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PRE-TRIAL CHAMBER I

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

**SITUATION IN LIBYA
IN THE CASE OF**

***THE PROSECUTOR v.
SAIF AL-ISLAM GADDAFI and ABDULLAH AL-SENUSSI***

Public and Redacted, with 2 Public Annexes

**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**

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I. INTRODUCTION

1. Libya makes this submission in reply to the responses of the Prosecution,¹ OPCD,² and OPCV,³ to the “Libyan Government’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi”, filed on 23 January 2013 (“Libyan Government’s further submissions”).⁴ In light of the overlap between the issues addressed in their Responses, the Libyan Government sets out its reply to each in this consolidated submission.
2. Before setting out that consolidated reply, Libya notes that this case is a litmus test for a credible and realistic complementarity system which is the fundamental object and purpose of the ICC Statute. In this regard, the requirements of Articles 19 and 17 must be interpreted in light of the constraints that are likely to be faced by national judicial systems in post-conflict transitional contexts. While States must submit evidence to satisfy the threshold for inadmissibility, the standard of proof and the timescales for providing such evidence cannot be so exacting in the circumstances of a particular case that they would effectively defeat, rather than enable, the pursuit of genuine national proceedings. Complementarity was not designed to allow the ICC to arrogate jurisdiction when a State is in the process of pursuing genuine national proceedings and yet requires a modest amount of additional time and / or a certain degree of flexibility in terms of the means by which the requisite evidence of those national proceedings may be placed before the Court.
3. Throughout these admissibility proceedings, Libya has engaged with the Court in good faith. It has done its utmost, in extremely difficult circumstances, to produce evidence of its on-going national proceedings in respect of Saif Al-Islam

¹ Prosecution’s Response to ‘Libyan Government’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi’, 12 February 2013, ICC-01/11-01/11-276 (“OTP Response”).

² Response to the ‘Libyan Government’s further submissions on issues related to admissibility of the case against Saif Al-Islam Gaddafi’, 18 February 2013, ICC-01/11-01/11-281 (“OPCD Response”).

³ OPCV’s observations on ‘Libyan Government’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi’, 18 February 2013, ICC-01/11-01/11-279 (“OPCV Response”).

⁴ ICC-01/11-01/11-258.

Gaddafi which cover the same conduct that forms the subject of the ICC proceedings against him. It has done so despite the fact that the ICC arrest warrants were issued while the Gaddafi regime was still in power and further orders for surrender were issued very shortly after the collapse of that regime. The experience of the ICTY-ICTR-SCSL as well the ICC itself demonstrates that even international jurisdictions require considerable time to conduct investigations and to complete the pre-trial phase of proceedings. Libya should not be held to a higher standard than that encountered by international criminal tribunals dealing with post-conflict investigations in other parts of the world.

4. There has been a fundamental change in Libya (and particularly within Libya's system of criminal justice) since its situation was referred to the ICC by the United Nations Security Council on 26 February 2011. In that time, an oppressive regime has been overthrown and the country has emerged from a bloody civil war; a transitional government has steered the country through its first democratic election in five decades in June 2012; Libya's judiciary, police, prosecution service and members of its legal profession have benefitted from training and other expertise gleaned from an array of international assistance measures; and a new Minister of Justice, Salah Marghani, who has been honoured by Human Rights Watch for his "extraordinary activism" in human rights took office in early December 2012. Human Rights Watch has described Mr Marghani as a "leading voice for justice in [his country], working relentlessly to protect the rights and dignity of others."⁵
5. Alongside these developments, the case in respect of Saif Al-Islam has also continued to progress under the supervision of the Prosecutor-General as described in the Government's 1 May 2012 Admissibility Challenge, its oral submissions made at the hearing of 9-10 October 2012, and its more recent submission of further evidence on 23 January 2013.

⁵ Human Rights Watch, "[Awards for Rights Activists from Congo, Libya](http://www.hrw.org/news/2012/08/14/awards-rights-activists-congo-libya): Winners Named for the 2012 Alison Des Forges Award", 14 August 2012, available at: <http://www.hrw.org/news/2012/08/14/awards-rights-activists-congo-libya>

6. Amongst the many competing priorities of the democratically elected Libyan Government, the appointment of a new Prosecutor-General has remained a priority and the current Prosecutor-General has, since the filing of the Government's 23 January 2013 supplemental submissions, now tendered his resignation. With the imminent appointment of a new Prosecutor-General, who will have a mandate given by the General National Congress, rather than the transitional government that preceded it, it is anticipated that the Libyan Government will be in a better position to provide additional evidence to the court relating to the ongoing proceedings with respect to Saif Al-Islam Gaddafi.
7. It is in this context that Libya respectfully requests the Pre-Trial Chamber to give effect to the principle of complementarity which is based on the primacy of national jurisdictions, as intended by the drafters of the ICC Statute, by either:
 - a. Granting Libya six weeks from the rendering of its decision on the present submissions to adduce such further evidential samples to the court relating to the investigation of Saif Al-Islam Gaddafi as it may consider to be necessary; and / or
 - b. Travelling to Tripoli to inspect the case file in order to review the evidence collated by Libya during its investigation of Saif Al-Islam Gaddafi.

II. PRELIMINARY ISSUE: ASSISTANCE TO THE CHAMBER

8. Libya wishes to express its regret at the outset of this reply regarding the language and tone of the OPCD's Response which is, at times, unhelpful and inapposite considering the sensitive transitional justice issues at stake. In particular, the Government of Libya denies employing a "sleight of hand to conjure an admissibility challenge out of thin air";⁶ applying a legal regime that "hearkens back to the darkest days of the People's Court from Old Libya";⁷

⁶ OPCD Response, para. 1.

⁷ Ibid, para. 9

initiating a “manipulated spectacle of victor’s revenge”;⁸ arresting Al-Senussi’s daughter on “trumped up charges”, or other such allegations.⁹

9. It is unfair, inappropriate and misconceived to characterize the Government of Libya’s attempts to balance its wider transitional justice responsibilities, such as accountability, peace and reconciliation with the demands of a fair investigation and trial for Saif Al-Islam Gaddafi, as somehow reminiscent of the worst aspects of the former regime. Such inflammatory assertions by an organ of the ICC does little to inspire confidence in these proceedings among the Libyan public and the victims of the Gaddafi regime.
10. Moreover, labeling the Government of Libya’s good faith attempts to interpret, *in advance of a trial*, its domestic law and/or the applicability or interpretation of international law (eg. in its interpretation of articles 435, 433 and 434 or the precise categorization of the remand order dated 21 November 2011), within an exceedingly complex factual matrix, as an attempt to intentionally “mislead” the Chamber, will not assist in achieving a fair resolution of the issues in contention.¹⁰
11. The Libyan Government rejects the OPCD’s suggestion that the “Government’s offer to either provide additional investigative materials within six weeks, or to allow representatives of the Chamber to review the materials in person in Tripoli is at best, disingenuous, and potentially, an abuse of the Court’s process, insofar as the Government is once again, attempting to use non-compliance in order to obtain more time”¹¹. Rather, the invitation reflects the preparedness of the Government to cooperate with the Court at a time when it is seeking to deal with the innumerable challenges it faces as a country in transition.
12. There is nothing “disingenuous” about inviting the Court to carry out what is akin to a site visit or ‘view’, which is a regular feature of international and

⁸ Ibid, para. 11.

⁹ Ibid, para. 25.

¹⁰ Ibid, para. 180, 19,

¹¹ Ibid, Para. 36.

domestic criminal justice systems, and to incorporate into the record of the admissibility proceedings evidence identified during such a visit as well as its own observations and experiences. This is entirely different to the evidential issues before the Court in the *Lubanga* litigation where the Court was restricted from entering material into the record due to confidentiality restrictions imposed by a third party. Accordingly, the OPCD's citation of that litigation as authority for its proposition that the "ICC Chamber cannot base decisions on evidence that the Chamber has merely viewed, but which does not form part of the record" is of no application to this particular issue. There is nothing in the Statute or Rules which limits the kind and form of information which the Court can take into account when making its admissibility assessment, as is explicitly accounted for in Rule 51, which gives a non-exhaustive list of the kind of material the court may consider. Furthermore, pursuant to Rule 58(2), the Pre Trial Chamber has a wide discretion regarding the "proper conduct of the proceedings" and it is submitted on behalf of the Government that this could include the Court selecting evidence it deems relevant in the course of a visit to the territory of the state challenging jurisdiction and incorporating such evidence into the record.

13. The Government of Libya further takes issue with the aspersion cast by the OPCD as to its good faith in inviting court representatives to Libya "in light of the well-known security situation".¹² The Government is not a party to the Rome Statute but has voluntarily entered into negotiations with the Registry to conclude a Memorandum of Understanding between the Government and the court in order to facilitate cooperation between the parties and provide security measures for all court participants to the fullest extent that it is able. It has done so in the face of the most serious concerns as to the alleged prior conduct of the OPCD.

¹² Ibid, para 39.

14. In sum, the Government of Libya has acted at all times in good faith and will continue to do so. It is submitted that it is essential that all parties avoid any undue adversarial positioning so that the Chamber may be assisted to assess the Government of Libya's ability to promote the rights of the Libyan people to achieve domestic trials of those who are suspected of mass atrocities against them.

III. BURDEN & STANDARD OF PROOF

A. *Burden of proof*

15. In its submissions to date, the Libyan Government has noted that the admissibility assessment is in two stages: (i) whether there exists a national investigation and/or prosecution in relation to the case within the ICC's jurisdiction; and (ii) where such proceedings exist, whether they are vitiated by an unwillingness or inability to carry them out genuinely.¹³ It is Libya's submission that it bears the burden of proof in relation to the first issue, while the party alleging unwillingness or inability bears the burden of proof in respect of the second issue.

16. In their Responses, the Prosecution and the OPCV assert that a state challenging the admissibility of a case before the ICC bears the burden of proving both stages of the admissibility test.¹⁴ The OPCD does not state this directly in its response but the tenor of its overall submissions indicates that it also shares this view.

1. Response to the Prosecution and the OPCV's arguments as to which party bears the burden of proof in relation to the second limb

17. The OPCV and Prosecution rely upon the Appeals Chamber's finding that "a State that challenges the admissibility of a case bears the burden of proof to

¹³ Libyan Government's further submissions, para. 8.

