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International
Criminal
Court

Original: English

No. ICC-01/11-01/11 OA 6
Date: 24 July 2014

THE APPEALS CHAMBER

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

SITUATION IN LIBYA

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

Public document

Judgment
on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi"

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

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

States Representatives
Mr Ahmed El-Gehani
Mr James Crawford
Mr Wayne Jordash
Ms Michelle Butler

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

Office of Public Counsel for victims
Ms Paolina Massidda

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I entitled "Decision on the admissibility of the case against Abdullah Al-Senussi" of 11 October 2013 (ICC-01/11-01/11-466-Conf),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

1. The "Decision on the admissibility of the case against Abdullah Al-Senussi" is confirmed. The appeal is dismissed.
2. The request for an oral hearing is rejected.
3. The requests to submit additional evidence on appeal are rejected.
4. Libya's Application of 24 February 2014 for Leave to Reply is dismissed.
5. The Defence Application for Leave to Reply of 11 March 2014 is dismissed.

REASONS

I. KEY FINDINGS

1. For a case to be admissible because the State is unwilling genuinely to investigate or prosecute in terms of article 17 (2) (c) of the Statute, it must be shown that the proceedings were not or are not being conducted independently or impartially *and* that the proceedings were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

2. Taking into account the text, context and object and purpose of the provision, this determination is not one that involves an assessment of whether the due process rights of a suspect have been breached *per se*. In particular, the concept of

proceedings "being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice" should generally be understood as referring to proceedings which will lead to a suspect evading justice, in the sense of not appropriately being tried genuinely to establish his or her criminal responsibility, in the equivalent of sham proceedings that are concerned with that person's protection.

3. However, there may be circumstances, depending on the facts of the individual case, whereby violations of the rights of the suspect are so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the suspect so that they should be deemed, in those circumstances, to be "inconsistent with an intent to bring the person to justice".

II. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial Chamber

4. The following outlines the main procedural background to this appeal, with further details, as relevant, contained within the body of this judgment.

5. On 26 February 2011, the Security Council of the United Nations adopted *Resolution 1970 (2011)*, referring the situation in Libya since 15 February 2011 to the Prosecutor of this Court.[1]

6. 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",[2] seeking, *inter alia*, the issuance of a warrant of arrest for Mr Abdullah Al-Senussi (hereinafter: "Mr Al-Senussi"). On 27 June 2011, Pre-Trial Chamber I (hereinafter: "Pre-Trial Chamber") issued a warrant of arrest for Mr Al-Senussi,[3] a decision thereon being issued on the same day[4]

[1] S/RES/1970 (2011).
[2] ICC-01/11-4-Conf-Exp. A public redacted version was registered on the same day (ICC-01/11-4-Red) (hereinafter: "Prosecutor's Application for Warrant of Arrest").
[3] "Warrant of Arrest for Abdullah Al-Senussi", ICC-01/11-01/11-4 (hereinafter: "Warrant of Arrest").
[4] "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.

(hereinafter: "Article 58 Decision"). A request for Mr Al-Senussi's arrest and surrender was issued on 4 July 2011.[5]

7. On 16 January 2013, the Registrar registered a provisional acknowledgment of the appointment of Mr Benedict Emmerson as counsel for Mr Al-Senussi (hereinafter: "Defence"), based on a power of attorney executed in favour of counsel by others on his behalf.[6]

8. On 2 April 2013, Libya filed the "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute"[7] (hereinafter: "Libya's Admissibility Challenge"). Libya also filed the "Libyan Government's Filing of Libyan Laws referred to in its Admissibility Challenge pertaining to Abdullah Al-Senussi filed on 2 April 2013", dated 5 April 2013.[8]

9. On 24 April 2013, the Prosecutor filed the "Prosecution's Response to 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute'".[9]

10. On 26 April 2013, the Pre-Trial Chamber issued the "Decision on the conduct of the proceedings following the 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute'"[10] (hereinafter: "Decision of 26 April 2013"). In this decision, the Pre-Trial Chamber, *inter alia*, appointed Paolina Massidda from the Office of Public Counsel for victims "as legal representative of victims who have already communicated with the Court in relation to the case"[11] (hereinafter: "Victims") and invited the Defence, the Victims and the Security Council "to submit observations on the Admissibility Challenge, if

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[5] "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.
[6] "Registration of the provisional acknowledgement of the appointment of Mr. Benedict Emmerson as counsel for Mr. Abdullah Al-Senussi", dated 15 January 2013 and registered on 16 January 2013, ICC-01/11-01/11-253, with confidential *ex parte* annex.
[7] ICC-01/11-01/11-307-Conf-Exp. A confidential redacted version was registered on the same day (ICC-01/11-01/11-307-Conf-Red) and a public redacted version was registered on 3 April 2013 (ICC-01/11-01-11-307-Red2).
[8] ICC-01/11-01/11-309.
[9] ICC-01/11-01/11-321-Conf. A public redacted version was registered on 2 May 2013 (ICC-01/11-01/11-321-Red).
[10] ICC-01/11-01/11-325.
[11] Decision of 26 April 2014, p. 7, a).

any, no later than Friday, 14 June 2013".[12] On 11 June 2013, further to an application of the Prosecutor of 7 June 2013,[13] the Pre-Trial Chamber issued a decision authorising the Prosecutor to file additional observations no later than the same date, 14 June 2013.[14]

11. On 14 June 2013, the Prosecutor,[15] Defence[16] and Victims[17] all filed responses to the Admissibility Challenge (hereinafter: "Prosecutor's Additional Response to Admissibility Challenge", "Defence Response to Admissibility Challenge" and "Victims' Response to Admissibility Challenge", respectively).

12. On 16 July 2013, pursuant to a request by Libya of 26 June 2013,[18] the Pre-Trial Chamber granted Libya leave to file a consolidated reply to the three responses to the Admissibility Challenge by 14 August 2013.[19] Libya filed its consolidated reply on 14 August 2013[20] (hereinafter: "Libya's Reply to the Responses to the Admissibility Challenge").

13. On 19 August 2013, the Pre-Trial Chamber issued a decision[21] authorising the filing of additional submissions by the Defence, by 26 August 2013, and by Libya, by 16 September 2013. The Defence filed its additional submissions on 26 August

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[12] Decision of 26 April 2014, p. 7, b).
[13] "Prosecution's Request for Leave to Present Additional Observations to the 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute'", ICC-01/11-01/11-349.
[14] "Decision on the Prosecutor's request for leave to present additional observations on Libya's challenge to the admissibility of the case against Abdullah Al-Senussi", ICC-01/11-01/11-351.
[15] "Prosecution's Additional Observations to the 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute'", ICC-01/11-01/11-355.
[16] "Defence Response on behalf of Mr. Abdullah Al-Senussi to 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute'", ICC-01/11-01/11-356.
[17] "Observations on behalf of victims on the 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute'", ICC-01/11-01/11-353-Conf. A public redacted version was registered on 18 June 2013 (ICC-01/11-01/11-353-Red).
[18] "Libyan Government's Request for leave to reply to the Prosecution's Additional Submissions and the Defence and OPCV Response to 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute'", ICC-01/11-01/11-372.
[19] "Decision on Libya's request for leave to file a consolidated reply", ICC-01/11-01/11-382.
[20] "Libyan Government's consolidated Reply to the Responses by the Prosecution, Defence and OPCV to the Libyan Government's Application relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute", ICC-01/11-01/11-403-Conf-Exp. A confidential redacted version was registered on the same day (ICC-01/11-01/11-403-Conf-Red) and a public redacted version was registered on 15 August 2013 (ICC-01/11-01/11-403-Red2).
[21] "Decision on additional submissions in the proceedings related to Libya's challenge to the admissibility of the case against Abdullah Al-Senussi", ICC-01/11-01/11-409.

2013[22] (hereinafter: "Defence's Additional Submissions"). On 5 September 2013, the Defence filed an addendum, requesting, *inter alia*, that the Pre-Trial Chamber order Libya to file its submissions by 10 September 2013 at the latest[23] (hereinafter: "Defence's Addendum"). Libya filed a response to the latter application on 9 September 2013[24] and, in a decision dated 11 September 2013, the Pre-Trial Chamber granted Libya until 26 September 2013 to file further submissions.[25] Such submissions were filed on that date[26] ("Libya's Final Submissions").

14. On 11 October 2013, the Pre-Trial Chamber issued the "Decision on the admissibility of the case against Abdullah Al-Senussi"[27] (hereinafter: "Impugned Decision").

B. Proceedings before the Appeals Chamber

15. The Defence filed its appeal against the Impugned Decision on 17 October 2013[28] (hereinafter: "Appeal") and on 4 November 2013, it filed the "Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Abdullah Al-Senussi'"[29] (hereinafter: "Document in Support of the Appeal").

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[22] "Filing on behalf of Mr. Abdullah Al-Senussi pursuant to 'Decision on additional submissions in the proceedings related to Libya's challenge to the admissibility of the case against Abdullah Al-Senussi' of 19 August 2013", ICC-01/11-01/11-418.
[23] "Addendum to 'Filing on behalf of Mr. Abdullah Al-Senussi pursuant to "Decision on additional submissions in the proceedings related to Libya's challenge to the admissibility of the case against Abdullah Al-Senussi" of 19 August 2013,' and Urgent Application pursuant to Regulation 35", ICC-01/11-01/11-432, para. 30.
[24] "Response to Mr. Al-Senussi's 'Urgent Application pursuant to Regulation 35'", ICC-01/11-01/11-438.
[25] "Decision varying the time limit for Libya's final submissions on the admissibility of the case against Mr Al-Senussi", ICC-01/11-01/11-441.
[26] "Government's Submissions and Response to Defence 'Filing on behalf of Mr. Abdullah Al-Senussi pursuant to "Decision on additional submissions in the proceedings related to Libya's challenge to the admissibility of the case against Abdullah Al-Senussi" of 19 September 2013' and '"Addendum" filed on 5 September 2013'", ICC-01/11-01/11-455.
[27] ICC-01/11-01/11-466-Conf. A public redacted version was registered on the same date (ICC-01/11-01/11-466-Red).
[28] "Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Abdullah Al-Senussi', and Request for Suspensive Effect", ICC-01/11-01/11-468-Conf (OA 6). A public redacted version was registered on the same date (ICC-01/11-01/11-468-Red).
[29] ICC-01/11-01/11-474 (OA 6).

16. On 22 November 2013, the Appeals Chamber rejected Defence's request for suspensive effect of the appeal.[30]

17. On 26 November 2013, Libya[31] and the Prosecutor[32] filed responses to the Document in Support of the Appeal (hereinafter: "Libya's Response to the Document in Support of the Appeal" and "Prosecutor's Response to the Document in Support of the Appeal", respectively).

18. On 20 December 2013, the Victims filed the "Observations on the 'Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's "Decision on the admissibility of the case against Abdullah Al-Senussi"'"[33] (hereinafter: "Victims' Observations on Appeal") as provided by order of the Appeals Chamber of 22 November 2013.[34] Libya[35] and the Defence[36] responded to these observations on 13 January 2014 (hereinafter: "Libya's Response to Victims' Observations on Appeal" and "Defence Response to Victims' Observations on Appeal", respectively), as provided by the same Appeals Chamber order.

19. On 19 December 2013, the Defence filed the "Request on behalf of Abdullah Al-Senussi to File Further Submissions Pursuant to Regulation 28"[37] (hereinafter: "Request of 19 December 2013"). Libya and the Prosecutor responded to this request on 9 and 10 January 2014, respectively.[38] On 20 January 2014, Libya filed the

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[30] "Decision on the request for suspensive effect and the request to file a consolidated reply", ICC-01/11-01/11-480 (OA 6).
[31] "Response to the 'Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's "Decision on the admissibility of the case against Abdullah Al-Senussi"'", ICC-01/11-01/11-482 (OA 6).
[32] "Prosecution's Response to the 'Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's "Decision on the admissibility of the case against Abdullah Al-Senussi"'", ICC-01/11-01/11-483 (OA 6). A corrigendum to this was registered on 27 November 2013 ("Corrigendum to Prosecution's Response to the 'Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's "Decision on the admissibility of the case against Abdullah Al-Senussi"'", ICC-01/11-01/11-483-Corr (OA 6).
[33] ICC-01/11-01/11-494.
[34] "Order in relation to the filing of victims' observations", ICC-01/11-01/11-481 (OA 6).
[35] "Libyan Government's Response to the OPCV's 'Observations on the "Document in Support of Appeal on behalf of Abdullah Al-Senussi against the Pre-Trial Chamber I's 'Decision on the admissibility of the case against Abdullah Al-Senussi'"'", ICC-01/11-01/11-499 (OA 6).
[36] "Response on behalf of Abdullah Al-Senussi to the 'Observations on the "Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Abdullah Al-Senussi'"'", ICC-01/11-01/11-500 (OA 6).
[37] ICC-01/11-01/11-493 (OA 6).
[38] "Libyan Government's Response to the 'Request on behalf of Abdullah Al-Senussi to File Further Submissions Pursuant to Regulation 28'", 9 January 2014, ICC-01/11-01/11-497(OA 6);

"Libyan Government's Request for the Appeals Chamber to dismiss *in limine* the new evidence submitted as part of the Al-Senussi Defence Response to the OPCV's Observations on its Document in support of its Appeal"[39] (hereinafter: "Libya's Request of 20 January 2014"). Libya filed an addendum to this request on 27 January 2014[40] (hereinafter: "Libya's Addendum of 27 January 2014").

20. On 6 February 2014, the Appeals Chamber issued a decision in relation to the Request of 19 December 2013[41] (hereinafter: "Decision of 6 February 2014"). It instructed the Defence "to file submissions on specific issues arising from" the responses filed by Libya and the Prosecutor to the Document in Support of the Appeal, by 14 February 2014,[42] referring to specific paragraphs of the Request of 19 December 2013 in relation to which leave had been granted to make submissions.[43] Libya, the Prosecutor and the Victims were granted leave to respond to those submissions by 24 February 2014, and the Defence, Libya and the Prosecutor were granted leave to respond to the Victims' submissions, by 3 March 2014.[44] The Appeals Chamber stated:

> The Appeals Chamber observes that the remainder of the Request is, in effect, an application to file additional evidence, as are the further requests and filings, in relation to new evidence, contained in the Defence Response to Victims' Observations and the Addendum to Libya's Request of 20 January 2014 and the annexes thereto. As such, the Appeals Chamber will consider those matters in due course, at the same time as it addresses ground two of the Document in Support of the Appeal which, similarly, concerns submissions that the Appeals Chamber should have regard to additional evidence in its determination of this appeal.[45]

21. On 12 February 2014, the Defence filed a response to Libya's filings of 20 and 27 January,[46] as referred to at paragraph 19 above (hereinafter: "Defence Response of

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"Prosecution's Response to 'Request on behalf of Abdullah Al-Senussi to File Further Submissions Pursuant to Regulation 28'", 10 January 2014, ICC-01/11-01/11-498 (OA 6).

[39] ICC-01/11-01/11-502 (OA 6).

[40] "Addendum to Libyan Government's Request for the Appeals Chamber to disregard the new evidence submitted as part of the Al-Senussi Defence Response to the OPCV's Observations on its Document in support of its Appeal", ICC-01/11-01/11-503 (OA 6).

[41] "Decision on Mr Al-Senussi's request to file further submissions and related issues", ICC-01/11-01/11-508 (OA 6).

[42] Decision of 6 February 2014, p. 3.

[43] Decision of 6 February 2014, para. 18.

[44] Decision of 6 February 2014, p. 3.

[45] Decision of 6 February 2014, para. 20.

[46] "Response on behalf of Abdullah Al-Senussi to the 'Libyan Government's Request for the Appeals Chamber to dismiss *in limine* the new evidence submitted as part of the Al-Senussi Defence Response

12 February 2014"), to which Libya applied for leave to reply on 24 February 2014[47] (hereinafter: "Libya's Application of 24 February 2014 for Leave to Reply").

22. On 14 February 2014, the Defence filed the "Further Submissions on behalf of Abdullah Al-Senussi Pursuant to Regulation 28"[48] (hereinafter: "Defence Further Submissions"). The Prosecutor[49] and Libya[50] filed responses to these submissions on 24 February 2014 (hereinafter: "Prosecutor's Response to Defence Further Submissions" and "Libya's Response to Defence Further Submissions", respectively).

23. On 11 March 2014, the Defence filed an application for leave to reply to Libya's Response to Defence Further Submissions[51] (hereinafter: "Defence Application for Leave to Reply of 11 March 2014"). Libya filed a response to this filing on 1 April 2014[52] (hereinafter: "Libya's Response of 1 April 2014").

24. The Appeals Chamber also recalls that, on 21 May 2014, it issued its judgment[53] (hereinafter: "*Gaddafi* Admissibility Judgment") in relation to an appeal filed by Libya against the Pre-Trial Chamber's "Decision on the admissibility of the case

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to the OPCV's Observations on its Document in support of its Appeal' filed on 20 January 2014 and the 'Addendum to Libyan Government's Request for the Appeals Chamber to disregard the new evidence submitted as part of the Al-Senussi Defence Response to the OPCV's Observations on its Document in support of its Appeal' filed on 27 January 2014", ICC-01/11-01/11-510 (OA 6).

[47] "Application on behalf of the Government of Libya for leave to reply to the 'Response on behalf of Abdullah Al-Senussi to the "Libyan Government's Request for the Appeals Chamber to dismiss *in limine* the new evidence submitted as part of the Al-Senussi Defence Response to the OPCV's Observations on its Document in support of its Appeal" filed on 20 January 2014 and the "Addendum to Libyan Government's Request for the Appeals Chamber to disregard the new evidence submitted as part of the Al-Senussi Defence Response to the OPCV's Observations on its Document in support of its Appeal" filed on 27 January 2014'", ICC-01/11-01/11-520 (OA 6).

[48] ICC-01/11-01/11-513-Conf (OA 6). A public redacted version was registered on the same day (ICC-01/11-01/11-513-Red).

[49] "Prosecution's Response to 'Further Submissions on behalf of Abdullah Al-Senussi Pursuant to Regulation 28'", ICC-01/11-01/11-517.

[50] "Libyan Government's Response to the Al-Senussi Defence's 'Further Submissions on behalf of Abdullah Al-Senussi Pursuant to Regulation 28'", ICC-01/11-01/11-519-Conf (OA 6). A public redacted version was filed on the same day (ICC-01/11-01/11-519-Red).

[51] "Application on behalf of the Defence for Abdullah Al-Senussi for leave to reply to, or submit further submissions in light of, 'Libyan Government's Response to the Al-Senussi Defence's "Further Submissions on behalf of Abdullah Al-Senussi Pursuant to Regulation 28"' of 24 February 2014", ICC-01/11-01/11-523-Conf (OA 6). A public redacted version was registered on the same day (ICC-01/11-01/11-523-Red).

[52] "Libyan Government's Response to Application on behalf of the Defence for Abdullah Al-Senussi for leave to reply to, or submit further submissions in light of, 'Libyan Government's Response to the Al-Senussi Defence's "Further Submissions on behalf of Abdullah Al-Senussi Pursuant to Regulation 28"' of 24 February 2014", ICC-01/11-01/11-535 (OA 6).

[53] "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'", ICC-01/11-01/11-547-Conf (OA 4). A public redacted version was registered on the same day (ICC-01/11-01/11-547-Red).

against Saif Al-Islam Gaddafi"[54] (hereinafter: "*Gaddafi* Admissibility Decision"), which had found the case against Mr Saif Al-Islam Gaddafi (hereinafter: "Mr Gaddafi") to be admissible before the Court. In the *Gaddafi* Admissibility Judgment, the Appeals Chamber, by majority, confirmed the *Gaddafi* Admissibility Decision.

III. PRELIMINARY ISSUES

A. Postponement of decision on appeal until Defence has been able to receive instructions from Mr Al-Senussi

25. The Defence submits, within ground one of the appeal, that it

> files this appeal without prejudice [*sic*] Mr. Al-Senussi's fundamental right to provide instructions to his Counsel in the admissibility proceedings. The Appeals Chamber should not decide this appeal without counsel being able to consult Mr. Al-Senussi. It would be a flagrant breach of his human rights and all standards of due process under Libyan law and international law for the Appeals Chamber to dispose of this matter without Mr. Al-Senussi being able to provide his instructions and all relevant information, particularly in response to Libya, and most importantly concerning his conditions, to the Appeals Chamber.[55]

26. This argument – while raising a preliminary matter as to whether the Appeals Chamber should determine the present appeal at this point in time – will be addressed below in section IV.B.1 in the context of the Defence's broader argument that the Pre-Trial Chamber erred in not properly taking into account the fact that the Defence had not been given access to Mr Al-Senussi during the pre-trial proceedings.

B. Confidential filings

27. Certain of the filings during the pre-trial phase of the proceedings and in this appeal and, have been filed confidentially, or confidentially, *ex parte*. Often, public redacted versions of those filings were also filed. In issuing this judgment, the Appeals Chamber has, 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.

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[54] 31 May 2013, ICC-01/11-01/11-344-Conf. A public redacted version was registered on the same day (ICC-01/11-01/11-344-Red).
[55] Document in Support of the Appeal, para. 48. *See also,* the Appeal, para. 28; Defence Response to Victims' Observations on Appeal, para. 30.

C. Non-compliance with page limits

28. The Appeals Chamber notes that the Defence has systematically failed to comply with the Regulations of the Court in relation to page limits.

29. First, both in the Document in Support of the Appeal[56] and in the Defence Response to Victims' Observations on Appeal,[57] the Defence makes an application to extend the page limit in a footnote. This constitutes an error as:

a) the Appeals Chamber has previously emphasised that substantive submissions should not be made in a footnote;[58] and

b) the Appeals Chamber has previously held that

> [a]n application for an extension of the page limit envisaged by the Regulations of the Court and its approval by a Chamber are prerequisites for the submission of an extended document. Unlike regulation 35 (2), second sentence, of the Regulations of the Court in respect of time limits, the Regulations of the Court do not provide for a retroactive extension of page limits.[59]

30. Second, the Document in Support of the Appeal averages approximately 410 words per page, the Defence Response to Victims' Observations on Appeal averages approximately 370 words per page, and the Defence Further Submissions averages approximately 365 words per page. Thus, three significant documents were filed by the Defence in breach of regulation 36 (3), fifth sentence, of the Regulations of the Court, which provides that "[a]n average page shall not exceed 300 words". In doing so, the Defence effectively circumvented the relevant page limits for those documents.

31. The Appeals Chamber strongly reprimands the Defence for the above non-compliance with the Regulations of the Court. The Appeals Chamber emphasises that parties are expected to comply with the requirements stipulated in the Court's legal

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[56] Document in Support of the Appeal, footnote 1.
[57] Defence Response to Victims' Observations on Appeal, footnote 2.
[58] *See Prosecutor v. Jean-Pierre Bemba Gombo*, "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 (OA 3), para. 30, citing *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the re-filing of the document in support of the appeal", 22 July 2008, ICC-01/04-01/06-1445 (OA 13), para. 6.
[59] *See 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, also cited in the *Gaddafi* Admissibility Judgment, para. 28.

texts and as laid down by the Chambers. Non-compliance with these requirements can, and will in the future, entail, *inter alia*, rejection of documents filed.

32. Further to the non-compliance that is recorded above in this case – and non-compliance that has taken place in other cases – the Appeals Chamber has decided that, henceforth, all parties shall add to the end of their filing a short, signed, statement to the following effect:

> It is hereby certified that this document contains a total of [ ] words and complies in all respects with the requirements of regulation 36 of the Regulations of the Court.

33. Notwithstanding the above, the Appeals Chamber recalls that regulation 29 (1) of the Regulations of the Court provides that "[i]n the event of non-compliance by 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 the present case, the Appeals Chamber has decided, pursuant to regulation 29 of the Regulations of the Court, to accept the Document in Support of the Appeal, the Defence Response to Victims' Observations on Appeal and the Defence Further Submissions for the following reasons.

34. First, the Appeals Chamber notes that the second ground of appeal in the Document in Support of the Appeal is, in reality, an application to submit additional evidence on appeal (as addressed further below). As such, this application could have been made independently, which would have significantly reduced the overall length of the Document in Support of the Appeal. Similar considerations apply to the Defence Response to Victims' Observations on Appeal, which contains lengthy submissions in respect of additional evidence.[60]

35. Second, the other parties and participants did not object to the length of the three above-mentioned documents (although the Appeals Chamber recognises that, in the circumstances described and criticised by the Appeals Chamber above, the other parties and participants may, along with the Appeals Chamber itself, not have immediately recognised the extent by which the documents exceeded the page limits). Responses to the documents having been filed, it would not have been appropriate for

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[60] *See*, similarly, the *Gaddafi* Admissibility Judgment, para. 29.

the Appeals Chamber to order the re-filing of the Defence's documents, which would have also involved permitting the filing of responses to those re-filed documents (even though the responses already filed adequately address the arguments raised) in what have already been document-intensive proceedings.[61]

36. As a result, in the specific circumstances of this case, and in light of the nature and complexity of the issues raised in this appeal, the Appeals Chamber regarded it as appropriate to accept the three documents referred to above.

D. Defence Application for Leave to Reply of 11 March 2014

37. The Defence filed the Defence Application for Leave to Reply of 11 March 2014, to which Libya filed Libya's Response of 1 April 2014.

38. The Defence seeks leave to reply in relation to submissions contained within Libya's Response to Defence Further Submissions. Notably, the Defence wishes to address what it characterises as "entirely new information contained in Libya's submissions that has never been previously submitted before the Appeals Chamber".[62] It submits that it wishes to reply to three issues, which it sets out as follows:

> - Libya has for the very first time in the appellate proceedings submitted new information about the purported 'application' and 'acceptance' by the Prosecutor-General' [*sic*] office of legal representatives for Mr. Al-Senussi – the Defence must be granted a fair opportunity to respond to this new information if any of it is to be taken into account by the Appeals Chamber;
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> - Libya has also raised new information in respect of the legal visit ordered by the Pre-Trial Chamber which has not been arranged by Libya; and,
>
> - Libya has inaccurately quoted Defence Counsel out of context which must be corrected for the record.[63] [Footnotes omitted.]

39. Libya argues that the Defence's request should be rejected on the basis a) that it was not filed expeditiously,[64] b) that it constitutes a substantive reply to the issues

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[61] *See*, similarly, the *Gaddafi* Admissibility Judgment, para. 29.
[62] Defence Application for Leave to Reply of 11 March 2014, para. 2.
[63] Defence Application for Leave to Reply of 11 March 2014, para. 2.
[64] Libya's Response of 1 April 2014, para. 5.

raised and as such "sidesteps the proper authorisation process",[65] and c) that good cause has not been shown to justify a reply.[66]

40. The Appeals Chamber has decided to dismiss the Defence Application for Leave to Reply of 11 March 2014. This is because, as will be explained below, and irrespective of the question of the legal basis for the request, it found no need for further submissions to be received on the issues raised by the Defence.

41. In relation to the information regarding potential legal representatives for Mr Al-Senussi in the domestic proceedings, this information will not be considered by the Appeals Chamber, having not been considered by the Pre-Trial Chamber in this case. Consequently, there is no need for the Defence to submit a reply in relation thereto.

42. Regarding the new information as to the arrangement of a legal visit for the Defence, given the Appeals Chamber's findings in relation to the role of the Defence and the fact that instructions from Mr Al-Senussi are unnecessary,[67] this point is moot. In any event, the information would not be considered by the Appeals Chamber, as again, it has not been considered by the Pre-Trial Chamber in this case.

43. Finally, relative to the Defence's assertion that Libya has inaccurately quoted the Defence out of context, in light of the fact that paragraph 17 of the Defence's application currently under consideration is substantive in nature, any further consideration of this point is clearly unnecessary. The Appeals Chamber recalls that it considers it highly inappropriate for a party to effectively use an application for leave to reply to file its substantive reply.[68]

E. Requests to submit additional evidence on appeal

44. The second ground of appeal reads:

> There is compelling new evidence that was not previously available which demonstrates that Libya is unwilling and unable genuinely to carry out the

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[65] Libya's Response of 1 April 2014, para. 7.
[66] Libya's Response of 1 April 2014, para. 8.
[67] *See* below, paras 145 et seq.
[68] *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), para. 68.

proceedings against Mr. Al-Senussi, within the meaning of Article 17(1)(a), (2) and (3).[69]

45. Although characterised as a separate ground of appeal, this ground essentially amounts to an application to submit additional evidence on appeal in respect of the first ground of appeal. Consequently, the Appeals Chamber finds it appropriate to consider this matter as a preliminary issue prior to entering into a discussion of the merits of the other grounds of appeal. In this context, the Appeals Chamber also regards it as appropriate to consider the additional applications to submit additional evidence on appeal, made in later filings.

