

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: ICC-01/11-01/11  
Date: 11 October 2013

**PRE-TRIAL CHAMBER I**

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

**SITUATION IN LIBYA**

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

**Public redacted**

**Decision on the admissibility of the case against Abdullah Al-Senussi**

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

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James Stewart, Deputy Prosecutor

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**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
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United Nations Security Council

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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
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**Pre-Trial Chamber I** (the “Chamber”) of the International Criminal Court (the “Court” or the “ICC”) issues the present decision under articles 17 and 19 of the Rome Statute (the “Statute”) on the admissibility of the case against Abdullah Al-Senussi (“Mr Al-Senussi”) before the Court.

## I. PROCEDURAL HISTORY

1. On 26 February 2011, the Security Council of the United Nations (the “UN”) adopted Resolution 1970, whereby it referred the situation in Libya since 15 February 2011 to the Prosecutor of the Court.<sup>1</sup>

2. On 27 June 2011, at the request of the Prosecutor,<sup>2</sup> the Chamber issued a warrant of arrest against Mr Al-Senussi, for his alleged criminal responsibility under article 25(3)(a) of the Statute for the crimes against humanity of murder and persecution committed in Benghazi, Libya, from 15 February 2011 until at least 20 February 2011, in violation of articles 7(1)(a) and (h) of the Statute (the “Warrant of Arrest”).<sup>3</sup>

3. On 2 April 2013, Libya filed the “Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute”, challenging the admissibility of the case against Mr Al-Senussi before the Court in accordance with articles 17(1)(a) and 19(2)(b) of the Statute (the “Admissibility Challenge”).<sup>4</sup>

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<sup>1</sup> S/RES/1970 (2011).

<sup>2</sup> “Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI”, 16 May 2013, ICC-01/11-4-Conf-Exp. A public redacted version is also available (ICC-01/11-4-Red).

<sup>3</sup> Pre-Trial Chamber I, “Warrant of Arrest for Abdullah Al-Senussi”, 27 June 2011, ICC-01/11-01/11-4. See also Pre-Trial Chamber I, “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’”, 27 June 2011, ICC-01/11-01/11-1 (hereinafter the “Article 58 Decision”).

<sup>4</sup> The Admissibility Challenge was presented in three different versions: a confidential *ex parte* version, only available to the Prosecutor (ICC-01/11-01/11-307-Conf-Exp); a confidential

4. On 24 April 2013, the Prosecutor, apparently relying on regulation 24 of the Regulation of the Court (the “Regulations”), filed a response to the Admissibility Challenge (the “Prosecutor’s Response”).<sup>5</sup>

5. On 26 April 2013, the Chamber issued, pursuant to rule 58 of the Rules of Procedure and Evidence (the “Rules”), a decision establishing the conduct of the proceedings following the filing of the Admissibility Challenge, whereby it, *inter alia*, appointed Paolina Massidda from the Office of Public Counsel for victims (the “OPCV”) as legal representative, for the purposes of the present admissibility proceedings, of the victims who had already communicated to the Court in relation to the case against Mr Al-Senussi, and set the time limit for the submission of written observations on the Admissibility Challenge.<sup>6</sup>

6. On 14 June 2013, the Defence of Mr Al-Senussi and the OPCV submitted their observations on the Admissibility Challenge (“Defence Observations”<sup>7</sup> and “OPCV Observations”,<sup>8</sup> respectively); and the Prosecutor, with the leave

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redacted version, available also to the Defence of Mr Al-Senussi and the Office of Public Counsel for victims (ICC-01/11-01/11-307-Conf-Red); and a public redacted version (ICC-01/11-01/11-307-Red2). For the purposes of the present decision, the Chamber has considered the version of the Admissibility Challenge that was made available to all the parties and participants of the present proceedings, *i.e.* the confidential redacted version.

<sup>5</sup> “Prosecution’s Response to ‘Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute’”, ICC-01-11-01/11-321-Conf. A public redacted version is also available (ICC-01/11-01/11-321-Red).

<sup>6</sup> Pre-Trial Chamber I, “Decision on the conduct of the proceedings following the ‘Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute’”, 26 April 2013, ICC-01/11-01/11-325.

<sup>7</sup> “Defence Response on behalf of Mr. Abdullah Al-Senussi to ‘Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute’”, 14 June 2013, ICC-01/11-01/11-356.

<sup>8</sup> “Observations on behalf of victims on the ‘Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute’”, 14 June 2013, ICC-01/11-01/11-353-Conf. A public redacted version is also available (ICC-01/11-01/11-353-Red).

of the Chamber,<sup>9</sup> filed additional observations on the Admissibility Challenge (the “Prosecutor’s Additional Observations” or “Additional Observations”).<sup>10</sup>

7. On 16 July 2013, the Chamber granted Libya’s request to file a consolidated reply to the observations by the Prosecutor, the Defence and the OPCV to the Admissibility Challenge.<sup>11</sup> This reply by Libya was filed in the record of the case on 14 August 2013 (“Libya’s Reply” or “Reply”).<sup>12</sup>

8. On 19 August 2013, following requests advanced by the Defence<sup>13</sup> and by Libya,<sup>14</sup> the Chamber issued the “Decision on additional submissions in the proceedings related to Libya’s challenge to the admissibility of the case against Abdullah Al-Senussi”, whereby the Chamber, *inter alia*: (i) “authorise[d] the Defence of Mr Al-Senussi to file further submissions relevant to the disposal of the Admissibility Challenge, [...] by Monday, 26 August 2013”; (ii) “request[ed] Libya to provide any relevant information in relation to the domestic proceedings against Mr Al-Senussi, including the timetable and nature of any such proceedings, by Monday, 16 September 2013”; and (iii) “authorise[d] Libya to complement its reply to the responses to the Admissibility Challenge,

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<sup>9</sup> Pre-Trial Chamber I, “Decision on the Prosecutor’s request for leave to present additional observations on Libya’s challenge to the admissibility of the case against Abdullah Al-Senussi”, 11 June 2013, ICC-01/11-01/11-351.

<sup>10</sup> “Prosecution’s Additional Observations to the ‘Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute”, 14 June 2013, ICC-01/11-01/11-355.

<sup>11</sup> Pre-Trial Chamber I, “Decision on Libya’s request for leave to file a consolidated reply”, 16 July 2013, ICC-01/11-01/11-382.

<sup>12</sup> “Libyan Government’s consolidated Reply to the Responses by the Prosecution, Defence and OPCV to the Libyan Government’s Application relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute”, 14 August 2013, presented in three different versions: a confidential *ex parte* version, only available to the Prosecutor (ICC-01/11-01/11-403-Conf-Exp); a confidential redacted version also available to the Defence of Mr Al-Senussi and the OPCV (ICC-01/11-01/11-403-Conf-Red); and a public redacted version (ICC-01/11-01/11-403-Red2). Also in this case, the Chamber has considered, for the purposes of the present decision, the version of Libya’s Reply that was made available to all the parties and participants of the present proceedings, *i.e.* the confidential redacted version.

<sup>13</sup> “Defence Application on behalf of Mr. Abdullah Al-Senussi concerning Libya’s Announcement of Trial Date in August 2013”, 10 July 2013, ICC-01/11-01/11-380.

<sup>14</sup> Libya’s Reply, paras 3 to 5.

and to reply to the additional submissions of the Defence of Mr Al-Senussi, in the same filing due by Monday, 16 September 2013".<sup>15</sup>

9. The Defence of Mr Al-Senussi filed, on 26 August 2013, its additional submissions in relation to the present admissibility proceedings (the "Defence Additional Submissions"),<sup>16</sup> and, on 5 September 2013, an "addendum" thereto.<sup>17</sup>

10. On 11 September 2013, the Chamber issued a decision whereby it: (i) extended the time limit for Libya's final submissions on the admissibility of the case against Mr Al-Senussi until 26 September 2013;<sup>18</sup> (ii) accepted the Defence "addendum" of 5 September 2013 to the Defence Additional Submissions;<sup>19</sup> (iii) authorised Libya to respond thereto in its final submissions;<sup>20</sup> and (iv) clarified that, unless otherwise decided, no further submissions by the parties and participants in relation to the admissibility of the case against Mr Al-Senussi would be accepted after Libya's final submissions of 26 September 2013.<sup>21</sup>

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<sup>15</sup> Pre-Trial Chamber I, "Decision on additional submissions in the proceedings related to Libya's challenge to the admissibility of the case against Abdullah Al-Senussi", 19 August 2013, ICC-01/11-01/11-409.

<sup>16</sup> "Filing on behalf of Mr. Abdullah Al-Senussi pursuant to 'Decision on additional submissions in the proceedings related to Libya's challenge to the admissibility of the case against Abdullah Al-Senussi' of 19 August 2013", 26 August 2013, ICC-01/11-01/11-418.

<sup>17</sup> "Addendum to 'Filing on behalf of Mr. Abdullah Al-Senussi pursuant to 'Decision on additional submissions in the proceedings related to Libya's challenge to the admissibility of the case against Abdullah Al-Senussi' of 19 August 2013' and Urgent Application pursuant to Regulation 35", 5 September 2013, ICC-01/11-01/11-432.

<sup>18</sup> Pre-Trial Chamber I, "Decision varying the time limit for Libya's final submissions on the admissibility of the case against Mr Al-Senussi", 11 September 2013, ICC-01/11-01/11-441, p. 7.

<sup>19</sup> *Ibid.*, para. 12.

<sup>20</sup> *Ibid.*, p. 7.

<sup>21</sup> *Ibid.*, para. 13.

11. On 26 September 2013, Libya provided its final submissions on issues related to the merits of the admissibility of the case against Mr Al-Senussi before the Court (“Libya’s Final Submissions” or “Final Submissions”).<sup>22</sup>

## II. LIBYA’S CHALLENGE TO THE ADMISSIBILITY OF THE CASE AGAINST MR AL-SENUSSI: AN OVERVIEW

12. The Admissibility Challenge is brought by Libya as a State having jurisdiction over the case against Mr Al-Senussi, in accordance with article 19(2)(b) of the Statute.

13. Libya submits that “its national judicial system is actively investigating Abdullah Al-Senussi for his alleged criminal responsibility for multiple acts of murder and persecution, committed pursuant to or in furtherance of State policy, amounting to crimes against humanity” and that “[t]hese acts, allegedly committed as part of a widespread or systematic attack against Libyan civilians, include but are not limited to crimes committed in Benghazi during the period from 15 to 20 February 2011”.<sup>23</sup> According to Libya, the details of these investigations show that the case against Mr Al-Senussi is being

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<sup>22</sup> “Government’s Submissions and Response to Defence ‘Filing on behalf of Mr. Abdullah Al-Senussi pursuant to ‘Decision on additional submissions in the proceedings related to Libya’s challenge to the admissibility of the case against Abdullah Al-Senussi’ of 19 September 2013’ and ‘Addendum’ filed on 5 September 2013”, 26 September 2013, ICC-01/11-01/11-455. The Chamber notes that in its Final Submissions, Libya argues that the evidence presented demonstrates that the case against Mr Al-Senussi is inadmissible before the Court and that this conclusion is further supported by the material and information provided as part of its Final Submissions. The first relief requested by Libya in its Final Submissions is indeed that the Chamber “take into account the additional material and submissions contained herein, which provide further support for a determination that the case against Mr. Al-Senussi is inadmissible” (Libya’s Final Submissions, para. 43(a)). The Chamber therefore understands Libya’s second request in its Final Submissions, namely to “grant Libya until 6 December 2013 to submit additional material arising from the transfer of the case to the Accusation Chamber” (Libya’s Final Submissions, para. 43(b)), as an alternative relief to the immediate declaration of inadmissibility of the case against Mr Al-Senussi that is, therefore, rendered moot by the present decision.

<sup>23</sup> Admissibility Challenge, para. 1.

investigated at the domestic level and, accordingly, is inadmissible before the Court pursuant to article 17(1)(a) of the Statute.

14. Libya argues that the evidence relied upon in support of its Admissibility Challenge “shows that Libya is carrying out concrete and specific investigative steps in relation to the case against Abdullah Al-Senussi and that its investigation is not in any way vitiated by ‘unwillingness’ or ‘inability’”.<sup>24</sup>

15. Libya states that an investigation of crimes allegedly committed by Mr Al-Senussi during the revolution of 2011 was commenced on 9 April 2012 and was originally conducted by the Libyan Military Prosecutor, in view of Mr Al-Senussi’s previous role as Director of Military Intelligence and his military rank.<sup>25</sup> Jurisdiction over the case has subsequently been vested in the civilian authorities (*i.e.* the Prosecutor-General’s office) following a decision rendered by the Supreme Court on 17 July 2012, and in application of article 157 of the Libyan Criminal Procedure Code and article 45 of the Military Procedures Act.<sup>26</sup> Libya asserts that “all of the witness testimonies that are to be relied upon at the domestic trial have been gathered by the civilian investigative team”.<sup>27</sup> In its Final Submissions, Libya informs the Chamber that, on 19 September 2013, as a result of the domestic investigation, the case against Mr Al-Senussi and 37 associated former Gaddafi-regime officials “was transferred to the Accusation Chamber (South Tripoli Court of First Instance)” and that the accusation proceedings are estimated to take approximately two months.<sup>28</sup>

16. Libya submits that the scope of the proceedings into Mr Al-Senussi’s alleged crimes “extends from the 1980s through to the attacks alleged to have

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<sup>24</sup> *Ibid.*, para. 36.

<sup>25</sup> Admissibility Challenge, paras 136 and Libya’s Reply, para. 136.

<sup>26</sup> Libya’s Reply, para. 26.

<sup>27</sup> *Ibid.*, paras 71 and 137. *See also* Annexes 2 and 6 to the Admissibility Challenge.

<sup>28</sup> Libya’s Final Submissions, para. 5.

been committed against civilians from the commencement of the revolution, on 15 February 2011, until the fall of the Gaddafi regime on 20 October 2011”,<sup>29</sup> and, therefore, “[t]he subject-matter of the Libyan investigation of Abdullah Al-Senussi is much broader than the ICC’s investigation”.<sup>30</sup> In relation to the part of the domestic case which is also being prosecuted before the Court, Libya submits that “the Prosecutor-General’s office is collating evidence that focuses, *inter alia*, upon Muammar and Saif Al-Islam Gaddafi’s criminal plan in Benghazi between the 15<sup>th</sup> to the 20<sup>th</sup> February 2011, of which [Mr] Al-Senussi is suspected, by virtue of his position as head of the Military Intelligence and the ensuing control over military forces, of being instrumental in implementing”.<sup>31</sup>

17. Libya asserts that, “[a]lthough the exact provisions of the Criminal Code with which Abdullah Al-Senussi will be charged are not yet fixed (because he has not yet had his case heard by the Accusation Chamber)”,<sup>32</sup> it is envisaged that the charges against Mr Al-Senussi arising from the investigation conducted will include: devastation, rapine and carnage; civil war; conspiracy; attacks upon the political rights of a Libyan subject; concealment of a corpse; indiscriminate or ‘random’ killings; arson; stirring up hatred between the classes; aiding members of a criminal association; intentional murder; use of force to compel another; misuse of authority against individuals; search of persons; unlawful arrest; unjustified deprivation of personal liberty; torture; and, possibly, incitement to rape, drug trafficking and serious damage to public funds.<sup>33</sup> In its Final Submissions, Libya confirms that “it is anticipated that the charges in Mr. Al-Senussi’s case will likely include unlawful killing,

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<sup>29</sup> Admissibility Challenge, para. 157.

<sup>30</sup> *Ibid.*, para. 158.

<sup>31</sup> *Ibid.*, para. 162.

<sup>32</sup> *Ibid.*, para. 154.

<sup>33</sup> *Ibid.*, para. 154, and Annex 3 to the Admissibility Challenge.

looting, the distribution of narcotics, incitement to commit rape, kidnapping, and other crimes associated with fomenting sedition and civil war".<sup>34</sup>

18. Libya asserts that several investigators (including some based in Benghazi) have been involved in the investigation of the crimes alleged to have been committed by Mr Al-Senussi, and that these investigators report to and are supervised by an Investigative Committee, composed of four members, which is in turn supervised by the Prosecutor-General.<sup>35</sup>

19. Libya also argues that in preparation for trial proceedings: (i) "arrangements have been made for the renovation of a courtroom complex and prison facility in Tripoli which will be capable of ensuring the proper administration of justice in accordance with minimum international standards during Abdullah Al-Senussi's trial";<sup>36</sup> and (ii) "[t]he Government has taken various steps to ensure the safety and security of witnesses in the case against Abdullah Al-Senussi".<sup>37</sup>

20. Libya also submits that "Libya's judiciary, police, prosecution service and members of its legal profession have benefitted from training and other expertise gleaned from an array of international assistance measures" and that this international support "has, in part, focused on the provision of an array of transitional justice measures, including those related to Libya's detention, investigation and prosecution system and will have a positive impact upon the trial of Abdullah Al-Senussi".<sup>38</sup> More specifically, the assistance provided by a number of UN agencies, the European Union and several national Governments "has ranged from funding projects to providing expert training and advice on best practices in diverse areas including: building an effective

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<sup>34</sup> Libya's Final Submissions, para. 8.

<sup>35</sup> Admissibility Challenge, para. 163 and Annexes 1 and 7 to the Admissibility Challenge.

<sup>36</sup> Admissibility Challenge, para. 176.

<sup>37</sup> *Ibid.*, para. 177.

<sup>38</sup> *Ibid.*, para. 180.

police force, improving security for trials, building capacity within the judiciary and within investigative and prosecutorial teams and enhancing conditions in detention centres”.<sup>39</sup>

21. On this basis, Libya submits that “[t]he evidence adduced by the government proves, with a high degree of specificity and probative value, that the case is being investigated by Libya. Pursuant to article 17(1)(a) and 17(2) and (3), the evidence is concrete, tangible and pertinent, demonstrating that the State is willing and able to carry out the investigation genuinely. There is no evidence to support a reasonable inference to the contrary”.<sup>40</sup>

22. More specifically, relying on the entirety of the evidence placed before the Chamber, Libya argues that: (i) “proper investigations are currently ongoing in relation to the same case as that outlined in the ICC warrant”;<sup>41</sup> and (ii) “there is no evidence to demonstrate that Libya is either unable or unwilling to carry out a genuine investigation into the case”<sup>42</sup> since (a) “[t]he investigation-conducted to-date, in difficult circumstances, is illustrative of the falsity of th[e] (counterintuitive) proposition that has no basis in logic or fact [that Libya has reason to protect Mr Al-Senussi from investigation or prosecution]”<sup>43</sup> and (b) “Abdullah Al-Senussi is in safe and secure government-controlled custody in Libya [and] [t]he necessary evidence and testimony is available and accessible in Libya, and is being collected pursuant to the investigations being conducted in accordance with law by the Prosecutor General and his team”.<sup>44</sup>

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<sup>39</sup> *Ibid.*, paras 181-182.

<sup>40</sup> *Ibid.*, para. 124.

<sup>41</sup> *Ibid.*, para. 39.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*, para. 195.

<sup>44</sup> *Ibid.*, para. 196.

23. Accordingly, Libya requests the Chamber to declare the case against Mr Al-Senussi inadmissible before the Court<sup>45</sup> or, in the alternative, “to consider implementing a positive approach to complementarity by declaring the case inadmissible subject to the fulfilment of express conditions or other ongoing obligations”.<sup>46</sup>

### III. THE DETERMINATION OF THE ADMISSIBILITY OF THE CASE: A TWO-STEP ANALYSIS

24. As recalled above, Libya’s Admissibility Challenge is made on the grounds that Libya is investigating the same case against Mr Al-Senussi that is before the Court, and, accordingly, that the case is inadmissible pursuant to article 17(1)(a) of the Statute.

25. Article 17(1)(a) of the Statute states that “the Court shall determine that a case is inadmissible where [t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation”. Article 17(2) and (3) of the Statute provide further clarification on what is to be considered unwillingness and inability genuinely to carry out the domestic proceedings.

26. As observed by the Appeals Chamber, article 17(1)(a) of the Statute contemplates a two-step test, according to which the Chamber, in considering whether a case is admissible before the Court, shall address in turn two questions: (i) whether, at the time of the proceedings in respect of a challenge to the admissibility of a case, there is an ongoing investigation or prosecution of the case at the national level (first limb); and, in case the answer to the first

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<sup>45</sup> *Ibid.*, para. 206.

<sup>46</sup> *Ibid.*, para. 194.

question is in the affirmative, (ii) whether the State is unwilling or unable genuinely to carry out such investigation or prosecution (second limb).<sup>47</sup>

27. A case is therefore inadmissible before the Court when both limbs of article 17(1)(a) of the Statute are satisfied. As held by this Chamber in the decision on the admissibility of the case against Saif Al-Islam Gaddafi (“Mr Gaddafi”), “the challenging State is required to substantiate all aspects of its allegations to the extent required by the concrete circumstances of the case”.<sup>48</sup> Indeed, “[t]he principle of complementarity expresses a preference for national investigations and prosecutions but does not relieve a State, in general, from substantiating all requirements set forth by the law when seeking to successfully challenge the admissibility of a case”.<sup>49</sup> The Chamber further recalls its consideration that “[t]hat said, [...] an evidentiary debate on the State’s unwillingness or inability will be meaningful only when doubts arise with regard to the genuineness of the domestic investigations or prosecutions”.<sup>50</sup> The Chamber is of the view that these considerations equally apply to the case against Mr Al-Senussi<sup>51</sup> and, accordingly, adheres to the same approach for the purposes of the present decision.

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<sup>47</sup> Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “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”, 25 September 2009, ICC-01/04-01/07-1497, paras 1 and 75-79. Pre-Trial Chamber I, “Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi”, 7 December 2012, ICC-01/11-01/11-239, para. 6.

<sup>48</sup> Pre-Trial Chamber I, “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”, 31 May 2013, ICC-01/11-01/11-344-Red (hereinafter, “*Gaddafi* Admissibility Decision”), para. 52.

<sup>49</sup> *Gaddafi* Admissibility Decision, para. 52.

<sup>50</sup> *Gaddafi* Admissibility Decision, para. 53.

<sup>51</sup> The Chamber notes that the arguments raised by Libya in this regard in the Admissibility Challenge (paras 90 to 102) and in its Reply (pp. 10 to 14) are essentially the same arguments that had been made in its challenge to the admissibility of the case against Mr Gaddafi, ICC-01/11-01/11-130-Conf (hereinafter, “*Gaddafi* Admissibility Challenge”) at para. 92 and in its further submissions on issues related to the admissibility of the case against Mr Gaddafi ICC-01/11-01/11-258-Conf-Red (hereinafter, “*Libya’s Submissions of 23 January 2013*”), at paras 19 and 20. Further, the Chamber notes that Libya, in its Final Submissions, states that “the

28. In order to demonstrate the inadmissibility of the case against Mr Al-Senussi before the Court, Libya relies on several items of evidence attached to the Admissibility Challenge as well as on the evidence placed before the Chamber within the context of the proceedings on the admissibility of the case against Mr Gaddafi “which is also likely to be relied upon in Abdullah Al-Senussi’s case due to its factual and legal proximity”.<sup>52</sup> Given Libya’s explicit reliance also on this latter material,<sup>53</sup> the Defence of Mr Al-Senussi, the Prosecutor and the OPCV have also submitted observations on it. Accordingly, for the purposes of the present decision, the Chamber takes into consideration the relevant evidence submitted by Libya as part of: (i) the *Gaddafi* Admissibility Challenge;<sup>54</sup> (ii) Libya’s Submissions of 23 January 2013; (iii) the present Admissibility Challenge; and (iv) Libya’s Final Submissions. The Chamber also considers the information and the evidence relied upon by the other parties and participants in support of their respective positions.

29. In addressing the factual arguments of the Defence, the Chamber is mindful that the Defence has not been able to visit Mr Al-Senussi,<sup>55</sup> despite a decision of the Chamber to that effect,<sup>56</sup> and that the Defence ability to properly raise certain issues of fact may have been prejudiced by this absence of direct contacts with Mr Al-Senussi. At the same time, the Chamber observes

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complementarity regime cannot work unless careful analysis of the circumstances is undertaken, and where other parties’ submissions are not on the basis of direct knowledge, such analysis must be undertaken primarily of the evidence provided by the state itself” (Libya’s Final Submissions, para. 15).

<sup>52</sup> Admissibility Challenge, para. 173.

<sup>53</sup> See e.g. Admissibility Challenge, para. 173.

<sup>54</sup> The Chamber recalls that the perfected translations of the annexes attached to *Gaddafi* Admissibility Challenge have been filed, and labelled with the same letter with which they were designated in the original challenge, as annexes to filing number ICC-01/11-01/11-144 (if classified as public) and to filing number ICC-01/11-01/11-145-Conf (if classified as confidential), both dated 15 May 2012.

<sup>55</sup> See Pre-Trial Chamber I, “Decision concerning a privileged visit to Abdullah Al-Senussi by his Defence”, 26 September 2013, ICC-01/11-01/11-456.

<sup>56</sup> Pre-Trial Chamber I, “Decision on the ‘Urgent Application on behalf of Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC’”, 6 February 2013, ICC-01/11-01/11-269.

that the Defence has not argued that a legal visit to Mr Al-Senussi was a necessary pre-condition for the Defence to make its submissions on the Admissibility Challenge such that a determination of the challenge would need to be suspended until after the taking place of the visit. Rather, it has on several occasions requested the Chamber to proceed to a determination on the merits of the Admissibility Challenge on an urgent basis.<sup>57</sup>

30. The Chamber's analysis in this decision is structured in accordance to the two-step nature of the test envisaged in article 17(1)(a) of the Statute. The Chamber will first analyse whether the evidence provided by Libya demonstrates that domestic proceedings are being undertaken by the Libyan judicial authorities with respect to the same case as the one before the Court (Section IV). The Chamber will then consider the question of whether Libya is unwilling or unable genuinely to carry out the proceedings against Mr Al-Senussi (Section V). An overall conclusion on the admissibility of the

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<sup>57</sup> See for example the latest Defence submission of 5 September 2013, in which the Defence stated: "the Chamber should not countenance any further avoidable delay. It therefore files this emergency application to request that the Chamber reduce the time available to Libya to make final submissions on admissibility and that the Chamber issue a decision on admissibility as soon as possible thereafter" (ICC-01/11-01/11-432, para. 7). Furthermore, on 24 April 2013, soon after the filing of the Admissibility Challenge and in advance of the Chamber's decision, under rule 58 of the Rules, on the conduct of the admissibility proceedings, the Defence of Mr Al-Senussi only requested to be granted 30 days after the issuance of the decision disposing of the *Gaddafi* Admissibility Challenge for its written observations on the present Admissibility Challenge, without making any similar request in relation to the (already) outstanding legal visit to Mr Al-Senussi (ICC-01/11-01/11-320). The Chamber notes that a different position was instead taken by the Defence of Mr Gaddafi in the proceedings on the admissibility of the case against Mr Gaddafi. Indeed, in that case, the Defence of Mr Gaddafi requested the Chamber to extend the time limit for the provision of its submissions on Libya's challenge until after a legal visit to Mr Gaddafi (ICC-01/11-01/11-162-Red), on the grounds that "it is essential that the Defence can consult with Mr. Gaddafi in relation to the main arguments, which will be raised in the Defence response" and that "Mr. Gaddafi is also best placed to provide the Defence with key information, which is directly relevant to the question as to whether the criteria under Article 17 of the Statute are met" (paras 10 and 11). The Chamber, agreeing with the Defence of Mr Gaddafi that it would be beneficial for the Defence to meet with Mr Gaddafi before making its submissions on the challenge to the admissibility of the case against him, granted the Defence request and extended the relevant time limit until two working days after counsel's return from the privileged visit to Mr Gaddafi, as requested by the Defence (Pre-Trial Chamber I, "Decision on the OPCD's 'Urgent Request for Extension of Time'", 1 June 2012, ICC-01/11-01/11-165).

present case before the Court is provided at the end of the decision (Section VI). Throughout the entirety of its analysis, the Chamber will take into account the full range of available material, since the relevance of each discrete piece of such material is not *a priori* limited to one or the other limb of the admissibility test.

#### IV. WHETHER THE DOMESTIC PROCEEDINGS IN LIBYA COVER THE SAME CASE AS THAT BEFORE THE COURT

##### A. *Submissions of the parties and participants*

###### 1. Libya's initial submissions in the Admissibility Challenge

31. In its Admissibility Challenge, Libya submits that, while it is clear that the first stage of the assessment of the admissibility of a case is “establishing the existence of domestic proceedings relating to the same ‘case’”, there is “a lack of clarity in the Court’s jurisprudence regarding the additional constituent elements of ‘the case’, which must be present in order for the Court to be satisfied that the *same case* is being investigated”.<sup>58</sup> Libya argues that “[i]n particular, it is unclear whether there is a requirement for a precise correspondence of incidents under investigation by the Court and the State”<sup>59</sup> as this matter has not been addressed by the Appeals Chamber in elaborating the “substantially the same conduct test” which, in Libya’s submission, “may be the correct test in principle [but] remains to be precisely defined”,<sup>60</sup> and, in any case, “has been created and applied by the Court without a comprehensive consideration of the legal basis for it, or an exploration of its consistency with the object and purpose of the Statute”.<sup>61</sup>

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<sup>58</sup> Admissibility Challenge, para. 60 (emphasis in the original).

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*, para. 64.

<sup>61</sup> *Ibid.*, para. 66.

32. Libya argues that the Admissibility Challenge has “particular features that distinguish [it] from previous challenges before the Court and previous *proprio motu* determinations of admissibility by the variously constituted chambers of the Court”,<sup>62</sup> and that “[t]he Court has not yet had the opportunity to consider the interpretation, applicability and viability of the test in circumstances of *contested* jurisdiction by an *active* territorial state”.<sup>63</sup> Accordingly, Libya submits that “the wholly different circumstances pertaining to the Libyan situation warrant the need to interpret the ‘substantially the same conduct’ test to ensure a purposive or flexible interpretation of the definition of a ‘case’”.<sup>64</sup>

33. According to Libya, the parameters of the “same conduct” test should be defined taking into account that “the state is to be accorded a margin of appreciation as to the contours of the case to be investigated, and the ongoing exercise of the national authorities’ prosecutorial discretion as to the focus and formulation of the case”.<sup>65</sup> In particular, Libya argues that “[c]onsistent with the principle of complementarity, and bearing in mind the overall criminality under consideration, a domestic prosecutor may legitimately hold genuine differences of opinion with the ICC Prosecutor regarding the appropriate contours of a particular case and the overall interests of justice [and] [t]he domestic authorities should not be unduly restrained in pursuing a national accountability agenda by being compelled to conduct an investigation and prosecution that mirrors precisely the factual substance of the investigation being conducted from time to time by the [Office of the Prosecutor]”.<sup>66</sup> In support of this position, Libya refers<sup>67</sup> to the decision issued by Trial Chamber

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<sup>62</sup> *Ibid.*, para. 80.

<sup>63</sup> *Ibid.* (emphasis in the original).

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

<sup>65</sup> *Ibid.*, para. 88.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*, footnote 93.

III on the admissibility of the case against Jean-Pierre Bemba Gombo before the Court.<sup>68</sup>

34. Libya suggests that the Chamber adopt “an interpretation of ‘conduct’ in line with the notion of ‘criminal transaction’ applied by the Ad Hoc Tribunals in the context of joinder of defendants and crimes which, in turn is similar to the notion of a ‘course of conduct’”.<sup>69</sup> In relation to the notion of “criminal transaction” before the *ad hoc* Tribunals, Libya submits that “[i]n determining whether or not crimes or defendants should be joined, the commonality of place and time of the commissions of the acts are significant factors [together with the] [f]eatures of the acts themselves [such as] the underlying methods and means; the victims of the crimes; the characteristics and the roles of the perpetrators; and whether or not there was a common purpose or plan that formed the basis of the criminal acts”.<sup>70</sup> Moreover, Libya notes that, before the *ad hoc* Tribunals, “[i]n defining the ‘same transaction’ [...] the various acts of the accused can be found to have a common purpose even if they do not overlap in time and place”.<sup>71</sup> According to Libya, “[s]imilar ideas underpin the concept of ‘course of conduct’, which is in fact explicitly referred to in the Statute in article 7(2) [and] is also a concept which has a solid foundation in various areas of domestic criminal law”.<sup>72</sup>

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<sup>68</sup> Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on the Admissibility and Abuse of Process Challenges”, 24 June 2010, ICC-01/05-01/08-802. Libya relies on para. 218 of this decision, in which the Trial Chamber held: “[f]or the purposes of Article 17 of the Statute, the case that was brought against the accused in the [Central African Republic] was broadly the same as the prosecution has now brought before Trial Chamber III, save that the charges are inevitably different (given the particular crimes within the ICC’s jurisdiction: Article 5 of the Statute) and the evidence has developed and changed as a result of the investigation by the [Office of the Prosecutor]. The conduct and the underlying offences (murder, rape, pillage, etc.) are the same, as are many of the central events that are relied on”.

<sup>69</sup> Admissibility Challenge, para. 73.

<sup>70</sup> *Ibid.*, para. 74.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*, para. 77.

35. Accordingly, Libya submits that “the Chamber should draw from the established concepts of ‘criminal transaction’ or ‘course of conduct’ when deciding whether or not a particular ‘case’ is the subject of national proceedings” and argues that “[o]n that basis, where the domestic proceedings relate to similar and / or related incidents which arise out of substantially the same course of conduct as that being investigated by the Court, [a case] should be inadmissible”.<sup>73</sup>

36. Libya submits that “[s]ince Abdullah Al-Senussi’s extradition to Libya, the Libyan criminal investigation has continued to progress and is now nearing the accusation stage of proceedings” and that “[m]ore than 100 witnesses have been interviewed between 9 April 2012 and 9 of February 2013 generating thousands of pages of evidence”.<sup>74</sup> In its Final Submissions, Libya asserts that the domestic investigations that have led to the transfer of the case against Mr Al-Senussi and his other 37 co-defendants “involved the recording of the evidence of more than 200 witnesses (amounting to several thousand pages) and the collation of associated evidence in the form of tens of thousands of documents”.<sup>75</sup>

37. Finally, Libya argues that the investigation conducted in relation to Mr Al-Senussi covers, and is actually broader than, the same case that is before the Court within the meaning of article 17(1)(a) of the Statute.<sup>76</sup>

## 2. The Defence

38. The Defence submits that “Libya is not investigating the same case” as the one before the Court.<sup>77</sup>

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<sup>73</sup> *Ibid.*, para. 78.

