

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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PRE-TRIAL CHAMBER I

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

SITUATION IN LIBYA

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

Public

**Public Redacted Version of the Corrigendum to the “Defence Response to the
“Application on behalf of the Government of Libya pursuant to Article 19 of the
ICC Statute””**

Source: Defence

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

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1. Introduction¹

Unsigned statement/sentiments from Mr. Saif Al Islam Gaddafi 7 June 2012, Zintan

1. *I want to face justice.*
2. *I want to do so because I believe that Libya, the victims in Libya, the internationally community and myself – all have a right to the truth, and for the truth to be made public.*
3. *I would have liked to have been tried in Libya by Libyan judges under Libyan law in front of the Libyan people. But what has been happening in my case cannot be called a trial.*
4. *The truth is only possible in a fair and impartial trial.*
5. *There will be no truth if I am kept locked up and silenced in a remote mountain village, with no or very limited possibility to speak to my lawyers in order to convey my defence.*
6. *There will also be no truth if witnesses are faced with possible life sentences for simply testifying in my favour, there is no security or protection for them, nor any consequences if these witnesses are threatened and killed.*
7. *There will certainly be no justice in the case, if the prosecution is based on evidence extracted from torture and other inadmissible evidence, or persons who are too scared to say the truth.*
8. *I am not afraid to die but if you execute me after such a trial you should just call it murder and be done with it.*

¹ The Defence hereby files a public redacted version of its filing of 24 July 2012. The Defence has verified that the information referenced to confidential annexes and filings, was cited in public filings and documents.

9. *I would also prefer to live to see Libya become a democracy based on human rights and respect for the rule of law, but you cannot expect democracy to flourish if all the Libyan people see are show trials run by political expediency.*
10. *Over a year ago, representatives of the NTC asked the international community to intervene so that the Libyan people could have justice. I am asking for exactly the same thing – the only way for Libya and the Libyan people to have justice is for the ICC to try this case in a fair, impartial and independent manner, and, in so doing, set standards, which Libya can follow on its future path to democracy and the rule of law.*
11. These were the sentiments, which Mr. Gaddafi wished to convey to the Honourable Pre-Trial Chamber, based on the views he had provided to the OPCD on 3 March 2012, and reconfirmed on 7 June 2012. When Mr. Gaddafi attempted to sign this statement after reading it, the guard, who had informed the ICC delegation through the interpreter that he was illiterate, did not understand English and that his sole purpose of being present was to ensure issues of physical security, confiscated the statement and brought it to Dr. Gehani to read.
12. The ‘guard’, who is actually Mr. Ahmed Amer – a councillor who speaks several languages - was planted in the room to deliberately trick the delegation.² He came back into the room and (in the presence of the ICC interpreter), started shouting that this statement was very dangerous, violated Libyan national security, and that the Defence could not have it back.
13. The Defence attempted to seek instructions from Mr. Gaddafi in relation to the content of the challenge to admissibility filed by the Libyan government, however, as will be discussed *infra*, several additional documents were confiscated, including an annex to the challenge to admissibility filed by the Government of Libya. When the Defence attempted to go through other annexes with Mr. Gaddafi, the guard abruptly cut the visit short. The entire visit only lasted approximately 45 minutes and had been constantly disrupted by the fact that Mr. Amer kept confiscating documents and demanding to read Defence documents, which were on the table.
14. Mr. Gaddafi was therefore completely deprived of the ability to have an effective opportunity to participate in the fundamental question as to where he should be tried.

² Press Conference with Captain Al-Ajami, Annex 19.

15. The ability of the Defence to subsequently voice his clear preference concerning his wish to be tried before the ICC was also impeded by the fact that Counsel for Mr. Gaddafi and three other ICC officials were subsequently arrested and kept in arbitrary detention for twenty-six days. The sole rationale for doing so appears to be that the Libyan authorities consider it to be illegal, treason, or a violation of national security for either Mr. Gaddafi or his Counsel to indicate that Mr Gaddafi does not wish to be tried before Libyan courts, or does not believe that he will be tried in an independent and impartial manner before these courts.³
16. Unlike the released ICC officials, Mr. Gaddafi remains in the physical custody of the Libyan authorities. Such a disproportionate reaction to Mr. Gaddafi's legitimate wish to express his preferences concerning the forum for the trial has inevitably had a chilling effect in terms of the ability of the Defence to convey more sensitive concerns of Mr. Gaddafi that are directly relevant to the admissibility of the case, without risking possible retaliation against the defendant.
17. It would also appear that the Libyan authorities may have exploited the scenario of the four detained ICC officials to obtain political leverage in the run up to the national elections,⁴ and to attempt to extract concessions from the ICC concerning the admissibility of the case.⁵
18. Such blatant strong-arm tactics are completely inimical to the rule of law, and underscore the fact that it will be absolutely impossible for Mr. Gaddafi to be judged in an independent and impartial manner in Libyan courts. If the ICC were to bow to such pressure, or to be influenced by the diplomatic pessimism that the recent events simply highlight the difficulty of eventually transferring Mr. Gaddafi to The Hague, then the Court will set a deleterious precedent both for international justice, and for the safety and security of ICC personnel, who will henceforth be viewed as potential

³ Press Conference with Commander Al-Ajami from the Zintan Brigade, Annex 19 at p. 3.

