

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 30 September 2013

## 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  
With Public Annexes A and B**

**Prosecution Response to “The Libyan Government’s further submissions in reply to the Prosecution and Gaddafi Responses to Document in Support of Libya’s Appeal against the Decision on the admissibility of the case against Saif Al-Islam Gaddafi”**

**Source: Office of the Prosecutor**

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

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## Introduction

1. On 23 September 2013 Libya requested additional time to translate into English the case-file of the case against Saif Al-Islam Gaddafi ("Mr Gaddafi"), Abdullah Al-Senussi ("Mr Al-Senussi") and 36 other co-accused in order to present it as evidence before the Appeals Chamber. Libya also requested to submit as evidence on appeal the minutes of the initial oral hearing held before the Accusation Chamber on 19 September 2013. Libya submits that the case-file has now been transferred to the Accusation Chamber and that the confidentiality restrictions imposed during investigation no longer apply.
2. The Prosecution opposes the Government of Libya ("Libya")'s request to present additional evidence on appeal. First, Libya has failed to show good cause to be granted additional time. Second, granting such a request for additional time will effectively constitute a reversal of the Pre-Trial Chamber's decision setting out a reasonable timeframe for Libya to provide supporting materials. Third, the materials do not meet the requirements to be adduced as evidence on appeal. Finally, the Prosecution also notes that Libya's submissions in reply do not raise any new issue that would merit a revision of the Pre-Trial Chamber I's decision finding the case against Mr Gaddafi admissible before the Court.

## Background

3. On 31 May 2013, Pre-Trial Chamber I found the case against Gaddafi admissible before the Court and reminded Libya of its obligation to surrender Mr. Gaddafi ("Admissibility Decision").<sup>1</sup>
4. On 7 and 24 June 2013, Libya appealed the Decision and requested suspensive effect of the Pre-Trial Chamber's order to surrender Mr. Gaddafi ("Appeal").<sup>2</sup>

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<sup>1</sup> ICC-01/11-01/11-344-Red.

5. On 16 and 18 July 2013, the Prosecution<sup>3</sup> and the Defence<sup>4</sup> filed their responses to Libya's Appeal.
6. On 18 July 2013, the Appeals Chamber rejected Libya's request for suspensive effect.<sup>5</sup>
7. On 29 July 2013, Libya requested to provide further submissions on 13 August to clarify matters arising from the Prosecution's and Defence's Responses which are purportedly not correct or are raised for the first time ("Libya Request").<sup>6</sup>
8. On 12 September 2013, the Appeals Chamber granted Libya Request.<sup>7</sup>
9. On 23 September 2013, Libya filed its further submissions in reply to the Responses to the Admissibility Appeal<sup>8</sup> ("Libya Reply").

### **Submissions**

10. The Prosecution will refrain from addressing Libya's submissions that constitute a mere repetition of the arguments raised in its Appeal and have been addressed by the Prosecution in its Response. The Prosecution will first address Libya's request to introduce additional evidence on appeal, and second, will respond to certain submissions that require further clarification.

#### **A. LIBYA'S REQUEST TO SUBMIT NEW EVIDENCE**

11. Libya requests more time to translate and submit as new evidence on appeal the case-file of the case against Mr Gaddafi, Mr Al-Senussi and 36 other co-accused,

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<sup>2</sup> ICC-01/11-01/11-350OA4 and ICC-01/11-01/11-370-Conf-Exp OA5. The public redacted version was filed on 25 June 2013 (ICC-01/11-01/11-370-Red2 OA4).

<sup>3</sup> ICC-01/11-01/11-384-RedOA4 ("Prosecution Response").

<sup>4</sup> ICC-01/11-01/11-386-RedOA4 ("Defence Response").

<sup>5</sup> ICC-01/11-01/11-384-Red.

<sup>6</sup> ICC-01/11-01/11-289OA4, para.4.

<sup>7</sup> ICC-01/11-01/11-442OA4.

<sup>8</sup> ICC-01/11-01/11-454-Conf OA4 and ICC-01/11-01/11-454-RedOA4.

which Libya reports has been transmitted to the domestic Accusation Chamber and is no longer subject to the confidentiality requirements of Article 59 of the Code of Criminal Procedure. Libya also requests to introduce as new evidence Annex A attached to its Reply, which contains the minutes of the initial hearing of the above-mentioned case held on 19 September 2013 before the Accusation Chamber. The Prosecution will address below the two requests separately.

