Separate Opinion of Judge Anita Ušacka

1. I agree with my colleagues that the Impugned Decision must be confirmed and the Defence's appeal dismissed. Nevertheless, I have decided to append the present separate opinion, in order to present my views on certain aspects of the case. I should underline that I do not intend to address all issues arising in this matter, but focus on those that require, in my view, particular attention.

I. THIRD GROUND OF APPEAL – "SAME CASE"

2. The Defence argues that the Pre-Trial Chamber erred when it found that Libya is investigating the same case as that before this Court. I agree with my colleagues that this argument must be rejected, but for different reasons than those set out in the Majority Judgment of the Appeals Chamber.

3. I addressed the interpretation of the term "same case" in article 17 (1) (a) of the Statute in my Dissenting Opinion to the Appeals Chamber's judgment on Libya's appeal against the Pre-Trial Chamber's decision[1] (hereinafter: "*Gaddafi* Admissibility Decision") finding the case against Mr Saif Al-Islam Gaddafi (hereinafter: "Mr Gaddafi") to be admissible[2] (hereinafter: "*Gaddafi* Dissenting Opinion").

4. In particular, in the *Gaddafi* Dissenting Opinion, I noted that the so-called "same person/same conduct test" had been developed in the jurisprudence of this Court, including that of the Appeals Chamber,[3] initially in relation to cases arising from so-called self-referrals, i.e. situations referred to the Prosecutor by the State concerned itself.

5. I also set out my own interpretation of the term "same case" in article 17 (1) (a) of the Statute, as follows:

> 47. It is my considered view that the Pre-Trial Chamber's finding that the "scope of the domestic investigation" did not "cover the same case as that set

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[1] "Decision on the admissibility of the case against Saif Al-Islam Gaddafi", 31 May 2013, ICC-01/11-01/11-344-Conf (public redacted version: ICC-01/11-01/11-344-Red).
[2] "Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'", "Dissenting Opinion of Judge Anita Ušacka", ICC-01/11-01/11-547-Anx2 (OA 4).
[3] *Gaddafi* Dissenting Opinion, paras 20-38.

out in the Warrant of Arrest issued by the Court" is erroneous due to its incorrect interpretation of article 17 (1) (a) of the Statute, an interpretation which is based solely on the "same person/(substantially) the same conduct" test.[4] In my opinion, the problem lies in the test itself, which, contrary to the express language of the chapeau of article 17 (1) of the Statute, disregards the principle of complementarity laid out in paragraph 10 of the Preamble and article 1 of the Statute.

48. As mentioned above, since 2006, the "same person/same conduct" test has been developed in the abstract, mostly on the basis of cases in which the States at issue did not challenge admissibility and did not demonstrate that they had undertaken any steps or activities regarding investigations/prosecutions of the alleged crimes or suspects. The application of this test to the case at hand proves that, if this test is to be applied in order to compare a case before the Court with a domestic case, the Court will come to wrong and even absurd results, potentially undermining the principle of complementarity and threatening the integrity of the Court.[5]

49. In interpreting article 17 (1) (a) of the Statute, I will only address, as required by the ground of appeal under discussion, "conduct" as a determining criterion for comparing the case before the Court with the domestic case, thereby focusing on the concrete facts of this case and especially the investigations by Libya.

50. To begin with, I will concentrate on whether the term "conduct" may be used in comparing the "case before the Court" with the case before the domestic authorities. The term "case"[6] in its legal meaning[7] is applied throughout the Court's legal texts to refer to a criminal case before a Chamber of the Court.[8]

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[4] This test is generally supported by e.g. M. M. El Zeidy, "The Principle of Complementarity: A New Machinery to Implement International Criminal Law" 23 *Michigan Journal of International Law* (2002), p. 849, at pp. 930-940; R. Rastan, "Situations and case: defining the parameters", in C. Stahn and M. M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. I (Cambridge University Press, 2011), p. 421, at pp. 438-445.

