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Date: **02 May 2013**

PRE-TRIAL CHAMBER I

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

SITUATION IN LIBYA

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

Public Redacted version

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"

Source: **Office of the Prosecutor**

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

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Introduction

1. Libya challenges the admissibility of the ICC's case against Abdullah Al-Senussi, submitting that it is investigating him for the same case as the ICC and that the investigation is nearly complete. Libya provides as samples of the evidence witness testimonies, death certificates and medical notes. In the alternative, Libya invites the Court to endorse a positive approach to complementarity and requests that the Chamber declare the case inadmissible subject to conditions and ongoing obligations.

2. Libya has provided specific evidence which appears relevant and with probative value to establish that it is investigating the suspect for substantially the same conduct which forms the basis of the crimes for which he is sought by the Court. Therefore, the Prosecution considers that at this time the case against Al-Senussi is inadmissible before the Court. In arriving at this determination, the Prosecution has applied the facts at issue against the admissibility criteria articulated in the existing case law of the Court, rather than the more expansive tests proposed by Libya. Nonetheless, the Court, including the Prosecution, should take steps to ensure the monitoring of the ongoing progress of Libya's investigation and prosecution.

Procedural Background

3. On 16 May 2011, the Prosecution requested an arrest warrant for Muammar Gaddafi, Saif Al-Islam Gaddafi ("Saif Al-Islam") and Abdullah Al-Senussi ("Al-Senussi").[1] On 27 June 2011, Pre-Trial Chamber I issued its decision pursuant to Article 58 ("Article 58 Decision")[2] granting arrest warrants for Muammar Gaddafi and Saif Al-Islam as indirect co-perpetrators under Article 25(3)(a) for the crimes of murder and persecution committed in various localities in Libya, in particular, Tripoli, Benghazi and Misrata from 15 to 28 February 2011.[3] On the same date, the Pre-Trial Chamber issued an arrest warrant for Abdullah Al-Senussi as a principal under Article 25(3)(a) for the crimes of murder and persecution committed in Benghazi from 15 to 20 February 2011.[4]

4. On 22 November 2011, the proceedings regarding to Muammar Gaddafi were terminated due to his death.[5]

5. On 1 May 2012, the Chamber received the "Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute", challenging the admissibility of the case against Saif Al-Islam ("Saif Al-Islam Admissibility Challenge").[6] Libya indicated that it was investigating Saif Al-Islam for the same case as the ICC and provided REDACTED witness summaries as supporting material.[7]

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[1] ICC-01/11-4-Red.
[2] ICC-01/11-01/11-1.
[3] ICC-01/11-01/11-2 and 3.
[4] ICC-01/11-01/11-4.
[5] ICC-01/11-01/11-28.
[6] ICC-01/11-01/11-130-Red.
[7] ICC-01/11-01/11-145-Conf-AnxC.

6. On 4 May 2012, in its "Decision on the Conduct of the Proceedings Following the "Application on behalf of the Government of Libya pursuant to Article 19 of the Statute",[8] the Pre-Trial Chamber considered that Libya's submissions "only concern the case against Mr Gaddafi".[9]

7. On 10 December 2012, the Chamber issued the "Corrigendum to the Order in relation to the request for arrest and surrender of Abdullah Al-Senussi", whereby it instructed the Registrar to, *inter alia*, "reiterate to the Libyan authorities the request for arrest and surrender of Al-Senussi and remind them of their obligation to comply with the request".[10]

8. On 15 January 2013, Libya informed the Chamber, *inter alia*, that the investigation into the national case against Al-Senussi is approaching completion, and the case will accordingly be transferred in the next month to the Chamber of Accusation for pre-trial proceedings.[11]

9. On 18 January 2013, the Chamber, noting that Libya had neither surrendered Al-Senussi to the Court nor sought to postpone his surrender to the Court, requested the Libyan authorities to provide observations on the way Libya intends to fulfil its obligations to cooperate with the Court in relation to his arrest and surrender, and especially its duty to comply with the Surrender Request.[12]

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[8] ICC-01/11-01/11-134.
[9] ICC-01/11-01/11-134,para.8.
[10] ICC-01/11-01/11-241-Corr.
[11] ICC-01/11-01/11-251,paras.4-5.
[12] ICC-01/11-01/11-254.

10. On 28 January, Libya filed the "Libyan Government's Observations regarding the case of Abdullah Al-Senussi"[13] whereby Libya stated that in the Saif Al-Islam Admissibility Challenge it had also expressed an intention to challenge the admissibility of the case against Al-Senussi.[14] It "once again" notified the Chamber of its challenge to the admissibility of the case against Al-Senussi and stated that it would submit further supplemental evidence in this regard as soon as practicable.[15]

11. On 6 February 2013, the Chamber found that Libya's obligation to surrender Al-Senussi to the Court stood fully and was not subject to any suspension under Article 95 because Libya had not challenged the admissibility of the case with respect to him.[16] On 25 February 2013, the Chamber rejected Libya's application for leave to appeal this decision[17].

12. On 2 April 2013, Libya filed its admissibility challenge to the case against Al-Senussi ("Challenge"). Libya requested the Court to declare the case inadmissible and to postpone the execution of the Court's request for surrender pending the determination of the admissibility challenge pursuant to Article 95.[18] On 5 April 2013, Libya filed the additional legislation referred to in the Challenge.[19]

[13] ICC-01/11-01/11-260.
[14] ICC-01/11-01/11-260,para.2.
[15] ICC-01/11-01/11-260,para.2.
[16] ICC-01/11-01/11-269,para.28.
[17] ICC-01/11-01/11-287.
[18] ICC-01/11-01/11-307-Conf-Exp. On 3 April, the Confidential Redacted version and Public Redacted versions were notified.
[19] ICC-01/11-01/11-309.

Confidentiality

13. The Prosecution files its response confidential because it refers to documents that have this same level of confidentiality.

Prosecution's Submissions

14. The Prosecution will first address Libya's submissions on the applicable legal framework and second, whether the Prosecution considers that Libya has proved that the case is inadmissible before the ICC.

1. Law on Complementarity

1.1. Admissibility Determination: a two-stage enquiry

15. Libya correctly notes that an admissibility determination follows a two-step inquiry, namely, (1) whether there exists a national investigation and/or prosecution in relation to the case at hand (or there has been one in the past), and (2) where such proceedings exist, whether they are vitiated by an unwillingness or inability to carry them out genuinely.[20] The unwillingness or inability of a State having jurisdiction over the case becomes relevant only where the first prong of the test has been satisfied.[21]

1.2. The burden and standard of proof

16. The Prosecution contests Libya's assertion that it only bears the burden of proof with respect to the first prong of the admissibility determination but

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[20] Challenge, para.59 referring to ICC-01/04-01/07-1497,OA8,para.78.
[21] ICC-01/04-01/07-1497,OA8,paras.75,79.

not the second.[22] The Prosecution submits that Libya, as the challenging party, has the burden to prove both elements of the admissibility test, the existence of an investigation and Libya's willingness and ability to investigate, to the standard of a balance of probabilities.[23]

17. The Appeals Chamber has held that the party lodging the admissibility challenge bears the burden to substantiate its claim of inadmissibility, stating that "a State that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible".[24] This burden refers to the two elements of the admissibility test and the phrasing in the negative of Article 17(1)(a) does not entail a shift of the burden of proof as Libya submits.[25] To the contrary, it stresses the fact that the Court must give central consideration to whether, notwithstanding a State's claim of relevant national proceedings, those proceedings are in fact vitiated by a lack of genuineness. Hence it is the State, as the challenging party, that must persuade the Court that all of the conditions set out in Article 17(1)(a) are fulfilled, namely that (1) there are relevant national proceedings, and (2) they are not vitiated by a lack of genuineness (i.e. that no 'unless' attaches).

[22] Challenge,paras.90-102.
[23] ICC-01/05-01/08-802,paras.201-202; ICC-01/09-01/11-307OA,para.62.
[24] ICC-01/09-01/11-307OA,para.62. Rule 58 indicates that the challenge must be in writing and contain the basis for it, which suggests that the challenge must be substantiated. This is consistent with the principle *onus probandi actori incumbit* mentioned by Libya.
[25] Commentators have indicated that the drafting of the provision in a negative form "does not *per se* create a presumption, in the technical sense of the word, in favour of inadmissibility." El Zeidy, M, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff, 2008) ("El Zeidy") p.159, quoting M Benzing,"The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity" Max Planck Yearbook of UN Law 591 (2003), p.600-601. A contrario, Challenge,para.95.

18. The allocation of the burden to the challenging State is also consistent with the *raison d'être* of the principle of complementarity: to prove a case inadmissible, the State must establish that it is undertaking a meaningful investigation that genuinely seeks to ascertain the criminal responsibility of the suspect.[26] Otherwise, a fraudulent or hopelessly inadequate investigation would preclude ICC action.[27] Thus, although the complementarity regime is premised on a "preference" for national proceedings, this preference does not entail a "presumption" of inadmissibility once a domestic investigation or prosecution is established,[28] nor is there a policy of giving the benefit of doubt to States[29] that would eliminate the burden on the State as the challenging party. It is the Court – and not the applicant State – which is vested with exclusive authority to rule on the questions of forum allocation where a challenge is brought to the jurisdiction or admissibility of a case.[30] This means that absent substantiation of a claim of inadmissibility by the challenging party (i.e. a discharging of its burden of proof), a case will remain admissible before the Court.[31]

19. Further, the European Court of Human Rights ("ECtHR") cases referred to by Libya are misplaced.[32] Those cases relate to the individual applicants showing that they have exhausted available domestic remedies, and merely indicate that the respondent State retains the right to present rebuttal evidence showing that the domestic remedies were not in fact exhausted. If the State chooses to raise this argument, the applicant could in turn contest

[26] ICC-01/09-02/11-274OA,para.61.
[27] Principle of Complementarity in Practice: Informal Expert Paper,para.22 ("Informal Expert Paper"). See fn.9 in particular.
[28] Challenge,paras.95-96.
[29] Challenge,paras.97-98.
[30] ICC-02/04-01/05-377,paras.45-46,51.
[31] This is without prejudice to an Article 19(1) determination made by the Chamber on its own motion.
[32] Challenge,paras.99-101.

those submissions by showing that such remedies were ineffective or inadequate. This scenario does not represent a "legal shift" of the burden of proof, as Libya claims. Rather, it reflects a standard approach whereby the moving party bears the burden to present a substantiated argument and the other party can present rebuttal evidence. Notably, the applicant bears the burden to substantiate his/her claim and also to demonstrate that they have exhausted the domestic remedies.[33] This is consistent with the Prosecution's submission, and the logic of the Statute, that the challenging party bears the burden with respect to admissibility challenges.

