

Separate Opinion of Judge Sang-Hyun Song

1. I agree with the majority of the Appeals Chamber that, in the present case, it is appropriate to confirm the Impugned Decision and to dismiss Libya's appeal. However, I respectfully disagree, for the reasons that follow, with the majority's interpretation of the term "case" in article 17 (1) (a) of the Statute (first ground of appeal), and the conclusion of the majority that Libya has failed to establish that the Pre-Trial Chamber's factual conclusions were unreasonable (second ground of appeal). I am of the view that, when assessing the evidence as a whole, it is clear that Libya is investigating the same case. This makes it necessary to also address Libya's fourth ground of appeal, namely that "[t]he Chamber erred in fact and in law in finding that, due to the unavailability of its national judicial system, Libya is unable to obtain the accused or the necessary evidence and testimony or is otherwise unable to carry out its proceedings, pursuant to article 17(3) of the Statute".¹ In this regard, I do not find any error in the Pre-Trial Chamber's conclusion in respect of article 17 (3) of the Statute that Libya is unable to obtain the accused and find the case to be admissible on that basis.

2. I wish to point out that I do not intend to provide an exhaustive analysis of the admittedly complex issue of complementarity, but would like to address a few specific aspects, which I consider to be of particular relevance in the present case.

I. THE INTERPRETATION OF THE TERM "CASE" IN ARTICLE 17 (1) (A) OF THE STATUTE

3. The starting point for the interpretation of the term "case" in article 17 (1) (a) of the Statute is indeed the *Ruto* Admissibility Judgment. In that judgment, the Appeals Chamber held:

Thus, the defining elements of a concrete case before the Court are the individual and the alleged conduct. It follows that for such a case to be inadmissible under article 17 (1) (a) of the Statute, the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.²

¹ Document in Support of the Appeal, para. 3.

² *Ruto* Admissibility Judgment, para. 40.



4. I agree with the Pre-Trial Chamber 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”.³ I also agree with the Pre-Trial Chamber that “the conduct allegedly under investigation by Libya must be compared to the conduct attributed to Mr Gaddafi in the Warrant of Arrest issued against him by the Chamber, as well as in the Chamber’s decision on the Prosecutor’s application for the warrant of arrest” (footnote omitted).⁴ Finally, I consider that the Pre-Trial Chamber correctly summarised the conduct underlying the Warrant of Arrest and the Arrest Warrant Decision,

namely that: Mr Gaddafi used his control over relevant parts of the Libyan State apparatus and Security Forces to deter and quell, by any means, including by the use of lethal force, the demonstrations of civilians, which started in February 2011 against Muammar Gaddafi’s regime; in particular, that Mr Gaddafi activated the Security Forces under his control to kill and persecute hundreds of civilian demonstrators or alleged dissidents to Muammar Gaddafi’s regime, across Libya, in particular in Benghazi, Misrata, Tripoli and other neighbouring cities, from 15 February 2011 to at least 28 February 2011.⁵

5. In comparing the conduct being investigated by the Prosecutor with that being investigated by Libya, in the circumstances of this specific case, I consider that for it to be found that the domestic investigation being carried out in Libya covers the same case, it must be found that it covers: (1) the use of the State apparatus by Mr Gaddafi; (2) for the alleged commission of the crimes of murder and persecution; (3) committed in the time period of 15 February 2011 to at least 28 February 2011; (4) against civilian demonstrators or alleged dissidents to Muammar Gaddafi’s regime; and (5) across Libya.

6. In this context, I note that the Pre-Trial Chamber pointed out⁶ that “the events expressly mentioned in the Article 58 Decision do not represent unique manifestations of the form of criminality alleged against Mr Gaddafi in the proceedings before the Court”, but that “[t]hey constitute rather samples of a course of conduct of the Security Forces, under Mr Gaddafi’s control, that allegedly carried out an attack [...]

³ Impugned Decision, para. 77.

⁴ Impugned Decision, para. 78.

⁵ Impugned Decision, para. 83.