[5] T. O. Hansen, "A Critical Review of the ICC's Recent Practice Concerning Admissibility Challenges and Complementarity", 13 *Melbourne Journal of International Law* (2012), p. 1, at p. 18; M. A. Newton, "The Complementarity Conundrum: Are We Watching Evolution or Evisceration?" 8 *Santa Clara Journal of International Law* (2010), p. 115, at pp. 119-123, stating that this "would cause a crisis of confidence that would shake the institutional foundation of the ICC".

[6] The French term that is used correspondingly in the legal texts is "l'affaire", but note that in the French versions of articles 14 (2), 15 (6), 36 (10), 42 (7), 82 (4) (c), 84 (2) (c), 127 (2) of the Statute the term "l'affaire" is used, but in the English version not the term "case". .

[7] Both the English and the French terms are mostly, but not exclusively, used with respect to proceedings before a judicial organ; e.g. in: J. E. Clapp, "Dictionary of the Law", (Random House, New York, 2000) p. 71 "case" is used with respect to "all proceedings with respect to a charge, claim or dispute filed with a court"; in B. A. Garner (ed.), "Blacks Law Dictionary" (Thomson, West, 8th ed.), p. 228, "case" is defined as "1. A civil or criminal proceeding, action, suit, or controversy at law or in equity; 2. A criminal investigation. 3. An individual suspect or convict in relation to any aspect of the criminal-justice system, [...]"; see Online Le Petit Robert: "affaire" is defined as "5. Procès, objet d'un débat judiciaire" and "4. Ensemble de faits créant une situation compliquée, où diverses personnes, divers intérêts sont aux prises".

[8] *See* for examples that do not refer directly to the admissibility of a "case", but mention in the French and English versions the terms "case" and "l'affaire": articles 24 (2); 39 (3), (4); 41 (2) (a); 64 (3); 65

Cases before the Court concern the commission of crimes that fall within its jurisdiction as referred to in articles 1 and 5 of the Statute.[9] Such crimes are defined by their relevant material and mental elements in articles 6 to 8 and 30 of the Statute. The Statute does not define the material elements of the crimes in general terms, but describes three main aspects "conduct", specific "consequences" and other "circumstances".[10] Thus, "conduct" is an important material element of a "crime" and therefore also an element of a "case". "Conduct" may, however, also be understood as extending to the acts of the individuals who are held responsible for the commission of these crimes in accordance with articles 25 and 28 of the Statute. These individuals need not necessarily personally carry out the "conduct" that is the basis of a crime, but this conduct and the consequences of this conduct are attributed to them.

51. This leads to the conclusion that conduct might be one of several possible elements for the purposes of comparing the "case before the Court" with a domestic case. But, in my opinion, article 17 (1) (a) of the Statute, applied in accordance with the principle of complementarity, does not require domestic authorities to investigate "(substantially) the same" conduct as the conduct that forms the basis of the "case before the Court". This means that, contrary to how I understand the Impugned Decision,[11] I do not think that the domestic investigation or prosecution needs to focus on largely or precisely the same acts or omissions that form the basis for the alleged crimes or on largely or precisely the same acts or omissions of the person(s) under investigation or prosecution to whom the crimes are allegedly attributed.

52. Establishing such a rigid requirement would oblige domestic authorities to investigate or prosecute exactly or nearly exactly the conduct that forms the basis for the "case before the Court" at the time of the admissibility proceedings, thereby being obliged to "copy" the case before the Court.[12] Instead of complementing each other, the relationship between the Court and the State would be competitive, requiring the State to do its utmost to fulfil the requirements set by the Court.[13]

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(1) (c), (3), (4); 89 (2); 90; 94 (1); 103 (1) (c) of the Statute; *see also* e.g. rules 21 (5), 34 (1) (a), (b), 39, 51, 73 (6) of the Rules of Procedure and Evidence.

[9] It is noted that article 70 of the Statute also includes crimes that fall within the jurisdiction of the Court.

