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## THE APPEALS CHAMBER

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

## SITUATION IN LIBYA

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

### Public Redacted version

Observations on behalf of victims on the Government of Libya's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi"

**Source:** Office of Public Counsel for Victims

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

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## I. PROCEDURAL HISTORY

1. On 27 June 2011, Pre-Trial Chamber I issued the “Decision on the ‘Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi’” (the “Article 58 Decision”),<sup>1</sup> issuing warrants of arrest against Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi for their alleged criminal responsibility under article 25(3)(a) of the Rome Statute for crimes against humanity committed across Libya in February 2011.

2. On 1 May 2012, the Government of Libya filed an Application pursuant to article 19 of the Rome Statute, requesting the Pre-Trial Chamber to: (i) postpone the execution of the request for surrender of Mr Gaddafi pursuant to article 95 of the Rome Statute; (ii) declare the case against him inadmissible and consequently quash the request for surrender (the “Admissibility Challenge”).<sup>2</sup>

3. On 4 May 2012, the Pre-Trial Chamber issued the “Decision on the Conduct of the Proceedings Following the ‘Application on behalf of the Government of Libya pursuant to Article 19 of the Statute’” whereby it decided, *inter alia*, to appoint, for the purpose of the admissibility proceedings, the Principal Counsel of the Office of Public Counsel for Victims (the “OPCV” or the “Office”) as legal representative of victims having communicated with the Court in relation to the case.<sup>3</sup> The Chamber specified that Libya’s submissions “*only concern the case against Mr Gaddafi*”.<sup>4</sup>

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<sup>1</sup> See the “Decision on the ‘Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi’” (Pre-Trial Chamber I), No. ICC-01/11-01/11-1, 27 June 2011 (the “Article 58 Decision”).

<sup>2</sup> See the “Application on behalf of the Government of Libya pursuant to Article 19 of the Statute”, No. ICC-01/11-01/11-130-Red, 1 May 2012 (the “Admissibility Challenge”).

<sup>3</sup> See the “Decision on the Conduct of the Proceedings Following the ‘Application on behalf of the Government of Libya pursuant to Article 19 of the Statute’” (Pre-Trial Chamber I), No. ICC-01/11-01/11-134, 4 May 2012, para. 13.

<sup>4</sup> *Idem*, para. 8.

4. On 7 December 2012, the Pre-Trial Chamber issued the “Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi”,<sup>5</sup> in which it requested the Government of Libya to submit further information and evidence on several issues concerning the admissibility of the case by 23 January 2013, and authorised, inter alia, the OPCD and the OPCV to respond to these submissions by 11 February 2013.<sup>6</sup>

5. On 23 January 2013 the Libyan Government filed its further submissions on the admissibility of the case against Gaddafi, which included 23 annexes. These submissions and 7 of its annexes were filed confidential and *ex parte* (Pre-Trial Chamber and Prosecution only). A public redacted version of said submissions, together with 16 public annexes, was made available to the OPCV. A public redacted version was filed on the same day.<sup>7</sup>

6. On 29 January 2013, the OPCD filed the “Urgent Defence request to dismiss Libya’s Submissions”.<sup>8</sup> The OPCD requested the Chamber to: (i) dismiss the Government of Libya’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi; and (ii) issue an immediate decision on the admissibility of the case.

7. On 30 January 2013, the Pre-Trial Chamber issued the “Decision concerning Libya’s *ex parte* submission of evidence relevant to its challenge to admissibility of

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<sup>5</sup> See the “Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi” (Pre-Trial Chamber I), No. ICC-01/11-01/11-239, 7 December 2012 (the “Decision on further submissions”).

<sup>6</sup> *Idem*, p. 23.

<sup>7</sup> See the “Libyan Government’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi”, No. ICC-01/11-01/11-258-Red2, 23 January 2013 (the “Libya’s further submissions”).

<sup>8</sup> See the “Public Redacted Version of the ‘Urgent Defence Request to Dismiss ‘Libyan Government’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi’”, No. ICC-01/11-01/11-261-Red, 29 January 2013.

the case against Saif Al-Islam Gaddafi".<sup>9</sup> The Pre-Trial Chamber found it appropriate to notify the OPCD of the annexes currently classified as '*ex parte*' in Libya's Submissions. However, it considered appropriate to give Libya the opportunity to apply "*discrete redactions, if any, to the concerned material, providing a justification for why each of those redactions is asserted to be necessary vis-à-vis the OPCD*".<sup>10</sup> The Chamber added that [u]pon receipt of the proposed redactions, if any, together with the explanations thereof, the Chamber will determine whether these redactions vis-à-vis the OPCD are warranted".<sup>11</sup>

8. On 7 February 2013, the Pre-Trial Chamber issued the "Decision on the 'Libyan Government's proposed redactions to ICC-01/01-01/11-258-Conf-Exp and Annexes 4,5,6,7,15,16 and 17'" <sup>12</sup> deciding that "*in the absence of a proper reason justifying the contrary, the OPCV should in principle be given access to the relevant material [...] with the same redactions hereby authorised by the Chamber vis-à-vis the OPCD*"<sup>13</sup> and consequently extended the deadline originally set up to provide any response to Libya's Submissions by 18 February 2013.<sup>14</sup>

9. On 12 February 2013, the Prosecution filed the "Prosecution's Response to 'Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi'" <sup>15</sup> establishing that Libya "*has not provided*

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<sup>9</sup> See the "Decision concerning Libya's *ex parte* submission of evidence relevant to its challenge to admissibility of the case against Saif Al-Islam Gaddafi" (Pre-Trial Chamber I), No. ICC-01/11-01/11-262, 30 January 2013.

<sup>10</sup> *Idem*, para. 14.

<sup>11</sup> *Ibid.*

<sup>12</sup> See the "Decision on the 'Libyan Government's proposed redactions to ICC-01/01-01/11-258-Conf-Exp and Annexes 4, 5, 6, 7, 15, 16 and 17'" (Pre-Trial Chamber I), No. ICC-01/11-01/11-271-Red, 7 February 2013.

<sup>13</sup> *Idem*, paras. 17 and 18.

<sup>14</sup> *Ibid.*, para. 19.

<sup>15</sup> See the "Prosecution's Response to 'Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi'", No. ICC-01/11-01/11-276-Red2, 12 February 2013.

*sufficient supporting evidence to demonstrate that it is investigating the same case as before the ICC*".<sup>16</sup>

10. On 19 February 2013, the Defence and the OPCV filed their respective responses to the 'Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi'.

11. On 31 May 2013, the Pre-Trial Chamber rendered its "Decision on the admissibility of the case against Saif Al-Islam Gaddafi" (the "Impugned Decision"), in which it declared the case against Mr Gaddafi admissible and rejected Libya's challenge to the admissibility of the case.<sup>17</sup>

12. On 7 June 2013, the Government of Libya filed the "Appeal against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'".<sup>18</sup>

13. On 25 June 2013, the Appellant filed the "Document in Support of the Government of Libya's Appeal against the 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'" (the "Document in support of the Appeal").<sup>19</sup>

14. On 16 July 2013, the Appeals Chamber issued an Order in relation to the filing of victims' observations in which it instructed, *inter alia*, the OPCV to submit

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<sup>16</sup> *Idem*, para. 45.