⁶ Any reference to the Pre-Trial Chamber’s statement is without prejudice to my view regarding the specificity requirements with respect to the charges for the purposes of trial.

which resulted in an unspecified number of killings and acts of persecution” (footnote omitted).⁷ From this statement, I consider that it is clear that overlap between the incidents is not a relevant factor for the purposes of determining whether the national investigation covers the same conduct as that alleged by the Prosecutor in the present case. In my view, it is irrelevant, for the purposes of this admissibility challenge, whether the national investigation covers, for example, the alleged killing of three civilians in Benghazi on 16 February 2011 in the area of Birka and Al Fatah and Jamal Abdun Naser streets, or the killing of a number of people at the Juliyana Bridge the following day – both incidents are mentioned in the Arrest Warrant Decision⁸ – or any other incident not specifically mentioned in the Arrest Warrant Decision. In other words, the incidents are interchangeable and the non-investigation of one particular incident by the domestic authorities does not mean that they are investigating different conduct. To require that the national investigation must cover the same incidents would, in my view, set too onerous a standard for admissibility challenges in cases, like the one before us, where there are potentially hundreds of incidents to investigate⁹ and where, in addition, the person under investigation is not alleged to have physically committed any acts of murder and persecution.¹⁰ To put it simply: to require that the national investigation cover exactly the same acts of murder and persecution would make the national investigators’ task impossible and, as a result, the complementarity principle, an essential element of the Statute – featuring prominently in both its Preamble¹¹ and first article¹² – would almost certainly become redundant.

⁷ Impugned Decision, para. 82.

⁸ Arrest Warrant Decision, para. 36.

⁹ The Arrest Warrant Decision refers to approximately 40 incidents involving acts of murder and persecution (see paras 36-62 of the Arrest Warrant Decision).

¹⁰ The Warrant of Arrest states at p. 6 that “there are reasonable grounds to believe that Saif Al-Islam Gaddafi is criminally responsible as an *indirect co-perpetrator*, under article 25(3) (a) of the Statute, for the following crimes committed by Security Forces under his control in various localities of the Libyan territory, in particular in Benghazi, Misrata, Tripoli and other neighbo[u]ring cities, from 15 February 2011 until at least 28 February 2011”. [Emphasis added] See also Arrest Warrant Decision, para. 83.

¹¹ The tenth paragraph of the Preamble to the Statute reads: “*Emphasizing* that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions”. [Emphasis added]

¹² Article 1 provides, in relevant part, that the Court “shall be complementary to national criminal jurisdictions”.

II. WHETHER LIBYA IS INVESTIGATING THE SAME CASE

7. In relation to the second ground of appeal, the majority concludes:

The Appeals Chamber notes that Libya placed a significant amount of material related to its domestic investigations before the Pre-Trial Chamber. As set out above, when reviewing factual findings of a first instance Chamber, the Appeals Chamber is not called upon to determine whether it might have reached a different factual conclusion from that of the first instance Chamber. Its review is limited to establishing whether the factual findings could be reasonably reached. As Libya has failed to establish that the Pre-Trial Chamber's factual conclusions were unreasonable, the second ground of appeal is dismissed.¹³

8. I respectfully disagree with the majority's conclusion. In my view, the Pre-Trial Chamber's finding that "a number of investigative steps have been taken by Libya with respect to certain discrete aspects",¹⁴ but "the evidence, taken as a whole, does not allow [it] to discern the actual contours of the national case against Mr Gaddafi such that the scope of the domestic investigation could be said to cover the same case as that set out in the Warrant of Arrest issued by the Court"¹⁵ is unreasonable. I am of the opinion that, when assessing the evidence as a whole, more than "discrete aspects" are being investigated by Libya, and the Pre-Trial Chamber should have concluded that Libya is investigating the same case as that being investigated by the Prosecutor.

9. I reach this conclusion based on my assessment, in particular, of annexes C and I to the Admissibility Challenge, and annexes 3, 11 and 16 to Libya's Further Submissions on Admissibility.

10. The content of Annex C is recalled in paragraph 122 of the Majority Judgment. While I note that the witness statement summaries are relatively short, I consider that, taken together, they provide insight into the breadth of Libya's investigation of Mr Gaddafi. In particular, it can be gleaned from the summaries that the investigation is broad, covering several incidents in various parts of the country. Importantly, the fact that a number of witness statement summaries relate to Mr Gaddafi's overall role in the events, as well as to several specific incidents, sufficiently demonstrates that Libya has taken investigative steps on a broad basis.

