

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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

Date: 31 May 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 Saif Al-Islam Gaddafi**

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

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**Pre-Trial Chamber I** (the “Chamber”) of the International Criminal Court (the “Court”) issues the following decision on Libya’s challenge to the admissibility of the case against Saif Al-Islam Gaddafi (“Mr Gaddafi”) under article 19 of the Rome Statute (the “Statute”).<sup>1</sup>

## I. PROCEDURAL HISTORY

1. On 26 February 2011, the United Nations Security Council (“Security Council”) adopted Resolution 1970, whereby it referred to the Prosecutor of the Court the situation in Libya since 15 February 2011.<sup>2</sup>

2. On 27 June 2011, the Chamber issued the Warrant of Arrest for Saif Al-Islam Gaddafi (the “Warrant of Arrest”), having found reasonable grounds to believe that he is criminally responsible under article 25(3)(a) of the Statute for the commission of crimes against humanity of murder and persecution in various locations of the Libyan territory, in particular in Benghazi, Misrata, Tripoli and other neighbouring cities, from 15 February 2011 until at least 28 February 2011 in violation of articles 7(1)(a) and (h) of the Statute.<sup>3</sup>

3. On 1 May 2012, Libya filed a challenge to the admissibility of the case against Mr Gaddafi (the “Admissibility Challenge”) and requested that the Chamber postpone the execution of the surrender request pursuant to article 95 of the Statute.<sup>4</sup> Libya subsequently filed perfected translations of the

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<sup>1</sup> Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, 1 May 2012, ICC-01/11-01/11-130-Conf, with Annexes A-K (public redacted version in ICC-01/11-01/11-130-Red).

<sup>2</sup> United Nations Security Council, Resolution 1970, 26 February 2011, S/RES/1970 (2011), para. 4.

<sup>3</sup> Pre-Trial Chamber I, Warrant of Arrest for Saif Al-Islam Gaddafi, 27 June 2011, ICC-01/11-01/11-3; 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 (the “Article 58 Decision”).

<sup>4</sup> Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, 1 May 2012, ICC-01/11-01/11-130-Conf, with confidential Annexes A-K, (public redacted version in ICC-01/11-01/11-130-Red).

annexes to its Admissibility Challenge<sup>5</sup> and a compilation of the relevant provisions of Libyan law referred to in the Admissibility Challenge.<sup>6</sup>

4. On 4 May 2012, the Chamber determined the proceedings to be followed for the purposes of the Admissibility Challenge and invited submissions from the Prosecutor, the Office of Public Counsel for the defence (the "OPCD"), the Office of Public Counsel for victims (the "OPCV"), and the Security Council of the United Nations.<sup>7</sup> Counsel of the OPCD (the "Defence") had previously been appointed to represent Mr Gaddafi pursuant to regulation 76(2) of the Regulations of the Court.<sup>8</sup>

5. On 18 May 2012, the Chamber granted leave under rule 103 of the Rules of Procedure and Evidence (the "Rules") to Lawyers for Justice in Libya and the Redress Trust to submit observations on the Admissibility Challenge by 8 June 2012.<sup>9</sup>

6. On 1 June 2012, the Chamber decided that Libya may postpone the execution of the request for surrender of Mr Gaddafi pursuant to article 95 of

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<sup>5</sup> Libyan Government's Re-filing of Confidential Annexes to its Article 19 Admissibility Challenge, 15 May 2012, ICC-01/11-01/11-145-Conf, with confidential Annexes C-F; Libyan Government's Re-filing of Public Annexes to its Article 19 Admissibility Challenge, 15 May 2012, ICC-01/11-01/11-144, with Annexes A, B and G-K.

<sup>6</sup> Libyan Government's filing of compilation of Libyan law referred to in its admissibility challenge, 28 May 2012, ICC-01/11-01/11-158, with Annexes A and B.

<sup>7</sup> Pre-Trial Chamber I, Decision on the Conduct of the Proceedings Following the "Application on behalf of the Government of Libya pursuant to Article 19 of the Statute, 4 May 2012, ICC-01/11-01/11-134.

<sup>8</sup> Pre-Trial Chamber I, Decision Appointing Counsel from the OPCD as Counsel for Saif Al-Islam Gaddafi, 17 April 2012, ICC-01/11-01/11-113.

<sup>9</sup> Pre-Trial Chamber I, Decision on the "Application by Lawyers for Justice in Libya and the Redress Trust for Leave to Submit Observations pursuant to Rule 103 of the Rules of Procedure and Evidence", 18 May 2012, ICC-01/11-01/11-153.

the Statute until such time that the Chamber has ruled on the Admissibility Challenge.<sup>10</sup>

7. On 4 June 2012, the Prosecutor and the OPCV filed responses to the Admissibility Challenge (the “Prosecutor’s Response to the Admissibility Challenge”<sup>11</sup> and the “OPCV’s Response to the Admissibility Challenge”<sup>12</sup>). The observations of Lawyers for Justice in Libya and the Redress Trust were presented on 8 June 2012 (the “Amici Observations”).<sup>13</sup> The response of the Defence to Libya’s Admissibility Challenge was filed on 24 July 2012 (the “Defence Response”).<sup>14</sup>

8. On 14 September 2012, the Chamber issued an order convening a hearing on Libya’s Admissibility Challenge on 8 and 9 October 2012 (the “Admissibility Hearing”) in which it decided, *inter alia*, that (i) at the hearing, Libya would be invited to provide its reply to the responses, (ii) at the hearing, Libya, the Prosecutor, the Defence and the OPCV would be given the opportunity to complement their respective previous submissions and evidence relevant to the Admissibility Challenge; and (iii) 3 October 2012 was the final date for all parties and participants to file in the record of the case

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<sup>10</sup> Pre-Trial Chamber I, Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute, 1 June 2012, ICC-01/11-01/11-163.

<sup>11</sup> Prosecution response to Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, 4 June 2012, ICC-01/11-01/11-167-Conf, with Annex 1 (public redacted version in ICC-01/11-01/11-167-Red).

<sup>12</sup> Observations on behalf of victims on the Government of Libya’s Application pursuant to Article 19 of the Rome Statute, 4 June 2012, ICC-01/11-01/11-166-Conf, with Annexes A and B (public redacted version in ICC-01/11-01/11-166-Red-Corr).

<sup>13</sup> Lawyers for Justice in Libya and Redress Trust’s Observations pursuant to Rule 103 of the Rules of Procedure and Evidence, 8 June 2012, ICC-01/11-01/11-172.

<sup>14</sup> Defence Response to the “Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute”, 31 July 2012, ICC-01/11-01/11-190-Conf-Corr, with Annexes 1-25 (public redacted version in ICC-01/11-01/11-190-Corr-Red).

any evidence relevant to the Admissibility Challenge upon which the participants intend to rely at the hearing.<sup>15</sup>

9. On 3 October 2012, the Defence filed additional evidence for use at the Admissibility Hearing.<sup>16</sup>

10. On 9 and 10 October 2012, the Chamber held the Admissibility Hearing in the presence of representatives of Libya, the Prosecutor, the Defence and the OPCV.<sup>17</sup>

11. On 7 December 2012, the Chamber requested Libya to provide by 23 January 2013 further submissions on a series of issues identified by the Chamber after the Admissibility Hearing together with the appropriate supporting evidence (the “Decision of 7 December 2012”).<sup>18</sup>

12. On 21 January 2013, the Defence filed an urgent request informing the Chamber that trial proceedings had begun in Zintan on 17 January 2013 against Mr Gaddafi, on charges of “compromising national security through the exchange of documents with the ICC delegation, and insulting the State's flag and national emblem” and requesting the Chamber to *inter alia* issue an

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<sup>15</sup> Pre-Trial Chamber I, Order convening a hearing on Libya's challenge to the admissibility of the case against Saif Al-Islam Gaddafi, 14 September 2012, ICC-01/11-01/11-207. On 25 September 2012, the Chamber informed the parties and participants that the Admissibility Hearing would be held on 9 and 10 October 2012.

<sup>16</sup> Defence Submission of Additional Evidence Pursuant to the “Order convening a hearing on Libya's challenge to the admissibility of the case against Saif Al-Islam Gaddafi” (ICC-01/11-01/11-207), 3 October 2012, ICC-01/11-01/11-216, with Annexes 1.1-7.4, 8.1-8.3 and A.

<sup>17</sup> Pre-Trial Chamber I, Transcript of Hearing, 9 October 2012, ICC-01/11-01/11-T-2-CONF-EXP-ENG (public redacted version in ICC-01/11-01/11-T-2-Red-ENG); Transcript of Hearing, 10 October 2012, ICC-01/11-01/11-T-3-CONF-EXP-ENG (public redacted version in ICC-01/11-01/11-T-3-Red-ENG).

<sup>18</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.

immediate decision on the admissibility of the case and order Libya to immediately surrender Mr Gaddafi to the custody of the ICC.<sup>19</sup>

13. On 23 January 2013, Libya filed its further submissions (“Libya’s Further Submissions”), together with a number of annexes attached thereto.<sup>20</sup>

14. On 11 February 2013, the Prosecutor filed her response to Libya’s Further Submissions together with annexes (the “Prosecutor’s Response to Libya’s Further Submissions”).<sup>21</sup>

15. On 18 February 2013, the OPCV and the Defence filed their observations on Libya’s Further Submissions (the “OPCV Observations on Libya’s Further Submissions”<sup>22</sup>) and (the “Defence Response to Libya’s Further Submissions”<sup>23</sup>).

16. On 19 February 2013, the Prosecutor withdrew a reference to trials *in absentia* in the Prosecutor’s Response to Libya’s Further Submissions.<sup>24</sup>

17. On 4 March 2013, Libya filed its consolidated reply to the responses to Libya’s Further Submissions (“Libya’s Reply”).<sup>25</sup>

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<sup>19</sup> Urgent Defence Request, 21 January 2013, ICC-01/11-01/11-255.

<sup>20</sup> Libyan Government’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi, 23 January 2013, ICC-01/11-01/11-258- Conf-Exp, with Annexes 1-23 (public redacted version in ICC-01/11-01/11-258-Red2).

<sup>21</sup> Prosecution’s Response to “Libyan Government’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi”, 11 February 2013, ICC-01/11-01/11-276-Conf-Exp, with Annexes A-C (public redacted version in ICC-01/11-01/11-276-Red2).

<sup>22</sup> OPCV’s Observations on “Libyan Government’s further submissions on issues related to admissibility of the case against Saif Al-Islam Gaddafi”, 18 February 2013, ICC-01/11-01/11-279.

<sup>23</sup> Response to the “Libyan Government’s further submissions on issues related to admissibility of the case against Saif Al-Islam Gaddafi, 18 February 2013, ICC-01/11-01/11-281-Conf, with Annexes 1-13 (public redacted version in ICC-01/11-01/11-281-Red2).

<sup>24</sup> Prosecution’s Notice of withdrawal regarding a reference in its “Prosecution’s Response to ‘Libyan Government’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi’” (ICC-01/11-01/11-276-Red2), 19 February 2013, ICC-01/11-01/11-282.

18. On 28 March 2013, Libya notified the Chamber of the appointment of a new Prosecutor-General and reiterated its request to the Chamber to be authorized to adduce further evidential samples relating to the investigation of Mr Gaddafi and/or to travel to Tripoli to inspect the case file against Mr Gaddafi (the "Notification").<sup>26</sup> On 3 April 2013, the Defence requested that the Notification be dismissed *in limine*.<sup>27</sup> On 24 April 2013, Libya responded that the Defence request of 3 April 2013 has no proper basis and/or is without merit.<sup>28</sup>

19. On 23 April 2013, in response to Libya's challenge to the admissibility of the case against Abdullah Al-Senussi,<sup>29</sup> the Defence (i) requested that the Chamber confirm that it would exclude from its consideration any information falling outside the parameters of the challenge concerning Mr Gaddafi and related responses; and (ii) reiterated previous requests for the Chamber to issue an immediate decision on the Admissibility Challenge.<sup>30</sup>

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<sup>25</sup> Libyan Government's consolidated reply to the responses of the Prosecution, OPCD, and OPCV to its further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi, 4 March 2013, ICC-01/11-01/11-293-Conf, with Annexes 1-3 (public redacted version in ICC-01/11-01/11-293-Red).

<sup>26</sup> Notification by Libyan Government supplemental to its consolidated reply to the responses of the Prosecution, OPCD, and OPCV to its further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi, 28 March 2013, ICC-01/11-01/11-306, with Annex 1.

<sup>27</sup> Request to dismiss the "Notification by Libyan Government supplemental to its consolidated reply to the responses of the Prosecution, OPCD and OPCV to its further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi" *in limine*, 3 April 2013, ICC-01/11-01/11-308, with Annex A.

<sup>28</sup> Libyan Government's Response to OPCD Request to dismiss the "Notification by Libyan Government supplemental to its consolidated reply to the responses of the Prosecution, OPCD and OPCV to its further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi" *in limine*, 24 April 2013, ICC-01/11-01/11-318-Conf-Exp (public redacted version in ICC-01/11-01/11-318-Red).

<sup>29</sup> Application on behalf of the Government of Libya relating to Adbullah Al-Senussi pursuant to Article 19 of the ICC Statute, 2 April 2013, ICC-01/11-01/11-307-Conf-Exp, with Annexes 1-30 (public redacted version in ICC-01/11-01/11-307-Red2).

<sup>30</sup> Response to the "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute", 23 April 2013, ICC-01/11-01/11-313.

Libya sought leave to reply to the Defence on 3 May 2013,<sup>31</sup> and the Defence requested that the Chamber reject Libya's request for leave to reply on 7 May 2013.<sup>32</sup>

20. On 26 April 2013, the Defence requested that the Chamber (i) immediately revoke the article 95 postponement of Mr Gaddafi's surrender and (ii) issue an immediate decision on the Admissibility Challenge. The Defence also provided to the Chamber recently obtained information as to the ability or willingness of Libya to accord Mr Gaddafi a fair and impartial trial, which it submitted should be taken into account in the decision on admissibility if the Chamber exercises its discretion to take account of additional information or evidence submitted after Libya's Further Submissions and the responses thereto.<sup>33</sup>

21. On 7 May 2013, the Defence filed an addendum to its urgent request of 21 January 2013, updating the Chamber on the progress of the trial proceedings in Zintan and requesting that the Chamber revoke its Article 95 postponement decision, and order Mr Gaddafi's immediate surrender to the custody of the ICC.<sup>34</sup>

22. On 29 May 2013, Libya filed a response requesting that the Chamber reject the Defence addendum as an attempt to re-litigate issues that had

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<sup>31</sup> Libyan Government's Request for leave to reply to the Defence for Mr. Saif Al-Islam Gaddafi's "Response to the "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute"", 3 May 2013, ICC-01/11-01/11-327.

<sup>32</sup> Defence response to the "Libyan Government's Request for leave to reply to the Defence for Mr. Saif Al-Islam Gaddafi's "Response to the "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute""", 7 May 2013, ICC-01/11-01/11-333.

<sup>33</sup> Urgent request for measures to remedy ongoing violations of Mr. Saif Al-Islam Gaddafi's rights before the ICC, 26 April 2013, ICC-01/11-01/11-323-Conf-Exp, with Annexes 1-4.

<sup>34</sup> Addendum to the "Urgent Defence Request" of 21 January 2013, and Request for Finding of Non-Compliance, 7 May 2013, ICC-01/11-01/11-332, with Annexes 1-3.

previously been decided or otherwise to supplement the Defence response to the Admissibility Challenge.<sup>35</sup>

23. The Chamber clarifies that, for the purposes of the present decision, it has not taken into account the information provided by the parties in filings subsequent to Libya's Reply of 4 March 2013, as the significance of this information has not been sufficiently demonstrated.

24. The Chamber underlines that the present decision was preceded by a number of confidential or confidential *ex parte* filings and portions of hearings. However, in light of the principle of publicity of the proceedings, the Chamber has filed a public redacted version of its decision. To the extent that the decision refers to information filed or discussed on a confidential or *ex parte* basis, the Chamber considers that the information concerned does not warrant confidentiality or, as the case may be, *ex parte* treatment at this time.

## II. LIBYA'S ADMISSIBILITY CHALLENGE

### A. *The initial submission*

25. Libya challenges the admissibility of the case on the basis that its national judicial system is actively investigating Mr Gaddafi for his alleged criminal responsibility for multiple acts of murder and persecution, committed pursuant to or in furtherance of a state policy, amounting to crimes against humanity.<sup>36</sup>

26. Libya submits that investigations into Mr Gaddafi's alleged criminal conduct began on the date of his capture, 23 November 2011, in particular

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<sup>35</sup> Libyan Government's Response to the Saif Al-Islam Gaddafi "Addendum to the "Urgent Defence Request" of 21 January 2013, and Request for Finding of Non-Compliance", 29 May 2013, ICC-01/11-01/11-343.

<sup>36</sup> Admissibility Challenge, para. 1.

with respect to financial crimes and corruption. A decision was taken on 17 December 2011 to extend this investigation to include crimes against the person under Libyan law.<sup>37</sup> On 8 January 2012, the Prosecutor-General commenced an investigation against Mr Gaddafi for serious crimes (including murder and rape) allegedly committed by Mr Gaddafi during the revolution (including in the period between 15 February to 28 February 2011).<sup>38</sup>

27. Libya contends that very substantial resources were deployed to interview witnesses and gather other evidence and sets out the further investigative steps that it intends to take in the future.<sup>39</sup> Once the final step of interviewing Mr Gaddafi to confirm his identity and confront him with the allegations against him has been completed, the case could move onto the accusation stage of proceedings and later to trial.<sup>40</sup>

28. At the time of the filing of the Admissibility Challenge, Libya envisaged that the likely charges against Mr Gaddafi would be: intentional murder; torture; incitement to civil war; indiscriminate killings; misuse of authority against individuals; arresting people without just cause; and the unjustified deprivation of personal liberty pursuant to articles 368, 435, 293, 296, 431, 433, 434 of the Libyan Criminal Code.<sup>41</sup> It affirmed that the National Transitional Council was considering the adoption of a draft law incorporating international crimes, modes of responsibility and penalties under the Statute.<sup>42</sup>

29. Libya submits that, pursuant to article 59 of Libya's Criminal Procedure Code, during the investigative phase of proceedings, investigations are confidential and the Libyan prosecution services may only disclose summary

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<sup>37</sup> Admissibility Challenge, paras 23, 42.

<sup>38</sup> Admissibility Challenge, paras 25, 44.

<sup>39</sup> Admissibility Challenge, paras 46-48.

<sup>40</sup> Admissibility Challenge, paras 48-49.

<sup>41</sup> Admissibility Challenge, para. 75.

<sup>42</sup> Admissibility Challenge, para. 84.

reports of their investigations to persons who are not involved in the Libyan investigative or prosecutorial team.<sup>43</sup> Once the investigative stage of the proceedings is completed, it will be able to provide examples of the evidence that its investigation has produced and that evidence will be relied upon in the accusation, trial and appeal phases of the case.<sup>44</sup>

30. Libya highlights recent positive developments including a constitutional prohibition on the establishment of exceptional courts and a constitutionally enshrined protection for the independence of the judiciary, which is also protected under several provisions of domestic Libyan law, including article 52 of the Judicial System Law and article 31 of the Freedoms Act.<sup>45</sup>

31. Libya states that suspects and defendants within the Libyan criminal justice system benefit from similar procedural rights and protections to those set out in the Statute and emphasises that Libya is party to international and regional human rights instruments which guarantee the right to a fair trial.<sup>46</sup> In its Admissibility Challenge, Libya sets out the procedures and rights of the accused applicable under Libyan law at each stage of the proceedings.<sup>47</sup>

#### ***B. Oral submissions at the Admissibility Hearing***

32. At the Admissibility Hearing, Libya's representatives gave an extensive presentation on the progress made and the challenges faced by Libya in its post-conflict transition to democracy, developments in the security situation and efforts made in judicial capacity building.<sup>48</sup> They emphasised that more time was needed by Libya to ensure that justice was achieved in the case

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<sup>43</sup> Admissibility Challenge, paras 40, 90.