12. At the outset, the Prosecution notes that Libya has not complied with the requirements of Regulation 62 of the Regulations of the Court ("RoC"), which regulates the presentation of evidence in appeal. According to the regulation, the party seeking to introduce additional evidence in appellate proceedings must file an application setting out (a) the evidence to be presented, and (b) the ground of appeal to which the evidence relates and the reasons why the evidence was not adduced before the Trial Chamber. First, and with respect to the case-file, Libya concedes that it is not able to make specific submissions as to the content of the dossier because it needs to be translated into English.<sup>9</sup> Second, and regarding Annex A, Libya vaguely submits that it "reflect[s] the contours and scope of the case as it developed during the investigation".<sup>10</sup> These submissions are not sufficient to meet the requirements of Regulation 62. Nor is Libya's submission that Annex A reflects the "contours and scope" of the case sustainable. The minutes of the initial hearing only indicate that the names of the lawyers of 32 of the 38 accused are read out, and thereafter the lawyers make diverse submissions before the Chamber such as, *inter alia*, asking for a copy of the indictment and the relevant material and the release of their clients.

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<sup>9</sup> Libya Reply, para.7.

<sup>10</sup> Libya Reply, para.6.

**1. Libya's request for more time to translate the case-file and to submit it as evidence**

13. Libya submits that on 19 September 2013 the initial hearing before the Accusation Chamber of the case against Mr Gaddafi, Mr Al-Senussi and other 36 accused was held.<sup>11</sup> Thus, and as a result of the transfer of the case-file from the investigation phase to the accusation phase,<sup>12</sup> the confidentiality restriction imposed by Article 59 of the Libyan Code of Criminal Procedure is now lifted and Libya is arguably in a position to disclose the case-file related to the Mr Gaddafi's case to the Court.<sup>13</sup> Counsel for Libya indicates that he has been provided with an Arabic copy of the dossier, which is over 1,000 pages, and that he will be provided with several thousand witness statements and interviews and other documentary evidence.<sup>14</sup>
14. Libya however requests more time, in particular, until 2 December 2013, so that it can translate the case-file materials into English.<sup>15</sup> As it is developed below, the Prosecution submits that, first, Libya's request for more time is not substantiated and would effectively constitute a revision of the Pre-Trial Chamber's decision setting out a reasonable time frame for Libya to provide supporting evidence; and second, the case-file does not meet the requirements to present additional evidence on appeal.

**(a) Libya's request for more time to translate and submit the materials**

15. Libya is not providing the case-file as additional evidence but rather asking for more time to translate it and file it before the Appeals Chamber by 2 December

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<sup>11</sup> Libya Reply, para.4.

<sup>12</sup> Libya Reply, para.5.

<sup>13</sup> Libya Reply, para.4.

<sup>14</sup> Libya Reply, para.5.

<sup>15</sup> Libya Reply, para.8.

2013.<sup>16</sup> Counsel for Libya also indicates that he has been provided with the dossier but that witness statements and some of the documentary evidence are in the process of being provided to Counsel.<sup>17</sup>

16. The Prosecution submits that Libya has failed to show good cause in its request for additional time. It would appear that the additional time is necessary for translation; however, Counsel for Libya is not yet in possession of all the relevant material.<sup>18</sup> Libya has consistently asked for more time before the Pre-Trial Chamber to submit additional material in support of its Challenge. Although the Pre-Trial Chamber afforded Libya several opportunities for over one year, Libya failed to provide additional supporting evidence. Hence, granting Libya's request for more time in the instant appellate proceedings would effectively constitute a reversal of the Pre-Trial Chamber's discretionary decision establishing a final deadline for Libya to provide the promised material.<sup>19</sup>
17. This course of action would therefore contravene the corrective nature of appellate proceedings. The Appeals Chamber has repeatedly stated that it should not reverse discretionary decisions simply because it would have decided differently, but only when it finds that the Pre-Trial Chamber exercised its discretion incorrectly.<sup>20</sup> As the Prosecution notes in its Response, the Pre-Trial Chamber's decisions were legally correct and reasonable.<sup>21</sup>
18. On these grounds Libya's request for additional time should be rejected.