1. Submissions of the parties and participants

46. In the Document in Support of the Appeal, the Defence submits that it has received new evidence that was not previously available concerning, *inter alia*, Mr Al-Senussi's treatment in detention before and during the accusation stage and that the evidence could not have been submitted to the Pre-Trial Chamber as it only became available after the Impugned Decision was issued.[70] The Defence avers that the evidence is vital as it shows, in particular, that Mr Al-Senussi was mistreated following the hearing on 19 September 2013 "in which the authorities have been seeking to obtain confessions from" him.[71] The Defence submits that the evidence is directly relevant to the issues arising under the first ground of appeal, as it demonstrates that Mr Al-Senussi is not being treated humanely and fairly and in a manner consistent with bringing him to justice, as well as that Libya is unable to carry out the proceedings against him.[72]

47. The Defence submits that the Appeals Chamber is entitled to admit new evidence relevant to the appeal, or, alternatively, that it can refer the new evidence back to the Pre-Trial Chamber to reconsider its decision in light of that new evidence,[73] setting out various legal bases that it submits would permit such courses

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[69] Document in Support of the Appeal, p. 65. *See also*, para. 3, where it characterises this ground as follows: "Ground 2: The Appeals Chamber is requested to consider new evidence, which was not previously available, concerning the mistreatment of Mr. Al-Senussi in detention and the conduct of the national proceedings which is relevant to Ground 1 as it further demonstrates that Libya is not willing and able to carry out genuine proceedings in Libya."
[70] Document in Support of the Appeal, para. 137.
[71] Document in Support of the Appeal, para. 137.
[72] Document in Support of the Appeal, para. 137.
[73] Document in Support of the Appeal, para. 138.

of action.[74] The Defence further sets out the nature of the new evidence,[75] averring that certain of the material can only be provided to the Appeals Chamber on a confidential and *ex parte* basis "due to very serious security concerns and risks".[76] The Defence submits that that the additional evidence was previously unavailable,[77] including because "[c]ertain of the incidents only occurred around the time or after the Admissibility Decision",[78] and emphasises that the additional evidence is relevant to the first ground of appeal.[79]

48. Libya submits that the *ex parte* status of the material filed with the Document in Support of the Appeal prevents Libya from making any submissions on its admissibility or substance and that its submissions should be understood in that context.[80] Libya submits that the evidence should not play any part in overturning the Impugned Decision without its disclosure to Libya and the other parties.[81] By reference to case-law of the International Criminal Tribunal for the former Yugoslavia, Libya further submits that the evidence can only be admitted if it is relevant, the Defence has demonstrated due diligence in relation to the collection of the evidence and its exclusion would amount to a miscarriage of justice – and that regulation 62 (1) (b) of the Regulations of the Court requires more than general assertions about security concerns.[82]

49. Libya further submits that the Appeals Chamber's jurisdiction is corrective and restricted to the assessment as at the date of the Impugned Decision[83] and that the admission of the new evidence "would impermissibly revise and expand the nature of appellate jurisdiction at the ICC"; yet, if such a course of action were permitted, Libya should also be given the opportunity to provide further evidence.[84] Libya submits that the new evidence should be rejected as the Defence has failed to establish

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[74] Document in Support of the Appeal, paras 139-151.
[75] Document in Support of the Appeal, paras 152-153.
[76] Document in Support of the Appeal, para. 152.
[77] Document in Support of the Appeal, paras 154-156.
[78] Document in Support of the Appeal, para. 154.
[79] Document in Support of the Appeal, paras 157-160.
[80] Libya's Response to the Document in Support of the Appeal, para. 112.
[81] Libya's Response to the Document in Support of the Appeal, para. 112.
[82] Libya's Response to the Document in Support of the Appeal, paras 113-116.
[83] Libya's Response to the Document in Support of the Appeal, para. 117.
[84] Libya's Response to the Document in Support of the Appeal, para. 118.

its relevance and has failed to demonstrate how it would have affected the Impugned Decision.[85]

50. The Prosecutor submits that, insofar as the new evidence filed with the Document in Support of the Appeal relates to facts that occurred after the Impugned Decision, the request for its admission should be rejected *in limine* as it (i) "contravenes the corrective nature of the appellate process",[86] and (ii) "circumvents the statutory framework of the admissibility proceedings",[87] as a determination of admissibility must be based on the set of facts that exist at the time of the admissibility proceedings before the Pre-Trial Chamber to avoid the determination being "subject to continuing reconsideration as facts and circumstances change".[88] The Prosecutor submits that, "[b]y contrast", facts that occurred prior to the Impugned Decision but which only became known to the Defence thereafter may be admitted if "(a) it was not available at trial to duly diligent counsel; (b) it is relevant and credible; and (c) it could have been a decisive factor in the decision".[89]

51. In relation to the first two annexes of additional evidence filed with the Document in Support of the Appeal, the Prosecutor submits that, as they have been provided on a confidential *ex parte* basis, she is unable to assess the evidence, evaluate whether it meets the test for admission of new evidence or verify whether it proves the issues alleged by the Defence.[90] The Prosecutor requests the Appeals Chamber, should it wish to admit the annexes, to order the Defence to provide a redacted version of them, or a summary thereof, to enable the parties the opportunity to provide observations on them.[91] The Prosecutor submits that the third (public) annex – a photograph of Mr Al-Senussi at a hearing on 3 October 2013 – does not meet the requirements for admission into evidence on appeal and that the Defence request should therefore be rejected.[92]

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[85] Libya's Response to the Document in Support of the Appeal, paras 119-121.
[86] Prosecutor's Response to the Document in Support of the Appeal, para. 115; *see also* paras 116-117.
[87] Prosecutor's Response to the Document in Support of the Appeal, para. 115; *see also* paras 118-119
[88] Prosecutor's Response to the Document in Support of the Appeal, para. 118.
[89] Prosecutor's Response to the Document in Support of the Appeal, para. 121.
[90] Prosecutor's Response to the Document in Support of the Appeal, para. 123.
[91] Prosecutor's Response to the Document in Support of the Appeal, para. 124.
[92] Prosecutor's Response to the Document in Support of the Appeal, paras 127-128.

52. The Victims oppose the Defence request for the submission of additional evidence, submitting that introducing new factual allegations on appeal should only be allowed exceptionally and that "the scope of appellate review must be limited to the facts and information that were available to the Pre-Trial Chamber at the time it took its decision".[93]

53. The Defence seeks the admission of further additional evidence on appeal in the Defence Response to Victims' Observations on Appeal,[94] as well as making submissions as to why all of the new evidence upon which it wishes to rely should be admitted.[95] The Defence also repeats its alternative argument – to which it points out that the other parties and participants do not respond – that the Pre-Trial Chamber could be directed by the Appeals Chamber to consider the new evidence.[96]

54. Further filings and submissions in relation to the admission of additional evidence were made thereafter[97] and there was also reference to facts and information that post-dated the Impugned Decision in various filings before the Appeals Chamber.[98]

2. Determination by the Appeals Chamber

55. The Appeals Chamber notes that the additional evidence being sought for admission concerns both information that pre-dates the Impugned Decision, although it is argued that it was not available until after the Impugned Decision was issued, and evidence that post-dates the Impugned Decision.

56. The Appeals Chamber recalls that in the recent *Gaddafi* Admissibility Judgment, it addressed a request by Libya to submit additional evidence on appeal.[99]

57. In that case, the Appeals Chamber recalled, in particular, that "its function is corrective in nature and 'the scope of proceedings on appeal is determined by the

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[93] Victims' Observations on Appeal, para. 40.
[94] Defence Response to Victims' Observations on Appeal, paras 37-41.
[95] Defence Response to Victims' Observations on Appeal, paras 32-36.
[96] Defence Response to Victims' Observations on Appeal, para. 42.
[97] *See* Libya's Request of 20 January 2014, Libya's Addendum of 27 January 2014, Defence Response of 12 February 2014, Libya's Application of 24 February 2014 for Leave to Reply, Libya's Response to Defence Further Submissions, Defence Application for Leave to Reply of 11 March 2014 and Libya's Response of 1 April 2014.
[98] *See*, by way of example, Defence Further Submissions, para. 14.
[99] *Gaddafi* Admissibility Judgment, paras 37-44.

scope of the relevant proceedings before the Pre-Trial Chamber'" (footnote omitted).[100] It rejected an application to submit minutes of a hearing and a decision that post-dated the *Gaddafi* Admissibility Decision (the impugned decision in that case), reiterating 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" (footnote omitted).[101] Regarding other material that Libya wished to submit, which pertained to the investigation "during the period in relation to which the Admissibility Decision was made", but which could not have been provided to the Pre-Trial Chamber at that time, the Appeals Chamber "note[d] 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".[102] The Appeals Chamber proceeded to state that, if Libya wished this 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.')".[103]

58. The Appeals Chamber determines that these considerations equally apply in the instant case. None of the documents that are sought to be admitted as additional evidence have been considered by the Pre-Trial Chamber. In addition, some of the information contained within the documents post-dates the Impugned Decision. As in the *Gaddafi* Admissibility Judgment, the Appeals Chamber considers that in the circumstances of this case, it would not be appropriate for it to consider this information when the Pre-Trial Chamber has not done so. For this reason, the Appeals Chamber rejects all of the additional evidence that is sought to be admitted on appeal. In rejecting this evidence, the Appeals Chamber also disregards any submissions made in relation thereto for the purposes of determining the present appeal.

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[100] *Gaddafi* Admissibility Judgment, para. 43.
[101] *Gaddafi* Admissibility Judgment, para. 43.
[102] *Gaddafi* Admissibility Judgment, para. 43.
[103] *Gaddafi* Admissibility Judgment, para. 44.

59. For the same reasons as those expressed above, the Appeals Chamber will also not take into account, in the circumstances of the present case, any other factual matters that post-date the Impugned Decision or were not before the Pre-Trial Chamber.

60. As to the Defence's submission that, as an alternative to the admission of the additional evidence on appeal, the Appeals Chamber could refer the matter back to the Pre-Trial Chamber for it to reconsider the Impugned Decision, the Appeals Chamber notes that the legal basis to which the Defence refers in support of this request is the purported power of a Chamber to reconsider its own previous decisions.[104] Without determining whether and under which circumstances a Chamber may reconsider its own decisions, the Appeals Chamber notes that the Defence does not explain how the purported power of a Chamber to reconsider its own decisions would give the Appeals Chamber the power to instruct the Pre-Trial Chamber to do so in the circumstances of the present case. The Impugned Decision is currently before the Appeals Chamber, and the appeal must be determined in line with the applicable legal framework governing the procedure for appeals under article 82 (1) (a) of the Statute. Accordingly, the Defence's request in this regard is rejected.

61. In rejecting the requests for additional evidence, the Appeals Chamber notes that the Prosecutor has the right to seek, pursuant to article 19 (10) of the Statute, a review of a decision that a case is inadmissible based on new facts. Without determining whether there may be other procedural avenues as to how the proposed additional evidence could be brought before the Pre-Trial Chamber, the Appeals Chamber considers that the additional evidence – to the extent that it is accessible to the Prosecutor – may be taken into account in any decision in relation to whether subsequently to seek a review under article 19 (10) of the Statute.

3. *Outstanding application related to the requests to submit additional evidence on appeal: Libya's Application of 24 February 2014 for Leave to Reply*

62. In Libya's Application of 24 February 2014 for Leave to Reply Libya essentially seeks leave to file a reply to a response submitted by the Defence[105] to

[104] Document in Support of the Appeal, paras 147-149.
[105] The Defence Response of 12 February 2014.

submissions Libya had made concerning the requests by the Defence to submit additional evidence on appeal.[106] As the Appeals Chamber has rejected the submission of additional evidence on appeal, this application is dismissed.

F. Request for an oral hearing

63. The Defence requests that the Appeals Chamber convene an oral hearing on the appeal.[107] It argues that the submissions are so voluminous and complex that they can only be truly tested in oral argument.[108] Distinguishing the present case from that of Mr Gaddafi, the Defence submits that, in those latter proceedings there had been an oral hearing before the Pre-Trial Chamber, while none was held in Mr Al-Senussi's case.[109] The Defence further submits that it would be "unfair for the future of Mr. Al-Senussi's case – and indeed his life –" if the case were determined without the Appeals Chamber having heard directly from the Defence, which could address concerns that the Appeals Chamber may have.[110] Further, the Defence argues that "the decision is of such importance and the consequences are so great that an oral hearing should not be denied".[111] Finally, the Defence submits that an oral hearing will allow the Appeals Chamber to hear and examine the evidence sought to be admitted, and also allow parties to make submissions on the basis of this evidence.[112] Libya[113] and the Prosecutor[114] oppose the Defence's request.

64. Rule 156 (3) provides that "[t]he appeal proceedings shall be in writing unless the Appeals Chamber decides to convene a hearing." As recently recalled in the *Gaddafi* Admissibility Judgment, "[t]he 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 reasons that

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[106] Namely, Libya's Request of 20 January 2014 and Libya's Addendum of 27 January 2014.
[107] Document in Support of the Appeal, paras 186 *et seq.*
[108] Document in Support of the Appeal, para. 189.
[109] Document in Support of the Appeal, para. 190.
[110] Document in Support of the Appeal, para. 190.
[111] Document in Support of the Appeal, para. 190.
[112] Document in Support of the Appeal, para. 191.
[113] Libya's Response to the Document in Support of the Appeal, paras 149-151.
[114] Prosecutor's Response to the Document in Support of the Appeal, paras 154-157.

demonstrate why an oral hearing *in lieu* of, or in addition to, written submissions is necessary'(footnote omitted)."[115]

65. As in the case of Mr Gaddafi, in light of the extensive submissions that have been filed in this case and the fact that the Appeals Chamber provided the parties with the opportunity to file additional submissions on appeal (see above), the Appeals Chamber considers it unnecessary to convene an oral hearing on this appeal. This request is therefore rejected.

IV. MERITS

66. The Appeals Chamber recalls that the Pre-Trial Chamber found that the same case against Mr Al-Senussi that is before the Court was subject to domestic proceedings in Libya, and that Libya was neither unwilling nor unable genuinely to investigate and prosecute the case.[116] It therefore found the case against Mr Al-Senussi to be inadmissible before the Court.[117]

67. Mr Al-Senussi raises three grounds of appeal:

- Ground 1: The Pre-Trial Chamber erred in law and fact and abused its discretion in finding that Libya is not unwilling and unable genuinely to carry out the proceedings against Mr Al-Senussi within the meaning of the provisions of Article 17.
- Ground 2: The Appeals Chamber is requested to consider new evidence, which was not previously available, concerning the mistreatment of Mr. Al-Senussi in detention and the conduct of the national proceedings which is relevant to Ground 1 as it further demonstrates that Libya is not willing and able to carry out genuine proceedings in Libya.
- Ground 3: The Pre-Trial Chamber erred in law and fact in finding that Libya was investigating and prosecuting the same case as the case before the ICC.[118]

68. The Appeals Chamber recalls that the second ground of appeal essentially amounts to an application to submit additional evidence on appeal and accordingly has been dealt with above as a preliminary issue. The Appeals Chamber also notes that the third ground of appeal deals with the question as to whether Libya and the

[115] *Gaddafi* Admissibility Judgment, para. 22.
[116] Impugned Decision, para. 311.
[117] Impugned Decision, para. 311.
[118] Document in Support of the Appeal, para. 3. *See also*, the slightly different formulations on pp. 7, 65, 73.

Prosecutor are investigating the same case; the first ground of appeal deals with issues concerning the willingness and ability of Libya. The Appeals Chamber recalls that it has stated, most recently in the *Gaddafi* Admissibility Judgment, 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.[119]

69. In light of this, the Appeals Chamber considers it appropriate first to address the third ground of appeal.

A. Third ground of appeal

70. Under the third ground of appeal, the Defence alleges that

> [t]he Pre-Trial Chamber erred in law and fact in concluding that Libya was investigating and prosecuting the same case as before the ICC.[120]

71. In essence, three errors are alleged: that the Pre-Trial Chamber erred in reaching its factual conclusions as to the Libyan investigation of Mr Al-Senussi by primarily relying on redacted statements;[121] that the Pre-Trial Chamber erred in its conclusions as to 'same case';[122] and that the Pre-Trial Chamber erred in not finding the case admissible on the basis that in the Libyan proceedings Mr Al-Senussi is not charged with the crime of persecution.[123] The Appeals Chamber will address each of these alleged errors in turn.

1. Reliance on redacted statements

(a) Relevant part of the Impugned Decision

72. In the Impugned Decision, the Pre-Trial Chamber noted that the Defence had only received redacted versions of some of the evidentiary material relied upon by

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[119] *Gaddafi* Admissibility Judgment, para. 213, referring to *Prosecutor v. Germain Katanga et al.*, "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. 78.
[120] Document in Support of the Appeal, p. 73.
[121] Document in Support of the Appeal, paras 164-168.
[122] Document in Support of the Appeal, paras 169-176.
[123] Document in Support of the Appeal, paras 177-184.

Libya to demonstrate that it is investigating the same case.[124] The Pre-Trial Chamber recalled that the Defence had requested the Chamber not to make any findings adverse to the Defence on the basis of such material before the Defence could make submissions on the material in unredacted form.[125]

73. The Pre-Trial Chamber recalled that, in relation to the admissibility proceedings in respect of the *Gaddafi* case, it had authorised Libya not to disclose certain information contained in the material it had submitted to the other parties and participants, notably the names and other identifying information of witnesses in the domestic proceedings.[126] Furthermore, the Pre-Trial Chamber noted that, "[f]ollowing the same rationale underlying the Chamber's previous decision", Libya had also filed evidentiary material in redacted form in the admissibility proceedings in respect of Mr Al-Senussi.[127] The Pre-Trial Chamber stated that, upon receipt of those redacted versions, it had considered whether there was a sufficient factual and legal basis for ordering the reclassification of the documents in question and that it had not done so, as their classification had appeared, and continued to appear, warranted.[128] The Pre-Trial Chamber reasoned that this was proportionate because the redaction of that information did not affect the comprehensibility of the material at issue and therefore the ability of the participants to provide meaningful observations on Libya's Admissibility Challenge.[129]

74. The Pre-Trial Chamber was not persuaded by the Defence request not to make findings adverse to the Defence on the basis of the redacted materials.[130] The Pre-Trial Chamber found that the effect of the redactions was limited.[131] Furthermore, the Pre-Trial Chamber stated that it exclusively considered the evidence that was made available to the Defence and to the other participants and that "[a]ny information that was submitted by Libya only on an *ex parte* basis has been disregarded by the

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[124] Impugned Decision, paras 101-102.
[125] Impugned Decision, para. 102.
[126] Impugned Decision, para. 103, referring to "Decision on the 'Libyan Government's proposed redactions to ICC-01/11-01/11-258-Conf-Exp and Annexes 4, 5, 6, 7, 15, 16 and 17'", 7 February 2013, ICC-01/11-01/11-271-Red (hereinafter: "Decision on Libyan Government's Proposed Redactions").
[127] Impugned Decision, para. 104.
[128] Impugned Decision, para. 104.
[129] Impugned Decision, para. 104.
[130] Impugned Decision, para. 105.
[131] Impugned Decision, para. 105.

Chamber".[132] The Pre-Trial Chamber noted that the Defence had provided its observations on the redacted material and found that there was no prejudice to the Defence.[133]

(b) Submissions of the parties and participants

75. On appeal, the Defence argues that the Pre-Trial Chamber relied almost exclusively on the redacted material, in particular in order to distinguish the case of Mr Al-Senussi from that of Mr Gaddafi.[134] The Defence submits that this was "grossly unfair" because, as a result of the redactions, the Defence was unable to investigate the source of the evidence, suggesting that it could be a "complete fabrication" or "trumped up".[135] The Defence also recalls that it was unable to receive instructions from Mr Al-Senussi, including on the material in question.[136] In the view of the Defence, the Pre-Trial Chamber erred when it found that the redactions were proportionate, in particular in light of the fact that, in respect of the domestic proceedings, Mr Al-Senussi would be entitled to have access to the material.[137] The Defence also submits that the Pre-Trial Chamber erred when it found that, despite the redactions, the material was comprehensible, and that it was often impossible for the Defence to understand upon which parts of a document the Pre-Trial Chamber had relied.[138] Lastly, the Defence argues that, even though the Chamber relied on the redacted statements, the "the Chamber had had the benefit of reading the statements in full without redactions which would have undoubtedly ensured that the Chamber could comprehend each of the statements as a whole".[139]

76. Libya submits that the Defence has failed to establish that the Pre-Trial Chamber erred in fact or in law in relation to this ground of appeal as a whole.[140] In relation to redactions, Libya contends that the Pre-Trial Chamber did not rely almost

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[132] Impugned Decision, para. 105.
[133] Impugned Decision, para. 105.
[134] Document in Support of the Appeal, para. 164.
[135] Document in Support of the Appeal, para. 165.
[136] Document in Support of the Appeal, para. 166.
[137] Document in Support of the Appeal, para. 167.
[138] Document in Support of the Appeal, para. 168.
[139] Document in Support of the Appeal, para. 168.
[140] Libya's Response to the Document in Support of the Appeal, para. 123.

exclusively on redacted statements[141] and that the reliance on redacted statements was fair and appropriate.[142]

77. The Prosecutor argues that the Pre-Trial Chamber did not err by relying upon redacted witness statements,[143] contending that they were considered jointly with other evidentiary materials,[144] that the right to disclosure is not absolute and the redactions were proportionate[145] and that the Defence did not argue before the Pre-Trial Chamber that it needed to investigate the source of the statements.[146] The Victims do not make submissions in relation to the Pre-Trial Chamber's reliance on redacted material.

(c) Determination by the Appeals Chamber

78. The Appeals Chamber observes that, in the Impugned Decision, the Pre-Trial Chamber noted the Defence arguments that findings adverse to the Defence should not be made without providing the Defence with the unredacted evidence. However, the Pre-Trial Chamber also observed that only the names or other identifying information of witnesses in the domestic proceedings in both the *Gaddafi* and *Al-Senussi* domestic cases had been redacted.[147] The Pre-Trial Chamber considered that the classification of the *ex parte* material remained warranted and was proportionate given that the redactions did not affect its comprehensibility.[148] It specifically stated that it had relied exclusively on the redacted version of the evidence that was disclosed to the Defence and had disregarded information submitted by Libya on an *ex parte* basis.[149]

79. In those circumstances, the Appeals Chamber is not persuaded by the arguments that the Defence raises on appeal in this regard. Notably, the Appeals Chamber cannot find any error in the Pre-Trial Chamber having found that it was necessary and proportionate for the identifying information of the witnesses in the domestic

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[141] Libya's Response to the Document in Support of the Appeal, paras 126-130.
[142] Libya's Response to the Document in Support of the Appeal, paras 131-137.
[143] Prosecutor's Response to the Document in Support of the Appeal, paras 131-135.
[144] Prosecutor's Response to the Document in Support of the Appeal, para. 132.
[145] Prosecutor's Response to the Document in Support of the Appeal, paras 132-133.
[146] Prosecutor's Response to the Document in Support of the Appeal, paras 134-135.
[147] Impugned Decision, paras 102-105, also citing the relevant Pre-Trial Chamber decisions in which it had authorised, or noted Libya's submissions in relation to, the redaction of identifying information, namely the Decision on Libyan Government's Proposed Redactions and the Decision of 26 April 2013.
[148] Impugned Decision, para. 104.
[149] Impugned Decision, para. 105.

proceedings to be redacted. The Appeals Chamber considers that, as part of its powers to determine the procedure in relation to proceedings in respect of admissibility under rule 58 (2) of the Rules of Procedure and Evidence, a Pre-Trial Chamber may also decide to rely on redacted material that has been submitted. The Appeals Chamber considers that the Pre-Trial Chamber's approach in the case at hand was not "so unfair and unreasonable as to constitute an abuse of discretion".[150] This is because the present proceedings are determining the admissibility of the case (the venue for the trial) on the basis of whether Libya is investigating the same case pursuant to article 17 of the Statute; they are not determining the criminal responsibility of the suspect.[151] For that reason, the Appeals Chamber is not convinced that there was a need for the Defence to investigate the sources of the information (and in any event, it appears that the Defence did not argue before the Pre-Trial Chamber that it wanted to investigate those sources).[152] The Appeals Chamber also notes that the Defence does not advance any substantiation for its argument that the evidence may be a "complete fabrication" or "trumped up".[153]

80. The Appeals Chamber also finds that there was nothing unreasonable about the Pre-Trial Chamber's conclusion that the redactions neither affected the comprehensibility of the material nor the ability of the Defence to provide meaningful observations thereon. This is particularly so in circumstances in which the Pre-Trial Chamber itself relied only on the redacted version of the evidence: the Pre-Trial Chamber expressly stated that it had disregarded any information that had been submitted by Libya on an *ex parte* basis only.

81. For all of the above reasons, the Defence arguments under this part of the third ground of appeal are dismissed.

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[150] *Gaddafi* Admissibility Judgment, para. 146, citing *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 entitled 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial'", 25 October 2013, ICC-01/09-01/11-1066 (OA 5), para. 60.
[151] *See also* Prosecutor's Response to the Document in Support of the Appeal, para. 134.
[152] Prosecutor's Response to the Document in Support of the Appeal, paras 134-135.
[153] Document in Support of the Appeal, para. 165.

2. *Alleged errors in the Pre-Trial Chamber's conclusions as to the "same case"*

(a) Relevant part of the Impugned Decision

82. In the Impugned Decision, the Pre-Trial Chamber set out in detail the legal principles that it considered applicable to its determination as to whether the Libyan investigation covers the same case as that before the Court.[154] It stated that "it must be demonstrated that: a) the person subject to the domestic proceedings is the same person against whom the proceedings before the Court are being conducted; and b) the conduct that is subject to the national investigation is substantially the same conduct that is alleged in the proceedings before the Court" (footnote omitted).[155] It found that, in the present case, the parameters of the conduct as alleged in the case before the Court are set out in the Warrant of Arrest, read with the Article 58 Decision,[156] and that a case-by-case analysis is required to determine whether the domestic investigation covers the same case as that before the Court.[157] By reference to the Warrant of Arrest and the Article 58 Decision, it considered that the alleged conduct of Mr Al-Senussi in the proceedings before the Court concerned

> the individual criminal responsibility of Mr Al-Senussi for killings and acts of persecution by reason of their (real or perceived) political opposition to the Gaddafi regime carried out on many civilian demonstrators and political dissidents, allegedly committed directly or through the Security Forces during the repression of the demonstrations taking place in Benghazi from 15 February 2011 until at least 20 February 2011 and as part of a policy designed at the highest level of the Libyan State machinery to deter and quell, by any means, the revolution against the Gaddafi regime occurring throughout Libya. [Footnotes omitted.][158]

83. In determining the approach to be followed to decide on what constituted the same case, the Pre-Trial Chamber stated that the jurisprudence of the Court requires that

> the alleged criminal conduct be sufficiently described with reference to precise temporal, geographic and material parameters, but not that such conduct be invariably composed of one or more 'incidents' of a pre-determined breadth. Indeed, whether *in concreto* any discrete "incident" or "event", purportedly

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[154] Impugned Decision, para. 65.
[155] Impugned Decision, para. 66 (i).
[156] Impugned Decision, para. 68.
[157] Impugned Decision, para. 66 (iii).
[158] Impugned Decision, para. 71.

> having narrower factual parameters, is identified because it overlaps fully with the alleged conduct or instead because it is of assistance to prove the alleged conduct to the requisite threshold without however exhausting it, will ultimately depend on the specificities of each case.[159] [Footnotes omitted.]

84. It stated that the "incidents" or "events" in the present case did not represent unique manifestations of Mr Al-Senussi's criminal conduct, but were rather "illustrative and non-exhaustive samples of discrete criminal acts", and that the Warrant of Arrest focused exclusively on the conduct of Mr Al-Senussi and did not retain any of the "incidents" or "events" referred to in the Article 58 Decision.[160] The Pre-Trial Chamber stated that the Warrant of Arrest contained confined temporal,[161] geographic[162] and material[163] parameters, which were "sufficiently precise to meet the requirements of article 58(3)(c) of the Statute".[164] It found that no reference to "incidents" was necessary to define the conduct and noted that certain of the incidents set out in the Article 58 Decision did not, in any event, narrow down the conduct from that alleged in the Warrant of Arrest (referring, for example, to the allegations that on 17 February 2011, in Benghazi, "a number of demonstrators were killed by Security Forces" and "on 20 February 2011, it is reported that at least 60 demonstrators were killed by the Security Forces").[165]

85. The Pre-Trial Chamber stated:

> In conclusion, since, as in the case against Mr Gaddafi, the conduct that is alleged in the criminal proceedings against Mr Al-Senussi is not shaped by the "incidents" mentioned in the Article 58 Decision, it is not required that domestic proceedings concern each of those "events" at the national level in order for the Chamber to be satisfied that Libya is investigating or prosecuting Mr Al-Senussi for substantially the same conduct that is alleged in the proceedings before this Court. However, the Chamber is of the view that the fact that all or some of the "incidents" or "events" referred to in the Article 58 Decision are encompassed in the national proceedings may still constitute a relevant indicator that the case subject to said proceedings is indeed the same as the one before the Court. In

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[159] Impugned Decision, para. 75.
[160] Impugned Decision, para. 76; *see also* para. 78 and footnote 178.
[161] Impugned Decision, para. 77, footnote 173: "Crimes allegedly committed [...] from 15 February 2011 until at least 20 February 2011".
[162] Impugned Decision, para. 77, footnote 174: "Crimes allegedly committed in Benghazi, Libya".
[163] Impugned Decision, para. 77, footnote 175: "Killings and inhuman acts depriving the civilian population of its fundamental rights on political grounds, allegedly committed by Mr Al-Senussi, directly or through the Security Forces, against real or perceived political dissidents of the Gaddafi regime as part of a State policy to repress, by any means, the revolution against the Gaddafi".
[164] Impugned Decision, para. 77.
[165] Impugned Decision, para. 77 and footnote 177.

> the same vein, the fact that "incidents" which are described in the Article 58 Decision as particularly violent or which appear to be significantly representative of the conduct attributed to Mr Al-Senussi, are not covered by the national proceedings may be taken into account in the Chamber's ultimate determination of whether those proceedings cover the same conduct alleged against Mr Al-Senussi in the proceedings before the Court.[166] [Footnotes omitted.]

