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Criminal
Court

Original: English

No. ICC-01/11-01/11 OA 4
Date: 21 May 2014

THE APPEALS CHAMBER

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

SITUATION IN LIBYA

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

Public redacted document

Judgment
on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi"

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

States Representatives
Mr Ahmed El-Gehani
Mr Philippe Sands
Mr Payam Akhavan
Ms Michelle Butler

Office of Public Counsel for victims
Ms Paolina Massidda

Counsel for Saif Al-Islam Gaddafi
Mr John R. W. D. Jones
Ms Sarah Bafadhel

Counsel for Abdullah Al-Senussi
Mr Ben Emmerson
Mr Rodney Dixon

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of Libya against the decision of Pre-Trial Chamber I entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi" of 31 May 2013 (ICC-01/11-01/11-344-Conf),

After deliberation,

By majority, Judge Anita Ušacka dissenting,

Delivers the following

JUDGMENT

1. The "Decision on the admissibility of the case against Saif Al-Islam Gaddafi" is confirmed. The appeal is dismissed.
2. The request for an oral hearing is rejected.
3. Libya's Request of 3 October 2013 is rejected.
4. The Registrar shall reclassify document ICC-01/11-01/11-459-Conf as public.

REASONS

I. KEY FINDINGS

1. The parameters of a "case", as referred to in article 17 (1) (a) of the Statute, are defined by the suspect under investigation and the conduct that gives rise to criminal liability under the Statute. The "conduct" that defines the "case", in situations such as the present, is both that of the suspect and that described in the incidents under investigation which is imputed to the suspect.

2. In assessing admissibility, what is required is a judicial assessment of whether the case that the State is investigating sufficiently mirrors the one that the Prosecutor is investigating. To be able to carry out the assessment as to whether the same case is being investigated, it will be necessary for a Chamber to know the contours or parameters of the investigation being carried out both by the Prosecutor and by the State.

II. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial Chamber

3. The following summarises the main procedural steps before Pre-Trial Chamber I (hereinafter: "Pre-Trial Chamber") in relation to this appeal. Further details are contained within the discussion of particular grounds of appeal.

4. On 16 May 2011, the Prosecutor submitted the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi".[1] On 27 June 2011, the Pre-Trial Chamber issued a warrant of arrest for Mr Saif Al-Islam Gaddafi[2] (hereinafter: "Mr Gaddafi"), a decision thereon being issued on the same day[3] (hereinafter: "Arrest Warrant Decision"). A request for Mr Gaddafi's arrest and surrender was issued on 4 July 2011.[4]

5. On 1 May 2012, Libya submitted its challenge to the admissibility of the case[5] (hereinafter: "Admissibility Challenge"), appending eleven annexes (annexes A – K).[6] On 28 May 2012, Libya submitted the "Libyan Government's filing of compilation of Libyan law referred to in its admissibility challenge", appending two annexes.[7]

6. Pursuant to a decision issued on 4 May 2012[8] (hereinafter: "Decision of 4 May 2012"), the Prosecutor and the Office of Public Counsel for victims acting for the

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[1] ICC-01/11-4-Conf-Exp. A public redacted version was filed on the same day (ICC-01/11-4-Red).
[2] "Warrant of Arrest for Saif Al-Islam Gaddafi", ICC-01/11-01/11-3 (hereinafter: "Warrant of Arrest").
[3] "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'", ICC-01/11-01/11-1.
[4] "Request to the Libyan Arab Jamahiriya for the arrest and surrender of Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi", ICC-01/11-01/11-5.
[5] "Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute", ICC-01/11-01/11-130-Conf. A public redacted version of the application was filed on the same day (ICC-01/11-01/11-130-Red).
[6] On 15 May 2012, Libya submitted two filings, appending perfected translations of the annexes to the Admissibility Challenge. *See* "Libyan Government's Re-filing of Public Annexes to its Article 19 Admissibility Challenge", ICC-01/11-01/11-144 and "Libyan Government's Re-filing of Confidential Annexes to its Article 19 Admissibility Challenge", ICC-01/11-01/11-145-Conf.
[7] ICC-01/11-01/11-158.
[8] "Decision on the Conduct of the Proceedings Following the 'Application on behalf of the Government of Libya pursuant to Article 19 of the Statute'", ICC-01/11-01/11-134.

victims (hereinafter: "Victims"), on 4 June 2012, submitted their responses to the Admissibility Challenge.[9]

7. Observations pursuant to rule 103 of the Rules of Procedure and Evidence (hereinafter a rule in the Rules of Procedure and Evidence is referred to as "rule") were filed on 8 June 2012.[10]

8. Lawyers acting on behalf of Mr Gaddafi (hereinafter: the "Defence") filed their response to the Admissibility Challenge on 24 July 2012,[11] having been granted extensions of time in order to do so.[12]

9. On 14 September 2012, the Pre-Trial Chamber issued the "Order convening a hearing on Libya's challenge to the admissibility of the case against Saif Al-Islam Gaddafi"[13] (hereinafter: "Order of 14 September 2012") setting the date, 8 and 9 October 2012 (later changed to 9 and 10 October 2012) for an oral hearing on the Admissibility Challenge and fixing 3 October 2012 as the date by which the parties and participants should submit any additional evidence on which they intended to rely at the hearing.[14] The Defence filed additional evidence on 3 October 2012[15] and the hearing was held on 9[16] and 10[17] October 2012 (hereinafter: "Oral Hearing of 9 October 2012" and "Oral Hearing of 10 October 2012", respectively).

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[9] "Prosecution response to Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute", ICC-01/11-01/11-167-Conf (a public redacted version was filed on 5 June 2012 (ICC-01/11-01/11-167-Red)); "Observations on behalf of victims on the Government of Libya's Application pursuant to Article 19 of the Rome Statute", ICC-01/11-01/11-166-Conf (a public redacted corrigendum was filed on 5 June 2012 (ICC-01/11-01/11-166-Red-Corr)).

[10] "Lawyers for Justice in Libya and Redress Trust's Observations pursuant to Rule 103 of the Rules of Procedure and Evidence", ICC-01/11-01/11-172.

[11] "Defence Response to the 'Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute'", ICC-01/11-01/11-190-Conf. A corrigendum was filed on 31 July 2012 (ICC-01/11-01/11-190-Conf-Corr) and a public redacted version of the corrigendum was filed on the same day (ICC-01/11-01/11-190-Corr-Red).

[12] "Decision on the OPCD's 'Urgent Request for Extension of Time'", 1 June 2012, ICC-01/11-01/11-165; "Decision on the OPCD 'Demande urgente en extension de delai'", 4 July 2012, ICC-01/11-01/11-184; "Decision on the OPCD 'Request Pursuant to Regulation 23*bis* of the Regulations'", 18 July 2012, ICC-01/11-01/11-187-Red.

[13] ICC-01/11-01/11-207.

[14] Order of 14 September 2012, p. 8.

[15] "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)", ICC-01/11-01/11-216.

[16] ICC-01/11-01/11-T-2-CONF-EXP-ENG ET; ICC-01/11-01/11-T-2-Red-ENG WT.

[17] ICC-01/11-01/11-T-3-CONF-EXP-ENG ET; ICC-01/11-01/11-T-3-Red-ENG WT.

10. On 7 December 2012, the Pre-Trial Chamber issued a decision in which it, *inter alia*, set a schedule for further filings in relation to the Admissibility Challenge[18] (hereinafter: "Decision of 7 December 2012"). Libya filed the "Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi" on 23 January 2013[19] (hereinafter: "Libya's Further Submissions on Admissibility"), appending annexes 1 – 23. A response by the Prosecutor was filed on 11 February 2013,[20] while on 18 February 2013, responses were filed by the Defence[21] (hereinafter: "Defence Response to Libya's Further Submissions on Admissibility") and the Victims.[22] On 4 March 2013, Libya filed a consolidated reply to those documents, appending three annexes[23] (hereinafter: "Libya's Reply of 4 March 2013").

11. On 31 May 2013, the Pre-Trial Chamber issued the "Decision on the admissibility of the case against Saif Al-Islam Gaddafi"[24] (hereinafter: "Impugned Decision"), finding the case against Mr Gaddafi to be admissible.

B. Proceedings before the Appeals Chamber

12. On 7 June 2013, Libya filed its appeal against the Impugned Decision[25] (hereinafter: "Appeal"), requesting that the Appeals Chamber a) reverse the Impugned Decision and b) determine that the case against Mr Gaddafi is inadmissible.[26] It also sought the suspension of the order for the surrender of Mr Gaddafi pending the

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[18] "Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", ICC-01/11-01/11-239.
[19] ICC-01/11-01/11-258-Conf-Exp. A public redacted version of the filing was filed on 25 January 2013 (ICC-01/11-01/11-258-Red2).
[20] "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-Conf-Exp. A public redacted version of the response was filed on 12 February 2013 (ICC-01/11-01/11-276-Red2).
[21] "Response to the 'Libyan Government's further submissions on issues related to admissibility of the case against Saif Al-Islam Gaddafi'", ICC-01/11-01/11-281-Conf. A public redacted version of the response was filed on 19 February 2013 (ICC-01/11-01/11-281-Red2).
[22] "OPCV's observations on 'Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi'", ICC-01/11-01/11-279.
[23] "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", ICC-01/11-01/11-293-Conf. A public redacted version of the reply was filed on the same day (ICC-01/11-01/11-293-Red).
[24] ICC-01/11-01/11-344-Conf. A public redacted version was filed on the same day (ICC-01/11-01/11-344-Red).
[25] "The Government of Libya's Appeal against Pre-Trial Chamber I's '*Decision on the admissibility of the case against Saif Al-Islam Gaddafi*'", ICC-01/11-01/11-350 (OA 4).
[26] Appeal, para. 11.

conclusion of the appeal.[27] On 24 June 2013, Libya filed its document in support of the appeal[28] (hereinafter: "Document in Support of the Appeal").

13. On 16 July 2013, the Prosecutor filed her response to the Document in Support of the Appeal[29] (hereinafter: "Prosecutor's Response to the Document in Support of the Appeal"), with the Defence filing its response on 18 July 2013[30] (hereinafter: "Defence Response to the Document in Support of the Appeal").

14. On 18 July 2013, the Appeals Chamber issued the "Decision on the request for suspensive effect and related issues",[31] *inter alia*, rejecting Libya's request for suspensive effect.

15. On 20 August 2013, the Victims filed their observations on the appeal[32] (hereinafter: "Victims' Observations on the Appeal") with, on 30 August 2013, responses thereto filed by the Defence[33] and Libya[34] (hereinafter: "Libya's Response to Victims' Observations on the Appeal"). No response was filed by the Prosecutor.

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[27] Appeal, para. 12.
[28] "Document in Support of the Government of Libya's Appeal against the 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'", ICC-01/11-01/11-370-Conf-Exp (OA 4); a corrigendum was filed on 25 June 2013 (ICC-01/11-01/11-370-Conf-Exp-Corr (OA 4)); a public redacted version was filed on 25 June 2013 (ICC-01/11-01/11-370-Red2 (OA 4)) and a further public redacted version was filed on 1 October 2013 (ICC-01/11-01/11-370-Red3 (OA 4)) pursuant to an order by the Appeals Chamber of 27 September 2013 ("Order on the reclassification and re-filing of a document", ICC-01/11-01/11-457-Conf (OA 4)).
[29] "Prosecution Response to the 'Document in Support of the Government of Libya's Appeal against the Decision on the admissibility of the case against Saif Al-Islam Gaddafi'", ICC-01/11-01/11-384-Conf (OA 4). A public redacted version was filed on 22 July 2013 (ICC-01/11-01/11-384-Red (OA 4) with a corrigendum to that version filed on 23 July 2013 (ICC-01/11-01/11-384-Red-Corr (OA 4)).
[30] "Defence Response to the 'Document in Support of the Government of Libya's Appeal against the Decision on the admissibility of the case against Saif Al-Islam Gaddafi'", ICC-01/11-01/11-386-Conf (OA 4). A public redacted version was filed on the same day (ICC-01/11-01/11-386-Red (OA 4)).
[31] ICC-01/11-01/11-387 (OA 4).
[32] "Observations on behalf of victims on the Government of Libya's appeal against the defence of Pre-Trial Chamber I entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'", ICC-01/11-01/11-411-Conf (OA 4). A public redacted version was filed on 21 August 2013 (ICC-01/11-01/11-411-Red (OA 4)).
[33] "Defence Response to the 'Observations on behalf of victims on the Government of Libya's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi"'", ICC-01/11-01/11-427 (OA 4).
[34] "The Libyan Government's Reply to the 'Observations on behalf of victims on the Government of Libya's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the admissibility of the case against Said [*sic*] Al-Islam Gaddafi'", ICC-01/11-01/11-428-Conf (OA 4). A public redacted version was filed on the same day (ICC-01/11-01/11-428-Red (OA 4)).

16. On 22 August 2013, the Appeals Chamber having granted leave to do so,[35] observations were filed, pursuant to rule 103, by Ms Mishana Hosseinioun.[36] The Victims,[37] Prosecutor,[38] Defence[39] and Libya[40] responded thereto on 29 August 2013.

17. On 29 July 2013, Libya submitted a request for leave to file further submissions on the appeal arising out of the Defence and Prosecutor's responses to the Document in Support of the Appeal.[41] Responses to that request were filed on 5 August 2013,[42] pursuant to an order by the Appeals Chamber.[43] The Appeals Chamber issued the "Decision on the Libyan Government's request to file further submissions" on 12 September 2013, instructing Libya "to file submissions on specific issues arising from" the responses filed by the Defence and the Prosecutor to the Document in Support of the Appeal[44] (hereinafter: "Decision of 12 September 2013"). Libya's further submissions were filed on 23 September 2013[45] (hereinafter: "Libya's Further Submissions on Appeal"). On 30 September 2013, responses to those further

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[35] "Decision on the 'Application on behalf of Mishana Hosseinioun for Leave to Submit Observations to the Appeals Chamber pursuant to Rule 103'", 15 August 2013, ICC-01/11-01/11-404 (OA 4).
[36] "Observations on behalf of Mishana Hosseinioun pursuant to Rule 103", ICC-01/11-01/11-414 (OA 4).
[37] "OPCV's submissions on the observations filed by Ms Mishana Hosseinioun", ICC-01/11-01/11-421 (OA 4).
[38] "Prosecution Response to 'Observations on behalf of Mishana Hosseinioun pursuant to Rule 103'", ICC-01/11-01/11-422 (OA 4).
[39] "Defence Response to the 'Observations on behalf of Mishana Hosseinioun pursuant to Rule 103'", ICC-01/11-01/11-423 (OA 4).
[40] "Response of the Libyan Government to 'Observations on behalf of Mishana Hosseinioun pursuant to Rule 103'", ICC-01/11-01/11-426 (OA 4) (hereinafter: "Libya's Response to the Rule 103 Observations on Appeal").
[41] "Libyan Government's Request to file further submissions clarifying matters raised in the Prosecution and Defence Responses to 'Document in Support of Libya's Appeal against the "Decision on the admissibility of the case against Saif Al-Islam Gaddafi"'", ICC-01/11-01/11-389 (OA 4). Libya also filed the "Renewed request to make further submissions responding to those of the Prosecution and Defence", 9 September 2013, ICC-01/11-01/11-436.
[42] "Defence Response to the 'Libyan Government's Request to file further submissions clarifying matters raised in the Prosecution and Defence Responses to "Document in Support of Libya's Appeal against the 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'"'", ICC-01/11-01/11-393 (OA 4); "Prosecution Response to 'Libyan Government's request to file further submissions clarifying matters raised in the Prosecution and Defence Responses to "Document in Support of Libya's Appeal against the Decision on the admissibility of the case against Saif Al-Islam's Gaddafi"'", ICC-01/11-01/11-394 (OA 4). This document was originally filed confidentially but was reclassified as public pursuant to the "Order on the reclassification of documents" of 12 August 2013 (ICC-01/11-01/11-400 (OA 4).
[43] "Order in relation to the Libya's request for leave to file further submissions in relation to its appeal against the 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'", 31 July 2013, ICC-01/11-01/11-391 (OA 4).
[44] ICC-01/11-01/11-442 (OA 4), p. 3.
[45] "The Libyan Government's further submissions in reply to the Prosecution and Gaddafi Responses to 'Document in Support of Libya's Appeal against the "Decision on the admissibility of the case against Saif Al-Islam Gaddafi"', ICC-01/11-01/11-454-Conf (OA 4). A public redacted version was filed on the same day (ICC-01/11-01/11-454-Red (OA 4)).

submissions were filed by the Defence[46] (hereinafter: "Defence Response to Libya's Further Submissions on Appeal"), the Prosecutor[47] (hereinafter: "Prosecutor's Response to Libya's Further Submissions on Appeal") and the Victims[48] (hereinafter: "Victims' Response to Libya's Further Submissions on Appeal").

18. On 3 October 2013, Libya filed the "Libyan Government's Request for leave to file Consolidated Reply to the Observations (on the Libyan Government's further Submissions) filed by the Defence for Saif Al-Islam Gaddafi, the Office of the Prosecutor and the Office of the Public Counsel for Victims on 30 September 2013"[49] (hereinafter: "Libya's Request of 3 October 2013"). On 10 October 2013, the Defence filed a response to Libya's request[50] (hereinafter: "Defence Response of 10 October 2013").

III. PRELIMINARY ISSUES

A. Confidential filings

19. Many of the filings in this appeal, and during the pre-trial phase of the proceedings, have been filed non-publicly with, often, public redacted versions being filed thereafter (see above). In issuing this judgment, the Appeals Chamber has, to the extent possible, and in the interests of the publicity of the proceedings, referred only to information which is public or which the Appeals Chamber considers can be made public. However, as it has been necessary to refer to some non-public information, parts of this judgment have been redacted in the public version and a confidential version has also been issued.

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[46] "Defence Response to 'The Libyan Government's further submissions in reply to the Prosecution and Gaddafi Responses to "Document in Support of Libya's Appeal against the 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'"", ICC-01/11-01/11-458-Conf-Exp (OA 4). A public redacted version was filed on the same day (ICC-01/11-01/11-458-Red2 (OA 4)).

[47] "Prosecution Response to 'The Libyan Government's further submissions in reply to the Prosecution and Gaddafi Responses to Document in Support of Libya's Appeal against the Decision on the admissibility of the case against Saif Al-Islam Gaddafi'", ICC-01/11-01/11-460 (OA 4).

[48] "Observations on 'the Libyan Government's further submissions in reply to the Prosecution and Gaddafi Responses to "Document in Support of Libya's Appeal against the 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'"", ICC-01/11-01/11-459-Conf (OA 4).

[49] ICC-01/11-01/11-462 (OA 4).

[50] "Defence Response to the 'Libyan Government's Request for leave to file Consolidated Reply to the Observations (on the Libyan Government's further Submissions) filed by the Defence for Saif Al-Islam Gaddafi, the Office of the Prosecutor and the Office'", ICC-01/11-01/11-465-Conf (OA 4). A public redacted version was filed on the same date (ICC-01/11-01/11-465-Red (OA 4)), with corrigenda to both filed on 14 October 2013 (ICC-01/11-01/11-465-Conf-Corr (OA 4) and ICC-01/11-01/11-465-Red-Corr (OA 4)).

20. The Victims' Response to Libya's Further Submissions on Appeal was filed confidentially. In paragraph 9 thereof, the Victims state that, pursuant to regulation 23 *bis* (2) of the Regulations of the Court (hereinafter a regulation in the Regulations of the Court is referred to as "regulation"), they filed this document confidentially because Libya's Further Submissions on Appeal were filed confidentially.[51] However, they request that the document be made public, as it "does not contain any information that should be kept confidential".[52] No objections to this request have been filed. Pursuant to regulation 23 *bis* (3) of the Regulations of the Court, the Appeals Chamber orders the Registrar to reclassify this document as public.

B. Request by Libya for an oral hearing

21. Libya argues that an oral hearing should be convened in respect of this appeal, as "[t]he issues arising in this appeal are of such significance to warrant the exercise of the Chamber's discretion to convene an oral hearing",[53] submitting that they are novel and that "determination of this appeal will be of great interest to the broader international community, States and non-States parties alike".[54] It argues that "[a] public hearing will effect the greatest possible openness and transparency as to the criminal process pertaining to Mr Gaddafi" and "will foster a better understanding of the ICC's processes and procedures, thereby reinforcing perceptions of its legitimacy".[55] The Prosecutor and the Defence argue that the request should be rejected.[56]

22. Rule 156 (3) provides that "[t]he appeal proceedings shall be in writing unless the Appeals Chamber decides to convene a hearing". The Appeals Chamber has stated that rule 156 (3) "establishes as a norm that proceedings on appeal [...] should be conducted by way of written submissions. The rule nonetheless also vests the Appeals Chamber with discretion to convene a hearing. However, for the Appeals Chamber to exercise its discretion and to depart from this norm it must be furnished with cogent

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[51] Victims' Response to Libya's Further Submissions on Appeal, para. 9.
[52] Victims' Response to Libya's Further Submissions on Appeal, para. 9.
[53] Document in Support of the Appeal, para. 195.
[54] Document in Support of the Appeal, para. 195.
[55] Document in Support of the Appeal, para. 197.
[56] Prosecutor's Response to the Document in Support of the Appeal, para. 5; Defence Response to the Document in Support of the Appeal, para. 5.

reasons that demonstrate why an oral hearing *in lieu* of, or in addition to, written submissions is necessary" (footnote omitted).[57]

23. The Appeals Chamber considers that, in the circumstances of this case, there appears to be no reason to grant Libya's request. This is particularly so in light of the voluminous submissions that have been filed before the Pre-Trial Chamber in this matter, as elaborated upon further below in relation to ground three of this appeal, in addition to the fact that the parties were also provided with several opportunities to file submissions before the Appeals Chamber, as set out above. As the Appeals Chamber has found in the past, many issues in interlocutory appeals "are usually complex, and, particularly in the early years of the Court's existence, many of them are novel", but, and this is also the case in these proceedings, the parties "have been given sufficient opportunity and have addressed the issues comprehensively and exhaustively in their written submissions".[58] In addition, and again as the Appeals Chamber has also found in the past in relation to submissions "that an oral hearing will serve to guarantee the public nature of the proceedings", the Appeals Chamber recalls that the submissions on appeal are largely public and "the publicity of the proceedings is therefore guaranteed".[59] Accordingly, the request by Libya for an oral hearing is rejected.

C. The Defence's request to summarily dismiss Libya's arguments

24. The Defence requests that the Appeals Chamber summarily dismiss the appeal and all of Libya's grounds of appeal. It submits:

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[57] *Prosecutor v. Francis Kirimi Muthaura et al.*, "Decision on the 'Request for an Oral Hearing Pursuant to Rule 156(3)'", 17 August 2011, ICC-01/09-02/11-251 (OA) (hereinafter: "*Muthaura* Appeals Chamber Decision of 17 August 2011"), para. 10. *See also, Prosecutor v. William Samoei Ruto et al.*, "Decision on the 'Request for an Oral Hearing Pursuant to Rule 156(3)'", 17 August 2011, ICC-01/09-01/11-271 (OA) (hereinafter: "*Ruto* Appeals Chamber Decision of 17 August 2011"), para. 10. *See also, Prosecutor v. Francis Kirimi Muthaura et al.*, "Decision on the 'Request to Make Oral Submissions on Jurisdiction under Rule 156(3)'", 1 May 2012, ICC-01/09-02/11-421 (OA 4) (hereinafter: "*Muthaura* Appeals Chamber Decision of 1 May 2012"), para. 10; *Prosecutor v. Jean-Pierre Bemba Gombo*, "*Corrigendum to* Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled 'Decision on the Admissibility and Abuse of Process Challenges'", 19 October 2010, ICC-01/05-01/08-962-Corr (OA 3), para. 25.

[58] *Muthaura* Appeals Chamber Decision of 17 August 201, para. 11; *Ruto* Appeals Chamber Decision of 17 August 2011, para. 11. *See also, Muthaura* Appeals Chamber Decision of 1 May 2012, para. 13.

[59] *Muthaura* Appeals Chamber Decision of 1 May 2012, para. 11.

> Libya's Appeal should be summarily dismissed because it either (a) merely repeats arguments which it raised before the Chamber and which were rejected, without showing how the Chamber erred; (b) raises new arguments on appeal and seeks to adduce new materials, which were not before the Chamber when it rendered its Decision; and (c) misstates the findings of the Chamber. These are all grounds for summary or *in limine* dismissal.[60] [Footnote omitted.]

25. The Defence proceeds to submit that each ground of appeal should be summarily dismissed.[61] The Appeals Chamber considers that, in this case, sufficient argumentation has clearly been presented by Libya to warrant the Appeals Chamber addressing the grounds of appeal on their merits. The grounds of appeal raise important and serious legal and factual issues which deserve consideration by the Appeals Chamber. It would indeed be wholly inappropriate to summarily dismiss them in the manner suggested.

D. The Defence request that Libya's Further Submissions on Appeal be summarily dismissed for failure to comply with regulation 36 (3)

26. The Defence argues that Libya's Further Submissions on Appeal should be dismissed *in limine* for failing to comply with the stipulated word and page limit.[62] The Defence argues that Libya's filing constitutes an average of 436 words per page, breaching regulation 36 (3), which provides that an average page should not exceed 300 words.[63] It contends that had Libya complied with the requisite word limit per page, the page limit of the filing would have been exceeded by 6 pages.[64] The Defence submits that "[t]he Court must ensure that its Regulations are respected. Moreover the breach of the regulations is not negligible but significant. The Defence is obviously prejudiced in having to respond within the time limit to a lengthier filing, while itself keeping within the prescribed page limit."[65] The Defence argues that, as Libya did not seek authorisation to exceed the word and page limit, its submissions should be summarily dismissed and it should not be given the opportunity to re-file.[66]

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[60] Defence Response to the Document in Support of the Appeal, para. 6.
[61] Defence Response to the Document in Support of the Appeal, paras 18-40.
[62] Defence Response to Libya's Further Submissions on Appeal, paras 1.a., 2-6.
[63] Defence Response to Libya's Further Submissions on Appeal, para. 3.
[64] Defence Response to Libya's Further Submissions on Appeal, para. 4.
[65] Defence Response to Libya's Further Submissions on Appeal, para. 5.
[66] Defence Response to Libya's Further Submissions on Appeal, para. 6.

27. In the Decision of 12 September 2013, the Appeals Chamber stipulated expressly that Libya's Further Submissions on Appeal "shall not be longer than 20 pages",[67] which is, in fact, the default page limit for documents filed with the Registry (regulation 37 (1)). Also relevant is regulation 36 (3) which provides:

> All documents shall be submitted on A4 format. Margins shall be at least 2.5 centimetres on all four sides. All documents that are filed shall be paginated, including the cover sheet. The typeface of all documents shall be 12 point with 1.5 line spacing for the text and 10 point with single spacing for footnotes. An average page shall not exceed 300 words.

28. Libya's Further Submissions on Appeal indeed exceed the word limit prescribed in the Regulations of the Court and thereby effectively exceed the page limit which was expressly stipulated by the Appeals Chamber in the Decision of 12 September 2013. Libya did not file an application to extend this page limit pursuant to regulation 37 (2) ("The Chamber may, at the request of a participant, extend the page limit in exceptional circumstances"), a prerequisite for the filing of a document which is longer than originally ordered.[68] Accordingly, it seems that Libya's filing is in breach of regulation 36 (3), in addition to being in breach of the Decision of 12 September 2013.

29. Regulation 29 (1) provides that "[i]n the event of non-compliance of a participant with the provisions of any regulation, or with an order of a Chamber made thereunder, the Chamber may issue any order that is deemed necessary in the interests of justice". In the circumstances of this case, the Appeals Chamber considers that it is in the interests of justice to accept Libya's filing. The Appeals Chamber notes that part of Libya's filing is an application to submit additional evidence on appeal. The Appeals Chamber did not envisage this application when it fixed the page limit of 20 pages – and this application could have been made independently, which would thereby have reduced the overall amount by which Libya's Further Submissions on Appeal exceed the word and page limit. In addition, the proceedings were already at an advanced stage when this filing was received and three filings have been submitted in response. Ordering its re-filing would have the consequence that the possibility to file responses would also have to be permitted (even though the responses already

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[67] Decision of 12 September 2013, p. 3.
[68] *Prosecutor v. Laurent Gbagbo,* "Decision on requests related to page limits and reclassification of documents", 16 October 2012, ICC-02/11-01/11-266 (OA 2), para. 9.

filed adequately address the arguments raised), essentially entailing the filing of four additional documents in proceedings that have already been lengthy and complicated. Having stated this, the Appeals Chamber reiterates that parties are expected to comply with the requirements stipulated in the Court's legal texts and as laid down by the Chambers. Breaches of these requirements can entail, *inter alia*, rejection of documents filed.

E. Libya's Request of 3 October 2013

30. Libya filed Libya's Request of 3 October 2013 seeking leave to file a reply to the Defence Response to Libya's Further Submissions on Appeal, the Prosecutor's Response to Libya's Further Submissions on Appeal and the Victims' Response to Libya's Further Submissions on Appeal, all filed on 30 September 2013.

31. Libya submits that regulation 24 (5) allows for the filing of a reply to a response with the leave of a Chamber and that regulation 28 provides the Appeals Chamber with the discretion to order further submissions.[69] Libya submits that "[t]he need to correct inaccuracies or respond to new arguments raised in the participant submissions prior to a decision on the admissibility of the case constitutes good cause for the granting of leave to reply" (footnote omitted).[70] It submits that the responses raise issues that are inaccurate and require a reply by Libya "to ensure that the Appeals Chamber has all the relevant information and submissions before it in respect of the appeal".[71] Libya argues that it would confine its reply to addressing issues raised by the responses.[72] It argues that there is good cause to reply in relation to eight issues, which it then lists.[73]

32. The Defence asks that the Appeals Chamber reject the request.[74] It argues that although Libya states that it wishes to file a reply, "it would in effect be Libya's third opportunity to substantiate its appeal – a sur-reply of sorts".[75] It argues that "[t]he substantive issues, for which leave to reply is sought, have been fully litigated by all parties [...] [and] Libya has exhausted its right to be heard in relation to every aspect

[69] Libya's Request of 3 October 2013, para. 2.
[70] Libya's Request of 3 October 2013, para. 5.
[71] Libya's Request of 3 October 2013, para. 5.
[72] Libya's Request of 3 October 2013, para. 6.
[73] Libya's Request of 3 October 2013, para. 7.
[74] Defence Response of 10 October 2013, para. 49.
[75] Defence Response of 10 October 2013, para. 2.

of its own appeal".[76] The Defence argues that regulation 24 (5) does not apply in relation to regulation 28 submissions filed in the context of an interlocutory appeal.[77] In the alternative, it argues that Libya has not demonstrated good cause to file a reply.[78] The Defence also argues that Libya has forfeited the right to file a response to the Victims' Response to Libya's Further Submissions on Appeal, arguing that Libya's response to this document was due on 4 October 2013 (the day after the filing of Libya's Request of 3 October 2013) and, as Libya did not ask for an extension of time sufficiently in advance of this deadline, nor submit reasons as to why it failed to file its response within the deadline, it forfeits the right to file a response thereto.[79] Finally, it argues that granting the request "would impact on the expeditiousness of the proceedings, and prejudice the Defence".[80] The Prosecutor did not file a response to this request.

33. In the Decision of 12 September 2013, the Appeals Chamber, *inter alia*, granted Libya leave to file further submissions on appeal, and the Prosecutor, Defence and Victims leave to respond thereto. This decision was issued pursuant to regulation 28 and stated in relevant part:

> 12. In relation to the merits of the Request, the Appeals Chamber recalls its previous jurisprudence that establishes that the Regulations of the Court "do not foresee replies to responses to documents in support of the appeal for appeals under rules 154 and 155". Nevertheless, the Appeals Chamber has also held that, "should the arguments that are raised in a response to a document in support of the appeal make further submissions by the appellant necessary for the proper disposal of the appeal, the Appeals Chamber will issue an order to that effect pursuant to regulation 28 (2) of the Regulations of the Court, bearing in mind the principle of equality of arms and the need for expeditious proceedings". Therefore, the question before the Appeals Chamber is whether Libya should be allowed to file additional submissions pursuant to regulation 28 of the Regulations of the Court.
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> 13. The Appeals Chamber has carefully considered the Request. It notes that Libya wishes to address several issues enumerated over 20 pages. The Appeals Chamber grants the Request because there is a need for clarification, but requires Libya to limit its submissions to 20 pages. In light of this, the Appeals Chamber emphasises that submissions under regulation 28 of the Regulations of the Court are not intended to reiterate a position or demonstrate mere

[76] Defence Response of 10 October 2013, para. 4.
[77] Defence Response of 10 October 2013, paras 10-16.
[78] Defence Response of 10 October 2013, paras 17-40.
[79] Defence Response of 10 October 2013, paras 5-6, 41-43.
[80] Defence Response of 10 October 2013, p. 12.

> disagreements with the position of another party. The Appeals Chamber also stipulates that Libya must not repeat arguments it has already submitted in its responses to the observations of victims and of Ms Hosseinioun. [Footnotes omitted.]

34. In the operative part of the decision, the Appeals Chamber instructed Libya "to file submissions on specific issues arising from the responses" filed by the Prosecutor and the Defence and allowed the Prosecutor, Defence and Victims to respond thereto, and Libya, the Prosecutor and the Defence to respond to the observations of the Victims. This decision, therefore, effectively set out the filings the Appeals Chamber expected to receive in this phase of the proceedings, the indication being that filings in addition to those specifically stipulated in the decision were not anticipated. Leaving aside the question of whether it is possible for Libya to seek leave to file a reply to the responses filed, in addition to the question as to the appropriate legal basis, if any, for this, the Appeals Chamber does not consider it necessary to receive such additional submissions.

35. The Appeals Chamber recalls that, as elaborated upon further below in relation to ground three of this appeal, Libya was provided with several opportunities to file submissions before the Pre-Trial Chamber in the course of these proceedings, in addition to having the possibility to make oral submissions at a hearing. During these appeals proceedings, Libya has also filed four substantive documents on the appeal.[81] The Appeals Chamber considers that Libya has been provided with ample opportunity to argue its case. Concerning the specific issues regarding which Libya wishes to make further submissions, the Appeals Chamber observes that in relation to compliance with regulation 36 (3), given that the Appeals Chamber is accepting Libya's Further Submissions on Appeal, further arguments on this issue are unnecessary. Regarding Libya's request to submit additional evidence on appeal and its wish to make further submissions on issues related thereto (issues (ii) – (vii) in Libya's Request of 3 October 2013), the Appeals Chamber considers that further submissions on this request are unnecessary and that Libya already had the opportunity to make its case on these points when it submitted its request to submit additional evidence. The Appeals Chamber is not convinced that further submissions by Libya will assist it in reaching its decision on that particular request. Regarding the

[81] *See* Document in Support of the Appeal; Libya's Response to the Rule 103 Observations on Appeal; Libya's Response to Victims' Observations on the Appeal; Libya's Further Submissions on Appeal.

irrelevant or incorrect arguments in relation to Libya's submissions on admissibility (issue (viii)), as stated, Libya has been provided with sufficient opportunity to make its case.

36. Libya's Request of 3 October 2013 is accordingly rejected.

F. Libya's request to submit additional evidence on appeal

37. On 23 September 2013, in Libya's Further Submissions on Appeal, Libya included a request to submit additional evidence on appeal.[82] Libya submits that, on 19 September 2013, the initial hearing was held (in Libya) for Mr Gaddafi, Mr Al-Senussi and 37 others before the Accusation Chamber; Libya attaches minutes of this hearing and minutes of a decision to allow defence teams to view the accusation file.[83] Libya submits that counsel for Libya had just obtained the dossier given by the Prosecutor-General's office to that Chamber, this dossier comprising over 1000 pages in Arabic of witness statements, interviews and other documentary materials.[84] Libya requests,

> on the basis of Rule 149, as well as the Appeals Chamber's inherent competence to ensure the fair and expeditious conduct of proceedings before it, (i) admission of the annex as additional material relevant to the Appeal; and (ii) an opportunity to file, by 2 December 2013, the relevant extracts of the Accusation Chamber dossier and additional witness statements and evidential materials as well as limited submissions on their contents.[85] [Footnote omitted.]

