



Original: **English**

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

Date: **14 June 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 Document with Public Annexes A and B, and Confidential *Ex Parte* (Chamber only) Annex C**

**Defence Response on behalf of Mr. Abdullah Al-Senussi to “Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute”**

**Source:** Mr. Abdullah Al-Senussi, represented by Ben Emmerson QC, Rodney Dixon, Amal Alamuddin, Anthony Kelly, and Prof. William Schabas

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## Introduction

1. The Defence for Mr. Abdullah Al-Senussi files this Response to the Admissibility Application submitted by Libya on 2 April 2013 in respect of Mr. Al-Senussi's case that is before the ICC.<sup>1</sup>
2. It is well-established in the ICC's jurisprudence that in accordance with the provisions of Articles 17 and 19 of the ICC Statute, Libya must demonstrate (i) the existence of domestic proceedings relating to the same case against Mr. Al-Senussi that is before the ICC and (ii) that the Libyan authorities are willing and able genuinely to investigate and prosecute this case within their domestic judicial system.
3. Article 17(1) sets out the test to be satisfied where a State challenges the admissibility of proceedings before the ICC. It provides in relevant part that "the Court shall determine that a case is inadmissible where ... [t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution". "Unwillingness" and "inability" are then defined in subparagraphs (2) and (3) that follow.
4. The applicable test is thus in two parts:
  - *First*, the Court must be satisfied that "the case" is being investigated or prosecuted by Libya.<sup>2</sup> If the Court does not consider that this initial limb has been satisfied, there is no further requirement to consider the second limb and the case must be found admissible.<sup>3</sup>
  - *Second*, provided the Court is satisfied that "the case" is being investigated or prosecuted by Libya, it must then go on to consider whether Libya is either (i) "unwilling" genuinely to carry out that investigation or prosecution; or (ii) "unable" genuinely to carry out that investigation or prosecution.

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<sup>1</sup> Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-307-Red2, 2 April 2013 (hereinafter "Admissibility Application of 2 April 2013").

<sup>2</sup> The sequence of the test is not disputed, see Admissibility Application of 2 April 2013, paras. 38(i), 60.

<sup>3</sup> Admissibility Application of 2 April 2013, para. 59, citing Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009.

A finding of either unwillingness or inability is sufficient to dispose of a State's challenge, and renders the case admissible before the ICC.

5. The Chamber has confirmed that the burden of proof in assessing “the inadmissibility of the case is premised on both limbs of article 17(1)(a) of the Statute[,] and the challenging State is required to substantiate all aspects of its allegations to the extent required by the concrete circumstances of the case.”<sup>4</sup> This finding is contrary to Libya's argument that it only bears the initial burden of establishing that it is investigating the same case as before the ICC and that the “burden of proof then shifts to the party asserting that those proceedings are vitiated in some way by ‘unwillingness’, ‘inability’ or a lack of genuineness.”<sup>5</sup>
6. Libya asserts that the case against Mr. Al-Senussi is inadmissible before the ICC on the grounds that “its national judicial system is actively investigating Abdullah Al-Senussi for his alleged criminal responsibility for multiple acts of murder and persecution, committed pursuant to or in furtherance of State policy, amounting to crimes against humanity.”<sup>6</sup> Libya also claims that it is currently able and willing genuinely to investigate and prosecute this case within its domestic legal system.
7. The Defence submits that Libya has failed to satisfy either of the two prongs under Article 17 to permit the case against Mr. Al-Senussi to be declared inadmissible before the ICC. Libya has not provided evidence that is sufficiently specific, concrete and probative to demonstrate that (i) the Libyan and ICC investigations cover the same conduct, (ii) Libya is able genuinely to carry out an investigation or prosecution of Mr. Al-Senussi, or (iii) Libya is willing genuinely to conduct such an investigation or prosecution.
8. The Chamber has already found in respect of the case against Saif Gaddafi that at present Libya is *unable* genuinely to carry out the investigation or prosecution of Mr. Gaddafi. The Defence submits that this finding applies equally in respect of Mr. Al-Senussi's case. The significant failings and shortcomings of the Libyan legal system

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<sup>4</sup> Decision on the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-344-Red, 31 May 2013, p. 52 (hereinafter “Gaddafi Admissibility Decision”).

<sup>5</sup> Admissibility Application of 2 April 2013, para. 38(ii).

<sup>6</sup> Admissibility Application of 2 April 2013, para. 1.

identified by the Chamber in its Decision also establish that Libya is unable genuinely to investigate or prosecute Mr. Al-Senussi's case. It would be untenable under the circumstances to find that Mr. Al-Senussi's case could be tried in Libya when the Chamber has determined that Libya is unable to investigate and try Mr. Gaddafi. Indeed, Libya has stated that Mr. Al-Senussi's case should be joined with Saif Gaddafi's case as they are so closely related, and that they will be dealt with by the same prosecutorial and judicial authorities.<sup>7</sup> Libya has relied on much of the same evidence and investigative materials in support of the Admissibility Application in Mr. Al-Senussi's case as put before the Chamber in the admissibility proceedings concerning Saif Gaddafi's case. The two cases have thus to be considered consistently when determining admissibility before the ICC.

9. As was found by the Chamber in Mr. Gaddafi's case, the first prong of the admissibility test (investigation of the same case), is not determinative of admissibility in light of the Chamber's finding that Libya is unable genuinely to investigate or prosecute Mr. Al-Senussi's case.<sup>8</sup> Even if Libya were able to establish that its investigation covered the same case as before the ICC, Libya's Admissibility Application should fail on account of Libya being unable genuinely to conduct the investigation or prosecution.
10. Furthermore, as in Mr. Gaddafi's case, there is accordingly no need to find that the alternative requirement of "willingness" is satisfied under Article 17. In the event that the Chamber deems it necessary to consider this requirement, the Defence submits that the evidence filed by Libya does not establish that Libya is willing genuinely to investigate or prosecute the case against Mr. Al-Senussi. The evidence overwhelmingly demonstrates that Libya is incapable of delivering justice in Mr. Al-Senussi's case, and that any judicial proceeding it attempts to conduct will be a 'show trial' that does not meet international standards of fairness and due process and that will inevitably result in Mr. Al-Senussi's execution.
11. The Defence therefore respectfully requests the Chamber to dismiss Libya's Admissibility Application. In addition, the Defence requests that the Chamber insist on Libya's compliance with the surrender order while the admissibility proceedings are underway for all of the reasons set out in the "Response on behalf of Abdullah Al-

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<sup>7</sup> Admissibility Application of 2 April 2013, para. 175.

<sup>8</sup> Gaddafi Admissibility Decision, para. 137.

Senussi to the Submission of the Government of Libya for Postponement of the Surrender Request for Mr. Al-Senussi.”<sup>9</sup> There is no basis to postpone the surrender request and Mr. Al-Senussi should be transferred to the ICC without any further delay. The Defence also requests that the Chamber urgently rule on the Renewed Application of 19 March 2013<sup>10</sup> in light of Libya’s on-going violations of the ICC’s orders and requests.

12. The Defence’s Response is divided into four parts:

- Part A: Libya is not investigating or prosecuting the same case;
- Part B: Libya is unable genuinely to investigate or prosecute Mr. Al-Senussi’s case;
- Part C: Libya is unwilling genuinely to investigate or prosecute Mr. Al-Senussi’s case; and
- Part D: Libya’s alternative argument based on “positive complementarity” should be rejected.

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<sup>9</sup> Response on behalf of Abdullah Al-Senussi to the Submission of the Government of Libya for Postponement of the Surrender Request for Mr. Al-Senussi, ICC-01/11-01/11-319, 24 April 2013.

<sup>10</sup> Renewed Application on behalf of Abdullah Al-Senussi to Refer Libya and Mauritania to the UN Security Council with Public Annex 1 and Confidential and Ex Parte (Registry only) Annexes 2 and 3, ICC-01/11-01/11-304.

## **PART A: Libya is not investigating the same case**

### **Legal Framework**

13. The applicable law is as set out in the Chamber’s “Decision on the admissibility of the case against Saif Al-Islam Gaddafi” of 31 May 2013<sup>11</sup>:

- A case is inadmissible before the ICC if the national proceedings encompass both the person and the conduct which is the subject of the case before the ICC.<sup>12</sup> The Chamber confirmed the Appeals Chamber’s finding that the national investigation “must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court”.<sup>13</sup>
- The Chamber held that “the determination of what is ‘substantially the same conduct as alleged in the proceedings before the Court’ will vary according to the concrete facts and circumstances of the case and, therefore requires a case-by-case analysis.”<sup>14</sup>
- The conduct allegedly under investigation by Libya must be compared to the conduct attributed to the accused in the Warrant of Arrest issued by the Chamber as well as the Chamber’s Decision under Article 58 on the Prosecutor’s application for the Warrant of Arrest.<sup>15</sup>
- The Chamber noted that it “would not be appropriate to expect Libya’s investigation to cover exactly the same acts of murder and persecution mentioned in the Article 58 Decision as constituting instances of Mr Gaddafi’s alleged course of conduct”<sup>16</sup> given that
  - The Warrant of Arrest (in Mr. Gaddafi’s case as in Mr. Al-Senussi’s case) does not refer to specific instances of killings and acts of

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<sup>11</sup> Gaddafi Admissibility Decision, para. 91.

<sup>12</sup> Gaddafi Admissibility Decision, para. 74.

<sup>13</sup> Gaddafi Admissibility Decision, para. 76.

<sup>14</sup> Gaddafi Admissibility Decision, para. 77.

<sup>15</sup> Gaddafi Admissibility Decision, para. 78.

<sup>16</sup> Gaddafi Admissibility Decision, para. 83.

persecution, but rather to acts resulting from the suspect's use of forces under his control to target the civilian population, and

- The Article 58 Decision (which is the same for both suspects) included references to various acts of murder and persecution as samples of a course of conduct which the Chamber found were committed as part of an attack on the civilian population, and thus constituted crimes against humanity.<sup>17</sup>

- Instead, the Chamber must assess, on the basis of the evidence submitted by Libya, “*whether the alleged domestic investigation addresses the same conduct underlying the Warrant of Arrest and Article 58 Decision*”.<sup>18</sup>
- The Chamber has been guided by the jurisprudence of the Appeals Chamber that the State challenging admissibility must provide the Court “*with evidence of a sufficient degree of specificity and probative value that it is indeed investigating the [same] case*”.<sup>19</sup>

14. Libya is thus required to show on the evidence submitted with its Application that it is indeed investigating the same conduct that underlies the Warrant of Arrest and Decision on the Arrest Warrant for Mr. Al-Senussi.

#### **Scope and subject matter of the Warrant of Arrest**

15. The conduct underlying the Warrant of Arrest and Article 58 Decision in Mr. Al-Senussi's case is the same as that alleged in Mr. Gaddafi's case, namely the use of and control over the Libyan Security Forces (as defined in the Warrant and Decision) to commit a widespread and systematic attack on the civilian population in Libya in February 2011 to quell the uprising against the regime of Muammar Gaddafi. Although Mr. Al-Senussi's charges of crimes against humanity are focussed on Benghazi, they stem from and are part of the same attack that it is alleged constituted a crime against humanity. As set out in Mr. Gaddafi's Warrant, the Warrant of Arrest for Mr. Al-Senussi also states that there are reasonable grounds to believe that

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<sup>17</sup> Gaddafi Admissibility Decision, para. 80-82.

<sup>18</sup> Gaddafi Admissibility Decision, para. 83.

<sup>19</sup> Gaddafi Admissibility Decision, para. 54.



- “a State policy was designed at the highest level of the Libyan State machinery and aimed at deterring and quelling, by any means, including the use of lethal force, the demonstrations of civilians against the regime of [Gaddafi] which started in February 2011”;
- “in furtherance of the abovementioned State policy, from 15 February 2011 until at least 28 February 2011 Libyan Security Forces, following a consistent modus operandi, carried out throughout Libya an attack against the civilian population taking part in demonstrations against Gaddafi’s regime or those perceived to be dissidents”;
- within this period, “the Security Forces killed and injured as well as arrested and imprisoned hundreds of civilians”; and
- “a widespread and systematic attack, in furtherance of a State policy, targeting the civilian population which was demonstrating against Gaddafi’s regime” occurred.<sup>20</sup>

16. The Chamber also stated in Mr. Al-Senussi’s Warrant of Arrest that:

- as part of this attack against civilian demonstrators or alleged dissidents to Gaddafi’s regime, “in particular” and “notably” in Benghazi, crimes against humanity were committed by Security Forces under the command of Abdullah Al-Senussi<sup>21</sup>; and
- once instructed by Muammar Gaddafi to implement the plan to quell civilian demonstrations, Abdullah Al-Senussi - in his role as the national head of Military Intelligence - used his control over the military forces, commanded these forces and directly instructed troops to attack civilians in Benghazi.<sup>22</sup>

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<sup>20</sup> Warrant of Arrest for Abdullah Al-Senussi, ICC-01/11-01/11-4, 27 June 2011 (hereinafter “Al-Senussi Arrest Warrant”), p. 4-5.

<sup>21</sup> Al-Senussi Arrest Warrant, p. 5.

<sup>22</sup> Al-Senussi Arrest Warrant, p. 5.

17. The Chamber identified specific incidents in Benghazi,<sup>23</sup> Tripoli,<sup>24</sup> Misrata,<sup>25</sup> and Al-Bayda, Derna, Tabruk and Ajdabiya<sup>26</sup> which gave the Chamber reasonable grounds to believe that “murders constituting crimes against humanity were committed from 15 February 2011 until at least 25 February 2011.”<sup>27</sup> Further, the Chamber identified specific incidents in these locations from 15 February 2011 to 28 February 2011 in finding that “several acts of persecution based on political grounds were committed in various localities of the Libyan territory.”<sup>28</sup>
18. Within this context, the Chamber found reasonable grounds to believe that from 15 to 20 February 2011, Mr. Al-Senussi as “the national head of the Military Intelligence ... exercised control over the armed forces under his command that were deployed in the city of Benghazi in order to suppress civilian demonstration.”<sup>29</sup> The Chamber held that by virtue of “his family ties and long lasting friendship with Muammar Gaddafi” as well as his “control over Military Intelligence, Abdullah Al-Senussi, although subordinated to Gaddafi, is at the same time the highest authority of the armed forces, of which all members are subordinated to him.”<sup>30</sup> Accordingly, Mr. Al-Senussi is charged by the ICC as being “in a position to trigger the actions of the armed forces”<sup>31</sup> and with having “used his powers over the military forces [and] ... directly instructed the troops to attack civilians demonstrating”, specifically in Benghazi.<sup>32</sup>
19. The Chamber found that “there are reasonable grounds to believe that Abdullah Al-Senussi (i) intended to bring about the objective elements of the crimes committed by the armed forces under his control from 15 February 2011 until at least 20 February 2011 in the city of Benghazi, (ii) knew that his conduct was part of a widespread and systematic attack against the civilian population pursuant to a State policy of targeting civilians perceived to be political dissidents; and (iii) was aware of his senior leadership role within the structure of the military and of his power to exercise full control over his subordinates.”<sup>33</sup>

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<sup>23</sup> Decision on Art 58 Application, paras. 36, 37.

<sup>24</sup> Decision on Art 58 Application, para. 38.

<sup>25</sup> Decision on Art 58 Application, para. 39.

<sup>26</sup> Decision on Art 58 Application, para. 41.

<sup>27</sup> Decision on Art 58 Application, para. 41.

<sup>28</sup> Decision on Art 58 Application, paras. 42-65.

<sup>29</sup> Decision on Art 58 Application, para. 84.

<sup>30</sup> Decision on Art 58 Application, para. 85.

<sup>31</sup> Decision on Art 58 Application, para. 86.

<sup>32</sup> Decision on Art 58 Application, para. 87.

<sup>33</sup> Al-Senussi Arrest Warrant, p. 5, 6.

20. Based on each of these findings, the Chamber issued a Warrant of Arrest for Abdullah Al-Senussi on the following charges:

*“there are reasonable grounds to believe that Abdullah Al-Senussi is criminally responsible as a principal to the following crimes committed in Benghazi from 15 February 2011 until at least 20 February 2011 by the member of the armed forces under his control, under article 25(3)(a) of the Statute as an indirect perpetrator:*

- i. Murder as a crime against humanity, within the meaning of article 7(1)9a) of the Statute; and*
- ii. Persecution as a crime against humanity, within the meaning of article 7(1)(h) of the Statute.”<sup>34</sup>*

21. These charges are identical to those issued against Saif Gaddafi (as cited in the Gaddafi Admissibility Decision<sup>35</sup>) but for the focus on Benghazi in Mr. Al-Senussi’s case. As in Mr. Gaddafi’s case, no specific incidents are referred to in Mr. Al-Senussi’s Warrant. The Article 58 Decision refers to several incidents in various places, including Benghazi, in concluding that an attack was committed against the civilian population that constituted a crime against humanity.<sup>36</sup> Accordingly, as found by the Chamber in the admissibility proceedings in Saif Gaddafi’s case<sup>37</sup>, the Chamber in the present case is required to assess on the evidence supplied by Libya whether the domestic investigation addresses the same conduct underlying the Warrant and Article 58 Decision, namely that in February 2011 Mr. Al-Senussi used his position and power to control, command and instruct the Libyan Security Forces to deter and quell, by any means, including the use of lethal force, the demonstrations of civilians against Muammar Gaddafi’s regime as part of a widespread and systematic attack on the civilian population in various places in Libya, notably in Benghazi.

22. In the Defence’s submission, for the reasons set out below, Libya has failed to submit evidence which is sufficiently specific and probative to demonstrate that the scope and subject matter of its domestic investigation covers the same conduct underlying the Warrant of Arrest and Article 58 Decision in Mr. Al-Senussi’s case.

<sup>34</sup> Al-Senussi Arrest Warrant, p. 6.

<sup>35</sup> Gaddafi Admissibility Decision, para. 79.

<sup>36</sup> Gaddafi Admissibility Decision, para. 81.

<sup>37</sup> Gaddafi Admissibility Decision, para. 83.

## Insufficiency of the evidence relied on by Libya

### *Overview of evidence submitted by Libya*

23. Libya asserts “that its investigation satisfies the most restrictive interpretation of either the ‘same conduct’ test or the ‘substantially the same conduct test’, it being predicated substantially on the same precise incidents as those pursued by the ICC”.<sup>38</sup>
24. Libya’s submissions on the domestic investigation itself are limited. The topic - which is central to any admissibility challenge - is only addressed at pages 71-80 of the Application, and even then in very general terms, including discussion about crimes that are not the subject of the ICC’s investigation and procedural aspects of the investigation which provide no information about the actual scope and content of the investigation. Indeed, the precise evidence relied on by Libya to argue it is investigating the same case is essentially as set out in one paragraph, paragraph 162, with various sources footnoted. Libya argues here that its investigation “mirrors” the allegations contained in the ICC’s Article 58 Decision. The sources relied on are mainly “*samples of evidential material*” that are attached to the Admissibility Application to seek to show that Libya is investigating the same case.<sup>39</sup>
25. Libya has also cited to evidence already relied on in the admissibility proceedings in Saif Gaddafi’s case, which similarly consist of “samples” of evidence, and Libya heavily relies on much of the same evidence filed in the admissibility proceedings in Mr. Gaddafi’s case.<sup>40</sup> Libya notes that annexes to its present Application need to be “considered alongside the evidence gathered in the Saif Al-Islam Gaddafi case”<sup>41</sup> including intercept evidence,<sup>42</sup> “passenger manifests and payment records for the transport of mercenaries.”<sup>43</sup>
26. The Chamber has already found that many of these documents contain no relevant information for the purposes of the admissibility proceedings.<sup>44</sup> And that those materials

<sup>38</sup> Admissibility Application of 2 April 2013, para. 63.

<sup>39</sup> Admissibility Application of 2 April 2013, para. 162.

<sup>40</sup> Admissibility Application of 2 April 2013, para. 162; See, footnotes 159-165.

<sup>41</sup> Admissibility Application of 2 April 2013, para. 173.

<sup>42</sup> Admissibility Application of 2 April 2013, para. 174.

<sup>43</sup> Admissibility Application of 2 April 2013, para. 173.