<sup>74</sup> *Ibid.*, para. 156. *See also* Annex 2 to Admissibility Challenge.

<sup>75</sup> Libya’s Final Submissions, para. 5.

<sup>76</sup> Admissibility Challenge, para. 156 to 161.

<sup>77</sup> Defence Observations, Part A.

39. The Defence commences its analysis by identifying the “scope and subject matter of the Warrant of Arrest” with a view to defining the conduct as alleged in the proceedings before the Court, which, in its view, Libya is required to demonstrate it has been investigating in order to meet its burden of proof with respect to the first limb of the admissibility determination.<sup>78</sup>

40. After analysing the content of the Warrant of Arrest and the Article 58 Decision, the Defence submits that “the Chamber in the present case is required to assess on the evidence supplied by Libya whether the domestic investigation addresses the same conduct underlying the Warrant [of Arrest] and Article 58 Decision, namely that in February 2011 Mr. Al-Senussi used his position and power to control, command and instruct the Libyan Security Forces to deter and quell, by any means, including the use of lethal force, the demonstrations of civilians against Muammar Gaddafi’s regime as part of a widespread and systematic attack on the civilian population in various places in Libya, notably in Benghazi”.<sup>79</sup>

41. The Defence asserts that “Libya has failed to submit evidence which is sufficiently specific and probative to demonstrate that the scope and subject matter of its domestic investigation covers the same conduct underlying the Warrant of Arrest and Article 58 Decision in Mr. Al-Senussi’s case”.<sup>80</sup> According to the Defence, this is so because the materials submitted by Libya “are general, vague, and lacking in sufficient detail to allow the Chamber to draw conclusions as to the nature and scope of the national investigation” and that “even though some of the materials show that there is an investigation on-going at the domestic level in respect of Mr. Al-Senussi with ‘certain discrete aspects’ that may relate to Mr. Al-Senussi’s conduct as alleged in the

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<sup>78</sup> *Ibid.*, paras 15 to 22.

<sup>79</sup> *Ibid.*, para. 21.

<sup>80</sup> *Ibid.*, para. 22.

proceedings before the ICC, this evidence lacks the sufficient degree of specificity and probative value to establish that Libya is investigating the same conduct underlying the Warrant of Arrest and Article 58 Decision".<sup>81</sup>

42. The Defence also provides a detailed assessment of the material relied on by Libya in support of its challenge to the admissibility of the case against Mr Al-Senussi.<sup>82</sup>

### 3. The Prosecutor

43. The Prosecutor submits that Libya has demonstrated that it is investigating Mr Al-Senussi for the same case that is before the Court.<sup>83</sup>

44. The Prosecutor endorses the interpretation according to which the defining elements of a case are the "individual" and the "conduct" and, accordingly, that "the 'same case' is composed of the 'same person' and the 'same conduct'".<sup>84</sup>

45. The Prosecutor submits that the admissibility determination depends on "the stage of the proceedings at the ICC and the level of specificity the case has reached" and, therefore, that the Admissibility Challenge "must be determined in relation to 'the case' as described in the Article 58 Decision and to the level of specificity of the underpinning factual allegations outlined therein".<sup>85</sup>

46. According to the Prosecutor, "subject to the requirements of genuineness, the case [against Mr Al-Senussi] should be determined inadmissible if Libya is investigating substantially the same incidents of killing and persecution (comprising arrests and mistreatment against perceived opponents to

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<sup>81</sup> *Ibid.*, para. 27.

<sup>82</sup> *Ibid.*, paras 39 to 57.

<sup>83</sup> Prosecutor's Response, para. 86; Prosecutor's Additional Observations, para. 26.

<sup>84</sup> Prosecutor's Response, para. 22.

<sup>85</sup> *Ibid.*, para. 24.

Gaddafi's regime) in Benghazi by members of the Security Forces from 15 until at least 20 February 2011, as described in the Article 58 Decision".<sup>86</sup>

47. Referring to the *Gaddafi* Admissibility Decision, the Prosecutor submits that the Chamber "appears to have departed from prior and consistent jurisprudence of other Pre-Trial Chambers which have defined a case as being incident-specific".<sup>87</sup> According to the Prosecutor, the notion of "incidents" must be understood as "criminal acts that occur in a particular location and at a specific time and in the framework of a course of conduct and series of events" and that "this notion is implicit in the principal documents that define the various phases of the proceedings".<sup>88</sup> In this regard, the Prosecutor asserts that "[a]lthough Article 58(2)(c) does not elaborate on the requirements of the 'concise statement of facts' [they] 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>89</sup>

48. The Prosecutor also submits that "the determination of what constitutes 'substantially the same conduct' will vary according to the concrete facts and circumstances of the case at hand, and therefore requires a case-by-case analysis" and that "the case which forms the subject of an admissibility determination must be denoted by a set of clearly defined parameters that will permit ready comparison [since] [i]f the given parameters are overly broad, effective comparison is rendered meaningless".<sup>90</sup> However, according to the Prosecutor, the conduct underlying the case against Mr Al-Senussi "even by the Chamber's own test, would have some confined parameters".<sup>91</sup> The Prosecutor submits that, consequently, "the parameters of subject-matter, place

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<sup>86</sup> *Ibid.*, para. 25.

<sup>87</sup> Prosecutor's Additional Observations, para. 13.

<sup>88</sup> *Ibid.*, para. 14.

<sup>89</sup> *Ibid.*, footnote 23.

<sup>90</sup> *Ibid.*, para. 16.

<sup>91</sup> *Ibid.*, para. 17.

and time in the Warrant of Arrest and Article 58 Decision mean that for an act of murder or persecution to fall within the Chamber's notion of 'conduct', it would need to be inextricably linked to those incidents that form the basis of the ICC case".<sup>92</sup>

49. In relation to the term "substantially" in the "same conduct" part of the test, the Prosecutor submits that this term "serves to explain in relation to what 'sameness' attaches, namely to the substance of the criminal behavior".<sup>93</sup> According to the Prosecutor, this entails that "a case will be 'substantially the same' if any difference in the underlying factual parameters is minor, such that the facts may be described as essentially the same because they are inextricably linked together in time, in space and by their subject-matter".<sup>94</sup>

50. On the basis of her assessment of the evidence relied upon by Libya in support of the Admissibility Challenge, the Prosecutor submits that "[w]hile Libya appears to be investigating nearly all of the incidents covered by the Article 58 Decision, there are a few incidents that it does not appear to be investigating from the samples provided such as the killing of three demonstrators in 16 February 2011 by the Security Forces, and the arrest of certain activists between 15 to 17 February 2011".<sup>95</sup> The Prosecutor, however, concludes that "this divergence is not substantial and therefore it does not affect the substantial identity between the two cases".<sup>96</sup>

#### 4. The OPCV

51. The OPCV submits that Libya "has failed to adduce evidence, with a sufficient degree of specificity and probative value demonstrating that the

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<sup>92</sup> *Ibid.*, para. 18.

<sup>93</sup> Prosecutor's Response, para. 67.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*, para. 78.

<sup>96</sup> *Ibid.*

same conduct as described in the Article 58 Decision is the subject of domestic investigations”.<sup>97</sup>

52. The OPCV submits that the inquiry as to the identity of conduct between the case being investigated at the domestic level and the one pending before the Court “requires, first, the identification of the parameters of the Court’s case and, second, the consideration of the degree of identity that is needed for a case to be declared inadmissible before the Court”.<sup>98</sup>

53. According to the OPCV, “the identification of the parameters of a ‘case’ should not be considered solely in light of the practice of the Court related to admissibility challenges [as] a ‘case’ is not a relative concept [...] dependent on the nature of the proceedings at hand, or on the status of the parties and participants involved”.<sup>99</sup> The OPCV asserts that “[i]n the context of Court’s proceedings, and not only in relation to admissibility proceedings, Chambers have clarified that the term ‘case’ must be interpreted as referring to specific factual incidents and circumstances”<sup>100</sup> and “have adopted a consistent and unitary interpretation of the term ‘case’, the parameters of which have been defined as the specific factual allegations supporting each of the legal elements of the crimes alleged”.<sup>101</sup>

54. In relation to the introduction of the word “substantially” in the same person/same conduct test, the OPCV position is that this “should be understood as a clarification to the same test, not as the introduction of a different test” and that “the term ‘substantially’ may also be understood as imposing on the challenging State to prove that it is investigating the

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<sup>97</sup> OPCV Observations, para. 58.

<sup>98</sup> *Ibid.*, para. 25.

<sup>99</sup> *Ibid.*, para. 29.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*, para. 30.

overwhelming majority of incidents referred to in the case under consideration before the Court”.<sup>102</sup>

55. In relation to the present Admissibility Challenge, the OPCV asserts that “there is a lack of clarity regarding the start, the progress and the current status of the Libyan investigation”<sup>103</sup> and, “[w]hile [...] acknowledg[ing] that most of [the] documents do have probative value, they, however, fail to satisfy the specificity requirement as articulated by the Appeals Chamber”.<sup>104</sup> According to the OPCV, “the material provided only refers to the general aspects of Mr Al-Senussi’s individual criminal responsibility, such as the existence of a State policy, the suspect’s command over the Security Forces and his essential contribution to the criminal plan”<sup>105</sup> and “the Libyan investigation appears to overlook the overwhelming majority of acts contained in the Article 58 Decision”.<sup>106</sup>

56. The OPCV submits in this regard that only a limited number of acts described in the Article 58 Decision are covered by the evidence relied upon by Libya, while the remaining acts are contained in “victims’ complaints” which “do not constitute evidentiary material that the crimes alleged therein are indeed being investigated”, rather than in witness statements.<sup>107</sup> It is the OPCV ultimate position that “[i]n the absence of evidence showing that subsequent investigative steps have been taken in relation to the remaining incidents, there are compelling reasons to believe that a situation of inactivity continues as far

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<sup>102</sup> *Ibid.*, para. 38.

<sup>103</sup> *Ibid.*, para. 53.

<sup>104</sup> *Ibid.*, para. 62.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*, para. 63.

<sup>107</sup> *Ibid.*, para. 64.

as these incidents are concerned”<sup>108</sup> and accordingly, the case against Mr Al-Senussi is admissible before the Court.<sup>109</sup>

#### 5. Libya’s submissions in the Reply

57. In its Reply, Libya structures its response to the arguments made by the Defence, the Prosecutor and the OPCV around two main issues, namely: (i) the scope of the “same conduct” requirement in terms of the applicable legal framework;<sup>110</sup> and (ii) the “evidential scope of ‘same conduct’ requirement”.<sup>111</sup>

58. In relation to the relevant law applicable to the determination of whether the same case before the Court is being investigated at the national level, Libya states at the outset: “[t]o be clear, there is no dispute that the ‘substantially the same conduct’ test is applicable”.<sup>112</sup> In essence, what Libya contests is instead the interpretation of this test advanced by the Prosecutor.

59. At first, Libya addresses the Prosecutor’s arguments in relation to the “constituent elements of ‘conduct’”.<sup>113</sup> Libya states that “[t]he Prosecut[or] makes a number of arguments that introduce the concept of ‘incidents’ as an element of the meaning of ‘conduct’”<sup>114</sup> and that “[a]lthough somewhat opaque, the Prosecut[or]’s argument seems to be that the core of the same conduct test is whether the same *events* are covered”.<sup>115</sup> According to Libya, the fact that the Warrant of Arrest does not refer to specific incidents and that any such reference in the Article 58 Decision is non-exhaustive is indicative of the meaning of “conduct” for the purposes of the cases against Mr Gaddafi and Mr Al-Senussi and, more generally, for the purposes of the admissibility test

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<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*, para. 65.

<sup>110</sup> Libya’s Reply, paras 21 to 62.

<sup>111</sup> *Ibid.*, paras 63 to 108.

<sup>112</sup> *Ibid.*, para. 21.

<sup>113</sup> *Ibid.*, paras 23 to 28.

<sup>114</sup> *Ibid.*, para. 23.

<sup>115</sup> *Ibid.*, para. 24 (emphasis in the original).

under article 17 of the Statute.<sup>116</sup> In this regard, Libya argues that “[t]he notion of ‘incident’ is not relevant *qua* conduct, but rather because whether the incidents are addressed by a criminal process (whether investigation, trial, or verdict) is an *indication* of whether the same conduct is addressed by it. [...] ‘[T]ime, space and subject matter’ are relevant, but it is the time, space and subject matter *of the accused’s alleged conduct* that matters”.<sup>117</sup>

60. In relation to the “degree of sameness” required under the “substantially same conduct” test, Libya, in response to the Prosecutor’s arguments, argues that the uncontested fact that “the relevant considerations are time, space and subject matter [...] does not speak to the issue of the requisite *degree* of sameness. The material questions are how similar in time, space, and subject matter must the conduct be (in order to be ‘substantially the same’)?”<sup>118</sup> In this regard, Libya submits that “[c]learly, the requirement is not that the domestic process mirrors precisely that which the ICC would do in the same circumstances. The word ‘substantially’ reflects this”.<sup>119</sup> According to Libya, the Prosecutor’s argument that “by adding the word ‘substantially’, the Appeals Chamber sought to describe the nature of the test, rather than departing from it, or proposing a different test where ‘sameness’ is not required”<sup>120</sup> is irrelevant as “[t]his is a distinction without a difference”.<sup>121</sup> Libya further argues that all the statutory provisions relied upon by the Prosecutor for her interpretation of the “substantially the same conduct test” – namely articles 17(1)(a), (b) and (c), 20(3), 90(1), 90(7), 89(4) and 94 of the Statute and rule 51 of the Rules – either support Libya’s position that “‘conduct’ cannot have a homogeneous meaning in all situations” or do not go further

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<sup>116</sup> *Ibid.*, paras 27 and 28.

<sup>117</sup> *Ibid.*, para. 28 (emphasis in the original).

<sup>118</sup> *Ibid.*, para. 32 (emphasis in the original).

<sup>119</sup> *Ibid.*, para. 30.

<sup>120</sup> Prosecutor’s Response, para. 32.

<sup>121</sup> Libya’s Reply, para. 30.

than providing support for the proposition that the “same conduct” is indeed the relevant criterion, without in fact adding anything to its interpretation, in particular on how the conduct must be defined.<sup>122</sup>

61. In relation to the second part of its Reply concerning the “evidential scope of ‘same conduct’ requirement”,<sup>123</sup> Libya takes issues primarily with the arguments made by the OPCV and the Defence.

62. In response to the OPCV arguments, Libya submits that the issues raised by the OPCV on the asserted lack of clarity regarding the commencement, progress and current status of the Libyan investigation<sup>124</sup> “do not impact upon the core admissibility question regarding the conduct of the domestic investigation, namely, whether it covers the ‘same case’ as that under consideration before the ICC”.<sup>125</sup> Nevertheless, Libya clarifies that the investigation of crimes that may have been committed by Mr Al-Senussi was begun on 9 April 2012,<sup>126</sup> being conducted at first by the Military Prosecutor’s office, and later transferred to the Prosecutor-General’s office following a decision of the Supreme Court in July 2012.<sup>127</sup> Libya stated that the investigation has produced “over two thousand pages of evidence (in the form of witness testimonies and documentary materials) [...] gathered and compiled by members of the prosecution investigative team”.<sup>128</sup>

63. Libya further submits that the OPCV argument with respect to the lack of probative value for the Chamber’s determination under article 17(1)(a) of the Statute of the “victims’ complaints” is “fundamentally misconceived [as] [t]here is no substantive distinction between the evidential status of the

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<sup>122</sup> *Ibid.*, paras 54 to 62.

<sup>123</sup> *Ibid.*, paras 63 to 108.

<sup>124</sup> See OPCV Observations, paras 53 to 57.

<sup>125</sup> Libya’s Reply, para. 69.

<sup>126</sup> *Ibid.*, para. 70.

<sup>127</sup> *Ibid.*, paras 71-72.

<sup>128</sup> *Ibid.*, para. 70.

testimonies that the OPCV has characterised as ‘victims complaints’ and those that the OPCV describes as ‘witness statements’<sup>129</sup>.

64. As to the Defence arguments, Libya submits that “[t]he general nature of [a number] of Defence submissions, which are descriptive rather than analytical in character, do not assist the Pre-Trial Chamber in assessing whether or not the precise evidential samples relied upon by the Government [...] establish that the Libyan investigation relates to the same case as the ICC investigation”.<sup>130</sup> In response to the Defence assessment of the individual items of evidence placed before the Chamber,<sup>131</sup> Libya further provides a counter-analysis addressing the discrete specific arguments made by the Defence<sup>132</sup> and ultimately urges the Chamber to “evaluate the evidence as a whole, taking into account both the context and the inherent links between the evidential samples, rather than isolating any particular piece of evidence for a disparate analysis”.<sup>133</sup>

## ***B. Analysis of the Chamber***

### **1. Applicable legal framework**

65. According to article 17(1)(a) of the Statute, the first determination that the Chamber is required to make concerns the question of whether the case against Mr Al-Senussi “is being investigated or prosecuted” by Libya.

66. In the context of the proceedings related to the admissibility of the case against Mr Gaddafi, the Chamber, mindful of the Court’s previous jurisprudence, set out its interpretation of the requirement that “the case is being investigated or prosecuted by a State which has jurisdiction over it”

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<sup>129</sup> *Ibid.*, para. 74.

<sup>130</sup> *Ibid.*, para. 78.

<sup>131</sup> Defence Observations, paras 39 to 57.

<sup>132</sup> Libya’s Reply, paras 80 to 106.

<sup>133</sup> *Ibid.*, para. 107.

within the meaning of article 17(1)(a) of the Statute. For the purposes of the present decision, the Chamber adheres to the same approach, and, more specifically, considers that the following principles form part of the legal framework also applicable to the present case:

- (i) in accordance with consistent jurisprudence of the Court, a determination of admissibility is case-specific, the constituent elements of a case before the Court being the “person” and the alleged “conduct”;<sup>134</sup> accordingly, for the Chamber to be satisfied that the domestic investigation covers the same “case” as that before the Court, it must be demonstrated that: a) the person subject to the domestic proceedings is the same person against whom the proceedings before the Court are being conducted; and b) the conduct that is subject to the national investigation is substantially the same conduct that is alleged in the proceedings before the Court;<sup>135</sup>

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<sup>134</sup> *Gaddafi* Admissibility Decision, paras 61 and 76. See also Appeals Chamber, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, “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’”, 30 August 2011, ICC-01/09-02/11-274, paras 39-40.

<sup>135</sup> *Gaddafi* Admissibility Decision, paras 61, 74 and 76 to 77. The Chamber recalls that the “same person, same conduct” test was initially elaborated in: Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, “Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo”, 24 February 2006, ICC-01/04-01/06-8-Corr, para. 31. This test was later recalled in: Pre-Trial Chamber I in *The Prosecutor v. Ahmad Muhammad Harun* (‘Ahmad Harun’) and *Ali Muhammad Ali Abd-Al-Rahman* (‘Ali Kushayb’), “Decision on the Prosecution Application under Article 58(7) of the Statute”, 27 April 2007, ICC-02/05-01/07-1-Corr, para. 24; *The Prosecutor v. Germain Katanga*, “Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga”, 6 July 2007, ICC-01/04-01/07-4, para. 20 (public redacted version in ICC-01/04-01/07-55); *The Prosecutor v. Mathieu Ngudjolo Chui*, “Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui”, 6 July 2007, ICC-01/04-01/07-262, para. 21. The same approach was followed in: Pre-Trial Chamber II in *The Prosecutor v. Kony et al.*, “Decision on the Admissibility of the Case under Article 19(1) of the Statute”, 10 March 2009, ICC-02/04-01/05-377, paras 17-18; *The Prosecutor v. William Samoei*

- (ii) the expression “the case is being investigated” must be understood as requiring the taking of “concrete and progressive investigative steps” to ascertain whether the person is responsible for the conduct alleged against him before the Court;<sup>136</sup> as held by the Appeals Chamber, these investigative steps may include “interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses”;<sup>137</sup>
- (iii) the parameters of the “conduct” alleged in the proceedings before the Court in each individual case are those set out in the document that is statutorily envisaged as defining the factual allegations against the person at the phase of the proceedings in question, in the present case the Warrant of Arrest;<sup>138</sup> consequently, “the determination of what is ‘substantially the same conduct as alleged in the proceedings before

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*Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, 30 May 2011, ICC-01/09-01/11-101, para. 54; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, 30 May 2011, ICC-01/09-02/11-96, para. 48. This jurisprudence of the Pre-Trial Chambers was later confirmed by the Appeals Chamber which, however, referred to “the same individual and substantially the same conduct”: Appeals Chamber, “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’”, 30 August 2011, ICC-01/09-02/11-274, para. 39.

<sup>136</sup> *Gaddafi* Admissibility Decision, paras 54, 55 and 73. See also Pre-Trial Chamber I, “Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi”, 7 December 2012, ICC-01/11-01/11-239, para. 11.

<sup>137</sup> Appeals Chamber, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, “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’”, 30 August 2011, ICC-01/09-02/11-274, paras 1 and 40.

<sup>138</sup> *Gaddafi* Admissibility Decision, paras 77-78. See also Appeals Chamber, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, “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’”, 30 August 2011, ICC-01/09-02/11-274, paras 38 to 40.

the Court' will vary according to the concrete facts and circumstances of the case and, therefore, requires a case-by-case analysis";<sup>139</sup>

- (iv) the assessment of the subject matter of the domestic proceedings must focus on the alleged conduct and not on its legal characterisation. Indeed, "[t]he question of whether domestic investigations are carried out with a view to prosecuting 'international crimes' is not determinative of an admissibility challenge" <sup>140</sup> and "a domestic investigation or prosecution for 'ordinary crimes', to the extent that the case covers the same conduct, shall be considered sufficient";<sup>141</sup>
- (v) "a decision on the admissibility of the case must be based on the circumstances prevailing at the time of its issuance"<sup>142</sup> and "for [a State] to discharge its burden of proof that currently there is not a situation of 'inaction' at the national level, it needs to substantiate that an investigation is in progress at this moment";<sup>143</sup>
- (vi) in the case of a challenge under article 17(1)(a) of the Statute, "a mere assurance that the national ongoing investigation covers the same as the case before the Court cannot be deemed sufficient to discharge [the] burden of proof in this regard";<sup>144</sup> indeed, as held by the Appeals Chamber, "the State must provide the Court with evidence

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<sup>139</sup> *Gaddafi* Admissibility Decision, para. 77.

<sup>140</sup> *Ibid.*, para. 85.

<sup>141</sup> *Ibid.*, para. 88.

<sup>142</sup> Pre-Trial Chamber I, "Decision on the OPCD requests in relation to the hearing on the admissibility of the case", ICC-01/11-01/11-212, para. 9.

<sup>143</sup> Pre-Trial Chamber I, "Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", 7 December 2012, ICC-01/11-01/11-239, para. 14.

<sup>144</sup> *Ibid.*, para. 28.

of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case”;<sup>145</sup>

(vii) in its analysis on whether the evidence presented demonstrates that the State is investigating or prosecuting the same case that is before the Court, “the Chamber is not called to determine whether [the] evidence is strong enough to establish the [person’s] criminal responsibility”;<sup>146</sup> a finding that the domestic authorities are taking steps to investigate the person’s responsibility in relation to the same case as the one before the Court “would not be negated by the fact that, upon scrutiny, the evidence may be insufficient to support a conviction by the domestic authorities”;<sup>147</sup>

(viii) the evidence that the State is requested to provide in order to demonstrate that it is investigating or prosecuting the case is not only “evidence on the merits of the national case that may have been collected as part of the purported investigation to prove the alleged crimes” but extends to “all material capable of proving that an investigation is ongoing”, including, for example, “directions, orders and decisions issued by authorities in charge of the investigation as well as internal reports, updates, notifications or submissions contained in the file arising from the [domestic] investigation of the case, to the extent that they demonstrate that [the national] authorities are taking concrete and progressive steps to ascertain

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<sup>145</sup> Appeals Chamber, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, “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’”, 30 August 2011, ICC-01/09-02/11-274, paras 2 and 61.

<sup>146</sup> *Gaddafi* Admissibility Decision, para. 122.

<sup>147</sup> *Ibid.*

whether [the person] is responsible for the conduct [alleged in the proceedings before] the Court".<sup>148</sup>

67. As recalled above, the Chamber's determination of the first limb of the admissibility test requires a comparison between the conduct attributed to Mr Al-Senussi in the proceedings before the Court and the conduct that constitutes the subject-matter of the proceedings allegedly carried out by the Libyan judicial authorities. This requires the successive identification of: (i) the conduct of Mr Al-Senussi that is the subject of the proceedings before the Court; and (ii) the conduct of Mr Al-Senussi that is allegedly subject to Libya's national proceedings, as emerging from the evidence presented by Libya in support of its claim. Once the terms of reference for the relevant comparison have been satisfactorily identified, the Chamber will proceed to determine whether Libya's domestic proceedings against Mr Al-Senussi are being undertaken in relation to substantially the same conduct as alleged in the proceedings before the Court.

## 2. The case against Mr Al-Senussi before the Court

68. In the case against Mr Al-Senussi, the conduct alleged in the proceedings before the Court is set out in the Warrant of Arrest issued by the Chamber against him, which must be read in conjunction with the Article 58 Decision.

69. The Warrant of Arrest for Mr Al-Senussi has been issued by the Chamber for his alleged criminal responsibility "as principal to the following crimes committed in Benghazi from 15 February 2011 until at least 20 February 2011 by the members of the armed forces under his control, under article 25(3)(a) of the Statute, as an indirect perpetrator: (i) murder as a crime against humanity,

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<sup>148</sup> Pre-Trial Chamber I, "Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", 7 December 2012, ICC-01/11-01/11-239, paras 10 and 11.

within the meaning of article 7(1)(a) of the Statute; and (ii) persecution as a crime against humanity, within the meaning of article 7(1)(h) of the Statute".<sup>149</sup>

70. More specifically, the following relevant facts are alleged in the Warrant of Arrest:

Following the events in Tunisia and Egypt which led to the departure of their respective Presidents in the early months of 2011, a State policy was designed at the highest level of the Libyan State machinery and aimed at deterring and quelling, by any means, including by the use of lethal force, the demonstrations of civilians against the regime of Muammar Mohammed Abu Minyar Gaddafi ('Gaddafi's regime') which started in February 2011;

[...] in furtherance of the abovementioned State policy, from 15 February 2011 until at least 28 February 2011 the Libyan Security Forces following a consistent *modus operandi*, carried out throughout Libya an attack against the civilian population taking part in demonstrations against Gaddafi's regime or those perceived to be dissidents;

[...] as of 15 February 2011 and within a period of less than two weeks in February 2011, the Security Forces killed and injured as well as arrested and imprisoned hundreds of civilians;

[...] a systematic and widespread attack, in furtherance of a State policy, targeting the civilian population which was demonstrating against Gaddafi's regime or those perceived to be dissidents to the regime, occurred within the meaning of article 7(1) of the Statute;

[...] in Benghazi, murders constituting crimes against humanity were committed from 15 February 2011 until at least 20 February 2011 by Security Forces under the command of Abdullah Al-Senussi, as part of the attack against the civilian demonstrators or alleged dissidents to Gaddafi's regime;

[...] from 15 February 2011 until at least 20 February 2011, in particular in Benghazi, inhuman acts that severely deprived the civilian population of its fundamental rights were inflicted on it by the Security Forces under the command of Abdullah Al-Senussi, because of this civilian population's political opposition (whether actual or perceived) to Gaddafi's regime;

[...] from 15 February 2011 until at least 20 February 2011, Abdullah Al-Senussi exercised his role as the national head of the Military Intelligence, one of the most powerful and efficient organs of repression of Gaddafi's regime and the state security organ in charge of monitoring the military camps and members of the Libyan armed forces;

[...] once instructed by Muammar Gaddafi to implement the plan to deter and quell civilian demonstrations against his regime in Benghazi, Abdullah Al-Senussi used his powers over the military forces, commanded the forces in Benghazi and directly instructed the troops to attack civilians demonstrating in the city;

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<sup>149</sup> Warrant of Arrest, p. 6.

[...] Abdullah Al-Senussi (i) intended to bring about the objective elements of the crimes committed by the armed forces under his control from 15 February 2011 until at least 20 February 2011 in the city of Benghazi, (ii) knew that his conduct was part of a widespread and systematic attack against the civilian population pursuant to a State policy of targeting civilians perceived to be political dissidents; and (iii) was aware of his senior leadership role within the structure of the military and of his power to exercise full control over his subordinates.<sup>150</sup>

71. In sum, the present case before the Court concerns the individual criminal responsibility of Mr Al-Senussi for killings and acts of persecution by reason of their (real or perceived) political opposition to the Gaddafi regime carried out on many civilian demonstrators and political dissidents, allegedly committed directly or through the Security Forces<sup>151</sup> during the repression of the demonstrations taking place in Benghazi from 15 February 2011 until at least 20 February 2011 and as part of a policy designed at the highest level of the Libyan State machinery to deter and quell, by any means, the revolution against the Gaddafi regime occurring throughout Libya.<sup>152</sup> The Chamber considers that this constitutes the relevant conduct alleged in the proceedings before the Court that defines the scope of the criminal case against Mr Al-Senussi.

72. The Chamber notes the arguments put forward by the Prosecutor and Libya in relation to the definition of “conduct” in the cases before the Court.<sup>153</sup>

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<sup>150</sup> *Ibid.*, pp. 4 to 6.

<sup>151</sup> The expression “Security Forces” is used in the Warrant of Arrest “to define the Libyan security and military system which is notably comprised of the Libyan Armed Forces and police; the military intelligence; the Internal and External Security Services; the Revolutionary Committees and its Bureau; the Revolutionary Guard; the People’s Guard; the Revolutionary Combating militias; brigades and militia units” (footnote 2). The same meaning is attached to this expression also in the present decision.

<sup>152</sup> See also the relevant conclusions of the Chamber in the Article 58 Decision, in particular, at paras 41, 65 and 90.

<sup>153</sup> The Chamber notes that also the OPCV purports to advance certain submissions in this regard. However, the essence of these submissions do not go further than the mere acknowledgment that the parameters of the “case” in the context of the admissibility proceedings must be the same as those that define the “case” in the context of other proceedings before the Court, and that “conduct” refers to the factual allegations supporting the legal elements of the alleged crimes (*see* OPCV Observations, paras 29 to 37). The Chamber

The Prosecutor, while satisfied that Libya is investigating the same case against Mr Al-Senussi,<sup>154</sup> considers that, in all circumstances and in all cases, the “conduct” must always be understood as “incident-specific”,<sup>155</sup> and that a warrant of arrest necessarily “includes the ‘incidents’” given that it “must [...] include reference to time and place” of the alleged crimes.<sup>156</sup> According to the Prosecutor, the term “incidents” identifies “criminal acts that occur in a particular location and at a specific time and in the framework of a course of conduct and series of events”.<sup>157</sup> The Prosecutor uses this term<sup>158</sup> to refer to those facts that are mentioned at paragraphs 36, 43, 44 and 49 to 54 of the Article 58 Decision,<sup>159</sup> which, in her view, must necessarily be covered by Libya’s investigation in order for the case against Mr Al-Senussi to be inadmissible before the Court under article 17(1)(a) of the Statute.<sup>160</sup>

73. Taking issue with the Prosecutor’s reliance on “the concept of ‘incidents’ as an element of the meaning of ‘conduct’”,<sup>161</sup> Libya counter-argues that “[t]he notion of ‘incident’ is not relevant *qua* conduct”<sup>162</sup> and that, while “‘time, space and subject matter’ are relevant, [...] it is the time, space and subject matter of

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is of the view that these principles are already settled, and that the OPCV submissions are not of actual assistance for the determination of the factual parameters of the case against Mr Al-Senussi before the Court.

<sup>154</sup> Prosecutor’s Response, para. 78.

<sup>155</sup> Prosecutor’s Additional Observations, para. 13.

<sup>156</sup> *Ibid.*, footnote 23.

<sup>157</sup> *Ibid.*, para. 14. The Chamber however observes that the Prosecutor, while referring to the “particular location” and “specific time” of the alleged criminal acts, fails to indicate how narrow, in her view, these parameters must be construed in order for a certain fact to qualify as an “incident”.

<sup>158</sup> The Chamber notes in this regard that term “incident” is not used in the Warrant of Arrest and appear in the Article 58 Decision only at paras 36(ii), 58 and 87, being used, in those three instances without any legal connotation.

<sup>159</sup> Prosecutor’s Response, para. 78 and footnotes 175 and 176.

<sup>160</sup> *Ibid.*, paras 25 and 78.

<sup>161</sup> Libya’s Reply, para. 23.

<sup>162</sup> *Ibid.*, para. 28.

*the accused's alleged conduct that matters*" for the identification of the parameters of the case before the Court.<sup>163</sup>

74. The Chamber recalls that the existing jurisprudence of the Court requires that the determination under article 17(1)(a) of the Statute be conducted with reference to the specific case before the Court, namely to the person's alleged criminal responsibility for the conduct that is the subject of the criminal proceedings against him or her before the Court.<sup>164</sup> In this sense, the identification of the conduct that is alleged in the proceedings before the Court cannot be done in the abstract, but is necessarily dependent on the factual parameters of each individual case and requires a case-by-case analysis.<sup>165</sup>

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<sup>163</sup> *Ibid.* (emphasis in the original).

<sup>164</sup> See para. 66(i) above. See also *Gaddafi* Admissibility Decision, paras 74 and 76.