38. Libya submits that this time frame is required in order to obtain translations of the documents in question.[86] Noting that the Appeals Chamber considers its jurisdiction to be corrective in nature, Libya recalls that the Appeals Chamber has "refused the admission of new evidence on appeal where this entails the mere assertion that the facts have changed since the previous decision on admissibility".[87] However, it distinguishes its request on two bases:

> 10. First, the material pertains to the investigation *during the period in relation to which the Admissibility Decision* was made. As already noted, the material could not have been provided to the Chamber as a result of Libyan law. It would

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[82] Libya's Further Submissions on Appeal, paras 4-11.
[83] Libya's Further Submissions on Appeal, paras 4, 6.
[84] Libya's Further Submissions on Appeal, para. 5.
[85] Libya's Further Submissions on Appeal, para. 8.
[86] Libya's Further Submissions on Appeal, para. 7.
[87] Libya's Further Submissions on Appeal, para. 9.

> be fundamentally unfair if compliance with its own criminal procedure precluded consideration by the Appeals Chamber of the Libyan Government's arguments.
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> 11. Second, the legal question of the extent to which the Court should presume the validity of states' domestic processes is in issue in the appeal, and Confidential Annex A sheds light upon this very point in respect of the *period to which the Admissibility Decision* [*sic*]. The material, therefore, is relevant to the present admissibility challenge.

39. The Prosecutor, Defence and Victims oppose this application. The Prosecutor argues that Libya has failed to show good cause to be accorded additional time, that granting this request would "effectively constitute a reversal of the Pre-Trial Chamber's decision setting out a reasonable timeframe for Libya to provide supporting materials" and that "the materials do not meet the requirements to be adduced as evidence on appeal".[88] In addition to arguing that Libya's submissions fail to meet the requirements of regulation 36 (3) (see above),[89] the Defence argues that the request should be dismissed *in limine* or on its merits.[90] The Victims argue that Libya's requests are "procedurally improper and should therefore be dismissed *in limine*".[91]

40. As referred to by Libya, the Appeals Chamber previously dealt with a request by a State, Kenya, to submit further material during appellate proceedings in relation to decisions declaring cases admissible before the ICC.[92] Kenya submitted an updated investigation report to the Appeals Chamber, asking it, as described by the Appeals Chamber,

> to accept the [report] "as further confirmation that the national investigation into the six ICC suspects is ongoing and progressing expeditiously" and "as further unequivocal evidence of the Government of Kenya's intentions and of its conduct in currently investigating the six suspects". Kenya reiterates its argument that "[t]he Appeals Chamber has acknowledged that national

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[88] Prosecutor's Response to Libya's Further Submissions on Appeal, para. 2. *See also*, paras 11-32.
[89] Defence Response to Libya's Further Submissions on Appeal, paras 2-6.
[90] Defence Response to Libya's Further Submissions on Appeal, paras 7-43.
[91] Victims' Response to Libya's Further Submissions on Appeal, para. 17.
[92] *Prosecutor v. William Samoei Ruto et al.*, "Decision on the 'Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility'", 28 July 2011, ICC-01/09-01/11-234 (OA) (hereinafter: "*Ruto* Appeals Chamber Decision of 28 July 2011"). *See also Prosecutor v. Francis Kirimi Muthaura et al.*, "Decision on the 'Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility", 28 July 2011, ICC-01/09-02/11-202 (OA), which is essentially identical.

> investigations and prosecutions may develop and change over time, and that therefore the determination of admissibility is an ongoing process which must be decided on the facts as they exist at the time of the admissibility proceedings". In another footnote, Kenya states that "[i]t would be illogical and a needless waste of court time and resources if the Government of Kenya would be required to file a second admissibility application in order to submit its latest investigative report to the Court".[93] [Footnotes omitted.]

41. The Appeals Chamber found that its jurisprudence required the report to be rejected.[94] It recalled that it had found in a previous judgment that "'the admissibility of a case must be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge'" (footnote omitted).[95] However, it stated that

> the expression "time of the proceedings" used by the Appeals Chamber in that judgment clearly referred to the time of the proceedings on the admissibility challenge before the Pre-Trial Chamber and not to the subsequent proceedings on appeal. Moreover, the Appeals Chamber also held that events which fall outside the scope of the relevant pre-trial or trial proceedings fall outside the scope of the appeal concerning those proceedings and should be rejected *in limine*.[96] [Footnote omitted.]

42. The Appeals Chamber stated that "[t]he function of the Appeals Chamber is not to decide anew on the admissibility of the case".[97] It continued:

> 13. As a corrective measure, the scope of proceedings on appeal is determined by the scope of the relevant proceedings before the Pre-Trial Chamber. The instant proceedings before the Pre-Trial Chamber concluded with the issuance of the Impugned Decision. Facts which postdate the Impugned Decision fall beyond the possible scope of the proceedings before the Pre-Trial Chamber and therefore beyond the scope of the proceedings on appeal. As the Updated Investigation Report concerns facts which postdate the Impugned Decision, it is not relevant for this appeal and must be rejected *in limine*.
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> 14. The Appeals Chamber is also not persuaded by Kenya's argument that the Appeals Chamber should accept the Updated Investigation Report in order to avoid Kenya having to bring a second challenge to the admissibility of the case. Article 19 of the Statute clearly distinguishes the bringing of a second challenge to the admissibility of the case from the bringing of an appeal against a Pre-

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[93] *Ruto* Appeals Chamber Decision of 28 July 2011, para. 3.
[94] *Ruto* Appeals Chamber Decision of 28 July 2011, para. 9.
[95] *Ruto* Appeals Chamber Decision of 28 July 2011, para. 10, referring to "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 (OA 8) (hereinafter: "*Katanga* Admissibility Judgment"), para. 56.
[96] *Ruto* Appeals Chamber Decision of 28 July 2011, para. 10.
[97] *Ruto* Appeals Chamber Decision of 28 July 2011, para. 11.

> Trial or Trial Chamber's decision on admissibility. If Kenya finds that the requirements for bringing a further challenge to the admissibility of proceedings are met, it should seek to bring such a challenge in accordance with article 19 (4) of the Statute rather than through appeals proceedings. [Footnote omitted.]

43. Contrary to Libya's arguments, the Appeals Chamber considers that these considerations equally apply in the instant case and on that basis its request to submit additional evidence on appeal should be rejected. In this regard, the Appeals Chamber is not convinced by the distinction being sought by Libya of its previous jurisprudence. As the Appeals Chamber has just recalled, its function is corrective in nature and "the scope of proceedings on appeal is determined by the scope of the relevant proceedings before the Pre-Trial Chamber".[98] With regard to the minutes of the hearing of 19 September 2013 and the minutes of the decision to allow the defence teams to view the accusation file (confidential annex A), as they concern a hearing that postdates the Impugned Decision, the Appeals Chamber reiterates that "[f]acts which postdate the Impugned Decision fall beyond the possible scope of the proceedings before the Pre-Trial Chamber and therefore beyond the scope of the proceedings on appeal".[99] Accordingly, the application to submit them as additional evidence must be rejected. Concerning the information which Libya wished to submit later as additional evidence, the Appeals Chamber notes that this information has not been considered by the Pre-Trial Chamber. In the circumstances of this case, it would not be appropriate for the Appeals Chamber to consider this material when the Pre-Trial Chamber has not done so. Accordingly, the request to submit this information must also be rejected.

44. Should Libya wish the above information to be considered by the Court, the correct avenue would rather be for it to make an application under article 19 (4) of the Statute, in which circumstances the Pre-Trial Chamber could decide whether to grant leave to Libya to bring a second challenge to the admissibility of the case ("In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial.").

IV. MERITS

45. Libya raises four grounds of appeal:

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[98] *Ruto* Appeals Chamber Decision of 28 July 2011, para. 13.
[99] *Ruto* Appeals Chamber Decision of 28 July 2011, para. 13.

i. The Chamber erred in law by holding that "a number of investigative steps" by the Libyan authorities, covering "discrete aspects" of the case before the ICC, failed to satisfy the "same conduct" test under article 17(1)(a) of the Statute;

ii. The Pre-Trial Chamber erred in fact and in law in finding that Libya has not substantiated that its domestic investigation covers the same case as that before the ICC;

iii. The Chamber erred procedurally, or acted unfairly, by failing to "take appropriate measures for the proper conduct of the procedure", thereby depriving Libya of the ability to rely upon highly relevant evidence in support of its admissibility challenge.

iv. The Chamber erred in fact and in law in finding that, due to the unavailability of its national judicial system, Libya is unable to obtain the accused or the necessary evidence and testimony or is otherwise unable to carry out its proceedings, pursuant to article 17(3) of the Statute.[100]

46. Libya submits:

The errors identified in the four grounds of appeal, cumulatively or in the alternative, materially affected the Impugned Decision in that, but for those errors, the Chamber would have found the case inadmissible. Further and alternatively, the errors identified in the four grounds of appeal, cumulatively or in the alternative, resulted in such unfairness in the admissibility proceedings as to affect the reliability of the Impugned Decision.[101]

47. Libya requests that the Impugned Decision be reversed and the case against Mr Gaddafi be found inadmissible.[102]

A. First ground of appeal

48. Under the first ground of appeal, Libya alleges:

The Chamber erred in law by holding that "a number of investigative steps" by the Libyan authorities, covering "discrete aspects" of the case before the ICC, failed to satisfy the "same conduct" test under article 17(1)(a) of the Statute;[103]

49. In respect of errors of law, the Appeals Chamber has held that it

will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed

[100] Document in Support of the Appeal, para. 3.
[101] Document in Support of the Appeal, para. 4.
[102] Document in Support of the Appeal, paras 5, 200.
[103] Document in Support of the Appeal, para. 3.

such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.[104]

50. This standard will guide the Appeals Chamber in its consideration of this ground of appeal.

1. Procedural context and relevant part of the Impugned Decision

51. In the Arrest Warrant Decision, the Pre-Trial Chamber decided to issue a warrant for the arrest of, *inter alia*, Mr Gaddafi for the crimes against humanity of murder and persecution, "committed across Libya from 15 February 2011 until at least 28 February 2011".[105] At paragraphs 36 to 39, the Pre-Trial Chamber set out alleged incidents in the course of which members of the Libyan security forces committed acts of murder. The same is done at paragraphs 42 to 64 in respect of the crime of persecution. The Pre-Trial Chamber found reasonable grounds to believe that Mr Gaddafi was criminally responsible for those crimes as an indirect co-perpetrator[106] and it set out Mr Gaddafi's criminal responsibility[107] and contributions to the criminal plan.[108] The Pre-Trial Chamber issued the Warrant of Arrest on the same day, wherein it summarised the allegations made and found reasonable grounds to believe that Mr Gaddafi was "criminally responsible as an indirect co-perpetrator" for the crimes of murder and persecution.[109]

52. In the Admissibility Challenge, Libya made submissions as to the progress of the domestic investigation in relation to Mr Gaddafi, stating that this investigation was initially conducted in respect of financial crimes and corruption, but later extended to "all crimes committed by Mr Gaddafi during the revolution ... starting from 17 February 2011".[110] Libya also made submissions as to the investigative steps that had been taken so far.[111] At the Oral Hearing of 9 October 2012, Libya specifically stated that the alleged crimes by Mr Gaddafi that it was investigating

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[104] *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled 'Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation'", 17 February 2012, ICC-02/05-03/09-295 (OA 2), para. 20.
[105] Arrest Warrant Decision, p. 41.
[106] Arrest Warrant Decision, para. 71 and para. 66 *et seq.*
[107] Arrest Warrant Decision, para. 72 *et seq.*
[108] Arrest Warrant Decision, para. 78 *et seq.*
[109] Warrant of Arrest, p. 6.
[110] Admissibility Challenge, para. 44, citing the Libyan Prosecutor-General's decision of 17 December 2011.
[111] Admissibility Challenge, paras 44-49.

included those that were listed at paragraphs 36 to 65 of the Arrest Warrant Decision.[112] In Libya's Further Submissions on Admissibility, Libya stated that the domestic investigation of Mr Gaddafi was "much broader than the ICC's investigation" (footnote omitted),[113] both in its temporal and geographical scope,[114] and attached 23 annexes relating to the investigation, as "samples" of evidence.[115] In Libya's Reply of 4 March 2013, Libya conceded that the evidence it had filed in relation to the ongoing investigations did not relate to all incidents mentioned in the Arrest Warrant Decision.[116] It submitted that further evidence could be provided, but that even without this, on the basis of the material already submitted, the Pre-Trial Chamber should be in a position to conclude that the domestic investigation covered substantially the same conduct as that of the Prosecutor.[117]

53. The Pre-Trial Chamber considered that it first needed "to determine whether the Libyan and the ICC investigations cover the same case" and that the evidence before it "must demonstrate that the Libyan authorities are taking concrete and progressive investigative steps in relation to such 'case'" (footnote omitted).[118] Reviewing previous relevant ICC jurisprudence, the Pre-Trial Chamber recalled that the *Lubanga* Pre-Trial Chamber had first found 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 before the Court'" (footnote omitted) and that this test was later endorsed by other Pre-Trial Chambers.[119] It noted that Pre-Trial Chambers had "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', without clarifying, however, what would be encompassed by the notion of 'incident'" (footnote omitted).[120] The Pre-Trial Chamber found that the Appeals Chamber, in the judgment in relation to admissibility in the case of *William Samoei Ruto et al.*,[121] had confirmed the validity of the 'same person/same

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[112] Oral Hearing of 9 October 2012, p. 22, lines 4-7.
[113] Libya's Further Submissions on Admissibility, para. 63.
[114] Libya's Further Submissions on Admissibility, paras 64-65.
[115] Libya's Further Submissions on Admissibility, para. 70.
[116] Libya's Reply of 4 March 2013, para. 40.
[117] Libya's Reply of 4 March 2013, para. 40.
[118] Impugned Decision, para. 73.
[119] Impugned Decision, para. 74.
[120] Impugned Decision, para. 75.
[121] *Prosecutor v. William Samoei Ruto et al.*, "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

conduct' test but that "rather than referring to 'incidents', the Appeals Chamber referred to the conduct 'as alleged in the proceedings before the Court'" and considered whether the domestic investigation covered "substantially the same conduct" as that alleged in the proceedings before the Court.[122] The Pre-Trial Chamber considered 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".[123]

54. In relation to the case before it, the Pre-Trial Chamber found that the conduct being investigated by Libya needed to be compared to that in the Warrant of Arrest and the Arrest Warrant Decision.[124] It noted that "[t]he 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" (footnote omitted).[125] It recalled that, in contrast, the Arrest Warrant 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, on the basis of which the Chamber was satisfied that [...] killings and inhuman acts amounting to persecution on political grounds were committed by the Security Forces [...] as part of an attack against the civilian demonstrators and/or perceived dissidents to Gaddafi's regime" (footnotes omitted).[126] It noted "that the events expressly mentioned [...] do not represent unique manifestations of the form of criminality alleged against Mr Gaddafi" and that they rather represented "samples of a course of conduct of the

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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) (hereinafter: "*Ruto* Admissibility Judgment"), para. 40. *See also*, *Prosecutor v. Francis Kirimi Muthaura et al.*, "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 (OA) (hereinafter: "*Muthaura* Admissibility Judgment"), para. 39. In the remainder of this judgment, citations are generally to the *Ruto* Admissibility Judgment only, and not to the *Muthaura* Admissibility Judgment, which is identical as regards the legal findings.

[122] Impugned Decision, para. 76.

[123] Impugned Decision, para. 77.

[124] Impugned Decision, para. 78.

[125] Impugned Decision, para. 80.

[126] Impugned Decision, para. 81.

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" (footnote omitted).[127] The Pre-Trial Chamber concluded:

> 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 in Benghazi, Misrata, Tripoli and other neighbouring cities, from 15 February 2011 to at least 28 February 2011.[128]

55. Having assessed the evidence provided by Libya in support of its submission that its investigation covered the same case as that of the Prosecutor, the Pre-Trial Chamber found that "the evidence presented satisfactorily demonstrates that a number of progressive steps directed at ascertaining Mr Gaddafi's criminal responsibility have been undertaken [...] and that an 'investigation' is currently ongoing on the domestic level".[129] As to the subject-matter of this investigation, the Pre-Trial Chamber recalled that it did "not expect the national investigation to cover the exact events that are mentioned in the [Arrest Warrant Decision]",[130] but that it must cover "the same conduct as that alleged in the Warrant of Arrest", setting out again the text of the last nine lines of paragraph 83 of the Impugned Decision (see above).[131] The Pre-Trial Chamber stated:

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[127] Impugned Decision, para. 82.
[128] Impugned Decision, para. 83.
[129] Impugned Decision, para. 132.
[130] Impugned Decision, para. 133.
[131] Impugned Decision, para. 133: 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

> 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.[132]

56. Notwithstanding this finding, the Pre-Trial Chamber concluded:

> 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.[133]

2. Determination by the Appeals Chamber

57. Libya argues that the Pre-Trial Chamber, having found that there was an ongoing domestic investigation covering "discrete aspects" of the case before the Court against Mr Gaddafi, should have concluded that the domestic investigation concerned the "same case", in terms of article 17 (1) (a) of the Statute, and that the Pre-Trial Chamber erred by requiring proof of the "actual contours" of the case and its "precise scope".[134]

58. This ground of appeal essentially revolves around the interpretation to be given to a "case" as referred to in article 17 (1) (a) of the Statute, and in particular how a case being investigated by the Prosecutor and one being investigated by Libya should be compared. Article 17 (1) (a) of the Statute provides:

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

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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".

[132] Impugned Decision, para. 134.

[133] Impugned Decision, para. 135.

[134] Document in Support of the Appeal, paras 44-45.

> (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;

59. The following three, inter-related issues are addressed in disposing of this ground of appeal. First, the meaning of the term "case", as referred to in article 17 (1) (a) of the Statute, including the role of underlying incidents in defining the scope of a case. Second, how to compare the cases under investigation by the Court and domestically to determine whether they are the same, as required by article 17 (1) (a). This includes addressing the requisite level of sameness of the investigations, the meaning of the phrase "substantially the same conduct", as used by the Appeals Chamber in the *Ruto* Admissibility Judgment,[135] and whether a State is investigating the same case if it has been established that "discrete aspects" of the case before the Court are being investigated domestically. And third, whether a State challenging the admissibility of a case before the Court is required to establish the "actual contours" or "precise scope" of the domestic investigation.

(a) The meaning of "case" in terms of article 17 (1) (a) of the Statute

60. In the *Ruto* Admissibility Judgment, the Appeals Chamber considered the interpretation of the term "case" in article 17 (1) (a) of the Statute in the context of an admissibility challenge under article 19 of the Statute. The Appeals Chamber stated:

> 37. [...] Article 17 (1) (a) to (c) sets out how to resolve a conflict of jurisdictions between the Court on the one hand and a national jurisdiction on the other. Consequently, under article 17 (1) (a), first alternative, the question is not merely a question of 'investigation' in the abstract, but is whether the *same case* is being investigated by both the Court and a national jurisdiction.
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> [...]
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> 39. The meaning of the words 'case is being investigated' in article 17 (1) (a) of the Statute must therefore be understood in the context to which it is applied. For the purpose of proceedings relating to the initiation of an investigation into a situation (articles 15 and 53 (1) of the Statute), the contours of the likely cases will often be relatively vague because the investigations of the Prosecutor are at their initial stages. The same is true for preliminary admissibility challenges under article 18 of the Statute. Often, no individual suspects will have been identified at this stage, nor will the exact conduct nor its legal classification be clear. The relative vagueness of the contours of the likely cases in article 18

[135] *Ruto* Admissibility Judgment, para. 40.

> proceedings is also reflected in rule 52 (1) of the Rules of Procedure and Evidence, which speaks of "information about the acts that may constitute crimes referred to in article 5, relevant for the purposes of article 18, paragraph 2" that the Prosecutor's notification to States should contain.
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> 40. In contrast, article 19 of the Statute relates to the admissibility of concrete cases. The cases are defined by the warrant of arrest or summons to appear issued under article 58, or the charges brought by the Prosecutor and confirmed by the Pre-Trial Chamber under article 61. Article 58 requires that for a warrant of arrest or a summons to appear to be issued, there must be reasonable grounds to believe that the person named therein has committed a crime within the jurisdiction of the Court. Similarly, under regulation 52 of the Regulations of the Court, the document containing the charges must identify the person against whom confirmation of the charges is sought and the allegations against him or her. Articles 17 (1) (c) and 20 (3) of the Statute, state that the Court cannot try a person tried by a national court for the same conduct unless the requirements of article 20 (3) (a) or (b) of the Statute are met. *Thus, the 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.[136] [Emphasis added, footnote omitted.]

61. Thus, the parameters of a "case" are defined by the suspect under investigation and the conduct that gives rise to criminal liability under the Statute.

62. In the present case, the same individual, Mr Gaddafi, is being investigated by the Prosecutor and in Libya. Therefore, this issue does not require further consideration.[137] In respect of the conduct giving rise to criminal liability, in this case, the Appeals Chamber notes that Mr Gaddafi is not alleged to have committed crimes with his own hand. Rather, the allegation is that he used the Libyan Security Forces to commit the crimes alleged: in this regard, in the Arrest Warrant Decision, the Pre-Trial Chamber found that Mr Gaddafi is responsible for the crimes against humanity of murder and persecution as an *indirect* co-perpetrator; the underlying criminal conduct is alleged to have been carried out by presumably a large number of direct perpetrators in the course of various incidents. For the purposes of defining a "case" in article 17 (1) (a) of the Statute, in situations such as the present, the Appeals Chamber considers that the conduct described in the incidents under investigation which is imputed to the suspect is a necessary component of the case. Such conduct

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[136] *Ruto* Admissibility Judgment, para. 40.
[137] The Pre-Trial Chamber noted that it was uncontested that the national investigation needed to cover the "same person". *See* Impugned Decision, para. 61.

forms the core of any criminal case because without it, there would be no case. At the same time, it is the conduct of the suspect him or herself that is the basis for the case against him or her: in the instant case, the crimes that were committed during the various incidents described in the Arrest Warrant Decision are imputed to Mr Gaddafi because he allegedly used the Security Forces to commit these crimes. Therefore, the "conduct" that defines the "case" is both that of the suspect, Mr Gaddafi, *and* that described in the incidents under investigation which is imputed to the suspect. "Incident" is understood as referring to a historical event, defined in time and place, in the course of which crimes within the jurisdiction of the Court were allegedly committed by one or more direct perpetrators. The exact scope of an incident cannot be determined in the abstract. What is required is an analysis of all the circumstances of a case, including the context of the crimes and the overall allegations against the suspect.

(b) Are the domestic and international cases the same?

63. The next issue that arises for determination is when it can be said that the cases under investigation by the Prosecutor and domestically are the same. As noted above, in the *Ruto* Admissibility Judgment, the Appeals Chamber stated that "the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court".[138] As already stated, the question of the individual under investigation does not require further consideration as it is not in dispute that the same individual, Mr Gaddafi, is being investigated by the Prosecutor and in Libya. As to the conduct under investigation, this was not a central issue in the *Ruto* Admissibility Judgment and the Appeals Chamber accordingly did not further define the phrase "substantially the same conduct". This question, however, presents itself in this ground of appeal. In particular, the question of the extent to which the conduct described in the incidents under investigation, which is imputed to Mr Gaddafi, must be the same.

64. Libya refers to the Pre-Trial Chamber's finding that "'it would not be appropriate to expect Libya's investigation to cover exactly the same acts of murder and persecution'".[139] It submits that "[t]he Chamber's own description of the conduct

[138] *Ruto* Admissibility Judgment, para. 40.
[139] Document in Support of the Appeal, para. 51, quoting the Impugned Decision, para. 83.

underlying the Warrant of Arrest and the [Arrest Warrant Decision] (with flexibility as to *types of crimes committed*) reflects this", stating that "[t]he inappropriateness of requiring exact correspondence is underlined by the requirement that 'for 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'" (footnote omitted).[140] Libya stresses the importance of the principle of complementarity and submits that "[t]o the extent possible [...] the Court must give effect to this strong presumption [in favour of domestic jurisdictions] by interpreting article 17 reasonably and flexibly in order to enable, rather than defeat, domestic proceedings".[141] It argues that it "was only required to adduce sufficient evidence to show generally that an investigation was ongoing into Mr. Gaddafi's control of state apparatus and security forces in the commission of crimes against civilians in relevant locations".[142] Referring to the idea of having to prove the same incidents, Libya argues that "the core of the test cannot be whether a domestic investigation addresses the same criminal outcomes, either as a matter of the law of complementarity in general or in the specific context of the *Gaddafi case*".[143] Libya argues:

> The word "conduct" is itself indicative of this. A criminal "event" or "incident" is not relevant *qua* conduct, but rather because incidents are a key aspect of *the subject matter of conduct*. Whether the same incidents are addressed by a criminal process (whether investigation, trial, or verdict) may be *evidence* as to whether the same conduct is addressed by it, but is not the central aspect of "conduct". Several persons could be responsible for the same criminal incident, particularly where the alleged mode of liability is not direct commission. But the reverse is not true: a person could not be held responsible for the same incident more than once through multiple types of conduct, as such convictions would be duplicitous.[144]

65. Libya argues "that the focus on 'conduct', means that there is considerable flexibility in respect of necessary similarity as to coverage of incidents between the domestic and international investigations", arguing that "[e]ven at the point of trial, when a higher standard of specificity can be expected of a case, it is less problematic

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[140] Document in Support of the Appeal, para. 52 (the reference in the footnote in this paragraph is incorrect and should rather be to the *Muthaura* Admissibility Judgment, para. 39).
[141] Document in Support of the Appeal, para. 56.
[142] Document in Support of the Appeal, para. 64.
[143] Libya's Further Submissions on Appeal, para. 24.
[144] Libya's Further Submissions on Appeal, para. 25.

to amend an indictment so as to include new *incidents*, than it is to allege new kinds of conduct in respect of those incidents".[145] Libya refers to jurisprudence from the *ad hoc* tribunals which stated that "[w]hether particular facts are 'material' depends on the nature of the Prosecution case. The Prosecution's characterization of the alleged criminal conduct and the proximity of the accused to the underlying crime are decisive factors in determining the degree of specificity with which the Prosecution must plead the material facts of its case in the indictment in order to provide the accused with adequate notice" (footnote omitted).[146] It submits that "the specificity demanded as regards alleged incidents varies depending upon the type of *conduct* alleged" (footnote omitted).[147] It submits that the Pre-Trial Chamber found it necessary to consider whether the domestic investigation addressed Mr Gaddafi's use of control to deter and quell the demonstrations of civilians and that "[t]his, the Chamber makes resoundingly clear, is the conduct in relation to which the admissibility assessment poses the question of substantial identity".[148]

66. The Prosecutor argues that the Pre-Trial Chamber "actually adopted a very broad interpretation of the 'substantially the same conduct' test".[149] However, she contends that

> while the Pre-Trial Chamber was correct in its conclusion, several issues remain unresolved from its interpretation and application of the "substantially the same conduct" test. The Chamber held that the determination of what is "substantially the same conduct" will vary according to the *concrete facts and circumstances* of the case and therefore requires a case-by-case analysis. However, it also held that in the case at hand the Appellant need not investigate the same *incidents* as those which form the basis of the crime for which the Court seeks the persons [*sic*] surrender. As such, it remains unclear which facts and circumstances are relevant to an assessment of "substantially the same conduct": i.e. whether it relates to the specific factual incidents which form the basis of the acts alleged as well as the forms of participation of the suspect and his or her alleged role, or only the latter. Moreover, the degree of sameness is [*sic*] encompassed by the term "substantially the same" is unclear: specifically, whether the word "substantially" actually alters the "same conduct" stipulation that is expressly

[145] Libya's Further Submissions on Appeal, para. 26.
[146] Libya's Further Submissions on Appeal, para. 26.
[147] Libya's Further Submissions on Appeal, para. 27.
[148] Libya's Further Submissions on Appeal, para. 30.
[149] Prosecutor's Response to the Document in Support of the Appeal, para. 48.

> contained within the Statute, or whether it serves rather to clarify how "same conduct" should be interpreted.[150] [Footnotes omitted.]

67. In relation to the phrase "substantially the same conduct", and specifically use of the word "substantially", the Prosecutor argues that "the Appeals Chamber sought to describe the nature of the test, rather than departing from it or proposing a different test where 'sameness' is not required".[151] She argues that discussion on this issue should start from focusing "on the required degree of sameness as it attaches to the term 'conduct'".[152] The Prosecutor submits that jurisprudence on *ne bis in idem* could be of assistance in this exercise, arguing that articles 17 and 20 of the Statute operate together in relation to complementarity, and setting out national jurisprudence and that from the European Court of Human Rights and European Court of Justice on the subject.[153] She argues:

> 64. In sum, and in light of the above case law, the Prosecution observes that use of the term "substantially" should not be understood to qualify "sameness" to mean that the *idem* in question (conduct) need *not* be the same. Rather, "substantially" serves to explain in relation to what "sameness" attaches, namely, to the substance of the criminal behavior. Thus, a case will be "substantially the same" if any difference in the underlying facts and circumstances are minor, such that the facts and circumstances may be described as essentially the same because they are inextricably linked together in time, space and by their subject-matter.
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> 65. If there is no inextricable linkage, but merely a re-occurrence of a similar act elsewhere, the two sets of facts cannot be described as the same in substance. Thus, if the focus of the national investigation or prosecution differs in any respect from the ICC case, the Chamber will need to scrutinize the national efforts closely, including reasons for such divergence, in order to determine whether the national authorities and the ICC are focused on substantially the same conduct.

68. The Prosecutor agrees that determining what constitutes "substantially the same conduct" will depend on the circumstances of the case, but states that "[n]onetheless, the case which forms the subject of an admissibility determination must be denoted by a set of clearly defined parameters that will permit ready comparison. If the given parameters are overly broad, effective comparison is rendered meaningless".[154] She

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[150] Prosecutor's Response to the Document in Support of the Appeal, para. 50.
[151] Prosecutor's Response to the Document in Support of the Appeal, para. 52.
[152] Prosecutor's Response to the Document in Support of the Appeal, para. 53.
[153] Prosecutor's Response to the Document in Support of the Appeal, paras 54-63.
[154] Prosecutor's Response to the Document in Support of the Appeal, para. 71.

argues that "the notion of 'incident' is necessary to identify the relevant parameters of time, place and subject-matter that will permit to compare the ICC case with the domestic case".[155] She recalls her previous submission that "although the Pre-Trial Chamber appeared to have departed from prior and consistent jurisprudence of other Pre-Trial Chambers which have defined 'case' as being incident-specific, its notion of 'conduct' was nonetheless capable of being reconciled with this earlier case-law" (footnote omitted).[156]

69. The Victims agree with the Prosecutor that there is a lack of clarity as to the facts and circumstances that could be relevant to determine 'substantially the same conduct', "and in particular whether it relates to the specific factual incidents which form the basis of the acts alleged before the Court" (footnote omitted).[157] They argue "that the Court should maintain a unitary and consistent approach to the notion of 'case', whose parameters are defined by the specific factual incidents and circumstances described for the purposes of this Admissibility Challenge in the [Arrest Warrant Decision]".[158]

70. In relation to whether "substantially the same conduct" is being investigated by Libya, the Appeals Chamber has already stated above that the conduct that defines the "case" as referred to in article 17 (1) (a) of the Statute, in situations such as the present, is both that of the suspect (Mr Gaddafi) and that described in the incidents under investigation which is imputed to the suspect.[159] It does not seem to be in dispute that the same conduct in relation to Mr Gaddafi must be under investigation. However, the question arises as to the extent to which it must be shown that the same incidents must be under investigation by both the Prosecutor and the State in question, the conduct alleged in those incidents being an integral part of the case against the suspect.

71. The Appeals Chamber considers that, ultimately, what constitutes the same case, as referred to in article 17 (1) (a) of the Statute, and in particular the extent to

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[155] Prosecutor's Response to Libya's Further Submissions on Appeal, para. 40.
[156] Prosecutor's Response to Libya's Further Submissions on Appeal, para. 42. *See also*, Prosecutor's Response to the Document in Support of the Appeal, paras 69-70.
[157] Victims' Observations on the Appeal, para. 39.
[158] Victims' Observations on the Appeal, para. 39.
[159] *Supra*, para. 62.

which there must be overlap, or sameness, in the investigation of the conduct described in the incidents under investigation which is imputed to the suspect, will depend upon the facts of the specific case. It is not possible to set down a hard and fast rule to regulate this issue. At the same time, the following may be said.

72. If, and perhaps most straightforwardly, the underlying incidents that the Prosecutor and the State are investigating are identical, the case will be inadmissible before the Court (subject to any finding of unwillingness or inability). At the other end of the scale, the Appeals Chamber finds it hard to envisage a situation in which the Prosecutor and a State can be said to be investigating the same case in circumstances in which they are not investigating *any* of the same underlying incidents. The real issue is, therefore, the degree of overlap required as between the incidents being investigated by the Prosecutor and those being investigated by a State – with the focus being upon whether the conduct is *substantially* the same. Again, this will depend upon the facts of the individual case. If there is a large overlap between the incidents under investigation, it may be clear that the State is investigating substantially the same conduct; if the overlap is smaller, depending upon the precise facts, it may be that the State is still investigating substantially the same conduct or that it is investigating only a very small part of the Prosecutor's case. For example, the incidents that it is investigating may, in fact, form the crux of the Prosecutor's case and/or represent the most serious aspects of the case. Alternatively, they may be very minor when compared with the case as a whole.

73. What is required is a judicial assessment of whether the case that the State is investigating sufficiently mirrors the one that the Prosecutor is investigating. The Appeals Chamber considers that to carry out this assessment, it is necessary to use, as a comparator, the underlying incidents under investigation both by the Prosecutor and the State, alongside the conduct of the suspect under investigation that gives rise to his or her criminal responsibility for the conduct described in those incidents.

74. In carrying out this assessment, a Chamber should consider any information provided by the State concerned as to why it is not investigating incidents that are being investigated by the Prosecutor and should take this into account in deciding whether the State in question is investigating substantially the same conduct. In addition, this judicial assessment should include a consideration of the interests of

victims and the impact on them of any decision that a case is inadmissible at the Court despite not all of the incidents being investigated domestically.

75. In the instant case, the Pre-Trial Chamber found that the evidence before it did not sufficiently demonstrate that Libya was investigating the same case.[160] However, it was "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".[161] Thus, the next question that needs to be addressed is whether a showing that a State is investigating "discrete aspects" of the case before the Court is sufficient to demonstrate that the State is investigating the same case in terms of article 17 (1) (a) of the Statute.