86. The Pre-Trial Chamber considered that the evidence submitted by Libya was sufficient (i) to conclude that concrete and progressive steps were being undertaken domestically and (ii) to identify the scope and subject-matter of the proceedings.[167] It concluded that it appeared that multiple lines of investigation were being followed[168] and that the evidence presented by Libya demonstrated concrete investigative steps being taken to identify *inter alia* a list of factual aspects.[169] By reference to the conduct alleged against Mr Al-Senussi in the proceedings before the Court, the Pre-Trial Chamber found that the evidence presented by Libya allowed it "to discern the contours of the domestic case against Mr Al-Senussi and, in turn, meaningfully to compare the alleged conduct of Mr Al-Senussi with the conduct attributed to him in the Warrant of Arrest".[170] It found that the facts being investigated by the Libyan authorities comprised the relevant factual aspects of Mr Al-Senussi's conduct as alleged in the proceedings before the Court.[171] It proceeded to state:

> Furthermore, the Chamber recalls that whether all or some of the narrower "incidents" or "events" mentioned in the Article 58 Decision are encompassed in the national proceedings may constitute a relevant indicator that the case before the domestic authorities is the same as the one before the Court. In this regard, the Chamber observes that the evidence provided by Libya indicates that the domestic proceedings cover, at a minimum, those events that are described in the Article 58 Decision as particularly violent or that appear to be significantly representative of the conduct attributed to Mr Al-Senussi. The fact that such events are referred to in the evidence submitted by Libya confirms that the same conduct alleged against Mr Al-Senussi in the proceedings before the Court is subject to Libya's domestic proceedings.[172] [Footnotes omitted.]

87. The Pre-Trial Chamber concluded that the evidence placed before it demonstrated that Libya was taking concrete and progressive steps to ascertain the

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[166] Impugned Decision, para. 79.
[167] Impugned Decision, para. 160.
[168] Impugned Decision, para. 161.
[169] Impugned Decision, para. 162.
[170] Impugned Decision, para. 163.
[171] Impugned Decision, para. 164.
[172] Impugned Decision, para. 165.

criminal responsibility of Mr Al-Senussi for substantially the same conduct as alleged in the proceedings before the Court.[173] As such, Libya had demonstrated that its domestic proceedings covered the "same case" as that before the Court, within the meaning of article 17 (1) (a) of the Statute.[174]

(b) Submissions of the parties and participants

88. The Defence recalls that the Pre-Trial Chamber, in the *Gaddafi* Admissibility Decision, found that the evidence that Libya had presented arguably showed that discrete aspects relating to Mr Gaddafi's conduct are under investigation domestically, but that it was not persuaded that the evidence sufficiently demonstrated that Libya was investigating the same case.[175] The Defence submits that "[t]he Chamber, however, departed from this approach in Mr. Al-Senussi's case and found that the same 'aspects' did establish that Libya was investigating the same case".[176] It argues that the conduct underlying the case against both Mr Gaddafi and Mr Al-Senussi is the same and that the Pre-Trial Chamber therefore erred in finding the case admissible against Mr Gaddafi and inadmissible against Mr Al-Senussi.[177] It argues:

> In both cases the Chamber had to be satisfied that Libya had provided "specific information about the criminal conduct under investigation in Libya" which showed a "sufficient degree of specificity and probative value, that the same conduct is the subject of domestic investigations." In Mr. Gaddafi's case the Chamber found that Libya had not met this standard, whereas it had done so in Mr. Al-Senussi's case. Yet, the Chamber failed to address in its reasoning that Libya alleges that it has sufficient and overlapping evidence to show that both the accused, together with other accused, are jointly involved in the same plan at the highest level to commit crimes in order to quell the demonstrations in Libya in February 2011. Having found that there was insufficient evidence and clarity about this overall plan in Mr. Gaddafi's case, it is inconsistent for the Chamber to have found that there was nevertheless sufficient clarity regarding this same plan in respect of Mr. Al-Senussi."[178] [Footnote omitted.]

89. Furthermore, agreeing with observations made by the Victims,[179] the Defence submits that the Pre-Trial Chamber erred in its interpretation of the words "conduct" and "case" and that "conduct" must always be understood as being incident-

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[173] Impugned Decision, para. 167.
[174] Impugned Decision, para. 168.
[175] Document in Support of the Appeal, para. 173.
[176] Document in Support of the Appeal, para. 174.
[177] Document in Support of the Appeal, paras 174-175.
[178] Document in Support of the Appeal, para. 175 (footnote omitted).
[179] *See* Victims' Observations on Appeal, paras 41-48.

specific.[180] The Defence avers that the Pre-Trial Chamber should have assessed whether Libya has established that it is investigating "the same specific incidents enumerated in the ICC's warrant of arrest and the Article 58 decision".[181] The Defence argues that the case before the Court "clearly involves conduct and incidents that are spread across the whole country, and thus the Libyan domestic proceedings cannot be said to cover the 'same case' if Libya's evidence is limited to certain locations, mainly in Benghazi".[182] Referring, by way of example, to factual allegations contained in paragraphs 36 (vi), 37 and 39 of the Article 58 Decision,[183] the Defence submits that "several incidents, both in Benghazi and in other locations in Libya, [...] are not covered by the evidence collected by Libya".[184]

90. Libya argues that the Pre-Trial Chamber adopted a consistent approach.[185] It argues that the Defence essentially suggests that instead of using the incidents in the arrest warrant decision in respect of a particular suspect, as a relevant indicator that the case is the same, the Pre-Trial Chamber should "require the State to prove the relevant conduct as outlined in the Arrest Warrant in respect of *all* co-suspects in challenging admissibility for a particular suspect", arguing that "[t]his is nonsensical and runs counter to the object and purpose of the admissibility provisions and the overall statutory regime".[186] Libya submits that "[t]he Arrest Warrant in Mr Al-Senussi's case is very clear – he is being investigated for criminal acts taking place in Benghazi from 15 to 20 February 2011, not the criminal acts taking place across Libya from 15 to 28 February 2011 which pertain to Mr Gaddafi only" (footnote omitted)[187] and it argues that "[t]here was an abundance of material" before the Pre-Trial Chamber which allowed the Chamber to conclude that Libya was investigating the same case.[188]

91. The Prosecutor first submits that both the evidence submitted by Libya in Mr Al-Senussi's case and the temporal and geographical parameters of Mr Al-Senussi's

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[180] Defence Response to Victims' Observations on Appeal, paras 43-44.
[181] Defence Response to Victims' Observations on Appeal, para. 46.
[182] Document in Support of the Appeal, para. 176.
[183] Document in Support of the Appeal, footnote 314.
[184] Document in Support of the Appeal, para. 176; *see* also footnote 314.
[185] Libya's Response to the Document in Support of the Appeal, p. 65.
[186] Libya's Response to the Document in Support of the Appeal, para. 139.
[187] Libya's Response to the Document in Support of the Appeal, para. 141.
[188] Libya's Response to the Document in Support of the Appeal, para. 142.

Warrant of Arrest and Article 58 Decision adequately distinguish Mr Al-Senussi's case from Mr Gaddafi's.[189] The Prosecutor then argues that Mr Al-Senussi's "criminal responsibility before the ICC is limited to acts of murder and persecution committed in Benghazi from 15 February until at least 20 February 2011. Thus, the factual allegations underpinning Al-Senussi's charges in Libyan proceedings do no [*sic*] need to cover acts elsewhere in the country for the case to be inadmissible. However, and for the purposes of the contextual elements, the Chamber did note that attacks against civilians were carried out elsewhere in the country" (footnote omitted).[190] The Prosecutor responds to the Defence by setting out her interpretation of how a comparison of the same case should be carried out and submitting that "a case will be 'substantially the same' if any differences 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".[191] The Prosecutor submits that, although the Pre-Trial Chamber's interpretation departed from prior jurisprudence, which defined a case as being incident-specific, it "is reasonable and compatible with the Prosecution's interpretation and with earlier case-law" (footnote omitted).[192] The Prosecutor argues that the test is met in this case.[193]

92. The Victims submit that they agree with the Defence "that the Chamber erred in law and in fact in finding that Libya is investigating the 'same case' or 'conduct'",[194] proceeding to argue that the Pre-Trial Chamber applied the wrong test as to whether Libya is investigating the same case and making submissions as to what they believe the test should be; essentially, that the word "case" should be interpreted "as referring to specific incidents".[195] They submit that the Appeals Chamber has "emphasised that cases at the pre-trial stage must be identifiable *'with sufficient clarity and detail'* and include reference to the specific factual allegations which support each of the elements of the crimes alleged" (emphasis in original, footnote omitted).[196] They argue that had the Pre-Trial Chamber applied the correct test, "it would have found

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[189] Prosecutor's Response to the Document in Support of the Appeal, paras 138-139.
[190] Prosecutor's Response to the Document in Support of the Appeal, para. 142.
[191] Prosecutor's Response to the Document in Support of the Appeal, para. 143.
[192] Prosecutor's Response to the Document in Support of the Appeal, para. 144.
[193] Prosecutor's Response to the Document in Support of the Appeal, para. 144.
[194] Victims' Observations on Appeal, para. 41.
[195] Victims' Observations on Appeal, para. 45. *See* also, paras 41-48.
[196] Victims' Observations on Appeal, para. 46.

that Libya has failed to provide evidence having a sufficient degree of specificity and probative value that demonstrate that it is investigating the same case" (footnote omitted).[197]

(c) Determination by the Appeals Chamber

93. The Appeals Chamber notes that the Defence advances two broad lines of argument in relation to the issue of "same case", namely (1) that the Pre-Trial Chamber's approach and factual findings in the Impugned Decision were in direct contradiction with the Pre-Trial Chamber's findings in the *Gaddafi* Admissibility Decision and (2) that the Pre-Trial Chamber's interpretation of "same case" was incorrect because it did not require that the same incidents were being investigated and that several incidents covered by the case before the Court were not covered by the Libyan investigation. The Appeals Chamber will consider each set of arguments in turn.

(i) Inconsistency with the Gaddafi Admissibility Decision

94. For the reasons that follow, the Appeals Chamber is not persuaded by the Defence argument that the Pre-Trial Chamber erred in the Impugned Decision because its findings contradicted those in the *Gaddafi* Admissibility Decision. The Appeals Chamber considers that the fact that the findings in the *Gaddafi* Admissibility Decision differ from those in the instant case does not *per se* illustrate that the findings in the latter were unreasonable. This is because, as correctly argued by the Prosecutor,[198] distinctions between the two cases permitted the Pre-Trial Chamber to arrive at different conclusions.

95. First, whereas the case against Mr Gaddafi concerns crimes allegedly committed throughout Libya,[199] the case against Mr Al-Senussi is limited to alleged crimes committed in the city of Benghazi.[200] This is also reflected in the Pre-Trial Chamber's findings in respect of Mr Gaddafi's and Mr Al-Senussi's respective criminal responsibility. The findings in relation to the latter focus on his role in relation to the crimes allegedly committed in Benghazi[201] and underline that Mr Al-Senussi

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[197] Victims' Observations on Appeal, para. 48.
[198] Prosecutor's Response to the Document in Support of the Appeal, para. 138-139.
[199] Article 58 Decision, para. 71. *See* also paras 72-83.
[200] Article 58 Decision, para. 71. *See* also paras 84-90.
[201] *See* Article 58 Decision, paras 84-90.

implemented a plan that had been devised by Muammar Gaddafi and his inner circle, which included his son, Mr Gaddafi.[202]

96. Second, Libya submitted substantially more evidence in the present case than in the case of *Gaddafi* to establish that it is investigating the same case. This, in and of itself, means that it would be reasonable to consider that a different conclusion in both cases could be reached.

97. Accordingly, the argument that the Impugned Decision was erroneous because it contradicted the findings in the *Gaddafi* Admissibility Decision is rejected.

(ii) Alleged errors in the interpretation and application of the "same case" requirement

98. The Defence alleges that the Pre-Trial Chamber applied an incorrect legal test to the question of whether Libya is investigating the same case as that before the Court.

99. The Appeals Chamber recently considered this issue in the *Gaddafi* Admissibility Judgment. The Appeals Chamber found that "the parameters of a 'case' are defined by the suspect under investigation and the conduct that gives rise to criminal liability under the Statute".[203] It proceeded to state that

> [t]he "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.[204]

100. Having recalled its finding in its judgment relating to admissibility in the case of *William Samoei Ruto et al.*[205] that "the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the

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[202] Article 58 Decision, para. 89.
[203] *Gaddafi* Admissibility Judgment, para. 61.
[204] *Gaddafi* Admissibility Judgment, para. 62.
[205] *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-01/11-01/11-307 (hereinafter: *Ruto* Admissibility Judgment").

Court",[206] the Appeals Chamber considered 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",[207] in particular, "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".[208] The Appeals Chamber considered that the extent of the overlap or sameness would "depend upon the facts of the specific case",[209] but proceeded to state:

> 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.
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> 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.

101. Turning to the case at hand, the Appeals Chamber notes that the Pre-Trial Chamber correctly recalled that the conduct being investigated must be substantially the same,[210] that the conduct alleged in the current case is set out in the Warrant of

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[206] *Gaddafi* Admissibility Judgment, para. 63, referring to the *Ruto* Admissibility Judgment, para, 40.
[207] *Gaddafi* Admissibility Judgment, para. 63.
[208] *Gaddafi* Admissibility Judgment, para. 70.
[209] *Gaddafi* Admissibility Judgment, para. 71.
[210] Impugned Decision, para. 66 (i).

Arrest, read with the Article 58 Decision,[211] and that the determination of "substantially the same conduct" must be made based upon the specific facts of the case.[212] The Appeals Chamber notes, however, that the Pre-Trial Chamber found that "no reference to the 'incidents' that are mentioned in the Article 58 Decision is [...] necessary in order to define, and purportedly narrow down, Mr Al-Senussi's conduct as alleged in the proceedings before the Court" (footnote omitted).[213] It stated that it considered it unnecessary that "each of those 'events'" was being investigated at the national level to find that Libya is investigating substantially the same conduct.[214] In sum, the Pre-Trial Chamber found that, as a matter of law, the specific incidents alleged against Mr Al-Senussi did not form part of the comparator in deciding on whether Libya is investigating the same case. The Appeals Chamber recalls that this is not in line with the jurisprudence of the Appeals Chamber just cited, which considers such incidents to play a central role in this comparison.

102. The Appeals Chamber notes, however, that the Pre-Trial Chamber nevertheless proceeded to find "that the fact that all or some" of the incidents are being investigated domestically "may still constitute a relevant indicator that the case" is the same.[215] The Pre-Trial Chamber also explained that it could take into account "the fact that 'incidents' which are described in the Article 58 Decision as particularly violent or which appear to be significantly representative of the conduct attributed to Mr Al-Senussi, are not covered by the national proceeding".[216]

103. When assessing overall the evidence submitted by Libya in order to determine whether it demonstrated that the same case was being investigated, the Pre-Trial Chamber indeed relied, at least in part, on the underlying incidents to assess the sameness of the cases being investigated and used them to conclude that Libya was investigating the same case. In particular, it recalled its finding that the incidents could "constitute a relevant indicator" and noted

> that the evidence provided by Libya indicates that the domestic proceedings cover, at a minimum, those events that are described in the Article 58 Decision

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[211] Impugned Decision, para. 68.
[212] Impugned Decision, paras 66 (iii), 74.
[213] Impugned Decision, para. 77.
[214] Impugned Decision, para. 79.
[215] Impugned Decision, para. 79.
[216] Impugned Decision, para. 79.

> as particularly violent or that appear to be significantly representative of the conduct attributed to Mr Al-Senussi. The fact that such events are referred to in the evidence submitted by Libya confirms that the same conduct alleged against Mr Al-Senussi in the proceedings before the Court is subject to Libya's domestic proceedings.[217] [Footnote omitted.]

104. In a footnote to this paragraph, the Pre-Trial Chamber stated:

> For example the witness statements provided as Annex 16 to Libya's Submissions of 23 January 2013 and as Annex 8 to the Admissibility Challenge address the arrest of certain named political activists [redacted] as well as the unfolding of the events in Benghazi on 17 February 2011, including the shooting at the demonstrators at Juliyana Bridge. General information about other narrower "incidents" that took place during the days of the repression of the revolution against the Gaddafi regime in Benghazi is also provided by those victims whose statements are attached as Annexes 14, 16, 17, 20, 21, 22, 24 and 26 to the Admissibility Challenge.[218]

105. Thus, although the Pre-Trial Chamber's statements as to the lack of relevance of the underlying conduct described in the incidents diverged from the Appeals Chamber's jurisprudence in the *Gaddafi* case (which, in any event, post-dates the Impugned Decision), it nevertheless assessed the evidence put forward by Libya also with regard to the incidents that constitute the case in the proceedings before the Court. In addition, based upon the factual findings contained in the Impugned Decision, on its face it does not appear that the domestic investigation does not sufficiently mirror the case before the Court.

106. The Appeals Chamber notes that the Defence argues that "several incidents, both in Benghazi and in other locations in Libya, which are identified and relied on in the Article 58 decision are not covered in the evidence collected by Libya".[219] In a footnote to this sentence, the Defence refers to the incidents described in paragraphs 36 (vi), 37 and 39 of the Article 58 Decision.[220]

107. The Appeals Chamber notes that the incidents described in paragraphs 37 and 39 of the Article 58 Decision relate to crimes alleged to have taken place in cities other than Benghazi. In this regard, the Appeals Chamber recalls that Mr Al-Senussi

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[217] Impugned Decision, para. 165.
[218] Impugned Decision, footnote 412.
[219] Document in Support of the Appeal, para. 176.
[220] Document in Support of the Appeal, footnote 314.

is only alleged to be responsible for crimes committed in Benghazi[221] – a fact that the Defence ignores. Accordingly, in order to determine whether Libya is investigating the same case as that before the Court, it is irrelevant to show that the Libyan investigation covers crimes allegedly committed in cities other than Benghazi.

108. As to paragraph 36 (vi) of the Article 58 Decision, the factual allegations described therein read as follows: "on 20 February 2011, it is reported that at least at least [*sic*] 60 demonstrators were killed by the Security Forces". In this regard, the Appeals Chamber notes that, at paragraphs 133 and 135 of the Impugned Decision, the Pre-Trial Chamber considered statements of witnesses put forward by Libya who reported on the injuring and killing of demonstrators in Benghazi on that day.[222] The Pre-Trial Chamber also noted, at paragraph 142 of the Impugned Decision, the death certificate of a person killed in Benghazi by gun-shots on 20 February 2011.[223] Furthermore, at paragraph 141 of the Impugned Decision, the Pre-Trial Chamber referred to medical records presented by Libya of "people who were treated in the Benghazi hospitals between 17 and 24 February 2011", a large number of which certify injuries inflicted in the course of demonstrations.[224] In the absence of further arguments by the Defence as to why those witness statements and documents relate to factual allegations other than those referred to at paragraph 36 (vi) of the Article 58 Decision, the Appeals Chamber considers that the Defence has failed to substantiate its argument that the factual allegations described therein are *not* covered by the domestic investigation.

109. The Appeals Chamber notes that the Defence referred to the factual allegations in paragraphs 36 (vi), 37 and 39 only as *examples* of incidents not covered by the domestic investigation. However, the Appeals Chamber does not consider that it is its role, in the absence of submissions by the Defence and in light of the Pre-Trial Chamber's findings referred to above, to assess in detail the remaining factual allegations in the case before the Court and determine whether they are covered by the Libyan investigation. In this regard, the Appeals Chamber recalls that the burden is on

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[221] *See* above para. 95.
[222] The witness statements were contained in annexes 23 and 26 to Libya's Admissibility Challenge.
[223] The death certificate was contained in annex 27 to Libya's Admissibility Challenge.
[224] The Pre-Trial Chamber referred to annexes 18 and 25 to Libya's Admissibility Challenge, the latter containing information relevant to events on 20 February 2011.

the appellant to substantiate not only that the first-instance Chamber erred, but also that the purported error materially affected the Impugned Decision.[225]

110. In sum, the Appeals Chamber finds that, while the Pre-Trial Chamber's findings as to the relevance of the incidents for the question of whether the same case is being investigated diverged from the Appeals Chamber's jurisprudence in the *Gaddafi* case, it nevertheless considered those incidents when actually assessing whether Libya was investigating the same case as that before the Court. As a consequence, the Appeals Chamber finds that the Defence has failed to demonstrate an appealable error in the Pre-Trial Chamber's factual findings in this regard or that "several incidents" mentioned in the Article 58 Decision were not covered by the domestic investigation.[226] Accordingly, this aspect of the third ground of appeal is rejected.

3. Alleged errors in relation to the crime of persecution

(a) Relevant part of the Impugned Decision

111. In the Impugned Decision, the Pre-Trial Chamber recalled that the allegations against Mr Al-Senussi in the proceedings before the Court include acts carried out against individuals because of their actual or perceived opposition to the Gaddafi regime, which are alleged to amount to crimes of "persecution" under article 7 (1) (h) of the Statute – and that "this factual aspect of the allegations against Mr Al-Senussi before the Court is not an element of any of the crimes with which it is currently envisaged that Mr Al-Senussi could be charged at the domestic level".[227]

112. Nevertheless, the Pre-Trial Chamber found by reference, *inter alia*, to the *Gaddafi* admissibility proceedings,[228] that the fact that the alleged crimes targeted people because of the identity of their group was "an aggravating factor which is taken into account in sentencing under articles 27 and 28 of the Libyan Criminal

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[225] *See,* for instance, *Prosecutor v. Joseph Kony et al.*, "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009", 16 September 2009, ICC-02/04-01/05-408 (hereinafter: "*Kony* Admissibility Judgment"), para. 48.
[226] In this context, the Appeals Chamber recalls that, in accordance with the test developed in the *Gaddafi* Admissibility Judgment, even a finding that "several incidents" are not being investigated domestically would not necessarily lead to the conclusion that the domestic investigation does not cover the same case. Rather, what would be required is a "judicial assessment of whether the case that the State is investigating sufficiently mirrors the one that the Prosecutor is investigating" (*Gaddafi* Admissibility Judgment, para. 73).
[227] Impugned Decision, para. 166.
[228] Paragraphs 111 and 113 of the *Gaddafi* Impugned Admissibility Decision in that case.

Code".[229] The Pre-Trial Chamber determined that the national provisions with which Libya contemplated charging Mr Al-Senussi, together with the provisions under articles 27 and 28 of the Libyan Criminal Code, "sufficiently capture Mr Al-Senussi's commission, between 15 and at least 20 February 2011 in Benghazi, of murders and inhuman acts severely depriving civilians of fundamental rights contrary to international law, by reason of their political identity, as alleged in the proceedings before the Court".[230] The Pre-Trial Chamber referred to the charges envisaged against Mr Al-Senussi under the Libyan Criminal Code arising out of the domestic investigation conducted against him, which include, *inter alia*, attacks upon the political rights of a Libyan subject, stirring up hatred between the classes, misuse of authority against individuals, unlawful arrest, unjustified deprivation of personal liberty, torture, unlawful killing "and other crimes associated with fomenting sedition and civil war".[231]

(b) Submissions of the parties and participants

113. In relation to the crime of persecution, the Defence submits that the finding of the Pre-Trial Chamber that the qualification that the criminal acts were inflicted on civilians "because of [their] political opposition (whether actual or perceived) to Gaddafi's regime", constituting the crime of persecution under the Statute, was not an element of any of the crimes with which Mr Al-Senussi could be charged domestically, should have been "fatal to Libya's application".[232] According to the Defence, this is because a central factual aspect of the case before the Court will not be reflected in the national prosecution.[233]

114. The Defence submits that factors that may be taken into account for sentencing purposes do not concern the charges and case brought against Mr Al-Senussi at trial[234] and that having regard to factors that could be applied at the sentencing stage is incorrect as it presupposes a conviction – were Mr Al-Senussi to be acquitted during

[229] Impugned Decision, para. 166.
[230] Impugned Decision, para. 166.
[231] Impugned Decision, footnote 414.
[232] Document in Support of the Appeal, paras 177-178.
[233] Document in Support of the Appeal, para. 178.
[234] Document in Support of the Appeal, para. 180.

the domestic proceedings, the factual aspects of persecution would never have formed a part of the proceedings against him.[235]

115. The Defence concedes that "domestic proceedings need not apply international crimes" and that investigating or prosecuting ordinary crimes may be sufficient "*to the extent that the case covers the same conduct*" (emphasis in original).[236] However, the Defence submits that the crimes charged in Libya must be capable of covering "both the underlying conduct and acts of murder and persecution as a crime against humanity".[237] The Defence further argues that an aggravating factor in sentencing is not an adequate substitute for being able to charge an accused under domestic law with offences that cover the same underlying conduct that could be charged as an international crime.[238] The Defence also contends that Articles 27 and 28 of the Libyan Criminal Code, upon which the Pre-Trial Chamber relied, do not set out aggravating features as such, nor make any reference to persecution being an aggravating factor.[239]

116. Libya submits that the findings of the Pre-Trial Chamber in relation to the crime of persecution were correct.[240] Libya submits that the focus should be upon the alleged conduct for which Mr Al-Senussi would be tried domestically, as opposed to its legal characterisation,[241] and that a plain reading of articles 27 and 28 of the Libyan Criminal Code indicates that the sentencing judge could take into account broad factors that would incorporate discriminatory grounds constituting the international crime of persecution.[242] Finally, Libya submits that the Pre-Trial Chamber's "focus on conduct rather than legal characterisation is consistent with the *travaux preparatoires* to the Rome Statute, the deference to sovereign states' legal systems intended by the concept of complementarity".[243]

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[235] Document in Support of the Appeal, para. 184.
[236] Document in Support of the Appeal, para. 181.
[237] Document in Support of the Appeal, paras 181-182.
[238] Document in Support of the Appeal, para. 183.
[239] Document in Support of the Appeal, para. 183.
[240] Libya's Response to the Document in Support of the Appeal, paras 143-147.
[241] Libya's Response to the Document in Support of the Appeal, para. 144.
[242] Libya's Response to the Document in Support of the Appeal, para. 146.
[243] Libya's Response to the Document in Support of the Appeal, para. 147.

117. The Prosecutor also submits that the findings of the Pre-Trial Chamber in relation to the crime of persecution were correct.[244] The Prosecutor contends that the domestic case has to be substantially the same as the one before the Court, that is, "the conduct needs [*sic*] be the same *in substance*" (emphasis in original).[245]Further, the Prosecutor argues that there is no requirement for a suspect to be charged by reference to exactly the same legal qualification.[246] The Prosecutor also submits that the Pre-Trial Chamber correctly found that the element of discriminatory intent was sufficiently covered by the relevant Libyan legislation[247] and that in the circumstances of the Libyan procedural system factual elements relevant to sentencing would be examined during the trial itself as there are no separate sentencing proceedings.[248] The Victims did not make any submissions on this issue.

(c) Determination by the Appeals Chamber

118. The Appeals Chamber notes that the Defence essentially argues that the fact that the international crime of persecution cannot be charged at the national level, as no corresponding provisions under Libyan law exist, but, if at all, can only be considered at the sentencing stage, should have led the Pre-Trial Chamber to conclude that Libya is not investigating the same case and that the case is therefore admissible before the Court. For the reasons that follow, the Appeals Chamber is not persuaded by this argument.

119. First, there was no need for Libya to charge Mr Al-Senussi with the international crime of "persecution" *per se*. As argued by Libya and the Prosecutor, there is no requirement in the Statute for a crime to be prosecuted as an international crime domestically.[249] This is because, in line with the previous jurisprudence of the Appeals Chamber in relation to what constitutes the same case,[250] what is required is that the crimes prosecuted at the domestic level cover "substantially the same conduct" as those charged by the Court. In determining whether they do, the Pre-Trial Chamber is required to assess whether the domestic case sufficiently mirrors the case

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[244] Prosecutor's Response to the Document in Support of the Appeal, paras 145-151.
[245] Prosecutor's Response to the Document in Support of the Appeal, paras 148.
[246] Prosecutor's Response to the Document in Support of the Appeal, para. 148.
[247] Prosecutor's Response to the Document in Support of the Appeal, para. 150
[248] Prosecutor's Response to the Document in Support of the Appeal, paras 151.
[249] *See* Libya's Response to the Document in Support of the Appeal, para. 144; Prosecutor's Response to the Document in Support of the Appeal, para. 146.
[250] *See* above, paras 99 et seq.

before the Court. As argued by both Libya and the Prosecutor, it is the alleged *conduct*, as opposed to its legal characterisation, that matters.[251]

120. On the facts of the present case, the Appeals Chamber observes that Libya envisages charging Mr Al-Senussi with domestic offences that include[252] civil war,[253] assault the political rights of the citizen,[254] stirring up hatred between the classes[255] and "other crimes associated with fomenting sedition and civil war".[256] Moreover, it is recalled that the overall context of the case as a whole (both before this Court and the relevant part of the case in Libya) is the use of the Security Forces to suppress demonstrators against a political regime, necessarily arising out of the opposition of civilians to the regime. Indeed, it is crimes allegedly committed in relation to the actions of that group (civilians opposed to the then political regime) that underpins the case as a whole.

121. As to the specific element of targeting a person or group of persons based on political, racial or other grounds,[257] the Appeals Chamber notes and accepts, as argued by Libya, that the broad factors that may be taken into account by a Libyan judge in sentencing indicate that they could include discrimination on grounds constituting the international crime of persecution as an aggravating feature.[258] The Appeals Chamber emphasises that the Pre-Trial Chamber came to its conclusion based upon the *combined* considerations of the crimes charged at the national level and the provisions of articles 27 and 28 of the Libyan Criminal Code.

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[251] *See* Libya's Response to the Document in Support of the Appeal, para. 144; Prosecutor's Response to the Document in Support of the Appeal, paras 147-9.
[252] For a fuller list of the charges with which the Pre-Trial Chamber stated that Libya envisages charging Mr Al-Senussi, *see* Impugned Decision, para. 166, footnote 414.
[253] Article 203 of the Libyan Criminal Code provides: "Any person who commits an act aiming at initiating a civil war in the country, or fragmenting national unity, or seeks to cause discord among the citizens of the Libyan Arab Republic shall be punished by death penalty": *see* ICC-01/11-01/11-273-AnxA, p. 2.
[254] Article 217 of the Libyan Criminal Code provides: "Any person who prevents others of practicing a political right wholly or partially by violence, threat or deceit, as well as any person who forces others to practice this right against their will shall be punished by imprisonment": *see* ICC-01/11-01/11-273-AnxA, p. 3.
[255] Article 318 of the Libyan Criminal Code provides: "Any person who publicly incites to the hatred of a group(s) of people or to scorn it by any way that breaches public order, shall be punished by imprisonment for a period not exceeding one year, and a fine ranged from twenty to one hundred pounds or either penalties": *see* ICC-01/11-01/11-309, p. 2.
[256] Impugned Decision, para. 166, footnote 414.
[257] *See* Elements of Crimes, Article 7 (1) (h), elements 2 and 3.
[258] *See* Libya's Response to the Document in Support of the Appeal, para. 146.