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<sup>16</sup> Libya Reply, para.8.

<sup>17</sup> Libya Reply, para.5.

<sup>18</sup> Libya Reply, paras.5 and 8.

<sup>19</sup> Moreover, this issue constitutes Libya's Third Ground of Appeal.

<sup>20</sup> ICC-01/04-01/07-2259 OA10, para.34.

<sup>21</sup> Libya is, of course, not precluded from presenting the material as supporting evidence for a new challenge pursuant to Article 19(4), although such a challenge would only be permitted in exceptional circumstances.

**(b) The case-file does not meet the requirements to be admitted as evidence on appeal**

19. Further, the admission of additional evidence is dependent on the unavailability of the evidence before the Pre-Trial Chamber and its particular quality. Under existing international practice, additional evidence will only be admitted if (a) it was not available at trial to duly diligent counsel; (b) it is relevant and credible; and (c) it could have been a decisive factor in the decision.<sup>22</sup> As it is developed below, the Prosecution submits that these requirements are not met in the instant case.

*(i) Was the evidence available at trial?*

20. Libya argues that “the material could not have been provided to the Chamber as a result of Libyan law”.<sup>23</sup> Hence, the issue in this case is whether evidence, which was existent and known during the proceedings before the Pre-Trial Chamber, but purportedly confidential due to domestic impediments, can be considered as not available.

21. The Prosecution submits that the Court needs to be mindful of the particularities of each domestic jurisdiction; however, these cannot constitute a barrier that justifies the infringement of a State’s international obligations.<sup>24</sup>

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<sup>22</sup> Archbold, *International Criminal Courts*, 3rd edition (2009), pp.1460-1461; see also L. Bianchi and I. Onsea, *Additional Evidence on Appeal, Review Proceedings, and the Remedy of Reconsideration* in: K. Khan, C. Buisman and C. Gosnell, *Principles of Evidence in International Criminal Justice* (2010), p.726. For a more detailed submission on the requirements to permit the presentation of additional evidence in appeal, see Prosecution’s response to Mr Thomas Lubanga’s appeal against the Article 74 Judgement: ICC-01/04-01/06-2969, paras.39-46.

<sup>23</sup> Libya Reply, para.10.

<sup>24</sup> This is in line with Article 27 of the Vienna Convention of the Law of Treaties which states that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. [...]”. While Libya is admittedly not a state party to the treaty of the court, the Rome Statute, it is bound by its provisions following the Security Council referral of the situation of Libya to the ICC pursuant to Resolution 1970 which established an international obligation on Libya to fully cooperate with the Court.



22. First, the Prosecution notes that in this case Libya itself appears to have adopted a selective interpretation of the terms of Article 59 in the course of these and other proceedings before this Court. For example, Article 59 did not prevent Libya from submitting evidence from its investigation case-file to the Pre-Trial Chamber in its filing of 23 January 2013,<sup>25</sup> nor in its challenge of the admissibility of the case of Mr Al-Senussi,<sup>26</sup> which according to Libya ought to have been considered by the Pre-Trial Chamber in determining the admissibility of Mr Gaddafi's case.
23. Moreover, in its Further Submission of 23 January 2013,<sup>27</sup> and in its filing of 4 March 2013,<sup>28</sup> Libya asked for six weeks to submit additional material without indicating that this would be possible as a result of the lifting of the restrictions under Article 59. Hence, it would appear that Libya could have made a further exception to this principle and provide the case-file to the Court.
24. Second, and conceding that Libya is better placed than the Prosecution to interpret its own legislation, some questions remain as to the interpretation of Libya's normative framework and Article 59 in particular. Libya could have interpreted and applied the relevant provisions enabling it to comply with the Court's orders. A cursory reading of the relevant provisions appears to indicate that Article 59 does not prevent the Prosecutor-General Office from sharing the evidence with the domestic judiciary when a judicial intervention is required, for instance, to review the provisional detention of the person under investigation.<sup>29</sup> Hence, Libya could have considered the ICC as part of its own judiciary.

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<sup>25</sup> ICC-01/11-01/11-258-Red2.

<sup>26</sup> ICC-01/11-01/11-307-Red2.

<sup>27</sup> ICC-01/11-01/11-258-Red2, para.35.

<sup>28</sup> ICC-01/11-01/11-293-Red, para.125.b.