20. Finally, it is particularly important that the State bear the burden on both prongs of the admissibility test because it has superior, and often exclusive, access to the necessary information, and therefore is in the best position to know the state of affairs and provide relevant evidence.[34] This is supported by the jurisprudence of the ECtHR.[35]

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[33] Article 35(1) of ECHR.

[34] Hall, C, "Article 19:Challenges to the jurisdiction of the Court or the admissibility of a case" in Triffterer, O (ed.), *Commentary on the Rome Statute of the International Criminal Court* (CH Beck, 2008),[7] ("Triffterer"); Informal Expert Paper, para.56; Barceló, JJ,"Burden of Proof, Prima Facie Case and Presumption", 1 Cornell Int'l L J,Vol.42 (2009),p.32-33.

[35] See: *Avsar v Turkey*, Appl. no.25657/94,"Judgment",10 July 2001:"Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation."; *Salman v Turkey*, Appl. no.21986/93,"Judgment",27 June 2000:"(…)such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation." Commentators have also indicated that adverse inference may be drawn by international tribunals from a party's refusal to produce evidence known or presumed to be in its possession.

1.3. The Same Person/ Same Conduct Test

21. The Prosecution submits that Libya's interpretation of the same case, namely "similar and/ or related incidents arising out of substantially the same course of conduct as well as other serious allegations of crimes"[36], is overly broad and appears to confuse the separate concepts of "case" and "situation" under the Statute. As will be developed below, this notion is not consistent with the relevant ICC jurisprudence, or with the contextual interpretation, the object and purpose of the Rome Statute, or the drafting history.

22. This Court's jurisprudence indicates that the ICC will try a case when the same case is not being investigated or prosecuted genuinely at a domestic level.[37] As the defining elements of a case are the individual and the conduct,[38] the "same case" is composed of the "same person" and the "same conduct". The issue disputed by Libya is what the "same conduct" means: whether "conduct" refers to specific factual incidents or broader events, and which degree of symmetry is required between the two cases to declare the case inadmissible.

23. The Prosecution submits first that "conduct" refers to specific factual incidents, and second that the level of symmetry required to declare a case inadmissible should be determined on a case-by-case basis. As discussed in more detail below, in relation to both the concepts of "conduct" and of

[36] Challenge,para.60. See also paras.72,78,89.

[37] ICC-01/04-01/07-1497OA8,para.85. Libya's submission that the prior jurisprudence is not applicable because the factual scenarios differ is misplaced. Like Libya, in the prior cases the challenging party argued that there had been or that there was an ongoing investigation if the Chamber was to endorse its notion of "case". The fact that the Chamber concluded that there was not an ongoing investigation does not undermine the fact that they upheld and applied a notion of "case" consistent with the same conduct/ same person test.

[38] ICC-01/09-01/11-307OA,para.40.

"sameness", a review of decisions at the national level and before the ECtHR and the European Court of Justice ("ECJ") on the *ne bis in idem* principle may be of guidance. These cases demonstrate that when determining the level of identity between two separate cases in the context of proceedings that seek a bar to subsequent or parallel proceedings, courts have had routine recourse to case-by-case assessments as to whether the factual parameters of time, space and subject-matter that define those cases were the same or substantially the same.

24. Moreover, an admissibility determination must consider the stage of the proceedings at the ICC and the level of specificity the case has reached.[39] Therefore, the current admissibility challenge must be determined in relation to "the case" as described in the Article 58 Decision and to the level of specificity of the underpinning factual allegations outlined therein.[40]

25. However, the relevant parameters (e.g. time, space, subject-matter as framed in the Article 58 decision) cannot be understood in broad and vague terms, as Libya proposes. Thus in this particular case, subject to the requirements of genuineness, the case should be determined inadmissible if Libya is investigating substantially the same incidents of killings and persecution (comprising arrests and mistreatment against perceived opponents to Gaddafi's regime) in Benghazi by members of the Security Forces from 15 until at least 20 February 2011, as described in the Article 58 Decision.

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[39] ICC-01/04-01/07-1497OA8,para.56. The Appeals Chamber has held that a determination under Article 17 must be based on the facts as they exist at the time of the admissibility proceedings. Although this statement in the Katanga case was directed to the facts as they existed at the national level, it arguably applies with equal relevance to the facts as they exist before the ICC.

[40] In particular, a "concise statement of the facts which are alleged to constitute those crimes";see Articles 58(2)(c) and 58(3)(c). This corresponds also to the wording of Article 90(1) which describes the parameters of a case that may be the subject of an admissibility challenge as relating to "same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender"(emphasis added)- these bases being set out in the Article 58 Decision.

26. By contrast, if the parameters were understood to be as Libya proposes (time, space and subject-matter related to Libya and the 2011 uprising generally), a domestic investigation against the suspect for virtually *any* incident within the situation would bar the ICC's intervention, leaving impunity for the actual conduct that formed the basis of the crimes for which the person was sought by the Court.[41]

27. Thus, if the focus of the national investigation or prosecution differs in any respect from the parameters as framed in the Article 58 Decision, the Chamber will need to scrutinize whether substantial identity persists and the reasons for any divergence in order to determine whether the national authorities and the ICC are indeed focused on the same conduct.

28. The Prosecution will develop below first that "conduct" refers to facts occurring during specific incidents, and second that the phrase "substantially the same conduct" refers to whether the facts and incidents contained in the two separate cases are inextricably linked by time, space and subject-matter. Regarding the factual character of the term "conduct", the Prosecution submits that this notion is supported by (a) the jurisprudence of the ICC, (b) the ordinary meaning of "case" and "conduct" and a consistent reading of Article 17, (c) the contextual reading of Article 17, (d) the drafting history, and (e) the object and purpose of the Rome Statute.

[41] Clearly, nothing should prevent Libya from investigating Al-Senussi for other crimes committed in other incidents. Indeed, the Statute foresees that a State and the ICC may have different cases against the same person, requiring a process of consultation and sequencing so that both cases can proceed. See in particular Articles 89(4), 94 and 90(7), and Rule 183. Under such a scenario, there is no conflict of jurisdiction and the admissibility provisions do not apply; thus, neither case bars the other in law and both cases can be heard sequentially before the two separate forums.

29. With respect to the symmetry required to declare the case inadmissible, the Prosecution will (f) address and contest Libya's proposed interpretation and (g) advance its proposed interpretation of "substantially the same conduct".

(a) ICC Jurisprudence – "Same person/ same conduct" and "same person/ substantially the same conduct"

i. The unitary and consistent ICC jurisprudence

30. As Libya itself notes, the Pre-Trial Chambers have routinely adopted an interpretation of "case" consistent with the so-called "same conduct" test, namely that a case constitutes "specific incidents during which one of more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects".[42] This position was first expressed by Pre-Trial Chamber I in the Lubanga case, where it stated "it is a *condition sine qua non* for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the Court".[43] While this definition was relied on by other Chambers, it found its most detailed elaboration in the decisions of Pre-Trial Chamber II in the *Kenya* cases, wherein the Chamber held that admissibility must be determined in relation to the same person for the same conduct.[44]

[42] ICC-01/04-01/06-8-Corr,para.21; ICC-02/05-01/07-1-Corr,paras.14,24; ICC-01/05-01/08-14-tENG,paras.16,21; ICC-02/04-01/05-377,para.14.
[43] ICC-01/04-01/06-8-Corr,para.31.
[44] ICC-01/09-01/11-101;ICC-01/09-02/11-96.

ii. Kenya Appeals Judgements and "substantially the same conduct"

31. The Appeals Chamber in the *Kenya* cases held that "the 'same person/same conduct' test applied by the Pre- Trial Chamber was the correct test. The Pre-Trial Chamber thus made no error of law."[45] The Appeals Chamber furthermore grounded this finding in provisions of the Statute that utilize the term "same conduct", including Articles 20(3) and 90(1).[46]

32. In the same judgment, the Appeals Chamber nonetheless went on without elaboration to refer to the test as requiring an assessment of the same person for "substantially the same conduct".[47] The Prosecution submits that by adding the word "substantially", the Appeals Chamber sought to describe the nature of the test, rather than departing from it or proposing a different test where "sameness" is not required. Any other interpretation would render the decision internally inconsistent and manifestly unreasonable. Further, the Prosecution recognizes that the addition of the word "substantially" introduces a small degree of flexibility into the same conduct test, but not to the point that it undermines the purpose of the test altogether.[48]

[45] ICC-01/09-01/11-307OA,para.47. The phrase "the specific stage that the proceedings have reached" refers to the facts that, as the Appeals Chamber explains, in contrast to the earlier preliminary examination stage, after the issuance of summonses to appear the proceedings have progressed to the stage where specific suspects and conduct have been identified by the Court; *ibid*, paras.42-45.
[46] ICC-01/09-01/11-307OA,para.40 and fn.81.
[47] ICC-01/09-01/11-307OA,paras.40. See also paras.1,41-43,62. As the Appeals Chamber held, the same person/same conduct test is deeply rooted in the Statute itself. Articles 17(1)(c) and 20(3) refer to "the same conduct" in relation to the same person. The express link between Article 17(1)(c) and the principle of *ne bis in idem* shows that the case must relate to the same person and the same conduct (*Ibid*.,para.40). Further, Article 90 (1), which deals with the choice of forum allocation with respect to competing requests for extradition and surrender, explicitly sets out the same person/same conduct test, relating it back to the tests for admissibility (*Ibid*.,fn.81).
[48] See that some commentators have referred to this test on similar terms: "In order to determine whether the national proceeding pertains to the same case as the ICC Prosecutor considers dealing with, the national description of the actus reus should be compared with that on which the ICC Prosecutor bases his involvement. […] The issue is whether the conducts described at the two levels are *essentially* the same

(b) The ordinary meaning of "case" and "conduct" and a consistent reading of Article 17(1)

33. The core of Libya's argument to support its broad notion of a "case" is that the scenarios under Article 17(1)(a) and (b) – which refer to "case" – have to be read in isolation from Article 17(1)(c) – which refers to "conduct" and is interlinked with the principle of *ne bis in idem* - meaning that the latter does not inform the meaning of the term "case" at all. Following this logic, Libya concludes that "case" should not be understood as incident-specific.[49]

34. This argument lacks merit. First, the ordinary meaning of "case" and "conduct" indicates that a case before the ICC must be based on particular prohibited conduct, with reference to facts occurring during specific incidents. This constitutes the subject-matter before the Court. Second, other provisions of the Statute indicate that the all three prongs of Article 17(1)(a)-(c) must be read in a consistent manner.