<sup>44</sup> Admissibility Challenge, paras 41, 91.

<sup>45</sup> Admissibility Challenge, paras 53-55.

<sup>46</sup> Admissibility Challenge, paras 56-57.

<sup>47</sup> Admissibility Challenge, paras 58-67.

<sup>48</sup> Pre-Trial Chamber I, Transcript of Hearing, 9 October 2012, ICC-01/11-01/11-T-2-Red-ENG, p. 6, line 22 – p. 13, line 7.

against Mr Gaddafi and argued that “[a] rush to judgment by the ICC, without granting Libya the necessary time, would be contrary to the necessity to co-operate with a post-conflict government facing serious security problems.”<sup>49</sup> Libya’s representative submitted that, given the particular context, the Court should engage with Libya in a constructive manner, receiving further reports and submissions “until such time as it has satisfied itself that Libya has had a reasonable opportunity to pursue a case at which time the Chamber can then make a decision on admissibility”.<sup>50</sup>

33. Libya’s representative indicated that its investigations covered exactly the same incidents and conduct as those contained in the ICC warrant of arrest and were, in fact, broader in terms of time and subject matter than the ICC Prosecutor’s investigation, and that the investigation had produced a very wide range of significant evidence.<sup>51</sup> Libya’s representative emphasised that difficulties in providing this evidence to the Chamber arise from confidentiality constraints under Libyan law at the investigation stage.<sup>52</sup>

34. The representative of Libya provided a brief overview of Libyan criminal procedure and the rights applicable to a suspect during the investigation and accusation stage of a case and the heightened importance given under Libyan law to due process considerations in cases where the death penalty is applicable.<sup>53</sup> It was confirmed that some of the offences with

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<sup>49</sup> Pre-Trial Chamber I, Transcript of Hearing, 9 October 2012, ICC-01/11-01/11-T-2-Red-ENG, p. 13, lines 2-4; p. 43, line 19 – p. 44, line 11; p. 49, line 24 – p. 53, line 5.

<sup>50</sup> Pre-Trial Chamber I, Transcript of Hearing, 9 October 2012, ICC-01/11-01/11-T-2-Red-ENG, p. 44, line 12 – p. 46, line 9.

<sup>51</sup> Pre-Trial Chamber I, Transcript of Hearing, 9 October 2012, ICC-01/11-01/11-T-2-Red-ENG, p. 17, line 25 – p. 19, line 19, p. 21, line 4 – p. 24, line 9; Transcript of Hearing, 10 October 2012, ICC-01/11-01/11-T-3-Red-ENG, p. 43, line 12 – p. 44, line 5.

<sup>52</sup> Pre-Trial Chamber I, Transcript of Hearing, 9 October 2012, ICC-01/11-01/11-T-2-Red-ENG, p. 18, line 5 – p. 18, line 25; p. 49, lines 6-23.

<sup>53</sup> Pre-Trial Chamber I, Transcript of Hearing, 9 October 2012, ICC-01/11-01/11-T-2-Red-ENG, p. 24, line 10 – p. 28, line 14.

which Mr Gaddafi will potentially be charged provide for the death penalty.<sup>54</sup> It was indicated that, if the legislative proposal to incorporate international crimes into Libyan law is passed, Mr Gaddafi may also be charged with the crimes against humanity of persecution and murder with the same penalties as those under the Statute.<sup>55</sup>

### C. *Libya's Further Submissions*

35. In its further submissions, Libya provided additional information on the progress of the investigation. Libya submits that, despite a delay occasioned by the extradition of Abdullah Al-Senussi from Mauritania, the investigation in relation to Mr Gaddafi has progressed since the filing of the Admissibility Challenge and is expected to be transferred to the *Chambre d'Accusation* within four weeks of Libya's further submissions, filed on 23 January 2013.<sup>56</sup> The appointment of a lawyer and the approval of the case by the *Chambre d'Accusation* are necessary prerequisites to the commencement of a trial and it is estimated that the examination by the *Chambre d'Accusation* would take approximately three months.<sup>57</sup>

36. Libya confirms that approximately fifty witnesses have been interviewed in total for the investigation, eight since the filing of the Admissibility Challenge and that testimonies have been obtained from persons who previously operated at the highest civilian and military levels of the Gaddafi regime.<sup>58</sup> Mr Gaddafi has been interviewed on a number of occasions since the filing of the Admissibility Challenge and he has been

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<sup>54</sup> Pre-Trial Chamber I, Transcript of Hearing, 9 October 2012, ICC-01/11-01/11-T-2-Red-ENG, p. 21, line 22 – p. 22, line 2; p. 28, line 21 – p. 29, line 3.

<sup>55</sup> Pre-Trial Chamber I, Transcript of Hearing, 9 October 2012, ICC-01/11-01/11-T-2-Red-ENG, p. 21, lines 12-22; p. 28, lines 14-20.

<sup>56</sup> Libya's Further Submissions, para. 60.

<sup>57</sup> Libya's Further Submissions, para. 60.

<sup>58</sup> Libya's Further Submissions, paras 48-49.

confronted with witnesses who have given testimonies in his case.<sup>59</sup> Libya has been unable to interview two witnesses as they are detained in detention facilities not yet under the control of the Libyan Government but claims that it is in the process of arranging the transfer of control over such detention facilities to the Libyan Government, at which point interviews will be carried out.<sup>60</sup>

37. Libya submits that its investigation covers “the same factual incidents charged as murder and persecution before the ICC; and the same allegations of individual conduct by Mr Gaddafi which have formed the basis for his alleged participation in crimes by the ICC”.<sup>61</sup> Libya reiterates that it deems its investigation to be broader in scope than the case before the Court, covering crimes against the person or ‘blood crimes’ with a broader temporal scope, from 11 February 2011 to the fall of the Gaddafi regime, and financial crimes dating back to 2006.<sup>62</sup> The geographic scope of its investigation encompasses “the incidents described in the ICC investigation within Benghazi, Tripoli and Misrata (and nearby cities) but also include crimes taking place in Bani Walid as well as other parts of Libya”. Investigative steps have been taken throughout Libya – including within Alzawia, Zawara and Bani Walid – in order to ensure that the country-wide allegations against Mr Gaddafi are properly investigated and evidenced.<sup>63</sup>

38. Libya submits that the list of charges that it contemplates bringing against Mr Gaddafi has grown and now includes the following additional charges: insulting constitutional authorities pursuant to article 195, devastation, rapine and carnage pursuant to article 202, civil war pursuant to

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<sup>59</sup> Libya’s Further Submissions, para. 49.

<sup>60</sup> Libya’s Further Submissions, para. 50.

<sup>61</sup> Libya’s Further Submissions, para. 71.

<sup>62</sup> Libya’s Further Submissions, paras 63-64.

<sup>63</sup> Libya’s Further Submissions, para. 65.

article 203, conspiracy pursuant to article 211, attacks upon the political rights of a Libyan pursuant to article 217, arson pursuant to article 297, spreading disease among plants and livestock pursuant to article 362, concealment of a corpse pursuant to article 294, aiding members of a criminal association pursuant to article 322, use of force to compel another pursuant to article 429, and search of persons pursuant to article 432 of the Libyan Criminal Code. In addition, Libya submits that it contemplates charges in the Sharia law governing retaliation and Diya compensation for killings pursuant to Law No 7 of 1988.<sup>64</sup>

39. Libya provides documentary evidence in support of its claims and invites the Chamber to send a representative to Tripoli to view the entire case file or allow the Libyan Government an additional six weeks to prepare copies of the full investigative materials if a fuller inspection is deemed necessary.<sup>65</sup>

***D. Libya's Reply to the Responses to its Further Submissions***

40. Libya repeats its request that the Chamber either grant six weeks for the production of such further evidential samples related to the case of Mr Gaddafi as may be considered necessary, or travel to Tripoli to inspect the case file in order to review the evidence collected by Libya during its investigation.<sup>66</sup> Libya rejects the Defence's suggestion that this offer is disingenuous and an attempt to use non-compliance to obtain more time and asserts that this should be accepted as an indication of its good faith and willingness to cooperate with the Court at a time when it is "seeking to deal with the innumerable challenges it faces as a country in transition".<sup>67</sup> It requests that the Chamber keep at the forefront of its deliberations that Libya

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<sup>64</sup> Libya's Further Submissions, paras 81-82.

<sup>65</sup> Libya's Further Submissions, para. 70.

<sup>66</sup> Libya's Reply, paras 7 and 42.

<sup>67</sup> Libya's Reply, paras 11-14.

has consistently sought to cooperate in good faith with the Court despite a host of obstacles and that its cooperation thus far has been extensive.<sup>68</sup>

41. Libya confirms that the Prosecutor-General has decided not to include in the charges against Mr Gaddafi any matters of Sharia law including issues relating to retaliation and compensation for killings.<sup>69</sup>

### III. BURDEN, STANDARD OF PROOF AND TYPE OF EVIDENCE

42. The Chamber will first rehearse the arguments of the parties and participants and will subsequently set forth its understanding regarding the burden and standard of proof and the type of evidence required to support an admissibility challenge.

#### A. *Submissions*

##### a. *Libya*

43. Libya argues that “the imposition of a legal test or standard of proof that is too onerous and exacting would be inconsistent with the presumption in favour of national proceedings”.<sup>70</sup>

44. Libya accepts that the burden of proof falls on the applicant bringing the challenge in respect of the first limb of the test – namely whether there is an ongoing investigation or prosecution of the case at the national level.<sup>71</sup> It further argues that the appropriate standard is “on the balance of probabilities” and relies on the jurisprudence of Trial Chamber III rejecting an argument that the applicable standard was “clear and convincing evidence”

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<sup>68</sup> Libya’s Reply, para. 43.

<sup>69</sup> Libya’s Reply, para. 97.

<sup>70</sup> Admissibility Challenge, para. 92; Libya’s Further Submissions, paras 6-7; see also Pre-Trial Chamber I, Transcript of Hearing, 9 October 2012, ICC-01/11-01/11-T-2-Red-ENG, p. 39, lines 7-23; p. 48, lines 17-21.

<sup>71</sup> Libya’s Further Submissions, paras 11-12; Pre-Trial Chamber I, Transcript of Hearing, 9 October 2012, ICC-01/11-01/11-T-2-Red-ENG, p. 48, lines 11-13.

in support of this argument.<sup>72</sup> It contends that the “balance of probabilities” standard is also consistent with the general practice of international courts and tribunals in analogous proceedings involving disputes between States.<sup>73</sup>

45. With respect to the second limb of the test – whether the State is unwilling or unable genuinely to carry out such investigation or prosecution – Libya contends that the burden of proof lies with the party asserting that the investigation or prosecution at national level is not genuine.<sup>74</sup> In this regard, it is submitted that (i) a presumption exists in favour of national jurisdictions, (ii) a “general principle of international law that the sovereign acts of a State within its domestic jurisdiction are presumed to be valid unless otherwise established” should be applied, and (iii) as a policy, States exercising jurisdiction should be given the benefit of the doubt and presumed to be acting in good faith.<sup>75</sup> In view of the serious nature of the allegation that a State is not genuinely investigating or prosecuting crimes within the jurisdiction of the Court, Libya submits that the standard of proof must necessarily be a very high one.<sup>76</sup>

*b. Prosecutor*

46. The Prosecutor submits that the party challenging admissibility bears the burden of demonstrating that the case is inadmissible in relation to both limbs of the test, namely the existence of an investigation and the genuineness of Libya’s willingness and ability to investigate, to the standard of “on the

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<sup>72</sup> Libya’s Further Submissions, para. 13; Pre-Trial Chamber I, Transcript of Hearing, 9 October 2012, ICC-01/11-01/11-T-2-Red-ENG, p. 48, lines 14-15.

<sup>73</sup> Libya’s Further Submissions, paras 17-18.

<sup>74</sup> Libya’s Further Submissions, paras 19-20; Pre-Trial Chamber I, Transcript of Hearing, 9 October 2012, ICC-01/11-01/11-T-2-Red-ENG, p. 48, lines 8-16.

<sup>75</sup> Admissibility Challenge, para. 92(iii); Libya’s Further Submissions, para, 20.

<sup>76</sup> Libya’s Further Submissions, paras 21-26.

balance of probabilities".<sup>77</sup> According to the Prosecutor, the allocation of the burden of proof to the State in respect of both limbs of the test is warranted because the State has superior and often exclusive access to the relevant information and is also consistent with the *raison d'être* of the complementarity principle: to prove that a case is inadmissible, the State must establish that it is conducting a meaningful investigation that genuinely seeks to ascertain the criminal responsibility of the suspect.<sup>78</sup>

### *c. Defence*

47. The Defence agrees that the burden of proof rests on the challenging party in respect of both limbs of the admissibility test, which it suggests are intrinsically linked.<sup>79</sup> It is submitted that there is no presumption of primacy for domestic investigations and that "considerations of state sovereignty should not be allowed to detract from the principle of effective international prosecutions".<sup>80</sup> It is said that, as the entity conducting the investigation, Libya is best placed to produce the relevant information.<sup>81</sup>

### *d. OPCV*

48. The OPCV submits that the burden of proof to show that a case is inadmissible rests on Libya in respect of both limbs of the test.<sup>82</sup> The OPCV submits that Libya's reference to academic commentary supporting the existence of a presumption in favour of the validity of acts of States is taken out of context and argues that such a presumption, even if recognised, is not

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<sup>77</sup> Prosecutor's Response to the Admissibility Challenge, para.16; Prosecutor's Response to Libya's Further Submissions, para. 23; Pre-Trial Chamber I, Transcript of Hearing, 9 October 2012, ICC-01/11-01/11-T-2-Red-ENG, p. 61, lines 5-14.

<sup>78</sup> Prosecutor's Response to Libya's Further Submissions, para. 23.

<sup>79</sup> Defence Response, paras 21-26.

<sup>80</sup> Defence Response, paras 27-33, quoting J. Pichon, "The Principle of Complementarity in the Cases of the Sudanese Nationals Ahmad Harun and Ali Kushayb before the International Criminal Court", *International Criminal Law Review* 8 (Martinus Nijhoff Publishers, 2008), pp. 185 and 201.

<sup>81</sup> Defence Response, para. 33.

<sup>82</sup> OPCV Observations on Libya's Further Submissions, paras 22-28.

applicable to matters regulated by special treaties.<sup>83</sup> Accordingly, such a presumption cannot override the established rules governing the allocation of burden before the Court.<sup>84</sup>

49. With respect to the standard of proof, the OPCV argues that Libya's assertion that a 'balance of probabilities' standard should be employed is based on a misleading interpretation of Appeals Chamber jurisprudence and a decision of Trial Chamber III premised on considerations that are irrelevant to the current case.<sup>85</sup> The OPCV advocates the adoption of the standard of 'clear and convincing evidence, which is higher than the 'balance of probabilities' standard and lower than the 'beyond reasonable doubt' standard.<sup>86</sup> It is argued that the imposition of this higher standard in relation to a State's challenge to admissibility is warranted because the State's judicial authorities have full control over national proceedings and unfettered access to the evidence, and it is the State, therefore, that is best placed to assist the Court in its determination.<sup>87</sup>

*e. Libya's Reply*

50. Libya contends that the argument of the OPCV and the Prosecutor that the burden of proof falls on Libya in respect of both limbs of the admissibility test is based on a selective quotation of an Appeals Chamber judgment to the effect that "a State that challenges the admissibility of a case bears the burden of proof to show that that case is inadmissible".<sup>88</sup> It is highlighted that the Appeals Chamber went on to find "[t]o discharge that burden, the State must provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case. It is

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<sup>83</sup> OPCV Observations on Libya's Further Submissions, paras 27-28.

<sup>84</sup> OPCV Observations on Libya's Further Submissions, paras 22-28.

<sup>85</sup> OPCV Observations on Libya's Further Submissions, paras 30-33.

<sup>86</sup> OPCV Observations on Libya's Further Submissions, para. 34.

<sup>87</sup> OPCV Observations on Libya's Further Submissions, para. 38.

<sup>88</sup> Libya's Reply, para. 17.

not enough to merely assert that investigations are ongoing.”<sup>89</sup> It is submitted that this judgment, as well as the other jurisprudence referred to by the Prosecutor and the OPCV, support Libya’s assertion that the burden of proof does not fall on it with respect to the second limb of the test.<sup>90</sup> It is further contended that the Prosecutor’s position with respect to the burden of proof is contradicted by her submission that there is a preference for domestic trials.<sup>91</sup>

51. With respect to the argument that the burden of proof in relation to the second limb of the test should fall on Libya as it is in the best position to access information, Libya submits that practical challenges in gathering evidence do not justify the shifting of the burden of proof.<sup>92</sup>

#### ***B. Findings of the Chamber***

52. The Chamber is guided by the jurisprudence of the Appeals Chamber that “a State that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible”.<sup>93</sup> The Chamber observes that the inadmissibility of the case is premised on both limbs of article 17(1)(a) of the Statute and the challenging State is required to substantiate all aspects of its allegations to the extent required by the concrete circumstances of the case. The principle of complementarity expresses a preference for national investigations and prosecutions but does not relieve a State, in general, from

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<sup>89</sup> Libya’s Reply, para. 17.

<sup>90</sup> Libya’s Reply, paras 17-19.

<sup>91</sup> Libya’s Reply, para. 21.

<sup>92</sup> Libya’s Reply, paras 29-30.

<sup>93</sup> 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-01/09-01/11-307 (OA), para. 62; 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, para. 9; Pre-Trial Chamber I, Transcript of Hearing, 10 October 2012, ICC-01/11-01/11-T-3-Red-ENG, p. 64 line 18 to p. 65, line 1.

substantiating all requirements set forth by the law when seeking to successfully challenge the admissibility of a case.

53. That said, the Chamber notes that 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. Depending on the circumstances, the Chamber may seek additional evidence to satisfy itself that genuine investigations or prosecutions are being carried out. In the present case, based on the submissions made and the available evidence, the Chamber considered that the ability of Libya to investigate and prosecute required further analysis. As a consequence, the Chamber took the initiative of asking specific questions in this regard to Libya and the other parties and participants, both at the Admissibility Hearing held in October 2012 and in the Chamber's decision issued on 7 December 2012.<sup>94</sup> The Chamber will determine, in light of its own assessment, whether it is satisfied that the State is conducting genuine investigations or prosecutions on the basis of the submissions and the evidence received in response.

54. The Chamber notes that the Statute does not set out a standard of proof for the purposes of a determination on the admissibility of a case. Different standards of proof are explicitly set out in the Statute for distinct stages of the proceedings from the issuance of a warrant of arrest, to the confirmation of charges and the final trial judgment.<sup>95</sup> Those standards of proof, however, do not apply to the admissibility determination, which deals *inter alia* with the question as to whether domestic authorities are taking concrete and progressive steps to investigate or prosecute the same case that is before the Court.<sup>96</sup> The Chamber is guided by the jurisprudence of the Appeals Chamber

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<sup>94</sup> Decision of 7 December 2012, paras 9 and 13 *et seq.*

<sup>95</sup> See articles 53(1)(a), 58(1)(a), 61(7) and 66(3) of the Statute.