<sup>44</sup> Gaddafi Admissibility Decision, para. 106.

that may be relevant, do not contain specific information as to the criminal conduct under investigation so as to allow the Chamber to draw conclusions about the precise scope and subject matter of the domestic investigation and whether it covers the same case before the ICC.<sup>45</sup>

27. The new materials submitted with the present Admissibility Application are in much the same vein as those submitted in Mr. Gaddafi's admissibility proceedings. They are general, vague, and lacking in sufficient detail to allow the Chamber to draw conclusions as to the nature and scope of the national investigation. As the Chamber found in Mr. Gaddafi's case<sup>46</sup>, even though some of the materials show that there is an investigation on-going at a domestic level in respect of Mr. Al-Senussi with "certain discrete aspects" that may relate to Mr. Al-Senussi's conduct as alleged in the proceedings before the ICC, this evidence lacks the sufficient degree of specificity and probative value to establish that Libya is investigating the same conduct that underlies the Warrant of Arrest and Article 58 Decision.
28. The Defence submits that the Chamber should make the same determination as made in respect of the evidence submitted by Libya in the admissibility proceedings concerning Mr. Gaddafi, namely that the evidence submitted in Mr. Al-Senussi's case, which relies extensively on the evidence filed in Mr. Gaddafi's case, "taken as a whole, does not allow the Chamber to discern the actual contours of the national case ... such that the scope of the domestic investigation could be said to cover the same case as that set out in the Warrant of Arrested issued by the Court."<sup>47</sup>
29. The Chamber has made it clear that the evidence to be taken into account does not refer exclusively to the evidence on the merits of the national case. It means all material capable of proving that an investigation into the same conduct as the ICC's case is on-going.<sup>48</sup> The Chamber emphasised that this could include evidence from the authorities in charge of the investigation and information in the file arising from the investigation to ascertain whether the Libyan authorities are taking concrete and progressive steps to

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<sup>45</sup> Gaddafi Admissibility Decision, paras. 115-118, 123, 124, 134-137.

<sup>46</sup> Gaddafi Admissibility Decision, paras. 132 and 134.

<sup>47</sup> Gaddafi Admissibility Decision, paras. 135.

investigate Mr. Al-Senussi's alleged responsibility for the conduct underlying the Warrant of Arrest issued by the ICC.<sup>49</sup>

30. The Defence's submission is that such evidence is completely lacking in the present Admissibility Application<sup>50</sup>. Libya has submitted a selection of piecemeal materials which do not explain with any clarity whether and how the national investigation seeks to establish Mr. Al-Senussi's responsibility for the conduct underlying the Warrant of Arrest.

*Annexes to the Application*

31. Libya has submitted 28 annexes with its Admissibility Application to seek to show that it is investigating the same case.<sup>51</sup> Approximately half of these annexes are extracts of witness statements in question-and-answer form (Annexes 8-12, 14-17, 20-24, 26). The other materials include official documents regarding procedures for the investigation (Annexes 1-7, 28); medical records, death certificates and a summary showing travels undertaken to collect information about injuries (Annexes 13, 18, 25, 27); and requests for weapons (Annex 19).
32. The documents include materials spanning the entire investigation into Mr. Al-Senussi's conduct: from the investigations by the transitional authorities in 2011 up to and including material gathered by the current prosecution authorities in 2013. They thus supposedly represent the best possible selection of material to demonstrate the same "case" that is available after more than two years of investigative work.
33. The vast majority of the documents either do not mention Mr. Al-Senussi at all or show in what way his alleged conduct is being investigated.
34. It is not clear from the materials that they have been gathered as part of an investigation focussed on Mr. Al-Senussi's alleged conduct. There are many questions to witnesses (even in the specifically-extracted sections of the statements provided) that relate to

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<sup>49</sup> Gaddafi Admissibility Decision, paras. 54, 55.

<sup>50</sup> Gaddafi Admissibility Decision, paras. 106-137.

<sup>51</sup> Libya has filed a total of thirty annexes but Annex 29 is a public speech by Tarek Mitri, Special Representative of the Secretary-General and Head of UNSMIL, before the UN Security Council on 14 March 2013, and Annex 30 is a list of authorities.

numerous other persons, relationships and structures and most relate to locations other than Benghazi.

35. As with the materials submitted in the Gaddafi case, a large number of the documents are not contemporaneous to the events they describe and have been prepared by the Libyan authorities for the purpose of the Admissibility Application.
36. In addition, a number of documents merely serve to establish the fact that civilian authorities are now in charge of the investigation. But the mere fact that the Libyan authorities are presently investigating Mr. Al-Senussi's case within the civilian judicial structures and not through the military courts, and are seeking to commence Mr. Al-Senussi's trial as soon as possible, does not in any way provide any specific, relevant and probative evidence about whether the scope and subject matter of the investigation in fact covers the same conduct as is before the ICC.<sup>52</sup>

*No further time should be permitted*

37. The Chamber stressed that in accordance with the ICC's jurisprudence it is for Libya as the challenging State "to ensure that the challenge is sufficiently substantiated by evidence". The investigation into Mr. Al-Senussi has been underway since 2011, as confirmed by the materials annexed to the Application. Submissions in relation to the admissibility of Mr. Al-Senussi's case have been filed since May 2012. The Chamber is under such circumstances not obliged to provide Libya with any further opportunities to present additional evidence and nor can Libya be expected to be allowed to submit additional evidence or cause further unnecessary delay.<sup>53</sup> Given that much of the same evidence submitted in Mr. Gaddafi's admissibility proceedings is again relied on by Libya for its admissibility challenge in Mr. Al-Senussi's case, it must be taken into account, as emphasised by the Chamber, that

- Following the filing of evidence with its admissibility challenge in Mr. Gaddafi's case on 1 May 2012, the Chamber allowed Libya a subsequent submission of additional evidence on 3 October 2012 for the purposes of the oral hearing that occurred on 9 and 10 October 2012, in which all of this evidence was considered, and

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<sup>52</sup> Admissibility Application of 2 April 2013, para. 30.

<sup>53</sup> Gaddafi Admissibility Decision, para. 136.

- Thereafter, the Chamber granted Libya a third opportunity to submit evidence on matters relevant to the admissibility of the case by 23 January 2013 in response to specific questions posed by the Chamber to seek to gain a full understanding of the steps that were taken domestically.<sup>54</sup>

38. Libya has thus had ample opportunity to address the specific concerns raised by the Chamber in relation to its national investigation and in particular whether its investigation covers the same underlying conduct as alleged in the ICC's Warrant of Arrest and Article 58 Decision. The Defence submits that Libya should not be afforded any further opportunity to supplement the evidence it has already filed for the purposes of the present Admissibility Application. The onus was on Libya to substantiate in full its admissibility challenge at the time of making its application on 2 April 2013. Libya had previously claimed that it required further time until the end of March 2013 to provide all necessary supplementary materials for its admissibility challenge in respect of Mr. Al-Senussi.<sup>55</sup> Although this request was not specifically ruled on, in effect Libya took this time to prepare its supplementary materials in filing its Admissibility Application in Mr. Al-Senussi's case on 2 April 2013.<sup>56</sup>

*Assessment of the materials*

39. The Defence has set out below the assessment of the materials relied on by Libya in support of the Admissibility Application. The Defence addresses all of the materials relied on by Libya from the admissibility proceedings in Mr. Gaddafi's case (submitted with the initial admissibility filing on 1 May 2012 and the supplemental materials filed on 23 January 2013) as well as the new materials submitted with the Application on 2 April 2013. They are grouped under the following headings (i) official documents of the Libyan authorities; (ii) summaries of witness statements; (iii) extracts of redacted witness statements; (iv) intercepts and (v) other materials (including medical records).

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<sup>54</sup> Gaddafi Admissibility Decision, para. 136.

<sup>55</sup> Libyan Government's Observations regarding the case of Abdullah Al-Senussi, ICC-01/11-01/11-260, 28 January 2013, para. 11. See also, Response of the Libyan Government to the 'Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC', ICC-01/11-01/11-264, 1 February 2013, paras. 25, 29.

<sup>56</sup> Admissibility Application of 2 April 2013.



40. In accordance with the Chamber's finding that the purpose of the admissibility determination is not to decide whether the evidence collected by the national authorities is strong enough to establish criminal responsibility but whether Libya is taking concrete steps to investigate Mr. Al-Senussi's responsibility in relation to the same case<sup>57</sup>, the Defence has not sought to comment on the merits of the evidence and whether it is admissible and could support a conviction. This is despite the very serious questions that do arise about the reliability and admissibility of the witness evidence put forward by Libya, particularly in light of allegations about the manner in which it was obtained through the use of coercion and torture and in the absence of proper procedural safeguards. These issues are addressed in more detail in Parts B and C below on "ability" and "willingness" genuinely to investigate the case.
41. Furthermore, it must be taken into account that the probative value of summarised or selectively extracted witness evidence – all of which is unsigned by the witness and much of which appears to relate to 'witnesses' who are themselves suspects in detention – is necessarily very limited in determining whether the evidence shows that Libya is investigating the same case. In addition, the Defence has only received redacted extracts of witness statements which allegedly form the basis of the national investigation (many of which are heavily redacted), thereby placing the Defence at a severe disadvantage to comment on whether the evidence demonstrates that Libya is investigating the same case. The Chamber is urged not to make any findings adverse to the Defence on the basis of redacted materials without providing the Defence with the opportunity to make submissions on such materials in de-redacted form (in whole or in part).

(i) Official documents of the Libyan authorities

42. Libya relies on various documents from the Libyan authorities that it submitted in the admissibility proceedings in Saif Gaddafi's case.<sup>58</sup> None of these documents provide any details about the investigation of Mr. Al-Senussi which permit the Chamber to ascertain whether the same case is being investigated:

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<sup>57</sup> Gaddafi Admissibility Decision, para. 115.

<sup>58</sup> Admissibility Application of 2 April 2013, para. 162, See, footnotes 159-165.

- Confidential Annex D of the filing of 1 May 2012 – it contains information about detention orders and extensions of detention for Saif Gaddafi. It makes no mention of Mr. Al-Senussi and does not concern his investigation in any way. In any event, the Chamber found that this document contains no specific information as to the criminal conduct under investigation.<sup>59</sup>
- Confidential Annex E and Annex F of the filing of 1 May 2012 – they contain some information from the Ministry of Justice and Military Prosecutor-General about the investigations against Mr. Gaddafi and Mr. Al-Senussi, but give no details about the investigations. Annex F covers the investigation into the events in 1996 at Abu Salim prison, which forms no part of the ICC’s case. The Chamber has noted in respect of these annexes that the *“link between Al-Senussi’s domestic investigations and those against Mr. Gaddafi has not been shown by Libya and it is not apparent to the Chamber from the evidence before it”*. The Chamber found that the information provided in these annexes *“falls short of clarifying the scope or subject matter of the domestic investigation”*.<sup>60</sup>
- Confidential Annex I of the filing of 1 May 2012 – it contains no information at all about Mr. Al-Senussi’s investigation, and yet Libya still footnotes it as a source in paragraph 162. The document only provides a review of Mr. Gaddafi’s investigation, and the Chamber has found that it does not contain specific information about the criminal conduct under investigation in Libya and thus falls *“short of substantiating ... with a sufficient degree of specificity and probative value, that the same conduct is the subject of domestic investigations.”*<sup>61</sup>
- Public Annexes 1-3 of Libya’s Submissions of 23 January 2013 – these documents contain no concrete information about the scope and subject matter of the investigation against Mr. Al-Senussi. Annex 1 does not even mention him. Annexes 2 and 3 mention interviews from Mr. Al-Senussi, but no details at all are provided about the content of these interviews and recordings. The Chamber has already found that Annex 1 is not relevant<sup>62</sup> and that Annexes 2 and 3 do not

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<sup>59</sup> Gaddafi Admissibility Decision, para. 117.

<sup>60</sup> Gaddafi Admissibility Decision, para. 115.

<sup>61</sup> Gaddafi Admissibility Decision, para. 116.

<sup>62</sup> Gaddafi Admissibility Decision, footnote 180.

contain specific information as to the criminal conduct under investigation in Libya.<sup>63</sup>

- Public Annex 8 of Libya's Submissions of 23 January 2013 – this is a Decision of the Constitutional Court about the procedures of the Peoples' Court of 23 December 2012. Libya has cited this document to show that its national investigation covers the same 'State policy' components and the elements of command exercised by Al-Senussi that form part of the ICC's charges. And yet this document makes no mention of the national investigation into Mr. Al-Senussi.
- Public Annexes 9-11 of Libya's Submissions of 23 January 2013 – Annexes 9 and 10 contain orders extending provisional detention for Mr. Gaddafi without mentioning Mr. Al-Senussi at all. Annex 11 is a review of Mr. Gaddafi's case by public prosecutors which suggests that his case is joined with Mr. Al-Senussi's case. No information is provided about Mr. Al-Senussi's investigation. The Chamber found that these documents "do not contain specific information as to the criminal conduct under investigation in Libya".<sup>64</sup>
- Public Annexes 12 and 13 of Libya's Submissions of 23 January 2013 – these annexes deal exclusively with the appointment of legal counsel in Mr. Gaddafi's case. They do not mention Mr. Al-Senussi at all. Libya has nevertheless cited these documents as support for its claim that the Libyan investigation covers the same allegations about Mr. Al-Senussi's command over the Libyan Security Forces as contained in the Warrant of Arrest and Article 58 Decision.

43. Libya also relies on new documents from the Libyan authorities that have been submitted with the present Admissibility Application. None of these documents provide any specific information about the scope and subject matter of the national investigation to establish that the conduct under investigation is the same as before the ICC.

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<sup>63</sup> Gaddafi Admissibility Decision, para. 116.

<sup>64</sup> Gaddafi Admissibility Decision, para. 117.

- Confidential Annex 1 – a letter submitting the investigative file of complaints no. 2012/327 and 2011/1133, but the case file is not attached.
- Confidential Annex 2 – a letter from the Prosecutor General’s office to Prof. El-Gehani for the purposes of the present proceedings stating that examples of testimonies of witnesses who have been interviewed in Mr. Al-Senussi’s case are enclosed.
- Confidential Annex 3 – another letter from the Prosecutor General’s office to Prof. El-Gehani about dates when it is said Mr. Al-Senussi has been interrogated “several times”. However, no details are given about the contents of these interrogations. The letter also notes charges in respect of Mr. Al-Senussi, but provides absolutely no information about the date, location or nature of the conduct that is being investigated or the scope of the national investigation.
- Confidential Annex 4 – another letter from the Prosecutor General’s office to Prof. El-Gehani, enclosing a transcription of speech allegedly made by Mr. Al-Senussi in Benghazi. Once again, no information is provided about the nature and scope of the domestic investigation.
- Confidential Annex 5 – another letter from the Prosecutor General’s office to Prof. El-Gehani merely stating the names of the members of the investigation team.
- Confidential Annex 6 – another letter from the Prosecutor General’s office to Prof. El-Gehani which confirms that the investigation is being conducted by the civilian prosecutor. It contains no information about the conduct being investigated.
- Confidential Annex 7 – a “Decision of the Attorney-General at the Department of Jurisdiction of Ben-Ghazi Court of Appeals” of 1 May 2011 to form a commission to investigate the crimes committed “by the Gaddafi battalions” and to complete “the criminal proceedings previously conducted by the Prosecution on 18 February 2011”. Yet again, this document contains no information about any investigation in respect of Mr. Al-Senussi.

- Confidential Annex 28 - a document setting out legal provisions suggesting that Mr. Al-Senussi's case should be handled by the civilian authorities. No information is provided about the investigation itself.

(ii) Summaries of witness statements

44. Libya has cited Confidential Annex C to the filing of 1 May 2012 in support of its contention that the Libyan investigation into Mr. Al-Senussi covers the same acts as those alleged in the ICC's charges, in particular the shooting of demonstrators in Juliana bridge in Benghazi on 17 February 2011, the arrest of the lawyer Fathi Terbil, the arrest of Idris Al-Mesmari and the shooting of civilian demonstrators.<sup>65</sup> This annex consists of short summaries of several witness statements. The statements themselves are not provided.
45. It is significant that Mr. Al-Senussi is only mentioned in one of these summaries (witness J.E.) as being involved in meetings of the High Security Committee. The summaries give no information or details about Mr. Al-Senussi's alleged role in relation to any of the incidents mentioned. They cannot be relied on to provide any information about the scope and subject matter of the national investigation into the alleged criminal conduct of Mr. Al-Senussi.
46. Furthermore, the Chamber has found that although the information contained in these summaries reflect "discrete aspects" of the conduct as alleged in the proceedings before the ICC, they do not answer the crucial question as to the scope of the domestic investigation: "*the scant level of detail and the lack of specificity of the summaries do not allow the Chamber to draw conclusions as to the precise scope of the domestic investigation.*"<sup>66</sup>

(iii) Extracts of redacted witness statements

47. Libya has submitted extracts of various witness statements and interviews (many of which are heavily redacted) that Libya claims establish that the national investigation

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<sup>65</sup> Admissibility Application of 2 April 2013, para. 162(iii).

<sup>66</sup> Gaddafi Admissibility Decision, para. 123.

covers the same case as before the ICC, namely Annexes 8-12, 14-17, 20-24 and 26 of the Admissibility Application. These statements / transcripts either do not mention Mr. Al-Senussi or do not provide any details of Mr. Al-Senussi's alleged role that are sufficient to allow the Chamber to draw conclusions about the precise scope and subject matter of the national investigation. As with the witness summaries above, the scant level of detail and lack of specificity do not establish that the domestic investigation covers the same conduct underlying the Warrant of Arrest in Mr. Al-Senussi's case.

48. Even though certain of the statements appear to refer to discrete aspects of conduct alleged in the ICC's proceedings (including similar aspects covered in the witness summaries, such as the alleged shooting of demonstrators in Benghazi on 17 February 2011, see for example Annexes 16 and 17), they do not provide the Chamber with sufficient information about the national investigation to establish that it covers the same underlying conduct as before the ICC, namely that Mr. Al-Senussi used his position, power, and connections with the Gaddafi family to control, command and instruct the Libyan Security Forces to deter and quell, by any means, including the use of lethal force, the demonstrations of civilians against Muammar Gaddafi's regime as part of a widespread and systematic attack on the civilian population in various places in Libya, notably in Benghazi.<sup>67</sup>
49. Libya has provided a selection of extracts that are fragmented and disconnected and from which it is impossible to discern with any clarity the scope, scale and content of the domestic investigation. Counsel for Libya have sought at paragraph 170 of the Application to organise these materials under various topics, but none of this clarifies the subject matter of the investigation and whether it covers the same underlying conduct as the ICC's case. In any event, it is not for Counsel to seek to impose some degree of organisation on Libya's dispersed investigation. It is for Libya through the submission of its own documents and files on the investigation to establish before the Chamber with sufficient specificity and certainty that its investigation covers the same underlying conduct as before the ICC. Libya has fallen short in substantiating its argument that the case is inadmissible before the ICC on account of the same case being investigated by Libya.

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<sup>67</sup> See paras. 15-30 above.

50. Moreover, Libya states that the Prosecutor-General plans “to conduct further interviews” which may include evidence relevant to “all aspects of Abdullah Al-Senussi’s command”.<sup>68</sup> This kind of generalised statement about future steps that may be taken provides no assistance as to the scope of the national investigation. The redacted extracts of statements which have been submitted and that appear to concern Mr. Al-Senussi’s alleged command position (such as Annexes 8-12) are generalised and disjointed. They do not permit the Chamber to draw the conclusion that this investigation covers the same underlying conduct - including allegations relevant to the suspect’s basis of individual criminal responsibility - as in the case before the ICC.

51. Libya has also referred to 3 witness statements or interviews that were attached to its further submissions of 23 January 2013 in Mr. Gaddafi’s admissibility proceedings, namely Annexes 4, 15 and 16.

- Annex 4 does not mention Mr. Al-Senussi at all. The events described do not appear to be relevant to any of the ICC’s charges against Mr. Al-Senussi. Furthermore, as the Chamber found, it is “not apparent from this statement that it was taken in relation to an investigation of the role of Mr. Gaddafi, if any, in the events described by the witness”.<sup>69</sup> The same finding equally applies to Mr. Al-Senussi.
- Annex 15 also does not mention Mr. Al-Senussi at all. It concerns alleged events in Babel Azizia. It is not apparent that the report is in any way relevant to the ICC’s charges against Mr. Al-Senussi. The statement certainly does not show that Libya is investigating the same conduct underlying the ICC’s Warrant of Arrest.
- Annex 16, as noted by the Chamber, appears to be a statement of an ‘insider’ witness about the outbreak of violence on 17 February in Benghazi.<sup>70</sup> It covers

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<sup>68</sup> Admissibility Application of 2 April 2013, para. 172.

<sup>69</sup> Gaddafi Admissibility Decision, para. 124.