35. A cursory review of the definition of the terms "*case*" ("[a] thing that befalls or happens to anyone, an event" or "[t]he state of facts juridically considered")[50] "*affaire*" (defined as a trial, case or lawsuit, each of which are

with regard to time, place and alleged behaviour."(emphasis added) Stigen, J, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Martinus Nijhoff Publishers, 2008), p.198 ("Stigen").

[49] Challenge,paras.69-70.

[50] See also:"a. A cause or suit brought into court for decision. b. A statement of the facts of any matter sub judice, drawn up for the consideration of a higher court. […]f. An incident or set of circumstances requiring investigation by the police". See *Oxford English Dictionary* on-line (OUP, 2009):http://dictionary.oed.com/cgi/findword?query_type=word&queryword=case. Legal dictionaries confirm that a "case" refers to the actions or questions contested before a court, or the crimes under investigation:"A question contested before a court of justice"–*The Cyclopedic Dictionary of Law* (Rothman & Co,1987),p.129;"A legal action or trial"–Curzon(ed.),*Dictionary of Law* (6th ed)(Longman,2002);"A court action"–Martin(ed.), *Oxford Dictionary of Law* (5th ed)(OUP,2003);"a possible crime and its investigation by the police"–*Collin's Dictionary of Law* (4th ed)(Bloomsbury,2004), p.41.

based on a particular set of facts placed before the court)[51] and "*asunto*" (the subject matter which is being dealt with; criminal proceeding, judicial proceeding)[52] – used in the English, French and Spanish versions of Article 17 – indicates that the term should be understood as being constituted by the underlying event, incident and circumstances – i.e. in the criminal context, the conduct of the suspect in relation to a given incident.

36. The definition of the terms "conduct" (behaviour, acts or omissions),[53] "comportement" (behaviour, conduct, reaction)[54] and "conducta" (set of actions, behaviour)[55] referred to in Article 17(1)(c) further confirms that this term should be understood as facts or acts related to a given event or incident.[56]

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[51] See French-English legal dictionary *Harrap's Dictionnaire Juridique*, (Chambers Harrap Publishers Ltd, 2004),p.6; Baleyte J.,*Dictionnaire économique et juridique Française/Anglais*(5 [th]ed.) (LGDJ, 2000). "L'affaire"which is defined as"Procès, objet d'une débat judiciaire."See *Le petit Robert de langue Française* on line:http://petitrobert.bvdep.com/frameset.asp?word=savoir.

[52] "Materia de que se trata;[…]causa (proceso criminal que se instruye de oficio o a instancia de parte), proceso judicial"(*Diccionario Jurídico on-line:*http://neoforum.iespana.es/neoforum/.)See further Louis A., *Dictionary of Legal Terms*, (Editorial Limusa,1990), defining "asunto" as "matter, business, affair, subject, issue;"contencioso", subject of litigation[…]".

[53] The *Oxford English Dictionary* defines "conduct" as, "a. Manner of conducting oneself or one's life; behaviour; usually with more or less reference to its moral quality (good or bad). b. (with a) A piece of behaviour, a proceeding; a course of conduct. See *Oxford English Dictionary* on-line (OUP,2013):http://www.oed.com/view/Entry/38617?rskey=ZUyjO1&result=1&isAdvanced=false#eid. Legal dictionaries confirm that "conduct" refers to behaviour, acts or omissions. See Personal behaviour, deportment, mode of action, any positive or negative act. An action or omission and its accompanying state of mind, or, where relevant, a series of acts and omissions" – *Blacks Law Dictionary* (6 [th]ed) (West Publishing Co,1990),p.295-296; "A way of behaving" – *Collin's Dictionary of Law* (4[th]ed) (Bloomsbury,2004),p.62.

[54] "Manière de se comporter; attitude, conduite, réaction" and "ensemble des réactions; behaviorisme."(*Le petit Robert de langue Française* (Le Robert,2010),p.487 French-English legal dictionaries confirm that "le comportement" means behaviour or conduct. See:Harrap's Dictionnaire Economique et Juridique (5e ed) (LGDJ ,2000),p.62; *Dictionnaire Juridique Dahl Française/ Anglais* (3[e]ed.)(Dalloz,2007),p.63.

[55] Conducta has been defined as « Manera con que los hombres se comportan en su vida y acciones » and « Conjunto de las acciones con que un ser vivo responde a una situación ». See *Diccionario Real Academia Espanola* on-line: http://lema.rae.es/drae/?val=conducta .

[56] Notably, the Spanish text of Article 20(3) referred to by Article 17(1)(c) refers to "hechos", e.g.,facts, rather than "conducta" or "conduct".

37. The provisions of the Statute must be interpreted in a manner which results in a coherent, rather than an internally inconsistent, system.[57] Article 17(1)(c) only spells out the components of "case", e.g. the same person and same conduct, at a particular stage of the proceedings, namely, when the person has already been tried with respect to the object/ subject-matter of the case. In so doing, Article 17(1)(c) incorporates Article 20(3), and the principle of *ne bis in idem*, into the scheme of admissibility.[58] Together the three parts of Article 17(1) implement the principle of complementarity and deal with the possible grounds rendering a case inadmissible in a systematic, sequential manner:[59] the three situations described in Article 17 (1)(a) to (c) "cover a State's complete range of activities with regard to criminal procedure from the opening of an investigation until the final judgement, leaving no loopholes".[60] These provisions, which have been described as the cornerstone of the Rome Statute,[61] must be read together systematically as they address the same subject matter: all govern "where the Court shall determine that *a case* is inadmissible".[62]

[57] ICC-01/04-01/06-803-tEN,para.284; ICC-01/05-01/08-388,paras.34-36.

[58] The link between *ne bis in idem* and Article 17, and the fact that a challenge based on *ne bis in idem* is indeed a challenge to admissibility under Article 17, is confirmed in Tallgren, I and Coracini, AR, "Article 20: Ne bis in idem", in Triffterer [47] ("Article 20"). Kleffner also emphasises the fact that Articles 17 and 20 together implement the principle of complementarity into the legal criteria to be applied. See Kleffner, J, *Complementarity in the Rome Statute and National Criminal Jurisdictions,* (OUP, 2008),pp.99,102.

[59] Article 17(1)(a) addresses the scenario where the investigation or prosecution of the case is ongoing; Article 17(1)(b) addresses the situation where the investigation of the case has finished without a prosecution; and Article 17(1)(c) refers to the case that has finished with a prosecution. See also El Zeidy, p.285. (quoting Bassiouni in fn 210) -"The principle of *ne bis in idem* is a 'corollary' of the principle of complementarity, mirrored in Article 17 […]While Article 17 covers investigations and prosecutions, Article 20 covers cases that have already been tried. *Article 20(3) sets the standards for assessing whether a domestic adjudication of a case makes it inadmissible before the ICC.*"(emphasis added)

[60] "Article 20" in Triffterer,[34], referred to in Challenge,para.69.

[61] ICC-02/04-01/05-377,para.34.

[62] Article 17(1),emphasis added.

(c) The context of the provision

Article 17(1) and Article 20(3)

38. Consistent with the Vienna Convention on the Law of Treaties, the ordinary meaning given to the terms in Article 17 must also be interpreted in light of the Statute as a whole. In that regard, and as noted by the Appeals Chamber, consideration must be given to the manner in which Articles 17 and 20(3) operate together to implement the system of complementarity.[63] Contrary to Libya's submissions,[64] Articles 17 and 20 were recognised as related throughout the drafting history.[65] Commentators have noted the "clear interplay" between these provisions[66] and the principle of *ne bis in idem* was "seen as a 'corollary' of the principle of complementarity [...]. While Article 17 covers investigations and prosecutions, Article 20 covers cases that have already been tried." [67] As early as 1995, the Ad Hoc Committee for the establishment of the International Criminal Court referred to the paramount importance of the concepts of admissibility and *ne bis in idem* which together serve to implement the principle of complementarity.[68]

[63] The fact that leading commentators, such as John Holmes, former coordinator of the Preparatory Committee refers to both provisions when addressing the principle of complementarity in the Rome Statute illustrates the close link between Articles 17 and 20. Holmes describes the principle of *ne bis in idem* enshrined in Article 20 as "a special aspect of Complementarity". See Holmes, JT,"The Principle of Complementarity" ("The Principle of Complementarity"), in Lee, RS (ed.), *The International Criminal Court: The Making of the Rome Statute: issues, negotiations, results* (Kluwer Law International,1999),pp.42, 44 ("Lee").
[64] Challenge,paras.69-70.
[65] Williams, S and Schabas W, "Article 17: Issues of Admissibility" in Triffterer,[9]and[10] ("Article 17").
[66] El Zeidy,p.306,721;Van den Wyngaert, C and Ongena, T,"Ne bis in idem: Principle, Including the Issue of Amnesty" ("Ne bis in idem") in Cassese, A, et al (ed.), *The Rome Statute of the International Criminal Court:A Commentary* (OUP, 2002),p.721 ("Cassese");"Article 20" in Triffterer,[18].
[67] El Zeidy,p.285.
[68] *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, UN Doc.A/50/22(1995),para.92. See also *Report of the Preparatory Committee on the Establishment of an*

39. This is consistent with the object and purpose of Article 20 which serves not only as an important guarantee of individual rights in criminal proceedings, but has also to be seen in a jurisdictional context, distributing and balancing the competences of the ICC and those of national courts according to the principle of complementarity:[69] whether under Article 17(1)(a), (b) or (c), the underlying rationale is the same, that the same case should only be heard once: before either the ICC or at the national level, subject to an assessment of genuineness.