76. In this regard, Libya essentially submits that once it is established that a State is investigating "discrete aspects" of the (broad) case under investigation by the Prosecutor, it has been demonstrated that the same case is being investigated in terms of article 17 (1) (a) of the Statute. In Libya's submission, a State should only be required to present "minimal evidence of an ongoing investigation relating broadly to the 'same conduct' – including 'discrete aspects' thereof".[162] In support of the proposition that the Pre-Trial Chamber, therefore, should have found that Libya *was* investigating the same case, Libya raises several arguments. First, Libya argues that the Pre-Trial Chamber made a general error as regards the requisite level of "sameness" of the case.[163] Libya recalls the will of the drafters of the Statute to give a "'strong presumption in favour of national jurisdictions'" (footnote omitted),[164] and submits that the Court must, to the extent possible, "give effect to this strong presumption by interpreting article 17 reasonably and flexibly in order to enable, rather than defeat, domestic proceedings".[165] Libya also submits that the obligation to investigate is an obligation of conduct, not of result, and that it is therefore sufficient to show that the State is indeed investigating, even if an investigation by the Court

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[160] Impugned Decision, para. 134.
[161] Impugned Decision, para. 134.
[162] Document in Support of the Appeal, para. 63.
[163] Document in Support of the Appeal, para. 53 *et seq.*
[164] Document in Support of the Appeal, para. 55.
[165] Document in Support of the Appeal, para. 56.

would potentially be more efficient.[166] Libya submits that "[t]here is no reason of logic or principle why a partially complete investigation that relates to 'aspects' of the overall ICC case should be insufficient".[167] More generally, Libya submits that "a finding of inadmissibility by the Appeals Chamber in the present case would give effect to that intention [of the drafters] and further the eradication of impunity by empowering national jurisdictions in challenging transitional situations".[168]

77. Libya seems to be arguing that the Pre-Trial Chamber should trust Libya's stated intention to investigate Mr Gaddafi fully, even if there is currently only limited investigative activity taking place. The Appeals Chamber dismissed such an approach in the *Ruto* Admissibility Judgment, where it found that the argument that there must be some leeway to allow a domestic investigation to proceed was unmeritorious because "the purpose of the admissibility proceedings under article 19 of the Statute is to determine whether the case brought by the Prosecutor is inadmissible because of a jurisdictional conflict" and that "[u]nless there is such a conflict, the case is admissible".[169] In this sense, if it has only been established that "discrete aspects" of the case before the Court are being investigated domestically, it will most likely not be possible for a Chamber to conclude that the same case is under investigation.

78. The Appeals Chamber also considers, as the Defence notes, that 'complementarity' does not mean that all cases must be resolved in favour of domestic investigation.[170] Complementarity is regulated by article 17 of the Statute and the test prescribed therein; the Court's role is to ensure that it will not step in should a case be inadmissible under the relevant criteria. It is, however, not the case that all cases must be resolved in favour of domestic investigation. Therefore, as the Appeals Chamber has previously stated,

> [a]lthough article 17 (1) (a) to (c) of the Statute does indeed favour national jurisdictions, it does so only to the extent that there actually are, or have been, investigations and/or prosecutions at the national level. If the suspect or conduct

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[166] Document in Support of the Appeal, paras 65-68.
[167] Document in Support of the Appeal, para. 69.
[168] Document in Support of the Appeal, para. 74.
[169] *Ruto* Admissibility Judgment, para. 44.
[170] Defence Response to the Document in Support of the Appeal, para. 84.

have not been investigated by the national jurisdiction, there is no legal basis for the Court to find the case inadmissible.[171]

(c) The "contours of the case"

79. The Pre-Trial Chamber concluded that, on the basis of "the evidence, taken as a whole", it could not "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".[172] Earlier in the decision, it referred to summaries of witness statements not allowing it "to draw conclusions as to the precise scope of the domestic investigation".[173]

80. Libya submits on appeal that this standard was too exacting. According to Libya, "[a]n ongoing investigation is necessarily conducted in progressive steps and stages. Nothing in the terms of article 17(1)(a) suggests that the case 'being investigated' must have reached a stage at which the 'actual contours' or 'precise scope' of the final case have clearly emerged or been established".[174] In particular, Libya argues that it is inherent in an *ongoing* domestic investigation that there is a lack of specificity.[175] Libya submits that in the course of an investigation, the scope may change, until such time as the case actually reaches the trial stage.[176] It emphasises that under its procedural system it was unlikely that the precise scope of the case would be clear before the accusation stage.[177] It also submits that it is in the interests of the Court that the admissibility of a case be challenged as early as possible, and that this is also required by article 19 (5) of the Statute; it follows that it cannot be that the domestic investigation has to be at a stage where its "actual contours" and "precise scope" are clear.[178] Libya recalls the jurisprudence of the Appeals Chamber in the *Muthaura* Admissibility Judgment, which found that "the words 'is being investigated' merely 'signify *the taking of steps*'", which, in Libya's submission, "is necessarily a progressive investigation that proceeds in stages. It is

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[171] *Ruto* Admissibility Judgment, para. 44.
[172] Impugned Decision, para. 135.
[173] Impugned Decision, para. 123.
[174] Document in Support of the Appeal, para. 60.
[175] Document in Support of the Appeal, para. 57 *et seq.*
[176] Document in Support of the Appeal, para. 61.
[177] Document in Support of the Appeal, para. 62.
[178] Document in Support of the Appeal, para. 63.

obvious that the 'actual contours' and 'precise scope' of the domestic case become increasingly clear as the investigation progresses" (footnote omitted).[179]

81. The Prosecutor argues that the Pre-Trial Chamber did not err in requiring clarity as to the actual contours and precise scope of Libya's investigation; she argues that "[t]he Court cannot identify whether there is an ongoing national investigation in relation to the same case if it is unclear what the national case encompasses".[180] The Prosecutor submits that "any investigation, either at the early stages or when it approaches its completion, will have certain defining parameters. [...] If the parameters of the Libyan case are so unclear that it is not possible to discern which conduct is actually being investigated, then, simply, there is no concrete case at the national level that will permit comparison to the ICC case; i.e. there is no conflict of jurisdictions and the case is admissible before the Court" (footnote omitted).[181] The Prosecutor argues that if a State challenges admissibility, it "needs to substantiate it with concrete, tangible and pertinent evidence that proper investigations are currently ongoing. The State's assertions that 'best efforts' are taken is not determinative if such statement is not supported with evidence" (footnotes omitted).[182] She argues further that "there is no presumption in the Statute in favour of national proceedings that would alter the evidentiary standard to grant leniency to States in the fulfilment of the burden of proof and/or standard" (footnote omitted).[183]

82. The Defence submits that the Chamber's use of the words 'actual contours' and 'precise scope' "refers to an epistemological question, not to the substance of the investigation".[184] It submits that "[t]he Chamber was not setting a standard to which the investigations should have progressed – Libya simply did not provide enough evidence to even establish the investigation that it was alleging to exist".[185] It argues that "[t]he Chamber had correctly identified the requisite standard of proof, namely 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*

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[179] Document in Support of the Appeal, para. 69.
[180] Prosecutor's Response to the Document in Support of the Appeal, para. 42.
[181] Prosecutor's Response to the Document in Support of the Appeal, para. 43.
[182] Prosecutor's Response to the Document in Support of the Appeal, para. 74.
[183] Prosecutor's Response to the Document in Support of the Appeal, para. 75.
[184] Defence Response to the Document in Support of the Appeal, para. 76.
[185] Defence Response to the Document in Support of the Appeal, para. 76.

case'" (footnote omitted).[186] The Victims submit that it was clear that when the Pre-Trial Chamber "inquired about the 'precise contours' of the domestic case, it did so only because it lacked basic information regarding the subject-matter of the domestic proceedings against Mr Gaddafi".[187] They submit that "[p]rovision of evidence regarding the precise parameters of the domestic case is a prerequisite to the complementarity assessment. It enables the Court to assess the level of similarity between concurrent proceedings".[188]

83. The Appeals Chamber does not consider it to be inherent in an on-going investigation that its contours are unclear. As noted by the Prosecutor, any investigation – irrespective of its stage – will have certain defining parameters, and it is an indication that there is no concrete case under investigation if those parameters are unclear.[189] In this sense, in relation to what must be submitted by a State in its challenge to admissibility, it must be possible for a Chamber to compare what is being investigated domestically against what is being investigated by the Prosecutor in order for it to assess whether the same case (substantially the same conduct) is being investigated. To make this assessment, the contours of the case being investigated domestically (and indeed by the Prosecutor) must be clear.

84. Concerning the argument that article 19 (5) of the Statute requires that a challenge to admissibility be submitted as early as possible, the Appeals Chamber does not agree that it follows from this that it is not possible for a domestic investigation to be at a stage where its "actual contours" and "precise scope" are clear.[190] Article 19 (5) provides that "[a] State [...] shall make a challenge at the earliest opportunity". As found in the *Ruto* Admissibility Judgment in relation to the argument that a challenge needed to be made, pursuant to this provision, as soon as a summons to appear had been issued "and therefore [the State] could not be 'expected to have prepared every aspect of its Admissibility Application in detail in advance of this date'" (footnote omitted), the Appeals Chamber stated that "[a]rticle 19 (5) of the Statute requires a State to challenge admissibility as soon as possible once it is in a

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[186] Defence Response to the Document in Support of the Appeal, para. 76, quoting the *Muthaura* Admissibility Judgment, para. 61.
[187] Victims' Observations on the Appeal, para. 25.
[188] Victims' Observations on the Appeal, para. 28.
[189] Prosecutor's Response to the Document in Support of the Appeal, para. 43.
[190] Document in Support of the Appeal, para. 63.

position to actually assert a conflict of jurisdictions" (footnote omitted).[191] Therefore, as soon as a State can present its challenge in such a way that it can show a conflict of jurisdictions, it must be submitted. To be successful, this challenge must be able to show what is being investigated by the State (the contours or parameters of the case) such that the Court is able to compare this against what is being investigated by the Prosecutor. It may be that those contours will develop as time goes on, but again, any investigation, irrespective of its stage, will have defining parameters. If a State is unable to present such parameters to the Court, no assessment of whether the same case is being investigated can be meaningfully made. In such circumstances, it would be unreasonable to suggest that the Court should accept that an investigation, capable of rendering a case inadmissible before the Court, is underway.

(d) Impact of the Appeals Chamber's findings on the Impugned Decision

85. The Appeals Chamber has concluded that the parameters of a "case", as referred to in article 17 (1) (a) of the Statute, are defined by the suspect under investigation and the conduct that gives rise to criminal liability under the Statute.[192] The "conduct" that defines the "case", in situations such as the present, is both that of the suspect and that described in the incidents under investigation which is imputed to the suspect.[193] In assessing admissibility, what is required is a judicial assessment of whether the case that the State is investigating sufficiently mirrors the one that the Prosecutor is investigating.[194] To be able to carry out the assessment as to whether the same case is being investigated, it will be necessary for a Chamber to know the contours or parameters of the investigation being carried out both by the Prosecutor and by the State.[195]

86. The Appeals Chamber notes that the Pre-Trial Chamber concluded, having analysed the evidence before it, that that evidence did "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

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[191] *Ruto* Admissibility Judgment, para. 46. *See also*, para. 100.
[192] *Supra* para. 61.
[193] *Supra* para. 62.
[194] *Supra* para. 73.
[195] *Supra* para. 83.

Warrant of Arrest issued by the Court".[196] The Appeals Chamber has found that it must be possible for the Pre-Trial Chamber to discern the contours of the investigation being carried out at the national level in order for it to be able to compare if the same case is being investigated domestically as that being investigated by the Prosecutor. As the Pre-Trial Chamber required just that, the Appeals Chamber can find no error in its legal conclusion.

(e) Purported insufficient reasoning

87. Libya submits, in the alternative, that the Impugned Decision is tainted by an error of law because it failed "to provide a reasoned opinion explaining why 'a number of investigative steps' did not satisfy the requirements of article 17(1)(a), and why an additional element of proof or the 'actual contours' and 'precise scope' of the case was required".[197] Libya avers that the Pre-Trial Chamber failed to explain how it arrived at this requirement in light of the *Muthaura* Admissibility Judgment[198] and that it did not explain why it moved from the requirement of "substantially the same conduct" in that judgment "to the more exacting requirement of proof of the 'actual contours' and 'precise scope' of the investigation in relation to that conduct".[199] It argues that "[t]he Chamber failed to address pertinent factors, such as the particular stage of a domestic investigation within the broader context of the Libyan criminal justice system, and why it chose not to draw reasonable inferences from these factors in favour of inadmissibility".[200] Libya submits that the Pre-Trial Chamber simply stated that the issue would require a case-by-case analysis.[201] Recalling jurisprudence of the Appeals Chamber and that of other tribunals (namely, the International Criminal Tribunal for the former Yugoslavia and the State Court of Bosnia and Herzegovina) as to the requirements for a reasoned opinion,[202] it submits that "[b]ased on this general statement on 'case-by-case' analysis of the evidence, the Chamber does not explain anywhere why the 'same conduct' test requires proof of the 'actual contours' and 'precise scope' of the domestic investigation".[203] It argues that therefore the Pre-Trial Chamber clearly failed to provide a reasoned opinion, which is "an error

[196] Impugned Decision, para. 135.
[197] Document in Support of the Appeal, para. 75.
[198] Document in Support of the Appeal, paras 76-77.
[199] Document in Support of the Appeal, para. 77.
[200] Document in Support of the Appeal, para. 77.
[201] Document in Support of the Appeal, para. 79.
[202] Document in Support of the Appeal, para. 78.
[203] Document in Support of the Appeal, para. 80.

of law and/or procedural error requiring the Appeals Chamber to reverse the Impugned Decision in relevant part".[204]

88. The Prosecutor argues that the Impugned Decision was sufficiently reasoned in line with relevant jurisprudence and that there is, therefore, no error.[205] The Defence argues that Libya's submissions in this regard are unsubstantiated and should be dismissed.[206]

89. The Appeals Chamber has found, in different contexts, that "[t]he extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the Pre-Trial Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion".[207] It has also found that "[t]he reasons for a decision should be comprehensible from the decision itself".[208] The Appeals Chamber has reversed decisions for lack of reasoning,[209] but has also found that, although the reasoning in a decision was sparse, it was not so lacking that the Chamber in question failed to fulfil its obligation to provide a reasoned decision.[210]

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[204] Document in Support of the Appeal, para. 80.
[205] Prosecutor's Response to the Document in Support of the Appeal, paras 81-85.
[206] Defence Response to the Document in Support of the Appeal, paras 101-102.
[207] *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for redactions under Rule 81'", 14 December 2006, ICC-01/04-01/06-773 (OA5) (hereinafter: "*Lubanga* Appeals Chamber Judgment (OA5) of 14 December 2006"), para. 20. *See also*, *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81'", 14 December 2006, ICC-01/04-01/06-774 (OA 6) (hereinafter: "*Lubanga* Appeals Chamber Judgment (OA6) of 14 December 2006"), para. 30; *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the Decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence'", 3 May 2011, ICC-01/05-01/08-1386 (OA 5) (OA 6), para. 59.
[208] *Lubanga* Appeals Chamber Judgment (OA6) of 14 December 2006, para. 33.
[209] *Lubanga* Appeals Chamber Judgment (OA5) of 14 December 2006; *Lubanga* Appeals Chamber Judgment (OA6) of 14 December 2006.
[210] *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'", 13 February 2007, ICC-01/04-01/06-824 (OA 7), paras 124, 136, 139; *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled 'Decision on application for interim release'", 16 December 2008, ICC-01/05-01/08-323 (OA), paras 53, 66; *Prosecutor v. Laurent Koudou Gbagbo*, "Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled 'Decision on the 'Requête de la Défense demandant la mise

90. The Appeals Chamber considers that the Impugned Decision was sufficiently reasoned. The Pre-Trial Chamber analysed the question of whether Libya was investigating the same case in detail, both from a legal and factual perspective. Recalling the aforementioned jurisprudence regarding the sufficiency of reasoning, the Appeals Chamber considers that the Impugned Decision indicates with sufficient clarity the basis of the decision. It is perfectly possible to understand, from the Impugned Decision, the Pre-Trial Chamber's conclusions and how it arrived at them and the Appeals Chamber accordingly does not find any error.

91. For the reasons set out above, the Appeals Chamber dismisses the first ground of appeal.

B. Second ground of appeal

92. Under the second ground of appeal, Libya alleges:

> The Pre-Trial Chamber erred in fact and in law in finding that Libya has not substantiated that its domestic investigation covers the same case as that before the ICC;[211]

93. The Appeals Chamber's standard of review in relation to legal errors has been set out above.[212] Regarding factual errors, the Appeals Chamber has held that it will not interfere with factual findings of a first-instance Chamber unless it is shown that that Chamber "committed a clear error, namely: misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts" (footnote omitted).[213] Regarding the misappreciation of facts, the Appeals Chamber has also stated that it "will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will

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en liberté provisoire du président Gbagbo'"", 26 October 2012, ICC-02/11-01/11-278-Red (OA), paras 46-50.

[211] Document in Support of the Appeal, para. 3.

[212] *Supra* paras 49-50.

[213] *Ruto* Admissibility Judgment, para. 56; *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa'", 2 December 2009, ICC-01/05-01/08-631-Red (OA 2), para. 61, citing *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release", 9 June 2008, ICC-01/04-01/07-572 (OA 4), para. 25. *See also*, *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled 'Decision on application for interim release'", 16 December 2008, ICC-01/05-01/08-323 (OA), para. 52.

interfere only in the case where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it" (footnote omitted).[214] These standards of review will guide the Appeals Chamber in its consideration of this ground of appeal.

1. Procedural context and relevant part of the Impugned Decision

94. The evidence submitted by Libya in support of its Admissibility Challenge comprised primarily eleven annexes to the Admissibility Challenge (Annexes A-K) and 23 annexes to Libya's Further Submissions on Admissibility (Annexes 1-23). In the analysis that follows, these annexes are simply referred to by their letter or number. As set out in more detail in the background to the first ground of appeal above, Libya argued before the Pre-Trial Chamber that its investigation was broader than that being undertaken by the Prosecutor, but that it included the crimes that were listed at paragraphs 36 to 65 of the Arrest Warrant Decision; Libya also argued, as seen in more detail in relation to ground three below, that it could provide further evidence to the Pre-Trial Chamber to substantiate its challenge.

95. In the Impugned Decision, the Pre-Trial Chamber stated that, in relation to the standard of proof, it was guided by the Appeals Chamber "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'" (footnote omitted).[215] It stated that "[i]n the view of the Chamber, such evidence shall *demonstrate* that Libya is taking concrete and progressive steps towards ascertaining Mr Gaddafi's responsibility".[216] It recalled that the Appeals Chamber had "mentioned interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses", stating that "[t]herefore, the Chamber has reminded Libya of the necessity to provide concrete, tangible and pertinent evidence that proper investigations are currently ongoing" (footnotes omitted).[217] The Pre-Trial Chamber recalled its Decision of 7 December 2012 in which it had stated that evidence "means all material capable of proving that an investigation is ongoing and that appropriate

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[214] *Ruto* Admissibility Judgment, para. 56. *See also*, *Prosecutor v. Callixte Mbarushimana*, "Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled 'Decision on the 'Defence Request for Interim Release'", 14 July 2011, ICC-01/04-01/10-283 (OA), paras 1, 17.
[215] Impugned Decision, para. 54, referring to the *Muthaura* Admissibility Judgment, para. 61.
[216] Impugned Decision, para. 54.
[217] Impugned Decision, para. 55, referring to the *Muthaura* Admissibility Judgment, para. 1.

measures are being envisaged to carry out the proceedings", and documents "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".[218]

96. Turning to the documents submitted by Libya, the Pre-Trial Chamber first stated that

> [m]any 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. Only those documents which may have a bearing on this issue will be considered hereunder along with, when pertinent, the arguments raised by the parties and the participants.[219] [Footnote omitted.]

97. The Pre-Trial Chamber assessed, in detail, four categories of evidence that Libya had submitted (documents, summaries of witness statements, three witness statements and intercepts). Having done so, it found, as set out in more detail above, that it had been shown "that an 'investigation' is currently ongoing at the domestic level".[220] However, it concluded that "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".[221]

2. Determination by the Appeals Chamber

98. The arguments raised under the second ground of appeal fall into two groups: first, allegations that the Pre-Trial Chamber erred in the evaluation of the evidence that Libya submitted in the proceedings relating to Mr Gaddafi;[222] and second, allegations that the Pre-Trial Chamber erred in not considering evidence that had been submitted to it in relation to Libya's admissibility challenge in respect of Mr Al-Senussi[223] (hereinafter: "Libya's *Al-Senussi* Admissibility Challenge")[224] and that it

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[218] Impugned Decision, para. 55, quoting from the Decision of 7 December 2012, paras 10-11.
[219] Impugned Decision, para. 106.
[220] Impugned Decision, para. 132.
[221] Impugned Decision, para. 135.
[222] Document in Support of the Appeal, paras 85-91, 96-109, 116-118.
[223] "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute", dated 2 April 2013 and registered 3 April 2013, ICC-01/11-01/11-307-Conf-Exp. A public redacted version was registered on the same date (ICC-01/11-01/11-307-Red2).
[224] Document in Support of the Appeal, paras 92-95.

failed to take into account evidence that would have been available had the Chamber granted Libya's requests for a further six weeks to present evidence and/or to travel to Tripoli to inspect the case file to review the evidence collected in the Libyan investigation.[225]

99. Libya argues that this ground of appeal raises allegations of errors of fact and law.[226] In addition, regarding the second part of the second group of allegations (failing to take into account evidence it would have adduced), Libya argues that this was a procedural error, but also that "declining to take into account such evidence also amounted to a clear error of fact, which had a material effect on the Impugned Decision".[227] The Appeals Chamber considers that, irrespective of Libya's characterisation, all of the arguments raised under the second allegation essentially concern allegations of procedural errors, which overlap with the arguments raised by Libya under the third ground of appeal. As a result, the Appeals Chamber considers it appropriate only to consider the first set of allegations under this ground of appeal. The second set of allegations will be considered within the third ground of appeal.

100. In addressing this ground of appeal, the Appeals Chamber will first consider the specific allegations of error made by Libya in relation to the evidence referred to by the Pre-Trial Chamber in the Impugned Decision, before considering Libya's argument as to the Pre-Trial Chamber's approach to the evaluation of the evidence. The Appeals Chamber's analysis is carried out against the standard of review applicable to factual errors, as set out above.[228] The Appeals Chamber underlines in this regard the deferential nature of the Appeals Chamber's review of factual findings of first-instance Chambers. Accordingly, at issue is not whether the Appeals Chamber would have reached the same factual conclusion as the Pre-Trial Chamber, but rather whether the Pre-Trial Chamber's factual conclusion could be reasonably reached based on the evidence before it.

(a) Specific allegations of factual errors

(i) Alleged factual errors in the assessment of documents

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[225] Document in Support of the Appeal, paras 110-115.
[226] Document in Support of the Appeal, para. 82.
[227] Document in Support of the Appeal, para. 115.
[228] *Supra* para. 93.

101. Libya argues that the Pre-Trial Chamber

> erroneously discounted the evidential value of various documents provided by Libya as it wrongly regarded that evidence as either: "falling short of clarifying the scope or subject matter of the domestic investigation" or "not contain[ing] specific information as to the criminal conduct under investigation in Libya". In some cases the Chamber made no apparent findings of fact on the documents and gave no reasoning as to the weight to be attributed to such documents in spite of the fact that they demonstrably were of a sufficient degree of specificity and probative value relevant to Libya's arguments concerning the 'same case' issue.[229] [Footnotes omitted.]

102. The first two documents in relation to which Libya argues that errors were made are confidential Annexes E and F. In the Impugned Decision, the Pre-Trial Chamber noted that Annexes E and F relate to the domestic investigation of Mr Al-Senussi (Annex E being a report by the Ministry of Justice of the National Transitional Council of Libya and Annex F being an opinion by the Assistant of the Military Prosecutor-General).[230] The Pre-Trial Chamber stated:

> 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.[231]

103. On appeal, Libya argues that the Pre-Trial Chamber "appears to have disregarded Annexes E and F almost entirely in its evaluation of the evidence" and that its finding on the annexes was "a clear error of fact".[232] It submits that "[n]o reasonable Chamber would have disregarded the fact that the very proceedings before it relate to a joined case against [Mr Gaddafi and Mr Al-Senussi] for their joint and individual roles in committing crimes against humanity (including murder) during the 2011 revolution" and that "[t]his fact alone ought to have provided more than a sufficient basis for presuming the relevance of evidential materials pertaining to [Mr Al-Senussi] when determining the scope and contours of the Libyan domestic investigation".[233] Libya states that the documentary evidence submitted by Libya in the *Gaddafi* admissibility proceedings shows that Mr Gaddafi and Mr Al-Senussi's

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[229] Document in Support of the Appeal, para. 86.
[230] Impugned Decision, para. 115.
[231] Impugned Decision, para. 115.
[232] Document in Support of the Appeal, para. 87.
[233] Document in Support of the Appeal, para. 88.

cases "were intended to be joined and tried together in Libya as they related to similar allegations of crimes (including murder and persecution) committed during the revolution and were accordingly linked" (footnote omitted).[234] Libya refers to public Annex 11 (a memorandum dated 13 January 2013 by the Head of Investigation Committee at the Attorney-General's Office, suggesting the joinder of the cases of Mr Gaddafi and Mr Al-Senussi and others) stating that it "supports the proposition of a joinder of the domestic cases on the basis that 'such crimes are inseparable in both facts and committers without undermining the legal structure on which the investigations were built'".[235] It argues that "[i]t is for this reason" that much of the evidence in both sets of admissibility proceedings refers to the other.[236] Libya submits that the relationship between the two cases is also evidenced by the fact that it had initially sought to challenge the admissibility of the cases of Mr Gaddafi and Mr Al-Senussi together "even though it requested severance of the two admissibility challenges on the basis that at that time Mr. Al-Senussi had not yet been extradited to Libya".[237] Libya submits that "it was [*sic*] clear error of fact for the Chamber to both fail to have proper regard to [these annexes] which contained specific and probative evidence in relation to the contours of the Libyan investigative proceedings in relation to [Mr Al-Senussi and Mr Gaddafi] and was, at the very least, important and relevant contextual evidence in showing the seriousness of the crimes with which the domestic investigation was concerned".[238]

104. The Appeals Chamber finds that Libya has not established that the Pre-Trial Chamber's findings in relation to Annexes E and F were unreasonable. [REDACTED]

105. [REDACTED][239] [REDACTED]. The Appeals Chamber therefore does not consider that the Pre-Trial Chamber's finding that "the information provided falls short of clarifying the scope and subject matter of the domestic investigation" was unreasonable.[240]

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[234] Document in Support of the Appeal, para. 89.
[235] Document in Support of the Appeal, para. 89.
[236] Document in Support of the Appeal, para. 89.
[237] Document in Support of the Appeal, para. 90.
[238] Document in Support of the Appeal, para. 91.
[239] [REDACTED].
[240] Impugned Decision, para. 115.

106. Annex F is [REDACTED][241]

107. In relation to the references in Annexes E and F to Mr Al-Senussi, the Pre-Trial Chamber found that there was no evidence that there is a link between the *domestic* investigation of Mr Al-Senussi and Mr Gaddafi.[242] Again, as far as these two annexes are concerned, the Appeals Chamber finds that this conclusion was not unreasonable. As to Libya's argument that Annex 11 demonstrated the link between the two cases, this annex merely suggests that the two cases be joined; the Appeals Chamber has not been directed to evidence that was before the Pre-Trial Chamber that such a joinder had indeed been ordered. As the Defence notes, it would have been for Libya to demonstrate the relevance of these particular documents to the Chamber's admissibility assessment.[243] The very fact that the proceedings are joined before the Court, or indeed were going to be joined in Libya, does not, in and of itself, mean that the only reasonable interpretation is that any documents related to Mr Al-Senussi have probative value as far as demonstrating that Libya is investigating the same case as the Prosecutor in relation to Mr Gaddafi.

108. In sum, the Appeals Chamber considers that the Pre-Trial Chamber's findings that Annexes E and F fall short of clarifying the subject matter of the domestic investigation of Mr Gaddafi and that there was no evidence, in these documents, of the link between the domestic case in relation to Mr Al-Senussi and that of Mr Gaddafi, are not unreasonable.

109. Libya next argues that the Pre-Trial Chamber erred in its assessment of confidential Annexes 5, 6 and 7. At paragraph 118 of the Impugned Decision, the Pre-Trial Chamber referred to these three annexes, but did not reach any conclusion as to the weight it would give to them. Nevertheless, it is reasonable to assume that they formed the basis for the Pre-Trial Chamber's finding, at paragraph 134 of the Impugned Decision, that aspects of the domestic investigation "include instances of mobilisation of militias and equipment by air, the assembly and the mobilization of military forces at the Abraq Airport [...]", as they appear to be the only items of evidence on the record that would support such a finding.

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[241] [REDACTED]
[242] Impugned Decision, para. 115.
[243] Defence Response to the Document in Support of the Appeal, para. 120.

110. Libya argues that the Pre-Trial Chamber erred "by seemingly reaching no conclusions at all as to the weight to be attributed to these documents".[244] Libya argues that the three annexes "provide evidential support for the fact that the Libyan investigation encompasses allegations against Saif Al-Islam Gaddafi for arranging finance and logistical matters (including the mobilization of mercenaries) for the implementation of the criminal plan to quell demonstrations by any means", and that this specific type of criminal conduct alleged in respect of Mr Gaddafi is also referred to in the Arrest Warrant Decision, citing to specific paragraphs of that decision.[245] Although it refers to the Pre-Trial Chamber's findings in paragraph 134, it states that "it reached no conclusion as to the proper weight to be attributed to these materials" which "is a clear error of fact that materially affected the Chamber's determination".[246] Libya argues that "[a]s entirely independent documents which specifically attest to the logistics for the transport of mercenaries (i.e. the specific criminal conduct alleged against Mr Gaddafi), they are highly relevant and probative".[247] It submits that "[f]ailing to place substantial weight upon them is a factual error which no reasonable fact finder could have made on the totality of the evidence".[248]

111. The Appeals Chamber finds that the Pre-Trial Chamber's findings regarding these annexes were not unreasonable. The annexes in question [REDACTED]. While it is true that paragraph 118 of the Impugned Decision does not indicate what the Pre-Trial Chamber concluded in relation to the three annexes, it is, as set out above, apparent from the Pre-Trial Chamber's finding at paragraph 134 of the Impugned Decision that it did attribute weight to them and concluded that they, among other items, illustrated 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".[249] Libya has not established why it was unreasonable for the Pre-Trial Chamber not to give those documents more weight.

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[244] Document in Support of the Appeal, para. 96. *See also*, para. 98.
[245] Document in Support of the Appeal, para. 97.
[246] Document in Support of the Appeal, para. 98.
[247] Document in Support of the Appeal, para. 98.
[248] Document in Support of the Appeal, para. 98.
[249] Impugned Decision, para. 134. *See also*, Prosecutor's Response to the Document in Support of the Appeal, para. 102.

112. Libya submits further that the Pre-Trial Chamber erred by giving insufficient weight to five other documents (Annexes I and 3, 9, 10 and 11).[250]

113. In relation to, *inter alia*, confidential Annex I and Annex 3, the Pre-Trial Chamber noted "that a number of the annexes presented by Libya were prepared by the Libyan authorities for the purpose of the Admissibility Challenge", including these two annexes.[251] It stated that "[h]aving 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".[252] In relation to, *inter alia*, Annexes 9, 10 and 11, the Pre-Trial Chamber noted that they gave "general information about the investigation against Mr Gaddafi".[253] It "observe[d] that they do not contain specific information as to the criminal conduct under investigation in Libya".[254]

114. Libya submits that the Pre-Trial Chamber erred "in failing to attribute sufficient weight" to these five annexes and by finding that they did "'not contain specific information as to the criminal conduct under investigation in Libya'".[255] Having provided information as to each annex, Libya submits that it is clear from its extracts that "each contains specific and probative evidence as to the exact criminal conduct under investigation in Libya which is capable of satisfying a reasonable Chamber that the Libyan investigation covers the 'same case' as that at the ICC".[256] In Libya's submission, "[t]he Chamber's failure to attribute significant evidential weight to them was unreasonable and an abuse of discretion".[257] It argues that the Pre-Trial Chamber's conclusion "could not reasonably have been reached on the evidence

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[250] Document in Support of the Appeal, paras 99-100.
[251] Impugned Decision, para. 116.
[252] Impugned Decision, para. 116.
[253] Impugned Decision, para. 117.
[254] Impugned Decision, para. 117.
[255] Document in Support of the Appeal, para. 99.
[256] Document in Support of the Appeal, para. 100.
[257] Document in Support of the Appeal, para. 100.

before it" and was "a clear error of fact that had a material impact on the Impugned Decision" (footnote omitted).[258]

115. Confidential Annex I is [REDACTED]. Annex 3 is a letter, dated 21 January 2013, by the Libyan Ministry of Justice to Mr Gehani, one of Libya's representatives in the proceedings before the Court. It states that the Ministry of Justice confirms that the "factual incidents" referred to at paragraphs 36 to 65 of the Arrest Warrant Decision are "included within the scope of the criminal investigation against Saif Al-Islam Gaddafi" and that the allegations as to his individual criminal responsibility are covered by evidence gathered in that investigation. The letter also states that 50 witness statements have been gathered so far, including statements from "important witnesses", and provides further details as to steps taken in the investigation.

116. For the following reasons, the Appeals Chamber finds that Libya has not established that the Pre-Trial Chamber should have accorded significant weight to these two annexes and that the failure to do so was unreasonable. In respect of Annex I, the Pre-Trial Chamber's finding that it does not contain "specific information as to the criminal conduct under investigation"[259] was not unreasonable. While this annex gives a general indication as to the investigation of Mr Gaddafi and the crimes covered, it does not provide information as to any incidents under investigation. In respect of Annex 3, the Appeals Chamber considers that it amounts essentially to an assertion that a broad investigation is ongoing without, however, substantiating this assertion. As referred to by the Prosecutor,[260] in the *Ruto* Admissibility Judgment, the Appeals Chamber has confirmed as correct the assertion that "'a statement by a Government that it is *actively investigating* is not [...] determinative. In such a case the Government must support its statement with tangible proof to demonstrate that it is actually carrying out relevant investigations'. In other words, there must be evidence with probative value" (footnote omitted).[261] This does not mean that a Chamber should not attribute *any* weight to statements by a government that it is investigating; the jurisprudence simply states that such statements should be supported and that they are not determinative. The Appeals Chamber notes that

[258] Document in Support of the Appeal, para. 100.
[259] Impugned Decision, para. 116.
[260] Prosecutor's Response to the Document in Support of the Appeal, para. 105.
[261] *Ruto* Admissibility Judgment, para. 63 (ellipses in original).

Annex I was prepared by the Deputy Prosecutor of the Office of the Public Prosecutor and Annex 3 was prepared by the Ministry of Justice (with, apparently, input from the Attorney General's Office). However, the same logic applies. The Appeals Chamber considers that it can reasonably be said that the probative value of such blanket assertions is low, in the absence of more specific proof as to what investigative steps have been taken, and in relation to which incidents. Thus, the Appeals Chamber considers that it was not unreasonable for the Pre-Trial Chamber not to place more weight on these documents.

117. Second, regarding Annexes 9 and 10 (detention orders in relation to Mr Gaddafi dated 30 October and 13 December 2012, respectively[262]), the Pre-Trial Chamber found that they provide "general information" about the Libyan investigation and that "they do not contain specific information as to the criminal conduct under investigation in Libya".[263] Libya argues that apart from one issue referred to in Annex 9, the "specific allegations of criminal conduct" in both annexes mirror or replicate the allegations before the Court.[264]

118. Annexes 9 and 10 mention charges to which Mr Gaddafi is said to have pleaded (although the Defence argues before the Appeals Chamber that the information given is partly contradictory[265]); however, in respect of many of these charges, no details are provided as to what those charges are. Most detail is provided in Annex 9, in relation to Mr Gaddafi's alleged participation in the shooting of persons in Benghazi, the killing of a journalist and the distribution of weapons, although even then the details given in relation to those incidents are sparse.[266]

119. Contrary to Libya's submissions, the Appeals Chamber considers that the Pre-Trial Chamber's conclusions in relation to these annexes were not unreasonable. Those documents do not refer to investigations as such, only charges – and the charges themselves are not set out. It is, therefore, unnecessary to consider further the

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[262] Note that the date on the first page of Annex 10 is 3 December 2012; however, the dates given on the following pages are 13 December 2012, which also appears to be the date on the first page of the Arabic original.
[263] Impugned Decision, para. 117.
[264] Document in Support of the Appeal, para. 99.
[265] Defence Response to the Document in Support of the Appeal, para. 135.
[266] *See also* Prosecutor's Response to the Document in Support of the Appeal, para. 106.