<sup>70</sup> Gaddafi Admissibility Decision, para. 126. As noted in the confidential version of the Decision, this witness has been interviewed by the ICC Prosecutor. It is thus most unlikely that he is still residing in Libya. In the absence of effective witness protection programs in Libya (as noted in Part B and C below), his return to give evidence at any trial could not be guaranteed. This would make his evidence unavailable for trial. Without access to relevant evidence, it cannot be established that Libya is able genuinely to conduct the investigation and prosecution of Mr. Al-Senussi’s case.

the alleged role of Mr. Gaddafi in the alleged killings of demonstrators in Benghazi and the arrest of journalist Idriss Al-Mismari. It also deals with Mr. Al-Senussi's alleged role in these incidents, including the alleged killings of civilian demonstrators at Jilianah bridge on 17 February 2013. Although the Chamber accepted that this statement was relevant for the determination of admissibility, the Chamber found that it only provided evidence that the national investigation covered discrete aspects of the conduct as alleged in the proceedings before the ICC (including "certain events in Benghazi on 17 February 2011 and the arrest of journalists and activists"<sup>71</sup>). It was not sufficient "to discern the actual contours" of the national investigation such that the "scope of domestic investigation could be said to cover the same case as set out in the Warrant of Arrest issued by the Court".<sup>72</sup> The Defence submits that the same finding should be made in the present case.

#### (iv) Intercepts

52. Libya has asserted that it relies on intercept evidence (Confidential Annex 17 to its submissions of 23 January 2013 in Saif Gaddafi's case) for the present Application.<sup>73</sup> However, only one out of all the records of intercepted calls refers to Mr. Al-Senussi as being someone who will attend a meeting (call 4). This information can hardly be said to provide the Chamber with evidence about the scope and content of the national investigation against Mr. Al-Senussi.
53. The fact that Libya states in its Application that it is going to attempt to obtain relevant transcript evidence which implicates Mr. Al-Senussi, does not assist in providing the Chamber with specific and probative evidence about the actual investigation being undertaken by the Libyan authorities.<sup>74</sup> Even though the Chamber noted that many of the intercepts allegedly concern Mr. Saif Gaddafi and relate to the repression of demonstrations, the Chamber did not find that these intercepts provided sufficient evidence to find that Libya is investigating the same case in respect of Saif Gaddafi.<sup>75</sup> The same conclusion is warranted here.

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<sup>71</sup> Gaddafi Admissibility Decision, paras. 126 and 134.

<sup>72</sup> Gaddafi Admissibility Decision, paras. 133-135.

<sup>73</sup> Admissibility Application of 2 April 2013, para. 174.

<sup>74</sup> Admissibility Application of 2 April 2013, para. 174.

<sup>75</sup> Gaddafi Admissibility Decision, paras. 128-131.



(v) Other materials

54. Libya refers to evidence gathered in Mr. Saif Gaddafi's case, including passenger manifests and payment records for the transport of mercenaries (Confidential Annexes 5-7 of Libya's Submissions of 23 January 2013).<sup>76</sup> None of these materials mention Mr. Al-Senussi and it is not apparent from the documents whether they relate to the investigation against Mr. Al-Senussi.
55. The Chamber did not find that any of this evidence was sufficient to find that the national investigations covers the same conduct as charged before the ICC in Mr. Gaddafi's case.<sup>77</sup>
56. In addition, Libya has included medical notes and death certificates (Annexes 13, 18, 25, and 27 of the Application of 2 April 2013). None of these materials add anything significant to the crucial question of whether the domestic investigation covers the same conduct underlying the ICC charges. They do not provide any basis for the Chamber to find that Libya is investigating the same case. Libya has not shown that there is any link between this medical evidence and any unlawful conduct that is alleged against Mr. Al-Senussi. The mere fact that medical evidence exists about deaths and injuries does not necessarily demonstrate that unlawful acts have occurred or that criminal responsibility for such acts is being investigated in respect of Mr. Al-Senussi.
57. Finally, Annex 19 appears to consist of requests for arms and ammunition, certain of which are from Mr. Al-Senussi, in June and July 2011. These documents add nothing to Libya's submission that it is investigating the same case focusing on events in Benghazi in February 2011.

**Overall submission on investigation of the same case**

58. The Chamber has found that it is not necessary for Libya to show that its investigation covers exactly the same events referred to in the Warrant of Arrest and Article 58 Decision.<sup>78</sup> However, the burden is on Libya to substantiate that its investigation covers

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<sup>76</sup> Admissibility Application of 2 April 2013, para. 173.

<sup>77</sup> Gaddafi Admissibility Decision, para. 118.

<sup>78</sup> Gaddafi Admissibility Decision, para. 133.

the same conduct as that alleged in the Warrant of Arrest, namely that Mr. Al-Senussi used his position, control and command over the Libyan Security Forces to deter and quell, by any means, the demonstrations of civilians against the Gaddafi regime, in particular by being instrumental in implementing Muammar and Saif Gaddafi's plan in Benghazi by virtue of his position as head of the Military Intelligence and the control exercised over military and security forces.

59. The Defence submits that Libya has failed, on the evidence submitted, to establish that its domestic investigation covers the same conduct as charged before the ICC. The fact that Libya may be taking some steps to advance an investigation against Mr. Al-Senussi or that discrete aspects may overlap does not demonstrate that the scope and subject matter of that investigation is the same as the case against Mr. Al-Senussi at the ICC. For all of the reasons set out above, the Defence submits that Libya's Admissibility Application should be dismissed as it does not establish that Libya is investigating the same case as the one that is before the ICC.

**PART B: Libya is unable genuinely to investigate or prosecute the case**

60. As noted above, the issue of whether Libya is investigating the same case is not determinative of the admissibility challenge as there is a clear basis to dismiss the Application on the grounds that Libya is unable genuinely to investigate or prosecute Mr. Al-Senussi's case.
61. The Chamber has already held that Libya is unable genuinely to investigate or prosecute Mr. Gaddafi's case. It is inconceivable in these circumstances that Libya could be found to be able to investigate or prosecute Mr. Al-Senussi's case, particularly when Libya is seeking to join the cases to be tried together as they are so closely related. Indeed, as is evident from Part A, Libya is relying on much the same evidence for the two cases.
62. The grounds on which the Chamber found that Libya is unable genuinely to investigate or prosecute Mr. Gaddafi's case apply equally to Mr. Al-Senussi's case. The Defence submits, for the reasons outlined below, that the Chamber should dismiss Libya's

Admissibility Application on the basis that Libya is unable genuinely to investigate or prosecute Mr. Al-Senussi's case.

### **Legal framework**

63. "Inability" is defined in Article 17(3) of the Chamber, which provides that:

"In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise is unable to carry out its proceedings."

64. Libya's Admissibility Application must therefore be dismissed if (i) the Libyan judicial system is unavailable (or it has totally or substantially collapsed); and, as a result, the Libyan state is either (ii) unable to obtain the accused; or (iii) unable to obtain evidence and witness testimony; or (iv) otherwise unable to carry out proceedings.

65. It is clear from the Chamber's Gaddafi Admissibility Decision that any one of the elements set out in Article 17(3) - inability to obtain the accused, inability to obtain the necessary testimony or other inability to carry out the proceedings - is sufficient to render the case admissible before the ICC, where this results from the unavailability or substantial collapse of the national judicial system.<sup>79</sup> The Gaddafi Decision also establishes that the national system need not *as a whole*, or *in its entirety* be unavailable; it is sufficient for it to be unavailable in for purposes of the suspect's specific case.

66. The Chamber's Decision also makes clear that violations of national law can demonstrate that a State is 'unable' to conduct proceedings.<sup>80</sup> The Chamber held that it should assess "whether the Libyan authorities are capable of investigating or prosecuting Mr. Gaddafi in accordance with the substantive and procedural law applicable in Libya." In addition, the Chamber noted that Libya has ratified relevant

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<sup>79</sup> The Chamber did not state that it was a requirement for each element of Article 17(3) to be established. A plain reading of the provision also makes it clear that the components are in the alternative.

<sup>80</sup> Gaddafi Admissibility Decision, para. 200 ("In other words, the Chamber must assess whether the Libyan authorities are capable of investigating or prosecuting Mr. Gaddafi in accordance with the substantive and procedural law applicable in Libya.")

human rights instruments.<sup>81</sup> These instruments include the International Covenant on Civil and Political Rights, the Convention against Torture, and the Arab and African human rights charters.<sup>82</sup>

67. As explained below<sup>83</sup>, the Chamber’s assessment of relevant human rights protections must take into account the fact that this is a case in which the suspect faces the death penalty in national proceedings. International human rights standards require that in such a case, the highest possible standards of due process be respected.

68. In considering “inability” in the Gaddafi Admissibility Decision the Chamber assessed each of its components in turn,<sup>84</sup> and found that:

- the Libyan judicial system was “unavailable” to Mr. Gaddafi within the meaning of Article 17(3) and could not be the appropriate forum for trial. The Chamber considered “it... apparent from the submissions that multiple challenges remain and that Libya continues to face substantial difficulties in exercising its judicial powers fully across the entire territory. Due to these difficulties... the Chamber is of the view that its national system cannot yet be applied in full in areas or aspects relevant to the case, being thus ‘unavailable’ within the terms of article 17(3) of the Statute”<sup>85</sup>;
- as a consequence of that unavailability, Libya was “unable to obtain the accused”, unable to obtain the “necessary testimony” and “otherwise unable to carry out [the] proceedings”.<sup>86</sup>
- In particular,
  - Libya’s “lack of full control over certain detention facilities has a direct bearing on the investigation against Mr Gaddafi”<sup>87</sup> and has resulted in

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<sup>81</sup> Gaddafi Admissibility Decision, para. 202.

<sup>82</sup> Gaddafi Admissibility Decision, para. 200 and 202.

<sup>83</sup> See paras. 157-162 below.

<sup>84</sup> Gaddafi Admissibility Decision, para. 199-215.

<sup>85</sup> Gaddafi Admissibility Decision, para. 205.

<sup>86</sup> Gaddafi Admissibility Decision, para. 205.

<sup>87</sup> Gaddafi Admissibility Decision, para. 210.

Libya's inability to protect senior former regime members "from torture and mistreatment in detention facilities."<sup>88</sup>

- Libya is unable to "obtain the necessary testimony due to the inability of judicial and governmental authorities to ascertain control and provide adequate witness protection;"<sup>89</sup> and
- The "Libyan authorities currently [do not] have the capacity to ensure protective measures"<sup>90</sup> for witnesses who agree to testify against the accused.
- Libya has been unable to "overcome the existing difficulties in securing a lawyer for" Mr. Gaddafi. The Chamber found that Libya "[fell] short of substantiating" how this impediment might be overcome.<sup>91</sup>

As a result, Libya was deemed 'unable' to conduct genuine proceedings in relation to Mr. Gaddafi.

69. The Defence submits that the same conclusion is warranted in Mr. Al-Senussi's case.
70. Libya has not established that it is presently able to exercise the necessary judicial powers in proceedings, including in respect of Mr. Al-Senussi's case. On the contrary, the evidence overwhelmingly demonstrates that in light of the activities of irregular militia and armed groups, and the insecurity that is widespread in Libya, the Libyan Governmental authorities do not have the ability to investigate and prosecute the case against Mr. Al-Senussi. In particular, as set out below, (1) the judicial system is in a state of substantial collapse and/or unavailable given that (a) the requisite Governmental authority and control does not extend over detention facilities, guards and the police, including in respect of the prison where Mr. Al-Senussi is detained; and (b) the security and proper functioning of judicial organs are constantly undermined; (2) access to the necessary evidence, including witness testimony, for judicial proceedings is severely compromised and there is no evidence that effective witness protection programs are in place; and (3) the Libyan authorities are otherwise unable to conduct

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<sup>88</sup> Gaddafi Admissibility Decision, para. 209.

<sup>89</sup> Gaddafi Admissibility Decision, para. 209.

<sup>90</sup> Gaddafi Admissibility Decision, para. 211.

<sup>91</sup> Gaddafi Admissibility Decision, para. 214.

genuine proceedings against Mr. Al-Senussi given that he has had no access to legal representation and other fundamental rights have been violated.

71. The actions of the authorities in procuring Mr. Al-Senussi's surrender illegally, denying him legal assistance, holding him in solitary confinement and exposing him to other abuses makes clear that no functioning judicial process is underway at this time. Government control over detention facilities is continually undermined by powerful armed groups and militias in a manner that exposes high-profile detainees in particular to the risk of abuse including torture. Al Hadba prison, where Mr. Al-Senussi is being held, is no exception. It is run by militia guards who consider themselves 'victims' of Mr. Al-Senussi and the former regime and who regard Mr. Al-Senussi as their "biggest prize".
72. Security concerns in relation to judicial proceedings as a whole - for any participant in such a politically-sensitive case - are very prominent. Witnesses lack any genuine system of protection and at least two witnesses relevant to Mr. Al-Senussi's case have already withdrawn on the ground that they fear for their safety. Defence counsel associated with senior Gaddafi-era officials risk persecution, or worse. Prosecutors are also under attack, including the Deputy-Prosecutor in Mr. Al-Senussi's case, who has recently been kidnapped by a militia and detained. Judges are subject to threats and lack sufficient impartiality and independence.<sup>92</sup> Libya's current - admitted - dependence on international assistance, both in relation to Mr. Al-Senussi's case<sup>93</sup> and more broadly, also evinces its continuing lack of capacity to conduct genuine proceedings in this case.
73. As a result of the substantial legal and institutional impediments that currently exist in Libya, most starkly in relation to trials of former Gaddafi-era officials such as Mr. Al-Senussi and Saif Gaddafi, as well as the specific violations of Mr. Al-Senussi's rights, as detailed below, the Defence submits that the national judicial system must be considered to be in a state of substantial collapse and/or currently unavailable for the

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<sup>92</sup> International Legal Assistance Consortium Rule of Law Assessment Report on Libya of 2013, p. 44, 47 (hereinafter "ILAC Report of 2013") (<http://www.ilac.se/2013/05/09/ilac-assessment-report-libya-2013/>); International Crisis Group, Trial by Error: Justice in Post-Qadhafi Libya, 17 April 2013, p. 3 (hereinafter "ICG Report of April 2013"); Libya must seek justice not revenge in case of former al-Gaddafi intelligence chief, Amnesty International, 18 October 2012; Human Rights Watch World Report 2013, p. 583 ([https://www.hrw.org/sites/default/files/wr2013\\_web.pdf](https://www.hrw.org/sites/default/files/wr2013_web.pdf)).

<sup>93</sup> Libya states that UN is assisting with this case. Admissibility Application of 1 May 2013, para. 13, 14; Admissibility Application of 2 April 2013, para. 15, 16.

purpose of the case against Mr. Al-Senussi (as the Chamber has already concluded in Mr. Gaddafi's case).

**(1) Libya's judicial system is in a state of substantial collapse and/or unavailable for Mr. Al-Senussi's case**

***(a) The necessary Government control does not extend over detention facilities and the police, including in respect of Al-Hadba prison***

74. Libya has submitted that “the Libyan Government has *not* been unable ‘to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings’” because “Abdullah Al-Senussi is in safe custody at a detention centre in Libya [Al-Hadba prison] which is controlled by the Libyan Government.”<sup>94</sup> Libya has not explained which arm of Government is supposedly in control or provided concrete evidence to substantiate its claim. Moreover, the Defence submits that the available evidence directly undermines Libya's assertions. The Defence, therefore, submits that Libya has not established that it is able to “obtain the accused” and that it is able to “carry out its proceedings” as provided for in Article 17(3).
75. The Defence has first addressed the lack of Government control over detention facilities in general throughout Libya and then considered the position in relation to the Al-Hadba prison.

*Lack of control over detention facilities*

76. The lack of Governmental control over detention facilities should be viewed in the context of the militia's significant influence over the Government and the increasing insecurity and breakdown of law and order in Libya, which directly affects the Government's ability to conduct judicial proceedings, especially for high-profile leaders of the former regime like Mr. Al-Senussi. The last twelve months has seen increasing violence including the storming of Libya's General National Congress on multiple occasions by armed groups, attacks on the Ministry of Justice, Ministry of Foreign Affairs, and the Prime Minister's Office, as well as attacks on lawyers and foreign embassies. Further evidence of the deterioration in the security is provided in Annex A.

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<sup>94</sup> Admissibility Application of 2 April 2013, para. 118.

77. The United Nations has recognised that there is serious cause for concern about the present administration of justice in Libya. It has been noted that there are “continuing reports of reprisals, arbitrary detentions without access to due process, wrongful imprisonment, mistreatment, torture and extrajudicial executions in Libya” as a result of which the Security Council “call[ed] upon the Libyan government to take all steps necessary to accelerate the judicial process, transfer detainees to State authority and prevent and investigate violations and abuses of human rights”.<sup>95</sup>
78. This position has been confirmed by several international reports prepared by diplomats and expert-NGOs. The US State Department’s 2012 Human Rights Report highlighted the “absence of effective justice and security” as the cause of “[t]he most significant human rights problems during the year.”<sup>96</sup> The report draws attention to the incapacitated state of the Libyan judiciary, highlighting the fact that “[a]lthough *militias* detained abusive Qadhafi-era officials, *the scarcely functioning criminal courts struggled to try them*, and when they did attempt to conduct trials, *judges often faced threats of violence*. In the same vein, *with the judiciary not fully functioning, the government had not taken concrete steps by year’s end to advance transitional justice*.”<sup>97</sup> The UK FCO’s conclusions are similar. The latest Report on Human Rights in Libya states that “[t]he Libyan judicial system is not yet fully functioning” and that “[c]ourt cases are often adjourned rather than dealt with immediately by judges, or do not progress as quickly as they should.”<sup>98</sup>
79. It is now well-documented that Libya’s difficulties in overseeing detention centres throughout the country go far beyond Libya’s lack of control over “extra-legal detention centres run by local brigades.”<sup>99</sup> In February 2013, Human Rights Watch stated that even official state detention facilities are only “controlled to some degree by the military or the Interior and Justice ministries.”<sup>100</sup> The International Legal Assistance Consortium has reported that “[i]n practice, the authorities have frequently had only

<sup>95</sup> UN Security Council Resolution 2095, S/RES/2095 (2013), para. 5.

<sup>96</sup> US State Department, Libya 2012 Human Rights Report, page 1 (<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>).

<sup>97</sup> US State Department, Libya 2012 Human Rights Report, page 3 (<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>) (emphasis added).

<sup>98</sup> Human Rights and Democracy: The 2012 Foreign & Commonwealth Office Report, April 2013, p. 195 (<http://www.hrdreport.fco.gov.uk/wp-content/uploads/2011/01/2012-Human-Rights-and-Democracy.pdf>).

<sup>99</sup> ILAC Report of 2013, p. 34.

<sup>100</sup> Libya: Slow Pace of Reform Harms Rights, Human Rights Watch, 6 February 2013 (<http://www.hrw.org/news/2013/02/06/libya-slow-pace-reform-harms-rights>).



incomplete control over even official prisons, leaving many of those detained at risk of abuse and torture.”<sup>101</sup> This evidence is consistent with the findings of foreign Governments that “Approximately half of Libya’s detention facilities are under some form of government control, but *most are in practice run by militias.*”<sup>102</sup>

80. Libya has submitted that “[t]he Libyan Ministry of Justice is ... working to bring all detention centres under the full control of the judicial police”<sup>103</sup> and that judicial police are being trained “to establish control over more prisons, and receive detainees transferred to prisons under the custody of the Ministry of Justice.”<sup>104</sup> Libya has equated detention centres run by the ‘judicial police’ as being under the full control of the Libyan authorities, particularly the Ministry of Justice. However, these claims are contradicted by the fact that the “judicial police consist of a former armed group with only minimal respect for ministerial directives”<sup>105</sup> and that the “judicial police on guard in a number of state-controlled facilities often are civilian brigades ... unwilling to conform to state standards.”<sup>106</sup> In April 2013, the International Crisis Group reported that “some armed groups [which] nominally fall under the authority of a civilian or military prosecutor’s office – depending on whether they have been recognised by the interior or defence ministry – ... tend to act both independently and arbitrarily.”
81. It has moreover been confirmed that detention facilities run by the judicial police have been infiltrated by militia groups, and that the judicial police have been powerless to act against these groups. In April 2013, it was reported that armed members of the Supreme Security Committee militia group stormed Tripoli’s main Jadaida Prison demanding the resignation of Justice Minister Salah Al-Marghani and threatening to release all prisoners.<sup>107</sup> The International Crisis Group has reported that Governmental authorities are unable to “confront armed groups or revolutionary brigades that often barred them from investigating cases, while refusing to turn detainees over to

<sup>101</sup> ILAC Report of 2013, p. 34.