Articles 90(1) and 90(7) and Rule 51

40. Libya further ignores the reference to "the same conduct" in other provisions of the Rome Statute. Article 90(1) on competing requests for surrender from the Court and from States is telling – as the Appeals Chamber noted, this provision indicates that the requests must concern "the same person for the *same conduct* which forms the basis of the crime for which the Court seeks the person's surrender" (emphasis added).

41. By contrast, Article 90(7) foresees that the national case may concern "the same person for conduct other than that which constitutes the crimes for which the Court seeks the person's surrender" (i.e. same person/other conduct). Whereas the "same person/same conduct" formulation contained in Article 90(1) is interlinked to questions of admissibility,[70] the "same person/other conduct" scenario in Article 90(7) has no such link with

International Criminal Court Volume I UN.Doc.A/51/22(1996) which records the observation that "the principle of non bis in idem was closely linked with the issue of complementarity",para.170. See generally,"Article 20" in Triffterer,[18].

[69] "Article 20" in Triffterer,[49]; this link is further emphasised in "Article 20" in Triffterer,[42].

[70] See Articles 90(2)-(6).

admissibility – because admissibility does not arise where the two cases are not the same.[71]

42. Further, Rule 51 prescribes that "[…] the independent and impartial prosecution of *similar conduct* […]" may prove illustrative as an example of a State's willingness. This provision is plainly addressing other cases from the one at issue. It follows that only the "same conduct" – and not "other" or "similar" conduct - can render a case inadmissible in its own right.

Articles 89(4) and 94

43. Further, Libya's notion would deprive of all effect Articles 89(4) and 94 that expressly contemplate the potential for the investigation and prosecution of different cases of the same suspect by the ICC and domestic authorities. The Statute provides that in such a scenario the decision on which case proceeds first is to be resolved through consultation and dialogue[72] and on a case-by-case basis between the Court and the State through the provisions related to cooperation, not through admissibility. Importantly, *both* cases can proceed; neither bars the other in law.

[71] Rastan, R,"Situation and Case: Defining the Parameters" in Stahn C and El Zeidy, M(eds.), *The International Criminal Court and Complementarity:From Theory to Practice* (CUP:2011), pp.444-445.
[72] Mochochoko, P, "International Cooperation and Judicial Assistance", in Lee,p.638: these provisions, incorporated in Part 9 of the Statute, reflect the position that "the Court should be given as much flexibility in as possible in its dealings with States". The arrangement gives neither side automatic priority, and presumes reasonableness on both sides: See Kress, C and Prost, K, "Article 89: Surrender of persons to the Court" in Triffterer,[46] ("Article 89"). Consistent with the object of avoiding impunity, the question in Article 89(4) is not whether a person will be surrendered; rather it is a question of which order the trials by the domestic court and the ICC will take place: See "Article 89" in Triffterer,[45].

(d) Drafting History

44. The drafting history of Article 17 indicates that the term "case" was intended to have its natural and common meaning rather than the broad meaning that Libya ascribes to it. The history shows that the term "case" was uncontroversial. It was not the subject of significant discussions and States focused their deliberations regarding admissibility on everything other than the definition of the term "case" because it appears that the meaning of the term was well understood. In the original ILC draft, the admissibility provision (Article 35) established that a "case" would be inadmissible depending on the national investigations and proceedings with regard to the "crime".[73] One commentator further refers without distinction to the terms case and crime.[74] At the Rome Conference the main discussions related to the issue of admissibility were focused on the determination of "unwillingness" and "inability". [75]

45. The drafting history of other relevant provisions of the Statute further supports a narrow definition of the term "case". First, the specific meaning of the term can be inferred in the discussions regarding the referral of situations to the Court and the initiation of investigations by the Prosecutor *propio motu*.[76] There were differing views among the delegations as to

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[73] "The Principle of Complementarity",in Lee, p.44. Furthermore, under the ILC draft, all a State had to show was that it was investigating the crime that formed the basis of the case before the Court, and not that it was investigating the same person who is accused before the Court for these crimes. By contrast, Article 42 of the ILC Draft Statute which enshrined the *ne bis in idem* principle conceptualised the exceptions to the application of the principle (the precursor to the test of "unwillingness" under Article 17) by reference to proceedings against a specific person for particular acts.

[74] Holmes adds that, although the Statute should provide criteria permitting the Court to intervene in cases even where the national authorities had acted or were acting, the criteria available to the Court proved deficient and occupied much of the negotiations: *Ibid*,p.44.

[75] *Ibid*,p.53.

[76] See Yee, L, "The International Criminal Court and the Security Council: Articles 13 (b) and 16", in Lee,pp.147-148. Also see: Fernandez de Gurmendi, S, "The Role of the International Prosecutor", in Lee, pp.175,180.

whether the Security Council should refer "matters", "cases" or "situations" to the Prosecutor. Delegates opted for the broadest notion ("situation") which would allow the Prosecutor discretion in determining the attribution of individual criminal responsibility through the selection of specific cases for investigation and prosecution.

(e) The Object and Purpose of the Rome Statute

46. Libya's proposed interpretation of case is grounded on the stated primacy of domestic jurisdictions.[77] While the Statute establishes a preference for genuine national proceedings, it does not establish their primacy *stricto sensu* in the sense that national courts can make determinative decisions on matters of forum selection. First, and as noted above, once a case is brought before the ICC it is the Court and not national courts that will decide where the case will be heard.[78] Second, the Statute does not seek to guarantee a right of national prosecution at all cost. Rather, it recognizes only a preference for genuine national proceedings where they relate to the specific case before the Court.

47. Further, the preservation of State sovereignty in the exercise of a State's own criminal jurisdiction cannot be claimed as the overriding and unique object and purpose of the Statute or the Court's complementarity regime. As the Appeals Chamber has held, the core rationale of the principle of complementarity is to strike a balance between safeguarding the primacy of domestic proceedings and the Rome Statute's goal to put an end to impunity so that the Court steps in if States do not investigate.[79] In this respect, Libya

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[77] Challenge,paras.46-48. See also, paras.64,71,79,88.
[78] ICC-02/04-01/05-377,paras.45-46,51.
[79] ICC-01/04-01/07-1497OA8, para.85.

overlooks the function of the ICC itself and in particular the ability of the Prosecution to carry out its mandate. Once a State admissibility challenge is upheld, the Court is permanently barred (subject to Article 19(10)) from ever proceeding against that person for that same conduct. If conduct is to be understood in the broad terms Libya proposes, it would have the effect of blocking any further or possible future ICC investigation and prosecution against a person once a domestic investigation within the same situation is opened for any similar types of offences.[80] Further, it would place the Prosecution in the unworkable position to assess the genuineness of domestic investigations relating to incidents that it has not itself investigated.

(f) Libya's proposed interpretation of "conduct"

48. To support its notion of the term "case",[81] Libya argues that an incident-specific interpretation of "case" is contrary to the object and purpose of the Rome Statute, as it undermines the State's discretion to determine the most appropriate prosecutorial strategy[82] and ignores a purported presumption in favour of domestic prosecutions.[83]

49. These arguments are without merit. Kenya raised similar arguments which were dismissed by the Appeals Chamber. For example, in addressing Kenya's argument that the availability of evidence might affect the case selection choices of a State, and that States should be granted leeway in the

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[80] Even if the national case was to result in an acquittal, as long as the domestic process was genuine, the Prosecution would be barred from ever seeking to hold that person to account for other crimes even if it's own evidence and case theory is stronger than the national counterpart.
[81] "Similar and/or related incidents arising out of substantially the same course of conduct as well as other serious allegations of crimes". Challenge,para.60. See also paras.72,78,89.
[82] Challenge,paras.71,79,88.
[83] Challenge,para.69.

application of the principle of complementarity, the Appeals Chamber held that the essential inquiry for the Court is to determine whether there exists a conflict of jurisdictions between the State and the ICC with regard to the specific case at hand. If the evidence available domestically refers to another person or conduct, there is no such conflict and the admissibility provisions simply do not apply.[84]

50. Further, and with respect to the purported presumption, the Appeals Chamber noted that although Article 17(1)(a) to (c) favours domestic jurisdictions, it does so as long as there are domestic investigations/ prosecutions related to the same suspect or conduct. If domestic authorities focus on other persons or conducts, there is logically no basis to find the case inadmissible.[85]

51. Importantly, moreover, the admissibility test is one of process, not of results: the Libyan authorities are not required to proceed to trial or obtain a conviction on all of the facts contained in the Article 58 Decision. If as a result of genuine investigations it decides either not to proceed to prosecution under Article 17(1)(b), or proceeds to trial but on the basis of modified charges or incidents due to the quality and availability of evidence, it is permitted to do so as long as this was based on a genuine process.

52. Libya refers to the notion of "criminal transaction" applied by the ad hoc tribunals in the context of joinder of defendants and crimes to support its broad notion of "conduct".[86] A "transaction" in this context is defined as "a number of acts or omissions whether occurring as one event or a number of

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[84] ICC-01/09-01/11-307OA,para.43. See also para.44.
[85] ICC-01/09-01/11-307OA,para.44.
[86] Challenge,paras.73-6.

events, at the same or different locations and being part of a common scheme, strategy or plan.[87] The Prosecution submits that the reference to the concept of "transaction" in joinders to define "conduct" or "case" is misplaced because joinder serves the purpose of judicial economy of the proceedings in order to avoid multiple prosecutions with the duplication of evidence and recalling of witnesses.[88] This is unrelated to admissibility and the principle of complementarity which seek to identify the proper forum to try the particular case at hand. The fact that two different cases can be joined together does not mean that they are the same.