¹³ Majority Judgment, para. 144.

¹⁴ Impugned Decision, para. 134.

¹⁵ Impugned Decision, para. 135.

11. Annex I is summarised in paragraph 116 of the Impugned Decision as “a statement from the Deputy Prosecutor of the Office of the Attorney General, indicating that witnesses, documents, telephone and video recordings suggest that Mr Gaddafi has committed a number of crimes”.¹⁶ Annex 3 is summarised at paragraph 115 of the Majority Judgment. It is a letter stating, *inter alia*, that 50 witness statements have been gathered so far, including by “important witnesses” and provides further details as to steps taken in the investigation. Both annexes I and 3 contain, in my view, information relevant to Libya’s investigation.

12. Annex 11 is summarised at paragraph 120 of the Majority Judgment. It is a memorandum, dated 13 January 2013, prepared by the Head of the Investigation Committee at the Attorney General’s Office, suggesting the joinder of Mr Gaddafi’s case with those of Mr Al-Senussi and others, as “[t]he investigation showed that, what the country went through was based on [*sic*] systematic general policy used by a group of the previous regime’s figures, headed by the accused in the case examined (i.e. Mr Gaddafi) and the accused in the case No. 630/2012 National Security such as [...] Abdullah Mohamed AlSenousi [*sic*] [...]. Their acts constitute a general framework for a set of serious crimes such as mass killings, random killing, looting, sabotage, rape and the spread [of] the spirit of discord and fragmentation of national unity. Such crimes are inseparable in facts and committers [...]”.¹⁷

13. Finally, Annex 16 is summarised in paragraph 126 of the Impugned Decision as follows:

The third witness statement contained in Annex 16 to Libya’s Further Submissions is the statement of an insider witness who [REDACTED]. The witness was specifically questioned by the Libyan investigators about the 17 February 2011 outbreak of violence, and, in particular, about the use of armed violence against demonstrators and the role and responsibility of Mr Gaddafi before, during and after the outbreak of violence. The witness was also questioned about the provision of money and arms to Mr Gaddafi’s supporters and the role of Mr Gaddafi in bringing mercenaries or military troops to Libya from elsewhere in order to kill demonstrators in Benghazi and other areas [...].

¹⁶ See also Majority Judgment, para. 115.

¹⁷ Annex 11, p. 3.

14. Based, in particular, on these five annexes, I reach the conclusion that the investigation by the Libyan national authorities encompasses: (1) the use of the State apparatus by Mr Gaddafi; (2) for the alleged commission of the crimes of murder and persecution; (3) committed in the time period of 15 February 2011 to at least 28 February 2011; (4) against civilian demonstrators or alleged dissidents to Muammar Gaddafi's regime; and (5) across Libya. Accordingly, in my view, Libya is investigating the same case within the meaning of article 17 (1) (a) of the Statute and in this respect the Pre-Trial Chamber erred.

15. Having concluded that the same case against Mr Gaddafi is being investigated by Libya, it is unnecessary for me to consider the third ground of appeal. However, in order to determine whether the case is inadmissible, it is necessary to proceed to consider the fourth ground of the appeal, which concerns whether there was any error in the determination of the Pre-Trial Chamber that Libya is unable genuinely to carry out these proceedings. This is because article 17 (1) (a) of the Statute mandates that the Court shall determine that a case is inadmissible where it is being investigated, "*unless the State is unwilling or unable genuinely to carry out the investigation or prosecution*" [emphasis added]. It is to this second part of article 17 (1) (a) of the Statute that I therefore now turn.

III. INABILITY

16. Libya's fourth ground of appeal is:

The Chamber erred in fact and in law in finding that, due to the unavailability of its national judicial system, Libya is unable to obtain the accused or the necessary evidence and testimony or is otherwise unable to carry out its proceedings, pursuant to article 17(3) of the Statute.¹⁸

17. At issue in this ground of appeal is the interpretation and application of article 17 (3) of the Statute, which provides:

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

¹⁸ Document in Support of the Appeal, para. 3.