<sup>102</sup> Human Rights and Democracy: The 2012 Foreign & Commonwealth Office Report, April 2013-06-11, p. 195 (emphasis added) (<http://www.hrdreport.fco.gov.uk/wp-content/uploads/2011/01/2012-Human-Rights-and-Democracy.pdf>).

<sup>103</sup> Admissibility Application of 2 April 2013, para 191.

<sup>104</sup> Admissibility Application of 2 April 2013, para 193.

<sup>105</sup> International Crisis Group, Trial by Error: Justice in Post-Qadhafi Libya, 17 April 2013 (hereinafter “ICG Report of April 2013”) (<http://www.crisisgroup.org/~media/Files/Middle%20East%20North%20Africa/North%20Africa/libya/140-trial-by-error-justice-in-post-qadhafi-libya.pdf>).

<sup>106</sup> ICG Report of April 2013, FN 142.

<sup>107</sup> SSC gunmen threaten to release Jadaida Prison inmates, Libyan Herald, 3 April 2013 (<http://www.libyaherald.com/2013/04/03/ssc-gunmen-threaten-to-release-jadida-prison-inmates/>).

government authorities or local prosecutors for fear they would be set free.”<sup>108</sup> Militia groups retain substantial influence over prisons where detainees are not released for fear of the militia’s reaction: the Government “dare not free anybody at least for now ... because the militias would become very angry at the government.”<sup>109</sup>

82. Reports have shown that the Government’s lack of control over detention facilities run by judicial police has resulted in State officials being “prevented from visiting certain state-controlled prisons, ‘because the head of the prison did not want to allow a prosecutor to interview a detainee;’”<sup>110</sup> detention facility guards ignoring the State’s decision to release detainees and instead recapturing them;<sup>111</sup> and guards preventing the screening of “200 detainees who fell under the general prosecutor’s jurisdiction” for over two months.<sup>112</sup>
83. The Libyan authorities’ “incomplete control over even official prisons” has left “many of those detained at risk of abuse and torture.”<sup>113</sup> Amina al-Megheirbi, head of the Human Rights Committee within the General National Congress, has confirmed that “[t]he Ministry of Justice does not have statistics on the number of detainees in the prisons they supervise.”<sup>114</sup> And in a recent radio interview with Justice Minister Merghani, when asked whether the Ministry of Justice has gained control over prisons in Libya and whether human rights are being respected within detention centres throughout Libya, the Minister admitted that “the answer is simple, the answer is No ... do we have violations now or not? Yes, we have violations, I admit this.”<sup>115</sup>
84. Various reports and statements have detailed the systematic abuse experienced by detainees in detention facilities not properly controlled by the State authorities<sup>116</sup>. The UN itself has confirmed this:

<sup>108</sup> ICG Report of April 2013, p. 31.

<sup>109</sup> Libya’s Prisoners Languish Despite Government Takeover, Al-Monitor (<http://www.al-monitor.com/pulse/originals/2012/al-monitor/in-libya-legalizing-kidnapping-a.html#ixzz2VnY100Ov>).

<sup>110</sup> ICG Report of April 2013, FN 142.

<sup>111</sup> ICG Report of April 2013, FN 141.

<sup>112</sup> ICG Report of April 2013, FN 142.

<sup>113</sup> ICG Report of April 2013, p. 34.

<sup>114</sup> New Libyan Government Struggles To Restore Order, Al Monitor (<http://www.al-monitor.com/pulse/security/2013/01/new-libyan-government-works-to-restore-order.html>).

<sup>115</sup> Libya Al-Hurra – Studio Al-Hurra Programme 23 March 2013, interview with Prof. El-Gehani and Justice Minister Merghani.

<sup>116</sup> Commission on Human Rights in the Libyan National Congress criticizing violations and torture, 26 February 2013 (<http://shorouknews.com/news/view.aspx?cdate=26022013&id=f3f500da-ed1b-4acd-b4e3-c27663e7368d>).

- On 26 January 2013, the High Commissioner for Human Rights, Navi Pillay, urged the Ministry of Justice and Prosecutor's office to gain control of the detention centres saying "lack of oversight by the central authorities creates an environment conducive to torture and ill treatment."<sup>117</sup>
- On 14 March 2013, Head of UNSMIL, Tarek Mitri, informed the Security Council that "the continued mistreatment and detention without due process of several thousand people remains a source of deep concern" and confirmed that there had been "a number of deaths in custody."<sup>118</sup>
- On 18 March 2013, the UN Office of the High Commissioner for Human Rights also reported that "human rights officers carried out numerous monitoring visits to places of detention ... [and] documented cases of torture and ill-treatment in various locations".<sup>119</sup>

85. Further confirmation is provided in multiple NGO and other expert reports, excerpts of which are provided in Annex A.

*Al-Hadba prison*

86. Given these circumstances, Libya has not established that Al-Hadba prison and Mr. Al-Senussi are under the effective control and authority of the Government, to the exclusion of militia groupings or that Mr. Al-Senussi is securely or lawfully detained there. Instead, the evidence shows that his continued detention is not secure and is in violation of applicable laws.

87. It is widely reported that the prison is run by the National Guard.<sup>120</sup> Although it is said that the National Guard is "tasked by the government to hold many high profile

<sup>117</sup> Human Rights concerns about armed brigades holding detainees in Libya, Office of the High Commission for Human Rights website, 26 January 2013 (<http://www.ohchr.org/EN/NewsEvents/Pages/HRconcernsaboutarmedbrigadesholdingdetaineesinLibya.aspx>).

<sup>118</sup> Security Council Briefing, 14 March 2013, Special Representative of the Secretary-General and Head of UNSMIL, Tarek Mitri, para. 13, 14.

<sup>119</sup> Libya: Update of the Office of the United Nations High Commissioner for Human Rights on cooperation in the field of human rights, A/HRC/22/CRP.2, 18 March 2013, page 3.

<sup>120</sup> Head of National Guard says its future will be decided by government committee, Libya Herald, 8 January 2013 (<http://www.libyaherald.com/2013/01/09/head-of-national-guard-says-its-future-will-be-decided-by->

prisoners such as Qaddafi's intelligence chief Abdullah Senussi and the regime's former Prime Minister Al-Baghdadi Al-Mahmoudi along with many others", in reality the available evidence shows that the extent of Governmental control is at best questionable.

88. The National Guard is led by Khalid Sharif,<sup>121</sup> a former senior commander of the Libyan Islamic Fighting Group who was previously detained in Abu Salim prison for seven years.<sup>122</sup> When released, he formed the National Guard and has expressed his desire for the National Guard to remain an independent body outside the control of the Ministry of Interior or Defence.<sup>123</sup> As noted by the International Crisis Group, "the 'National Guard' under Khalid ash-Sharif ... from the Libyan Islamic Fighting Group ... was intended to protect borders and key infrastructure and later became part of the revolutionary brigades' attempt to create a border guard force."<sup>124</sup>
89. Furthermore, it is widely known that guards at the Al-Hadba prison consist of former prisoners under the Gaddafi regime; many being former prisoners of Al-Hadba prison itself. Al-Hadba's prison chief, Mohamed Gweider, told the media that two of the guards who tortured him while he was in prison are his prisoners now and that the "biggest prize is Senussi himself."<sup>125</sup>
90. Following their meetings with Al-Hadba prison officials, Human Rights Watch highlighted that the lack of training and vetting to ensure that prison guards do not have a record of abuse was a major problem, and that for many of the guards their role of supervising detainees such as Al-Senussi was "personal."<sup>126</sup> Gweider has stated that "If

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government-committee); Kadhafi premier in 'decent' condition in jail: UN, AFP, 28 February 2013. (<http://www.google.com/hostednews/afp/article/ALeqM5hmz50cfMsNAIOIt40myoGyMFTZng?docId=CNG.d572974b587374e97a8bd17882b3eeaa.341>).

<sup>121</sup> Libya: Ensure Abdallah Sanussi Access to Lawyer, HRW, 17 April 2013 (<http://www.hrw.org/news/2013/04/17/libya-ensure-abdallah-sanussi-access-lawyer>).

<sup>122</sup> Head of National Guard says its future will be decided by government committee, Libya Herald, 8 January 2013 (<http://www.libyaherald.com/2013/01/09/head-of-national-guard-says-its-future-will-be-decided-by-government-committee/>).

<sup>123</sup> Head of National Guard says its future will be decided by government committee, Libya Herald, 8 January 2013 (<http://www.libyaherald.com/2013/01/09/head-of-national-guard-says-its-future-will-be-decided-by-government-committee/>).

<sup>124</sup> International Crisis Groups, Divided We State: Libya's Enduring Conflicts, 14 September 2012 ([http://www.crisisgroup.org/~media/Files/Middle%20East%20North%20Africa/North%20Africa/libya/130-divided-we-stand-libyas-enduring-conflicts](http://www.crisisgroup.org/~/media/Files/Middle%20East%20North%20Africa/North%20Africa/libya/130-divided-we-stand-libyas-enduring-conflicts)).

<sup>125</sup> In the new Libya, former prisoners guard their onetime captors, Washington Post, 3 March 2013 ([http://articles.washingtonpost.com/2013-03-03/world/37418071\\_1\\_saif-al-islam-gaddafi-senussi-libyan-rebels](http://articles.washingtonpost.com/2013-03-03/world/37418071_1_saif-al-islam-gaddafi-senussi-libyan-rebels)).

<sup>126</sup> In the new Libya, former prisoners guard their onetime captors, Washington Post, 3 March 2013 ([http://articles.washingtonpost.com/2013-03-03/world/37418071\\_1\\_saif-al-islam-gaddafi-senussi-libyan-rebels](http://articles.washingtonpost.com/2013-03-03/world/37418071_1_saif-al-islam-gaddafi-senussi-libyan-rebels)).

you think about it logically, I should be taking revenge”<sup>127</sup> and Sharif has stated that Mr. Al-Senussi “is wise enough not to escape the prison if he wants to live.”<sup>128</sup>

91. The Defence is also able to put before the Chamber evidence about persons being held in the prison that confirm the realities of militia control of the prison and the abuses being committed.<sup>129</sup> This is provided in confidential and *ex parte* Annex C.
92. There has also been at least one episode, on 5 April 2013, in which protesters gathered outside Al-Hadba prison calling for the Government to execute Mr. Al-Senussi immediately and threatening that, if their demand was not met, they would storm the prison to execute him themselves.<sup>130</sup>
93. Under these circumstances, Libya has not demonstrated on the evidence it has provided that the prison and Mr. Al-Senussi are securely under Government control. The Defence submits that this issue has a direct bearing on whether Libya is able to investigate and prosecute Mr. Al-Senussi’s case. Although in his case it is not a question of him being ‘transferred’ into State custody (as it is in Saif Gaddafi’s case), the fact that Al-Hadba prison, like many other prisons, is in effect being run by militia groups outside of the requisite Governmental control means that the national legal system cannot be said to be “available” for the purpose of Mr. Al-Senussi’s case. It calls into question the Government’s continued ability to “obtain” the accused for the purposes of judicial proceedings and “to carry out its proceedings” (as provided for in Article 17(3)).

***(b) Security and functioning of the judicial authorities and organs***

94. The Defence submits that the Chamber should also take into consideration that the security situation within Libya, and the lack of Government control, significantly affects

<sup>127</sup> In the new Libya, former prisoners guard their onetime captors, Washington Post, 3 March 2013 ([http://articles.washingtonpost.com/2013-03-03/world/37418071\\_1\\_saif-al-islam-gaddafi-senussi-libyan-rebels](http://articles.washingtonpost.com/2013-03-03/world/37418071_1_saif-al-islam-gaddafi-senussi-libyan-rebels)).

<sup>128</sup> Head of National Guard says its future will be decided by government committee, Libya Herald, 8 January 2013 (<http://www.libyaherald.com/2013/01/09/head-of-national-guard-says-its-future-will-be-decided-by-government-committee/>).

<sup>129</sup> Confidential and *ex parte* (Chamber only) Annex C. This annex is filed as confidential and *ex parte* due to security and safety concerns pertaining to the persons involved if the evidence was to be available to the parties and the public. Even redactions to the annex could permit the persons’ identities to be disclosed.

<sup>130</sup> See, <http://www.facebook.com/newsLy>.

the ability of the judicial authorities and organs to function effectively and thus has a direct impact on the national investigation and proceedings against Mr. Al-Senussi.

95. It has been widely reported that,

- public distrust in the judiciary has “substantially hamper[ed] the Courts’ ability to effectively and independently function”; particularly in relation to conflict related cases.<sup>131</sup>
- “prosecutors, police, criminal investigators and other staff in the judicial sector ... highlighted difficulties and threats they face in carrying out their duties in light of the prevailing security situation and the de facto authority exerted by armed militias.”<sup>132</sup>
- “threats and physical attacks on prosecutors and judges” have inhibited the rule of law”<sup>133</sup>
- “inadequate security and threats against local prosecutors and judges have forced the suspension of all investigations and trials since December 2012” in the region east of Benghazi.<sup>134</sup>
- “prosecutors face even more immediate security concerns than judges”<sup>135</sup> with prosecutors finding themselves in a situation where they must choose to either “charge suspects and incur the wrath of the detainees’ communities, or release detainees and incur the wrath of the alleged victims’ communities.”<sup>136</sup>
- “prosecutors declin[e] to charge or release prisoners, since either course could provoke a violent response.”<sup>137</sup>

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<sup>131</sup> ILAC Report of 2013, p. 44.

<sup>132</sup> Libya must seek justice not revenge in case of former al-Gaddafi intelligence chief, Amnesty International, 18 October 2012.

<sup>133</sup> Human Rights Watch World Report 2013, p. 583 ([https://www.hrw.org/sites/default/files/wr2013\\_web.pdf](https://www.hrw.org/sites/default/files/wr2013_web.pdf)); ILAC Report of 2013, P. 36.

<sup>134</sup> ICG Report of April 2013, p. 3.

<sup>135</sup> ILAC Report of 2013, p. 47

<sup>136</sup> ILAC Report of 2013, p. 47.

<sup>137</sup> ILAC Report of 2013, p. 47.

- The inability of the Government to provide security for prosecutors to process cases “in light of the *de facto* authority exerted by armed militias”<sup>138</sup> has resulted in delays as the judiciary is “unable to find prosecutors willing to review the files.”<sup>139</sup>
- Furthermore, Amnesty International has reported that “very few lawyers are willing to represent alleged ‘Gaddafi loyalists’, either for ideological reasons or out of fear of reprisals.”<sup>140</sup>

96. Specific reported instances of violence against prosecutors include an incident on 9 May 2013 and one on 4 June 2013<sup>141</sup> in which prosecutors have been attacked as a reprisal for carrying out their functions.<sup>142</sup>

97. Indeed, the Deputy Prosecutor assigned to Mr. Al-Senussi’s case, Taha Bara, was recently abducted and abused by militia groups in May 2013. He is also the spokesperson for the Attorney-General’s office. It is reported that Justice Minister Salah Al-Marghani<sup>143</sup> stated that Bara was “being held illegally in Tripoli’s Mitiga jail” and that “the aim of those holding him and the two others was to control and strike fear in the judiciary.”<sup>144</sup> Marghani commented<sup>145</sup> on the pictures<sup>146</sup> of Bara being held at Mitiga jail with his head shaved and with signs of beating, stating that his treatment amounted to human rights abuses punishable under the law.<sup>147</sup> Videos circulating on

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<sup>138</sup> ILAC Report of 2013, p. 47

<sup>139</sup> ILAC Report of 2013, p. 47

<sup>140</sup> Libya must seek justice not revenge in case of former al-Gaddafi intelligence chief, Amnesty International, 18 October 2012.

<sup>141</sup> Misrata lawyer attacked, Libya Herald, 6 June 2013 (<http://www.libyaherald.com/2013/06/06/misrata-lawyer-attacked/>).

<sup>142</sup> ILAC Report of 2013, p. 47.

<sup>143</sup> [http://www.youtube.com/watch?v=7bPSm45e\\_6g&sns=em](http://www.youtube.com/watch?v=7bPSm45e_6g&sns=em).

<sup>144</sup> Justice Minister denounces detention of public prosecutor and Congressman: Khoms militiamen seize power station in protest, Libya Herald, 23 May 2013 (<http://www.libyaherald.com/2013/05/23/justice-minister-denounces-detention-of-public-prosecutor-and-congressman-khoms-militiamen-seize-power-station-in-protest/>).

<sup>145</sup> Justice Minister denounces detention of public prosecutor and Congressman: Khoms militiamen seize power station in protest, Libya Herald, 23 May 2013 (<http://www.libyaherald.com/2013/05/23/justice-minister-denounces-detention-of-public-prosecutor-and-congressman-khoms-militiamen-seize-power-station-in-protest/>); [http://www.youtube.com/watch?v=7bPSm45e\\_6g&sns=em](http://www.youtube.com/watch?v=7bPSm45e_6g&sns=em).

<sup>146</sup> <https://www.facebook.com/photo.php?fbid=545615868817884&set=a.123611544351654.12379.118995841479891&type=1&theater;> [http://gaddafimedia.blogspot.nl/2013/05/blog-post\\_1219.html](http://gaddafimedia.blogspot.nl/2013/05/blog-post_1219.html); <https://www.facebook.com/photo.php?fbid=447194355371573&set=a.142547052502973.30894.142454565845555&type=1&theater>.

<sup>147</sup> Justice Minister denounces detention of public prosecutor and Congressman: Khoms militiamen seize power station in protest, Libya Herald, 23 May 2013 (<http://www.libyaherald.com/2013/05/23/justice-minister-denounces-detention-of-public-prosecutor-and-congressman-khoms-militiamen-seize-power-station-in-protest/>).

the internet include a recording of the attack on Bara<sup>148</sup> and an interview from the militia group responsible for the arrest of Bara.<sup>149</sup>

98. The Defence submits that the arrest and beating of the prosecutor in the national investigation and proceedings against Mr. Al-Senussi in order to “control and strike fear” into the judiciary must be viewed as a major impediment to the progress of the case against Mr. Al-Senussi. This event in particular demonstrates that Libya “continues to face substantial difficulties in exercising its judicial powers” in the case against Mr. Al-Senussi and that the “national system cannot yet be applied in full in areas or aspects relevant” to this case.<sup>150</sup>

## **(2) Inability to gain access to the necessary testimony and evidence**

99. The unavailability of Libya’s judicial system for purposes of Mr. Al-Senussi’s case also results in an inability to obtain necessary evidence, including witness testimony. Libya’s ability to obtain control over witnesses is severely hampered in two principal ways. *First*, as the Court recognised in the Gaddafi Admissibility Decision, there is the “inability of judicial and governmental authorities to ascertain control” over detention centres in Libya where many such witnesses (many of whom are themselves suspects) are found.<sup>151</sup>
100. *Second*, the Court has already recognised Libya’s inability to “provide adequate witness protection” to witnesses who might be at risk of political reprisal.<sup>152</sup> In the Gaddafi Admissibility Decision, the Chamber found that this inability to reach and to protect witnesses had “a direct bearing” on Libya’s inability to conduct a genuine investigation or trial, and it rejected Libya’s challenge on this basis.<sup>153</sup>
101. The same conclusions can be drawn in the present case. Libya has failed even to address the issue of accessing witnesses held in militia-controlled detention centres in its Admissibility Application. As set out below, in respect of witness protection, Libya does nothing more than cite provisions of the Libyan Criminal Procedure Code that

<sup>148</sup> <http://www.youtube.com/watch?v=W0m17hFHx6U>.

<sup>149</sup> <http://www.youtube.com/watch?v=aUOY6gJzXC0>; <http://www.youtube.com/watch?v=G0TF3WCZOJc>.

<sup>150</sup> Gaddafi Admissibility Decision, para. 205.

<sup>151</sup> Gaddafi Admissibility Decision, para. 206-211.

<sup>152</sup> Gaddafi Admissibility Decision, para. 209.