<sup>96</sup> Decision of 7 December 2012, paras 10-11.

to the effect that the State “must provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case”.<sup>97</sup> In the view of the Chamber, such evidence shall *demonstrate* that Libya is taking concrete and progressive steps towards ascertaining Mr Gaddafi’s responsibility.

55. In exemplifying the type of evidence that may be considered to demonstrate that an investigation is in progress, the Appeals Chamber has mentioned interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses.<sup>98</sup> Therefore, the Chamber has reminded Libya of the necessity to provide concrete, tangible and pertinent evidence that proper investigations are currently ongoing<sup>99</sup> and has clarified that:

*“[T]he concept of “evidence”, within the context of admissibility proceedings, does not refer exclusively to evidence on the merits of the national case that may have been collected as part of the purported domestic investigation to prove the alleged crimes. In this context, “evidence” rather means all material capable of proving that an investigation is ongoing and that appropriate measures are being envisaged to carry out the proceedings.*

*Accordingly, the Chamber is of the view that evidence for the purposes of substantiating the Admissibility Challenge may also include, depending on the circumstances, 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 Libyan investigation of the case, to the extent that they demonstrate that Libyan authorities are taking concrete and progressive steps to ascertain whether Mr Gaddafi is responsible for the conduct underlying the warrant of arrest issued by the Court.”*<sup>100</sup>

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<sup>97</sup> 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. 61.

<sup>98</sup> *Ibid.*, para. 1.

<sup>99</sup> Pre-Trial Chamber I, Transcript of Hearing, ICC-01/11-01/11-T-3-RED-ENG, 10 October 2012, p. 64, line 15 – p. 65, line 1.

<sup>100</sup> Decision of 7 December 2012, paras 10 and 11.

#### IV. THE CASE UNDER INVESTIGATION OR PROSECUTION

56. The Chamber notes articles 17, 19, 21, 90 and 95 of the Statute and rules 58 and 59 of the Rules.

57. Article 17 of the Statute reads, in the relevant part:

*1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:*

*(a) The 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 or prosecution.*

58. The Chamber notes that the Appeals Chamber has stated that article 17(1)(a) of the Statute contemplates a two-step test, according to which the Chamber, in considering an admissibility challenge, shall address in turn two questions: (i) whether, at the time of the proceedings in respect of an admissibility challenge, there is an ongoing investigation or prosecution of the case at the national level; and, in case the answer to the first question is in the affirmative, (ii) whether the State is unwilling or unable genuinely to carry out such investigation or prosecution.<sup>101</sup>

59. The specificities of the case together with considerations of fairness and expeditiousness have led the Chamber to address both aspects of the test throughout the proceedings and in this comprehensive decision.

60. The correct interpretation of the term “case” within the meaning of article 17(1)(a) of the Statute was discussed at length with the parties and participants in these proceedings. Mindful of the submissions, the Chamber’s findings are set forth hereunder. Thereafter, the Chamber will examine the evidence presented in the case in order to determine whether the challenging party has demonstrated that it is investigating the same case.

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<sup>101</sup> Appeals Chamber, 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.

**A. *The same case***

61. The “case” within the meaning of article 17 of the Statute is characterised by two components: the person and the conduct. While it is uncontested that national investigations must cover the “same person”,<sup>102</sup> the “conduct” part of the test raises issues of interpretation and needs further clarification.

**a. *Submissions***

**(i) *Libya***

62. Libya submits that its national investigation must cover “substantially the same conduct” but need not “mirror” the case before the Court. It is argued that the imposition of such an onerous standard would be unreasonable because States ordinarily do not have access to the Prosecutor’s investigative material, would be unnecessary to bring an end to impunity, and would be manifestly inconsistent with the presumption in favour of the primacy of national proceedings.<sup>103</sup>

63. Libya submits that it is not required to charge Mr Gaddafi under the same legal qualifications as those applicable in the case before the Court, provided that the underlying acts are substantially the same.<sup>104</sup> There is no rule in the Statute or in customary or positive law which obliges States to prosecute acts solely on the basis of international law.<sup>105</sup> It is emphasised that such flexibility is particularly important in the case of a Security Council

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<sup>102</sup> 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-01/09-01/11-307, paras 1, 40-43.

<sup>103</sup> Libya’s Further Submissions, para. 27.

<sup>104</sup> Admissibility Challenge, paras 86-87; Pre-Trial Chamber I, Transcript of Hearing, 9 October 2012, ICC-01/11-01/11-T-2-Red-ENG, p. 46, line 21 – p. 47, line 5.

<sup>105</sup> Admissibility Challenge, para. 87.

referral where the State will not be a party to the Statute and has no obligation to implement crimes within the Court's jurisdiction into its domestic law.<sup>106</sup>

64. Libya contends that the ICC investigation during the early stage of the conflict covers only a limited range of crimes between February and March 2011, which are not necessarily the most serious crimes and that to require Libya to focus its resources on exactly the same incidents rather than substantially the same conduct in that time period would be wholly unreasonable.<sup>107</sup>

65. In its view, the test requires Libya to establish that its proceedings focus on "substantially the same conduct and series of events as the ICC case such that the criminal responsibility of Saif Al-Islam Gaddafi is to be examined in the context of substantially the same incidents and underlying facts and allegations of criminal responsibility".<sup>108</sup> Libya avers that its previous submissions indicating that its investigation covers the same factual incidents and the same allegations of individual conduct should not be understood as setting the parameters of the actual threshold test.<sup>109</sup>

(ii) *Prosecutor*

66. The Prosecutor contends that there is no requirement that conduct be prosecuted as an international crime and asserts that conduct forming the basis for crimes under the Statute may be prosecuted as 'ordinary crimes' under national law.<sup>110</sup> At the same time, the Prosecutor cautions that account must be taken of other national laws, such as discrepancies in the modes of

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<sup>106</sup> Admissibility Challenge, para. 87.

<sup>107</sup> Libya's Reply, para. 41.

<sup>108</sup> Libya's Reply, para. 34.

<sup>109</sup> Libya's Reply, para. 33.

<sup>110</sup> Prosecutor's Response to the Admissibility Challenge, paras 23-26.

liability, defences, or grounds for excluding criminal responsibility which might impact on or impede domestic prosecutions.<sup>111</sup>

67. In the Prosecutor's Response to the Admissibility Challenge, the Prosecutor argues that, while the conduct charged, meaning the acts and incidents, must be the same in the case before the Court and the national proceedings, the legal characterisation of the acts may differ. In the submission of the Prosecutor, it is in this sense that the same person/substantially the same conduct test set out by the Appeals Chamber must be understood.<sup>112</sup>

68. Later, in her Response to Libya's Further Submissions, the Prosecutor argues that "substantially the same conduct" cannot be interpreted in a manner that would allow variation in the underlying facts and incidents, as such a flexible interpretation would undermine the very purpose of complementarity.<sup>113</sup> However, at the same time, the Prosecutor recognised that, given the scale of the crimes generally at issue in cases before the Court, prosecutors and investigators have considerable latitude regarding the focus of their investigation and that the legal, evidentiary or strategic considerations that set the focus may be markedly different for the ICC Prosecutor than for national authorities. Therefore, the Prosecutor accepts that the purpose of the test could be met even if a national investigation or prosecution does not exactly match all of the features of the Court's investigation or prosecution.

69. The Prosecutor suggests that, in applying the "substantially the same conduct" test, the Chamber should satisfy itself that, at a minimum, "the national authorities are focused on the same course of conduct and series of events as the ICC, meaning that they are examining the person's criminal

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<sup>111</sup> Prosecutor's Response to the Admissibility Challenge, para. 24.

<sup>112</sup> Prosecutor's Response to the Admissibility Challenge, para. 25.

<sup>113</sup> Prosecutor's Response to Libya's Further Submissions, para. 28.

responsibility in the context of substantially the same incidents and underlying facts and allegations of criminal responsibility”.<sup>114</sup> The Chamber should consider “whether the conduct that forms the basis of the ICC crimes – for which the Court seeks the person’s surrender – is reflected in the crimes for which the suspect stands accused at the national level”.<sup>115</sup>

(iii) *Defence*

70. The Defence also asserts that the domestic authorities must demonstrate that they are (i) investigating the same specific incidents, during which one or more crimes within the jurisdiction of the Court appear to have been committed, and (ii) pursuing the same defendant for the same (or substantially the same) conduct as the ICC proceedings.<sup>116</sup> The Defence emphasises the correlation between admissibility challenges under article 17 of the Statute and the *ne bis in idem* protection enshrined in article 20 of the Statute.<sup>117</sup> It argues that the Appeals Chamber reference in the Kenya cases to “substantially the same conduct” was related to the particular arguments raised in that case and that, in the present case, no justification exists for exempting Libya from a requirement to demonstrate that its case covers the same person and the same conduct as the ICC case.<sup>118</sup>

(iv) *OPCV*

71. The OPCV agrees that the Prosecutor may charge Mr Gaddafi with “ordinary crimes”, provided that national criminal legislation encompasses all the material elements of the crimes alleged in the specific case before the International Criminal Court.<sup>119</sup>

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<sup>114</sup> Prosecutor’s Response to Libya’s Further Submissions, para. 31.

<sup>115</sup> Prosecutor’s Response to Libya’s Further Submissions, para. 31.

<sup>116</sup> Defence Response, para. 117.

<sup>117</sup> Defence Response to Libya’s Further Submissions, paras 50-52.

<sup>118</sup> Defence Response to Libya’s Further Submissions, paras 53-54.

<sup>119</sup> OPCV’s Response to the Admissibility Challenge, para. 32.

72. The OPCV asserts that the “same conduct test” approved by the Appeals Chamber requires States to investigate the same incidents as alleged in the proceedings before the Court.<sup>120</sup> This view is consistent with both the Appeals Chamber view that article 17 operates as a norm for resolving conflict between different jurisdictions and the drafting history of the Statute.<sup>121</sup> Further, this view is supported by academic opinion which views article 17(1) of the Statute as the corollary of the *ne bis in idem* rule under article 20 of the Statute.<sup>122</sup>

***b. Findings of the Chamber***

*(i) The same conduct test*

73. As recalled above, the first analysis that the Chamber is required to undertake is to determine whether the Libyan and the ICC investigations cover the same case. Accordingly, the evidence presented in support of the Admissibility Challenge must demonstrate that the Libyan authorities are taking concrete and progressive investigative steps in relation to such “case”.<sup>123</sup>

74. In the *Lubanga* case, Pre-Trial Chamber I found for the first time that for a case to be inadmissible before the Court, national proceedings must “encompass both the person and the conduct which is the subject of the case

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<sup>120</sup> OPCV’s Response to the Admissibility Challenge, para. 25; OPCV Observations on Libya’s Further Submissions, paras 39-42.

<sup>121</sup> OPCV’s Response to the Admissibility Challenge, para. 25; OPCV Observations on Libya’s Further Submissions, paras 41-42.

<sup>122</sup> OPCV’s Response to the Admissibility Challenge, para. 25; OPCV Observations on Libya’s Further Submissions, para. 42.

<sup>123</sup> See 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’, ICC-01/09-02/11-274, para.1; Pre-Trial Chamber I, “Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi” ICC-01/11-01/11-239, para. 11.

before the Court".<sup>124</sup> This test later became the settled jurisprudence of the Pre-Trial Chambers.<sup>125</sup>

75. Pre-Trial Chambers have also indicated that a case encompasses "specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects",<sup>126</sup> without clarifying, however, what would be encompassed by the notion of "incident".

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<sup>124</sup> *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.

<sup>125</sup> The 'same conduct' test has been recalled by Pre-Trial Chamber I in *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; *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); *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; *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-2-Conf, para. 50 (public redacted version in ICC-02/05-01/09-3); and *Prosecutor v. Bahr Idriss Abu Garda*, Decision on the Prosecutor's Application under Article 58, 7 May 2009, ICC-02/05-02/09-1-Conf, para. 4 (public redacted version in ICC-02/05-02/09-12-Anx1). The same approach was taken by Pre-Trial Chamber II in *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; *Prosecutor v. William Samoei 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; *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. Lastly, the same position was adopted by Pre-Trial Chamber III in *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, 10 June 2008, ICC-01/05-01/08-14-tENG (translation notified 17 July 2006), para. 16.

<sup>126</sup> See Pre-Trial Chamber III in *Prosecutor v. Laurent Gbagbo*, Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo" 30 November 2011, ICC-02/11-01/11-9-US-Exp, para. 10 (public redacted version in ICC-02/11-01/11-9-Red); The same language is used by Pre-Trial Chamber I in *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; Pre-Trial Chamber I, DECISION ON THE APPLICATIONS FOR PARTICIPATION IN THE PROCEEDINGS OF VPRS 1,

76. The Appeals Chamber endorsed the Pre-Trial Chambers' approach with respect to the specific nature of the admissibility test when it found that "article 19 of the Statute relates to the admissibility of concrete cases" and that "the defining elements of a concrete case before the Court are the individual and the alleged conduct".<sup>127</sup> Thus, the validity of the "same person/same conduct" test has been confirmed by the Appeals Chamber. However, rather than referring to "incidents", the Appeals Chamber referred to the conduct "as alleged in the proceedings before the Court". In addition, the Appeals Chamber has stated that the investigation or prosecution must cover "substantially" the same conduct:

*"[T]he defining elements of a concrete case before the Court are the individual and the alleged conduct. It follows that for such a case to be inadmissible under article 17(1)(a) of the Statute, the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court."*<sup>128</sup>

77. The Chamber considers that the determination of what is "substantially the same conduct as alleged in the proceedings before the Court" will vary according to the concrete facts and circumstances of the case and, therefore, requires a case-by-case analysis.

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VPRS2, VPRS3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, ICC-01/04-101-tEN-Corr, (translation notified 22 March 2006) para. 65; further in *Prosecutor v. Ahmad Harun and Ali Kushayb*, Decision on Prosecution Application under Article 58(7) of the Statute, 27 April 2007, ICC-02/05-01/07-1-Corr, para. 14.

<sup>127</sup> Appeals Chamber, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, 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-01/09-01/11-307, para. 40; Appeals Chamber, *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, para. 39.

<sup>128</sup> 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", ICC-01/09-02/11-274, para. 39. The same requirement has been recalled in paras 40, 41, 42 and 61 of the said decision.

78. In the case at hand, the conduct allegedly under investigation by Libya must be compared to the conduct attributed to Mr Gaddafi in the Warrant of Arrest issued against him by the Chamber, as well as in the Chamber's decision on the Prosecutor's application for the warrant of arrest.<sup>129</sup>

79. In the Warrant of Arrest, the Chamber found reasonable grounds to believe that:

*Saif Al-Islam Gaddafi is criminally responsible as an indirect co-perpetrator, under article 25(3)(a) of the Statute, for the following crimes committed by Security Forces under his control in various localities of the Libyan territory, in particular in Benghazi, Misrata, Tripoli and other neighboring cities, from 15 February 2011 until at least 28 February 2011:*

- i. murder as a crime against humanity, 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>130</sup>*

80. The Warrant of Arrest does not refer to specific instances of killings and acts of persecution, but rather refers to acts of such a nature resulting from Mr Gaddafi's use of the Libyan Security Forces to target the civilian population which was demonstrating against Gaddafi's regime or those perceived to be dissidents to the regime.<sup>131</sup>

81. Conversely, the Article 58 Decision includes a long, non-exhaustive list of alleged acts of murder and persecution committed against an identified category of people within certain temporal and geographical parameters,<sup>132</sup> on the basis of which the Chamber was satisfied that throughout Libya – in particular in Tripoli, Misrata, Benghazi, Al-Bayda, Derna, Tobruk and

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<sup>129</sup> Warrant of Arrest; Article 58 Decision.

<sup>130</sup> Warrant of Arrest, p. 6.

<sup>131</sup> Warrant of Arrest, footnote 2: "The security forces were comprised of: (i) the Libyan Armed Forces and police; (ii) the military intelligence; (iii) the Internal and External Security Services; (iv) the Revolutionary Committees and its Bureau; (v) the Revolutionary Guard; (vi) the Popular Guard; (vii) the Revolutionary Combating militias; and (viii) Brigades and militia units" (the "Security Forces").

<sup>132</sup> Article 58 Decision, paras 36-65.

Ajdabiya – killings and inhuman acts amounting to persecution on political grounds were committed by the Security Forces from 15 February 2011 until at least 28 February 2011 as part of an attack against the civilian demonstrators and/or perceived dissidents to Gaddafi's regime.<sup>133</sup>

82. The Chamber notes that the events expressly mentioned in the Article 58 Decision do not represent unique manifestations of the form of criminality alleged against Mr Gaddafi in the proceedings before the Court. They constitute rather samples of a course of conduct of the Security Forces, under Mr Gaddafi's control, that allegedly carried out an attack committed across Libya from 15 February 2011 onwards against the civilians who were dissidents or perceived dissidents to Gaddafi's regime, which resulted in an unspecified number of killings and acts of persecution.<sup>134</sup>

83. Therefore, in the circumstances of the case at hand and bearing in mind the purpose of the complementarity principle, the Chamber considers that it would not be appropriate to expect Libya's investigation to cover exactly the same acts of murder and persecution mentioned in the Article 58 Decision as constituting instances of Mr Gaddafi's alleged course of conduct. Instead, the Chamber will assess, on the basis of the evidence provided by Libya, whether the alleged domestic investigation addresses the same conduct underlying the Warrant of Arrest and Article 58 Decision, namely that: Mr Gaddafi used his control over relevant parts of the Libyan State apparatus and Security Forces to deter and quell, by any means, including by the use of lethal force, the demonstrations of civilians, which started in February 2011 against Muammar Gaddafi's regime; in particular, that Mr Gaddafi activated the Security Forces under his control to kill and persecute hundreds of civilian demonstrators or alleged dissidents to Muammar Gaddafi's regime, across Libya, in particular

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<sup>133</sup> Article 58 Decision, paras 41 and 65; Warrant of Arrest, p. 5.

<sup>134</sup> Warrant of Arrest, p.4.

in Benghazi, Misrata, Tripoli and other neighbouring cities, from 15 February 2011 to at least 28 February 2011.

*(ii) The legal characterisation of the conduct: ordinary versus international crimes*

84. The Chamber notes that a draft bill incorporating international crimes at the time of the current admissibility decision has not yet been adopted by Libya.<sup>135</sup>

85. The Chamber is of the view that the assessment of domestic proceedings should focus on the alleged conduct and not its legal characterisation. The question of whether domestic investigations are carried out with a view to prosecuting “international crimes” is not determinative of an admissibility challenge.

86. The Chamber notes that the Statute does not make a distinction between ordinary and international crimes. Article 20(3) of the Statute allows for a successful *ne bis in idem* challenge whenever a person “has been tried by another court for conduct also proscribed by article 6, 7, 8 or 8 *bis*”. In contrast to similar provisions in the Statutes of the International Criminal Tribunal for the Former Yugoslavia (the “ICTY”) and the International Criminal Tribunal for Rwanda (the “ICTR”), article 20(3) of the Statute does not require the same legal characterisation of the crime in order to satisfy the *ne bis in idem* principle.<sup>136</sup>

87. The *travaux préparatoires* demonstrate that the decision to depart from the language of the ICTY and ICTR Statutes<sup>137</sup> and to exclude reference to the

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<sup>135</sup> Libya’s Further Submissions, paras 78-80.

