Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/11-01/11**
Date: **20 December 2013**

THE APPEALS CHAMBER

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

SITUATION IN LIBYA

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

Public

Observations on the "Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Abdullah Al-Senussi'"

Source: **Office of Public Counsel for Victims**

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

The Office of the Prosecutor
Ms Fatou Bensouda
Mr James Stewart
Mr Fabricio Guariglia

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

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

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Ms Paolina Massidda
Ms Sarah Pellet
Mr Mohamed Abdou

The Office of Public Counsel for the Defence

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

REGISTRY

Registrar
Mr Herman von Hebel

Defence Support Section

Detention Section

Victims and Witnesses Unit

Victims Participation and Reparations Section

Other

I. PROCEDURAL HISTORY

1. On 11 October 2013, Pre-Trial Chamber I (the "Chamber") issued the "Decision on the admissibility of the case against Abdullah Al-Senussi" (the "Impugned Decision"), in which it decided that "*the case against Abdullah Al-Senussi is inadmissible before the Court under article 17(l)(a) of the Statute*".[1]

2. On 17 October 2013, the Defence (the "Appellant") filed the "Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Abdullah Al-Senussi', and Request for Suspensive Effect", requesting the Appeals Chamber to reverse the Impugned Decision and find that the case against Abdullah Al-Senussi is admissible before the ICC.[2]

3. On 4 November 2013, the Defence filed the "Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Abdullah Al-Senussi'" (the "Document in Support of the Appeal").[3]

4. On 22 November 2013, the Appeals Chamber issued an Order inviting victims to submit their observations on the Document in Support of the Appeal by 20 December 2013.[4]

---

[1] See the "Decision on the admissibility of the case against Abdullah Al-Senussi" (Pre-Trial Chamber I), No. ICC-01/11-01/11-466-Red, 11 October 2013 (the "Impugned Decision").
[2] See the "Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Abdullah Al-Senussi', and Request for Suspensive Effect", No. ICC-01/11-01/11-468-Red OA 6, 17 October 2013.
[3] See the "Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Abdullah Al-Senussi'", No. ICC-01/11-01/11-474 OA6, 4 November 2013 (the "Document in Support of the Appeal").
[4] See the "Order in relation to the filing of victims' observations" (Appeals Chamber), No. ICC-01/11-01/11-481 OA6, 22 November 2013. See also the "Decision on the conduct of the proceedings following the 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute" (Pre-Trial Chamber I), No. ICC-01/11-01/11-325, 26 April 2013.[5] See the Impugned Decision, *supra* note 1, para. 311.

5. In compliance with the said Order, the Principal Counsel of the OPCV, acting as the legal representative of the victims having communicated with the Court in respect of the case, files her observations on the Document in Support of the Appeal.

II. OBSERVATIONS

6. The Principal Counsel endorses and supports grounds one and three as set out in the Document in Support of the Appeal; and opposes ground two. The arguments advanced by the Appellant clearly establish the existence of factual and legal errors which materially affected the outcome of the Impugned Decision, and led the Chamber to conclude that the case against Mr Al-Senussi was inadmissible before the Court.

7. The errors alleged by the Appellant do not constitute mere disagreements with the findings of the Pre-Trial Chamber and the Appeals Chamber is not simply invited to reach different conclusions. Rather, the Appeals Chamber ought to correct and remove the unfairness arising from clear and substantial errors in the interpretation and application of the admissibility provisions as set out in the legal texts of the Court. On the one hand, the first and third grounds of appeal demonstrate that the Chamber committed a series of legal errors and adopted a patently wrong interpretation of the law, which in turn resulted in the erroneous finding that Libya has shown "*that it is investigating the same case*".[5] Further, the Appellant has provided persuasive arguments showing that the Impugned Decision is inherently inconsistent and entirely unreasonable in light of the information and evidence presented by the parties and participants to the Chamber throughout the proceedings. Finally, the Appellant demonstrated that the errors committed by the Chamber, at least collectively, materially affected the Impugned

[5] See the Impugned Decision, *supra* note 1, para. 311.

Decision, and that its determination on admissibility would have been substantially different absent these errors.

8. The Impugned Decision must therefore be invalidated. In this respect, the Principal Counsel respectfully requests the Appeals Chamber to reverse the Impugned Decision and find that the case against Mr Al Senussi is admissible before the Court. In light of the Appellant's extensive and detailed submissions, the Principal Counsel will only provide additional observations on certain arguments discussed in the Document in Support of the Appeal.