¹⁴ OTP Response, para. 23; OPCV Response, para. 14.

show that the case is inadmissible”.¹⁵ In the very next sentence, which the OPCV does not quote, and which the Prosecution quotes selectively, the Appeals Chamber states that:

*To discharge that burden, the State must provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case. It is not enough to merely assert that investigations are ongoing.*¹⁶

18. Patently, the Appeals Chamber is referring only to the first part of the admissibility assessment. Later in the same decision the Appeals Chamber notes as follows:

*Nowhere in the Impugned Decision did the Pre-Trial Chamber find that Kenya was not to be trusted. The Pre-Trial Chamber rejected the Admissibility Challenge not because it did not trust Kenya or doubted its intentions, but rather because Kenya failed to discharge its burden to provide sufficient evidence to establish that it was investigating the three suspects.*¹⁷

19. The Prosecution and the OPCV refer to jurisprudence making the important point that “determining the existence of an investigation must be distinguished from assessing whether the State is unwilling or unable genuinely to carry out the investigation or prosecution, which is the second question to consider when determining the admissibility of a case”.¹⁸ This jurisprudence does not assist in establishing that the State party challenging admissibility bears the burden of proof in relation to the second question. Indeed, it suggests the converse by

¹⁵ OTP Response, para. 23, referring to 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 (“Kenya appeal decision of 30 August 2011”), para. 61.

¹⁶ Kenya appeal decision of 30 August 2011, para. 61.

¹⁷ Kenya appeal decision of 30 August 2011, para. 82.

¹⁸ OPCV Response, para. 24; para. 25; OTP Response, para. 24.

highlighting the Court's dual approach when ruling on the two threshold questions.

20. The OPCV's assertion that the Libyan Government's argument concerning the burden of proof "is based upon the erroneous premise that the existence of a national investigation is *per se* sufficient to render a case inadmissible before the ICC"¹⁹ conflates the determination of the merits with the determination of the burden of proof. Accordingly, it misunderstands the Government's position. The substantive issues for both the first and the second question must still be considered by the Court when ruling on an admissibility challenge regardless of which party bears the burden of proof in relation to those issues.

21. To argue that the burden of proof is on the state for the second limb of the admissibility assessment, whilst maintaining that there is a "preference" for domestic trials as the Prosecution suggests,²⁰ removes the logic supposed by that preference. The "preference" for national prosecutions is in fact a presumption in favour of domestic proceedings, upon which the very core of complementarity relies. The presumption and, by extension, the principle of complementarity, would be emasculated if the State was straddled with this additional burden in relation to the second part of the admissibility assessment.

2. The OPCV's arguments concerning the presumption of validity as to sovereign acts of a State within its domestic jurisdiction

22. The OPCV argues that the general principle that "the sovereign acts of a State within its domestic jurisdiction are presumed to be valid unless otherwise established" is inapplicable to the current proceedings before the ICC.²¹

23. The OPCV advances two arguments to the effect that any such presumption, emanating from public international law, is irrelevant to the matter at hand. It asserts first, that "the presumption in favor of the validity of acts of States, even

¹⁹ OPCV Response, para. 23.

²⁰ OTP Response, para. 23.

²¹ OPCV Response, para. 27.

if recognized and accepted in certain areas of international law, cannot be advanced in order to override the established rules governing the allocation of burden before the ICC”.²² It contends that the “general principles on State responsibility [are inapplicable] to matters regulated by special treaties [as] confirmed by the Articles on Responsibility of States for Internationally Wrongful Acts”.²³

24. The applicable “special treaty” to which the OPCV refers can only be the ICC Statute. However, the OPCV argues, only seven paragraphs earlier and one paragraph later that “[t]he Rome Statute does not contemplate the standard or the burden of proof to be applied for the purpose of the determination of challenges pursuant to articles 17 and 19”.²⁴ Accordingly, there is no basis for the OPCV’s suggestion that the ICC Statute, rather than principles of public international law, governs this issue.

25. The OPCV’s argument is also misconceived in the sense that it relies upon the Rome Statute’s article 25(4) (exclusion of matters affecting State responsibility) to suggest that the presumption of validity of State acts in the absence of proof to the contrary is of no relevance to ICC proceedings.²⁵ However, the issue of the burden of proof in admissibility proceedings is a matter not of State responsibility – criminal or otherwise, but of incursion upon a state’s *interests and rights*.

26. The OPCV also refers to the fact that “the State is not party to the criminal litigation” before the ICC (in relation to which the OPCV cites article 25(2) of the Statute)²⁶ as further basis for its contention that there is no presumption in favour of the validity of the Libyan investigation for the purposes of admissibility. The OPCV’s arguments, in this regard, betray a misconception of the nature of admissibility proceedings which form no part of the trial process or

²² Ibid, para. 28.

²³ Ibid, para. 28.

²⁴ Ibid, paras 21, 29.

²⁵ Ibid, para. 27, referring to Statute, article 25(4).

²⁶ Ibid, para. 27.

the determination of criminal guilt. As noted by the Appeals Chamber, they are, rather, the resolution of a conflict of jurisdiction and form no part of the trial process.²⁷

27. For all these reasons, the OPCV has not succeeded in showing that Libya erred in its submission that the public international law principle that the acts of a State within its domestic jurisdiction are proved to be valid unless otherwise established applies to ICC admissibility proceedings.

3. Relevance of Security Council Resolution 1970

28. The OPCV appears to argue that the co-operation obligations deriving from Security Council Resolution 1970 illustrate that the Libyan Government bears the burden of proof in all matters before the ICC.²⁸ This reasoning conflates the burden of proof in admissibility proceedings with the entirely distinct obligation to co-operate with the Court. Moreover, the nature of the limits of the Security Council's powers under Chapter 7 of the UN Charter are irrelevant to the matter at hand, as the ICC's jurisdiction is, in substance, based upon and limited by the principle of complementarity, regardless of whether that jurisdiction has been triggered by the Security Council's powers under Chapter 7.

4. Practicalities of obtaining evidence

29. Both the OPCV and the Prosecution seek to bolster their submissions concerning the burden of proof regarding the second part of the admissibility assessment by referring to the practicalities of obtaining evidence.²⁹ The argument that one party has more access to information does not merit a subversion of the established international law principles regarding the burden of proof in relation to assertions of either unwillingness or inability. To argue otherwise is akin to suggesting that a chamber should impose a burden, in the context of criminal proceedings, on a defendant to prove a reasonable doubt as to his/her

²⁷ *Kenya* appeal decision of 30 August 2011, para. 36.

²⁸ OPCV Response, para. 28.

²⁹ OPCV response, para. 38; OTP Response, para. 23.

guilt merely because of practical obstacles and challenges to the collection of evidence. While the litigation context in this example is different (ie. a criminal prosecution versus a pre-trial determination of admissibility) and this divergence is accounted for by a differing standard of proof in each type of litigation, the obvious problem of shifting the burden of proof remains the same. Any such *practical* challenges, can – and, indeed, must – be dealt with adequately through *practical* measures to overcome them (e.g., state co-operation in response to requests for disclosure on particular issues). It is not appropriate to reverse a legal burden for reasons of mere expedience.

30. Implementation of the Prosecution’s proposed burden of proof would create a precedent inconsistent with general international law. Moreover, the Prosecution’s rationale for deeming it necessary in the present case is not supported by the reality of the Libyan situation. The Libyan Government has demonstrated a clear and proven willingness, as illustrated by the Libyan Government’s previous submissions and those by way of reply in this submission, (i) to engage with international actors (whether the ICC or other international organisations, NGOs and foreign governments); and (ii) to provide the maximum evidence as regards its own criminal investigations, within the limits imposed by domestic due process requirements.

B. Standard of Proof

31. The Government submits that its submissions as to the applicable standard of proof are to be preferred to those of the OPCV. The OPCV asserts that the standard is one of “clear and convincing evidence”, on the basis that “adoption of any lower standard [...] would frustrate the object and purpose of the Rome Statute to ‘put an end to impunity’”.³⁰ However, the OPCV fails to address the legal position as set out in the Libyan Government’s further submissions,³¹ merely asserting in relation to one of the several authorities relied upon by the

³⁰ OPCV Response, para. 15.

³¹ Libyan Government’s further submissions, paras 21-26.

Government that the Appeals Chamber “did not consider the standard of proof”.³² In the absence of any submissions by the OPCV to advance their contention, the Government simply reiterates its reliance on its earlier submissions regarding the appropriate standard of proof.

IV. PART 1 OF ADMISSIBILITY TEST: EXISTENCE OF A NATIONAL INVESTIGATION AND / OR PROSECUTION

A. Applicable law: “same person, same conduct”

32. The Prosecution, the OPCD and the OPCV raise a number of arguments concerning the requirement, under article 17(1)(a) that “[t]he [same] case is being investigated or prosecuted by a State”.

1. “Substantially”

33. The OPCV argues that, in order to demonstrate the existence of a national investigation or prosecution for the purposes of article 17, the investigation or prosecution must cover *exactly* the same conduct. In support of this, the OPCV argues, first, that Libya’s own submissions support its point merely because the Libyan Government has argued that its investigation covers *the same* factual incidents and *the same* allegations of individual conduct.³³ Of course, this argument must fail. The fact that the Libyan Government is acting beyond its obligations - by ensuring that its’ domestic investigation covers the same conduct, and not only substantially the same conduct – does not impact upon the parameters of the actual threshold test. As the Prosecution recognises, *if* the state concerned is pursuing *all* of the allegations that would be addressed by a case before the ICC, the material question of whether a domestic case addresses *substantially* the same conduct as the ICC case does not arise.³⁴

³² OPCV Response, para. 31.

³³ OPCV Response, para. 39.

³⁴ OTP Response, para. 26.