Defence's submissions as to the dubious probative value of the annexes and alleged contradictions.[267]

120. Finally, Annex 11 is a memorandum, dated 13 January 2013, prepared by the Head of the Investigation Committee at the Attorney-General's Office suggesting the joinder of Mr Gaddafi's case with those of Mr Al-Senussi and others. It states that "[t]he investigation showed that, what the country went through was based on [*sic*] systematic general policy used by a group of the previous regime's figures, headed by the accused in the case examined (i.e. Saif al-Islam Gaddafi) and the accused in the case No. 630/2012 National Security such as [...] Abdullah Mohamed AlSenousi [*sic*] [...]. Their acts constitute a general framework for a set of serious crimes such as mass killings, random killing, looting, sabotage, rape and the spread the spirit of discord and fragmentation of national unity. Such crimes are inseparable in both facts and committers [...]". However, as noted by the Prosecutor and the Defence,[268] there is no detail given as to when and where these crimes are alleged to have been committed. Therefore, the Appeals Chamber considers that the Pre-Trial Chamber's finding that the annex contains "general information about the investigation against Mr Gaddafi" and does "not contain specific information as to the criminal conduct under investigation in Libya"[269] was not unreasonable.

(ii) Alleged factual errors in the assessment of summaries of witness statements

121. Libya submits that "[t]he Pre-Trial Chamber erred in fact and law [...] in failing to attribute sufficient weight to the summaries of witness statements contained in Annex C [...]".[270]

122. The Pre-Trial Chamber summarised the content of confidential Annex C.[271] It found, *inter alia*, that the "summaries indicate, in 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; was the brain behind the killings; held meetings and communications with the High Security Committee, Abdullah Al-

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[267] Defence Response to the Document in Support of the Appeal, para. 135.
[268] Prosecutor's Response to the Document in Support of the Appeal, para. 107; Defence Response to the Document in Support of the Appeal, para. 136.
[269] Impugned Decision, para. 117.
[270] Document in Support of the Appeal, para. 101.
[271] Impugned Decision, paras 119-120.

Senussi and Khamis Gaddafi; ordered the mobilisation, recruitment and arming of supporters including young men to fight, kill and suppress the protesters even if that lead [*sic*] to the eradication of the Libyan people" (footnotes omitted).[272] The Pre-Trial Chamber stated that, in its view

> 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 the evidence. Thus, the Chamber disagrees with the Defence contention that these summaries have no greater evidential value than the assertions of a State.[273] [Footnote omitted.]

123. The Pre-Trial Chamber dismissed the Defence's arguments that it is impossible to ascertain from the summaries whether the witnesses were providing first-hand accounts of the events or simply recounting versions of events, noting that this "misapprehends the purpose of the admissibility determination" and that the Pre-Trial Chamber was not called upon to decide if the evidence was strong enough to establish Mr Gaddafi's criminal responsibility, but "whether Libya is taking steps to investigate Mr Gaddafi's responsibility in relation to the same case".[274] The Pre-Trial Chamber noted that the witness summaries had "not been accompanied by samples of the actual evidence".[275] It noted that one of the statements seemed to have been annexed to Libya's Further Submissions on Admissibility but stated that it was "not certain that this is indeed the case".[276] It stated:

> 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, 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 lack of specificity of the summaries do not allow the Chamber to draw conclusions as to the precise scope of the domestic investigation.[277] [Footnote omitted.]

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[272] Impugned Decision, para. 120.
[273] Impugned Decision, para. 121.
[274] Impugned Decision, para. 122.
[275] Impugned Decision, para. 123.
[276] Impugned Decision, para. 123.
[277] Impugned Decision, para. 123.

124. Libya submits that the latter finding is "patently wrong and illustrates an unreasonable approach to the level of detail needed in order to satisfy the Appeals Chamber's requirement that submissions pertaining to the issue of 'same case' are supported by evidence of sufficient specificity and probative value".[278] Libya argues that the Appeals Chamber has not found that witness summaries are insufficient to meet this standard, and it submits that these summaries were prepared in good faith by the Deputy Prosecutor and Vice Prosecutor in office at the time who were both subject to the relevant professional conduct provisions; Libya submits that "contrary to the Chamber's erroneous finding that it would be desirable to verify the accuracy of their contents by comparison with their corresponding witness statements, they ought – without any further enquiry – to have been treated by the Chamber as documents which, in the absence of an evidenced challenge to their authenticity, were both highly relevant to the 'same case' issue and which were to be attributed substantial evidential weight".[279] Libya also submits that, as summarised by the Pre-Trial Chamber at paragraph 120 of the Impugned Decision (reproduced in part above), the summaries "provide significant details of the Libyan investigation into Mr Gaddafi's alleged conduct".[280] Libya argues:

> In the context of the very significant detail showing the scope and contours of the criminal conduct alleged against [Mr] Gaddafi which can be readily gleaned from a review of pages 1 to 5 of the witness summaries at Annex C (as is apparent in the Chamber's summary of them [...]) it is abundantly clear that the Chamber's conclusion that they lacked detail and specificity is manifestly wrong. It is a conclusion that no reasonable Chamber could have reached. The error materially impacted on the Impugned Decision, as a proper evaluation of the witness summaries would have led to the conclusion that the Libyan domestic investigation [...] related to the 'same case' as before the ICC.[281]

125. The Appeals Chamber finds that the Pre-Trial Chamber did not err in its conclusions as to Annex C because it has not been established that its findings were unreasonable. Annex C is [REDACTED].[282] [REDACTED]

126. In light of the arguments by Libya, the Appeals Chamber would first note that whether a witness summary lacks authenticity is something that will need to be

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[278] Document in Support of the Appeal, para. 102.
[279] Document in Support of the Appeal, para. 102.
[280] Document in Support of the Appeal, para. 103.
[281] Document in Support of the Appeal, para. 104.
[282] Annex C, ICC stamped p. 2. [REDACTED]

assessed on a case-by-case basis. It is not the case that witness summaries inherently lack probative value for the purposes of supporting an admissibility challenge. However, the Appeals Chamber considers that, contrary to what is argued by Libya, the Pre-Trial Chamber did not fail to accord weight to the witness summaries because they lacked authenticity; the Pre-Trial Chamber's ultimate conclusion was based on the deficiencies in the content of the summaries (as set out above). As pointed out by the Prosecutor, the Pre-Trial Chamber considered Annex C and "engaged in a detailed and full assessment of the information provided and adhered to them certain probative value",[283] and addressed and dismissed the arguments raised by the Defence in respect of Annex C.[284] The Appeals Chamber notes that the Pre-Trial Chamber found 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" (footnote omitted).[285] However, it immediately went on to state that "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".[286] In this regard, its ultimate conclusions were based on the content of the summaries and not their authenticity. The Appeals Chamber notes that although the witness summaries indicate that the investigation may be broad, covering several incidents in various parts of the country, they are also relatively short and lacking in detail. Taken as a whole, the Appeals Chamber cannot find that the Pre-Trial Chamber's conclusion that the witness summaries "do not allow the Chamber to draw conclusions as to the precise scope of the domestic investigation"[287] was unreasonable.

(iii) Alleged factual errors in the assessment of witness statements

127. Libya argues that the Pre-Trial Chamber erred in failing to give three witness statements (Annexes 4, 15 and 16) "decisive weight".[288] It acknowledges that "although it makes no express finding as to the weight to be attributed from these witness statements", the Pre-Trial Chamber, in paragraph 134 of the Impugned Decision, "does appear to have placed a degree of weight on two out of the three

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[283] Prosecutor's Response to the Document in Support of the Appeal, para. 111.
[284] Prosecutor's Response to the Document in Support of the Appeal, para. 112.
[285] Impugned Decision, para. 123.
[286] Impugned Decision, para. 123.
[287] Impugned Decision, para. 123.
[288] Document in Support of the Appeal, para. 105.

statements".[289] However, Libya submits that, since these statements "were highly probative pieces of evidence containing specific allegations as to the criminal conduct of [Mr] Gaddafi forming part of the domestic investigation, they ought to have been accorded substantial weight by the Chamber and ought to have been the subject of an express finding as to the weight attributed to them".[290] Libya argues that the errors

> had a material impact on the decision as a proper evaluation of the evidence would have resulted in the Chamber ruling that the Libyan investigation related to the same case as that before the ICC. By contrast, the Chamber's findings were ones that could not reasonably be reached on the evidence before it.[291]

128. Regarding confidential *ex parte* Annex 4, the Pre-Trial Chamber summarised its contents and found that it was "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".[292] Libya argues that the Pre-Trial Chamber erred in this finding and submits that it was "plainly wrong" that the Pre-Trial Chamber did not give such a statement "considerable evidential weight".[293] Libya argues:

> Had the Chamber adopted a correct approach to consideration of the evidence as a whole, it would have been apparent that this witness statement provides important contextual information in support of most of the allegations and prospective charges against Mr. Gaddafi in the domestic investigation who, as one of the suspected orchestrators and leaders, is being investigated for his logistical role in implementing the criminal plan to suppress demonstrators at any cost.[294] [Footnote omitted.]

129. The Appeals Chamber can find no error in the Pre-Trial Chamber's findings. Annex 4 is a statement recounting events at the Abraq airport. As stated by the Pre-Trial Chamber, it is not apparent from it "that it was taken in relation to an investigation of the role of Mr Gaddafi, if any, in the events described by the witness".[295] As acknowledged by Libya, while the Pre-Trial Chamber did not make any other specific finding as to the weight to be attached to Annex 4, it appears to be the basis for a finding at paragraph 134 of the Impugned Decision. The Appeals

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[289] Document in Support of the Appeal, para. 105.
[290] Document in Support of the Appeal, para. 106.
[291] Document in Support of the Appeal, para. 108.
[292] Impugned Decision, para. 124.
[293] Document in Support of the Appeal, para. 106.a.
[294] Document in Support of the Appeal, para. 106.a.
[295] Impugned Decision, para. 124.

Chamber considers that Libya has not substantiated why it was unreasonable for the Pre-Trial Chamber not to place more weight on Annex 4.

130. Regarding confidential *ex parte* Annex 15, the Pre-Trial Chamber summarised the witness statement, including noting that it states that "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".[296] The Pre-Trial Chamber dismissed the Defence argument that the "statement bears hallmarks of witness coercion" as being "wholly speculative".[297] In relation to the time of executions described in the statement, the Pre-Trial Chamber noted that the case before the ICC encompassed events until *at least* 28 February 2011, dismissing an argument by the Defence that the events testified to fell outside the temporal scope of the case.[298] In that regard, the Pre-Trial Chamber also noted that "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".[299]

131. Libya argues that the Pre-Trial Chamber erred when finding that Mr Gaddafi promised to distribute weapons without doing so, as the statement clearly says that the witness heard from his neighbours that Mr Gaddafi distributed Kalashnikovs; this, leaving aside "the fact that evidence establishing that a leader is planning to supply weapons to direct perpetrators is critical evidence in leadership cases".[300] Libya also submits that the Pre-Trial Chamber erred in finding that the witness statement merely may indicate that Libya is taking investigative steps in relation to the same case when it "recounts in detail a chilling incident" (which Libya then describes).[301] Libya submits:

> This eyewitness account of the killing of an unarmed civilian, combined with a hearsay account of daily killings outside of the Gaddafi compound ought to have been given decisive weight by the Court on the 'same case' issue. It attests

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[296] Impugned Decision, para. 125.
[297] Impugned Decision, para. 125.
[298] Impugned Decision, para. 125.
[299] Impugned Decision, para. 125.
[300] Document in Support of the Appeal, para. 106.b.
[301] Document in Support of the Appeal, para. 106.b.

> to the gathering of both direct and indirect evidence in support of allegations against Mr. Gaddafi for the core crimes of murders and persecutions of protestors. Accordingly, and undeniably, it is a witness statement directly matching the criminal conduct alleged in the ICC case. The Trial [*sic*] Chamber's error of fact in failing to attribute decisive weight to this piece of evidence was therefore patently wrong.[302]

132. The Appeals Chamber does not find that the Pre-Trial Chamber's overall findings were unreasonable. First, in relation to the handing out of weapons, the Appeals Chamber accepts that the Pre-Trial Chamber's summary was incomplete and that the statement says that the witness heard from his neighbours that Mr Gaddafi distributed Kalashnikovs. However, this does not establish that the Pre-Trial Chamber did not give sufficient weight to the statement as a whole and that its finding was unreasonable. In this regard, the Appeals Chamber notes that the Pre-Trial Chamber specifically refuted two arguments put forward by the Defence.[303] In addition, Libya's argument that the Pre-Trial Chamber was wrong to hold that Annex 15 only *may* indicate that Libya is investigating Mr Gaddafi is unpersuasive. As the Prosecutor notes, the Pre-Trial Chamber used the word "may" in responding to an argument by the Defence that the document could not be relied upon, to indicate that the Chamber *could* rely on it.[304]

133. Finally, regarding confidential *ex parte* Annex 16, the Pre-Trial Chamber summarised the witness statement[305] and dismissed the Defence's argument that the witness was not reliable as he had an incentive to implicate other people "in order to minimise his own liability".[306] It stated that the argument was "speculative and exceeds the purpose of the 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".[307]

134. Libya argues that the Pre-Trial Chamber erred "by not making any express findings as to the proper weight to be attributed" to this annex.[308] It submits that, given its content, it should "have been regarded as decisive of the 'same case'

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[302] Document in Support of the Appeal, para. 106.b.
[303] Impugned Decision, para. 125.
[304] Prosecutor's Response to the Document in Support of the Appeal, para. 119.
[305] Impugned Decision, para. 126.
[306] Impugned Decision, para. 127.
[307] Impugned Decision, para. 127.
[308] Document in Support of the Appeal, para. 106.c.

issue".[309] It submits that "[a]ll of this alleged conduct is contained in the [Arrest Warrant Decision] and accordingly this statement alone demonstrates that the Libyan investigation relates to the same case as that before the ICC. The Trial [*sic*] Chamber's error of fact in failing to attribute decisive weight to this piece of evidence was therefore patently wrong".[310]

135. The Appeals Chamber can find no error in the Pre-Trial Chamber's overall approach to this evidence. As noted by the Prosecutor,[311] the Pre-Trial Chamber considered this witness statement and seemingly based parts of its factual findings on it, when referring, at paragraph 134 of the Impugned Decision, to "certain events in Benghazi on 17 February 2011, and the arrest of journalists and activists against the Gaddafi regime" being investigated by Libya. However, the Appeals Chamber considers that it was not unreasonable for the Pre-Trial Chamber not to find this statement "decisive of the 'same case' issue"[312] because this statement does not, in and of itself, establish that Libya was investigating the same case.

(iv) Alleged factual errors in the assessment of intercepts

136. In the Impugned Decision, the Pre-Trial Chamber discussed the content of the intercepts (confidential Annex 17) and recounted Libya's submissions as to how they were obtained and authenticated.[313] Regarding authentication, the Pre-Trial Chamber stated that it was

> not persuaded that the reliability of the recordings should be discounted as suggested by the Defence. 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.[314] [Footnote omitted.]

137. As to the date of the conversations, the Pre-Trial Chamber dismissed a Defence argument that there was "no temporal or factual overlap between the intercepts

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[309] Document in Support of the Appeal, para. 106.c.
[310] Document in Support of the Appeal, para. 107.
[311] Prosecutor's Response to the Document in Support of the Appeal, para. 125.
[312] Document in Support of the Appeal, para. 106.c.
[313] Impugned Decision, paras 128-130.
[314] Impugned Decision, para. 131.

submitted and the case before the Court".[315] It stated that "[i]t is clear from the discussions [...] that the intercept communications relate to the repression of demonstrations against the Gaddafi regime from 15 February 2011 until *at least* 28 February 2011".[316] The Impugned Decision does not contain a specific finding as to the weight the Pre-Trial Chamber gave to Annex 17.

138. Libya submits that the Pre-Trial Chamber erred in fact by failing to give "decisive weight" to Annex 17.[317] Libya states that the Pre-Trial Chamber found that the intercepts, "which show Mr. Gaddafi's integral role in the planning and coordination of the use of force to suppress civilians and his oversight of activities throughout Libya merely 'relate to the repression of demonstrations against the Gaddafi regime from 15 February 2011 until at least 28 February 2011'".[318] However, it submits that, as they "record Mr. Gaddafi ordering the killing of rebels; planning for the use of guns against unarmed protestors; and stating that there will be no retreat, it ought to have attributed decisive weight to this document".[319] It argues that the Pre-Trial Chamber's error "had a material impact on the decision as a reasonable evaluation of the intercepts would have led to the conclusion that the Libyan investigation related to the same case as that before the ICC. By contrast, the Chamber's finding with respect to the intercepts was one that could not reasonably be reached on the evidence before it".[320]

139. The Appeals Chamber is not persuaded by Libya's arguments in relation to Annex 17. Although the Pre-Trial Chamber could have made a finding in relation to the weight it would attach to these transcripts, it is clear from its findings that it considered the information contained therein, refuting arguments by the Defence, in its overall assessment of the evidence presented by Libya. Libya has failed to establish that it was unreasonable for the Pre-Trial Chamber not to give them more weight.

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[315] Impugned Decision, para. 131.
[316] Impugned Decision, para. 131.
[317] Document in Support of the Appeal, para. 109.
[318] Document in Support of the Appeal, para. 109.
[319] Document in Support of the Appeal, para. 109.
[320] Document in Support of the Appeal, para. 109.

(b) Unreasonable approach to evaluation of evidence

140. Libya also alleges that the Pre-Trial Chamber "erred by carrying out a flawed evaluation of the evidence relied upon by Libya to satisfy the same case test".[321] It

> affirms the requirement of the Appeals Chamber that a State challenging admissibility must substantiate its case by means of evidence of a "sufficient degree of specificity and probative value". However, it asserts that the Pre-Trial Chamber erred in law and fact when assessing the evidentiary materials relied upon by Libya so as to wrongly conclude that Libya had fallen short of substantiating, by means of evidence of a sufficient degree of specificity and probative value, that the domestic investigation covers the same case that is before the Court.[322] [Footnotes omitted.]

141. Libya submits that the Pre-Trial Chamber "fell into error by isolating particular categories of materials, discounting many of those categories wholesale and conducting a reasoned evaluation of only part of the evidence adduced by the Government" (footnote omitted).[323] It argues that "[t]his flawed approach resulted in only a few of the many pieces of evidence submitted by the Government being properly evaluated [...]".[324] Libya submits that, notwithstanding the Pre-Trial Chamber's "stated intention to consider 'the evidence taken as a whole', it in fact adopted an unreasonable approach and conducted a disparate analysis of the evidence submitted by" Libya.[325] Libya submits that the Pre-Trial Chamber specifically "failed to consider whether there were linkages between individual pieces of evidence and then take those linkages into account".[326] It submits that it was apparent from its reasoning on the evidence that it did not take this approach.[327] In Libya's submission, "[t]he result of the Chamber's flawed approach was that the specificity and probative value of the evidential material was diluted as the documents were considered without reference to their context or their proper place within the factual matrix of the Libyan investigation", leading to unfairness.[328] It argues that if the Pre-Trial Chamber had properly considered the evidence, it would have concluded that Libya was

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[321] Document in Support of the Appeal, para. 116.
[322] Document in Support of the Appeal, para. 116.
[323] Document in Support of the Appeal, para. 117.
[324] Document in Support of the Appeal, para. 117.
[325] Document in Support of the Appeal, para. 118.
[326] Document in Support of the Appeal, para. 118.
[327] Document in Support of the Appeal, para. 118, referring to Impugned Decision, paras 114-135.
[328] Document in Support of the Appeal, para. 118.

investigating the same case.[329] As its overall conclusion on ground two, Libya submits:

> The errors of law and fact outlined above, whether considered individually or in combination, materially affected the decision. If the Chamber had instead properly considered the evidence and applied a reasonable approach to its evaluation it would have concluded that Libya was investigating the same case as that before the ICC.[330]

142. The Prosecutor submits that Libya failed to explain before the Pre-Trial Chamber the links between the items of evidence, and it now fails to explain how the alleged error had a material effect on the Impugned Decision.[331] The Defence submits that Libya's arguments should be dismissed for being duplicative of other submissions under this ground or, in the alternative, for being misconceived.[332] It submits that it fell on Libya, and not the Pre-Trial Chamber, to make out links between the evidence it submitted and that Libya has not provided any examples of such links in any event.[333]

143. The Appeals Chamber can find no error in the Pre-Trial Chamber's overall evaluation of the evidence. The Appeals Chamber first notes that Libya's arguments are general in nature and, as argued by the Prosecutor and the Defence, indeed do not indicate the links between specific items of evidence which the Pre-Trial Chamber allegedly overlooked. Irrespective of this, however, the Appeals Chamber considers that it is in any event apparent from the Impugned Decision that the Pre-Trial Chamber properly considered the evidence that was before it. Libya argues that the Pre-Trial Chamber's approach resulted in it only properly evaluating "a few of the many pieces of evidence submitted".[334] The Appeals Chamber notes that the Pre-Trial Chamber stated in the Impugned Decision that certain documents "contain no information of relevance to the determination as to whether" Libya is investigating the same case, and it explained that it would only analyse those items of evidence that did.[335] Having considered the items to which this finding must relate,[336] the Appeals

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[329] Document in Support of the Appeal, para. 118.
[330] Document in Support of the Appeal, para. 119.
[331] Prosecutor's Response to the Document in Support of the Appeal, para. 135.
[332] Defence Response to the Document in Support of the Appeal, paras 202-203.
[333] Defence Response to the Document in Support of the Appeal, para. 203.
[334] Document in Support of the Appeal, para. 117.
[335] Impugned Decision, para. 106. The Pre-Trial Chamber gave the examples of Annexes A, B and 1 in footnote 180.

Chamber finds neither this approach nor conclusion to be unreasonable. Thereafter, the Pre-Trial Chamber explained in detail its findings in relation to those items of evidence that it found to be relevant. As found above, the Appeals Chamber finds that the Pre-Trial Chamber's conclusions in relation to those items of evidence were not unreasonable. The Pre-Trial Chamber then concluded that, although certain investigative activity was taking place in Libya, "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" (emphasis added).[337] Again, the Appeals Chamber considers that this conclusion was not unreasonable.

(c) Conclusion in relation to the second ground of appeal

144. The Appeals Chamber notes that Libya placed a significant amount of material related to its domestic investigations before the Pre-Trial Chamber. As set out above, when reviewing factual findings of a first instance Chamber, the Appeals Chamber is not called upon to determine whether it might have reached a different factual conclusion from that of the first instance Chamber. Its review is limited to establishing whether the factual findings could be reasonably reached. As Libya has failed to establish that the Pre-Trial Chamber's factual conclusions were unreasonable, the second ground of appeal is dismissed.

C. Third Ground of appeal

145. Under the third ground of appeal, Libya alleges:

> The Chamber erred procedurally, or acted unfairly, by failing to "take appropriate measures for the proper conduct of the procedure", thereby depriving Libya of the ability to rely upon highly relevant evidence in support of its admissibility challenge.[338]

146. In respect of *procedural errors,* the Appeals Chamber has held that such errors may be relied on "as the basis for impugning [a decision]".[339] However, it has stated that "as part of the reasons in support of a ground of appeal, an appellant is obliged

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[336] The Appeals Chamber understands the Pre-Trial Chamber's finding to relate to Annexes A, B, D, G, H, 1, 8, 12, 13, 14, 18, 19, 20, 21, 22 and 23.
[337] Impugned Decision, para. 135.
[338] Document in Support of the Appeal, para. 3.
[339] *Kony* Admissibility Judgment, para. 47.

not only to set out the alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision".[340] In respect of errors in relation to *discretionary decisions*, the Appeals Chamber has stated that the following standard of review would guide its analysis:

> The Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion [...] merely because the Appeals Chamber, if it had the power, might have made a different ruling. To do so would be to usurp powers not conferred on it and to render nugatory powers specifically vested in the Pre-Trial Chamber.
>
> [...] [T]he Appeals Chamber's functions extend to reviewing the exercise of discretion by the Pre-Trial Chamber to ensure that the Chamber properly exercised its discretion. However, the Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion [...], save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination. This means in effect that the Appeals Chamber will interfere with a discretionary decision only under limited conditions. The jurisprudence of other international tribunals as well as that of domestic courts endorses this position. They identify the conditions justifying appellate interference to be: (i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion.[341] [Footnotes omitted.]

147. These standards of review will guide the Appeals Chamber in its consideration of this ground of appeal.

148. Libya's arguments are divided into four subsections which will be considered in the same order below.

1. Failure to take appropriate measures for the proper conduct of the procedure, occasioning a failure to take into consideration relevant and probative evidence

149. Within this subsection, the Appeals Chamber will consider Libya's argument that the Pre-Trial Chamber failed to consider evidence that Libya could have made available to it. It will thereafter address Libya's submissions regarding the errors made by the Pre-Trial Chamber in relation to the material submitted in support of

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[340] *Kony* Admissibility Judgment, para. 48.

[341] *Prosecutor v. William Samoei Ruto et al.*, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial'", 25 October 2013, ICC-01/09-01/11-1066, para. 60, quoting the *Kony* Admissibility Judgment, paras 79-80. *See also*, *Ruto* Admissibility Judgment, paras 89-90.

Libya's *Al-Senussi* Admissibility Challenge. The Appeals Chamber will also address the arguments alleging procedural errors that were raised under the second ground of appeal.[342]

(a) Error regarding evidence that could have been made available to the Pre-Trial Chamber

150. In the Impugned Decision, the Pre-Trial Chamber recalled, in the procedural history, the filing of Libya's Further Submissions on Admissibility and Libya's Reply of 4 March 2013.[343] It also recalled that "[o]n 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" (footnote omitted).[344] Reference to these requests is also made when summarising the Admissibility Challenge in general.[345] The Pre-Trial Chamber stated:

> 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.[346]

151. Later, having analysed the evidence before it, the Pre-Trial Chamber stated:

> 136. The Chamber notes that Libya has offered to the Chamber the possibility of a fuller inspection of the case file, and the Prosecutor has suggested that Libya be provided more time to submit additional evidence. 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. 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 subsequent submission of additional evidence on 3 October 2012, for the purposes of the Admissibility Hearing. 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.

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[342] *Supra* paras 98-99.
[343] Impugned Decision, paras 13 and 17, respectively.
[344] Impugned Decision, para. 18.
[345] Impugned Decision, paras 39-40.
[346] Impugned Decision, para. 23.

> 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. [Footnotes omitted.]

152. Libya submits that

> the Chamber erred procedurally, or acted unfairly, pursuant to Rule 58(2), by failing to "take appropriate measures for the proper conduct of the procedure", thereby depriving Libya of the ability to rely upon highly relevant evidence in support of its admissibility challenge. It is submitted that the unfairness and the errors, "materially affected the impugned decision" occasioning a Decision that was so unfair and unreasonable as to constitute an abuse of discretion. The Decision would have been 'substantially different' but for the unfairness and the errors.[347] [Footnote omitted.]

153. Libya submits that the Pre-Trial Chamber had to consider its challenge "'on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge'" (footnote omitted).[348] Although it accepts that the Pre-Trial Chamber was not obliged to consider, nor could a State expect to be allowed to present, additional evidence, Libya argues that the Pre-Trial Chamber "was obliged to promulgate a procedure that provided Libya with fairness and certainty (concerning the methodology underpinning the discharge of its purported burden of proof)".[349] It submits that "[t]he procedure had to take into account the rapidly evolving circumstances in Libya and ensure that the Challenge was decided on the basis of the facts that existed at the time of the proceedings. This meant that relevant information or evidence that had been notified to the Chamber within a reasonable time prior to the Impugned Decision had to be fairly considered".[350] Libya submits that the Pre-Trial Chamber was particularly obliged to address the following:

> (i) Libya's offer to allow the Chamber to inspect the totality of the investigative file held in Tripoli; and

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[347] Document in Support of the Appeal, para. 120.
[348] Document in Support of the Appeal, para. 121, quoting from the *Katanga* Admissibility Judgment, para. 56.
[349] Document in Support of the Appeal, para. 121.
[350] Document in Support of the Appeal, para. 122.

> (ii) The evidence contained within filings subsequent to Libya's Reply of 4 March 2013, *inter alia*: (a) relating to significant changes occasioned by the appointment of a new Prosecutor-General (with a mandate given by the General National Congress, rather than the transitional government); (b) evidence submitted in support of the admissibility challenge relating to Mr. Al-Senussi; and (c) other more recent evidence of relevant progress pertaining to the domestic investigation (e.g., the appointment of a new Prosecutor General, "further evidential samples related to the case of Mr. Gaddafi as may be considered necessary", and information showing that Mr. Gaddafi consented to being represented by two lawyers (one appointed by his aunt and one by the Court at his hearing in Zintan on 2 May 2013 relating to incidental domestic proceedings.)[351] [Footnotes omitted.]

154. Libya submits that "[t]he Chamber's procedural unfairness with regard to this additional evidence unfairly deprived Libya of due process and highly probative evidence in support of its challenge".[352] Libya also argues that "the Chamber failed to adopt an adequate (or arguably any) procedure to take into account the restrictions imposed by Article 59 of Libya's Code of Criminal Procedure", recalling how it had suggested the issue could be resolved with the Chamber, including proposing, on three occasions, on-site inspection.[353] Libya argues that "[n]otwithstanding this, the Chamber failed to consider or decide these issues in advance of the Impugned Decision, thereby failing to ensure a procedure that allowed Libya to rely upon the best available evidence, prior to the accusation phase of the proceedings when evidence would be more readily accessible with fewer legal constraints".[354] Libya argues:

> In circumstances where the Chamber failed to address a (repeated) proposal to inspect the totality of the investigative file and had not indicated to Libya that it did not appreciate the significance of the most up-to-date information (see Ground 2, above), it was plainly illogical and unfair to reject this evidence on the basis that it is "for the challenging State to ensure that the challenge is sufficiently substantiated by evidence".[355] [Footnote omitted.]

155. As stated within discussion of the second ground of appeal, Libya also raises related complaints which the Appeals Chamber considers appropriate to address here. Libya argues that the Pre-Trial Chamber erred "by failing to take into account other specific and probative evidence pertaining to the scope and contours of the domestic

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[351] Document in Support of the Appeal, para. 122.
[352] Document in Support of the Appeal, para. 123.
[353] Document in Support of the Appeal, para. 126.
[354] Document in Support of the Appeal, para. 126.
[355] Document in Support of the Appeal, para. 127.

investigation which would have been available to the Court if it had granted Libya's requests to both adduce further materials and to undertake a site visit to Tripoli".[356] Libya refers to the efforts it was making to produce sufficient evidence "amidst a rapid and ongoing fundamental change in Libya".[357] It refers, *inter alia*, to how it had alerted the Pre-Trial Chamber to the significance of the imminent appointment of a new Prosecutor-General to its ability to file additional evidence.[358] In such circumstances, it argues that "the Chamber's refusal to accede to Libya's requests to adduce additional evidence within a modest timeframe of six weeks or to conduct a site visit to Tripoli where it could inspect the investigative case file for itself in order to satisfy itself of the contours and scope of the domestic case was a decision which could not be taken by any reasonable Pre-Trial Chamber".[359] Libya argues that the Pre-Trial Chamber "wholly disregarded" its submissions as to the effect of the appointment of the new Prosecutor-General on Libya's ability to substantiate its case, giving no reasoning or analysis on Libya's submissions on the issue.[360] It argues that the additional evidence it would have submitted "had further submissions being [*sic*] considered by the Chamber and/or an inspection of the case file in Tripoli carried out, would have been of sufficient specificity and probative value to satisfy the Chamber that the domestic investigation was in relation to the same case as that before the ICC".[361]

156. The Prosecutor submits that the Pre-Trial Chamber established a fair system for the conduct of the proceedings, in particular (i) by convening an oral hearing; (ii) by providing Libya with three opportunities to present evidence over a prolonged period and (iii) by entering its findings over a year after the Admissibility Challenge had been lodged.[362] She notes that the Pre-Trial Chamber correctly exercised its discretion "by entering into a dialogue with [Libya] in consideration of the circumstances of the case that would allow full understanding of the steps that were taken domestically and the challenges encountered by the local authorities", but that "an admissibility determination cannot be left pending for an indefinite period of time, particularly

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[356] Document in Support of the Appeal, para. 110.
[357] Document in Support of the Appeal, para. 111.
[358] Document in Support of the Appeal, paras 112-113.
[359] Document in Support of the Appeal, para. 114.
[360] Document in Support of the Appeal, para. 114.
[361] Document in Support of the Appeal, para. 115.
[362] Prosecutor's Response to the Document in Support of the Appeal, para. 138.

when there is limited progress in the presentation of substantiating evidence by the challenging party" (footnote omitted).[363] She also notes that an admissibility challenge has the effect of suspending the investigations of the Prosecutor under article 19 (7) of the Statute, subject to the limited exceptions under article 19 (8) of the Statute, and that this means that, pending a decision on the challenge, "no further progress is possible before the ICC".[364]

157. The Defence submits that "[i]t would have been well within the Chamber's discretion to dismiss Libya's challenge without providing any further opportunities for it to supplement its initial challenge" and that a State "has a duty to ensure that its initial challenge is substantiated" (footnote omitted).[365] It submits that "[i]f the Appeals Chamber found that the Pre-Trial Chamber committed no error in the *Kenya* cases by resolving the admissibility challenge in the space of two months and accepting limited additional annexes, then this Pre-Trial Chamber was clearly acting well within the bounds of its discretion in the current case" (footnote omitted).[366] The Defence submits that "the Chamber was also obliged to take into consideration the impact on the rights of the defendant before the ICC, and the overall expeditiousness of the proceedings" in setting the appropriate time frame for the proceedings.[367] In addition, it stresses the fact that Mr Gaddafi is in detention and that this needed to be considered in not prolonging the proceedings.[368] The Defence addresses specifically the proposal that a delegation travel to Tripoli to view case files and the impact of the notification of the appointment of a new Prosecutor-General, and argues that the Pre-Trial Chamber did not act unreasonably.[369]

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[363] Prosecutor's Response to the Document in Support of the Appeal, para. 142.
[364] Prosecutor's Response to the Document in Support of the Appeal, para. 142. Article 19 (7) and (8) provides: "7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17. 8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court: (a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6; (b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and (c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58".
[365] Defence Response to the Document in Support of the Appeal, para. 166.
[366] Defence Response to the Document in Support of the Appeal, para. 168.
[367] Defence Response to the Document in Support of the Appeal, para. 171.
[368] Defence Response to the Document in Support of the Appeal, paras 172-183.
[369] Defence Response to the Document in Support of the Appeal, paras 187-201.