Ground one: "*The Pre-Trial Chamber erred in law and fact, and abused its discretion, in finding that Libya is not unwilling and unable genuinely to carry out the proceedings against Mr Al-Senussi in Libya, within the meaning of Article 17(1)(a), (2)(c) and (3), respectively*"

A. The Pre-Trial Chamber failed to identify and consider which principles of due process under article 17(2) of the Rome Statute are applicable to the case

9. The Appellant correctly notes that the Chamber failed to identify the legal standards applicable to the "unwillingness" under article 17(2)(c) of the Rome Statute.[6] Throughout its analysis of the Defence's arguments regarding the conformity of Libya's domestic proceedings with the requirements of article 17(2)(c) of the Rome Statute, the Chamber has failed to define what could, in its view, be considered as inconsistent "*with an intent to bring the person concerned to justice*" or be indicative of a State's "unwillingness".[7] The Chamber merely indicated that "*alleged violations of the accused's procedural rights are not* per se *grounds for a finding of unwillingness or inability under Article 17 of the Statute*" and that "*certain violations of the procedural rights of the accused may be relevant to the assessment of the independence and impartiality of the national proceedings*".[8] In so doing,

[6] See the Document in Support of the Appeal, *supra* note 3, para. 24.
[7] See the Impugned Decision, *supra* note 1, paras. 235 *et seq.*
[8] *Idem*, para. 235.

the Chamber not only failed to enunciate a clear test for assessing the requirements described in article 17(2)(c) of the Rome Statute, but also completely overlooked a core argument put forward by the Defence. Indeed, the Defence specifically stated that "*many of the arguments raised in the context of 'inability' also support a finding of 'unwillingness'*".[9] The Chamber should have therefore considered the Defence's argument as not only demonstrating a lack of "*independence and impartiality*", but also as relevant to the requisite "*intent to bring the person concerned to justice*". A careful review of the Impugned Decision demonstrates, however, that the Chamber only considered the incidence of the violation of the suspect's procedural rights on the "*independence and impartiality of the national proceedings*", but did not address whether these violations impacted on the Libya's intent to bring the person concerned to justice.[10] The separation made between these two requirements is apparent, particularly in light of the Chamber's indication that article 17(2)(c) of the Rome Statute identifies "*two cumulative requirements*", namely the "*lack of independence and impartiality"* and *"the intent to bring the person to justice*".[11] Thus, by restricting the scope of its analysis, the Chamber failed to articulate clear standards for assessing the "unwillingness" of the State concerned.

10. Furthermore, it is apparent that the Chamber did not conduct a proper analysis of the requirements of article 17(2)(c) of the Rome Statute and, in particular, did not consider at all whether the various allegations concerning breaches of Mr Al-Senussi's rights reached the level required for declaring the domestic proceedings inconsistent with the intent to bring the person concerned to justice. This failure certainly constitutes a material error of law by the Chamber, which substantially affected the outcome of the Impugned Decision. Should the Chamber have considered international standards applicable to article 17(2)(c) of the Rome Statute, it would have found, at the very least, that proceedings

[9] See the "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", No. ICC-01/11-01/11-356, 14 June 2013, para. 144.
[10] See the Impugned Decision, *supra* note 1, paras. 234-243.
[11] *Idem*, para. 235.

conducted in breach of the defendant's basic procedural rights are inconsistent with the intent to "*bring the person concerned to justice*". In particular, the Chamber would not have required the Defence to establish that the "*alleged violation must be linked to one of the scenarios provided for in article 17(2) or (3) of the Statute*",[12] since such link is obvious and virtually axiomatic. Indeed, it was noted that "*proceedings that are not conducted impartially or independently from the perspective of the defendant* […] *might evidence unwillingness*".[13] This view finds support in rule 51 of the Rules of Procedure and Evidence, which provides that in "*considering the matters referred to in article 17, paragraph 2, and in the context of the circumstances of the case, the Court may consider,* inter alia, *information that the State referred to in article 17, paragraph 1, may choose to bring to the attention of the Court showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct* […]". Rule 51 of the Rules of Procedure and Evidence therefore mandates the Chamber, if the circumstances so require, to consider the international standards applicable to article 17(2) of the Rome Statute.

11. The Principal Counsel therefore agrees with the Defence's submission that the Chamber failed to "*consider and define the meaning and scope of what conduct should be considered 'in the circumstance' to be 'inconsistent with an intent to bring the person concerned to justice'*".[14] This error arising from the incomplete and inadequate analysis of the Chamber is even more acute given that the Chamber was considering the issue of "*unwillingness*" for the first time.[15]

---

[12] *Ibid*.

[13] DRUMBL (M. A.), "Policy through complementarity: The atrocity trial as justice", in STAHN (C.) and EL-ZEIDY (M.) (Eds.), *The International Criminal Court and Complementarity: from theory to practice*, Cambridge university Press, 2011, p. 201.

[14] See the Document in Support of the Appeal, *supra* note 3, para. 24.

[15] In the *Gaddafi* Case, the Chamber found no need to address the question of unwillingness. See the "Decision on the admissibility of the case against Saif Al-Islam Gaddafi" (Pre-Trial Chamber I), No. ICC-01/11-01/11-344-Red, 31 May 2013, para. 216. (the "Saif Al-Islam Admissibility Decision").