[10] *See* G. Werle, "Principles of International Criminal Law", (Second Edition, Asser Press 2009), pp. 143-144. This is also confirmed by the Elements of Crimes, which mentions these elements and adds the contextual circumstances of the crimes. This refers e.g. to whether an attack against a civilian population occurred in relation to crimes against humanity. The Elements of Crimes also mention "particular mental elements".

[11] *See supra* para. 46.

[12] D. Robinson, "The Mysterious Mysteriousness of Complementarity", 21 *Criminal Law Forum* (2010), p. 67, at pp. 100-101; *see also* M. A. Newton, "The Complementarity Conundrum: Are We Watching Evolution or Evisceration?", 8 *Santa Clara Journal of International Law* (2010), p. 115, at 163, stating that "[c]omplementarity was never intended to institute a system of competition in which the domestic authorities face a hostile supranational forum intent on preserving its own prestige and power at the expense of endangering lasting peace and stability in countries already ravaged by mass atrocity."

[13] Newton, *ibid.*

53. Such an approach would strongly intrude upon the sovereignty of States and the discretion afforded to national prosecutorial authorities, with the consequence that the Court would become a "supervisory" authority, checking in detail not only the "scope" and content of any investigative and prosecutorial steps, but also scrutinising the State's substantive and procedural law and how it relates to the crimes in the Rome Statute.[14]

54. This approach not only disregards the many differences in the legal frameworks and in the practice of criminal justice between domestic jurisdictions and the Court, but also between the various domestic jurisdictions.[15] National cases can differ from the "case before the Court" in respect of evidence, such as available witnesses, victims, and the number and locations of incidents that are under investigation or prosecution.

55. Further, such an approach could potentially preclude a State from focusing its investigations on a wider scope of activities and could even have the perverse effect of encouraging that State to investigate only the narrower case selected by the Prosecutor. I view this as a harmful potential effect, particularly so in a situation such as Libya, where the actions of the Gaddafi regime in February 2011 (which is also the time period of the alleged crimes in the Court's warrant of arrest) triggered the Security Council referral, but where the change of government many months later led to the initiation of a transitional justice process. In such a situation, it may be assumed that the interests of the people of Libya and of the victims of the former regime could be better and more directly addressed by Libyan investigations and prosecutions in a process of transitional justice. Weighing the interests at stake in conformity with the principle of complementarity, it could indeed be said that "[i]t seems plainly more important that Libyans have the experience of transitional justice than that the ICC works its mandate".[16]

56. In addition, applying this strict approach raises a concern about timing, as the proceedings before the Court might have progressed further than the domestic proceedings or *vice versa*.[17] Therefore, the "case before the Court" may already have many more concrete elements than a "case" which is still under investigation domestically. In the proceedings before the Court, the

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[14] *See* Impugned Decision, paras 199-204; *see* similarly, but with respect to the second limb of article 17 (1) (a) of the Statute, A. Bishop, "Failure of Complementarity: The Future of the International Criminal Court Following the Libyan Admissibility Challenge" 22 *Minnesota Journal of International Law* (2013), p. 388, at pp. 414-415.

[15] *Kenya Admissibility Dissents*, Muthaura et al, para. 27; Ruto et al, para 27, stating that "a note of caution is necessary in relation to the understanding of the terms 'investigation' and 'prosecution'. The terms used in the various official language versions of the Statute appear to differ in their meaning too, especially with respect to the distinction between investigation and prosecution. This is not surprising, given that the terminology is based on the criminal law traditions of the countries in which the official languages are spoken. There are important differences not only between, for instance, Common Law and Civil Law systems, but also between the various national jurisdictions belonging to the same tradition".

[16] *See* D. Luban, "After the Honeymoon: Reflections on the Current State of International Criminal Justice", 11 *Journal of International Criminal Justice* (2013), p. 505, at p. 512.