18. Libya essentially argues that the Pre-Trial Chamber erred in its interpretation and application of the term “unavailability of its national judicial system”,¹⁹ and that it further erred by finding that the Libyan judicial system was “unable” in relation to the case against Mr Gaddafi.²⁰

19. For the reasons that follow, I do not consider that the Pre-Trial Chamber erred in this regard.

A. “Unavailability”

20. The Pre-Trial Chamber found that article 17 (3) of the Statute was to be assessed in accordance with Libyan substantive and procedural law²¹ and referred to relevant national provisions in this respect.²² Having taken note “of the efforts deployed by Libya under extremely difficult circumstances to improve security conditions, rebuild institutions and restore the rule of law”,²³ it found that:

it is 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, which are further explained below, 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. As a consequence, Libya is “unable to obtain the accused” and the necessary testimony and is also “otherwise unable to carry out [the] proceedings” in the case against Mr Gaddafi in compliance with its national laws, in accordance with the same provision.²⁴

21. Having proceeded to examine specific aspects of the case relevant to its determination under article 17 (3) of the Statute,²⁵ the Pre-Trial Chamber stated its overall conclusion on “inability” in the following terms:

In light of the above, although the authorities for the administration of justice may exist and function in Libya, a number of legal and factual issues result in the unavailability of the national judicial system for the purpose of the case against Mr Gaddafi. As a consequence, Libya is, in the view of the Chamber, unable to secure the transfer of Mr Gaddafi’s custody from his place of

¹⁹ Document in Support of the Appeal, paras 144-153.

²⁰ Document in Support of the Appeal, paras 154-177.

²¹ Impugned Decision, paras 199-200.

²² Impugned Decision, paras 201-203.

²³ Impugned Decision, para. 204.

²⁴ Impugned Decision, para. 205.

²⁵ Impugned Decision, paras 206-214.

detention under the Zintan militia into State authority and there is no concrete evidence that this problem may be resolved in the near future. Moreover, the Chamber is not persuaded that the Libyan authorities have the capacity to obtain the necessary testimony. Finally, the Chamber has noted a practical impediment to the progress of domestic proceedings against Mr Gaddafi as Libya has not shown whether and how it will overcome the existing difficulties in securing a lawyer for the suspect.²⁶

22. Libya submits that the Pre-Trial Chamber did not consider the criterion of “unavailability of [a State’s] national judicial system” separately from the discussion of the criteria relevant to “inability”,²⁷ bypassing proper consideration of unavailability “by, in effect, referring to Libya’s purported inability ‘to obtain the accused or the evidence and testimony or otherwise [...] carry out its proceedings’ as examples or evidence of ‘unavailability’”.²⁸ Libya argues that this led to a merger of considerations of “unavailability” and “inability”, and to “inherently circular reasoning”,²⁹ which did not take into account the text of article 17 (3) of the Statute, which requires, first, a consideration of the “collapse” or “unavailability” of the national judicial system and, second, whether *due to* that “collapse” or “unavailability”, the State is “unable” to obtain the accused or the necessary evidence, or otherwise to carry out its proceedings.³⁰

23. Libya avers that the Pre-Trial Chamber did not define the meaning of “unavailability”,³¹ and that it should have done so by means of a textual, contextual and teleological analysis, which would have resulted in a stringent standard in relation to a determination of inability, permitting the Court to intervene “only in exceptional circumstances”, consistent with the Statute’s deference to domestic prosecutions.³² Libya submits that the Pre-Trial Chamber set too high a legal standard for a State to satisfy in that it focused “solely on discrete examples of difficulties” that Libya faces in respect of Mr Gaddafi (failure to obtain two witness statements, the non-transfer of Mr Gaddafi, “speculative concerns” about witness protection and difficulties in obtaining legal representation).³³ Instead, in Libya’s submission, the Pre-Trial

²⁶ Impugned Decision, para. 215.

²⁷ Document in Support of the Appeal, paras 148-149.

²⁸ Document in Support of the Appeal, para. 149.

²⁹ Libya’s Response to Victims’ Observations on the Appeal, para. 40.

³⁰ Document in Support of the Appeal, para. 147.

³¹ Document in Support of the Appeal, paras 150-152.

³² Document in Support of the Appeal, para. 150.

³³ Document in Support of the Appeal, para. 153.