<sup>165</sup> See *Gaddafi* Admissibility Decision, para. 77. On this point, see also, e.g., ICTR, *The Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, Appeals Chamber Judgement, 7 July 2006, para. 23 ("[t]he Prosecution's characterization of the alleged criminal conduct and the proximity of the accused to the underlying crime are decisive factors in determining the degree of specificity with which the Prosecution must plead the material facts of its case in the indictment in order to provide the accused with adequate notice. For example, where the Prosecution alleges that an accused personally committed the criminal acts in question, it must plead the identity of the victim, the place and approximate date of the alleged criminal acts, and the means by which they were committed 'with the greatest precision'. However, less detail may be acceptable if the 'sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes'."), with reference to the relevant jurisprudence of the ICTY (*The Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Appeals Chamber Judgement, 23 October 2001; *The Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Chamber Judgement, 29 July 2004; and *The Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Appeals Chamber Judgement, 25 February 2005). See also ICTR, *The Prosecutor v. Ntakirutimana*, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, Appeals Chamber Judgement, 13 December 2004, paras 73-74 ("[i]n many of the cases before the two International Tribunals, the number of individual victims is so high that identifying all of them and pleading their identities is effectively impossible. The inability to identify victims is reconcilable with the right of the accused to know the material facts of the charges against him because, in such circumstances, the accused's ability to prepare an effective defence to the charges does not depend on knowing the identity of every single alleged victim. The Appeals Chamber recalls that the situation is different, however, when the Prosecution seeks to prove that the accused personally killed or harmed a particular individual. [...] [T]he Prosecution cannot simultaneously argue that the accused killed a named individual yet claim that the 'sheer scale' of the crime made it impossible to identify that individual in the indictment. Quite the contrary: the Prosecution's obligation to provide particulars in the indictment is at its highest when it seeks to prove that the accused killed or harmed a specific individual [...]

75. A rapid perusal of the cases currently before the Court suffices to show that they differ significantly in the description of the factual parameters of the conduct alleged in the proceedings against each individual suspect or accused, and demonstrates that the different cases cannot be considered to be necessarily equal in terms of how broad or narrow the alleged conduct is construed. What is in all cases required at every phase of the proceedings before the Court is that the alleged criminal conduct be sufficiently described with reference to precise temporal, geographic and material parameters, but not that such conduct be invariably composed of one or more “incidents” of a pre-determined breadth.<sup>166</sup> Indeed, whether *in concreto* any discrete “incident” or “event”, purportedly having narrower factual parameters, is identified because it overlaps fully with the alleged conduct<sup>167</sup> or instead because it is of assistance to prove the alleged conduct to the requisite threshold without

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There may well be situations in which the specific location of criminal activities cannot be listed, such as where the accused is charged as having effective control over several armed groups that committed crimes in numerous locations. In cases concerning physical acts of violence perpetrated by the accused personally, however, location can be very important. [...] When the Prosecution seeks to prove that the accused committed an act at a specified location, it cannot simultaneously claim that it is impracticable to specify that location in advance”).

<sup>166</sup> As observed in the *Gaddafi* Admissibility Decision, some Pre-Trial Chambers have indicated that a case includes “specific incidents” during which crimes within the jurisdiction of the Court appear to have been committed, but “what would be encompassed by the notion of ‘incident’” has not been clarified in the jurisprudence of the Court (*Gaddafi* Admissibility Decision, para. 75).

<sup>167</sup> See for example the events in Bogoro on 24 February 2003 during which the crimes alleged against Germain Katanga and Mathieu Ngudjolo Chui have allegedly been committed (Pre-Trial Chamber I, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Decision on the confirmation of charges”, 26 September 2008, ICC-01/04-01/07-717; and ICC-01/04-01/07-1588). It appears from her submission that the Prosecutor would characterise these events as an “incident”. The same consideration would appear applicable also to the case against Abdallah Banda and Saleh Jerbo, who are charged with crimes committed during the alleged attack against the base of the African Union Mission in Sudan at Haskanita on 29 August 2007 (see ICC-02/05-03/09-79-Red, para. 162; and Pre-Trial Chamber I, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, “Decision on the Confirmation of Charges”, 7 March 2011, ICC-02/05-03/09-121-Corr-Red).

however exhausting it,<sup>168</sup> will necessarily depend on the specificities of each case.

76. As observed above, in the instant case, the Article 58 Decision indeed contains a list of particular “incidents” or “events” that fall within the relevant factual parameters of the criminal conduct alleged against Mr Al-Senussi before the Court.<sup>169</sup> However, like in the case against Mr Gaddafi,<sup>170</sup> these “incidents” or “events” do not represent unique manifestations of Mr Al-Senussi’s alleged criminal conduct, but rather are illustrative and non-exhaustive samples of discrete criminal acts that substantiate the

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<sup>168</sup> For example, the Chamber observes that Thomas Lubanga Dyilo has been found guilty of the crimes of conscripting and enlisting children under the age of fifteen years into the [Forces Patriotiques pour la Libération du Congo] and using them to participate actively in hostilities from early September 2002 to 13 August 2003, that were, *inter alia*, demonstrated by the evidence provided by several witnesses in relation to certain identified incidents (*see* Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, “Judgment pursuant to Article 74 of the Statute”, 14 March 2012, ICC-01/04-01/06-2842, at, *e.g.*, paras 911 to 916). Indeed, the document containing the charges brought against Mr Lubanga refers to crimes allegedly committed over a one-year period (between 1 September 2002 and 13 August 2013) and in an extended geographic area (the district of Ituri in the Democratic Republic of Congo), while rehearsing the stories of nine child soldiers as “representative [experiences] of those other children enlisted, conscripted and used by the FPLC” (ICC-01/04-01/06-1573-Anx1, para. 101). Another example is provided by the case against Omar Hassan Ahmad Al Bashir. The first warrant against him has been issued for his alleged criminal responsibility for war crimes and crimes against humanity committed “from soon after the April 2003 attack on El Fasher airport until 14 July 2008” throughout the Darfur region, “including *inter alia*” on certain dates at a number of locations (Pre-Trial Chamber I, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, “Warrant of Arrest for Omar Hassan Ahmad Al Bashir”, 4 March 2009, ICC-02/05-01/09-1; *see also id.*, “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, 4 March 2009, ICC-02/05-01/09-3, paras 78 and 109). For the purposes of the second warrant of arrest, the Chamber found that the material elements of the crimes of genocide by killing and genocide by causing serious bodily or mental harm were established to the “reasonable grounds to believe” standard relying on its previous findings that thousands of civilians belonging primarily to the Fur, Masalit and Zaghawa groups were subject, throughout the Darfur region, to acts of murder and rape by forces of the Government of Sudan (GoS) and hundreds of them to acts of forcible transfer “between the start of the GoS counter-insurgency campaign soon after the April 2003 attack on El Fasher airport and 14 July 2008” (Pre-Trial Chamber I, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, “Second Decision on the Prosecution’s Application for a Warrant of Arrest”, 12 July 2010, ICC-02/05-01/09-94, paras 22-23 and 29-30; *see also id.*, “Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir”, 12 July 2010, ICC-02/05-01/09-95 pp. 6-7).

<sup>169</sup> Article 58 Decision, paras 36 to 64.

<sup>170</sup> *Gaddafi* Admissibility Decision, paras 81-82.

evidentiary threshold of “reasonable grounds to believe” that Mr Al-Senussi is criminally responsible for the direct and indirect commission of the crimes of murder and persecution perpetrated against civilian demonstrators and political dissidents to the Gaddafi regime in Benghazi from 15 until at least 20 February 2011.<sup>171</sup> Moreover, the Warrant of Arrest does not retain any of the “incidents” or “events” referred to in the Article 58 Decision, but focuses exclusively on the conduct alleged against Mr Al-Senussi for which his arrest has been sought.<sup>172</sup>

77. The Chamber considers that Mr Al-Senussi’s alleged criminal conduct as described in the Warrant of Arrest has confined temporal,<sup>173</sup> geographic<sup>174</sup> and material<sup>175</sup> parameters which are sufficiently precise to meet the requirements of article 58(3)(c) of the Statute, according to which a warrant of arrest shall contain a “concise statement of the facts which are alleged to constitute those crimes [for which the person’s arrest is sought]”. Contrary to the Prosecutor’s argument,<sup>176</sup> no reference to the “incidents” that are mentioned in the Article 58 Decision is therefore necessary in order to define, and purportedly narrow down,<sup>177</sup> Mr Al-Senussi’s conduct as alleged in the proceedings before the Court.

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<sup>171</sup> See Article 58 Decision, paras 41, 65 and 90.

<sup>172</sup> Warrant of Arrest, pp. 4 to 6.

<sup>173</sup> Crimes allegedly committed during the repression of the demonstrations in Benghazi that took place from 15 February 2011 until at least 20 February 2011.

<sup>174</sup> Crimes allegedly committed in Benghazi, Libya.

<sup>175</sup> Killings and inhuman acts depriving the civilian population of its fundamental rights on political grounds, allegedly committed by Mr Al-Senussi, directly or through the Security Forces, against real or perceived political dissidents to the Gaddafi regime as part of a State policy to repress, by any means, the revolution against the Gaddafi.

<sup>176</sup> Prosecutor’s Additional Observations, para. 14.

<sup>177</sup> The Chamber also observes that the “list of incidents”, together with a number of identified acts of murder and persecution falling within the parameters of the alleged conduct, further includes entries that cannot be understood as providing any relevant detail with narrower scope than the conduct for which the Warrant of Arrest has been issued. For example, this list includes statements like “on [17 February 2011] in Benghazi, a number of demonstrators were

78. In this regard, the Chamber finally notes that it was the Prosecutor's own "concise statement of the facts" in the application for a warrant of arrest pursuant to article 58 of the Statute to indicate that the allegations against Mr Al-Senussi (as well as against Muammar and Saif Al-Islam Gaddafi) were not to be understood as limited to an exhaustive list of illustrative "incidents".<sup>178</sup> The warrant of arrest was consequently requested by the Prosecutor for the crimes of murder and persecution committed "through the Libyan State apparatus and Security Forces" "across Libya" and "[f]rom 15 February 2011 onwards".<sup>179</sup> It was the Chamber, in the Warrant of Arrest, to

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killed by Security Forces" (para. 36(iii)) and "on 20 February 2011, it is reported that at least 60 demonstrators were killed by the Security Forces" (para. 36(vi)).

<sup>178</sup> See ICC-01/11-4-Red, paras 4 to 35, in which the Prosecutor refers to a number of events as "examples" of criminal acts against the civilian demonstrators and political dissidents, which were "replicated" on several unspecified occasions throughout the relevant time (e.g. paras 12, 14, 15, 17 and 20) and to a "systematic campaign of arrests and detentions of alleged dissidents [as of 15 February 2011 up until 16 May 2011]" (para. 24). More detailed information about the unfolding of the events in Benghazi was provided in the section entitled "Summary of the evidence and other information establishing reasonable grounds to believe that [the suspects] committed crimes within the jurisdiction of the Court" (paras 92 to 107 and 130 to 135 of the confidential *ex parte* version of the application). In the application, the Prosecutor also states that "the Prosecution has selected a few incidents that are representative of [the suspects'] crimes" (para. 62) and that "[t]he total number of incidents and ensuing casualties remain undetermined due to the widespread cover-up carried out by the Security Forces for the purpose of hiding the evidence of past crimes" (para. 28). The Prosecutor's conclusion, for which warrants of arrest were ultimately requested, reads as follows: "[i]n sum, the evidence demonstrates that GADDAFI conceived a plan to quell the popular demonstrations of February 2011 by all means, including through the use of extreme and lethal violence. Pursuant to this plan, the Security Forces carried out a widespread and systematic policy of attacks against civilians perceived as dissidents with the purpose of maintaining GADDAFI's power. SAIF AL-ISLAM and AL-SENUSSI played key roles in the implementation of the plan. As a result, GADDAFI, SAIF AL-ISLAM and AL-SENUSSI are criminally responsible for the killings, arrests, detentions, disappearances and acts of ill-treatment against unarmed demonstrators and alleged dissidents committed by the Libyan Security Forces as of 15 February [2011]" (para. 35).

<sup>179</sup> See the "counts" describing the crimes that Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi were alleged by the Prosecutor of having committed, and for which the issuance of warrants of arrest was requested (ICC-01/11-4-Red, p. 16), namely: under "Count 1" (murder), "[f]rom 15 February 2011 onwards, GADDAFI, as indirect perpetrator, and SAIF AL-ISLAM and AL-SENUSSI, as indirect co-perpetrators, committed crimes against humanity in the form of murder across Libya in, inter alia, Tripoli, Benghazi, and Misrata, through the Libyan State apparatus and Security Forces in violation of Articles 7(1)(a) and 25(3)(a) of the Rome Statute"; and under "Count 2" (persecution), "[f]rom 15 February 2011 onwards, GADDAFI, as indirect perpetrator, and SAIF AL-ISLAM and AL-SENUSSI, as indirect co-

narrow the broad parameters as they had been defined by the Prosecutor, and to identify the more precise scope of Mr Al-Senussi's conduct in the terms summarised above.

79. In conclusion, since, as in the case against Mr Gaddafi,<sup>180</sup> the conduct that is alleged in the criminal proceedings against Mr Al-Senussi is not shaped by the "incidents" mentioned in the Article 58 Decision, it is not required that domestic proceedings concern each of those "events" at the national level in order for the Chamber to be satisfied that Libya is investigating or prosecuting Mr Al-Senussi for substantially the same conduct that is alleged in the proceedings before this Court. However, the Chamber is of the view that the fact that all or some of the "incidents" or "events" referred to in the Article 58 Decision are encompassed in the national proceedings may still constitute a relevant indicator that the case subject to said proceedings is indeed the same as the one before the Court. In the same vein, the fact that "incidents" which are described in the Article 58 Decision as particularly violent or which appear to be significantly representative of the conduct attributed to Mr Al-Senussi, are not covered by the national proceedings may be taken into account in the Chamber's ultimate determination of whether those proceedings cover the same conduct alleged against Mr Al-Senussi in the proceedings before the Court.<sup>181</sup>

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perpetrators, committed crimes against humanity in the form of persecution across Libya in, inter alia, Tripoli, Benghazi, Misrata and other Libyan localities through the Libyan State apparatus and Security Forces in violation of Articles 7(1)(h) and 25(3)(a) of the Rome Statute".

<sup>180</sup> *Gaddafi* Admissibility Decision, para. 83.

<sup>181</sup> At this juncture, the Chamber recalls that the "incidents" or "events" appearing throughout the Article 58 Decision include, *inter alia*, the following events occurred in Benghazi between 15 and 20 February 2011 as part of the repression of the civilian demonstrations against Gaddafi regime: (i) the arrest, on 15 February 2011, by the Security Forces of a lawyer who was organising a protest against Gaddafi regime scheduled for 17 of February 2011 (para. 43); (ii) the arrest of several authors, writers and alleged dissidents (including that of the Libyan author Idriss Al-Mismari) between 15 and 17 February 2011 (paras 43 and 44); (iii) the attack by the Security Forces on demonstrators with tear gas and live ammunition, following the

### 3. The case against Mr Al-Senussi in Libya's national proceedings

80. The Chamber will hereunder identify, on the basis of the evidence submitted by Libya, the scope of the case against Mr Al-Senussi on which the Libyan judicial authorities have been allegedly taking concrete and progressive identifiable investigative steps.

#### *a. Assessment of the evidence submitted by Libya*

81. For the sake of clarity, the Chamber makes hereunder a separate analysis of each discrete item of evidence placed before it by Libya. However, except for those specific pieces of evidence explicitly deemed irrelevant or lacking any probative value, the Chamber will make its determination on the basis of the entirety of the evidence presented, considered as a whole. The conclusion of this section will indicate the particular pieces of evidence which the Chamber relies upon in support of each of its findings.<sup>182</sup>

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gathering of an increasing number of demonstrators in the area of Birka, in Al Fatah street and Jamal Abdun Naser street on 16 February 2011, causing the death of at least three civilian demonstrators (para. 36(i)); (iv) the attack, on the same day, by forces loyal to Muammar Gaddafi on civilian demonstrators who were hit with sticks and dispersed (para. 52); (v) the event of 17 February 2011 at the Juliyana Bridge, when Security Forces, armed with machineguns, barricaded the street to stop the demonstrators, opened fire for a significant period of time on the unarmed demonstrators, causing a large number of injuries and deaths among the demonstrators, and arrested those demonstrators that were not shot and were not able to flee (para. 36(ii) and 53); (vi) the attack, on the same day, carried out by the Security Forces who fired with live ammunition on unarmed demonstrators, who had gathered near the High Court in the centre of Benghazi to protest against the arrest of the individual who had been organising the forthcoming protest against Gaddafi regime (para. 50); (vii) the killing and seriously injuring, still on 17 February 2011, by the Security Forces of a number of other demonstrators in different areas of the town (paras 36(iii) and 52) and the attacks by the Security Forces continuing throughout the night (para. 53); (viii) the killing and seriously injuring by the Security Forces on 18 February 2011 of a number of civilians while participating in the funeral procession for the demonstrators killed the day before (paras 36(iv) and 54); and (ix) the killing by the Security Forces of at least 60 demonstrators on 20 February 2011 (para. 36(vi)). The Article 58 Decision further states that “[a]ccording to several reports, once taken into custody, protesters were subjected to torture” (para. 46) and that “[a]bductions and subsequent torture of family members of alleged dissidents have also been reported” (para. 47).

<sup>182</sup> *Infra*, para. 162.

82. The materials relied upon by Libya in support of the Admissibility Challenge fall into three main categories, which the Chamber will analyse in turn: (i) documents prepared by the Libyan authorities for the specific purpose of substantiating the Admissibility Challenge in the proceedings before the Court; (ii) items of evidence collected by the Libyan judicial authorities as part of their domestic investigations; and (iii) other materials not falling within the scope of the previous two categories. The arguments made by the Defence of Mr Al-Senussi and the OPCV in relation to discrete categories of evidence or individual items of evidence are addressed, when pertinent, at the relevant juncture of the below analysis.

*(i) Documents prepared by the Libyan authorities specifically for proceedings before the Court*

83. In relation to the documents prepared by the Libyan authorities in order to substantiate Libya's assertions in the admissibility proceedings before the Court, the Chamber notes the Appeals Chamber's holding to the effect that the State "must [demonstrate] that it is indeed investigating the case. It is not sufficient merely to assert that investigations are ongoing".<sup>183</sup> However, the fact that these documents were prepared by Libya specifically for the purposes of the proceedings before the Court does not entail that they be disregarded in the present analysis, as they may still provide valuable indications of certain investigative activities on the part of the competent Libyan authorities in relation to Mr Al-Senussi's alleged criminal conduct.

84. As part of the challenge to the admissibility of the case against Mr Gaddafi, Libya provided a document containing short summaries of some

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<sup>183</sup> Appeals Chamber, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, "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'", 30 August 2011, ICC-01/09-02/11-274, paras 2 and 61.

of the witness statements which at that time had been collected by the competent authorities.<sup>184</sup> This document is not part of the domestic record of the case, but was prepared by the Prosecutor-General specifically in order that it could be provided to the Chamber in the context of the admissibility proceedings.<sup>185</sup> Libya submits that the summaries contained in the Prosecutor-General's report "were prepared in good faith by the Deputy Prosecutor and Vice Prosecutor in office at the relevant time, both of whom are officers of the Libyan Courts with all of the associated professional conduct rules and regulations", and "[t]herefore, they may properly be treated, without any further enquiry or attempt to match them to witness statements, as evidence which is highly relevant to the 'same case' issue".<sup>186</sup>

85. In the *Gaddafi* Admissibility Decision, the Chamber considered that these summaries "provide some detail of the alleged evidence given by the witnesses and hence they have some inferential value about the existence and content of the evidence".<sup>187</sup> In this sense, the Chamber concluded that the summaries contained in the Libyan Prosecutor-General's report "do have some probative value" and "are not to be equated to plain assertions from the Libyan prosecuting authorities that the witness statements 'exist'".<sup>188</sup> The Chamber considers that the same conclusion is equally applicable in the context of the present admissibility proceedings.

86. These summaries are presented in respect of three categories of witnesses, namely: (i) close friends of Mr Gaddafi;<sup>189</sup> (ii) high ranking military

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<sup>184</sup> Annex C to *Gaddafi* Admissibility Challenge.

<sup>185</sup> Pre-Trial Chamber I, Transcript of the hearing of 10 October 2012, ICC-01/11-01/11-T-3-CONF-ENG, p. 53, lines 16 to 20.

<sup>186</sup> Libya's Reply, para. 92.

<sup>187</sup> *Gaddafi* Admissibility Decision, para. 121.

<sup>188</sup> *Ibid.*

<sup>189</sup> Annex C to *Gaddafi* Admissibility Challenge, pp. 1-2.

commanders forming the High Security Committee;<sup>190</sup> and (iii) “civilians who accompanied [Mr Gaddafi] (volunteers) and [...] family members of the victims”.<sup>191</sup> The summaries indicate, in general terms, that information was given to the Libyan judicial authorities by a number of witnesses about, *inter alia*, the role played, most notably, by Mr Gaddafi in the mobilisation, recruitment and arming of mercenaries and supporters for the repression of the civilian demonstrations against the Gaddafi regime. Mr Al-Senussi is explicitly mentioned in the summary of one witness statement as having been involved, throughout the crisis, in meetings with Mr Gaddafi and commanders of the High Security Committee.<sup>192</sup>

87. In the view of the Chamber, the information contained in these summaries does reflect discrete aspects of the domestic case which are relevant to the factual allegations against Mr Al-Senussi in the proceedings before the Court. However, as held by the Chamber in the *Gaddafi* Admissibility Decision, the scant level of detail and the lack of specificity of the summaries do not permit the Chamber to draw conclusions as to the scope of the domestic investigation.<sup>193</sup> In other words, the fragmented and decontextualized short summaries of isolated information that was given to the Libyan authorities by a number of witnesses do not indicate the existence of concrete and identifiable investigative steps on the part of Libya, and do not provide an intelligible overview of the factual allegations investigated by the competent authorities. In this sense, the item of evidence under consideration is of little assistance to the Chamber’s determination of the scope and subject-matter of the alleged national proceedings against Mr Al-Senussi.

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<sup>190</sup> *Ibid.*, pp. 3-4.

<sup>191</sup> *Ibid.*, pp. 4 to 6.

<sup>192</sup> *Ibid.*, p. 3.

<sup>193</sup> See also *Gaddafi* Admissibility Decision, para. 123.

88. Libya also provides the Chamber with a document that was prepared by the Public Prosecutor's Office "in response to the content of the report submitted by the [R]egistrar of the International Criminal Court [in March 2012]".<sup>194</sup> This document provides a short summary of the testimony given by a witness, who had previously given a statement to the Prosecutor of this Court, about an event occurring in Benghazi "during the Revolution of 17 February 2011" and Mr Al-Senussi's involvement therein.<sup>195</sup> It is further stated that investigation into these facts fall within the jurisdiction of the military prosecution. The Chamber considers that this scarce information provided by Libya to the Court about the existence of the testimony of a witness allegedly collected before May 2012 is of no actual significance for the identification of the factual scope of Libya's proceedings in relation to Mr Al-Senussi.

89. The same document also indicates that the "Public Prosecution", together with [REDACTED], have conducted investigations into an alleged offence of [REDACTED] committed by Mr Al-Senussi.<sup>196</sup> It is in particular reported that it was discovered that Mr Al-Senussi [REDACTED] [REDACTED] [REDACTED].<sup>197</sup> It is clear from this document that the relevant facts have been investigated exclusively as possible violations of Libya's financial law.<sup>198</sup> Therefore, in the absence of any explanation as to the relevance of these alleged investigative steps for the purposes of the Admissibility Challenge, the Chamber considers that this part of the document is of no relevance to the determination of whether Libya is

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<sup>194</sup> Annex E to *Gaddafi* Admissibility Challenge.

<sup>195</sup> *Ibid.*, p. 4.

<sup>196</sup> *Ibid.*, pp. 5-6.

<sup>197</sup> *Ibid.*, p. 5.

<sup>198</sup> *Ibid.*, p. 6.

undertaking proceedings against Mr Al-Senussi for the same conduct as alleged in the proceedings before the Court.

90. The Chamber also has before it a letter prepared by the Deputy Prosecutor of the Office of the Attorney General<sup>199</sup> specifically for the proceedings before the Court. In this letter it is asserted that the Libyan investigators have “listened to more than 30 witnesses in addition to the telephone and video recordings, and some documents [...] which all showed that Saif Al-Islam Gaddafi had committed crimes related to killing/murder [and] persecution which are clear in Libyan law in different clauses under the penal code [...] and the gathering of evidence is still ongoing”.<sup>200</sup> The letter also lists the relevant provisions of the Libyan Criminal Code. The Chamber acknowledges that the alleged investigation into the case against Mr Gaddafi may significantly overlap with the case in relation to Mr Al-Senussi. However, the document in question provides no relevant and substantiated information about the contours of the criminal conduct being considered by the Libyan judicial authorities.

91. Other two letters addressed to Ahmed El-Gehani, Libyan focal point for matters related to the Court, were also submitted to the Chamber in the proceedings related to the admissibility of the case against Mr Gaddafi. The first letter,<sup>201</sup> dated 15 January 2013, was prepared by the Prosecutor-General and states that the investigation against Mr Gaddafi, which was ongoing at the time, resulted in the collection of a large amount of evidence, including telephone intercepts in relation to both Mr Gaddafi and Mr Al-Senussi.<sup>202</sup>

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<sup>199</sup> Annex I to *Gaddafi* Admissibility Challenge.

<sup>200</sup> *Ibid.*, p. 2 (emphasis omitted).

<sup>201</sup> Annex 2 to Libya’s Submissions of 23 January 2013.

<sup>202</sup> *Ibid.*, p. 2.

92. The second letter,<sup>203</sup> dated 21 January 2013, was prepared by the Ministry of Justice “at the request of Professor Ahmed El-Gehani for the purpose [of] the admissibility proceedings in the case of Saif Al-Islam Gaddafi before the International Criminal Court”.<sup>204</sup> Under the heading “Contours of the case”, the Ministry of Justice asserts that the Prosecutor-General’s office has “taken into consideration the incidents of murder and persecution outlined in paragraphs 36 – 65 of the [Article 58 Decision]” and “confirms that these factual incidents are included within the scope of the criminal investigation against Saif Al-Islam Gaddafi”.<sup>205</sup> It is also stated in this letter that Mr Al-Senussi gave a statement to the Prosecutor-General’s team in relation to the case against Mr Gaddafi.<sup>206</sup>

93. The Chamber is of the view that these two letters contain no substantiated information as to the factual allegations forming the basis of Libya’s proceedings against Mr Al-Senussi. Therefore, they are of no assistance to the Chamber’s determination.

94. As part of the Admissibility Challenge, Libya submits a number of letters, all dated 11 or 12 February 2013, from the Prosecutor-General addressed to Mr El-Gehani.<sup>207</sup>

95. The first of these letters<sup>208</sup> is the accompanying letter to the provision of a number of samples of witness statements reportedly taken by national investigators as part of the investigation in relation of Mr Al-Senussi. The Prosecutor-General states in this letter that “100 persons [were] interrogated by the Public Prosecution as of 9/4/2012 to 9/2/2013” and that the evidentiary

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<sup>203</sup> Annex 3 to Libya’s Submissions of 23 January 2013.

<sup>204</sup> *Ibid.*, p. 3.

<sup>205</sup> *Ibid.*

<sup>206</sup> *Ibid.*

<sup>207</sup> Annexes 2, 3, 4, 5 and 6 to the Admissibility Challenge.

<sup>208</sup> Annex 2 to the Admissibility Challenge.

material “exceeded two thousand papers of investigation in addition to the attachments”.<sup>209</sup> The Prosecutor-General further confirms that statements were taken by the civilian prosecution authorities and that “[t]he confrontation of the accused Abdullah Sanussi with the results of the testimonies of witnesses, and the document process has been conducted in writing”.<sup>210</sup> This document, while asserting that there is no situation of inactivity in relation to the domestic case against Mr Al-Senussi, provides no information on the factual scope and subject-matter of the alleged domestic proceedings.

96. In a second letter to Mr El-Gehani,<sup>211</sup> the Prosecutor-General states that, as of 11 February 2013, the investigation in relation to Mr Al-Senussi was ongoing and that the latest investigative activity at the time was conducted two days earlier when a named individual had been heard as a witness. It is also stated in the letter that Mr Al-Senussi “has been interrogated several times after extradition by the Mauritanian authorities” and the first interrogation was conducted on 17 September 2012.<sup>212</sup> Finally, the letter clarifies that the crimes alleged against Mr Al-Senussi during the investigation include “random killing, and foment sedition and disparity among citizens of the country, and freedom restriction, which is an abuse to his job authorities, and drug trafficking, and composition of armed gangs, and incitement to rape, and serious damage to public money”.<sup>213</sup>

97. The Chamber observes that this list of crimes with which Mr Al-Senussi may be charged provides some information about the general contours of Libya’s proceedings against him. However, no information is given in the

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<sup>209</sup> *Ibid.*, p. 2.

<sup>210</sup> *Ibid.*

<sup>211</sup> Annex 3 to the Admissibility Challenge.

<sup>212</sup> *Ibid.*, p. 2.

<sup>213</sup> *Ibid.*

letter about the factual scope of said proceedings, in particular in terms of time, location and nature of the conduct that they allegedly cover.

98. In another letter to Mr El-Gehani,<sup>214</sup> the Prosecutor-General asserts that the material collected during the investigations in relation to Mr Al-Senussi includes “the transcription of audio and visual tapes in which [he] was involved”.<sup>215</sup> This letter is not limited to a mere assurance that the concerned evidence exists, since it also includes “a photocopy of the transcription made to the speech of [Mr Al-Senussi] to a group of his followers at Benghazi city in the first days of demonstrations”.<sup>216</sup> It appears from the transcription of the video recording of the concerned speech – the accuracy of which the Chamber has no reason to doubt – that Mr Al-Senussi called for his followers “to be ready to destroy these filthy groups altogether”.<sup>217</sup> The Chamber considers the enclosed item of evidence relevant to the identification of the factual scope and subject-matter of Libya’s proceedings against Mr Al-Senussi.

99. Libya further relies on a letter<sup>218</sup> in which the Prosecutor-General provides Mr El-Gehani with the names of the members of the investigation team. This document contains no information about the scope of the national investigation in respect of Mr Al-Senussi and its relevance is limited to the information that the team assigned to such investigation is composed of three members of the Prosecutor-General’s office. In another letter,<sup>219</sup> the Prosecutor-General explains that the rationale for the case being handled by the civilian, as opposed to the military, prosecutor is that “the incidents subject of investigation in the [...] case constitutes a criminal scheme involving military and civilian individuals” and Libyan law stipulates that “the public

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<sup>214</sup> Annex 4 to the Admissibility Challenge.

<sup>215</sup> *Ibid.*, p. 2.

<sup>216</sup> *Ibid.*

<sup>217</sup> *Ibid.*, p. 3.

<sup>218</sup> Annex 5 to the Admissibility Challenge.

<sup>219</sup> Annex 6 to the Admissibility Challenge.

prosecution is the entity competent to investigate the case in which a military person is involved with civilians".<sup>220</sup> The President of the Supreme Court of Libya and Chairman of the Supreme Council of Judiciary confirms that the ordinary prosecution authorities are responsible for the investigation into Mr Al-Senussi's case by virtue of article 157 of the Libyan Criminal Procedural Act and article 45 of the Military Procedures Act.<sup>221</sup>

100. According to Libya, the fact that the case is subject to civilian jurisdiction "provides important evidence about the conduct being investigated in respect of Mr. Al-Senussi in that for the case to be subject to civilian jurisdiction it has to relate to crimes committed by members of the military against the civilian population".<sup>222</sup> Libya indeed submits that "[i]f the case had been confined to crimes committed by the military against other members of the military, jurisdiction would have vested in the military prosecutor's office".<sup>223</sup> From the material submitted, the Chamber has not been able to clarify if the case of Mr Al-Senussi falls under the jurisdiction of the civilian prosecution authorities because it relates to crimes allegedly committed by him *together with* civilians or *against* civilians. The explanation that, according to Libyan law, civilian jurisdiction is triggered when "a military person is *involved* with civilians", as appearing in the English translation of the Prosecutor-General's letter at annex 6 to the Admissibility Challenge, does not assist in this regard. In any case the Chamber considers that this fact has limited value for the identification of the factual scope of Libya's proceedings against Mr Al-Senussi.

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<sup>220</sup> *Ibid.*, p. 2.

<sup>221</sup> Annex 28 to the Admissibility Challenge, p. 2.

<sup>222</sup> Libya's Reply, para. 90.

<sup>223</sup> *Ibid.*

(ii) *Evidence collected as part of Libya's domestic investigation*

101. In support of its Admissibility Challenge, Libya further relies on evidence pertaining to the substance of the national case purportedly collected as part of the investigation into Mr Al-Senussi's alleged criminal responsibility.

102. At the outset, the Chamber notes the Defence complaint that it has only received the redacted version of certain evidential materials submitted by Libya "which allegedly form the basis of the national investigation".<sup>224</sup> On this ground, the Defence requests the Chamber "not to make any findings adverse to the Defence on the basis of redacted materials without providing the Defence with the opportunity to make submissions on such materials in de-redacted form (in whole or in part)".<sup>225</sup> On the point raised by the Defence, Libya submits that it "took care to only redact identifying features of witnesses in the interests of witness protection" and, therefore "[t]he redactions to evidential materials are [...] very limited in nature".<sup>226</sup>

103. The Chamber observes that the non-disclosure of discrete information contained in certain materials provided within the context of the admissibility proceedings in relation to Mr Gaddafi has been authorised by the Chamber, to the extent that only the names or other identifying information of the witnesses in the domestic proceedings be redacted *vis-à-vis* the parties and participants in the admissibility proceedings before the Court.<sup>227</sup> The Chamber also decided to provide access to this material to the Defence of Mr Al-Senussi in redacted form.<sup>228</sup>

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<sup>224</sup> Defence Observations, para. 41.

<sup>225</sup> *Ibid.*

<sup>226</sup> Libya's Reply, footnote 115.

<sup>227</sup> Pre-Trial Chamber I, "Decision on the 'Libyan Government's proposed redactions to ICC-01/11-01/11-258-Conf-Exp and Annexes 4, 5, 6, 7, 15, 16 and 17'", 7 February 2013, ICC-01/11-01/11-271-Red, p. 9.

<sup>228</sup> *Ibid.*, para. 18.