122. In the above circumstances, the Appeals Chamber concludes that the conduct underlying the crime of persecution is sufficiently covered in the Libyan proceedings so that the conduct being investigated is substantially the same as that alleged before the Court. The Appeals Chamber therefore finds no error arising out of the Pre-Trial Chamber's findings in relation to the crime of persecution that would render its finding that the case is inadmissible under article 17 (1) (a) of the Statute incorrect.

4. Overall conclusion in relation to the third ground of appeal

123. In light of the above, the Appeals Chamber dismisses the Defence's third ground of appeal and will proceed to consider the arguments that the Defence raises under its first ground of appeal.

B. First ground of appeal

124. Under the first ground of appeal, the Defence alleges as follows:

> The Pre-Trial Chamber erred in law and fact and abused its discretion in finding that Libya is not unwilling and unable genuinely to carry out the proceedings against Mr Al-Senussi within the meaning of the provisions of Article 17.

125. Before addressing the merits of the first ground of appeal, the Appeals Chamber here sets out a brief overview of the Impugned Decision in relation to unwillingness and inability. More specific findings of the Pre-Trial Chamber are set out below during the course of the Appeals Chamber's determination of the issues raised by this ground of the appeal.

126. In the Impugned Decision, the Pre-Trial Chamber observed that the same factual circumstances could be relevant both to unwillingness and inability and therefore addressed the factual submissions[259] prior to proceeding to an overall determination of whether the relevant facts established either unwillingness or inability.[260]

127. The Pre-Trial Chamber set out the relevant statutory framework of the Court[261] and features of Libyan national law that it considered to be significant.[262] The Pre-

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[259] An overview of the legal and factual submissions of the parties and participants before the Pre-Trial Chamber is provided at paragraphs 172-198 of the Impugned Decision.
[260] Impugned Decision, paras 169-171. *See also* para. 207.
[261] Impugned Decision, paras 199-202.
[262] Impugned Decision, paras 203-206.

Trial Chamber considered that the two limbs of the admissibility test under article 17 (1) (a) of the Statute were inextricably linked and that the evidence put forward by Libya could therefore be relied upon both to substantiate that the domestic proceedings covered the same case as that before the Court and that they were genuine,[263] recalling its previous findings in relation to the investigative steps that Libya had undertaken and noting further submissions by Libya in this regard,[264] outlining the progress of the domestic proceedings[265] and noting the international assistance that Libya was receiving.[266]

128. In considering the arguments of the Defence, the Pre-Trial Chamber emphasised that only irregularities potentially falling within article 17 (2) or (3) of the Statute that were sufficiently substantiated by evidence could be a ground for finding unwillingness or inability.[267] The Pre-Trial Chamber proceeded to make findings in relation to the factual submissions of the Defence and the Victims.[268] The Pre-Trial Chamber concluded that the following facts had been substantiated and were relevant to its determination under article 17 (1) (a), (2) and (3) of the Statute: the evidence that had been collected as part of the investigation against Mr Al-Senussi, as well as the scope, methodology and resources of that investigation; that the judicial proceedings had progressed; that Libya had sought international assistance; Mr Al-Senussi's lack of legal representation in the domestic proceedings; the serious security situation in Libya; the absence of protection programmes for witnesses; and the lack of control by the Government over certain detention facilities.[269]

129. The Pre-Trial Chamber was satisfied that Libya was not unwilling, concluding that the investigation had been adequately conducted and that the lack of legal representation did not justify a finding of unwillingness but instead appeared to have been caused by the security situation.[270]

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[263] Impugned Decision, para. 210.
[264] Impugned Decision, paras 211-213.
[265] Impugned Decision, paras 214-215.
[266] Impugned Decision, para. 216.
[267] Impugned Decision, para. 221.
[268] Impugned Decision, paras 230-288.
[269] Impugned Decision, para. 289.
[270] Impugned Decision, para. 292.

130. The Pre-Trial Chamber was further satisfied that Libya was not unable genuinely to carry out the proceedings in the present case,[271] concluding that Libya was able to obtain the suspect, as he was already in the custody of the Libyan authorities,[272] that Libya was able to obtain the necessary evidence and testimony, observing that at least some of the necessary evidence had already been collected and that there was no indication that collection of evidence and testimony would cease as a result of unaddressed security concerns for witnesses or because of a lack of Government control over certain detention facilities,[273] that Libya's ability to carry out the proceedings was not affected *per se* by the ongoing security concerns, taking account of the nature of the evidence gathered and the progression of the proceedings to the accusation phase,[274] and that, in light of Libya's submissions, the Pre-Trial Chamber could not conclude that Libya would be unable to provide adequate legal representation for Mr Al-Senussi for the subsequent judicial proceedings.[275]

131. On appeal, under the heading "Specific errors committed by the Pre-Trial Chamber",[276] the Defence sets out what it terms "several critical legal and factual errors [committed by the Pre-Trial Chamber] in reaching its overall conclusion that Libya is not unwilling and unable to try Mr. Al-Senussi".[277] These are the four issues set out directly below, each of which will be considered in turn:

> (i) The failure to take account of the lack of any contact between the Defence team and Mr. Al-Senussi to obtain his instructions and place all relevant evidence before the Chamber.
>
> (ii) The failure to rely on the lack of legal representation during the proceedings to date, including the Accusation Stage, to find that Libya is both unwilling and unable to try Mr. Al-Senussi.
>
> (iii) The failure to find that Mr. Al-Senussi is not being brought to justice in proceedings that are independent and impartial in light of the overwhelming evidence placed before the Chamber (and taking into account the new evidence which is the subject of Ground 2).

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[271] Impugned Decision, para. 310.
[272] Impugned Decision, para. 294.
[273] Impugned Decision, paras 295-301.
[274] Impugned Decision, para. 303.
[275] Impugned Decision, paras 304-308.
[276] Document in Support of the Appeal, p. 14.
[277] Document in Support of the Appeal, para. 32.

(iv) The failure to find that Libya is unable to try Mr. Al-Senussi given that it is unable to obtain the necessary evidence, provide adequate witness protection and is otherwise unable to carry out the proceedings.[278]

132. The Defence's arguments under this ground of appeal at times overlap and are repetitive, appearing in different ways throughout the ground. Nevertheless, the Appeals Chamber will address the Defence's arguments broadly in the order in which they are raised.

1. Lack of contact between Mr Al-Senussi and the Defence

133. The Appeals Chamber considers that the Defence's arguments regarding the lack of contact between Mr Al-Senussi and the Defence essentially raise the following three issues: first, that the Pre-Trial Chamber committed a procedural error because it should not have issued a decision in circumstances in which the Defence had not had access to Mr Al-Senussi; second, that the lack of contact between Mr Al-Senussi and the Defence should have had an impact on the finding that the Defence had not sufficiently substantiated certain of its factual allegations; and, third, that Libya's failure to grant access to Mr Al-Senussi was a clear indication of Libya's unwillingness and/or inability to try Mr Al-Senussi and should have led the Pre-Trial Chamber to enter a finding in that regard. The Appeals Chamber will analyse the three sets of arguments in turn.

(a) Alleged procedural error in relation to lack of instructions by Mr Al-Senussi to the Defence

134. The Defence argues that the Pre-Trial Chamber should not have declared the case against Mr Al-Senussi inadmissible in circumstances in which the Defence had not had access to Mr Al-Senussi.[279] The Defence also submits that the Appeals Chamber should not decide the present appeal unless and until the Defence has been able to consult Mr Al-Senussi.[280] These sets of arguments are closely related because they address the role of Mr Al-Senussi and the Defence in the proceedings in relation to Libya's Admissibility Challenge. Therefore, the Appeals Chamber will address them together.

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[278] Document in Support of the Appeal, para. 32.
[279] Document in Support of the Appeal, para. 39.
[280] Document in Support of the Appeal, para. 48.

(i) Relevant part of the Impugned Decision

135. The Pre-Trial Chamber, when setting out generally how it intended to approach the Defence's factual arguments, stated:

> In addressing the factual arguments of the Defence, the Chamber is mindful that the Defence has not been able to visit Mr Al-Senussi, despite a decision of the Chamber to that effect, and that the Defence ability to properly raise certain issues of fact may have been prejudiced by this absence of direct contacts with Mr Al-Senussi. *At the same time, the Chamber observes that the Defence has not argued that a legal visit to Mr Al-Senussi was a necessary pre-condition for the Defence to make its submissions on the Admissibility Challenge such that a determination of the challenge would need to be suspended until after the taking place of the visit.* Rather, it has on several occasions requested the Chamber to proceed to a determination on the merits of the Admissibility Challenge on an urgent basis.[281] [Emphasis added, footnotes omitted.]

(ii) Submissions of the parties and participants

136. The Defence argues that the Pre-Trial Chamber erred in failing "to take account of the lack of any contact between the Defence team and Mr. Al-Senussi to obtain his instructions and place all relevant evidence before the Chamber".[282] It argues that the Pre-Trial Chamber "did not acknowledge and address that Mr. Al-Senussi has an undeniable right to counsel under the Rome Statute".[283] The Defence further submits that it was the most elementary principle of fairness that the Pre-Trial Chamber should have heard from Mr Al-Senussi (through instructions to his counsel) in response to Libya's assertions and that "his rights have been violated by being refused access to his lawyers and that his case has been undeniably and irreversibly prejudiced by that fact alone".[284]

137. The Defence submits that the Pre-Trial Chamber was wrong to rely upon the Defence having not asked for the proceedings to be suspended until a visit had taken place as a reason for ruling on the admissibility of the case in the absence of such instructions, stating that the Chamber did not criticise Libya for having failed to facilitate a visit over eight months.[285] It argues that "[i]t was of course absolutely essential for the Defence to obtain Mr. Al-Senussi's instructions, and the Defence thus

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[281] Impugned Decision, para. 29.
[282] Document in Support of the Appeal, para. 32.
[283] Document in Support of the Appeal, paras 39-41, referring to articles 67 (1) (b) and (d) and 55 (2) of the Statute.
[284] Document in Support of the Appeal, para. 34. *See also*, paras 33-49 in general.
[285] *See* Document in Support of the Appeal, paras 34.

took all possible steps to get a visit arranged".[286] It submits that "[i]t is unthinkable that any accused before the ICC could be refused access to his ICC lawyers and that the ICC would nevertheless continue blindly with the proceedings as though there was no problem. And yet, this is exactly what the Pre-Trial Chamber did".[287] It submits that the Pre-Trial Chamber should have considered whether the proceedings would be prejudiced by Mr Al-Senussi not being able to give material information himself and that there clearly was such prejudice, since it was "the most elementary of all principles of fairness and due process that the judges must hear from the other side (in this case, Mr Al-Senussi) in response to the assertions being made by the applicant (Libya)".[288]

138. The Defence submits that it "proceeded on the basis that no admissibility challenge could succeed when Libya had refused to allow the Defence to visit or speak with Mr. Al-Senussi"[289] and therefore argued before the Pre-Trial Chamber that the matter should be decided quickly so that Mr Al-Senussi could be brought to The Hague "where his rights would be protected, including his right to consult with counsel in a secure, privileged and confidential environment".[290] It agrees with the Victims that it "was entitled to assume that the Chamber would ensure that its own orders for a visit would be complied with before it issued any ruling on Libya's admissibility challenge that was prejudicial to the Defence".[291] The Defence argues that it had also repeatedly submitted that its request for a visit should be enforced, that Libya should be reported to the Security Council for non-compliance, and that the Pre-Trial Chamber should not suspend the surrender order so that Mr Al-Senussi could be brought to The Hague.[292]

139. In response to Libya's arguments as to the nature of the proceedings, the Defence states that Libya argued consistently before the Pre-Trial Chamber that it was actively engaged in trying to ensure a visit, which led the Pre-Trial Chamber not to find Libya in non-compliance with its orders, but that "Libya has changed its position [on appeal] to assert that there is no right to counsel during the admissibility

[286] Document in Support of the Appeal, para. 34.
[287] Document in Support of the Appeal, para. 23.
[288] Document in Support of the Appeal, para. 37.
[289] Document in Support of the Appeal, para. 42.
[290] Document in Support of the Appeal, para. 42.
[291] Defence Response to Victims' Observations on Appeal, para. 24.
[292] Document in Support of the Appeal, para. 42.

proceedings".[293] It argues that "[t]his is a deplorable position to adopt, and it confirms Libya's complete disrespect of even the most very basic of fair trial and human rights' standards".[294]

140. The Defence submits, within the first ground of appeal, that it

> files this appeal without prejudice [*sic*] Mr. Al-Senussi's fundamental right to provide instructions to his Counsel in the admissibility proceedings. The Appeals Chamber should not decide this appeal without counsel being able to consult Mr. Al-Senussi. It would be a flagrant breach of his human rights and all standards of due process under Libyan law and international law for the Appeals Chamber to dispose of this matter without Mr. Al-Senussi being able to provide his instructions and all relevant information, particularly in response to Libya, and most importantly concerning his conditions, to the Appeals Chamber.[295]

141. In response, Libya argues that questions of admissibility primarily concern the State in question and the Court.[296] It argues that the Defence conflates "the role of the accused and the accused's legal representatives in a dispute concerning the forum for the criminal proceedings; and [...] the rights of the accused in the criminal proceedings".[297] Libya submits that the Defence's reliance on articles 67 (1) and 55 (2) of the Statute is misplaced.[298] With respect of the existence of a right to legal representation under international law, Libya states:

> The right to representation, as a matter of due process, does not require that an accused be represented by counsel in relation to decisions such as the location of the trial. This being so, barriers to such representation cannot evince, or even suggest, inability or unwillingness to conduct genuine domestic proceedings.[299]

142. It argues that the assessment of prejudice "must be predicated upon the nature of the proceedings" and that "any prejudice suffered because of lack of contact with ICC lawyers is not to be equated to denial of legal representation in a criminal trial".[300] Libya also argues that the Defence cannot raise arguments regarding the lack of

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[293] Defence Response to Victims' Observations on Appeal, para. 26. *See also*, Defence Further Submissions, para. 5.
[294] Defence Further Submissions, para. 6.
[295] Document in Support of the Appeal, para. 48. *See also,* the Appeal, para. 28; Defence Response to Victims' Observations on Appeal, para. 30.
[296] Libya's Response to the Document in Support of the Appeal, paras 13-22.
[297] Libya's Response to the Document in Support of the Appeal, para. 13.
[298] Document in Support of the Appeal, paras 14-16.
[299] Libya's Response to the Document in Support of the Appeal, para. 19.
[300] Libya's Response to the Document in Support of the Appeal, para. 22. *See also* para. 43 and Libya's Response to Defence Further Submissions, para. 7.

access to Mr Al-Senussi for the first time on appeal and that it has "failed to allege or meaningfully articulate the alleged prejudice arising from the lack of instructions".[301]

143. The Prosecutor submits that the Pre-Trial Chamber did consider the lack of a legal visit.[302] She argues that, in any event, the Defence's arguments should be dismissed,[303] in particular because before the Pre-Trial Chamber the "[Defence] never put into question its ability to take procedural steps or make submissions on behalf of Al-Senussi in the absence of specific instructions" (footnote omitted).[304]

144. The Victims agree with several of the arguments of the Defence and make additional arguments to show that the Pre-Trial Chamber erred.[305] Notably, the Victims argue, with reference, *inter alia,* to the Code of Professional Conduct for counsel that it "failed to properly consider the scope of legal representation before the Court, as well as the duties and obligations ensuing from the attorney-client relationship".[306] The Victims note that Pre-Trial Chambers enjoy discretion in regulating admissibility proceedings under rule 58 of the Rules of Procedure and Evidence and submit that, therefore, the Defence must show that in the case at hand, the Pre-Trial Chamber abused its discretion.[307] The Victims also note that in circumstances such as the present, where the suspect is not yet before the Court, rule 58 (3) of the Rules of Procedure and Evidence does not expressly provide for a right of the suspect to make written observations.[308] Nevertheless, the Victims submit that the Pre-Trial Chamber exercised its discretion unreasonably in the case at hand.[309] The Victims submit that the Pre-Trial Chamber was obliged to ensure that a visit take place "because what was at issue was the actual conditions faced by the defendant and the applicability of article 17(2)(c) of the Rome Statute".[310] They also submit that the Pre-Trial Chamber committed a procedural error in ordering that a report by the

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[301] Libya's Response to the Document in Support of the Appeal, para. 23.
[302] Prosecutor's Response to the Document in Support of the Appeal, paras 45-48.
[303] Prosecutor's Response to the Document in Support of the Appeal, paras 44-53.
[304] Prosecutor's Response to the Document in Support of the Appeal, para. 50.
[305] Victims' Observations on Appeal, paras 22-39.
[306] Victims' Observations on Appeal, paras 24, 25.
[307] Victims' Observations on Appeal, para. 28.
[308] Victims' Observations on Appeal, para. 31.
[309] Victims' Observations on Appeal, paras 32-39.
[310] Victims' Observations on Appeal, para. 34.

Registrar on arrangements for a visit be filed by 14 October 2013, but rendering the Impugned Decision on 11 October 2013.[311]

(iii) Determination by the Appeals Chamber

145. For the reasons that follow, the Appeals Chamber is not persuaded by the Defence's arguments that the Pre-Trial Chamber erred when it proceeded to determine Libya's Admissibility Challenge even though Mr Al-Senussi had not had an opportunity to give instructions to the Defence. As will be set out below, the Defence's arguments are based upon an incorrect understanding of the role of the suspect in admissibility proceedings in circumstances such as the present.

146. The legal framework of the Court expressly provides for two participatory rights of the suspect in proceedings in relation to admissibility. First, pursuant to article 19 (2) (a) of the Statute, "[a]n accused person or a person for whom a warrant of arrest or summons to appear has been issued" is entitled to challenge the admissibility of a case. Thus, the suspect himself or herself may trigger admissibility proceedings. Second, rule 58 (3) of the Rules of Procedure and Evidence provides that "[t]he 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". Thus, under this provision, the suspect is entitled to participate in admissibility proceedings triggered by others, including States, by making written submissions. The *right* to participate under rule 58 (3) of the Rules of Procedure and Evidence, however, does not extend to *any* person in respect of whom a warrant of arrest or summons to appear has been issued; it only applies to suspects who have been either surrendered to the Court or who have appeared before it.

147. In this regard, the Appeals Chamber recalls its findings in the *Kony* Admissibility Judgment, which concerned the admissibility of the cases against four fugitive suspects. In relation to the "[p]urported obligation of the Pre-Trial Chamber to appoint counsel to represent the four suspects",[312] the Appeals Chamber rejected the argument that such a right arose out of article 67 (1) of the Statute and rule 121 (1)

[311] Victims' Observations on Appeal, para. 38.
[312] *Kony* Admissibility Judgment, p. 24.

of the Rules of Procedure and Evidence, finding that: (a) in relation to article 67 (1) (d), it provides for the right to be present *at the trial* and to legal assistance; (b) the person referred to in rule 121 is the person appearing before the Pre-Trial Chamber and not someone yet to appear; (c) rule 121 is related to confirmation proceedings and not the issuance of a warrant or summons; and (d) rule 121 (1) imports the rights in article 67 as confirmation proceedings are proceedings akin to a trial.[313] It stated that "internationally recognised human rights standards do not necessarily extend all the rights enshrined in article 67 of the Statute to persons who have not yet been surrendered to the Court or appeared voluntarily before it".[314] It concluded that the Pre-Trial Chamber was not obliged to appoint counsel to represent the four suspects.[315]

148. The Appeals Chamber is of the view that the same considerations apply to the case at hand. Article 55 (2) of the Statute, which the Defence argues the Pre-Trial Chamber should have had in mind,[316] does not alter this analysis. Article 55 (2) of the Statute is concerned with the specific rights of a suspect who is being questioned in the course of an investigation. It does not relate to the participatory rights of the suspect in the context of admissibility proceedings.

149. Notwithstanding the above, the Appeals Chamber recalls that rule 58 (2) of the Rules of Procedure and Evidence provides, in respect of admissibility proceedings, that the Pre-Trial Chamber "shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings". The Appeals Chamber has found that under this provision, "the Pre-Trial Chamber enjoys broad discretion in determining how to conduct the proceedings relating to challenges to the admissibility of a case".[317] This includes the possibility to grant the suspect participatory rights that go beyond those provided for in rule 58 (3) of the Rules of Procedure and Evidence. Indeed, in the above-mentioned admissibility proceedings in the case of *Joseph Kony et al.*, the Pre-Trial Chamber appointed counsel to represent the interests of the defence;[318] such counsel was not expected to receive instructions

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[313] *Kony* Admissibility Judgment, paras 65-66.
[314] *Kony* Admissibility Judgment, para. 66.
[315] *Kony* Admissibility Judgment, paras 68.
[316] Document in Support of the Appeal, para. 41.
[317] *Ruto* Admissibility Judgment, para. 89.
[318] *See* above, para. 7.

from the suspects in that case. Nevertheless, the Appeals Chamber underlines that the granting of participatory rights to the suspect that go beyond those stipulated in rule 58 (3) of the Rules of Procedure and Evidence lies within the discretion of the Pre-Trial Chamber.

150. The Appeals Chamber recalls that in the present case, the Pre-Trial Chamber recognised the Defence as representing Mr Al-Senussi based on a power of attorney executed in favour of counsel by third persons on behalf of Mr Al-Senussi.[319] The Defence participated throughout the pre-trial proceedings and indeed filed the appeal against the Impugned Decision currently under consideration. The Appeals Chamber has no doubt that the Pre-Trial Chamber, in exercising its discretion under rule 58 (2) of the Rules of Procedure and Evidence, was entitled to grant the Defence such a role in the proceedings in relation to Libya's Admissibility Proceedings. However, the Defence argues that the Pre-Trial Chamber should have afforded broader participatory rights and decided upon Libya's Admissibility Challenge only once the Defence had received instructions from Mr Al-Senussi. At issue, therefore, is a review of the Pre-Trial Chamber's exercise of discretion in relation to Mr Al-Senussi's participatory rights.[320]

151. In the *Kony* Admissibility Judgment, the Appeals Chamber explained its standard of review in respect of discretionary decisions as follows:

> [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 under article 19 (1) of the Statue to determine admissibility, 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

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[319] "Registration of the provisional acknowledgement of the appointment of Mr. Benedict Emmerson as counsel for Mr. Abdullah Al-Senussi", dated 15 January 2013 and registered on 16 January 2013, ICC-01/11-01/11-253, with confidential *ex parte* annex.
[320] This is also Victims' Observations on Appeal, para. 28.

> incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion.[321] [Footnotes omitted.]

152. The question is therefore whether the Pre-Trial Chamber erred in exercising its discretion under rule 58 (2) of the Rules of Procedure and Evidence in relation to the participatory rights of Mr Al-Senussi.

153. In the view of the Appeals Chamber, the Defence has not established that the Pre-Trial Chamber's exercise of discretion in the case at hand was erroneous. Several of the Defence's arguments appear to be premised on the assumption that Mr Al-Senussi was actually *entitled* to participate in the proceedings in relation to Libya's Admissibility Challenge. As has been explained above, there is no such right provided for by the Court's legal texts in situations such as the present and the Defence's arguments are therefore misconceived. Nor is the Appeals Chamber persuaded by the Victims' arguments relating to the professional duties of the Defence vis-à-vis Mr Al-Senussi. The relevant provisions of the Code of Professional Conduct for counsel generally regulate the relationship between counsel and the client, but they do not concern the exercise of discretion of a Pre-Trial Chamber in circumstances such as the present.

154. The Appeals Chamber also does not consider that the Pre-Trial Chamber abused its discretion in light of the fact that the issue of the Defence's visit to Mr Al-Senussi had not been resolved by the time the Impugned Decision was issued. The Appeals Chamber recalls that the Pre-Trial Chamber noted in the Impugned Decision that "the Defence has not argued that a legal visit to Mr Al-Senussi was a necessary pre-condition for the Defence to make its submissions on the Admissibility Challenge such that a determination of the challenge would need to be suspended until after the taking place of the visit".[322] It noted that, in fact, the Defence had requested on several occasions that the Pre-Trial Chamber render a decision on Libya's Admissibility Challenge on an urgent basis.[323] In such circumstances the Appeals Chamber finds that the Pre-Trial Chamber cannot be faulted for proceeding to determine the matter even though a visit had not taken place. The Appeals Chamber recalls that admissibility proceedings cannot remain pending indefinitely, and indeed "need to

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[321] *Kony* Admissibility Judgment, para. 80.
[322] Impugned Decision, para. 29.
[323] Impugned Decision, para. 29.

proceed without undue delay".[324] For the same reason, the Appeals Chamber finds the Victims' arguments unpersuasive that the Pre-Trial Chamber erred in issuing the Impugned Decision before having received the Registrar's report on the visit of the Defence to Libya.

155. The Appeals Chamber notes that the Defence also argues that it "proceeded on the basis that no admissibility challenge could succeed when Libya had refused to allow the Defence to visit or speak with Mr. Al-Senussi".[325] Such a strategy is clearly open to criticism and does not show an abuse in the Pre-Trial Chamber's exercise of discretion.

156. As to the Victims' argument that the Pre-Trial Chamber acted unreasonably because questions concerning article 17 (2) (c) of the Statute and the "actual conditions faced by the defendant" were at issue,[326] the Appeals Chamber does not consider that, merely because the Defence adopted a certain line of argumentation in its observations on Libya's Admissibility Challenge, this automatically and necessarily required the Pre-Trial Chamber to broaden the participatory rights of Mr Al-Senussi beyond those that it had already granted (namely, allowing the Defence to participate in the admissibility proceedings).

157. In sum, the Defence has not established that the Pre-Trial Chamber's exercise of discretion was erroneous.

158. The Appeals Chamber recalls that the Defence also submits that the Appeals Chamber should not proceed to rule upon the appeal against the Impugned Decision until Mr Al-Senussi has had an opportunity to meet with the Defence.[327] The Appeals Chamber considers that, in light of the above, it would be inappropriate to do so. The Appeals Chamber notes in this regard that the Defence suggests that Mr Al-Senussi could provide information about his treatment in the course of the investigation against him – yet for the reasons set out above, the Appeals Chamber would in any

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[324] *Gaddafi* Admissibility Judgment, para. 166.
[325] Document in Support of the Appeal, para. 42.
[326] Victims' Observations on Appeal, para. 34.
[327] Document in Support of the Appeal, para. 48.

event not consider information in this appeal that was not placed before the Pre-Trial Chamber.[328]

(b) Alleged error in respect of the evidentiary standard

(i) Relevant part of the Impugned Decision

159. In considering how the burden of proof should be distributed in deciding on an admissibility challenge, the Pre-Trial Chamber stated:

> A case is therefore inadmissible before the Court when both limbs of article 17(1)(a) of the Statute are satisfied. As held by this Chamber in the decision on the admissibility of the case against Saif Al-Islam Gaddafi ("Mr Gaddafi"), "the challenging State is required to substantiate all aspects of its allegations to the extent required by the concrete circumstances of the case". Indeed, "[t]he principle of complementarity expresses a preference for national investigations and prosecutions but does not relieve a State, in general, from substantiating all requirements set forth by the law when seeking to successfully challenge the admissibility of a case". The Chamber further recalls its consideration that "[t]hat said, [...] an evidentiary debate on the State's unwillingness or inability will be meaningful only when doubts arise with regard to the genuineness of the domestic investigations or prosecutions".[329] [Footnotes omitted.]

160. The Pre-Trial Chamber also stated that "[i]n this regard, the Chamber emphasises that, although Libya carries the burden of proof, any factual allegation raised by any party or participant must be sufficiently substantiated in order to be considered properly raised".[330] It stated that it would take into account only those irregularities that may constitute indicators of one or more of the scenarios described in articles 17 (2) or (3) that are "sufficiently substantiated by the evidence and information placed before the Chamber".[331] On three occasions, the Pre-Trial Chamber referred to the fact that the Defence had not been given access to Mr Al-Senussi.[332] It acknowledged "that the Defence ability to properly raise certain issues of fact may have been prejudiced by this absence of direct contacts with Mr Al-Senussi".[333] In considering certain factual allegations presented by the Defence, it considered that the Defence's arguments

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[328] *See* above, paras 55 et seq.
[329] Impugned Decision, para. 27.
[330] Impugned Decision, para. 208.
[331] Impugned Decision, para. 221.
[332] Impugned Decision, paras 29, 219 and footnote 551.
[333] Impugned Decision, para. 29. *See also*, para. 219 and footnote 551.

> amount to generic assertions without any tangible proof, and that no concrete information in this regard is made available to [*sic*] Chamber in order for it to infer unwillingness or inability on the part of Libya to conduct its proceedings against Mr Al-Senussi under any of the scenarios envisaged [*sic*] article 17(2) and (3) of the Statute. In these circumstances, the Chamber is of the view that the 'uncertainties' identified by the Defence cannot be considered to be issues properly raised before the Chamber such that Libya would be under the duty to disprove them in order for the Admissibility Challenge to be upheld. Indeed the burden of proof cannot be interpreted as an obligation to disprove any possible 'doubts' raised by the opposing participants in the admissibility proceedings.[334] [Footnote omitted.]