<sup>29</sup> In order for the judiciary to review the provisional detention of the person under investigation, it is required to review the case-file in order to confront him with the charges for which he is provisionally detained. *See* for instance, ICC-01/11-01/11-258-Anx10 which contains a court session, whereby the domestic court reviewing the provisional detention of Mr Gaddafi asked him about the crimes charged and reviewed the documents of the case before ordering the extension of Mr Gaddafi's detention for forty five days.

25. Finally, the Prosecution notes that the terms of Article 59 are unclear respecting at what stage of the domestic proceedings the confidentiality restriction is lifted. Article 59 indicates that the case-file is confidential during the investigation stage without any reference to the organ responsible for such investigation.<sup>30</sup> According to Articles 148<sup>31</sup> and 151<sup>32</sup> of the Code of Criminal Procedure, the Accusation Chamber can also conduct investigative steps that it deems necessary to supplement the investigation under review, and according to Article 147<sup>33</sup> its proceedings are similarly not accessible to the public. Hence, if the investigation conducted by the Accusation Chamber needs to be afforded the same safeguard of secrecy as the investigation of the Prosecutor-General Office, and notwithstanding the paramount importance of the confidentiality of investigations to Libya, Libya would arguably need to wait until the Accusation Chamber decides on whether to conduct any investigatory steps before providing the materials to the Appeals Chamber.
26. For all the above reasons, the Prosecution submits that in this specific case the application of Article 59 of the Libyan Code of Criminal Procedure does not permit the conclusion that the case-file related to Mr Gaddafi's case was not available at trial.

*(ii) Is the new evidence relevant and credible?*

27. Libya has the burden to demonstrate that the materials are relevant and credible. As noted above and conceded by Libya, "prior to translation [of the materials

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<sup>30</sup> Article 59 of Libyan Code of Criminal Procedure provides that: "[t]he investigation procedures and their results shall be considered confidential. Investigators and public prosecution members, their assistants such as clerks and experts and any other persons related to investigation or who may attend same due to their position or profession may not divulge the investigations' procedures and results. Any person who violates this provision shall be punished in accordance with article 236 of the Penal Code. » See ICC-01/11-01/11-158-AnxB, p.2.

<sup>31</sup> See ICC-01/11-01/11-158-AnxB, p.2. The text of the Article does not limit confidentiality to only the investigation conducted by the Prosecutor-General Office. The relevant section of the Code of Criminal Procedure under which this Article falls is titled "investigation by the investigative judge".

<sup>32</sup> ICC-01/11-01/11-158-AnxB, p.4.

<sup>33</sup> See Annex A to this filing.

from Arabic to English], it is not possible to make specific submissions concerning particular aspects of the contents of the dossier.”<sup>34</sup> Hence, the Prosecution is unable to establish whether the purported new material meets this requirement.

*(iii) Could have the new evidence been a decisive factor in the decision?*

28. The Prosecution concedes that the new evidence, if it is sufficiently specific and has probative value and effectively relates to Mr Gaddafi and substantially the same conduct as the ICC case, may have permitted the Pre-Trial Chamber to conclude that Libya is investigating the same case thus finding that the first limb of the admissibility determination was met. However, the Pre-Trial Chamber also found that the provision of additional evidence in support of the first limb of the admissibility test would not be determinative at this stage, and the case would remain admissible because of the serious concerns with respect to the second limb of the admissibility test, namely Libya’s ability genuinely to carry out the investigation or prosecution against Mr Gaddafi.<sup>35</sup>
29. In particular, the case-file will most likely not be relevant to determine Libya’s ability to obtain the custody of Mr Gaddafi, to provide a lawyer to him and to provide protective measures to witnesses. All these were grounds relied upon by the Pre-Trial Chamber to conclude that Libya was unable to investigate Mr Gaddafi’s case.<sup>36</sup> Hence, even if the Pre-Trial Chamber were to find that Libya was investigating the same case upon consideration of the case-file, the Chamber would have still found that the case was admissible before the Court due to Libya’s inability under Article 17(1)(c). The new material would therefore not constitute a decisive factor.

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<sup>34</sup> Libya Reply, para.7.

<sup>35</sup> Admissibility Decision, para.137

<sup>36</sup> Decision, paras.204-215.