2. Meaning of “conduct”

34. Contrary to the submissions of OPCD and the OPCV,³⁵ Libya continues to assert that the correct test to be applied is that defined by the Appeals Chamber: “substantially the same conduct”. That is, that Libya is required to establish that its proceedings focus on substantially the same conduct and series of events as the ICC case such that criminal responsibility of Saif Al-Islam Gaddafi is to be examined in the context of substantially the same incidents and underlying facts and allegations of criminal responsibility.³⁶ Libya notes that the Prosecution has also endorsed this standard in its Response.³⁷

B. Substantially the same conduct: sufficiency of evidence

35. The Prosecution observes that the information provided by the Libyan Government sufficiently demonstrates the existence of national proceedings against Saif Al-Islam Gaddafi.³⁸ However, it contends that the supporting evidence provided to date is insufficient to conclude that Libya is indeed investigating substantially the same conduct as that described in the Article 58 Decision and that Libya should be required to furnish additional samples from its investigative file within a reasonable timeframe.³⁹ The OPCV and the OPCD also maintain that Libya has not provided sufficient evidence to establish that the same conduct test in relation to Saif Al-Islam Gaddafi has been met.⁴⁰

36. Contrary to these submissions, in accordance with paragraphs 10-12 of the Pre-Trial Chamber’s 7 December 2012 decision, in its supplemental submission filed on 23 January 2013, Libya has provided an array of evidence of the type requested by the Court relating both to the progress and subject-matter of the Libyan Government’s investigation of Saif Al-Islam Gaddafi.

³⁵ OPCV Response, para. 39-43; OPCD Response, para. 50-54 referring to ICC-01-11-01/11-190 at para. 116-133.

³⁶ ICC-01/11-01/11-258, para. 27.

³⁷ OTP Response, para 31.

³⁸ Ibid, para. 38.

³⁹ Ibid, para. 38.

⁴⁰ OPCV Response, paras 46, 54-57; OPCD Response, paras 148-150.

37. This evidence includes, *inter alia*: witness testimonies; transcripts of intercepts; documentary evidence relating to flights carrying mercenaries; Ministry of Justice, Supreme Judicial Council and Office of the Attorney-General documents pertaining to Libyan law, the contours of the case, the progress of the investigation, the proposed modalities for the trial, efforts to ensure legal representation; Supreme Court decisions regarding applicable criminal procedures; detention orders; resolutions of the Libyan Parliament regarding the Investigation Committee and a raft of materials relating to international assistance and capacity building for Libya's criminal justice system.
38. This recent evidence supplements that which was annexed to the Government's 1 May 2012 admissibility challenge, which included, *inter alia*: reports by the Prosecutor-General regarding the investigation and proposed trial; detention orders; a Prime Ministerial press statement relating to Libya's intentions for the case; reports by judicial officials regarding Libyan criminal law and procedure; a draft decree on international crimes together with a Libyan parliamentary document regarding this draft decree.
39. This array of evidence, which goes significantly beyond the mere assurances which the Pre-trial Chamber cautioned against in its 7 December 2012 decision⁴¹, indicates, by comparison to the allegations leading to the ICC warrant of arrest, that the Libyan investigation covers:
- i. The same conduct as that would be covered by the ICC case⁴² (indeed the Libyan process goes some way beyond that of the ICC including in terms of temporal extent,⁴³ geographic scope,⁴⁴ and nature of the criminal acts referred to in the Article 58 Decision);⁴⁵

⁴¹ ICC-01/11-01/11-239, para. 28.

⁴² Eg. by comparison with the ICC case as set out in the ICC Article 58 Decision relating to Saif Al-Islam Gaddafi, ICC-01/11-01/11, 27 June 2011.

⁴³ Libyan Government's further submissions, para. 64.

⁴⁴ Libyan Government's further submissions, para. 65.

⁴⁵ Libyan Government's further submissions, paras 67, 72.

- ii. Legal categorizations of those crimes which are concomitant with the high level of gravity associated with international crimes;⁴⁶
- iii. Appropriate “linkage” evidence concerning the particular acts of Mr. Gaddafi contributing to the conduct alleged, and which covers the material allegations in the ICC’s Article 58 Decision;⁴⁷
- iv. Substantially the same factual allegations as those in the ICC case and that specific sample pieces of evidence of the type requested by the Pre-Trial Chamber in its 7 Decision 2012 (ie. witness statements, flight documents, transcripts of intercepts) has been submitted to the Court relating to:
 - a. [REDACTED];
 - b. [REDACTED];
 - c. [REDACTED];
 - d. [REDACTED];
 - e. [REDACTED];
 - f. [REDACTED];
 - g. [REDACTED];
 - h. [REDACTED]; and
 - i. [REDACTED].⁴⁸

40. These sample pieces of evidence submitted to date⁴⁹ prove that the Libyan investigation covers substantially the same factual allegations contained in paragraphs 14-35, 36(ii), 41-44, 49-53, 64-65, 72-83 of the ICC’s Article 58 Decision of 27 June 2011. The Libyan Government does not deny that the

⁴⁶ Libyan Government’s further submissions, paras 82, 83, 86, 87.

⁴⁷ Libyan Government’s further submissions, para. 67, 68, 73, 85.

⁴⁸ Libyan Government’s further submissions, Annexes 4-7, and 15-17.

⁴⁹ Libyan Government’s further submissions, Annexes 4-7, and 15-17.

sample pieces of evidence submitted to the court thus far do not deal with the factual allegations contained in paragraphs 36(i),(iii)-(vi), 37-40, 45-48 or 54-63 of the ICC's Article 58 Decision. Further evidence on other specific incidents is available and could be produced before the Court if additional time to do so were granted. However it is submitted that on the basis of the evidence now before the Court, the Pre-Trial Chamber is in a position to conclude that the same conduct test has been met on the basis that materials proving that the investigation covers substantially the same factual allegations as the ICC case have been provided by Libya.

41. Libya's efforts, in difficult circumstances, to adduce evidence to show that its investigation meets the same conduct test have been rendered difficult by the fact that States do not have access to the ICC Prosecutor's investigative file or indeed the confidential materials underpinning the Court's Article 58 Decision. Furthermore, the Prosecution case, based on an expedited investigation during the early stages of the conflict, covers only a limited range of crimes during February-March 2011. These are not necessarily the most serious crimes and to require that Libya focus all its resources on exactly the same incidents rather than substantially the same conduct in that time period would be wholly unreasonable. For all these reasons it is submitted that Libya's approach to date, of providing samples of a substantial number of the factual allegations underpinning the Court's arrest warrant should be considered sufficient, thereby ensuring that a decision on admissibility is founded on a proper evidential basis without placing an excessive burden on a State seeking to challenge admissibility.

42. In the event that the Pre-Trial Chamber takes the view that, before it can be satisfied that Libya has met the same conduct test, it needs to have sight of further sample pieces of evidence of the type requested in its 7 December 2012 decision pertaining to the factual allegations contained in paragraphs 36(i),(iii)-(vi), 37-40, 45-48 and 54-63, Libya respectfully requests that the Pre-Trial

Chamber either (i) allow the Libyan Government an additional six weeks to prepare copies of the investigative materials (together with English translations) so that they can be lodged with the court; and / or (ii) send a representative or a delegation to Tripoli to view the entire case file.

43. When considering this important issue, the Libyan Government asks the Pre-Trial Chamber to keep in the forefront of its deliberations that:

- a. The Libyan Government has consistently sought to cooperate in good faith with the Court despite a host of obstacles arising from its recent emergence from armed conflict, its transition to a democracy, a change of Government post election in mid-2012 and the need for a new Prosecutor-General to be appointed by that Government to progress the case to fruition;⁵⁰
- b. Despite this host of difficult circumstances, Libya's co-operation with the Court has thus far been extensive and has even undertaken the exceptional measure of providing disclosure of evidence to the Court and the parties even though this amounts to a breach of article 59 of the Libyan Criminal Procedure Code which requires secrecy of investigations in order to prevent prejudice to the investigation and to protect witnesses;
- c. The Pre-Trial Chamber has the discretion to allow a further final opportunity to Libya to provide additional samples of evidence as pursuant to Rule 58 of the ICC Rules of Procedure and Evidence it shall decide on the procedure to be followed with respect to admissibility proceedings;
- d. The Pre-trial Chamber may undertake a site visit to view the case file in order to establish facts through the exercise of its *proprio motu* powers and its power under Article 3(3) of the ICC Statute to sit "elsewhere" than The Hague whenever it considers it "desirable". This may be a welcome

⁵⁰ The current Prosecutor-General has recently tendered his resignation and it is envisaged that a new Prosecutor-General will be appointed by the new Government imminently.

signal of the ICC's willingness to engage with States directly affected by international crimes and to do its utmost to enable the complementarity system.

V. PART 2 OF ADMISSIBILITY TEST: UNWILLINGNESS OR INABILITY TO CARRY OUT GENUINE INVESTIGATION / PROSECUTION

A. *Issues raised by the Prosecution*

44. The Prosecution raises a number of queries concerning:

- a. the transfer of Saif Al-Islam Gaddafi to a government controlled detention centre in Tripoli;⁵¹ and
- b. the individuals who have conducted interviews of Saif Al-Islam Gaddafi in detention in Zintan;⁵²
- c. Saif Al-Islam Gaddafi's right to a lawyer during such interviews.⁵³

45. Each of these queries will be dealt with below. The Prosecution's remaining concerns about non-governmental controlled detention centres are addressed in the capacity building section of this reply below.

46. The Prosecution additionally include in their Confidential, Redacted Response an *Ex Parte* (Prosecution, OPCD and OPCV only) submission and Annex relating to this second limb of admissibility which has been withheld from the Libyan Government.⁵⁴ As this submission and Annex were filed on an *ex parte* basis, the Libyan Government is deprived of an ability to respond to this submission. Given that this and other Chambers have consistently held that for admissibility proceedings to be fair the State concerned "as the triggering force and main actor" enjoys "the opportunity to respond to the parties and the participants' observations", the Libyan Government requests that this submission and Annex

⁵¹ This issue is also raised by the OPCV: OPCV Response, para 62.

⁵² This issue is also raised by the OPCV: OPCV Response, para 63.

⁵³ See, for example, OTP Response, paras 17, 42.

⁵⁴ OTP Response, para. 42.

be struck from the record.⁵⁵ It would plainly be unfair for this submission and Annex to play any part in the Court's assessment of admissibility in the absence of the Libyan Government having the opportunity to consider and respond to such materials.

