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International Criminal Court

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No.: **ICC-01/11-01/11**
Date: **5 June 2012**

PRE-TRIAL CHAMBER I

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

SITUATION IN LIBYA

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

PUBLIC REDACTED Version,
With PUBLIC Annex 1

Prosecution response to Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute

Source: **Office of the Prosecutor**

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Introduction[1]

1. On 1 May 2012, the Government of Libya ("the Applicant") submitted an application ("the Application") pursuant to Articles 17(1)(a) and 19(2)(b) of the Rome Statute ("the Statute"), challenging the admissibility of the case against Saif Al-Islam Gaddafi ("Saif Al-Islam") on the grounds that its national authorities are investigating the same case under the jurisdiction of the Court.

2. [REDACTED].[2] [REDACTED]. The information provided shows that the Libyan authorities are investigating Saif Al-Islam for his involvement in the planning, financing and supervision of widespread and systematic attacks against civilians in Libya, and for specific incidents that occurred as a consequence of Saif Al-Islam's actions. The case being investigated by Libyan authorities is substantially the same, almost identical, as the case presented by the Office of the Prosecutor.

3. The Applicant offers to supplement these summary reports with the actual evidence it has collected "should the Chamber require this, once the case reaches the accusation stage of proceedings", which it estimates will occur in three weeks, as well as oral testimony from the Prosecutor-General.[3] Additionally, the Applicant submits that an eventual trial will meet "internationally recognized norms and standards for the independent and impartial prosecution of similar conduct".[4]

4. This is the first time that a State has submitted an admissibility challenge providing concrete information that it is prosecuting the same case as that pending before the International Criminal Court. Libya invokes its primacy and the principle of complementarity, the cornerstone of the Rome Statute.

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[1] Pursuant to Regulation 23*bis* of the Regulations of the Court, the Prosecution files this document confidential since it reveals confidential material including the Applicant's annex C.
[2] ICC-01/11-01/11-130-Red.
[3] ICC-01/11-01/11-134, para. 41; ICC-01/11-01/11-132, para. 13; ICC-01/11-01/11-130-Red, para. 91.
[4] Rule 51, Rules of Procedure and Evidence.

5. The principle of complementarity is set out in the Preamble of the Statute, which recalls "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" and emphasizes "that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions". The principle is further expressed in Article 1, which underscores that the ICC is "complementary to national criminal jurisdictions", and is further developed thoughout the Statute, including in Article 17.[5]

6. The Statute gave a Court a judicial mandate: it shall not intervene when States conduct genuine proceedings, but it shall intervene when the States are unable or unwilling to fulfill their obligations.

7. In order to fulfil this mandate, the Appeals Chamber has held that an admissibility determination follows a two-step inquiry, namely, (1) whether there exists a national investigation and/or prosecution in relation to the case at hand, and (2) where such proceedings exist, whether they are vitiated by an unwillingness or inability to carry them out genuinely.[6]

8. The Applicant has provided information which demonstrates the first limb at this stage, that it is investigating substantially the same case alleged before this Court and that it has taken concrete investigative steps that surpass the threshold of inactivity. However, the future progress of the proceedings announced by the Government in its Application has not yet materialized. Saif Al-Islam still does not have a defence lawyer in the national proceedings and the relationship between the national authorities and the Zintan militia who arrested him and still have custody over him is not clear. These facts suggest the possibility that in the current circumstances the Government of Libya may be unable to move the case forward. In accordance with Libyan law, the appointment of a lawyer by the

[5] Articles 1 and 17, ICC Statute.
[6] ICC-01/04-01/07-1497, para. 78.

suspect is a prerequisite to proceed to the next phase of the case. Accordingly, the Prosecution considers that before reaching a conclusion the Court should accept the Libyan Government's offer to provide further information and that it should invite the in-court testimony of the Prosecutor General. His testimony should provide clarity not just on the evidence collected, but in particular, on the ability of the Applicant to advance the judicial proceedings.

Procedural History

9. On 26 February 2011, the United Nations Security Council ("UNSC") adopted Resolution 1970, referring the situation in Libya since 15 February 2011 to the Prosecutor of the Court pursuant to Article 13(b) of the Statute.

10. On 16 May 2011, the Prosecutor sought an arrest warrant against Saif Al-Islam.[7] On 27 June 2011 the Chamber issued the warrant. [8]

11. On 19 November 2011, Saif Al-Islam was captured by fighters from the Zintan brigades[9] near the southern city of Sabha. On 23 November 2011, the Libyan authorities confirmed the arrest of Saif Al-Islam.