<sup>17</sup> See the "Decision on the admissibility of the case against Saif Al-Islam Gaddafi" (Pre-Trial Chamber I), No. ICC-01/11-01/11-344-Red, 31 May 2013 (the "Impugned Decision").

<sup>18</sup> See the "Government of Libya's Appeal against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'", No. ICC-01/11-01/11-350, para. 11.

<sup>19</sup> See the "Document in Support of the Government of Libya's Appeal against the 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'", No. ICC-01/11-01/11-370-Red2, 25 June 2013 (the "Document in support of the Appeal").

observations on the document in support of the appeal filed by the Libyan Government by 20 August 2013.<sup>20</sup>

15. On the same day, the Prosecution filed its response to the Document in support of the Appeal.<sup>21</sup>

16. On 18 July 2013, the Defense filed its response to the Document in support of the Appeal.<sup>22</sup>

17. In accordance with the Appeals Chamber's order dated 16 July 2013, the Principal Counsel of the Office, acting as legal representatives, files the following observation on behalf of victims having communicated with the Court in respect of the case.

## II. SUBMISSIONS

18. The victims oppose the appeal of the Government of Libya against the Decision on the admissibility of the case against Mr Saif Al-Islam Gaddafi. The Impugned Decision is based on a proper consideration of the facts and evidence; on unimpeachable procedure as well as on a reasonable interpretation and application of the law. Consequently the Appeal shall be rejected.

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<sup>20</sup> See the "Order in relation to the filing of victims' observations and the request pursuant to rule 103 of the Rules of Procedure and Evidence" (Appeals Chamber), No. ICC-01/11-01/11-383 OA4, 16 July 2013.

<sup>21</sup> See the "Prosecution Response to the "Document in Support of the Government of Libya's Appeal against the Decision on the admissibility of the case against Saif Al-Islam Gaddafi", No. ICC-01/11-01/11-384- Red-Corr OA4, 16 July 2013 (the "Prosecution submissions").

<sup>22</sup> See the "Defense Response to the 'Document in Support of the Government of Libya's Appeal against the Decision on the admissibility of the case against Saif Al-Islam Gaddafi'", No. ICC-01/11-01/11-386-Red OA4, 18 July 2013.

**A. The Pre-Trial Chamber committed no error of law by holding that Libya failed to satisfy the requirement of “investigation of the same case” as that before the Court**

19. The Government of Libya argues, as a first ground of appeal, that the Pre-Trial Chamber’s erred in law *“by holding that a number of investigative steps by the Libyan authorities, covering discrete aspects of the case before the ICC, failed to satisfy the same conduct test under article 17(1)(a) of the Statute”*.<sup>23</sup>

**1. Proof of the “actual contours” and “precise scope” of an alleged national investigation is essential to a proper determination of the Admissibility Challenge**

20. The Government contends that by *“requiring proof of the ‘actual contours’ and ‘precise scope’ of its domestic investigation the Chamber clearly applied a legal standard which required more than substantially the same conduct, and which necessarily and erroneously requires the domestic criminal process to encompass nearly all aspects – or at least more than “certain aspects” – of the ICC case”*.<sup>24</sup> This argument is without merit. The Principal Counsel submits that, in light of the specific circumstances of the case, requiring proof of the “actual contours” and “precise scope” of domestic proceedings was necessary for the proper consideration of the Admissibility Challenge.

21. It is well established that for a State to successfully challenge the admissibility of a case before the ICC, it must provide *“the Court with evidence with a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the [same] case”*.<sup>25</sup> Such evidence must show that domestic

<sup>23</sup> See the the Document in support of the Appeal, *supra* note 19, para. 44.

<sup>24</sup> *Idem*, para. 53.

<sup>25</sup> See the “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’” (Appeals Chamber), No. ICC-01/09-01/11-307 OA, 30 August 2011, para. 1 (the “Ruto Admissibility Judgment”) and the “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



investigation(s) cover both the same person and the same conduct (or, at the very least, substantially the same conduct) as in the case before the Court.<sup>26</sup>

22. The admissibility assessment is, in fact, nothing more than a comparison of two concurrent investigative processes. In other words, when considering an admissibility challenge, the relevant Chamber must examine the level of identity between the domestic investigation and that before the Court. The purpose of such assessment is to determine whether there is “*conflict of jurisdictions between the Court on the one hand and a national jurisdiction on the other*”.<sup>27</sup>

23. The precise scope and the subject-matter of ICC investigations are defined, as in the present case, within the Warrant of Arrest and the Article 58 Decision.<sup>28</sup> With regard to domestic proceedings, the contours of the national investigation may be established by any reliable means, including through judicial orders and decisions, witness or suspect interviews, documentary evidence and forensic analyses.<sup>29</sup> The provision of such evidence allows the Chamber to carry out the assessment provided for in articles 17 and 19 of the Rome Statute. Most importantly, it enables the Chamber to make an informed decision on the degree of correspondence between the subject-matter of the domestic case and that alleged in the proceedings before the ICC.

24. In the present case, Libya merely made a general statement that its domestic investigation “*includes, but is not limited to, the incidents of murder and persecution that*

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Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute” (Appeals Chamber), No. ICC-01/09-02/11-274 OA, 30 August 2011, para. 1 (the “Muthaura Admissibility Judgment”).

<sup>26</sup> See the Ruto Admissibility Judgment, *supra* note 25, paras. 1-2 and the Muthaura Admissibility Judgment, *supra* note 25, paras. 1-2.

<sup>27</sup> See the Ruto Admissibility Judgment, *supra* note 25, para. 37 and the Muthaura Admissibility Judgment, *supra* note 25, para. 36.

<sup>28</sup> See the “Decision on the ‘Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi” (Pre-Trial Chamber I), No. ICC-01/11-01/11-1, 27 June 2011 (the “Article 58 Decision”).

<sup>29</sup> See the Ruto Admissibility Judgment, *supra* note 25, para. 41 and the Muthaura Admissibility Judgment, *supra* note 25, para. 37.

are listed at paragraphs 36 to 65 of the 27 June 2011 Article 58 decision”.<sup>30</sup> The Pre-Trial Chamber correctly found that this statement “cannot be deemed sufficient to discharge [the Government’s] burden of proof”.<sup>31</sup> The Chamber specifically instructed the Libyan Government to provide detailed information on a number of specific issues.<sup>32</sup> Despite the Chamber’s clear instructions, the Government failed to provide any additional evidence demonstrating that its national investigation covers the conduct set out in the relevant documents of the Court. It restated its earlier position, asserting that the “subject matter of the Libyan investigation of Saif Al-Islam Gaddafi is much broader than the ICC’s investigation”.<sup>33</sup>

25. It is therefore crystal clear that when Pre-Trial Chamber I inquired about the “precise contours” of the domestic case, it did so only because it lacked basic information regarding the subject-matter of the domestic proceedings against Mr Gaddafi. Further, the Government failed to establish how its national investigation related to the specific factual allegations set out in the Article 58 Decision, with the exception of a few allegations.<sup>34</sup> With respect to the remaining allegations, the Government indicated that they were covered by a broad list of provisions of the Libyan Criminal Code.<sup>35</sup> However, the Government never provided additional evidence demonstrating that those remaining allegations were indeed being investigated as such and, therefore, the Chamber could not ascertain whether national proceedings included said allegations.