⁴ The Libyan television news viewed by the ICC staff in Zintan contained numerous reports of how the Libyan authorities (depending on the report, either the NTC or the Zintan brigade) had clearly demonstrated their capacity to effectively defend Libya against dangerous pro-Gaddafi ICC spies and to face down the Security Council, and the ICC. See also "ICC staff 'in jail' in Libya after Saif Gaddafi visit", BBC, 11 June 2012 and the Press Conference of Captain Al Ajami, Annex 19.

⁵ After the four ICC officials were initially arrested, the ICC focal point Dr. Gehani informed the ICC interpreter (in Arabic) that 'we had to understand that the Libyan authorities would do anything to keep the case in Libya and ensure that Mr. Gaddafi is not transferred to The Hague'. The ICC interpreter contemporaneously reported this conversation to the three other ICC detained officials.

According to Australian Foreign Minister Senator Bob Carr, the Libyan authorities had indicated that they would be likely to release Ms. Taylor "if the ICC agreed that Saif could be tried in Libya, rather than The Hague." C. Stephen, 'Libya dashes hopes of early release for Australian ICC official' *The Guardian* 21 June 2012.

bargaining tools by any States which are being required to cooperate with the ICC against their will.

19. As observed by Judge Nieto-Navia in the Barwaygwaiza case,

The Appeals Chamber, although mindful of this essential need for co-operation by the Rwandan government, is also mindful of the role the Tribunal plays in this process and therefore I refute most strenuously the suggestion that in reaching decision, political considerations should play a persuasive or governing role. On the contrary, in no circumstances would such considerations cause the Tribunal to compromise its judicial independence and integrity. This is a Tribunal whose decisions must be taken, solely with the intention of both implementing the law and guaranteeing justice to the case before it, not a result of political pressure and threats to withhold co-operation being exerted by an angry government.⁶

20. The Defence for Mr. Saif Al Islam Gaddafi therefore respectfully requests the Honourable Pre-Trial Chamber to dismiss the challenge to admissibility submitted by the Libyan authorities on the grounds that the Libyan authorities have failed to discharge their burden of demonstrating that:

1. Libya is actively investigating the conduct related to the ICC case concerning Mr. Gaddafi;
2. Libya is willing to genuinely investigate and prosecute Mr. Gaddafi in a manner which is consistent with principles of due process recognized by international law; and
3. Libya is able to genuinely investigate and prosecute Mr. Gaddafi.

2. Burden of Proof for the Admissibility Challenge

21. As the entity challenging admissibility, the responsibility for establishing that all elements of the admissibility challenge are met rests squarely on the Libyan authorities.⁷

⁶ Prosecutor v. Barayagwiza, Decision on Prosecutor's Request for Review of Reconsideration, Separate Decision of Judge Nieto-Navia, 31 March 2000 at para. 7.

⁷ 'Decision on the OPCD request for variation of time limit', ICC-01/11-01/11-159, 28 May 2012 at para. 9, citing Appeals Chamber, "Judgment on the appeal of the Republic of Kenya against the decision of Pre-

22. There is no basis in either the wording of Article 17 or the jurisprudence of the ICC for differentiating between the burden of proof, which applies to establishing the existence of investigations or prosecutions, and the burden for demonstrating whether the State is genuinely able or willing to conduct such investigations or prosecutions.
23. Article 17(1) delineates three distinct criteria, which must be satisfied in order to determine that the case is inadmissible:
- i. The case is being actively investigated or prosecuted by a State, which has jurisdiction over it;
 - ii. The State is not unwilling genuinely to carry out the investigation or prosecution; and
 - iii. The State is not unable genuinely to carry out the investigation or prosecution.
24. The Appeals Chamber has confirmed the cumulative nature of these criteria.⁸
25. The second and third criteria are intrinsically linked to the first:
- In both article 17 (1) (a) and (b) of the Statute, the question of unwillingness or inability is linked to the activities of the State having jurisdiction. Article 17 (1) (a) links the unwillingness or inability to the investigation or prosecution: "unless the State is unwilling or unable genuinely to carry out the investigation or prosecution" (emphasis added).⁹
26. Inclusion of the word "unless" does not shift the burden of proof as concerns the second and third criteria, but rather qualifies the general assertion that *any* investigation or prosecution of a case by a State with jurisdiction over the case is sufficient.
27. The Libyan authorities have also sought to diminish their evidential burden by repeatedly citing a so-called presumption of primacy for domestic investigations based on State sovereignty under the ICC Statute. The burden of proof falls on the entity challenging admissibility: the fact that a State is challenging admissibility in the present case does not exempt the Libyan authorities from discharging this burden.