12. On 1 May 2012, the Applicant submitted the present Application. It also requested the postponement of the execution of the request for surrender of the suspect pending a decision on the Application, pursuant to Article 95 of the Statute ("the Postponement Request"). On 4 May 2012, this Chamber invited submissions on the postponement request by 11 May 2012. On 1 June 2012, the

[7] ICC-01/11-4.
[8] ICC-01/11-01/11-3.
[9] See The Telegraph, 19 November 2011, "Saif Gaddafi arrested in desert after month-long hunt by Libya's new government", http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/ 8901065/Saif-Gaddafi-arrested-in-desert-after-month-long-hunt-by-Libyas-new-government.html; The Guardian, 19 November 2011, "Saif al-Islam Gaddafi captured in Libya", http://www.guardian.co.uk/ world/ 2011/nov/19/saif-al-islam-gaddafi-captured.

Chamber decided that Libya may postpone the execution of the request for his surrender ("Decision on the Postponement Request"). [10]

Submissions

(I) Legal standards and considerations

A. Effect of Security Council Referral on Applicant's Ability to Bring an Admissibility Challenge

13. In relation to the Applicant's arguments in Section IV.B of its Application, the Prosecution observes that a referral of a situation by the Security Council does not affect the right under Article 19(2)(b) of the Statute of *any* State with jurisdiction to lodge an admissibility challenge before this Court.[11] As noted by the Chamber in its Decision on the Postponement Request, the Court has consistently held that the legal framework of the Statute applies in the situations referred by the Security Council in Libya and Darfur, Sudan, including its complementarity and cooperation regimes.[12] Article 19 permits any "State," including a non-State Party, to bring an admissibility challenge.[13]

B. Admissibility test

14. The assessment under Article 17 is case-specific. An admissibility determination is not a judgment on the national justice system as a whole, but relates to "the case" under examination.[14]

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[10] ICC-01/11-01/11-134.
[11] ICC-01/11-01/11-130-Red, paras. 76-81; ICC-01/11-01/11-163, paras. 28-30.
[12] ICC-01/11-01/11-163, para. 28.
[13] The Statute explicitly distinguishes between "States" and "State parties". Article 19 refers to "States".
[14] As the Appeals Chamber has stated, "article 19 of the Statute relates to the admissibility of concrete cases"; ICC-01/09-02/11-274, para. 39.

15. The Appeals Chamber has held that an admissibility challenge determination follows a two-step inquiry, namely, (1) the existence of national investigations and/or prosecution in relation to the case at hand, and (2) where such proceedings exist, whether they are vitiated by an unwillingness or inability to carry them out genuinely.[15]

16. The party challenging admissibility bears the burden to demonstrate that the case is inadmissible[16] on a "balance of probabilities"[17] and must discharge its burden in relation to both limbs of the inquiry.

17. The Appeals Chamber established that an Applicant must provide tangible proof to demonstrate it is actually carrying out relevant investigations.[18] The Appeals Chamber has held that an Applicant must provide "evidence of a sufficient degree of specificity and probative value that demonstrate that it is indeed investigating the case". [19]

18. With respect to the first limb of the test, the national investigation must cover the same individual and "substantially the same conduct" as alleged in the proceedings before the Court.[20]

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[15] ICC-01/04-01/07-1497, para. 78.
[16] ICC-01/09-02/11-274, para. 61.
[17] ICC-01/05-01/08-802, para. 203.
[18] ICC-01/09-02/11-274, para.61. See also ibid, para. 62: "As the Prosecutor correctly points out, '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."
[19] ICC-01/09-02/11-274, para. 2.
[20] ICC-01/09-02/11-274, para. 39. As the Appeals Chamber has held, the same person/same conduct test is deeply rooted in the Statute itself. Ibid. Article 17(1)(c) and Article 20(3) refer to "the same conduct" in relation to the same person. The express link between Article 17(1)(c) and the principle of *ne bis in idem* shows that the case must relate to the same person and the same conduct. Further, Article 90, which deals with the choice of forum allocation with respect to competing requests for extradition and surrender, explicitly sets out the same person/same conduct test, relating it back to the tests for admissibility; ICC-01/11-01/11-163, paras. 31-34. This Chamber has held that there exists intimate links between certain provisions of the cooperation regime and the complementarity provisions, in the context of addressing the applicability of article 95 in Part IX to requests for arrests or surrender at the time of an admissibility challenge.