158. The Victims address the third ground of appeal in a general way. They note, *inter alia*, that Libya was given several opportunities to make substantive arguments and to present evidence before the Pre-Trial Chamber, which showed "considerable, and perhaps even excessive, flexibility in allowing the Government to complement and provide further evidence"[370] and that no procedural error can arise from the Pre-Trial Chamber's refusal to receive additional evidence.[371]

159. Libya's arguments largely question the procedure implemented by the Pre-Trial Chamber for the conduct of these admissibility proceedings, the argument being that the Pre-Trial Chamber erred by not properly considering submissions in which Libya advised the Pre-Trial Chamber of the existence of additional evidence supporting its challenge to the admissibility of the case against Mr Gaddafi. In essence, the arguments revolve around the appropriate interpretation to be given to rule 58, which provides, in relevant part, as follows:

> 1. A request or application made under article 19 shall be in writing and contain the basis for it.
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> 2. When a Chamber receives a request or application raising a challenge or question concerning its jurisdiction or the admissibility of a case in accordance with article 19, paragraph 2 or 3, or is acting on its own motion as provided for in article 19, paragraph 1, it shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings. It may hold a hearing. It may join the challenge or question to a confirmation or a trial proceeding as long as this does not cause undue delay, and in this circumstance shall hear and decide on the challenge or question first.
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> 3. The Court shall transmit a request or application received under sub-rule 2 to the Prosecutor and to the person referred to in article 19, paragraph 2, who has been surrendered to the Court or who has appeared voluntarily or pursuant to a summons, and shall allow them to submit written observations to the request or application within a period of time determined by the Chamber.
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> [...]

160. In a previous judgment, having first stated that "[t]he Court's legal instruments do not set out in detail the procedure to be followed upon an admissibility challenge under article 19 of the Statute",[372] the Appeals Chamber stated:

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[370] Victims' Observations on the Appeal, para. 67.
[371] Victims' Observations on the Appeal, para. 70.
[372] *Ruto* Admissibility Judgment, para. 88.

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

161. The Appeals Chamber noted that it was open to the Pre-Trial Chamber in that case, pursuant to rule 58, to permit the filing of additional evidence.[373] However, it stated that "the question that the Appeals Chamber has to resolve is not what the Pre-Trial Chamber could have done, but whether the Pre-Trial Chamber erred in what it did. [...], rule 58 vests the Pre-Trial Chamber with broad discretion. The Appeals Chamber will interfere only if the Pre-Trial Chamber's exercise of discretion amounted to an abuse".[374]

162. The Appeals Chamber considers that the same standard guides it here. Accordingly, when addressing Libya's arguments, the Appeals Chamber will not consider whether the Pre-Trial Chamber could have conducted the admissibility proceedings differently or whether it could have given Libya an opportunity to submit additional evidence. Rather, the guiding question for the Appeals Chamber's review in this ground of appeal will be whether the procedure the Pre-Trial Chamber adopted was so unfair and unreasonable as to constitute an abuse of discretion.[375]

163. For the following reasons, the Appeals Chamber finds that the Pre-Trial Chamber did not err.

164. The Appeals Chamber has found that "[a]rticle 19 (5) of the Statute requires a State to challenge admissibility as soon as possible once it is in a position to actually assert a conflict of jurisdictions" (footnote omitted).[376] It has also stated that "[t]he State cannot expect to be allowed to amend an admissibility challenge or to submit additional supporting evidence just because the State made the challenge prematurely".[377] Effectively, this comes down to the principle that a State should, as a general rule, not challenge the admissibility of a case until it is in a position to

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[373] *Ruto* Admissibility Judgment, para. 97.
[374] *Ruto* Admissibility Judgment, para. 98.
[375] *Supra* para. 146.
[376] *Ruto* Admissibility Judgment, para. 46. *See also*, para. 100.
[377] *Ruto* Admissibility Judgment, para. 100.

substantiate that challenge. In this regard, admissibility proceedings should not be used as a mechanism or process through which a State may gradually inform the Court, over time and as its investigation progresses, as to the steps it is taking to investigate a case. Admissibility proceedings should rather only be triggered when a State is ready and able, in its view, to fully demonstrate a conflict of jurisdiction on the basis that the requirements set out in article 17 are met.

165. The Appeals Chamber accepts that there may be national legislation in existence or other impediments to a State being able to either disclose to the Court the progress of its investigations, or to take all the necessary steps to investigate. In this case, Libya has asserted, *inter alia*, that it is a State in transition; it also asserts that it was prevented from disclosing to the Court evidence as to the investigations it was undertaking as a result of article 59 of its Code of Criminal Procedure, which it submits required it to maintain information as to investigations confidential; and it asserts that the appointment of a new Prosecutor-General was significant, therefore justifying more time. While accepting the reality that these situations can arise, the Appeals Chamber nevertheless considers that a State cannot expect that such issues will automatically affect admissibility proceedings; on the contrary, such issues should in principle be raised with the Prosecutor directly (prior to instigating admissibility proceedings), with a view to advising her as to the steps the State is taking, any impediments to those steps and allowing her to reach sensible decisions as to whether or not, in the circumstances, it is appropriate for her, at that time, to pursue a case, pending the progress of investigations by the State. It is, in principle, not the place for such issues to be raised with a Chamber in the context of admissibility proceedings.

166. The Appeals Chamber notes, as submitted by the Prosecutor, that "[t]he lodging of a challenge by a State [...] has the effect of suspending the investigations of the [Prosecutor] [...] meaning that pending the determination of the challenge, no further progress is possible before the ICC".[378] In this regard, article 19 (7) of the Statute provides that the Prosecutor shall suspend the investigation until the Court has ruled on the challenge; only limited investigative steps may be taken in such a situation, subject to authorisation by the Court (article 19 (8) of the Statute). In this sense, even

[378] Prosecutor's Response to the Document in Support of the Appeal, para. 142.

the mere challenge to the admissibility of a case by a State has significant repercussions on the Prosecutor's investigation. This is one of the reasons why admissibility proceedings need to proceed without undue delay. In addition, the Appeals Chamber considers that there is simply a need for clarity as far as admissibility proceedings are concerned, and that a challenge should in principle only be submitted when it is substantiated by evidence so that the Chamber in question may then proceed expeditiously to decide thereon.

167. Therefore, while it is open to Chambers, pursuant to rule 58, to permit the filing of additional evidence, they are "not obliged to do so, nor could [a State] expect to be allowed to present additional evidence. Rather, [...] it [is for a State] to ensure that the Admissibility Challenge [is] sufficiently substantiated by evidence"[379] and this at the time of the filing of the challenge.

168. Libya questions the Pre-Trial Chamber's actions after the filing of Libya's Further Submissions on Admissibility on 23 January 2013; however, in considering whether the Pre-Trial Chamber abused its discretion in regulating these proceedings, the Appeals Chamber finds it necessary to consider the procedural steps taken throughout the duration of these proceedings. Having done so, the Appeals Chamber considers that the Pre-Trial Chamber in this case, and in its discretion, provided Libya with ample opportunity to substantiate its challenge to the admissibility of the case against Mr Gaddafi, beyond the filing of the Admissibility Challenge itself. Particularly in light of what has just been said, the Appeals Chamber considers that it was by no means unreasonable for the Pre-Trial Chamber to draw the line when it did.

169. The proceedings in this case took place over a period of 13 months. The Appeals Chamber would highlight the following steps which demonstrate the Pre-Trial Chamber's flexibility in addition to its understanding of the situation with which it was presented. Libya first filed the Admissibility Challenge, with its eleven annexes, on 1 May 2012. Thereafter, it was provided with an opportunity to respond to rule 103 submissions[380] and, having sought leave to do so,[381] to file a reply to the

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[379] *Ruto* Admissibility Judgment, para. 98.

[380] "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 (hereinafter: "Decision of 18 May 2012").

responses to the Admissibility Challenge.[382] On application by Libya,[383] the Pre-Trial Chamber suspended the deadline for the filing of its reply and permitted Libya to file updates on the situation in Libya by 7 September 2012.[384] On 7 September 2012, Libya filed a "provisional report" and a request for leave to file a further report by 28 September 2012.[385] The Pre-Trial Chamber found it unnecessary to receive a further report but decided that it would rather be appropriate, in light of the information provided in the provisional report, "to convene a hearing where Libya will be given a further opportunity to provide its reply to the Responses orally together with submissions of the other parties and participants to the admissibility proceedings".[386] It stated that Libya would also have "the opportunity to complement its previous submissions and evidence relevant to its Admissibility Challenge"; in this regard, it noted that Libya had

> indicated that it would be possible, within a few weeks of the filing of the Admissibility Challenge, to provide to the Chamber examples of the evidence that its investigation had produced and that would be relied upon in the accusation, trial and appeal phases of the trial. In the same vein, Libya anticipated that a number of further investigative steps were to be conducted immediately after the filing of the Admissibility Challenge, and that, once these final steps were completed within a few weeks of the filing of the Challenge, the case would move further onto the accusation stage of proceedings. It is to be noted that no additional information has so far been provided to the Chamber, whether with respect to the anticipated examples of evidence collected or on the development, if any, of the proceedings against [Mr] Gaddafi.[387] [Footnotes omitted.]

170. The Pre-Trial Chamber stated that it would decide at the hearing on the need for further final written submissions.[388] In addition, it fixed another deadline, and therefore further opportunity, for the submission of any additional evidence that the

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[381] "Libyan Government Application for leave to reply to any Response/s to article 19 admissibility challenge", 17 May 2012, ICC-01/11-01/11-150.
[382] "Decision on the 'Libyan Government Application for leave to reply to any Response/s to article 19 admissibility challenge'", 26 July 2012, ICC-01/11-01/11-191 (hereinafter: "Decision of 26 July 2012").
[383] "Libyan Government Request for Status Conference and Extension of Time to file a Reply to the Responses to its Article 19 Admissibility Challenge", 30 July 2012, ICC-01/11-01/11-192.
[384] "Decision on the 'Libyan Government Request for Status Conference and Extension of Time to file a Reply to the Responses to its Article 19 Admissibility Challenge'", 9 August 2012, ICC-01/11-01/11-200 (hereinafter: "Decision of 9 August 2012").
[385] "Libyan Government's provisional report pursuant to the Chamber's Decision of 9 August 2012 & Request for leave to file further report by 28 September 2012", 7 September 2012, ICC-01/11-01/11-205.
[386] Order of 14 September 2012, para. 12.
[387] Order of 14 September 2012, para. 13.
[388] Order of 14 September 2012, paras 13-14.

parties (including Libya) may wish to rely on at the hearing.[389] The oral hearing took place on 9 and 10 October 2012, during which Libya participated and made submissions. Libya was reminded of the need "to provide concrete, tangible and pertinent evidence" that proper investigations were ongoing.[390]

171. Thereafter, the Pre-Trial Chamber issued the Decision of 7 December 2012, specifically directing Libya as to the further evidence it required (see further below), and providing Libya with another opportunity to submit that evidence, by 23 January 2013.[391] The Pre-Trial Chamber expanded on the "[a]pplicable law" in relation to admissibility proceedings,[392] thereafter going through, in some detail, the "[i]nformation and clarifications requested of Libya": it stated that Libya needed to substantiate with evidence the assertions it had made in the Admissibility Challenge and during the Oral Hearing of 9 and 10 October 2012 that it is currently investigating the case against Mr Gaddafi;[393] it stated that, "[i]n addition, appropriate evidence needs to be provided by Libya in order to substantiate its assertions with respect to" a list of issues which then followed, and in relation to which, it set out background and what it required to be submitted as evidence thereof.[394] For example, it noted that Libya had stated that the investigation was ongoing since the filing of the Admissibility Challenge but that Libya had not referred to what steps it had taken since that filing; it stated that Libya needed to substantiate that an investigation was in progress at that time.[395]

172. Libya filed Libya's Further Submissions on Admissibility on 23 January 2013, accompanied by 23 annexes. On 20 February 2013, Libya sought leave to reply to the responses to these submissions,[396] which the Pre-Trial Chamber granted on 26

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[389] Order of 14 September 2012.
[390] Oral Hearing of 10 October 2012, p. 64, lines 19-20.
[391] Decision of 7 December 2012.
[392] Decision of 7 December 2012, paras 4-12.
[393] Decision of 7 December 2012, para. 13.
[394] Decision of 7 December 2012, paras 14-48.
[395] Decision of 7 December 2012, para. 14.
[396] "Libyan Government's Request for leave to reply to Responses by OTP, OPCV and OPCD to Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", ICC-01/11-01/11-283.

February 2013.[397] This reply was filed on 4 March 2013 (Libya's Reply of 4 March 2013).[398]

173. Clearly, Libya was provided with several opportunities to substantiate its original filing. In this regard, the Appeals Chamber notes that the record illustrates that the Pre-Trial Chamber, as it stated itself, "enter[ed] 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".[399] In doing so, the Pre-Trial Chamber demonstrated its appreciation of the circumstances of the case and gave considerable leeway to Libya to substantiate its case.

174. Other decisions of note, which also demonstrate the Pre-Trial Chamber's appreciation of Libya's transitional position and opportunity in those circumstances to substantiate its case, are the following. First, the Pre-Trial Chamber found that Libya was "the triggering force and main actor" in the proceedings and should be given the opportunity to file a reply to responses to its Admissibility Challenge[400] and Libya's Further Submissions on Admissibility.[401] Second, the Pre-Trial Chamber extended the time limit for Libya to file its reply to the Admissibility Challenge, given the extensive submissions that had been filed in the responses.[402] Third, the Pre-Trial Chamber rejected a Defence request[403] to shorten the deadline for the filing of a reply by Libya.[404] Fourth, the Pre-Trial Chamber permitted Libya to substantiate its challenge based on the situation as it evolved during the proceedings and not just based on that existing at the time of the filing of the Admissibility Challenge. It

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[397] "Decision on the 'Libyan Government's Request for Leave to reply to Responses by OTP, OPCV and OPCD to Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi'", ICC-01/11-01/11-288 (hereinafter: "Decision of 26 February 2013").

[398] Alongside these specifically accorded opportunities, Libya filed several other documents in the course of the proceedings. *See* e.g. "Libyan Government's filing of compilation of Libyan law referred to in its admissibility challenge", 28 May 2012, ICC-01/11-01/11-158; "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", ICC-01/11-01/11-306 (hereinafter: "Libya's Notification of 28 March 2013").

[399] Impugned Decision, para. 136.

[400] Decision of 26 July 2012, para. 8.

[401] Decision of 26 February 2013, para. 11.

[402] Decision of 26 July 2012, para. 9.

[403] "Urgent Request Pursuant to Regulation 35 of the Regulations of the Court", 14 August 2012, ICC-01/11-01/11-201.

[404] "Decision on the OPCD 'Urgent Request Pursuant to Regulation 35 of the Regulations of the Court", 21 August 2012, ICC-01/11-01/11-203.

referred specifically to the substantiation of existing investigations in decisions issued on 2 October 2012[405] and 7 December 2012.[406] In particular, the former decision was issued in response to the "Defence Request" of 19 September 2012 in which the Defence argued, *inter alia*, that the oral hearing should be confined to the submission of evidence and submissions related to the initial Admissibility Challenge.[407] The Pre-Trial Chamber found that "it would be unreasonable to disregard the circumstances currently prevailing, by preventing Libya to address, at this point in time, any changes or developments in the factual circumstances underlying its Admissibility Challenge".[408] Finally, the Pre-Trial Chamber expressly referred to the specific situation of Libya, as a State in the process of transition following the events of 2011, as warranting attention.[409]

175. The Appeals Chamber also notes that although the Pre-Trial Chamber provided Libya with ample opportunity to make submissions in support of its challenge to the admissibility of the case, it was also, correctly, cognisant of the need to ensure that the proceedings be conducted expeditiously[410] and without undue delay.[411] In addition, it recalled the fact that Mr Gaddafi was in detention and that therefore proceedings needed to advance.[412]

176. Therefore, contrary to what Libya submits, the Appeals Chamber finds that the Pre-Trial Chamber determined the Admissibility Challenge "on the basis of the facts as they exist[ed] at the time of the proceedings",[413] and did take into account "the rapidly evolving circumstances in Libya".[414] In addition, it accorded considerable leeway to Libya to substantiate its case.

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[405] "Decision on OPCD requests in relation to the hearing on the admissibility of the case", ICC-01/11-01/11-212 (hereinafter: "Decision of 2 October 2012").
[406] Decision of 7 December 2012.
[407] ICC-01/11-01/11-209.
[408] Decision of 2 October 2012, para. 10.
[409] Decision of 9 August 2012, para. 18.
[410] Decision of 4 May 2012, para. 13; Decision of 9 August 2012, para. 16; Decision of 26 February 2013, paras 10, 12.
[411] Decision of 18 May 2012, para. 8; Decision of 9 August 2012, para. 20; Order of 14 September 2012; Decision of 26 February 2013, para. 10.
[412] Decision of 9 August 2012, para. 19; Order of 14 September 2012. In general, *see* the Defence Response to the Document in Support of the Appeal, paras 165, 171-186.
[413] Document in Support of the Appeal, para. 121, quoting from the *Katanga* Admissibility Judgment, para. 56.
[414] Document in Support of the Appeal, para. 122.

177. As to Libya's argument that the Pre-Trial Chamber "had an obligation" to address its offer to inspect the totality of the investigative file held in Tripoli and other evidence in filings post 4 March 2013,[415] the Appeals Chamber notes that the Pre-Trial Chamber did just that in the Impugned Decision. Having considered the evidence before it, the Pre-Trial Chamber noted "that Libya has offered to the Chamber the possibility of a fuller inspection of the case file" (footnote omitted),[416] and concluded that "Libya has had sufficient opportunities to submit evidence in support of its Admissibility Challenge".[417] Although the Appeals Chamber accepts that the Pre-Trial Chamber could have specifically addressed these requests prior to issuing the Impugned Decision, in light of the circumstances as a whole, the Appeals Chamber considers that it was not unreasonable for the Pre-Trial Chamber to proceed on the basis of the information before it, and without granting these requests or issuing a prior decision thereon.

178. The Appeals Chamber also notes that Libya had asserted several times, including after ample notice by the Pre-Trial Chamber as to the burden it should meet (see also below), that it had submitted sufficient evidence to satisfy the Pre-Trial Chamber that it was investigating the same case. The Appeals Chamber considers that it was for Libya to ensure that adequate information was before the Pre-Trial Chamber and that its challenge was substantiated. If Libya felt that additional evidence was required, it should have already filed this evidence with the Pre-Trial Chamber on one of the several occasions allocated to it and not have expected the Pre-Trial Chamber to consider what it had submitted and then provide Libya with a further opportunity to substantiate its challenge. In this respect, the Appeals Chamber recalls that the burden of proof to show that it was investigating the same case was on Libya[418] (indeed meeting that burden should have been done in the Admissibility Challenge). And, that Libya was specifically on notice as to this requirement, the Pre-Trial Chamber having alerted Libya to the evidence it stated was required to satisfy that burden, in addition to providing Libya with several opportunities to submit that evidence.

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[415] Document in Support of the Appeal, para. 122.
[416] Impugned Decision, para. 136, with the footnote (208) referring to, *inter alia*, Libya's Further Submissions on Admissibility and Libya's Reply of 4 March 2013.
[417] Impugned Decision, para. 137.
[418] *Ruto* Admissibility Judgment, para. 62.

179. In light of how the Pre-Trial Chamber conducted these proceedings, and bearing in mind the fact that a State should, in principle, submit a challenge to admissibility only when it is substantiated, the Appeals Chamber considers that it would impose an unnecessarily high standard to find that the Pre-Trial Chamber was unreasonable in failing to accede to Libya's requests. The Appeals Chamber considers, in light of the circumstances of this case, that it was not unreasonable for the Pre-Trial Chamber to have decided on the admissibility of the case without having recourse to this additional information at this stage of the proceedings and that Libya has not established that the Pre-Trial Chamber's approach in respect of Libya's requests to produce additional evidence was unreasonable.

180. This aspect of the third ground of appeal is therefore rejected.

(b) Failure to consider evidence filed in support of the Al-Senussi Admissibility Challenge

181. Libya argues that the Pre-Trial Chamber erred by failing "to take into account the evidential materials submitted as part of the Al-Senussi Admissibility Challenge (in so far as they pertained to Mr Gaddafi) when deliberating on the Gaddafi Admissibility Challenge".[419]

182. In the Admissibility Challenge, Libya submitted "that the proper scope of this admissibility challenge, relates only to the case against Mr Gaddafi".[420] In the Decision of 4 May 2012, the Pre-Trial Chamber considered that the scope of the Admissibility Challenge "must be understood to only concern the case against Mr Gaddafi" (footnote omitted) and stated that, accordingly, it would "not consider the admissibility of the case against Mr Al-Senussi in resolving" the Admissibility Challenge.[421]

183. On 2 April 2013, Libya filed Libya's *Al-Senussi* Admissibility Challenge, to which, on 23 April 2013, the Defence (for Mr Gaddafi) filed a response[422] (hereinafter: "Defence Response to the *Al-Senussi* Admissibility Challenge"). Despite this being a response in relation to a challenge to admissibility filed by Mr Al-

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[419] Document in Support of the Appeal, para. 92.
[420] Admissibility Challenge, para. 73.
[421] Decision of 4 May 2012, para. 8.
[422] "Response to the 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute'", ICC-01/11-01/11-313.

Senussi, its purpose was to raise concerns regarding Mr Gaddafi, with the ultimate request being that the Pre-Trial Chamber decide the Admissibility Challenge (regarding Mr Gaddafi) forthwith.[423] The Defence recalled, *inter alia*, Libya's request in the Admissibility Challenge (regarding Mr Gaddafi) that the admissibility challenges in respect of Mr Al-Senussi and Mr Gaddafi be considered separately.[424] It went on to state:

> 16. Having contrived to benefit from additional time to mount its admissibility challenge against Mr. Al-Senussi, the Government cannot now join the challenges, or seek to rely upon the one filed latest in time in order to supplement its earlier challenge against Mr. Gaddafi.
>
> 17. The Article 19 application concerning Mr. Al-Senussi is also comprised of information and evidence which were not included in the initial challenge concerning Mr. Gaddafi. The Defence has never had an opportunity to seek instructions from Mr. Gaddafi in relation to such matters, and should not have to.
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> [...]
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> 20. [...] in the same manner that the Pre-Trial Chamber determined that it would not "consider the admissibility of the case against Mr Al-Senussi in resolving the Article 19 Application [against Mr. Gaddafi]", the Chamber must also exclude from its consideration of the latter any legal or factual arguments set out in the challenge to the admissibility of the case against Mr. Al-Senussi. [Footnote omitted.]

184. The Defence requested that the Pre-Trial Chamber immediately decide on the Admissibility Challenge and that it "confirm that it will exclude any information from its consideration which falls outside the parameters of the challenge concerning Mr. Gaddafi, and related responses".[425]

185. On 3 May 2013, Libya filed a request for leave to reply to the Defence Response to the *Al-Senussi* Admissibility Challenge[426] (hereinafter: "Libya's Request of 3 May 2013"). It stated that "[t]he Response raises issues concerning the admissibility challenges relating to both Mr. Al-Senussi and Mr. Gaddafi, which are either incorrect or are raised for the first time and thus necessitate a reply from Libya

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[423] Defence Response to the *Al-Senussi* Admissibility Challenge, para. 21.
[424] Defence Response to the *Al-Senussi* Admissibility Challenge, para. 15.
[425] Defence Response to the *Al-Senussi* Admissibility Challenge, paras 21-22.
[426] "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"'", ICC-01/11-01/11-327.

in order to ensure that the Chamber has all the relevant information and submissions before it in respect of both challenges".[427] It stated:

> Examples of submissions to which a reply is warranted include new and distinct issues of law and fact relating to:
>
> a. the allegation that the Government "contrived to benefit from additional time to mount its admissibility challenge against Mr Al-Senussi" and the suggestion that Libya now "seek[s] to rely upon the one filed latest in time in order to supplement its earlier challenge against Mr. Gaddafi";
>
> b. the relevance and status of the information and evidence served in the challenge concerning Mr. Al-Senussi, which was not included in the initial challenge concerning Mr. Gaddafi;
>
> c. the current status of domestic proceedings against Mr. Gaddafi; and
>
> d. the legal representation of persons associated with the former regime.[428]

186. In the Impugned Decision, the Pre-Trial Chamber recalled the filing of the Defence Response to the *Al-Senussi* Admissibility Challenge, in which the Defence "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".[429] It also recalled that Libya sought leave to reply to this document on 3 May 2013 and that the Defence requested that the Pre-Trial Chamber reject this request.[430] The Pre-Trial Chamber noted that, on 26 April 2013, the Defence, *inter alia*, provided information to the Chamber that "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".[431]

187. The Pre-Trial Chamber stated:

> 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

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[427] Libya's Request of 3 May 2013, para. 5.
[428] Libya's Request of 3 May 2013, para. 6.
[429] Impugned Decision, para. 19.
[430] Impugned Decision, para. 19.
[431] Impugned Decision, para. 20, referring to "Urgent request for measures to remedy ongoing violations of Mr. Saif Al-Islam Gaddafi's rights before the ICC", ICC-01/11-01/11-323-Conf-Exp.

> to Libya's Reply of 4 March 2013, as the significance of this information has not been sufficiently demonstrated.[432]

188. Libya argues that the Pre-Trial Chamber erred by failing "to take into account the evidential materials submitted as part of the Al-Senussi Admissibility Challenge (in so far as they pertained to Mr. Gaddafi) when deliberating on the Gaddafi Admissibility Challenge".[433] It submits that "the propriety of reliance by the Chamber" on the material filed in relation to the *Al-Senussi* admissibility proceedings was raised by the Defence (and Libya had sought leave to reply in relation to those submissions), but that no decision had been rendered on that request.[434] Libya submits that, in Libya's *Al-Senussi* Admissibility Challenge, "it was expressly noted that the evidential materials contained in the Annexes thereto is to be considered alongside the evidence filed in the Gaddafi admissibility proceedings" (footnote omitted).[435] Libya argues:

> Any reasonable Pre-Trial Chamber ought therefore to have taken account of the materials contained in the Abdullah Al-Senussi Admissibility Challenge in the absence of a determination in advance that they would not be so considered. Such a determination would, of course, have had to follow receipt of submissions from the Libyan Government on their admissibility in the Gaddafi admissibility proceedings.[436]

189. Libya proceeds to summarise the evidence which it submits should have been evaluated by the Pre-Trial Chamber, and which is comprised of witness statements and 6 other annexes.[437] It argues that if the Pre-Trial Chamber had considered this evidence (and Annexes E and F to the Admissibility Challenge), it would have found that Libya was investigating the same case.[438] It submits:

> Various pieces of evidence referred to [...] were of direct relevance to the question of the scope and contours of the domestic case against Mr. Gaddafi and were of sufficient specificity and probative value to be accorded significant weight by the Pre-Trial Chamber. They provide direct evidence of the conduct included in the Warrant of Arrest for Mr. Gaddafi, which the Chamber in

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[432] Impugned Decision, para. 23.
[433] Document in Support of the Appeal, para. 92.
[434] Document in Support of the Appeal, para. 92.
[435] Document in Support of the Appeal, para. 92
[436] Document in Support of the Appeal, para. 93.
[437] Document in Support of the Appeal, para. 94.
[438] Document in Support of the Appeal, para. 95.

paragraph 133 determined was the appropriate test for determining whether the "same case" element of admissibility has been satisfied.[439]

190. The Appeals Chamber is not persuaded that the Pre-Trial Chamber's approach to the material filed in relation to the Al-Senussi Admissibility Challenge was unfair or unreasonable. Libya submitted Libya's *Al-Senussi* Admissibility Challenge on 2 April 2013. The deadline for the filing of submissions by Libya in the *Gaddafi* admissibility proceedings had been set for 4 March 2013.[440] As stated above, the Appeals Chamber considers that the Pre-Trial Chamber did not act unreasonably in setting this deadline. In addition, and for the reasons that follow, the Appeals Chamber cannot find that the Pre-Trial Chamber erred when it decided not to consider the material relating to Libya's *Al-Senussi* Admissibility Challenge in deciding on the Admissibility Challenge (in relation to Mr Gaddafi), even though it was filed before it, in the same case, but in the context of the admissibility challenge in relation to the co-accused.

191. The Appeals Chamber notes that the issue of whether these documents should be considered by the Pre-Trial Chamber in the context of the challenge to the admissibility of the case against Mr Gaddafi was raised before that Chamber. Although Libya submits for the first time in the Document in Support of the Appeal that the Pre-Trial Chamber should have taken this material into account in the context of the *Gaddafi* admissibility proceedings,[441] the Pre-Trial Chamber was on notice that there was an issue, because of the content of the Defence Response to the *Al-Senussi* Admissibility Challenge and Libya's Request of 3 May 2013. As noted by Libya, the Pre-Trial Chamber did not decide on its request to file submissions on this issue.[442] The issue is recalled in the Impugned Decision, which refers to both filings (and particularly the content of that of 23 April 2013),[443] and is implicitly referred to in the conclusion that the Pre-Trial Chamber "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".[444] For the

[439] Document in Support of the Appeal, para. 95.
[440] Decision of 26 February 2013, p. 7.
[441] Document in Support of the Appeal, para. 92 *et seq.*
[442] Document in Support of the Appeal, para. 92.
[443] Impugned Decision, para. 19.
[444] Impugned Decision, para. 23.

reasons set out below, the Appeals Chamber considers that it was not unreasonable for the Pre-Trial Chamber not to consider this material.

192. First, the Appeals Chamber notes that Libya did not specifically request the Pre-Trial Chamber to consider these documents in the context of the *Gaddafi* admissibility proceedings. In Libya's *Al-Senussi* Admissibility Challenge, Libya noted that witness evidence referred to would need "to be considered alongside the evidence gathered in the Saif Al-Islam Gaddafi case (which is also likely to be relied upon in Abdullah Al-Senussi's case due to its factual and legal proximity)".[445] No such request was made in relation to the *Gaddafi* admissibility proceedings. Indeed, how the *Al-Senussi* material would be considered in the context of the *Gaddafi* admissibility proceedings was not raised by Libya until 3 May 2013, and then only in reaction to a filing by the Defence (for Mr Gaddafi) to Libya's *Al-Senussi* Admissibility Challenge of 23 April 2013.

193. Second, the Appeals Chamber notes that Libya stated in the Admissibility Challenge "that the proper scope of [the Admissibility Challenge], relates only to the case against Mr Gaddafi".[446] The Pre-Trial Chamber proceeded on this basis,[447] thereby providing notice to Libya as to how it perceived the scope of its challenge. The Appeals Chamber considers that it would have been reasonable for Libya to assume that this decision would also have the result that, should a challenge to the admissibility of the case against Mr Al-Senussi be filed, any documents filed in support of that challenge would not automatically be considered by the Pre-Trial Chamber when deciding on the challenge to admissibility in relation to Mr Gaddafi.

194. In sum, the Appeals Chamber cannot find that the Pre-Trial Chamber acted unreasonably in not considering, in the admissibility proceedings in relation to the case against Mr Gaddafi, the materials filed by Libya in support of Libya's *Al-Senussi* Admissibility Challenge.

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[445] *Al-Senussi* Admissibility Challenge, para. 173.
[446] Admissibility Challenge, para. 73.
[447] Decision of 4 May 2012, para. 8.

2. *Rejection of evidence on erroneous basis that its significance had not been sufficiently demonstrated*

195. In the Impugned Decision, the Pre-Trial Chamber recalled the fact that Libya had notified it of the appointment of a new Prosecutor-General in Libya's Notification of 28 March 2013.[448] As noted above, it also generally found that it had "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".[449]

196. Libya argues that the Pre-Trial Chamber "unfairly rejected the information provided by Libya subsequent to Libya's Reply of 4 March 2013 on the basis that its significance had not been sufficiently demonstrated" (footnote omitted).[450] Libya refers in particular to the information related to the appointment of a new Prosecutor-General, and recalls its argument submitted to the Pre-Trial Chamber, in Libya's Notification of 28 March 2013, that this appointment "would have a significant impact upon the efficient progress of the domestic case, as well as cooperation with the Court".[451] Libya argues that "[d]espite this information, and subsequent demonstration of the positive impact on the development of the domestic proceedings and transitional justice generally (as evidenced, *inter alia*, through the submissions advanced in the Al-Senussi case), the Chamber disregarded the information concluding its 'significance had not been sufficiently demonstrated'" (footnote omitted).[452] Libya argues that due process dictated that any doubts the Pre-Trial Chamber might have had as to the significance of this information "or any of the changes post 4 March 2013" (referring to paragraph 122 of the Document in Support of the Appeal) should "have been brought to Libya's attention so that this highly relevant and probative, contemporaneous evidence might be fairly considered".[453]

197. The Prosecutor argues that Libya "did not state, for example, that the new Prosecutor-General would submit additional investigative material. The mere assertion that the new Prosecutor was likely to be more cooperative was not in and of

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[448] Impugned Decision, para. 18.
[449] Impugned Decision, para. 23
[450] Document in Support of the Appeal, para. 129.
[451] Document in Support of the Appeal, para. 130.
[452] Document in Support of the Appeal, para. 130.
[453] Document in Support of the Appeal, para. 131.

itself sufficient to merit a different conclusion from the Chamber".[454] The Defence submits, *inter alia*, that Libya "failed to show a connection between the appointment of the new Prosecutor-General and any concrete positive developments in the Gaddafi case or the Libyan justice sector at large".[455] It submits that Libya could not expect the Pre-Trial Chamber, if in doubt, to request more information, since this would have amounted to subverting the burden of proof and making the Pre-Trial Chamber a "direct proponent for Libya's challenge".[456] As part of their broad argument to the effect that Libya was provided with ample opportunities to submit evidence, the Victims note that "Libya could not have legitimately expected to be given unlimited opportunities to present additional evidence or alter the grounds of the Admissibility Challenge".[457]

198. The Appeals Chamber considers that the Pre-Trial Chamber did not err in how it treated the information relating to the appointment of a new Prosecutor-General. The information provided by Libya must be seen in the context of the proceedings as a whole. In the Decision of 26 February 2013, the Pre-Trial Chamber reiterated that it considered it appropriate to authorise Libya to reply to the responses filed by the other parties to Libya's Further Submissions on Admissibility.[458] However, it also stated that any such reply should be limited to the specific issues raised in those responses and be filed by 4 March 2013, i.e. within a shorter time frame than that requested by Libya. In doing so, it noted "the considerable amount of time that has elapsed since the filing of the Admissibility Challenge and the need, at the advanced stage of the current proceedings, to proceed to an expeditious resolution of the Admissibility Challenge".[459] As the Appeals Chamber has already found, it was not unreasonable for the Pre-Trial Chamber to fix this deadline. At this point in time, ten months after the triggering of the admissibility proceedings, Libya was on notice of the fact that the Pre-Trial Chamber was determined to proceed to "an expeditious resolution of the admissibility challenge".[460] As already stated, a State challenging admissibility cannot

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[454] Prosecutor's Response to the Document in Support of the Appeal, para. 132.
[455] Defence Response to the Document in Support of the Appeal, para. 222.
[456] Defence Response to the Document in Support of the Appeal, para. 223.
[457] Victims' Observations on the Appeal, para. 70.
[458] Decision of 26 February 2013, para. 11.
[459] Decision of 26 February 2013, para. 12.
[460] Decision of 26 February 2013, para. 12.

expect to be given the chance to file additional evidence nor is a Pre-Trial Chamber obliged to permit it.[461]

3. The Pre-Trial Chamber failed to adapt the procedure to the specific issues (such as uncertainties as to the legal and factual situation at hand)

199. Libya submits that the Pre-Trial Chamber "failed to adapt the procedure to deal with the multiple legal and factual uncertainties that arose during the admissibility proceedings, depriving Libya of the certainty required to understand and discharge the burden of proof".[462] It submits that "[t]he conclusion – that '[i]n the view of the Chamber, Libya has had sufficient opportunities to submit evidence in support of its Admissibility Challenge' – was based upon a failure to appreciate that Libya was, from the outset, not made aware of the precise standard of proof" (footnote omitted).[463] Libya argues that "it was incumbent upon the Chamber to clarify their position relating to the burden and standard of proof", noting the different views which had been expressed.[464] In addition, it submits that "there was a significant degree of disagreement concerning the meaning of the 'case'".[465] Libya notes that the Pre-Trial Chamber advised Libya of the need to provide concrete, tangible and pertinent evidence and provided guidance as to the type of evidence to be submitted, but "by failing to decide the standard of proof, the Chamber neglected to provide guidance concerning *the cogency* of this type of evidence required".[466]

200. Libya argues that such guidance was also not provided in the Impugned Decision and that "[i]n sum, the procedure throughout fell short of providing any certainty concerning the *precise* standard of proof, rather than the type of evidence that might go to satisfaction of it, placing Libya at a distinct disadvantage in the proceedings".[467] It argues that the failure to articulate the standard should be viewed alongside Libya's proposal for the Chamber to view the entire investigative file and "the attempt to rely upon highly probative contemporaneous evidence" post 4 March 2013, and submits that "[g]iven the uncertainties surrounding the nature and quality of

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[461] *Ruto* Admissibility Judgment, para. 98.
[462] Document in Support of the Appeal, para. 132.
[463] Document in Support of the Appeal, para. 132.
[464] Document in Support of the Appeal, para. 133.
[465] Document in Support of the Appeal, para. 134.
[466] Document in Support of the Appeal, para. 135.
[467] Document in Support of the Appeal, para. 136

evidence required to satisfy the (undefined) standard of proof, it was of pivotal importance to the fairness of the process that the Chamber considered all relevant and available evidence".[468] It argues:

> This evidence may have been of "sufficient degree of specificity and probative value" to meet the standard envisaged by the Chamber in its (undefined) standard of proof. The evidence would have significantly impacted upon the conclusions, *inter alia*, 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", or that it was not possible to "discern the actual contours of the national case against Mr Gaddafi". This evidence would have provided the Chamber with a substantially enhanced view of the investigation, its contours and precise scope. Further, the developments concerning Libya's new Prosecutor-General, developments in capacity building, and the appointment of legal representatives for Mr. Gaddafi in his domestic proceedings were of critical importance to the second limb of the complementarity assessment, namely ability.[469] [Footnotes omitted.]