<sup>136</sup> See in contrast article 10 (2) of the Statute of the ICTY and article 9 (2) of the Statute of the ICTR, which permit those tribunals to try a person for international crimes in case they have only been convicted of ordinary domestic crimes at the national level.

<sup>137</sup> The 1993 and 1994 draft versions of the Statute follows the language of the ICTY/ICTR. Compare article 20(3) of the Statute with International Law Commission, “Report of the

ordinary crimes exception was a deliberate decision that followed extensive discussions during the negotiating process.<sup>138</sup> The reference to ordinary crimes met a considerable amount of resistance and the concept was finally excluded from the Draft Statute in 1998.<sup>139</sup>

88. It follows that a domestic investigation or prosecution for “ordinary crimes”, to the extent that the case covers the same conduct, shall be considered sufficient. It is the Chamber’s view that Libya’s current lack of legislation criminalising crimes against humanity does not *per se* render the case admissible before the Court.

#### **B. Analysis of facts and evidence**

89. In the following section, the Chamber will assess the facts and evidence presented by Libya, with a view to concluding whether at the time of the proceedings there is an ongoing investigation or prosecution of the case at the national level. Only thereafter will it resort to the second limb of the admissibility test.

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Working Group on a Draft Statute for an International Criminal Court”, in *Report of the International Law Commission on the work of its forty-fifth session*, 3 May-23 July 1993, A/48/10, pp. 120-121 (draft article 45(2)); International Law Commission, “Report of the Working Group on a Draft Statute for an International Criminal Court”, in *Report of the International Law Commission on the work of its forty-sixth session*, 2 May-22 July 1994, A/49/10, p. 117 (draft article 42(2)).

<sup>138</sup> See *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, 1995, G.A., 50th Sess., Supp. No. 22, A/50/22, paras. 43, 179. See also *Summary of the Proceedings of the Ad Hoc Committee during the period 3-13 April 1995*, A/AC.244/2, para. 105; *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I (Proceedings of the Preparatory Committee During March-April and August 1996)*, 13 September 1996, G.A., 51st Sess., Supp. No. 22, A/51/22, para. 171. See also *Composite paper: Complementarity: Concrete Suggestions to the ILC Draft made in the Course of the Discussion*, 2 April 1996 (draft article 42); *Annex: Complementarity: a compilation of concrete proposals made in the course of discussion for amendment of the ILC Draft Statute (Preparatory Committee on the Establishment of an International Criminal Court, 25 March-12 April 1996)*, 8 April 1996, A/AC.249/CRP.9/Add.1 (draft article 42).

<sup>139</sup> *Draft Statute for the International Criminal Court. Part 2. Jurisdiction, Admissibility and Applicable Law*, 2 April 1998, A/AC.249/1998/CRP.8 (draft article 13). See also *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act*, 14 April 1998, A/Conf.183/2/Add.1 (draft article 18).

*a. Submissions*

*(i) Prosecutor*

90. In the Prosecutor's Response to Libya's Further Submissions, it is argued that, although the samples of evidential material provided by Libya are specific and appear to be probative of some of the allegations underlying the charges against Mr Gaddafi, the supporting evidence provided is insufficient to conclude on the balance of probabilities that Libya is indeed investigating substantially the same conduct as that described in the Article 58 Decision.<sup>140</sup> On the basis that the existence of domestic investigations against Mr Gaddafi had been sufficiently demonstrated, the Prosecutor submitted that Libya should be required to furnish additional samples from its investigative file within a reasonable timeframe.<sup>141</sup>

*(ii) Defence*

91. The Defence argues that Libya has failed to meet its obligation to provide evidence of a sufficient degree of specificity and probative value and asserts that the summary of witness statements prepared by the Prosecutor-General at annex C to the Admissibility Challenge has no greater evidential weight than the assertions of a State. With respect to the summarised witness statements, the Defence submits that (i) they are too vague to have any probative value or to allow an assessment of their relevance to the case against Mr Gaddafi; (ii) there are clear indications that some of the information therein is unreliable; and (iii) it is impossible to ascertain whether first-hand information is being provided, whether the statements were extracted through the use of torture, coercion or the violation of due process

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<sup>140</sup> Prosecutor's Response to Libya's Further Submissions, paras 37-38.

<sup>141</sup> Prosecutor's Response to Libya's Further Submissions, para. 38.

protections or whether the summaries accurately reflect the contents of the statements.<sup>142</sup>

92. The Defence provides information which it submits suggests that some of the witnesses whose statements have been summarised may have been tortured, subjected to coercive measures, interrogated without counsel or detained in circumstances which violated their rights.<sup>143</sup> The Defence points to reports of torture in detention centres in Libya and coercive measures that have been implemented against those associated with the former regime and questions whether, in these circumstances, statements from witnesses who are also suspects could be considered to be reliable, voluntary or have probative value.<sup>144</sup> It is underlined that, under international and Libyan law, the use of evidence obtained from torture is prohibited and that the protections under article 55 of the Statute are applicable to the Libyan investigation.<sup>145</sup> It is contended that the burden of proving that the statements were obtained in voluntary circumstances rests on Libya as the party tendering the evidence.<sup>146</sup>

93. In its response to Libya's Further Submissions, the Defence maintains its position that Libya has failed to discharge its burden of proving that it is investigating the same conduct or that an active investigation since 1 May 2012 has been shown.<sup>147</sup> In the submission of the Defence, annexes 4, 5, 6 and 7 to Libya's Further Submissions are the only evidential samples allegedly obtained by Libya since the Admissibility Challenge was filed.<sup>148</sup> It is contended that annexes 6 and 7 were already in the possession of the Libyan authorities at the time the Admissibility Challenge was filed, annex 4 was

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<sup>142</sup> Defence Response, paras 77-87.

<sup>143</sup> Defence Response, paras 107-115.

<sup>144</sup> Defence Response, paras 101-106.

<sup>145</sup> Defence Response, paras 91-100.

<sup>146</sup> Defence Response, para. 90.

<sup>147</sup> Defence Response to Libya's Further Submissions, paras 58-63, 148-151.

<sup>148</sup> Defence Response to Libya's Further Submissions, paras 63-66.

signed by the Deputy Prosecutor on a Friday when he was present in Zintan to interrogate the ICC delegation, and annex 5, the only document reliably dated after 1 May 2012, has no evidential value.<sup>149</sup> It is submitted that the information provided in Libya's Further Submissions, and the fact that only 8 witnesses were interviewed in 8 months, demonstrates, at best, a lackadaisical approach, inconsistent with a detained person's right to have their case prosecuted with due diligence.<sup>150</sup> In addition, it is argued that annexes 2 and 3 represent mere assertions from the Libyan authorities,<sup>151</sup> annex 15 demonstrates no temporal or factual overlap with the ICC case and bears hallmarks of witness coercion,<sup>152</sup> and annex 16 completely lacks reliability and has limited relevance to the ICC case.<sup>153</sup>

94. With respect to the intercept evidence submitted at annex 17 to Libya's Further Submissions, the Defence submits there are significant questions concerning the authenticity, chain of custody and reliability of the recordings and that there is no temporal or factual overlap between the intercepts submitted and the ICC case.<sup>154</sup> It is also said that Libya has produced no evidence of judicial authorisation in relation to the intercepts and that illegally obtained intercepts are not admissible as evidence under Libyan law.<sup>155</sup>

95. On the basis of the evidential samples submitted by Libya, the Defence alleges that the investigating authorities do not seem to employ consistent or thorough investigative techniques or any method of testing the reliability of the evidence collected, and that the questioning of witnesses appears to be highly leading and prejudicial, for example, failing to elicit clarification when

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<sup>149</sup> Defence Response to Libya's Further Submissions, paras 64-66.

<sup>150</sup> Defence Response to Libya's Further Submissions, paras 60-61.

<sup>151</sup> Defence Response to Libya's Further Submissions, para. 59.

<sup>152</sup> Defence Response to Libya's Further Submissions, paras 152-153.

<sup>153</sup> Defence Response to Libya's Further Submissions, paras 154-157.

<sup>154</sup> Defence Response to Libya's Further Submissions, paras 97-104, 158.

<sup>155</sup> Defence Response to Libya's Further Submissions, paras 105-106.

a witness equates Tuaregs with mercenaries, suggesting that a national investigation will promulgate stereotypes and will be deleterious to the rights of victims and the international community to know the truth.<sup>156</sup>

96. The Defence also argues that Libya failed to answer the Chamber's questions as set out in the Decision of 7 December 2012 or did so in general and misleading terms and that, as a result, issues related to the circumstances in which witness statements were obtained, by whom and whether they can be relied upon at trial under Libyan law remain unclear.<sup>157</sup> In particular, the Defence draws attention to reports of the Libyan authorities' inability to gain control over detention centres run by militias and the mistreatment and torture of prisoners, and raises concerns about the likelihood that some of the potential witnesses relied on by Libya may have been subjected to abuse or mistreatment.<sup>158</sup>

97. The Defence points to several contradictory statements from Libya as to the procedure applied to and the authority responsible for issuing the detention orders for Mr Gaddafi and submits that no weight or credibility can be accorded to Libya's Further Submissions on the issue.<sup>159</sup>

98. Finally, the Defence challenges Libya's assertion that it is investigating the same case. It is alleged that the Admissibility Challenge contains no information about the mode of liability that might apply to Mr Gaddafi, the temporal scope and geographic location of or manner of alleged contribution to the different offences, and, accordingly, does not establish that Libya is investigating the same incidents.<sup>160</sup> Similarly, with respect to the additional

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<sup>156</sup> Defence Response to Libya's Further Submissions, paras 87-96, 153.

<sup>157</sup> Defence Response to Libya's Further Submissions, paras 67-87.

<sup>158</sup> Defence Response to Libya's Further Submissions, paras 67-86.

<sup>159</sup> Defence Response to Libya's Further Submissions, paras 107-117.

<sup>160</sup> Defence Response, paras 123-126.

potential charges referred to in Libya's Further Submissions, it is said that the factual basis for these charges has not been set out.<sup>161</sup>

99. The Defence raises queries on whether random killings and articles 202 and 203 under Libyan law may apply to Mr Gaddafi.<sup>162</sup> With respect to the offences applicable to 'public officers', the Defence disputes Libya's assertion that Libyan law recognises *de facto* authority, noting that no legal authority has been produced by Libya in support of this contention and that, in any event, Libya has produced only one piece of unreliable evidence to support the contention that Mr Gaddafi exercised *de facto* authority at the relevant time.<sup>163</sup>

100. The Defence also submits that the offences that Libya has identified as potentially applicable to Mr Gaddafi in the Admissibility Challenge do not encompass the element of targeting a group on discriminatory grounds, which is a material element of the crime of persecution under article 7(1)(h) of the Statute.<sup>164</sup> It is claimed that the fact that discriminatory intent can be taken into account as an aggravating factor under Libyan law is contingent on a conviction and does not mean that the same conduct will be covered by the investigation.<sup>165</sup> It is further claimed that discriminatory intent cannot be taken into account as an aggravating factor in sentencing under Libyan law and that Libyan law would not capture the full extent of Mr Gaddafi's responsibility.<sup>166</sup> Accordingly, it is asserted that the Libyan investigation does not cover substantially the same conduct as the ICC case.<sup>167</sup>

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<sup>161</sup> Defence Response to Libya's Further Submissions, para. 189.

<sup>162</sup> Defence Response to Libya's Further Submissions, paras 186, 190.

<sup>163</sup> Defence Response to Libya's Further Submissions, paras 180-185.

<sup>164</sup> Defence Response, paras 127-132.

<sup>165</sup> Defence Response to Libya's Further Submissions, para. 187.

<sup>166</sup> Defence Response to Libya's Further Submissions, para. 188.

<sup>167</sup> Defence Response, para. 133.

*(iii) OPCV*

101. The OPCV submits that the evidence provided with Libya's Admissibility Challenge is insufficient to establish the existence of a national investigation against Mr Gaddafi.<sup>168</sup> In particular, the OPCV maintains that the only direct evidence of investigations submitted by Libya – a remand order and three remand order extensions, contained in annex D to the Admissibility Challenge – lack essential information such as the reason for Mr Gaddafi's detention or the allegations under investigation. It is noted that it is unclear as to whether the orders were made in the presence of or with the knowledge of Mr Gaddafi and whether they were in fact ever communicated to a competent law enforcement authority.<sup>169</sup> Similarly, it is argued that the report of Libya's Prosecutor-General, submitted in annex C to the Admissibility Challenge, does not identify the crimes in relation to which Mr Gaddafi is being investigated or prosecuted and in any event is not, on its own, sufficient evidence of the existence of a national investigation against Mr Gaddafi.<sup>170</sup>

102. The OPCV notes that some samples of evidential material to support the existence of an investigation against Mr Gaddafi were provided with Libya's Further Submissions, but that this evidence is related to limited facts and events and does not demonstrate that the 'same conduct' is being investigated or even identify the contours of the national case.<sup>171</sup> Moreover, it is submitted that annexes 3, 9, 10, 12 and 13 to Libya's Further Submissions suggest that Mr Gaddafi had been interrogated by or in direct contact with the Libyan authorities, without any clarification as to how this was carried out given

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<sup>168</sup> OPCV's Response to the Admissibility Challenge, paras 18- 22.

<sup>169</sup> OPCV's Response to the Admissibility Challenge, para. 20.

<sup>170</sup> OPCV's Response to the Admissibility Challenge, paras 18, 22.

<sup>171</sup> OPCV Observations on Libya's Further Submissions, para. 57.

their lack of control over the suspect. In view of this inconsistency, the OPCV submits that no probative value should be accorded to these annexes.<sup>172</sup>

103. In any event, the OPCV submits that the general nature of the information provided in both the Admissibility Challenge and Libya's Further Submissions does not allow an assessment of whether the same conduct is being investigated by national authorities.<sup>173</sup> In the view of the OPCV, the Admissibility Challenge is based on a vague and general assertion that Mr Gaddafi is being investigated for "all crimes committed [...] during the revolution ... starting from February 2011", without reference to the investigative steps that have been undertaken in respect of each of the incidents set out in the Article 58 Decision and lacking specificity as to the time period, location or incidents under investigation.<sup>174</sup> Similar observations are made with respect to the information provided in Libya's Further Submissions.<sup>175</sup> Despite Libya's assertion that it has added eleven new charges since the filing of the Admissibility Challenge, the OPCV avers that the total number of charges does not accord with the information contained in the detention orders and that Libya has failed to provide documentary evidence specifying the details of the allegations and charges against Mr Gaddafi.<sup>176</sup>

*(iv) Libya's Reply*

104. Libya reiterates that, in its Admissibility Challenge and in Libya's Further Submissions, it has supplied an array of evidence of the type requested by the Chamber relating both to the progress and subject-matter of its investigation into Mr Gaddafi, proving that it covers substantially the same factual allegations as those contained in the Chamber's Article 58 Decision. At

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<sup>172</sup> OPCV Observations on Libya's Further Submissions, paras 63-64.

<sup>173</sup> OPCV's Response to the Admissibility Challenge, para. 28; OPCV Observations on Libya's Further Submissions, para. 48.

<sup>174</sup> OPCV's Response to the Admissibility Challenge, para. 26.

<sup>175</sup> OPCV Observations on Libya's Further Submissions, paras 54-56.

<sup>176</sup> OPCV Observations on Libya's Further Submissions, paras 45-47.

the same time, it is acknowledged that the evidentiary samples submitted cover only one of the factual allegations of murder and less than half of the factual allegations of persecution contained in the Article 58 Decision.<sup>177</sup> Libya maintains that the evidence now before the Chamber is sufficient to allow it to conclude that Libya is investigating substantially the same factual allegations as those encompassed by the ICC case.<sup>178</sup>

105. Libya states that adducing evidence to satisfy the same conduct test has been rendered difficult by the fact that it has not had access to the Prosecutor's investigative file or evidence.<sup>179</sup>

*b. Findings of the Chamber*

106. As indicated above, Libya has provided a number of documents in order to substantiate its Admissibility Challenge. Many of these documents contain no information of relevance to the determination as to whether the same conduct as that covered by the Article 58 Decision is under investigation in Libya.<sup>180</sup> Only those documents which may have a bearing on this issue will

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<sup>177</sup> Libya's Reply, para. 40.

<sup>178</sup> Libya's Reply, para. 40.

<sup>179</sup> Libya's Reply, para. 41.

<sup>180</sup> See, for example, Annex A to the Admissibility Challenge, which contains a press statement from the Prime Minister of the National Transitional Council of Libya giving general information about progress of the national authorities in the investigation of Mr Gaddafi's conduct without any specific details of what this investigation encompasses, and Annex B to the Admissibility Challenge, which contains letters from the Libyan authorities to the Executive Director of the United Nations Office on Drugs and Crime and to the United Nations High Commissioner for Human Rights relating to the cooperation and assistance given by these two organizations to Libya; Admissibility Challenge, Annex A, perfected translation filed on 15 May 2012, ICC-01/11-01/11-144-AnxA and Admissibility Challenge, Annex B, perfected translation filed on 15 May 2012, ICC-01/11-01/11-144-AnxB; Annex 1 to Libya's Further Submissions which contains a letter from Libya's Minister of Justice, prepared for the purposes of the admissibility proceedings before the ICC explaining that article 59 of the Libyan Criminal Procedural Code protects the confidentiality of investigative materials before the accusation phase of the proceedings and requesting the Chamber not to disclose the investigative materials to the public or to the parties in the case. This statement does not contain information about the scope or subject matter of the domestic investigations; Libya's Further Submissions, ICC-01/11-01/11-258-Anx1.

be considered hereunder along with, when pertinent, the arguments raised by the parties and the participants.

107. The Chamber will hereunder conduct an analysis of the evidence and the material submitted with a view to determining, in turn: (i) whether Libyan legislation sufficiently captures the same conduct for which the suspect is charged before this Court; and (ii) whether an investigation against Mr Gaddafi for the same conduct as that alleged in the proceedings before the Court is ongoing at the domestic level.

*(i) Libyan Legislation*

108. As already stated above, the Chamber is of the view that there is no requirement under the Statute that the investigation at the national level be aimed at the prosecution of “international” crimes as long as the investigation covers the same conduct. However, the Chamber has raised specific concerns regarding the ordinary crimes in relation to which Mr Gaddafi is being investigated.<sup>181</sup>

109. In this regard, the Chamber noted in particular that a number of the crimes potentially applicable to Mr Gaddafi appear, under Libyan legislation, to apply to “public officers” only, which may raise problems as Mr Gaddafi did not occupy a formal official position within the Libyan State. Libya has confirmed that it is a requisite element of four of the potential charges against Mr Gaddafi that the offender is a public officer but states that this requirement can be satisfied in Mr Gaddafi’s case if sufficient evidence of his *de facto* authority can be produced.<sup>182</sup>

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<sup>181</sup> Decision of 7 December 2012, paras 32-37; Transcript of Hearing, 10 October 2012, ICC-01/11-01/11-T-3-Red-ENG, p. 57, line 22 – p. 61, line 14.

<sup>182</sup> Libya’s Further Submissions, paras 84-85.