161. In a footnote to this paragraph, and as cited above, it stated:

> The Chamber is mindful of the Defence submission that 'Libya's refusal to arrange for a legal visit has meant that the Defence has no way of verifying the conditions under which Mr. Al-Senussi, has been detained and interrogated' [...], and it has already indicated above that it would take this into account for the purposes of the present analysis (*supra* para. 29 and 219). Nevertheless, the Chamber is of the view that the fact that the Defence did not have access to Mr Al-Senussi cannot *per se* lead to the positive conclusion that certain fundamental rights of Mr Al-Senussi have been violated in the course of the domestic proceedings against him, or be in itself sufficient to cast doubt on Libya's counter-assertions.[335]

(ii) Submissions of the parties and participants

162. The Defence argues that the Pre-Trial Chamber "failed to take into account when assessing the evidence, and determining whether Libya had discharged its burden [...], that the Defence had been unable to obtain Mr Al-Senussi's instructions and place all relevant information on his circumstances before the Chamber in response to Libya's assertions".[336] As to the Pre-Trial Chamber's findings that the Defence allegations were "generic" and without "tangible proof" and that Libya was under no obligation to disprove them as they had not been properly substantiated, it argues that this reversed the burden of proof and that "[t]he Chamber also failed to take into account that the Defence's allegations could have been further substantiated through the Defence being allowed to take instructions from Mr Al-Senussi in a privileged and confidential environment", arguing that it was "clearly essential" for the Chamber to receive information from Mr Al-Senussi as to his treatment in

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[334] Impugned Decision, para. 239.
[335] Impugned Decision, footnote 551.
[336] Document in Support of the Appeal, para. 34.

detention and whether his rights were being observed.[337] The Defence argues that the burden was on Libya to establish that the requirements of articles 17 (2) and (3) had been satisfied and that it was not for the Defence to prove that irregularities had occurred,[338] and that this error pervaded the Pre-Trial Chamber's findings on unwillingness and inability.[339]

163. Libya contends that the Pre-Trial Chamber merely reiterated that parties wishing to raise issues bore an evidential burden to raise sufficiently relevant and probative allegations before Libya had an obligation to disprove them – and that evidential burdens are not inconsistent with legal burdens of proof.[340] Libya argues that "the benefit of not bearing the burden of proof does not, and cannot, extend to acceptance of unsubstantiated assertions or to an expectation of a suspension of proceedings in the speculative hope of obtaining evidence to bolster those submissions".[341] Libya submits that the Pre-Trial Chamber was correct to hold that parties bore the evidential burden to raise sufficiently relevant and probative allegations before Libya had an obligation to disprove them.[342]

164. The Prosecutor submits that the Pre-Trial Chamber set out the burden of proof correctly, namely that it was for Libya to prove both limbs of the admissibility assessment.[343] The Prosecutor submits, however, that the fact that Libya bears the burden of proof "does not mean that the [Defence] is relieved from substantiating its assertions if it disputes the arguments advanced by Libya" and that the Pre-Trial Chamber was correct to find that any factual allegation raised by a party had to be sufficiently substantiated in order to be considered properly raised.[344] The Prosecutor argues that this is not a reversal of the burden of proof, but rather "reflects the correct approach whereby the party advancing an argument needs to substantiate his or her submissions with supporting evidence".[345]

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[337] Document in Support of the Appeal, para. 35.
[338] Document in Support of the Appeal, para. 71.
[339] Document in Support of the Appeal, para. 72.
[340] Libya's Response to the Document in Support of the Appeal, para. 41, referring to paragraph 208 of the Impugned Decision.
[341] Libya's Response to the Document in Support of the Appeal, para. 34.
[342] Libya's Response to the Document in Support of the Appeal, para. 41.
[343] Prosecutor's Response to the Document in Support of the Appeal, para. 41.
[344] Prosecutor's Response to the Document in Support of the Appeal, para. 42.
[345] Prosecutor's Response to the Document in Support of the Appeal, para. 43.

165. The Victims argue that the Pre-Trial Chamber did not take into account the fact that the Defence's ability to raise issues may have been prejudiced by the lack of contact with Mr Al-Senussi and it "erred in disregarding the significance and relevance of said submissions in the context of admissibility proceedings, and particularly, when assessing the willingness of a State".[346] They submit that the Pre-Trial Chamber

> should also have considered whether alternative measures were warranted to alleviate this unfairness. As this situation was essentially the product of Libya's non-cooperation, the Chamber should have placed the burden of proof on the Libyan Government in order for the latter to establish that the defendant was being '*brought to justice*'. Instead, the Chamber adopted a rigid approach to the burden of proof which was not in line with the specific circumstances of the case at hand.[347] [Footnote omitted.]

(iii) Determination by the Appeals Chamber

166. The Appeals Chamber recalls that it has previously found that "a State that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible".[348] The Appeals Chamber considers that this means in respect of article 17 (1) (a) of the Statute that what a State challenging admissibility needs to prove is that it is conducting a genuine investigation or prosecution – which requires proof of both limbs of the provision. The Appeals Chamber notes that this was also the approach adopted by the Pre-Trial Chamber.[349]

167. Nevertheless, even though the State bears the burden of proof in general, the Appeals Chamber considers that the Pre-Trial Chamber was reasonable in placing an "evidential" burden on the Defence sufficiently to substantiate the factual allegations it was making. This is because, if it were otherwise, the proceedings could potentially be significantly delayed by the need to consider and rebut all factual allegations, including those for which there is no sufficient substantiation. Therefore, in finding as such, the Pre-Trial Chamber did not err.

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[346] Victims' Observations on Appeal, para. 14.
[347] Victims' Observations on Appeal, para. 15.
[348] *Ruto* Admissibility Judgment, para. 62.
[349] Impugned Decision, para. 27.

168. The Defence argues that the Pre-Trial Chamber erred in not properly taking account of the fact that it had not received instructions from Mr Al-Senussi.[350] The Appeals Chamber is not persuaded by this argument. The Impugned Decision demonstrates that the Pre-Trial Chamber was fully cognisant of the fact that the Defence had not had the chance to obtain information from Mr Al-Senussi. In particular, as pointed out by the Prosecutor,[351] the Pre-Trial Chamber noted this fact when considering the Defence's argument that "Libya has not sufficiently demonstrated that violations of Mr Al-Senussi's fundamental rights have not occurred during the national proceedings against him", considering the Defence's submissions nevertheless to be "generic assertions without any tangible proof" which Libya was not obliged to rebut.[352] In the view of the Appeals Chamber, this approach was not incorrect. The Appeals Chamber recalls that it does not consider that the Pre-Trial Chamber acted unreasonably by deciding on Libya's Admissibility Challenge in the absence of contact between the Defence and Mr Al-Senussi.[353] A necessary corollary of this was that Mr Al-Senussi was unable to put, through the Defence, factual information about his detention and personal well-being before the Pre-Trial Chamber. However, this does not mean that the requirement sufficiently to substantiate factual allegations no longer applied.

169. The Appeals Chamber finds the Defence's references to the jurisprudence of the Inter-American Court of Human Rights and the European Court of Human Rights as well as that of the UN Human Rights Committee[354] to be of only very limited relevance. This is because the cited jurisprudence concerns the determination of complaints that an individual's human rights have been violated. In those proceedings, the State directly responds to the allegations of the complainant. The case at hand, in contrast, concerns the question of the admissibility of the case and is therefore primarily a question of forum – the relationship between States and the Court is the principal issue in these proceedings. While violations of human rights may, in specific and limited circumstances, play a role in the determination as to

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[350] Document in Support of the Appeal, para. 137.
[351] Prosecutor's Response to the Document in Support of the Appeal, para. 46.
[352] Impugned Decision, paras 328-239.
[353] *See* above, paras 145 et seq.
[354] Document in Support of the Appeal, paras 45-46.

whether a case is inadmissible,[355] admissibility proceedings are not primarily a mechanism to complain about human rights violations.

170. The Appeals Chamber therefore dismisses the argument of the Defence that the Pre-Trial Chamber misapplied the evidentiary standard.

(c) Impact of lack of the contact on the questions of unwillingness and inability

(i) Relevant part of the Impugned Decision

171. In the Impugned Decision, the Pre-Trial Chamber noted that "the fact that the Defence did not have access to Mr Al-Senussi cannot *per se* lead to the positive conclusion that certain fundamental rights of Mr Al-Senussi have been violated in the course of the domestic proceedings against him, or be in itself sufficient to cast doubt on Libya's counter-assertions".[356]

(ii) Submissions of the parties and participants

172. The Defence argues that the Pre-Trial Chamber "did not consider whether this most elementary breach of the accused's rights – the failure to permit [Mr Al-Senussi] to consult with his lawyers at all so that the Chamber could be informed about the conditions he faces in detention and in the national proceedings – in itself demonstrated that Mr. Al-Senussi was not being treated independently, impartially, and fairly and being brought to justice".[357] Referring to the history of Libya's failure to facilitate a visit, the Defence argues that "[t]he only reasonable inference that could be drawn, which the Pre-Trial Chamber should have drawn, is that Libya has delayed excessively in arranging any visit and has no genuine intention of allowing Mr. Al-Senussi to speak with his Defence team. That in and of itself [...] establishes that Libya is not bringing Mr. Al-Senussi to justice having regard to Libyan law and international standards of due process".[358] The Defence is of the view that the failure of Libya to facilitate a visit of Mr Al-Senussi by the Defence demonstrates that it is unwilling and unable to try him.[359]

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[355] *See* below, paras 211 et seq.
[356] Impugned Decision, footnote 551.
[357] Document in Support of the Appeal, para. 23.
[358] Document in Support of the Appeal, para. 44. *See also*, Defence Response to Victims' Observations on Appeal, para. 26.
[359] Defence Further Submissions, para. 4.

173. Libya argues that the Defence "failed to justify the assertion that the lack of contact between Mr. Al-Senussi and his ICC counsel is 'reason alone to find that Libya is unwilling and unable to try Mr Al-Senussi'" (footnote omitted).[360]

174. The Prosecutor submits that the Defence "did not argue before the Pre-Trial Chamber that the case was admissible on the sole ground that the legal visit had yet to take place. Rather, it referred to this factor as additional evidence in support of its argument as to Libya's inability and unwillingness" (footnote omitted).[361] The Prosecutor argues that "[a]lthough Libya has not yet facilitated a visit by [the Defence], this does not necessarily mean that Libya is unable and/or unwilling within the terms of Article 17(2) and (3)".

175. The Victims submit that the Pre-Trial Chamber erred by disregarding the relevance of the lack of contact between the Defence and Mr Al-Senussi when assessing, in particular, the question of willingness under article 17 (2) (c) of the Statute.[362]

(iii) Determination by the Appeals Chamber

176. The Appeals Chamber notes that the Defence does not explain how the fact that Mr Al-Senussi was unable to give instructions to the Defence representing him at this Court would lead *per se* to a finding that Libya is unwilling or unable genuinely to investigate and prosecute Mr Al-Senussi in Libya. Nor is any reason immediately apparent, given that the concepts of unwillingness and inability, as set out in article 17 (2) and (3) of the Statute, concern the willingness and ability of a State to carry out domestic proceedings and not the State's cooperation in respect of the proceedings before the Court. In the absence of proper substantiation, the Appeals Chamber will therefore not consider this issue further and dismisses the Defence's argument.

2. Lack of counsel in domestic proceedings

177. The Defence submits that the Pre-Trial Chamber should have concluded that lack of counsel in the domestic proceedings illustrated that Libya was unwilling

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[360] Libya's Response to the Document in Support of the Appeal, para. 24.
[361] Prosecutor's Response to the Document in Support of the Appeal, para. 52.
[362] Victims' Observations on Appeal, para. 14.

and/or unable in terms of article 17 (2) (c) or (3) of the Statute genuinely to investigate and prosecute Mr Al-Senussi.[363]

(a) Relevant part of the Impugned Decision

178. Having set out earlier in the Impugned Decision the relevant provisions of Libyan law which relate to the appointment of counsel in domestic proceedings,[364] the Pre-Trial Chamber addressed the issue of the lack of legal representation.[365] The Pre-Trial Chamber summarised the Defence submissions as to the effect that Mr Al-Senussi's lack of counsel in the domestic proceedings should have on the admissibility proceedings, in particular that it should warrant a finding of both inability and unwillingness.[366] It referred to Libya's submissions that, at that time, Mr Al-Senussi was not legally represented and "that '[t]he sensitivity of the case and the security situation is such that there has been some delay in achieving this'" (footnote omitted), but that it would be taking steps to ensure the appointment of a lawyer in the near future.[367] The Pre-Trial Chamber considered that:

> At this point of its analysis, the Chamber finds it sufficient to observe that Mr Al-Senussi is yet to appoint (or to have appointed to him) a lawyer to represent him in the domestic proceedings in Libya, notwithstanding his entitlement, under article 106 of Libya's Criminal Procedure Code, to benefit from legal representation. The Chamber also recalls that, upon completion of the proceedings before the Accusation Chamber, the case against Mr Al-Senussi cannot proceed further without a lawyer to represent him at trial. The Chamber considers that these are relevant considerations for the purposes of its determination under article 17(2)(c) and (3) of the Statute and, accordingly, the Chamber will take these facts into account, together with all the other relevant circumstances, for its conclusion on whether Libya is unwilling or unable genuinely to carry out the proceedings against Mr Al-Senussi".[368] [Footnotes omitted.]

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[363] Document in Support of the Appeal, paras 50-69.
[364] Impugned Decision, para. 206: "According to Libya's Criminal Procedure Code, suspects have a right to legal representation during the investigation phase of the case, both in interviews with the Prosecutor-General and when confronted with witnesses, as well as the right to view the investigating material relating to their case. If the suspect does not appoint counsel, the Accusation Chamber will appoint counsel to review the investigative materials in order to prepare the case for the defence. It is indeed one of the key roles of the Accusation Chamber to ensure that a lawyer is appointed to represent the suspect during the trial. The lawyer has the right to ask for sufficient time to prepare the case. If a trial were to proceed without a lawyer to represent the accused, or without allowing the lawyer sufficient time to prepare the case, the trial verdict would be quashed on appeal" (footnotes omitted).
[365] Impugned Decision, paras 230-233.
[366] Impugned Decision, para. 230.
[367] Impugned Decision, para. 232.
[368] Impugned Decision, para. 233.

179. When assessing Libya's willingness, the Pre-Trial Chamber stated:

> In the Chamber's view, the fact that Mr Al-Senussi's right to benefit from legal assistance at the investigation stage is yet to be implemented does not justify a finding of unwillingness under article 17(2)(c) of the Statute, in the absence of any indication that this is inconsistent with Libya's intent to bring Mr Al-Senussi to justice. Rather, from the evidence and the submissions before the Chamber, it appears that Mr Al-Senussi's right to legal representation has been primarily prejudiced so far by the security situation in the country".[369] [Footnotes omitted.]

180. When considering the issue of ability, and, in particular, "any residual form of inability on the part of Libya to 'otherwise carry out its proceedings' as a result of a total or substantial collapse or unavailability of its national judicial system",[370] the Pre-Trial Chamber considered "the fact that Mr Al-Senussi has not been provided with any form of legal representation for the purposes of the national proceedings against him up until now".[371] The Pre-Trial Chamber recalled Libya's submissions that it would take steps to ensure the appointment of a lawyer in the near future, that it had also stated "that 'the delays in relation to the appointment of defence counsel' are only an 'understandable consequence of the challenging transnational [*sic*] context and security difficulties' and that '[t]hese challenges, however, are far from insurmountable and do not amount to inability or unwillingness on the part of the Government to carry out genuine proceedings'" (footnote omitted).[372]

181. The Pre-Trial Chamber considered "that the problem of legal representation, while not compelling at the present time, holds the potential to become a fatal obstacle to the progress of the case. Indeed, as recalled above, according to the Libyan national justice system, trial proceedings cannot be conducted in the absence of a lawyer for the suspect".[373] It considered, however, that "the admissibility of a case must be determined in light of the circumstances existing at the time of the admissibility proceedings" and that it therefore was required to "determine whether the current circumstances are such that a concrete impediment to the future appointment of counsel can be identified".[374] It noted that, as stated by Libya, counsel

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[369] Impugned Decision, para. 292.
[370] Impugned Decision, para. 302.
[371] Impugned Decision, para. 304.
[372] Impugned Decision, para. 306.
[373] Impugned Decision, para. 307.
[374] Impugned Decision, para. 307.

for Mr Al-Senussi had not yet been appointed because of security difficulties.[375] In distinguishing the present case from the *Gaddafi* case, the Pre-Trial Chamber stated:

> The Chamber observes that contrary to the situation in relation to Mr Gaddafi, who is not under the control of the State national authorities and for whom attempts to secure legal representation have repeatedly failed, Mr Al-Senussi is instead imprisoned in Tripoli by the central Government, and Libya submits that "recently, several local lawyers have indicated their willingness to represent Mr. Al-Senussi in the domestic proceedings". In its Final Submissions, Libya has confirmed that "many local lawyers from Mr Al-Senussi's tribe have indicated their willingness to represent Mr. Al-Senussi but have not yet been given a formal power of attorney [and] [i]t is expected that this final hurdle to securing legal representation will be overcome at the order of the Accusation Chamber in the very near future". The Chamber has no reason to put into question the information provided by Libya in this regard, or to consider it refuted by the existence of certain security challenges across the country. In these circumstances, the Chamber cannot conclude at this point in time that the situation is such that Mr Al-Senussi's case will be impeded from proceeding further on the grounds that Libya will be unable to adequately address the current security concerns and ensure the provision of adequate legal representation for Mr Al-Senussi as necessary for the subsequent judicial proceedings as presently envisaged.[376] [Footnotes omitted.]

182. The Pre-Trial Chamber concluded that Libya was not unable for the purposes of article 17 (3) of the Statute.[377]

(b) Submissions of the parties and participants

183. The Defence arguments as to the implications of the lack of counsel in the domestic proceedings on the admissibility of the case against Mr Al-Senussi are somewhat unclear. This is, in particular, because the Defence does not separate out those arguments which go to unwillingness from those which go to inability. However, in essence, the Defence submits that Mr Al-Senussi's rights were violated because he did not have a lawyer in the proceedings in Libya and that this should have resulted, in and of itself, in a finding of unwillingness and inability.[378]

184. The Defence makes four arguments as to why the Pre-Trial Chamber erred. First, it argues that the Pre-Trial Chamber erred in not finding that article 106 of the

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[375] Impugned Decision, para. 307.
[376] Impugned Decision, para. 308.
[377] Impugned Decision, para. 309.
[378] Document in Support of the Appeal, para. 51.

Libyan Criminal Procedure Code had been violated[379] and that it also failed to consider and apply international human rights law, arguing that "[t]he right to legal representation is an indispensable and obligatory requirement in any criminal case, especially one involving the death penalty".[380] Second, the Defence submits that "the Chamber erred in not finding that the denial of Mr Al-Senussi's right to counsel during the investigation and accusation stages would have a prejudicial impact on the proceedings, which cannot be reversed and remedied",[381] referring again to international human rights jurisprudence and stating that the Pre-Trial Chamber failed to recognise that the violations that had taken place tainted any future proceedings in Libya "irremediably".[382] Third, the Defence argues that the Pre-Trial Chamber "reversed the burden of proof and failed to require Libya to establish that the lack of legal representation was not an impediment to it being willing and able genuinely to carry out the proceedings. In so doing, the Chamber contradicted its own findings in the same case against Saif Gaddafi".[383] Fourth, the Defence submits that the Pre-Trial Chamber erred in trying "to get around the blatant violation of Mr. Al-Senussi's right to legal representation by finding that it was primarily due to the 'current security concerns', namely that lawyers are afraid to come forward due to safety concerns".[384] The Defence argues that the reason for the lack of counsel should be irrelevant, submitting that "either the security situation does not allow for counsel to be appointed, indicating Libya's inability to carry out genuine proceedings, or Libya is unwilling to do so and Mr. Al-Senussi is not being brought to justice".[385] It submits that "there was ample evidence before the Chamber to show that Libya had in fact not sought to ensure that Mr. Al-Senussi did obtain legal representation" and that "[t]he Pre-Trial Chamber gave no weight at all to these matters, and instead sought to avoid the central issue by blaming the problem on the 'security situation'".[386] It argues that "[b]y finding that the security situation had caused the lack of legal representation, the

[379] Document in Support of the Appeal, para. 53.
[380] Document in Support of the Appeal, para. 57.
[381] Document in Support of the Appeal, para. 53.
[382] Document in Support of the Appeal, para. 64.
[383] Document in Support of the Appeal, para. 53.
[384] Document in Support of the Appeal, para. 83.
[385] Document in Support of the Appeal, para. 83.
[386] Document in Support of the Appeal, para. 84.

Chamber contradicted its own finding that the security situation had not adversely affected Libya's ability to conduct the national proceedings".[387]

185. Furthermore, the Defence submits that Libya "is asking the Court to turn a blind eye to the egregious violations of Mr. Al-Senussi's rights on the promise that Libya will not take advantage of these violations in the future proceedings in which Mr. Al-Senussi will face the death penalty".[388] It argues that "[t]he Chamber's determination under Article 17 cannot properly be based on what may or may not occur and be corrected in the national proceedings in the future, especially when the Appeals Chamber will be unable to determine after the conclusion of the appeal whether Libya's claims have materialised or not".[389]

186. Libya disputes the Defence's argument that the Pre-Trial Chamber erred in its assessment of the evidence,[390] that it reversed the burden of proof[391] or that it contradicted the Pre-Trial Chamber's findings in the *Gaddafi* Admissibility Decision.[392] Regarding international human rights law, Libya argues that "the absence of legal representation during the investigation or the accusation phase of judicial proceedings does not give rise to an automatic violation of 'well-established international human rights and due process standards' law (or Article 106 of the Libyan Criminal Procedure Code)" (footnote omitted) and that "even if [it] did amount to a 'flagrant breach of his [Mr Al-Senussi's] most fundamental rights', the Chamber was correct to find that no prejudice arises that 'cannot now be remedied and reversed'" and that this was not reason alone to find Libya unwilling or unable.[393] Libya submits that based on article 106 of the Libyan Code of Criminal Procedure, "the accused may be interrogated without counsel being present. Any alleged violation must be seen in this context".[394] It argues that "[t]he Chamber correctly enumerated Libya's domestic law: an accused can be investigated without a legal representative in the pre-trial phase, but it is obligatory to have one at trial and at that

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[387] Document in Support of the Appeal, para. 85.
[388] Defence Response to Victims' Observations on Appeal, para. 19.
[389] Defence Response to Victims' Observations on Appeal, para. 19. *See also*, Defence Further Submissions, paras 25-26.
[390] Libya's Response to the Document in Support of the Appeal, paras 29-32.
[391] Libya's Response to the Document in Support of the Appeal, paras 33-44.
[392] Libya's Response to the Document in Support of the Appeal, paras 45-47.
[393] Libya's Response to the Document in Support of the Appeal, para. 52.
[394] Libya's Response to the Document in Support of the Appeal, para. 66.

time denial gives rise to the assumption of prejudice that is now prematurely alleged by the Defence".[395] Libya submits that "[it] has noted on multiple occasions [...] the trial will not commence unless Mr. Al-Senussi has legal representation in Libya. Such representation will also take effect within, and for the purposes of, the accusation stage" (footnote omitted).[396] Regarding the difference with the *Gaddafi* case, it submits that "the difference in location and governance of detention between the *Gaddafi* and *Al-Senussi* cases was plainly key to the Pre-Trial Chamber's assessment" (footnote omitted).[397]

187. The Prosecutor argues that the Pre-Trial Chamber adequately considered the issue of the lack of legal representation in the domestic proceedings.[398]

188. The Victims submit that the Pre-Trial Chamber failed to take into account Mr Al-Senussi's lack of legal representation in the proceedings in Libya, criticising the Chamber's approach and asserting that the decision "revealed patent contradictions" with the *Gaddafi* Admissibility Decision.[399]

(c) Determination by the Appeals Chamber

(i) Should lack of counsel in domestic proceedings have led to a finding of unwillingness?

189. The Defence's arguments that Mr Al-Senussi's lack of counsel in the domestic proceedings should have led to a finding that Libya is unwilling to investigate and prosecute him genuinely are considered against the Appeals Chamber's interpretation of article 17 (2) (c) of the Statute, which will be set out below.[400] For the following reasons, the Appeals Chamber finds that the Pre-Trial Chamber did not err when it found that the lack of counsel in the domestic proceedings, in the specific circumstances of the case, did not establish "unwillingness" in terms of article 17 (2) of the Statute.

190. The Appeals Chamber considers that denying a suspect access to a lawyer may, depending on the specific circumstances, be relevant to a finding that domestic

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[395] Libya's Response to the Document in Support of the Appeal, para. 67.
[396] Libya's Response to Defence Further Submissions, para. 17.
[397] Libya's Response to Defence Further Submissions, para. 18.
[398] Prosecutor's Response to the Document in Support of the Appeal, paras 54-63.
[399] Victims' Observations on Appeal, para. 13.
[400] *See* below paras 211 et seq.

proceedings "are not being conducted independently or impartially, and they [...] are being conducted in a manner which [...] is inconsistent with an intent to bring the person concerned to justice" (article 17 (2) (c) of the Statute) and result in a finding of unwillingness. The Appeals Chamber notes the Defence's submissions in this regard, and, in particular, the references to human rights jurisprudence suggesting that the right to a fair trial will often include the right to access to a lawyer also in the early stages of the proceedings. The Appeals Chamber also notes the various arguments advanced by the parties and participants as to the requirements of Libyan law regarding access to a lawyer during the investigation and accusation stages of the proceedings. Nevertheless, the Appeals Chamber recalls that, in the context of admissibility proceedings, the Court is not primarily called upon to decide whether in domestic proceedings certain requirements of human rights law or domestic law are being violated. Rather, what is at issue is whether the State is willing genuinely to investigate or prosecute. In the context of article 17 (2) (c) of the Statute, the question is whether the failure to provide a lawyer constitutes a violation of Mr Al-Senussi's rights which is "so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the accused so that they should be deemed [...] to be 'inconsistent with an intent to bring [Mr Al-Senussi] to justice'".[401]

191. In the view of the Appeals Chamber, even if one accepted that the lack of access to a lawyer during the investigation stage of the proceedings violated Mr Al-Senussi's right to a fair trial and provisions of Libyan law (and may therefore give rise to remedies under both international and national law), and without wishing to downplay in any way the importance of the right to counsel during the investigation phase, which is indeed also provided for under the Statute,[402] such violations would not reach the high threshold for finding that Libya is unwilling genuinely to investigate or prosecute Mr Al-Senussi. In this regard, the Appeals Chamber notes that Libya does not dispute that Mr Al-Senussi's trial could not commence unless he is represented by a lawyer[403] – a fact the Pre-Trial Chamber specifically noted.[404] Thus, this is not a case where the suspect would be unrepresented during the trial itself.

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[401] *See* below, para. 230.
[402] *See* article 55 (2) (c) and (d) of the Statute.
[403] Libya's Admissibility Challenge, para. 149; Libya's Response to the Document in Support of the Appeal, para. 30.

192. In addition, the Appeals Chamber recalls that the Pre-Trial Chamber found that the reason why Mr Al-Senussi had not seen a lawyer was primarily the "security situation in the country".[405] The Appeals Chamber disagrees with the Defence's submission that "the reason why counsel has not been appointed should be irrelevant to the Chamber's conclusion".[406] Rather, it must be demonstrated that the specific facts of a case lead to the finding of unwillingness. In the view of the Appeals Chamber, in the circumstances of the present case, the lack of a lawyer due primarily to the security situation in the country, without more, does not lead to a finding that the proceedings were 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" within the meaning of article 17 (2) (c) of the Statute.

193. The Appeals Chamber considers that the Defence has not established that the Pre-Trial Chamber's conclusion that the lack of a domestic lawyer was primarily due to the security situation was unreasonable. To the contrary, the Defence even accepts in its submissions on appeal that "the security situation has contributed to the problem".[407] The Defence generally submits that "there was ample evidence before the [Pre-Trial] Chamber to show that Libya had in fact not sought to ensure that Mr. Al-Senussi did obtain legal representation".[408] However, it does not direct the Appeals Chamber to any evidence the Pre-Trial Chamber purportedly overlooked. Instead, it points to additional evidence which it wishes to submit on appeal and to a newspaper article which, it appears, was not put before the Pre-Trial Chamber either.[409] As noted above, the Appeals Chamber will not consider the proposed additional evidence or other information that was not put before the Pre-Trial Chamber.[410]

194. Regarding the alleged contradictions in the Pre-Trial Chamber's findings as to the security situation, in particular that the Pre-Trial Chamber contradicted itself by finding that the security situation did not adversely affect Libya's ability to conduct

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[404] Impugned Decision, para. 233.
[405] Impugned Decision, para. 292.
[406] Document in Support of the Appeal, para. 83.
[407] Document in Support of the Appeal, para. 83.
[408] Document in Support of the Appeal, para. 84.
[409] Document in Support of the Appeal, footnotes 136 and 137.
[410] *See* above paras 55 et seq.

the proceedings, but at the same time caused the lack of legal representation,[411] the Appeals Chamber considers that the Defence misrepresents the Impugned Decision. The Pre-Trial Chamber discussed the security situation in different contexts. At paragraph 303 of the Impugned Decision, the Pre-Trial Chamber addressed Libya's general ability to carry out its proceedings (as indicated by the words *per se*), as follows:

> At the outset, the Chamber considers that Libya's capacity to carry out the proceedings against Mr Al-Senussi is not affected *per se* by the ongoing security concerns across the country, in particular taking into account the quantity and nature of the evidence gathered as part of the investigation in relation to Mr Al-Senussi's case, the ultimate transfer of the case to the Accusation Chamber and the recent commencement of the accusation phase. The fact that the hearing of 19 September 2013 occurred without incident, notwithstanding certain protests outside the courtroom complex, further confirms that Libya appears to be in a position to address the ongoing security difficulties in order that the proceedings against Mr Al-Senussi not be hindered.[412] [Footnote omitted.]