[17] In that respect it is also noteworthy that the proceedings before the Court could not progress during the past two years since the admissibility challenge was raised, while the national proceedings continued.

Prosecutor has wide discretion to determine the parameters of a case and also to decide which case to prosecute.[18] The same is also true for many other legal systems. Therefore, domestic authorities could still be at a stage of their proceedings where the "conduct" is not yet as clearly defined as in the case before the Court, if at all. It also needs to be pointed out that the "case before the Court" is also subject to development at different stages of the proceedings. The conduct that is the basis of the crimes alleged in the warrant of arrest might be different from the conduct that is under scrutiny at the confirmation hearing or at trial.[19]

57. The drafting history shows that the States were fully aware of differences in legal cultures and the difficulties that domestic legal systems may face in investigating and prosecuting the "most serious crimes of concern to humanity". In my opinion, the task imposed on the Court is to find the appropriate balance between respecting the sovereignty of States and ensuring an effective Court, within the framework of the overarching common goal of the Court and the States, which is to fight impunity.[20]

58. As opposed to solely relying on the "same person/(substantially) the same conduct" test, I would prefer that the Court, in comparing a case before the Court and a domestic case, be guided by a complementarity scheme that contains multiple criteria that are assessed by reference to the concrete circumstances of each specific case.[21] In the case at hand, "conduct" is one of the essential elements in deciding whether the "case before the Court" is being investigated or prosecuted by domestic authorities. In my view, contrary to the opinion of my colleagues,[22] "conduct" should be understood much more broadly than under the current test. While there should be a nexus between the conduct being investigated and prosecuted domestically and that before the Court, this "conduct" and any crimes investigated or prosecuted in relation thereto do not need to cover all of the same material and mental elements of the crimes before the Court and also does not need to include the same acts attributed to an individual under suspicion.[23] In the case at hand, it may be argued that the goal of fighting impunity is also achieved, even if not exactly the same conduct as that before the Court is under investigation by Libya, but if the suspect's link to the use of the Security Forces in Libya and their consequences are the subject of the investigation of the Libyan authorities. Beyond that, the domestic investigations might even potentially focus on subsequent time periods, if the crimes allegedly committed through the use of Security Forces are considered by the domestic authorities to be graver than those on which the Court's investigations concentrate.

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[18] *See* e.g., The Office of the Prosecutor, "Office of the Prosecutor Policy Paper", September 2003, pp. 5-7; The Office of the Prosecutor, "Strategic Plan, June 2012-2015", 11 October 2013, pp. 6, 13-14, 18-21.

[19] This is only restricted by the rule of speciality (article 101 of the Statute).

[20] Preamble of the Statute setting out that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation".

[21] *See* for the concrete circumstances of this case, *supra,* paras 3-9.

[22] *See* Majority Judgment, paras 63, 72-75; Separate Opinion, para. 6.

[23] *See supra*, para. 50.

59. Another criterion of this complementarity scheme is the clearly expressed, genuine will of a State to carry out investigations and prosecutions that manifests itself in an advancing process of investigating and prosecuting, as exemplified in this case by the concrete actions taken by Libya.[24] I do not doubt that future cases on admissibility will raise new issues that will require the jurisprudence of the Court to develop further, and possibly add more confined and new elements to the test relevant to the first limb of article 17 (1) (a) of the Statute, such as the persons at issue,[25] the range of the sentence/s[26] and alternative forms of justice.[27]

[...]

63. To follow my suggested approach would most likely lead to the conclusion that Libya is investigating the same case against Mr Gaddafi and would, depending on a finding in relation to the second limb of article 17 (1) (a) of the Statute, make the case before the Court inadmissibe. However, considering the lack of reasoning and the Pre-Trial Chamber's decision to address the second limb of article 17 (1) (a) of the Statute although it had found that Libya is not investigating the same case,[28] I would leave the application of the standards established in this Opinion in the hands of the Pre-Trial Chamber and would consequently not address the second limb, in this case, the fourth ground of appeal, either.