110. In relation to the Chamber's query as to whether article 296 of the Libyan Criminal Code (indiscriminate/random killings) applies to Mr Gaddafi in view of its exclusion of acts constituting an attack on State safety, Libya confirms that the relevant article will apply to the acts of Mr Gaddafi.<sup>183</sup>

111. With regard to "persecution", Libya indicated that, although persecutory intent is not an element of any of the crimes against Mr Gaddafi, it is an aggravating factor which is taken into account in sentencing under articles 27 and 28 of the Libyan Criminal Code.<sup>184</sup>

112. The ordinary crimes for which Mr Gaddafi is being investigated are intentional murder, torture, incitement to civil war, indiscriminate killings, misuse of authority against individuals, arresting people without just cause, and unjustified deprivation of personal liberty pursuant to articles 368, 435, 293, 296, 431, 433 and 434 of the Libyan Criminal Code.<sup>185</sup> In addition, he may potentially be charged with insulting constitutional authorities pursuant to article 195, devastation, rapine and carnage pursuant to article 202, civil war pursuant to article 203, conspiracy pursuant to article 211, attacks upon the political rights of a Libyan pursuant to article 217, arson pursuant to article 297, spreading disease among plants and livestock pursuant to article 362, concealment of a corpse pursuant to article 294, aiding members of a criminal association pursuant to article 322, use of force to compel another pursuant to article 429, and search of persons pursuant to article 432 of the Libyan Criminal Code.<sup>186</sup>

113. The Chamber observes that the crimes with which Libya contemplates charging Mr Gaddafi under Libyan legislation, do not cover all aspects of the

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<sup>183</sup> Libya's Further Submissions, para. 86.

<sup>184</sup> Libya's Further Submissions, para. 87.

<sup>185</sup> Admissibility Challenge, para. 75.

<sup>186</sup> Libya's Further Submissions, paras 81-82.

offences to be brought under the Rome Statute. However, these offences together with the provisions under articles 27 and 28 of the Libyan Criminal Code may sufficiently capture Mr Gaddafi's use of his control over the Libyan State apparatus and Security Forces to kill and persecute hundreds of civilian demonstrators or alleged dissidents to Muammar Gaddafi's regime between 15 and at least 28 February 2011, as alleged in the Warrant of Arrest.

*(ii) Whether Libya is investigating Mr Gaddafi for the "same conduct"*

114. In the following section the Chamber will assess the evidence presented by Libya with a view to ascertaining whether Libya is investigating Mr Gaddafi for the same conduct as that alleged in the proceedings before the Court. To this end, the Chamber analyses (i) documents; (ii) summary of witness statements; (iii) three witness statements; and (iv) intercepts.

*Documents*

115. Two of the annexes presented by Libya relate to the domestic investigation against Mr Al-Senussi: annex E to Libya's Admissibility Challenge, a report by the Ministry of Justice of the National Transitional Council of Libya; and annex F to Libya's Admissibility Challenge, an opinion by the Assistant of the Military Prosecutor General.<sup>187</sup> The link between Al-Senussi's domestic investigations and those against Mr Gaddafi has not been shown by Libya and it is not apparent to the Chamber from the evidence before it. Although annex E contains some information relevant to the case against Mr Gaddafi, the information provided falls short of clarifying the scope or subject matter of the domestic investigation.

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<sup>187</sup> Admissibility Challenge, Annexes E and F, perfected translations filed on 15 May 2012, ICC-01/11-01/11-145-Conf-AnxE and ICC-01/11-01/11-145-Conf-AnxF.

116. Further, the Chamber notes that a number of the annexes presented by Libya were prepared by the Libyan authorities for the purpose of the Admissibility Challenge, specifically: (i) annex I to the Admissibility Challenge, a statement from the Deputy Prosecutor of the Office of the Attorney General, indicating that witnesses, documents, telephone and video recordings suggest that Mr Gaddafi has committed a number of crimes; (ii) annex 2 to Libya's Further Submissions, a statement from the Attorney General's office providing information of a general nature about the taking of witness statements and the recording of phone calls; and (iii) annex 3 to Libya's Further Submissions, a report prepared by the Ministry of Justice, confirming that the incidents of murder and persecution outlined in paragraphs 36 – 65 of the Article 58 Decision are included within the scope of criminal investigations against Mr Gaddafi.<sup>188</sup> Having reviewed these documents, the Chamber observes that they do not contain specific information as to the criminal conduct under investigation in Libya and, as such, fall short of substantiating, by means of evidence with a sufficient degree of specificity and probative value, that the same conduct is the subject of domestic investigations.

117. A number of the annexes submitted by Libya give general information about the investigation against Mr Gaddafi. Annex D to the Admissibility Challenge and annexes 9 and 10 to Libya's Further Submissions contain orders extending the provisional detention of Mr Gaddafi in Zintan. Annex 11 to Libya's Further Submissions contains a memorandum of the results of the examination and review of case number 229/2012 against Mr Gaddafi by the Members of the Examination and Review Committee at the Attorney General's Office, suggesting that case number 229/2012 be joined with case number 630/2013 (Abdullah Al-Senussi and others) given the interrelation of

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<sup>188</sup> Libya's Further Submissions, Annex 3, ICC-01/11-01/11-258-Anx3, p. 3.

facts, the need to preserve evidence, fairness, consistency and in order to ensure the determination of the whole truth. Having reviewed these documents, the Chamber observes that they do not contain specific information as to the criminal conduct under investigation in Libya.

118. Annex 5 to Libya's Further Submissions contains a letter signed by a [REDACTED], in response to a query from the Supreme Prosecution Office in Libya about [REDACTED] flights. The letter states that [REDACTED]. The destination and the time of departure of the aircraft were stated to be unknown. Further, Libya provides, in annexes 6 and 7 to its Further Submissions, the schedule of flights operated between 17 and 19 February 2011 and a number of flight documents.

*Summaries of witness statements*

119. Annex C to the Admissibility Challenge contains a summary of witness statements that was prepared by the Deputy Prosecutor and the Vice Prosecutor at the Office of the Libyan Attorney General in order to accompany and substantiate the Admissibility Challenge before the Court. Libya confirms that "all of the witness summaries referred to in the 1 May 2012 Admissibility Challenge, together with all of the other testimonies in the Saif Al-Islam Gaddafi investigative file, have been prepared by members of the Ministry of Justice prosecution team assigned to the Saif Al-Islam Gaddafi case".<sup>189</sup>

120. These summaries are presented in three categories including: (i) close friends of Mr Gaddafi; (ii) high ranking military commanders from the High Security Committee; (iii) civilians, armed by Mr Gaddafi, who volunteered to accompany him and family members of victims. The summaries indicate, in

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<sup>189</sup> Libya's Further Submissions, para. 51.

general terms, that Mr Gaddafi was running State affairs before and during the revolution and was in charge of the “management” of the revolutionary crisis; <sup>190</sup> was the brain behind the killings; <sup>191</sup> held meetings and communications with the High Security Committee, Abdullah Al-Senussi and Khamis Gaddafi; <sup>192</sup> ordered the mobilisation, recruitment and arming of supporters including young men to fight, kill and suppress the protesters<sup>193</sup> even if that lead to the eradication of the Libyan people.<sup>194</sup> Reference is also made to the fact that Mr Gaddafi: [REDACTED]<sup>195</sup>; [REDACTED]<sup>196</sup> and [REDACTED].<sup>197</sup>

121. In the view of the Chamber, the information contained in these summaries does reflect discrete aspects of the conduct as alleged in the proceedings before the Court. In addition, the summaries do have some probative value. They are not to be equated to plain assertions from the Libyan prosecuting authorities that the witness statements “exist”. The 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

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<sup>190</sup> Admissibility Challenge, Annex C, perfected translation filed on 15 May 2012, ICC-01/11-01/11-145-Conf-AnxC, p. 2, summaries of witnesses identified as [REDACTED].

<sup>191</sup> Admissibility Challenge, Annex C, perfected translation filed on 15 May 2012, ICC-01/11-01/11-145-Conf-AnxC, p. 3, summaries of witnesses identified as [REDACTED] and p. 4, summaries of witnesses identified as [REDACTED].

<sup>192</sup> Admissibility Challenge, Annex C, perfected translation filed on 15 May 2012, ICC-01/11-01/11-145-Conf-AnxC, p. 2, summary of witness identified as [REDACTED].

<sup>193</sup> Admissibility Challenge, Annex C, perfected translation filed on 15 May 2012, ICC-01/11-01/11-145-Conf-AnxC, p. 2, summaries of witnesses identified as [REDACTED], p. 3, summaries of witnesses identified as [REDACTED]; and p. 4, summaries of witnesses identified as [REDACTED].

<sup>194</sup> Admissibility Challenge, Annex C, perfected translation filed on 15 May 2012, ICC-01/11-01/11-145-Conf-AnxC, p. 3, summary of witness identified as [REDACTED].

<sup>195</sup> Admissibility Challenge, Annex C, perfected translation filed on 15 May 2012, ICC-01/11-01/11-145-Conf-AnxC, p. 3, summary of witness identified as [REDACTED].

<sup>196</sup> Admissibility Challenge, Annex C, perfected translation filed on 15 May 2012, ICC-01/11-01/11-145-Conf-AnxC, p. 4, summary of witness identified as [REDACTED].

<sup>197</sup> Admissibility Challenge, Annex C, perfected translation filed on 15 May 2012, ICC-01/11-01/11-145-Conf-AnxC, p. 4, summary of witness identified as [REDACTED]; and p. 5, summaries of witnesses identified as [REDACTED].

the evidence. Thus, the Chamber disagrees with the Defence contention that these summaries have no greater evidential value than the assertions of a State.<sup>198</sup>

122. In addition, the Defence contends that it is impossible to ascertain from the summaries whether the witnesses are providing first-hand evidence or simply recounting versions of events that they have heard on television, or indeed, second hand or third hand anonymous hearsay.<sup>199</sup> In the view of the Chamber, this argument misapprehends the purpose of the admissibility determination. Indeed, the Chamber is not called to determine whether such evidence is strong enough to establish the criminal responsibility of Mr Gaddafi but, instead, whether Libya is taking steps to investigate Mr Gaddafi's responsibility in relation to the same case. The Chamber's finding as to the latter would not be negated by the fact that, upon scrutiny, the evidence may be insufficient to support a conviction by the domestic authorities.

123. The Chamber notes that the summaries have not been accompanied by samples of the actual evidence. One of the summarized statements appears to have been annexed to Libya's Further Submissions but the Chamber is not certain that this is indeed the case. Although the Chamber agrees with the Defence that, in the absence of the actual text of the statements, it is not possible to determine whether the summaries accurately reflect the content of the actual statements,<sup>200</sup> the reality is that, even if such verification were carried out, the crucial question as to the scope of the domestic investigations would remain unanswered. In other words, the scant level of detail and the

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<sup>198</sup> Defence Response, para. 70.

<sup>199</sup> Defence Response, para. 86.

<sup>200</sup> Defence Response, para. 84.

lack of specificity of the summaries do not allow the Chamber to draw conclusions as to the precise scope of the domestic investigation.

*Witness statements*

124. Libya also submits three witness statements in support of its Admissibility Challenge. The first statement is a three page interrogation report of a witness that is contained in annex 4 to Libya's Further Submissions. The witness indicates that, between 15 and 17 February 2011, several civil and military (MiGs) aircrafts arrived at 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 centre part of the country. The witness states that most of the military men left after [REDACTED]. According to the witness, revolutionaries attacked the airport thereafter and there were clashes between them and the soldiers who remained in the airport. Subsequently, the airport was bombed by airplanes affiliated to the Gaddafi regime. It is not apparent from this statement that it was taken in relation to an investigation of the role of Mr Gaddafi, if any, in the events described by the witness.

125. The second witness statement, contained in Annex 15 to Libya's Further Submissions, stems from a witness who testifies that, in August 2011, Mr Gaddafi used to come out of Babel Aziza, a military compound in southern Tripoli, promising to distribute weapons (Kalashnikovs) among the population without, however, ever doing so. The witness also describes an event whereby three young persons were brought in a car to Mr Gaddafi and who were described by the person who brought them as "rats". The witness states that, while they were sitting on their knees with their hands tied behind their backs, Mr Gaddafi ordered the guards to kill them, and the order was executed. In the view of the Chamber, the Defence contention that this

statement bears hallmarks of witness coercion is wholly speculative.<sup>201</sup> No indications in this item of evidence suggest or support the position of the Defence. The Defence also alleges that the executions fall outside the temporal parameters set out in the Warrant of arrest and Article 58 Decision. This argument is not convincing. First, according to that decision, the temporal parameters of the case have been set as 15 February 2011 until *at least* 28 February 2011. Second, in any case, events which may have occurred outside the parameters of the case may still be indicative or corroborative of other facts or events that took place within that timeframe. Thus, the taking of the statement may still indicate that steps directed at ascertaining Mr Gaddafi's responsibility in relation to the same case are being taken.

126. The third witness statement contained in Annex 16 to Libya's Further Submissions is the statement of an insider witness who [REDACTED]. The witness was specifically questioned by the Libyan investigators about the 17 February 2011 outbreak of violence, 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. The witness was also questioned about the provision of money and arms to Mr Gaddafi's supporters and the role of Mr Gaddafi in bringing mercenaries or military troops to Libya from elsewhere in order to kill demonstrators in Benghazi and other areas. The witness further mentions that Mr Gaddafi ordered the arrest of the journalist Idriss Al-Mismari who had earlier spoken to Al Jazeera.

127. The Chamber considers that the contention by the Defence that the witness is not reliable because he is a self-confessed perpetrator having an obvious incentive to attribute responsibility to other persons in order to minimise his own liability,<sup>202</sup> is speculative and exceeds the purpose of the

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<sup>201</sup> Defence Response to Libya's Further Submissions, paras 152-153.

<sup>202</sup> Defence Response to Libya's Further Submissions, para. 154.

admissibility determination. As such the Defence argument does not put into question the relevance of this witness statement for the determination of the matter under consideration.

### *Intercepts*

128. Annex 17 to Libya's Further Submissions contains transcripts of four intercepted communications between Mr Gaddafi and [REDACTED] and four intercepted communications between Mr Gaddafi and [REDACTED]. In those intercepts, reference is made to the planning and coordination of the use of force to repress civilians and a follow up as to the military situation in the Eastern Zone (Tobruk and Benghazi). The need to secure the oil fields, the support of the rebels by the United States of America and France, the possibility that Misrata, Benghazi, Ras Lanuf and Tripoli would be taken by the rebels and the fact that there would be no retreat were also mentioned.

129. It is said that 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 in the Gaddafi family's former compound, in the Madar and Libyan telecommunications offices, and elsewhere after the fall of Tripoli in August 2011 and thereafter, and were passed on to the Prosecutor-General's office directly from the individuals who obtained them or by other individuals who received the intercepts from the persons who found them.<sup>203</sup> At the Admissibility Hearing, Libya's representative stated that these recordings are free and available to all.<sup>204</sup>

130. Libya states that the contents of the intercepts have been authenticated through the confrontation process and through witnesses who have testified

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<sup>203</sup> Libya's Further Submissions, para. 53.

<sup>204</sup> Pre-Trial Chamber I, Transcript of Hearing, 10 October 2012, ICC-01/11-01/11-T-3-Red-ENG, p. 56, line 12 - p. 57, line 5.

that the voices on the recordings are those of certain former Gaddafi regime officials. Libya states that the transcripts of the intercepts were prepared by volunteer lawyers and that, if the intercepts are ultimately to be relied upon as evidence, the prosecutor's office will prepare its own transcripts.<sup>205</sup> Libya submits that the admissibility of the intercepts is a matter which will be determined by the trial court at the appropriate time.<sup>206</sup>

131. The Chamber notes that Libya's assertion that the intercepts have been authenticated through the testimony of witnesses that the voices on the recordings are those of certain former Gaddafi regime officials has not been supported by evidence. However, the Chamber is not persuaded that the reliability of the recordings should be discounted as suggested by the Defence.<sup>207</sup> Indeed, the lack of judicial authorisation or the lack of a clear chain of custody in relation to the intercepts is not a conclusive argument against a finding that domestic investigations are taking place. What matters for the purposes of the admissibility determination is whether or not steps are being taken domestically in order to ascertain the responsibility of the suspect in relation to the same case. In addition, the Defence submission that there is no temporal or factual overlap between the intercepts submitted and the case before the Court is incorrect. It is clear from the discussions between Mr Gaddafi and [REDACTED] and those between Mr Gaddafi and [REDACTED] that the intercept communications relate to the repression of demonstrations against the Gaddafi regime from 15 February 2011 until *at least* 28 February 2011.

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<sup>205</sup> Libya's Further Submissions, para. 54.

<sup>206</sup> Libya's Further Submissions, para. 55.

<sup>207</sup> Defence Response to Libya's Further Submissions, paras 97-104, 158.

*(iii) Overall conclusion on the investigation of same case*

132. In light of the above, the Chamber considers that the evidence presented satisfactorily demonstrates that a number of progressive steps directed at ascertaining Mr Gaddafi's criminal responsibility have been undertaken by the Libyan authorities, and that an "investigation" is currently ongoing at the domestic level.

133. As far as the subject-matter of this domestic investigation is concerned, the Chamber recalls, as set out above, that it does not expect the national investigation to cover the exact events that are mentioned in the Article 58 Decision. Conversely, Libya is required to substantiate that its investigation covers the same conduct as that alleged in the Warrant of Arrest, *i.e.* that Mr Gaddafi used his control over relevant parts of the Libyan State apparatus and Security Forces to deter and quell, by any means, including by the use of lethal force, the demonstrations of civilians, which started in February 2011 against Muammar Gaddafi's regime; in particular, that Mr Gaddafi activated the Security Forces under his control to kill and persecute hundreds of civilian demonstrators or alleged dissidents to Muammar Gaddafi's regime, across Libya, in particular in Benghazi, Misrata, Tripoli and other neighbouring cities, from 15 February 2011 to at least 28 February 2011.

134. On the basis of the materials placed before it, the Chamber is not persuaded that the evidence presented sufficiently demonstrates that Libya is investigating the same case as that before the Court. As found above, the Chamber is satisfied that some items of evidence show that a number of investigative steps have been taken by Libya with respect to certain discrete aspects that arguably relate to the conduct of Mr Gaddafi as alleged in the proceedings before the Court. These aspects include instances of mobilisation of militias and equipment by air, the assembly and the mobilization of

military forces at the Abraq Airport, certain events in Benghazi on 17 February 2011, and the arrest of journalists and activists against the Gaddafi regime.

135. Nevertheless, the evidence, taken as a whole, does not allow the Chamber to discern the actual contours of the national case against Mr Gaddafi such that the scope of the domestic investigation could be said to cover the same case as that set out in the Warrant of Arrest issued by the Court. Libya has fallen short of substantiating, by means of evidence of a sufficient degree of specificity and probative value, the submission that the domestic investigation covers the same case that is before the Court.

136. The Chamber notes that Libya has offered to the Chamber the possibility of a fuller inspection of the case file,<sup>208</sup> and the Prosecutor has suggested that Libya be provided more time to submit additional evidence.<sup>209</sup> The Chamber is guided by the jurisprudence of the Appeals Chamber to the effect that it is for the challenging State to ensure that the challenge is sufficiently substantiated by evidence and, although it is open to the Pre-Trial Chamber to allow the filing of additional evidence, the Chamber is not obliged to do so, nor could the State expect to be allowed to present additional evidence.<sup>210</sup> Libya first submitted evidence together with the Admissibility Challenge, filed on 1 May 2012. In light of the circumstances of the case the Chamber believed it was important to enter into a dialogue with Libya that would allow full understanding of the steps that were taken domestically and the challenges encountered by the local authorities. The Chamber allowed a

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<sup>208</sup> Libya's Further Submissions, para. 48; Libya's Reply, paras 7, 12; Prosecution's Response to Libya's Further Submissions, para. 45.