19. The Prosecution further observes that it is not necessary that investigations be completed at the time an admissibility challenge is filed. As decided by the Appeals Chamber, for an admissibility challenge to be successful, it is required to show that concrete progressive investigative steps be taken and demonstrated at the time when an admissibility challenge is raised.[21] This approach is also consistent with the statutory scheme which encourages states to provide early notice that it is investigating or prosecuting the same case, in order to promote efficiency, judicial economy and effective cooperation.[22]

20. The second part of the admissibility test requires the Applicant to demonstrate that its investigation and prosecution is "genuine" within the meaning of Article 17(1)(a) – that is, that the proceedings are not a sham designed to shield the person and guarantee impunity – and that it is able to advance the investigation and prosecution within the meaning of Article 17(3).

21. The term "genuinely" is not a self-standing consideration under Article 17; it correlates to the terms 'unwilling' and 'unable' to describe the *quality*, the good faith, of the national investigation and/or prosecution in question.[23] Admissibility must be determined on the basis of the genuineness of national investigations or prosecutions as they currently exist.[24] Indeed, when the challenge is made before an investigation or trial is completed, it will be impossible for the Court to base an admissibility decision on a predictable outcome.

22. When an admissibility challenge is made early in a national jurisdiction's investigation, as is the case here, then the Court may monitor the future progress of the national proceedings to ensure that the requirements of the admissibility

[21] ICC-01/09-02/11-274, para.81.
[22] This is reflected, inter alia, in Articles 18 and 19(5).
[23] Kevin J. Heller, The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process, 17 CRIM. L. FORUM 255 (2006).
[24] ICC-01/04-01/07-1497, para. 56.

test continue to be satisfied. The Prosecution is committed to reopen the discussion on the admissibility of the case if is considered necessary as a consequence of the monitoring activities.

C. Crime Labeling

23. There is no requirement that the crimes charged in the national proceedings have the same "label" as the ones before this Court. The Statute does not set out to regulate how States may choose to incorporate crimes within the jurisdiction of the Court into their national legal system. There is no requirement under the Statute, for example, for States to adopt legislation incorporating the crimes listed in Article 6 through 8 into national law.[25] Therefore, there may be discrepancies in the way a particular act is criminalized under the Rome Statute and under national law.

24. At the same time, other provisions of national law may also impact on the admissibility of a particular case. These include the availability of defences or other grounds for excluding criminal responsibility not permissible under the Rome Statute, the existence of significant discrepancies or lacunae in available modes of liability that might fatally affect the theory of the national prosecution, or the existence of immunities or special procedural rules based on official capacity that could impede prosecution. The assessment of complementarity, therefore, cannot be based on a rigid approach that examines only whether the conduct concerned is criminalized as an ordinary or international crime. Instead, the Chamber will need to examine a range of factors, on a case-by-case basis, in order for it to be able to determine how national law would shape the contours of the proceedings at hand.

[25] Even amongst States Parties, there is wide disparity in how they have chosen to legislate in relation to crimes within the jurisdiction of the Court: some have directly incorporated ICC crimes as international offences under national law, others have applied or modified existing war crimes legislation, while others still have adopted an ordinary crimes approach.

25. As noted above, the test developed by the Appeals Chamber requires the Court to be satisfied that the case at the national level would be substantially the same as that which would have been heard before the ICC (against the same person for substantially the same conduct).[26] The term "substantially" indicates that the national authorities are not necessarily required to charge the suspect under the exact same legal qualification. While the conduct itself must necessarily be the same, meaning the underlying acts and incidents concerned,[27] the legal characterisation of such conduct may differ: it must be the same *in substance*,[28] bearing in mind such factors as those described above. [29]

26. Even in states that have incorporated the international crimes into domestic statutes, in any given case the national prosecutor may make a strategic decision, based on the available evidence, not to charge an international crime, and instead charge only domestic crimes such as murder or assault. A national prosecution for grave domestic crimes should be considered sufficient to preclude this Court from ruling a case admissible, bearing in mind the considerations set out in paragraph 25 above. In principle a conviction on such charges avoids the impunity of the individual, satisfies the victims' needs for justice, ensures that domestic actors confront past crimes, and spares the resources of this Court.[30]

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[26] ICC-01/09-02/11-274, para. 39.
[27] See above paragraphs 18-19.
[28] ICC-01/11-01/11-130-Red, paras. 86-87.
[29] In this regard, Trial Chamber III, in the context of admissibility proceedings in the *Bemba* case that pre-dated the Appeals Chamber decisions in the Kenya cases, considered as a preliminary matter whether the cases before the ICC and at the national level were the same, by reference to a similar test. It observed that they were "save that the charges are inevitably different (given the particular crimes within the ICC's jurisdiction: Article 5 of the Statute) and the evidence has developed and changed as a result of the investigation by the OTP. The conduct and underlying offences (murder, rape, pillage etc) are the same, as are many of the central events that are relied on." ICC-01/05-01/08-802, para. 218.
[30] ICC-01/04-01/07-949.