64. In addressing the consequences of a finding of inadmissibility of a case before the Court, it should be noted that the Prosecutor has the power, according to article 19 (10) of the Statute, to request the Chamber to review this decision if "new facts have arisen which negate the basis on which the case has previously been found inadmissible under article 17". There is no temporal limitation established in this provision. The Prosecutor may therefore continue her monitoring activities, *inter alia*, in relation to whether the State's investigation or prosecution is conducted with a genuine intent. Where a case is declared admissible by the Court upon a State's challenge to its admissibility, the State depends on the Court to "grant leave" if it considers that "exceptional circumstances" justify allowing a second challenge.[29] Thus, it may be argued that in such a scenario, the State's right to challenge the admissibility of a case is effectively forfeited.

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[24] *See* in relation to such "advancing proceedings", D. Robinson, "Three Theories of Complementarity: Charge, Sentence or Process? A Comment on Kevin Heller's Sentence-Based Theory of Complementarity", in W. A. Schabas, et al. (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate Publishing Limited, 2013), pp. 375-378; H. O. Hobbs, "The Security Council and the Complementarity Regime of the International Criminal Court: Lessons From Libya", 9 *Eyes on the ICC* (2012-2013), p. 19, at p. 45.

[25] *See* T. O. Hansen, "A Critical Review of the ICC's Recent Practice Concerning Admissibility Challenges and Complementarity", 13 *Melbourne Journal of International Law* (2012), p. 1, at p.18

[26] *See* K. J. Heller, "A Sentence-Based Theory of Complementarity", in W. A. Schabas, et al. (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate Publishing Limited, 2013).

[27] *See* C. Roach, "Legitimising Negotiated Justice: the International Criminal Court and Flexible Governance", 17 *The International Journal of Human Rights* (2013), p. 619, at pp. 625-629.

[28] *See supra* para. 45.

[29] *See* article 19 (4) of the Statute.

65. As a concluding remark on the subject of complementarity, I would also like to point out that the overall goal of the Statute to combat impunity can also be achieved by the Court through means of active cooperation with the domestic authorities.[30] Many States, and not only States Parties of the Rome Statute, have incorporated the crimes of the Statute into their domestic legislation.[31] They might, however, face problems that are inherent in the investigation and prosecution of the "most serious crimes of international concern".[32] The Court, together with other international organisations and other States, is in an ideal position to actively assist domestic authorities in conducting such proceedings, be it by the sharing of materials and information collected or of knowledge and expertise.[33]

6. Turning to the case against Mr Al-Senussi, in light of the above, I do not agree with the interpretation and application of the "same person/same conduct" test, as set out in section IV.A.2.(c)(ii) of the Majority Judgment.

7. Nevertheless, based on my own interpretation of article 17 (1) (a) of the Statute, I would have reached the same finding as the majority, namely that the Defence has not substantiated its argument that the Pre-Trial Chamber's conclusion that Libya is investigating the same case as that before the Court is erroneous. I therefore agree that the third ground of appeal must be rejected.

II. FIRST GROUND OF APPEAL – "UNWILLINGNESS" AND "INABILITY"

8. I also agree with the conclusion of the Majority Judgment that the first ground of appeal, addressing the second limb of article 17 (1) (a) of the Statute, must be rejected. In that regard, I would, however, like to make a few remarks.

9. First, I find it regrettable that the Majority Judgment only touches upon aspects of the interpretation of the second of limb article 17 (1) (a) of the Statute and the notions of "unwillingness" and "inability" set out in article 17 (2) and (3) of the Statute. These are key questions for the relationship between the Court and domestic

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[30] *See* M. A. Newton, "The Complementarity Conundrum: Are We Watching Evolution or Evisceration?", 8 *Santa Clara Journal of International Law* (2010), p. 115, at pp. 163-164; D. Robinson, "The Mysterious Mysteriousness of Complementarity", 21 *Criminal Law Forum* (2010), p. 67, at p. 100; S. C. Roach, "How Political is the ICC? Pressing Challenges and the Need for Diplomatic Efficacy", 19 *Global Governance* (2013), p. 507, at p. 515.