195. It then proceeded to discuss the problems with the provision of legal representation, noting that Libya had argued that "'the delays in relation to the appointment of defence counsel' are only an 'understandable consequence of the challenging transnational [*sic*] context and security difficulties'".[413] It noted that Libya had admitted that the current lack of legal representation was primarily the result of "security difficulties".[414] Thus, the Pre-Trial Chamber acknowledged that the security situation had led to problems in those proceedings, albeit affecting not the investigation as a whole, but specifically the appointment of counsel. The Appeals Chamber can find no contradiction in these two conclusions.

196. In sum, therefore, the Defence's argument that the Pre-Trial Chamber erred when it found that Libya was not unwilling to investigate and prosecute Mr Al-Senussi genuinely despite lack of counsel in the domestic proceedings must be rejected.

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[411] Document in Support of the Appeal, para. 85.
[412] Impugned Decision, para. 303.
[413] Impugned Decision, para. 306.
[414] Impugned Decision, para. 307.

(ii) Should lack of counsel in domestic proceedings have led to a finding of inability?

197. The Defence submits that Mr Al-Senussi's lack of counsel should have led the Pre-Trial Chamber to find that Libya is unable genuinely to investigate and prosecute him.[415] Inability, per article 17 (3) of the Statute, with regard to the right to counsel, is concerned with whether Libya is found to be "otherwise unable to carry out its proceedings", because a lawyer is required in order for Mr Al-Senussi to be tried under Libyan law, yet in the circumstances, according to the Defence, it is impossible to provide one.

198. The Appeals Chamber notes that it is not in dispute between the parties and participants that the appointment of counsel is a prerequisite for the trial in Libya to take place. Indeed, Libya had provided information to the Pre-Trial Chamber regarding the appointment of counsel and has acknowledged that the trial will not progress without appointment of counsel.[416] The Pre-Trial Chamber was aware of this fact and expressly found "that the problem of legal representation, while not compelling at the present time, holds the potential to become a fatal obstacle to the progress of the case".[417] It considered, however, that "the admissibility of a case must be determined in light of the circumstances existing at the time of the admissibility proceedings" and that it therefore was required to "determine whether the current circumstances are such that a concrete impediment to the future appointment of counsel can be identified".[418]

199. Although the Defence's submissions are rather unclear, the Appeals Chamber understands that the Defence seeks to challenge these findings essentially on two grounds: first, on the ground that the fact that Mr Al-Senussi has not been legally represented in the domestic case thus far means that the proceedings have been compromised to an extent that they can no longer go ahead;[419] second, on the ground that the Pre-Trial Chamber's finding is speculative and contradicted by its findings in

[415] Document in Support of the Appeal, para. 51.
[416] Libya's Response to the Document in Support of the Appeal, para. 30.
[417] Impugned Decision, para. 307.
[418] Impugned Decision, para. 307.
[419] *See*, in particular, Document in Support of the Appeal, paras 64, 65, 68.

the *Gaddafi* Admissibility Decision.[420] The Appeals Chamber will address these submissions in turn.

200. The Appeals Chamber is not persuaded by the Defence's argument that the trial is irreparably prejudiced by the fact that Mr Al-Senussi has not had counsel appointed in the proceedings thus far. The Defence appears to submit that, because of the alleged violations to Mr Al-Senussi's right to a fair trial that have already occurred, the proceedings in Libya will inevitably have to be aborted, rendering Libya unable genuinely to prosecute him. In that regard, the Appeals Chamber notes the submissions of the Defence referring to human rights law and jurisprudence that suggest that, under certain circumstances, lack of legal representation in the early parts of proceedings may render the entire trial unfair.[421] The Appeals Chamber understands that these submissions relate not only to the question of unwillingness,[422] but also to the question of inability to conduct genuine investigations or prosecutions.[423] The Appeals Chamber considers, however, that these questions do not have to be determined in the context of this appeal. This is because even if the Libyan courts, in the further conduct of the proceedings, were to conclude that the proceedings in respect of Mr Al-Senussi must be terminated because of the lack of a lawyer during the early stages of the proceedings, this would not render Libya unable genuinely to prosecute him. This is because, even though it is one of the objectives of the Statute and indeed of the complementarity principle to end impunity,[424] this does not mean that this objective is only attained if trials for the most serious crimes end with a conviction. Indeed, it is intrinsic to the notion of criminal justice that trials may end with an acquittal or have to be terminated because a fair trial is no longer possible. Should this occur, it cannot be said that the jurisdiction in question was unable genuinely to try the suspect; to the contrary, subject to the specific circumstances of the case, a genuine prosecution could have taken place.

201. As to the second set of the Defence's arguments, the Appeals Chamber finds that the Pre-Trial Chamber's conclusion that it "cannot conclude at this point in time

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[420] Document in Support of the Appeal, paras 86-90.
[421] *See* Document in Support of the Appeal, paras 66-68.
[422] *See* above, paras 190-191.
[423] *See* Document in Support of the Appeal, para. 69: "These serious violations of Mr. Al-Senussi's rights clearly show that Libya is unable and unwilling to try him".
[424] *See* Preamble of the Statute, para. 5.

that the situation is such that Mr Al-Senussi's case *will* be impeded from proceeding further on the grounds that Libya will be unable to adequately address the current security concerns and ensure the provision of adequate legal representation for Mr Al-Senussi" (emphasis added)[425] was not unreasonable. The Pre-Trial Chamber based this finding primarily on Libya's submissions that Mr Al-Senussi was in a detention centre under the control of the central authorities, and that counsel could soon be appointed, as several lawyers have indicated their willingness to represent him.[426] In the view of the Appeals Chamber, in light of Libya's submissions, it was not unreasonable for the Pre-Trial Chamber to conclude that, although in the past it had not been possible to appoint counsel for Mr Al-Senussi because of the security situation, there was a prospect of this happening in the future. Although the Pre-Trial Chamber's conclusion did involve an element of prediction, this is not unreasonable for issues such as the present one. In this regard, the Appeals Chamber recalls that, should it later become clear that the issue of legal representation cannot be resolved, this may be a basis for the Prosecutor to seek, pursuant to article 19 (10) of the Statute, a review of the decision that the case against Mr Al-Senussi is inadmissible.

202. Turning to the Defence's argument that the Pre-Trial Chamber erred in taking into account information provided by Libya, just prior to issuance of the Impugned Decision, as to the appointment of counsel, and to which it was not given the opportunity to respond,[427] the Appeals Chamber can find no error. First, the Appeals Chamber notes that information as to the imminent appointment of counsel was also contained in Libya's Reply to the Responses to the Admissibility Challenge of 14 August 2013.[428] In addition, in the absence of the Defence demonstrating that it made any attempt to respond to the submissions of Libya, including seeking leave to do so, the Appeals Chamber cannot find any basis upon which it could consider finding a procedural error in this regard.

203. Regarding the argument that the Pre-Trial Chamber's findings were inconsistent with those that it had made in the *Gaddafi* case, the Appeals Chamber notes, as also

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[425] Impugned Decision, para. 308.
[426] Impugned Decision, para. 308.
[427] Document in Support of the Appeal, paras 77-78.
[428] Libya's Reply to the Responses to the Admissibility Challenge, para. 146.

stated above,[429] that the fact that the findings in that decision may differ from those in the Impugned Decision does not *per se* illustrate that the findings in the latter were unreasonable. Nevertheless, the Appeals Chamber would note that, in its view, the main distinguishing factor between the two cases is the fact that the central authorities were unable to obtain Mr Gaddafi.[430] In this respect, it notes that the Pre-Trial Chamber, in the *Gaddafi* Admissibility Decision, referred to the fact that the Libyan authorities did not have custody over Mr Gaddafi.[431] In the Appeals Chamber's view, although not stated expressly in that decision, it is implicit that if the central authorities were unable to obtain Mr Gaddafi for purposes of his trial in that case, guaranteeing that a lawyer would be appointed would be considerably more difficult than in the present case.[432] Thus, while the Appeals Chamber is not called upon in the present appeal to determine the correctness of the findings made in the *Gaddafi* Admissibility Decision, it finds sufficient differences between that decision and the case at hand. Accordingly, the Defence's arguments in this regard are dismissed.

3. Failure to find that Mr Al-Senussi is not being brought to justice in proceedings that are independent and impartial

(a) Relevant part of the Impugned Decision

204. The Appeals Chamber refers to the brief summary of the Impugned Decision set out at paragraphs 126 to 130 above and to the more specific parts of the Impugned Decision that are referred to as part of its determination below.

(b) The meaning of "unwillingness" in law

(i) Submissions of the parties and participants

205. The essence of the Defence argument on the meaning of article 17 (2) (c) of the Statute, which underpins its submissions in this part of the appeal, appears to be encapsulated by its reference to Libya having the "burden of showing that the proceedings are being conducted independently, impartially and fairly and with the intention of bringing Mr. Al-Senussi to justice".[433]

206. The Defence continues:

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[429] *See* above paras 94 et seq.
[430] Impugned Decision, para. 308. *See Gaddafi* Admissibility Decision, paras 206-208, 215.
[431] Prosecutor's Response to the Document in Support of the Appeal, paras 62-63.
[432] Libya's Response to Defence Further Submissions, para. 18.
[433] Document in Support of the Appeal, para. 97.

> The requirement that the proceedings must be impartial and independent and be consistent with an intention on the part of Libya to bring Mr. Al-Senussi to justice must be assessed having regard to international standards of due process. Bringing an accused to justice must entail treating him humanely and fairly and conducting fair proceedings – these requirements are all integral to the definition of 'justice' as a matter of international law. The Chamber is thus required to determine whether Libya is conducting fair investigative and prosecutorial proceedings taking into account the fair trial and due process requirements that are recognised under international law. This view is re-enforced by the Chamber's duty under Article 21(3), which provides that the Chamber's application and interpretation of the law '*must be consistent with internationally recognized human rights*'.[434] [Emphasis in original, footnotes omitted.]

207. The Defence also argues that the Pre-Trial Chamber did not identify which principles of due process recognised by international law had to be taken into account under article 17 (2) of the Statute and failed to consider any of those standards.[435]

208. Libya submits that the Defence's approach to unwillingness "is contrary to the text, context and object and purpose of article 17(2)",[436] contending that the Court "was not designed to be a human rights court".[437] Libya further submits that the Pre-Trial Chamber appropriately identified the applicable legal standards in relation to article 17 (2) of the Statute and the Defence was therefore incorrect to argue that procedural violations were automatically "dispositive of the question of an intent to bring to justice".[438]

209. The Prosecutor argues that the Court cannot reject an admissibility challenge solely on the basis that a State's domestic procedures are not fully consistent with those of other States or international instruments of human rights,[439] and that the Court should "only declare a case admissible on the grounds that due process rights have been violated in those instances where, due to the complete absence of even the

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[434] Document in Support of the Appeal, para. 97 [footnotes omitted]. *See also* Defence Response to Victims' Observations on Appeal, para. 10; Defence Further Submissions, para. 23.
[435] Document in Support of the Appeal, paras 24, 99. *See also* Defence Response to Victims' Observations on Appeal, paras 6-8.
[436] Libya's Response to the Document in Support of the Appeal, para. 77. *See*, generally, paras 74-78.
[437] Libya's Response to the Document in Support of the Appeal, para. 78.
[438] Libya's Response to Victims' Observations on Appeal, para. 5. *See also* paras 3-4.
[439] Prosecutor's Response to the Document in Support of the Appeal, para. 20.

minimum and most basic requirements of fairness and impartiality, the national efforts can only be viewed as a travesty of justice" (footnote omitted).[440]

210. The Victims agree with the last argument of the Defence referenced above, submitting that the Pre-Trial Chamber failed to articulate clear standards for assessing the unwillingness of a State and arguing that the Pre-Trial Chamber only considered the violations of the rights of the suspect from the perspective of the independence and impartiality of the proceedings, but did not address whether those violations impacted upon Libya's intent to bring the person concerned to justice.[441] The Victims submit that, had the Pre-Trial Chamber considered international standards it would have found that proceedings conducted in breach of the defendant's basic procedural rights are inconsistent with the intent to bring that person to justice.[442]

(ii) Determination by the Appeals Chamber

211. Article 17 (1) (a) of the Statute provides:

> 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.

212. Article 17 (2) provides:

> 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;

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[440] Prosecutor's Response to the Document in Support of the Appeal, para. 30. *See*, generally, paras 18-30.
[441] Victims' Observations on Appeal, paras 9, 11.
[442] Victims' Observations on Appeal, para. 10.

> (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.

213. The Appeals Chamber observes that, at first sight, the text of article 17 (2) (c) and the *chapeau* of article 17 (2) could potentially be read to support the position argued for by the Defence, namely that a State is unwilling genuinely to carry out the investigation or prosecution if it does not respect the fair trial rights of the suspect. Article 17 (2) (c) refers to proceedings not being conducted "independently or impartially" and to "justice", and the *chapeau* contains the requirement of "having regard to the principles of due process recognized by international law". The Appeals Chamber is also aware that some commentators have argued that the provision should be interpreted consistently with the position taken by the Defence.[443]

214. However, the Appeals Chamber observes that a closer analysis of the text, context, object and purpose of article 17 (2) (c) demonstrates that the interpretation proposed by the Defence is not sustainable for the reasons set out below.

215. The Appeals Chamber recalls that article 17 is designed to determine the circumstances in which a case shall be inadmissible before the Court by reference to the actions of a State which has jurisdiction over that case. In making that determination, regard is to be had to the fact that the Court is "complementary to national criminal jurisdictions"[444] and the question to be resolved is whether the Court or the State is the proper forum to exercise jurisdiction over the case.

216. It is recalled that article 17 (2) as a whole defines the circumstances in which a State is *unwilling* genuinely to carry out the investigation and/or prosecution. It makes an exception to the rule that a case is inadmissible before the Court if, as in the

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[443] *See*, for example, F. Gioia, "State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court", *Leiden Journal of International Law* (2006), Vol. 19(4), p. 1095, at pp. 1110-1113.
[444] Paragraph 10 of the Preamble and article 1 of the Statute, as referred to in article 17 (1) of the Statute.

present case, it is being investigated or prosecuted by a State which has jurisdiction over it.[445]

217. The purpose of this exception is to ensure that the principle of complementarity – which enables States to retain jurisdiction over cases and promotes the exercise of criminal jurisdiction domestically[446] – is not abused, so that it would be contrary to the overall purpose of the Statute, which is to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole.[447]

218. The concept of being "unwilling" genuinely to investigate or prosecute is therefore primarily concerned with a situation in which proceedings are conducted in a manner which would lead to a suspect evading justice as a result of a State not being willing genuinely to investigate or prosecute. This is provided for most specifically in article 17 (2) (a), which expressly states that, in order to determine unwillingness, the Court shall consider whether, "[t]he proceedings were or are being undertaken or the national decision was made *for the purpose of shielding the person concerned from criminal responsibility*" (emphasis added). The fact that the other two sub-paragraphs of article 17 (2) do not expressly refer to shielding or protecting the person concerned cannot detract from the fact that they are sub-paragraphs of a provision defining *unwillingness*. The primary reason for their inclusion is therefore likewise not for the purpose of guaranteeing the fair trial rights of the suspect generally.

219. Indeed, the Court was not established to be an international court of human rights, sitting in judgment over domestic legal systems to ensure that they are compliant with international standards of human rights.[448] However, if the

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[445] Article 17 (1) (a) of the Statute. Pursuant to article 17 (1) (b) of the Statute, it also forms an exception to the rule that a case is inadmissible where it has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned.

[446] *See* the Preamble of the Statute, in particular its fourth, sixth and tenth paragraphs and article 1 of the Statute.

[447] *See* the Preamble of the Statute, in particular its fourth and fifth paragraphs. *See also Katanga* Admissibility Judgment, para. 83: "the Statute's overall purpose, as reflected in the fifth paragraph of the Preamble, [is] 'to put an end to impunity'".

[448] *See*, in this context, M. Benzing, "The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity", 7 Max Planck Yearbook of United Nations Law (2003), p. 591 at p. 598: "[...] international law provides other, more suitable remedies to address breaches of human rights of the accused in the context of other instruments and institutions. Were the protection of human rights of the accused in national

interpretation proposed by the Defence were adopted, the Court would come close to becoming an international court of human rights. A case could be admissible merely because domestic proceedings do not fully respect the due process rights of a suspect. This would necessarily involve the Court passing judgment generally on the internal functioning of the domestic legal systems of States in relation to individual guarantees of due process. Had this been the intention behind article 17, the Appeals Chamber would have expected this to have been included expressly in the text of the provision.

220. Article 17 (2) (c) therefore cannot be understood to mean that violations of rights of the suspect *per se* are sufficient to amount to "unwillingness" within the meaning of article 17 (2) of the Statute. That is not to say that concepts of due process are irrelevant to the Court's consideration of unwillingness. It is clear that regard has to be had to "principles of due process recognized by international law" for all three limbs of article 17 (2),[449] and it is also noted that whether proceedings were or are "conducted independently or impartially" is one of the considerations under article 17 (2) (c). The concept of independence and impartiality is one familiar in the area of human rights law. Rule 51 of the Rules of Procedure and Evidence specifically permits States to bring to the attention of the Court, in considering article 17 (2), information "showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct". As such, human rights standards may assist the Court in its assessment of whether the proceedings are or were conducted "independently or impartially" within the meaning of article 17 (2) (c).

221. However, it must be borne in mind that the notions of independence and impartiality (a) are included within a provision which is primarily concerned with whether the national proceedings are being conducted in a manner that would enable the suspect to evade justice and must be seen in that light (in other words, the provision is not primarily concerned with whether the rights of the suspect are being

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jurisdictions added to the mandate of the Court, this would indeed add a dimension entirely different from the initial idea for its establishment".

[449] Yet it is equally clear that this factor does not make the human rights of the defendant the primary consideration, as its application to all three limbs of article 17 (2) necessarily means that it is relevant to the assessment of whether the proceedings "were or are being undertaken [...] for the purpose of shielding the person concerned from criminal responsibility" (article 17 (2) (a) of the Statute) – a notion which has little to do with due process principles being present so as to protect the rights of the accused in the manner in which that phrase would usually be understood in the human rights context.

violated); and (b) are only one of two cumulative criteria that need to be met before the requirements of article 17 (2) (c) have been fulfilled. The second criterion is that of the proceedings "being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice". However, for the reasons stated above, this criterion cannot primarily be concerned with whether there have been violations of the rights of a suspect.

222. Furthermore, the Appeals Chamber observes that the same or very similar criteria that constitute unwillingness in article 17 (2) (c) – that proceedings were not conducted independently or impartially and were "conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice" – are also reflected in article 20 (3) (b) of the Statute in respect of an exception to the principle of *ne bis in idem*. As the two provisions contain such similar language it is reasonable to assume that they were intended to have the same meaning. The Appeals Chamber considers that the criteria used in article 20 (3) (b) support giving them a meaning which primarily concerns proceedings that are not genuine in that they are akin to sham or other proceedings that unjustly benefit the accused: in such circumstances, for the purposes of putting an end to impunity, it is understandable why a person could still be tried at the Court notwithstanding that he or she has already supposedly been tried by another court. It is less easy to imagine that there was an intention for an accused to be tried again at this Court for the same conduct that had already been tried nationally on the basis that the domestic trial did not fully comply with international standards of due process.

223. The Appeals Chamber therefore concludes that the interpretation put forward by the Defence cannot be correct in light of the text, context, object and purpose of the provision.

224. The Appeals Chamber observes that this conclusion is confirmed by reference to the drafting history of the provision.[450] Differing views were expressed during the course of the negotiations. Yet the Appeals Chamber notes that, in early discussions upon what was to become article 17, the views of several delegations are recorded, in relation to the nature of exceptions to the exercise of national jurisdiction, which

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[450] *See Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 United Nations Treaty Series 18232, article 32.

focused upon whether the Court should intervene "where an operating national judicial system was being used as a shield"[451] or to safeguard against sham trials or "the risk of perpetrators of serious crimes being protected by sympathetic national judiciaries or authorities".[452]

225. In relation to whether the provision was concerned with guaranteeing the rights of the suspect, the Appeals Chamber notes that certain States, during the course of the negotiations of the Court's Statute, emphasised that the international criminal court should not pass judgment on the operation of national courts in general[453] or on the

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[451] *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, 6 September 1995, A/50/22, para. 45 (hereinafter: "Report of the Ad Hoc Committee").

[452] *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I (Proceedings of the Preparatory Committee during March-April 1996 and August 1996)*, 13 September 1996, A/51/22, para. 157 (hereinafter: "Report of the Preparatory Committee"). *See also* "Report of the Ad Hoc Committee, para. 45: "According to several delegations, the decision on whether national jurisdiction should be set aside should be made on a case-by-case basis, taking into account, among other factors, the probability that national jurisdiction would be exercised in a particular instance. It was noted that, while the jurisdiction of an international criminal court was compelling where there was no functioning judicial system, *the intervention of the court in situations where an operating national judicial system was being used as a shield required very careful consideration. The remark was also made that if national authorities failed, without a well-founded reason, to take action in respect of the commission of a crime under the draft statute, the international criminal court should exercise its jurisdiction*" [emphasis added]. It is further noted that the Report of the Preparatory Committee also records views of delegations that appear to suggest that the focus was upon whether there were any national proceedings at all and to safeguard against sham trials. Para. 154 makes reference to some delegations feeling that: "There may be instances where the Court could obtain jurisdiction quickly 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. But as long as the relevant national system was investigating or prosecuting a case in good faith, according to this view, the Court's jurisdiction should not come into operation. A view was also expressed that *a possible safeguard against sham trials* could also be for the Statute to set out certain basic conditions relating to investigations, trials and the handling of requests for extradition and legal assistance" [emphasis added]; para. 157 of the same report refers to some delegations noting that: "while national authorities and courts had the primary responsibility for prosecuting the perpetrators of the crimes listed in the Statute, *the Court was an indispensable asset in enhancing the prevention of impunity, which too often had been the reward for violators of human rights and humanitarian law*. While attempts should be made to minimize the risk of the Court dealing with a matter that could eventually be dealt with adequately on the national level, it was, according to this view, still *preferable to the risk of perpetrators of serious crimes being protected by sympathetic national judiciaries or authorities*" [emphasis added]. *See also* J. T. Holmes, 'The Principle of Complementarity', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International, 1999), p. 41 (hereinafter: "Holmes in Lee") at p. 50: "[T]he main purpose of adding a provision on 'unwillingness' was to preclude the possibility of sham trials aimed at shielding perpetrators". The Appeals Chamber notes that Mr John Holmes was the coordinator of consultations on complementarity during the Preparatory Committee, a role which he continued at the Rome Conference: *see* Holmes in Lee, pp. 45, 51.

[453] Report of the Ad Hoc Committee, para. 43: "It was stressed that the standards set by the [International Law] Commission were not intended to establish a hierarchy between the international criminal court and national courts, or to allow the international criminal court to pass judgment on the operation of national courts in general".

penal system of a State.[454] It is further noted that part of a draft proposal by Italy on what is now article 17 was not adopted. That proposal read, in relevant part, that:

> In deciding on issues of admissibility under this article, the Court shall consider whether:
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> [...]
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> (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.*[455] [Emphasis added]

226. While the reasons for the non-adoption of this proposal are not specifically referred to in the *travaux préparatoires* themselves, the Appeals Chamber regards as significant, as stated above, that article 17 (2) (c) itself does not contain an express requirement for the Court to consider whether the domestic proceedings fully respect the due process rights of a suspect. This is of particular note in light of the fact that this was the subject of a specific proposal during the course of the negotiations of this provision.

227. Furthermore, in relation to the principle of *ne bis in idem*, and what became article 20 (3) (b), the Appeals Chamber notes that the focus of the original draft of this provision in the Court's Draft Statute was upon "where the first trial was a sham, i.e. was intended to protect the accused from international criminal responsibility" – and

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[454] Report of the Preparatory Committee, para. 161, in which it was recorded that a number of delegations expressed the view, in relation to the then third paragraph of the Preamble of the Draft Statute (*Report of the International Law Commission on the work of its forty-sixth session*, 2 May - 22 July 1994, A/49/10, (hereinafter: "Draft Statute"), pp. 43-44) that: "[W]hile the determination of 'availability' of national criminal systems was more factual, the determination of whether such a system was 'ineffective' was too subjective. Such a determination would place the Court in the position of passing judgment on the penal system of a State. That would impinge on the sovereignty of national legal systems and might be embarrassing to that State to the extent that it might impede its eventual cooperation with the Court".

[455] *Draft Proposal by Italy on Article 35*, 5 August 1997, Non-Paper/WG.3/No.4. *See also* Holmes in Lee, p. 50: "The final criterion to determine unwillingness was the question of the independence and impartiality of the proceedings. The original idea was to include this proposal in the criteria relating to inability. Where a State was unable to provide for independent and impartial proceedings (including guaranteeing due process for defendants), the Court should then intervene. The whole question of the rights of defendants was addressed in other parts of the Statute and *many delegations believed that procedural fairness should not be a ground for the purpose of defining complementarity*".

that views to similar effect were expressed during the negotiating history of the provision.[456]

228. What is known of the relevant drafting history therefore confirms the Appeals Chamber's interpretation of the focus of article 17 (2) (c) being upon ensuring that an accused does not evade justice. The Appeals Chamber is not aware anything in the drafting history that points towards the primary intention of the provision being to protect the domestic due process rights of a suspect – nor does the Defence cite any such drafting history or other authority in this regard.

229. However, notwithstanding the above, the Appeals Chamber also observes that, while article 17 is *lex specialis* on questions of admissibility, the Statute as a whole is underpinned by the requirement in article 21 (3) that the application and interpretation of law under the Statute "must be consistent with internationally recognized human rights". The Appeals Chamber also notes the final paragraph of the Preamble, setting out that the States Parties to the Statute "Resolved to guarantee lasting respect for and

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[456] Article 42 (2) (b) of the Draft Statute provided, in relevant part, that a person tried by another court could only be tried under the Statute if, *inter alia*, "the proceedings in the other court were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted". The commentary of the International Law Commission accompanying the provision stated as follows: "Article 42 (2) deals with subsequent trial before the International Criminal Court in relation to a crime which has already been the subject of trial before another court. It does not in all cases bar the second trial. Instead, two exceptions are envisaged: (a) where the first trial was for an 'ordinary crime'; and (b) *where the first trial was a sham, i.e. was intended to protect the accused from international criminal responsibility*" (Draft Statute, p. 58, para. 5 – emphasis added). The commentary later continued: "[P]aragraph 2 (b) reflects the view that the Court should be able to try an accused if the previous criminal proceeding for the same acts was really a 'sham' proceeding, possibly even designed to shield the person from being tried by the Court. The Commission adopted the words 'the case was not diligently prosecuted' on the understanding that they are not intended to apply to mere lapses or errors on the part of the earlier prosecution, but to a lack of diligence of such a degree as to be calculated to shield the accused from real responsibility for the acts in question. Paragraph 2 (b) is designed to deal with exceptional cases only" (Draft Statute, p. 58, para. 7). Paragraphs 170 and 173 of the Report of the Preparatory Committee are also relevant in this context. Para. 170 records that the remark was made that [what is now article 20] should not apply to "proceedings discontinued for technical reasons. In addition, non bis in idem should not be construed in such a way *as to permit criminals to escape any procedure*" [emphasis added]; and para. 173 records that: "A view was also expressed that [what is now article 20] should include cases where the sentence imposed by the national jurisdiction was manifestly inadequate for the offence as an exception to non bis in idem. It was noted, however, that a possible solution would provide for the Court to try a person already tried in another court, *only if the proceedings in the other court manifestly intended to shield the accused from his/her international criminal responsibility*" [emphasis added]. It also appears that at least one delegation recognised that the provision could be read to include due process considerations – and suggested its deletion as a result – albeit that this was not intended to be its purpose: in 1996 the United Kingdom suggested the removal of article 42 (2) of the Draft Statute on the basis, *inter alia*, that "[s]ubparagraph (b) goes wider than is desirable *in allowing consideration to be given to an aspect of the fairness of national proceedings* (the rights of the accused) *which go wider than the objective of the article*" ("UK discussion paper", 29 March 1996, para. 18 – emphasis added).

the enforcement of international justice". As set out above, the Appeals Chamber considers that article 17 was not designed to make principles of human rights *per se* determinative of admissibility. Yet, at the same time, the Appeals Chamber agrees with the Prosecutor that the fact that admissibility is not an enquiry into the fairness of the national proceedings *per se* does not mean "that the Court must turn a blind eye to clear and conclusive evidence demonstrating that the national proceedings completely lack fairness".[457]

230. At its most extreme, the Appeals Chamber would not envisage proceedings that are, in reality, little more than a predetermined prelude to an execution, and which are therefore contrary to even the most basic understanding of justice, as being sufficient to render a case inadmissible.[458] Other less extreme instances may arise when the violations of the rights of the suspect are so egregious that it is clear that the international community would not accept that the accused was being brought to any genuine form of justice. In such circumstances, it is even arguable that a State is not genuinely investigating or prosecuting at all.[459] Whether a case will ultimately be admissible in such circumstances will necessarily depend upon its precise facts. However, in light of those matters considered above, the Appeals Chamber concludes that:

1) For a case to be admissible under article 17 (2) (c) it must be shown that the proceedings were not or are not being conducted independently or impartially *and* that the proceedings were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

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[457] Prosecutor's Response to the Document in Support of the Appeal, para. 29.
[458] *See, generally*, F. Mégret & M.G. Samson, "Holding the Line on Complementarity in Libya: the Case for Tolerating Flawed Domestic Trials" 11(3) *Journal of International Criminal Law* (2013), p. 571. The authors state, at p. 586: "While the ICC Statute is targeted at preventing impunity, and it is clearly in this spirit that the 'intent to bring the person concerned to justice' in Article 17(2)(c) must be read, we would suggest that the use of the word 'justice' here encompasses the broad idea that the goal is indeed to make the person criminally accountable, not to actually defeat the goals of the criminal process through an entirely illusory process. In trials in which a conviction is predetermined, for example, or indeed an irrelevance, the line between imperfect justice and absolute injustice is crossed. We are no longer dealing with 'trials' at all but, if the death penalty is imposed, something akin to an extrajudicial execution and, if the accused is incarcerated, an arbitrary imprisonment. The so-called trial, then, is not a hearing of the case, but simply the chosen vehicle for human rights violations. Thus, an assessment by the ICC in such circumstances is not an exercise in evaluating domestic human right norms and procedure in and of themselves, but a question of determining whether something that can recognizably be described as a trial has occurred." [Footnote omitted].
[459] *See* article 17 (1) (a) of the Statute.