26. Accordingly, the Principal Counsel is of the view that the Pre-Trial Chamber gave due regard to the Government’s unsubstantiated submissions that the remaining factual allegations were also covered by domestic proceedings. It was

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<sup>30</sup> See the transcript of the hearing held on 9 October 2012, No. ICC-01/11-01/11-T-2-Red-ENG, page 21, lines 4 to 11.

<sup>31</sup> See the Decision on further submissions, *supra* note 5, para. 28.

<sup>32</sup> *Idem*.

<sup>33</sup> See the Libya’s further submissions, *supra* note 7, para. 63.

<sup>34</sup> *Idem*, para. 72.

<sup>35</sup> *Ibid.*, para. 82.

entirely reasonable for the Pre-Trial Chamber to request the Government to provide adequate proof of the “precise scope” of its national investigation in order to verify these claims. The Chamber thus correctly found that “*a number of investigative steps have been taken by Libya with respect to certain discrete aspects that arguably relate to the conduct of Mr Gaddafi as alleged in the proceedings before the Court*”.<sup>36</sup>

***2. The Pre-Trial Chamber’s approach to the level of specificity for establishing the existence of a national investigation was correct***

27. Libya further argues that the Pre-Trial Chamber incorrectly interpreted the requisite level of specificity by requiring evidence of the “actual contour” and “precise scope” of the case.<sup>37</sup> In the Government’s view, such an approach demonstrates that the Pre-Trial Chamber imported additional requirements into the admissibility test, thereby imposing upon Libya “*a requirement of demonstrating the degree of investigative progress or finality*”.<sup>38</sup> The Government contends that such additional requirements are inconsistent with the inherent lack of specificity of an on-going investigation<sup>39</sup> and that article 17(1)(a) of the Rome Statute contains an obligation of conduct, not of result.<sup>40</sup>

28. The approach asserted by the Government is misconceived and reflects a flawed understanding of the evidentiary standard applicable to admissibility proceedings. Provision of evidence regarding the precise parameters of the domestic case is a prerequisite to the complementarity assessment. It enables the Court to assess the level of similarity between concurrent proceedings.

29. Indeed, the terms “is being investigated” have been defined by the Appeals Chamber as “*the taking of steps directed at ascertaining whether this individual is*

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<sup>36</sup> See the Decision on further submissions, *supra* note 5, para. 134.

<sup>37</sup> See the Document in support of Appeal, *supra* note 19, para. 64.

<sup>38</sup> *Idem*.

<sup>39</sup> *Ibid.*, paras. 60-64.

<sup>40</sup> *Ibid.*, paras. 65-70.

responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses”.<sup>41</sup> Moreover, the Appeals Chamber ruled that “a statement by a Government that it is actively investigating is not [...] determinative. In such a case the Government must support its statement with tangible proof to demonstrate that it is actually carrying out relevant investigations”.<sup>42</sup>

30. Therefore, the Appeals Chamber made it clear that for a State to satisfy the requisite standard of proof under article 19 of the Rome Statute, it must have already conducted concrete and meaningful investigative steps. This requirement *per se* demonstrates that the admissibility test requires a certain degree of progress with regard to domestic proceedings. A State challenging the admissibility of a case must, at the very least, be in a position to establish that the “actual contours” of its investigation covers the conduct alleged in the proceedings before the Court through providing specific evidence that it is investigating the same case. To suggest otherwise would simply mean that the State is discharged from the obligation to substantiate its admissibility challenge.

31. There are therefore no merits in asserting that the Court is prevented from exercising jurisdiction over the case as long as the State has taken certain investigative steps.<sup>43</sup> Such an interpretation goes contrary to the requirement according to which the evidence ought to be of sufficient degree of specificity. It also conflicts with the fact that the complementarity test is aimed at resolving “conflicts between competing jurisdictions” in relation to specific conducts.<sup>44</sup> Indeed, for a jurisdictional conflict to take place, national investigative proceedings must have reached an advanced stage, to enable an assessment under article 17 of the Rome Statute. The resolution of such conflict requires, in the first place, that the

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<sup>41</sup> See the Ruto Admissibility Judgment, *supra* note 25, para. 1 and the Muthaura Admissibility Judgment, *supra* note 25, para. 1.

<sup>42</sup> *Idem*, para. 62 and para. 62.

<sup>43</sup> See the Document in support of the Appeal, *supra* note 19, para. 62.

<sup>44</sup> See the Ruto Admissibility Judgment, *supra* note 25, para. 99 and the Muthaura Admissibility Judgment, *supra* note 25, para. 98.

Chamber define the “precise scope” and “actual contours” of the two competing processes.

32. Furthermore, the “precise scope” and/or “actual contours” is what distinguishes preliminary admissibility challenges under article 18 of the Rome Statute from challenges made under article 17(1)(a) of the Rome Statute, as emphasised by the Appeals Chamber

*“For the purpose of proceedings relating to the initiation of an investigation into a situation (articles 15 and 53 (1) of the Statute), the contours of the likely cases will often be relatively vague because the investigations of the Prosecutor are at their initial stages. The same is true for preliminary admissibility challenges under article 18 of the Statute. Often, no individual suspects will have been identified at this stage, nor will the exact conduct nor its legal classification be clear. The relative vagueness of the contours of the likely cases in article 18 proceedings is also reflected in rule 52 (1) of the Rules of Procedure and Evidence, which speaks of “information about the acts that may constitute crimes referred to in article 5, relevant for the purposes of article 18, paragraph 2” that the Prosecutor’s notification to States should contain.*

*In contrast, article 19 of the Statute relates to the admissibility of concrete cases. The cases are defined by the warrant of arrest or summons to appear issued under article 58, or the charges brought by the Prosecutor and confirmed by the Pre-Trial Chamber under article 61”.<sup>45</sup>*

33. As submitted by the Prosecution, “if the parameters of the Libyan case are so unclear that it is not possible to discern which conduct is actually being investigated, then, simply, there is no concrete case at the national level that will permit comparison to the ICC case”.<sup>46</sup> The mere existence of an investigation at the national level does not necessarily imply that the same case is being investigated. A challenging State must show that it has sufficient and specific evidence in relation to the parameters of the domestic case.

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<sup>45</sup> *Idem*, paras. 39-40 and para. 38.

<sup>46</sup> See the Prosecution submissions, para. 43.