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', ICC-01/09-02/11-274, para. 61.

⁸ Prosecutor v. Katanga and Ngudjolo, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case', 25 September 2009, ICC-01/04-01/07-1497 at para. 78.

⁹ Prosecutor v. Katanga and Ngudjolo, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case', 25 September 2009, at para. 76.

28. Moreover, no such presumption of primacy exists. The ICC Statute is founded on the principle of complementarity, but “if States do not or cannot investigate and, where necessary, prosecute, the International Criminal Court must be able to step in”.¹⁰
29. In construing the notion of complementarity under the Rome Statute, considerations of State sovereignty should not prevail against the overarching concern of the Statute to ensure an effective remedy for the “victims of unimaginable atrocities that deeply shock the conscience of humanity”, and to “put an end to impunity” through the genuine investigation and prosecution of alleged crimes.¹¹ As important as state sovereignty is to the principle of complementarity, “[c]onsiderations of state sovereignty should not be allowed to detract from the principle of effective international prosecutions.”¹²
30. The jurisdiction of the ICC in this case was triggered by Security Council Resolution 1970 - a resolution which the Libyan authorities – affiliated to the National Transitional Council (NTC) - expressly requested and endorsed.¹³ Having called for the ICC to assume primacy over domestic investigations for the events in question, the NTC cannot now claim that its State sovereignty is being violated by the very same ICC action.
31. Indeed, in a statement to the Security Council, the NTC representative explicitly congratulated the Security Council for invoking the responsibility to protect doctrine, and issuing Security Council Resolution 1970 to pierce the veil of State sovereignty in order to protect the human rights of all persons in Libya.¹⁴
32. Mr. Saif Al Islam Gaddafi is neither more nor less deserving as any other person in Libya of having his fundamental human rights protected and vindicated by the ICC in circumstances in which the national authorities are either unwilling or unable to do so.
33. It should also be noted that as the entity conducting the investigations, the Libyan authorities exercise control over the information concerning these proceedings: “[a]s

¹⁰ ICC-01/04-01/07-1497 at para. 85.

¹¹ Preamble to the Rome Statute; ICC-01/04-01/07-1497 at para. 83.

¹² J. Pichon, ‘The Principle of Complementarity in the Cases of the Sudanese Nationals Ahmad Harun and Ali Kushayb before the International Criminal Court,’ *International Criminal Law Review* 8 (Martinus Nijhoff Publishers, 2008) 185, 201.

¹³ Mr. Shalgham (Libyan Arab Jamahiriya) addressing the Security Council on 25 February 2011, http://www.un.org/ga/search/view_doc.asp?symbol=S/PV.6490; Mr. Dabbashi (Libyan Arab Jamahiriya) addressing the Security Council on 26 February 2011, http://www.un.org/ga/search/view_doc.asp?symbol=S/PV.6491

¹⁴ Mr. Dabbashi (Libya) addressing the Security Council on 16 September 2011, http://www.un.org/ga/search/view_doc.asp?symbol=S/PV.6620

most, if not all, of the relevant information about national proceedings would be in the hands of national authorities, not the ICC prosecutor, the burden of proof should be placed on the party best able to produce the relevant information – the state.”¹⁵ To hold otherwise “would impose a prohibitively onerous burden on the Court. Moreover, to give the ICC such a role would involve the ICC in a considerable amount of investigation into national legal systems, which is not the intended remit of the Court.”¹⁶

34. In the present case, by failing to allow the Defence to communicate with Mr. Gaddafi on a privileged basis, the Libyan authorities have impeded the Defence from being able to verify or contest issues, which are fundamental to the admissibility challenge. It would be appropriate for the Chamber to draw adverse inferences against the Libyan authorities, in connection with issues, which the Defence was prevented from verifying with the defendant.¹⁷
35. The Appeals Chamber has also confirmed that there is no presumption of accuracy and good faith as concerns the statements of State parties.¹⁸
36. The credibility and weight of the Libyan authorities’ assurances to undertake certain investigative actions and to apply principles of fair trial, must also be viewed through the lens of – *inter alia*:
- i. Libya’s demonstrated failure to comply with fundamental obligations under the Rome Statute or ICC judicial orders, such as their obligation to bring Mr. Gaddafi before a judge pursuant to Article 59, to provide him with appropriate dental treatment, to implement a privileged visit with his ICC counsel, and to immediately release Mr. Gaddafi’s counsel and three other illegally detained ICC staff;¹⁹

¹⁵ “Justice in the Balance: Recommendations for an Independent and Effective International Criminal Court,” Human Rights Watch, June 1998, p. 76.