<sup>209</sup> Prosecutor's Response to Libya's Further Submissions, para. 38.

<sup>210</sup> 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. 96.

subsequent submission of additional evidence on 3 October 2012, for the purposes of the Admissibility Hearing.<sup>211</sup> Later, the Chamber granted Libya a third opportunity to submit evidence on any matters relevant to the admissibility of the case by 23 January 2013.<sup>212</sup>

137. In the view of the Chamber, Libya has had sufficient opportunities to submit evidence in support of its Admissibility Challenge and the Chamber has received submissions in response from the parties and the participants. Furthermore, the submission of additional evidence in support of the first limb of the admissibility test would not be determinative at this stage because, as developed below, serious concerns remain with respect to the second limb of the admissibility test, namely Libya's ability genuinely to carry out the investigation or prosecution against Mr Gaddafi.

#### **V. WILLINGNESS OR ABILITY GENUINELY TO INVESTIGATE AND PROSECUTE**

138. The Chamber received submissions related to the second limb of the admissibility analysis. In relation to the issue of "inability", in light of the initial submissions and evidence received, the Chamber raised a number of additional specific questions in order to ascertain the ability of Libya genuinely to investigate and prosecute the case at hand. Given that, as explained below, Libya is found to be unable genuinely to carry out the investigation or prosecution against Mr Gaddafi the Chamber will not address the alternative requirement of "willingness".

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<sup>211</sup> Pre-Trial Chamber I, Order convening a hearing on Libya's challenge to the admissibility of the case against Saif Al-Islam Gaddafi, 14 September 2012, ICC-01/11-01/11-207.

<sup>212</sup> Decision of 7 December 2012, para. 48.

## *A. Submissions*

### *a. Prosecutor*

139. The Prosecutor submits that the second limb of the test requires Libya to demonstrate that its proceedings are not a sham designed to shield the person and guarantee impunity and that it is able to advance the investigation and prosecution within the meaning of article 17(3) of the Statute. It is argued that the term ‘genuinely’ correlates to the terms ‘unwilling’ and ‘unable’ to describe the quality or good-faith of the national investigation or prosecution.<sup>213</sup>

140. The Prosecutor contends that there is no requirement on the State to demonstrate that its domestic procedures and protections are consistent with those of other legal systems, including those of the Court, and relies on the opinion of commentators and the drafting history of the Statute as supporting this view.<sup>214</sup> In particular, the Prosecutor points to the rejection of a proposal from Italy that would have made lack of due process a ground for admissibility since according to the Coordinator of the Working Group ‘many delegations believed that procedural fairness should not be a ground for defining complementarity’.<sup>215</sup>

141. The Prosecutor asserts that the procedural rights and protections applicable under Libyan legislation and the Libyan criminal justice system appear to be similar to those set out in the Rome Statute.<sup>216</sup> It is said that the Chamber should refrain from embarking on “a speculative exercise to

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<sup>213</sup> Prosecutor’s Response to the Admissibility Challenge, paras 20-21.

<sup>214</sup> Prosecutor’s Response to the Admissibility Challenge, paras 27-32.

<sup>215</sup> Prosecutor’s Response to the Admissibility Challenge, para. 30; Prosecutor’s Response to Libya’s Further Submissions, para. 34.

<sup>216</sup> Prosecutor’s Response to the Admissibility Challenge, paras 42-44.

consider how the rights of the suspect in this case will be respected in the course of future investigation and prosecution".<sup>217</sup>

142. The Prosecutor submits that Libya's past and contemplated investigative steps confirm its genuine willingness to pursue the case against Mr Gaddafi.<sup>218</sup>

143. As to what constitutes 'inability' on the part of the State genuinely to investigate or prosecute a case, the Prosecutor cites various identifying criteria, such as the existence of a political situation that makes holding trials impossible, a debilitating lack of judges, prosecutors and other court personnel, obstruction by uncontrolled elements that render the system unavailable, public disorder, natural disasters or chaos resulting from a civil war.<sup>219</sup>

144. The Prosecutor initially submitted that questions were raised about Libya's ability to carry out its proceedings within the meaning of article 17(3) of the Statute due to the lack of progress in appointing a lawyer to represent Mr Gaddafi.<sup>220</sup> Subsequently, the Prosecutor noted the steps taken by Libya in a short period of time against an extremely difficult backdrop, as well as the progress in the investigation of the case against Mr Gaddafi, and concluded that, despite ongoing difficulties, Libya appears able at this time to conduct the proceedings.<sup>221</sup>

145. The Prosecutor initially suggested that a trial *in absentia* is possible under Libyan law. Subsequently, she retracted that submission and indicated

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<sup>217</sup> Prosecutor's Response to the Admissibility Challenge, para. 45.

<sup>218</sup> Prosecutor's Response to the Admissibility Challenge, para. 40; Prosecutor's Response to Libya's Further Submissions, para. 40.

<sup>219</sup> Prosecutor's Response to Libya's Further Submissions, para. 35.

<sup>220</sup> Prosecutor's Response to the Admissibility Challenge, para. 41.

<sup>221</sup> Prosecutor's Response to Libya's Further Submissions, paras 41-44.

that what is relevant is whether the State is unable *to obtain the accused* and not whether or not a trial *in absentia* is possible.<sup>222</sup>

***b. OPCV***

146. The OPCV submits that the prevailing view of the term ‘genuinely’ in article 17(1)(a) of the Statute is that it relates to the genuineness of the investigation or prosecution and not to the ability or willingness of a State to carry out an investigation or prosecution.<sup>223</sup>

147. The OPCV contends that a finding of ‘inability’ means that there must have been either a total or substantial collapse of the national judicial system, or in the alternative, the national judicial system must be unavailable.<sup>224</sup> The following factors are presented as indicative of ‘inability’: the extent to which the State was exercising effective control over its territory; the existence of a functioning law enforcement mechanism; whether the State was able to secure the accused or the necessary evidence; and whether the extent and scope of the crimes committed were such that the national jurisdiction cannot adequately address them.<sup>225</sup> It is argued that a ‘collapse’ suggests a “lack of judicial infrastructure as well as of trained and equipped personnel responsible for carrying out the different phases of domestic proceedings”. A collapse should be considered ‘substantial’ if it is “of such intensity that it affects a significant or considerable part of the domestic justice system” and is “sufficient to paralyse the system in fulfilling its functions in relation to investigation, prosecution, trial and execution of sentences”.<sup>226</sup>

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<sup>222</sup> Prosecution’s Notice of withdrawal regarding a reference in its Prosecution’s Response to ‘Libyan Government’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi’ (ICC-01/11-01/11-276-Red2), 19 February 2013, ICC-01/11-01/11-282.

<sup>223</sup> OPCV’s Response to the Admissibility Challenge, para. 21.

<sup>224</sup> OPCV’s Response to the Admissibility Challenge, para. 39.

<sup>225</sup> OPCV’s Response to the Admissibility Challenge, para. 40.

<sup>226</sup> OPCV’s Response to the Admissibility Challenge, para. 40.

148. The OPCV argues that Libya is unable genuinely to investigate and prosecute Mr Gaddafi, based on (i) the lack of substantive criminal legislation; (ii) the current security situation; and (iii) the failure of the relevant authorities to secure the transfer of the suspect.<sup>227</sup>

149. The OPCV contends that the scope of the crimes with which Libya has indicated it is likely to charge Mr Gaddafi is considerably narrower than the crimes against humanity of murder and persecution contained in article 7 of the Statute.<sup>228</sup> It is said that certain anomalies exist in the translation of certain provisions of Libyan law that may render them inapplicable to the case against Mr Gaddafi.<sup>229</sup> In addition, as four of the crimes under national law apply only to acts committed by public officers, questions are raised as to whether Mr Gaddafi, who is alleged to have exercised *de facto* control, could qualify as a public officer under Libyan law.<sup>230</sup> The OPCV contends that Libya's Further Submissions do not clarify the issue of whether *de facto* authority is recognised under Libyan law and do not cite any legal authority or specific pronouncement by the domestic courts in support of its assertion.<sup>231</sup>

150. The OPCV submits that Libya faces a lack of territorial security and control, which creates problems in obtaining the necessary evidence and testimony, and maintaining trained and qualified staff, including judges, prosecutors and lawyers.<sup>232</sup> It argues that the extent of the collapse of the

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<sup>227</sup> OPCV's Response to the Admissibility Challenge, paras 30-49; Transcript of Admissibility Hearing, 9 October 2012, ICC-01/11-01/11-T-2-Red-ENG, p.64, line 17 – p. 66, line 24.

<sup>228</sup> OPCV's Response to the Admissibility Challenge, para. 33.

<sup>229</sup> OPCV's Response to the Admissibility Challenge, para. 34.

<sup>230</sup> OPCV's Response to the Admissibility Challenge, para. 34.

<sup>231</sup> OPCV Observations on Libya's Further Submissions, paras 59-61.

<sup>232</sup> OPCV's Response to the Admissibility Challenge, paras 36-39, 41-44.

judicial system in Libya may preclude an adequate investigation and, if appropriate, prosecution of the suspect.<sup>233</sup>

151. With respect to witness protection and security, the OPCV submits that the measures detailed in Libya's Further Submissions are inadequate to address the challenges faced in convincing victims to testify in the absence of any special witness protection program under national law.<sup>234</sup> It is pointed out that the preservation of anonymity of witnesses during the investigation phase envisioned by Libya would not be matched by a similar protective measure during the trial phase.<sup>235</sup> The OPCV further submits that Libya has failed to outline the mechanism or resources that it intends to put in place to ensure the meaningful and effective participation of victims in the proceedings against Mr Gaddafi and argues that this issue is directly relevant to the determination of the admissibility of the case against Mr Gaddafi.<sup>236</sup>

152. The OPCV avers that Libya's inability to secure the transfer of Mr Gaddafi's custody from the Zintan Brigade to State authority is a further demonstration of its inability to investigate and prosecute the suspect.<sup>237</sup>

153. Finally, the OPCV submits that Libya has not shown that its courts meet internationally recognised norms and standards for the independent and impartial prosecution of similar conduct, as prescribed by rule 51 of the Rules.<sup>238</sup>

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<sup>233</sup> OPCV's Response to the Admissibility Challenge, para. 45.

<sup>234</sup> OPCV Observations on Libya's Further Submissions, paras 65-66.

<sup>235</sup> OPCV Observations on Libya's Further Submissions, para. 66.

<sup>236</sup> OPCV Observations on Libya's Further Submissions, paras 49-53.

<sup>237</sup> OPCV's Response to the Admissibility Challenge, paras 46-48; OPCV Observations on Libya's Further Submissions, paras 62-64.

<sup>238</sup> OPCV's Response to the Admissibility Challenge, para. 49.

*c. Defence*

154. In the opinion of the Defence, the issue of whether a trial will be fair is directly relevant to the 'willingness' and 'ability' of a State to investigate and prosecute a case. In support of this argument, the Defence relies on the reference to "the principles of due process recognised by international law" in the *chapeau* of article 17(2) of the Statute, the overarching obligation of the Court under article 21(3) of the Statute to apply the provisions of the Statute in a manner consistent with "internationally recognised human rights", as well as the reference to 'justice' in article 17(2)(b) and (c) of the Statute, which the Defence equates with a decision based on a fair trial.<sup>239</sup>

155. In the submission of the Defence, if the word 'justice' is interpreted narrowly in the sense of securing a conviction, article 17(2)(b) and (c) would unnecessarily duplicate article 17(2)(a) of the Statute, which governs proceedings being undertaken for the purpose of shielding the person concerned from criminal responsibility.<sup>240</sup> It is submitted that, even if a narrow interpretation of the word 'justice' is adopted, article 17(2)(c) of the Statute still requires that proceedings be conducted 'independently or impartially'.<sup>241</sup>

156. The Defence also relies on Trial Chamber II's finding that self-referrals based on a State's inability to hold a fair trial are consistent with the notion of complementarity under article 17 of the Statute and the fact that, under rule 51 of the Rules, the Court may consider information that the national courts meet "internationally recognised norms for the independent and impartial

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<sup>239</sup> Defence Response, paras 38-42; Pre-Trial Chamber I, Transcript of Hearing, 9 October 2012, ICC-01/11-01/11-T-2-Red-ENG, p. 92, line 4 - p. 93, line 25; Transcript of Hearing, 10 October 2012, ICC-01/11-01/11-T-3-Red-ENG, p. 2, line 16 - p. 4, line 6.

<sup>240</sup> Pre-Trial Chamber I, Transcript of Hearing, 9 October 2012, ICC-01/11-01/11-T-2-Red-ENG, p. 92, line 17 - p. 93, line 25.

<sup>241</sup> Pre-Trial Chamber I, Transcript of Hearing, 10 October 2012, ICC-01/11-01/11-T-3-Red-ENG, p. 13, lines 2-25.

prosecution of similar conduct”.<sup>242</sup> The Defence underlines the fact that fair trial rights apply at all stages of proceedings and asserts that the Libyan investigation into Mr Gaddafi’s conduct is an ‘investigation under the Statute’ within the meaning of article 55 and must therefore comport with the requirements therein.<sup>243</sup>

157. The Defence further argues that exclusion of fair trial considerations from the determination on the Admissibility Challenge would violate the right of Mr Gaddafi to benefit from the protections enshrined in article 67(1) of the Statute in full equality with other defendants tried before the Court.<sup>244</sup> It submits that the legal act of transferring jurisdiction triggers extradition protections, including the principle of *non-refoulement*, and therefore, the Chamber must consider the implications for the rights of Mr Gaddafi if jurisdiction were to be ceded to Libya.<sup>245</sup>

158. The Defence adds that Libya’s ability to adhere to the standards of human rights instruments that it has ratified, such as the International Covenant on Civil and Political Rights (the “ICCPR”) and the African and Arab Charters on Human Rights, is relevant to its ability to investigate and prosecute this case, and refers to the jurisprudence of the ICTY and the ICTR, which explicitly consider whether a defendant’s rights under article 14(1) of the ICCPR would be respected in a domestic trial in determining whether a case could be referred to national authorities.<sup>246</sup> In this regard, the Defence

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<sup>242</sup> Defence Response, paras 56-57; Pre-Trial Chamber I, Transcript of Hearing, 10 October 2012, ICC-01/11-01/11-T-3-Red-ENG, p. 3, line 11 - p. 4, line 1.

<sup>243</sup> Defence Response, paras 49-50.

<sup>244</sup> Defence Response, para. 43.

<sup>245</sup> Defence Response, paras 51-52.

<sup>246</sup> Defence Response, paras 46-48.

submits that fair trial concerns may be symptomatic of a collapsed justice system or may render a justice system unavailable to an accused person.<sup>247</sup>

159. The Defence asserts that the fact that Mr Gaddafi faces the death penalty in connection with domestic proceedings both heightens the obligation to ensure the application of fair trial standards and raises an independent barrier to the transfer of the case.<sup>248</sup>

160. The Defence alleges that the action taken so far by Libya indicates a lack of willingness to prosecute him domestically, possibly motivated by concerns regarding the poor quality or unavailability of evidence, or the implication of members of the current regime.<sup>249</sup> The Defence also points to a “strong popular sentiment, directed to public authorities, that Mr Gaddafi should be killed rather than tried in a court of law”.<sup>250</sup> At the Admissibility Hearing, the Defence made an extensive presentation of allegedly misleading, contradictory or incorrect information provided by Libyan officials to the Court and the media. In its submission, this casts doubts on the genuine willingness or ability of Libya to prosecute the case against Mr Gaddafi.<sup>251</sup>

161. The Defence highlights unjustified delays inconsistent with an intent to bring Mr Gaddafi to justice in relation to (i) commencing and taking active steps in investigating the allegations which form the basis of the case before the Court;<sup>252</sup> (ii) notifying Mr Gaddafi of the legal basis for his detention and the nature of the charges against him;<sup>253</sup> (iii) bringing him before a judge;<sup>254</sup>

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<sup>247</sup> Pre-Trial Chamber I, Transcript of Hearing, 10 October 2012, ICC-01/11-01/11-T-3-Red-ENG, p. 17, line 22 - p. 18, line 6.

<sup>248</sup> Defence Response, paras 58-66; Pre-Trial Chamber I, Transcript of Hearing, 10 October 2012, ICC-01/11-01/11-T-3-Red-ENG, p. 4, line 13- p. 7, line 13.

<sup>249</sup> Defence Response, paras 156-158.

<sup>250</sup> Defence Response, para. 159.

<sup>251</sup> Pre-Trial Chamber I, Transcript of Hearing, 9 October 2012, ICC-01/11-01/11-T-2-Red-ENG, p. 69, line 23 – p. 84, line 14.

<sup>252</sup> Defence Response, paras 164-168.

<sup>253</sup> Defence Response, paras 169-177.

and (iv) facilitating his right to legal representation and access to a lawyer in connection with the domestic investigation.<sup>255</sup> It is suggested that the failures in regularising Mr Gaddafi's detention amount to procedural defects which could impede the ability of the Libyan courts to render justice.<sup>256</sup>

162. In the Defence Response to Libya's Further Submissions, the Defence highlights the potential for unreasonable delay in proceedings which may be engendered by the potential joinder of the case against Mr Gaddafi with that of other persons and the scheduling of a trial against Mr Gaddafi for separate security offences in Zintan in May 2013.<sup>257</sup> It is argued that Libya's Further Submissions fail to address the impact of issues concerning the custody of Mr Gaddafi, the implementation of protective measures or the logistical impediments concerning the assignment of counsel and that adverse inferences must be drawn concerning the possibility of unreasonable delay in such circumstances.<sup>258</sup>

163. In addition, the Defence argues that the proceedings in Libya have not and are not being conducted independently and impartially, or in a manner which is consistent with an intent to bring the person concerned to justice. The Defence contends that a number of violations of Mr Gaddafi's rights under national law have occurred, including the following: prolonged arbitrary detention at a secret location that is not a designated detention facility, in a climate of uncertainty and insecurity as to his fate, amounting to cruel and inhuman treatment; false promises to Mr Gaddafi regarding the charges against him; failure to inform Mr Gaddafi of the factual and legal basis for his arrest; refusal to facilitate privileged communication and failure

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<sup>254</sup> Defence Response, paras 178-188.

<sup>255</sup> Defence Response, paras 192-210.

<sup>256</sup> Defence Response, paras 189-191.

<sup>257</sup> Defence Response to Libya's Further Submissions, paras 140-145.

<sup>258</sup> Defence Response to Libya's Further Submissions, paras 146-147.

to respect privileged nature of visit between Mr Gaddafi and the Defence; arrest and arbitrary incommunicado detention of Defence counsel and ICC officials and seizure of privileged defence documents; failure to respect Mr Gaddafi's right to an independent defence; denial of the means to communicate with friends and family; and denial of dental treatment.<sup>259</sup> The Defence further maintains that these breaches should give rise to the nullity of the entire procedure under article 304 of the Libyan criminal procedure if the law is applied in an independent and impartial manner, which would frustrate the ability of the domestic authorities to bring Mr Gaddafi to justice.<sup>260</sup>

164. In the Defence Response to Libya's Further Submissions, the Defence raises a number of other issues with respect to Mr Gaddafi's ability to exercise his rights under Libyan law.<sup>261</sup> Firstly, it is claimed that Libya has not produced any record of an interrogation of Mr Gaddafi, or information as to the dates or subject-matter of such questioning, and that no reference to an interrogation appears on the remand orders in respect of Mr Gaddafi.<sup>262</sup> Secondly, concerns are reiterated about Libya's continuing failure to appoint or inability to find counsel willing to act for Mr Gaddafi and the questioning of the suspect in the absence of legal representation.<sup>263</sup> Finally, the Defence argues that no evidence has been produced in support of Libya's contention that Mr Gaddafi has exercised his right to view the investigative materials in his case and confront the witnesses against him. It is argued that no credence can be given to Libya's claim in view of its previous contradictory statements in this regard and its failure to respond to multiple Defence requests for

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<sup>259</sup> Defence Response, paras 220-309; Defence Response to Libya's Further Submissions, paras 107-139; See also, Pre-Trial Chamber I, Transcript of Hearing, 10 October 2012, ICC-01/11-01/11-T-3-Red-ENG, p. 7, line 14 - p. 9, line 14; p. 13, line 20 - p. 17, line 21.