D. Due Process Considerations

27. The Applicant has itself focused not on the question of whether it is shielding the suspect but rather on whether it is willing and able to conduct, in a reconstructed judicial system, fair proceedings that are consistent with international standards. While admissibility requires a genuine willingness and ability to pursue a prosecution if warranted, the Applicant also urges the importance of avoiding a "rushed trial ... that would not meet international minimum standards of due process".[31]

28. The Statute requires that the State with jurisdiction must establish a genuine willingness and ability, but it need not also establish that its domestic procedural protections comport with the ICC Statute and Rules of Procedure and Evidence. The Rome Statute was not intended, and ought not to be read as, an international instrument that binds States to adopt particular processes. Indeed, it expressly recognizes and respects the multiplicity of legal systems.[32] Thus, the Court cannot reject an admissibility challenge, despite the willingness and ability of the State and the identity of the case, solely on the ground that attributes of the State's domestic procedures are not fully consistent with those of other legal systems including the Rome Statute.

29. Both the negotiating history of the Statute and the opinion of commentators support this view. During the negotiations leading to the adoption of the Rome Statute an overarching concern by negotiating States was that a determination of admissibility of a case by the Court not become a judgment on the fairness and efficiency of the national system.[33] The view expressed repeatedly was that the

[31] ICC-01/11-01/11-130-Red, para.12.
[32] See Preamble , Articles 88, 89,93.
[33] J. Holmes, "The Principle of Complementarity" in Roy S. Lee, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (1999), pp. 50-51; see also *ibid* pp.53-54.

ICC should not function as a court of appeal on national decisions based on alleged domestic deviations from applicable human rights norms.[34]

30. The drafting history of the relevant provisions confirms this conclusion: during the drafting of Article 17, most delegates were concerned with sham or ineffective proceedings and thought that the problem of overly-harsh national proceedings was one that could be taken up with a human rights body, not the ICC.[35] In particular, one proposal from Italy that would have specifically made the lack of due process a ground for admissibility[36] was rejected since, according to the Coordinator of the Working Group, "many delegations believed that procedural fairness should not be a ground for defining complementarity".[37] Thus, if the drafters had intended "genuinely" to require States to provide defendants with due process, they could have done so explicitly by including a specific paragraph to that effect, but they explicitly considered the issue and decided not to.[38]

31. The chapeau of Article 17(2) requires the Court to have regard to the "principles of due process recognized by international law" when determining "unwillingness" in a particular case, supporting an argument that the State must be willing to provide a trial that respects some basic standards of fairness. However, this chapeau provision must be read in conjunction with the three

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[34] J. Holmes, "The Principle of Complementarity" in Roy S. Lee, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (1999), pp. 50-51; see also *ibid* pp.52-56. E. Carnero Rojo, "The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From 'No Peace without Justice' to 'No Peacewith Victor's Justice'?"; 18 Leiden Jrnl Int'l L. (2005), paras. 852-854; J. Holmes, "Complementarity: National Courts *versus* the ICC" in A. Cassese, P.Gaeta, J. Jones, "The Rome Statute of the International Criminal Court: A Commentary" (2002), pp. 672-679.

[35] D. Robinson, "Three Theories of Complementarity: Charge, Sentence, or Process?", *Harvard International Law Journal*, vol. 53, 2012, p. 175, ft. 52.

[36] Draft Proposal by Italy, UN Doc. A/AC.249/1997/WG.3/IP.4, 5 August 1997: "In deciding on issues of admissibility under this article, the Court shall consider whether... (ii) the said investigations or proceedings have been or are impartial or independent, or were or are designed to shield the accused from international criminal responsibility or were or are conducted with full respect for the fundamental rights of the accused; (iii) the case was, or is, diligently prosecuted."

[37] J. Holmes, "The Principle of Complementarity" in Roy S. Lee, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (1999), p. 50.