B. The Pre-Trial Chamber failed to take into account relevant facts and reversed the burden of proof

12. In addressing the factual submissions of the Defence and the OPCV in relation to the "unwillingness", the Chamber erred by misappreciating facts that were crucial to the determination of Libya's willingness and by disregarding several material facts and evidence. In particular, the Principal Counsel agrees with the Appellant's submissions that the Chamber has "*failed to rely on the lack of legal representation during the proceedings* […] *to find that Libya is unwilling to prosecute the case*".[16] The Chamber also disregarded a significant amount of evidence-related to the independence and impartiality of the Libyan judicial system. These errors were compounded by the wrong approach taken by the Chamber in relation to the allocation of the burden of proof.

1. The Pre-Trial Chamber failed to take into account the violations of the defendant's rights in Libya when assessing inability and unwillingness

13. The Principal Counsel agrees with the Appellant that the Chamber failed to take into account the defendant's lack of legal representation in the context of the on-going proceedings in Libya.[17] In this respect, she concurs with the Defence's submission that the non-appointment of a lawyer for Mr Al-Senussi violates Libyan and international laws.[18] As pointed *supra*, the fact that the suspect has no legal representation constitutes a relevant indication that Libya lacks the requisite willingness to bring the person concerned to justice.[19] The Chamber failed to properly consider this argument and instead, relied on mere assertions by the Libyan Government that a lawyer would be appointed in the future.[20] Moreover,

[16] See the Document in Support of the Appeal, *supra* note 3, para. 32.
[17] *Idem*, *supra* note 3, paras. 50 *et seq*.
[18] *Ibid*., *supra* note 3, para. 53.
[19] See *supra* para. 10.
[20] See the Impugned Decision, *supra* note 1, para. 232.

although the Chamber confirmed that it would take this fact into account "*for its conclusion on whether Libya is unwilling or unable genuinely to carry out the proceedings against Mr Al-Senussi*",[21] it, in fact, failed to do so and the Impugned Decision revealed patent contradictions with the findings made in the Gaddafi Admissibility Decision.[22]

2. The Pre-Trial Chamber did not take into account the lack of contact between the Defence and Mr Al-Senussi when assessing the evidence

14. The Appellant notes that the Chamber failed to take into account the fact that the "*Defence had been unable to obtain Mr. Al-Senussi's instructions and place all relevant information on his circumstances before the Chamber*".[23] Although the Chamber explicitly recognised "*that the Defence has not been able to visit Mr Al-Senussi and that the Defence ability to properly raise certain issues of fact may have been prejudiced by this absence of direct contacts with Mr Al-Senussi*",[24] it did not, however, take this very important limitation into account. This is clear from the Chamber's further observation "*that the Defence has not argued that a legal visit to Mr Al-Senussi was a necessary pre-condition for the Defence to make its submissions on the Admissibility Challenge*".[25] In so doing, the Chamber appears to suggest that, in principle, the Defence's submissions have no material effect on the outcome of the admissibility proceedings, even when these submissions relate to article 17(2)(c) of the Rome Statute and the conditions under which the suspect is brought to trial. This erroneous finding is based on a wrong interpretation of the relevant legal texts by the Chamber which, as stated *supra*, fails to take into account the links between the violations of the defendant's rights and the "*intent to bring the person concerned to justice*" as a requirement of the admissibility test.[26] Therefore, the Chamber erred in disregarding the significance and relevance of said submissions in the context of

[21] *Idem*, para. 233.
[22] See the Saif Al-Islam Admissibility Decision, *supra* note 15, paras. 212 *et seq.*
[23] See the Document in Support of the Appeal, *supra* note 3, para. 34.
[24] See the Impugned Decision, *supra* note 1, para. 29.
[25] *Idem*.
[26] See *supra* paras. 9-15.

admissibility proceedings, and particularly, when assessing the willingness of a State under article 17(2)(c) of the Rome Statute.

15. The Chamber should also have considered whether alternative measures were warranted to alleviate this unfairness. As this situation was essentially the product of Libya's non-cooperation, the Chamber should have placed the burden of proof on the Libyan Government in order for the latter to establish that the defendant was being "*brought to justice*". Instead, the Chamber adopted a rigid approach to the burden of proof which was not in line with the specific circumstances of the case at hand.[27]

3. Failure to consider and assess other evidence

16. Moreover, the Appellant rightly asserts that the Chamber failed to properly assess the significant body of evidence which clearly showed that Libya is unwilling and unable to investigate and prosecute the same case.[28] The Principal Counsel adopts in full the submissions of the Defence concerning the errors in the Chamber's factual assessment of inability and unwillingness.[29]

4. The Chamber's reversal of the burden of proof

17. The Principal Counsel concurs with the Appellant's submission that the Chamber improperly reversed the burden of proof in admissibility proceedings.[30] Although the Chamber restated the finding of the Appeal Chamber's judgment in the *Muthaura* and the *Ruto* cases by which it decided that "*the state must provide the Court with evidence of a sufficient degree of specificity and probative value that*

[27] The Chamber found that "*an evidentiary debate on Libya's unwillingness or inability will only be meaningful when doubts arise as to the genuineness of the domestic proceedings*" and that "*the burden of proof that lies with Libya cannot be interpreted as an obligation to disprove any possible 'doubts' raised by the opposing participants in the admissibility proceedings*". See the Impugned Decision, *supra* note 1, paras. 208 and 239.