104. Following the same rationale underlying the Chamber's previous decision, Libya subsequently redacted from the evidence submitted as part of the Admissibility Challenge the names and other identifying information of the witnesses appearing in their statements and those of the victims contained in their medical certificates.<sup>229</sup> Upon receipt of the Admissibility Challenge, the Chamber considered, under regulation 23 *bis* of the Regulations, whether Libya had given a sufficient "factual and legal basis" for the provision of certain material on an *ex parte* basis, simultaneously filing a redacted version, and, in its decision under rule 58 of the Rules on the conduct of the present admissibility proceedings, explicitly referred to the existence of different versions of the Admissibility Challenge and the explanations provided by Libya.<sup>230</sup> Since the classification chosen by Libya appeared then (and still appears) warranted, the Chamber has not ordered the reclassification of the concerned material prior to the establishment of the time limit for the observations of parties and participants in relation to the Admissibility Challenge.<sup>231</sup> Inherent to this consideration is the recognised proportionality of the non-disclosure of the concerned information, in the sense that its redaction does not affect the comprehension of the material at issue and, therefore, the ability of the parties and participants to provide meaningful observations on the Admissibility Challenge.<sup>232</sup>

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<sup>229</sup> Admissibility Challenge, para. 127, with the reference to the Chamber's decision number ICC-01/11-01/11-271-Red of 7 February 2013. The Annexes attached to the Admissibility Challenge that have been provided in a redacted form to the Defence of Mr Al-Senussi and the OPCV are Annexes 3, 4, 8 to 18 and 20 to 27.

<sup>230</sup> Pre-Trial Chamber I, "Decision on the conduct of the proceedings following the 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute'", 26 April 2013, ICC-01/11-01/11-325, para. 3.

<sup>231</sup> *Ibid.*

<sup>232</sup> See also Pre-Trial Chamber I, "Decision on the 'Libyan Government's proposed redactions to ICC-01/11-01/11-258-Conf-Exp and Annexes 4, 5, 6, 7, 15, 16 and 17'", 7 February 2013, ICC-01/11-01/11-271-Red, para. 12.

105. In these circumstances, the Chamber is not persuaded by the Defence request “not to make any finding adverse to the Defence on the basis of redacted materials [altogether]”.<sup>233</sup> The effect of the redactions applied is indeed limited to the individual non-disclosed information and does not extend to the entire document containing any discrete redacted information.<sup>234</sup> For the purposes of the present decision, the Chamber has exclusively considered the items of evidence relied upon by Libya in the version that was made available to the Defence of Mr Al-Senussi, the Prosecutor and the OPCV. Any information that was submitted by Libya only on an *ex parte* basis has been disregarded by the Chamber.<sup>235</sup> That said, and given that the Defence has been given the opportunity to provide its observations on the redacted material, no prejudice to the Defence can be discerned.

106. The evidence allegedly collected as part of the domestic investigation against Mr Al-Senussi that is relied upon by Libya in support of its Admissibility Challenge falls into three categories: (i) witness statements; (ii) documentary evidence; and (iii) intercepts. Each will be addressed in turn.

#### Witness statements

107. Libya provides the Chamber with several witness statements allegedly collected as part of its investigation into the case of Mr Al-Senussi. Three of those witness statements were originally submitted as part of the proceedings on the admissibility of the case against Mr Gaddafi.

108. The first of these statements<sup>236</sup> is given by a witness who testifies that, between 15 and 17 February 2011, several civil and military aircrafts arrived at

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<sup>233</sup> Defence Observations, para. 41.

<sup>234</sup> See rules 81(2) and (4) of the Rules for the same *ratio*.

<sup>235</sup> Consequently, all the references to the items of evidence analysed in the present decision are made to their confidential redacted version.

<sup>236</sup> Annex 4 to Libya’s Submissions of 23 January 2013.

the Abraq airport carrying approximately 3,000 armed military personnel affiliated to the army and the people's guards from tribes in the western, south and central parts of Libya.<sup>237</sup> The witness states that most of the military personnel left after [REDACTED]

[REDACTED].<sup>238</sup> According to the witness, revolutionaries attacked the airport thereafter and there were clashes between them and the soldiers who remained in the airport.<sup>239</sup> Subsequently, after the evacuation of the military, the airport was bombed by aircrafts affiliated to the Gaddafi regime.<sup>240</sup>

109. It is not apparent from this statement whether it was taken in relation to an investigation into the role of Mr Al-Senussi, if any, in the events described by the witness. However, as held in the *Gaddafi* Admissibility Decision, this item of evidence may show the taking of investigative steps in relation to "the assembly and the mobilization of military forces at the Abraq Airport".<sup>241</sup> Indeed, the existence and content of the witness statement under consideration appears to indicate that, as part of its investigation, Libya has been collecting evidence on some discrete aspects of certain advance arrangements made at the high level of the State machinery to repress the demonstrations against the Gaddafi regime.

110. The second of the witness statements that were submitted in the context of the admissibility proceedings in the *Gaddafi* case<sup>242</sup> is provided by an individual who testifies that, in August 2011, Mr Gaddafi used to come out of Bab al-Azizia, a military compound in southern Tripoli, promising to distribute Kalashnikovs among the population,<sup>243</sup> and, on one occasion and in

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<sup>237</sup> *Ibid.*, p. 1.

<sup>238</sup> *Ibid.*, p. 2.

<sup>239</sup> *Ibid.*, p. 3.

<sup>240</sup> *Ibid.*

<sup>241</sup> *Gaddafi* Admissibility Decision, para. 134.

<sup>242</sup> Annex 15 to Libya's Submissions of 23 January 2013.

<sup>243</sup> *Ibid.*, p. 4.

front of the witness, ordered his guards to kill some civilians, describing them as “rats”, who had been previously arrested.<sup>244</sup> This piece of evidence appears of limited value for the disposal of the Admissibility Challenge. In particular, it does not assist in discerning the contours of the domestic case against Mr Al-Senussi and appears to refer to events falling outside the temporal and geographic parameters of the case. In this regard, while the promised distribution of weapons on the part of Mr Gaddafi may be of importance (in light of the allegation that Mr Gaddafi elaborated with Mr Al-Senussi the plan to quell by force the civilian demonstrations), the Chamber is of the view that the existence and content of the item of evidence in question do not assist in the determination of the subject-matter of the domestic proceedings against Mr Al-Senussi.

111. The third witness statement originally placed before the Chamber in support of the challenge to the admissibility of the case against Mr Gaddafi,<sup>245</sup> is provided by an insider witness who [REDACTED]. The witness was specifically questioned by the Libyan investigators about the 17 February 2011 outbreak of violence,<sup>246</sup> and, in particular, about the use of armed violence against demonstrators and the role and responsibility of Mr Gaddafi before, during and after the outbreak of violence.<sup>247</sup> Questions of whether the demonstrators taking part in the protests against the Gaddafi regime were armed and whether firearms were used against them by the Security Forces were also asked.<sup>248</sup> The witness also gives information about: (i) the arrest of [REDACTED] upon orders issued by Mr Gaddafi and Mr Al-Senussi;<sup>249</sup> (ii) the arrest of the journalist Idriss

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<sup>244</sup> *Ibid.*, pp. 4-5.

<sup>245</sup> Annex 16 to Libya’s Submissions of 23 January 2013.

<sup>246</sup> *Ibid.*, pp. 2-3.

<sup>247</sup> *Ibid.*, pp. 2-9.

<sup>248</sup> *Ibid.*, pp. 6-7.

<sup>249</sup> *Ibid.*, p. 4.

Al-Mismari ordered by Mr Gaddafi;<sup>250</sup> (iii) Mr Al-Senussi's presence "on the streets" of Benghazi on 17 February 2011;<sup>251</sup> (iv) the unfolding of events in Benghazi on 17 February 2011, both with respect to the civilian demonstrations and the activities of the Security Forces (including those of Mr Al-Senussi) in the repression of those demonstrations;<sup>252</sup> and (v) the shooting at the demonstrators at the Juliyana Bridge and Mr Al-Senussi's direct participation therein.<sup>253</sup>

112. Libya attaches to its Admissibility Challenge a further sixteen statements, six of which were provided by members of the Libyan military or persons associated with the former regime,<sup>254</sup> while the other ten were given by civilian demonstrators and members of their families.<sup>255</sup>

113. The first witness statement attached to the Admissibility Challenge is provided by [REDACTED].<sup>256</sup> Libya places before the Chamber the minutes of the interviews conducted with the witness in [REDACTED] 2012<sup>257</sup> and [REDACTED] 2012.<sup>258</sup>

114. During the first interview, the Libyan investigators requested the witness to provide any information in his possession, *inter alia*, in relation to: (i) the activities of the officials of Gaddafi regime [REDACTED];<sup>259</sup> (ii) the eruption of the demonstrations in Tripoli on 20 February 2013 and the following activities taken that day and

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<sup>250</sup> *Ibid.*, p. 7.

<sup>251</sup> *Ibid.*, p. 6.

<sup>252</sup> *Ibid.*, pp. 5 to 7.

<sup>253</sup> *Ibid.*, pp. 6-7.

<sup>254</sup> Annexes 8, 9, 10, 11, 12 and 15 to the Admissibility Challenge.

<sup>255</sup> Annexes 14, 16, 17, 20, 21, 22, 23 (which contain the declarations of two complainants), 24 and 26 to the Admissibility Challenge.

<sup>256</sup> Annex 8 to the Admissibility Challenge.

<sup>257</sup> *Ibid.*, pp. 2 to 32.

<sup>258</sup> *Ibid.*, pp. 33 to 40.

<sup>259</sup> *Ibid.*, p. 7.

on the following days in order to repress the demonstrations and handle the situation;<sup>260</sup> (iii) the line of command and the level of coordination between these forces in the repression of the demonstration and the instructions given to the different branches of the Security Forces;<sup>261</sup> (iv) the provision of “money, livelihood, vehicles and weapons” to the different bodies of the Security Forces;<sup>262</sup> (v) the specific role of a number of high officials of the Gaddafi regime “during the events of the 17 February Revolution”;<sup>263</sup> (vi) the existence of a policy adopted by Muammar Gaddafi to “[stir] sedition amongst the Libyan tribes” and the use of any such policy during the repression of the revolution;<sup>264</sup> and (vii) a number of alleged operational meetings.<sup>265</sup>

115. The witness also gave evidence concerning: (i) the monitoring and the arrests of potential dissidents to the Gaddafi regime [REDACTED]  
[REDACTED];<sup>266</sup> (ii) the arrest and release of [REDACTED] in Benghazi;<sup>267</sup> (iii) Mr Al-Senussi’s control over the External and Internal Security Services and the Military Intelligence of the Security Forces;<sup>268</sup> (iv) [REDACTED]  
[REDACTED];<sup>269</sup> (v) Mr Al-Senussi’s direct contacts with Muammar Gaddafi;<sup>270</sup> (vi) Mr Al-Senussi’s involvement in the arrests, torture and killings of demonstrators and political dissidents,<sup>271</sup> and, more generally,

<sup>260</sup> *Ibid.*, pp. 8 to 12.

<sup>261</sup> *Ibid.*, pp. 10 to 12 and 17 to 24.

<sup>262</sup> *Ibid.*, pp. 11-12.

<sup>263</sup> *Ibid.*, pp. 12 and 14 to 16

<sup>264</sup> *Ibid.*, pp. 27-28.

<sup>265</sup> *Ibid.*, pp. 18-19, 24 to 27 and 29 to 31.

<sup>266</sup> *Ibid.*, p. 7.

<sup>267</sup> *Ibid.*, p. 7.

<sup>268</sup> *Ibid.*, p. 9.

<sup>269</sup> *Ibid.*, p. 11.

<sup>270</sup> *Ibid.*, p. 20.

<sup>271</sup> *Ibid.*, pp. 18-19.

his involvement in crimes allegedly committed during the repression of the revolution.<sup>272</sup>

116. The same witness, who remained in detention in [REDACTED],<sup>273</sup> was re-interviewed by the Libyan investigators on [REDACTED] 2012 with a view to clarifying some aspects of a previous statement given by him in relation to Mr Al-Senussi's involvement in [REDACTED], and in particular in relation to an episode that took place in April 2011.<sup>274</sup> During this interview, the witness also stated that "[Mr Al-Senussi] was primarily responsible during and before the events and no-one could reject his instructions. He was responsible for all armed forces and groups formed. No security horde would have been formed unless after coordination with him".<sup>275</sup>

117. The Chamber observes that it appears from the minutes of these interviews that in the course of both interviews the witness was on several occasions confronted with declarations given by other witnesses and provided with the opportunity to respond thereto,<sup>276</sup> requested to comment on certain documentary evidence that was shown to him,<sup>277</sup> invited to clarify certain aspects of his declarations and confronted with potentially inconsistent statements previously made.<sup>278</sup>

118. Libya also provides the witness statement given by [REDACTED]  
[REDACTED].<sup>279</sup> The witness provides accounts of a meeting between members of the Libyan State apparatus (including Mr Al-Senussi) and [REDACTED]

<sup>272</sup> *Ibid.*, pp. 9 to 12, 17 to 26, 33 to 37 and 40.

<sup>273</sup> *Ibid.*, p. 33.

<sup>274</sup> *Ibid.*, pp. 33 to 40.

<sup>275</sup> *Ibid.*, p. 40.

<sup>276</sup> *See, e.g.*, Annex 8 to the Admissibility Challenge, pp. 18, 19, 20, 24, 25, 26, 29, 35 and 37 to 39.

<sup>277</sup> *See, e.g.*, Annex 8 to the Admissibility Challenge, pp. 17, 28 and 37.

<sup>278</sup> *See, e.g.* Annex 8 to the Admissibility Challenge, pp. 22, 33 and 37 to 39.

<sup>279</sup> Annex 9 to the Admissibility Challenge.

██████████.<sup>280</sup> At the meeting, Mr Al-Senussi allegedly provided an update about the progress of the military situation in Libya, received a written plan which included ██████████  
██████████ and made arrangements for the implementation of further military strategies.<sup>281</sup> The meeting is reported to have taken place on ████ March 2011, therefore after the repression of the demonstrations in Benghazi alleged in the proceedings before the Court. Nevertheless, the Chamber considers that the statement covers issues that are of relevance in ascertaining Mr Al-Senussi's direct involvement in the organisation and implementation of the activities of the Security Forces for the repression of the revolution against the Gaddafi regime in early 2011.

119. Another witness statement available to the Chamber was provided by ██████████  
██████████.<sup>282</sup> The witness testifies to the activities of ██████████  
██████████, as well as the activities of Mr Al-Senussi himself. In particular, the witness was interviewed about, and gave information on: (i) the existence of "plans to attack" Benghazi;<sup>283</sup> (ii) the arrangements made by Mr Al-Senussi in connection with payments, weapons and vehicles for mercenaries during the revolution;<sup>284</sup> (iii) Mr Al-Senussi's travel to Benghazi following the outbreak of the revolution on 17 February 2011, together with some of his subordinates;<sup>285</sup> (iv) the personal involvement of Mr Al-Senussi in the suppression of the demonstrations in Tripoli from 19 February 2011 onwards;<sup>286</sup> (v) Mr Al-Senussi's ██████████ for militants and volunteers

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<sup>280</sup> *Ibid.*, p. 5.

<sup>281</sup> *Ibid.*, pp. 6-7.

<sup>282</sup> Annex 10 to the Admissibility Challenge.

<sup>283</sup> *Ibid.*, p. 4.

<sup>284</sup> *Ibid.*, pp. 5-9.

<sup>285</sup> *Ibid.*, pp. 10-11.

<sup>286</sup> *Ibid.*, pp. 11-12.

who were used in the suppression of the revolution;<sup>287</sup> and (vi) Mr Al-Senussi's attendance at key operational meetings at the relevant time of the revolution, including [REDACTED]

[REDACTED].<sup>288</sup>

120. Another witness statement<sup>289</sup> collected by the Libyan judicial authorities is provided by [REDACTED]. The witness was interviewed about [REDACTED] the Security Forces after the commencement of the demonstrations on 18 February 2011 and, in particular, on the activities of [REDACTED].<sup>290</sup>

He states that instructions on how to confront the demonstrators were given directly by Mr Al-Senussi, who "used to follow up what was happening in the fields during demonstrations continuously and accurately [and] request the situation for each mosque and each region in Tripoli".<sup>291</sup> According to the witness, Mr Al-Senussi's instructions were aimed at "combating demonstrations and suppression by any means".<sup>292</sup> Finally the witness reports that Mr Al-Senussi, [REDACTED], also provided payments to the members of [REDACTED] the Security Forces.<sup>293</sup> It emerges from the minutes that, at the end of the interview, the witness [REDACTED].<sup>294</sup>

121. Libya provides the statement<sup>295</sup> of [REDACTED] who also gives a direct account of the former Government efforts to suppress the revolution. The witness provides detailed descriptions of the

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<sup>287</sup> *Ibid.*, pp. 13-14.

<sup>288</sup> *Ibid.*, pp. 15-16.

<sup>289</sup> Annex 11 to the Admissibility Challenge.

<sup>290</sup> *Ibid.*, pp. 3 to 7.

<sup>291</sup> *Ibid.*, p. 7.

<sup>292</sup> *Ibid.*

<sup>293</sup> *Ibid.*, pp. 3 to 5.

<sup>294</sup> *Ibid.*, p. 8.

<sup>295</sup> Annex 12 to the Admissibility Challenge.

activities of the high officials, including Mr Al-Senussi, who were involved in handling the security situation in Benghazi, and in Libya in general, from three days before the outbreak of the revolution in Benghazi and throughout the relevant period. In particular, the minutes of the witness interview indicate that the Libyan investigators specifically inquired about: (i) the preparatory activities of the high ranking officials of the Security Forces prior to the commencement of the demonstrations against the regime;<sup>296</sup> (ii) the activities relating to suppression of the demonstrations;<sup>297</sup> (iii) the lines of command and the level of coordination between the different actors involved in the suppression of the demonstrations;<sup>298</sup> (iv) the provision of ammunition, weapons, money and logistics to the different units of the Security Forces and civilian volunteers used in the battlefronts;<sup>299</sup> (v) the recruitment of mercenaries;<sup>300</sup> (vi) the existence of a “policy of spreading discord amongst tribes” formulated by Muammar Gaddafi and implemented by high officials of the State machinery;<sup>301</sup> and (vii) [REDACTED]

[REDACTED].<sup>302</sup> With respect to all these issues, the witness also details the relevant role played by Mr Al-Senussi, in particular in coordinating certain activities to prevent the commencement of the demonstrations against the regime,<sup>303</sup> being assigned to handle the situation in Benghazi “militarily and in terms of security”,<sup>304</sup> organising patrols to suppress the demonstrators,<sup>305</sup> giving instructions to kill

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<sup>296</sup> *Ibid.*, pp. 3 to 5, 9 and 16.

<sup>297</sup> *Ibid.*, pp. 3 to 12.

<sup>298</sup> *Ibid.*, pp. 5-6,

<sup>299</sup> *Ibid.*, pp. 6 to 12.

<sup>300</sup> *Ibid.*, pp. 12.

<sup>301</sup> *Ibid.*, pp. 13 to 15.

<sup>302</sup> *Ibid.*, pp 14 to 16.

<sup>303</sup> *Ibid.*, p. 4.

<sup>304</sup> *Ibid.*, p. 3.

<sup>305</sup> *Ibid.*, pp. 3-4.

and arrest the demonstrators,<sup>306</sup> and participating at important operational meetings.<sup>307</sup>

122. Another [REDACTED] gave a statement to the Libyan judicial authorities in relation to [REDACTED] the events of the suppression of the revolution against the Gaddafi regime.<sup>308</sup> The witness testifies about the distribution of weapons by the Security Forces to volunteers who participated in the repression of the demonstrations in Misrata.<sup>309</sup> Furthermore, when asked about the possibility that during the repression [REDACTED], the witness confirms [REDACTED]

[REDACTED].<sup>310</sup> The Chamber observes that this statement apparently refers to events falling outside the geographic scope of the case against Mr Al-Senussi before the Court and, therefore, does not appear to be specifically aimed at the determination of the facts underlying the Warrant of Arrest. Nevertheless, its collection on the part of the Libyan judicial authorities indicates that, as part of the domestic investigation, investigative steps have been taken in order to establish the existence and implementation of a national policy to repress the demonstrations occurring, at the relevant time, throughout the entire country.

123. As recalled above, together with the witness statements provided by members of the Libyan military or persons associated with the former regime, Libya also provides the statements of a number of civilian demonstrators and their families reporting the commission of crimes during the repression of the revolution against the Gaddafi regime.

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<sup>306</sup> *Ibid.*, p. 5.

<sup>307</sup> *Ibid.*, pp 5 and 14 to 16

<sup>308</sup> Annex 15 to the Admissibility Challenge.

<sup>309</sup> *Ibid.*, pp. 3-4.

<sup>310</sup> *Ibid.*, p. 7.

124. The Chamber notes the OPCV argument that a distinction must be made between these documents (which the OPCV defines as “victims’ complaints”)<sup>311</sup> and the “witness statements”<sup>312</sup> analysed above by the Chamber. The OPCV argues that the two kinds of documents “seem to have been drafted by two different authorities”,<sup>313</sup> and that the “victims’ complaints” cannot be considered “evidentiary material that the crimes alleged therein are indeed being investigated”.<sup>314</sup> The OPCV recognises that these “victims’ complaints” “may provide basis for subsequent investigations”,<sup>315</sup> but argues that Libya has not provided “evidence showing that subsequent investigative steps were taken”.<sup>316</sup>

125. Libya counter-argues that “[t]here is no substantive distinction between the evidential status of the testimonies that the OPCV has characterised as ‘victims complaints’ and those that the OPCV describes as ‘witness statements’”.<sup>317</sup> According to Libya, the only difference between these two types of material “is one of form”, namely that “due to resources constraints some are taken on paper with an old Ministry of Justice letterhead from the pre-revolution days (entitled ‘General People’s Committee for Justice’) whereas others are taken on paper with the new Ministry of Justice letterhead”.<sup>318</sup> Libya submits that, regardless of this difference in form, all this materials “are witness testimonies of individuals compiled through question and answer interrogatory style meetings between the witness and members of

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<sup>311</sup> The OPCV describes as “victims’ complaints” the material provided as Annexes 14, 16, 17, 20, 21, 22, 23, 24 and 26 to the Admissibility Challenge (OPCV Observations, para. 64 and footnote 91).

<sup>312</sup> According to the OPCV, “witness statements” are only those attached as Annexes 8, 9, 10, 11, 12 and 15 to the Admissibility Challenge (OPCV Observations, para. 64 and footnote 92).

<sup>313</sup> OPCV Observations, para. 64 and footnote 92.

<sup>314</sup> *Ibid.*, para. 64.

<sup>315</sup> *Ibid.*

<sup>316</sup> *Ibid.*

<sup>317</sup> Libya’s Reply, para. 74.

<sup>318</sup> *Ibid.*

the Prosecutor-General's Office (which is an organ of the Ministry of Justice)".<sup>319</sup>

126. The Chamber observes that the statements provided by "insider" witnesses appear different in nature from those given by the alleged victims of the crimes and their families when reporting the commission of crimes to the Libyan authorities. However, the Chamber has no reason to question Libya's clarification on the evidential status in Libyan criminal proceedings of the material of the latter kind, or to consider *a priori* that the collection of this type of statements cannot be considered an "investigative step" on the part of the national authorities. On this basis, the Chamber is not persuaded that "victims' complaints" must be accorded, solely on this ground, no or lower probative value in demonstrating that Libya has been taking concrete steps to investigate the case against Mr Al-Senussi. These documents will be analysed hereunder.

127. The first statement given by alleged victims of the repression of the revolution is provided by an individual who participated in the demonstrations in Benghazi.<sup>320</sup> He provides information on: (i) the demonstration of 15 February 2011 in which the release of "the lawyer Fathi Treel" was demanded and during which "there was a crowd of police and security forces and central armed forces";<sup>321</sup> (ii) the violent suppression of demonstrations in several areas of Benghazi on 17 February 2011,<sup>322</sup> which resulted in many civilians being injured or killed;<sup>323</sup> (iii) the shooting on 18 February 2011 of demonstrators attending the funeral of those people killed

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<sup>319</sup> *Ibid.*

<sup>320</sup> Annex 14 to the Admissibility Challenge.

<sup>321</sup> *Ibid.*, p. 3.

<sup>322</sup> The Chamber notes that in the witness statement it is indicated "07/02/2011" as the date of the relevant demonstrations and their suppression (p. 3). However, the Chamber considers that this is a mere editorial error of the English translation of the statement and the date must rather be understood as 17 February 2011.

<sup>323</sup> Annex 14 to the Admissibility Challenge, p. 3.

the day before;<sup>324</sup> (iv) the killing by gunshot of [REDACTED] “in front of Al-Fadhil Battalion” on 19 February 2011;<sup>325</sup> and (v) the continuation of the suppression of demonstrations in particular between 18 and 21 March 2011.<sup>326</sup>

128. Another statement collected by the Libyan authorities<sup>327</sup> is provided by a civilian who, *inter alia*, reports that, during the demonstrations of 17 February 2011 in Benghazi, Mr Al-Senussi “with other persons driving Land Cruisers”

[REDACTED].<sup>328</sup>

129. Libya further provides the statement of a civilian demonstrator who participated at the demonstrations of 15 February 2011 in Benghazi.<sup>329</sup> He states that soldiers [REDACTED] surrounded the demonstrators and shot live bullets at them, killing or injuring many of them.<sup>330</sup> According to his statement, during the repression of the demonstration, he was arrested and, [REDACTED]

[REDACTED], he was subject to several forms of torture and inhuman treatment, [REDACTED]

[REDACTED].<sup>331</sup>

130. Another civilian demonstrator provides a statement<sup>332</sup> in which he reports that, on 19 February 2011 in Benghazi, soldiers of the “Gaddafi battalions” shot at the demonstrators with Kalashnikovs and mortars, and [REDACTED]

[REDACTED].<sup>333</sup> In the minutes of the

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<sup>324</sup> *Ibid.*

<sup>325</sup> *Ibid.*

<sup>326</sup> *Ibid.*, p. 4.

<sup>327</sup> Annex 16 to the Admissibility Challenge.

<sup>328</sup> *Ibid.*, p. 3.

<sup>329</sup> Annex 17 to the Admissibility Challenge.

<sup>330</sup> *Ibid.*, pp. 2-3.

<sup>331</sup> *Ibid.*, pp. 3-4.

<sup>332</sup> Annex 20 to the Admissibility Challenge.

<sup>333</sup> *Ibid.*, p. 3.

interview, the investigators report that they “noticed [REDACTED]  
[REDACTED]”.<sup>334</sup>

131. Libya also places before the Chamber the statement<sup>335</sup> of an individual who participated in the demonstration of 15 February 2011 in Benghazi demanding the release of the “solicitor Fathi Terbil”.<sup>336</sup> He reports that during this demonstration, while in front of the Benghazi Security Directorate, the Security Forces [REDACTED].<sup>337</sup> According to the complainant, the demonstrations were suppressed “by soldiers of [REDACTED] [REDACTED] carrying out orders of Mu’ammar Gaddafi and Abdullah Al-Senousi, staying inside [REDACTED]”.<sup>338</sup> The complainant further reports that during another demonstration on 19 February 2011 in Benghazi [REDACTED]  
[REDACTED]

[REDACTED].<sup>339</sup> The investigators requested the provision of a “medical report stating [that the complainant] [REDACTED]”, which, they report, “was reviewed and attached to the papers”.<sup>340</sup>

132. Libya further provides the statement of an individual<sup>341</sup> who reports the killing of [REDACTED] in Benghazi on 18 February 2011 during the demonstration which took place outside the Benghazi Security Directorate following the funeral of the demonstrators who had been killed the day before.<sup>342</sup> The complainant states that [REDACTED]  
[REDACTED] and considers Mr Al-Senussi to be one of those

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<sup>334</sup> *Ibid.*, p. 4.

<sup>335</sup> Annex 21 to the Admissibility Challenge.

<sup>336</sup> *Ibid.*, p. 2.

<sup>337</sup> *Ibid.*

<sup>338</sup> *Ibid.*

<sup>339</sup> *Ibid.*, p. 3.

<sup>340</sup> *Ibid.*

<sup>341</sup> Annex 22 to the Admissibility Challenge.

<sup>342</sup> *Ibid.*, p. 2.

responsible for the killing as [REDACTED].<sup>343</sup> The interviewers explicitly inquired about “the reason that led [REDACTED] to participate in the demonstration”<sup>344</sup> and on whether any witness to the shooting was available.<sup>345</sup> In the statement it is further reported that, once questioned by the Libyan investigators about the existence of “any evidence of the death”, the complainant “submitted [...] a copy of the coroner report, and a copy of medical certificate of death reason, and a copy of the patience status, a copy of the burial permit from Civil Status Department, [and] a copy of deceased identity card”.<sup>346</sup> The investigation report states that all these documents were “viewed and attached”.<sup>347</sup>

133. The Chamber was also provided with two statements of two individuals<sup>348</sup> who report the killing of [REDACTED] in front of the “Al-Fadeel Bu-Omar battalion” during a demonstration that took place in Benghazi on 20 February 2011.<sup>349</sup>

134. Another statement is given by a civilian who participated in the demonstrations in Benghazi on 15 February 2011.<sup>350</sup> He declares that the demonstrators were confronted by [REDACTED] which surrounded them and shot at them, killing and injuring many and arresting some others, himself included.<sup>351</sup> He states that in the period of his detention, [REDACTED], he was subject to several forms of

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<sup>343</sup> *Ibid.*, pp. 2 and 4.

<sup>344</sup> *Ibid.*, p. 3.

<sup>345</sup> *Ibid.*, p. 4.

<sup>346</sup> *Ibid.*, p. 3.

<sup>347</sup> *Ibid.*

<sup>348</sup> Annex 23 to the Admissibility Challenge.

<sup>349</sup> *Ibid.*, pp. 3 to 5.

<sup>350</sup> Annex 24 to the Admissibility Challenge.

<sup>351</sup> *Ibid.*, p. 2.

torture.<sup>352</sup> The complainant indicates that Mr Al-Senussi [REDACTED]  
[REDACTED].<sup>353</sup> The Investigation Report states that the complainant “was examined by the Coroner [...] to check his injuries”.<sup>354</sup>

135. Finally, Libya provides the statement of an individual who attended the demonstrations in Benghazi on 18, 19 and 20 February 2011.<sup>355</sup> He states that on each occasion the Security Forces shot at the demonstrators with live ammunition, injuring many of them and arresting others,<sup>356</sup> and that, on 20 February 2011, [REDACTED].<sup>357</sup> The investigation report states that the interviewers explicitly asked the complainant to describe the demonstrations “in detail” and the circumstances of [REDACTED].<sup>358</sup> A “photocopy of a medical report from the [REDACTED] [REDACTED] in Benghazi” was also submitted to the investigators.<sup>359</sup>

#### Documentary evidence

136. As part of their domestic investigations, the Libyan judicial authorities also collected certain items of documentary evidence. Samples of this documentary evidence have been placed before the Chamber and are relied upon by Libya in support of its claim that it is investigating Mr Al-Senussi for the same conduct alleged in the proceedings before the Court. This evidence falls into three categories: (i) flight documents; (ii) medical documents; and (iii) written orders.

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<sup>352</sup> *Ibid.*, pp. 2 and 3.

<sup>353</sup> *Ibid.*, p. 3.

<sup>354</sup> *Ibid.*, p. 2.

<sup>355</sup> Annex 26 to the Admissibility Challenge.

<sup>356</sup> *Ibid.*, p. 3.

<sup>357</sup> *Ibid.*

<sup>358</sup> *Ibid.*

<sup>359</sup> *Ibid.*, p. 4.

a) Flight documents

137. Libya relies upon a letter signed by a [REDACTED] [REDACTED], in response to a query from the “Libyan Supreme Prosecution Office” about [REDACTED] flights.<sup>360</sup> The letter states that [REDACTED] [REDACTED] [REDACTED]. The destination and the time of departure of the aircraft were stated to be unknown. The schedule of flights operated between 17 and 19 February 2011 and a number of other flight documents<sup>361</sup> are also provided by Libya.

138. In the *Gaddafi* Admissibility Decision, the Chamber took these documents into account in reaching its conclusion that Libya’s investigations appear to cover aspects of “mobilisation of militias and equipment by air”.<sup>362</sup> The same consideration applies with respect to the present case, given that the investigation of high-level state arrangements for the repression of the demonstrators, including by mobilising mercenaries by air, is equally relevant to the case against Mr Al-Senussi.

b) Medical documents

139. Libya provides a series of “medical documents” which, it submits, are “highly relevant in showing the correspondence between the crime base evidence which underpins the ICC investigations of murders and persecutory acts taking place in Benghazi at the hands of Security Forces directed by

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<sup>360</sup> Annex 5 to Libya’s Submissions of 23 January 2013.

<sup>361</sup> Annexes 6 and 7 to the Libya’s Submission of 23 January 2013.

<sup>362</sup> *Gaddafi* Admissibility Decision, para. 134.

Mr Al-Senussi from 15 – 20 February 2011 and the crime base evidence underpinning the Libyan investigation of Mr Al-Senussi”.<sup>363</sup>

140. The first of this set of documents<sup>364</sup> is defined by Libya as an excerpt from lists of “medical evacuations to foreign countries”.<sup>365</sup> This list indicates that between 20 February and 29 April 2011 multiple individuals were transferred to [REDACTED] to receive medical treatment. It is however unclear which entity compiled the list, on what basis, for what purpose and upon whose request. The Chamber is therefore not in a position to draw any inference from the provision of this document by Libya in terms of identification of concrete investigative steps directed at ascertaining Mr Al-Senussi’s criminal responsibility.

141. Furthermore, Libya submits several medical records of people who were treated in the Benghazi hospitals between 17 and 24 February 2011.<sup>366</sup> One of the reports was prepared by the [REDACTED] [REDACTED],<sup>367</sup> while the others were submitted by several hospitals and health centres in Benghazi.<sup>368</sup> A large number of these medical records certify injuries caused by gunshots<sup>369</sup> or other injuries that appear to have been caused in the course of the demonstrations that took place in Benghazi at the relevant time.<sup>370</sup> A table referring to the “[s]tatistic of names of the injured with bullets during the period [from] 15 February 2011” prepared by the [REDACTED]

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<sup>363</sup> Libya’s Reply, para. 105.

<sup>364</sup> Annex 13 to the Admissibility Challenge.

<sup>365</sup> Libya’s Reply, para. 105. *See also* Admissibility Challenge, List of Annexes – Annex 13, p. 96.

<sup>366</sup> Annexes 18 and 25 to the Admissibility Challenge.