<sup>153</sup> Gaddafi Admissibility Decision, para. 210.



theoretically may provide protective measures to witnesses in sensitive cases but in reality cannot be effectively implemented.<sup>154</sup>

102. Libya's lack of control over detention facilities and the police, as detailed above, has contributed to the State authorities' inability to access witnesses and obtain the necessary testimony to conduct the investigation and proceedings against Mr. Al-Senussi:

- State officials have been “prevented from visiting state-controlled prisons “because the head of the prison did not want to allow a prosecutor to interview a detainee”;<sup>155</sup> and
- Militia groups have barred State officials “from investigating cases, while refusing to turn detainees over to government authorities or local prosecutors for fear they would be set free.”<sup>156</sup>

103. In Mr. Al-Senussi's case, one of the public prosecutors, Taha Bara (who has since himself been arrested by a militia), confirmed to the media that there are prisons in Libya that he cannot enter.<sup>157</sup>

104. In the Gaddafi Admissibility Decision, the Chamber noted “Libya has been unable to interview two witnesses as they are detained in detention facilities not yet under the control of the Libyan Government”<sup>158</sup>. It relied on this example to find that Libya lacked the capacity to obtain the necessary testimony thus rendering the national judicial system unavailable.<sup>159</sup>

105. As is evident from Libya's filings<sup>160</sup>, these witnesses are potentially equally relevant to the investigation into Mr. Al-Senussi's case. Their testimony might provide evidence concerning Mr. Al-Senussi's alleged authority and control over State apparatus<sup>161</sup> as

<sup>154</sup> Admissibility Application of 2 April 2013, para. 177.

<sup>155</sup> ICG Report of April 2013, FN 142.

<sup>156</sup> ICG Report of April 2013, p. 31.

<sup>157</sup> New Libyan Government Struggles to Restore Order, Al-Monitor (<http://www.al-monitor.com/pulse/security/2013/01/new-libyan-government-works-to-restore-order.html#ixzz2VnW3cOUM>).

<sup>158</sup> Gaddafi Admissibility Decision, para. 36.

<sup>159</sup> Gaddafi Admissibility Decision, para. 205.

<sup>160</sup> Admissibility Application of 1 May 2012, Confidential Annex C.

<sup>161</sup> Gaddafi Admissibility Decision, para. 36.

well as photo evidence relating to the events in Benghazi<sup>162</sup>. Moreover, Libya has relied on this evidence in support of its Admissibility Application.<sup>163</sup>

***Lack of witness protection programs***

106. As in the case against Mr. Gaddafi, Libya has not provided any evidence of an effective witness protection programme that would be implemented in such a way as to allow witnesses to testify either for or against Mr. Al-Senussi.<sup>164</sup>
107. The Chamber found in relation to Mr. Gaddafi's case that "Libya has presented no evidence about specific protection programmes that may exist under domestic law" or whether "witnesses for the suspect may effectively benefit from such programmes."<sup>165</sup> It also found that it was "unclear ... whether the domestic law provides for the immunity of statements made by witnesses at trial". As such, the Chamber found that Libya "failed to substantiate its assertions that it envisages the implementation of protective measures for witnesses who agree to testify" and the Chamber was therefore not persuaded that "the Libyan authorities currently have the capacity to ensure protective measures."<sup>166</sup>
108. Given the overlap between the facts underlying the cases of Mr. Al-Senussi and Mr. Gaddafi, it is most likely that much of the same evidence will be relied on. In Libya's words, "the Prosecutor-General's office is collating evidence that focuses, *inter alia*, upon Muammar and Saif Al-Islam Gaddafi's criminal plan... of which Al-Senussi is suspected... of being instrumental in implementing [*sic.*]"<sup>167</sup> Libya also itself submitted that "witness evidence [in Mr. Al-Senussi's case] needs to be considered alongside the evidence gathered in the Saif Al-Islam Gaddafi case (*which is also likely to be relied upon in Abdullah Al-Senussi's case due to its factual and legal proximity*)."<sup>168</sup> The Defence submits that precisely the same issues which apply to the gathering of witness

<sup>162</sup> Admissibility Application of 1 May 2012, Confidential Annex C.

<sup>163</sup> Libya notes in Confidential Annex C to the Admissibility Application of 1 May 2012 that Libya intends to take the statements of two witnesses. Libya has in general cited to Confidential Annex C as supporting Libya's assertion that its investigation of Mr. Al-Senussi includes evidence of the existence of a State policy in February 2011 and the underlying acts and incidents committed as a consequence of the plan implemented by Al-Senussi, See, Admissibility Application of 2 April 2013, para 162.

<sup>164</sup> Gaddafi Admissibility Decision, para. 211.

<sup>165</sup> Gaddafi Admissibility Decision, para. 211.

<sup>166</sup> Gaddafi Admissibility Decision, para. 211.

<sup>167</sup> Admissibility Application of 2 April 2013, para. 162.

<sup>168</sup> Admissibility Application of 2 April 2013, para. 173 (emphasis added).

evidence in Mr. Gaddafi's case therefore also apply in the present case, and precisely the same concerns regarding the lack of witness protection arise in both cases.

109. In the Admissibility Application regarding Mr. Al-Senussi's case, Libya submits that "to ensure the safety and security of witnesses in the case against Abdullah Al-Senussi ... [t]he principal protective measure at the pre-trial phase stems from the confidentiality of investigations."<sup>169</sup> It adds that "Libyan courts have the capacity to order protective measures at subsequent phases of the proceedings including *in camera* witness testimony, witness anonymity, and police protection where required."<sup>170</sup> During the trial phase, Libya states that "[w]itnesses can also be granted police protection upon the order of the trial judge."<sup>171</sup>
110. Libya made these same submissions in the admissibility proceedings concerning Mr. Gaddafi's case, and they were found to be insufficient by the Chamber. Libya has provided no evidence of specific witness protection programs or that it has the capacity to ensure witness protection in the proceedings against Mr. Al-Senussi.
111. Furthermore, the inability of Libya to address the threats against the judicial authorities as well as abuses against detainees, as noted above, casts serious doubt over Libya's capacity to implement any of the protective measures provided for in Article 59 of the Libyan Criminal Procedural Code; namely, that "Libyan courts have the capacity to order protective measures at subsequent phases of the proceedings including *in camera* witness testimony, witness anonymity, and police protection where required."<sup>172</sup>
112. Libya's ability to deploy police protection for victims and witnesses (particularly defence witnesses) is highly questionable. As reported, there are "hundreds of armed groups that ... function as parallel police forces, at times working against state interests."<sup>173</sup> The police "have been barely functioning" and "on their own, they could not confront armed groups or revolutionary brigades."<sup>174</sup> Given that the "police and military remain in shambles", the State authorities have had to pay "many militias,

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<sup>169</sup> Admissibility Application of 2 April 2013, para. 177.

<sup>170</sup> Admissibility Application of 2 April 2013, para. 177.

<sup>171</sup> Admissibility Application of 2 April 2013, para. 177.

<sup>172</sup> Admissibility Application of 2 April 2013, para. 177.

<sup>173</sup> ICG Report of April 2013, p. 4.

<sup>174</sup> ICG Report of April 2013, p. 31.

relying on them to serve as security forces.”<sup>175</sup> For example, the Supreme Security Committee, which has been accused of “abduction and terrorizing people” is “funded by the Interior Ministry [and has] bec[ome] stronger and better armed than the official police forces.”<sup>176</sup>

113. Given that Libya lacks the ability to deal with the significant threats directed towards members of the judiciary, as detailed above, it is doubtful that the judiciary will be able to implement any effective witness protection measures, especially for defence witnesses. Human Rights Watch has reported that Libya’s “judicial system remain[s] weak, especially in its ... ability to address threats and physical attacks on prosecutors and judges.”<sup>177</sup>

114. Although Libya submits that judges have “a significant discretion” to hear evidence by way of video-link, it has not provided evidence that this would successfully preserve witness anonymity in light of the general political and security situation in Libya and bearing in mind the targeting of perceived Gaddafi / Senussi sympathisers in particular.<sup>178</sup> Libya’s failure to address the implementation of specific witness protection programs and measures is noted by the Chamber in the Gaddafi Admissibility Decision.<sup>179</sup>

115. In the Gaddafi Admissibility Decision the Chamber concluded that Libya is incapable of protecting former members of the Gaddafi regime or those associated with them:

“The Chamber notes in this regard that it has been reported that conflict-related detainees including senior former regime members have not been protected from torture and mistreatment in detention facilities. Strong concerns have been raised at the highest levels of the Libyan Government by United Nations Support Mission in Libya about instances of torture and death from torture in detention centres that had been brought to its attention. The Government has been urged to commence State inspections and assume full control over detention facilities as soon as possible.”<sup>180</sup>

116. The Chamber went on to conclude that Libya “has failed to substantiate its assertions

<sup>175</sup> Libyan militias promise wealth in unstable nation, USA Today, 13 March 2013 (<http://www.usatoday.com/story/news/world/2013/03/13/libya-militia-wealth/1985211/>).

<sup>176</sup> New Libyan Government Struggles to Restore Order, Al-Monitor (<http://www.al-monitor.com/pulse/security/2013/01/new-libyan-government-works-to-restore-order.html#ixzz2VnUPGZcd>).

<sup>177</sup> Human Rights Watch World Report, p. 583 ([https://www.hrw.org/sites/default/files/wr2013\\_web.pdf](https://www.hrw.org/sites/default/files/wr2013_web.pdf)).

<sup>178</sup> Admissibility Application of 2 April 2013, para. 177.

<sup>179</sup> Gaddafi Admissibility Decision, para. 211.

<sup>180</sup> Gaddafi Admissibility Decision, para. 209.

that it envisages the implementation of protective measures for witnesses who agree to testify in the case against Mt. Gaddafi” and that as a result it was “not ... persuaded that the authorities currently have the capacity to ensure protective measures”.<sup>181</sup>

117. Since the Chamber’s Decision, these concerns have proved to be justified. Two witnesses who were originally prepared to testify in the cases against Mr. Gaddafi and Mr. Al-Senussi have now informed the Office of the Prosecutor that they are no longer prepared to testify against Mr. Gaddafi or Mr. Al-Senussi “due to security concerns”.<sup>182</sup>
118. The deteriorating security situation in the country and the vengeful tactics to ostracise perceived Gaddafi sympathisers also has the effect of deterring witnesses who may have relevant information for the defence. As noted above, two prosecution witnesses have already withdrawn their testimony, and defence witnesses could face far graver threats. Mr. Al-Senussi would therefore be severely hampered in his ability to present his case under the same conditions as the prosecution in any trial, as he is presently restricted in his ability to challenge the investigation proceedings. In these circumstances, his rights under Libyan law to present evidence during the proceedings are illusory.
119. As the Chamber held in the Gaddafi Admissibility Decision, Libya’s inability to access witness testimony and subsequently to protect witnesses from reprisal, including witnesses testifying in Mr. Senussi’s defence, leads to the conclusion that Libya is “unable” to conduct genuine proceedings and therefore requires that Mr. Al-Senussi’s case be found admissible under Article 17.<sup>183</sup>

**(3) Other inability to carry out proceedings: the lack of legal representation and other violations of Mr. Al-Senussi’s rights**

*(a) Violations of Mr. Al-Senussi’s Right to Counsel*

120. In the Gaddafi Admissibility Decision, the Chamber found that Libya’s inability to overcome the difficulties of securing legal representation for Mr. Gaddafi is a “practical impediment to the progress of the domestic proceedings”. In these circumstances, a

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<sup>181</sup> Gaddafi Admissibility Decision, para. 211.

<sup>182</sup> Rule 77 material disclosed by OTP to Saif Gaddafi defence, 12 June 2013.

<sup>183</sup> Gaddafi Admissibility Decision, para. 215.

trial cannot be conducted in accordance with the rights of the accused.<sup>184</sup> The lack of legal representation contributes to “the unavailability of the national judicial system”<sup>185</sup> and reveals that Libya is “otherwise unable” to conduct genuine proceedings as a result.

121. The exact same impediment exists in the national proceedings against Mr. Al-Senussi who is also without any legal representation. Mr. Al-Senussi has had no access to a lawyer of his choosing throughout the nine months he has been detained in Libya.
122. Under Libyan law, a suspect’s right to counsel is guaranteed under Articles 31 and 33 of the Constitutional Declaration and Articles 106 and 435 of the Criminal Procedure Code. This encompasses the right to be represented during interrogations and witness confrontations during the investigation phase, the right to review evidence against him, and the right to have privileged meetings with his counsel.<sup>186</sup> Article 304 of the Code also provides that where there has been a breach of law in the procedure of a criminal investigation and trial, “the non-observance of the law related to any substantive procedures results in the nullity of that procedure”.
123. Under the ICC Statute, the right to counsel is protected in Article 55. This provision makes clear that the suspect’s fundamental due process rights - including the right “[t]o have legal assistance of the person's choosing” - impose obligations on State authorities investigating alleged crimes falling within the scope of the ICC Statute.<sup>187</sup> In addition, Mr. Al-Senussi’s right to counsel is recognised in the main regional and international human rights conventions to which Libya is a party.<sup>188</sup>
124. In accordance with these provisions, Mr. Al-Senussi has repeatedly requested legal representation. During a prison visit on 15 April 2013,<sup>189</sup> it is reported that Mr. Al-

<sup>184</sup> Gaddafi Admissibility Decision, para. 214.

<sup>185</sup> Gaddafi Admissibility Decision, para. 215.

<sup>186</sup> Gaddafi Admissibility Decision, para. 201 and see para 146 – “during the investigation phase of a case, a suspect has the right to appoint a lawyer to attend interviews with the Prosecutor-General ...and during confrontation of the defendant with witnesses by the Prosecutor-General. Suspects also have the right to view the investigative materials relating to their case”

<sup>187</sup> The Article provides that – regardless of who has custody of the suspect - “[w]here there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities... that person shall also have the following rights”.

<sup>188</sup> United Nations Human Rights Committee, General Comment 13 (1984); Arab Charter on Human Rights, Article 16(3); African Charter on Human and People’s Rights, Article 7(c) (this provides an accused “[t]he right to defence, including the right to be defended by counsel of his choice.”). See also Admissibility Challenge, paras. 144 and 202.

<sup>189</sup> Libya: Ensure Abdallah Sanussi Access to Lawyer, HRW, 17 April 2013 (<http://www.hrw.org/news/2013/04/17/libya-ensure-abdallah-sanussi-access-lawyer>).

Senussi told Human Rights Watch that during his detention he had been brought before a judge once a month to review his detention order and that “[d]uring these sessions, I have asked the judge to let me see my family and I have asked for a lawyer.”<sup>190</sup> Yet, no lawyer of his choosing has been secured.

125. Libya has conceded that under Article 106 of the Libyan Criminal Procedure Code, “during the investigation phase of the case, a suspect has the right to appoint a lawyer to attend interviews with the Prosecutor-General and the Military Prosecutor and during confrontation of the defendant with witnesses by the Prosecutor-General.”<sup>191</sup> But despite Mr. Al-Senussi’s requests for a lawyer during the investigative stage,<sup>192</sup> it is plain from Libya’s submissions that:

- Mr. Al-Senussi has been interrogated on at least three occasions in Libya, including 17 September 2012 and 9 February 2013,<sup>193</sup> as well as in Mauritania by Libyan, Mauritanian and foreign agents.<sup>194</sup> During these interrogations he was not assisted by counsel.
- Mr. Al-Senussi has also “already been confronted with many statements taken from witnesses”.<sup>195</sup> During these confrontations he was not assisted by counsel.
- Mr. Al-Senussi has been held without access to counsel to raise challenges to the legal basis, duration and conditions of his detention or otherwise advise him on his rights.

<sup>190</sup> ICC: Libya's Bid to Try Gaddafi, Sanussi, HRW, 13 May 2013, Question 34 (<http://www.hrw.org/news/2013/05/13/qa-libya-and-international-criminal-court#40>).

<sup>191</sup> Admissibility Application of 2 April 2013, para. 146; Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-130-Red, 1 May 2012, para. 59 (hereinafter “Admissibility Application of 1 May 2013”); Libyan Government’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi”, ICC-01/11-01/11-258-Red, 23 January 2013, para. 96. See also, Public Annex B to Libyan Government’s filing of compilation of Libyan law referred to in its admissibility challenge, ICC-01/11-01/11-158-AnxB, 28 May 2013.

<sup>192</sup> Confidential Annex 2 of Admissibility Application of 2 April 2013, ICC-01/11-01/11-307-Conf-Anx2; Confidential and Redacted Annex 3 of Admissibility Application of 2 April 2013, ICC-01/11-01/11-307-Conf-Anx3-Red; Trial of Gaddafi son likely to be delayed after spy chief arrest, Reuters, 6 September 2012 (<http://in.reuters.com/article/2012/09/06/libya-senussi-arrest-idINL6E8K66V920120906>); Libya court postpones Saif al-Islam Gaddafi trial, BBC, 10 September 2012 (<http://www.bbc.co.uk/news/world-africa-19551566>).

<sup>193</sup> Admissibility Application of 2 April 2013, para. 165.

<sup>194</sup> The HRW report of 17 April 2013 also confirms that during his incarceration in Mauritania, Mr. Al-Senussi was interrogated by officials from “Saudi Arabia, Lebanon and the United States” without access to any legal counsel (See Libya, Ensure Abdallah Sanussi Access to Lawyer, HRW, 17 April 2013 (<http://www.hrw.org/news/2013/04/17/libya-ensure-abdallah-sanussi-access-lawyer>)).

<sup>195</sup> Admissibility Application of 2 April 2013, para. 166.

126. These clear violations of Mr. Al-Senussi's rights under Libyan law over an extensive period of nine months demonstrate that Libya cannot conduct the proceedings genuinely "in accordance with the substantive and procedural law applicable in Libya."<sup>196</sup>
127. Libya has provided no evidence in its Admissibility Application to establish that this serious impediment can or will be overcome. It was not able to do so in Mr. Gaddafi's case either. Rather, Libya's failure to permit detainees access to legal representation has been documented in numerous reliable reports as a systematic and ongoing problem. As the International Legal Assistance Consortium Rule of Law Assessment Report on Libya of 2013 notes, many detainees "have not seen a lawyer or prosecutor, and frequently remain detained under inhumane conditions and at risk of torture."<sup>197</sup> In March 2013, Human Rights Watch stated that the "challenges facing the Libyan judicial system ... include abuse in custody, denial of access to lawyers, and the lack of judicial reviews."<sup>198</sup>
128. Furthermore, as the Chamber is aware, Counsel appointed by the ICC to represent Mr. Al-Senussi have been unable to visit, or have any contact (even by telephone) with Mr. Al-Senussi. Since being appointed on 9 January 2013, Mr. Al-Senussi's Counsel have actively attempted to visit Mr. Al-Senussi. Libya has repeatedly failed to comply with the Chamber's orders to facilitate such a legal visit. Libya has not agreed a Memorandum of Understanding with the ICC to ensure that Counsel will have the necessary privileges and immunities. Instead, Libya has insisted that Counsel will be subject to local Libyan law.<sup>199</sup> Further, Libya continues to assert that Mr. Al-Senussi can only be consulted in the presence of a local lawyer which would make a mockery of any legal visit which the ICC has ordered must be confidential and privileged. Libya was provided with a proposed Memorandum of Understanding by the Registrar in March 2012 (over a year and two months ago), and yet has delayed in reaching any agreement. Libya has submitted that the Minister of Justice and Attorney-General were seized of the matter but that consultations may take time;<sup>200</sup> that an English version of

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<sup>196</sup> Gaddafi Admissibility Decision, para. 200.

<sup>197</sup> International Legal Assistance Consortium Rule of Law Assessment Report on Libya of 2013 (hereinafter "ILAC Report of 2013") (<http://www.ilac.se/2013/05/09/ilac-assessment-report-libya-2013/>).

<sup>198</sup> Libya: Ensure Due Process for Extradited Libyans, HRW, 30 March 2013 (<http://www.hrw.org/news/2013/03/30/libya-ensure-due-process-extradited-libyans>).

<sup>199</sup> Second report of the Registry on the visit of the defence team to Libya, ICC-01/11-01/11-328, 3 May 2013, para. 5.

<sup>200</sup> First report of the Registry on the visit of the defence team of Abdullah Al-Senussi to Libya, ICC-01/11-01/11-294-Conf-Exp, 6 March 2013, para. 7.



the MoU was required after having had the draft for many months<sup>201</sup>, and that delays were “due to the deferred appointment of the new Prosecutor General.”<sup>202</sup> Libya has not issued visas to Defence Counsel or set any date for the visit. Libya has provided no evidence to confirm that a legal visit will in fact be permitted and take place in a confidential and privileged environment in accordance with an agreement on immunities.

129. The African Court on Human and People’s Rights recognised, in March of this year, that in Mr. Gaddafi’s case “there exists a situation of extreme gravity and urgency, as well as a risk of irreparable harm to the Detainee.”<sup>203</sup> The ACHPR’s finding came in the context of an order for provisional measures which was premised on, amongst other things, the fact that Mr. Gaddafi had been held in isolated detention for long periods, the fact that he had been unable to appoint a lawyer and the fact that he had been interrogated in the absence of legal counsel.<sup>204</sup> Mr. Al-Senussi faces the same conditions and Libya has taken no remedial steps.