[28] See the Document in Support of the Appeal, *supra* note 3, paras. 95-135.

[29] *Idem.*

[30] *Ibid.*, para. 35.

demonstrates that it is indeed investigating the case",[31] it considered that Libya had no duty to disproof or even clarify uncertainties regarding the circumstances of Mr Al-Senussi's detention and trial.[32]

18. In analysing the Defence's various factual submissions, the Chamber did "*not consider necessary to determine whether, in principle, the factual matters referred to by the Defence are relevant considerations for the Chamber's determination under article 17 of the Statute*".[33] In doing so, the Chamber conflated the relevance of these factual allegations with the reliability of the evidentiary material produced by the Defence. It was obvious that the Defence would not be able to substantiate these allegations in the absence of any direct contact with the defendant and without having the opportunity to assess the situation on the ground. In light of the impossibility for the Defence to obtain a legal visit to the defendant, the Principal Counsel submits that it was entirely unreasonable for the Chamber to expect and require the Defence to provide specific and conclusive evidence regarding Libya's willingness to genuinely prosecute the person concerned. As a consequence, the Chamber's refusal to entertain the Defence submissions on the ground that they were not supported by evidence appeared to embrace an improper and overly-rigid approach to burden allocation, which requires participants to establish the State's lack of willingness in all circumstances, including when the State itself prevents contacts with the defendant.

19. The Principal Counsel further observes that the Defence allegations were dismissed on the grounds that "*uncertainties* [...] *cannot be considered to be issues properly raised before the Chamber*"[34]. It is however submitted that, as a matter of principle, Counsel shall be entitled to raise any concerns and doubts when the interests of their clients so dictate. Under professional rules of conduct, Counsel

[31] See the Impugned Decision, *supra* note 1, para. 66
[32] *Idem*, *supra* note 1, para. 239.
[33] *Ibid*.
[34] *Ibid*.

"*shall take into account the Client's personal circumstances and specific needs*", and more generally, "*shall put the client's interests before counsel's own interests or those of any other person*".[35] Counsel must also "*act at all time with fairness, integrity and candour towards the client*".[36]

20. As the issue at stake concerned alleged violations of Mr Al-Senussi's right to due process, the Defence was entitled to place all the information available to it before the Chamber, which in turn should have taken further steps to investigate this matter and should have, at the very least, instructed Libya to clarify and disprove these specific factual allegations.

21. The finding in the Impugned Decision that the Defence allegations are improperly raised is the result of an inconsistent and a flawed overall reasoning regarding burden allocation.[37] This finding should therefore be reversed by the Appeals Chamber.

C. The Defendant's lack of effective legal representation in the context of the admissibility proceedings

22. The Principal Counsel concurs with the Appellant' arguments that the Chamber committed an error by failing to take into account the lack of contact between Counsel and Mr Al-Senussi.[38] The Principal Counsel wishes to highlight that this specific finding by the Chamber did not only violate the suspect's right to counsel as enshrined in articles 55(2) and 67(1)(b) and (d) of the Rome Statute, but also had a wider impact on the manner in which the representation of Mr Al-

[35] See the Code of Professional Conduct for Counsel, articles 9 and 16. See also *infra* paras. 23-24.
[36] *Idem*, article 14.
[37] *Ibid*.
[38] See the Document in Support of the Appeal, *supra* note 3, para. 34 which reads "*the Appellant asserts that it was wrong for the Chamber to rely on the fact that the defence had not asserted that a legal visit was a necessary pre-condition for the defence to make its submissions, and that the determination of the admissibility challenge should be suspended until such a visit has taken place*". See also paras. 35-39.

Senussi had been carried out. In particular, the Chamber failed to consider the likely effects of the lack of contact on the professional duties of Counsel.

23. In its analysis of the Defence's submissions, the Chamber should also have taken into account the provisions of the Code of Professional Conduct for Counsel. In particular, it should have considered the provisions of article 14(2) and 15 of said Code which regulate the performance by counsel of his or her duties under legal representation.[39]

24. The Code of Conduct for Counsel emphasises the importance of communication and interaction between counsel and his or her client, the lack of which may affect the very purpose of legal representation. The significance of such interaction and the necessity of continued contacts are highlighted in article 9 of said Code, which provides that "*where a client's ability to make decisions concerning representation is impaired because of mental disability or for any other reason, counsel shall inform the Registrar and the relevant Chamber. Counsel shall also take the steps necessary to ensure proper legal representation of the client according to the Statute and the Rules of Procedure and Evidence*".[40]

25. Given the fact that the Defence has not been permitted to meet with the suspect at any time during the course of the admissibility proceedings, it is difficult to see how such protracted lack of contact can be reconciled with the requirement for effective legal representation. Consequently, in indicating that the Defence had not asserted that a legal visit was necessary for it to make its submissions, [41] the Chamber failed to properly consider the scope of legal representation before the Court, as well as the duties and obligations ensuing from the attorney-client relationship.