[31] *See* L. E. Carter, "The Future of the International Criminal Court: Complementarity as a Strength or a Weakness?", 12 *Washington University Global Studies Law Review* (2013), p. 451, pp. 464-473.

[32] *See* e.g. F. Mégret and M. G. Samson, "Holding the Line on Complementarity in Libya", 11 *Journal of International Criminal Justice* (2013), p. 571, at pp. 577, 587.

[33] *See* C. C. Jalloh, "Kenya vs. The ICC Prosecutor", 53 *Harvard International Law Journal* (2012), p. 269, at pp. 284-285. This is also termed "positive" and/or "active" complementarity.

jurisdictions, and more guidance by the Appeals Chamber as to how these provisions should be interpreted would have been helpful also for future cases.

10. Secondly, I would like to underline that I am not convinced by the Defence's argument that violations of fair trial rights of a suspect should be sufficient to render the State in question unwilling genuinely to prosecute or investigate or even that Libya has the "burden of showing that the proceedings are being conducted independently, impartially and fairly and with the intention of bringing Mr. Al-Senussi to justice".[34] As important as the human right to a fair trial is, it cannot play a central role in the determination of the admissibility of a case. The Defence basically asks the Court to assume the role of a human rights court, sitting in judgment over domestic proceedings that are not yet even concluded. As I explained in the *Gaddafi* Dissenting Opinion, the rationale underlying the complementarity principle is a different one,[35] and I doubt that the Statute would even have been adopted had it foreseen the degree of interference with domestic proceedings argued for by the Defence.

11. Thirdly, in relation to whether Libya is unable genuinely to investigate and to prosecute Mr Al-Senussi, I note that both the Impugned Decision[36] and the Majority Judgment[37] address the purportedly significant differences between the case of Mr Al-Senussi and that of Mr Gaddafi.

12. In respect of Mr Gaddafi, the Pre-Trial Chamber decided – arguably unnecessarily – to consider the second limb of article 17 (1) (a) of the Statute even though it had found that Libya had not established that it was investigating the same case.[38] The Pre-Trial Chamber noted that Mr Gaddafi was not in the custody of the central authorities, but that of the Zintan militia;[39] that there were difficulties in obtaining the necessary evidence, in particular because of a lack of Government control over certain detention centres where potential witnesses are currently held and because of the non-existence of a proper witness protection programme;[40] and that

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[34] Document in Support of the Appeal, para. 97.
[35] *Gaddafi* Dissenting Opinion, paras 12-19.
[36] *See* Impugned Decision, paras 294-309.
[37] *See* Majority Judgment, paras 279, 287, 295.
[38] *See Gaddafi* Admissibility Decision, para. 137.
[39] *Gaddafi* Admissibility Decision, paras 206-208.
[40] *Gaddafi* Admissibility Decision, paras 209-211.

there were challenges in relation to the appointment of defence counsel for Mr Gaddafi.[41] On that basis, the Pre-Trial Chamber concluded that Libya was unable genuinely to investigate and prosecute Mr Gaddafi.[42]

13. In contrast, in respect of Mr Al-Senussi the Pre-Trial Chamber found in the Impugned Decision that, given that he "is already in the custody of the Libyan authorities, Libya is not 'unable to obtain the accused'";[43] that "at least some of the evidence and testimony that [is] necessary to carry out the proceedings against Mr Al-Senussi [...] has [...] already been collected, and there is no indication that collection of evidence and testimony has ceased or will cease because of unaddressed security concerns for witnesses in the case against Mr Al-Senussi or due to the absence of governmental control over certain detention centres";[44] and that "contrary to the situation in relation to Mr Gaddafi, who is not under the control of the State national authorities and for whom attempts to secure legal representation have repeatedly failed, Mr Al-Senussi is instead imprisoned in Tripoli by the central Government, and Libya submits that 'recently, several local lawyers have indicated their willingness to represent Mr. Al-Senussi in the domestic proceedings".[45]