[38] K. J. Heller, "The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process", 17 *Crim. L. Forum* (2006), p. 265.

subparagraphs of article 17(2).[39] The requirement is cumulative. Accordingly, the Court cannot find a State unwilling on the sole ground that the national proceedings violate due process, but must also find a violation of one of the three subparagraphs.[40]

32. Similarly, the language of Article 17(2)(c), pursuant to which a "lack of independence or impartiality" in the national proceedings could trigger a finding of unwillingness when it is "inconsistent with the intent to bring the person concerned to justice", should be read in conjunction with other parts of the provision: a case is admissible under Article 17(2)(c) only if a national proceeding lacks independence or impartiality *and* is "being conducted in a manner which, in the circumstances, is inconsistent with the intent to bring the person concerned to justice". The two requirements are conjunctive, meaning that both requirements must be satisfied for a case to be admissible.[41]

(II) Application of the Legal Standards to the Facts of this Case:

i) Concrete Investigation of the same person for the same conduct:

33. [REDACTED] the Applicant also refers to (i) the collation and analysis of photographs of the various geographic locations which were the subject of crimes in the period from 17 February 2011 onwards, including Benghazi, Tripoli, Al-bayda, Bani Walid, Zintan and Misrata; (ii) the preparation of transcripts of intercept evidence consisting of recordings in which Saif Al-Islam issues direct

[39] I. Stegmiller, *The Pre-Investigation Stage of the ICC: Criteria for Situation Selection*, Duncker & Humblot GmBH, 2011, p. 307.
[40] K. J. Heller, "The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process", 17 *Crim. L. Forum* (2006), pp. 262-263.
[41] K. J. Heller, "The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process", 17 *Crim. L. Forum* (2006), pp. 261; Jakob Pichon, "The Principle of the Complementarity in the Cases of the Sudanese Nationals Ahmad Harun and Ali Kushayb before the International Criminal Court", 8 ICLR 2008, pp. 193-194.

orders to security brigades to kill protestors; and (iii) the ongoing and/or planned collection of other documentary evidence, including passenger manifests and payment records for the transport of mercenaries.[42]

34. Although the Prosecution has not had access to the witness interview records themselves, and it has not shared with the Libyan authorities any of the evidence it has independently collected, the information arising from the summary reports of statements taken from insiders and crime-base witnesses is nonetheless consistent with the type of information and evidence collected by the Prosecution.

35. There is no question that the national authorities are investigating the same person before the Court, namely Saif Al-Islam Gaddafi. Likewise, the summary of evidence provided by the Applicant shows that it has taken concrete steps to investigate Saif Al-Islam for substantially the same conduct at issue in the case before the ICC.

36. The same conduct part of the test must be analysed with regard to the suspect's alleged role in the case. Saif Al-Islam is alleged to have planned and directed an attack on civilians opposed to the Gaddafi regime after 15 February 2011. To satisfy the same conduct part of the test, therefore, the national proceedings should also focus on this conduct. The Prosecution is satisfied that the Applicant's investigation centers on the same conduct alleged in the ICC case, namely:

    1. [REDACTED];[43]

    2. [REDACTED];[44]

    3. [REDACTED];[45]

[42] ICC-01/11-01/11-130-Red, para. 47.
[43] [REDACTED].
[44] [REDACTED].

4. [REDACTED];[46]

5. [REDACTED].[47]

37. The Libyan investigation team has interviewed three categories of witnesses which provide evidence or information concerning these elements of crimes including: (1) close friends and associates of Saif Al-Islam; (2) high-ranking military commanders and members of the Security Forces; (3) civilians who either became so-called "volunteers" during the attacks or who are family members of the victims. [REDACTED][48] [REDACTED].[49] [REDACTED].

38. Furthermore, the Applicant has submitted information indicating that it is investigating crimes committed in the same localities[50] which are the subject of the 27 June 2011 arrest warrant issued by this Court against Saif Al-Islam,[51] including Benghazi, Tripoli, Albayda, Bani Walid, Zintan and Misrata.

39. The Applicant states that the investigation against the suspect is currently based on the characterization of the conduct as "ordinary crimes" under the Penal Code of Libya, and the Applicant is considering passing legislation that would allow for the characterization of the conduct, in the alternative, as crimes against humanity.[52] As assessed previously, however, the Applicant's admissibility challenge should not turn on its ability to label the conduct it is investigating and prosecuting as "crimes against humanity."