47. The Libyan Government affirms at the outset the Prosecution's recognition that "the Statute's complementarity provisions should not become a tool for overly harsh structural assessments",⁵⁶ and submits that the criteria of willingness, ability, and genuineness, must be considered with this firmly in mind, regardless of where the burden of proof lies.

1. Saif Al-Islam Gaddafi's detention in Zintan

48. The Libyan Government does not deny that Saif Al-Islam Gaddafi remains in Zintan (one of the largest cities in north-western Libya) and that efforts to arrange his transfer to a detention facility in Tripoli are ongoing.⁵⁷ During his incarceration in Zintan Saif Al-Islam Gaddafi has been visited by representatives of the International Committee of the Red Cross and Human Rights Watch on several occasions.⁵⁸ Permission was granted by the Minister of Justice, Salah Marghani, for a further visit by Human Rights Watch on 4 March 2013.⁵⁹ It is now a matter for Human Rights Watch to arrange this visit at their earliest convenience.

49. Since 30 October 2012 each of the extensions of Saif Al-Islam Gaddafi's periods of detention have been judicially approved by Tripoli based judges⁶⁰ who have travelled to Zintan to conduct a private hearing (ie. a closed session) on the extension of his remand period. These hearings have been facilitated by the local authorities in Zintan without any difficulties. The Libyan Government understands that the reference on the remand extension documents to these

⁵⁵ See ICC-01/11-01-11-288, paras 10-11; ICC-01/11-01/11-159, para 9; ICC-01/09-01/11-76, para 15.

⁵⁶ OTP Response, para. 35.

⁵⁷ Libyan Government's further submissions, para. 99.

⁵⁸ Libyan Government's further submissions, paras 99, 106.

⁵⁹ Cf. OPCD Response, para. 26.

⁶⁰ Libyan Government's further submissions, para. 57.

hearings bearing held in public is an error as the hearings were held in closed session and were not open to members of the public.

50. The Libyan Government will shortly begin implementation of its recently devised proposal for the members of the Zintan brigade responsible for guarding Saif Al-Islam Gaddafi in Zintan to be trained and regularised so as to form part of the judicial police which would then guard him upon his transfer to a central government controlled prison in Tripoli. It is not possible to say with any certainty the exact date of Mr Gaddafi's transfer to Tripoli but it is understood that this will occur before the earliest possible estimated commencement date of the trial in May 2013.

51. It is anticipated that if the national security proceedings, which are presently in the pre-trial phase and for which there was a public court hearing⁶¹ in the Zintan court on 17 January 2013, are to proceed to trial that once Saif Al-Islam Gaddafi is transferred to Tripoli these proceedings will also be transferred to the Tripoli court.

52. Mr. Gaddafi has been interrogated and confronted with witnesses during his detention in Zintan by officers from the Prosecutor-General's office tasked to work on the cases of former Gaddafi regime officials. These interrogations by the Prosecutor-General's team have proceeded with the cooperation of the Zintani authorities.⁶²

53. The investigative stage of the proceedings in relation to Saif Al-Islam Gaddafi is now nearing completion, and the precise timeframe for its transfer to the Chambre d'Accusation for pre-trial proceedings is a matter for the Chambre d'Accusation itself.⁶³ However, it is certain that it is not possible for the trial to commence before the case has been approved by the Chambre d'Accusation and a lawyer has been appointed to represent Saif Al-Islam Gaddafi.⁶⁴ The Libyan

⁶¹ Cf. OPCD Response, para. 26.

⁶² Cf. OPCV Response, para. 63; OPCD Response, para 198.

⁶³ Libyan Government's further submissions, para. 60, referring to ICC-01/11-01/11-251, paragraph 4.

⁶⁴ Libyan Government's further submissions, para. 60.

Government is in the process of approaching the Bar Associations of Tunisia and Egypt to obtain a suitably qualified and experienced counsel for Saif Al-Islam Gaddafi who will be permitted, together with a Libyan lawyer, to represent Saif Al-Islam Gaddafi in the Libyan proceedings.

54. Mr. Gaddafi has not yet chosen to exercise his right to appoint counsel during the investigative phase of proceedings. Contrary to the submissions of the Prosecution and the OPCD, this has however not led to a breach of his rights under Article 106 of the Code of Criminal Procedure⁶⁵ as this provision only guarantees the presence of counsel during interrogations during the investigative phase where a counsel has been appointed.⁶⁶ Upon entering the accusatory phase of proceedings, the Chambre d'Accusation will appoint counsel for him in the event that Saif Al-Islam Gaddafi does not choose a counsel for himself.⁶⁷

B. Issues raised by the OPCV

55. The OPCV additionally raises concerns with respect to:

- a. the measures for securing victims' participation under Libyan law and the relevance of these to the Court's admissibility assessment;
- b. the arrangements for witness protection and security in Libya particularly during the trial phase of proceedings.⁶⁸

56. Both of these concerns will be dealt with below. The OPCV's other concerns regarding the certainty of the charges against Saif Al-Islam Gaddafi and the 'public officer' issue within certain Libyan criminal charges are dealt with below under the OPCD section of this reply.

⁶⁵ Cf. Prosecution Response, para. 43; OPCD Response, para 206.

⁶⁶ Libyan Government's further submissions, para. 97.

⁶⁷ Libyan Government's further submissions, paras 96, 97.

⁶⁸ OPCV Response, paras 49-53, 65, 66.

2. Victim participation in Libyan proceedings and relevance of this to the admissibility assessment

57. The OPCV rightly recognises that Libyan law permits the participation of victims in its criminal justice system and that they may do so upon application to the Prosecutor. Article 173 of the Libyan Criminal Procedure Code sets out the application procedure to be followed for such participation by victims. Likewise, article 61 of the Libyan Criminal Procedure Code permits victims (through their legal representatives) to participate during the investigative phase of proceedings, including the right to present evidence. These procedures enshrining the participatory role of victims in Libyan criminal proceedings are far superior to those of many sophisticated legal systems, particularly those following a common law tradition. The Pre-Trial Chamber will be aware that States Parties are not required to implement legislation regarding victim participation and, accordingly, it would not be appropriate for the Court to embark upon a qualitative assessment of a particular state's laws regarding the role of victims in its justice system and the modalities, if any, of their participation.

58. The OPCV's submission that the "question of victims' participation in Libya is directly relevant to the determination of the admissibility of the case against Mr. Gaddafi before the ICC"⁶⁹ is unsupported by the Statute, the *travaux préparatoires*, or the current views of the States Parties on the matter. In fact, in a recent discussion of the issue, States Parties "expressed the need to be cautious with regard to the role that the Assembly can or should play vis-à-vis encouraging States to adopt victims' participation and reparation strategies at a domestic level" and noted that "others have expressed concerns with regard to intermingling the notion of complementarity which has been the subject of

⁶⁹ OPCD Response, para. 49.

judicial decisions, with the unique system of victims' participation under the Rome Statute."⁷⁰

59. The enhanced position of victims in the Court's procedural framework does not import into the complementarity enquiry the kind of assessment that the OPCV is proposing. Rather, the focus of the complementarity assessment is whether the state has failed to act or has proven to be *unwilling* or *unable* to investigate or prosecute *genuinely*. The core consideration in this assessment is whether, with regard to the principles of due process recognised by international law, a state has shown its commitment to end impunity. There is no jurisprudential or academic or state practice support for the proposition that the theoretical or actual participation of victims is relevant to this consideration.
60. The OPCV has also stated that "assessing the efficiency of the system for victims' participation in Libya will enable the Court to better evaluate the Government's ability to give effect to its domestic laws – as part of the overall assessment of the Government's ability." This is a misinterpretation of the provisions regarding the assessment of ability. "Ability" only falls to be considered when there is said to have been a total or substantial collapse or unavailability of the judicial system which has led to an inability "to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings".⁷¹ The Court is not required to consider the quality of the proceedings as such and, again, it is not permitted to enquire into the modalities of victim participation in instances where the domestic law of a country makes provision for such participation. Indeed, to suggest that it is required to undertake this enquiry is to effectively hold Libya to a higher standard than states with no laws in place at all regarding victim participation. There is no basis in the Statute or in the *travaux* to support such an interpretation.

⁷⁰ ICC-ASP/11/32 *Report of the Bureau on Victims and affected communities and the Trust Fund for Victims and Reparations* (23 October 2012), para 33.

⁷¹ Article 17(3) ICC Statute.

61. The Government notes the OPCV's assertion that information regarding the number and details of participating victims will assist in the assessment of public confidence in the national criminal justice system and in understanding the overall security situation. The Government avers that unless security concerns give rise to the unavailability of the national judicial system under article 17(3) of the ICC Statute (which is denied and in fact does not appear to be suggested by any of the parties to the present proceeding), neither of these considerations pertains to the Court's task in determining the admissibility of the case.
62. By way of general observation, the Government notes that the model for victim participation contained within the Rome Statute was largely influenced by a recognition that international trials away from the seat of the alleged criminality lead to a sense of disconnection and disenfranchisement for the victims.⁷² A local trial, by its very existence, minimises (if not negates entirely) these problems. The prosecution of international crimes by national courts, regardless of the precise modalities for victim participation, has an important expressive value for victims by restoring the authority of the law where it has been ignored and assisting in strengthening the criminal justice infrastructure.
63. To the extent that OPCV is concerned with victim participation, it is national proceedings in Libya's courts rather than the remote confines of The Hague that can best facilitate access and a sense of ownership by the thousands of victims and their families. Indeed, the democratic legitimacy of the current Government and its transitional justice policy is a reflection of the wishes of the victims whose sacrifices made freedom possible for the Libyan people.
64. Although victim participation is not a requirement for a finding of inadmissibility, the Government emphasizes its recognition of the vital importance of the role of victims in the criminal process. It acknowledges the

⁷² Kritz, NJ, 'Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights' (1996) 59 Law & Contemp. Probs. 127, 149.

significant role played by the OPCV and the achievements of the Rome Statute with regard to the participation of victims at the international level. However, whilst the model for victim participation in the Rome Statute may be seen as an ideal for states to emulate should they wish to do so, it does not set a benchmark against which states' domestic proceedings should be assessed or admissibility challenges determined.