201. Libya concludes that "[t]he procedure adopted by the Chamber removed swathes of highly significant and probative evidence from the assessment thereby depriving Libya of fairness and due process".[470]

202. The Prosecutor notes that Libya did not make an express request for the determination of these issues and that, in any event, the Pre-Trial Chamber did state its position regarding the burden and standard of proof in its Decision of 7 December 2012 and in the Impugned Decision.[471] The Defence submits that had the Pre-Trial Chamber provided clarification on such matters, "it would have violated the principle of adversarial proceedings by predetermining key issues, without the benefit of the parties' submissions on these matters".[472] It also argues that the Pre-Trial Chamber did clarify that an admissibility determination is comprised of a two-step test, that the challenging state bears the burden of proof and that, in order to satisfy this burden, Libya would have to adduce evidence with a sufficient degree of specificity and probative value.[473]

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[468] Document in Support of the Appeal, para. 137.
[469] Document in Support of the Appeal, para. 138.
[470] Document in Support of the Appeal, para. 139.
[471] Prosecutor's Response to the Document in Support of the Appeal, paras 146-147, referring to the Decision of 7 December 2012 and the Impugned Decision.
[472] Defence Response to the Document in Support of the Appeal, para. 226.
[473] Defence Response to the Document in Support of the Appeal, paras 228-234.

203. For the following reasons, the Appeals Chamber considers that the Pre-Trial Chamber did not act unreasonably. First, the Appeals Chamber would note that the arguments related to the submission of additional evidence have already been addressed above under the first part of this ground of appeal. The main issue underlying this part of the third ground of appeal is whether principles of due process required the Pre-Trial Chamber to provide clarification as to the precise standard of proof to be applied in the admissibility proceedings and to provide clarification as to the particular interpretation it would favour in respect of, in particular, the interpretation of a "case". The Appeals Chamber considers that the existence of "a significant degree of disagreement"[474] among the parties as regards the interpretation of legal texts is not an uncommon feature of judicial proceedings and that it is the responsibility of a Chamber to adopt the interpretation that it considers to be correct when adjudicating on the proceedings. This interpretation may be one of those submitted by the parties. Alternatively, if such interpretations are not found to be correct, the Chamber may set out and apply its understanding of the law. However, it is usually only in its decision that a Chamber is required to provide what in its view is the correct interpretation of the law, which it thereafter applies to the relevant facts. The parties are generally provided with the opportunity to make submissions as to the particular issue in question prior to the Chamber adjudicating thereon and by the fact that, subject to the relevant provisions,[475] parties in disagreement with a decision can file an appeal in relation thereto. The Appeals Chamber considers, therefore, that the arguments presented by Libya under this limb are misguided and premised on a misunderstanding of the obligations of a Chamber in circumstances such as those in the instant proceedings.

204. Irrespective of the above, with regard to the articulation of the standard of review, the pre-trial record illustrates that the Pre-Trial Chamber was attentive to difficulties that Libya might be facing in light of the relative novelty of the relevant issues and the existence of only a limited body of case-law. During the Oral Hearing of 10 October 2012, the Pre-Trial Chamber specifically asked the representatives of Libya whether "the Libyan authorities" were really aware that "the Libyan side, in these proceedings is under an obligation to provide concrete, tangible and pertinent

[474] Document in Support of the Appeal, para. 134.
[475] Articles 81 and 82 of the Statute.

evidence that [...] proper investigations are currently ongoing and proper and concrete preparations for the trial are ongoing".[476] Further, the Pre-Trial Chamber stated that if there was any doubt, it hoped "that counsel would do all to ensure that the Libyan side and the authorities in Tripoli understands this necessity which is really very important for the outcome of these proceedings".[477] The representative for Libya responded as follows:

> MR SANDS: Judge Kaul, thank you very much for that question. I hope I can reassure you in this sense. Counsel are acutely aware of this need. That acute awareness has been communicated, is being communicated and will continue to be communicated. I want to be very careful what I say in open court, because there are circumstances that shall we say have given rise to certain concerns about the fulfilment of that duty not as a matter of principle, but in terms of timeliness, but in short the authorities are acutely aware, we are acutely aware and we remain absolutely committed to meeting Libya's full responsibilities in reaching the appropriate standard as determined by the Pre-Trial Chamber.[478]

205. In addition, in the lengthy Decision of 7 December 2012, the Pre-Trial Chamber addressed the applicable law and information and clarifications requested of Libya. It recalled that, pursuant to the *Muthaura* Admissibility Judgment, "a State challenging the admissibility of a case 'bears the burden of proof to show that the case is inadmissible' and that, to discharge this burden, 'the State must provide the Court with evidence with a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case. It is not sufficient merely to assert that investigations are ongoing'" (footnote omitted).[479] In addition, the Pre-Trial Chamber went to considerable lengths to detail these principles in light of the specific features of the case not only by reiterating the point (previously made during the Oral Hearing of 10 October 2012[480]) that it was necessary for Libya "to provide tangible and pertinent evidence that proper investigations are currently ongoing",[481] but also clarifying "its understanding with respect to the kinds of evidence, which can be considered evidence demonstrating that Libya is investigating the case".[482] It highlighted that evidence for the purposes of admissibility proceedings would mean "all material capable of proving that an investigation is ongoing and that appropriate

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[476] Oral Hearing of 10 October 2012, p. 64, lines 18-22.
[477] Oral Hearing of 10 October 2012, p. 64, lines 23-25, p. 65, line 1.
[478] Oral Hearing of 10 October 2012, p. 65, lines 2-10.
[479] Decision of 7 December 2012, para. 8.
[480] *Supra* para. 204.
[481] Decision of 7 December 2012, para. 9.
[482] Decision of 7 December 2012, para. 10.

measures are being envisaged to carry out the proceedings"[483]; as such, it may include "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".[484] It explained that evidence on the merits of the domestic case would include "the kinds of material that Libya mentioned having collected as part of the domestic investigation, in particular: witness statements, intercept evidence, speeches of Mr Gaddafi, telephone calls of Mr Gaddafi from February 11 onward (including those between him and other officials), photographic material, flight manifests showing transport arrangements made by Mr Gaddafi for the use of mercenaries against protesters and bank payment transaction records showing payments of funds to engage those mercenaries" (footnote omitted).[485] The Pre-Trial Chamber stated that it "expect[ed] Libya to substantiate with evidence, within the meaning [stated above], the assertions made in the Admissibility Challenge and reiterated at the [Oral Hearing of 9 and 10 October 2012], that it is currently conducting an investigation into the case against Mr Gaddafi".[486] It listed, in addition, five categories of issues in respect of which Libya would have to provide appropriate evidence, ranging from "the status of domestic proceedings";[487] "the subject-matter of the domestic investigation";[488] "Libyan national law";[489] Mr Gaddafi's "exercise of his rights under Libyan national law"[490] and "the capacity of Libyan authorities to investigate and prosecute".[491] For each category, the type and subject-matter of information requested by the Chamber was specifically spelt out. In providing such detailed guidance, the Pre-Trial Chamber provided effective and useful guidance as to what Libya was required to produce to substantiate its admissibility challenge.

206. For these reasons, Libya's arguments are dismissed.

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[483] Decision of 7 December 2012, para. 10.
[484] Decision of 7 December 2012, para. 11.
[485] Decision of 7 December 2012, para. 12.
[486] Decision of 7 December 2012, para. 13.
[487] Decision of 7 December 2012, paras 14-25
[488] Decision of 7 December 2012, paras 26-29.
[489] Decision of 7 December 2012, paras 30-37.
[490] Decision of 7 December 2012, paras 38-40.
[491] Decision of 7 December 2012, paras 41-47.

4. Linking the propriety of the admission of evidence on the first limb ("the case") with the merits of the assessment of the second limb ("inability")

207. Finally, Libya argues:

> The Trial Chamber further erred in deciding that Libya was not entitled to rely upon additional evidence that, "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". Again, it was incumbent upon the Chamber to ensure due process for Libya. The question of whether Libya should be allowed to submit additional evidence in support of the first limb of the test could not be made contingent upon the assessment of the merits on the question of the second limb ("inability"). The Chamber had an obligation to not only consider the merits of each separately, but also to ensure that the failure to discharge the burden of proof in relation to one limb of the admissibility test was not permitted to undermine procedural fairness and due process with regard to the other. [Footnote omitted.][492]

208. The Prosecutor submits that Libya's argument is incorrect, since the reason for the Pre-Trial Chamber to reject Libya's request to submit more evidence was not that Libya was unable, but rather that it had already been afforded sufficient opportunities.[493] She states that the "Chamber then noted – albeit *obiter* – that the submission of additional evidence [...] would not be determinative at this stage because even if [Libya] had demonstrated that it was investigating the same case, Libya was unable within the terms of Article 17(3)".[494] The Defence first submits that "[a]t best, this ground constitutes a disagreement with the Chamber's decision, rather than a valid ground of appeal".[495] It further observes that, in any event, this limb "again misconstrues the Impugned Decision",[496] which made it clear that the request for additional submissions was rejected because the Pre-Trial Chamber decided that Libya had had sufficient opportunities to submit evidence.[497]

209. Paragraph 137 of the Impugned Decision, which is in dispute, reads as follows:

> 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

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[492] Document in Support of the Appeal, para. 140.
[493] Prosecutor's Response to the Document in Support of the Appeal, para. 149.
[494] Prosecutor's Response to the Document in Support of the Appeal, para. 149.
[495] Defence Response to the Document in Support of the Appeal, para. 236.
[496] Defence Response to the Document in Support of the Appeal, para. 237.
[497] Defence Response to the Document in Support of the Appeal, para. 237.

> 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.

210. As submitted by both the Prosecutor and the Defence, the Appeals Chamber considers that Libya's argument as to the meaning of this paragraph is flawed. The Appeals Chamber notes that a considerable portion of the Impugned Decision is devoted to considering the first limb of the complementarity assessment. Paragraph 135, in particular, clarifies that the Pre-Trial Chamber considered the evidence as a whole and held that it did not allow it to discern the actual contours of the national case against Mr Gaddafi, since "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". Paragraph 136 and the first part of paragraph 137 clarify, by means of recalling the most salient steps of the proceedings, why the Pre-Trial Chamber was of the view that it had provided Libya with sufficient opportunities to submit its evidence. The Appeals Chamber has already found that these conclusions were not unreasonable. Against this background, the Appeals Chamber considers it reasonable to interpret the last sentence of this paragraph, unfortunate though its wording may be, as an introduction to the next section of the Impugned Decision; it does not interpret this sentence to mean that it rejected the submission of any additional evidence because the second limb of the test was not satisfied. The Appeals Chamber therefore does not conclude from it that the Pre-Trial Chamber made the assessment of the first limb "conditional" upon the outcome of the assessment on the second limb. For these reasons, the argument under this limb is dismissed.

5. Conclusion in relation to the third ground of appeal

211. In sum, the Appeals Chamber concludes that Libya has failed to establish that the Pre-Trial Chamber acted unreasonably in the conduct of the admissibility proceedings. Accordingly, the third ground of appeal is rejected.

D. Fourth ground of appeal

212. Under the fourth ground of appeal, Libya alleges:

> The Chamber erred in fact and in law in finding that, due to the unavailability of its national judicial system, Libya is unable to obtain the accused or the

> necessary evidence and testimony or is otherwise unable to carry out its proceedings, pursuant to article 17(3) of the Statute.[498]

213. The Appeals Chamber has concluded that the Pre-Trial Chamber did not err in finding that Libya had not satisfied the Pre-Trial Chamber that it is investigating the same case. Noting that the fourth ground of appeal raises the question of Libya's ability under article 17 (3) of the Statute, the Appeals Chamber recalls that it has found that

> in considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse.[499]

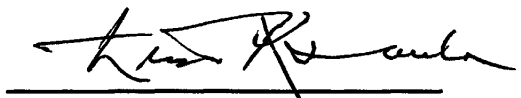
214. Accordingly, the Appeals Chamber will not proceed to consider the arguments raised under ground four of the appeal.

V. APPROPRIATE RELIEF

215. On an appeal pursuant to article 82 (1) (a) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case, it is appropriate to confirm the Impugned Decision and to dismiss the appeal.

Judge Sang-Hyun Song appends a separate opinion to this judgment. Judge Anita Ušacka appends a dissenting opinion to this judgment.

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



Judge Erkki Kourula
Presiding Judge

Dated this 21st day of May 2014
At The Hague, The Netherlands

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[498] Document in Support of the Appeal, para. 3.
[499] *Katanga* Admissibility Judgment, para. 78.

Separate Opinion of Judge Sang-Hyun Song

1. I agree with the majority of the Appeals Chamber that, in the present case, it is appropriate to confirm the Impugned Decision and to dismiss Libya's appeal. However, I respectfully disagree, for the reasons that follow, with the majority's interpretation of the term "case" in article 17 (1) (a) of the Statute (first ground of appeal), and the conclusion of the majority that Libya has failed to establish that the Pre-Trial Chamber's factual conclusions were unreasonable (second ground of appeal). I am of the view that, when assessing the evidence as a whole, it is clear that Libya is investigating the same case. This makes it necessary to also address Libya's fourth ground of appeal, namely that "[t]he Chamber erred in fact and in law in finding that, due to the unavailability of its national judicial system, Libya is unable to obtain the accused or the necessary evidence and testimony or is otherwise unable to carry out its proceedings, pursuant to article 17(3) of the Statute".[1] In this regard, I do not find any error in the Pre-Trial Chamber's conclusion in respect of article 17 (3) of the Statute that Libya is unable to obtain the accused and find the case to be admissible on that basis.

2. I wish to point out that I do not intend to provide an exhaustive analysis of the admittedly complex issue of complementarity, but would like to address a few specific aspects, which I consider to be of particular relevance in the present case.

I. THE INTERPRETATION OF THE TERM "CASE" IN ARTICLE 17 (1) (A) OF THE STATUTE

3. The starting point for the interpretation of the term "case" in article 17 (1) (a) of the Statute is indeed the *Ruto* Admissibility Judgment. In that judgment, the Appeals Chamber held:

> Thus, the 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.[2]

[1] Document in Support of the Appeal, para. 3.
[2] *Ruto* Admissibility Judgment, para. 40.

4. I agree with the Pre-Trial Chamber 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".[3] I also agree with the Pre-Trial Chamber that "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" (footnote omitted).[4] Finally, I consider that the Pre-Trial Chamber correctly summarised the conduct underlying the Warrant of Arrest and the Arrest Warrant 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 in Benghazi, Misrata, Tripoli and other neighbouring cities, from 15 February 2011 to at least 28 February 2011.[5]

5. In comparing the conduct being investigated by the Prosecutor with that being investigated by Libya, in the circumstances of this specific case, I consider that for it to be found that the domestic investigation being carried out in Libya covers the same case, it must be found that it covers: (1) the use of the State apparatus by Mr Gaddafi; (2) for the alleged commission of the crimes of murder and persecution; (3) committed in the time period of 15 February 2011 to at least 28 February 2011; (4) against civilian demonstrators or alleged dissidents to Muammar Gaddafi's regime; and (5) across Libya.

6. In this context, I note that the Pre-Trial Chamber pointed out[6] 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", but that "[t]hey constitute rather samples of a course of conduct of the Security Forces, under Mr Gaddafi's control, that allegedly carried out an attack [...]

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[3] Impugned Decision, para. 77.
[4] Impugned Decision, para. 78.
[5] Impugned Decision, para. 83.
[6] Any reference to the Pre-Trial Chamber's statement is without prejudice to my view regarding the specificity requirements with respect to the charges for the purposes of trial.

which resulted in an unspecified number of killings and acts of persecution" (footnote omitted).[7] From this statement, I consider that it is clear that overlap between the incidents is not a relevant factor for the purposes of determining whether the national investigation covers the same conduct as that alleged by the Prosecutor in the present case. In my view, it is irrelevant, for the purposes of this admissibility challenge, whether the national investigation covers, for example, the alleged killing of three civilians in Benghazi on 16 February 2011 in the area of Birka and Al Fatah and Jamal Abdun Naser streets, or the killing of a number of people at the Juliyana Bridge the following day – both incidents are mentioned in the Arrest Warrant Decision[8] – or any other incident not specifically mentioned in the Arrest Warrant Decision. In other words, the incidents are interchangeable and the non-investigation of one particular incident by the domestic authorities does not mean that they are investigating different conduct. To require that the national investigation must cover the same incidents would, in my view, set too onerous a standard for admissibility challenges in cases, like the one before us, where there are potentially hundreds of incidents to investigate[9] and where, in addition, the person under investigation is not alleged to have physically committed any acts of murder and persecution.[10] To put it simply: to require that the national investigation cover exactly the same acts of murder and persecution would make the national investigators' task impossible and, as a result, the complementarity principle, an essential element of the Statute – featuring prominently in both its Preamble[11] and first article[12] – would almost certainly become redundant.

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[7] Impugned Decision, para. 82.
[8] Arrest Warrant Decision, para. 36.
[9] The Arrest Warrant Decision refers to approximately 40 incidents involving acts of murder and persecution (*see* paras 36-62 of the Arrest Warrant Decision).
[10] The Warrant of Arrest states at p. 6 that "there are 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 neighbo[u]ring cities, from 15 February 2011 until at least 28 February 2011". [Emphasis added] *See also* Arrest Warrant Decision, para. 83.
[11] The tenth paragraph of the Preamble to the Statute reads: "*Emphasizing* that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions". [Emphasis added]
[12] Article 1 provides, in relevant part, that the Court "shall be complementary to national criminal jurisdictions".

II. WHETHER LIBYA IS INVESTIGATING THE SAME CASE

7. In relation to the second ground of appeal, the majority concludes:

> The Appeals Chamber notes that Libya placed a significant amount of material related to its domestic investigations before the Pre-Trial Chamber. As set out above, when reviewing factual findings of a first instance Chamber, the Appeals Chamber is not called upon to determine whether it might have reached a different factual conclusion from that of the first instance Chamber. Its review is limited to establishing whether the factual findings could be reasonably reached. As Libya has failed to establish that the Pre-Trial Chamber's factual conclusions were unreasonable, the second ground of appeal is dismissed.[13]

8. I respectfully disagree with the majority's conclusion. In my view, the Pre-Trial Chamber's finding that "a number of investigative steps have been taken by Libya with respect to certain discrete aspects",[14] but "the evidence, taken as a whole, does not allow [it] 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"[15] is unreasonable. I am of the opinion that, when assessing the evidence as a whole, more than "discrete aspects" are being investigated by Libya, and the Pre-Trial Chamber should have concluded that Libya is investigating the same case as that being investigated by the Prosecutor.

9. I reach this conclusion based on my assessment, in particular, of annexes C and I to the Admissibility Challenge, and annexes 3, 11 and 16 to Libya's Further Submissions on Admissibility.

10. The content of Annex C is recalled in paragraph 122 of the Majority Judgment. While I note that the witness statement summaries are relatively short, I consider that, taken together, they provide insight into the breadth of Libya's investigation of Mr Gaddafi. In particular, it can be gleaned from the summaries that the investigation is broad, covering several incidents in various parts of the country. Importantly, the fact that a number of witness statement summaries relate to Mr Gaddafi's overall role in the events, as well as to several specific incidents, sufficiently demonstrates that Libya has taken investigative steps on a broad basis.

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[13] Majority Judgment, para. 144.
[14] Impugned Decision, para. 134.
[15] Impugned Decision, para. 135.

11. Annex I is summarised in paragraph 116 of the Impugned Decision as "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".[16] Annex 3 is summarised at paragraph 115 of the Majority Judgment. It is a letter stating, *inter alia*, that 50 witness statements have been gathered so far, including by "important witnesses" and provides further details as to steps taken in the investigation. Both annexes I and 3 contain, in my view, information relevant to Libya's investigation.

12. Annex 11 is summarised at paragraph 120 of the Majority Judgment. It is a memorandum, dated 13 January 2013, prepared by the Head of the Investigation Committee at the Attorney General's Office, suggesting the joinder of Mr Gaddafi's case with those of Mr Al-Senussi and others, as "[t]he investigation showed that, what the country went through was based on [*sic*] systematic general policy used by a group of the previous regime's figures, headed by the accused in the case examined (i.e. Mr Gaddafi) and the accused in the case No. 630/2012 National Security such as [...] Abdullah Mohamed AlSenousi [*sic*] [...]. Their acts constitute a general framework for a set of serious crimes such as mass killings, random killing, looting, sabotage, rape and the spread [of] the spirit of discord and fragmentation of national unity. Such crimes are inseparable in facts and committers [...]".[17]

13. Finally, Annex 16 is summarised in paragraph 126 of the Impugned Decision as follows:

> 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 [...].

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[16] *See also* Majority Judgment, para. 115.
[17] Annex 11, p. 3.

14. Based, in particular, on these five annexes, I reach the conclusion that the investigation by the Libyan national authorities encompasses: (1) the use of the State apparatus by Mr Gaddafi; (2) for the alleged commission of the crimes of murder and persecution; (3) committed in the time period of 15 February 2011 to at least 28 February 2011; (4) against civilian demonstrators or alleged dissidents to Muammar Gaddafi's regime; and (5) across Libya. Accordingly, in my view, Libya *is* investigating the same case within the meaning of article 17 (1) (a) of the Statute and in this respect the Pre-Trial Chamber erred.

15. Having concluded that the same case against Mr Gaddafi is being investigated by Libya, it is unnecessary for me to consider the third ground of appeal. However, in order to determine whether the case is inadmissible, it is necessary to proceed to consider the fourth ground of the appeal, which concerns whether there was any error in the determination of the Pre-Trial Chamber that Libya is unable genuinely to carry out these proceedings. This is because article 17 (1) (a) of the Statute mandates that the Court shall determine that a case is inadmissible where it is being investigated, "*unless the State is unwilling or unable genuinely to carry out the investigation or prosecution*" [emphasis added]. It is to this second part of article 17 (1) (a) of the Statute that I therefore now turn.

III. INABILITY

16. Libya's fourth ground of appeal is:

> The Chamber erred in fact and in law in finding that, due to the unavailability of its national judicial system, Libya is unable to obtain the accused or the necessary evidence and testimony or is otherwise unable to carry out its proceedings, pursuant to article 17(3) of the Statute.[18]

17. At issue in this ground of appeal is the interpretation and application of article 17 (3) of the Statute, which provides:

> 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 unable to carry out its proceedings.

[18] Document in Support of the Appeal, para. 3.

18. Libya essentially argues that the Pre-Trial Chamber erred in its interpretation and application of the term "unavailability of its national judicial system",[19] and that it further erred by finding that the Libyan judicial system was "unable" in relation to the case against Mr Gaddafi.[20]

19. For the reasons that follow, I do not consider that the Pre-Trial Chamber erred in this regard.

A. "Unavailability"

20. The Pre-Trial Chamber found that article 17 (3) of the Statute was to be assessed in accordance with Libyan substantive and procedural law[21] and referred to relevant national provisions in this respect.[22] Having taken note "of the efforts deployed by Libya under extremely difficult circumstances to improve security conditions, rebuild institutions and restore the rule of law",[23] it found that:

> 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 unable to carry out [the] proceedings" in the case against Mr Gaddafi in compliance with its national laws, in accordance with the same provision.[24]

21. Having proceeded to examine specific aspects of the case relevant to its determination under article 17 (3) of the Statute,[25] the Pre-Trial Chamber stated its overall conclusion on "inability" in the following terms:

> 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

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[19] Document in Support of the Appeal, paras 144-153.
[20] Document in Support of the Appeal, paras 154-177.
[21] Impugned Decision, paras 199-200.
[22] Impugned Decision, paras 201-203.
[23] Impugned Decision, para. 204.
[24] Impugned Decision, para. 205.
[25] Impugned Decision, paras 206-214.

> 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.[26]

22. Libya submits that the Pre-Trial Chamber did not consider the criterion of "unavailability of [a State's] national judicial system" separately from the discussion of the criteria relevant to "inability",[27] bypassing proper consideration of unavailability "by, in effect, referring to Libya's purported inability 'to obtain the accused or the evidence and testimony or otherwise [...] carry out its proceedings' as examples or evidence of 'unavailability'".[28] Libya argues that this led to a merger of considerations of "unavailability" and "inability", and to "inherently circular reasoning",[29] which did not take into account the text of article 17 (3) of the Statute, which requires, first, a consideration of the "collapse" or "unavailability" of the national judicial system and, second, whether *due to* that "collapse" or "unavailability", the State is "unable" to obtain the accused or the necessary evidence, or otherwise to carry out its proceedings.[30]

23. Libya avers that the Pre-Trial Chamber did not define the meaning of "unavailability",[31] and that it should have done so by means of a textual, contextual and teleological analysis, which would have resulted in a stringent standard in relation to a determination of inability, permitting the Court to intervene "only in exceptional circumstances", consistent with the Statute's deference to domestic prosecutions.[32] Libya submits that the Pre-Trial Chamber set too high a legal standard for a State to satisfy in that it focused "solely on discrete examples of difficulties" that Libya faces in respect of Mr Gaddafi (failure to obtain two witness statements, the non-transfer of Mr Gaddafi, "speculative concerns" about witness protection and difficulties in obtaining legal representation).[33] Instead, in Libya's submission, the Pre-Trial

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[26] Impugned Decision, para. 215.
[27] Document in Support of the Appeal, paras 148-149.
[28] Document in Support of the Appeal, para. 149.
[29] Libya's Response to Victims' Observations on the Appeal, para. 40.
[30] Document in Support of the Appeal, para. 147.
[31] Document in Support of the Appeal, paras 150-152.
[32] Document in Support of the Appeal, para. 150.
[33] Document in Support of the Appeal, para. 153.

Chamber should have interpreted "unavailability" as requiring a consideration of "actual, systemic difficulties that have a direct and quantifiable (rather than purely speculative) impact on the ongoing investigation".[34] Libya submits that the interpretation of "unavailability" should set a similarly high threshold for ICC intervention as that intended by a "total or substantial collapse", in light of its context (in particular its textual proximity to 'total or substantial collapse'), and the object and purpose of the Statute: a finding of "unavailability" as a result "of some deficiencies or inefficiencies in the national system" would, according to Libya, "render otiose" the use of the term "substantial", rather than "partial", in relation to a "collapse" in article 17 (3) of the Statute.[35]

24. I do not consider Libya's principal arguments in relation to the Pre-Trial Chamber's interpretation and application of the "unavailability" criterion to be persuasive. First, I agree that, in order to determine "inability" within the meaning of article 17 (3) of the Statute, it is necessary for a Chamber to consider *both* the "unavailability" of a State's national judicial system *and* whether that State "is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings" – and that the State must be unable "*due to*" [emphasis added] this unavailability. However, contrary to Libya's submissions, I find that the Pre-Trial Chamber *did* consider the criterion of "unavailability" separately from that of inability – and considered that the latter was a consequence of the former. The Pre-Trial Chamber found that Libya's national judicial system was unavailable as a result of Libya facing "substantial difficulties in exercising its judicial powers fully across the entire territory".[36] *As a result*, Libya was, *inter alia*, "unable to obtain the accused".[37] Accordingly, both requirements of article 17 (3) of the Statute were therefore considered and, in the view of the Pre-Trial Chamber, met. The fact that the two factors require consideration does not, in my view, mean that there is no link between them.

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[34] Document in Support of the Appeal, para. 153.
[35] Document in Support of the Appeal, paras 150-151. *See* generally paras 150-153.
[36] Impugned Decision, para. 205.
[37] Impugned Decision, para. 205.

25. Second, I understand the English term "unavailability" to mean that the national judicial system is not capable of being used or is not at one's disposal.[38] The French version of the term – *indisponibilité* – has a similar meaning.[39] I have also had regard to the submissions of the Prosecutor, by reference to the Spanish and Arabic versions of the text, that a literal interpretation of the term "unavailability" could potentially mean "non-existent" in addition, or as opposed, to "non-accessible",[40] if reliance is placed upon certain of the (equally authentic)[41] language versions of the Statute.[42] However, even though, according to certain of those language versions, the literal meaning of the term could potentially be "non-existent", I find that the correct interpretation of the term, in context, and in light of the object and purpose of the Statute, is that the national judicial system is incapable of being used, which incorporates the notion of being inaccessible, in the circumstances of a particular case.

26. This is because article 17 (3) of the Statute requires the Court to consider whether, in a particular case, a State is unable due to "a total or substantial collapse or unavailability of its national judicial system". The concept of "unavailability" is distinct from that of a "collapse".[43] In order to determine inability in a particular case, the Court is required to find either "a total or substantial collapse" *or* the "unavailability" of the national judicial system. Furthermore, given that the Court was established "to put an end to impunity for the perpetrators"[44] of "the most serious

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[38] The word "unavailability" is not defined, as such, in the Online Oxford English Dictionary. Yet, according to the same source, the term "availability" means: "1.a. The quality of being available; capability of being employed or made use of", or "2.*concr.* That which is available"; *see* Oxford English Dictionary (Online) http://www.oed.com/view/Entry/13582?redirectedFrom=availability#eid (last accessed on 21 May 2014). The word "unavailable" means "1. Unavailing; inefficacious; ineffectual" and "2. Not available; incapable of being used"; *see* Oxford English Dictionary (Online) http://www.oed.com/view/Entry/209504?redirectedFrom=unavailable#eid (last accessed on 21 May 2014). The word "available" is defined as "I. That may avail. *arch.* 1.a. Capable of producing a desired result; of avail, effectual, efficacious. *arch.* or *Obs.* except as in 1b. 1.b. in *Law*. Valid. 2. Of advantage; serviceable, beneficial, profitable (*to, unto*). *arch.* (The last quotation passes into 3a.) II. That may be 'availed of'. 3.a. Capable of being employed with advantage or turned to account; *hence*, capable of being made use of, at one's disposal, within one's reach. [...]"; *see* Oxford English Dictionary (Online) http://www.oed.com/view/Entry/13583?redirectedFrom=available#eid (last accessed on 21 May 2014).

[39] "Indisponible" has been defined as "dont on ne peut pas disposer": *see* French Dictionary Larousse (Online) http://www.larousse.com/en/dictionaries/french/indisponible/42645 (last accessed on 21 May 2014).

[40] Prosecutor's Response to the Document in Support of the Appeal, paras 159-160.

[41] *See* article 128 of the Statute.

[42] I note that there is nothing in the drafting history that concretely defines the term "unavailability".

[43] *See also* Prosecutor's Response to the Document in Support of the Appeal, paras 156-157.

[44] Preamble of the Statute, fifth paragraph.

crimes of concern to the international community as a whole",[45] it is consistent therewith for it to be sufficient for the system to be unavailable *in respect of a particular case*. Were the situation otherwise, perpetrators of such crimes would be able to escape investigation and prosecution merely because the system was potentially available to one or more other perpetrators, even if there were no prospect of it being available in their case.[46] Moreover, Libya's submissions in relation to the ongoing nature of the investigation[47] or genuineness[48] do not alter my view. I, therefore, do not find any legal error in the Pre-Trial Chamber's approach to "unavailability" in the present case.

B. "Unable to obtain the accused"

27. Under the heading "*(i) Inability to obtain the accused*",[49] the Pre-Trial Chamber noted 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

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[45] Preamble of the Statute, fourth paragraph.

[46] That it is sufficient for the system to be unavailable *in respect of a particular case* is a view supported by various commentators. *See* F. Gioia, "Comments on Chapter 3 of Jann Kleffner", in J.K. Kleffner and G. Kor (eds), *Complementary Views on Complementarity: Proceedings of the International Roundtable on the Complementary Nature of the International Criminal Court, Amsterdam, 25/26 June 2004* (T.M.C. Asser Press, 2006), p. 107 ("there is more to inability than the scenario of a collapsed State. The Statute provides that inability might also be triggered by the 'unavailability' of a given legal system. What does unavailability amount to? It may be briefly described as a situation in which a legal system is theoretically in place and functioning as a whole but incapable of functioning in respect of a given case, due to legal or factual obstacles, and always provided that such unavailability results in the State being 'unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings'. [Footnotes omitted]"); J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Martinus Nijhoff Publishers, 2008), pp 317-318 ("The fact that 'unavailability' is included alongside 'total or substantial collapse' indicates that the former adds something to the latter. It thus appears to cover situations where a legal system has not collapsed (*i.e.* it still exists) but is inadequate (not accessible or not useful) for the purpose of dealing genuinely with a given case. [...] In light of the object and purpose of the Rome Statute, the 'unavailability' criterion should arguably be construed sufficiently broadly so as to reduce the number of situations where the ICC must defer to national proceedings despite the state's actual inability to carry out its proceedings in a meaningful manner. Deferral in such situations would effectively mean that impunity would prevail as a result of the national system's inadequacy, exactly what the Rome Statute aims at avoiding."). *See also* M. El-Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff Publishers, 2008), p. 222 ("the unavailability of an effective judicial system, that is, one capable of guaranteeing a full, effective domestic criminal process in relation to a certain situation or case" [footnote omitted]).

[47] Document in Support of the Appeal, para. 172.

[48] Document in Support of the Appeal, paras 173-176.

[49] Impugned Decision, p. 85.