Chamber should have interpreted “unavailability” as requiring a consideration of “actual, systemic difficulties that have a direct and quantifiable (rather than purely speculative) impact on the ongoing investigation”.³⁴ Libya submits that the interpretation of “unavailability” should set a similarly high threshold for ICC intervention as that intended by a “total or substantial collapse”, in light of its context (in particular its textual proximity to ‘total or substantial collapse’), and the object and purpose of the Statute: a finding of “unavailability” as a result “of some deficiencies or inefficiencies in the national system” would, according to Libya, “render otiose” the use of the term “substantial”, rather than “partial”, in relation to a “collapse” in article 17 (3) of the Statute.³⁵

24. I do not consider Libya’s principal arguments in relation to the Pre-Trial Chamber’s interpretation and application of the “unavailability” criterion to be persuasive. First, I agree that, in order to determine “inability” within the meaning of article 17 (3) of the Statute, it is necessary for a Chamber to consider *both* the “unavailability” of a State’s national judicial system *and* whether that State “is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings” – and that the State must be unable “*due to*” [emphasis added] this unavailability. However, contrary to Libya’s submissions, I find that the Pre-Trial Chamber *did* consider the criterion of “unavailability” separately from that of inability – and considered that the latter was a consequence of the former. The Pre-Trial Chamber found that Libya’s national judicial system was unavailable as a result of Libya facing “substantial difficulties in exercising its judicial powers fully across the entire territory”.³⁶ *As a result*, Libya was, *inter alia*, “unable to obtain the accused”.³⁷ Accordingly, both requirements of article 17 (3) of the Statute were therefore considered and, in the view of the Pre-Trial Chamber, met. The fact that the two factors require consideration does not, in my view, mean that there is no link between them.

³⁴ Document in Support of the Appeal, para. 153.

³⁵ Document in Support of the Appeal, paras 150-151. *See generally* paras 150-153.

³⁶ Impugned Decision, para. 205.

³⁷ Impugned Decision, para. 205.

25. Second, I understand the English term “unavailability” to mean that the national judicial system is not capable of being used or is not at one’s disposal.³⁸ The French version of the term – *indisponibilité* – has a similar meaning.³⁹ I have also had regard to the submissions of the Prosecutor, by reference to the Spanish and Arabic versions of the text, that a literal interpretation of the term “unavailability” could potentially mean “non-existent” in addition, or as opposed, to “non-accessible”,⁴⁰ if reliance is placed upon certain of the (equally authentic)⁴¹ language versions of the Statute.⁴² However, even though, according to certain of those language versions, the literal meaning of the term could potentially be “non-existent”, I find that the correct interpretation of the term, in context, and in light of the object and purpose of the Statute, is that the national judicial system is incapable of being used, which incorporates the notion of being inaccessible, in the circumstances of a particular case.

26. This is because article 17 (3) of the Statute requires the Court to consider whether, in a particular case, a State is unable due to “a total or substantial collapse or unavailability of its national judicial system”. The concept of “unavailability” is distinct from that of a “collapse”.⁴³ In order to determine inability in a particular case, the Court is required to find either “a total or substantial collapse” or the “unavailability” of the national judicial system. Furthermore, given that the Court was established “to put an end to impunity for the perpetrators”⁴⁴ of “the most serious

³⁸ The word “unavailability” is not defined, as such, in the Online Oxford English Dictionary. Yet, according to the same source, the term “availability” means: “1.a. The quality of being available; capability of being employed or made use of”, or “2. *concr.* That which is available”; see Oxford English Dictionary (Online) <http://www.oed.com/view/Entry/13582?redirectedFrom=availability#eid> (last accessed on 21 May 2014). The word “unavailable” means “1. Unavailing; inefficacious; ineffectual” and “2. Not available; incapable of being used”; see Oxford English Dictionary (Online) <http://www.oed.com/view/Entry/209504?redirectedFrom=unavailable#eid> (last accessed on 21 May 2014). The word “available” is defined as “I. That may avail. *arch.* 1.a. Capable of producing a desired result; of avail, effectual, efficacious. *arch.* or *Obs.* except as in 1b. 1.b. in *Law.* Valid. 2. Of advantage; serviceable, beneficial, profitable (*to, unto*). *arch.* (The last quotation passes into 3a.) II. That may be ‘availed of’. 3.a. Capable of being employed with advantage or turned to account; hence, capable of being made use of, at one’s disposal, within one’s reach. [...]”; see Oxford English Dictionary (Online) <http://www.oed.com/view/Entry/13583?redirectedFrom=available#eid> (last accessed on 21 May 2014).