34. Therefore, Libya cannot legitimately claim that it is only required to produce “minimal evidence” and discrete “aspects” of its investigation in order to satisfy the complementarity test set out in article 19 of the Rome Statute.<sup>47</sup> As the moving party, it determined the timing of its own Admissibility Challenge and should have known whether or not the evidence adduced at that time was sufficient for the granting of said Challenge.

35. On the other hand, the Principal Counsel agrees with the Government’s assertion that article 17(1)(a) of the Rome Statute contains an obligation of conduct, not one of result.<sup>48</sup> However, this does not absolve Libya from demonstrating that it has used its best efforts to investigate the same conduct as set out in the Article 58 Decision. The Libyan Government is therefore not required to establish that it has in its possession conclusive incriminating evidence in respect of each of the criminal acts alleged before the Court, but that it has taken concrete steps toward investigating those acts. Indeed, as the Pre-Trial Chamber correctly pointed out, the notion of evidence “*does not refer exclusively to evidence on the merits of the national case that may have been collected as part of the purported domestic investigation to prove the alleged crimes. In this context, “evidence” rather means all material capable of proving that an investigation is ongoing and that appropriate measures are being envisaged to carry out the proceedings*”.<sup>49</sup>

### ***3. The Pre-Trial Chamber’s interpretation of “sameness” was not unreasonable***

36. The Government avers that the Pre-Trial Chamber committed an error of law by applying “*a legal standard which clearly required more than substantially the*

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<sup>47</sup> See the Document in support of the Appeal, *supra* note 19, para. 63.

<sup>48</sup> *Idem*, paras. 65-70.

<sup>49</sup> See the Decision on further submissions, *supra* note 5, para. 11.

*same conduct*".<sup>50</sup> The Principal Counsel submits that the Government's contention, as such, fails to identify any legal error.

37. The standard according to which national investigations must cover *substantially* the same conduct was articulated by the Appeals Chamber in the admissibility judgments related to the Kenyan cases.<sup>51</sup> Although the Appeals Chamber did not define the word "substantially", it clearly confirmed the correctness of the "same conduct" test. Indeed, the Appeals Chamber found that the Pre-Trial Chamber committed no error of law in applying the "same person/same conduct" test.<sup>52</sup>

38. Thus, the introduction by the Appeals Chamber of the word "substantially" can only be interpreted as setting minimum standards applicable to the complementarity assessment. In other words, a Pre-Trial Chamber is equally correct in adopting the "*substantially* same conduct" standard or the more exigent "same conduct", depending on the specific circumstances of the case.

39. The Principal Counsel agrees with the Prosecution's submissions that there exists a lack of clarity as to which facts and circumstances may be relevant to assess "*substantially the same conduct*", and in particular whether it relates to the specific factual incidents which form the basis of the acts alleged before the Court.<sup>53</sup> In this respect, it is submitted that the Court should maintain a unitary and consistent approach to the notion of "case", whose parameters are defined by the specific factual incidents and circumstances described for the purposes of this Admissibility Challenge in the Article 58 Decision.

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<sup>50</sup> See the Document in support of the Appeal, *supra* note 19, para. 53.

<sup>51</sup> See the Ruto Admissibility Judgment, *supra* note 25, para. 1 and the Muthaura Admissibility Judgment, *supra* note 25, para. 1.

<sup>52</sup> See the Ruto Admissibility Judgment, *supra* note 25, para. 47 and the Muthaura Admissibility Judgment, *supra* note 25, para. 46.

<sup>53</sup> See the Prosecution submissions, *supra* note 21, para. 50.

**B. The Pre-Trial Chamber committed no error of law in finding that Libya has not substantiated that its domestic investigation covers the same case as that before the Court**

40. Libya contends that the Pre-Trial Chamber committed an error by failing to give sufficient weight to relevant facts before it and substantiated by evidence of a sufficient degree of specificity and probative value.<sup>54</sup> The Principal Counsel observes that reversal of factual determinations is appropriate only where there has been a “*misappreciation of the facts [...], a disregard of relevant facts, or taking into account facts extraneous to the sub judice issues*”.<sup>55</sup> An appellant is therefore required to establish that a “clear error” was made.<sup>56</sup>

41. As to the “misappreciation of facts”, the Appeals Chamber held that “[it] will not disturb a Pre-Trial or Trial Chamber’s evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the Chamber’s conclusion could have reasonably been reached from the evidence before it”.<sup>57</sup>

42. Accordingly, the Principal Counsel submits that the Pre-Trial Chamber’s determination that Libya has not provided “*enough evidence with a sufficient degree of specificity and probative value to demonstrate that the Libyan and the ICC investigations cover the same conduct*”<sup>58</sup> was correct and reflected a proper exercise of the Chamber’s fact-finding discretion.

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<sup>54</sup> See the Document in support of the Appeal, *supra* note 19, para. 85.

<sup>55</sup> See the “Judgement in the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release” (Appeals Chamber), No. ICC-01/04-01/07-572 OA4, para. 25.

<sup>56</sup> See the Ruto Admissibility Judgment, *supra* note 25, paras. 56-57 and the Muthaura Admissibility Judgment, *supra* note 25, paras. 55-56.

<sup>57</sup> *Idem*.

<sup>58</sup> See the Impugned Decision, *supra* note 17, para. 219.



***1. The Pre-Trial Chamber's assessment of material produced by the Libyan Government was correct***

43. Libya contends that the Pre-Trial Chamber committed an error by disregarding Annexes E and F from its factual assessment.<sup>59</sup> The Principal Counsel submits that this assertion is incorrect.

44. The Pre-Trial Chamber explicitly recognised that “*annex E contains some information relevant to the case against Mr Gaddafi*”.<sup>60</sup> Notwithstanding, it noted that “*the information provided falls short of clarifying the scope or subject matter of the domestic investigation*”.<sup>61</sup> This determination by the Pre-Trial Chamber reflects an entirely reasonable and unbiased evaluation of the evidence presented. Indeed, Annex E contained a listing of certain charges under investigation by the Libyan authorities.<sup>62</sup> Most of the factual allegations referred to in said Annex [REDACTED], which clearly do not fall within the subject-matter of the case before the ICC as defined in the Article 58 Decision.<sup>63</sup> A single incident appeared to be of direct relevance to the admissibility proceedings, namely, [REDACTED].<sup>64</sup> The Annex does not provide any information as to the other allegations falling within the scope of the case before the Court. With regard to Annex F,<sup>65</sup> it refers to a crime that entirely falls outside the jurisdiction of the Court.

45. Moreover, it worth noting that Annexes E and F were specifically prepared by the Libyan authorities for the purpose of the Admissibility Challenge, which in turn affect their probative value. Therefore, they fail to satisfy both requirements of “specificity” and “sufficient probative value”. In light of this lack of specificity, the

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<sup>59</sup> See the Document in support of the Appeal, *supra* note 19, para.85.

<sup>60</sup> See the Impugned Decision, *supra* note 17, para. 115.

<sup>61</sup> *Idem*, para. 115.