3. Arrangements for witness protection and security in Libya during the trial phase of proceedings

65. The OPCV has queried whether the measures protecting witness anonymity during the pre-trial phase of proceedings in Libya are able to be continued during the trial. Libya is able to clarify that matters of witness protection during the trial phase of proceedings fall within the discretionary powers of the trial judge. Under article 275 of the Libyan Criminal Procedure Code a criminal trial judge can accept evidence in whatever form he or she deems appropriate. This is a very flexible procedure which permits a trial judge to hear evidence by way of video-link, to preserve witness anonymity (from the public rather than from the accused) by hearing the witness in closed session, or for the witness to give their evidence in advance of the court hearing by way of a written statement made to a notary. These kinds of alternative procedures for the giving of evidence are common in rape cases in Libya in order to prevent victim witnesses from further humiliation. Witnesses can also be granted police protection upon the order of the trial judge.

C. Issues raised by the OPCD

66. The OPCD raise a number of fair trial concerns in its lengthy response. It also queries the genuineness and concrete nature of the capacity building efforts to which Libya has referred in its submissions. The OPCD suggests that its queries with respect to fair trial and capacity building issues are such as to show that Libya is either unwilling or unable to carry out the investigation or prosecution of Saif Al-Islam Gaddafi. Each argument will be addressed in turn.

4. Fair trial concerns

67. When considering the fair trial criticisms leveled by the OPCD against Libya, it is critical to remember that the ICC is not called upon to act as a human rights court. In any event, any minimal threshold criteria required by Article 17 cannot be interpreted such that Libya is held to higher standards than those achieved at the international criminal tribunals or those which were envisaged by the drafters of the ICC Statute for States contesting admissibility to meet.

a) Effect of Alleged Delays

68. The OPCD, in its Response, repeatedly asserts that a fifteen-month pre-trial delay is inimical to a fair and expeditious trial.⁷³ In particular the OPCD asserts, *inter alia*, that if the ICC “fails to step in now, it may be too late for any judicial forum to genuinely prosecute this case in an independent and impartial manner”⁷⁴ and “[t]he further protraction of the proceedings could potentially undermine the goal of eliminating impunity by jeopardising the ability of the ICC to subsequently prosecute Mr. Gaddafi.”⁷⁵

69. These suggestions are both contradictory and wrong. Implicit in the assertion that “it may be too late” if the ICC “fails to step in now” is the suggestion that the Government intends to rush the investigation and subsequent judicial process. As is clear from the timeframe presented to the Court, the Government has no wish to have an unduly expedited or unfair trial and it reiterates its submission that it intends to carry out its investigation and prosecution in such a way that justice is ensured. On the other hand, the repetitive assertion that a fifteen-month pre-trial period amounts to a “protracted” period or is otherwise likely to lead to irrevocable prejudice is not supported by international legal principle or practice within the international criminal law process.

⁷³ See for example, OPCD Response para. 3,

⁷⁴ OPCD Response, para. 15

⁷⁵ Ibid, Para. 48.

70. It is the norm for international criminal trials or trials of international crimes at the domestic level to require pre-trial periods far in excess of fifteen months, even for cases which do not attract the constraints of an immediate post-conflict environment. On average, it has taken the ICC 189 days from the surrender of a suspect to the court or his first appearance before the opening of the confirmation hearing.⁷⁶ This is of course after the OTP has spent lengthy periods of time conducting its preliminary examination and making the requisite application for an arrest warrant. The time has been even longer between the confirmation of the charges and the initiation of the trial, with it taking on average 559 days.

71. Prosecutorial due diligence must always be considered in the context of the complexity of the proceedings. There is nothing in a fifteen-month delay *per se* that causes undue prejudice. The ICTR has held that, in view of the gravity of the charges and the complexity of the cases, a four-year delay between arrest and commencement of the proceedings in the case was not unreasonable⁷⁷ nor was an eight-year delay between arrest and the current stage of the trial.⁷⁸ The Tribunal has held that the reasonableness of the period of delay before trial cannot be translated into a fixed period of years or months. It must be assessed on a case-by-case basis.⁷⁹ The complexity and gravity of the case are key considerations in this assessment.

72. Equally, even if Mr. Gaddafi's trial was joined with other co-defendants there is no basis for concluding that this is "also likely to engender significant adjournments and delays in the proceeding. This would constitute unjustified delay, which is inconsistent with an intent to bring Mr. Gaddafi to justice, as

⁷⁶ V Nerlich, 'The Confirmation of Charges Procedure at the International Criminal Court: Advance or Failure?' (2012) *JICJ*, p.8.

⁷⁷ *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, Decision on Decision for a Stay of Proceedings and Abuse of Process (20 February 2004) at para. 16

⁷⁸ *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Second Motion to Dismiss for Deprivation of his Right to Trial Without Undue Delay (29 May 2007)

⁷⁹ *Prosecutor v Rwamakuba*, No. ICTR-98-44C-PT, *Decision on Defence Motion for Stay of Proceedings* (3 June 2005) at para. 26; *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Defects in the Form of the Indictment* (5 August 2005) at para. 6

understood by Article 17(2)(b) of the Statute”.⁸⁰ It should be borne in mind that prosecutions of international crimes or similarly complex trials typically last for several years. There is nothing in principle or fact that allows for the OPCD’s characterization of “unreasonable delay” or “dilatory and prejudicial” proceedings,⁸¹ with or without joinder.

73. Moreover, the relevant question for the purposes of complementarity is not whether a defendant has been investigated within a “reasonably expeditious timeframe”. Rather, the Court is required to conduct the enquiry set out in article 17(2), which provides that:

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:

...

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

74. It is clear from the *travaux* that this is a high threshold. The Preparatory Committee’s draft had required that the delay be ‘undue’ but this was considered by many delegates at Rome as creating too low a threshold, enabling the Court to second guess national decisions in a way which was undesirable to many states.⁸² The higher standard of ‘unjustified’ was preferred as it would enable national jurisdiction to provide justifications or reasons for any delay before the Court could exercise jurisdiction, whereas a finding of ‘undue’ delay

⁸⁰ OPCD Response, para. 144.

⁸¹ Ibid, para. 142 – 143.

⁸² Sharon Williams and William Schabas, 'Issues of Admissibility' in Triffterer, O (2nd ed) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2010), 264.

could occur with or without the views of the relevant state.⁸³ Therefore, if there is any delay, the Court must consider the submissions put forward by the relevant State to explain such a delay.

75. Moreover, contrary to the assertion of the OPCD, a finding of unjustified delay is not in and of itself determinative of admissibility. Rather, according to the clear language of article 17, to establish unwillingness the Court must examine the subjective intention of the State and determine that there is either an intention to 'shield the accused' or an absence of 'intent to bring the person concerned to justice'. As has been reiterated and demonstrated, the Libyan Government is committed to bringing Mr Gaddafi to justice.

76. Some assistance in interpreting what constitutes an "unjustified delay" can be gained from the Article 6 jurisprudence of the European Court of Human Rights ("ECtHR") regarding the right to a hearing within a reasonable time. The enquiry into the reasonableness of the time taken to carry out the hearing is not assessed against an objective benchmark or threshold. Rather, the Court considers whether any delay might jeopardise the "effectiveness and credibility" of the proceedings.⁸⁴ In determining what constitutes a "reasonable time", regard must be had to the circumstances of each case including, in particular, the complexity of the factual or legal issues raised by the case; the conduct of the applicant and of the competent administrative and judicial authorities and what is at stake for the applicant.⁸⁵

77. The Government does not accept that there has been an unjustified delay in the investigation and prosecution of Mr Gaddafi. Bearing in mind the complexity of the factual and legal issues raised by the case, the Government's timeframe for the prosecution of Mr Gaddafi is justifiable and intended to achieve justice.

⁸³ John, Holmes, 'The Principle of Complementarity' in Lee, R (ed) *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer, The Hague 1999), 54.

⁸⁴ *H v France* (1990) 12 EHRR 74.

⁸⁵ *Zimmermann and Steiner v Switzerland* (1984) 6 EHRR 17, para 24.

78. Indeed, the Government of Libya has made considerable and adequate progress within this time frame in transforming this environment into a functioning democratic state *and* conducting effective investigations necessary to provide for an effective investigation and prosecution of Saif Al-Islam Gaddafi. The OPCD fails to identify any prejudice to the proposed trial arising from this passage of time.

b) Statement Taking Processes

79. Throughout its Response, the OPCD misconstrues answers given in good faith by the Libyan Government. One such example of this attempt to suggest, without evidence, a hostile intent, can be seen in relation to the taking of witness statements. On this topic, the OPCD suggests that because article 1 of the Libyan Criminal Procedure Code gives the Prosecutor the sole authority to submit and proceed with a criminal action, “[i]t follows that any procedures conducted outside this framework, such as interviews conducted by *thumar* or local council members, would be invalid and could give rise to a nullity in proceedings” or that “there is a strong likelihood that a significant component of its evidence would have to be excluded for the purpose of the trial”.⁸⁶

80. However, as Libya expressly clarified in its 23 January 2013 submissions, all of the witness statements, which form part of the Prosecutor’s investigative file in relation to Saif Al-Islam Gaddafi, were prepared by members of the office of the Prosecutor-General responsible for the case of Saif Al-Islam Gaddafi (whose mandates have been renewed and are ongoing).⁸⁷ This submission means exactly what it says - none of the witness interviews, summaries or witness statements which will be relied upon in the national proceedings against Saif Al-Islam Gaddafi were conducted or prepared either by committees of volunteers, *thumar* or local council members. There is therefore no basis for such a proposition.

⁸⁶ OPCD Response, paras. 75-86.

⁸⁷ Cf. OPCV Response, para.47.

81. The OPCD also attempts to import unrealistic standards into the Libyan investigation. It criticizes the Libyan Prosecution for failing to clarify aspects of prospective witness testimony at an early stage of the investigation, including, purportedly failing to ask the witness to clarify the basis of knowledge or to test reliability or look for possible sources of corroboration.⁸⁸ Additionally, the OPCD criticizes the Libyan authorities for failing to “recalibrate their questioning” to properly test the evidence provided by witnesses.⁸⁹ Finally, the OPCD criticizes the Libyan government for failing to employ any technique to test the reliability of its evidence other than the process of witness confrontation.⁹⁰ The OPCD is attempting to transform admissibility proceedings into a criminal trial, scrutinizing the reliability and credibility of each and every witness statement in detail.