53. Indeed, since the underlying logic of a joinder is different from complementarity, the commonalities or parameters required to join cases together are far broader than those which seek to determine "sameness" of a conduct in order to bar a second prosecution. Hence, while two historical events may be joined together in a trial, they could still be tried sequentially if there were not such a joinder. In *Milosevic*,[89] for example, the joinder concerned the separate events concerning the wars in Croatia, Bosnia and Kosovo. While it was found that all three wars had as a common aim the expulsion of non-Serbs and the establishment of Serb control through a JCE, this did not mean, by reverse, that prosecuting Milosevic for Kosovo would have barred the ICTY Prosecutor from prosecuting him separately for Croatia.

[87] Challenge,para.73, referring to Rule 2 of RPE. See also paras.74-6.
[88] ICC-01/04-01/07-307,pp.8-9 and the ICTY jurisprudence cited therein. Note that the jurisprudence of the ad hoc tribunals has been considered in some cases, notwithstanding its non-binding nature, when there is a similarity between the relevant provisions. ICC-01/09-01/11-414,para.31; ICC-01/04-01/06-2842,para.603. This is not the case in the instant scenario.
[89] Challenge, para.75.

54. Further, the "same transaction" test from the US which Libya cites as authority[90] appears in Justice Brennan's opinion in *Ashe v Swenson*.[91] The Prosecution submits that the "same transaction" test from US case law, however, does not in fact support the position of Libya. Firstly, the facts that underpinned the US Supreme Court's analysis in *Ashe v Swenson* related to a single historic event: whether a man who had been acquitted in a prosecution for robbing one of six poker players could be prosecuted afterwards for robbing another of the six poker player in the same game. While Justice's Brennan's "same transaction" test barred a second prosecution for the robbery of the other players in that same game, it was not being applied as a bar to prosecution for the robbery of other poker players in other poker games, even assuming the intention or goal of the robber was the same.

55. Second, the Supreme Court majority in *Ashe v Swenson* did not actually rely on Justice's Brennan's "same transaction" test, but adopted a rule of "collateral estoppel" to prevent the second prosecution. The majority held that an "issue of ultimate fact determined by a valid and final judgment", namely proving the identity of the robber in the first case, was an issue that could not again be litigated between the parties in the second case, i.e. that factual issue was *res judicata*.[92]

[90] Challenge, para.75.
[91] *Ashe v Swenson*, 397 U.S. 436 (1970), at 457: where he stated that "the Double Jeopardy Clause requires the prosecution, except in most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode or transaction". Brennan argued for such a policy in order to guard "against vexatious multiple prosecutions" and in favour of judicial economy. *Ibid*, at 454.
[92] *Ibid*,at 441. It should be noted that even the narrow conception of "same transaction" defined by Justice Brennan has been consistently been rejected by the Supreme Court: "We have steadfastly refused to adopt the "single transaction" view of the Double Jeopardy Clause"; *Garrett v United States*, 471 U.S. 773 (1985),at 790.

56. Finally, the references to "course of conduct" in the Statute[93] do not provide authority for the broad formulation that Libya proposes.[94] A "course of conduct involving the multiple commission of acts" for the purpose of Article 7(2) may relate to the same historical event but it may also relate to far broader factual parameters, depending on the factual allegations contained in the case. Similarly, any parallelism with the domestic interpretation of "course of conduct" is misplaced,[95] as the cases cited by Libya are all highly specific and distinguishable from an admissibility determination .[96]

(g) Prosecution's Interpretation of "substantially the same conduct"

57. The principle of complementarity indicates that the Court complements – not supersedes - domestic jurisdictions and will therefore defer to them when they carry out genuine investigations and prosecutions of the same case, defined as person and conduct. If the States are inactive or are otherwise unwilling or unable to genuinely proceed in relation to that case, the ICC will intervene. There is no dispute with respect to the person element, but there appears to be some confusion with respect to the

[93] Challenge, para.77.
[94] The Prosecution in its response to the admissibility challenge in the Saif al-Islam case observed that "substantially the same conduct" test of the Appeals Chamber, the Chamber should satisfy itself that, at a minimum, the national authorities are focused on the same course of conduct and series of events as the ICC, meaning that they are examining the person's criminal responsibility in the context of substantially the same incidents and underlying facts and allegations of criminal responsibility"; ICC-01/11-01/11-276-Conf-Exp, para.31. Libya proposed formulation appears to confuse the separate notions "substantially the same conduct" and "course of conduct" to create "substantially the same course of conduct".
[95] Challenge, para.77, fn.88.
[96] *Moorov v HM Advocate* occurs in the context of the unique evidentiary requirement for corroborative evidence particular to Scottish criminal law; in *HW v Lo*, an Australian Court considers the phrase "course of conduct" in light of its very specific purpose within legislation dealing with compensation for victims of crime; and in *Pratt v DPP*, a Divisional Court in the UK considers whether a series of acts constitute a "course of conduct" amounting to harassment under the Protection from Harassment Act 1997. The phrase is not defined in this act and is applied by the Court in a fact-specific manner such that it provides very little guidance outside of this context. In this case, the Court finds that two assaults perpetrated by a husband on his wife over a four month period had "sufficient similarity in type" to amount to a "course of conduct" pursuant to the act.

"conduct" limb of the test in the light of the Appeals Chamber's reference to "substantially the same conduct".

58. As explained above, the Prosecution submits that the Appeals Chamber confirmed the correctness of the application of the "same person/ same conduct" test and the introduction of "substantially" should be understood as a clarification to the same test, not the introduction of a different test. At issue in these proceedings, therefore, is how the term "substantially the same" should be understood. Sameness means identity, symmetry or equivalence - as opposed to something that is different or merely similar, but not the same. The starting point for any discussion should therefore focus on the required degree of sameness as it attaches to the term "conduct".

59. The question of sameness and degrees of variation permitted between two cases has frequently arisen in national cases related to the application of *ne bis in idem, e.g.* the fundamental principle of law which restricts the possibility of an accused being prosecuted repeatedly on the basis of either the same offence/crime or conduct.[97] The Prosecution considers that the jurisprudence related to this principle may be of assistance, given the close interlink between *ne bis in idem* and complementarity during the drafting history, their common function in determining forum allocation and, most notably, the similarity in the inquiry regarding whether the two cases are indeed "the same", and what "same" means in this context.[98]

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[97] This will depend on how the *idem* is characterized in domestic law. Stigen,p.207. "Article 20" in Triffterer,[11]-[15]. Schabas, W, *The International Criminal Court:A Commentary on the Rome Statute* (OUP,2010),p.373.

[98] While most national criminal justice systems know this general principle, there is no agreement on the definition or even on the name, as it is also known as *res judicata*, *autrefois acquit/ autrefois convict* and double jeopardy. "Ne bis in idem" in Cassese,p.706; "Article 20" in Triffterer,[1]-[17].

60. Typically, the *idem* serves to identify the unique "object of the trial" and can be described in factual terms as the same historical event or the same conduct that has been submitted to the trial court for judgment on the merits (*idem factum*)[99] or in legal terms (*idem crimen*) as the same set of facts plus the identical legal qualification (same offence) or a similar legal qualification (by norms that protect a similar legal interest, e.g. charging the offences of murder and subsequently manslaughter for the same killing).[100] The "same offence", "same crime" or "same elements" (which look primarily to legal qualification) appear to protect the *idem* more narrowly than the "same conduct", "facts" or "acts".[101]

61. German jurisprudence on *ne bis in idem* has defined the "same conduct" as a set of complex, inseparably interconnected facts which is independent of the legal qualification or the legally protected interest,[102] or the historic and therefore temporarily and circumstantially limited event to which the

[99] The factual approaches have encountered problems in determining the precise limit of the object of a trial (e.g.,the "sameness" of two incidents); for example, a single historical event may constitute several offences under the law (*concursus*) or several events may be forged into an artificial legal unity.
[100] "Ne bis in idem" in Cassese,p.714; "Article 20" in Triffterer,[7]; Sluiter, G et al (ed.), *International Criminal Procedure:Principles and Rules* (OUP, 2012),p.437 ("Sluiter"); Van den Wyngaert, C and Stessens, G "The international *non bis in idem* principle: resolving some of the unanswered questions," 4 *Int'l & Comp L Quarterly*,Vol.48,779 (1999),p.789.
[101] Carter LE, "The Principle of Complementarity and the International Criminal Court: the Role of Ne bis in idem", 8 Santa Clara J Int'l L 165 (2010),p.170. Regarding the scope of the *idem*, see review of national application in Sluiter,p.475-6, which shows that most national laws adopt a factual approach. Similarly, the *idem* in international instruments also differs: Article 14(7) of the ICCPR prohibits the retrial of "offences" for which a person has been finally convicted or acquitted. Article 4 of Protocol 7 to ECHR uses a similar language and also refers to the prohibition of retrial for the same "offences". However, Article 54 of the Convention Implementing the Schengen Agreement ("CISA") prohibits a retrial for the same "acts". Articles 9 and 10 of the ICTR and ICTY Statutes, respectively, prohibit retrial for "acts" already tried by the tribunal or by domestic courts with certain exceptions and Article 8(4) of the American Convention on Human rights prohibits retrial "for the same cause". "Ne bis in idem" in Cassese,pp.722-6; Erdei, I, "Cumulative Convictions in International Criminal Law: Reconsideration of a seemingly settled issue" 34 Suffolk Transnat'l L Rev 317 (2011),p.321-322. See generally: Cuesta, JL, "Concurrent National and International Criminal Jurisdiction and the Principle of 'Ne bis in idem, General Report" 73 Int'l Revue of Penal Law (2002),707-736.
[102]BGH 5 StR, 342/04, 9 June 2008 (receiving smuggled substances and their possession during a transfer that the smuggle was intended for in the first place is one single conduct).