130. In Saif Gaddafi’s case, Libya made a strained attempt to argue that the State was seeking to find a lawyer to represent him, or that he did not want a lawyer.<sup>205</sup> The Chamber did not accept these assertions in light of the record before it.<sup>206</sup> No such attempted justification is made in respect of Mr. Al-Senussi. In its lengthy Admissibility Application Libya devotes only two paragraphs to the topic of “Abdullah Al-Senussi’s health and access to a lawyer”. The single paragraph on the right to counsel simply states that Libya “remains keen” to comply with its obligation to provide access to counsel and that it will address this issue “as a matter of priority”. The Defence submits that Libya have on the basis of these submissions clearly not established that this fundamental impediment will be overcome.

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<sup>201</sup> First report of the Registry on the visit of the defence team of Abdullah Al-Senussi to Libya, ICC-01/11-01/11-294-Conf-Exp, 6 March 2013, para. 3.

<sup>202</sup> Second report of the Registry on the visit of the defence team to Libya, ICC-01/11-01/11-328, 3 May 2013, para. 3.

<sup>203</sup> In the Matter of the African Commission on Human and People’s Rights v. Libya, Application No. 002/2013, Order for Provisional Measures, 15 March 2013, para. 17.

<sup>204</sup> In the Matter of the African Commission on Human and People’s Rights v. Libya, Application No. 002/2013, Order for Provisional Measures, 15 March 2013, para. 3.

<sup>205</sup> Gaddafi Admissibility Decision, para. 212 (citing Libyan Government’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11258-Red, 23 January 2013, paras. 258-268).

<sup>206</sup> Gaddafi Admissibility Decision, para. 212.

***(b) Other violations of Mr. Al-Senussi's rights demonstrating an inability genuinely to conduct the proceedings***

131. The right to access legal counsel also underpins almost every other right at the investigation, pre-trial and trial stages of criminal proceedings, including the right to adequate facilities for the preparation of a defence, the right to silence and the ability to access a judge to review the legality of detention.
132. The lack of legal representation is of particular concern as Mr. Al-Senussi has been held almost exclusively in solitary confinement, mostly incommunicado, and isolated from family or other visits and even separated from other prisoners at the same detention facility.<sup>207</sup> As noted above, he has been interrogated in the absence of a lawyer and has been confronted with alleged evidence against him without the benefit of legal advice. Furthermore, his family is gravely concerned about his medical condition and whether it has been given due attention. It is simply not possible to know at this stage the full extent and gravity of the violations in question (both in relation to Mr. Al-Senussi's detention in Libya and in Mauritania) because nobody has had access to him in a safe, confidential and privileged environment.
133. In Mr. Al-Senussi's case his rights to be protected from arbitrary arrest and detention have clearly been violated and it is very likely that he has been subjected to other abuses.

***(i) Unlawful Capture and Detention***

134. The Defence has set out detailed submissions on the circumstances under which Libya unlawfully obtained Mr. Al-Senussi in previous filings and it incorporates those submissions here.<sup>208</sup> The OPCD has also referred to evidence of Mr. Al-Senussi's

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<sup>207</sup> Defence Submission of Additional Evidence Pursuant to the 'Order convenint a hearing on Libya's challenge to the admissibility of the case against Saif Al-Islam Gaddafi (ICC-01/11-01/11-207), ICC-01/11-01/11-216-Anx3A.4, 3 October 2013.

<sup>208</sup> Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC, ICC-01/11-01/11-248, 9 January 2013, paras. 28-59; Renewed Application on behalf of Mr. Abdullah Al-Senussi to Refer Libya and Mauritania to the UN Security Council with Public Annex 1 and Confidential and Ex Parte (Registry only) Annexes 2 and 3, ICC-01/11-01/11-304, paras. 18-34.

unlawful transfer.<sup>209</sup> These submissions and accompanying evidence show that the Libyan authorities played a very direct role in obtaining custody over Mr. Al-Senussi in Libya in breach of Mauritanian, Libyan and international law, including by sending a high-level delegation to secure his transfer, taking part in a ruse to lure him to the airport in Mauritania, arranging the plane that transported him to Libya, and paying a \$200 million bribe to secure the deal. A summary of the evidence that establishes these facts is set out in Annex B hereto. As explained in previous filings, Libya's actions violated ICC orders and the Security Council resolution that referred the situation in Libya to this Court. Libya's rendition of Mr. Al-Senussi also violates Mauritanian and Libyan law, since the judicial procedures for extradition were not followed.<sup>210</sup>

135. The circumstances of this unlawful rendition undermine the integrity of Libya's proceedings against Mr. Al-Senussi in their entirety. This is because,

“[t]here is (...) no principle more basic to any proper system of law than the maintenance of the rule of law itself. When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, ... respect for the rule of law demands that the court take cognisance of that circumstance. To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is ... an insular and unacceptable view.”<sup>211</sup>

136. The obligation to obtain an accused legally is also provided for in the ICC Statute itself. Article 59(2) requires that national judicial authorities determine that all individuals arrested pursuant to ICC arrest warrants have been so arrested in accordance with proper legal procedures. And Article 55(1)(d) provides that, where an individual is being investigated for crimes falling within the remit of the ICC Statute, he “shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in

<sup>209</sup> Addendum to the ‘Request to Submit Observations Pursuant to Regulation 77(4) of the Regulations of the Court’, ICC-01/11-01/11-206, 11 September 2012, paras. 5, 6.

<sup>210</sup> Reply to the “Response of the Libyan Government to the ‘Renewed Application on behalf of Mr. Abdullah Al-Senussi to Refer Libya and Mauritania to the UN Security Council’”, ICC-01/11-01/11-329-Anx1, 3 May 2013.

<sup>211</sup> *R v Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42, at 67 (per Lord Bridge).

this Statute”. This applies to a suspect held in a State that is subject to the Statute, as well as one held in the Court’s own detention facility.<sup>212</sup>

137. The Defence submits that it is not only the initial arrest that is problematic, but also Mr. Al-Senussi’s continued detention 9 months later. According to Libyan law, “suspects may not be imprisoned without due process and a written order signed by the Prosecutor-General.”<sup>213</sup> Nor can they be held in indefinite detention. The Libyan Code of Criminal Procedure provides that a suspect may be remanded in custody for a maximum of 15 days, with any extension up to 45 days to be granted by the investigating judge.<sup>214</sup> Under Article 123 of the Code, any further extensions must be submitted to a court of first instance presided over by three judges, who must hear statements from both the prosecution and the accused before submitting an order, and who may extend the period of detention by a maximum of 45 days at any one time until the investigation has come to an end. Any extension must be supported by a reasoned (not formulaic) decision by a judge. International human rights law requires similar guarantees.<sup>215</sup> The appointment of legal counsel should take place within hours of arrest, and certainly before the suspect is interviewed and confronted with evidence against him.<sup>216</sup> And it has been noted that ten days without access to a lawyer is excessive.<sup>217</sup> Libya has presented no evidence whatsoever to allow the Chamber – even if it were applying a relatively low standard of proof – to conclude that any of these rights have been respected.

*(ii) Other violations*

138. In addition, as noted above, Libya’s refusal to arrange for a legal visit has meant that the Defence has no way of verifying the conditions under which Mr. Al-Senussi, has been detained and interrogated.<sup>218</sup> However, the facts surrounding Libya’s treatment of Mr.

<sup>212</sup> HRW Report, International Criminal Court, Making the International Criminal Court Work, A Handbook for Implementing the Rome Statute, September 2001, p. 19-20.

<sup>213</sup> Admissibility Application of 2 April 2013, para. 148.

<sup>214</sup> Libyan Criminal Procedure Code, Article (187) bis (b).

<sup>215</sup> League of Arab States, Arab Charter on Human Rights, May 22, 2004, Article 14; International Covenant on Civil and Political Rights, Article 9; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Articles 10, 11; African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, Article 6.

<sup>216</sup> Case of Magee v. The United Kingdom, App No. 28135/95, Judgment, 6 June 2000.

<sup>217</sup> United Nations Human Rights Committee, *Rafael Marques de Morais v. Angola*, Communication No. 1128/2002, U.N. Doc. CCPR/C/83/D/1128/2002 (2005), para. 6.5 (finding violation of Article 9(4))

<sup>218</sup> On 20 April 2013 Human Rights Watch (HRW) reported that they had been given access to Mr. Al-Senussi in his cell. Mr. Al-Senussi told HRW that, although he had asked for a lawyer within days of being arrested he had

Al-Senussi strongly indicate that his arrest and detention have involved other significant violations of his human rights and thereby further confirm Libya's inability to conduct genuine proceedings.

139. In particular, Libya has not provided evidence that the following rights enumerated in the ICC Statute, and under Libyan law (including treaties that have been ratified) have been respected:

- It is unclear whether Mr. Al-Senussi has been arrested pursuant to an ICC warrant or not and whether he was informed of his rights and of any charges against him in a language that he understands. No judicial documents of this nature have been produced, nor has Libya even alleged that this has taken place.
- It is unclear whether, how soon, how often and under what circumstances Mr. Al-Senussi has been brought before a judge; whether the judge has the power to grant release; whether the judge is independent; whether the judge has issued reasoned decisions; or whether any decisions comply with the presumption of liberty under national or international law. No judicial documents of this nature have been produced, nor has Libya alleged that any of proceedings have taken place.
- It is unclear whether Mr. Al-Senussi has been tortured or subjected to inhuman or degrading treatment.<sup>219</sup> Libya admits that “it is a fact that violations of human rights were committed in detention centres in 2012” and that “not all detention centres are under the control of the Ministry of Justice”.<sup>220</sup> There is also evidence

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still not been given access to one. HRW reported that Mr. Al-Senussi has said the conditions of his detention were “reasonable” despite complaining that he was confined to his cell and not allowed out to exercise. Mr. Al-Senussi's conversation with HRW was not a privileged legal conversation, and he was accordingly unlikely to be at liberty to speak freely about the conditions of his detention. It is therefore of limited value as a source of information on Mr. Al-Senussi's detention, and it is not a substitute for access to legal counsel.

<sup>219</sup> Addendum to the ‘Request to Submit Observations Pursuant to Regulation 77(4) of the Regulations of the Court, ICC-01/11-01/11-206, 11 September 2012, para. 2; Defence Submission of Additional Evidence Pursuant to the ‘Order convenint a hearing on Libya's challenge to the admissibility of the case against Saif Al-Islam Gaddafi (ICC-01/11-01/11-207), ICC-01/11-01/11-216-Anx8.2, 3 October 2013; In the new Libya, former prisoners guard their onetime captors, Washington Post, 3 March 2013 ([http://articles.washingtonpost.com/2013-03-03/world/37418071\\_1\\_saif-al-islam-gaddafi-senussi-libyan-rebels](http://articles.washingtonpost.com/2013-03-03/world/37418071_1_saif-al-islam-gaddafi-senussi-libyan-rebels)).

<sup>220</sup> Admissibility Application of 2 April 2013, para. 191; Defence Submission of Additional Evidence Pursuant to the ‘Order convenint a hearing on Libya's challenge to the admissibility of the case against Saif Al-Islam Gaddafi (ICC-01/11-01/11-207), ICC-01/11-01/11-216-Anx3A.3A, 3 October 2013, p. 4 which says that Al Hadba falls under the authority of the judicial police.

to suggest that Mr. Al-Senussi has been assaulted.<sup>221</sup>

- It is unclear whether Mr. Al-Senussi was informed of his right to silence or whether this right has been respected.
- It is unclear whether Mr. Al-Senussi has been allowed to exercise his right to view the investigative materials in his case or whether these have been appropriately recorded.
- It is unclear whether Mr. Al-Senussi's health problems have been adequately monitored and treated.

140. All of these issues, in addition to the violations of Mr. Al-Senussi's right to counsel, demonstrate that Libya is "otherwise unable to carry out proceedings" in his case, and that Libya's Admissibility Application should therefore be rejected.

#### **Overall submission on "inability"**

141. The Defence submits that the evidence set out above clearly demonstrates that the impediments which the Chamber identified in finding that Libya is unable to investigate or prosecute the case against Mr. Gaddafi are equally applicable in Mr. Al-Senussi's case.

142. The Admissibility Application should be dismissed on the grounds that Libya is unable to investigate or prosecute Mr. Al-Senussi's case. He is without any legal representation, and Libya has provided no evidence to demonstrate that this impediment will be overcome. Libya has provided no concrete evidence that Mr. Al-Senussi is "in safe custody ... controlled by the Libyan Government"<sup>222</sup> while the available evidence shows to the contrary that his detention is unsafe and unlawful. Prisons are susceptible to the whim of militia groups with police and Government authorities having very

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<sup>221</sup> Defence Submission of Additional Evidence Pursuant to the 'Order convening a hearing on Libya's challenge to the admissibility of the case against Saif Al-Islam Gaddafi (ICC-01/11-01/11-207), ICC-01/11-01/11-216-Anx3.3, 3 October 2013, p. 2. The annex says that one of the rebels just left Al-Senussi and he was happy, saying: I hit him on his "**Ankafto**" so everyone present said Allah Akbar. I asked the person next to me **what Ankafto mean and he said: "the back of his neck"**. #Libya. Abdul-Azim Mohamed Al-Jazeera reporter who reported on **Al-Senussi's surrender**.

<sup>222</sup> Admissibility Application of 2 April 2013, para. 118.

limited power over the militia. Libya is unable to “obtain the necessary testimony” to conduct the national investigations and proceedings in Mr. Al-Senussi’s case “due to the inability of judicial and governmental authorities to ascertain control and provide witness protection.”<sup>223</sup> The State authorities are unable to address the systematic problem of abuse and mistreatment within detention facilities which severely hampers Libya’s ability to provide adequate protection for witnesses, many of whom are detainees. The Government has provided no evidence of specific witness protection programs<sup>224</sup> under Libyan law and no assurance that the minimal witness protection measures of Court-ordered police protection would provide any tangible security when police forces are “barely functioning”<sup>225</sup> and the Government is paying militia groups to provide security.<sup>226</sup> The abduction and beating of the public prosecutor assigned to Mr. Al-Senussi’s case by the militia also highlights Libya inability to conduct the proceedings against Mr. Al-Senussi in Libya.

143. In light of the record established in this Part, the Defence submits that the only possible conclusion is that Libya is ‘unable’ to conduct genuine proceedings in this case according to Article 17 of the ICC Statute.

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<sup>223</sup> Gaddafi Admissibility Decision, para. 209.

<sup>224</sup> Gaddafi Admissibility Decision, para. 211.

<sup>225</sup> ICG Report of April 2013, p. 31.

<sup>226</sup> Libyan militias promise wealth in unstable nation, USA Today, 13 March 2013 (<http://www.usatoday.com/story/news/world/2013/03/13/libya-militia-wealth/1985211/>).

**PART C: Libya is unwilling genuinely to prosecute or investigate the case**

144. The Defence submits that Libya is not only unable genuinely to investigate or prosecute Mr. Al Senussi's case, it is also unwilling genuinely to do so. As noted above, the Chamber need not consider "unwillingness" if it has concluded (as it did in relation to Saif Gaddafi) that Libya is "unable" to conduct the proceedings. In any event, many of the arguments raised above in the context of "inability" also support a finding of "unwillingness". For example, Libya's inability to obtain and detain the accused in a legal manner and its inability to provide legal representation also support a finding that Libya is not willing to provide such protections to this accused.

**Legal framework**

145. "Unwillingness" is defined under Article 17(2) of the Statute. This provision directs that the Court:

"shall consider, having regard to the principles of due process recognized by international law, whether ...

(...)

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice."

146. To successfully challenge admissibility, Libya must discharge its burden to satisfy the Court that neither of subparagraphs (b) or (c) apply.<sup>227</sup> If it does not, the Chamber must rule that it is "unwilling" for purposes of Article 17 and dismiss its challenge.

147. The Chamber recognised in the Gaddafi Admissibility Decision that the extent to which

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<sup>227</sup> Libya had submitted in its Admissibility Application that the "burden of proving that Libya is "unwilling or unable genuinely to carry out the investigation or prosecution or that the proceedings lack genuineness lies on the party asserting it." (Admissibility Application of 2 April 2013, para. 94). This proposition was rejected in the Gaddafi Admissibility Decision; the Chamber held that Libya had an obligation to substantiate "all aspects" of the requirements for the purposes of admissibility ("The Chamber observes that the inadmissibility of the case is premised on both limbs of article 17(1)(a) of the Statute and the challenging State is required to substantiate all aspects of its allegations to the extent required by the concrete circumstances of the case") (Gaddafi Admissibility Decision, para. 52).



the suspect or accused has been afforded human rights -- and in particular due process rights -- under national and international law is relevant to assessing a state's "inability" genuinely to investigate or prosecute a case.<sup>228</sup>

148. The Defence submits that the same must be true when assessing a State's "willingness" to investigate or prosecute the case.<sup>229</sup> Article 17 itself states in terms that, when applying the "unwilling" standard, the Chamber must "have regard to the principles of due process recognized by international law".
149. The Rome Statute's framework as whole also confirms that human rights, including due process rights, must be taken into account in admissibility proceedings -- whether it is the State's 'ability' or 'willingness' that is at issue.<sup>230</sup> This legal framework includes Article 21(3) which requires that the Statute be construed "consistent[ly] with internationally recognized human rights".<sup>231</sup> The ICC Appeals Chambers has clarified that these rights must guide the interpretation of the complementarity provisions in the Statute because "[h]uman rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court."<sup>232</sup> The human rights of suspects at the investigation stage are protected under Article 55,<sup>233</sup> and under human rights' treaties that Libya has ratified.
150. Moreover, the overarching provision in Article 17 relates to both inability and unwillingness and provides that a case being investigated or prosecuted by the State is inadmissible "unless the State is unwilling or unable genuinely to carry out the investigation or prosecution".<sup>234</sup> The word "genuinely" therefore explicitly applies to

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<sup>228</sup> The Chamber's assessment of the Libyan system focussed on the inability of the system to afford the defendant rights he would ordinarily be afforded, including rights to legal representation; the right to review evidence (Gaddafi Admissibility Decision, para. 201); and the right to a public hearing (Gaddafi Admissibility Decision, para. 202).

<sup>229</sup> Gaddafi Admissibility Decision, paras. 216-218.

<sup>230</sup> As the Chamber has confirmed on many occasions, "although Libya is not a State Party to the Statute, it is under an obligation to cooperate with the Court [and] the Statute... is the legal framework within which Libya must comply" with the Court's requests. Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi, 7 March 2012.

<sup>231</sup> Gaddafi Admissibility Decision, para. 56.

<sup>232</sup> Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, ICC-01/04-01/06-772, 14 December 2013, para. 36, 37.

<sup>233</sup> Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, ICC-01/04-01/06-772, 14 December 2013, para. 36, 37. See also, Article 66 and 67 of the Statute providing for the rights of an accused at trial.

<sup>234</sup> Rome Statute, Article 17(1)(a) (emphasis added).

both the inability and unwillingness prongs and necessarily includes a due process component. As recognised in the ICC’s informal expert paper of 2003, while “[i]t was extremely important to many States [drafting the ICC Statute] that proceedings cannot be found “non-genuine” simply because of a comparative ‘lack of resources’ ... [t]he issue is whether the proceedings are so inadequate that they cannot be considered “genuine” proceedings.”<sup>235</sup>

151. An ability and willingness to conduct genuine national proceedings in compliance with principles of due process must mean that the proceedings can neither be designed to acquit nor designed to convict. Although Libya attempts - in violation of established Vienna Convention principles on treaty interpretation - to read any meaning out of the key terms ‘unwilling’, ‘unable’ and ‘genuine’, suggesting that all three refer to nothing more than ‘sham proceedings’ to shield an accused from criminal responsibility,<sup>236</sup> this view is no longer tenable in light of the Chamber’s analysis in the Gaddafi Admissibility Decision.
152. The Chamber made clear in this Decision that a State’s “inability” to conduct genuine proceedings can be evidenced not only where there is a ‘sham’ trial *but also* when an investigation and trial process is predetermined to convict or lacks sufficient due process guarantees.<sup>237</sup> The same must be true where the State is determined to be “unwilling” rather than “unable” to conduct genuine proceedings. The *reason* (inability versus unwillingness) for the unacceptable result (lack of genuine proceedings) does not change the fact that the result is unacceptable for admissibility purposes.
153. This is confirmed by the language of Article 17(2)(c) which makes a case inadmissible on the basis of “unwillingness” where “[t]he proceedings were not or are not being conducted independently or impartially”. This is set out without distinction as to a

<sup>235</sup> See the Informal Expert Paper: The Principle of Complementarity in Practice (2003), (<http://www.icc-cpi.int/iccdocs/doc/doc654724.PDF>).