82. Putting aside the marginal relevance of these issues to the central issues in the admissibility challenge, it is submitted that the OPCD’s critique is misconceived. It is standard practice within international criminal law to take preliminary witness statements that are supplemented in time through further clarificatory statements and proofing processes. The process of “building” a case against a suspect involves the taking of preliminary statements that necessarily become more detailed over time as the issues for trial are narrowed and as the reliable evidence becomes more apparent.

83. Arguably, the Libyan process is an advance on most of the international or hybrid criminal tribunals (with the exception of the ECCC) since, as acknowledged by the OPCD, the Libyan process involves testing the statements through a process of confrontation – a technique not generally employed at the other international criminal tribunals including at the International Criminal Court.

⁸⁸ OPCD Response, para. 89.

⁸⁹ Ibid, para. 93.

⁹⁰ Ibid, para. 95-96.

84. Finally, the Government rejects the OPCD's submission that the theoretical possibility that the "trial record could be composed of evidence from persons who have been tortured or mistreated...constitutes an insurmountable barrier to the ICC transferring jurisdiction of the case to Libya."⁹¹ Again this is a misstatement of the complementarity enquiry. Implicit in the OPCD's submission is the notion that the mere possibility of the use of evidence obtained as a result of torture automatically defeats the statutory presumption in favour of domestic prosecution. There is nothing in the Statute or the *travaux* to support such a view and it is an entirely inaccurate interpretation. Again, the Court's enquiry requires it to consider whether or not the domestic jurisdiction is carrying out an investigation or prosecution genuinely. Whilst the Court is required, in assessing "unwillingness", to have "regard to the principles of due process recognised by international law" in considering the exhaustive indicia of unwillingness listed in paragraph 2 of article 17, the Court is not required to ensure and enforce exact compliance by the domestic court with those principles. It certainly is not the case that the mere possibility of a breach of one of those principles results in an automatic finding of admissibility. Such an interpretation turns the principle of complementarity on its head. Again, the Court is not an international human rights court. Rather, it is an international criminal court of last resort which is founded on a presumption in favour of national jurisdictions.

c) Alleged Risk of Mistreatment

85. The OPCD suggests that "in assessing the probability that Mr. Gaddafi will be mistreated if the jurisdiction of the case is ceded to Libya, it is not necessary to prove that Mr. Gaddafi has or will definitely be mistreated. It is sufficient to adduce reliable evidence concerning a system of mistreatment, which has been directed against persons associated with the former regime, and to establish that on the basis of the defendant's profile, he is particularly vulnerable to such

⁹¹ Ibid, para. 86.

mistreatment”.⁹²

86. The Libyan Government notes that the complementarity enquiry to be undertaken by the ICC is very different to the enquiry undertaken by a state party to the European Convention on Human Rights when considering whether the extradition of an individual is in compliance with Article 3. The Court is only required to consider whether the specific domestic proceedings are being carried out genuinely with an intent to bring the person to justice. It is not required to scrutinise the proceedings from the exacting perspective of a human rights court, which is precisely what the OPCD is proposing.

87. Assuming for one moment that it were appropriate to adopt the extradition standards of the European Court of Human Rights in relation to Saif Al-Islam Gaddafi, it is accepted that it would not be necessary to prove that Mr. Gaddafi has or will definitely be mistreated. However, a system of mistreatment directed against persons associated with the former regime has not been shown to exist and no available evidence suggests that Saif Al-Islam Gaddafi is at risk of such mistreatment in any event. Even applying European Convention standards, it is simply not sufficient to show that *some* mistreatment or even torture or extra-judicial executions have taken place within Libya, however regrettable these occurrences may be, as frankly conceded by the Minister of Justice who has taken steps that have dramatically improved protection against such incidents.

88. Even before a human rights court (which the ICC is not), NGO reports of alleged mistreatment or breaches of procedural safeguards are not sufficient to prove a system of mistreatment giving rise to a risk to Saif Al-Islam Gaddafi. Both of these unfortunate occurrences are regrettably commonplace in many countries, even those with long histories of democratic tradition. In a post conflict environment such as that in Libya such occurrences are regrettable but unsurprising. But they simply do not allow for a conclusion that “on the day that Muammar and Mutassim Gaddafi were killed, it was clear that Libya

⁹² Ibid, para. 27.

suspended the rule of law on matters concerning the Gaddafi family”.⁹³ Such a submission takes complex and regrettable events that took place in the context of armed conflict, mass-atrocities and the consequent chaos in its immediate aftermath, and attempts to unreasonably extrapolate future adverse consequences for Mr Gaddafi which cannot properly be inferred from them either legally or on the facts.

89. In sum, there is no evidence that either a system of mistreatment exists or that Saif Al-Islam Gaddafi has been or will be maltreated or otherwise subject to cruel or inhumane treatment. Indeed, the OPCD appears to concede this fact by referring to “the appalling *legal* conditions, to which Mr. Saif Al-Islam Gaddafi continues to be subjected”.⁹⁴ Whilst this allegation of appalling legal conditions is refuted, it makes clear that the OPCD cannot substantiate any claim that Mr. Gaddafi has been mistreated or is at risk. The attempt by the OPCD to “cut and paste” from unrelated incidents to the current situation is misconceived.

d) The impact of the death penalty on the test for complementarity

90. The OPCD submits in its Response⁹⁵ that the “fact that Mr Gaddafi is facing the death penalty...calls for heightened attention to his due process protections”. Again, this is a misstatement of the law. The Statute does not require a dual-track assessment of admissibility depending on a specific sentencing option for a particular state. The question of acceptable forms of punishment is entirely a matter for a particular national jurisdiction, provided that the sentence is permitted under international law. Neither the Statute generally nor article 17 specifically require, or intended to serve as an incentive for, the harmonisation of sentencing provisions in domestic jurisdictions.⁹⁶ A state’s recourse to the death penalty is lawful under international law and is outside the judicial

⁹³ Ibid, para. 29.

⁹⁴ Ibid, para. 1 [emphasis added].

⁹⁵ Ibid, para. 22.

⁹⁶ Carsten Stahn, “Libya, the International Criminal Court and Complementarity: A Test for ‘Shared Responsibility’” (2012) *JICJ* 1, 22.

purview of the ICC. According to the complementarity principle, “from the standpoint of the Statute and the Court, states are free to decide on the question in accordance with their national laws.”⁹⁷

91. This position is clearly articulated in the statement of the President of the Rome Conference at the last meeting of the plenary:

*The debate at this conference on the issue of which penalties should be applied by the Court has shown that there is no international consensus on the inclusion or non-inclusion of the death penalty. However, in accordance with the principle of complementarity, national jurisdictions have the primary responsibility for investigating, prosecuting and punishing individuals, in accordance with their national laws, for crimes falling under the jurisdiction of the International Criminal Court. In this regard, the Court would clearly not be able to affect national policies in this field. It should be noted that not including the death penalty in the Statute would not in any way have a legal bearing on national legislation and practice regarding the death penalty. Nor shall it be considered as influencing the development of international customary law or in any other way the legality of penalties imposed by national systems for serious crimes.*⁹⁸

92. The negotiating history shows that the Statute was intended to reflect differing legal cultures, including divergent views regarding penalties. This is reflected in article 80 of the Statute.⁹⁹ The Court was not designed to be a human rights court with responsibility for harmonising standards and enforcing an agreed ideal that is confined to certain parts of the world and this is precisely what the OPCD

⁹⁷ Jessica Almqvist, “Complementarity and Human Rights: A Litmus Test for the International Criminal Court” (2008) 30 *Loy. L.A. Int’l & Comp. L. Rev* 335, 341.

⁹⁸ Statement of Mr Conso (Italy) (President), 9th plenary meeting, 17 July 1998, A/CONF.183/SR.9, para 53 (contained within A/CONF.183/13 (Vol.11) at page 124.

⁹⁹ Carsten Stahn, page 22.

is proposing by suggesting that the court apply a different standard to Libya by reason of its retention of the death penalty.

93. Libya emphasizes however that the mere availability of the death penalty in its Criminal Code for crimes of exceptional gravity in no way suggests that such penalty would necessarily be the sentence imposed on an accused person, or that any death sentence imposed would necessarily be implemented.

e) The impact of the Political Isolation Law

94. The OPCD asserts that the [draft] Political Isolation Law, which has not been adopted, let alone implemented, by the General National Congress (and for this reason was not dealt with in the Libyan Government's submissions), will "significantly impact on the independence and impartiality of the judiciary and members of the Ministry of Justice." Given that the draft law has not yet been adopted and does not therefore form part of the laws of Libya, this assertion is purely speculative. Far from being a "stick to threaten or remove any judges who attempt to issue independent decisions, which uphold the rights of highly unpopular defendants", the draft law is designed to enhance legitimacy of the judiciary by removing from it those individuals who previously acted in accordance with the dictates of the Gaddafi regime and showed a complete disregard for the rule law. This is a legitimate exercise of sovereignty by a democratically elected government committed to rebuilding its country. It finds parallels in the practice of the lustration laws of other States emerging from authoritarian rule.

95. Furthermore, the Court's enquiry regarding the admissibility of the case against Mr Gaddafi necessitates an examination by the Court of the domestic proceedings against him and a determination regarding their independence and impartiality. The general and speculative nature of the OPCD's assertions regarding the [draft] Political Isolation Law does not in any way gainsay the independence and impartiality of the proceedings involving Mr Gaddafi.

f) Questions to be determined at trial

96. It is accepted that the Trial Chamber's queries concerning Libyan domestic law and fair trial rights within the criminal process are relevant to the question of whether there is an ongoing investigation or prosecution and whether the Libyan state is able to genuinely carry out such an investigation or prosecution. However, it is submitted that the OPCD's approach to these questions attempts to import unrealistic or unwarranted procedural standards or practices into Libya's proposed criminal proceedings.