14. To my mind, at least some of the distinctions drawn by the Pre-Trial Chamber between the cases of Mr Al-Senussi and of Mr Gaddafi appear to be far-fetched and are not particularly convincing. However, rather than this being an indication that the Pre-Trial Chamber erred in the case of Mr Al-Senussi, as the Defence alleges,[46] the need to distinguish between the two cases in the way the Pre-Trial Chamber did arguably only arose because the Pre-Trial Chamber may have been too demanding when it considered whether Libya was able genuinely to investigate and prosecute in relation to Mr Gaddafi.

15. In particular, I am concerned by the emphasis that the Pre-Trial Chamber placed on the fact that Mr Gaddafi was detained by the Zintan militia and not by the central authorities. I recall that Libya submitted that the Zintan militia was a

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[41] *Gaddafi* Admissibility Decision, paras 212-214.
[42] *Gaddafi* Admissibility Decision, para. 215.
[43] Impugned Decision, para. 294.
[44] Impugned Decision, para. 298.
[45] Impugned Decision, para. 308 (footnotes omitted).
[46] *See* Document in Support of the Appeal, paras 87, 88, 127, 130, 134.

"Government-sanctioned local authority and that there is no distinction in international law between a central and local authority".[47] Libya also referred to the "numerous examples [...] of the central Libyan Government exercising its authority in Zintan in relation to the domestic proceedings alongside the Zintan Brigade, which is responsible for supervising [Mr Gaddafi's] detention".[48] In my view, Libya's submissions should not have been ignored, in particular as it is for Libya to decide in which part of the country a trial should take place and where a suspect should be detained. Accordingly, I am of the opinion that the case against Mr Al-Senussi and that against Mr Gaddafi are rather similar. In the absence of evidence to the contrary, the results of the two cases should also be the same.

16. Given that the *Gaddafi* Admissibility Decision is no longer before the Appeals Chamber, I shall refrain from further commenting on its correctness in relation to the second limb of the admissibility test. Nevertheless, it may very well be based on an incorrect understanding, in particular, of the standard of proof and the assessment of facts in relation to admissibility challenges. In that regard, I recall my findings in the *Gaddafi* Dissenting Opinion:

> 60. In addition, I find that the Pre-Trial Chamber erred in imposing the burden of proof solely on Libya and in its evidentiary standards when assessing the materials relevant to Libya's investigations in order to establish whether Libya is investigating or prosecuting the case before the Court.[49] In my opinion, this does not comply with article 17 (1) (a) of the Statute and the principle of complementarity.
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> 61. Admissibility proceedings are not criminal proceedings, but proceedings *sui generis*.[50] The ways in which admissibility proceedings may be triggered

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[47] "Corrigendum to Document in Support of the Government of Libya's Appeal against the 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'", dated 24 June 2013 and registered on 25 June 2013, ICC-01/11-01/11-370-Conf-Exp (public redacted version: ICC-01/11-01/11-370-Red) (OA 4) (hereinafter: "*Gaddafi* Document in Support of the Appeal), para. 157.
[48] *Gaddafi* Document in Support of the Appeal, para. 158.
[49] The Pre-Trial Chamber also imposed a "high" burden of proof, but this is apparently due to its strict understanding of what is required by "(substantially) the same conduct" and would be remedied with a more flexible test as proposed in this Opinion.
[50] *See Kenya Admissibility Dissents*, Muthaura et al, para. 16; Ruto et al, para. 16. *See also* rule 58 of the Rules of Procedure and Evidence, providing the Chamber with discretion to conduct the proceedings as appropriate for their specific character. Further, with respect to whether the burden to prove that the investigation by a State is insufficient lies with the Prosecutor, *see* M. A. Newton, "The Complementarity Conundrum: Are We Watching Evolution or Evisceration?", 8 *Santa Clara Journal of International Law* (2010), p. 115, at p. 136; J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Martinus Nijhoff Publishers, 2008), pp. 178, 183.