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[45] [REDACTED].
[46] [REDACTED].
[47] [REDACTED].
[48] [REDACTED].
[49] [REDACTED].
[50] Applicant's Admissibility Challenge, para. 47.
[51] ICC-01/11-1,paras. 37-41.
[52] ICC-01/11-01/11-130-Red, para. 84.

(ii) Unwillingness or inability to carry out the investigation or prosecution genuinely

40. The second part of the admissibility test requires the Applicant to demonstrate that its investigation and prosecution is "genuine" within the meaning of Article 17(1)(a) – that is, that the proceedings are not a sham designed to shield the person and guarantee impunity. In this instance, there is no suggestion that the Applicant's effort lacks genuineness. To the contrary, its genuine interest in pursuing the case is demonstrated by its commitment of "very substantial resources"[53] to the investigation. Further, though the investigation is ongoing, the Applicant believes it will soon be completed; it states that in the "near future" it intends to interview Saif Al-Islam and confront him with the allegations, a step that occurs in the final stage of the investigation.[54] These past and contemplated investigative steps confirm that the Applicant has "genuine" intentions to actively complete the investigation and to pursue a prosecution.

41. However, despite the Applicant's predictions at the time it filed its challenge on 1 May 2012, it does not appear that Saif Al-Islam has received a defence lawyer within Libya, a precondition to presenting to him the charges and completing the investigation under Libyan law[55]. This lack of progress could be related to the restrictions established because the Zintan militia exercise custody over him. The Prosecution is mindful of the substantial challenges faced by the Applicant, but this apparent lack of progress raises questions about whether the Applicant is able to "otherwise carry out its proceedings" within the meaning of Article 17(3). Therefore, the Prosecution submits that the Court should require the Applicant to appear before the Court to provide additional information on its ability to advance the investigation and prosecution of Saif Al-Islam.

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[53] Applicant's Admissibility Challenge, para. 49.
[54] Applicant's Admissibility Challenge, paras. 48, 49.
[55] ICC-01/11-01/11-158-AnxB, Article (161), Libyan Criminal Procedure Code

(iii) Due process considerations

42. There is no need to analyse the fairness of the Libyan's criminal justice system because there is no indication that the Applicant is trying shield the suspect. However, although not required to do so by Article 17, the Applicant sets out the scope of procedural rights and protections which are at the core of the Libyan legislation and criminal justice system. These procedural rights and protections appear to be similar to those rights and protections set forth in the Rome Statute,[56] and include the (i) presumption of innocence[57], (ii) right to a trial before an impartial and independent judiciary, (iii) right to counsel,[58] (iv) right to a public hearing, (v) right to remain silent, (vi) right to present evidence and call witnesses, (vii) right to a written judgement, and (viii) right to question prosecution witnesses.[59]

43. The Applicant's rules of criminal procedural and the specific due process guarantees that are applicable throughout the various stages of a domestic criminal case appear to provide most of the procedural rights afforded to an accused person or suspect under the Rome Statute.

44. The Applicant has committed to respecting the rights of the suspect in this case and has set forth the legal underpinnings of those protections in Libyan law.

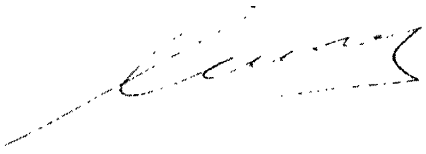
45. The Chamber should not embark on a speculative exercise to consider how the rights of the suspect in this case will be respected in the course of future investigation and prosecution. In the event that the question arises in the future in this case, as the Court continues to monitor the progress of the investigation and

[56] Applicant's Admissibility Challenge, paras. 56-65.
[57] Applicant's Admissibility Challenge, para. 56 (ii).
[58] Applicant's Admissibility Challenge, paras. 61-62.
[59] Applicant's Admissibility Challenge, para. 63.

prosecution in Libya, then the Court can consider the question in its concrete form and request further briefing and argument from all of the parties and participants.

Conclusion

46. The Applicant has demonstrated that it has taken concrete steps to investigate the same person for the same conduct at issue in the case before the ICC. Further, there is no evidence to suggest that the Applicant is not genuine in its investigation and prosecution of Saif Al-Islam. However, there remain questions about its ability to advance the investigation and prosecution of Saif Al-Islam. Therefore the Court should accept the Applicant's offer to provide further information, including the testimony of the General Prosecutor, to provide clarity on its ability to advance its case.



Luis Moreno-Ocampo,
Prosecutor

Dated this 5th Day of June 2012
At The Hague, The Netherlands