[39] See the Code of Professional Conduct for Counsel, Articles 14 (2) and 15(1)(3).
[40] *Ibid.*, Article 9(3).
[41] *Idem.,* para. 29.

26. Indeed, the Chamber's remark that "*the Defence ability to properly raise certain issues of fact may have been prejudiced by this absence of direct contacts with Mr. Al-Senussi*"[42] is not sufficient to remedy the prejudice caused to the suspect. This assertion is purely speculative and fails to take into account the requirements of legal representation under the legal text of the Court. In addition, it does not appear that the Chamber examined the effects of these impediments in its overall conclusion in respect of the admissibility of the case. This error by the Chamber materially affected the Impugned Decision.

27. The Chamber's failure to exercise its powers in a manner that is consistent with the rights of the suspect to legal representation in the context of admissibility proceedings is a serious error of law. This error is compounded by another legal error which relates to the erroneous allocation of burden of proof by the Chamber.

D. Denial of the legal visit by the Defence reveals gross procedural errors

28. In the Principal Counsel's view, the unfairness arising from a domestic investigation or other proceedings before national courts is distinct in nature from errors arising from the conduct of admissibility proceedings before the pre-trial or trial Chambers of the Court. Indeed, domestic proceedings against the defendant are the subject-matter of the admissibility challenge and constitute the factual basis for any admissibility decision. The Chamber's analysis pertaining to the conformity of national proceedings with international law principles of due process is a question of fact, which is determined on the basis of the information available and the evidence presented. Such analysis is substantially different from the procedural decisions taken by the relevant Chamber in relation to the conduct of the proceedings following the filing of an admissibility challenge pursuant to rule 58 of the Rules of Procedure and Evidence. With respect to the latter, the Appellant must show that the Chamber abused its discretion.

[42] See the Impugned Decision, *supra* note 1, para. 29.

29. In the Document in Support of the Appeal, the Appellant addresses both issues under the same heading, entitled "*failure to take account the Defence lack of contact with Mr. Al-Senussi*".[43] In particular, the Defence asserts that "*it was wrong for the Chamber to rely on the fact that the Defence had not asserted that a legal visit was a necessary pre-condition for the Defence to make its submissions, and that the determination of the admissibility challenge should be suspended until such a visit has taken place*."[44] The Defence further argues that "*the Chamber should have determined whether the proceedings were prejudiced by Mr. Al-Senussi not being able to provide material information himself in response to the evidence submitted to the Defence*".[45]

30. The assertions made in this respect must therefore be examined separately from other alleged errors of law and facts. Indeed, they relate to whether the Chamber properly exercised its discretion under rule 58 of Rules of Procedure and Evidence when it found that a visit by the Defence was unnecessary. As these grievances mainly focus on the procedural aspects of admissibility proceedings, it is submitted that they must be treated by the Appeals Chamber as a procedural error, since they reveal an abuse of discretion by the Chamber which inevitably affected the outcome of the Impugned Decision.

31. The Principal Counsel concurs with the Appellant's submission that the Chamber erred in finding that a legal visit was unnecessary and that it was improper for the Chamber to dispose of the Admissibility Challenge without the defendant having been heard throughout the admissibility proceedings.[46] However, the Principal Counsel does not agree with the reasoning put forward by the Defence. At the outset, the Principal Counsel observes that rule 58 of the Rules of Procedure and Evidence places an explicit obligation on the Chamber to allow

[43] See the Document in Support of the Appeal, *supra* note 3, para. 34.
[44] *Idem*.
[45] *Ibid.*, para. 37.
[46] *Ibid.*, para. 34.

written observations from a defendant "*who has been surrendered to the Court or who has appeared voluntarily or pursuant to a summons*" (emphasis added). None of these scenarios applies to Mr Al-Senussi. In the Decision on the conduct of admissibility proceedings, the Chamber nonetheless emphasised that "*Mr Al-Senussi's exercise of procedural rights in relation to the Admissibility Challenge cannot be made contingent on Libya's compliance with the Surrender Request*" and indicated that "*the Defence of Mr Al-Senussi shall be allowed to submit written observations*".[47] Consequently, the Chamber showed certain flexibility in interpreting the modalities of participation set out in rule 58 of the Rules of Procedure and Evidence.