indictment and confirmation of charges refer.[103] Further, German Courts have provided some useful parameters to determine the sameness of conduct. For example: the "same conduct" would include not only the conduct explicitly described in the indictment but also all behavior that forms a unity with this conduct and which, if tried separately, would unnaturally divide up an event actually belonging together.[104] A temporal connection is neither necessary nor sufficient and[105] a fact can be part of the same conduct if, from an economic perspective, it can be traced back to the original event.[106] Further, it was also noted that a close factual relationship is decisive and has to be considered for every individual case.[107]

62. An Argentinean commentator has indicated that there will be "sameness" (or basic identity) of conduct regardless of the existence of temporal differences or differences on space, method/ manner or in the object of the imputed fact as long as these divergences do not undermine the existence of a single historical event. As an example, there will be sameness if there is a minor difference on the amount of money stolen (10 or 20 USD), if the victim was A instead of B, if the injuries were caused with a knife or with another object, or if the fact was perpetrated in a near location or on an approximate time. In sum, these differences do not indicate that the relevant facts form a different historical event.[108] In other words, they are not substantial.[109]

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[103] BGH 3 StR 566/08, 5 March 2009 (drunk driving was considered part of the conduct of the transport of illegal substances if this transport was the purpose of the trip).
[104] BGH 2 StR 520/96, 1 October 1997 (a violent re-acquisition of illegal substances is a separate offence from the preceding trade with it); BGH 1 StR 542/11, 7 February 2012.
[105] BGH 1 StR 542/11, 7 February 2012.
[106] BGH 1 StR 4/09, 18 February 2009 (for example, money laundering and the illegal acquisition of that money that made the laundering necessary, or bribery and the acquisition of the money used).
[107] BGH 1 StR 542/11, 7 February 2012.
[108] Maier, JBJ, *Derecho Penal Procesal, T.1, Fundamentos* (Editores del Puerto, 1996),p.610.
[109] Lord Morris' detailed review of English authorities over 400 years in *Connelly v DPP* further illustrates the historic use of terms such as "substantially" to describe the "sameness" of offences which

63. U.S. courts have applied a fact-intensive *ne bis in idem* inquiry in certain extradition cases where the *ne bis in idem* provision in question barred extradition for charges based on the "same facts" or "same acts" (rather than barring extradition for the "same offence").[110] For example, in *United States v Jurado-Rodriguez,* the court applied a fact-intensive approach when analyzing whether the *ne bis in idem* provision in a U.S.-Luxembourg extradition decree barred a money laundering and conspiracy prosecution in the United States. The court found that the money laundering prosecution was barred because the U.S. charges relied on "almost identical"[111] material propositions of facts as those previously used to convict the defendants of money laundering in Luxembourg, and the material elements of the two money laundering crimes were "substantially the same".[112] Conversely, the court found that the conspiracy charge could go ahead because the conspiracy charged in the U.S. was "much broader as well as longer in time than that prosecuted in Luxembourg", and the material propositions of fact were "substantially different" since the U.S. allegations involved "more extensive independent drug trafficking".[113]

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are based on the same facts. Notwithstanding that the doctrine of *autrefois acquit/autrefois convict* in English and Wales protects a person from being put in peril twice for the "same offence" as opposed to the "same conduct", and although Lord Morris' position was ultimately in the minority, his analysis is apposite insofar as it indicates the origin and use in English cases of the term "substantially" and its synonyms. Thus, reference is made to prior cases that examined whether two offences based on the same facts were, *inter alia*, "substantially or practically the same", "in effect the same", whether "there was in substance one offence", or "another in substance different". Lord Morris' view, that the doctrine *autrefois acquit/autrefois convict* applies where the offences are substantially the same, was opposed by the majority view which concurred with Lord Devlin that for the doctrine to apply it must be the same offence in fact and in law; *Connelly v DPP* (1964) 48 Cr App R 183, 203, 229,215-6.

[110] Note that in general, U.S. doctrine of double jeopardy protects against individuals being placed in jeopardy twice for the same "offence", thus providing narrower protection against multiple prosecutions. See U.S. Constitution, 5th amendment; *United States v Jurado-Rodriguez*, 907 F.Supp. 568, 580(E.D.N.Y.1995) ("Jurado-Rodriguez").

[111] The underlying material propositions of fact were not entirely identical since, as the court recognized, the U.S. money laundering charge involved a more extended time period: Jurado-Rodriguez, 580.

[112] *Ibid*.

[113] *Ibid*,580-81(E.D.N.Y.1995).

64. The ECJ and the ECtHR have also examined the required "sameness" to bar a second prosecution pursuant to the *ne bis idem* principle. For example, the ECJ in *Van Esbroeck*[114] held that "the same acts" for the purposes of Article 54 CISA is to be understood as the "identity of the material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together in time, in space and by their subject-matter".[115] This was confirmed in another case, *Van Straaten,* concerning the smuggling of narcotics between Schengen-states.[116] The ECJ recalled *Van Esbroeck* and held that the quantities of narcotic drugs and the accomplices do not need to be identical for there to be identity of *facts*.[117] In *Kraaijenbrink,* the Court was asked to provide guidance on the question of what extent the intentions of the subject are relevant for a finding of "idem".[118] The ECJ, after recalling once more *Van Esbroeck*, held that the same criminal intention or subjective

[114] Case C-436/04 *Van Esbroeck* [2006]ECR I-2333 "Judgment". The case concerned the smuggling a shipment of various narcotics from Belgium into Norway, the Belgian Court of Cassation stayed the proceedings, and asked the ECJ (amongst other things) whether the export and import of illicit substances should be considered as "the same acts" for the purposes of Article 54 CISA.

[115] *Ibid*,paras.36-38. The ECJ held that "import" and "export" of illegal substances should be seen as a set of facts which are inextricably linked together in an area without internal borders such as the EU.

[116] Case C-105/05 *Van Straaten* [2006]ECR I-9327 "Judgment". By verdict on 23 June 1983, Mr Van Straaten was acquitted by a Dutch criminal court from charges of importing into the Netherlands the amount of approximately 5500 grams of heroin from Italy on or around 26 March 1983. He was however found guilty of possession of 1000 grams of heroin on or around 27 March until around 30 March 1983 together with Mr Yilmaz. On 22 November 1999, he was sentenced *in absentia* by the district court at Milan (Italy) to 10 years imprisonment for exporting on several occasions an amount of approximately 5 kilograms of heroin from Italy into The Netherlands on or around 27 March 1983 together with Mr Karakus Coskun.

[117] *Ibid,*paras.41-44.

[118] Case C-367/05 *Kraaijenbrink* [2007]ECR I-6619 "Judgment". In 1998, Mrs.Kraaijenbrink was sentenced by the local district court at Middelburg (Netherlands) for "several offences under Article 416 of the Netherlands Penal Code of receiving and handling the proceeds of drug trafficking between October 1994 and May 1995 in the Netherlands" as well as for acting in breach of the Opiumwet (the Dutch Opium law). Three years later, she was sentenced by the criminal court at Ghent (Belgium) for the offence of "exchanging in Belgium sums received from trading narcotics in the Netherlands between November 1994 and February 1996", which sentence was upheld in appeal. Mrs. Kraaijenbrink appealed before the Belgian Court of Cassation, which stayed proceedings in order to ask the ECJ whether the conduct on the basis of which Mrs. Kraaijenbrink was convicted in Belgium and The Netherlands should be regarded as "the same acts" within the meaning of Article 54 CISA in view of the fact that the underlying intentions were the same.

link between a set of concrete circumstances is insufficient for a finding of idem or the same acts.[119]

65. A similar approach has been adopted in the most recent ECtHR jurisprudence.[120] In *Zolotukhin v Russia*,[121] the Court held that the use of the term "offence" in Article 4 of Protocol 7 cannot justify a more restrictive approach which looks only to the question of legal characterization because the Convention must be interpreted and applied in a manner which renders its rights practical and effective.[122] Hence, the Court held that this provision must be understood "as prohibiting the prosecution or trial of a second 'offence' in so far as it arises from identical facts or facts which are substantially the same".[123] This test has been subsequently upheld in the recent *Tsonyo Tsonev v Bulgaria*, where the Court found a violation of Article 4 of Protocol 7 as the facts of the two offences were substantially the same.[124]

66. Notably, the ECtHR has adopted a similar approach in determining the inadmissibility of cases before the Court when the same matter was submitted simultaneously to another international institution: Article 35.2(b) seeks to avoid a plurality of international proceedings relating to the same

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[119] *Ibid*,para.29.
[120] Previously the ECrtHR has interpreted *idem* broadly as conduct in one case (*Gradinger v Austria*, Appl.no. 15963/90, "Judgment", 23 October 1995,para.55), and gave it the narrower interpretation (covering only the previous conduct under law, and allowing a second prosecution for different charges) in another (*Oliveira v Switzerland*, Appl.no. 25711/94, "Judgement" 30 July 1998,para.26).
[121] *Sergei Zolotukhin v Russia*, Appl.no.1493/03 "Grand Chamber Judgment" 10 February 2009. The case concerned a Russian national who had displayed disorderly behaviour towards several public officials. He was placed in detention for three days for the administrative offence of "minor disorderly acts". Shortly afterwards, he was prosecuted for the criminal offences of "disorderly acts", "use of violence against a public official", and "insulting a public official" on the basis of the same facts. On 7 June 2007, the Chamber held unanimously that there had been a violation of Article 4 of Protocol No.7. At the request of the Russian government, the case was referred to the Grand Chamber for review.
[122] *Ibid*, para.81.
[123] *Ibid*, para.83.
[124] *Tsonyo Tsonev v Bulgaria*, Appl. no.2376/03, "Judgment" 14 January 2012,para.52.

cases[125] and applications are considered as being "substantially the same" when they concern the same persons, facts and complaints.[126]

67. In sum, and in light of the above case law, the Prosecution observes that use of the term "substantially" does not qualify "sameness" to mean that the *idem* in question need *not* in fact be the same, as this would be internally inconsistent. Rather, "substantially" serves to explain in relation to what "sameness" attaches, namely, to the substance of the criminal behavior. Thus, a case will be "substantially the same" if any difference in the underlying factual parameters is minor, such that the facts may be described as essentially the same because they are inextricably linked together in time, in space and by their subject-matter.