> held are still ongoing". 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. 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.[50] [Footnotes omitted]

28. The Pre-Trial Chamber further held that "no concrete progress" had been made to transfer Mr Gaddafi to Tripoli since his apprehension in November 2011 and that no evidence had been produced that this problem would be resolved in the near future.[51] Finally, the Pre-Trial Chamber noted the submissions of Libya "that *in absentia* trials are not permitted under Libyan law when the accused is present on Libyan territory and his location is known to the authorities".[52] Accordingly, the Pre-Trial Chamber concluded that "[a]s a result, without the transfer of Mr Gaddafi into the control of the central authorities, the trial cannot take place".[53]

29. Libya argues, *inter alia*, that the Pre-Trial Chamber erred by finding that Libya "is unable to secure the transfer of Mr Gaddafi's custody into State authority and that this constitutes an inability to 'obtain the accused'".[54] Libya avers that the Pre-Trial Chamber's determination was "based on several erroneous premises".[55]

30. In this respect, Libya argues that the Pre-Trial Chamber erred in finding that the judicial system operative in Zintan falls outside Libyan authority, submitting that the Chamber had insufficient regard to various factors that established that the Libyan Government "is able to exercise its authority over Mr Gaddafi alongside the local authority in Zintan".[56]

31. Libya avers that the Pre-Trial Chamber "elided the desirability of transfer to Tripoli with the ability of Libya to 'obtain the custody of Mr Gaddafi'".[57] Libya contends that the fact that this transfer has not yet occurred does not reflect an

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[50] Impugned Decision, para. 206
[51] Impugned Decision, para. 207.
[52] Impugned Decision, para. 208.
[53] Impugned Decision, para. 208.
[54] Document in Support of the Appeal, para. 154.
[55] Document in Support of the Appeal, para. 156.
[56] Document in Support of the Appeal, paras 157-160.
[57] Document in Support of the Appeal, para. 161.

inability to "obtain" Mr Gaddafi; that it is incorrect to equate "the carrying out of a transfer from one area falling within the authority of Libya to another with an (in)ability to obtain the accused"; and that there was no legal impediment to his trial being conducted in Zintan.[58] Libya submits that the finding of the Pre-Trial Chamber that the trial could not take place without Mr Gaddafi's transfer into the control of the central authorities was unreasonable in light of "these clear indices of sufficient control by the central government in Zintan", combined with a lack of evidence that the domestic proceedings had been disrupted as a result of Mr Gaddafi's detention in Zintan.[59]

32. In my view, the main issue to be determined here is not whether or not the judicial system operative in Zintan falls outside Libyan authority or whether the Zintan Brigade is in fact a "Government-sanctioned local authority". Rather, the issue under this ground of appeal is whether the central authorities have been able to obtain Mr Gaddafi for the purposes of trial. In this regard, the Pre-Trial Chamber found that Libya had not been able to secure the transfer of Mr Gaddafi from Zintan into the control of the central authorities for his detention and trial in Tripoli,[60] and that, without such a transfer, his trial could not take place.[61] I do not find this conclusion to be unreasonable.

33. First, even assuming that there was a degree of cooperation in certain respects between the central Government and the Zintan Brigade, this apparently had not been sufficient to transfer Mr Gaddafi into the control of the central authorities so that his trial could take place. In this regard, I note that Libya does not point to any evidence that the Pre-Trial Chamber overlooked in coming to that specific conclusion.

34. Second, this conclusion stands even assuming, as Libya argues on appeal,[62] that "the State" should not be interpreted to mean exclusively the "central" authorities; that Mr Gaddafi has, in fact, been under the control of the authorities in that the Zintan Brigade "is a Government-sanctioned local authority"; and that there is no

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[58] Document in Support of the Appeal, para. 161.
[59] Document in Support of the Appeal, para. 161.
[60] Impugned Decision, paras 206-207.
[61] Impugned Decision, para. 208.
[62] Document in Support of the Appeal, para. 157.

distinction in international law between a central and a local authority.[63] Again, considering those parts of Libya's submissions that are referenced in the relevant part of the Impugned Decision,[64] as well as the references in the submissions of the Prosecutor and the Defence on appeal to other materials that were before the Pre-Trial Chamber and that are relevant to its determination,[65] I cannot see any clear error in the conclusion of the Pre-Trial Chamber that "without the transfer of Mr Gaddafi into the control of the *central* authorities, the trial cannot take place" (emphasis added).[66]

35. Finally, in relation to Libya's submission that there is no legal impediment to Mr Gaddafi's trial being held in Zintan and that the trial could take place there,[67] I note Libya's submissions to the Pre-Trial Chamber at a hearing in October 2012, which included the statement that the President of Libya had confirmed to the media on 22 September 2012 that "there is no prospect of a trial taking place in Zintan due to inadequate courtroom facilities and the other infrastructure that will be needed for a trial".[68] I further note that, in the Impugned Decision, the Pre-Trial Chamber referred to Libya's submissions in stating that it was estimated that Mr Gaddafi's transfer to Tripoli "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".[69] As such, I do not find anything within the argument raised that could demonstrate any clear error on

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[63] Document in Support of the Appeal, para. 157.
[64] *See* Impugned Decision, paras 206-208.
[65] I note, in particular, the following statements that were made by representatives of Libya in the pre-trial proceedings: a statement in a filing by one of Libya's legal representatives in May 2012 that: "[...] it is still the case that despite best efforts, Mr. Gaddafi is not yet in the custody of the interim Libyan Government. As set forth in previous submissions, Mr. Gaddafi is still being held by the Zintan brigade which originally captured him in combat" ("Libyan Government Response to Defence Request", 30 May 2012, ICC-01/11-01/11-160, para. 20); and a statement by the representative of Libya at a hearing on 9 October 2012: "MR SANDS: So it's very quick what I have to say about the question of control over Mr Gaddafi's detention. It is correct that he presently remains in the custody of the Zintan Brigade. Once the Prosecutor-General is appointed by the new cabinet, that Prosecutor-General is expected to prioritise, working with the Zintan Brigade, to effect the transfer of Mr Gaddafi from Zintan to Tripoli and, in particular, to the purpose-built trial and detention facilities there. This engagement with the Zintan Brigade will form part of the new government's commitment to demobilising the various militia groups which remain active across Libya, as discussed earlier by Professor El-Gehani, and you will appreciate the significance of that for the present delicate situation in which Libya finds itself" (ICC-01/11-01/11-T-2-Red-ENG, p. 29, lines 14-24).
[66] Impugned Decision, para. 208.
[67] Document in Support of the Appeal, para. 161.
[68] ICC-01/11-01/11-T-2-Red-ENG, p. 19 line 25 to p. 20 line 2, also referred to in the Prosecutor's Response to the Document in Support of the Appeal, para. 170, footnote 324.
[69] Impugned Decision, para. 206, referring to Libya's Reply of 4 March 2013.

the part of the Pre-Trial Chamber on the basis of the facts that were before it at the time of the Impugned Decision.

36. For these reasons, I cannot find any clear error or unreasonableness in the conclusions of the Pre-Trial Chamber in respect of Libya being unable to obtain Mr Gaddafi.

37. In light of the foregoing – and given that it is sufficient for one of the (alternative) criteria in respect of a State being "unable" under article 17 (3) of the Statute to be satisfied – I do not consider it necessary to rule upon the other aspects of Libya's alleged inability, which are addressed at paragraphs 209-214 of the Impugned Decision.

IV. CONCLUSION

38. In conclusion, I therefore agree that, in the present case, it is appropriate to confirm the Impugned Decision and to dismiss Libya's appeal.

Judge Sang-Hyun Song

Dated this 21st day of May 2014

At The Hague, The Netherlands

Dissenting Opinion of Judge Anita Ušacka

1. I respectfully disagree with my colleagues on the resolution of this appeal that leads them to confirm the "Decision on the admissibility of the case against Saif Al-Islam Gaddafi"[1] (hereinafter: the "Impugned Decision"), in which the case against Mr Saif Al-Islam Gaddafi (hereinafter: "Mr Gaddafi") was found to be admissible before the Court.

2. For the reasons that follow, I would have reversed the Impugned Decision and remanded the matter to the Pre-Trial Chamber in order to allow it, *ex nunc*, to apply the facts to the correct interpretation of article 17 (1) (a) of the Statute, based on the specific circumstances of this case and the correct standard of proof, as laid out below.

I. IMPORTANT FEATURES OF THE PROCEDURAL HISTORY

3. Without attempting to recall the entire procedural history of this case, I would like to draw attention to several features that I consider to be of particular importance. They are important because the issue of complementarity in the case at hand should not be analysed in the abstract, but on the basis of the specific background of this case and the concrete steps taken by Libya. The facts of this case are, in many respects,

[1] 31 May 2013, ICC-01/11-01/11-344-Conf.

different from the previous cases that have formed the basis for the Court's jurisprudence to date. These differences include the trigger mechanism that allows the Court to exercise jurisdiction in this case, the fast-paced development of events in Libya following the United Nations Security Council Resolutions, the willingness of the new government of Libya to deal with the case domestically, the active cooperation of Libya with the Prosecutor, the difficulties Libya faces during its transitional period, and the particular relationship between the trio of principal participants in this case, i.e. Libya, the Prosecutor and the Defence. With respect to the latter, I specifically note the very active role taken by the suspect's Defence Counsel in opposing Libya, a position that has an impact on the relationship between the Court and Libya, as well as the apparently contradictory positions taken by the Prosecutor at different stages of this case as well as during the admissibility proceedings.[2]

4. The start of the case against Mr Gaddafi before the Court:[3] On 26 February 2011, the Security Council of the United Nations (hereinafter: "Security Council"), "[*s*]*tressing* the need to hold to account those responsible for attacks, including by forces under their control, on civilians", referred "the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court".[4] Five days later, on 3 March 2011, the Prosecutor decided to open an investigation into the situation pursuant to article 53 (1) (a) of the Statute. Two months later, on 16 May 2011, the Prosecutor requested Pre-Trial Chamber I

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[2] *See* "Prosecution's Submissions on the Prosecutor's recent trip to Libya", 25 November 2011, ICC-01/11-01/11-31, paras 7-9; "Prosecution Observations on Libya's Submissions Regarding the arrest of Saif Al-Islam Gaddafi", 2 February 2012, ICC-01/11-01/11-50; "Prosecution's Response to 'Government of Libya's Application for Leave to Appeal the "Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi"'", 16 April 2012, ICC-01/11-01/11-110; "Prosecution response to Application of the Government of Libya pursuant to Article 19 of the ICC Statute", 4 June 2012, ICC-01/11-01/11-167-Conf, paras 6-8, 33-39; "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, paras 37-38; "Prosecution's Response to the 'Document in Support of the Government of Libya's Appeal against the Decision on the admissibility of the case against Saif Al-Islam Gaddafi'", 16 July 2013, ICC-01/11-01/11-384-Conf, submissions in relation to the first and second grounds of appeal.

[3] Compare this time frame to that relevant to the Darfur Security Council Referral in 2005: The Prosecutor took two months to decide to open an investigation and two years (2007) to request the issuance of the first two warrants of arrest in relation to this situation. The warrant of arrest against Omar Hassan Al-Bashir was requested in July 2008 and the first warrant of arrest was issued in March 2009.

[4] United Nations, Security Council, *Resolution 1970*, 26 February 2011, SC/10187/Rev.1.

(hereinafter: "Pre-Trial Chamber") to issue three warrants of arrest,[5] including for Mr Gaddafi, for having committed murder and persecution as crimes against humanity on and after 15 February 2011. On 27 June 2011, the Pre-Trial Chamber issued these warrants of arrest.[6]

5. The regime change in Libya and Libya's first submissions before the Court: The government of Muammar Gaddafi was overthrown in October 2011. Shortly thereafter, on 19 November 2011, Mr Gaddafi was arrested within Libya[7] and has been held in Zintan, Libya, from the time of his arrest. The Pre-Trial Chamber, upon receipt of this information, invited Libya to make submissions in relation to the arrest of Mr Gaddafi.[8] In response thereto, Libya requested a postponement of the surrender request pursuant to article 94 of the Statute for the reason that it had initiated domestic proceedings against Mr Gaddafi and was also considering investigating Mr Gaddafi for the conduct that is the subject of the Court's warrants of arrest.[9] The Pre-Trial Chamber rejected the request and reiterated the need for Libya to surrender Mr Gaddafi.[10] Thereafter, Libya requested a postponement of the surrender request pursuant to article 95 of the Statute for the reason that Libya was intending to file an admissibility challenge. On 4 April 2012, this request was also rejected by the Pre-Trial Chamber, on the basis that the intention to file an admissibility challenge is not sufficient.[11]

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[5] "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI", ICC-01/11-4-Conf-Exp; public redacted version: ICC-01/11-4-Red.

[6] "Warrant of Arrest for Saif Al-Islam Gaddafi", ICC-01/11-01/11-3; "Warrant of Arrest for Abdullah Al-Senussi", ICC-01/11-15; "Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi", ICC-01/11-13. *See also* "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'", ICC-01/11-12.

[7] *See* Pre-Trial Chamber I, "Public Redacted Version of Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi", 6 December 2011, ICC-01/11-01/11-39-Red, para. 3.

[8] *See* Pre-Trial Chamber I, "Public Redacted Version of Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi", 6 December 2011, ICC-01/11-01/11-39-Red, paras 9, 11.

[9] "Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi", 7 March 2012, ICC-01/11-01/11-72, paras 8, 12-13.

[10] "Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi", 7 March 2012, ICC-01/11-01/11-72; *see also* "Decision on the Registry-OPCD Visit to Libya", 3 February 2012, ICC-01/11-01/11-52, allowing the Registry and the OPCD that was appointed to represent the interests of Mr Gaddafi to visit Mr Gaddafi.

[11] "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.

6. Challenge to the admissibility of the case before the Court: On 1 May 2012, Libya filed the admissibility challenge (hereinafter: "Admissibility Challenge").[12] The Pre-Trial Chamber held in a separate decision that Libya may, pursuant to article 95 of the Statute, postpone the surrender of Mr Gaddafi due to the Admissibility Challenge.[13]

7. Stay of the Prosecutor's investigations: Another effect of the Admissibility Challenge is, according to article 19 (7) of the Statute, the suspension of the Prosecutor's investigation in relation to the case *Prosecutor v. Saif Al-Islam Gaddafi*.[14] Therefore, the investigation has not proceeded since. In addition, the case is not yet at the confirmation stage.

8. The flow of information from Libya to the Pre-Trial Chamber: Libya submitted information about the legal proceedings initiated against Mr Gaddafi and about the development of Libya's legal system at the same time as the Admissibility Challenge.[15] Libya continued to inform the Pre-Trial Chamber about the state of affairs in Libya,[16] was heard at an oral hearing held on 9 and 10 October 2012, filed further submissions on 23 January 2013,[17] and provided further information in its

[12] "Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute", ICC-01/11-01/11-130-Conf; public redacted version: ICC-01/11-01/11-130-Red.
[13] "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", 2 June 2012, ICC-01/11-01/11-163, para. 16.
[14] *See* Office of the Prosecutor, "Third Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1970 (2011)", 16 May 2012, para. 30. *See also* "Prosecution Response to the 'Document in Support of the Government of Libya's Appeal against the Decision on the admissibility of the case against Saif Al-Islam Gaddafi'", 16 July 2013, ICC-01/11-01/11-384-Conf (OA 4), para. 142. Article 19 (7) and (8) of the Statute provides: "7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17. 8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court: (a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6; (b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and (c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58".
[15] "Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute", ICC-01/11-01/11-130-Conf, with eleven annexes. *See also* "Libyan Government's filing of compilation of Libyan law referred to in its admissibility challenge", 28 May 2012, ICC-01/11-01/11-158.
[16] *See* e.g. "Libyan Government's provisional reprot pursuant to the Chamber's Decision of 9 August 2012 & Request for leave to file further report by 28 September 2012", 7 September 2012, ICC-01/11-01/11-205.
[17] "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; "Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", ICC-01/11-01/11-258-Conf-Exp with Annexes 1-23.

reply on 4 March 2013 to the responses of the parties to its further submissions.[18] In the latter filings, Libya requested that the Pre-Trial Chamber come to Tripoli to inspect the investigative file and provided additional information about the appointment of a new Prosecutor-General by the General National Congress (as opposed to the transitional government) and other additional case-related information.[19] Furthermore, it submitted additional information in support of its challenge to the admissibility of the case against Mr Abdullah Al-Senussi (hereinafter: "Mr Al-Senussi") to the same Pre-Trial Chamber in the same joint case.[20] On 23 September 2013, when the case was already at the appeals stage, Libya requested leave to submit additional evidence on appeal,[21] reporting that on 19 September 2013 an initial hearing was held in Libya before a Libyan Accusation Chamber in relation to Mr Gaddafi, Mr Al-Senussi and 37 others.[22]

9. Since the overthrow of the Gaddafi regime, Libya has been in a state of transition: The present situation in Libya has divergent aspects, as is the case with many transitional regimes. While Libya moved from a transitional parliament (the National Transitional Council) to a newly elected parliament in August 2012, it still had interim governments and was still attempting to implement steps to fully stabilise the country, including by promulgating a new constitution. The Security Council, in its Resolution 2095 of 14 March 2013, called these "positive developments [...] which will improve the prospects for a democratic, peaceful and prosperous future for its people".[23] This Security Council Resolution also extended the mandate of the United Nations Support Mission in Libya (UNSMIL) in time and scope, including supporting Libya in managing the process of a democratic transition, promoting the rule of law, restoring public security, etc. In the same resolution, the Security Council,

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[18] "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", ICC-01/11-01/11-293-Conf.
[19] "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", ICC-01/11-01/11-293-Conf, paras 6-7.
[20] "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute", 2 April 2013, ICC-01/11-01/11-307-Conf-Exp.
[21] "The Libyan Government's further submissions in reply to the Prosecution and Gaddafi Responses to 'Document in Support of Libya's Appeal against the 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'"", ICC-01/11-01/11-454-Conf (OA 4). A public redacted version was filed on the same day, ICC-01/11-01/11-454-Red (OA 4), paras 4-11.
[22] ICC-01/11-01/11-454-Red (OA 4), paras 4, 6.
[23] United Nations, Security Council, *Resolution 2095*, 14 March 2013, S/RES/2095, para. 1.

however, expressed grave concerns "at continuing reports of reprisals, arbitrary detentions without access to due process, wrongful imprisonment, mistreatment, torture and extrajudicial executions in Libya" and called upon "the Libyan government to take all steps necessary to accelerate the judicial process, transfer detainees to State authority and prevent and investigate violations and abuses of human rights [...]".[24]

10. With the above procedural history in mind, I note that all four grounds of appeal raised by Libya focus on the application of the principle of complementarity.[25] The first three grounds of appeal are interlinked and deal with alleged legal, factual and procedural errors in relation to the Pre-Trial Chamber's finding that Libya is not investigating the same case against Mr Gaddafi that is currently before the Court. The first ground of appeal addresses both the interpretation of the phrase "case is being investigated or prosecuted by a State which has jurisdiction over it" in article 17 (1) (a) of the Statute and the application of this legal provision by the Pre-Trial Chamber in this specific case. The focus of the first ground of appeal as well as of this Opinion therefore is on whether it is necessary that Libya investigates (substantially) the same conduct as that which is the basis for the warrant of arrest.

11. Before entering into an analysis of how article 17 (1) (a) of the Statute has been interpreted and applied in the previous jurisprudence of the Court as well as in the Impugned Decision, the principle of complementarity needs to be briefly discussed.

II. THE PRINCIPLE OF COMPLEMENTARITY

12. The principle of complementarity is enshrined in the Preamble and article 1 of the Statute, both establishing that the Court "shall be complementary to national criminal jurisdictions". While complementarity is not further explained in the Statute, it is referred to in the chapeau of article 17 (1) of the Statute, which reads under the heading "Issues of admissibility":

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[24] United Nations, Security Council, *Resolution 2095*, 14 March 2013, S/RES/2095, para. 5; *see also* J. M. Otto, et al. (eds), "Searching for Justice in Post-Gaddafi Libya", 2013, accessed at: https://openaccess.leidenuniv.nl/bitstream/handle/1887/21634/Otto%20JM%2c%20%20J%20Carlisle%2c%20J%20and%20S%20Ibrahim%202013%20Searching%20for%20Justice%20in%20Post-Gaddafi%20Libya.pdf?sequence=2.

[25] *See* "Document in Support of the Government of Libya's Appeal against the 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'", 24 June 2013, ICC-01/11-01/11-370-Conf-Exp-Corr (OA 4). The appeal was filed on 7 June 2013.

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;
>
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.
>
> (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
>
> (d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

> (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
>
> (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
>
> (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. 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 unable to carry out its proceedings.

13. The legal concept that a Court should "be complementary to national criminal jurisdictions" was included for the first time in the history of international criminal law in the Statute. The *ad hoc* tribunals, for example, were not complementary to the jurisdictions of the former Yugoslav States or Rwanda. Rather, these tribunals retained primary jurisdiction over domestic courts, to which the *ad hoc* tribunals

could refer cases.[26] However this Court differs from the tribunals, having been established on the basis of an international treaty, namely the Rome Statute.

14. The drafting history of the Statute shows that the principle of complementarity was, from the very beginning, at the heart of the intense discussions about the Court that took in total more than four years and which had the goal of clarifying the relationship between the Court's jurisdiction and domestic jurisdictions.[27] The basic proposal, starting from the 1994 International Law Commission Draft, was that it is the Court, and not the States, that should have the authority to decide whether a case before the Court is admissible.[28] During negotiations, it was agreed that solely mentioning this principle in the Preamble of the Statute was not sufficient, and that a mechanism needed to be established in terms of how the Court was to apply this principle.[29] These mechanisms were then established when drafting articles 17, 18 and 19 of the Statute.

15. At the beginning, two main positions were taken in relation to the understanding of complementarity, which changed gradually over the years. On the one hand, it was expressed that there should be a strong presumption for state sovereignty, which meant that the Court would not be able to intervene if a State had an operational judicial system and undertook a "*bona fide*" investigation and/or prosecution.[30] On the other hand, it was stated that the Court should have primacy of jurisdiction.[31] A view that sought to balance these two positions was that the Court should not be merely residual in character, but, at the same time, should respect the primacy of national jurisdictions.[32]

16. Later, positions were developed by States that the Court should not act as an appeals tribunal or engage in judicial review of national decisions, while other States

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[26] *See* rule 11*bis* of the ICTY Rules of Procedure and Evidence.
[27] *See* United Nations, General Assembly, *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court,* 6 September 1995, A/50/22 (hereinafter: "Ad-Hoc Committee Report"), para. 29.
[28] Yearbook of the International Law Commission 1994, Volume II Part Two, Report of the Commission to the General Assembly on the work of its forty-sixth session, A/CN.4/SER.A/1994/Add.l (Part 2), p. 45.
[29] Ad-Hoc Committee Report, paras 36-47.
[30] Ad-Hoc Committee Report, para. 31. *See also* United Nations, General Assembly, Report of the Secretary-General, 31 March 1995, A/AC.244/1/Add.2, pp. 9-11.
[31] Ad-Hoc Committee Report, para. 32.
[32] Ad-Hoc Committee Report, para. 33.

favoured a role for the Court in situations where national jurisdictions were ineffective.[33] At issue was therefore the balance between a State's sovereignty and an effective and credible Court.[34] The matter was of great importance because the credibility and strength of the Court in achieving its overall goal to fight impunity depended on its resolution.

17. With concessions on all sides, consensus emerged at the 1997 Preparatory Committee that "[t]he Court would not take jurisdiction unless the State with criminal jurisdiction over the offence was unable or unwilling to carry out the investigation or prosecution".[35] This consensus entered the Rome Conference as the cornerstone to the successful adoption of the Statute and was adopted without substantive changes. It has been repeatedly said that, "[w]ithout it there would have been no agreement" on the Statute.[36]

18. On the basis of this agreement, 93 States ratified the Rome Statute by March 2003, when the first 18 judges of the Court were sworn in. Today, this number has risen to 122 States Parties. Complementarity was also the subject of the first resolution of the Statute's Review Conference in Kampala in 2010. This resolution clarified that there is a close link between the overall goal of the Court, i.e. to "combat impunity for the most serious crimes of international concern as referred to in the Rome Statute", and the principle of complementarity.[37] It recalled the importance of cooperation with States for the Court's work to be successful, as the Court acts without its own police. It also stressed that it is foremost the primary responsibility of national jurisdictions to prosecute the crimes at issue. The resolution also recognised the need to strengthen national legal systems and enhance international assistance to "effectively prosecute perpetrators of the most serious crimes of concern to the

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[33] United Nations, General Assembly, *Report of the Preparatory Committee on the Establishment of an International Criminal Court: Volume I,* 13 September 1996, A/51/22, paras 153-160; note para. 154: "Rather, [the Court's] jurisdiction should be understood as having an exceptional character. There may be instances where the Court could obtain jurisdiction quikcly over a case because no good-faith effort was under way at the national level to investigate or prosecute the case, or no credible national justice system even existed to consider the case".

[34] *See* S. A. Williams and W. A. Schabas, "Article 17: Issues of Admissibility", in O. Triffterer (ed.), Commentary on the Rome Statute (C.H. Beck-Hart-Nomos, 2nd ed., 2008), p. 608 (hereinafter: "Triffterer Commentary, Article 17"), p. 613.

[35] Triffterer Commentary, Article 17, p. 610.

[36] Triffterer Commentary, Article 17, p. 613.

[37] Kampala Review Conference, "Complementarity", 8 June 2010, Resolution RC/Res.1.

international community".[38] It also took into account that the Statute has been ratified by States from all continents with different political systems, legal traditions, cultures and languages. Complementarity has also been an ongoing subject of discussion at the Assembly of States Parties.[39]

19. The literal understanding of the term "complementary" conveys that the Court and States should work in unison – by complementing each other – in reaching the Statute's overall goal, i.e. to fight against impunity for the commission of the most serious crimes of concern to humankind.[40] In my dissents from the admissibility judgments in the *Situation in the Republic of Kenya*, I noted:

> The "criminal jurisdiction" of the Court and that of States are "complementary" to each other. This means that both the Court and States strive to achieve the goals of the Statute, as reflected in its Preamble, especially that of putting an "end to impunity for the perpetrators" of "the most serious crimes of concern to the international community as a whole". This also means that there must be, to the extent possible, close cooperation and communication between the Court, especially the Office of the Prosecutor, and the State in question. Complementarity reinforces the principle of international law that it is the sovereign right of every State to exercise its criminal jurisdiction; but it also ensures that the Court can step in to give effect to the goals of international criminal justice. While dialogue between the State and the Court is therefore required and desired, it is the Court, and not a third authority, that is the arbiter in case of conflict. According to a commentator, complementarity attempts to reconcile "the imperatives of sovereignty and global justice". When those "imperatives" clash, the judiciary of the Court will have to determine whether a case is admissible on the basis of article 17 (1) (a) and (b) of the Statute. [Footnotes omitted.][41]

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[38] Kampala Review Conference, "Complementarity", 8 June 2010, Resolution RC/Res.1, para. 3.
[39] ICC-ASP/9/Res.3; *see also* ICC-ASP-8-51, ICC-ASP-9-26.
[40] According to the Oxford English Dictionary, the word "complementary" is used with respect to two or more things in order to express that they are mutually complementing or complement each other's deficiencies; *see* Oxford English Dictionary, Online OED, meaning 3.a. "That which completes or makes perfect; the completion, perfection, consummation"; meaning 5.a. "Something which, when added, completes or makes up a whole; each of two parts which mutually complete each other, or supply each other's deficiencies"; the word "complement" indicates that one part is used to make a whole with another.
[41] Appeals Chamber, *Prosecutor v. William Samoei Ruto et al.*, "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'", Dissenting Opinion of Judge Anita Ušacka, 20 September 2011, ICC-01/09-01/11-336 (OA), para. 19; Appeals Chamber, *Prosecutor v. Francis Kirimi Muthaura et al.*, "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'", Dissenting Opinion of Judge Anita Ušacka, 20 September 2011, ICC-01/09-02/11-342 (OA), para. 19 [hereinafter: "*Kenya Admissibility Dissents*" and distinguished in the footnotes by "Muthaura et al" and "Ruto et al"].

III. THE JURISPRUDENCE ON THE "SAME PERSON – SAME CONDUCT" TEST

A. Introduction

20. From the moment of the Statute's promulgation, the principle of complementarity attracted the attention of the academic world. However, the Court had the delicate task of developing its jurisprudence on complementarity in the setting of so-called "self-referral" situations,[42] i.e. in relation to cases arising from the situations in Uganda (2003), the Democratic Republic of the Congo (hereinafter: "DRC") (2004) and the Central African Republic (hereinafter: "CAR") (2005).

21. The cases of the first suspects who were surrendered to the Court in these situations had similar histories. In cases arising from the investigations in the DRC, Mr Lubanga, Mr Katanga, and Mr Ngudjolo Chui were all arrested by DRC authorities based on national arrest warrants and held in its custody. Furthermore, national proceedings were discontinued with their surrender to the Court. Mr Bemba from the CAR situation was arrested in a European State, but he too was the subject of proceedings in CAR while he was at large. The cases differ in whether the domestic arrest warrants were for similar or different conduct investigated by the Prosecutor.

22. Evidently, these were cases where the national authorities chose not to exercise their sovereign rights, but wanted the Court to investigate and prosecute against the individuals surrendered to the Court. Therefore, these cases did not give rise to any disputes with respect to the principle of complementarity, as on its face there was no conflict between the sovereign rights of the States and the exercise of the Court's jurisdiction.[43]

23. In 2010, the Prosecutor initiated investigations in Kenya pursuant to article 15 of the Statute with the authorisation of Pre-Trial Chamber II.[44] While Kenya was

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[42] *See* e.g. C. Kress "'Self-Referrals' and 'Waivers of Complementarity': Some Considerations in Law and Policy" 2 *Journal for International Criminal Justice*, (2004), p. 944; *see also* J. Kleffner, "Auto-referrals and the complementary nature of the ICC", in: C. Stahn, G. Sluiter, *The Emerging Practice of the International Criminal Court* (Nijhoff Publishers, Leiden, Boston 2009), pp. 41-53.
[43] The question nevertheless arises as to how the Court *should* deal with such cases.
[44] *Situation in Kenya* "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", 31 March 2010, ICC-01/09-19. A corrigendum was filed on 1 April 2010 (ICC-01/09-19-Corr).

informed at that time that, pursuant to article 18 (1) of the Statute, the Prosecutor would initiate such investigations, Kenya did not announce that it was investigating its nationals "with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States".[45] However, a year later, in 2011, after Pre-Trial Chamber II issued six summonses to appear, including against the main leaders of the major political Kenyan parties, Kenya reacted by raising admissibility challenges. Pre-Trial Chamber II rejected these challenges because Kenya was held to be inactive with respect to these six suspects.[46]

B. The Pre-Trial Chambers' first jurisprudence

24. In the case of *Prosecutor v. Thomas Lubanga*, Pre-Trial Chamber I was the first Chamber to express itself in more detail[47] on notions relevant to article 17 (1) (a) and (b) of Statute. In its decision allowing victims to participate in the situation stage of the proceedings (hereinafter: "2006 Lubanga Victims Decision"), Pre-Trial Chamber I made a first finding on the notion of a "case". It held:

> The Chamber considers that the Statute, the Rules of Procedure and Evidence and the Regulations of the Court draw a distinction between situations and cases in terms of the different kinds of proceedings, initiated by any organ of the Court, that they entail. Situations, which are generally defined in terms of temporal, territorial and in some cases personal parameters, such as the situation in the territory of the Democratic Republic of the Congo since 1 July 2002, entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such. **Cases, which comprise 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, entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear.** [Emphasis added and footnotes omitted.][48]

25. It is worth mentioning that the Pre-Trial Chamber did not reveal the reasons that led it to this definition. Rather, the Pre-Trial Chamber referred to Triffterer's 1st

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[45] *See* article 18 (2) of the Statute.

[46] *Prosecutor v. William Samoei Ruto et al.*, "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. 70; *Prosecutor v. Francis Kirimi Muthaura et al.*, "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. 66.

[47] *See Prosecutor v. Joseph Kony et al.*, "Decision on the Prosecutor's application for warrants of arrest under article 58", 8 July 2005, ICC-02/04-01/05-1, p. 2.

[48] *Situation in the Democratic Republic of Congo*, "Decision on Application for Participation in the Proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5 and VPRS-6", 17 January 2006, ICC-01/04-101, para. 65. A corrigendum was filed in English on 22 March 2006 (ICC-01/04-101-tEN-Corr).

edition of the *Commentary on the Rome Statute of the International Criminal Court* as the only source. The referenced commentary, however, does not refer to the more detailed description given by the Pre-Trial Chamber. Rather, in my view, it proposes a more elastic approach: "The concept of a 'case' would seem to imply that an individual or individuals had been or were targeted as the result of an investigation of a 'situation'".[49] It was, accordingly, the Pre-Trial Chamber that referred for the first time to the notion of "incidents", as well as to the fact that a "case" only starts after the issuance of a warrant of arrest or summons to appear.

26. In making a preliminary finding on the admissibility of the case, Pre-Trial Chamber I addressed the use of the term "case" in article 17 (1) (a) of the Statute and held by reference to the above decision and again without further reasoning (hereinafter: "2006 Preliminary Admissibility Decision")[50]:

> Having defined the concept of case as including "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," the Chamber considers that it is a *conditio sine qua non* for a case arising from the investigation of a situation to be inadmissible that **national proceedings encompass both the person and the conduct** which is the subject of the case before the Court.[51] [Emphasis added and footnote omitted.]

27. As the national proceedings related to different conduct from that investigated by the Prosecutor (i.e. article 8 (2) (e) (vii) of the Statute - child soldiers), the Pre-Trial Chamber found the case, on a preliminary basis, to be admissible, without needing to consider questions related to the self-referral that had triggered the Court's jurisdiction. This aspect of the decision was not appealed. In connected proceedings, in relation to the case *Prosecutor v. Bosco Ntaganda*, the Appeals Chamber held that Pre-Trial Chambers should, as a rule, refrain from such a preliminary assessment of the admissibility of a case when issuing warrants of arrest or summonses to appear, because neither the State nor the suspect could have a say in these proceedings.[52]

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[49] C. K. Hall, "Article 19: Challenges to the Jurisdiction of the Court or the Admissibility of a Case", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Nomos Verlagsgesellschaft, 1st ed., 1999), p. 407.

[50] "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", dated 24 February 2006 and registered on 9 March 2006, ICC-01/04-01/06-8-US-Corr.

[51] Preliminary Admissibility Decision, para. 31.

[52] *See Democratic Republic of the Congo*, "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'", 13 July 2006, ICC-01/04-168, paras 48-53; unsealed in 2008.

Nonetheless, it appears that the Pre-Trial Chambers felt bound at times to make preliminary assessments of the admissibility of a case pursuant to article 19 (1) of the Statute when doing so.[53] The approach of Pre-Trial Chamber I was applied in a number of subsequent cases by other Pre-Trial Chambers[54] and developed into "the so-called 'same person/same conduct' test".[55] The Prosecutor has also relied on this test in his/her submissions before the Chambers.[56]

28. The first challenges to the admissibility of a case were raised by two accused persons in the cases of *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*[57] and *Prosecutor v. Jean-Pierre Bemba.*[58] Thereafter, Kenya became the first State to

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[53] Pre-Trial Chamber I, *Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*, "Decision on the Prosecution Application under Article 58(7) of the Statute", 27 April 2007, ICC-02/05-01/07-1-Corr, para. 24; Pre-Trial Chamber I, *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: ICC-01/04-01/07-55; Pre-Trial Chamber I, *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; Pre-Trial Chamber I, *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: ICC-02/05-01/09-3; Pre-Trial Chamber II, *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. Bahr Idriss Abu Garda*, "Decision on the Prosecutor's Application under Article 58", 7 May 2009, ICC-02/05-02/09-l-Conf, para. 4, public redacted version: ICC-02/05-02/09-12-Anxl.

[54] *Ibid.*; *see also* Pre-Trial Chamber II, *Prosecutor v. William Samoei Ruto et al.*, "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; Pre-Trial Chamber II, *Prosecutor v. Francis Kirimi Muthaura et al.*, "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; Pre-Trial Chamber III, *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, para. 16.

[55] *See* the reference to this "test" in: Appeals Chamber, *Prosecutor v. Francis Kirimi Muthaura et al.*, "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 (OA), para. 27; Appeals Chamber, *Prosecutor v. William Samoei Ruto et al.*, "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. 28 (hereinafter: "*Kenya Admissibility Judgments*" and distinguished in the footnotes by "Muthaura et al" and "Ruto et al").