³⁹ “Indisponible” has been defined as “dout on ne peut pas disposer”: see French Dictionary Larousse (Online) <http://www.larousse.com/en/dictionaries/french/indisponible/42645> (last accessed on 21 May 2014).

⁴⁰ Prosecutor’s Response to the Document in Support of the Appeal, paras 159-160.

⁴¹ See article 128 of the Statute.

⁴² I note that there is nothing in the drafting history that concretely defines the term “unavailability”.

⁴³ See also Prosecutor’s Response to the Document in Support of the Appeal, paras 156-157.

⁴⁴ Preamble of the Statute, fifth paragraph.

crimes of concern to the international community as a whole”,⁴⁵ it is consistent therewith for it to be sufficient for the system to be unavailable *in respect of a particular case*. Were the situation otherwise, perpetrators of such crimes would be able to escape investigation and prosecution merely because the system was potentially available to one or more other perpetrators, even if there were no prospect of it being available in their case.⁴⁶ Moreover, Libya’s submissions in relation to the ongoing nature of the investigation⁴⁷ or genuineness⁴⁸ do not alter my view. I, therefore, do not find any legal error in the Pre-Trial Chamber’s approach to “unavailability” in the present case.

B. “Unable to obtain the accused”

27. Under the heading “(i) *Inability to obtain the accused*”,⁴⁹ the Pre-Trial Chamber noted that

Libya has not yet been able to secure the transfer of Mr Gaddafi from his place of detention under the custody of the Zintan militia into State authority. In response to a specific request for clarification from the Chamber, the Libyan representatives indicated that “[e]fforts to arrange Mr Gaddafi’s transfer to a detention facility in Tripoli where other Gaddafi-era officials are presently

⁴⁵ Preamble of the Statute, fourth paragraph.

⁴⁶ That it is sufficient for the system to be unavailable *in respect of a particular case* is a view supported by various commentators. See F. Gioia, “Comments on Chapter 3 of Jann Kleffner”, in J.K. Kleffner and G. Kor (eds), *Complementary Views on Complementarity: Proceedings of the International Roundtable on the Complementary Nature of the International Criminal Court, Amsterdam, 25/26 June 2004* (T.M.C. Asser Press, 2006), p. 107 (“there is more to inability than the scenario of a collapsed State. The Statute provides that inability might also be triggered by the ‘unavailability’ of a given legal system. What does unavailability amount to? It may be briefly described as a situation in which a legal system is theoretically in place and functioning as a whole but incapable of functioning in respect of a given case, due to legal or factual obstacles, and always provided that such unavailability results in the State being ‘unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings’. [Footnotes omitted]”); J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Martinus Nijhoff Publishers, 2008), pp 317-318 (“The fact that ‘unavailability’ is included alongside ‘total or substantial collapse’ indicates that the former adds something to the latter. It thus appears to cover situations where a legal system has not collapsed (*i.e.* it still exists) but is inadequate (not accessible or not useful) for the purpose of dealing genuinely with a given case. [...] In light of the object and purpose of the Rome Statute, the ‘unavailability’ criterion should arguably be construed sufficiently broadly so as to reduce the number of situations where the ICC must defer to national proceedings despite the state’s actual inability to carry out its proceedings in a meaningful manner. Deferral in such situations would effectively mean that impunity would prevail as a result of the national system’s inadequacy, exactly what the Rome Statute aims at avoiding.”). See also M. El-Zeid, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff Publishers, 2008), p. 222 (“the unavailability of an effective judicial system, that is, one capable of guaranteeing a full, effective domestic criminal process in relation to a certain situation or case” [footnote omitted]).

⁴⁷ Document in Support of the Appeal, para. 172.

⁴⁸ Document in Support of the Appeal, paras 173-176.