## **2. Annex A – minutes of the initial hearing before the Accusation Chamber.**

30. Annex A contains the minutes of the initial and apparently procedural hearing before the Accusation Chamber held on 19 September 2013. The Prosecution submits that Annex A does not constitute new and relevant evidence that can be admitted on appeal. First, the hearing constitutes a fact that postdates the Admissibility Decision and falls beyond the scope of the proceedings before the Pre-Trial Chamber, and therefore falls beyond the scope of this appeal.<sup>37</sup>
31. Second, Annex A bears no relevance to the issues before the Appeals Chamber and, had Annex A been available to the Pre-Trial Chamber, the Admissibility Decision would have remained unchanged. The Prosecution notes that neither Mr Gaddafi nor a Defence Counsel on his behalf was present during this hearing. Further, no assurances were given to guarantee Mr Gaddafi's presence in the next hearing.
32. In light of the above, the Prosecution submits that Libya's request to be granted more time to translate and to submit as additional evidence the case-file transferred to the Accusation Chamber, and to submit as evidence Annex A should be rejected.

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<sup>37</sup> This is in accordance with the jurisprudence of the Appeals Chamber which stated in the Kenya cases that: "As a corrective measure, the scope of proceedings on appeal is determined by the scope of the relevant proceedings before the Pre-Trial Chamber. The instant proceedings before the Pre-Trial Chamber concluded with the issuance of the Admissibility Decision. Facts which postdate the Admissibility Decision fall beyond the possible scope of the proceedings before the Pre-Trial Chamber and therefore beyond the scope of the proceedings on appeal. As the Updated Investigation Report concerns facts which postdate the Impugned Decision, it is not relevant for this appeal and must be rejected *in limine*" ICC-01/09-02/11-202 OA, para.12 and ICC-01/09-01/11-234 OA, para.13.

## B. PROSECUTION'S RESPONSE TO LIBYA'S SUBMISSIONS IN REPLY

### 1. The "Precise Scope" test and purported distinction between evidentiary and substantive requirements<sup>38</sup>

33. Libya seeks to rebut the Prosecution's and the Defence's arguments that Libya's Appeal incorrectly conflates the question of sufficiency of the evidence with that of the legal test of "substantially the same conduct".<sup>39</sup> Libya reiterates that the Chamber's finding that the "evidence taken as a whole, does not allow the Chamber to discern the actual contours of the national case against Mr Gaddafi" indicates that an erroneous legal test was applied.<sup>40</sup>
34. The Prosecution reiterates its earlier submissions on the matter.<sup>41</sup> In order to determine the degree of sameness between the domestic and the ICC case, the Chamber needs first to examine the scope or defining parameters of the two cases. This is a preliminary step required to enable the fact-finder to make such comparison, regardless of the standard to be subsequently applied.
35. The Chamber concluded that the evidence presented by Libya did not permit the determination of the scope of the Libyan case; hence, it was unable to compare it with the ICC case and determine whether Libya was investigating "substantially the same conduct" as the ICC with respect to Mr Gaddafi. The Chamber indeed assessed the evidence presented by Libya to reach this conclusion, but contrary to Libya's submissions, it did not apply - nor did it erroneously interpret - the "substantially same conduct" test to make such determination. The Chamber never reached the second stage where it would have compared the two cases in light of this test.

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<sup>38</sup> Libya Reply, paras.13-15.

<sup>39</sup> Libya Reply, para.13.

<sup>40</sup> Libya Reply, para.14.

<sup>41</sup> Prosecution Response, para.42.

## **2. The relevance of Article 19(5)<sup>42</sup>**

36. Libya claims that, contrary to the Prosecution's submissions, it did not submit that Article 19(5) dictates the application of a lower standard of proof in determining whether Libya investigates the same case as the ICC.<sup>43</sup> However, Libya suggests just the opposite in its Reply when it reiterates that "the requisite level of 'sameness' for inadmissibility must depend upon the stage reached by the criminal process concerned"<sup>44</sup> thus effectively asking for some leniency, and the application of a lower evidentiary threshold, at an early stage of the domestic proceedings.
37. Libya's submissions are misplaced. As noted by the Prosecution in its Response,<sup>45</sup> Article 19(5) requires a State to challenge the admissibility as soon as possible once it is in a position to actually assert a conflict of jurisdictions.<sup>46</sup> Thence, once a challenge has been filed, domestic authorities need to provide the Court with "evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case".<sup>47</sup> Hence, a lower evidentiary threshold is not applicable at the early stage of the domestic proceedings. In any event and according to Libya, the investigation phase of the case against Mr Gaddafi has concluded.