2) Taking into account the text, context, object and purpose of the provision, this determination is not one that involves an assessment of whether the due process rights of a suspect have been breached *per se*. In particular, the concept of proceedings "being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice" should generally be understood as referring to proceedings which will lead to an suspect evading justice, in the sense of not appropriately being tried genuinely to establish his or her criminal responsibility, in the equivalent of sham proceedings that are concerned with that person's protection.

3) However, there may be circumstances, depending on the facts of the individual case, whereby violations of the rights of the suspect are so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the suspect so that they should be deemed, in those circumstances, to be "inconsistent with an intent to bring that person to justice".

231. In light of the above, insofar as the Defence argues that a State is unwilling genuinely to carry out the investigation or prosecution if it does not respect the fair trial rights of the suspect *per se*, this argument must be rejected. The Appeals Chamber further observes that it was both relevant and appropriate for the Pre-Trial Chamber to have considered the investigative steps that had been undertaken by Libya, as well as the progression of the domestic proceedings, as part of its assessment as to whether Libya was willing genuinely to investigate and prosecute Mr Al-Senussi.[460] Furthermore, the Pre-Trial Chamber appropriately emphasised that "only those irregularities that may constitute relevant indicators of one or more of the scenarios described in article 17(2) or (3) of the Statute, and that are sufficiently substantiated by the evidence and information placed before the Chamber" could form a ground for a finding of unwillingness or inability,[461] and it correctly found that "alleged violations of the accused's procedural rights are not *per se* grounds for a finding of unwillingness or inability under article 17 of the Statute".[462]

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[460] Impugned Decision, paras 209-216.
[461] Impugned Decision, para. 221.
[462] Impugned Decision, para. 235.

232. The Appeals Chamber notes that, as argued by the Defence and the Victims, the Pre-Trial Chamber did not provide an extensive interpretation of article 17 (2) (c) and its requirements, and appears, in its assessment of certain alleged violations of Mr Al-Senussi's rights, to have considered such violations as relevant solely to the independence and impartiality of the proceedings.[463] This had no effect on the Pre-Trial Chamber's decision as a whole. This is because, as will be seen below, the Defence has not demonstrated that the factual findings of the Pre-Trial Chamber were unreasonable. As such, any potential inconsistency with the approach of the Appeals Chamber would not have had any impact on the Pre-Trial Chamber's overall determination that Libya was not unwilling genuinely to carry out the proceedings.

(c) Assessment of the Pre-Trial Chamber's approach to the facts

(i) Submissions of the parties and participants

233. Under the overall heading, "Failure to find that Mr. Al-Senussi is not being brought to justice in proceedings that are independent and impartial",[464] the Defence submits, *inter alia*, that "[n]o reasonable chamber could have found on the evidence and in the circumstances in Mr. Al-Senussi's particular case that he is being treated fairly and will receive a fair and independent trial in Libya".[465] The Defence contends that the Pre-Trial Chamber failed to appreciate the significance of the evidence the Defence had put before it, considered as a whole, and erred in giving it no weight.[466]

234. In essence, the Defence case is that Mr Al-Senussi will be convicted and sentenced to death in proceedings falling well below any acceptable standard.[467] The Defence alleges, *inter alia*, that Mr Al-Senussi "has been imprisoned incommunicado, without a lawyer throughout his proceedings, cut-off from his family, interrogated, mistreated to confess, knowing that his young daughter is held in detention by his captors and is then kidnapped, without any visit from his ICC lawyers, guarded by his alleged victims, with armed militia present, against a backdrop of immense public pressure for his execution as revenge for the past"[468] and with it being "inconceivable

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[463] Impugned Decision, para. 235.
[464] Document in Support of the Appeal, p. 38.
[465] Document in Support of the Appeal, para. 92.
[466] Document in Support of the Appeal, para. 93.
[467] Document in Support of the Appeal, para. 93.
[468] Document in Support of the Appeal, para. 103.

that any judges would be able to do anything other than convict and order Mr. Al-Senussi's execution given the consequences for their own position and indeed their own safety and lives" (footnote omitted).[469]

235. Libya argues that the Defence has not demonstrated that the Pre-Trial Chamber erred in its approach to the evidence and that the Defence's alleged factual errors "are informed by the incorrect legal test" and do not amount to clear errors even on the basis of "the correct test".[470]

236. The Prosecutor submits that the Defence does not demonstrate how the Pre-Trial Chamber erred in assessing the evidence or demonstrate that its findings were unreasonable.[471] She argues, *inter alia*, that the submissions of the Defence related to Mr Al-Senussi's due process rights are based upon an incorrect interpretation of the law and "constitute a misguided disagreement with the Chamber's assessment of the evidence".[472]

237. The Victims adopt in full the submissions of the Defence in relation to the Pre-Trial Chamber's factual assessment of unwillingness (and inability), submitting that the Chamber failed properly to assess the significant body of evidence that showed that Libya was unwilling (and unable).[473]

238. More specific arguments of the Defence, and responses thereto, are addressed during the course of the determination of the Appeals Chamber of this part of the appeal, which follows directly below.

(ii) Determination by the Appeals Chamber

239. For the reasons that follow, the Appeals Chamber finds that the Defence has failed to demonstrate that the findings of the Pre-Trial Chamber were unreasonable.

240. The Defence divides its alleged errors into different sub-headings, which the Appeals Chamber will address in turn. The Defence does not clearly specify whether

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[469] Document in Support of the Appeal, para. 96.
[470] Libya's Response to the Document in Support of the Appeal, para. 83. *See*, generally, paras 29-32, 70-100.
[471] Prosecutor's Response to the Document in Support of the Appeal, para. 64. *See*, generally, paras 64-90.
[472] Prosecutor's Response to the Document in Support of the Appeal, paras 74-75.
[473] Victims' Observations on Appeal, para. 16.

it is alleging errors of fact or law or a combination of the two, but the manner in which it presents its arguments suggests that these are primarily alleged errors of fact.

241. In respect of errors of fact, 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' [...]. 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 interfere only in the case where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it' [...][474] [Footnotes omitted.]

242. It is this standard of review that will guide the Appeals Chamber in its consideration of the Defence's alleged errors of fact.

243. The Defence first argues that the Pre-Trial Chamber overlooked "substantial and compelling evidence" that established that "the conditions for holding a fair, impartial and independent trial in Libya simply do not exist".[475] The Defence presents, at paragraph 96 of the Document in Support of the Appeal, eleven bullet points concerning alleged deficiencies in the national proceedings in Libya, stating that the sources of the evidence for the assertions made "are provided in the footnotes", which are extensive and, *inter alia*, list submissions and evidence that were before the Pre-Trial Chamber. However, save for its overall assertion that the Pre-Trial Chamber overlooked "substantial and compelling evidence" in coming to its conclusion, the Defence does not precisely specify the alleged error made by the Pre-Trial Chamber in relation to each of the assertions set out nor do they focus concretely upon which aspects of the evidence listed in the footnotes it allegedly demonstrates that the conclusions of the Pre-Trial Chamber were erroneous or unreasonable. These failures necessarily affect the manner in which the Appeals Chamber can respond to this part of the Defence arguments.

244. Nevertheless, the Appeals Chamber makes the following specific comments on the bullet points that are raised:

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[474] *Gaddafi* Admissibility Judgment, para. 93.
[475] Document in Support of the Appeal, para. 96.

a) the Defence submissions about "essentially incommunicado imprisonment"[476] concern arguments raised about Mr Al-Senussi's lack of access to a lawyer, which was directly taken into consideration by the Pre-Trial Chamber, and has already been addressed – and dismissed – above; the same is true in relation to any purported new evidence about Mr Al-Senussi's treatment in detention, as the Defence application for the admission of additional evidence on appeal has been rejected. As such, the arguments raised by the Defence in this part of its appeal must likewise be dismissed;

b) issues arising out of the Defence assertion that, in light of public demand and statements of members of the Government, "the pressure on the Libyan judiciary is such that the only possible outcome of any national proceedings in Libya will be Mr. Al-Senussi's conviction and execution"[477] were addressed, and rejected, by the Pre-Trial Chamber, which found that it was not persuaded "that the statements referenced by the Defence can be attributed to the actual or perceived conduct of the Libyan judicial authorities that are involved in the proceedings against Mr Al Senussi" and that, therefore, it was not persuaded that these statements would indicate that the proceedings were not being carried out independently and impartially and were inconsistent with an intent to bring Mr Al-Senussi to justice within the meaning of article 17 (2) (c) of the Statute.[478] The Defence does not substantiate on appeal why the factual finding that the statements could not be attributed to the judicial authorities was unreasonable (as opposed to expressing disagreement with the factual conclusion of the Pre-Trial Chamber). The arguments raised in this regard must therefore be dismissed;

c) similarly, the assertion that "[j]udges and prosecutors, including in Mr. Al-Senussi's case, are under threat and attack"[479] was expressly addressed by the

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[476] Document in Support of the Appeal, para. 96, first bullet point.
[477] Document in Support of the Appeal, para. 96, second bullet point.
[478] Impugned Decision, para. 241. It is noted that, in coming to that conclusion, the Pre-Trial Chamber footnoted both paragraph 168 of the Defence Response to the Admissibility Challenge, which referred to the public statements referenced by the Defence in making its submissions, as well as the findings that the Pre-Trial Chamber made in relation to allegations of a systemic lack of independence and impartiality of the Libyan judiciary, which are addressed further below (*see*, Impugned Decision, footnotes 560 and 561).
[479] Document in Support of the Appeal, para. 96, third bullet point.

Pre-Trial Chamber,[480] which took the overall security situation into account as part of its overall conclusion on inability[481] – and the conclusion that the Defence purports to draw from the security situation, namely that it is "inconceivable that any judges would be able to do anything other than convict and order Mr. Al-Senussi's execution" in light of the security situation[482] is speculative;

d) similar considerations to those set out in the previous paragraph apply to the Defence allegations in relation to "the prominence and power of armed militia groups" and the conclusion that the Defence purports to draw that "it is inconceivable that any court sitting in Al-Hadba could be regarded as free and independent of the influence of armed militia groupings".[483] These arguments must therefore also be dismissed as unsubstantiated;

e) the fact that Judge Van den Wyngaert expressed her concerns in relation to the security situation following the abduction and release of the then Libyan Prime Minister[484] did not affect her overall finding that the case against Mr Al-Senussi was inadmissible on the basis of the record as it then stood.[485] This argument therefore cannot assist the Defence;

f) the Pre-Trial Chamber's finding in relation to Mr Al-Senussi's alleged mistreatment in detention[486] was that the submissions of the Defence in this regard were "generic assertions without any tangible proof", that the matter was not properly raised so as to require Libya to disprove it and that "the burden of proof that lies with Libya cannot be interpreted as an obligation to disprove any possible 'doubts' raised by the opposing participants in the

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[480] Impugned Decision, paras 259-261, 272-281. It is noted that the Pre-Trial Chamber specifically referenced, *inter alia*, the majority of the paragraphs of the Defence Response to the Admissibility Challenge and Defence's Additional Submissions on Admissibility Challenge to which the Defence now refers on appeal (*see*, Impugned Decision, footnotes 600, 630 when compared with Document in Support of the Appeal, footnotes 159, 160).
[481] Impugned Decision, paras 299, 303.
[482] Document in Support of the Appeal, para. 96, third bullet point.
[483] Document in Support of the Appeal, para. 96, fourth bullet point. The Pre-Trial Chamber addressed Defence submissions in relation to alleged militia control of Al-Hadba at paragraphs 263-265 of the Impugned Decision.
[484] Document in Support of the Appeal, para. 96, fifth bullet point.
[485] "Declaration of Judge Christine Van den Wyngaert", 11 October 2013, ICC-01/11-01/11-466-Anx, para. 1.
[486] Document in Support of the Appeal, para. 96, sixth bullet point.

admissibility proceedings".[487] As already found above,[488] the Appeals Chamber does not find any error in relation to this approach of the Pre-Trial Chamber;

g) the Defence allegation that the Pre-Trial Chamber's finding that the hearing on 19 September 2013 "proceeded 'without incident' is a gross misstatement"[489] is unsubstantiated – as are the other allegations made in that sub-paragraph of the Document in Support of the Appeal that have not already been addressed above. In fact, the Pre-Trial Chamber, in reaching that conclusion, specifically referred to its finding that the hearing had "reportedly occurred without security incidents despite the presence of certain protesters outside the courtroom"[490] by reference to three newspaper articles that had been relied upon by Libya.[491] Having examined those three newspaper articles and the submissions that Libya had made in relation thereto,[492] the Appeals Chamber cannot find any error in relation to the finding of the Pre-Trial Chamber. The Appeals Chamber notes that the Defence did not attempt to place the newspaper article upon which it purports to rely on appeal in relation to this finding before the Pre-Trial Chamber and therefore, for the reasons that were expressed above in relation to the application to admit additional evidence and the corrective nature of an appeal, cannot rely upon it now. The Defence arguments addressed in this paragraph must therefore be dismissed;

h) insofar as the Defence argues that "[t]here was simply no basis for the Chamber to conclude that Mr. Al-Senussi's rights to due process have been guaranteed",[493] the submissions in relation to the lack of legal representation have been addressed, and dismissed, above. Furthermore, as set out above in relation to the correct interpretation of article 17 (2) (c) of the Statute, it has also been pointed out that due process considerations *per se* do not lead to the

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[487] Impugned Decision, para. 239. The Pre-Trial Chamber had also previously stated that "although Libya carries the burden of proof, any factual allegation raised by any party or participant must be sufficiently substantiated in order to be considered properly raised" (Impugned Decision, para. 208).
[488] *See* above, paras 166 et seq.
[489] Document in Support of the Appeal, para. 96, seventh bullet point.
[490] Impugned Decision, para. 303.
[491] Impugned Decision, para. 215 and footnote 503.
[492] Libya's Final Submissions, para. 33.
[493] Document in Support of the Appeal, para. 96, eighth bullet point.

automatic admissibility of a case, nor has the Defence demonstrated that the factual conclusions of the Pre-Trial Chamber in relation to due process were unreasonable. These Defence arguments must therefore be dismissed;

i) the Defence argument that it is inconceivable that Defence witnesses will testify for Mr Al-Senussi in the absence of adequate witness protection measures[494] is speculative, in particular in the absence of any information about who such witnesses may be. In fact, the Pre-Trial Chamber specifically took the absence of witness protection programmes into account in its determination of whether Libya was genuinely able to carry out its proceedings under article 17 (3) of the Statute[495] and further found that "there is no indication from the information in its possession that witnesses would deliberately be exposed to, or intentionally left unprotected from, security threats in the country on the part of Libya such that it would be inconsistent with an intent to bring Mr Al-Senussi to justice" pursuant to article 17 (2) (c) of the Statute[496] – and the Defence has not demonstrated that that conclusion was unreasonable;

j) the relevance of the detention of Mr Al-Senussi's daughter[497] to the Defence case on admissibility has not been made out. Indeed, the Defence has neither directly challenged the Pre-Trial Chamber's conclusion on this issue[498] nor demonstrated that it was unreasonable;

k) the Defence submissions in relation to its inability to visit Mr Al-Senussi in Libya[499] have been addressed – and dismissed – above.

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[494] Document in Support of the Appeal, para. 96, ninth bullet point.
[495] Impugned Decision, paras 287, 300-301. At paragraph 300, the Pre-Trial Chamber specifically noted "that several officials of the Gaddafi-era, whose testimony may arguably be considered of particular importance in the case against Mr Al-Senussi, are currently detained in the Al-Hadba prison of Tripoli, which [...] is under the control of the Libyan Government".
[496] Impugned Decision, para. 288.
[497] Document in Support of the Appeal, para. 96, tenth bullet point.
[498] Impugned Decision, para. 242, which states, in relevant part: "The Chamber is not in a position to determine the circumstances surrounding Anoud Al-Senussi's conviction and is in any event unable to draw any inference from this fact raised by the Defence. Indeed, the type of 'evidential shortcomings and procedural irregularities' identified by the Defence, even if they occurred, does not indicate Libya's unwillingness or inability to carry out the proceedings against Mr Al-Senussi" [footnote omitted].
[499] Document in Support of the Appeal, para. 96, eleventh bullet point.

245. The Appeals Chamber concludes that the evidential matters raised by the Defence that have been addressed above, whether taken individually or collectively, do not demonstrate any error in relation to the findings of the Pre-Trial Chamber for the reasons set out above.

246. The Defence next argues that the Pre-Trial Chamber, in its assessment of the evidence, failed to have regard to international standards and placed undue weight on irrelevant factors.[500] In light of both its legal and factual findings above, the Appeals Chamber finds the Defence's arguments in this part of the Document in Support of the Appeal to be based upon an incorrect interpretation of the meaning of article 17 (2) (c) of the Statute, to be unsubstantiated on the facts or to fail to identify any concrete error on the part of the Pre-Trial Chamber. As such, the Defence has not shown any error in the approach or findings of the Pre-Trial Chamber.

247. Under the heading "'Progress' in the proceedings and the hearing on 19 September 2013",[501] the Defence argues in essence that the Pre-Trial Chamber should not have placed weight on the case having progressed to the accusation stage and the hearing on 19 September 2013 having occurred "without incident".[502] The various arguments that the Defence raises in this regard are addressed – and dismissed – in other parts of this judgment. The Appeals Chamber therefore does not need to address them further here.

248. The Defence next argues, under the heading "Treatment in detention and violations of Mr. Al-Senussi's due process rights"[503] that the Pre-Trial Chamber reversed the burden of proof by requiring the Defence to prove that Mr Al-Senussi was not being treated humanely and brought to justice.[504] The Defence further argues that the Pre-Trial Chamber's reliance upon three pieces of evidence to demonstrate that Libya had in any event met the concerns of the Defence was flawed and that the Pre-Trial Chamber did not sufficiently take into account that Mr Al-Senussi did not have legal representation.[505]

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[500] Impugned Decision, paras 94, 99-103.
[501] Document in Support of the Appeal, p. 51.
[502] Document in Support of the Appeal, paras 104-106.
[503] Document in Support of the Appeal, para. 52.
[504] Document in Support of the Appeal, paras 107-108.
[505] Document in Support of the Appeal, paras 109-111.

249. The Appeals Chamber has already addressed Defence arguments in relation to the burden of proof and Mr Al-Senussi's lack of legal representation above and not found there to be any error in the approach of the Pre-Trial Chamber.[506] The Pre-Trial Chamber did not reverse the burden of proof, but instead reasonably found that a matter must be properly raised before Libya is under an obligation to disprove it – and that had not been done by the Defence in the present case.[507] In those circumstances, any alleged flaws made by the Pre-Trial Chamber in relation to evidence presented by Libya were irrelevant to its ultimate conclusion, which was that the matters had not been appropriately raised by the Defence and that Libya therefore did not have to disprove them.[508] While it is therefore unnecessary to address the Defence arguments further, the Appeals Chamber nevertheless notes that there was no error in the Pre-Trial Chamber proceeding to observe that Libya had in any event addressed most of the matters put forward by the Defence, including that Human Rights Watch had reported that Mr Al-Senussi had not complained of physical abuse and had described his conditions as reasonable in a private interview that it had held with him.[509]

250. Under the heading "Lack of independence and impartiality",[510] the Defence raises several arguments that the Appeals Chamber will address separately below. In so doing, the Appeals Chamber considers that, as a result of its findings in relation to the facts, in the particular circumstances of this case it is unnecessary for it to give a comprehensive definition of the elements of independence and impartiality in this judgment. However, the Appeals Chamber considers that basic definitions of those terms that have been utilised previously, including in the context of decisions of human rights tribunals, are of relevance in relation to their meaning under article 17 (2) (c) – at least when considering the independence and impartiality of national courts. In general terms, independence incorporates the notion of a court being independent of the executive and the legislature, as well as of the parties to the proceedings. In respect of impartiality, the personal or subjective impartiality of a

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[506] *See* above, paras 166 et seq.
[507] Impugned Decision, paras 208, 239.
[508] Impugned Decision, para. 239.
[509] Impugned Decision, para. 240.
[510] Document in Support of the Appeal, p. 55.

judge is presumed unless the contrary is shown; yet consideration also needs to be given as to whether objective reasonable doubts as to impartiality arise.[511]

251. The Defence first argues that the Pre-Trial Chamber overlooked the effect that Government statements assuming Mr Al-Senussi's guilt would have on the judiciary.[512] The Defence submits that, combined with public opinion and the presence of armed militia groups, it was impossible for any court to give Mr Al-Senussi a fair and independent hearing in which he could be acquitted, with the Pre-Trial Chamber having overlooked "[t]he well-established principle of 'justice being done and being seen to be done'".[513]

252. In relation to this argument, the Appeals Chamber notes that the Pre-Trial Chamber did not overlook the concept of justice "being done and being seen to be done", making it express that it was not persuaded that the statements by public officials that had been referenced by the Defence could be attributable "to the actual *or perceived* conduct of the Libyan judicial authorities that are involved in the proceedings against Mr Al-Senussi" (emphasis added).[514] As already found above in relation to the Defence's general arguments under the heading that "substantial and compelling evidence was overlooked",[515] the Defence has not shown that this factual finding of the Pre-Trial Chamber was unreasonable.

253. The Defence also argues under the heading of "lack of independence and impartiality"[516] that the Pre-Trial Chamber failed to address the Defence argument that a higher level of scrutiny was required in Mr Al-Senussi's case because it could

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[511] *See*, in this connection, the standard that the Plenary of the Court has used in relation to impartiality within article 41 (2) (a) of the Statute, namely: "whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias in the judge. This standard is concerned not only with whether a reasonable observer could apprehend bias, but whether any such apprehension is objectively reasonable" (footnotes omitted): "Decision of the Plenary of Judges on the Defence Applications for the Disqualification of Judge Cuno Tarfusser from the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*", 20 June 2014, ICC-01/05-01/13-511-Anx, para. 17. The Appeals Chamber has also adopted the standard of the "reasonable observer, properly informed", albeit in the context of the impartiality of the Prosecutor pursuant to article 42 (7) of the Statute; *see Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Decision on the Request for Disqualification of the Prosecutor", 12 June 2012, ICC-01/11-01/11-175 (OA 3), para. 20.
[512] Document in Support of the Appeal, paras 112-113.
[513] Document in Support of the Appeal, para. 113.
[514] Impugned Decision, para. 241.
[515] Document in Support of the Appeal, p. 39.
[516] Document in Support of the Appeal, p. 55.

result in the imposition of the death penalty,[517] wrongly rejected arguments that it had made in relation to proceedings against Mr Al-Senussi's daughter[518] and that no mention was made of Mr Al-Senussi being without any legal representation at the hearing of 19 September 2013, upon which the Pre-Trial Chamber relied as an example of judicial independence, referring to the adjournment of the hearing to allow certain defence teams to view the accusation file.[519]

254. In respect of these arguments, the Appeals Chamber observes, first, that the Pre-Trial Chamber expressly set out the Defence argument that considerations of due process must be even more stringent in a case to which the death penalty was potentially applicable – and reiterated that its assessment was to be made by reference to Libya's domestic law.[520] The Pre-Trial Chamber had also set out the more stringent procedure that applied under Libyan law in relation to cases in which the death penalty has been imposed following conviction.[521] The Pre-Trial Chamber was therefore expressly aware that the potential imposition of the death penalty formed a part of the factual context in which it was determining whether Libya was unwilling and took its decision against that background. What was at issue for the Pre-Trial Chamber was whether the requirements of article 17 (2) (c) of the Statute had been met. For the reasons set out in this judgment, the Defence has not demonstrated any error in the conclusions of the Pre-Trial Chamber in that regard. Second, the Defence has not demonstrated that the Pre-Trial Chamber's conclusions in relation to Mr Al-Senussi's daughter were unreasonable, nor is it apparent that these allegations could, in any event, establish Libya's unwillingness in the present case within the meaning of article 17 (2) (c) of the Statute. Third, Mr Al-Senussi's lack of legal representation has been addressed by the Appeals Chamber above.

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[517] Document in Support of the Appeal, paras 114-115.
[518] Document in Support of the Appeal, para. 116.
[519] Document in Support of the Appeal, para. 119.
[520] Impugned Decision, paras 220-221.
[521] Impugned Decision, para. 205, in which the Pre-Trial Chamber stated as follows, footnoting paragraphs of the Admissibility Challenge: "The judgment of the Criminal Trial Court can be appealed to the Supreme Court by the Prosecutor or by the defendant, depending on whether it is a verdict of acquittal or conviction. In the event it finds errors of law, the Supreme Court nullifies the verdict of the Criminal Trial Court. A more stringent procedure is followed when the death penalty has been imposed following conviction. In these cases, the sentence cannot be carried out until the Supreme Court has considered the case and, even if the defendant does not appeal the sentence, the Prosecutor is obliged to do so before the sentence can be carried out. Furthermore, in these situations, the Supreme Court is not limited to considering errors of law, but reviews all factual, legal and procedural matters leading to the verdict and sentence" (footnotes omitted).

255. The Defence further submits that the Pre-Trial Chamber relied upon evidence of independence and impartiality in its conclusions that was not directly relevant to Mr Al-Senussi's case and that this was in contrast to the manner in which it had stated that Defence evidence could only be considered to the extent that the systemic difficulties raised had a bearing on Mr Al-Senussi's case.[522]

256. The Appeals Chamber observes generally that the Pre-Trial Chamber's approach to independence and impartiality was careful and considered[523] – and is not persuaded by the arguments that the Defence raises on appeal. The Appeals Chamber notes that the Pre-Trial Chamber expressly addressed the factual assertions of the Defence and the Victims,[524] yet did not find them to be persuasive.[525] The fact that the Pre-Trial Chamber was more persuaded by evidence presented by Libya than that presented by the Defence does not, in itself, amount to an appealable error. The Defence has not demonstrated that there was anything unreasonable about the conclusions of the Pre-Trial Chamber.

257. The Appeals Chamber specifically disagrees with the submission of the Defence that none of the material relied upon in the Impugned Decision had anything to do with Mr Al-Senussi's case.[526] Information provided by Libya about the independence and impartiality of its courts in general is clearly relevant to the determination to be carried out under article 17 (2) (c) of the Statute – as the wording of rule 51 of the Rules of Procedure and Evidence itself demonstrates (enabling a State to provide information to the Court showing that "its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct").

258. Furthermore, the examples relied upon in respect of the independence and impartiality of proceedings in relation to other senior members of the former regime, at least one of whom is being held in the same prison as Mr Al-Senussi, and whose cases are joined to and part of the same case as that against Mr Al-Senussi,[527] are

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[522] Document in Support of the Appeal, paras 117-119.
[523] *See*, Impugned Decision, paras 244-258.
[524] Impugned Decision, paras 246-247.
[525] Impugned Decision, para. 258. *See also* paras 248-251.
[526] Document in Support of the Appeal, para. 117.
[527] *See* Impugned Decision, paras 251, 254-256.

clearly relevant factors to take into consideration, in particular in the absence of any specific information that the court proceedings in Mr Al-Senussi's case are not being undertaken independently or impartially. It is not unreasonable to assume that if their proceedings can be conducted independently and impartially, the same is true for the proceedings in relation to Mr Al-Senussi. The fact that the Defence had requested the Pre-Trial Chamber to take into account a report stating that the Minister of Education of the former regime had been sentenced to capital punishment on similar charges to those alleged against Mr Al-Senussi was specifically referred to by the Pre-Trial Chamber[528] and, if anything, demonstrates that there have been different outcomes (convictions and acquittals) in relation to cases involving members of the former regime.

259. Furthermore, the Appeals Chamber is not persuaded by the argument of the Defence that the acquittals referred to by the Pre-Trial Chamber are irrelevant and were for unrelated offences.[529] The Appeals Chamber understands the Pre-Trial Chamber to have found these acquittals to be of relevance as they demonstrate that Libyan courts had acquitted former senior members of the same regime of very serious charges (albeit not the same charges as the case now under consideration, the trial of which is yet to commence). The Appeals Chamber does not find any clear error or unreasonableness in the Pre-Trial Chamber noting Libya's submission that those acquittals had reportedly been seen as important because they demonstrated the independence and impartiality of Libyan courts in relation to senior members of the former regime on trial for serious charges.[530]

260. The Defence argues finally, in this part of its appeal, that the Pre-Trial Chamber erroneously rejected Defence arguments that Mr Al-Senussi's allegedly unlawful rendition from Mauritania to Libya demonstrated that Libya was unwilling and unable to try him.[531]

261. The Appeals Chamber does not find any unreasonableness in the conclusion of the Pre-Trial Chamber that "the alleged modalities of Mr Al-Senussi's transfer to Libya, irrespective of whether they are true" do not demonstrate unwillingness or

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[528] Impugned Decision, para. 246.
[529] Document in Support of the Appeal, para. 118.
[530] Impugned Decision, para. 255.
[531] Document in Support of the Appeal, paras 120-122.

inability within the meaning of articles 17 (2) or (3) of the Statute.[532] Nor does the Appeals Chamber accept the Defence assertion that the alleged manner of his transfer renders a conviction inevitable.[533] It was not unreasonable for the Pre-Trial Chamber to find that the manner of Mr Al-Senussi's transfer could not, in the circumstances of the present case, establish unwillingness within the meaning of article 17 (2) (c) of the Statute.