⁴⁹ Impugned Decision, p. 85.

held are still ongoing”. Libya subsequently reiterated that efforts to arrange Mr Gaddafi’s transfer to detention in Tripoli are ongoing and that it will shortly begin implementation of its recently devised proposal to train members of the Zintan brigade so that they may form part of the judicial police who will be responsible for guarding Mr Gaddafi upon his transfer to Tripoli. It estimated that the transfer will take place “before the earliest possible estimated commencement date of the trial in May 2013” and that the national security proceedings in Zintan will also be transferred to the Tripoli court at this point if they proceed to trial.⁵⁰ [Footnotes omitted]

28. The Pre-Trial Chamber further held that “no concrete progress” had been made to transfer Mr Gaddafi to Tripoli since his apprehension in November 2011 and that no evidence had been produced that this problem would be resolved in the near future.⁵¹ Finally, the Pre-Trial Chamber noted the submissions of Libya “that *in absentia* trials are not permitted under Libyan law when the accused is present on Libyan territory and his location is known to the authorities”.⁵² Accordingly, the Pre-Trial Chamber concluded that “[a]s a result, without the transfer of Mr Gaddafi into the control of the central authorities, the trial cannot take place”.⁵³

29. Libya argues, *inter alia*, that the Pre-Trial Chamber erred by finding that Libya “is unable to secure the transfer of Mr Gaddafi’s custody into State authority and that this constitutes an inability to ‘obtain the accused’”.⁵⁴ Libya avers that the Pre-Trial Chamber’s determination was “based on several erroneous premises”.⁵⁵

30. In this respect, Libya argues that the Pre-Trial Chamber erred in finding that the judicial system operative in Zintan falls outside Libyan authority, submitting that the Chamber had insufficient regard to various factors that established that the Libyan Government “is able to exercise its authority over Mr Gaddafi alongside the local authority in Zintan”.⁵⁶

31. Libya avers that the Pre-Trial Chamber “elided the desirability of transfer to Tripoli with the ability of Libya to ‘obtain the custody of Mr Gaddafi’”.⁵⁷ Libya contends that the fact that this transfer has not yet occurred does not reflect an

⁵⁰ Impugned Decision, para. 206

⁵¹ Impugned Decision, para. 207.

⁵² Impugned Decision, para. 208.

⁵³ Impugned Decision, para. 208.

⁵⁴ Document in Support of the Appeal, para. 154.

⁵⁵ Document in Support of the Appeal, para. 156.

⁵⁶ Document in Support of the Appeal, paras 157-160.

⁵⁷ Document in Support of the Appeal, para. 161.

inability to “obtain” Mr Gaddafi; that it is incorrect to equate “the carrying out of a transfer from one area falling within the authority of Libya to another with an (in)ability to obtain the accused”; and that there was no legal impediment to his trial being conducted in Zintan.⁵⁸ Libya submits that the finding of the Pre-Trial Chamber that the trial could not take place without Mr Gaddafi’s transfer into the control of the central authorities was unreasonable in light of “these clear indices of sufficient control by the central government in Zintan”, combined with a lack of evidence that the domestic proceedings had been disrupted as a result of Mr Gaddafi’s detention in Zintan.⁵⁹

32. In my view, the main issue to be determined here is not whether or not the judicial system operative in Zintan falls outside Libyan authority or whether the Zintan Brigade is in fact a “Government-sanctioned local authority”. Rather, the issue under this ground of appeal is whether the central authorities have been able to obtain Mr Gaddafi for the purposes of trial. In this regard, the Pre-Trial Chamber found that Libya had not been able to secure the transfer of Mr Gaddafi from Zintan into the control of the central authorities for his detention and trial in Tripoli,⁶⁰ and that, without such a transfer, his trial could not take place.⁶¹ I do not find this conclusion to be unreasonable.

33. First, even assuming that there was a degree of cooperation in certain respects between the central Government and the Zintan Brigade, this apparently had not been sufficient to transfer Mr Gaddafi into the control of the central authorities so that his trial could take place. In this regard, I note that Libya does not point to any evidence that the Pre-Trial Chamber overlooked in coming to that specific conclusion.

34. Second, this conclusion stands even assuming, as Libya argues on appeal,⁶² that “the State” should not be interpreted to mean exclusively the “central” authorities; that Mr Gaddafi has, in fact, been under the control of the authorities in that the Zintan Brigade “is a Government-sanctioned local authority”; and that there is no

⁵⁸ Document in Support of the Appeal, para. 161.

⁵⁹ Document in Support of the Appeal, para. 161.

⁶⁰ Impugned Decision, paras 206-207.