32. The Principal Counsel submits that despite this apparent flexibility, the Chamber's handling of the proceedings has been irrational and unfair to the Defence. Although the Chamber declared that it will take into account Libya's noncompliance with the surrender request, it did not, at any time during the proceedings, make any finding to give effect to this statement. Throughout the admissibility proceedings, the Chamber has failed to take any procedural steps in response to Libya's noncompliance with the Chamber's instructions, including its protracted failure to arrange for a legal visit by the Defence. It is all the more accurate when taking into account the clear directions from the Chamber to the "*Libyan authorities to refrain from taking any action which would frustrate, hinder or delay Libya's compliance with its obligation to surrender Mr Al-Senussi to the Court*".[48] More generally, the Chamber did not, at any time, consider the consequences of the Defence being denied access to Libya on its ability to represent the defendant. It did not examine whether there were alternative means for resolving this situation

[47] See the "Decision on the conduct of the proceedings following the 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute'" (Pre-Trial Chamber I), No. ICC-01/11-01/11-325, 26 April 2013, para. 8.
[48] See the "Decision on 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" (Pre-Trial Chamber I), No. ICC-01/11-01/11-269, 6 February 2013, p. 15.

and whether such lack of direct contact impinged on the rights of the Defence in the context of the admissibility proceedings.[49]

33. Instead, the Chamber made an adverse finding concluding that the Defence's allegations regarding the violation of the procedural rights of Mr Al-Senussi were unsubstantiated. This adverse finding was made without the defendant having been heard by the Chamber and in the absence of assurances that the defendant had been notified or otherwise informed of the developments in the proceedings before the Court.

34. In the Principal Counsel's view, the Chamber was under an obligation to ensure that a legal visit would take place, not because it was required to do so pursuant to rule 58 of the Rules of Procedure and Evidence, but because what was at issue was the actual conditions faced by the defendant and the applicability of article 17(2)(c) of the Rome Statute. No reasonable Chamber could ever have found that direct instructions or statements from the defendant were unnecessary, especially when considering the State's intent "*to bring the person concerned to justice*". Indeed, it is apparent that when the Chamber decided to allow the visit, it did so to enable the Defence to hear directly from the defendant on the alleged violations of his personal rights, rather than to collect information or evidence relating to other aspects of the admissibility proceedings. In this regard, the Chamber indicated that "*its power to issue such orders or seek such cooperation as may be necessary to protect Mr Gaddafi or assist in the preparation of his defence* […] *cannot be made contingent on Libya's compliance with the request for arrest and surrender issued by the Court. The same applies to Mr Al-Senussi*".[50]

[49] See *supra* paras. 22-27.

[50] See the "Decision on 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", *supra* note 48, para. 39.

35. Therefore, it was entirely unreasonable for the Chamber to conclude that, despite the lack of contact between Mr Al-Senussi and the Defence, the violations alleged were "*generic*" and "*without any tangible proof*".[51] Regardless of the validity of this factual finding and the correctness of the burden allocation, it is submitted that the procedure adopted by the Chamber, which failed to secure any contact between Mr Al-Senussi and his lawyers, directly contributed to hindering the Defence ability to substantiate its claim.

36. The procedural error on the part of the Chamber is even more evident in light of its position with regard to the arrangement of the legal visit. By requesting the Registrar to make the necessary arrangement with the Libyan authorities for a privileged visit,[52] the Chamber created the expectation that the admissibility of the case would not be decided until said visit takes place. It was of course entirely reasonable for the Defence to proceed on the basis that the Admissibility Challenge will not succeed should Libya refuse to comply with the Chamber's order. Indeed, the sole fact that the Chamber ordered such a visit demonstrates its relevance to the determination of the Admissibility Challenge.[53] The importance of the visit was reaffirmed in a further decision by the Chamber, issued only two weeks before the Impugned Decision.[54] In the latter, the Chamber indicated that it would be appropriate that "*a visit is organised on the basis of an* ad hoc *arrangement to be concluded by the Registrar and Libya as soon as possible*" and instructed the Registrar "*to report on the matter*" by 14 October 2013.[55]

37. The Chamber, however, did not wait for that report to be filed on 14 October 2013 as per its instructions, and issued the decision on the Admissibility Challenge

---

[51] See the Impugned Decision, *supra* note 1, para. 239.
[52] *Idem.*
[53] See the "Decision on 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", *supra* note 48, p. 15.
[54] See the "Decision concerning a privileged visit to Abdullah Al-Senussi by his Defence" (Pre-Trial Chamber I), No. ICC-01/11 01/11-456, 26 September 2013.
[55] *Idem*, para. 14 and p. 7.

on 11 October 2013. In the Impugned Decision, the Chamber simply noted that it "*is mindful that the Defence has not been able to visit Mr Al-Senussi*".[56] To date, the decision requesting the Registry to report on the Defence visit has not been revoked. On the contrary, the Registry implemented it and submitted on 14 October 2013 the "Sixth Report of the Registry on the visit of the defence team to Libya".[57]

38. By ordering the Registry to report on the Defence visit on 14 October 2013, while deciding to issue the Impugned Decision before receiving the requested report by the Registry, the Chamber committed a gross procedural error. First, this error resulted in a situation of uncertainty as to whether the Pre-Trial Chamber is still seised of the case against Mr Al-Senussi. Indeed, after the issuance of the Impugned Decision the Registry informed the Government of Libya that the "*Pre-Trial Chamber was still seized of the matter despite decision on the admissibility issued on 11 October 2013*", whereas Libya considered that "*Mr. Emmerson was not the counsel of Mr. Al-Senussi anymore*".[58] In principle, since the Chamber found that the case against Mr Al-Senussi is inadmissible, it should have refrained from considering the Registry's report. Indeed, when a case is found inadmissible under article 19 of the Rome Statute, the Pre-Trial Chamber ceases to have jurisdiction over this case.[59]