68. If there is no inextricable linkage, but merely a re-occurrence of a similar act elsewhere, the two sets of facts cannot be described as the same in substance. Thus, and as noted above, if the focus of the national investigation or prosecution differs in any respect from the ICC case, the Chamber will need to scrutinize the national efforts closely, including reasons for such divergence, in order to determine whether the national authorities and the ICC are focused on substantially the same conduct.

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[125] Article 35.2 indicates that: "The Court shall not deal with any application submitted under Article 34 that (a) is anonymous; or (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information."

[126] *Pauger v Austria* Appl.no. 24872/94, "Decision" 9 January 1995, DR 80 Ap.170. The ECtHR found that the applicant's communication to the Human Rights Committee, regarding his claim to a widower's pension, and the present application before the Court, regarding the application of transitory provisions to his pension rights, concerned essentially the same issue, namely, discrimination.

69. This interpretation of the relevant jurisprudence is further consistent with the Rome Statute that does not require States to incorporate the crimes listed into their domestic legislation.[127] Accordingly, as the domestic legal characterization of the crimes in Articles 6 to 8 might vary, the Court must determine whether the underlying conduct is the same in substance.

1.4. Genuine investigation and prosecution: willingness and ability

70. The second part of the admissibility test requires Libya to demonstrate that it is willing and able to genuinely investigate or prosecute the case.[128] The term "genuinely" in Article 17(1)(a) and (b) requires a showing that the investigative and prosecutorial efforts are sincere and that there exist the means to bring them to completion.[129]

71. First, the Chamber's determination of a State's "willingness" should be guided by the drafting history of Article 17. As the Prosecution noted in its response to Libya's Challenge in Saif Al-Islam's case, an overarching concern by negotiating States was that a determination of admissibility by the Court not become a judgment on the fairness of the national system *per*

[127] Implementing legislation under the Rome Statute is only required in three areas: Part 9, Articles 70 and 109. This is due in part to the view during the drafting process that the Statute creates a code of crimes for the Court, not for States, whose obligations are already contained in other international instruments and/or customary international law. Thus, the Preamble of the Statute does not establish a new duty for States to investigate and prosecute such crimes, but recalls a pre-existing duty to do so: "Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". This is reflected in Part 9 which refers to the choice of national law in implementing ICC requests for cooperation (Articles 88 and 99), and in Article 80 with respect to the national application of penalties. It is also apparent from the drafting of Article 20(3) in the rejection of the "ordinary crimes" exception contained in the original 1994 ILC Draft Statute, due to concern that it would restrict the right of States to apply national law: "Article 20" in Triffterer,[17], [26]-[27],[31]-[32].
[128] Article 17(1)(a) and (b).
[129] This term qualifies "to carry out the investigation or prosecution" and "to prosecute". Note that "genuinely" was preferred to "effectively", which was proposed in earlier drafts but was unacceptable to several delegations, because of a concern that the ICC might "judge" a legal system against a perfectionist standard: Informal Expert Paper,para.22, fn.9. See also: Heller, K, "The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process", 17 Crim L Forum 255 (2006),p.11 ("K.Heller"); "The Principle of Complementarity" in Lee,pp.50-51.

se.[130] Hence, the ICC should not function as a court of appeal on national decisions based on alleged domestic deviations from applicable human rights norms.[131] The Court cannot find a State unwilling on the sole ground that the national proceedings violate due process, but must also find a violation of one of the three subparagraphs in Article 17(2).[132]

72. Second, in order to find a State "unable", Article 17(3) requires two sets of considerations: first, total or substantial "collapse" or "unavailability" of the national judicial system, <u>and</u> second, and as a consequence, whether the State is unable to obtain the accused, or the evidence and testimony, or is otherwise unable to carry out proceedings.[133] Commentators to the Rome Statute refer to the ordinary meaning of these terms and state that "inability" embraces objective criteria such as a political situation that makes holding trials impossible or a debilitating lack of judges, prosecutors and other court personnel.[134] Obstruction by uncontrolled elements that render the system unavailable has also been considered a relevant factor.[135] Other factors may include public disorder, natural disasters and chaos resulting from a civil war.[136] The Prosecution reiterates that while Article 17 sets out benchmarks to enable the Court to identify cases that cannot be genuinely heard before national courts, the Statute's complementarity provisions should not become a tool for overly harsh structural assessments of the

[130] ICC-01/11-01/11-167-Red,paras.28-31. In particular, a proposal from Italy that would have specifically made the lack of due process a ground for admissibility was rejected since, according to the Coordinator of the Working Group, "many delegations believed that procedural fairness should not be a ground for defining complementarity": "The Principle of Complementarity" in Lee,p.50; Rojo, EC, "The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From 'No Peace without Justice' to 'No Peace with Victor's Justice'?"; 18 Leiden Jrnl Int'l L.(2005),pp.848-849 ("E.C.Rojo").
[131] "The Principle of Complementarity" in Lee, pp.50-51; See also *ibid*, pp.52-56. EC Rojo, pp.852-854.
[132] ICC-01/11-01/11-167-Red,para.31 and authorities cited therein.
[133] K.Heller,p.10.
[134] *Ibid*.
[135] Informal Expert Paper,para.50, Annex 4.
[136] El Zeidy, p.222; See generally pp.222-228.

judicial machinery in developing countries or in countries in the midst of a post-conflict democratic transition[137] which, as Libya notes, will not possess a sophisticated or developed judicial system.[138]

73. Only where the national investigation or proceedings lack fundamental procedural rights and guarantees to such a degree that the national efforts can no longer be held to be consistent with the object and purpose of the Statute and Article 21(3) should the Court consider matters of fairness as a corollary to its admissibility determination.[139] In light of the drafting history of Article 17 described above, such considerations should be applied cautiously and only to those cases where due to the complete absence of even the minimum and most basic requirements of fairness and impartiality, the national efforts can only be viewed as a travesty of justice, and accordingly justify the continued exercise of jurisdiction by the Court.[140]

[137] "Article 17" in Triffterer, p.624.
[138] Challenge,para.113.
[139] ICC-01/04-01/06-772OA4, para.36.
[140] In particular, Article 69(7) further provides that evidence obtained in violation of this "Statute or internationally recognized human rights" may not be admissible before the Court if it is "antithetical to the Court's proceedings". Thus, the Court must satisfy itself that (i) there exist no fundamental reliability issues with respect to any piece of evidence presented as part of the admissibility challenge that would nullify a particular aspect of the case, and hence affect the Applicant's ability to investigate the suspect for the same conduct; and (ii) any decision to defer a case to the national level would be consistent with the object and purpose of the Statute and Article 21(3), in view of clear and conclusive evidence demonstrating that the national proceedings concerning that case completely lack fairness.

2. The admissibility of the case against Al-Senussi

2.1. First step of the admissibility test: Is Libya investigating the same case?

74. Libya submits that it is investigating the same case as the ICC regardless of the Chamber's interpretation of "case".[141] It argues that its ongoing investigation mirrors the allegations contained in the ICC's Article 58 Decision and thus there exists sufficient identity between the two investigations to conclude that the same case is being investigated.[142] Libya however notes that its investigation is broader than that before the ICC: it includes financial crimes from approximately 2006 until October 2011,[143] and crimes against humanity (or "blood crimes") from 11 February 2011 until October 2011 committed throughout Libya.[144] Al-Senussi is also being investigated for crimes perpetrated prior to the 2011 uprising, such as the 1996 Abu Salim massacre.[145]

75. The Prosecution notes that the Libyan authorities have provided samples of evidential material which are specific and appear to be probative of substantially the same conduct described in the Article 58 Decision.[146] Libya attaches REDACTED witness interviews,[147] medical reports REDACTED[148] and death certificates[149] REDACTED.[150] The witnesses interviewed include members of the Libyan military, including high-ranking officials who worked closely with Al-Senussi and civilian eyewitnesses, including victims,

[141] Challenge,paras.38(i) and 63.
[142] Challenge,para.162.
[143] Challenge,paras.159-160.
[144] Challenge,paras.160-161.
[145] Challenge,para.160.
[146] ICC-01/09-01/11-307OA,para.62.
[147] Annex 8; Annex 9; Annex 10; Annex 11; Annex 12; Annex 15. See also Annex 14; Annex 16; Annex 17; Annex 20; Annex 21; Annex 22; Annex 23; Annex 24; Annex 26.
[148] Annexes 18-(REDACTED) and 25-(REDACTED). See also Annex 13 REDACTED.
[149] Annexes 25 (REDACTED) and 27 (REDACTED).
[150] Annex 19.

protestors and revolutionary fighters. Further, Libya also refers to the materials provided in its challenge against the admissibility of Saif Al-Islam's case, namely witness summaries,[151] REDACTED witness statements, phone intercepts and flight data.[152]

76. From the evidence submitted it appears that the Libyan investigation focuses on: the existence of a State policy to deter and quell the demonstrations by all means;[153] Al-Senussi's command over Security Forces;[154] Al-Senussi's essential contributions to the plan: inciting killing of civilians;[155] recruitment of mercenaries;[156] mobilisation of militias and troops;[157] provision of supplies to Security Forces;[158] imprisoning, torturing and eliminating demonstrators;[159] and Al-Senussi's knowledge and intent regarding the commission of the crimes.[160] In addition, and with respect to the underlying facts and incidents, Libya indicates that it is investigating the arrest of REDACTED and Idriss Al-Mismari, the shooting at Julyana bridge and the shooting of countless unarmed demonstrators.[161]