<sup>367</sup> Annex 18 to the Admissibility Challenge, p. 3.

<sup>368</sup> Annex 25 to the Admissibility Challenge, pp. 2, 3, 4, 6, 7, 8, 9, 10, 11, 12 and 13.

<sup>369</sup> *Ibid.*, pp. 3, 4, 6, 7, 8 (*see original at p. 20*), 9 (*see original at p. 21*), 10 and 12.

<sup>370</sup> Annex 18 to the Admissibility Challenge, p. 3.

██████████ is also provided.<sup>371</sup> This list includes names of individuals injured by gunshot in Benghazi on 17 February 2011.

142. Libya also provides a medical certificate of death of ██████████ killed in Benghazi on 20 February 2011.<sup>372</sup> The certificate attests that the death occurred on the “road” and was caused by “[g]un shot ██████████ ██████████”.<sup>373</sup>

143. The Chamber considers that these official medical records<sup>374</sup> appear to indicate that, as part of their investigation, the Libyan authorities have sought to identify possible victims of the crimes under investigation and, more generally, to document the kinds of injury, and in particular gunshot wounds, inflicted during the repression of the demonstrations of February 2011 in Benghazi.

c) Written orders

144. Libya provides some written orders issued by Mr Al-Senussi, in his capacity of “Director of Intelligence”, to the Weapons and Ammunition Department, requesting the supply of weapons and ammunition of an identified quantity and quality.<sup>375</sup> Subsequent written orders by which ██████████ instructed that weapons and ammunitions be provided to the military intelligence department are also presented by Libya.<sup>376</sup>

145. The Chamber considers that these written orders appear to indicate that Libya has taken investigative steps to document the military activities undertaken by Mr Al-Senussi during the repression of the revolution against

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<sup>371</sup> Annex 25 to the Admissibility Challenge, p. 5.

<sup>372</sup> Annex 27 to the Admissibility Challenge.

<sup>373</sup> *Ibid.*, p. 3.

<sup>374</sup> With the exception, for the reasons provided above, of the excerpt from the lists of “medical evacuations to foreign countries” attached as Annex 13 to the Admissibility Challenge.

<sup>375</sup> Annex 19, pp. 1, 2, 3 and 6.

<sup>376</sup> *Ibid.*, pp. 4 and 5.

the Gaddafi regime. In this sense, they may be relevant to the question of whether Libya's proceedings cover the same case before the Court, even if they are dated between 1 June 2011 and 20 July 2011, and therefore refer to facts that occurred after the commission of the crimes that are alleged in the proceedings against Mr Al-Senussi before the Court.

### Intercepts

146. Libya also provides the transcripts of the intercepts of four telephone communications which took place between Mr Gaddafi and [REDACTED], on [REDACTED] March 2011, and between Mr Gaddafi and [REDACTED] [REDACTED] on [REDACTED] March 2011.<sup>377</sup> In those intercepted communications, the transcripts of which were initially submitted to the Chamber in support of the challenge to the admissibility of the case against Mr Gaddafi, the planning and coordination of the use of force to repress civilian demonstrations were extensively discussed.

147. As observed in the *Gaddafi* Admissibility Decision, "these intercepts were recorded upon the order of Muammar Gaddafi prior to the fall of his regime and were found by rebel fighters and others and thereafter [...] passed on to the Prosecutor-General's office directly from the individuals who obtained them".<sup>378</sup> The Chamber also considered that "the transcripts of the intercepts were prepared by volunteer lawyers" rather than by the Libyan authorities,<sup>379</sup> and that "Libya's assertion that the intercepts have been authenticated [...] has not been supported by evidence".<sup>380</sup> However, the Chamber concluded that

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<sup>377</sup> Annex 17 to Libya's Submissions of 23 January 2013.

<sup>378</sup> *Gaddafi* Admissibility Decision, para. 129, with reference to Libya's Submissions of 23 January 2013, para. 53. This is confirmed by Libya at para. 174 of the Admissibility Challenge.

<sup>379</sup> *Gaddafi* Admissibility Decision, para. 130, with reference to Libya's Submissions of 23 January 2013, para. 54. See also para. 174 of the Admissibility Challenge.

<sup>380</sup> *Gaddafi* Admissibility Decision, para. 131.

these aspects did not warrant that these intercepts (the admissibility of which as evidence in the national proceedings will be determined by the Accusation Chamber<sup>381</sup>) be entirely discounted for the identification of the factual subject of the investigation allegedly being conducted by the Libyan authorities.<sup>382</sup> The same considerations apply for the purposes of the present decision.

148. The Chamber is of the view that the intercepted communications cover significant aspects of the activities and roles of the members of the former Gaddafi regime as part of the repression of the civilian demonstrations, including Mr Al-Senussi's expected presence at a meeting when, it was stated, "the situation will be assessed and [Mr Gaddafi] will be given the solution".<sup>383</sup> In this sense, the fact that the relevant telephone communications took place in March 2011 does not exclude their potential significance in the context of Libya's proceedings on the facts alleged in the case before the Court, and accordingly their relevance to the Chamber's identification of the factual scope of such domestic proceedings.

*(iii) Other materials*

149. As part of its challenge to the admissibility of the case against Mr Gaddafi, Libya submitted an "opinion" presented by the Assistant of the Military Prosecutor-General.<sup>384</sup> This document, in which Mr Al-Senussi is described as the "accused", provides a summary of the events at the Abu Salim prison in 1996 and Mr Al-Senussi's role in those events, as emerging from the testimony of six witnesses. The investigation into those facts is reported to be ongoing. The Chamber considers that while this document may indicate investigations into alleged crimes committed by Mr Al-Senussi during the Gaddafi regime in

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<sup>381</sup> Admissibility Challenge, para. 174; Libya's Submissions of 23 January 2013, para. 55.

<sup>382</sup> *Gaddafi* Admissibility Decision, para. 131.

<sup>383</sup> Annex 17 to Libya's Further Submissions, p. 7.

<sup>384</sup> Annex F to *Gaddafi* Admissibility Challenge.

1996, it does not provide any information relevant to the consideration of whether Libya is investigating Mr Al-Senussi for the same conduct alleged in the proceedings before the Court, that exclusively concern crimes committed in the course of the repression of the revolution in Benghazi in February 2011.

150. Libya also submitted a copy of the Decision of the Constitutional Court about the procedures of the Peoples' Court, dated 23 December 2012.<sup>385</sup> In the Admissibility Challenge, Libya cites this document in support of its assertion that the national investigation covers key aspects of the case before the Court, namely the existence of a "State policy" and the command of Mr Al-Senussi over the Security Forces.<sup>386</sup> The Chamber notes, however, that this document makes no mention of the national investigation in relation to Mr Al-Senussi. Therefore, in the absence of any explanation on how this document relates to the determination of the factual parameters of the domestic case against him, the Chamber considers this document irrelevant to the matter under consideration.

151. The Chamber was also provided with a document dated 13 January 2013 entitled "Memorandum of the Results of the Examination and Review of the Case No. 229/2012" which was sent to Libya's Prosecutor-General by the Members of the Examination and Review Committee of the Prosecutor-General's Office.<sup>387</sup> In this memorandum, the Prosecutor-General's investigative team suggests that the case against Mr Gaddafi be joined with the case against Mr Al-Senussi and several other individuals, given the interrelation of facts, the need to preserve evidence, fairness, consistency and in order to ensure the determination of the "whole truth".<sup>388</sup> It is stated in the memorandum that "[t]he investigation showed that, what the country went

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<sup>385</sup> Annex 8 to Libya's Submissions of 23 January 2013.

<sup>386</sup> Admissibility Challenge, footnote 160.

<sup>387</sup> Annex 11 to Libya's Submissions of 23 January 2013.

<sup>388</sup> *Ibid.*, pp. 3-4.

through was based on systematic general policy used by a group of the previous regime's figures, headed by [...] Saif Al-Islam Gaddafi [...] Abdullah Mohamed Al-Senousi [...] and other figures of the previous regime. Their acts constitute a general framework for a set of serious crimes such as mass killings, random killing, looting, sabotage, rape and the spread the spirit of discord and fragmentation of national unity. Such crimes are inseparable in both facts and committers without undermining the legal structure on which the investigations were built".<sup>389</sup>

152. The Chamber considers that this document, beyond concluding that the investigation has indicated that several crimes were committed by members of Gaddafi regime as part of a "systematic general policy", does not contain actual information on the factual scope and subject-matter of the asserted concrete and progressive investigative steps purportedly carried out in relation to Mr Al-Senussi's alleged criminal responsibility.<sup>390</sup>

153. As part of its Admissibility Challenge, Libya also provides a letter, dated 9 June 2012, from the Attorney General at the Benghazi Court of Appeals to the Attorney General in Benghazi "submit[ting] the investigation file for complaints number 2012/327 [and] 2011/1133".<sup>391</sup> The file is however not attached. In the absence of any explanation from Libya as to the significance of this letter to the admissibility of the case against Mr Al-Senussi before the Court, its relevance to the matter *sub judice* is not apparent to the Chamber. In particular, no information is given with respect to the scope of the case against Mr Al-Senussi allegedly being investigated at the domestic level.

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<sup>389</sup> *Ibid.*, p. 3. The Chamber notes that, as suggested in the document under consideration, the case against Mr Al-Senussi has indeed been eventually joined with the cases against 37 other officials of the former Gaddafi regime (*See* Annex A to Libya's Final Submissions).

<sup>390</sup> *See also* Gaddafi Admissibility Decision, para. 117.

<sup>391</sup> Annex 1 to the Admissibility Challenge.

154. Libya further relies on the “Decision of the Attorney-General at the Department of Jurisdiction of Ben-Ghazi Court of Appeals” of 1 May 2011,<sup>392</sup> by which three “committees” were created to “investigate the events and crimes done by the Gaddafi battalions and complet[e] the criminal proceedings previously collected by the Prosecution on 18 February 2011”.<sup>393</sup> The relevance of this document is limited to the consideration that, as of 1 May 2011, the Libyan civilian authorities had the intention to investigate the crimes committed on 18 February 2011 against the civilian demonstrators, and took the attendant preliminary steps. No other information relevant to the determination of the further investigative steps conducted or on the identification of the scope of Libya’s investigation in relation to Mr Al-Senussi emerges from this document.

155. Libya also attaches to the Admissibility Challenge the transcripts of the speech given on 13 March 2013 to the UN Security Council by Tarek Mitri, Special Representative of the Secretary-General and head of the United Nations Support Mission in Libya (“UNSMIL”).<sup>394</sup> This document provides no information on the existence and subject-matter of Libyan investigations in relation to Mr Al-Senussi. It is therefore irrelevant to the consideration of whether Libya is investigating the same case that is before the Court.

156. Finally, as part of its Final Submissions, Libya provides the minutes of the hearing held on 19 September 2013 before the Accusation Chamber to which the case against Mr Al-Senussi has been transferred,<sup>395</sup> which include an oral decision to adjourn the hearing before the Accusation Chamber in order to allow the defence teams to view the accusation file.<sup>396</sup> The Chamber notes that,

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<sup>392</sup> Annex 7 to the Admissibility Challenge.

<sup>393</sup> *Ibid.*, p. 3.

<sup>394</sup> Annex 29 to the Admissibility Challenge.

<sup>395</sup> Annex A to Libya’s Final Submissions.

<sup>396</sup> Annex B to Libya’s Final Submissions.

as previously suggested by the Libyan investigative team,<sup>397</sup> the case against Mr Al-Senussi has now been joined with the cases against 37 other Gaddafi-regime officials, including Mr Gaddafi, Al-Baghdadi Al-Mahmoudi (last prime minister under the Gaddafi regime), Abu Zaid Omar Dorda (Muammar Gaddafi's former prime minister and head of the External Security Agency at the time of the 2011 revolution), Abdul Ati El-Obaidi (former Foreign Minister), Mohamed Al-Zway (former Secretary of the General People's Congress) and Mansour Dhou (former head of the Tripoli Internal and Security Agency).<sup>398</sup>

157. The Chamber considers that the transfer of the case to the Accusation Chamber, while of no actual assistance to the determination of the contours and scope of the domestic proceedings against Mr Al-Senussi, indicates that they are currently in progress.

*b. Determination by the Chamber on Libya's case against Mr Al-Senussi*

158. At this juncture, the Chamber will provide its determination on the factual scope of the national proceedings in relation to Mr Al-Senussi, as emerging from the evidence submitted by Libya and analysed above by the Chamber.

159. As held above,<sup>399</sup> for the purposes of the consideration on whether Libya's proceedings cover the same case as the one before the Court, the Chamber is not called upon to determine whether the evidence collected by Libya as part of its investigation is sufficient to prove Mr Al-Senussi's criminal responsibility for the conduct alleged in the Warrant of Arrest. What the Chamber must determine are the parameters of the facts that Libya is trying to

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<sup>397</sup> See above para. 151.

<sup>398</sup> Annex A to Libya's Final Submissions. See also para. 38 of Libya's Final Submissions.

<sup>399</sup> See para. 66(vii) above.

ascertain by taking concrete, identifiable and progressive steps, *i.e.* whether there is activity on the part of Libya's judicial authorities and at what such activity is directed.

160. The Chamber considers that the evidence submitted by Libya is sufficient to conclude that concrete and progressive steps are being undertaken by the domestic authorities in the proceedings against Mr Al-Senussi, and to identify the scope and the subject-matter of such proceedings.

161. Indeed, the Chamber is of the view that adequate, tangible and progressive investigative steps have been taken by the investigative team at the Prosecutor-General's office, including conducting interviews of witnesses, obtaining documentary evidence (such as medical reports, death certificates and written orders), and requesting that external sources provide relevant information. In particular, it appears that multiple lines of investigation are being followed by Libya's judicial authorities in order to shed light on the repression of the demonstrations against the Gaddafi regime. Witnesses were asked to clarify and elaborate on certain parts of their testimony, and requested to comment on information provided by other witnesses and on documentary evidence in the investigative record. The investigators also inquired about aspects of a potentially exculpatory nature, and information of this character, when provided by the witnesses, has been duly recorded in the minutes of the relevant interviews. Victims reporting commission of crimes were also required to substantiate their assertions with documentary evidence.

162. The Chamber is satisfied that the evidence relied upon by Libya for the purposes of the Admissibility Challenge demonstrates the taking of identifiable, concrete and progressive investigative steps in relation to Mr Al-Senussi's criminal responsibility (ultimately resulting in the transfer of

the case to the Accusation Chamber), with a view to clarifying and ascertaining, *inter alia*, the following relevant factual aspects:

- (i) the existence at the relevant time of a policy conceived at the highest level of the State government to deter and quell, by any means, the demonstrations against the Gaddafi regime;<sup>400</sup>
- (ii) the mobilisation of militias and equipment, recruitment of mercenaries, incitement of individuals to kill the demonstrators, provision of supplies to the Security Forces and other arrangements for the repression of the civilian demonstrations, including the role of Mr Al-Senussi and his alleged accomplices in these activities;<sup>401</sup>
- (iii) Mr Al-Senussi's command over the Security Forces,<sup>402</sup> and his presence in Benghazi immediately after the outbreak of the revolution to manage the situation;<sup>403</sup>
- (iv) the carrying out by the Security Forces of numerous attacks on civilian demonstrators in many areas of Benghazi between 15 and 20 February 2011, causing the death of and serious injuries to countless civilians,<sup>404</sup> as well as similar attacks conducted in the country throughout the period of the repression of the revolution to the Gaddafi regime;<sup>405</sup>

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<sup>400</sup> Annexes 16 and 17 to Libya's Submissions of 23 January 2013 and Annexes 4, 8, 9, 10, 11, 12, 15 and 19 to the Admissibility Challenge. *See also* Annex 11 to Libya's Submissions of 23 January 2013.

<sup>401</sup> Annexes 4, 5, 6, 7, 16 and 17 to Libya's submissions of 23 January 2013 and Annexes 4, 8, 9, 10, 11, 12, 15, 16 and 19 to the Admissibility Challenge.

<sup>402</sup> Annex 16 to Libya's Submissions of 23 January 2013 and Annexes 8, 9, 10, 11, 12, 17 and 19 to the Admissibility Challenge.

<sup>403</sup> Annex 16 to Libya's Submissions of 23 January 2013 and Annexes 10, 12, 16 to the Admissibility Challenge.

<sup>404</sup> Annex 16 to Libya's Submissions of 23 January 2013 and Annexes 14, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27 to the Admissibility Challenge.

<sup>405</sup> Annexes 8, 11, 12 and 15 to the Admissibility Challenge.

- (v) Mr Al-Senussi's direct involvement in the shooting of the civilian demonstrators in Benghazi between 15 and 20 February 2011;<sup>406</sup>
- (vi) the arrest of journalists, activists and civilians demonstrating against the Gaddafi regime and the role of Mr Al-Senussi and his alleged accomplices in some of these events;<sup>407</sup> and
- (vii) instances of detention and torture of civilian dissidents [REDACTED]  
[REDACTED], between 15 and 20 February 2011, in Benghazi.<sup>408</sup>

4. Comparison between the case before the Court and the case subject to domestic proceedings

163. As found above, the evidence presented by Libya allows the Chamber to discern the contours of the domestic case against Mr Al-Senussi and, in turn, to meaningfully compare the alleged conduct of Mr Al-Senussi with the conduct attributed to him in the Warrant of Arrest issued against him. The Chamber recalls that the present case before the Court concerns the individual criminal responsibility of Mr Al-Senussi for the killings and acts of persecution by reason of their (real or perceived) political opposition to the Gaddafi regime carried out against many civilian demonstrators and political dissidents, allegedly committed directly or through the Security Forces during the repression of the demonstrations taking place in Benghazi from 15 February 2011 until at least 20 February 2011 and as part of a policy designed at the highest level of the Libyan State machinery to deter and quell, by any means, the revolution against the Gaddafi regime occurring throughout Libya.

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<sup>406</sup> Annex 16 to Libya's Submissions of 23 January 2013 and Annexes 10, 12 and 16 to the Admissibility Challenge.

<sup>407</sup> Annex 16 to Libya's Submissions of 23 January 2013; Annexes 8, 12, 17, 24, 26 to the Admissibility Challenge.

<sup>408</sup> Annexes 17 and 24 to the Admissibility Challenge.

164. The Chamber is satisfied that the facts that have been investigated by the Libyan authorities in relation to Mr Al-Senussi, as summarised above,<sup>409</sup> comprise the relevant factual aspects of Mr Al-Senussi's conduct as alleged in the proceedings before the Court.<sup>410</sup>

165. Furthermore, the Chamber recalls that whether all or some of the narrower "incidents" or "events" mentioned in the Article 58 Decision are encompassed in the national proceedings may constitute a relevant indicator that the case before the domestic authorities is the same as the one before the Court.<sup>411</sup> In this regard, the Chamber observes that the evidence provided by Libya indicates that the domestic proceedings cover, at a minimum, those events that are described in the Article 58 Decision as particularly violent or that appear to be significantly representative of the conduct attributed to Mr Al-Senussi.<sup>412</sup> The fact that such events are referred to in the evidence submitted by Libya confirms that the same conduct alleged against Mr Al-Senussi in the proceedings before the Court is subject to Libya's domestic proceedings.

166. Finally, the Chamber recalls that a number of criminal acts that are alleged against Mr Al-Senussi in the proceedings before the Court are qualified, *inter alia*, by having been inflicted on civilians "because of [their] political opposition (whether actual or perceived) to Gaddafi's regime".<sup>413</sup> These acts

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<sup>409</sup> *Supra*, para. 162.

<sup>410</sup> *Supra*, paras 70 and 71.

<sup>411</sup> *See supra* para. 79.

<sup>412</sup> For example the witness statements provided as Annex 16 to Libya's Submissions of 23 January 2013 and as Annex 8 to the Admissibility Challenge address the arrest of certain named political activists [REDACTED] as well as the unfolding of the events in Benghazi on 17 February 2011, including the shooting at the demonstrators at Juliyana Bridge. General information about other narrower "incidents" that took place during the days of the repression of the revolution against the Gaddafi regime in Benghazi is also provided by those victims whose statements are attached as Annexes 14, 16, 17, 20, 21, 22, 24 and 26 to the Admissibility Challenge.

<sup>413</sup> Warrant of Arrest, p. 5. *See also* Article 58 Decision, para. 65.

allegedly constitute the crime of “persecution” within the meaning of article 7(1)(h) of the Statute. The Chamber notes that this factual aspect of the allegations against Mr Al-Senussi before the Court is not an element of any of the crimes with which it is currently envisaged that Mr Al-Senussi could be charged at the domestic level.<sup>414</sup> Nevertheless, as observed in the *Gaddafi* Admissibility Decision, the fact that the crimes targeted a particular group of individuals by reason of the identity of the group “is an aggravating factor which is taken into account in sentencing under articles 27 and 28 of the Libyan Criminal Code”.<sup>415</sup> Accordingly, the national provisions with which Libya contemplates charging Mr Al-Senussi, together with the provisions under articles 27 and 28 of the Libyan Criminal Code, sufficiently capture Mr Al-Senussi’s commission, between 15 and at least 20 February 2011 in Benghazi, of murders and inhuman acts severely depriving civilians of fundamental rights contrary to international law, by reason of their political identity, as alleged in the proceedings before the Court.<sup>416</sup>

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<sup>414</sup> Libya submits that it is envisaged that the charges against Mr Al-Senussi arising from the investigation conducted will include: devastation, rapine and carnage (article 202 of the Libyan Criminal Code); civil war (article 203); conspiracy (article 211); attacks upon the political rights of a Libyan subject (article 217); concealment of a corpse (article 294); indiscriminate or ‘random’ killings (article 296); arson (article 297); stirring up hatred between the classes (article 318); aiding members of a criminal association (article 322); intentional murder (article 368); use of force to compel another (article 429); misuse of authority against individuals (article 431); search of persons (article 432); unlawful arrest (article 433); unjustified deprivation of personal liberty (article 434); torture (article 435) (Admissibility Challenge, para. 154 and Annex 3). In its Final Submissions, Libya confirms that “it is anticipated that the charges in Mr. Al-Senussi’s case will likely include unlawful killing, looting, the distribution of narcotics, incitement to commit rape, kidnapping, and other crimes associated with fomenting sedition and civil war” (Libya’s Final Submissions, para. 8). The text of the relevant provisions of the Libyan Criminal Code has been provided to the Chamber by Libya by filings number ICC-01/11-01/11-158-AnxA of 28 May 2012, ICC-01/11-01/11-273-AnxA of 11 February 2013 and ICC-01/11-01/11-309 of 8 April 2013.

<sup>415</sup> *Gaddafi* Admissibility Decision, para. 111, with reference to Libya’s Submissions of 23 January 2013, para. 87.

<sup>416</sup> See also *Gaddafi* Admissibility Decision, para. 113.

5. Conclusion on the first limb of the admissibility test

167. In light of the above, the Chamber is satisfied that the evidence placed before it demonstrates that the Libyan competent authorities are taking concrete and progressive steps directed at ascertaining the criminal responsibility of Mr Al-Senussi for substantially the same conduct as alleged in the proceedings before the Court.

168. Accordingly, Libya has demonstrated that it is undertaking domestic proceedings covering the “same case” as that before the Court within the meaning of article 17(1)(a) of the Statute.

**V. WHETHER LIBYA IS UNWILLING OR UNABLE GENUINELY TO CARRY OUT THE PROCEEDINGS AGAINST MR AL-SENUSSI**

169. According to article 17(1)(a) of the Statute, when a case is being investigated or prosecuted by a State which has jurisdiction over it, that case is nevertheless admissible before the Court when the State is either unwilling or unable genuinely to carry out the proceedings. While either of the two scenarios (unwillingness or inability) is sufficient to render a case admissible, the Chamber observes that, in practice, the same factual circumstances may often have a bearing on both aspects.

170. It is of significance that, in the Admissibility Challenge, Libya makes “factual submissions” without distinguishing between the two aspects,<sup>417</sup> and the Defence explicitly states that “many of [its] arguments raised [...] in the context of ‘inability’ also support a finding of ‘unwillingness’”.<sup>418</sup> Moreover, the Defence has considered certain factual circumstances as primarily warranting a finding of “unwillingness”, whereas the OPCV has considered,

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<sup>417</sup> Admissibility Challenge, Part III.

<sup>418</sup> Defence Observations, para. 144.

conversely, that the same or similar circumstances serve to demonstrate Libya's "inability".<sup>419</sup>

171. In light of the above, the Chamber will not attempt a separate analysis of the two aspects at issue, but will instead address in turn all submissions in relation to relevant factual circumstances,<sup>420</sup> before proceeding, at the end of this section, to an overall determination as to whether the relevant facts demonstrate unwillingness and/or inability on the part of Libya to genuinely conduct the proceedings against Mr Al-Senussi.<sup>421</sup>

#### *A. Submissions of the parties and participants*

172. At the outset, the Chamber considers it of assistance to provide a brief overview of the main submissions of the parties and participants in relation to Libya's willingness and ability genuinely to carry out the proceedings against Mr Al-Senussi, in particular with respect to the applicable law and to the main conclusions of each party or participant in light of the available information. The specific submissions made by the parties and participants in relation to certain factual circumstances will be addressed as part of the Chamber's analysis, below.

##### 1. Libya

173. Libya argues that "[i]rrespective of where the burden of proof lies",<sup>422</sup> the evidence relied upon in support of the Admissibility Challenge satisfactorily establishes that the "Libyan Government is willing and able to investigate and

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<sup>419</sup> For example, both the Defence and the OPCV raise allegations regarding a purported lack of independence of Libya's judiciary. This amounts, according to the Defence, to "unwillingness" (Defence Observations, paras 167 to 169) and, according to the OPCV, to unavailability of the national judicial system leading to "inability" (OPCV Observations, paras 74 to 80) on the part of Libya to conduct genuine proceedings against Mr Al-Senussi.

<sup>420</sup> *Infra*, paras 209 to 288.

<sup>421</sup> *Infra*, paras 289 to 309.

<sup>422</sup> Admissibility Challenge, para. 102.

prosecute ‘the case’ against Mr Al-Senussi in a genuine way”.<sup>423</sup> According to Libya, “[t]his is evidenced by the concrete and specific steps that the Government is taking with regard to investigating the case against Abdullah Al-Senussi”.<sup>424</sup>

174. In relation to “unwillingness” within the meaning of article 17(2) of the Statute, Libya argues that “[u]ltimately, each of the scenarios under article 17(2) requires proof of the subjective intention of the State – either an intention to ‘shield the accused’ or an absence of ‘intent to bring the person concerned to justice’”.<sup>425</sup> Libya further submits that “the list of criteria in article 17(2) is exhaustive and [...] this reflects the desire of the drafters to limit the circumstances in which a finding of unwillingness can be made”.<sup>426</sup> It is argued that “[t]he phrase ‘in accordance with the norms of due process recognised by international law’ was inserted in order to insert further objectivity into the determination of unwillingness”<sup>427</sup> and that “[d]ue process is to be examined with a view to determining whether the process is designed to shield the person concerned from criminal responsibility, not to ensure that the domestic proceedings accord with a particular ideal as determined by the ICC”.<sup>428</sup> Libya concludes on this point by arguing that “the evidence it has submitted in support of [the Admissibility Challenge] shows that Libya is *genuinely* investigating the case in a manner consistent with an intention to bring Abdullah Al-Senussi to justice within the meaning of article 17(2) of the Statute” as “[i]t is plain that there is no motive whatsoever to allow Abdullah Al-Senussi to enjoy impunity or to carry out the investigation and prosecution

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<sup>423</sup> *Ibid.*, para. 103.

<sup>424</sup> *Ibid.*

<sup>425</sup> *Ibid.*, para. 109.

<sup>426</sup> *Ibid.*, 110.

<sup>427</sup> *Ibid.*, para. 111.

<sup>428</sup> *Ibid.*

of him so as to shield him from justice. There is no trace of any intent other than 'to bring the person to justice'".<sup>429</sup>

175. In relation to "inability", Libya argues that "[t]he text of Article 17(3) provides for two cumulative sets of considerations: first, 'collapse' or 'unavailability' of the national judicial system and secondly, whether, as a result of that 'collapse' or 'unavailability', the State is 'unable to obtain the accused, or the necessary evidence and testimony, or otherwise unable to carry out proceedings'".<sup>430</sup>

176. With respect to the first set of considerations, Libya observes that the Statute imposes a high threshold by requiring "the 'collapse' of the national judicial system to be either 'total' or substantial'".<sup>431</sup> In relation to "unavailability", Libya submits that the negotiating history provides little assistance as to the meaning of this term, which, it suggests, "pertains to the scenario in which a judicial system is in fact operative but, for a range of legal or factual reasons, it is incapable of functioning in relation to a particular case".<sup>432</sup> Libya argues that "[t]he evidence provided in support of [the Admissibility Challenge] shows that there are no factual or legal impediments to Libya's investigation of Abdullah Al-Senussi and, therefore, no 'unavailability' within the terms of the Statute. To the contrary, the Government has taken concrete and identifiable steps to advance the investigation and prosecution of Abdullah Al-Senussi, based upon the determination to bring him to justice".<sup>433</sup> As for the second set of considerations, Libya submits that "Abdullah Al-Senussi is in safe custody at a detention centre in Libya which is controlled by the Libyan Government" and

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<sup>429</sup> *Ibid.*, para. 102.

<sup>430</sup> *Ibid.*, para. 115.

<sup>431</sup> *Ibid.*, para. 116.

<sup>432</sup> *Ibid.*, para. 117.

<sup>433</sup> *Ibid.*

“[t]he necessary evidence and testimony is available and readily accessible by Libya, and is being collected pursuant to the investigations being conducted”.<sup>434</sup>

177. Finally, Libya argues that that the term “[g]enuinely’ qualifies the phrase ‘to carry out the investigation or prosecution’ and not the terms ‘unwilling’ and ‘unable’” and “was added to article 17 to inject further objectivity into the assessment of the domestic proceedings”.<sup>435</sup> Libya also submits that the term “‘genuinely’ requires consideration of whether the domestic proceedings are ‘sham’ proceedings”<sup>436</sup> and that “[g]iven the detailed criteria set out in article 17(2) and (3), it seems that ‘genuinely’ adds little substance to the assessment of the domestic proceedings, particularly in the case of ‘unwillingness’”.<sup>437</sup>

178. Libya also takes issue with the Defence and the OPCV request that the Chamber apply in the present case the findings of the *Gaddafi* Admissibility Decision. According to Libya, “[t]o invite the Chamber to apply its ruling in the *Gaddafi* case without separate and independent consideration of the proceedings relating specifically to Mr. Al-Senussi is to ignore the requirements of the complementarity assessment, namely consideration of the specificities of the particular case before it”.<sup>438</sup>

## 2. The Defence

179. The Defence argues that Libya is both unwilling and unable genuinely to carry out the proceedings against Mr Al-Senussi.

180. In terms of the legal framework applicable to a finding of “unwillingness” within the meaning of article 17(2) of the Statute, the Defence submits that “[i]n

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<sup>434</sup> *Ibid.*, para. 118.

<sup>435</sup> *Ibid.*, para. 121.

<sup>436</sup> *Ibid.*, para. 122.

<sup>437</sup> *Ibid.*, para. 123.

<sup>438</sup> Libya’s Reply, para. 115.

order to establish unwillingness the court must [...] be satisfied either that proceedings are intended to shield the accused, or that there has been an unjustified delay in proceedings, or that the proceedings are not being conducted ‘independently or impartially’”, and that “[t]he existence of any one of these scenarios is sufficient for a finding of admissibility and the analysis must take into account international human rights, including due process rights”.<sup>439</sup>

181. According to the Defence, “Libya’s unwillingness genuinely to investigate or prosecute Mr. Al-Senussi is manifest both in the unjustified delay to which his proceedings have been subject and in the lack of independence and impartiality with which they are being carried out”.<sup>440</sup> On the first point, the Defence argues that “Libya has been conducting its investigations for over two years [and] [d]espite this significant lapse of time, preliminary logistical and legal steps remain outstanding”.<sup>441</sup> On the second point, the Defence submits that “the administration of justice is manifestly biased against Mr. Al-Senussi and designed not to bring him to any genuine form of justice”.<sup>442</sup>

182. In relation to “inability” pursuant to article 17(3) of the Statute, the Defence submits that “Libya has not established that it is presently able to exercise the necessary judicial powers in proceedings, including in respect of Mr. Al-Senussi’s case”.<sup>443</sup> According to the Defence, “in light of the activities of irregular militia and armed groups, and the insecurity that is widespread in

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<sup>439</sup> Defence Observations, para. 156.

<sup>440</sup> *Ibid.*, para. 172.

<sup>441</sup> *Ibid.*

<sup>442</sup> *Ibid.*

<sup>443</sup> *Ibid.*, para. 70.

Libya, the Libyan Governmental authorities do not have the ability to investigate and prosecute the case against Mr. Al-Senussi".<sup>444</sup>

183. In particular, the Defence submits that "the judicial system is in a state of substantial collapse and/or unavailable given that (a) the requisite Governmental authority and control does not extend over detention facilities, guards and the police, including in respect of the prison where Mr. Al-Senussi is detained; and (b) the security and proper functioning of judicial organs are constantly undermined".<sup>445</sup> Furthermore, according to the Defence, "access to the necessary evidence, including witness testimony, for judicial proceedings is severely compromised and there is no evidence that effective witness protection programs are in place".<sup>446</sup> In addition, the Defence argues that "the Libyan authorities are otherwise unable to conduct genuine proceedings against Mr. Al-Senussi given that he has had no access to legal representation and other fundamental rights have been violated".<sup>447</sup>

184. Finally, the Defence submits that "[t]he actions of the authorities in procuring Mr. Al-Senussi's surrender illegally, denying him legal assistance, holding him in solitary confinement and exposing him to other abuses makes clear that no functioning judicial process is underway at this time".<sup>448</sup>

### 3. The Prosecutor

185. The Prosecutor submits that "[t]he second part of the admissibility test requires Libya to demonstrate that it is willing and able to genuinely investigate or prosecute the case" and that "[t]he term 'genuinely' in Article 17(1)(a) and (b) requires a showing that the investigative and prosecutorial

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<sup>444</sup> *Ibid.*

<sup>445</sup> *Ibid.*

<sup>446</sup> *Ibid.*

<sup>447</sup> *Ibid.*

<sup>448</sup> *Ibid.*, para. 71.

efforts are sincere and that there exist the means to bring them to completion".<sup>449</sup>

186. According to the Prosecutor, "the Chamber's determination of a State's 'willingness' should be guided by the drafting history of Article 17", and particularly by the fact that "an overarching concern by negotiating States was that a determination of admissibility by the Court not become a judgment on the fairness of the national system *per se*".<sup>450</sup> The Prosecutor submits that "the ICC should not function as a court of appeal on national decisions based on alleged domestic deviations from applicable human rights norms" and "cannot find a State unwilling on the sole ground that the national proceedings violate due process, but must also find a violation of one of the three subparagraphs in Article 17(2)".<sup>451</sup>

187. In relation to "inability", the Prosecutor submits that "while Article 17 sets out benchmarks to enable the Court to identify cases that cannot be genuinely heard before national courts, the Statute's complementarity provisions should not become a tool for overly harsh structural assessments of the judicial machinery in developing countries or in countries in the midst of a post-conflict democratic transition which, as Libya notes, will not possess a sophisticated or developed judicial system".<sup>452</sup>

188. According to the Prosecutor, "[o]nly where the national investigation or proceedings lack fundamental procedural rights and guarantees to such a degree that the national efforts can no longer be held to be consistent with the object and purpose of the Statute and Article 21(3) should the Court consider

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<sup>449</sup> Prosecutor's Response, para. 70.