39. More importantly, the Defence legitimately relied on the visit to the defendant to substantiate its claim that the rights of the suspect had been violated, and the fact that such visit did not take place annihilated any chance for the Defence to discharge that burden. These procedural errors led the Chamber to the erroneous conclusion that Libyan domestic proceedings had been conducted in a

---

[56] The Impugned Decision, *supra* note 1, para. 29.
[57] See the "Report of the Registry on the visit of the defence team to Libya", No. ICC-01/11-01/11-467-Conf, 14 October 2013.
[58] *Idem*, para. 6.
[59] See the "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" (Appeals Chamber), No. ICC-01/04-01/07-1497 OA 8, 25 September 2009, para. 79.

manner consistent with the intent to bring the person concerned to justice. If the Defence were provided with the opportunity to meet directly with the defendant, it would have been in a position to provide more specific information and evidence on this issue. The procedure adopted by the Chamber can therefore be qualified as an abuse of discretion in which the burden of proof was placed on the Defence. It was clearly impossible for the Defence to provide more detailed information while still being prevented from meeting directly with Mr Al-Senussi. The Impugned Decision must therefore be reversed.

Ground 2: There is compelling new evidence that was not previously available which demonstrates that Libya is unwilling and unable genuinely to carry out the proceedings against Mr. Al-Senussi, within the meaning of Article 17(1)(a), (2) and (3)

40. The Principal Counsel opposes the Defence's request for submission of new evidence.[60] Introducing and litigating new factual allegations in appeal must only be allowed in very exceptional circumstances. As the Appeals Chamber has previously observed, its function is to "*determine whether the determination by the Pre-Trial Chamber on the admissibility of the case* […] *was in accord with the law*".[61] Accordingly, the scope of appellate review must be limited to the facts and information that were available to the Pre-Trial Chamber at the time it took its decision. Moreover, the Appeals Chamber's review is limited to the facts as they existed at the time of the proceedings "*on the admissibility challenge before the Pre-Trial Chamber and not to the subsequent proceedings on appeal*".[62] Consequently, the Appellant's request for admission of three annexes is unfounded and must therefore be rejected.

---

[60] See the Document in Support of the Appeal, *supra* note 3, para. 137.

[61] See the "Decision on the 'Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility'" (Appeals Chamber), No. ICC-01/09-01/11-234 OA, 28 July 2011, para. 11. See also the "Decision on the 'Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility'" (Appeals Chamber), No. ICC-01/09-02/11-202 OA, para. 10.

[62] See the "Decision on the 'Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility'", *supra* note 61, para. 9 (we underline).

Ground three: ***The Pre-Trial Chamber erred in law and fact in concluding that Libya was investigating and prosecuting the same case as before the ICC***

41. The Principal Counsel concurs with the Defence's argument that the Chamber erred in law and in fact in finding that Libya is investigating the "same case" or "conduct".[63] In addition to the arguments set out in the Document in Support of the Appeal, the Principal Counsel submits, in summary, the following:

A. The Pre-Trial Chamber misconstrued the definition of the term "case" as set out in articles 17 and 19 of the Rome Statute, and erred in law by holding that the contours of a case before the ICC may be composed of "*illustrative and non-exhaustive samples of discrete criminal acts*".[64]

B. The Pre-Trial Chamber failed to properly consider the OPCV's argument on the need to uphold a consistent and coherent approach to the definition of "case", particularly, having regard to the ICC jurisprudence in the context of other proceedings before the Court. Failure to consider this argument resulted in the Chamber reaching an erroneous conclusion, *i.e.* "*that the conduct that is alleged in the criminal proceedings against Mr Al-Senussi is not shaped by the 'incidents' mentioned in the Article 58 Decision*".[65]

C. The Pre-Trial Chamber rejected the Prosecution's argument that the conduct must always be understood as "incident-specific" and be limited to the facts that are expressly mentioned in the request for arrest warrant or in the Article 58 Decision.[66] In holding that a conduct before the ICC may include other unspecified acts, some of which may not be even

[63] See the Document in Support of the Appeal, *supra* note 3, paras. 169 *et seq.*
[64] See the Impugned Decision, *supra* note 1, para. 76.
[65] *Idem*, para. 79.
[66] *Ibid*., paras. 72-78.

known to the Prosecution, the Chamber unduly expanded the scope of the case that was initially defined by the Prosecution without specifying its precise contours.

D. The Chamber indicated that the "incidents" and "events" referred to in the Article 58 Decision may "*constitute a relevant indicator*" that the domestic case is the same as the one before the Court.[67] It nevertheless failed to specify what other "indicators" or "factors" have been taken into consideration when considering the admissibility of the case against Mr Al-Senussi.