<sup>62</sup> See the “Application on behalf of the Government of Libya pursuant to Article 19 of the Statute”, No. ICC-01/11-01/11-130-Red, 1 May 2012 (the “Admissibility Challenge”), Annex E.

<sup>63</sup> *Idem*.

<sup>64</sup> *Ibid*.

<sup>65</sup> *Ibid.*, Annex F.

Chamber's finding that Annexes E and F failed to clarify "*the scope or subject matter of the domestic investigation*"<sup>66</sup> was entirely reasonable.

46. Libya also asserts that it "*was a patent error of fact for the Chamber to fail to take into account the evidential materials submitted as part of the Al-Senussi Admissibility Challenge*".<sup>67</sup> This assertion is both legally and procedurally unsound.

47. The severance of the admissibility challenges of Mr Gaddafi and Mr Al-Senussi was decided by the Pre-Trial Chamber on the basis of a request made by the Libyan Government itself.<sup>68</sup> The Chamber specifically stated that "*the scope of the Article 19 Application [...] must be understood to only concern the case against Mr Gaddafi*".<sup>69</sup> This decision by the Pre-Trial Chamber was never contested by the Government as no leave to appeal was sought at the time. Moreover, in a subsequent decision the Pre-Trial Chamber rejected Libya's "*argument that the Admissibility Challenge of 1 May 2012 is to be considered a challenge to the admissibility of the case against Mr Al-Senussi*".<sup>70</sup> The parties and participants, including the Libyan Government, were plainly on notice that even though the two challenges had common features, they were procedurally independent. At no point during the Gaddafi admissibility proceedings did the Chamber instruct or receive substantive submissions on the evidence relied upon by Libya in the Al-Senussi Admissibility Challenge. Reliance on such evidence in the Impugned Decision would have therefore constituted a clear error of law by the Chamber.

48. Furthermore, the Government did not explicitly state that it intended to rely on evidential material from the Al-Senussi Admissibility Challenge. If the

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<sup>66</sup> See the Impugned Decision, *supra* note 17, para. 115.

<sup>67</sup> See the Document in support of the Appeal, *supra* note 19, para. 92 *et seq.*

<sup>68</sup> See the Admissibility Challenge, *supra* note 2, para. 73.

<sup>69</sup> See the "Decision on the Conduct of the Proceedings Following the 'Application on behalf of the Government of Libya pursuant to Article 19 of the Statute'", *supra* note 3, para. 8.

<sup>70</sup> See the Decision on the "Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC", No. ICC-01/11-01/11-269, 6 February 2013, p. 31.

Government's intention was to rely on documents other than those specifically introduced as part of Saif Al-Islam article 19 proceedings, it should have made an unambiguous request to this effect.

49. Even assuming that the evidence annexed to the Al-Senussi Admissibility Challenge were to be treated as additional evidence in support of the Gaddafi Admissibility Challenge, this would not have materially affected the outcome of the Impugned Decision. In fact such evidence would have been rejected as procedurally improper. Indeed, the Government does not have an unfettered right to submit additional material as and when it deems fit. It cannot repeatedly alter the grounds of its challenge according to its own timetable and regardless of time-limits prescribed by the Chamber or the applicable provisions.

50. In this regard, the Principal Counsel reiterates her position that all supporting evidence must in principle be filed along with the Admissibility Challenge.<sup>71</sup> Indeed, nowhere does the Statute suggest, or even imply, that a State or other applicant should be permitted to incrementally file information as and when they deem it fit.

51. Last but not least, in the present case, the Government had ample opportunities to make its arguments and to present its evidence both in writing and orally during no less than one year of litigation. During this phase of the proceedings, the Pre-Trial Chamber even issued a detailed decision in which it explained the type of evidence it expected to receive from the Government and the specific aspects of the Admissibility Challenge which needed to be supported by sufficient evidence.<sup>72</sup> On several occasions, the Libyan Government was given the opportunity to make substantive submissions, to present further evidence and to

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<sup>71</sup> See the "OPCV's observations on "Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", No. ICC-01/11-01/11-279, 18 February 2013, para. 17.

<sup>72</sup> See the Decision on further submissions, *supra* note 5.

reply to the parties' and participants' responses.<sup>73</sup> Therefore, it cannot reasonably be argued that the Pre-Trial Chamber did not give Libya sufficient opportunity to present its claim and substantiate its Admissibility Challenge. The Pre-Trial Chamber's decision to disregard the material of the Al-Senussi Admissibility Challenge was therefore not unreasonable and merely reflected a proper exercise of discretion in accordance with rule 58(2) of the Rule of Procedure and Evidence.<sup>74</sup>

52. Moreover, the Government fails to provide any ground to support its contention according to which the Impugned Decision was founded on a failure to give sufficient weight to relevant documents annexed to Libya's further Submissions.<sup>75</sup> The Pre-Trial Chamber's assessment of the material presented was not unreasonable. The material provided by the Government lacked specificity and probative value and thus, were insufficient to establish that the domestic investigation covers the same conduct under consideration before the Court.

53. The Principal Counsel agrees with the Government that the letter contained in Annex 5 to Libya's further submissions could be used in support of the fact that the Libyan investigation covers the allegations regarding the use of mercenaries.<sup>76</sup> However, the relevance of this annex is affected by its lack of specificity. Indeed, the Pre-Trial Chamber correctly noted that the "*destination and the time of departure of the aircraft were stated to be unknown*".<sup>77</sup> These two factors, *i.e.* time and location, are important considerations underlying the admissibility assessment, particularly in order to assess whether the domestic investigation encompasses the same conduct. Moreover, the letter does not explicitly refer to "mercenaries", but to "*armed black Africans in uniform*".

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<sup>73</sup> See the "Decision on the Conduct of the Proceedings Following the 'Application on behalf of the Government of Libya pursuant to Article 19 of the Statute'", *supra* note 3 and the Decision on further submissions, *supra* note 5.

<sup>74</sup> In this sense, see the Ruto Admissibility Judgment, *supra* note 25, para. 97 and the Muthaura Admissibility Judgment, *supra* note 25, para. 96.

<sup>75</sup> See Libya's further submissions, *supra* note 7, Annex 5.

<sup>76</sup> *Idem*, Annex 5.

<sup>77</sup> *Ibid.*

54. On the other hand, Annexes 6 and 7 provide general information regarding [REDACTED].<sup>78</sup> However, they fall short from establishing that the flights listed carried armed mercenaries. To the contrary, the documents only refer to [REDACTED]. Moreover, the link between the information contained in these two annexes and the “*very specific type of criminal conduct*” of Mr Gaddafi is even less apparent.<sup>79</sup>

55. Hence, Annexes 5, 6 and 7 to Libya’s further submissions lack the requisite level of specificity. The Pre-Trial Chamber was therefore correct not to rely on these documents when assessing the “same case” requirement of the admissibility test.