⁶¹ Impugned Decision, para. 208.

⁶² Document in Support of the Appeal, para. 157.

distinction in international law between a central and a local authority.⁶³ Again, considering those parts of Libya's submissions that are referenced in the relevant part of the Impugned Decision,⁶⁴ as well as the references in the submissions of the Prosecutor and the Defence on appeal to other materials that were before the Pre-Trial Chamber and that are relevant to its determination,⁶⁵ I cannot see any clear error in the conclusion of the Pre-Trial Chamber that "without the transfer of Mr Gaddafi into the control of the *central* authorities, the trial cannot take place" (emphasis added).⁶⁶

35. Finally, in relation to Libya's submission that there is no legal impediment to Mr Gaddafi's trial being held in Zintan and that the trial could take place there,⁶⁷ I note Libya's submissions to the Pre-Trial Chamber at a hearing in October 2012, which included the statement that the President of Libya had confirmed to the media on 22 September 2012 that "there is no prospect of a trial taking place in Zintan due to inadequate courtroom facilities and the other infrastructure that will be needed for a trial".⁶⁸ I further note that, in the Impugned Decision, the Pre-Trial Chamber referred to Libya's submissions in stating that it was estimated that Mr Gaddafi's transfer to Tripoli "will take place 'before the earliest possible estimated commencement date of the trial in May 2013' and that the national security proceedings in Zintan will also be transferred to the Tripoli court at this point if they proceed to trial".⁶⁹ As such, I do not find anything within the argument raised that could demonstrate any clear error on

⁶³ Document in Support of the Appeal, para. 157.

⁶⁴ See Impugned Decision, paras 206-208.

⁶⁵ I note, in particular, the following statements that were made by representatives of Libya in the pre-trial proceedings: a statement in a filing by one of Libya's legal representatives in May 2012 that: "[...] it is still the case that despite best efforts, Mr. Gaddafi is not yet in the custody of the interim Libyan Government. As set forth in previous submissions, Mr. Gaddafi is still being held by the Zintan brigade which originally captured him in combat" ("Libyan Government Response to Defence Request", 30 May 2012, ICC-01/11-01/11-160, para. 20); and a statement by the representative of Libya at a hearing on 9 October 2012: "MR SANDS: So it's very quick what I have to say about the question of control over Mr Gaddafi's detention. It is correct that he presently remains in the custody of the Zintan Brigade. Once the Prosecutor-General is appointed by the new cabinet, that Prosecutor-General is expected to prioritise, working with the Zintan Brigade, to effect the transfer of Mr Gaddafi from Zintan to Tripoli and, in particular, to the purpose-built trial and detention facilities there. This engagement with the Zintan Brigade will form part of the new government's commitment to demobilising the various militia groups which remain active across Libya, as discussed earlier by Professor El-Ghani, and you will appreciate the significance of that for the present delicate situation in which Libya finds itself" (ICC-01/11-01/11-T-2-Red-ENG, p. 29, lines 14-24).

⁶⁶ Impugned Decision, para. 208.

⁶⁷ Document in Support of the Appeal, para. 161.

⁶⁸ ICC-01/11-01/11-T-2-Red-ENG, p. 19 line 25 to p. 20 line 2, also referred to in the Prosecutor's Response to the Document in Support of the Appeal, para. 170, footnote 324.

⁶⁹ Impugned Decision, para. 206, referring to Libya's Reply of 4 March 2013.

the part of the Pre-Trial Chamber on the basis of the facts that were before it at the time of the Impugned Decision.

36. For these reasons, I cannot find any clear error or unreasonableness in the conclusions of the Pre-Trial Chamber in respect of Libya being unable to obtain Mr Gaddafi.

37. In light of the foregoing – and given that it is sufficient for one of the (alternative) criteria in respect of a State being “unable” under article 17 (3) of the Statute to be satisfied – I do not consider it necessary to rule upon the other aspects of Libya’s alleged inability, which are addressed at paragraphs 209-214 of the Impugned Decision.

IV. CONCLUSION

38. In conclusion, I therefore agree that, in the present case, it is appropriate to confirm the Impugned Decision and to dismiss Libya’s appeal.


Judge Sang-Hyun Song

Dated this 21st day of May 2014

At The Hague, The Netherlands