262. For the reasons stated above, the Appeals Chamber does not find that the Defence has demonstrated any error in the findings of the Pre-Trial Chamber within this part of the appeal, which must, therefore, be dismissed.

4. Failure to find that Libya is unable to try Mr Al-Senussi

263. Under the heading "Failure to find that Libya is unable to try Mr. Al-Senussi",[534] the Defence submits, pursuant to article 17 (3) of the Statute, that the finding that Libya is able to carry out the proceedings in this case should be reversed.[535] The Defence argues that "in respect of each of the issues that it considered [in relation to article 17 (3) of the Statute], the Chamber failed to give any weight to the real impediments created by the fragile state of security in Libya as it impacted directly on Mr. Al-Senussi's case".[536] The Defence then proceeds to set out arguments against the findings of the Pre-Trial Chamber in relation to each of the factors that the Pre-Trial Chamber addressed, which will be addressed in turn below.

264. Article 17 (3) of the Statute 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.

265. The Appeals Chamber notes that, in order to make a finding of inability under article 17 (3) of the Statute, the Court must be satisfied that there is *both* a "total or substantial collapse or unavailability" of the national judicial system *and* that, as a result, "the State is unable to obtain the accused or the necessary evidence and

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[532] Impugned Decision, para. 236.
[533] Document in Support of the Appeal, para. 121.
[534] Document in Support of the Appeal, p. 58.
[535] Document in Support of the Appeal, paras 123-135.
[536] Document in Support of the Appeal, para. 123.

testimony or otherwise unable to carry out its proceedings". The Appeals Chamber will therefore first examine the Defence arguments from the perspective of whether there was any error in the findings of the Pre-Trial Chamber in relation to each of the aspects of being "unable" that are set out. As set out above in relation to the section of this judgment on unwillingness, the standard of review for factual errors is whether the findings of the Pre-Trial Chamber demonstrated a clear error or were unreasonable.

(a) Lack of Government control over detention facilities

(i) Relevant part of the Impugned Decision

266. The Pre-Trial Chamber considered the Defence argument that the Al-Hadba prison (Mr Al-Senussi's detention facility) was "in effect being run by militia groups outside the requisite Government control" (footnote omitted),[537] and considered that whether the Al-Hadba prison was under Libya's control was relevant to Libya's ability to obtain Mr Al-Senussi and carry out the proceedings,[538] but was satisfied that Libya exercised sufficient control.[539] The Pre-Trial Chamber further considered *ex parte* evidence placed before it by the Defence, but concluded that it did not support the Defence's argument that the document confirmed the reality of militia control of the prison,[540] and demonstrated that judicial proceedings against people in the prison were ongoing and were therefore not impeded by alleged militia control.[541]

267. The Pre-Trial Chamber further considered the Defence argument that Libya did not have control of all detention centres throughout the country,[542] in the context of whether this made Libya unable to obtain the necessary evidence and testimony under article 17 (3) of the Statute.[543] In so doing, it set out the Defence arguments and evidence in relation to Libya's inability to access witnesses and obtain the necessary testimony,[544] including quoting one of the prosecutors in Mr Al-Senussi's case stating

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[537] Impugned Decision, para. 263.
[538] Impugned Decision, para. 264.
[539] Impugned Decision, para. 264.
[540] Impugned Decision, para. 265.
[541] Impugned Decision, para. 265.
[542] Impugned Decision, para. 266, referring to the Defence Response to the Admissibility Challenge, paras 76-84.
[543] Impugned Decision, para. 267.
[544] Impugned Decision, paras 268-269, referring to two International Crisis Group reports and a newspaper report, upon which the Defence had relied.

that there were secret prisons in Libya that the Attorney General could not enter.[545] The Pre-Trial Chamber opined that the undisputed fact that "an unspecified number of detention centres are yet to be transferred under the control of the central government [...] may be a relevant 'contextual' fact" in relation to whether Libya could carry out its proceedings against Mr Al-Senussi under article 17 (3) and would be taken into account in the overall factual assessment,[546] alongside submissions and evidence from Libya that the Libyan Ministry of Justice was working to bring all detention centres under the full control of the judicial police, with the continued close assistance of the UN.[547]

268. In its overall conclusion,[548] the Pre-Trial Chamber considered whether, taking into account the evidence already gathered by Libya, factual circumstances rendered Libya unable.[549] The Pre-Trial Chamber found that the security situation was a relevant aspect, as it could impact upon Libya's capacity to obtain the evidence that is necessary to conduct genuine criminal proceedings against Mr Al-Senussi and that the security situation must be assessed against the absence of effective protection for witnesses and the fact that certain detention facilities are yet to be transferred to the Ministry of Justice's authority – factors that were compelling in the *Gaddafi* case "given that Libya did not satisfactorily demonstrate that it had collected more than a few sparse items of evidence as part of its investigation against Mr Gaddafi".[550] In the present case, Libya had provided a considerable amount of evidence, and there was nothing to indicate that the collection of testimony would cease because of security concerns for witnesses in the case against Mr Al-Senussi or lack of governmental control over certain detention facilities.[551] The Pre-Trial Chamber considered that the progressive and concrete investigative steps taken and the fact that judicial proceedings were progressing and had reached the accusation stage demonstrated that the proceedings had not been prejudiced by the security challenges, noting also that

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[545] Impugned Decision, para. 269.
[546] Impugned Decision, para. 270.
[547] Impugned Decision, para. 271, referring to annexes 20 and 23 to "Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", 23 January 2013, ICC-01/11-01/11-258-Red2 (hereinafter: "Libya's Submissions of 23 January 2013") and annex 29 to the Admissibility Challenge.
[548] Impugned Decision, paras 295-301.
[549] Impugned Decision, para. 296.
[550] Impugned Decision, para. 297.
[551] Impugned Decision, para. 298.

other officials of the former regime were subject to ongoing judicial proceedings.[552] The Pre-Trial Chamber further noted that several officials of the former regime "whose testimony may arguably be considered of particular importance in the case against Mr Al-Senussi" were currently detained in the Al-Hadba prison under the control of the Libyan Government.[553]

(ii) Submissions of the parties and participants

269. The Defence challenges the conclusion of the Pre-Trial Chamber that Libya exercised sufficient control over Mr Al-Senussi's detention facilities, which the Defence contends was "critical" to its finding that the judicial system had not collapsed or was not unavailable, arguing that it "misappreciated crucial evidence of militia being able to influence the treatment of Mr. Al-Senussi and the conduct of his proceedings".[554] The Defence argues that the Pre-Trial Chamber relied solely upon Libya's assertions and a single Human Rights Watch report to come to this conclusion, as opposed to Defence evidence, including a confidential witness statement confirming that militia controlled the prison.[555] The Defence submits that the militia are simply "backing Mr. Al-Senussi's prosecution so that he can be convicted and sentenced to death" and "their presence and influence makes a mockery of fair and just proceedings".[556]

270. The Defence further submits that the Pre-Trial Chamber was wrong to conclude that the fact that other detention facilities were not under Government control was not decisive because Libya could advance the proceedings against Mr Al-Senussi – and that the distinction that it drew with its finding in the *Gaddafi* case on this issue was "wholly unsustainable".[557] The Defence argues that, in the *Gaddafi* Admissibility Decision, the Pre-Trial Chamber did not rely upon the lack of evidence gathered in that case to find that Libya was unable to obtain the necessary evidence due to the security situation and not exercising sufficient control over prisons and that the findings in the two cases should be the same.[558] The Defence contends that the security situation and lack of control of prisons are serious impediments to being able

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[552] Impugned Decision, para. 299.
[553] Impugned Decision, para. 300.
[554] Document in Support of the Appeal, paras 124-125.
[555] Document in Support of the Appeal, paras 125-126.
[556] Document in Support of the Appeal, para. 126.
[557] Document in Support of the Appeal, para. 127.
[558] Document in Support of the Appeal, para. 127.

to carry out the proceedings, with it being impossible to conduct proceedings in Libya if the necessary evidence cannot be obtained and witnesses are not protected, in particular if defence witnesses cannot be obtained as a result of lack of Government control over detention facilities or because they are too afraid to come forward without effective witness protection.[559]

271. Libya submits that the Pre-Trial Chamber did not commit any error of law or fact in relation to its finding that Libya is able to carry out the proceedings against Mr Al-Senussi.[560] Libya argues that the Defence makes "generalised and speculative assertions" in relation to alleged militia involvement in the running of the Al-Hadba prison,[561] that no error is demonstrated by the Defence submissions in relation to the control of other detention facilities[562] and that the Pre-Trial Chamber's approach in taking into account the investigative material that had been gathered in the case as a whole was "entirely reasonable".[563]

272. The Prosecutor submits that the Defence submissions should be dismissed,[564] contending that the Pre-Trial Chamber reasonably concluded that Libya was not unable to obtain the accused or the necessary evidence and testimony for his proceedings.[565]

273. The Victims adopt in full the submissions of the Defence in relation to the Pre-Trial Chamber's factual assessment of inability (and unwillingness), with respect to each of the grounds of inability that are considered in this judgment below, submitting that the Pre-Trial Chamber failed properly to assess the significant body of evidence that showed that Libya was unable (and unwilling).[566]

(iii) Determination by the Appeals Chamber

274. The Appeals Chamber observes that, in finding itself satisfied that Libya had demonstrated that it exercised sufficient control over Mr Al-Senussi's detention facilities, the Pre-Trial Chamber set out in a footnote the evidence upon which it had

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[559] Document in Support of the Appeal, para. 128.
[560] Libya's Response to the Document in Support of the Appeal, para. 101.
[561] Libya's Response to the Document in Support of the Appeal, para. 102.
[562] Libya's Response to the Document in Support of the Appeal, para. 103.
[563] Libya's Response to the Document in Support of the Appeal, para. 104.
[564] Prosecutor's Response to the Document in Support of the Appeal, para. 94.
[565] Prosecutor's Response to the Document in Support of the Appeal, paras 94-102.
[566] Victims' Observations on Appeal, para. 16.

relied to come to that conclusion.[567] This included reference to a letter from the Prosecutor-General confirming that Mr Al-Senussi was being held at the "Al Hadaba Detention Facility of the Ministry of Justice",[568] to a further letter demonstrating that Mr Al-Senussi had been questioned by the national judicial authorities,[569] to a Human Rights Watch report of 17 April 2013 stating, *inter alia*, that Mr Al-Senussi's detention facility "is administered by the judicial police under the authority of the Justice Ministry", that the visit was "facilitated by Justice Minister Salah Marghani and the acting head of the detention facility", and that Mr Al-Senussi had said that he had been brought before a judge about once a month to review his detention and had been questioned by Libyan investigators during his first five months in detention,[570] and to Libya's submissions that (a) judicial proceedings were ongoing against Muammar Gaddafi's last Prime Minister, who is detained at the same prison,[571] and (b) that the 19 September 2013 hearing took place in a courtroom that is part of the same purpose-built complex as Al-Habda prison, exemplifying the Government's control over the prison.[572]

275. The Appeals Chamber has also had regard to the confidential *ex parte* annex that the Defence provided only to the Pre-Trial Chamber,[573] to which reference was made in the Impugned Decision. The Appeals Chamber has noted the conclusion of the Pre-Trial Chamber that it did not accept the Defence argument that Libya did not have control of the Al-Hadba prison. The Appeals Chamber has further noted that, in coming to that conclusion, the Pre-Trial Chamber did not accept the Defence argument that the *ex parte* annex confirmed the reality of militia control of the prison and, in so doing, the Pre-Trial Chamber, in a footnote, also referred to an example of a paragraph of the document that supported the Defence argument, thereby demonstrating that it took a balanced approach to its assessment of the evidence.[574]

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[567] Impugned Decision, footnote 606.
[568] ICC-01/11-01/11-252-Conf-Anx3.
[569] ICC-01/11-01/11-307-Conf-Anx2.
[570] Human Rights Watch, "Libya: Ensure Abdallah Sanussi Access to Lawyer", available at http://www.hrw.org/news/2013/04/17/libya-ensure-abdallah-sanussi-access-lawyer.
[571] Libya's Reply to Responses to the Admissibility Challenge, para. 168.
[572] Libya's Final Submissions, para. 33.
[573] ICC-01/11-01/11-356-Conf-Exp-AnxC.
[574] Impugned Decision, para. 265 and footnote 608.

The Appeals Chamber observes that the Pre-Trial Chamber also found that the annex made clear that judicial proceedings were ongoing against persons in the prison.[575]

276. In light of the above, the Appeals Chamber cannot discern any clear error or unreasonableness in the conclusions of the Pre-Trial Chamber. The overall conclusions of the Pre-Trial Chamber were clearly based upon the evidence before it, which is set out above; and the Defence has not demonstrated that those conclusions were unreasonable. In particular, the Defence submissions do not call into question the findings of the Pre-Trial Chamber pursuant to article 17 (3) of the Statute that Libya has been able to obtain Mr Al-Senussi[576] and that the proceedings against him have progressed.[577]

277. Furthermore, the Defence has not substantiated its argument that the militia was able to influence Mr Al-Senussi's treatment and the conduct of the proceedings against him. The Appeals Chamber has already addressed – and dismissed – similar arguments in the section of this judgment on unwillingness.

278. In relation to the Defence argument that the Government did not exercise control over other detention facilities, the Appeals Chamber does not find the Pre-Trial Chamber's conclusions in this regard to be unreasonable. The findings of the Pre-Trial Chamber have been set out in detail above. The Appeals Chamber notes, in particular, that the Pre-Trial Chamber specifically held that the fact that an unspecified number of detention centres were yet to be transferred to the central Government could be of relevance in its determination as to whether Libya was able to carry out the proceedings. In relation to that determination, the Appeals Chamber does not find it unreasonable for the Pre-Trial Chamber to have had regard to the amount of evidence that had already been gathered by Libya, including a reference by the Pre-Trial Chamber to paragraphs 161 and 211 of the Impugned Decision[578] in which it had expressly detailed the investigative steps that had been undertaken to date (which included the investigators having inquired about and recorded aspects of a potentially exculpatory nature). The Pre-Trial Chamber also expressly noted that several officials of the former regime were in the same prison as Mr Al-Senussi and

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[575] Impugned Decision, para. 265 and footnote 610.
[576] Impugned Decision, para. 294.
[577] Impugned Decision, paras 299, 303.
[578] Impugned Decision, para. 298, footnote 661.

that their evidence might be of particular importance in his case.[579] Recalling that the Pre-Trial Chamber was examining whether Libya was able to obtain "the necessary evidence and testimony", the Appeals Chamber cannot find anything unreasonable about its findings in the circumstances set out.

279. Furthermore, the fact that the Pre-Trial Chamber came to a different conclusion from the one that it reached in the *Gaddafi* case also does not demonstrate that it committed any error. The Appeals Chamber emphasises that the facts of the *Gaddafi* case are not before it for resolution in this appeal. Furthermore, a mere difference in conclusion in two cases does not in itself demonstrate unreasonableness in respect of the present appeal. In any event, the conclusion in the present case can be distinguished from that in the *Gaddafi* case. Indeed, the Pre-Trial Chamber itself held that the absence of effective witness protection programmes and the fact that certain detention facilities were yet to be transferred to the authority of the Ministry of Justice had had a direct bearing upon the (lack of) evidence gathered in the *Gaddafi* case.[580] It is correct that the Pre-Trial Chamber in that case did not expressly rely upon the lack of evidence gathered, as opposed to the lack of control over prisons,[581] but the reality was that the Pre-Trial Chamber found that the evidence obtained in that case had not been sufficient for it to determine the actual contours of the case against Mr Gaddafi. As such, insufficient evidence had been gathered and the Pre-Trial Chamber's finding in that case is consistent with determining that the reason for that was that Libya did not have sufficient control over prison facilities to collect the necessary evidence. This was in contrast to the present case in which the Pre-Trial Chamber found that Libya had collected a considerable amount of evidence – and that there was no indication that this would cease as a result of unaddressed security concerns for witnesses or the absence of government control over certain detention facilities.[582] Indeed, the Pre-Trial Chamber found that it was possible to obtain the necessary evidence in the circumstances of the present case, which is the relevant question for the purposes of article 17 (3) of the Statute. The Appeals Chamber does not find this to have been an unreasonable conclusion in the circumstances set out.

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[579] Impugned Decision, para. 300.
[580] Impugned Decision, para. 297.
[581] *See Gaddafi* Admissibility Decision, paras 209-211.
[582] Impugned Decision, para. 298.

(b) Lack of security for judicial authorities and organs

(i) Relevant part of the Impugned Decision

280. In the Impugned Decision, the Pre-Trial Chamber referred to submissions of the Defence in relation to Taha Bara, the deputy prosecutor in Mr Al-Senussi's case, having been abducted and abused by militia groups[583] and to Libya's submissions to the contrary in that regard.[584] The Pre-Trial Chamber stated that it could not determine whether there was any link with his involvement in the Al-Senussi proceedings, not being able to draw a conclusion based upon either the Defence's or Libya's interpretation of the facts.[585]

281. The Pre-Trial Chamber further referred to submissions by the Defence and by the Victims, supported by NGO and media reports, stating that governmental authorities, prosecutors and, to a more limited extent, judges, faced security threats,[586] and to Libya's submissions and evidence in response.[587]

282. The Pre-Trial Chamber opined that certain incidents of threats or violence across the country against judicial authorities may have occurred, which were relevant to its final determination of ability, and would therefore be taken into account.[588] In its overall conclusion, the Pre-Trial Chamber observed that the proceedings in Mr Al-Senussi's case had not so far been prejudiced by security challenges, as demonstrated by the concrete and progressive investigative steps that had been taken, and the judicial proceedings having progressed and reached the accusation stage, with the 19

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[583] Impugned Decision, para. 273, referring to para. 97 of the Defence Response to the Admissibility Challenge.
[584] Impugned Decision, para. 274.
[585] Impugned Decision, para. 275.
[586] Impugned Decision, paras 276-277, referring to Defence Response to the Admissibility Challenge, para. 95 and annex A, Defence's Additional Submissions on Admissibility Challenge, paras 6-14 and Victims' Observations on the Admissibility Challenge, para. 68 and footnote 96.
[587] Impugned Decision, paras 278-280, referring to the Admissibility Challenge, para. 187, Libya's Final Submissions, paras 21-23, 42 and annex 23 of Libya's Submissions of 23 January 2013. The Pre-Trial Chamber noted that Libya did not dispute the existence of serious security challenges across the country, but also submitted that Libya was not passive in the face of violence and that Benghazi was the focus of increasingly successful attempts to apprehend those responsible for violence. The Pre-Trial Chamber further noted efforts made by Libya to identify appropriate measures to provide security personnel to courts, with "coordination mechanisms" being established in that regard between the Ministry of Justice, Ministry of Interior and Ministry of Defence, with the assistance of UNSMIL – and recognising that sufficient personnel would need to be assigned to court buildings; and quoted Libya's submission that it was "fully aware of the security issues that will arise at the time of any trial of Mr. Al-Senussi".
[588] Impugned Decision, para. 281.

September 2013 hearing passing "without incident" – and noting that other former Gaddafi officials are also subject to ongoing judicial proceedings.[589] As such, Libya was able to carry out those proceedings.

(ii) Submissions of the parties and participants

283. The Defence submits that it is "wholly inconsistent" for the Pre-Trial Chamber to have found that security concerns resulted in the judicial system being "unavailable" in the *Gaddafi* case, yet available to try Mr Al-Senussi.[590]

284. The Defence further submits that the Pre-Trial Chamber was wrong to imply that it was necessary to show that the judicial officials in Mr Al-Senussi's case had themselves been threatened.[591] The Defence argues that there is a real danger that, in light of the security concerns, judges will feel unable independently to assess the evidence in the case.[592]

285. Libya argues that the Pre-Trial Chamber's findings were reasonable and that the Defence does not provide any legal or factual substantiation of its submissions.[593]

286. The Prosecutor submits that the Defence fails to demonstrate any error in the reasoning of the Pre-Trial Chamber.[594] The Victims do not make any specific submissions on the issue of lack of security for judicial authorities and organs.

(iii) Determination by the Appeals Chamber

287. The Appeals Chamber does not find the conclusion of the Pre-Trial Chamber in relation to the security situation for judicial authorities and organs to have been unreasonable. As elaborated above in relation to the previous section of this judgment, the distinction between this case and that of *Gaddafi* can be justified as a result of the progress made in the *Al-Senussi* investigation, when compared with the lack of progress in the *Gaddafi* case. It is further noted that, in the *Gaddafi* case, the Pre-Trial Chamber had also found that, on the facts of that case, Libya had been "unable" in all

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[589] Impugned Decision, paras 299, 303.
[590] Document in Support of the Appeal, para. 130.
[591] Document in Support of the Appeal, para. 131.
[592] Document in Support of the Appeal, para. 131.
[593] Libya's Response to the Document in Support of the Appeal, paras 105-107.
[594] Prosecutor's Response to the Document in Support of the Appeal, para. 104. *See also* paras 105-107.

three respects set out in article 17 (3) of the Statute (including an inability to obtain Mr Gaddafi). While not ruling upon the facts of the *Gaddafi* case in the context of this appeal, the Appeals Chamber notes that the facts of the present case are different, and the Defence has not demonstrated any error in the Pre-Trial Chamber having based itself specifically upon the facts of the present case, which led it to different factual conclusions.[595]

288. Furthermore, the Appeals Chamber has already addressed, in the context of considering unwillingness above, Defence arguments in relation to the impact of the security situation on the judges in the present case, and dismisses them here for the same reasons. The Appeals Chamber further agrees with Libya's submission that the Defence arguments raised in this regard are speculative.[596]

(c) Lack of security for witnesses

(i) Relevant part of the Impugned Decision

289. In the Impugned Decision, the Pre-Trial Chamber noted submissions of the Defence[597] – expressly referring to Defence submissions that two prosecution witnesses had informed the Office of the Prosecutor of this Court that they were no longer prepared to testify as a result of security concerns[598] – and the Victims,[599] stating that the lack of an effective witness protection programme in Libya impedes witness testimony in Mr Al-Senussi's case;[600] and considered that the security situation of witnesses could impact upon Libya's ability to obtain the necessary evidence and testimony within the meaning of article 17 (3), stating that, "in the context of a potentially precarious security situation across the country, witnesses may be afraid of coming forward or may be eliminated, ultimately causing prejudice to the domestic proceedings".[601]

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[595] *See* Impugned Decision, paras 294, 299, 301, 303, 308-309.
[596] Libya's Response to the Document in Support of the Appeal, para. 106.
[597] Defence Response to the Admissibility Challenge, paras 106-119.
[598] Impugned Decision, para. 284.
[599] Victims' Observations on the Admissibility Challenge, paras 72-73.
[600] Impugned Decision, para. 282.
[601] Impugned Decision, para. 283.

290. The Pre-Trial Chamber further referred to Libya's submissions,[602] which it considered to add nothing new to what had been submitted by Libya in the *Gaddafi* case, in which the Pre-Trial Chamber had not been persuaded by the assertion that the Libyan authorities had the capacity to ensure protective measures, and that this would therefore be considered as part of its overall determination under article 17 (3).[603]

291. As in the previous sections on inability addressed above, and for some of the same reasons,[604] in its overall conclusion, the Pre-Trial Chamber found that the lack of witness protection programmes, in the circumstances of this case, did not result in inability as a result of not obtaining the necessary evidence and testimony.[605] The Pre-Trial Chamber considered that the security situation had to be assessed against the absence of effective protection programmes for witnesses and the fact that certain detention facilities had not yet been transferred to the authority of the Ministry of Justice, stating that, in the *Gaddafi* Admissibility Decision, those two aspects had been deemed compelling "given that Libya did not satisfactorily demonstrate that it had collected more than a few sparse items of evidence as part of its investigation against Mr Gaddafi".[606] The Pre-Trial Chamber considered that there was no indication that the collection of evidence and testimony would cease because of unaddressed security concerns for witnesses or lack of governmental control over certain detention facilities.[607] The Pre-Trial Chamber further found that several Gaddafi-era officials, whose testimony may be of particular importance in the present case, were detained in the Al-Hadba prison in Tripoli, which is under the control of the Libyan Government.[608]

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[602] Impugned Decision, para. 285, referring to para. 177 of the Admissibility Challenge and para. 143 of Libya's Reply to the Responses to the Admissibility Challenge.
[603] Impugned Decision, paras 286-287.
[604] It is recalled that the Pre-Trial Chamber observed that the proceedings in Mr Al-Senussi's case had not so far been prejudiced by security challenges, as demonstrated by the concrete and progressive investigative steps that had been taken, and the judicial proceedings having progressed and reached the accusation stage, with the 19 September 2013 hearing passing "without incident" – and noting that other former Gaddafi officials are also subject to ongoing judicial proceedings (Impugned Decision, paras 299, 303).
[605] Impugned Decision, para. 301.
[606] Impugned Decision, para. 297.
[607] Impugned Decision, para. 298.
[608] Impugned Decision, para. 300.

(ii) Submissions of the parties and participants

292. The Defence submits that the Pre-Trial Chamber's attempted distinction of its finding on this issue in the *Gaddafi* case, on the basis of more evidence having been gathered in the present case, means that the Pre-Trial Chamber found that as long as it is possible to obtain necessary prosecution evidence there is no need to consider the ability to obtain necessary Defence evidence, which "clearly contradicts the most basic notion of a 'genuine' judicial proceeding".[609] The Defence contends that the findings in the two cases (*Gaddafi* and *Al-Senussi*) contradict each other.[610] The Defence argues that, as a result of a lack of effective witness protection, defence witnesses will not be prepared to come forward as a result of security concerns.[611]

293. Libya argues that the Pre-Trial Chamber's findings were reasonable and that the Defence does not provide any legal or factual substantiation of its submissions.[612]

294. The Prosecutor argues that the Defence fails to demonstrate any factual error in the findings of the Pre-Trial Chamber, having considered the absence of effective witness protection programmes jointly with other factors.[613] The Prosecutor further contends that the findings were not inconsistent with those in the *Gaddafi* case.[614] The Victims do not make any specific submissions on the issue of security for witnesses.

(iii) Determination by the Appeals Chamber

295. The Appeals Chamber does not find the conclusions of the Pre-Trial Chamber in relation to the security for witnesses to have been unreasonable. As argued by the Prosecutor, as the facts underpinning the *Gaddafi* and *Al-Senussi* cases differ, there was no automatic inconsistency between them.[615] The Appeals Chamber again notes that it is not, in this case, making any determination of factual matters that arose in the *Gaddafi* case. In any event, each case needs to be looked at on its own concrete facts in relation to whether Libya is able to carry out its proceedings. In the present case, the Pre-Trial Chamber's conclusion that the absence of witness protection

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[609] Document in Support of the Appeal, para. 134.
[610] Document in Support of the Appeal, para. 134. *See also* Defence Further Submissions, para. 14.
[611] Document in Support of the Appeal, para. 135.
[612] Libya's Response to the Document in Support of the Appeal, paras 105-107.
[613] Prosecutor's Response to the Document in Support of the Appeal, para. 108. *See also* paras 109-112; Prosecutor's Response to Defence Further Submissions, paras 12-13.
[614] Prosecutor's Response to the Document in Support of the Appeal, para. 112.
[615] Prosecutor's Response to the Document in Support of the Appeal, para. 112.

programmes had not resulted in Libya's inability to obtain the necessary evidence was not unreasonable, in particular, as argued by the Prosecutor, because the Pre-Trial Chamber considered a variety of circumstances together, including the amount of evidence that had been gathered in the case as a whole. Furthermore, the Appeals Chamber notes that the arguments of the Defence are speculative, there being no evidence of specific Defence witnesses not being prepared to testify.[616]

296. The Appeals Chamber also emphasises that the Pre-Trial Chamber did not find that only prosecution evidence was relevant in relation to its determination. As already referred to above, the Pre-Trial Chamber had previously noted that the investigative material provided included exculpatory evidence. Furthermore, it specifically noted, when considering witness security, that the Defence had submitted that two *prosecution* witnesses were no longer prepared to testify.[617] It is further observed that the reference to other former regime officials being imprisoned with Mr Al-Senussi who may have evidence of particular importance to his case[618] could mean that such evidence would be important for either the prosecution or the Defence.

297. For the above reasons, the Appeals Chamber finds that the Defence has not demonstrated that the conclusions of the Pre-Trial Chamber were unreasonable in relation to whether Libya was able to conduct its proceedings within the meaning of article 17 (3) of the Statute.

298. For the reasons set out above, the Appeals Chamber does not find the Defence to have demonstrated any error in the findings of the Pre-Trial Chamber that Libya was not unable within the meaning of articles 17 (1) (a) and 17 (3) of the Statute.

V. APPROPRIATE RELIEF

299. 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, as no appealable error has been

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[616] The Appeals Chamber notes, as explained above, that additional evidence which post-dates the Impugned Decision cannot be taken into account by the Appeals Chamber in the determination of this appeal. As such, those matters referred to at paragraphs 13-14 of the Defence Further Submissions which post-date the Impugned Decision have not been taken into account.
[617] Impugned Decision, para. 284.
[618] Impugned Decision, para. 300.

identified that would materially affect the Impugned Decision, it is appropriate to confirm the Impugned Decision.

Judge Sang-Hyun Song and Judge Anita Ušacka append separate opinions to this judgment.

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

Judge Akua Kuenyehia
Presiding Judge

Dated this 24th day of July 2014
At The Hague, The Netherlands