<sup>236</sup> Admissibility Application of 2 April 2013, para. 105, 108-111, 122, 123. Paragraph 105 states the concepts of unwillingness and inability are merely “signifiers of sham proceedings”. Paragraph 122 states that “The term ‘genuinely’ requires consideration of whether the “domestic proceedings are ‘sham’ proceedings”. Paragraph 122 says that genuine means ‘not sham.’ Paragraph 123 says that genuine “adds little substance to the assessment of the domestic...” See also, Paragraphs 108-111.

<sup>237</sup> The Chamber’s analysis is not limited anywhere to a review of ‘sham’ proceedings. See, e.g. para. 120 which states “... the Chamber must assess whether the Libyan authorities are capable of investigating or prosecuting Mr. Gaddafi in accordance with the substantive and procedural law applicable in Libya”. The Chamber goes on to assess protections afforded to defendants in the context of criminal proceedings in Libya, including the right to a lawyer; the right to review evidence (Gaddafi Admissibility Decision, para. 201); the right to a public hearing; to remain silent; and to present defence evidence (Gaddafi Admissibility Decision, para. 202).

process that leads to an unjust acquittal as opposed to an unjust conviction. The standard is itself drawn from international human rights law, including the ICCPR which has been ratified by Libya and requires judicial and prosecutorial independence and impartiality in all criminal proceedings.<sup>238</sup>

154. In addition, the relevant subparagraphs of Article 17(2) make “unwillingness” dependent on a finding that the State does not have an intent to “bring the person concerned to justice”. This echoes the statement in the Preamble to the Statute confirming that in creating the Court its founding States were “[r]esolved to guarantee lasting respect for and the enforcement of international justice”.<sup>239</sup> The term “international justice” surely cannot mean justice only where the accused is shielded from guilt.
155. The Defence submits that Libya’s submissions in its Admissibility Challenge that “unwillingness” to conduct genuine proceedings has no relation to international human rights standards on due process and can only mean conducting sham proceedings to shield the accused from responsibility,<sup>240</sup> (but not unjust convictions leading to execution) are therefore untenable.
156. In order to establish unwillingness the court must therefore be satisfied either that proceedings are intended to shield the accused, or that there has been an unjustified delay in proceedings, or that the proceedings are not being conducted “independently or impartially”. The existence of any one of these scenarios is sufficient for a finding of admissibility and the analysis must take into account international human rights, including due process rights.

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<sup>238</sup> International Covenant on Civil and Political Rights, art. 14(1), 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976). See also Rule 51 of the Rules of Procedure and Evidence of the International Criminal Court, which provides that a State “may choose to bring to the attention of the Court [information] showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct”.

<sup>239</sup> Rome Statute, Preamble. The preamble also states that “the most serious crimes of concern to the international community as a whole must not go unpunished and... their effective prosecution must be ensured by taking measures at the national level”.

<sup>240</sup> Admissibility Application of 2 April 2013, para. 195. (“Unwillingness pursuant to Article 17(2)(a) must be directed towards the sole objective of shielding the person from accountability”).

## Relevance of the Death Penalty

157. In the Gaddafi Admissibility Decision, the Chamber noted that “Libya emphasises that the availability of the death penalty does not mean that it will be applied”. This purported reassurance belies the fact that Libya is in fact committed to the death penalty. Unlike Libya, the vast majority of African states have now either abolished the death penalty *de jure* or *de facto*. Moreover, many African States were among the 112 States that voted for the General Assembly resolution in December 2012 calling for a moratorium on capital punishment. This included three States that border on Libya: Chad, Algeria and Tunisia. Yet Libya took a very public position in support of capital punishment and voted against the resolution. Libyan courts have also reportedly imposed the death penalty in recent cases.<sup>241</sup>
158. Article 80 of the Rome Statute was inserted in the Chapter on penalties in order to reassure some States that the Statute’s exclusion of capital punishment from the sentencing provisions would not in itself impose an obligation for them to abolish the death penalty. But it does not follow that the issue of capital punishment is to be entirely ignored by the Court in determining issues of admissibility. Article 17 itself refers to “the principles of due process recognized by international law” and the interpretation of article 17 is subject to article 21(3) and its reference to consistency “with internationally recognized human rights”. Consequently, a State that cannot ensure the rigorous fair trial guarantees that are required in death penalty cases cannot satisfy the threshold set by article 17.
159. The United Nations Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty state that capital punishment “may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings”.<sup>242</sup> As explained above, this provision has already been breached by Libya since Mr. Al-Senussi is “suspected of or

<sup>241</sup> Misrata court hands out death sentences, Libya Herald, 6 June 2013 (<http://www.libyaherald.com/2013/06/06/misrata-court-hands-out-death-sentences/>).

<sup>242</sup> Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, UN Doc. E/RES/1984/50, annex, para. 5 (emphasis added).

charged with a crime for which capital punishment” may be imposed and has been denied “adequate” (or indeed any) legal assistance.

160. More broadly, the fact that the death penalty is at issue requires a higher bar on the due process requirements relevant to these proceedings. Within the Inter-American human rights system, where case law on the subject of capital punishment is highly developed, the Inter-American Court of Human Rights has held that “[b]ecause execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result”.<sup>243</sup> According to the Inter-American Commission of Human Rights, there is “an enhanced obligation to ensure that any deprivation of life which may occur through the application of the death penalty comply strictly with the requirements of the applicable inter-American human rights instruments, including the American Declaration. This ‘heightened scrutiny test’ is consistent with the restrictive approach taken by other international human rights authorities to the imposition of the death penalty.”<sup>244</sup>

161. In addition, the UN Human Rights Council, in its 2012 report on “the Question of the Death Penalty” stressed that “the death penalty may be carried out only pursuant to a final judgment rendered by a competent court after a process which gives all possible fair trial safeguards... including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings”.<sup>245</sup> Similarly, the African Commission on Human and Peoples’ Rights “encourages all states party to the African Charter to take all measures to refrain from exercising the death penalty” and has held that execution and implementation of a death sentence resulting from a trial that does not respect fundamental procedural safeguards amounts to an arbitrary deprivation of the right to life.<sup>246</sup>

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<sup>243</sup> The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law. Advisory Opinion OC-16/99, 1 October 1999. Series A No. 16, para. 136.

<sup>244</sup> IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cardenas and Leal García, United States, August 7, 2009, para. 122.

<sup>245</sup> UN Human Rights Council, Question of the death penalty: report of the Secretary-General, 2 July 2012, A/HRC/21/29, para. 31 (emphasis added).

<sup>246</sup> International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) v. Nigeria, 137/94-139/94-154/96-161/97, 31 October 1998, para. 103. Also: Egyptian Initiative for Personal Rights and Interights v. Egypt, 334/06, 3 March 2011, para. 231. Interights et al. (on behalf of Mariette Sonjaleen Bosch) v. Botswana, 240/01, 20 November 2003, para. 52.

162. The due process analysis inherent in the assessment of a State's ability and willingness to conduct 'genuine' proceedings must therefore be even more stringent in a case, such as this, where a conviction in a national court would very likely result in the suspect being sentenced to death.

### **Unjustified delay**

163. The Defence submits that, having regard to the principles of due process recognised by international law, there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring Mr. Al-Senussi to justice. Although there initially appeared to be a danger of a swift, 'sham' trial for Mr. Al-Senussi in the Libyan courts, the problem has become one of unjustifiable delay in the proceedings.<sup>247</sup>

164. The Libyan investigation appears to be stuck – or is being held – at the pre-accusation stage during which a lawyer is denied and the investigation materials remain largely secret. After two years of investigation, there is apparently still not enough evidence to sustain a single charge.

165. There is, in addition, a serious risk of further future delays in light of the way in which Libya is choosing to conduct proceedings. This risk is evident on Libya's own submissions regarding the status of the case at present:

- Mr. Al-Senussi is yet to be assigned counsel and his case has yet to be assigned a case number for trial.<sup>248</sup>
- Mr. Al-Senussi's case may be joined with the cases against at least **nine** other individuals. One of them is Saif Gaddafi, whose case cannot proceed given his absence from Tripoli and lack of appointed counsel.<sup>249</sup>

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<sup>247</sup> In its filing of 15 January 2013, Libya stated that the pre-trial phase before the *Chambre d'Accusation* was likely to begin in February. See, Observations by Libya in response to the OPCD Notification of 8 January 2013, ICC-01/11-01/11-251, 15 January 2013, para. 4. And in its filing of 28 January 2013 Libya avers that "[t]he best estimate of the Libyan Government is that the *Chambre d'Accusation's* examination of the case is likely to take approximately three months" See, Libyan Government's Observations regarding the case of Abdullah Al-Senussi, ICC-01/11-01/11-260 28 February 2013, para. 13. In its Admissibility Challenge, Libya made clear that Mr. Al-Senussi, amongst other things, had not yet been brought before the *Chambre d'Accusation* at all (Admissibility Application of 2 April 2013, para. 175).

<sup>248</sup> Admissibility Application of 2 April 2013, para. 175.

<sup>249</sup> Admissibility Application of 2 April 2013, para. 175.

- Mr. Al-Senussi's trial is to take place in a renovated "courtroom complex and prison facility" but the renovation work, as at 2 April 2013 when Libya filed its Admissibility Challenge, had not yet begun.<sup>250</sup>

166. That these preliminary, and crucial, issues remain outstanding over 9 months after Mr. Al-Senussi's illegal transfer into Libyan custody give rise to the presumption that proceedings are not being conducted expeditiously. Libya's Admissibility Application fails entirely to address the potential impact of such prosecutorial misconduct on the suspect's right to a speedy trial. He has not yet been charged with any crime as regards alleged conduct in Benghazi or elsewhere in the country. The Defence submits that such delay violates due process standards and as a result Libya is "unwilling" to conduct proceedings without unjustified delay or in a manner that suggests a genuine intent to bring the suspect to justice.

#### **Domestic proceedings are not independent or impartial**

167. The record in this case also shows that having regard to the principles of due process recognised by international law, proceedings were not and are not being conducted independently or impartially, nor are they being conducted in a manner which is consistent with an intent to bring Mr. Al-Senussi to justice. The submissions made in Part B above are relevant to such a finding but will not be repeated here.

168. Moreover, the lack of judicial independence and impartiality is demonstrated in several ways:

- Libyan officials have made numerous public statements which betray a lack of appreciation for the basic tenets of the criminal justice system, including the principle that a suspect is presumed innocent until proven guilty.<sup>251</sup> The Minister of Finance has stated that Mr Al-Senussi "was responsible for the deaths of 1200 people" and was "conducting himself ... as if he had not committed any crimes at all".<sup>252</sup> The former Deputy Minister of Finance announced that he "wish[ed] to congratulate the Libyan people on ... the arrest of this criminal who ill-treated

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<sup>250</sup> Admissibility Application of 2 April 2013, para. 176 ("...arrangements have been made for the renovation of a courtroom complex and prison facility in Tripoli").

<sup>251</sup> See, *supra*, para 72.

<sup>252</sup> Statement of Hassan Zaqlam, Libyan Minister of Finance, "Al Khabar", 5 September 2012 (<http://www.youtube.com/watch?v=0KQL8wZqXnE>).

and tortured the Libyan People”.<sup>253</sup> A former spokesman for the Ministry of Foreign Affairs highlighted that “Abdullah Al-Senussi... was responsible for many crimes...”<sup>254</sup> The former Libyan Prime Minister has stated that “I guarantee he [Senussi] was almost directly or indirectly involved in most if not all of the crimes [of the former regime]”.<sup>255</sup> And another Libyan official has said that “all this evidence is sufficient to sentence [Senussi and Gaddafi] to death. The Judge or judges who are viewing these cases should have issued these judgments, because they [the judgments] will be applauded by the Libyans”<sup>256</sup>

- The Government also previously stated that Saif Gaddafi “will receive the most severe penalty [in Libya]” and then “there will be no need for another trial [at the ICC]”.<sup>257</sup>
- As the ICC Appeals Chamber has recognised in this case,<sup>258</sup> statements by public officials that assume the suspect’s guilt fundamentally undermine the suspect’s presumption of innocence, in violation of recognised international human rights norms.<sup>259</sup>
- The appointment and selection of judges is also a matter of particular concern. Libya’s Justice and Judicial Affairs committee “discussed the fact that the judges presiding in some of the trials of the former regime officials had taken part in the ‘special courts’ of the Gaddafi era” and determined that “it was important to

<sup>253</sup> Statement of Moraje’ Ghayth, Deputy Minister of Finance, LibyaChanneltv Libya, 11 September 2012 (<http://www.youtube.com/watch?v=aUnZFNhB16Y>).

<sup>254</sup> Statement of Saad Al-Shalmani, Spokesperson for the Ministry of Foreign Affairs. *Id.* at 5:20.

<sup>255</sup> Statement by former Libyan Prime Minister Abdurrahim el-Keib, L. Harding, I. Black, ‘Mauritania extradites Gaddafi spy chief Senussi to Libya’, *The Guardian*, 5 September 2012, (<http://www.guardian.co.uk/world/2012/sep/05/mauritania-gaddafi-senussi-libya?newsfeed=true>).

<sup>256</sup> ICC-01/11-01/11-340-Conf-AnxE (statement by Mustafa Abdul Jalil (NTC Chairman, 11 May 2013); The full interview- published on 29 April 2013 - is also found at <http://www.youtube.com/watch?v=WZDTi5GK5kl> at 44:27 minutes.

<sup>257</sup> Statement by Dr. Salwa Fawzi El-Deghali, in charge of Legal Affairs and Women for the NTC, Press conference with Luis Moreno-Ocampo, 23.11.11 (video).

<sup>258</sup> Decision on the Request for Disqualification of the Prosecutor, No. ICC-01/11-01/11 OA 3, 12 June 2012 (“As reflected consistently in the comments, decisions or judgments of, inter alia, the United Nations Human Rights Committee, the African Commission on Human and Peoples’ Rights and the European Court of Human Rights, relevant authorities, including prosecutors, must respect the presumption of innocence in their public statements and must “refrain from prejudging the outcome of a trial”), para. 26.

<sup>259</sup> See, e.g., Case of *Allenet de Ribemont v. France*, App No. 15175/89, Judgment, 10 February 1995, paras. 32-41 ([http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57914#{"itemid":\["001-57914"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57914#{)) and other authorities cited at paras 25-27 of Appeals Chamber’s Decision on the Request for Disqualification of the Prosecutor, No. ICC-01/11-01/11 OA 3, 12 June 2012 .



exclude these figures from the current trials to ensure the ... integrity of the process”.<sup>260</sup>

- The ‘Political Isolation Law’, which recently came into force, has widely been condemned as being discriminatory against former Gaddafi-era officials and a gross breach of their human rights.<sup>261</sup> It has been submitted that this law “is being used as a stick to threaten or remove any judges who attempt to issue independent decisions which uphold the rights of highly unpopular defendants”.<sup>262</sup>

169. Furthermore, members of Mr. Al-Senussi’s own family have been subjected to biased criminal proceedings.<sup>263</sup> His 21-year old daughter, Anoud Amer Al-Senussi, was recently sentenced to ten months in prison for allegedly travelling on false documentation, despite evidential shortcomings and serious procedural irregularities during the proceedings.<sup>264</sup> There is also the obvious risk that the fact that she is in detention could be used by those interrogating Mr. Al-Senussi.

170. Despite the demonstrated unavailability of the judicial system, its lack of independence and impartiality, and the multiple violations of Mr. Al-Senussi’s rights detailed above and in Part B, Libya has restricted its comments in the Admissibility Application to

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<sup>260</sup> Public Redacted Version of the “Response to the “Libyan Government’s further submissions on issues related to admissibility of the case against Saif Al-Islam Gaddafi””, ICC-01/11-01/11-Red2, 18 February 2013, para. 172 (citing ‘GNC committee urges exclusion of former regime judges’ Libya Herald 26 December 2012 <http://www.libyaherald.com/2012/12/27/gnc-body-urges-exclusion-of-former-regime-judges/>).

<sup>261</sup> Libya: Reject ‘Political Isolation Law’, HRW, 4 May 2013 (<http://www.hrw.org/news/2013/05/04/libya-reject-political-isolation-law>); Political Isolation and Libya’s Future, Middle East Policy Council, 17 May 2013 (<http://www.mepc.org/articles-commentary/commentary/political-isolation-and-libyas-future>); Libyan ‘Political Isolation law’ is national unity disaster, 7 May 2013 (<http://www.bariatwan.com/english/?p=1640>); Analysis: Libya is at the Crossroads; The Choice between Exclusion and Inclusion, Tripoli Post, 5 April 2013 (<http://www.tripolipost.com/articledetail.asp?c=1&i=10078>); Isolation Law will not Benefit Libya, The Majalia, 13 March 2013 (<http://www.majalla.com/eng/2013/03/article55239273>); Libya’s ‘Political Isolation Law’ Generates Controversy, Al Monitor, 20 February 2013 (<http://www.al-monitor.com/pulse/originals/2013/02/libya-isolation-law-debaathification-qaddafi-era.html>).

<sup>262</sup> Public Redacted Version of the “Response to the “Libyan Government’s further submissions on issues related to admissibility of the case against Saif Al-Islam Gaddafi””, ICC-01/11-01/11-182-Red2, 18 February 2013, para. 173.

<sup>263</sup> Tripoli Court of Appeal, Judgment against Anoud Abdullah Mohammad Al-Senoussi of 19 February 2013, Case No. 1286 of 2012.

<sup>264</sup> Irregularities in Ms. Al-Senussi’s case include (i) her arrest by military police followed by detention, first in a private residence and subsequently in a detention facility designated for political prisoners despite her status as a private citizen whose alleged crime was not military or political in nature.; (ii) the adjournment of her hearing six times due to the court’s inability to gain access to a key witness (ultimately the court went ahead with sentencing without oral testimony from any witnesses); and (iii) irrelevant references in the judgment to the fact that Ms. Al-Senussi is Mr. Al-Senussi’s daughter, with the court referring to Mr. Al-Senussi’s former position under Gaddafi on both occasions (Anoud Judgment, pages 2-3, 4 and 9).

theoretical remarks about the protections afforded to defendants under Libyan law and the effects of ongoing efforts at reform.<sup>265</sup> Libya has not addressed the concrete circumstances of Mr. Al-Senussi's case and demonstrated how his rights will be protected or even how they can be in light of the abuses that have already occurred.

171. Accordingly, for the reasons set out in this section, as well as in Section B relating to "inability", the Libyan proceedings cannot be considered either independent or impartial or consistent with due process and an intent to bring Mr. Al-Senussi to "justice" within the meaning of Article 17.

### **Overall submission on unwillingness**

172. Libya's unwillingness genuinely to investigate or prosecute Mr. Al-Senussi is manifest both in the unjustified delay to which his proceedings have been subject and in the lack of independence and impartiality with which they are being carried out. Libya has been conducting its investigations for over two years. Despite this significant lapse of time, preliminary logistical and legal steps remain outstanding. For the reasons set out above, the administration of justice is manifestly biased against Mr. Al-Senussi and designed not to bring him to any genuine form of justice. The Defence submits that these circumstances put beyond doubt Libya's unwillingness genuinely to investigate or prosecute Mr. Al-Senussi and accordingly the Defence respectfully requests that Mr. Al-Senussi's case must be found admissible before the ICC.

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<sup>265</sup> Admissibility Application of 2 April 2013, paras. 139-155, 189-193.