<sup>450</sup> *Ibid.*, para. 71.

<sup>451</sup> *Ibid.*

<sup>452</sup> *Ibid.*, para. 72.

matters of fairness as a corollary to its admissibility determination”.<sup>453</sup> The Prosecutor argues that “such considerations should be applied cautiously and only to those cases where due to the complete absence of even the minimum and most basic requirements of fairness and impartiality, the national efforts can only be viewed as a travesty of justice, and accordingly justify the continued exercise of jurisdiction by the Court”.<sup>454</sup>

189. In relation to the case against Mr Al-Senussi, the Prosecutor submits that “[f]rom the material submitted, it does not appear that Libya is unwilling to carry out the investigation of Al-Senussi genuinely” and “Al-Senussi is in the custody of the central government, and Libya does not appear to be shielding Al-Senussi from criminal responsibility”.<sup>455</sup> Moreover, in the Prosecutor’s view, “at this time there appear to be no delays which can be described as presumptively excessive, unreasonable, inconsistent with an intent to bring the person to justice [and] [a]ny delays, at this stage, do not appear to be attributable to anything other than obstacles arising from the challenges of establishing a fully functional government in a transitional post-conflict stage”.<sup>456</sup> In this regard the Prosecutor argues that “it is essential that States not be held to a higher standard with regard to the speed and progress of their proceedings than has been met by the ICC itself or other international tribunals, particularly given the history of Libya, its very recent emergence from four decades of autocratic rule, and the serious security challenges facing the country”.<sup>457</sup> Finally, the Prosecutor submits that “Libya has not shown a lack of

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<sup>453</sup> *Ibid.*, para. 73.

<sup>454</sup> *Ibid.*

<sup>455</sup> *Ibid.*, para. 79.

<sup>456</sup> *Ibid.*

<sup>457</sup> *Ibid.*

independence or impartiality inconsistent with the intent to bring Al-Senussi to justice".<sup>458</sup>

190. With respect to Libya's ability genuinely to carry out the proceedings against Mr Al-Senussi, the Prosecutor submits that "Libya, notwithstanding the challenges it has faced, has taken relevant steps in a relatively short period of time and against an extremely difficult backdrop".<sup>459</sup> In particular, the Prosecutor finds of significance: (i) that "[t]he investigation, now conducted by the civilian Prosecutor-General, appears to have progressed since its start on 9 April 2012"; (ii) that "[s]ubstantial evidence has been gathered, in particular, more than 100 witnesses have been interviewed, including Al-Senussi on two occasions, and documentary evidence and phone intercepts have been obtained"; (iii) that "[a]n apparently qualified team of prosecutors and investigators, managed by an Investigation Committee composed of four members, is investigating the case throughout the country under the supervision of the Prosecutor General"; and (iv) that "Libya has secured relevant international assistance on the rule of law, including training of prosecutors and judges on national strategies for the investigation and prosecution of officials of Gaddafi's regime and on screening and criminal investigation".<sup>460</sup>

191. In her Additional Observations, which were filed after the *Gaddafi* Admissibility Decision, the Prosecutor argues that "[t]here are some significant differences between the case against Saif Al-Islam and the case against Abdullah Al-Senussi: first, Senussi is under custody of the Libyan central authorities, and second, and notwithstanding the existence of detention centers which are not controlled by the Libyan central authorities, it appears that

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<sup>458</sup> *Ibid.*

<sup>459</sup> *Ibid.*, para. 82.

<sup>460</sup> *Ibid.*

Libya has had the capacity to obtain the *necessary* evidence, which is both specific and sufficiently probative, to investigate Al-Senussi for the same case as that of the ICC [as] evidenced by the material attached to the Challenge, in particular its 16 witness testimonies as well as medical reports, death certificates and military documents”.<sup>461</sup> On this latter point, the Prosecutor further argues that “the threshold under Article 17(3) is not that *any* evidence cannot be gathered, but that the *necessary* evidence and testimony cannot be obtained as a result of a total or substantial collapse or unavailability of its national judicial system” and “[t]hus, even in the scenario that Libya is not able to gather the testimony of certain witnesses due to obstacles arising from the current situation within the country, this would not deem Libya automatically unable for the purposes of Article 17(3)”.<sup>462</sup>

192. According to the Prosecutor, “[t]he issue is therefore whether at this point in the Libyan domestic proceedings, namely, the investigation stage, Libya is deemed unable to gather the necessary evidence and to carry out its proceedings because first, Defence witnesses may be unwilling to testify at trial due to security concerns which have not at this stage been adequately addressed (and the necessary evidence might not therefore be presented) and second, Libya will be unable to move to the prosecution or trial stage of the proceedings unless Al-Senussi is provided adequate legal representation”.<sup>463</sup> The Prosecutor submits that in conducting its determination the Chamber “must [...] on the one hand, resist engaging in speculative assessments as to the outcome of possible future events at the national level; and on the other, remain vigilant to obvious obstacles, established on the basis of concrete

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<sup>461</sup> Prosecutor’s Additional Observations, para. 20 (emphasis in the original).

<sup>462</sup> *Ibid.* (emphasis in the original).

<sup>463</sup> *Ibid.*, para. 22.

evidence, that establish a foreseeable risk that national proceedings cannot in fact be carried out”.<sup>464</sup>

193. It is the Prosecutor’s view that “[n]otwithstanding that the case against Al-Senussi is in the midst of its investigation, it is difficult to predict the impact that the current lack of clarity as to the existence and effective functioning of a witness protection program in Libya can have on the presentation of the necessary evidence in subsequent proceedings” also considering that “[a]t this stage there is no list of prospective Defence witnesses, nor is there an assessment of their need for protective measures”.<sup>465</sup>

194. Finally, with respect to the appointment of Defence counsel, the Prosecutor argues that “while Libya is currently able to investigate Al-Senussi at this stage, unless he is appointed a lawyer, there is no prospect that proceedings can progress to the next phase” and that, while the Chamber “cannot base its decision on the admissibility of the case now on possible future facts”, it must, however, “be satisfied, on the basis of submissions received, that there is no impediment or defect that would render the future appointment of counsel impossible, thereby finding Libya unable to ‘otherwise carry out its proceedings’ within the meaning of Article 17(3)”.<sup>466</sup>

#### 4. The OPCV

195. The OPCV submits that “various factors [...] are likely to hinder Libya’s capacity to genuinely investigate the case against Mr Al-Senussi”.<sup>467</sup> The OPCV specifically mentions three of these factors.

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<sup>464</sup> *Ibid.*, para. 24.

<sup>465</sup> *Ibid.*, para. 25.

<sup>466</sup> *Ibid.*

<sup>467</sup> OPCV Observations, para. 66.

196. First, the OPCV submits that Libya lacks the ability to ensure the safety of the proceedings,<sup>468</sup> citing a number of issues: “the numerous attacks on ministries and governmental entities”; the inability of Libya “to ensure security and safety of criminal courts [which], as a result, have to operate at *minima*”, “the Government’s lack of control over detention facilities”; and “the risks faced by lawyers who act for associates of the former regime”. According to the OPCV, these issues, taken together, “cannot but lead to the conclusion that the Libyan judicial system is unavailable within the meaning of article 17(3) of the Rome Statute”.<sup>469</sup>

197. Second, the OPCV argues that Libya lacks the ability to obtain witness testimonies due to the absence of proper protective measures for witnesses addressing the security challenges faced by Libya.<sup>470</sup>

198. Third, the OPCV draws the Chamber’s attention to the “[l]ack of independent judiciary”.<sup>471</sup> Indeed, according to the OPCV, “[i]t appears that the Libyan authorities have currently chosen to keep in place the existing judicial system which survived the fall of the former regime”.<sup>472</sup>

## ***B. Analysis of the Chamber***

### **1. Applicable legal framework**

199. Article 17(1)(a) of the Statute provides that a case is inadmissible before the Court when it is being investigated or prosecuted by a State which has jurisdiction over it, “unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”.

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<sup>468</sup> *Ibid.*, paras 68 to 71.

<sup>469</sup> *Ibid.*, paras 68-69.

<sup>470</sup> *Ibid.*, para. 72.

<sup>471</sup> *Ibid.*, paras 74 to 80.

<sup>472</sup> *Ibid.*, para. 76.

200. Article 17(2) of the Statute further clarifies that:

In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

- (a) the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
- (b) there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person to justice.

201. According to article 17(3) of the Statute, in order to determine “inability” in a particular case, the Chamber “shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise is unable to carry out its proceedings”.

202. The Chamber observes that the determination in accordance with article 17(1)(a), (2) and (3) of the Statute on the State’s “willingness” and “ability” must be conducted in relation to the specific domestic proceedings concerning the same case that is prosecuted before the Court, for which the Chamber is satisfied that there is no situation of inactivity. In this sense, the Chamber’s analysis in the present case is limited to the determination of whether Libya is unwilling or unable genuinely to carry out its ongoing proceedings against Mr Al-Senussi for the same case that is before the Court. More precisely, the Chamber is called upon to assess whether the circumstances surrounding the national proceedings against Mr Al-Senussi, as emerging from the material presented, indicate that at least one of the following findings is warranted:

- (i) Libya is unwilling genuinely to carry out the proceedings against Mr Al-Senussi given that, “having regard to the principles of due process recognized by international law”, the Chamber considers that:
  - a. the proceedings against Mr Al-Senussi are being undertaken for the purpose of shielding him from criminal responsibility for crimes within the jurisdiction of the Court;
  - b. there has been an unjustified delay in the proceedings against Mr Al-Senussi which in the circumstances is inconsistent with an intent to bring him to justice; or
  - c. the proceedings against Mr Al-Senussi are not being conducted independently or impartially and they are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring him to justice; or
- (ii) Libya is unable genuinely to conduct the proceedings against Mr Al-Senussi given that, due to a total or substantial collapse or unavailability of its national judicial system:
  - a. Libya is unable to obtain custody of Mr Al-Senussi;
  - b. Libya is unable to obtain the evidence and testimony that is necessary to conduct its proceedings against Mr Al-Senussi; or
  - c. Libya is otherwise unable to carry out its proceedings against Mr Al-Senussi.

## 2. Significant features of Libyan national law

203. At the outset, the Chamber emphasises that Libya’s willingness and ability to carry out its proceedings against Mr Al-Senussi must be assessed in light of the relevant law and procedures applicable to domestic proceedings in

Libya.<sup>473</sup> In this regard, the Chamber observes that Libya's Criminal Procedure Code describes in detail the procedure applicable to national criminal cases, including the rights to be accorded to the accused at the different phases of the proceedings.<sup>474</sup> The Chamber also notes that certain other applicable guarantees are provided in Libya's Constitutional Declaration of 3 August 2011<sup>475</sup> and that Libya has ratified a number of relevant human rights instruments.<sup>476</sup>

204. The civilian criminal justice system in Libya consists of four phases: investigation, accusation, trial and appeal.<sup>477</sup> The investigation is conducted by the Prosecutor-General who acts independently from the judiciary.<sup>478</sup> It is required that all investigative procedures undertaken in relation to a suspect's case be recorded.<sup>479</sup> After completion of an investigation, when the Prosecutor-General is of the view that there is sufficient evidence to warrant the case proceeding, the case is transmitted to the Accusation Chamber which reviews the sufficiency of the evidence lawfully collected by the Prosecutor-General and, on this basis, decides whether to dismiss the case or

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<sup>473</sup> See also *Gaddafi* Admissibility Decision, para. 200.

<sup>474</sup> The text of the relevant provisions of Libya's Criminal Procedure Code has been provided to the Chamber in ICC-01/11-01/11-158-AnxB and ICC-01/11-01/11-273-AnxB. Other information in relation to the applicable national procedural law has been provided by Libya's Prosecutor-General (Annex C to *Gaddafi* Admissibility Challenge, pp. 6 to 8) and by a judge of the Tripoli Court of First Instance (Annex H to *Gaddafi* Admissibility Challenge).

<sup>475</sup> The Constitutional Declaration has been provided to the Chamber as Annex G to *Gaddafi* Admissibility Challenge.

<sup>476</sup> Libya is party to international and regional human rights instruments that guarantee the right to a fair trial, including the International Covenant on Civil and Political Rights, the United Nations Convention against Torture, the International Convention on the Elimination of Racial Discrimination, the African Charter on Human and Peoples' Rights, the Arab Charter on Human Rights and resolutions such as the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, adopted by the African Union in 2003 (*Admissibility Challenge*, para. 144).

<sup>477</sup> *Admissibility Challenge*, para. 128.

<sup>478</sup> *Ibid.*

<sup>479</sup> *Ibid.*, para. 147. See also Annex H to *Gaddafi* Admissibility Challenge, p. 6.

remit it to the Criminal Trial Court for trial.<sup>480</sup> It is not possible for a trial to commence prior to the conclusion of the Accusation Chamber's procedure.<sup>481</sup>

205. The judgment of the Criminal Trial Court can be appealed to the Supreme Court by the Prosecutor or by the defendant, depending on whether it is a verdict of acquittal or conviction.<sup>482</sup> In the event it finds errors of law, the Supreme Court nullifies the verdict of the Criminal Trial Court.<sup>483</sup> A more stringent procedure is followed when the death penalty has been imposed following conviction. In these cases, the sentence cannot be carried out until the Supreme Court has considered the case and, even if the defendant does not appeal the sentence, the Prosecutor is obliged to do so before the sentence can be carried out.<sup>484</sup> Furthermore, in these situations, the Supreme Court is not limited to considering errors of law, but reviews all factual, legal and procedural matters leading to the verdict and sentence.<sup>485</sup>

206. According to Libya's Criminal Procedure Code, suspects have a right to legal representation during the investigation phase of the case, both in interviews with the Prosecutor-General and when confronted with witnesses, as well as the right to view the investigating material relating to their case.<sup>486</sup> If the suspect does not appoint counsel, the Accusation Chamber will appoint counsel to review the investigative materials in order to prepare the case for the defence.<sup>487</sup> It is indeed one of the key roles of the Accusation Chamber to

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<sup>480</sup> Admissibility Challenge, paras 129-130. It also appears from Libya's submissions that the Accusation Chamber may also order that supplementary investigations into the case be conducted: *see* Admissibility Challenge, para. 130, Libya's Final Submissions, para. 8, and Annex H to *Gaddafi* Admissibility Challenge, p. 5.

<sup>481</sup> Admissibility Challenge, para. 129.

<sup>482</sup> *Ibid.*, paras 132-133.

<sup>483</sup> *Ibid.*

<sup>484</sup> *Ibid.*, para. 134.

<sup>485</sup> *Ibid.*

<sup>486</sup> *Ibid.*, para. 146.

<sup>487</sup> *Ibid.*

ensure that a lawyer is appointed to represent the suspect during the trial.<sup>488</sup> The lawyer has the right to ask for sufficient time to prepare the case.<sup>489</sup> If a trial were to proceed without a lawyer to represent the accused, or without allowing the lawyer sufficient time to prepare the case, the trial verdict would be quashed on appeal.<sup>490</sup>

### 3. Assessment of facts and evidence

207. The Chamber analyses below the factual allegations advanced by the parties and participants that are alleged to have a bearing on Libya's willingness and/or ability genuinely to carry out the proceedings against Mr Al-Senussi. Following this analysis, and taking into account all the factual allegations that are both relevant to the Chamber's consideration under article 17 of the Statute and sufficiently substantiated by the available evidence and information, the Chamber will provide its conclusion on whether Libya is willing and able genuinely to carry out the proceedings against Mr Al-Senussi.<sup>491</sup>

208. As observed above,<sup>492</sup> the Chamber recalls that Libya, as the State challenging the admissibility of the case against Mr Al-Senussi, is required to substantiate the Admissibility Challenge to the extent required by the concrete circumstances of the case, and that an evidentiary debate on Libya's unwillingness or inability will only be meaningful when doubts arise as to the genuineness of the domestic proceedings. In this regard, the Chamber emphasises that, although Libya carries the burden of proof, any factual allegation raised by any party or participant must be sufficiently substantiated in order to be considered properly raised.

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<sup>488</sup> *Ibid.*, para. 130 and 149.

<sup>489</sup> *Ibid.*, para. 149.

<sup>490</sup> *Ibid.* See Annex G to *Gaddafi* Admissibility Challenge.

<sup>491</sup> See paras 289 to 309 below.

<sup>492</sup> See para. 27 above.

*a. Facts and evidence relied upon by Libya*

209. Libya submits that the evidence presented in support of the Admissibility Challenge demonstrates the quality of the ongoing investigation against Mr Al-Senussi and, in turn, the genuineness of the domestic proceedings. In these circumstances, in Libya's submission, there is no indication that it is unwilling or unable genuinely to conduct the proceedings against Mr Al-Senussi.

210. The Chamber recognizes that the two limbs of the admissibility test, while distinct, are nonetheless intimately and inextricably linked. Therefore, evidence put forward to substantiate the assertion of ongoing proceedings covering the same case that is before the Court may also be relevant to demonstrate their genuineness. Indeed, evidence related, *inter alia*, to the appropriateness of the investigative measures, the amount and type of resources allocated to the investigation, as well as the scope of the investigative powers of the persons in charge of the investigation are relevant for both limbs since such aspects, which are significant to the question of whether there is no situation of "inactivity" at the national level, are also relevant indicators of the State's willingness and ability genuinely to carry out the concerned proceedings.

211. The Chamber therefore recalls its previous findings in relation to the first limb of the admissibility test,<sup>493</sup> including, in particular, that the evidence relied upon by Libya demonstrates: (i) that adequate investigative steps have been taken by the Prosecutor-General's investigative team, including conducting interviews of witnesses, obtaining documentary evidence, and requesting specific information from relevant external sources; (ii) that multiple lines of investigation have been followed by the judicial authorities with a view to

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<sup>493</sup> See paras 160 to 165 above.

ascertaining those facts that may be relevant to ascertaining Mr Al-Senussi's alleged criminal responsibility; and (iii) that, during interviews, witnesses were asked to provide information of a potential exculpatory nature, to comment on information given by other witnesses or on items of documentary evidence, and to clarify portions of their own interviews, while victims were also requested to provide documentary evidence in support of their assertions as to the harm suffered as a result of the commission of the reported crimes.<sup>494</sup>

212. In addition, the Chamber notes that Libya has provided information relating to the resources allocated to the investigation of Mr Al-Senussi. It appears that several investigators (including some based in Benghazi) are currently investigating Mr Al-Senussi's alleged crimes. According to the information before the Chamber, these investigators report to an Investigative Committee, composed of four members, which is in turn supervised by the Prosecutor-General.<sup>495</sup> It is submitted that "[t]he Investigative Committee benefits from all of the financial and other resources available to the Prosecutor-General's Office on a priority basis".<sup>496</sup>

213. Libya has also informed the Chamber that the members of the Investigative Committee designated to investigate the crimes allegedly committed by Mr Al-Senussi: (i) "are part of, and thus possess the full powers of, the Prosecutor-General's office, [including] the power to summon witnesses, to search and seize evidence, to conduct forensic examinations and crime scene investigations, and to request international judicial cooperation";<sup>497</sup> (ii) "have benefitted from strategic advice as to the planning of trials of former Gaddafi regime officials by UN experts";<sup>498</sup> (iii) "[conduct] on-site investigations,

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<sup>494</sup> See para. 161 above.

<sup>495</sup> Admissibility Challenge, para. 163.

<sup>496</sup> *Ibid.*, para. 164.

<sup>497</sup> *Ibid.*

<sup>498</sup> *Ibid.*

including exhumations of mass graves, as well as investigations at prisons and other locations where executions and acts of torture were carried out”;<sup>499</sup> (iv) have “made sure to preserve evidence in accordance with regular criminal investigative procedures [including] the retention of documents, electronic material (audio CDs and video DVDs), photographs and DNA samples in addition to witness testimonies”.<sup>500</sup>

214. The Chamber also recalls that the domestic proceedings against Mr Al-Senussi and an additional other 37 officials of the former Gaddafi regime have progressed such that on 19 September 2013, the case was transferred to the Accusation Chamber as a result of the investigations conducted by the Prosecutor-General and his office.<sup>501</sup> According to Libya, this fact shows that despite the existence of certain security concerns across the country “significant and sufficient portions of the judicial system have remained functional, efficient and robust”.<sup>502</sup>

215. The Chamber also notes that the hearing before the Accusation Chamber held in the purpose-built courtroom complex in Tripoli on 19 September 2013 reportedly occurred without security incidents despite the presence of certain protesters outside the courtroom.<sup>503</sup> In this regard, Libya states that “[s]ecurity

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<sup>499</sup> *Ibid.*

<sup>500</sup> *Ibid.*

<sup>501</sup> *Supra*, para. 156.

<sup>502</sup> Libya’s Final Submissions, para. 18.

<sup>503</sup> On this point Libya relies on, *inter alia*: Libya Herald, “Abdullah Senussi charged in Tripoli court; Saif still in Zintan”, 19 September 2013 (available at <http://www.libyaherald.com/2013/09/19/43193/#axzz2fu8YPFel>); The Telegraph, “Saif Gaddafi asks for trial to be heard in Zintan rather than Tripoli”, 19 September 2013 (available at <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/10321188/Saif-Gaddafi-asks-for-trial-to-be-heard-in-Zintan-rather-than-Tripoli.html>); and The Tripoli Post, “Seif Gaddafi Misses Tripoli Hearing But Attends Another Court in Zintan”, 20 September 2013 (available at <http://www.tripolipost.com/articledetail.asp?c=1&i=10652>).

both inside and around the prison/court complex was tight and effective, with local shops being asked to close for the duration of the hearing”.<sup>504</sup>

216. Finally, the Chamber notes that Libya has been receiving international assistance in several relevant areas. In particular, the UN has been providing assistance in supporting the Libyan Government to formulate a prosecutorial strategy, as well as providing training for public prosecutors on screening and criminal investigations.<sup>505</sup> The UNSMIL continues to assist Libya by providing advice on how to advance conflict-related criminal proceedings, which includes training of judges and prosecutors and advising the Ministry of Justice and the Prosecutor-General’s office on national strategies for the investigation and prosecution of officials of the Gaddafi regime for serious conflict-related crimes.<sup>506</sup> Libya has also availed itself of international assistance with a view to enhancing the investigative and forensic capability of the Libyan police force.<sup>507</sup>

217. The Chamber considers that all these facts and circumstances are relevant to its consideration on whether Libya is willing and able genuinely to carry out the proceedings against Mr Al-Senussi.

*b. Facts and evidence relied upon by the Defence and the OPCV*

218. The Defence and the OPCV allege certain facts that, in their view, indicate Libya’s unwillingness and/or inability genuinely to carry out the proceedings against Mr Al-Senussi within the meaning of article 17 of the Statute. These facts fall within two main categories, which the Chamber will address in turn:

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<sup>504</sup> Libya’s Final Submissions, para. 33.

<sup>505</sup> Annex 23 to Libya’s Submissions of 23 January 2013, pp. 7-8 and Admissibility Challenge, para. 189.

<sup>506</sup> Annex 20 to Libya’s Submissions of 23 January 2013, p. 6.

<sup>507</sup> It is submitted that the European Union, Italy, Turkey, Argentina and the United Kingdom have provided this kind of assistance and that the United Arab Emirates, France, Italy, Turkey and the United States have pledged additional assistance (*see* Admissibility Challenge, para. 186 and Annex 23 to Libya’s Submissions of 23 January 2013, p. 8).

(i) facts which allegedly affect the validity of the proceedings against Mr Al-Senussi; and (ii) facts which allegedly affect the functioning of the Libyan judicial system, ultimately impacting on Libya's willingness and/or ability genuinely to carry out the proceedings against Mr Al-Senussi.

219. In relation to the analysis of the factual assertions made by the Defence, the Chamber reiterates, as stated above,<sup>508</sup> that it is mindful that the Defence ability to raise certain factual matters may have been prejudiced by the absence of direct contacts with Mr Al-Senussi, since a visit to Mr Al-Senussi by his counsel has not taken place despite the Chamber's order to this effect.

*(i) Facts allegedly affecting the validity of the domestic proceedings against Mr Al-Senussi*

220. The Defence alleges that the domestic proceedings against Mr Al-Senussi are being conducted in violation of his fundamental rights or are otherwise vitiated by procedural irregularities. In particular, the Defence alleges that: (i) the domestic proceedings against Mr Al-Senussi are tainted by "unjustified delay";<sup>509</sup> (ii) Mr Al-Senussi has not benefited from legal assistance to date in the proceedings;<sup>510</sup> (iii) other of Mr Al-Senussi's fundamental rights have been violated or, at a minimum, there is no indication that they have been respected;<sup>511</sup> and (iv) Mr Al-Senussi may be further prejudiced by a systemic lack of independence and impartiality of the Libyan judicial system.<sup>512</sup> In relation to this set of arguments, the Defence submits that considerations of due process are inherent in the assessment of a State's ability and willingness to conduct "genuine" proceedings and "must [...] be even more stringent in a

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<sup>508</sup> *Supra* para. 29.

<sup>509</sup> Defence Observations, paras 163 to 166.

<sup>510</sup> *Ibid.*, paras 120 to 130.

<sup>511</sup> *Ibid.*, paras 131 to 140.

<sup>512</sup> *Ibid.*, paras 168 to 171.

case, such as this, where a conviction in a national court would very likely result in the suspect being sentenced to death”.<sup>513</sup>

221. The Chamber reiterates that the assessment of Libya’s ability and willingness to carry out its proceedings against Mr Al-Senussi must be made with reference to Libya’s own national law. Nonetheless, the Chamber emphasises that it is not just any alleged departure from, or violation of, national law that may form a ground for a finding of unwillingness or inability.<sup>514</sup> The Chamber will take into account only those irregularities that may constitute relevant indicators of one or more of the scenarios described in article 17(2) or (3) of the Statute, and that are sufficiently substantiated by the evidence and information placed before the Chamber.

Allegations that the proceedings against Mr Al-Senussi are being conducted with “unjustified delays”

222. At first, the Defence argues that the proceedings against Mr Al-Senussi are being conducted with “unjustified delays”.<sup>515</sup>

223. The Chamber observes that unjustified delay in the national proceedings is a factor which can ground, in accordance with article 17(2)(b) of the Statute, a finding on unwillingness, provided that such unjustified delay is, in the circumstances of the case, “inconsistent with the intent to bring the person to justice”. This is in line with the rest of article 17(2) of the Statute, which mandates the Chamber to examine factual circumstances with a view to ultimately discerning the State’s intent as concerns its ongoing domestic proceedings against the specific individual. The Chamber will therefore

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<sup>513</sup> *Ibid.*, para. 162.

<sup>514</sup> As observed above, the Chamber recalls that the relevant provisions which form part of Libya’s national law are set out in the Libyan Criminal Procedure Code and the Libya’s Constitution Declaration of 3 August 2011 as well as in those human rights instruments that Libya has ratified: *see* above para. 203.

<sup>515</sup> Defence Observations, paras 163 to 166.

consider whether the factual allegations of the Defence indicate the existence of unjustified delay in the proceedings against Mr Al-Senussi which is inconsistent with the intent to bring him to justice, and in doing so will take into account all the relevant information emerging from the evidence in its possession, *inter alia*, relating to the chronology of the domestic proceedings and the complexity of the domestic case. Indeed, the Chamber is of the view that the determination of whether there has been any such unjustified delay must be made not against an abstract ideal of “justice”, but against the specific circumstances surrounding the investigation concerned.

224. The Defence submits that “[a]lthough there initially appeared to be a danger of a swift, ‘sham’ trial for Mr. Al-Senussi in the Libyan courts, the problem has become one of unjustifiable delay in the proceedings” and that “[t]he Libyan investigation appears to be stuck – or is being held – at the pre-accusation stage during which a lawyer is denied and the investigation materials remain largely secret. After two years of investigation, there is apparently still not enough evidence to sustain a single charge”.<sup>516</sup> The Defence also argues that “[t]here is, in addition, a serious risk of further future delays in light of the way in which Libya is choosing to conduct proceedings [as evidenced by the fact that]: [(i)] Mr. Al-Senussi is yet to be assigned counsel and his case has yet to be assigned a case number for trial; [(ii)] Mr. Al-Senussi’s case may be joined with the cases against at least nine other individuals. One of them is Saif Gaddafi, whose case cannot proceed given his absence from Tripoli and lack of appointed counsel; [(iii)] Mr. Al-Senussi’s trial is to take place in a renovated ‘courtroom complex and prison facility’ but the renovation work, as at 2 April 2013 when Libya filed its Admissibility Challenge, had not yet begun”.<sup>517</sup> According to the

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<sup>516</sup> *Ibid.*, para. 164.

<sup>517</sup> *Ibid.*, para. 165 (emphasis omitted).

Defence, “[t]hat these preliminary, and crucial, issues remain outstanding over 9 months after Mr. Al-Senussi’s illegal transfer into Libyan custody give[s] rise to the presumption that proceedings are not being conducted expeditiously”.<sup>518</sup>

225. Contrary to the submission of the Defence, Libya asserts that “any delays in the proceedings are an understandable result of the challenges Libya faces as a country in transition and [...] they in no way demonstrate a lack of intention to bring Mr. Al-Senussi to justice”.<sup>519</sup>

226. Likewise, the Prosecutor states that “at this time there appear to be no delays which can be described as presumptively excessive, unreasonable, inconsistent with an intent to bring the person to justice” and that “[a]ny delays, at this stage, do not appear to be attributable to anything other than obstacles arising from the challenges of establishing a fully functional government in a transitional post-conflict stage”, given, in particular, Libya’s “very recent emergence from four decades of autocratic rule, and the serious security challenges facing the country”.<sup>520</sup>

227. In the view of the Chamber, the relevant chronology of Libyan proceedings against Mr Al-Senussi can briefly be summarised as follows: on 9 April 2012, the investigation commences under the direction of the Military Prosecutor;<sup>521</sup> on 17 July 2012, the Supreme Court issues a decision clarifying that jurisdiction over cases such as Mr Al-Senussi’s fall within the competence of civilian judicial authorities and, thereafter, the investigation of Mr Al-Senussi is transferred to the Prosecutor-General;<sup>522</sup> on 5 September 2012,

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<sup>518</sup> *Ibid.*, para. 166.

<sup>519</sup> Libya’s Reply, para. 161.

<sup>520</sup> Prosecutor’s Response, para. 79.

<sup>521</sup> Admissibility Challenge, paras 26 and 136, and Libya’s Reply, para. 72.

<sup>522</sup> Admissibility Challenge, para. 127, and Libya’s Reply, para. 72. *See also* Annexes 8 and 28 to the Admissibility Challenge.

Mr Al-Senussi is transferred to Libya by Mauritania<sup>523</sup> and, from that moment on, the Libyan judicial authorities are able to interview him<sup>524</sup> and confront him, pursuant to article 106 of Libya's Criminal Procedure Code, with the evidence they have collected; on 2 April 2013, Libya files the Admissibility Challenge before this Chamber. Throughout this period, Libya has continued progressively to conduct its investigation, as demonstrated by the dates of witness interviews, which appear in the evidence submitted as part of the Admissibility Challenge. Finally, on 19 September 2013, the case against Mr Al-Senussi is transferred to the Accusation Chamber.<sup>525</sup>

228. The Chamber observes that the proceedings against Mr Al-Senussi appear to cover factual allegations that have broad temporal, geographic and material parameters, since they refer to events and different alleged criminal conducts taking place over a long period of time and across the entire country.<sup>526</sup> The investigation into the crimes allegedly committed in Benghazi as part of the repression of the revolution of 2011 appears on its own to be sufficiently broad in scope to be understandably challenging.

229. In these specific circumstances, the Chamber is of the view that a period of less than 18 months between the commencement of the investigation in relation to Mr Al-Senussi and the referral of the case against him to the

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<sup>523</sup> See "Libyan Government's provisional report pursuant to the Chamber's Decision of 9 August 2012 & Request for leave to file further report by 28 September 2012", 7 September 2013, ICC-01/11-01/11-205, para. 13.

<sup>524</sup> According to the Prosecutor-General's Office, the first interview of Mr Al-Senussi took place on 17 September 2012 (Annex 3 to the Admissibility Challenge); see also Admissibility Challenge, para. 165.

<sup>525</sup> Annex A to Libya's Final Submissions.

<sup>526</sup> See, *inter alia*, Annex E to *Gaddafi* Admissibility Challenge, which refers to investigative activities into an alleged offence of [REDACTED] committed by Mr Al-Senussi in 2011, and Annex F to *Gaddafi* Admissibility Challenge, which is an "opinion" by the Assistant of the Military Prosecutor-General, providing a summary of the events at the Abu Salim prison in 1996 and Mr Al-Senussi's role into these events, as emerging from the testimonies of six witnesses.

Accusation Chamber cannot be considered to constitute an unjustified delay inconsistent with an intent to bring Mr Al-Senussi to justice.