97. For example, the OPCD criticizes Libya on the basis that:

- a. its evidential samples are allegedly "completely lacking in probative value";¹⁰⁰
- b. its intercept evidence was allegedly not obtained in accordance with a judicial order or verified according to best practice standards;¹⁰¹
- c. its detention orders allegedly contain a number of technical discrepancies;¹⁰²
- d. it is not definitive that the trial court will find that Saif Al-Islam Gaddafi satisfied the test for being a *de facto* public officer for the purposes of articles 431, 433, 434 and 435 of the Libyan Criminal Code;¹⁰³
- e. it is not yet certain how the trial court will construe article 202 of the Libyan Criminal Code for crimes taking place during a revolution leading to a change of Government;¹⁰⁴
- f. the list of charges which Saif Al-Islam Gaddafi will face at trial has not yet been finally determined (and will not be finally determined until the conclusion of the accusation phase of proceedings) and indeed since the

¹⁰⁰ OPCD Response, para 153-155.

¹⁰¹ Ibid, para. 97-106.

¹⁰² Ibid, paras. 126-139.

¹⁰³ OPCD Response, paras 180-185. See also: OPCV Response, paras. 59-61.

¹⁰⁴ OPCD Response, para 186

Libya's 23 January 2013 supplemental submissions the Prosecutor-General has decided not to include in the charges any matters of sharia law including issues relating to retaliation and compensation for killings.¹⁰⁵

98. Even if these criticisms are true (which is not accepted by the Libyan Government), such issues are matters which must be judicially determined during the actual trial (or accusation) phase of proceedings. They do not impinge upon the question of willingness or ability of a State for the purposes of the complementarity assessment.
99. Consistent with all regularly constituted and independent court processes, the Libyan Government is unable to provide definitive answers with regard to all aspects of the intended trial of Gaddafi or his putative co-accused. The OPCD attempts to have the Chamber draw adverse inferences from the fact that the Libyan government (and/or the Libyan courts) is not in a position to provide complete and definitive answers on all trial matters. In any event, rather than proving a fair trial was possible or likely, definitive answers to all trial matters, would prove the converse. Trial matters must by nature be decided ultimately at trial by the judiciary, not by the executive.
100. Further, it ought to go without saying, that the failure to provide definitive answers on particular issues cannot be the basis of an automatic dismissal of the challenge. None of the alleged errors detailed in the OPCD's response,¹⁰⁶ even if found to be correct, and even if considered cumulatively, may be deemed dispositive of the admissibility challenge. They are complex issues relating to ongoing trial proceedings or the interpretation of applicable law in a post-conflict environment. They need to be examined carefully to understand the difficulties that such an environment creates and the meaningful progress made, nonetheless, towards a trial process for the Libyan people.

¹⁰⁵ OPCD Response, paras. 191-196. See also: OPCV Response, para. 46.

¹⁰⁶ See for example, OPCD Response, para. 19.

g) Erroneous submissions by the OPCD

101. The OPCD has made a host of erroneous submissions in its Response which misrepresent the true position in Libya and which can be seen to be incorrect when verified by reference to publicly available information, the Libyan Government's evidential materials contained in Annexes to its submissions and / or the plain wording of Libyan law. A few examples are considered below.

102. First, the OPCD criticises the Government for being unable to exercise control over the building where the General National Congress sits. This point is misguided.¹⁰⁷ The recent occupation and subsequent eviction of the war veterans, who were protesting with respect to their pension entitlements, in fact shows the democratic system working effectively and that the Government is able to control and address challenges peacefully.¹⁰⁸ That the war veterans were permitted to exercise their democratic right to protest and that the Government peacefully evicted them from the premises following a resolution by Congress to remove them, shows the fundamental and positive changes that have occurred in Libya since the Revolution.

103. Second, the OPCD asserts that Mr Al-Mahmoudi has been denied access to his lawyer.¹⁰⁹ However, Mr Al-Mahmoudi has had access to his legal team and he has also received visits from family members. This was confirmed by representatives from the UN Mission in Libya who visited Mr Al-Mahmoudi at the Correction and Rehabilitation center at al-Hadba in Tripoli on 28 February 2013.¹¹⁰ The visit was arranged by the Minister for Justice as a matter of priority following the entirely false allegations that Mr Al-Mahmoudi had been tortured and was in a critical condition. The UNSMIL representatives spoke to Mr Al-

¹⁰⁷ Ibid, para 13.

¹⁰⁸ See: "Protestors forced out of Congress; attempt to besiege PM's office", *Libya Herald*, 21 February 2013, <http://www.libyaherald.com/2013/02/21/protestors-forced-out-of-congress-attempt-to-besiege-pms-office/>

¹⁰⁹ OPCD Response, para 24.

¹¹⁰ See: "Libya PM denies Gaddafi premier in 'critical condition'", Reuters, 28 February 2013, <http://www.reuters.com/article/2013/02/28/us-libya-gaddafi-pm-idUSBRE91R16520130228>

Mahmoudi privately and he confirmed that he was being treated well and that he had contact with his legal team, consisting entirely of Libyan lawyers as well as some family members.

104. Third, the OPCD additionally asserts that Abdullah Al-Senussi has been kept in isolation.¹¹¹ This assertion is incorrect. Mr Al-Senussi was visited in Hadba Al-Khadra jail by four members of the Libyan Observatory for Human Rights on 4 February 2013.¹¹² Arrangements were also made for Mr Al-Senussi's daughter to visit him on 12 February 2013, following a request from her.¹¹³ In a recent interview by the Libya Herald, Unood Al-Senussi, Mr Al-Senussi's daughter, who is in prison on charges relating to a false passport, spoke of the favourable treatment that she and Mr Al-Senussi were receiving and of her contact with her family.¹¹⁴

105. Other mistaken submissions include, *inter alia*, the OPCD's submissions on: the practical impact of the Supreme Court judgment;¹¹⁵ the alleged clarification provided by article 61 of the Libyan Criminal Procedure Code (which in fact is limited to cases where an investigation is being conducted by a judge rather than a prosecutor) to the meaning of article 59 of the same Code;¹¹⁶ the relevance of discriminatory intent to considerations of sentence under the Libyan Criminal Code;¹¹⁷ and the Libyan judiciary's imposition of the death penalty following unfair trials such as trials in absentia (the OPCD omits to mention here that all persons convicted under Libyan law in absentia are

¹¹¹ OPCD Response, para 25.

¹¹² See: "Prison visit for Al-Senussi" *Libya Herald*, 4 February 2013, <http://www.libyaherald.com/2013/02/04/prison-visit-for-al-senussi/>

¹¹³ See: "Libya says can try Gaddafi spy chief, appeals order", *Reuters*, 12 February 2013, <http://news.yahoo.com/libya-says-try-gaddafi-spy-chief-appeals-order-180525317.html>

¹¹⁴ See: "Exclusive: Interview with Abdullah Senussi's imprisoned daughter", *Libya Herald*, 2 March 2013, <http://www.libyaherald.com/2013/03/02/exclusive-interview-with-abdullah-senussis-imprisoned-daughter/>

¹¹⁵ OPCD Response, paras 165-167.

¹¹⁶ *Ibid*, footnote 27.

¹¹⁷ *Ibid*, paras 187-188.

entitled to a fresh trial [and fresh sentence if found guilty] upon presentation to a court).¹¹⁸

106. Due to the limited time granted for the Government's reply and the voluminous nature of the OPCD submissions, it is not possible for the Libyan Government to set out comprehensively in this document each of the erroneous and unsubstantiated submissions made by the OPCD in its Response. However, the Libyan Government trusts that the few examples cited above will be sufficient for the Pre-Trial Chamber to exercise caution when considering the array of mere assertions of bad faith or poor conduct by the OPCD in its response which are wholly unsubstantiated by evidence.

5. The genuine and concrete nature of capacity building efforts in Libya

107. The Government of Libya refutes the OPCD's assertions regarding its capacity building efforts and the support it has received and continues to receive from the international community.¹¹⁹ With regard to the latter, the recent meeting of the Government of Libya and its partners in Paris on 12 February 2013 shows the extent of this commitment and support. The support for Libya from its international partners is unqualified and ongoing, as illustrated by the communiqué issued after the meeting:

1. The Government of the State of Libya and international partners met today in Paris to renew their commitment to the Libyan people and their aspirations to build a modern democratic and accountable state solidly anchored in a rule of law system, institutions and practices, and in respect for human rights. Today's International Ministerial Conference marks a new phase in the relationship between Libya and its partners, in which Conference participants – including Denmark, France, Germany, Italy, Malta, Qatar, Spain, Turkey, the United Arab Emirates, the United Kingdom, the United States of America, the African

¹¹⁸ Ibid, para 178.

¹¹⁹ Ibid, paragraphs 282-288.

Union, the Arab Maghreb Union, the European Union, the Gulf Cooperation Council, the League of Arab States, and the United Nations – reaffirmed their unequivocal support for the Libyan Government in its determination to build, on the basis of the two attached Plans, namely the National Security Development Plan, and the Justice and Rule of Law Development Plan, a secure, prosperous and democratic nation, and overcome existing challenges in the areas of national security, rule of law and justice.

...

*6. The International Ministerial Conference on Support to Libya builds on the Senior Officials meeting held in London on 17 December, at which the Libyan Government had outlined a comprehensive plan of action in the priority areas of security sector, justice and rule of law. The Libyan Government today presented its international partners with its priorities for the development and reform of the security, rule of law and justice sectors. Libya's international partners have stressed the significance of these priorities and pledged additional assistance in support of Libyan efforts in these sectors.*¹²⁰

108. The allegation that the Libyan authorities “pay lip service to the need for reform”,¹²¹ ignores the enormous achievements made by the Libyan people in the two years since their liberation from over 40 years of authoritarian rule. Credible and peaceful national elections, the smooth transfer of power to the General National Congress and the formation of a transitional government are achievements of incalculable importance, which have laid the foundations for the rebuilding of the state with the assistance of the United Nations and the international community.

109. The Libyan Government is aware that there are continuing challenges but it is committed to meet those challenges with the pledged support of the

¹²⁰ Annex 1, Public, “Paris Communiqué, International Ministerial Conference on Support to Libya in the Areas of Security, Justice and Rule of Law”, Paris, 12 February 2013.

¹²¹ OPCD Response, para 287.

international community and as such has set out, and started to implement, concrete proposals for rebuilding, reforming and restructuring in the key areas of security, justice and the rule of law.