42. The Principal Counsel observes that the Chamber has taken a similar approach in both *Al-Senussi* and *Gaddafi* admissibility decisions for the purpose of defining the words "conduct" and "case". It is submitted that the approach taken by the Chamber is wrong in relation to both cases. However, while in the *Gaddafi* decision this finding did not affect the outcome of the admissibility decision; in the present proceedings, the finding impacted on how the Chamber assessed the evidence submitted by Libya.[68] In particular, it led the Chamber to take into account materials which are clearly unrelated and irrelevant to the allegations brought by the Prosecutor before the Court. Should the Chamber have applied the correct definition of case/conduct, it would have found that Libya had not provided sufficient evidence substantiating that it is investigating the same case. Therefore, the Principal Counsel concurs with the Appellant's assertions that the Chamber erred in making a different finding on the first limb of admissibility than the one adopted in the Gaddafi Admissibility Decision.[69]

43. The legal finding that a case before the ICC can comprise an open-ended list of acts or incidents is untenable. The Principal Counsel wishes to highlight that the

[67] *Ibid.*, para. 79.
[68] *Ibid.*, paras. 81 *et seq.*
[69] See the Document in Support of the Appeal, *supra* note 3, para. 175.

approach taken by the Chamber is inconsistent with the established jurisprudence of the Court. In admissibility, as well as other, proceedings, the various chambers have ruled that a case, as opposed to a situation, need to be considered in light of the explicit and specific facts set out in the relevant charging documents. This does not mean that the contours of a case before the Court cannot be subject to change, it simply suggests that a case need to be clearly defined.

44. The Principal Counsel further notes that the Court has adopted a consistent and unitary interpretation of the term "case", the parameters of which have been defined as the specific factual allegations supporting each of the legal elements of the crimes alleged.[70] It is submitted that the Appeals Chamber should not depart from this general approach in relation to admissibility proceedings under article 19 of the Rome Statute. Indeed, this interpretation of the concept of "case" as a set of specific and identifiable incidents was upheld in the Kenyan cases. The Appeals Chamber emphasised the requirement for specificity and preciseness in the following terms:

> "*The meaning of the words 'case is being investigated' in article 17 (1) (a) of the Statute must therefore be understood in the context to which it is applied. For the purpose of proceedings relating to the initiation of an investigation into a situation (articles 15 and 53 (1) of the Statute), the contours of the likely cases will often be relatively vague because the investigations of the Prosecutor are at their initial stages. The same is true for preliminary admissibility challenges under article 18 of the Statute. Often, no individual suspects will have been identified at this stage, nor will the exact conduct nor its legal classification be clear.*
> […]
> *In contrast, article 19 of the Statute relates to the admissibility of concrete cases. The cases are defined by the warrant of arrest or summons to appear issued under article 58, or the charges brought by the Prosecutor and confirmed by the Pre-Trial Chamber under article 61*".[71]

[70] See *infra* for detailed jurisprudence.
[71] See the "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'" (Appeals

45. The interpretation of the word "case" as referring to specific incidents has also been recognised as an essential component of fair and impartial trials. Indeed, the various chambers of the Court have emphasised the importance of preserving the defendant's due process rights, as detailed in article 67 of the Rome Statute.[72]

46. Moreover, the Appeals Chamber emphasised that cases at the pre-trial stage must be identifiable "*with sufficient clarity and detail*" and include reference to the specific factual allegations which support each of the elements of the crimes alleged.[73] It is therefore not subject to any doubt that the requirement relating to the specificity and preciseness of the charges in a given case, which in turn defines the *exact* contours of the case, constitutes a fundamental safeguard for the defendant.

47. As indicated in the Observations filed by the OPCV before the Pre-Trial Chamber on behalf of victims, a strict approach should be applied for the same conduct/same person test as the most appropriate for the determination of an admissibility challenge.[74]

Chamber), No. ICC-01/09-01/11-307 OA, 30 August 2011, paras. 38-39 and the "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'" (Appeals Chamber), No. ICC-01/09-02/11-274 OA, 30 August 2011, paras. 38-40 (we underline).

[72] See "Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'", No. ICC-01/04-01/06-2205 OA 15 OA 16, 8 August 2009, para. 90; See the "Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled 'Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons'" (Appeals Chamber), No. ICC-01/04-01/07-3363 OA 13, 27 March 2013, para. 49.

[73] See the "Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'", *supra* note 72, footnote 163.

[74] See the "Observations on behalf of victims on the 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute'", No. ICC-01/11-01/11-353-Red, 17 June 2013 paras. 37-39.

48. The Chamber's failure to adopt the correct interpretation of the case materially affected the Impugned Decision. Should the Chamber have applied the correct legal standards, it would have found that Libya has failed to provide evidence having a sufficient degree of specificity and probative value that demonstrate that it is investigating the same case.[75]

FOR THE FOREGOING REASONS the Principal Counsel respectfully requests the Appeals Chamber to reverse the Impugned Decision and find that the case against Mr Al-Senussi is admissible before the ICC.

Paolina Massidda
Principal Counsel

Dated this 20th day of December 2013
At The Hague, The Netherlands

[75] *Idem*, para. 65.