Lack of legal representation for Mr Al-Senussi

230. The Defence argues that the Chamber should take into account the fact that Mr Al-Senussi does not benefit from legal representation in the national proceedings. According to the Defence, this circumstance warrants both a finding of inability – on the ground that Libya is unable to carry out the proceedings against Mr Al-Senussi – and a finding of unwillingness, given that this “support[s] a finding that Libya is not willing to provide such protections to this accused”.<sup>527</sup> In this latter respect, the Defence argues that it appears that Mr Al-Senussi has been interrogated on several occasions in the absence of a lawyer and has been confronted with evidence against him without the benefit of legal advice,<sup>528</sup> despite repeatedly requesting a lawyer.<sup>529</sup>

231. The Chamber notes that, on 17 April 2013, Human Rights Watch reported on a visit to Mr Al-Senussi that had taken place two days before.<sup>530</sup> In the relevant part, this report reads as follows: “Sanussi’s main complaint was lack of access to a lawyer since his extradition in September 2012. ‘I asked for a lawyer on the second or third day after my arrival here in Libya,’ he told Human Rights Watch, adding ‘I haven’t seen or spoken with a lawyer yet’”.<sup>531</sup> The report further states that “Justice Minister Marghani told Human Rights Watch after the visit that ‘Sanussi has the right to a defense lawyer of his choice like any other person standing trial’ [and] that so far no Libyan lawyer

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<sup>527</sup> Defence Observations, para. 144.

<sup>528</sup> *Ibid.*, paras 125 and 132.

<sup>529</sup> *Ibid.*, para. 124.

<sup>530</sup> Human Rights Watch, “Libya: Ensure Abdallah Sanussi Access to Lawyer” (available at <http://www.hrw.org/news/2013/04/17/libya-ensure-abdallah-sanussi-access-lawyer>). This report was relied upon, first, by Defence (Defence Observations, paras 124 and 138, and accompanying footnote) and subsequently by Libya (Libya’s Reply, paras 131-132 and 152).

<sup>531</sup> *Ibid.*

had taken on the case".<sup>532</sup> Finally, it is stated that "Marghani assured Human Rights Watch that 'Libya is committed to provide a fair trial,' adding that Libyan law says that 'no trial should take place without the presence of a defense lawyer'".<sup>533</sup>

232. Libya confirms that, at the moment, Mr Al-Senussi does not have legal representation in the national proceedings, and admits that "[t]he sensitivity of the case and the security situation is such that there has been some delay in achieving this".<sup>534</sup> Libya further submits that "[t]he Ministry of Justice is cognisant of the need to ensure that Mr. Al-Senussi appoints a local lawyer by virtue of a formal power of attorney and will be taking further steps to facilitate the appointment of such a lawyer in the near future".<sup>535</sup> In its most recent submission before the Chamber, Libya indicates that it is expected that the execution of a formal power of attorney will be carried out "at the order of the Accusation Chamber in the very near future".<sup>536</sup>

233. At this point of its analysis, the Chamber finds it sufficient to observe that Mr Al-Senussi is yet to appoint (or to have appointed to him) a lawyer to represent him in the domestic proceedings in Libya, notwithstanding his entitlement, under article 106 of Libya's Criminal Procedure Code, to benefit from legal representation.<sup>537</sup> The Chamber also recalls that, upon completion of the proceedings before the Accusation Chamber, the case against Mr Al-Senussi cannot proceed further without a lawyer to represent him at trial.<sup>538</sup> The Chamber considers that these are relevant considerations for the purposes of its determination under article 17(2)(c) and (3) of the Statute and,

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<sup>532</sup> *Ibid.*

<sup>533</sup> *Ibid.*

<sup>534</sup> Libya's Reply, para. 146.

<sup>535</sup> *Ibid.*

<sup>536</sup> Libya's Final Submissions, para. 28.

<sup>537</sup> *See* para. 206 above.

<sup>538</sup> *See* para. 206 above.

accordingly, the Chamber will take these facts into account, together with all the other relevant circumstances, for its conclusion on whether Libya is unwilling or unable genuinely to carry out the proceedings against Mr Al-Senussi.

Allegations of violations of Mr Al-Senussi's other fundamental rights during the domestic proceedings

234. The Defence also argues that other fundamental procedural rights of Mr Al-Senussi are being violated in Libya's proceedings against him. While most of the Defence submissions in this regard are made in the context of Libya's alleged inability to "otherwise carry out its proceedings",<sup>539</sup> the Defence contends that the same facts equally warrant a finding of unwillingness under article 17(2) of the Statute.<sup>540</sup>

235. Before proceeding to the analysis of these arguments, the Chamber emphasises that alleged violations of the accused's procedural rights are not *per se* grounds for a finding of unwillingness or inability under article 17 of the Statute. In order to have a bearing on the Chamber's determination, any such alleged violation must be linked to one of the scenarios provided for in article 17(2) or (3) of the Statute. In particular, as far as the State's alleged unwillingness is concerned, the Chamber is of the view that, depending on the specific circumstances, certain violations of the procedural rights of the accused may be relevant to the assessment of the independence and impartiality of the national proceedings that the Chamber is required to make, having regard to the principles of due process recognized under international law, under article 17(2)(c) of the Statute. However, this latter provision, identifying two cumulative requirements, provides for a finding of

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<sup>539</sup> Defence Observations, paras 120 to 140.

<sup>540</sup> *Ibid.*, paras 144, 167 and 171.

unwillingness only when the manner in which the proceedings are being conducted, together with indicating a lack of independence and impartiality, is to be considered, in the circumstances, inconsistent with the intent to bring the person to justice.<sup>541</sup>

236. At first, the Defence argues that Mr Al-Senussi's transfer to Libya from Mauritania constitutes an "unlawful rendition [that] undermine[s] the integrity of Libya's proceedings against Mr Al-Senussi in their entirety"<sup>542</sup> and indicates that "no functioning judicial process is underway at this time".<sup>543</sup> The Chamber is not persuaded by this Defence argument and is of the view that the alleged modalities of Mr Al-Senussi's transfer to Libya, irrespective of whether they are true, do not demonstrate, or otherwise indicate, the existence of one of the scenarios envisaged under article 17(2) or (3) of the Statute.

237. Next, the Defence argues that "the facts surrounding Libya's treatment of Mr. Al-Senussi strongly indicate that his arrest and detention have involved other significant violations of his human rights and thereby further confirm Libya's inability to conduct genuine proceedings".<sup>544</sup> Moreover, the Defence argues that the same considerations also demonstrate that "having regard to the principles of due process recognised by international law, proceedings were not and are not being conducted independently or impartially, nor are

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<sup>541</sup> The Chamber notes in this regard that, differently from article 17(2)(c) of the Statute, these requirements are instead presented disjunctively in rule 9(ii) of the ICTY Rules of Procedure and Evidence, which governs the conditions under which the Prosecutor can assert primacy jurisdiction over a State and which reads as follows: "[w]here it appears to the Prosecutor that in any such investigations or criminal proceedings instituted in the courts of any State [...] there is a lack of impartiality or independence, *or* the investigations or proceedings are designed to shield the accused from international criminal responsibility, *or* the case is not diligently prosecuted [...] the Prosecutor may propose to the Trial Chamber designated by the President that a formal request be made that such court defer to the competence of the Tribunal" (emphasis added).

<sup>542</sup> Defence Observations, para. 135. See also Annex B to the Defence Observations.

<sup>543</sup> Defence Observations, para. 71.

<sup>544</sup> *Ibid.*, para. 138.

they being conducted in a manner which is consistent with an intent to bring Mr. Al-Senussi to justice".<sup>545</sup>

238. More specifically, according to the Defence, Libya has not sufficiently demonstrated that violations of Mr Al-Senussi's fundamental rights have not occurred during the national proceedings against him. In particular, the Defence submits that: (i) "[i]t is unclear whether, how soon, how often and under what circumstances Mr. Al-Senussi has been brought before a judge; whether the judge has the power to grant release; whether the judge is independent; whether the judge has issued reasoned decisions; or whether any decisions comply with the presumption of liberty or international law";<sup>546</sup> (ii) "[i]t is unclear whether Mr Al-Senussi has been tortured or subjected to inhuman or degrading treatment", considering Libya's own admission that violations of human rights were committed in some detention centres in 2012 and taking into account a post on a social networking website dated 5 September 2012, by an Al-Jazeera journalist who heard a rebel saying that he had hit Mr Al-Senussi on the back of the neck;<sup>547</sup> (iii) "[i]t is unclear whether Mr. Al-Senussi was informed of his right to silence or whether this right has been respected";<sup>548</sup> (iv) "[i]t is unclear whether Mr Al-Senussi has been allowed to exercise his right to view the investigative materials in his case or whether these have been appropriately recorded";<sup>549</sup> and (v) "[i]t is unclear whether Mr Al-Senussi's health problems have been adequately monitored and treated".<sup>550</sup>

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<sup>545</sup> *Ibid.*, para. 167.

<sup>546</sup> *Ibid.*, para. 139. See also para. 137.

<sup>547</sup> *Ibid.*, para. 139, with reference to Admissibility Challenge, para. 191, and ICC-01/11-01/11-216-Anx3.3, p. 2.

<sup>548</sup> Defence Observations, para. 139.

<sup>549</sup> *Ibid.*

<sup>550</sup> *Ibid.*

239. The Chamber does not consider necessary to determine whether, in principle, the factual matters referred to by the Defence are relevant considerations for the Chamber's determination under article 17 of the Statute. Indeed, the Chamber considers that the above submissions by the Defence amount to generic assertions without any tangible proof, and that no concrete information in this regard is made available to Chamber in order for it to infer unwillingness or inability on the part of Libya to conduct its proceedings against Mr Al-Senussi under any of the scenarios envisaged article 17(2) and (3) of the Statute.<sup>551</sup> In these circumstances, the Chamber is of the view that the "uncertainties" identified by the Defence cannot be considered to be issues properly raised before the Chamber such that Libya would be under the duty to disprove them in order for the Admissibility Challenge to be upheld. Indeed, the burden of proof that lies with Libya cannot be interpreted as an obligation to disprove any possible "doubts" raised by the opposing participants in the admissibility proceedings.

240. In relation to these Defence arguments, the Chamber also observes that, in any case, most of these matters put forward by the Defence have indeed been addressed by Libya in its submissions before the Chamber. First, Libya relies<sup>552</sup> on the report published by Human Rights Watch following its visit to Mr Al-Senussi in April 2013 which included a private and confidential interview.<sup>553</sup> In this report, Human Rights Watch states that Mr Al-Senussi

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<sup>551</sup> The Chamber is mindful of the Defence submission that "Libya's refusal to arrange for a legal visit has meant that the Defence has no way of verifying the conditions under which Mr. Al-Senussi, has been detained and interrogated" (Defence Observations, para. 138), and it has already indicated above that it would take this into account for the purposes of the present analysis (*supra* para. 29 and 219). Nevertheless, the Chamber is of the view that the fact that the Defence did not have access to Mr Al-Senussi cannot *per se* lead to the positive conclusion that certain fundamental rights of Mr Al-Senussi have been violated in the course of the domestic proceedings against him, or be in itself sufficient to cast doubt on Libya's counter-assertions.

<sup>552</sup> Libya's Reply, para. 152.

<sup>553</sup> Human Rights Watch, "Libya: Ensure Abdallah Sanussi Access to Lawyer" (available at <http://www.hrw.org/news/2013/04/17/libya-ensure-abdallah-sanussi-access-lawyer>).

“did not complain of physical abuse and said his conditions in custody have been ‘reasonable’”.<sup>554</sup> More specifically, it is stated in the report that “Sanussi [...] said he had no complaints about his treatment and conditions except that authorities did not permit him to leave his cell to exercise” and that “Sanussi said that he has been taken before a judge about once a month to review his detention. Each time the judge has extended the detention, he said.”<sup>555</sup> In relation to the confrontation procedure under Libya’s Criminal Procedure Code,<sup>556</sup> the Chamber observes that in a letter provided by the Prosecutor-General’s office, it is explicitly stated that “[t]he confrontation of the accused Abdullah Sanussi with the results of the testimonies of witnesses, and the documentation process has been conducted in writing and without voice or visual records in accordance with the judicial customs in Libya”.<sup>557</sup> Finally, in the Admissibility Challenge, Libya submits that “[s]ince Abdullah Al-Senussi’s extradition to Libya from Mauritania he has received regular medical check-ups to ensure his health”.<sup>558</sup> In support of this submission, Libya relies on [REDACTED] previously filed in the record of the present case.<sup>559</sup>

241. The Chamber notes that, in addition, the Defence submits that members of the former and current Libyan Government have made numerous public statements that assume Mr Al-Senussi’s guilt, thereby undermining his presumption of innocence and, in turn, demonstrating that the proceedings against Mr Al-Senussi are not being conducted with judicial independence.<sup>560</sup>

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<sup>554</sup> *Ibid.*

<sup>555</sup> *Ibid.*

<sup>556</sup> See para. 206 above.

<sup>557</sup> Annex 2 to the Admissibility Challenge, p. 2.

<sup>558</sup> Admissibility Challenge, para. 178.

<sup>559</sup> ICC-01/11-01/11-252-Conf-Anx3.

<sup>560</sup> Defence Observations, para. 168. The Defence makes reference to public statements made by the Minister of Finance, the former Deputy Minister of Finance, the former spokesman for the Ministry of Foreign Affairs, the former Prime Minister, the NTC Chairman, and the member of the NTC in charge of Legal Affairs and Women (Defence Observations, para. 168 and footnotes 251 to 257).

This raises the question of whether statements by public officials allegedly infringing on a suspect's presumption of innocence could be relevant to the determination on the admissibility of a case under article 17 of the Statute. The Chamber does not need to address this question at this juncture. Given the manner in which Libya's proceedings are developing to date, the Chamber is not persuaded, in any event, that the statements referenced by the Defence can be attributed to the actual or perceived conduct of the Libyan judicial authorities that are involved in the proceedings against Mr Al Senussi. Therefore, the Chamber is not persuaded that these statements, in themselves or in combination with other factors, would indicate that these proceedings can be regarded as not being conducted independently or impartially and as being carried out in a manner which is inconsistent with the intent to bring Mr Al Senussi to justice in accordance with article 17(2)(c) of the Statute.<sup>561</sup>

242. Finally, the Chamber notes that the Defence, with a view to showing the lack of independence and impartiality of the proceedings against Mr Al-Senussi, states that "members of Mr. Al-Senussi's own family have been subjected to biased criminal proceedings" and, in particular, his daughter, Anoud Al-Senussi, was sentenced to ten months in prison for travelling on false documentation "despite evidential shortcomings and procedural irregularities".<sup>562</sup> The Chamber is not in a position to determine the circumstances surrounding Anoud Al-Senussi's conviction and is in any event unable to draw any inference from this fact raised by the Defence. Indeed, the type of "evidential shortcomings and procedural irregularities"<sup>563</sup> identified by

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<sup>561</sup> Allegations on systemic lack of impartiality and independence of the Libyan judiciary are discussed below at paras 244 to 258.

<sup>562</sup> Defence Observations, para. 169.

<sup>563</sup> *Ibid.* According to the Defence, "[i]rregularities in Ms. Al-Senussi's case include (i) her arrest by military police followed by detention, first in a private residence and subsequently in a detention facility designated for political prisoners despite her status as a private citizen whose alleged crime was not military or political in nature; (ii) the adjournment of her hearing six times due to the court's inability to gain access to a key witness (ultimately the court went

the Defence, even if they occurred, does not indicate Libya's unwillingness or inability to carry out the proceedings against Mr Al-Senussi.

243. In conclusion, the Chamber recalls that the assessment of Libya's ability and willingness to carry out its proceedings against Mr Al-Senussi must be made with reference to Libya's national legal system<sup>564</sup> and is limited to those considerations that have the potential to bear upon any of the scenarios envisaged under article 17(2) and (3) of the Statute.<sup>565</sup> For the considerations expressed above in relation to the facts alleged by the Defence, the Chamber concludes that the information available to it does not indicate that the domestic proceedings against Mr Al-Senussi are tainted by departures from, or violations of, the Libyan national law such that they would support, in accordance with article 17 of the Statute, a finding of unwillingness or inability on the part of Libya to carry out the proceedings against Mr Al-Senussi.

Allegations of systemic lack of independence and impartiality of the Libyan judicial system

244. Arguments related to an alleged systemic lack of independence and impartiality of the Libyan judicial system have been raised by both the Defence and the OPCV.

245. At the outset, the Chamber clarifies that, while submissions of a general nature indicating significant defects of Libya's national judicial system may be relevant as "contextual information", information of this kind can be considered only to the extent that such systemic difficulties have a bearing on

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ahead with sentencing without oral testimony from any witnesses); and (iii) irrelevant references in the judgment to the fact that Ms. Al-Senussi is Mr. Al-Senussi's daughter, with the court referring to Mr. Al-Senussi's former position under Gaddafi on both occasions" (Defence Observations, footnote 264).

<sup>564</sup> *Supra*, paras 203 and 221. The significant features of the relevant Libyan applicable law are described at paras 203 to 206.

<sup>565</sup> *Supra*, paras 221.

the domestic proceedings against Mr Al-Senussi, such that it would warrant a finding of one of the scenarios envisaged under article 17(2) or (3) of the Statute.

246. Turning to the specific factual assertions under consideration, the Chamber notes that according to the Defence the lack of independence and impartiality of the Libyan judicial system is evidenced primarily by two systemic aspects: on the one hand, by the fact, confirmed by the Libya's Justice and Judicial Affairs committee,<sup>566</sup> that it appears that the judges presiding over the trials of the former regime officials have taken part in the "special courts" of the Gaddafi-era and that these figures have not been excluded from the current trials to ensure the integrity of the process;<sup>567</sup> and, on the other hand, by the recent entry into force of the "Political Isolation Law", which "has widely been condemned as being discriminatory against former Gaddafi-era officials and a gross breach of their human rights".<sup>568</sup> The Defence also requests the Chamber<sup>569</sup> to take into account a report by Amnesty International, according to which the former Minister of Education in the Gaddafi regime, Ahmed Ibrahim, was sentenced to capital punishment on charges that are similar, in law and in fact, to those alleged by Libya against Mr Al-Senussi and that if the Supreme Court finally upholds the verdict, the execution will take place.<sup>570</sup>

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<sup>566</sup> Defence Observations, para. 168 and footnote 260, citing: Libya Herald, "GNC committee urges exclusion of former regime judges", 26 December 2012 (available at <http://www.libyaherald.com/2012/12/27/gnc-body-urges-exclusion-of-former-regime-judges/#axzz2fFs8w5vQ>).

<sup>567</sup> Defence Observations, para. 168.

<sup>568</sup> *Ibid.*

<sup>569</sup> Defence Additional Submissions, paras 17-18.

<sup>570</sup> Amnesty International, "Libya: al-Gaddafi loyalists at risk of 'revenge' death sentences", 2 August 2013 (available at <http://www.amnesty.org/en/news/libya-al-gaddafi-loyalists-risk-revenge-death-sentences-2013-08-02>). See also Defence Additional Submissions, footnote 25, citing: BBC, "Gaddafi minister Ahmed Ibrahim sentenced to death", 31 July 2013, (available at <http://www.bbc.co.uk/news/world-africa-23524134>).

247. The OPCV, arguing that the lack of an independent judiciary “constitute[s] a form of unavailability of the judicial system”,<sup>571</sup> similarly submits that “the Libyan judiciary continues to be manned by the very same judges who supported the former regime and who sat in ‘special’ and ‘extraordinary’ courts known for their lack of independence and impartiality and for having endorse[ed] human rights violation for decades, as acknowledge[d] by Libya itself” and that “it has not been reported that any of the judges who served during the Gaddafi-era on People’s Court and other types of ‘extraordinary’ or ‘special’ courts has been dismissed from duty on such basis”.<sup>572</sup>

248. The Chamber observes that the independence and impartiality of the judiciary is recognised in articles 32 and 33 of Libya’s Constitutional Declaration of 3 August 2011.<sup>573</sup> In particular, article 32 provides that “Judges shall be independent, subject to no other authority than the law and conscience” and that “[e]stablishing Exceptional Courts shall be prohibited”. Libya submits that it was the “exceptional” or “special” courts operational under Muammar Gaddafi that carried out human rights violations against persons considered to be enemies of the regime and “were staffed not by ordinary judicial officers (who reported to the Ministry of Justice and who still work as judges in Libya today) but were presided over by court officials specially appointed by Muammar Gaddafi’s security apparatus”.<sup>574</sup> A conference report by Wilton Park and the British Foreign and Commonwealth Office dated 11 April 2011 is relied upon by Libya in support of this statement.<sup>575</sup>

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<sup>571</sup> OPCV Observations, para. 80.

<sup>572</sup> *Ibid.*, para. 79.

<sup>573</sup> Annex G to *Gaddafi* Admissibility Challenge.

<sup>574</sup> Admissibility Challenge, para. 140.

<sup>575</sup> Foreign and Commonwealth Office and Wilton Park Conference Report, “Libya and Human Rights: the way forward”, 11 April 2011, (available at <https://www.wiltonpark.org.uk/wp-content/uploads/WP1127-Report.pdf>).

249. Further, as submitted by Libya, the National Transitional Council (NTC) “issued Law 3 of 2011 adjusting law 6 of 2006 on the judiciary, with the aim of insulating the judiciary from the executive”,<sup>576</sup> and, by NTC Resolution no. 17 of 2 April 2011, the Internal Security Agency and the State Security Court were abolished and numerous political prisoners were released.<sup>577</sup>

250. The Chamber also notes that the Supreme Judicial Council is now composed only of members of the judiciary and is chaired by the President of the Supreme Court instead of the Minister of Justice.<sup>578</sup>

251. Libya also relies on the decision issued by the Supreme Court on 23 December 2012,<sup>579</sup> in order to demonstrate “the independence and impartiality of Libya’s judiciary, Libya’s commitment to uphold the principle of fair trials for all, and the ability of its judiciary to deliver fair trials”.<sup>580</sup> The Chamber observes that in this decision, the judges of the Supreme Court unanimously determined that the application of the People’s Court procedures to criminal cases was unconstitutional, since it “establishes discrimination among persons in submission to law, violates the principle of equality, undermines the personal freedom, breaches the regulations of fair trial which renders it in violation of the well-established constitutional rules in this regard”.<sup>581</sup> Considering that the intervention of the Supreme Court took place upon motion of the lawyer of Abu Zaid Omar Dorda (Muammar Gaddafi’s former prime minister and head of the External Security Agency at the time of the 2011 revolution), in whose case the Prosecutor-General had sought to apply the People’s Court procedure, the Chamber finds significant the following statement made in the decision of 23 December 2012: “[t]here is no

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<sup>576</sup> Libya’s Reply, para. 164.

<sup>577</sup> *Ibid.*

<sup>578</sup> Annex 23 to Libya’s Submissions of 23 January 2013, p. 5.

<sup>579</sup> Annex 8 to Libya’s Submissions of 23 January 2013.

<sup>580</sup> Admissibility Challenge, para. 142.

<sup>581</sup> Annex 8 to Libya’s Submissions of 23 January 2013, p. 7.

room for pleading that crimes viewed by the People's Court had special gravity and political considerations, since the type of crime and degree of gravity do not justify the laws' violation of the constitutional rules which are superior to them".<sup>582</sup>

252. The Chamber has also before it a "discussion paper" of the Libyan Government, dated 13 December 2012, about "Rule of Law and Transitional Justice Priorities".<sup>583</sup> In this document, which mentions the relevant measures already taken and identifies necessary further actions with the assistance of the international community, "[b]olstering the independence of the judiciary" is considered "an urgent priority in Libya, in order to increase public trust in rule of law institutions" and has been placed under the responsibility of the General National Congress, the Ministry of Justice, the High Judiciary Institute, the Supreme Judicial Council and the Bar Association.<sup>584</sup> As indicated in the document,<sup>585</sup> and subsequently confirmed by Libya,<sup>586</sup> a review of the code of conduct of Libyan judges in light of the Bangalore Principles has been carried out with the assistance of the UN and a UN-led workshop has been held for Libyan judges on judicial integrity and accountability.

253. The Chamber also notes the information that has been provided by Libya under rule 51 of the Rules, according to which, the State "may choose to bring to the attention of the Court [information] showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct".

254. In particular, Libya provides, as an indication of the impartiality and independence of the Libyan judiciary, the example of the judicial proceedings

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<sup>582</sup> *Ibid.*

<sup>583</sup> Annex 23 to Libya's Submissions of 23 January 2013.

<sup>584</sup> *Ibid.*, p. 5.

<sup>585</sup> *Ibid.*, p. 6.

<sup>586</sup> Libya's Reply, para. 167

against Al-Baghdadi Al-Mahmoudi, who was the last prime minister under the Gaddafi regime and who is currently detained in the same prison as Mr Al-Senussi.<sup>587</sup> It is reported that the trial against Al-Baghdadi Al-Mahmoud has been adjourned at the request of his lawyer in order to have sufficient time to prepare the defence.<sup>588</sup> Moreover, it is reported that representatives of the Tunisian Ministry of Human Rights and Justice and the Tunisian League for Human rights, who attended the trial, stated: “[w]e’re here on our own initiative to see, first hand, if he is getting a fair trial [...]. The fact that the trial is open to the public and the press indicates a strong desire to give Al-Baghdadi al-Mahmoudi a fair trial’.<sup>589</sup> The Defence provides the Chamber with a recent newspaper article in which it is stated that one of the French lawyers of Al-Baghdadi al-Mahmoudi “[had] not been given access to the case and that he and his colleague had not been granted a visa”, ultimately requesting a postponement of the trial, and that the same lawyer “denounced the trial [...] as ‘expeditious’”.<sup>590</sup> The Chamber notes that the case against Al-Baghdadi Al-Mahmoud has now been joined with the case against Mr Al-Senussi and was transferred to the Accusation Chamber on 19 September 2013.<sup>591</sup>

255. Libya also refers to the recent acquittal of the former Foreign Minister, Abdul Ati El-Obeidi, and the former Secretary of the General People’s Congress, Mohamed Al-Zway as indicative of the impartiality and independence of the Libyan judiciary.<sup>592</sup> Indeed, the Chamber notes that the

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<sup>587</sup> Libya’s Reply, para. 168.

<sup>588</sup> Libya Herald, “Tripoli Court again postpones trial of Baghdadi Al-Mahmoudi”, 13 June 2013 (available at <http://www.libyaherald.com/2013/06/13/tripoli-court-again-postpones-trial-of-baghdadi-al-mahmoudi/>), cited in Libya’s Reply, para. 169 and footnote 221.

<sup>589</sup> *Ibid.*

<sup>590</sup> Middle east online, “Trial of Baghdadi Mahmudi raises fear of ‘revenge’ justice in Libya”, 6 August 2013 (available at <http://www.middle-east-online.com/english/?id=60599>), referenced to by the Defence in its Additional Submissions, para. 20 and footnote 30.

<sup>591</sup> Annex A to Libya’s Final Submissions.

<sup>592</sup> Libya’s Reply, para. 169.

acquittal of the two individuals, although for charges related to the “1988 Lockerbie bombing”, has reportedly been “seen as important because it shows the impartiality and independence of the Libya courts at a time when many voices outside the country claim that a fair trial is impossible in Libya”.<sup>593</sup> The cases against Abdulati Al-Obeidi and Mohamed Al-Zway for other alleged crimes have eventually been joined with the case against Mr Al-Senussi and transferred on 19 September 2013 to the Accusation Chamber.<sup>594</sup>

256. The Chamber also considers relevant that the hearing before the Accusation Chamber held on 19 September 2013 in the case against Mr Al-Senussi and another 37 officials of the former Gaddafi regime has been adjourned to 3 October 2013, upon request of some defence teams, in order to allow them to view the accusation file.<sup>595</sup>

257. Finally, the Chamber notes the additional argument of the OPCV that “Egyptian courts recently refused the extradition of former high-level officials to Libya on the basis that they would not enjoy their full rights in Libya”.<sup>596</sup> In particular, the OPCV refers to a decision of Cairo’s Administrative Court of 3 April 2013 which ruled against the extradition to Libya of Qaddaf al-Dam, Muammar Gaddafi’s cousin.<sup>597</sup> In relation to this discrete argument, the Chamber does not find it necessary to entertain the relevance of the factual submission advanced by the OPCV and the probative value of the documentation provided in its support; rather, the Chamber finds it sufficient to note that the same materials relied upon by the OPCV explicitly state that Qaddaf al-Dam “is being treated as an asylum seeker and [...] Egypt is obliged

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<sup>593</sup> Libya Herald, “Court finds Obeidi and Zway not guilty; Attorney General to appeal”, 17 June 2013 (available at <http://www.libyaherald.com/2013/06/17/court-finds-obeidi-and-zway-not-guilty-attorney-general-to-appeal/>), referenced to in Libya’s Reply, footnote 222.

<sup>594</sup> Annex A to Libya’s Final Submissions.

<sup>595</sup> Annex B to Libya’s Final Submissions.

<sup>596</sup> OPCV Observations, para. 70.

<sup>597</sup> *Ibid.*

to respond to his request”,<sup>598</sup> and that other Gaddafi-era officials arrested at the same time as Qaddafi al-Dam were extradited to Libya.<sup>599</sup> The Chamber is therefore unable to draw any inference relevant to the matter *sub judice* from this material provided by the OPCV.

258. In light of the above, and considering all relevant circumstances, the Chamber is not persuaded that the information provided by the Defence and the OPCV indicates a systemic lack of independence and impartiality of the judiciary such that would demonstrate, alone or in combination with other relevant circumstances, that the proceedings against Mr Al-Senussi “are not being conducted independently or impartially and they [...] are being conducted in a manner which, in the circumstances is inconsistent with an intent to bring [Mr Al-Senussi] to justice”, within the meaning of article 17(2)(c) of the Statute.

*(ii) Facts allegedly affecting the functioning of Libya’s judicial system for the purposes of the proceedings against Mr Al-Senussi*

259. The Defence<sup>600</sup> and the OPCV<sup>601</sup> also submit that the current security situation in Libya affects the functioning of Libya’s judicial system and, in turn, directly impacts on the national proceedings against Mr Al-Senussi.

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<sup>598</sup> See The New York Times, “Egypt: Court Blocks Extradition of Ex-Qaddafi Aide to Libya”, 3 April 2013 (available at <http://www.nytimes.com/2013/04/04/world/middleeast/egypt-court-rules-against-extradition-of-former-qaddafi-aide-to-libya.html>), cited in the OPCV Observations, footnote 100.

<sup>599</sup> See The New York Times, “Egypt: Court Blocks Extradition of Ex-Qaddafi Aide to Libya”, 3 April 2013 (available at <http://www.nytimes.com/2013/04/04/world/middleeast/egypt-court-rules-against-extradition-of-former-qaddafi-aide-to-libya.html>); and Daily News Egypt, “Egypt court rules against handing Kadhafi cousin to Libya”, 4 April 2013 (available at <http://www.dailynewsegypt.com/2013/04/04/egypt-court-rules-against-handing-kadhafi-cousin-to-libya/>), both referred to in the OPCV Observations, footnote 100.

<sup>600</sup> Defence Observations, paras 94 to 98 and Defence Additional Submissions, paras 6 to 14.

<sup>601</sup> OPCV Observations, paras 68-69.

260. In particular, the Defence argues that “the security situation within Libya, and the lack of Government control, significantly affects the ability of the judicial authorities and organs to function effectively and thus has a direct impact on the national investigation and proceedings against Mr Al-Senussi”.<sup>602</sup>

261. The Chamber considers that submissions in relation to the precarious security situation in Libya – which is not in itself disputed by Libya<sup>603</sup> – may be relevant to the Chamber’s determination of the admissibility of the present case only if they bear upon the domestic proceedings against Mr Al-Senussi. Indeed, the existence of certain constraints under which a national system may be acting does not *per se* render the State unwilling or unable genuinely to carry out the proceedings with respect to a specific suspect. More precisely, in relation to ‘inability’ under article 17(3) of the Statute, the Chamber is of the view that not simply any “security challenge” would amount to the unavailability or a total or substantial collapse of the national judicial system rendering a State unable to obtain the necessary evidence or testimony in relation to a specific case or otherwise unable to carry out genuine proceedings.

262. Accordingly, the Chamber will hereunder address the main submissions alleged to have a tangible impact on the proceedings against Mr Al-Senussi, namely Libya’s lack of control over (certain) detention facilities, the security threats faced by the Libyan judicial authorities and organs, and the security concerns for witnesses and victims involved in the case against Mr Al-Senussi.

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<sup>602</sup> Defence Observations, para. 94.

<sup>603</sup> Libya’s Reply, para. 134. This also includes the abduction of Anoud Al-Senussi on 2 September 2013 while being released from serving her prison service in Libya (*see* ICC-01/11-01/11-432, paras 11 to 13, and Libya’s Final Submissions, paras 40 to 42).

Alleged lack of Governmental control over detention facilities

263. The Defence argues that Libya has not demonstrated that the prison where Mr Al-Senussi is being held (the Al-Hadba prison) is under the control of the Government,<sup>604</sup> and, to the contrary, it “is in effect being run by militia groups outside the requisite Governmental control”.<sup>605</sup>

264. The Chamber is of the view that the issue of whether the Al-Hadba prison is under the control of Libya is relevant to the Chamber’s consideration of Libya’s ability to obtain Mr Al-Senussi and to carry out its proceedings against him, within the meaning of article 17(3) of the Statute. However, the Chamber is not persuaded by the Defence proposition that the Government of Libya does not exercise control over the Al-Hadba prison so that judicial proceedings against Mr Al-Senussi would be impeded from proceeding further. To the contrary, the Chamber is satisfied that Libya has demonstrated that it is currently in a position to exercise sufficient control over the detention facilities in which Mr Al-Senussi is being held.<sup>606</sup>

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<sup>604</sup> Defence Observations, paras 86 to 93.

<sup>605</sup> *Ibid.*, para. 93.