[56] *See* e.g., *Prosecutor v. German Katanga and Mathieu Ngudjolo Chui,* "Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a)", 19 March 2009, ICC-01/04-01/07-968-Conf-Exp, para. 4.

[57] Trial Chamber II, "Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)", 16 June 2009, ICC-01/04-01/07-1213-tENG.

[58] Trial Chamber III, "Decision on the Admissibility and Abuse of Process Challenges", 24 June 2010, ICC-01/05-01/08-802.

challenge the admissibility of a case before the Court,[59] followed by Libya in relation to both suspects in the case of *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al Senussi*.[60]

C. Appeals Chamber's jurisprudence

29. The current proceedings are the fourth appeal proceedings[61] in which a matter relevant to complementarity has come before the Appeals Chamber.

30. On the appeal of the admissibility decision in *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (hereinafter: "*Katanga Admissibility Judgment*"), the Appeals Chamber[62] refrained from addressing the correctness of the "same person/same conduct test",[63] because it found that the DRC was not conducting any proceedings against Mr Katanga at the time of the admissibility challenge and had ended its own prosecution due to the Court's proceedings.[64] The Appeals Chamber held that "[i]naction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court [...]".[65] On that basis, it found that the Trial Chamber had correctly found the case to be admissible. Therefore, the *Katanga Admissibility Judgment* clarified that the Court may not only step in when it finds that a State is unable or unwilling to investigate and prosecute, but also when a State is inactive. Without it being clearly stated, this Judgment nevertheless sanctioned the practice of self-referrals and clarified that such States do not need to express that they are unable or unwilling. It is sufficient that they are inactive. Explaining the underlying rationale of this approach, the Appeals Chamber held:

> The Chamber must nevertheless stress that the complementarity principle, as enshrined in the Statute, strikes a balance between safeguarding the primacy of domestic proceedings vis-à-vis the International Criminal Court on the one

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[59] Pre-Trial Chamber II, "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.
[60] *See* Impugned Decision; *see also* Pre-Trial Chamber I, "Decision on the admissibility of the case against Abdullah Al-Senussi", 11 October 2013, ICC-01/11-01/11-466-Red.
[61] This number counts the two judgments that comprise the *Kenya Admissibility Judgments* as one.
[62] Composition of the bench: Judge Nsereko, Presiding Judge, Judge Song, Judge Kourula, Judge Trendafilova and Judge Aluoch.
[63] "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, para. 81.
[64] *Katanga Admissibility Judgment*, paras 80-83.
[65] *Katanga Admissibility Judgment*, para. 2.

> hand, and the goal of the Rome Statute to "put an end to impunity" on the other hand. If States do not or cannot investigate and, where necessary, prosecute, the International Criminal Court must be able to step in.[66] [Footnote omitted.]

31. The Appeals Chamber also established that article 17 (1) (a) and (b) of the Statute has two distinct limbs: First, a Chamber always needs to consider whether a case is being investigated or prosecuted or whether it has been investigated and prosecuted (the first limb). Second, if the first question is answered positively, a Chamber needs to determine whether a State is unwilling or unable to genuinely investigate and prosecute (the second limb).[67]

32. In the case of *Prosecutor v. Jean-Pierre Bemba Gombo*, the Appeals Chamber[68] did not find merit in Mr Bemba's appeal against Trial Chamber III's rejection of his challenge to the admissibility of the case against him. This appeal dealt with specific questions, mostly of fact, relevant to whether Trial Chamber III had correctly assessed judicial decisions taken by the CAR judiciary. The Appeals Chamber did not express itself on the "same person/same conduct" test, but confirmed the jurisprudence of the *Katanga Admissibility Judgment* set out above.[69]

33. The first appeals that were based on challenges by a State, Kenya, in the first *proprio motu* situation before the Court were rejected by the Appeals Chamber. In the *Kenya Admissibility Judgments*, based on Kenya's appeals in both Kenya cases, the Appeals Chamber, by majority,[70] confirmed Pre-Trial Chamber II's finding that Kenya was inactive in investigating and prosecuting the six suspects at issue. It made a number of findings of relevance to the ground of appeal at hand, in particular to the interpretation and application of article 17 (1) (a) of the Statute, which is summarised in the below paragraphs.

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[66] *Katanga Admissibility Judgment*, para. 85.
[67] *Katanga Admissibility Judgment*, para. 78.
[68] "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled 'Decision on the Admissibility and Abuse of Process Challenges'", 19 October 2010, ICC-01/05-01/08-962. Composition of the bench: Judge Ušacka, Presiding Judge, Judge Song, Judge Kourula, Judge Kuenyehia and Judge Nsereko.
[69] "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled 'Decision on the Admissibility and Abuse of Process Challenges'", 19 October 2010, ICC-01/05-01/08-962, paras 74, 107-109.
[70] Composition of the bench: Judge Nsereko, Presiding Judge, Judge Song, Judge Kourula, Judge Kuenyehia and Judge Ušacka (dissenting).

34. After establishing that it is the "case" before the Court, i.e. what is described in the summons to appear, that needs to be compared to the Kenyan proceedings,[71] the Appeals Chamber adopted the "same person/same conduct" test developed by Pre-Trial Chamber I in the 2006 Preliminary Admissibility Decision, finding that the domestic investigation or prosecution must relate to the same case consisting of the same person and the same conduct as that before the Court.[72] It did not, however, refer to "incidents" as Pre-Trial Chamber I had in the 2006 Lubanga Victims Decision, but added the word "substantially" to the term "same conduct", concluding that "the national investigation must cover the same individual and **substantially the same conduct** as alleged in the proceedings before the Court"[73] (emphasis added).

35. The Appeals Chamber also defined the phrase "is being investigated" as signifying "the taking of steps directed at ascertaining whether *those suspects* are responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses. The mere preparedness to take such steps or the investigation of *other* suspects is not sufficient"[74] (footnote omitted).

36. Regarding the burden of proof, the Appeals Chamber found, without explanation, that

> a State that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible. To discharge that burden, the State must provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case. It is not sufficient merely to assert that investigations are ongoing.[75] [Footnote omitted.]

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[71] *Kenya Admissibility Judgments,* Muthaura et al, paras 33-46; Ruto et al, paras 34-47.
[72] *Kenya Admissibility Judgments*, Muthaura et al, para. 39; Ruto et al, para. 40. The Appeals Chamber referred in support of its position to articles 17 (1) (c) and 20 (3) of the Statute.
[73] *Kenya Admissibility Judgments,* Muthaura et al, para. 39; Ruto et al, para. 40.
[74] *Kenya Admissibility Judgments,* Muthaura et al, para. 40; Ruto et al, para. 41.
[75] *Kenya Admissibility Judgments*, Muthaura et al, para. 61; Ruto et al, para. 62. In that context, the majority of the Appeals Chamber quoted an earlier Judgment of the Appeals Chamber, in which the Appeals Chamber held in respect of decisions taken in criminal proceedings: "[I]t is an essential tenet of the rule of law that judicial decisions must be based on facts established by evidence. Providing evidence to substantiate an allegation is a hallmark of judicial proceedings; courts do not base their decisions on impulse, intuition and conjecture or on mere sympathy or emotion. Such a course would lead to arbitrariness and would be antithetical to the rule of law", referring to *Situation in Uganda*, "Judgment on the appeals of the Defence against the decisions entitled 'Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06,

37. The Appeals Chamber adopted the "same person/substantially the same conduct" test without explaining why it added the term "substantially" or what this term means. One may understand this addition as allowing a more flexible approach than that taken in the 2006 Preliminary Admissibility Decision. However, this addition to the admissibility test was made in the abstract and was in any case not applied in the Judgments because the Appeals Chamber found that Kenya had not taken any investigative steps with respect to the six suspects before the Court,[76] thus making it unnecessary to compare the cases any further.

38. I dissented from these Judgments,[77] with a focus on the procedural and factual findings of Pre-Trial Chamber II and on the basis that the admissibility proceedings should have been moulded to the fact that Kenya was only starting its investigations against those suspects.[78] An additional important feature of these proceedings was that Kenya had made a request to receive materials from the Prosecutor that would allow it to focus its investigations on the six suspects, because it argued that it did not have such materials.[79]

IV. DISCUSSION OF THE IMPUGNED DECISION

39. The present appeal is the first admissibility case before the Court in which a State submitted a wealth of information about its ongoing proceedings and has clearly expressed the will to investigate and prosecute the same suspects as the Court as well as conduct that is arguably even broader than that contained in the warrants of arrests. This will of Libya is clearly evidenced by the progressing investigations and prosecutions that they have undertaken. Therefore, for the first time, the matter of what is "substantially the same conduct" was – and is in this appeal – under examination on the basis of Libya's concrete activities.

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a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06'", 23 February 2009, ICC-02/04-179 (OA), para. 36; *see also* ICC-02/04-01/05-371 (OA 2), para. 36.

[76] *Kenya Admissibility Judgments*, Muthaura et al, paras 63-69; Ruto et al, paras 64-70.

[77] *See Kenya Admissibility Dissents.*

[78] There was material in the record that related to investigative steps taken in respect of one of the suspects. *See Kenya Admissibility Judgments*, Muthaura et al, paras 63-69; Ruto et al, 64-70, in which the Appeals Chamber held in that regard that the "information falls short of substantiating what has been done to investigate him for that conduct" and "lacked specificity".

[79] Kenya therefore requested the Court to cooperate and order the Prosecutor to provide it with such materials. Pre-Trial Chamber II rejected the request to have such materials disclosed shortly after it found that there was not a sufficient amount of evidence to confirm the charges against two of the six suspects. At the trial preparation stage, the Prosecutor requested that Trial Chamber V drop the charges against two other suspects due to lack of evidence. Currently, a trial has started against two of the six suspects.

40. An analysis of the Impugned Decision reveals that the Pre-Trial Chamber applied the Court's jurisprudence, particularly that articulated in the *Kenya Admissibility Judgments*. It did so regarding the required content of the domestic investigations, i.e. the "same person/substantially the same conduct" test,[80] what establishes that an investigation is occurring,[81] the burden of proof to be applied and as to the way in which it assessed the evidence.[82] Based on this, the Pre-Trial Chamber rightly concluded 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".[83] Subsequently, the Pre-Trial Chamber ruled, based on the fact that the incidents mentioned in the warrant of arrest only establish samples "of the form of criminality alleged against Mr Gaddafi",[84] that Libya's investigation did not need "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".[85]

41. The Pre-Trial Chamber established that Libya did not need to investigate the same international "crimes", but that it was sufficient that the "domestic proceedings [...] focus on the alleged conduct and not its legal characterisation",[86] an issue that had not been addressed in the *Kenya Admissibility Judgments*.

42. Carefully analysing not only the wealth of evidence and materials that were submitted by Libya,[87] but also Libyan legislation, the Pre-Trial Chamber found that it was, "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".[88]

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[80] Impugned Decision, paras 73-77.
[81] Impugned Decision, paras 73, 134.
[82] Impugned Decision, paras 52-55.
[83] Impugned Decision, para. 77.
[84] Impugned Decision, para. 82.
[85] Impugned Decision, para. 83.
[86] Impugned Decision, para. 85; It based this finding on article 20 (3) of the Statute, which clarifies that it is a conviction for the same underlying conduct and not the same legal characterisation of a crime over which the Court has jurisdiction, that prevents the Court from conducting criminal proceedings against such a convicted person.
[87] Libya submitted more than 500 pages of materials, annexed to its filings in the proceedings.
[88] Impugned Decision, para. 134. It should be noted that, in reaching the conclusion that Libya has taken "a number of investigative steps", the Pre-Trial Chamber applied the language of the *Kenya Admissibility Judgments* relevant to the definition of an "investigation"; these aspects included: "[...]

43. Regrettably, the Pre-Trial Chamber did not stop its analysis at this point, but instead arrived at a finding in the next paragraph that I find difficult to subscribe to:

> [T]he 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.[89]

44. This finding contains numerous confusing aspects. First, no further explanation was given as to why the material provided by Libya did not meet the "same person/substantially the same conduct" test. Further, it is unclear what the Pre-Trial Chamber meant with respect to terms such as "actual contours of the national case against Mr Gaddafi", "scope of the domestic investigation" and "means of evidence of a sufficient degree of specificity and probative value". On the basis of this lack of explanation, I support the submissions of Libya that the Impugned Decision lacks clarity and reasoning on these points. I would like to point out that the notions expressed in this paragraph of the Impugned Decision are also addressed by my colleague Judge Song who comes to the conclusion that the Pre-Trial Chamber erred, but for different reasons.[90]

45. Considering the Impugned Decision in its entirety, it could be said that the Pre-Trial Chamber was not even itself entirely certain about its finding that Libya was not investigating the same case, because in considering the question of additional evidence, the Pre-Trial Chamber held that "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".[91] Consequently, the Pre-Trial

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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".

[89] Impugned Decision, para. 135.

[90] Separate Opinion, paras 7 *et seq.*

[91] Impugned Decision, para. 137. This finding of the Pre-Trial Chamber appears to be contradictory to the *Katanga Admissibility Judgment* that clearly established that a Chamber must first determine whether a State is investigating or prosecuting the same case as that before the Court and only needs to consider whether that State is genuinely unable or unwilling to carry out this investigation or prosecution if the first limb is answered in the *affirmative*.

Chamber proceeded to analyse the second limb and found that Libya was, in any case, genuinely unable to investigate the case against Mr Gaddafi, thereby arguably leaving open whether it had actually made a definitive conclusion on the first limb of the test.

46. The lack of reasoning and the uncertainty about its findings may already be a sufficient basis for reversing the Impugned Decision and remanding the matter to the Pre-Trial Chamber. However, despite the uncertainty as to what precisely the Pre-Trial Chamber had in mind in relation to the "conduct" that it expected Libya to investigate, it is evident that the Pre-Trial Chamber found that an investigation covering "discrete aspects" of the case before the Court was not sufficient. On the basis of the Impugned Decision, one may, however, conclude that, according to the Pre-Trial Chamber, Libya's investigation had to cover more of the conduct or even entirely the same conduct as what it considered to be the essence of the warrant of arrest against Mr Gaddafi. This conclusion of the Pre-Trial Chamber is, to my mind, based on an erroneous interpretation of the first limb of article 17 (1) (a) of the Statute and, as a result of this, on an erroneous application of this legal provision.

V. INTERPRETATION AND APPLICATION OF THE FIRST LIMB OF ARTICLE 17 (1) (A) OF THE STATUTE

47. It is my considered view that the Pre-Trial Chamber's finding that the "scope of the domestic investigation" did not "cover the same case as that set out in the Warrant of Arrest issued by the Court" is erroneous due to its incorrect interpretation of article 17 (1) (a) of the Statute, an interpretation which is based solely on the "same person/(substantially) the same conduct" test.[92] In my opinion, the problem lies in the test itself, which, contrary to the express language of the chapeau of article 17 (1) of the Statute, disregards the principle of complementarity laid out in paragraph 10 of the Preamble and article 1 of the Statute.

48. As mentioned above, since 2006, the "same person/same conduct" test has been developed in the abstract, mostly on the basis of cases in which the States at issue did not challenge admissibility and did not demonstrate that they had undertaken any steps or activities regarding investigations/prosecutions of the alleged crimes or

[92] This test is generally supported by e.g. M. M. El Zeidy, "The Principle of Complementarity: A New Machinery to Implement International Criminal Law" 23 *Michigan Journal of International Law* (2002), p. 849, at pp. 930-940; R. Rastan, "Situations and case: defining the parameters", in C. Stahn and M. M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. I (Cambridge University Press, 2011), p. 421, at pp. 438-445.

suspects. The application of this test to the case at hand proves that, if this test is to be applied in order to compare a case before the Court with a domestic case, the Court will come to wrong and even absurd results, potentially undermining the principle of complementarity and threatening the integrity of the Court.[93]

49. In interpreting article 17 (1) (a) of the Statute, I will only address, as required by the ground of appeal under discussion, "conduct" as a determining criterion for comparing the case before the Court with the domestic case, thereby focusing on the concrete facts of this case and especially the investigations by Libya.

50. To begin with, I will concentrate on whether the term "conduct" may be used in comparing the "case before the Court" with the case before the domestic authorities. The term "case"[94] in its legal meaning[95] is applied throughout the Court's legal texts to refer to a criminal case before a Chamber of the Court.[96] Cases before the Court concern the commission of crimes that fall within its jurisdiction as referred to in articles 1 and 5 of the Statute.[97] Such crimes are defined by their relevant material and mental elements in articles 6 to 8 and 30 of the Statute. The Statute does not define the material elements of the crimes in general terms, but describes three main aspects "conduct", specific "consequences" and other "circumstances".[98] Thus, "conduct" is

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[93] T. O. Hansen, "A Critical Review of the ICC's Recent Practice Concerning Admissibility Challenges and Complementarity", 13 *Melbourne Journal of International Law* (2012), p. 1, at p. 18; M. A. Newton, "The Complementarity Conundrum: Are We Watching Evolution or Evisceration?" 8 *Santa Clara Journal of International Law* (2010), p. 115, at pp. 119-123, stating that this "would cause a crisis of confidence that would shake the institutional foundation of the ICC".

[94] The French term that is used correspondingly in the legal texts is "l'affaire", but note that in the French versions of articles 14 (2), 15 (6), 36 (10), 42 (7), 82 (4) (c), 84 (2) (c), 127 (2) of the Statute the term "l'affaire" is used, but in the English version not the term "case". .

[95] Both the English and the French terms are mostly, but not exclusively, used with respect to proceedings before a judicial organ; e.g. in: J. E. Clapp, "Dictionary of the Law", (Random House, New York, 2000) p. 71 "case" is used with respect to "all proceedings with respect to a charge, claim or dispute filed with a court"; in B. A. Garner (ed.), "Blacks Law Dictionary" (Thomson, West, 8th ed.), p. 228, "case" is defined as "1. A civil or criminal proceeding, action, suit, or controversy at law or in equity; 2. A criminal investigation. 3. An individual suspect or convict in relation to any aspect of the criminal-justice system, [...]"; see Online Le Petit Robert: "affaire" is defined as "5. Procès, objet d'un débat judiciaire" and "4. Ensemble de faits créant une situation compliquée, où diverses personnes, divers intérêts sont aux prises".

[96] *See* for examples that do not refer directly to the admissibility of a "case", but mention in the French and English versions the terms "case" and "l'affaire": articles 24 (2); 39 (3), (4); 41 (2) (a); 64 (3); 65 (1) (c), (3), (4); 89 (2); 90; 94 (1); 103 (1) (c) of the Statute; *see also* e.g. rules 21 (5), 34 (1) (a), (b), 39, 51, 73 (6) of the Rules of Procedure and Evidence.

[97] It is noted that article 70 of the Statute also includes crimes that fall within the jurisdiction of the Court.

[98] *See* G. Werle, "Principles of International Criminal Law", (Second Edition, Asser Press 2009), pp. 143-144. This is also confirmed by the Elements of Crimes, which mentions these elements and adds the contextual circumstances of the crimes. This refers e.g. to whether an attack against a civilian

an important material element of a "crime" and therefore also an element of a "case". "Conduct" may, however, also be understood as extending to the acts of the individuals who are held responsible for the commission of these crimes in accordance with articles 25 and 28 of the Statute. These individuals need not necessarily personally carry out the "conduct" that is the basis of a crime, but this conduct and the consequences of this conduct are attributed to them.

51. This leads to the conclusion that conduct might be one of several possible elements for the purposes of comparing the "case before the Court" with a domestic case. But, in my opinion, article 17 (1) (a) of the Statute, applied in accordance with the principle of complementarity, does not require domestic authorities to investigate "(substantially) the same" conduct as the conduct that forms the basis of the "case before the Court". This means that, contrary to how I understand the Impugned Decision,[99] I do not think that the domestic investigation or prosecution needs to focus on largely or precisely the same acts or omissions that form the basis for the alleged crimes or on largely or precisely the same acts or omissions of the person(s) under investigation or prosecution to whom the crimes are allegedly attributed.

52. Establishing such a rigid requirement would oblige domestic authorities to investigate or prosecute exactly or nearly exactly the conduct that forms the basis for the "case before the Court" at the time of the admissibility proceedings, thereby being obliged to "copy" the case before the Court.[100] Instead of complementing each other, the relationship between the Court and the State would be competitive, requiring the State to do its utmost to fulfil the requirements set by the Court.[101]

53. Such an approach would strongly intrude upon the sovereignty of States and the discretion afforded to national prosecutorial authorities, with the consequence that the Court would become a "supervisory" authority, checking in detail not only the

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population occurred in relation to crimes against humanity. The Elements of Crimes also mention "particular mental elements".

[99] *See supra* para. 46.

[100] D. Robinson, "The Mysterious Mysteriousness of Complementarity", 21 *Criminal Law Forum* (2010), p. 67, at pp. 100-101; *see also* M. A. Newton, "The Complementarity Conundrum: Are We Watching Evolution or Evisceration?", 8 *Santa Clara Journal of International Law* (2010), p. 115, at 163, stating that "[c]omplementarity was never intended to institute a system of competition in which the domestic authorities face a hostile supranational forum intent on preserving its own prestige and power at the expense of endangering lasting peace and stability in countries already ravaged by mass atrocity."

[101] Newton, *ibid.*

"scope" and content of any investigative and prosecutorial steps, but also scrutinising the State's substantive and procedural law and how it relates to the crimes in the Rome Statute.[102]

54. This approach not only disregards the many differences in the legal frameworks and in the practice of criminal justice between domestic jurisdictions and the Court, but also between the various domestic jurisdictions.[103] National cases can differ from the "case before the Court" in respect of evidence, such as available witnesses, victims, and the number and locations of incidents that are under investigation or prosecution.

55. Further, such an approach could potentially preclude a State from focusing its investigations on a wider scope of activities and could even have the perverse effect of encouraging that State to investigate only the narrower case selected by the Prosecutor. I view this as a harmful potential effect, particularly so in a situation such as Libya, where the actions of the Gaddafi regime in February 2011 (which is also the time period of the alleged crimes in the Court's warrant of arrest) triggered the Security Council referral, but where the change of government many months later led to the initiation of a transitional justice process. In such a situation, it may be assumed that the interests of the people of Libya and of the victims of the former regime could be better and more directly addressed by Libyan investigations and prosecutions in a process of transitional justice. Weighing the interests at stake in conformity with the principle of complementarity, it could indeed be said that "[i]t seems plainly more important that Libyans have the experience of transitional justice than that the ICC works its mandate".[104]

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[102] *See* Impugned Decision, paras 199-204; *see* similarly, but with respect to the second limb of article 17 (1) (a) of the Statute, A. Bishop, "Failure of Complementarity: The Future of the International Criminal Court Following the Libyan Admissibility Challenge" 22 *Minnesota Journal of International Law* (2013), p. 388, at pp. 414-415.

[103] *Kenya Admissibility Dissents*, Muthaura et al, para. 27; Ruto et al, para 27, stating that "a note of caution is necessary in relation to the understanding of the terms 'investigation' and 'prosecution'. The terms used in the various official language versions of the Statute appear to differ in their meaning too, especially with respect to the distinction between investigation and prosecution. This is not surprising, given that the terminology is based on the criminal law traditions of the countries in which the official languages are spoken. There are important differences not only between, for instance, Common Law and Civil Law systems, but also between the various national jurisdictions belonging to the same tradition".

[104] *See* D. Luban, "After the Honeymoon: Reflections on the Current State of International Criminal Justice", 11 *Journal of International Criminal Justice* (2013), p. 505, at p. 512.

56. In addition, applying this strict approach raises a concern about timing, as the proceedings before the Court might have progressed further than the domestic proceedings or *vice versa*.[105] Therefore, the "case before the Court" may already have many more concrete elements than a "case" which is still under investigation domestically. In the proceedings before the Court, the Prosecutor has wide discretion to determine the parameters of a case and also to decide which case to prosecute.[106] The same is also true for many other legal systems. Therefore, domestic authorities could still be at a stage of their proceedings where the "conduct" is not yet as clearly defined as in the case before the Court, if at all. It also needs to be pointed out that the "case before the Court" is also subject to development at different stages of the proceedings. The conduct that is the basis of the crimes alleged in the warrant of arrest might be different from the conduct that is under scrutiny at the confirmation hearing or at trial.[107]

57. The drafting history shows that the States were fully aware of differences in legal cultures and the difficulties that domestic legal systems may face in investigating and prosecuting the "most serious crimes of concern to humanity". In my opinion, the task imposed on the Court is to find the appropriate balance between respecting the sovereignty of States and ensuring an effective Court, within the framework of the overarching common goal of the Court and the States, which is to fight impunity.[108]

58. As opposed to solely relying on the "same person/(substantially) the same conduct" test, I would prefer that the Court, in comparing a case before the Court and a domestic case, be guided by a complementarity scheme that contains multiple criteria that are assessed by reference to the concrete circumstances of each specific case.[109] In the case at hand, "conduct" is one of the essential elements in deciding whether the "case before the Court" is being investigated or prosecuted by domestic

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[105] In that respect it is also noteworthy that the proceedings before the Court could not progress during the past two years since the admissibility challenge was raised, while the national proceedings continued.

[106] *See* e.g., The Office of the Prosecutor, "Office of the Prosecutor Policy Paper", September 2003, pp. 5-7; The Office of the Prosecutor, "Strategic Plan, June 2012-2015", 11 October 2013, pp. 6, 13-14, 18-21.

[107] This is only restricted by the rule of speciality (article 101 of the Statute).

[108] Preamble of the Statute setting out that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation".

[109] *See* for the concrete circumstances of this case, *supra,* paras 3-9.

authorities. In my view, contrary to the opinion of my colleagues,[110] "conduct" should be understood much more broadly than under the current test. While there should be a nexus between the conduct being investigated and prosecuted domestically and that before the Court, this "conduct" and any crimes investigated or prosecuted in relation thereto do not need to cover all of the same material and mental elements of the crimes before the Court and also does not need to include the same acts attributed to an individual under suspicion.[111] In the case at hand, it may be argued that the goal of fighting impunity is also achieved, even if not exactly the same conduct as that before the Court is under investigation by Libya, but if the suspect's link to the use of the Security Forces in Libya and their consequences are the subject of the investigation of the Libyan authorities. Beyond that, the domestic investigations might even potentially focus on subsequent time periods, if the crimes allegedly committed through the use of Security Forces are considered by the domestic authorities to be graver than those on which the Court's investigations concentrate.

59. Another criterion of this complementarity scheme is the clearly expressed, genuine will of a State to carry out investigations and prosecutions that manifests itself in an advancing process of investigating and prosecuting, as exemplified in this case by the concrete actions taken by Libya.[112] I do not doubt that future cases on admissibility will raise new issues that will require the jurisprudence of the Court to develop further, and possibly add more confined and new elements to the test relevant to the first limb of article 17 (1) (a) of the Statute, such as the persons at issue,[113] the range of the sentence/s[114] and alternative forms of justice.[115]

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[110] *See* Majority Judgment, paras 63, 72-75; Separate Opinion, para. 6.
[111] *See supra*, para. 50.
[112] *See* in relation to such "advancing proceedings", D. Robinson, "Three Theories of Complementarity: Charge, Sentence or Process? A Comment on Kevin Heller's Sentence-Based Theory of Complementarity", in W. A. Schabas, et al. (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate Publishing Limited, 2013), pp. 375-378; H. O. Hobbs, "The Security Council and the Complementarity Regime of the International Criminal Court: Lessons From Libya", 9 *Eyes on the ICC* (2012-2013), p. 19, at p. 45.
[113] *See* T. O. Hansen, "A Critical Review of the ICC's Recent Practice Concerning Admissibility Challenges and Complementarity", 13 *Melbourne Journal of International Law* (2012), p. 1, at p.18
[114] *See* K. J. Heller, "A Sentence-Based Theory of Complementarity", in W. A. Schabas, et al. (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate Publishing Limited, 2013).
[115] *See* C. Roach, "Legitimising Negotiated Justice: the International Criminal Court and Flexible Governance", 17 *The International Journal of Human Rights* (2013), p. 619, at pp. 625-629.

60. In addition, I find that the Pre-Trial Chamber erred in imposing the burden of proof solely on Libya and in its evidentiary standards when assessing the materials relevant to Libya's investigations in order to establish whether Libya is investigating or prosecuting the case before the Court.[116] In my opinion, this does not comply with article 17 (1) (a) of the Statute and the principle of complementarity.

61. Admissibility proceedings are not criminal proceedings, but proceedings *sui generis*.[117] The ways in which admissibility proceedings may be triggered differ as do the participants to any such proceedings.[118] In the proceedings at hand, the proceedings have three main participants: the Prosecutor, the State that is investigating or prosecuting and the suspect or accused. Victims as well as the authority that referred the situation to the Court may also make observations in these proceedings.[119] Any of the participants may have materials and information that are potentially relevant to whether a State is investigating or prosecuting the case before the Court and that they can share with the Court. As a rule, such materials should also be in the possession of the Prosecutor who needs to consider, from the very start of a "case", whether it is or may be admissible pursuant to article 17 of the Statute.[120] Requiring all of the participants to provide information would allow the Court to fully assess whether a State is investigating or prosecuting the case before the Court. The Court would thereby discharge its duty under the Statute that it "shall be complementary to national jurisdictions".[121] Such an approach would imply that the admissibility proceedings are Chamber-led and do not depend on which participant

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[116] The Pre-Trial Chamber also imposed a "high" burden of proof, but this is apparently due to its strict understanding of what is required by "(substantially) the same conduct" and would be remedied with a more flexible test as proposed in this Opinion.

[117] *See Kenya Admissibility Dissents*, Muthaura et al, para. 16; Ruto et al, para. 16. *See also* rule 58 of the Rules of Procedure and Evidence, providing the Chamber with discretion to conduct the proceedings as appropriate for their specific character. Further, with respect to whether the burden to prove that the investigation by a State is insufficient lies with the Prosecutor, *see* M. A. Newton, "The Complementarity Conundrum: Are We Watching Evolution or Evisceration?", 8 *Santa Clara Journal of International Law* (2010), p. 115, at p. 136; J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Martinus Nijhoff Publishers, 2008), pp. 178, 183.

[118] *See* e.g. article 19 (1), (2) and (3) of the Statute.

[119] *See* article 19 (3) of the Statute.

[120] *See* article 53 (1) (b) and 53 (2) (b) of the Statute. Further, regarding the uncertainty of the relationship between the Prosecutor and the State of Libya, *see* S. C. Roach, "Legitimising Negotiated Justice: the International Criminal Court and Flexible Governance", 17 *The International Journal of Human Rights* (2013), p. 619, at p. 628.

[121] *See* article 1 of the Statute.

initiates the admissibility proceedings pursuant to article 19 of the Statute.[122] Having this background in mind, I consider that placing the burden of proof to show that a State is investigating or prosecuting solely on the challenging State, i.e. in this case Libya, appears unfair and undermines the principle of complementarity.[123]

62. Furthermore, the Court's rules of evidence should not be routinely applied to materials provided by a State in admissibility proceedings that are *sui generis*. Evaluating materials provided by a State according to the rules of evidence may lead, as it apparently did in the case at hand, to the result that documents submitted by governments in transition might be considered as lacking "probative value" or being not sufficiently "specific". Rather, to my mind, the materials provided should be taken at their face value, especially if the State, as in the case of Libya, has clearly expressed its intent to investigate the case before the Court and has taken action in this regard. Furthermore, stringent standards would impose unnecessarily high requirements on States with a legal and judicial system in transition and would unduly burden their transitional justice efforts. In addition, States that do not have such difficulties might more easily meet these high standards, putting them in a more advantageous position compared to States in transition.[124]

63. To follow my suggested approach would most likely lead to the conclusion that Libya is investigating the same case against Mr Gaddafi and would, depending on a finding in relation to the second limb of article 17 (1) (a) of the Statute, make the case before the Court inadmissible. However, considering the lack of reasoning and the Pre-Trial Chamber's decision to address the second limb of article 17 (1) (a) of the Statute although it had found that Libya is not investigating the same case,[125] I would leave the application of the standards established in this Opinion in the hands of the

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[122] *See e.g.* L. M. Keller, "The Practice of the International Criminal Court: Comments on 'The Complementarity Conundrum'", *8 Santa Clara Journal of International* Law (2010), p. 199, at pp. 228-230; M. A. Fairlie and J. Powderly, "Complementarity and Burden Allocation", in C. Stahn and M. M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. I (Cambridge University Press, 2011), pp. 642-681; suggesting also admissibility proceedings with a shared burden, or burden-free for the State; J. K. Kleffner (ed), *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press, 2008), pp. 208-209; *see also* Ad-Hoc Committee Report, para. 49.

[123] *See* article 1 of the Statute.

[124] *See* e.g., T. O. Chibueze, "The International Criminal Court: Bottlenecks to Individual Criminal Liability in the Rome Statute", 21 *Annual Survey of International & Comparative Law* (2006), p. 185, at p. 196.

[125] *See supra* para. 45.

Pre-Trial Chamber and would consequently not address the second limb, in this case, the fourth ground of appeal, either.

64. In addressing the consequences of a finding of inadmissibility of a case before the Court, it should be noted that the Prosecutor has the power, according to article 19 (10) of the Statute, to request the Chamber to review this decision if "new facts have arisen which negate the basis on which the case has previously been found inadmissible under article 17". There is no temporal limitation established in this provision. The Prosecutor may therefore continue her monitoring activities, *inter alia*, in relation to whether the State's investigation or prosecution is conducted with a genuine intent. Where a case is declared admissible by the Court upon a State's challenge to its admissibility, the State depends on the Court to "grant leave" if it considers that "exceptional circumstances" justify allowing a second challenge.[126] Thus, it may be argued that in such a scenario, the State's right to challenge the admissibility of a case is effectively forfeited.

65. As a concluding remark on the subject of complementarity, I would also like to point out that the overall goal of the Statute to combat impunity can also be achieved by the Court through means of active cooperation with the domestic authorities.[127] Many States, and not only States Parties of the Rome Statute, have incorporated the crimes of the Statute into their domestic legislation.[128] They might, however, face problems that are inherent in the investigation and prosecution of the "most serious crimes of international concern".[129] The Court, together with other international organisations and other States, is in an ideal position to actively assist domestic authorities in conducting such proceedings, be it by the sharing of materials and information collected or of knowledge and expertise.[130]

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[126] *See* article 19 (4) of the Statute.
[127] *See* M. A. Newton, "The Complementarity Conundrum: Are We Watching Evolution or Evisceration?", 8 *Santa Clara Journal of International Law* (2010), p. 115, at pp. 163-164; D. Robinson, "The Mysterious Mysteriousness of Complementarity", 21 *Criminal Law Forum* (2010), p. 67, at p. 100; S. C. Roach, "How Political is the ICC? Pressing Challenges and the Need for Diplomatic Efficacy", 19 *Global Governance* (2013), p. 507, at p. 515.
[128] *See* L. E. Carter, "The Future of the International Criminal Court: Complementarity as a Strength or a Weakness?", 12 *Washington University Global Studies Law Review* (2013), p. 451, pp. 464-473.
[129] *See* e.g. F. Mégret and M. G. Samson, "Holding the Line on Complementarity in Libya", 11 *Journal of International Criminal Justice* (2013), p. 571, at pp. 577, 587.
[130] *See* C. C. Jalloh, "Kenya vs. The ICC Prosecutor", 53 *Harvard International Law Journal* (2012), p. 269, at pp. 284-285. This is also termed "positive" and/or "active" complementarity.

VI. CONCLUSION

66. For the reasons given, I would have ordered the reversal of the Impugned Decision and remanded the matter to the Pre-Trial Chamber for new consideration.

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

Judge Anita Ušacka

Dated this 21st day of May 2014

At The Hague, The Netherlands