110. While the Libyan Government accepts the OPCD's contention that the international support it is receiving does not include direct action by international experts on the specific proceedings relating to Saif Al-Islam Gaddafi, the assistance which is being and will be received cuts across the entire Libyan justice and security sectors. Accordingly, international expertise will be gleaned on all aspects of Libya's detention, investigation and prosecution system and will inevitably have a positive impact upon the standards applied to the trial of Saif Al-Islam Gaddafi.

111. To that end, on 12 February 2013, the International Ministerial Conference adopted two Plans, namely the National Security Development Plan, and the Justice and Rule of Law Development Plan¹²² for implementation by the competent authorities of the Libyan Government, and with the assistance and full support of its international partners.¹²³ These plans contain a list of priorities and details of concrete deliverables in the key areas of security, justice and the rule of law. They detail the ongoing steps and future steps that reflect the Libyan Government's commitment to accountability and transparency.

112. The National Security Development Plan shows the extent of international support for the Libyan Government in ensuring the security of its people. The unqualified support of the international partners who attended the meeting in assisting with security matters is articulated in the communiqué:

9. The Libyan Government has identified six priority areas in the security sector, including: i) national security coordination and architecture; ii) disarmament, demobilization and reintegration (DDR); iii) arms and ammunition control; iv)

¹²² Annex 2, Confidential, Security Sector, Justice and Rule of Law Development Plans, as adopted by the International Ministerial Conference held in Paris on 12 February 2013.

¹²³ Annex 1, para 19.

border security and management; v) defence reform and development; and vi) police reform and development.

*10. Conference participants discussed the Libyan Government's security priorities, as discussed above. Libya's international partners expressed their political, technical and materiel support for the Libyan Government's efforts to address these challenges through both security sector reform and security operation-related solutions.*¹²⁴ *(emphasis added)*

113. The two plans serve to refute the submissions made by the OPCD regarding the alleged lack of support from the international community and Libya's purported failure to take concrete steps with regard to the specific aspects of capacity building highlighted by the OPCD in its Response which are considered below.

a) An effective police force

114. The OPCD makes numerous criticisms throughout its Response about the effectiveness of the police force. Libya acknowledges the need for an effective, accountable and affordable national police service, which contributes to safety, security and justice within Libya and which enjoys the confidence of all Libyans.¹²⁵ The Libyan Government is continuing to receive the assistance of the United Nations in establishing a High Committee for Police Reform and Development (HCPRD) within two months. Turkey has also pledged its support to this project. The Committee will arrange training for Libyan police in international and regional practices, change management and organisational development.¹²⁶

115. The Government is preparing a police reform and development strategy, which it aims to complete within the next four months. This will be based on a thorough assessment of existing capacities and a broad national consultation

¹²⁴ Annex 1.

¹²⁵ Annex 2, page 16.

¹²⁶ Ibid.

process. The United Nations has provided technical support for the completion of this document. The European Union, Italy, the United Kingdom and the United States have also pledged their support to the project. This will provide an important blueprint for the reform and restructuring of the police force.

116. A key and urgent priority for the Government is the development of a Critical Response Force in order “to ensure the rule of law, and to deter, prevent, and respond effectively to serious public order and security incidents in the immediate and longer-terms.”¹²⁷ It is intended that this capability should be built on the existing Operations Department within the Ministry. International support is required to establish this capability, ensuring consistency in training standards, equipment and operational procedures. Italy has pledged its support to this project and it is hoped that the United Nations will continue to assist Libya in coordinating additional international support.¹²⁸

117. The Government is taking steps to enhance the investigative and forensic capability of the Libyan police by utilising the existing offers of international assistance over the next 12-18 months. To date, assistance has been provided by the European Union, Italy, Turkey and the United Kingdom. France, Italy, Turkey and the United States have pledged additional assistance.¹²⁹ It is hoped that this kind of assistance will overcome the kinds of investigative problems which have arisen in the wake of the attack on the US embassy in Benghazi in 2012 and can contribute to improved investigative procedures in the trials of former Gaddafi regime officials.

b) Security for courts and court participants (including judges, counsel and witnesses)

118. The OPCD Response raises an array of concerns with respect to the inability of the Libyan authorities to protect its courts and court personnel. The

¹²⁷ Annex 2, page 17.

¹²⁸ Ibid.

¹²⁹ Ibid, page 19.

Government is acutely aware of the link between security concerns and the proper operation of the justice system. It is committed to identifying appropriate measures to provide security personnel to the courts within one month and will establish a coordination mechanism between the MoJ, MoI and MoD to ensure the security of the courts, which could take the form of a committee meeting on regular basis, within two months. The Government intends to ensure that sufficient personnel are assigned to court buildings within three months. To this end, the Government is training thousands of new recruits to the judicial police.¹³⁰ The UN has been providing assistance to this Government in this area.¹³¹

c) Independence of the Judiciary

119. The OPCD has expressed concern regarding the independence and impartiality of the judiciary, albeit based on a purely speculative assertion regarding the possible implementation of the Political Isolation Law. The Government of Libya is committed to bolstering the independence of the judiciary and “views this as an urgent priority in Libya in order to increase public trust in rule of law institutions.”¹³² This was the driving force behind the change in the composition of the Supreme Judicial Council (“SJC”). The new arrangement sees the SJC composed only of members of the judiciary and chaired by the President of the Supreme Court instead of the Minister of Justice. A review of the code of conduct of Libyan judges in light of the Bangalore Principles has also been carried out with the assistance of the UN and an UN-led workshop has been held for Libyan judges on judicial integrity and accountability. Denmark and the United Nations have also assisted with work on legislative support on the issues of judicial integrity and independence.¹³³

¹³⁰ Annex 3, Public, “Statement by Justice Minister of Libya Salah Marghani in response to Libya Chapter of HRW World Report 2013, 06 February 2013.

¹³¹ Annex 2, page 19.

¹³² Ibid, page 21.

¹³³ Ibid.

d) Increasing capacity to investigate and prosecute crimes

120. The plan reiterates Libya's commitment to the "pursuit of accountability for serious crimes of the past", which it recognises as a "cornerstone of the transitional justice process in Libya". However, Libya recognises that there are limitations on its resources in this regard and that its resources need to be managed in a way that gives priority to the investigations and trials of senior members of the former regime that have already commenced. Accordingly, it is intended that the Prosecutor General will adopt a top-down prosecutorial strategy within two months, which prioritises the cases of those alleged to have the highest degree of responsibility for serious crimes. The UN has been providing support to the Libyan Government in the form of support in formulating a prosecutorial strategy and training on screening/criminal investigation for public prosecutors.¹³⁴

e) Detention centres

121. The Government of Libya has received and continues to receive considerable international support and assistance for the reform of its prison system from the ICPS/UK, the UN and Jordan. This support has included capacity-building and training workshops and the creation of a forum for MoD, MoJ and MoI to facilitate access to detainees, including through civil society.¹³⁵

122. Libya does not shy away from the fact that violations of human rights were committed in detention centres in 2012. Indeed, this has been pointed out not just by the OPCD but also by the Prosecution.¹³⁶ However, it is important to keep in mind that the new Minister of Justice has "unequivocally condemned" such practices and that it is taking urgent steps to immediately end such practices in all detention centres (whether under government control or not) by training judicial police, security forces, rebels and other armed groups on

¹³⁴ Ibid, page 24.

¹³⁵ Ibid, page 25.

¹³⁶ OTP Response, para 42.

human rights.¹³⁷ The Libyan Ministry of Justice is also working hard to bring all detention centres under the actual and full control of the judicial police as soon as possible. By May 2013 it intends to take control of all detainees in Misrata through a special arrangement that involves the creation of a new correction facility at the Aviation Academy, which will be under the full control of the military police. It is intended that the model of Misrata will be applied to all other areas.¹³⁸

123. The following extract from the communiqué emphasises, contrary to the submissions of the OPCD, the extent of Libya's commitment to the rule of law and the international community's acknowledgement of, and support for, that commitment:

*18. Conference participants welcomed the commitment made by the Government of Libya and the steps it has since taken to bring all detention centres under government control and to ensure access to justice for the large number of detainees held. The international support aims at enhancing the implementation of international human rights and rule of law standards, especially in relation to treatment in detention, legality of detention, and the rights of accused persons to expeditious and fair trials.*¹³⁹

VI. CONCLUSION

124. Libya submits that it has established on-going national proceedings with respect to Saif Al-Islam Gaddafi and has otherwise satisfied all the requisite elements of the ICC Statute for a finding of inadmissibility. It has acted in good faith in engaging with the ICC, sought the assistance of the UN and other international actors, and made significant progress in enhancing the rule of law in Libya since the collapse of the Gaddafi regime in November 2011. A ruling in favour of Libya would signal the success of a credible and realistic

¹³⁷ Annex 3, page 1.

¹³⁸ Ibid.

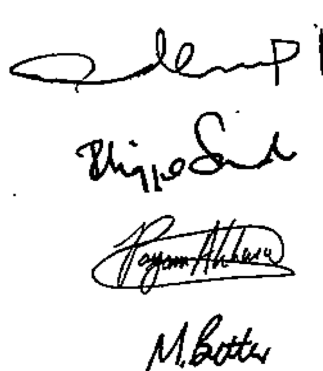
¹³⁹ Annex 1

complementarity system, which rightfully encourages and permits domestic proceedings under the continued observation of the ICC as they progress to the accusatory, trial, and appellate stages.

125. In this light, the Libyan Government respectfully requests the Pre-trial Chamber to either:

- a. Find the case against Saif Al-Islam Gaddafi inadmissible before the Court;
or
- b. Grant Libya six weeks from the rendering of its decision on the present submissions to adduce such further evidential samples to the court relating to the investigation of Saif Al-Islam Gaddafi as it may consider to be necessary; and / or
- c. Travel to Tripoli to inspect the case file in order to review the evidence collated by Libya during its investigation of Saif Al-Islam Gaddafi.

Respectfully submitted:



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 Professor Payam Akhavan
 Michelle Butler
*Libyan ICC Coordinator and
 Counsel on behalf of the Government of Libya*

Dated this 4th day of March 2013
 At London, United Kingdom

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