<sup>260</sup> Defence Response, paras 189-191 and 216-218.

<sup>261</sup> Defence Response to Libya's Further Submissions, paras 196-212.

<sup>262</sup> Defence Response to Libya's Further Submissions, paras 196-199.

<sup>263</sup> Defence Response to Libya's Further Submissions, paras 200-206.

disclosure of information concerning the nature and detail of the charges against Mr Gaddafi.<sup>264</sup>

165. The Defence contends that further indications of the impossibility of an independent and impartial investigation and prosecution of Mr Gaddafi can be derived from an examination of the specific legal procedure geared towards ‘political’ offences which would be applied to Mr Gaddafi’s case.<sup>265</sup> Reference is made to recently promulgated Libyan laws, which deliberately target persons associated with the former regime on the one hand, and shield the rebels and *thuwar* from prosecution on the other, which violate Mr Gaddafi’s presumption of innocence, and right to an impartial trial, and have a chilling effect on the independence of the judiciary in relation to his case.<sup>266</sup> Finally, the Defence asserts that the actions and statements of Libyan officials indicate that a ‘presumption of guilt’ applies to Mr Gaddafi, create a public perception that the life of a Gaddafi family member is meaningless, and reveal the extent of inappropriate executive influence over the case, thereby demonstrating that the requisite level of impartiality and independence is lacking.<sup>267</sup>

166. The Defence underlines the use of the past and present tenses in article 17(2)(c) of the Statute – “were not or are not being conducted independently or impartially” – and argues that the fact that proper procedures were not applied to Mr Gaddafi’s detention under Libyan or international law render the case admissible.<sup>268</sup> It is stressed that Libya has acknowledged that the People’s Court procedure, which was struck down as unconstitutional and

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<sup>264</sup> Defence Response to Libya’s Further Submissions, paras 207-212.

<sup>265</sup> Defence Response, paras 311-314.

<sup>266</sup> Defence Response, paras 315-331; Defence Response to Libya’s Further Submissions, paras 170-175.

<sup>267</sup> Defence Response, paras 332-353; Pre-Trial Chamber I, Transcript of Hearing, 10 October 2012, ICC-01/11-01/11-T-3-Red-ENG, p. 9, line 15 - p. 11, line 23.

<sup>268</sup> Defence Response to Libya’s Further Submissions, paras 107-139.

discriminatory by the Libyan Supreme Court on 23 December 2012, had been applied in relation to Mr Gaddafi in contravention of Libya's prior assurances that it would apply all of the fair trial requirements set out in international instruments ratified by Libya.<sup>269</sup> In the view of the Defence, the correct interpretation of Libyan law is that the unlawful application of the People's Court procedure in past proceedings against Mr Gaddafi could invalidate the investigation against him in its entirety.<sup>270</sup> It is noted that violations of Libyan criminal procedure continue to occur in relation to Mr Gaddafi's case, pointing to the fact that on 17 January 2013, he was brought straight before a trial chamber to be prosecuted for charges related to alleged national security violations without the prior oversight of a *Chambre d'accusation*.<sup>271</sup>

167. The Defence raises concerns about Libya's submission that it intends to prosecute Mr Gaddafi under Sharia law, which it submits would deprive Mr Gaddafi of many of the protections available under the Libyan Criminal Procedure Code and impact on the independence and impartiality of proceedings.<sup>272</sup>

168. The Defence points to various factors which indicate that Libya is unable genuinely to carry out the investigation or prosecution against the defendant.

169. First, the Defence states that the Libyan authorities have failed to secure custody of Mr Gaddafi from the Zintan brigade, at least partly due to the concern of the latter that the central authorities do not have the capacity to ensure that Mr Gaddafi's supporters do not try to liberate him. The Defence alleges that, even if custody of Mr Gaddafi were obtained, there is a risk that

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<sup>269</sup> Defence Response to Libya's Further Submissions, paras 117-121.

<sup>270</sup> Defence Response to Libya's Further Submissions, paras 164-169.

<sup>271</sup> Defence Response to Libya's Further Submissions, para. 169.

<sup>272</sup> Defence Response to Libya's Further Submissions, paras 191-195.

Mr Gaddafi would be tortured and killed in detention, thereby depriving victims of their right to the truth.<sup>273</sup>

170. Second, the Defence contends that investigators, prosecutors and judges in Libya lack the capacity genuinely to investigate and prosecute the case. In support of this argument, the Defence alleges deficiencies in the investigative steps taken by the Libyan authorities and an inability on their part to conduct other criminal proceedings relating to the post-February 2011 events. The Defence points to statements of Libyan officials, and information contained in international and NGO reports, which, in its submission, demonstrate a lack of understanding of basic human rights or the role of a defence, and a dependence on international assistance to build judicial capacity.<sup>274</sup>

171. Third, the Defence argues that the ongoing unrest in the country and the inability of the Libyan authorities to impose their control over the security brigades and militias has impacted on the conduct of investigations and the work of the judiciary.<sup>275</sup> In particular, it is alleged that witnesses would be deterred from testifying in defence of Mr Gaddafi and lawyers deterred from assuming his representation by the campaign of collective punishment that has been applied to anyone considered to be an associate of Mr Gaddafi and the public arrest of Mr Gaddafi's defence counsel and seizure of confidential defence materials.<sup>276</sup> The Defence highlights irregularities in proceedings against other Gaddafi era officials and submits that the protection of Libyan law has become unavailable to this group.<sup>277</sup> It is said that Libya has not adopted any measures to ensure the safety of participants in domestic

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<sup>273</sup> Defence Response, paras 358-368.

<sup>274</sup> Defence Response, paras 369-381.

<sup>275</sup> Defence Response, paras 382-385; Pre-Trial Chamber I, Transcript of Hearing, 10 October 2012, ICC-01/11-01/11-T-3-Red-ENG, p. 24, line 9 - p. 27, line 12.

<sup>276</sup> Defence Response, paras 386-399; Pre-Trial Chamber I, Transcript of Hearing, 10 October 2012, ICC-01/11-01/11-T-3-Red-ENG, p. 12, lines 14-19.

<sup>277</sup> Pre-Trial Chamber I, Transcript of Hearing, 10 October 2012, ICC-01/11-01/11-T-3-Red-ENG, p. 18, line 9 – p. 19, line 3; p. 23, lines 6-25.

proceedings against Mr Gaddafi and that there is no provision under Libyan law for the admission of documentary or video-link evidence.<sup>278</sup> The result would be that the defence of Mr Gaddafi would be severely handicapped in terms of its ability to present its case under the same conditions as the prosecution.<sup>279</sup>

172. Finally, the Defence suggests that the Libyan authorities lack the capacity to implement judicial orders, which is the *sine qua non* of an effective criminal justice system.<sup>280</sup>

173. In the Defence Response to Libya's Further Submissions, the Defence contends that Libya has failed to provide concrete and detailed responses to the Chamber's queries in relation to witness protection and security set out in the Decision of 7 December 2012.<sup>281</sup> It alleges that the information given by Libya demonstrates its lack of understanding of the requirements of an effective witness protection scheme,<sup>282</sup> and highlights an absence of "Defence-oriented measures" aimed at addressing the particular sensitivities of Defence witnesses.<sup>283</sup> It is further claimed that Libya's suggestion of withholding the identities of prosecution witnesses from Mr Gaddafi would violate the rights of the Defence, not be adequate in the circumstances to protect all witnesses or prevent leaking of sensitive information from the judicial authorities and demonstrates their lack of capacity to move the case forward to the next stage.<sup>284</sup> Further, the Defence asserts that an effective witness protection program cannot be maintained by Libya in circumstances where there is no effective protection for police, investigators, or judges, with some courts

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<sup>278</sup> Defence Response, paras 401-404.

<sup>279</sup> Defence Response, para. 400.

<sup>280</sup> Defence Response, paras 405-408.

<sup>281</sup> Defence Response to Libya's Further Submissions, para. 222.

<sup>282</sup> Defence Response to Libya's Further Submissions, paras 224-225, 234.

<sup>283</sup> Defence Response to Libya's Further Submissions, paras 226-229.

<sup>284</sup> Defence Response to Libya's Further Submissions, paras 232-236.

shutting down due to lack of security. It contends that the security situation in Libya is such that the national judicial system must be considered unavailable within the meaning of article 17(3) of the Statute.<sup>285</sup>

174. The Defence also reiterates concerns about the failure of Libya to appoint legal representation to Mr Gaddafi, its alleged obstruction of attempts by the Defence to assist in the appointment of Counsel and the significant practical impediments to securing any legal representation of Mr Gaddafi in view of the security environment and the risk faced by lawyers who act for associates of the former regime.<sup>286</sup> In the view of the Defence, this issue must be considered dispositive of Libya's inability to carry out proceedings within the meaning of article 17(3) of the Statute.

175. The Defence repeats its arguments in relation to Libya's failure to obtain custody of Mr Gaddafi and claims the authorities have no intention to effectuate his transfer to Tripoli during the first part of 2013.<sup>287</sup> It further contends that Libya has not submitted any information that would demonstrate its capacity to detain Mr Gaddafi in a secure and humane environment in Tripoli and asserts that recent escapes from a prison in Tripoli highlight the risk that Mr Gaddafi could be liberated if custody were transferred to the Libyan authorities.<sup>288</sup>

176. Finally, in relation to assistance in capacity building from the international community, the Defence underlines that the impact of such measures is hypothetical or aspirational and may not be taken into account for the purposes of the decision on the Admissibility Challenge.<sup>289</sup> It is also argued that many international organisations and countries may be precluded

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<sup>285</sup> Defence Response to Libya's Further Submissions, paras 238-257.

<sup>286</sup> Defence Response to Libya's Further Submissions, paras 258-268.

<sup>287</sup> Defence Response to Libya's Further Submissions, paras 269-281.

<sup>288</sup> Defence Response to Libya's Further Submissions, paras 272-281.

<sup>289</sup> Defence Response to Libya's Further Submissions, paras 284-287.

for policy reasons from providing assistance to a judicial system that applies the death penalty.<sup>290</sup>

*d. The Amici Curiae*

177. In their submission, the Amici express concern regarding the general political instability and increasing insecurity hindering Libya's willingness to implement a fair judicial system. As regards the independence and impartiality of the justice system, the Amici observe that, while Libya has taken important steps to improve the independence of the judiciary, challenges remained, mentioning instances of executive interference and continuing detention of members of Gaddafi's brigades without due process. The Amici further note the power of the militias and their potential influence on the judiciary and the administration of justice as a whole, the lack of training of judges specific to substantive and procedural international criminal law, the ease with which they can be removed or sanctioned, as well as the lack of a framework to afford victim and witness protection.<sup>291</sup>

178. The Amici also express concerns regarding the disparity between prosecution of Gaddafi loyalists and members of revolutionary brigades, the former being subjected to "much more rigorous scrutiny". In particular, it is noted that laws had been introduced creating a blanket amnesty for "acts made necessary by the 17 February revolution".<sup>292</sup>

179. With regard to the independence of defence lawyers, the Amici submit that "in practice, the right to have access to a lawyer before being questioned is often disregarded" and underscore the difficulties inherent in representing Gaddafi loyalists. They further highlight practical challenges, such as the absence of "specific allowance for the use of video-link testimony" for

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<sup>290</sup> Defence Response to Libya's Further Submissions, paras 282-283.

<sup>291</sup> Amici Observations, paras 11-20.

<sup>292</sup> Amici Observations, para. 21.

witnesses located outside of Libya and the lack of clarity regarding the possibility for foreign lawyers to represent Libyan clients.<sup>293</sup>

180. In relation to the functioning of the Libyan legal system, the Amici submit that “the criminal courts are only beginning to function, and mainly for *de minimus* crimes”, with only a small number of high-profile cases having progressed beyond the investigation phase. They also highlighted the absence of cases against revolutionaries. Further, the Amici contend that “numerous allegations of torture of detainees have been acknowledged by the Minister of Justice” and note the “strong reliance on confession evidence in which allegations of ill-treatment or torture have been made”. Among other issues, the Amici note the Libyan authorities’ limited ability to exercise control over the detention facilities run by militias, the existence of secret and unregulated detention centres, as well as the existence of logistical and practical challenges in relation to the review process. Finally, the Amici allege that the transfer of detainees held by militias to official detention facilities, including in the case of Mr Gaddafi, has been widely inconsistent.<sup>294</sup>

181. As to the existing legal framework for the prosecution of international crimes the Amici emphasise the “potential symbolic weight of prosecutions based on ‘international’ as opposed to ‘ordinary’ crimes”.<sup>295</sup>

#### *e. Libya*

##### *(i) Investigative resources*

182. In response to the Chamber’s queries about the allocation of resources and activities of the investigation team assigned to Mr Gaddafi’s case, Libya states that the “Investigation Committee [...] is composed of fourteen (14) prosecutors and other support staff”, and benefits from all of the financial and

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<sup>293</sup> Amici Observations, paras 22-25.

<sup>294</sup> Amici Observations, paras 26-32.

<sup>295</sup> Amici Observations, para. 35.

other resources available to, and has the full powers of the Prosecutor-General's Office. It submits that the committee is composed of prosecutors and investigators with considerable experience in criminal matters and who benefitted from strategic advice as to the planning of trials of former Gaddafi regime officials by UN experts. On-site investigations have been carried out and evidence has been preserved in accordance with regular criminal investigative procedures.<sup>296</sup>

(ii) *Capacity building*

183. Libya has provided detailed submissions on the measures of assistance that it has received from the European Union, various national governments, and UN agencies, including the UN Support Mission in Libya, the Office of the UN High Commissioner for Human Rights, the UN Office of Drugs and Crime, and the UN Development Program, with respect to human rights, transitional justice and the rule of law.<sup>297</sup>

184. Libya underlines its achievements in capacity building under challenging conditions and the important impact of international assistance in this regard.<sup>298</sup> Libya highlights the international assistance received, progress made and proposed strategy towards developing an effective, accountable and affordable national police service, improving security for courts and participants in proceedings, bolstering the independence of the judiciary, increasing the capacity to investigate and prosecute crimes and reforming detention centres, in particular, by taking urgent steps to bring an end to the practice of torture.<sup>299</sup>

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<sup>296</sup> Libya's Further Submissions, para. 94.

<sup>297</sup> Libya's Further Submissions, paras 103-113.

<sup>298</sup> Libya's Reply, paras 107-113.

<sup>299</sup> Libya's Reply, paras 114-123.

(iii) *Witness protection and security*

185. Libya claims that the security situation in the country has not impeded its investigation in any significant way.<sup>300</sup> Libya states that it envisages implementing protective measures for some of the witnesses who testify in the case against Mr Gaddafi. Examples of witness protection measures available under Libyan law are cited, including non-disclosure of investigative materials, the giving of *in camera* witness testimony, witness anonymity and police protection.<sup>301</sup> It has also been clarified that the measures for witness protection applicable at pre-trial can be continued at trial as it is within the discretionary powers of the trial judge to receive evidence in whatever form he or she deems appropriate.<sup>302</sup>

(iv) *Mr Gaddafi's Exercise of Rights under Libyan Law*

186. Libya reiterates that each of the extensions of Mr Gaddafi's detention has been judicially approved by Tripoli based judges since 30 October 2012 and that Mr Gaddafi has been visited in detention by representatives of human rights organisations on several occasions with the full cooperation of the local Zintan authorities.<sup>303</sup>

187. Libya states that Mr Gaddafi has been questioned on several occasions since the filing of the Admissibility Challenge and has been informed of the accusations and evidence against him but has not exercised his right to view the investigative materials.<sup>304</sup>

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<sup>300</sup> Libya's Further Submissions, para. 95.

<sup>301</sup> Libya's Further Submissions, para. 95.

<sup>302</sup> Libya's Reply, para. 65.

<sup>303</sup> Libya's Reply, paras 48-49.

<sup>304</sup> Libya's Further Submissions, paras 88-93.

188. Libya submits that Mr Gaddafi has not exercised his right to appoint counsel and states that, if Mr Gaddafi fails to appoint counsel, the *Chambre d'Accusation* will do so in the accusatory phase.<sup>305</sup>

189. With respect to the Chamber's query as to the concrete steps that have been taken to identify and secure legal representation for Mr Gaddafi, Libya quotes the Minister of Justice as saying that "*Ministry of Justice officials have been in continuous high level contact with the Libyan Law Society and the Popular Lawyers Office in order to select a suitably qualified and committed highly qualified counsel or a team of defence counsels to represent him during his forthcoming trial*".<sup>306</sup>

(v) *Custody of Mr Gaddafi*

190. Libya confirms that Mr Gaddafi remains in Zintan and that efforts to arrange his transfer to a detention facility in Tripoli are ongoing.<sup>307</sup> Libya states that "[a]rrangements 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 Mr Gaddafi's trial".<sup>308</sup> According to Libya, the *Chambre d'Accusation* in Mr Gaddafi's case is presently scheduled to take place at the South Tripoli Criminal Court.<sup>309</sup>

191. In Libya's reply to submissions, it indicates that efforts to arrange Mr Gaddafi's transfer to detention in Tripoli are ongoing. The Chamber was appraised of Libya's proposals to effect the transfer, which Libya estimates

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<sup>305</sup> Libya's Further Submissions, paras 93, 96.

<sup>306</sup> Libya's Further Submissions, para. 97.

<sup>307</sup> Libya's Further Submissions, para. 99.

<sup>308</sup> Libya's Further Submissions, para. 100.

<sup>309</sup> Libya's Further Submissions, para. 102.

will occur “before the earliest possible estimated commencement date of the trial in May 2013”.<sup>310</sup>

*(vi) Victims’ participation*

192. Libya emphasises that victims have rights of participation under Libyan law that are far superior to those in many sophisticated legal systems, but nonetheless argues that it would be inappropriate for the Chamber to embark on a qualitative assessment of the victims’ participation scheme under national law for the purposes of an admissibility assessment.<sup>311</sup>

*(vii) Delays in proceedings*

193. With respect to arguments that the delay in proceedings thus far has been inimical to a fair and expeditious trial, Libya underscores the importance of taking the time to carry out an investigation and prosecution that ensures justice without undue expedition or unfairness.<sup>312</sup> It emphasises that the question relevant to complementarity is not whether the person has been investigated within a reasonably expeditious timeframe, but whether “[t]here has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice”. It argues by reference to the preparatory works that “unjustified delay” establishes a higher threshold than “undue delay” and suggests that guidance as to the interpretation of what constitutes an unjustified delay may be sought from the jurisprudence of the ECHR.<sup>313</sup> Libya further asserts that, in view of the complexity of the factual and legal issues raised by the case, its timeframe for the prosecution of Mr Gaddafi is justifiable and intended to achieve justice.<sup>314</sup>

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<sup>310</sup> Libya’s Reply, paras 50-51.