56. As to other documents appended to Libya further submissions, such as Annexes 3, 9, 10 and 11, it is submitted that they fail to satisfy the cumulative requirements of “specificity” and “probative value”.<sup>80</sup>

57. Indeed, in Annexes 3 and 11 the Government relies on mere assertions which do not amount to proof. Annex 3 contains a letter from the Ministry of Justice in which it confirms that the incidents of murder and persecution outlined in paragraphs 36 to 65 of the Article 58 Decision are included within the scope of the criminal investigation against Mr Gaddafi.<sup>81</sup> Similarly, Annex 11 contains a Memorandum from the Attorney-General in which he makes reference to the finding of the on-going investigation and notably, to “*systematic general policy*” implemented by Mr Gaddafi and Mr Al-Senussi.<sup>82</sup> The fact that various Libyan authorities have made statements confirming that the “same case” is being investigated does not, in any way, imply that the Government is no longer required to substantiate its claim. Indeed, as previously held by the Appeals Chamber “*a*

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<sup>78</sup> *Ibid.*, annexes 5, 6 and 7.

<sup>79</sup> See the Document in support of the Appeal, *supra* note 19, para.97.

<sup>80</sup> See Libya’s further submissions, *supra* note 7, annexes 3, 9 and 11.

<sup>81</sup> *Idem*, Annex 3.

<sup>82</sup> *Ibid.*, Annex 11.

*statement by a Government that it is actively investigating is not [...] determinative. In such a case the Government must support its statement with tangible proof to demonstrate that it is actually carrying out relevant investigations".*<sup>83</sup>

58. Annexes 9 and 10 contain two orders for extension of detention of the suspect. However, these orders only make reference to a limited number of allegations, such as killings by gunshot and distribution of weapons, while the remaining allegations are not explicitly stated. As pointed out by the Government, said annexes appear to refer to a number of incidents contemplated in the Article 58 Decision. However, the Principal Counsel notes that even for these allegations, the date and place are not specified.<sup>84</sup> It cannot be reasonably considered as sufficient to establish that the "same case" is being investigated at the national level. The Pre-Trial Chamber was therefore correct to note that these annexes do not "*contain specific information as to the criminal conduct under investigation in Libya*".<sup>85</sup>

59. With respect to the summaries of witness statements, the Chamber specifically stated they "*do have some probative value*" although they cannot be equated to "*plain assertions*".<sup>86</sup> The Government contests this finding and claims that attributing lower probative value to summaries than to actual witness statements "*illustrates an unreasonable approach to the level of detail needed in order to satisfy the [...] requirement that submissions pertaining to the issue of 'same case' are supported by evidence of sufficient specificity and probative value*".<sup>87</sup>

60. The main weakness of these summaries consists in their lack of specificity and not, as suggested by the Government, in their lack of probative value. The Pre-

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<sup>83</sup> See the Ruto Admissibility Judgment, *supra* note 25, para. 63 and the Muthaura Admissibility Judgment, *supra* note 25, para. 62.

<sup>84</sup> See the Document in support of the Appeal, *supra* note 19, para.99.

<sup>85</sup> See the Impugned Decision, *supra* note 17, para. 117.

<sup>86</sup> *Idem*, para. 121.

<sup>87</sup> See the Document in support of the Appeal, *supra* note 19, para.102.

Trial Chamber's conclusion was indeed based on the *"lack of specificity of the summaries"*, which in turn was said not to allow *"the Chamber to draw conclusions as to the precise scope of the domestic investigation"*.<sup>88</sup>

61. Moreover, the Government erroneously claims that Pre-Trial Chamber adopted *"an unreasonable approach to the level of detail needed"* in order to satisfy the requirements articulated by the Appeals Chamber.<sup>89</sup> This is incorrect as none of the summaries – even taken collectively – provides details on the scope and contours of the criminal conduct under investigation at the domestic level. As the Pre-Trial correctly noted, the summaries only provide some information in relation to the general aspects of the defendant's criminal conduct, such as the fact that he was running State affairs and that he ordered the mobilisation, recruitment and arming of supporters.<sup>90</sup>

62. In addition, witness statements presented by Libya, *i.e.* Annexes 4, 15 and 16, do not substantiate the Government's claim that the domestic investigation encompasses the same conduct as before the Court. Although these statements refer to a number of incidents contained in the Article 58 Decision – such as [REDACTED]<sup>91</sup> – taken collectively, they do not provide details in respect of the precise contours of the national investigation nor do they cover the same conduct as set out in the Article 58 Decision. In this respect, it is submitted that no reasonable Chamber could have reached the conclusion that the witness-related material constitute sufficient evidence showing that the same case is under investigation at the national level.

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<sup>88</sup> See the Impugned Decision, *supra* note 17, para. 122.

<sup>89</sup> See the Document in support of the Appeal, *supra* note 19, para.102.

<sup>90</sup> See the Impugned Decision, *supra* note 17, para. 120.

<sup>91</sup> See Libya's further submissions, *supra* note 7, annexes 16.

**C. The Pre-Trial Chamber did not act unfairly or did not commit any procedural error**

63. The Appeals Chamber emphasised that Chambers have broad discretion with regard to the procedure to be followed upon an admissibility challenge under article 19 of the Rome Statute. It indeed stated that:

*“Rule 58 of the Rules of Procedure and Evidence stipulates the procedure to be followed when filing a request or application under article 19 of the Statute. It requires that this request be transmitted to the Prosecutor and the person concerned, who shall be given an opportunity to make written submissions. Save for these express stipulations, the Pre-Trial Chamber enjoys broad discretion in determining how to conduct the proceedings relating to challenges to the admissibility of a case”.*<sup>92</sup>

64. Therefore, for the Government to successfully challenge the Impugned Decision on procedural grounds, it must establish that the *“decision is so unfair and unreasonable as to constitute an abuse of discretion”*.<sup>93</sup>

**1. The Pre-Trial Chamber exercised properly its discretion under rule 58 of the Rules of Procedure and Evidence**

65. Libya erroneously asserts that the Pre-Trial Chamber committed a procedural error by *“failing to take appropriate measures for the proper conduct of the procedure”*.<sup>94</sup> In particular, the Government avers that the Pre-Trial Chamber had an obligation to “address” its request for inspection of *“the totality of the investigative file held in Tripoli”*.<sup>95</sup>

66. The Principal Counsel recalls the Appeals Chamber’s ruling that appellate review does not serve the purpose of reconsidering *“what the Pre-Trial Chamber*

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<sup>92</sup> *Idem*.

<sup>93</sup> See the “Judgment on the appeal of the Defence against the ‘Decision on the admissibility of the case under article 19 (1) of the Statute’ of 10 March 2009” (Appeals Chamber), No. ICC-02/04-01/05-408 OA3, 16 September 2009, para. 80.

<sup>94</sup> See the Document in support of the Appeal, *supra* note 19, para.120.

<sup>95</sup> *Idem*.