differ as do the participants to any such proceedings.[51] In the proceedings at hand, the proceedings have three main participants: the Prosecutor, the State that is investigating or prosecuting and the suspect or accused. Victims as well as the authority that referred the situation to the Court may also make observations in these proceedings.[52] Any of the participants may have materials and information that are potentially relevant to whether a State is investigating or prosecuting the case before the Court and that they can share with the Court. As a rule, such materials should also be in the possession of the Prosecutor who needs to consider, from the very start of a "case", whether it is or may be admissible pursuant to article 17 of the Statute.[53] Requiring all of the participants to provide information would allow the Court to fully assess whether a State is investigating or prosecuting the case before the Court. The Court would thereby discharge its duty under the Statute that it "shall be complementary to national jurisdictions".[54] Such an approach would imply that the admissibility proceedings are Chamber-led and do not depend on which participant initiates the admissibility proceedings pursuant to article 19 of the Statute.[55] Having this background in mind, I consider that placing the burden of proof to show that a State is investigating or prosecuting solely on the challenging State, i.e. in this case Libya, appears unfair and undermines the principle of complementarity.[56]

62. Furthermore, the Court's rules of evidence should not be routinely applied to materials provided by a State in admissibility proceedings that are *sui generis*. Evaluating materials provided by a State according to the rules of evidence may lead, as it apparently did in the case at hand, to the result that documents submitted by governments in transition might be considered as lacking "probative value" or being not sufficiently "specific". Rather, to my mind, the materials provided should be taken at their face value, especially if the State, as in the case of Libya, has clearly expressed its intent to investigate the case before the Court and has taken action in this regard. Furthermore, stringent standards would impose unnecessarily high requirements on States with a legal and judicial system in transition and would unduly burden their transitional justice efforts. In addition, States that do not have such difficulties might more

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[51] *See* e.g. article 19 (1), (2) and (3) of the Statute.
[52] *See* article 19 (3) of the Statute.
[53] *See* article 53 (1) (b) and 53 (2) (b) of the Statute. Further, regarding the uncertainty of the relationship between the Prosecutor and the State of Libya, *see* S. C. Roach, "Legitimising Negotiated Justice: the International Criminal Court and Flexible Governance", 17 *The International Journal of Human Rights* (2013), p. 619, at p. 628.
[54] *See* article 1 of the Statute.
[55] *See e.g.* L. M. Keller, "The Practice of the International Criminal Court: Comments on 'The Complementarity Conundrum'", *8 Santa Clara Journal of International* Law (2010), p. 199, at pp. 228-230; M. A. Fairlie and J. Powderly, "Complementarity and Burden Allocation", in C. Stahn and M. M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. I (Cambridge University Press, 2011), pp. 642-681; suggesting also admissibility proceedings with a shared burden, or burden-free for the State; J. K. Kleffner (ed), *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press, 2008), pp. 208-209; *see also* Ad-Hoc Committee Report, para. 49.
[56] *See* article 1 of the Statute.

easily meet these high standards, putting them in a more advantageous position compared to States in transition.[57]

III. CONCLUSION

17. In conclusion, I am of the view that the Appeals Chamber must confirm the Impugned Decision as no appealable errors have been identified in it. As has been set out above, I therefore agree with the conclusion of the Majority Judgment, although for partly differing reasons, as set out above.

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

Judge Anita Ušacka

Dated this 24th day of July 2014

At The Hague, The Netherlands

[57] *See* e.g., T. O. Chibueze, "The International Criminal Court: Bottlenecks to Individual Criminal Liability in the Rome Statute", 21 *Annual Survey of International & Comparative Law* (2006), p. 185, at p. 196.