<sup>311</sup> Libya’s Reply, paras 57-61.

<sup>312</sup> Libya’s Reply, paras 68-69.

<sup>313</sup> Libya’s Reply, paras 75-76.

<sup>314</sup> Libya’s Reply, paras 77-78.

(viii) *Taking of testimony*

194. With regard to the taking of witness statements, Libya clarifies that none of the interviews, summaries or statements that will be relied upon in the national proceedings were conducted or prepared by committees of volunteers, *thuwar*, or local council members.<sup>315</sup> Libya also defends the techniques used to record and test the reliability of witness statements at such a preliminary stage of proceedings.<sup>316</sup> It asserts that the Defence's argument, according to which the possibility of the trial record containing evidence obtained from persons who have been tortured or mistreated operates as a bar to a finding of inadmissibility, is legally inaccurate.<sup>317</sup>

(ix) *Treatment of Mr Gaddafi*

195. With respect to the alleged potential for mistreatment with respect to Mr Gaddafi, Libya submits that there is no evidence that Mr Gaddafi is at risk of mistreatment and that the existence of a system of mistreatment against persons associated with the former regime has not been shown.<sup>318</sup> It further argues that the admissibility enquiry requires only a consideration of whether the specific domestic proceedings are being carried out genuinely with an intent to bring the person to justice and does not extend to an exacting scrutiny of proceedings from the perspective of a human rights court.<sup>319</sup>

196. In relation to the impact of the possible application of the death penalty in relation to Mr Gaddafi, Libya contends that the drafting history of the Statute shows an intention to reflect differing views regarding penalties and that a State's recourse to the death penalty is outside the judicial purview of

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<sup>315</sup> Libya's Reply, para. 80.

<sup>316</sup> Libya's Reply, paras 81-82.

<sup>317</sup> Libya's Reply, para. 84.

<sup>318</sup> Libya's Reply, paras 85, and 87-89.

<sup>319</sup> Libya's Reply, para. 86.

the Court.<sup>320</sup> Nonetheless, Libya emphasises that the availability of the death penalty does not mean that it will be applied.<sup>321</sup>

(x) *Other issues*

197. Libya submits that a number of the factors that are relied upon by the Defence to support an argument of 'unwillingness' or 'inability' are matters for judicial determination at trial, which cannot be definitively determined at this stage of proceedings.<sup>322</sup> Specifically, the following arguments are identified as falling into this category: the lack of probative value of Libya's evidential samples; whether the intercept evidence was legally obtained or authenticated in accordance with best practice standards; technical discrepancies in the detention orders relating to Mr Gaddafi; whether Mr Gaddafi qualifies as a 'public officer' in *de facto* terms; the application to Mr Gaddafi of provisions of Libyan law dealing with persons agitating against the Government; and the lack of finality of the list of charges that Mr Gaddafi will face at trial.<sup>323</sup>

198. Libya also submits that a number of the Defence's allegations with regard to the security situation in the country, the appointment of lawyers to and detention conditions of other suspects and the interpretation and application of various provisions of Libyan law are erroneous.<sup>324</sup>

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<sup>320</sup> Libya's Reply, paras 90-92.

<sup>321</sup> Libya's Reply, para. 93.

<sup>322</sup> Libya's Reply, paras 96-100.

<sup>323</sup> Libya's Reply, para. 97.

<sup>324</sup> Libya's Reply, paras 101-106.

***B. Findings of the Chamber in relation to the inability of Libya genuinely to carry out the investigation or prosecution***

***a. Applicable law***

199. Turning to the matter of whether Libya is able genuinely to investigate or prosecute the case against Saif Al-Islam Gaddafi, the Chamber recalls that according to article 17(3) of the Statute:

In order to determine inability in a particular case, the Court 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.

200. The Chamber considers that the ability of a State genuinely to carry out an investigation or prosecution must be assessed in the context of the relevant national system and procedures. In other words, the Chamber must assess whether the Libyan authorities are capable of investigating or prosecuting Mr Gaddafi in accordance with the substantive and procedural law applicable in Libya.

201. The Chamber notes that the Libyan Code of Criminal Procedure, which is based on the Italian model, regulates the four phases of Libyan criminal proceedings—investigation, accusation, trial, and appeal.<sup>325</sup> Article 59 of said Code provides for the confidentiality of investigations.<sup>326</sup> Under article 106 of said Code, the defendant has a right to a lawyer during the investigation phase of the case, both in interviews with the Prosecutor-General and when confronted by witnesses.<sup>327</sup> He also has the right to review evidence presented against him, under article 435 of said Code.<sup>328</sup> Forced confessions are

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<sup>325</sup> Admissibility Challenge, para. 39.

<sup>326</sup> Admissibility Challenge, para. 39.

<sup>327</sup> Admissibility Challenge, AnxC, perfected translation filed on 15 May 2012, ICC-01/11-01/11-145-Conf-AnxC, p. 8; Admissibility Challenge, para. 59.

<sup>328</sup> Admissibility Challenge, para. 59.

inadmissible in criminal proceedings.<sup>329</sup> Article 9 of said Code requires that a defendant in custody should be informed of his or her rights and duties, and article 4 of the Prisons Act requires that the defendant should only be held in a prison “prepared for that purpose unless the Public Prosecutor decides otherwise.”<sup>330</sup>

202. Other rights granted during trial proceedings include the right to a public hearing; the right to have proceedings recorded; the right to be presented with the indictment and all evidence presented by the prosecution; the right to remain silent; the right to present defence evidence and the right to a written judgment (articles 241, 247, 251, 266, 276 of the Libyan Code of Criminal Procedure).<sup>331</sup> Where the death penalty has been imposed, the sentence cannot be carried out until the case has been considered by the Supreme Court. Commutation of the death sentence to life imprisonment is possible where the family members of victims forgive the convicted person.<sup>332</sup> Once the Trial Court hears the evidence of family members, they may impose a new sentence.<sup>333</sup> Additional guarantees are provided under articles 31 and 33 of Libya’s Constitutional Declaration.<sup>334</sup> The Chamber notes in addition that Libya has ratified relevant human rights instruments.<sup>335</sup>

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<sup>329</sup> Admissibility Challenge, para. 59 (citing Article 435 of the Libyan Code of Criminal Procedure); Admissibility Challenge, AnxC, perfected translation filed on 15 May 2012, ICC-01/11-01/11-145-Conf-AnxC, p. 7.

<sup>330</sup> Admissibility Challenge, para. 59; Admissibility Challenge, AnxC perfected translation filed on 15 May 2012, ICC-01/11-01/11-145-Conf-AnxC, p. 8.

<sup>331</sup> Admissibility Challenge, para. 63.

<sup>332</sup> Admissibility Challenge, para. 67.

<sup>333</sup> Admissibility Challenge, para. 67. This is consistent with Article 6 of the ICCPR.

<sup>334</sup> Admissibility Challenge, para. 56.

<sup>335</sup> Libya is party to international and regional human rights instruments that guarantee the right to a fair trial, including the ICCPR, the UN 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.

203. The Chamber notes that Libya has confirmed that the trial of Mr Gaddafi will be conducted in accordance with the general criminal procedure of Libya as the application of the “People’s Court procedure” was declared unconstitutional by the Libyan Supreme Court on 23 December 2012.<sup>336</sup>

*b. Unavailability of the national system*

204. Having considered the responses and evidence received, the Chamber takes note of the efforts deployed by Libya under extremely difficult circumstances to improve security conditions, rebuild institutions and restore the rule of law. In this regard, it takes note, in particular, of the Libyan submissions on specific measures of assistance received from national governments and regional and international organizations to enhance capacity, *inter alia*, with respect to transitional justice.<sup>337</sup> The Chamber emphasises the relevance of specific submissions related to progress made, as well as those regarding the proposed strategy to improve the effectiveness and accountability of the police service, the security for the courts and participants in the proceedings, to reform the detention centres and to bring practices of torture to an end.<sup>338</sup>

205. Without prejudice to these achievements, it is apparent from the submissions that multiple challenges remain and that Libya continues to face substantial difficulties in exercising its judicial powers fully across the entire territory. Due to these difficulties, which are further explained below, the Chamber is of the view that its national system cannot yet be applied in full in areas or aspects relevant to the case, being thus “unavailable” within the terms of article 17(3) of the Statute. As a consequence, Libya is “unable to obtain the accused” and the necessary testimony and is also “otherwise

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<sup>336</sup> Libya’s Further Submissions, paras 74-77.

<sup>337</sup> Libya’s Further Submissions, paras 103-113; Libya’s Reply, paras 107-113.

<sup>338</sup> Libya’s Further Submissions, paras 103-113; Libya’s Reply, paras 114-123.

unable to carry out [the] proceedings” in the case against Mr Gaddafi in compliance with its national laws, in accordance with the same provision.

*(i) Inability to obtain the accused*

206. The Chamber notes that Libya has not yet been able to secure the transfer of Mr Gaddafi from his place of detention under the custody of the Zintan militia into State authority. In response to a specific request for clarification from the Chamber, the Libyan representatives indicated that “[e]fforts to arrange Mr. Gaddafi’s transfer to a detention facility in Tripoli where other Gaddafi-era officials are presently held are still ongoing”.<sup>339</sup> Libya subsequently reiterated that efforts to arrange Mr Gaddafi’s transfer to detention in Tripoli are ongoing and that it will shortly begin implementation of its recently devised proposal to train members of the Zintan brigade so that they may form part of the judicial police who will be responsible for guarding Mr Gaddafi upon his transfer to Tripoli.<sup>340</sup> It estimated that the transfer will take place “before the earliest possible estimated commencement date of the trial in May 2013” and that the national security proceedings in Zintan will also be transferred to the Tripoli court at this point if they proceed to trial.<sup>341</sup>

207. The Chamber has no doubt that the central Government is deploying all efforts to obtain Mr Gaddafi’s transfer but, in spite of Libya’s recent assurances, no concrete progress to this effect has been shown since the date of his apprehension on 19 November 2011. The Chamber is not persuaded that this problem may be resolved in the near future and no evidence has been produced in support of that contention.

208. The Chamber notes the submissions of Libya that *in absentia* trials are not permitted under Libyan law when the accused is present on Libyan territory

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<sup>339</sup> Libya’s Further Submissions, para. 99.

<sup>340</sup> Libya’s Reply, para. 50.

<sup>341</sup> Libya’s Reply, para. 50.

and his location is known to the authorities.<sup>342</sup> As a result, without the transfer of Mr Gaddafi into the control of the central authorities, the trial cannot take place.

*(ii) Inability to obtain testimony*

209. The Chamber is also concerned about the lack of capacity to obtain the necessary testimony due to the inability of judicial and governmental authorities to ascertain control and provide adequate witness protection. The Chamber notes in this regard that it has been reported that conflict-related detainees including senior former regime members have not been protected from torture and mistreatment in detention facilities.<sup>343</sup> Strong concerns have been raised at the highest levels of the Libyan Government by United Nations Support Mission in Libya about instances of torture and death from torture in detention centres that had been brought to its attention. The Government has been urged to commence State inspections and assume full control over detention facilities as soon as possible.<sup>344</sup>

210. Contrary to the suggestion of the Prosecutor,<sup>345</sup> the Chamber is of the view that this lack of full control over certain detention facilities has a direct bearing on the investigation against Mr Gaddafi. In this regard, it is noteworthy that in the 1 May 2012 Admissibility Challenge, Libya envisaged taking the statements of two witnesses for Mr Gaddafi's case.<sup>346</sup> In response to a subsequent request for clarification by the Chamber, the Libyan Government stated that it has not been possible for the Libyan prosecuting

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<sup>342</sup> Pre-Trial Chamber I, Transcript of Hearing, 10 October 2012, ICC-01/11-01/11-T-3-Red-ENG, p. 62, lines 10-14.

<sup>343</sup> Human Rights Watch, 'Libya: Slow Pace of Reform Harms Rights', 6 February 2013; ICC-01/11-01/11-281-Conf-Anx4.

<sup>344</sup> Libya's Further Submissions, Anx 19, pp. 3-4; Anx 20 p. 5; Anx 21 pp. 7 and 11.

<sup>345</sup> Prosecutor's Response to Libya's Further Submissions, para. 42.

<sup>346</sup> Admissibility Challenge, AnxC, perfected translation filed on 15 May 2012, ICC-01/11-01/11-145-Conf-AnxC, p. 6.

authorities to conduct interviews with these two individuals as they are presently being held in detention facilities which are not yet under the control of the Libyan Government.<sup>347</sup>

211. The Chamber notes the various submissions received during the admissibility proceedings in regard to witness protection programmes under Libyan law. Libya has indicated that the measures for witness protection applicable at pre-trial can be continued at trial as it is within the discretionary powers of the trial judge to receive evidence in whatever form he or she deems appropriate.<sup>348</sup> However, further to its submission that trial judges have discretionary powers to order protective measures, Libya has presented no evidence about specific protection programmes that may exist under domestic law. It is unclear, for instance, whether the domestic law provides for the immunity of statements made by witnesses at trial. In addition, it is unclear whether witnesses for the suspect may effectively benefit from such programmes. As such, the Libyan Government has failed to substantiate its assertions that it envisages the implementation of protective measures for witnesses who agree to testify in the case against Mr Gaddafi. Therefore, and in light of the circumstances, the Chamber is not persuaded by the assertion that the Libyan authorities currently have the capacity to ensure protective measures.

*(iii) Otherwise unable to carry out its proceedings: appointment of defence counsel*

212. The Libyan Government submits that the suspect has not exercised his right to appoint counsel as set out in article 106 of the Libyan Code of Criminal Procedure. The Defence cautions that significant practical impediments exist to securing any legal representation for Mr Gaddafi in

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<sup>347</sup> Libya's Further Submissions, para. 50.

<sup>348</sup> Libya's Reply, para. 65.

view of the security situation in Libya and the risk faced by lawyers who act for associates of the former regime.<sup>349</sup>

213. The Chamber notes that this position was confirmed by the Libyan Government during the Admissibility Hearing. Indeed, attempts to secure legal representation for Mr Gaddafi have seemingly failed. In response to a query from the Chamber as to the concrete steps that have been taken in order to secure independent legal representation for Mr Gaddafi, Libya indicates that Libyan Ministry of Justice officials have engaged in continuing high level contacts with the Libyan Law Society and the Popular Lawyer's Office in order to find a suitably qualified lawyer.<sup>350</sup> Later, Libya added that it is in the process of approaching the Bar Associations of Tunisia and Egypt in order to obtain suitably qualified and experienced counsel who will be permitted, together with a Libyan lawyer, to represent Mr Gaddafi.<sup>351</sup>

214. These submissions, however, fall short of substantiating whether and how the difficulties in securing a lawyer for the suspect may be overcome in the future. The Chamber notes that Libya has recently submitted that the interrogation of Mr Gaddafi without the presence of his counsel is not a breach of Libyan law, as the presence of counsel during interrogations pursuant to article 106 of the Libyan Code of Criminal Procedure is only required where counsel has been appointed.<sup>352</sup> However, the Chamber is concerned that this important difficulty appears to be an impediment to the progress of proceedings against Mr Gaddafi. If this impediment is not removed, a trial cannot be conducted in accordance with the rights and protections of the Libyan national justice system, including those enshrined in articles 31 and 33 of its 2011 Constitutional Declaration.

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<sup>349</sup> Defence Response to Libya's Further Submissions, paras 258-268.

<sup>350</sup> Libya's Further Submissions, para. 97.

<sup>351</sup> Libya's Reply, para. 53.

<sup>352</sup> Libya's Reply, para. 54.

*c. Overall conclusion on “inability”*

215. In light of the above, although the authorities for the administration of justice may exist and function in Libya, a number of legal and factual issues result in the unavailability of the national judicial system for the purpose of the case against Mr Gaddafi. As a consequence, Libya is, in the view of the Chamber, unable to secure the transfer of Mr Gaddafi’s custody from his place of detention under the Zintan militia into State authority and there is no concrete evidence that this problem may be resolved in the near future. Moreover, the Chamber is not persuaded that the Libyan authorities have the capacity to obtain the necessary testimony. Finally, the Chamber has noted a practical impediment to the progress of domestic proceedings against Mr Gaddafi as Libya has not shown whether and how it will overcome the existing difficulties in securing a lawyer for the suspect.

*C. Findings of the Chamber in relation to the unwillingness of Libya genuinely to carry out the investigation or prosecution*

216. As set out above, Libya has been found to be unable genuinely to carry out the investigation or prosecution against Mr Gaddafi. Therefore, the Chamber need not address the alternative requirement of “willingness” and, in particular, the issues raised by the Defence about the impossibility of a fair trial for Mr Gaddafi in Libya.

217. Indeed, various fair trial considerations have been discussed above in the context of the Chamber’s determination as to Libya’s ability genuinely to investigate or prosecute the case. The Chamber has assessed Libya’s capacity to investigate in accordance with the Libyan Code of Criminal Procedure, Libya’s Constitutional Declaration and various human rights instruments that have been ratified by Libya.<sup>353</sup> This assessment has been pertinent because

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<sup>353</sup> Libya is party to international and regional human rights instruments that guarantee the right to a fair trial, including the ICCPR, the UN Convention against Torture, the

those issues impact on Libya's ability to carry out its proceedings in accordance with Libyan law.

218. Given that the case is admissible before the Court and that Libya's challenge to the admissibility of the case is herewith rejected, the Chamber does not need to address the implications of the alleged impossibility of a fair trial for Mr Gaddafi on Libya's willingness genuinely to carry out the investigation or prosecution.

## VI. CONCLUSION

219. In this Admissibility Challenge, the Chamber has not been provided with enough evidence with a sufficient degree of specificity and probative value to demonstrate that the Libyan and the ICC investigations cover the same conduct and that Libya is able genuinely to carry out an investigation against Mr Gaddafi. The Chamber finds that the present case is admissible before the Court and recalls Libya's obligation to surrender the suspect.<sup>354</sup>

220. The Chamber recalls that a finding on admissibility is predicated on facts as they exist at the time of the proceedings concerning the admissibility challenge as the domestic activities or lack thereof may change over time. It follows that the present decision is without prejudice to any subsequent challenge that may be brought before the Chamber, provided that the requirements of article 19(4), third sentence, of the Statute have been met.

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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.

<sup>354</sup> Pre-Trial Chamber I, Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi, 4 April 2012, ICC-01/11-01/11-100, para. 19.

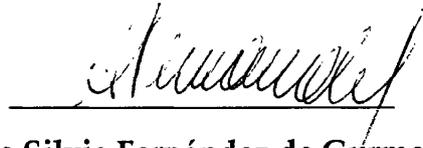
**FOR THESE REASONS, THE CHAMBER**

**REJECTS** Libya's challenge to the admissibility of the case against Saif Al-Islam Gaddafi;

**DETERMINES** that the case against Saif Al-Islam Gaddafi is admissible;

**REMINDS** Libya of its obligation to surrender Saif Al-Islam Gaddafi to the Court.

Done in both English and French, the English version being authoritative.

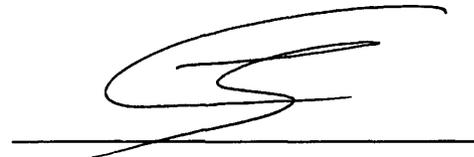


**Judge Silvia Fernández de Gurmendi**

**Presiding Judge**



**Judge Hans-Peter Kaul**



**Judge Christine Van den Wyngaert**

Dated this 31 May 2013

At The Hague, The Netherlands