*could have done*” but is rather limited to the issue of “*whether the Pre-Trial Chamber erred in what it did*”.<sup>96</sup>

67. The Principal Counsel further notes that the Libyan Government was given several opportunities to make substantive arguments and to present evidence both in writing and orally before the Chamber. Throughout proceedings, the Pre-Trial Chamber showed considerable, and perhaps even excessive, flexibility in allowing the Government to complement and provide further evidence to substantiate its Admissibility Challenge. It cannot therefore be said that Libya was not given sufficient opportunity to present supporting evidence.<sup>97</sup>

68. Moreover, the Government does not provide any justification as to why it was not in a position to present the investigative file to The Hague, as it did for the samples of evidential material it produced. Thus, the Government’s contention that the Chamber should have addressed its request before making a decision on admissibility is without merit.

69. The Government also contends that the Pre-Trial Chamber’s rejection of its request to file “up-to-date” information was “*plainly illogical and unfair*”.<sup>98</sup>

70. In this respect, the Principal Counsel recalls the Admissibility Judgment in the Kenyan cases, wherein the Appeals Chamber emphasised that “[w]hile it would have been open to the Pre-Trial Chamber to allow the filing of additional evidence, it was not obliged to do so, nor could Kenya expect to be allowed to present additional evidence”.<sup>99</sup> No procedural error can therefore arise from the Chamber’s refusal to receive additional evidence as long as the challenging State had previous opportunities to

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<sup>96</sup> See the Ruto Admissibility Judgment, *supra* note 25, para. 97 and the Muthaura Admissibility Judgment, *supra* note 25, para. 96.

<sup>97</sup> See also *supra* paras. 50 and 51.

<sup>98</sup> See the Document in support of the Appeal, *supra* note 19, para.127.

<sup>99</sup> See the Ruto Admissibility Judgment, *supra* note 25, para. 97 and the Muthaura Admissibility Judgment, *supra* note 25, para. 96.

present and substantiate its claim. The same reasoning applies to Libya's assertion that the Chamber "*unfairly rejected the information provided by Libya subsequent to Libya's Reply of 4 March 2013*".<sup>100</sup> Indeed, Libya could not have legitimately expected to be given unlimited opportunities to present additional evidence or alter the grounds of the Admissibility Challenge.

**D. The Pre-Trial Chamber did not err in fact or in law in its determination in relation to Libya's inability to investigate the case**

71. Although the first limb of the admissibility test was not met, submissions were received in relation to the second part of the complementarity assessment and in particular with respect to the Libyan Government's ability to investigate the case.<sup>101</sup> Accordingly, the Chamber found it appropriate to ascertain Libya's ability to genuinely investigate and prosecute the case, notwithstanding its finding regarding the Government's failure to establish that it is investigating the same case. In this regard, the Principal Counsel agrees with the Prosecution's submission according to which the Chamber had no need to examine whether the Government was unable within the meaning of article 17(3) of the Rome Statute, particularly in light of its findings in respect of the "same case" standard.<sup>102</sup> Nonetheless, the Chamber's reasoning in relation to "inability" is consistent with the legal texts of the Court and the Appellant failed to demonstrate any error on the part of the Pre-Trial Chamber in this regard.

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<sup>100</sup> See the Document in support of the Appeal, *supra* note 19, para. 129.

<sup>101</sup> See the Impugned Decision, *supra* note 17, para. 138.

<sup>102</sup> See the Prosecution submissions, *supra* note 21, para. 150.

### 1. *The “unavailability” of the national judicial system*

72. Libya argues that the Pre-Trial Chamber failed to consider the definition of “unavailability”.<sup>103</sup> The Government asserts that the Chamber committed an error by failing “to address in any meaningful way the extent or degree to which these legal and factual issues constituted ‘unavailability’ within the meaning of the Statute”.<sup>104</sup> It further contends that although article 17(3) of the Rome Statute requires at first the examination of the “unavailability” or the “collapse” of the national system, the Chamber “appeared to bypass proper consideration of that condition present by, in effect, referring to Libya’s purported inability to “obtain the accused or the evidence and testimony or otherwise [...] carry out proceedings”.<sup>105</sup> Similarly, it asserts that the interpretation of unavailability “sets a similarly high threshold for ICC intervention as that intended by ‘total or substantial collapse’”.<sup>106</sup>

73. The Principal Counsel notes that the Chamber did examine the “unavailability” condition prior to examining the remaining parts of the “inability” test. The Chamber stated that “Libya continues to face substantial difficulties in exercising its judicial powers fully across the entire territory”.<sup>107</sup> Although the Government contends that the Chamber should have focused in its analysis on “actual, systemic difficulties that have quantifiable [...] impact on the on-going investigation”,<sup>108</sup> it does not explain how the factual finding of the Chamber with regard to “unavailability” is incorrect. The Government does not even attempt to show that the Chamber’s determination was based on a misappreciation of the facts or a disregard of relevant facts and has failed to present sufficient and specific evidence to the contrary.

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<sup>103</sup> See the Document in support of the Appeal, *supra* note 19, para. 150.

<sup>104</sup> *Idem*, para. 148.

<sup>105</sup> *Ibid.*, para. 149.

<sup>106</sup> *Ibid.*

<sup>107</sup> See the Impugned Decision, *supra* note 17, para. 205

<sup>108</sup> See the Document in support of the Appeal, *supra* note 19, para. 153.

74. This specific finding regarding the “unavailability” of the judicial system must be viewed in the broader context of the admissibility proceedings, during which the Government itself acknowledged numerous challenges faced by Libya. Accordingly, the fact that Libya is facing significant difficulties was not an issue. Rather, the legal issue which needed to be resolved by the Chamber was whether these practical challenges could amount to “unavailability” within the meaning of article 17(3) of the Rome Statute. The Chamber therefore had to consider specific facts and circumstances, rather than systemic difficulties. In this respect, the Principal Counsel agrees with the Prosecution’s submissions that the term “unavailability” should be given a broader interpretation.<sup>109</sup> According to such interpretation, the concept of “unavailability” is intended to cover the situation where although there is no collapse in the national criminal justice system, it is not accessible or may not be disposed of. In contrast to the partial or total collapse, the assessment of unavailability must therefore be evaluated in relation to a specific case and does not require, as the Government’s suggests, consideration of systemic difficulties. This approach is most consistent with the object and purpose of the Statute, namely “to put an end to impunity”. It ensures that no case can be found inadmissible before the Court as a result of factors which render the State’s judicial system inaccessible in respect of a specific case.

75. The Chamber was therefore correct in considering the “unavailability” of the national judicial system. The Pre-Trial Chamber’s reference to discrete examples was necessary to reach its conclusion on Libya’s ability to investigate the case of Mr Gaddafi. But on the other hand, there is no requirement that the examples referred to in an admissibility decision cover the totality of the incidents rendering a State unable to investigate a case. Rather, it is sufficient to identify cases of “unavailability” that result in the inability of the national system.

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<sup>109</sup> See the Prosecution submissions, *supra* note 21, paras. 156-164.