<sup>606</sup> See, e.g., ICC-01/11-01/11-252-Conf-Anx3, which includes an official letter from the Prosecutor-General confirming Mr Al-Senussi’s detention “in connection with [his] case at the Al Hadaba Detention Facility of the Ministry of Justice” as well as [REDACTED]; Annex 2 to the Admissibility Challenge, by which the Prosecutor-General’s office informs the Court that Mr Al-Senussi has been interviewed by the national judicial authorities on numerous occasions and has been confronted with most of the evidence collected against him; Human Rights Watch, “Libya: Ensure Abdallah Sanussi Access to Lawyer” (available at <http://www.hrw.org/news/2013/04/17/libya-ensure-abdallah-sanussi-access-lawyer>), in which it is stated that Mr Al-Senussi’s detention facility “is administered by the judicial police under the authority of the Justice Ministry”, that the visit of Human Rights Watch “was facilitated by Justice Minister Salah Marghani and the acting head of the detention facility”, and that Mr Al-Senussi “said that he has been before a judge about once a month to review his detention [...] [and] that Libyan investigators had questioned him mainly during the first five months of his detention”. Furthermore, as submitted by Libya at para. 168 of its Reply, judicial proceedings against Mr Al-Baghdadi Al-Mahmoudi, Muammar Gaddafi’s last prime minister, who is detained in the same prison as Mr Al-Senussi, are currently ongoing. Finally, the Chamber notes Libya’s submission that “the fact of the hearing on 19 September 2013 being held in the court room in Tripoli, which is in itself part of the same purpose-built

265. The Chamber is aware of the item of evidence submitted on an *ex parte* basis by the Defence of Mr Al-Senussi,<sup>607</sup> and has taken this document into consideration for the present determination, since it is of the view that this would not cause prejudice to Libya. The Chamber is however unable to accept the Defence argument that this document “confirm[s] the realit[y] of militia control of the [Al-Hadba] prison”.<sup>608</sup> Even more importantly, the Chamber observes that this document makes it clear that judicial proceedings against “persons being held in the [Al-Hadba] prison”<sup>609</sup> are currently ongoing and are therefore not impeded or precluded from the alleged “militia control” over the prison.<sup>610</sup> The Defence argument that Libya does not have control over the Al-Hadba prison where Mr Al-Senussi is been held cannot therefore be upheld.

266. In a more general fashion, the Defence also argues that Libya’s control does not extend to all detention centres throughout the country.<sup>611</sup>

267. The Chamber’s assessment in the present decision is limited to whether a number of factual circumstances render Libya unable genuinely to carry out its domestic proceedings against Mr Al-Senussi. The Chamber is of the view that, depending on all the relevant circumstances, the lack of control over detention facilities where relevant witnesses may be located may be a relevant factor to take into account when determining the State’s ability to collect the “necessary

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complex as Al-Habda prison exemplifies the Government’s firm control over this prison” (Libya’s Final Submissions, para. 33).

<sup>607</sup> Confidential and *ex parte* (Chamber only) Annex C to the Defence Observations.

<sup>608</sup> Defence Observations, para. 91. *See, e.g.*, para. 25 of the item of evidence at issue, which appears to support a different conclusion than the one advanced by the Defence, which instead seems to stem from other statements made by the witness, for example at para 29.

<sup>609</sup> Defence Observations, para. 91.

<sup>610</sup> *See e.g.* paras 14-22 and 33-36 of the Confidential and *ex parte* (Chamber only) Annex C to the Defence Observations.

<sup>611</sup> Defence Observations, paras 76 to 84.

evidence and testimony” to carry out the proceedings within the meaning of article 17(3) of the Statute.<sup>612</sup>

268. The Defence argues that the fact that “Libya’s lack of control over detention facilities [...] contribute[s] to the State authorities’ inability to access witnesses and obtain the necessary testimony to conduct the investigation and proceedings against Mr. Al-Senussi” is, at first, demonstrated by two statements made by the International Crisis Group in two reports on Libya.<sup>613</sup> In the first report, dated 14 September 2012, the International Crisis Group states that “armed groups or revolutionary brigades [...] often barred [the police] from investigating cases, while refusing to turn detainees over to government authorities or local prosecutors for fear that they would be set free”.<sup>614</sup> In the second report, dated 17 April 2013, it is stated that “a human rights activist”, interviewed by representatives of the International Crisis Group on 13 March 2013, stated that “the head of [a] prison did not want to allow a prosecutor to interview a detainee”.<sup>615</sup>

269. The Defence further relies<sup>616</sup> on a newspaper article dated 8 January 2013, according to which “Taha Baara, the spokesman for the attorney general in Libya [...] not[ed] that there are in fact secret prisons in Libya that he cannot enter [and] [t]hus, he cannot determine the number of such prisoners or the

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<sup>612</sup> See also *Gaddafi Admissibility Decision*, paras 209-210.

<sup>613</sup> Defence Observations, para. 102 and footnotes 155-156.

<sup>614</sup> International Crisis Group, “Divided We Stand: Libya’s Enduring Conflicts”, Middle East/North Africa Report N°130, 14 September 2012, p. 31 (available at <http://www.crisisgroup.org/~media/Files/Middle%20East%20North%20Africa/North%20Africa/libya/130-divided-we-stand-libyas-enduring-conflicts.pdf>).

<sup>615</sup> International Crisis Group, “Trial by Error: Justice in Post-Qadhafi Libya”, Middle East/North Africa Report N°140, 17 April 2013, footnote 142 (available at <http://www.crisisgroup.org/~media/Files/Middle%20East%20North%20Africa/North%20Africa/libya/140-trial-by-error-justice-in-post-qadhafi-libya.pdf>).

<sup>616</sup> Defence Observations, para. 83 and footnote 114.

number of detainees in them”.<sup>617</sup> It is further reported that “Baara expressed optimism regarding the plans of Justice Minister Salah al-Mirghani in this regard, saying that the justice minister had clarified that the prisons that are in the hands of rebels will soon be under the control of his ministry”.<sup>618</sup> The Defence expressly mentions that Taha Bara is “one of the public prosecutors” in Mr Al-Senussi’s case.<sup>619</sup> It is confirmed by Libya that Taha Bara, who is the Deputy Prosecutor at the Prosecutor-General’s Office, is indeed part of the “Investigative Committee” that supervises the investigative team designated to investigate the crimes alleged to have been committed by Mr Al-Senussi.<sup>620</sup>

270. The Chamber is of the view that the fact that an unspecified number of detention centres are yet to be transferred under the control of the central government, something that is not disputed by Libya,<sup>621</sup> may be a relevant “contextual” fact for the Chamber’s consideration pursuant to article 17(3) of the Statute of whether, due to the unavailability of the national judicial system, Libya is unable to carry out the proceedings against Mr Al-Senussi. This aspect will therefore be taken into account and assessed against all the other relevant factual circumstances.

271. The Chamber also notes, and will consider for the purpose of its conclusion, the submission of Libya that “[t]he Libyan Ministry of Justice is [...] working to bring all detention centres under the full control of the judicial police”<sup>622</sup> with the continued close assistance of UNSMIL,<sup>623</sup> as well as the

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<sup>617</sup> Al Monitor, “New Libyan Government Struggles to Restore Order”, 8 January 2013, footnote 142 (available at <http://www.al-monitor.com/pulse/security/2013/01/new-libyan-government-works-to-restore-order.html#ixzz2VnW3cOUM>).

<sup>618</sup> *Ibid.*

<sup>619</sup> Defence Observations, para. 103.

<sup>620</sup> Admissibility Challenge, para. 163. See also Annex 5 to the Admissibility Challenge.

<sup>621</sup> See Admissibility Challenge, paras 191 and 193; and Libya’s Reply, para. 125.

<sup>622</sup> Admissibility Challenge, para. 191.

<sup>623</sup> Libya’s Reply, para. 125. A series of measures identified by the Libyan Government in order to achieve this result are provided at pp. 9 and 10 of the “Rule of Law and Transitional Justice

evidence provided in support of this assertion. This evidence includes an “Information Note on Activities of the United Nations Support Mission in Libya” dated 26 September 2012, stating that the “UNSMIL is working with the Judicial Police to increase its capacity to establish control over more prisons, and receive detainees transferred to prisons under the custody of the Ministry of Justice”.<sup>624</sup> It also includes the record of the briefing to the UN Security Council of 14 March 2013, by Tarek Mitri, Special Representative of the Secretary-General and Head of UNSMIL, who declared himself “pleased to note that the Government has taken measures to accelerate the screening of detainees and their transfer to state-controlled detention facilities”.<sup>625</sup>

#### Security of judicial authorities and organs

272. The Defence and the OPCV make several submissions relating to security of the Libyan judicial authorities and organs allegedly impacting on the ongoing proceedings against Mr Al-Senussi.

273. The Defence brings to the attention of the Chamber the fact that “the Deputy Prosecutor assigned to Mr. Al-Senussi’s case, Taha Bara, was recently abducted and abused by militia groups in May 2013”.<sup>626</sup>

274. In relation to this event, Libya submits that the YouTube videos and Facebook pages relied by the Defence to substantiate the allegation of “abduction” are “unsubstantiated and unverified”, and that, in any case, “[t]he interviews in the You Tube videos referenced by the Defence do not contain any suggestion that the arrest of Mr. Bara was in any way related to his involvement with the proceedings against Mr Al-Senussi specifically or, more

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Priorities” Discussion Paper that was filed in the record of the case as Annex 23 to Libya’s Submissions of 23 January 2013.

<sup>624</sup> Annex 20 to Libya’s Submissions of 23 January 2013, p. 5.

<sup>625</sup> Annex 29 to the Admissibility Challenge, p. 4.

<sup>626</sup> Defence Observations, para. 97.

generally, his position within the Attorney General's office".<sup>627</sup> Libya indeed argues that, according to certain sources, "[r]ather than an 'abduction', it appears that Mr. Bara was arrested along with Khmos Congressman Akram Al-Janin and the Investment Undersecretary at the Oil Ministry following a disturbance at a villa in Tripoli's Zenata area".<sup>628</sup> Libya further states that "[a]lthough there is a lack of clarity surrounding the circumstances of Mr. Bara's arrest and although it seems that an initial request by the Minister for Justice for the release of Mr. Bara went unheeded, the subsequent request of the Attorney General was fulfilled and Mr. Bara was released". Accordingly, it is Libya's final submission that "rather than showing a lack of control or authority by the central Government, this in fact shows that it was able to reassert its full authority in these particular circumstances".<sup>629</sup>

275. The Chamber is unable to determine, on the information in its possession, the circumstances related to Mr Bara's "abduction" or "arrest" and, in particular, whether there is any link with his involvement in the proceedings against Mr Al-Senussi. No conclusion can therefore be drawn from the alleged events, and neither the proposed interpretation of the Defence nor Libya's counter-reading of the same facts can be upheld on the information before the Chamber.

276. The Defence also relies on several NGO reports and media articles, according to which governmental authorities, local prosecutors, and, to a more limited extent, judges face security threats and have been recently targeted with violence.<sup>630</sup>

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<sup>627</sup> Libya's Reply, para. 135.

<sup>628</sup> *Ibid.*, with reference to Libya Herald, "Taha Bara released", 16 June 2013 (available at <http://www.libyaherald.com/2013/06/16/taha-bara-released/#axzz2g7VD18wz>).

<sup>629</sup> Libya's Reply, para. 136.

<sup>630</sup> See Defence Observations, para. 95 and Annex A, and Defence Additional Submissions, paras 6 to 14.

277. The OPCV makes similar submissions and argues that “Libya is not fully able to ensure security and safety of criminal courts and, as a result, they have to operate at *minima*”.<sup>631</sup> In support of its contention, the OPCV relies on the following statement made by the International Crisis Group in its report of 17 April 2013: “[a]cross the country, criminal courts operate at a bare minimum. In the Jebel Akhdar region, east of Benghazi, inadequate security and threats against local prosecutors and judges have forced the suspension of all investigations and trials since December 2012. The courthouse in Waddan, a desert city some 600km south east of Tripoli, was torched in February 2013 and all case files destroyed”.<sup>632</sup>

278. Libya does not dispute the existence of serious security challenges across the country and, in particular, that “in summer 2013, Benghazi has suffered an increase in violent attacks on law officials and a decrease in the overall level of security”.<sup>633</sup> On this point, Libya argues that it “has not remained passive in the face of violence by those seeking to disrupt Libya’s transitional justice endeavours [but] [o]n the contrary, Benghazi is the focus of increasingly successful attempts to apprehend those responsible for the violence and to provide enhanced security”.<sup>634</sup>

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<sup>631</sup> OPCV Observations, para. 68.

<sup>632</sup> International Crisis Group, “Trial by Error: Justice in Post-Qadhafi Libya”, Middle East/North Africa Report N°140, 17 April 2013, pp. 3-4 (available at <http://www.crisisgroup.org/~media/Files/Middle%20East%20North%20Africa/North%20Africa/libya/140-trial-by-error-justice-in-post-qadhafi-libya.pdf>), cited in the OPCV Observations at para. 68 and footnote 96.

<sup>633</sup> Libya’s Final Submissions, para. 12. *See also* Libya’s Reply, para. 134.

<sup>634</sup> Libya’s Final Submissions, para. 21. More specifically, Libya submits that “Benghazi has a ‘Joint Security Room’ that works under the direct supervision of the Cabinet [and] alongside local police, helping them to develop security plans and coordinate with the relevant authorities” and that the Joint Security Room, which “is chaired by the commander of the Central Military Zone and includes senior local security personnel [...] has been responsible for supervising arrests, seizing weapons, and otherwise detaining and investigating those attempting to ensure impunity for the former Gaddafi regime officials [with the] assistance from foreign specialists who are able to provide targeted assistance to complement and support the relevant Libyan infrastructure and expertise”. Libya asserts that “[a]s a result of

279. In relation to the security of criminal courts, Libya submits that it “is committed to identifying appropriate measures to provide security personnel to courts”.<sup>635</sup> In this regard, Libya provides the Chamber with a discussion paper on “Rules of Law and Transitional Justice” dated 13 December 2012 in which measures to ensure security of courts are identified.<sup>636</sup> In particular, it is indicated, *inter alia*, that coordination mechanisms between the Ministry of Justice, the Ministry of Interior and the Ministry of Defence will be established, with the assistance of UNSMIL, in order to ensure the security of the courts and that “sufficient personnel will need to be assigned to court buildings”.<sup>637</sup> Libya submits in this regard that it is currently “training thousands of new recruits to fortify the judicial police”.<sup>638</sup>

280. Finally, Libya declares itself “fully aware of the security issues that will arise at the time of any trial of Mr. Al-Senussi, including those that may arise in the context of transportation to and from the court in Tripoli” given that “[a]s with any other judicial system around the world, prisoners are more likely to be the focus of attacks or attempt to escape at this time”.<sup>639</sup> Nevertheless, it is Libya’s submission that “Libya’s security services are more than capable of securing Mr. Al-Senussi or any of the other 37 accused”.<sup>640</sup>

281. The Chamber is of the view that the fact that certain incidents of threats or violence against judicial authorities may have occurred across the country

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work by the Joint Security Room in Benghazi, suspects have been sent to Tripoli where they will be further investigated and may be tried”. (Libya’s Final Submissions, paras 21 and 22). Furthermore, Libya submits that “hundreds of former revolutionaries who had been trained as police were deployed to Benghazi and Tripoli” (Libya’s Final Submissions, para. 23).

<sup>635</sup> Admissibility Challenge, para. 187.

<sup>636</sup> Annex 23 to Libya’s Submissions of 23 January 2013, pp. 3-4.

<sup>637</sup> Annex 23 to Libya’s Submissions of 23 January 2013, p. 4.

<sup>638</sup> Admissibility Challenge, para. 187, with reference to, *inter alia*, Libya Herald, “Revolutionaries start training as judicial police”, 2 February 2013 (available at <http://www.libyaherald.com/2013/02/02/revolutionaries-start-training-as-judicial-police/>).

<sup>639</sup> Libya’s Final Submissions, para. 42.

<sup>640</sup> *Ibid.*

does not necessarily entail “collapse” or “unavailability” of the Libyan judicial system such that would impede Libya’s ability to carry out the proceedings against Mr Al-Senussi within the meaning of article 17(3) of the Statute. Nevertheless, the Chamber considers that the existence of serious security concerns in Libya is an issue relevant to the final determination on Libya’s ability to conduct its proceedings against Mr Al-Senussi, and will therefore take this fact into account, together with all the other circumstances, in its final conclusion on the matter.

#### Security of witnesses in the national case against Mr Al-Senussi

282. Both the Defence and the OPCV refer to the fact that the lack of an effective witness protection program in Libya impedes witness testimony in the case against Mr Al-Senussi.<sup>641</sup>

283. The Chamber considers that the security situation of witnesses could impact on Libya’s ability to obtain the necessary evidence and testimony within the meaning of article 17(3) of the Statute. Indeed, in the context of a potentially precarious security situation across the country, witnesses may be afraid of coming forward or may be eliminated, ultimately causing prejudice to the domestic proceedings. The security situation of witnesses is therefore relevant to the Chamber’s conclusion on whether Libya is unable genuinely to carry out the proceedings against Mr Al-Senussi.

284. In this regard, the Defence submits that according to certain material disclosed by the Prosecutor under rule 77 of the Rules, “[t]wo witnesses who were originally prepared to testify in the cases against Mr. Gaddafi and Mr. Al-Senussi have now informed the Office of the Prosecutor [of this Court]

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<sup>641</sup> Defence Observations, paras 106 to 119; OPCV Observations, paras 72-73.

that they are no longer prepared to testify against Mr. Gaddafi or Mr. Al-Senussi 'due to security concerns'".<sup>642</sup>

285. Libya submits that it "has taken various steps to ensure the safety and security of witnesses in the case against Mr Al-Senussi in preparation for trial proceedings" and that "[t]he principal protective measure at the pre-trial phase stems from the confidentiality of investigations and the associated witness measures pursuant to Article 59 of the Libyan Criminal Procedural Code".<sup>643</sup> Libya further submits that "Libyan courts have the capacity to order protective measures at subsequent phases of the proceedings including *in camera* witness testimony, witness anonymity, and police protection where required".<sup>644</sup> Libya indicates in this regard that "[w]itness protection during the trial stage of the proceedings falls within the discretionary powers of the trial judge under Article 275 of the Libyan Criminal Procedural Code [who] can accept evidence in whatever form he or she deems appropriate [including] [...] by way of video-link, to preserve witness anonymity (from the public rather than from the accused) by hearing the witness in closed session, or permitting the witness to give their evidence in advance of the court hearing by way of a written statement made to a notary".<sup>645</sup> According to Libya, "the sufficiency or otherwise of such measures should not be judged prematurely and speculatively before the need for protective measures has arisen and the precise modalities of such measures required, which, as is the norm with trials of this nature, may be developed with assistance from others, including, in this instance, UNSMIL and Libya's international partners, are apparent".<sup>646</sup>

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<sup>642</sup> Defence Observations, para. 117.

<sup>643</sup> Admissibility Challenge, para. 177.

<sup>644</sup> *Ibid.*

<sup>645</sup> *Ibid.*

<sup>646</sup> Libya's Reply, para. 143.

286. In the *Gaddafi* Admissibility Decision, the Chamber considered similar information and submissions by Libya in respect of the applicable national procedural system and noted that “further to its submission that trial judges have discretionary powers to order protective measures, Libya has presented no evidence about specific protection programme that may exist under domestic law”.<sup>647</sup> On this basis, the Chamber declared itself “not persuaded by the assertion that the Libyan authorities currently have the capacity to ensure protective measures”.<sup>648</sup>

287. This concern remains valid, as Libya has provided no new submissions intended to demonstrate the existence and effective functioning of a witness protection programme in the country. This issue will therefore be considered, in light of all other relevant factors, for the Chamber’s determination on whether Libya is able genuinely to carry out its proceedings within the meaning of article 17(3) of the Statute.

288. Finally, the Chamber is of the view that there is no indication from the information in its possession that witnesses would deliberately be exposed to, or intentionally left unprotected from, security threats in the country on the part of Libya such that it would be inconsistent with an intent to bring Mr Al-Senussi to justice within the meaning of article 17(2)(c) of the Statute.

#### 4. Conclusion on the second limb of the admissibility test

289. On the basis of the analysis conducted above, the Chamber shall make its determination of whether Libya is unwilling or unable genuinely to carry out its proceedings within the meaning of article 17(1)(a) and article 17(2) or (3) of the Statute. As indicated above, the Chamber is of the view that certain facts relevant to this consideration are sufficiently substantiated by the materials in

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<sup>647</sup> *Gaddafi* Admissibility Decision, para. 211.

<sup>648</sup> *Ibid.*

the Chamber's possession. Relevant facts referred to by Libya in support of its Admissibility Challenge relate to the evidence (both in terms of its quantity and quality) collected as part of the investigation of Mr Al-Senussi, the scope, methodology and resources of the investigation into Mr Al-Senussi's case,<sup>649</sup> the recent transfer to the Accusation Chamber of the case against Mr Al-Senussi and his other 37 co-defendants,<sup>650</sup> the example of certain judicial proceedings conducted to date against other former Gaddafi-era officials,<sup>651</sup> and the efforts made to resolve certain issues of the justice system through recourse to international assistance.<sup>652</sup> Other facts have been brought to the Chamber's attention by the Defence and/or the OPCV to counter Libya's submissions, namely the lack of legal representation for Mr Al-Senussi,<sup>653</sup> the serious security difficulties currently experienced across Libya,<sup>654</sup> the absence of protection programmes for witnesses in the context of this precarious security situation<sup>655</sup> and the difficulties faced by the national authorities in exercising control over certain detention facilities.<sup>656</sup>

*a. Whether Libya is unwilling genuinely to carry out the proceedings against Mr Al-Senussi*

290. First, the Chamber considers that there is no indication that the proceedings against Mr Al-Senussi are being undertaken for the purpose of shielding him from criminal responsibility for the crimes that are alleged in the proceedings before the Court, such that it would warrant a finding of "unwillingness" within the meaning of article 17(2)(a) of the Statute.

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<sup>649</sup> See paras 211 to 213 above.

<sup>650</sup> See para. 214 above.

<sup>651</sup> See paras 253 to 255 above.

<sup>652</sup> See paras 216, 252 and 271 above.

<sup>653</sup> See paras 231 to 233 above.

<sup>654</sup> See para. 281 above.

<sup>655</sup> See paras 283 to 288 above.

<sup>656</sup> See paras 267 to 271 above.

291. Second, as expressly found above,<sup>657</sup> the Chamber is of the view that the national proceedings against Mr Al-Senussi cannot be considered as tainted by an unjustified delay that in the concrete circumstances is inconsistent with an intent to bring Mr Al-Senussi to justice, within the meaning of article 17(2)(b) of the Statute.

292. Third, the Chamber is satisfied that the two cumulative requirements that may ground a finding of unwillingness under article 17(2)(c) of the Statute are not present in relation to the domestic proceedings against Mr Al-Senussi. Libya has provided persuasive information showing that the investigations into Mr Al-Senussi's case are not being conducted in a manner that is inconsistent with the intent to bring Mr Al-Senussi to justice. On this point the Chamber recalls that the investigation against Mr Al-Senussi, which has ultimately led to the transfer of the case to the Accusation Chamber,<sup>658</sup> appears to have been adequately conducted.<sup>659</sup> In the Chamber's view, the fact that Mr Al-Senussi's right to benefit from legal assistance at the investigation stage is yet to be implemented does not justify a finding of unwillingness under article 17(2)(c) of the Statute, in the absence of any indication that this is inconsistent with Libya's intent to bring Mr Al-Senussi to justice. Rather, from the evidence and the submissions before the Chamber, it appears that Mr Al-Senussi's right to legal representation has been primarily prejudiced so far by the security situation in the country.<sup>660</sup>

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<sup>657</sup> See paras 227 to 229 above.

<sup>658</sup> Annex A to Libya's Further Submissions.

<sup>659</sup> See paras 161 and 211 above.

<sup>660</sup> Libya's Reply, para. 146, with reference to also Human Rights Watch, "Libya: Ensure Abdallah Sanussi Access to Lawyer" (available at <http://www.hrw.org/news/2013/04/17/libya-ensure-abdallah-sanussi-access-lawyer>). The issue of Mr Al-Senussi's legal representation as a potential impediment to Libya's ability to carry out the proceedings against Mr Al-Senussi is addressed below at paras 301 to 307.

293. Accordingly, the Chamber concludes that Libya is not unwilling genuinely to carry out its proceedings against Mr Al-Senussi within the meaning of article 17(1)(a) and (2) of the Statute.

*b. Whether Libya is unable genuinely to carry out the proceedings against Mr Al-Senussi*

294. In relation to Libya's ability under article 17(1)(a) and (3) of the Statute, the Chamber considers that, given that Mr Al-Senussi is already in custody of the Libyan authorities, Libya is not "unable to obtain the accused". This ground, explicitly identified in article 17(3) of the Statute as one of the aspects that may warrant a finding of inability, is therefore not applicable to the present case.

295. The Chamber turns now to the determination of whether Libya is unable genuinely to conduct the proceedings against Mr Al-Senussi on the basis that Libya is unable to obtain the necessary evidence and testimony as a result of a total or substantial collapse or unavailability of its national judicial system.

296. As recalled above, Libya submits that the evidence already collected and relied upon for the Admissibility Challenge demonstrates its ability to collect the "necessary evidence and testimony". The question before the Chamber is therefore whether, taking into account the evidence already gathered and the stage of the proceedings reached at the national level, there are relevant factual circumstances that would negate any such ability.

297. The Chamber is of the view that the security situation across Libya is a relevant aspect as it may, in itself or in combination with other circumstances, impact on Libya's capacity to obtain the evidence and the testimony that are necessary to conduct genuine criminal proceedings against officials of the Gaddafi regime, Mr Al-Senussi included. In particular, on this specific point, the Chamber considers that the security situation must be assessed against the

absence of effective protection programmes for witnesses and the fact that certain detention facilities are yet to be transferred under the authority of the Ministry of Justice. In this regard, in the *Gaddafi* Admissibility Decision, the Chamber considered that these two aspects have a direct bearing on the investigation against Mr Gaddafi as they prevent Libya from obtaining “the necessary evidence and testimony” within the meaning of article 17(3) of the Statute. Those aspects were deemed compelling, given that Libya did not satisfactorily demonstrate that it had collected more than a few sparse items of evidence as part of its investigation against Mr Gaddafi.

298. The Chamber observes that Libya has provided a considerable amount of evidence collected as part of its investigation against Mr Al-Senussi. This evidence includes several relevant witness and victims’ statements as well as pieces of documentary evidence, such as written orders, medical records and flight documents.<sup>661</sup> In the Chamber’s view, at least some of the evidence and testimony that necessary to carry out the proceedings against Mr Al-Senussi – which need not comprise all possible evidence – has therefore already been collected, and there is no indication that collection of evidence and testimony has ceased or will cease because of unaddressed security concerns for witnesses in the case against Mr Al-Senussi or due to the absence of governmental control over certain detention facilities.

299. Indeed, the Chamber observes that it appears that the domestic proceedings in the case against Mr Al-Senussi have so far not been prejudiced by these security challenges, as demonstrated by the progressive and concrete investigative steps taken to date and the fact that the judicial proceedings against Mr Al-Senussi are currently progressing and have recently reached the accusation stage. The Chamber also considers that despite these security

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<sup>661</sup> See paras 161 and 211 above.

challenges, other former officials of the Gaddafi regime are also subject to ongoing judicial proceedings, whether in the same case against Mr Al-Senussi or not. The Chamber is not persuaded that the same ongoing security challenges would have a more adverse impact on the continuation of the proceedings against Mr Al-Senussi.

300. The Chamber also notes that at least one of the witnesses, whose statements have been submitted as part of the Admissibility Challenge, was interviewed while in detention in ██████████<sup>662</sup> and that several officials of the Gaddafi-era, whose testimony may arguably be considered of particular importance in the case against Mr Al-Senussi, are currently detained in the Al-Hadba prison of Tripoli, which, as found above,<sup>663</sup> is under the control of the Libyan Government.

301. Taking into account all the relevant circumstances, the Chamber, while reiterating its concerns about the lack of appropriate witness protection programmes in the proceedings against Mr Al-Senussi in the context of the country's precarious security situation, considers that this fact, in the concrete circumstances of the present case, does not result in Libya's inability genuinely to carry out its proceedings in Mr Al-Senussi's case on the grounds that Libya, as a result of a total or substantial collapse or unavailability of its national judicial system, is unable to obtain the evidence and testimony that is necessary for the proceedings against Mr Al-Senussi.

302. Finally, the Chamber turns to the consideration of any residual form of inability on the part of Libya to "otherwise carry out its proceedings" as a result of a total or substantial collapse or unavailability of its national judicial system.

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<sup>662</sup> Annex 8 to the Admissibility Challenge, p. 33.

<sup>663</sup> *Supra*, paras 264 and 265.

303. At the outset, the Chamber considers that Libya's capacity to carry out the proceedings against Mr Al-Senussi is not affected *per se* by the ongoing security concerns across the country, in particular taking into account the quantity and nature of the evidence gathered as part of the investigation in relation to Mr Al-Senussi's case, the ultimate transfer of the case to the Accusation Chamber and the recent commencement of the accusation phase. The fact that the hearing of 19 September 2013 occurred without incident, notwithstanding certain protests outside the courtroom complex,<sup>664</sup> further confirms that Libya appears to be in a position to address the ongoing security difficulties in order that the proceedings against Mr Al-Senussi not be hindered.

304. Nevertheless, and as observed above,<sup>665</sup> the Chamber considers of relevance for its determination under article 17(3) of the Statute the fact that Mr Al-Senussi has not been provided with any form of legal representation for the purposes of the national proceedings against him up until now.

305. In the *Gaddafi* Admissibility Decision, the Chamber held that, considering the Libyan procedural systems, "the difficulties in securing a lawyer for the suspect [...] appear to be an impediment to the progress of proceedings against Mr Gaddafi".<sup>666</sup> Likewise, as submitted by Libya, Mr Al-Senussi "needs to have a lawyer appointed to represent him" before his case can proceed to trial.<sup>667</sup>

306. Libya submits that "[t]he Ministry of Justice is cognisant of the need to ensure that Mr. Al-Senussi appoints a local lawyer by virtue of a formal power of attorney and will be taking further steps to facilitate the appointment of

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<sup>664</sup> *Supra*, para. 215.

<sup>665</sup> *Supra*, para. 233.

<sup>666</sup> *Gaddafi* Admissibility Decision, para. 214.

<sup>667</sup> Admissibility Challenge, para. 175.

such a lawyer in the near future”.<sup>668</sup> Further, Libya asserts that “the delays in relation to the appointment of defence counsel” are only an “understandable consequence of the challenging transnational context and security difficulties” and that “[t]hese challenges, however, are far from insurmountable and do not amount to inability or unwillingness on the part of the Government to carry out genuine proceedings”.<sup>669</sup>

307. The Chamber is of the view that the problem of legal representation, while not compelling at the present time, holds the potential to become a fatal obstacle to the progress of the case. Indeed, as recalled above, according to the Libyan national justice system, trial proceedings cannot be conducted in the absence of a lawyer for the suspect. However, as observed at several junctures of the present decision, the admissibility of a case must be determined in light of the circumstances existing at the time of the admissibility proceedings. The Chamber must therefore determine whether the current circumstances are such that a concrete impediment to the future appointment of counsel can be identified. It appears, by Libya’s own admission, that the fact that Mr Al-Senussi is yet to obtain legal representation is primarily due to “security difficulties”.<sup>670</sup>

308. The Chamber observes that contrary to the situation in relation to Mr Gaddafi, who is not under the control of the State national authorities and for whom attempts to secure legal representation have repeatedly failed,<sup>671</sup> Mr Al-Senussi is instead imprisoned in Tripoli by the central Government, and Libya submits that “recently, several local lawyers have indicated their

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<sup>668</sup> Libya’s Reply, para. 146.

<sup>669</sup> *Ibid.*

<sup>670</sup> *Ibid.*

<sup>671</sup> *Gaddafi* Admissibility Decision, para. 213, with reference to Libya’s Submissions of 23 January 2013, para. 97.

willingness to represent Mr. Al-Senussi in the domestic proceedings”.<sup>672</sup> In its Final Submissions, Libya has confirmed that “many local lawyers from Mr Al-Senussi’s tribe have indicated their willingness to represent Mr. Al-Senussi but have not yet been given a formal power of attorney [and] [i]t is expected that this final hurdle to securing legal representation will be overcome at the order of the Accusation Chamber in the very near future”.<sup>673</sup> The Chamber has no reason to put into question the information provided by Libya in this regard, or to consider it refuted by the existence of certain security challenges across the country. In these circumstances, the Chamber cannot conclude at this point in time that the situation is such that Mr Al-Senussi’s case will be impeded from proceeding further on the grounds that Libya will be unable to adequately address the current security concerns and ensure the provision of adequate legal representation for Mr Al-Senussi as necessary for the subsequent judicial proceedings as presently envisaged.

309. Taking into account all the relevant circumstances, the Chamber therefore considers that Libya is not unable to otherwise carry out the proceedings against Mr Al-Senussi due to a total or substantial collapse or unavailability of its national judicial system.

310. Accordingly, the Chamber is satisfied that Libya is not unable genuinely to carry out the proceedings against Mr Al-Senussi, within the meaning of article 17(1)(a) and (3) of the Statute.

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<sup>672</sup> Libya’s Reply, para. 146.

<sup>673</sup> Libya’s Final Submissions, para. 28.

## VI. OVERALL CONCLUSION ON THE ADMISSIBILITY OF THE CASE AGAINST MR AL-SENUSSI BEFORE THE COURT

311. In light of the above, the Chamber concludes that the same case against Mr Al-Senussi that is before the Court is currently subject to domestic proceedings being conducted by the competent authorities of Libya – which has jurisdiction over the case – and that Libya is not unwilling or unable genuinely to carry out its proceedings in relation to the case against Mr Al-Senussi. The case against Mr Al-Senussi is therefore inadmissible before the Court pursuant to article 17(1)(a) of the Statute.

312. The Chamber notes that according to article 19(10) of the Statute, “[i]f the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17”. The Prosecutor may therefore seize the Chamber with a request for review of the present decision as appropriate.

**FOR THESE REASONS, THE CHAMBER**

**DECIDES** that the case against Abdullah Al-Senussi is inadmissible before the Court under article 17(1)(a) of the Statute.

Judge Christine Van den Wyngaert appends a declaration.

Done in both English and French, the English version being authoritative.



**Judge Silvia Fernández de Gurmendi**

**Presiding Judge**



**Judge Hans-Peter Kaul**



**Judge Christine Van den Wyngaert**

Dated this Friday, 11 October 2013

At The Hague, The Netherlands