## **PART D: Positive Complementarity**

### **Libya's submissions on transitional justice and "Positive Complementarity"**

173. Libya dedicates a sizable portion of its Admissibility Application to a discussion of Libyan history and politics, the outcome of diplomatic conferences and the current status of reform and training initiatives. Mr. Al-Senussi's case is barely mentioned in the first 50 pages of the Application, except to reiterate that, in the context of Libya's transition, the importance of "national ownership" over the trial of Abdullah Al-Senussi" cannot be overstated.<sup>266</sup> The Chamber is invited to find that it is essential to allow Libya to put Mr. Al-Senussi on trial "as part of its program of building a new and democratic Libya governed by the rule of law";<sup>267</sup> because to do otherwise would be to "deny the Libyan people this historic opportunity to eradicate the long-standing culture of impunity".<sup>268</sup> The Chamber is reminded that it is essential for Libya to have "[n]ational 'ownership' of the trial of Abdallah Al-Senussi as a foundation for reconciliation and the rule of law".<sup>269</sup> Libya must be able to conduct its own trial of Mr. Senussi "for the full range of crimes alleged against him as a matter of the highest importance"<sup>270</sup>; and because it will "provide Libya's long-suffering people a unique opportunity to assume ownership over the past".<sup>271</sup> Libya even goes so far as to suggest that, if it is not given the right to conduct the trial over this case, this sets a precedent whereby The Hague can become "a de facto refuge for accused or convicted persons in respect of even more serious charges falling ... outside the scope of" the ICC's jurisdiction.<sup>272</sup>
174. The Defence submits that none of these arguments are relevant to the present admissibility proceedings. Libya's "ownership" of its transitional justice process, and even "ownership" of any trial of Mr. Al-Senussi, is not at stake in these proceedings.

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<sup>266</sup> Admissibility Application of 2 April 2013, paras. 12-17.

<sup>267</sup> Admissibility Application of 2 April 2013, paras. 12.

<sup>268</sup> Admissibility Application of 2 April 2013, para. 2.

<sup>269</sup> Admissibility Application of 2 April 2013, paras. 12-17.

<sup>270</sup> Admissibility Application of 2 April 2013, para.12.

<sup>271</sup> Admissibility Application of 2 April 2013, para.14, 160. See also, para 53 which states that holding national trials is "essential to post-conflict judicial capacity-building ...and the establishment of the rule of law"; Para 53 (citing NTC PM Speech "It is imperative for Libya to ... create a new culture in which the rule of law is allowed to flower and prevail").

<sup>272</sup> Admissibility Application of 2 April 2013, para. 64.

The ICC proceedings concern a period from 15 to 28 February 2011<sup>273</sup> in which it is alleged that international crimes were committed. This does not mean that Libya could not, after an ICC trial, pursue investigations and prosecutions in relation to conduct that pre-dates or post-dates or otherwise differs from the case at the ICC.<sup>274</sup> The only question in these admissibility proceedings is whether – to the extent that the ICC and Libya are pursuing the same case at all<sup>275</sup> – Libya is able *at this juncture* to pursue it in a genuine manner in accordance with the provisions under the ICC’s Statute.

175. Libya’s argument on this point is aspirational; and if accepted, it is submitted would set a dangerous precedent. Libya argues over many pages about its preference for holding trials “at home”<sup>276</sup> and about the fact that the international community is committed to assisting the new Libya.<sup>277</sup> Most importantly, Libya’s argument rests on a desire to try and build a fair and functioning judicial system in the future, but not before it puts Mr. Al-Senussi on trial. Libya submits that Mr. Al-Senussi’s case would be politically useful “in *demonstrating* that the Libyan justice system is capable of proper investigation and prosecution... [and] that it can conduct fair trials which meet applicable international standards.”<sup>278</sup> In effect, Libya’s submission is that, even though its justice system is incapable currently of genuinely investigating and prosecuting Mr. Al-Senussi, it should nevertheless be allowed to retain jurisdiction over him as a means in itself of “contribut[ing] to judicial capacity-building”.<sup>279</sup>
176. Recognising that it may not be capable of trying Mr. Al-Senussi, Libya relies on an alternative argument based on “positive complementarity”. Libya invites the Chamber to “consider embracing a ‘positive’ approach to complementarity by declaring the case inadmissible subject to the implementation of monitoring and assistance initiatives and review by the Chamber of the investigation and prosecution ... as they develop”.<sup>280</sup> Libya asks the Chamber to:

“ ... declare the case inadmissible subject to the fulfillment of express

<sup>273</sup> Decision on the ‘Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Munyar GADDAFI, Saif Al-Islam GADDAFI, and Abdullah AL-SENUSSI, ICC-01/11-01/11-1, 27 June 2011, para. 32.

<sup>274</sup> See, *infra*, paras. 190-193.

<sup>275</sup> See, *supra*, part A.

<sup>276</sup> Admissibility Application of 2 April 2013, para. 48. Neither is the idea that “trials conducted away from the seat of the crimes lead to a sense of disconnection and disenfranchisement for the victims.”

<sup>277</sup> Admissibility Application of 2 April 2013, para. 17.

<sup>278</sup> Admissibility Application of 2 April 2013, para. 12.

<sup>279</sup> Admissibility Application of 2 April 2013, para. 14.

<sup>280</sup> Admissibility Application of 2 April 2013, para. 40.

conditions or other ongoing obligations ... [This would] allow[] the Libyan Government time to complete its domestic proceedings relating to Abdullah Al-Senussi subject to monitoring and the acceptance of assistance or the fulfillment of other express initiatives and obligations.’’<sup>281</sup>

177. The Defence submits that Libya’s alternative argument should be rejected. Libya’s submissions on “Positive Complementarity” have no statutory basis and are unfair and unworkable in practice. Furthermore, Libya provides no explanation of what remedy may be available for any violations that did occur.

### **No statutory basis**

178. Libya’s novel “positive complementarity” argument was not advanced by Libya in the pleadings in admissibility challenge in the Gaddafi case and appears as an eleventh-hour attempt to fill what is now a very clear gap in Libya’s ability to conduct genuine proceedings in this case.

179. The legal basis for this request is entirely unclear. Libya itself accepts that “[t]here is no explicit reference to this concept in the Statute, nor was it canvassed during the negotiations on complementarity.’’<sup>282</sup>

180. In fact, the recent reports of the Court to the Assembly of States Parties on complementarity have emphasised the lack of any relationship between determinations of admissibility by the Court and any efforts that the Office of the Prosecutor or the Court more broadly may undertake in the spirit of “positive complementarity”:

“The Court stresses, however, that any complementarity activities as detailed in this report are not directly related to the issue of the judicial determination of admissibility, which can only be addressed, and ultimately decided by the judges, within the framework of the Court’s judicial proceedings. Any cooperation that the Court gives to national authorities in respect of possible or actual national prosecutions for serious international crimes is given strictly without prejudice to any determination the Court’s judges may make in respect of inability or unwillingness to conduct genuine national proceedings. In other words, any form of cooperation from the Court to a national authority for the strengthening of their judicial/legal capacity would not amount to a safeguard from the Chamber finding a

<sup>281</sup> Gaddafi Admissibility Decision, para. 199.

<sup>282</sup> Admissibility Application of 2 April 2013, para. 201.

case admissible within the scope of article 17 of the Rome Statute.<sup>283</sup>

181. The concept of “positive complementarity” is premised on the view that judicial capacity in some States is not adequate. It is described by the Court in its report on the subject as “active encouragement of and assistance to national prosecutions”.<sup>284</sup> The resolution on complementarity adopted at the Kampala Review Conference also refers in several places to the importance of strengthening domestic capacity.<sup>285</sup> That the issue of capacity building even arises in any particular case should create a presumption that there is a problem with respect to a State’s ability to investigate and prosecute at a given time. In the present case Libya itself admits that although many countries have expressed a willingness to conduct training and assist with reforms, some “critical steps to enhance the investigative” capacity of the country will only take place within 12-18 months and other necessary reforms of the judiciary will presumably take even longer to bear fruit.<sup>286</sup> As summarised by Libya before the Court, it would like “to create a judicial system which is fair. However, conducting proper investigations and prosecutions will take time”.<sup>287</sup>

182. Libya’s argument on positive complementarity threatens to undermine the statutory complementarity regime. The ICC framework set out in Articles 17 and 19 is designed to ensure that a challenge to the admissibility of a case before the Court is made by a State “at the earliest opportunity” (something Libya has not done).<sup>288</sup> The Court has confirmed that admissibility must be judged according to the State’s capacity to conduct investigations at the time the challenge is made.<sup>289</sup> In the interests of finality, the admissibility of a case “may be challenged only once by any person or State”.<sup>290</sup> And the issue can only be reopened thereafter where there are “exceptional circumstances” and only on the basis of “double jeopardy” after a trial has begun.<sup>291</sup>

<sup>283</sup> ‘Report of the Court on complementarity’ (2011), ICC-ASP/10/23, para. 6. Also: ‘Report of the Court on complementarity’, ICC-ASP/11/39, para. 3 (emphasis added).

<sup>284</sup> ‘Report of the Court on complementarity’, ICC-ASP/10/23, para. 2.

<sup>285</sup> Resolutions and Declarations adopted by the Review Conference, ‘Complementarity’, RC/Res.1, 8 June 2010 ([http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.1-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.1-ENG.pdf)).

<sup>286</sup> Admissibility Application of 2 April 2013, paras. 184-186.

<sup>287</sup> Admissibility Hearing, 9 October 2012, ICC-01/11-01/11-T-2-Red-ENG, p. 12-13 and 65.

<sup>288</sup> Response on behalf of Abdullah Al-Senussi to the Submission of the Government of Libya for Postponement of the Surrender Request for Mr. Al-Senussi, ICC-01/11-01/11-319, paras. 29, 45-47.

<sup>289</sup> The Prosecutor v. Laurent Gbagbo, Decision on the “Requête relative à la recevabilité de l’affaire en vertu des Articles 19 et 17 du Statut”, ICC-02/11-01/11, of 11 June 2013, para. 23 (“In the view of the Chamber, the admissibility of a case must be determined on the basis of the factual situation in existence at the time of the admissibility proceedings”).

<sup>290</sup> ICC Statute, Article 19.

<sup>291</sup> ICC Statute, Article 19.

183. Libya’s argument, however, is that where a case fails to meet the thresholds set out in Article 17, the Chamber should nevertheless find it “inadmissible on a temporary basis subject to” conditions which Libya has not defined and with no end-date.<sup>292</sup> Libya’s proposal is therefore that, where the ICC considers national proceedings to be inadequate, it should nevertheless allow those proceedings to continue until an undefined point at which their manifest inadequacy requires them to be declared inadmissible. The Defence submits that this approach to complementarity cannot be correct.
184. Indeed, it is simplistic to suggest that “positive complementarity” in some ways underpins the vision of international justice set out in the Rome Statute. If that were correct, earlier rulings concerning admissibility in other situations before the Court where the justice system appears capable of investigation and trial but where it has been ‘inactive’ ought to have prompted initiatives by the Court to encourage domestic prosecutions – a formula for a potentially infinite ‘wait and see’ approach. In the situations in Uganda and the Democratic Republic of the Congo, where admissibility was not challenged by the State Party, the Court applied article 17 and declared the situations and the cases to be admissible. If the philosophical basis of the Court’s activity were genuinely subject to so-called “positive complementarity”, as Libya now claims, it would be incompatible with such an approach for the Court to proceed on the basis of ‘inactivity’ without further inquiry or effort to prompt the State Party to assume its responsibilities.

### **Unfair and unworkable**

185. The lack of a legal basis for applying “positive complementarity” in this manner is matched by vagueness as to how such a scheme might work in practice. Libya proposes that is not an independent body that would ‘monitor’ the proceedings, or even ICC Judges. It submits it should be the Office of the Prosecutor, and Libya itself.<sup>293</sup> On this basis it invites the Chamber to “declare the case inadmissible on a temporary basis subject to ongoing monitoring and reporting on the progress of the trial by both the OTP

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<sup>292</sup> Admissibility Application of 2 April 2013, para 205.

<sup>293</sup> Admissibility Application of 2 April 2013, para. 203.

and the Libyan government".<sup>294</sup> But, as the Office of the Prosecutor highlighted during the course of the Saif Gaddafi admissibility hearing, monitoring could not take place at the investigation stage since the process is, under Libyan law, confidential.<sup>295</sup> This phase would therefore be effectively unmonitored. As for the trial stage, Libya itself argues in its Admissibility Challenge that "it is plain that the Statute did not envisage a wholesale examination of the overall trial process, an examination that, in any event, would be impracticable given that the particular article 17(2) focus may be upon the pre-trial investigation".<sup>296</sup> The OTP has also confirmed that any monitoring would be conducted mainly from the seat of the Court, and that it would not be in a position to attend daily trial proceedings.<sup>297</sup> They would therefore presumably have to rely on Libya's own account of how the proceedings were progressing.

186. Even if effective monitoring were possible at the investigation or trial stage, it is not clear how the two parties whose interests are opposed to those of the defence – i.e. the two prosecuting authorities – are in a position to be the guardians of defence rights. Nor does Libya address what the purported remedies would be if a violation were found to occur. Since many violations typically occur at the investigation stage but affect the trial process, it is not made clear how such violations could be observed or prevented. If violations occur during the trial, Libya has not answered how significant they would have to be for any action to be taken, or what action should be taken. In such circumstances, it is not clear whether Libya should be permitted re-commence the proceedings, and if this could happen on multiple occasions. If a violation is discovered or unremedied after several years of a trial process, could the proceedings be halted and transferred to the ICC to start again, given the defendant's right to a speedy trial? The rights of victims and witnesses would also have to be considered, and whether they could be recalled to testify.
187. The Defence submits that Libya's argument should also be considered unworkable in light of the State's own conduct to date, which can only be described as revealing a fundamental disrespect for international jurisdictions such as the ICC. The Government has a very poor track record with monitoring and international involvement generally.

<sup>294</sup> Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-307-Red2, 2 April 2013, para. 205.

<sup>295</sup> Admissibility Hearing, ICC-01/11-01/11-T-2-Red-ENG, 9 October 2012, p. 64.

<sup>296</sup> Admissibility Application of 2 April 2013, para 111.

<sup>297</sup> Admissibility Hearing, ICC-01/11-01/11-T-2-Red-ENG, 9 October 2012, p. 64.



When the United Nations Commission of Inquiry was tasked with investigating and reporting on violations in Libya, the Government asked to be exempted from monitoring on the basis that its assurances that it would implement the recommendations were sufficient. Yet, as the OPCD has pointed out, many months after the issuance of the Commission's report it is apparent that they had not done so. This prompted the Secretary-General of the United Nations to remark that "[a]ssurances from Libyan authorities that incidents of torture or mistreatment will be investigated ... have not been translated into effective action."<sup>298</sup> Libya has also failed to respond to orders for provisional measures from the African Court of Human Rights concerning Mr. Gaddafi's case. As the Chamber is aware, Libya has repeatedly refused to comply with the orders of the ICC.

### **ICC and the Death Penalty**

188. There is also a link between capital punishment and the “positive complementarity” requested by Libya. Libya is not asking the Court to remain merely neutral on the subject of the death penalty. By invoking “positive complementarity”, it is requesting that the Court assist and contribute to a regime that administers capital punishment. Libya has not provided any undertaking that it will not impose the death penalty. It cannot on the one hand seek the Court's involvement in its justice system, and on the other contend that “a State's recourse to the death penalty is outside the judicial purview of the Court”.<sup>299</sup>
189. In its submission, Libya effectively acknowledges that its justice system is a work in progress. Indeed it asks the Court, as part of “positive complementarity”, to assist in building a proper justice system that, by implication, does not yet exist. The lack of basic due process safeguards in Libya's justice system should in and of itself indicate that recourse to the death penalty violates fundamental principles of international human rights law, and the ICC should not be asked to play a role in advancing such a process.

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<sup>298</sup> Admissibility Hearing, ICC-01/11-01/11-T-3-Red-ENG, 10 October 2012, p. 28 (referring to ICC-01/11-01/11-216-Anx3A.2).

<sup>299</sup> Libyan Government's consolidated reply to the responses of the Prosecution, OPCD and OPCV to its further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-293-Red, 4 March 2013, para. 90.

## Sequencing of trials

190. Furthermore, the Defence submits that Libya's reliance on "positive complementarity" is unnecessary given the provisions of the Rome Statute that permit the sequencing of trials.
191. The Chamber has confirmed that, where national authorities are investigating a different case, Article 89(4) contemplates a sequencing approach whereby the Court can deal with its own case first, and the national authorities can thereafter conduct national trials in respect of other cases. Libya has confirmed that "[t]he subject matter of the Libyan investigation of Abdullah Al-Senussi is much broader than the ICC's investigation"<sup>300</sup> and that – unlike the ICC case, which focuses on crimes committed in limited locations over a period of 5 days in 2011 – the Libyan investigation goes back to the 1980s, extends later than 2011 and "includes crimes taking place [beyond Benghazi and] throughout Libya".<sup>301</sup>
192. Under Article 89(4), "[i]f the person sought is being proceeded against ... in the requested State for a crime different from that for which surrender to the Court is sought, the requested State, after making its decision to grant the request, shall consult with the Court."<sup>302</sup> These provisions are complemented by Rule 183 which states that "[t]he requested State may temporarily surrender the person sought in accordance with conditions determined between the requested State and the Court. In such case the person ... shall be transferred to the requested State once his or her presence before the Court is no longer required, at the latest when the [ICC] proceedings have been completed".<sup>303</sup>
193. The ICC Statute therefore contemplates a situation in which, in agreement with the ICC, national proceedings are postponed until after the ICC investigation and proceedings have been completed. As leading commentators have noted,<sup>304</sup> this would provide a

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<sup>300</sup> Admissibility Application of 2 April 2013, para. 158.

<sup>301</sup> Admissibility Application of 2 April 2013, para 161.

<sup>302</sup> Rome Statute, Art. 89(4).

<sup>303</sup> Rules of Procedure and Evidence, Rule 183.

<sup>304</sup> Kress/Prost in Triffterer "While article 89 para. 4 does not conclusively answer[] the question of agreement between the Court and the requested State, some valuable guidance may be derived from other provisions in Part 9. In particular, the idea underlying article 90 para. 7 (b) suggests that "special consideration" should be given to the relative nature and gravity of the conduct in question which will, as a general rule point to the priority of the

framework within which to try Mr. Al-Senussi given that the scope of Libya's case against him differs from that of the ICC and given that the Libyan judiciary, on Libya's own submissions, needs additional time for reform before it is capable of providing a safe and genuine judicial process. Further, given that Mr. Al-Senussi faces the death penalty in Libya and in light of Libya's demonstrated noncompliance with Court orders, he would have to be tried first at the ICC.

### **Overall submission**

194. For all of these reasons, the Defence submits that Libya's submissions on "positive complementarity" are flawed and should be rejected. Rather than requesting a sequencing of trials from the ICC as contemplated under Article 89(4), Libya seeks to introduce into the admissibility proceedings the concept of "positive complementarity" which has no grounding in either the text of the Statute or the *travaux*, and that cannot effectively guarantee Mr. Al-Senussi's rights in national proceedings in which he faces the death penalty.

### **Conclusion**

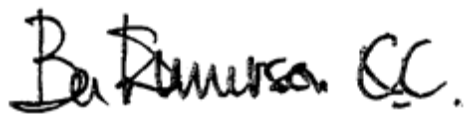
195. The Defence requests the Chamber to dismiss Libya's Admissibility Application in respect of Mr. Al-Senussi's case on the grounds set out in this Response. Libya has not established that (i) it is investigating the same case as is before the ICC, (ii) it is able genuinely to investigate or prosecute Mr. Al-Senussi's case; and (iii) it is willing genuinely to investigate or prosecute Mr. Al-Senussi's case.

196. In addition, Libya's application to postpone the surrender request for Mr. Al-Senussi should be refused and the Chamber should order that he is transferred to the ICC immediately. The Chamber is also requested to rule urgently on the Defence's application to report Libya to the Security Council for its continuing violations of the ICC's orders.

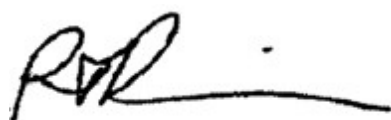
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international proceedings". The authors also confirm the the "the provision [is] applicable to both the cases of a pending prosecution [in a national court] and the service of a sentence" following a national court trial.

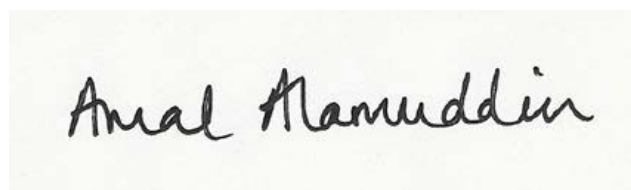
Counsel on behalf of Mr. Abdullah Al-Senussi,



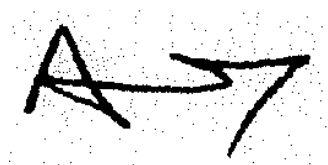
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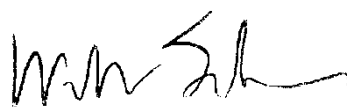
**Rodney Dixon**



**Amal Alamuddin**



**Anthony Kelly**



**Professor William Schabas**

Dated 14<sup>th</sup> June 2013

London, United Kingdom