## **3. "Constituent 'aspects' of a case" and the notions of conduct and incident<sup>48</sup>**

38. Libya argues that "[a] criminal 'event' or 'incident' is not relevant *qua* conduct, but rather because incidents are a key aspect of *the subject matter of conduct*. Whether the same incidents are addressed by a criminal process (whether

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<sup>42</sup> Libya Reply, para.22.

<sup>43</sup> Libya Reply, para.22 referring to Prosecution Response, paras.73-74.

<sup>44</sup> Libya Reply, para.21

<sup>45</sup> Prosecution Response, paras.73-74.

<sup>46</sup> ICC-01/09-01/11-307OA, para.46.

<sup>47</sup> ICC-01/09-01/11-307OA, para.61.

<sup>48</sup> Libya Reply, paras.24-31.

investigation, trial, or verdict) may be *evidence* as to whether the same conduct is addressed by it, but is not the central aspect of “conduct”.”<sup>49</sup> Libya therefore appears to reject the use of the notion of “incident” in identifying the relevant “conduct” in relation to which the admissibility assessment is based, and endorses a much more flexible notion of “conduct” that only requires that the domestic case relates to the subject-matter of the ICC case.<sup>50</sup> Further, Libya partially quotes the Pre-Trial Chamber’s definition of the relevant conduct in this case,<sup>51</sup> and states that the Prosecution erred in considering the Pre-Trial Chamber’s notion of “conduct” as broad.<sup>52</sup>

39. First, the Prosecution has referred to “incident” for the purposes of an admissibility determination as criminal acts that occur in a particular location and at a specific time and in the framework of a certain course of conduct.<sup>53</sup> In this context, although the notion of “incident” has not been expressly set out in the statutory framework, the Prosecution submits that it is implicit in the principal documents that define the various phases of the proceedings: the Article 15 Application, the Article 58 Application, and the Document Containing the Charges under Article 61. All three documents require that the Prosecution provide a “statement of facts” which are alleged to constitute the crimes, which appears to necessitate, with as much precision as is possible, the location and time of each alleged crime.<sup>54</sup>

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<sup>49</sup> Libya Reply, para.25.

<sup>50</sup> Libya Reply, para.26.

<sup>51</sup> Libya Reply, para.30 in which Libya submitted that: “The Chamber noted that assessing “whether the alleged domestic investigation addresses the same conduct underlying the Warrant of Arrest and Article 58 Decision” entailed determining whether the domestic investigation addressed Mr. Gaddafi’s “[use of] his control over relevant parts of the Libyan State apparatus and Security Forces to deter and quell, by any means, including by the use of lethal force, the demonstrations of civilians”. This, the Chamber makes resoundingly clear, is the conduct in relation to which the admissibility assessment poses the question of substantial identity.”

<sup>52</sup> Libya Reply, para.31.

<sup>53</sup> See Prosecution Response, para.69. See also ICC-01/11-01/11-355, para.14.

<sup>54</sup> Regulation 49 of the RoC specifies that the “statement of facts” in the Article 15 Application shall indicated, as a minimum inter alia, “[t]he places of the alleged commission of the crimes, e.g. country, town, as precisely as possible” and “[t]he time or time period of the alleged commission of the crimes”. Regulation 52 similarly requires that that the Document Containing the Charges shall include “[a] statement of facts, including the time

40. The Prosecution therefore reiterates that the notion of “incident” is necessary to identify the relevant parameters of time, place and subject-matter that will permit to compare the ICC case with the domestic case. Obviously the specificity of those parameters will depend on the concrete case before the Court. However, if these parameters are framed in such a broad and flexible manner as Libya suggests, a comparison would not be possible.
41. Second, Libya partially reproduced the Pre-Trial Chamber’s definition of the relevant conduct which reads in full as follows:

[...],Mr Gaddafi used his control over relevant parts of the Libyan State apparatus and Security Forces to deter and quell, by any means, including by the use of lethal force, the demonstrations of civilians, *which started in February 2011 against Muammar Gaddafi’s regime; in particular, that Mr Gaddafi activated the Security Forces under his control to kill and persecute hundreds of civilian demonstrators or alleged dissidents to Muammar Gaddafi’s regime, across Libya, in particular in Benghazi, Misrata, Tripoli and other neighbouring cities, from 15 February 2011 to at least 28 February 2011.*<sup>55</sup> (emphasis added)

42. Thus, the Pre-Trial Chamber set out certain material, temporal and geographic parameters in defining the relevant conduct being investigated by the ICC Prosecutor. Contrary to Libya’s submissions, the Prosecution does not understand the Chamber’s notion of “conduct” as encompassing any criminal act committed anywhere in Libya during the 2011 uprising as long as it somehow relates to “Mr Gaddafi’s use of the Libyan Security Forces to target the civilian population which was demonstrating against Gaddafi’s regime or those perceived to be dissidents to the regime”.<sup>56</sup> In addition to the relevant subject-matter, the Pre-Trial Chamber did provide temporal (15 February to at least 28 February) and geographical parameters (Benghazi, Misrata, Tripoli and other neighbouring cities). This is why the Prosecution noted in its Response that,

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and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person to trial...”. Although Article 58(2)(c) does not elaborate on the requirements of the “concise statement of facts”, the Prosecution submits that it must be at least as specific as those required at the earlier and later stages of the proceedings, namely to include reference to time and place.

<sup>55</sup> Admissibility Decision, para.83. The part in italics was omitted in Libya Reply.

<sup>56</sup> Libya Reply, para.28.



although the Pre-Trial Chamber appeared to have departed from prior and consistent jurisprudence of other Pre-Trial Chambers which have defined “case” as being incident-specific, its notion of “conduct” was nonetheless capable of being reconciled with this earlier case-law.<sup>57</sup>

#### **4. The relevance of the *ne bis in idem* principle**<sup>58</sup>

43. Libya appears to question the relevance of the *ne bis in idem* principle in determining the degree of sameness when comparing the ICC and the domestic case. Libya submits that this principle can only be understood on the basis of an actual or potential verdict and reiterates that the comparison between the ICC and domestic cases needs to consider the concrete stage of the two proceedings.<sup>59</sup> Libya appears, once more, to require significant flexibility and the application of a low threshold in determining the sameness of the two cases if the national proceedings are at an early stage.
44. Libya’s submissions are misplaced. First, as the Prosecution indicated in its Response,<sup>60</sup> an ICC Chamber will conduct its admissibility determination at the time that the State challenges the admissibility of the case before the Court. The Chamber will expect that the domestic case – even if at investigation stage - have certain defining parameters of time, place and subject-matter in order to compare it with the ICC case. This does not mean that those parameters shall remain immovable when the proceedings advance. However, if the domestic process is such at an early stage that those parameters are not defined, there is simply no “case” at the domestic level and there is no conflict of jurisdictions.
45. Moreover, the Prosecution did not seek to apply the *ne bis in idem* principle to the case at hand; it only considered that the jurisprudence related to this principle

<sup>57</sup> Prosecution Response, para.69.

<sup>58</sup> Libya Reply, paras.32-34.

<sup>59</sup> Libya Reply, paras.33-34.

<sup>60</sup> Prosecution Response, paras.4, 43,79 and 174.

may be of assistance given the close interlink between *ne bis in idem* and the complementarity provisions, their common function in determining forum allocation and, most notably, the similarity in the inquiry regarding whether the two cases are indeed “the same”, and what “same” means in this context.<sup>61</sup>

### **5. Interpretation of “unavailability”<sup>62</sup>**

46. Libya contends that the Prosecution failed to substantiate its interpretation of “unavailability”. This is an unsound allegation considering that the Prosecution supported its interpretation by reference to the drafting history, the ordinary meaning of the term as well as a contextual and purposive interpretation of the relevant provisions.<sup>63</sup>

### **Conclusion**

47. For the foregoing reasons, the Prosecution submits that Libya’s request to submit new evidence should be rejected and its arguments in reply should be disregarded.




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Fatou Bensouda,  
Prosecutor

Dated this 30<sup>th</sup> day of September 2013

At The Hague, The Netherlands

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<sup>61</sup> Prosecution Response, para.54

<sup>62</sup> Libya Reply, paras.49-50.

<sup>63</sup> Prosecution Response, paras.155-164