76. The Principal Counsel therefore submits that the Pre-Trial Chamber correctly interpreted and applied the unavailability condition provided for in article 17(3) of the Rome Statute. It showed considerable flexibility and ruled that the State's ability to conduct an investigation "*must be assessed in the context of the relevant national system and procedures*".<sup>110</sup> Therefore, it did not set a high standard and refrained from making reference to standards applicable to international tribunals.

## 2. *The Government's inability to obtain the suspect*

77. In relation to the specific illustrations of inability underlined by the Pre-Trial Chamber, the Principal Counsel contends that said findings were correct in light of the prevailing conditions in Libya. In particular, the Principal Counsel submits that throughout the admissibility proceedings, the Government did not assert, much less substantiate with evidence, that it was able to obtain the suspect. The Pre-Trial Chamber correctly noted "*in response to a specific request for clarification from the Chamber, the Libyan representatives indicated that efforts to arrange Mr. Gaddafi's transfer to a detention facility in Tripoli where other Gaddafi-era officials are presently held are still ongoing*".<sup>111</sup>

78. The Government appears to have changed its initial position, now claiming "*that the Zintan Brigade is a Government-sanctioned local authority and that there is no distinction in international law between a central and local authority*".<sup>112</sup> The Principal Counsel respectfully requests the Appeals Chamber to treat this assertion as new factual allegation which was not put forward before the Pre-Trial Chamber, and thus must be dismissed *in limine*. In advancing new factual allegations on appeal, the Government is, in effect, asking the Appeals Chamber to depart from its normal function so as to be and to be placed in the position of having to exercise

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<sup>110</sup> See the Impugned Decision, *supra* note 17, para. 125.

<sup>111</sup> *Idem*, para. 206.

<sup>112</sup> See the Document in support of the Appeal, *supra* note 19, para.150.

the powers of the Pre-Trial Chamber. This approach is procedurally unsound. The Government cannot constantly be allowed to alter the factual basis for its Admissibility Challenge so as to defeat the fairness of the proceedings.

### 3. *The Government's inability to obtain testimony*

79. The Government contests the Chamber's finding in relation to Libya's lack of capacity to obtain the necessary testimony.<sup>113</sup> The Chamber relied on two sets of considerations to conclude that the Government has failed to substantiate its capacity to implement protective measures for witnesses: first, it found that the Government's lack of control over detention facilities has significant consequences for witness protection measures,<sup>114</sup> and second, it found that the Government did not provide sufficient evidence to demonstrate that it had ever implemented witness protection programmes, particularly at the trial stage.<sup>115</sup>

80. At the outset, the Principal Counsel notes that the Government does not contest the specific factual findings which form the basis of the Chamber's Decision. It merely argues that *"the weight placed on the absence of [witness] statements is wholly disproportionate"* and that the impact created by the absence of such testimony on the on-going investigation is highly speculative.<sup>116</sup> However, the Chamber made specific reference to Libya's inability to obtain testimony from two witnesses to illustrate the significant impact that the Government's lack of control over detention facilities could have on domestic proceedings.<sup>117</sup> It was obviously not the Chamber's intention to draw an exhaustive list of incidents that are likely to hinder the Appellant's ability to obtain witness-related evidence. The example cited by the Chamber was therefore intended to support its finding that *"the lack of full control over certain detention facilities has a direct bearing on the investigation against*

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<sup>113</sup> See the Document in support of the Appeal, *supra* note 19, para. 162.

<sup>114</sup> See the Impugned Decision, *supra* note 17, para. 210.

<sup>115</sup> *Idem*, para. 211.

<sup>116</sup> See the Document in support of the Appeal, *supra* note 19, para. 163.

<sup>117</sup> See the Impugned Decision, *supra* note 17, para. 210.

*Mr Gaddafi*".<sup>118</sup> At no point did the Chamber suggest that the absence of these two statements was sufficient to demonstrate Libya's inability to obtain witness testimonies. Rather, the Chamber's analysis was much broader and took into account the actual difficulties to obtain similar evidence in light of the prevailing security conditions in the country and lack of control.

81. The Chamber provided further reasons relating to the absence of protective measures for witnesses under Libyan law at the trial stage.<sup>119</sup> Although the Chamber took note of Libya's submissions concerning the possibility for implementing protective measures, it reasonably concluded that no evidence has been provided to demonstrate that the Government has taken any step toward implementing a protection programme for witnesses called to testify in the case against Mr Gaddafi.<sup>120</sup> The Government's inability is further confirmed by the fact that Libya had no prior experience in implementing such measures. Moreover, the Government's allegation of intrusion upon States' rights to determine their own domestic proceedings is unfounded.<sup>121</sup> Indeed, the Chamber did not require the Government to take specific protective measures nor did it inquire about the modalities of implementation in respect of specific witnesses, but simply considered the existence of adequate protective measures within the Libyan criminal justice system.

82. In light of the above, the Principal Counsel submits that the approach adopted by the Chamber was not unreasonable.

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<sup>118</sup> *Idem*, para. 210.

<sup>119</sup> *Ibid.*, para. 211.

<sup>120</sup> *Ibid.*

<sup>121</sup> See the Document in support of the Appeal, *supra* note 19, para.163.

#### 4. *The Government's inability to otherwise carry out proceedings*

83. Libya challenges the Chamber's finding in relation to the failure to appoint defence counsel for Mr Gaddafi.<sup>122</sup> The Government does not, in principle, contest that the failure to appoint counsel for the defendant could be characterised as a form of inability. It further recognises that the "*process has been difficult and no lawyers had been found at the time*" of the admissibility proceedings.<sup>123</sup> In support of its contention that the Chamber erred in its findings, the Government refers to the hearing in Zintan on 2 May 2013 during which the defendant appeared to have been provided with legal representation.<sup>124</sup> The Principal Counsel submits that these allegations should be dismissed because they refer to new facts which were not brought to the attention of the Pre-Trial Chamber. In this respect, it is important to recall the ruling of the Appeals Chamber that the admissibility of a case must be determined on the basis of the facts as they exist at the time of the admissibility proceedings.<sup>125</sup>

84. In addition, the Government's position as to the appointment of a lawyer for Mr Gaddafi was based on a different argument. So far, the Government has contended that Mr Gaddafi has waived his right to appoint a lawyer during the investigative phase. This claim was at no point during the admissibility proceedings confirmed by sufficient evidence. The Government has thus failed to substantiate its assertions in this regard.

85. It is therefore clear that the Pre-Trial Chamber did not commit any error in asserting that the Libyan national judicial authorities are not able to investigate the case against Mr Gaddafi.

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<sup>122</sup> *Idem*, para. 167.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*, para. 169.

<sup>125</sup> See the "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, No. ICC-01/04-01/07-1497 OA8, 25 September 2009, para.56.



**FOR THE FOREGOING REASONS** the Principal Counsel respectfully requests the Appeals Chamber to reject the Appeal filed by Libya.

A handwritten signature in black ink, reading "Paolina Massidda". The signature is written in a cursive style with a horizontal line underneath the name.

**Paolina Massidda**  
**Principal Counsel**

Dated this 21<sup>st</sup> day of August 2013

At The Hague, The Netherlands