77. After reviewing the materials provided, the Prosecution notes that the sample of testimonies/interviews provided refer to the following incidents:

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[151] ICC-01/11-01/11-130, Annex C.
[152] ICC-01/11-01/11-258-Red. Annexes 4,15-16;5-7;17.
[153] Annex 8; Annex 9; Annex 4 ; Annex 10; Annex 11; Annex 12; See also: ICC-01/11-01/11-130, Annex C, and ICC-01/11-01/11-258-Red2, Annexes 16 and 17. See for comparison, Article 58 Decision,paras.14,31-32,76.
[154] Annex 8; Annex 9; Annex 10; Annex 11; Annex 12; Annex 17; Annex 19; See also: ICC-01/11-01/11-258-Red2, Annex 16: See for comparison, Article 58 Decision paras.84-87.
[155] Annexes 4, 11 and 16; See also: ICC-01/11-01/11-258-Red2, Annex 16.
[156] Annex 8; Annex 10; Annex 12.
[157] Annex 8; Annex 10; Annex 11 ; Annex 12. See also : ICC-01/11-01/11-258-Red2, Annex 16:
[158] Annex 8; Annex 10; Annex 11 ; Annex 12; Annex 19.
[159] Annex 8; Annex 11 ; Annex 12; Annex 16; Annex 17; Annex 24. See also : ICC-01/11-01/11-258-Red2, Annex 16. See for comparison, Article 58 decision,paras.36,43,44,49-54.
[160] Annex 4; Annex 8; Annex 9; Annex 10; Annex 12; Annex 17. ICC-01/11-01/11-258Red2, Annex 16; See for comparison, Article 58 Decision,para.88.
[161] Challenge,para.162(iii).

REDACTED;[162] REDACTED [163] REDACTED;[164] REDACTED;[165] REDACTED [166], REDACTED;[167] REDACTED;[168] REDACTED [169] REDACTED [170], REDACTED;[171] REDACTED;[172] REDACTED [173] REDACTED.[174]

78. As noted above, the scope of the Libyan investigation needs to be assessed against the factual allegations described in the Article 58 Decision, in particular the incidents of murder[175] and persecution[176] in Benghazi from 15 February until at least 20 February 2011. While Libya appears to be investigating nearly all of the incidents covered by the Article 58 Decision, there are a few incidents that it does not appear to be investigating from the samples provided such as the killing of three demonstrators in 16 February 2011 by Security Forces,[177] and the arrest of certain activists between 15 to 17 February 2011.[178] The Prosecution however considers that this divergence is not substantial and therefore it does not affect the substantial identity between the two cases.[179] Further, and from the materials reviewed, it does not appear that this difference is due to a lack of genuineness in the domestic proceedings. Hence, Libya is investigating substantially the same conduct as that described in the Article 58 Decision, namely the incidents investigated arise from the same course of conduct and series of events such

[162] REDACTED.
[163] REDACTED.
[164] REDACTED.
[165] REDACTED.
[166] REDACTED.
[167] REDACTED.
[168] REDACTED.
[169] REDACTED.
[170] REDACTED.
[171] REDACTED.
[172] REDACTED.
[173] REDACTED.
[174] REDACTED.
[175] Article 58 Decision,para.36.
[176] Article 58 Decision,paras.43,44,49-54.
[177] Article 58 Decision, para.36(i).
[178] Article 58 Decision, para.43.
[179] REDACTED.

that they are inextricably linked in time, in space and by their subject-matter. The Prosecution however notes that this determination is made in light of the materials reviewed at this stage and subject to revision based on changed circumstances pursuant to Article 19(10)-(11).

2.2 Second Step of the admissibility test: whether Libya is willing and able to investigate

79. If the Chamber finds that Libya has demonstrated that it is investigating or prosecuting the same case, it will then need to consider whether such activity is vitiated by an unwillingness or inability on the part of Libya to carry them out genuinely. From the material submitted, it does not appear that Libya is unwilling to carry out the investigation of Al-Senussi genuinely. Al-Senussi is in the custody of the central government, and Libya does not appear to be shielding Al-Senussi from criminal responsibility.[180] Moreover, at this time there appear to be no delays which can be described as presumptively excessive, unreasonable, inconsistent with an intent to bring the person to justice.[181] Any delays, at this stage, do not appear to be attributable to anything other than obstacles arising from the challenges of establishing a fully functional government in a transitional post-conflict stage. The Prosecution recalls that it is essential that States not be held to a higher standard with regard to the speed and progress of their proceedings than has been met by the ICC itself or other international tribunals, particularly given the history of Libya, its very recent emergence from four decades of autocratic rule, and the serious security challenges facing the

[180] Article 17(2)(a).
[181] Article 17(2)(b).

country. Finally, Libya has not shown a lack of independence or impartiality inconsistent with the intent to bring Al-Senussi to justice.[182]

80. Further, and although there is no need to embark into an assessment of Libya's criminal justice system, Libya sets out the scope of the procedural rights and protections which are at the core of the Libyan legislation and criminal justice system.[183]

81. In a recent meeting with representatives of Human Rights Watch, nonetheless, Al-Senussi indicated that he had no access to counsel and that he had not been informed of the charges against him.[184] Representatives of the Libyan government also interviewed by HRW indicated that no lawyer would take upon Al-Senussi's case.[185] In the Challenge, Libya has however noted that the case cannot proceed to trial without the defendant having counsel and that if Al-Senussi does not appoint counsel of his choice, the Court will appoint one for him.[186] The Prosecution encourages Libya to expedite and facilitate the appointment of counsel and to address Al-Senussi's claims of not having been informed of the charges against him.

82. With respect to Libya's ability, the Prosecution notes that Libya, notwithstanding the challenges it has faced,[187] has taken relevant steps in a relatively short period of time and against an extremely difficult backdrop. The investigation, now conducted by the civilian Prosecutor-General, appears to have progressed since its start on 9 April 2012. Substantial

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[182] The two requirements of Article 17(2)(c) are conjunctive.
[183] Challenge,paras.143,148,150. See also para.177 (on measures to ensure witness safety).
[184] http://www.hrw.org/news/2013/04/17/libya-ensure-abdallah-sanussi-access-lawyer; http://www.libyaherald.com/2013/04/20/still-no-access-to-lawyer-for-senussi/.
[185] *Ibid*.
[186] Challenge,para.149.
[187] Challenge,para.145.

evidence has been gathered, in particular, more than 100 witnesses have been interviewed,[188] including Al-Senussi on two occasions,[189] and documentary evidence[190] and phone intercepts have been obtained.[191] An apparently qualified team of prosecutors and investigators, managed by an Investigation Committee composed of four members, is investigating the case throughout the country under the supervision of the Prosecutor General.[192] Libya has secured relevant international assistance on the rule of law, including training of prosecutors and judges on national strategies for the investigation and prosecution of officials of Gaddafi's regime and on screening and criminal investigation.[193] Notably, Al-Senussi is in detention in Tripoli.[194] While Libya has made progress in its investigation to date, in light of the ongoing security challenges facing the country, the Court should monitor the ongoing developments in the case to insure that Libya remains fully able to investigate and prosecute it.

83. Further, the Libyan Criminal Code appears to penalize as ordinary crimes the underlying allegations of the Article 58 Decision (see in particular indiscriminate or random killings, intentional murder, unlawful arrest, unjustified deprivation of personal liberty, torture, stirring up hatred between the classes).[195] In addition, prior legislation that infringed

[188] Challenge,para.156.Annex 2.
[189] Challenge,para.165. Annex 3. Al-Senussi has also been confronted with witness statements. See para.166.
[190] See Annexes 13,18,25,27 (REDACTED) and 19 (REDACTED).
[191] Challenge,para.174.
[192] Challenge,para.163, Annexes 1,5and 7. The Committee has the full powers of the Prosecutor-General's Office, e.g. to summon witnesses, to search and seize evidence, to conduct forensic examinations, to benefit from strategic advice from UN experts. See Challenge,para.164.
[193] Challenge,paras.189-190. See in general paras.183-193.
[194] Challenge,paras.118,176.
[195] *Ibid*,paras.151-155.

international standards on human rights, such as the People's Court, has been found unconstitutional.[196]

84. As noted above, the Prosecution does not consider that the classification of the crimes in this case by Libya as "ordinary" crimes, as opposed to international crimes, to be necessarily determinative[197] because there is no requirement under the Rome Statute for States to adopt legislation incorporating the crimes listed in Articles 6 through 8 into national law. As such, the crimes charged in national proceedings often will not, and indeed need not, have the same "label" as the ones before the Court. At the same time, other provisions of national law may also impact on the admissibility of a particular case, such as the availability of defences or other grounds for excluding criminal responsibility not permissible under the Rome Statute, the existence of significant discrepancies or lacunae in available modes of liability that might fatally affect the theory of the national prosecution, or the existence of immunities or special procedural rules based on official capacity that could impede prosecution. Hence, a determination on admissibility needs to be on a case-by-case basis in order for it to be able to determine how national law would shape the contours of the proceedings at hand.

85. The Prosecution is satisfied, in the light of the above, that the domestic characterisation of the crimes of murder and persecution which are the subject of the case before this Court are qualified in relation to substantially the same conduct in the national case against Al-Senussi, and that Libya appears, at this time and in light of the materials considered, able to conduct the proceedings.

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[196] Challenge,paras.139-142.
[197] See above para.69. See prior submission in the Saif Al-islam admissibility challenge:ICC-01/11-01/11-167-Red,paras.23-24.

Conclusion

86. Libya has demonstrated that it is investigating Al-Senussi for substantially the same conduct as the ICC. Hence, the Prosecution submits that the case is inadmissible before the Court at this stage and in light of the materials provided. This assessment is subject to revision based on changed circumstances, including a failure by the State to progress genuine proceedings further, pursuant to Article 19(10)-(11). Accordingly the Court, including the Prosecution, should take steps to ensure the monitoring of Libya's investigation and prosecution.

Fatou Bensouda,
Prosecutor

Dated this 2nd day of May 2013

At The Hague, The Netherlands