¹⁶ *Ibid.*

¹⁷ Public Redacted Version of the “Defence Request”, ICC-01/11-01/11-152-Red, 18 May 2012, at paras. 78 and 79.

¹⁸ Prosecutor v. Ruto et al., 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”, ICC-01/09-01/11-307 at para. 69, citing ICC-02/04-179 (OA) and ICC-02/04-01/05-371 (OA 2), para. 36.

¹⁹ Al-Moayad v. Germany ECHR, dec. no. 35865/03, § 68, 20 February 2007.

- ii. The absence of any concrete and specific details as to how the Libyan authorities intend to implement certain rights, bearing in mind the current security and human rights situation in Libya;²⁰
- iii. The fact that the admissibility challenge was submitted by authorities which had not been democratically elected, and any assurances provided by it (including as concerns their intention to actively prosecute the case) might be completely overturned after the elections;²¹ and
- iv. The absence of any independent, impartial, and neutral monitoring mechanism as concerns the progress of the domestic proceedings.²²

3. The relevance of the right to a fair trial and due process issues to Article 17 determinations

37. The *raison d'être* of the ICC is to eliminate impunity. Impunity will not, however, be eliminated if the wrong person is convicted for the wrong crimes. The false conviction of an innocent person is a crime in itself, and creates judicial impunity for the actual perpetrators of the crimes in question. Eliminating impunity also does not equate to convicting whoever happens to have been arrested by the Prosecution - otherwise a trial would not be necessary.²³ A fair independent and impartial process is the *sine qua non* for eliminating impunity, and is a fundamental right guaranteed by all human rights instruments.

38. In determining whether a State should be considered to be 'unwilling' for the purposes of admissibility, the chapeau of Article 17(2) enjoins the Court to have "regard to the principles of due process recognized by international law". This criterion reflects the overarching obligation of the Court under Article 21(3) to apply the provisions of the Statute in a manner which is consistent with "internationally recognized human rights".

39. When read in connection with Article 21(3), it cannot be said that the phrase 'principles of due process recognized by international law' is in any way ambiguous;

²⁰ Klein v. Russia, no. 24268/08, § 55, 1 April 2010; Khaydarov v. Russia, no. 21055/09, at para. 111, 20 May 2010.

²¹ Shamayev and Others v. Georgia and Russia, no. 36378/02, para. 344, ECHR 2005-III; Kordian v. Turkey (dec.), no. 6575/06, 4 July 2006; Abu Salem v. Portugal (dec.), no 26844/04, 9 May 2006.

²² Prosecutor v. Trbic, Referral Bench "Decision on Referral of Case Under Rule 11bis With Confidential Annex"; 27 April 2007 at paras. 44-45; Mohammed Alzery v. Sweden (25 October 2006) Communication No. 1416/2005 at para. 11.5; Chentiev and Ibragimov v. Slovakia (dec.), nos. 21022/08 and 51946/08, 14 September 2010; Gasayev v. Spain (dec.), no. 48514/06, 17 February 2009.

²³ Prosecutor v. Barayagwiza, Decision on Prosecutor's Request for Review of Reconsideration, Separate Decision of Judge Nieto-Navia, 31 March 2000 at para. 16.

there is therefore no basis for resorting to the drafting history rather than interpreting and applying this phrase in accordance with its plain meaning, and in a manner which is consistent with other provisions in the Statute, such as Article 21(3) of the Statute.

40. Similarly, the term ‘justice’ in Article 17(2)(b) and (c) must be given its ordinary meaning, which connotes a decision, which has been based on a fair trial. To equate ‘justice’ with ‘convictions’ would be fundamentally contrary to the presumption of innocence.
41. Notably, the Appeals Chamber has invoked Article 21(3) of the Statute in order to proclaim that a “fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped.”²⁴ The Appeals Chamber accepted that “the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice.”²⁵
42. The interests of an individual State can hardly be said to trump the interest of the international community to put the accused on trial, which is in turn, subordinated to the overarching requirements of fair trial. Hence, if Article 21(3) operates to prevent the ICC from convening a trial, which would breach the defendant’s right to a fair trial, it must also operate to prevent the ICC from divesting its jurisdiction to a State, which is either unwilling or unable to convene a fair trial against the defendant.
43. Article 67(1) of the Statute enshrines the right of the accused to benefit from the protections elucidated in article 67(1)(a) in full equality. If the Chamber were to exclude fair trial considerations from the ambit of admissibility challenges, this would violate the right of the defendant to benefit from Article 67(1) in full equality with other defendants, who are being tried before the ICC. It would also mean that the application of Article 21(3) would be applied in a discriminatory manner, depending on the nationality of the defendant, as defendants originating from States which adhere to fair trial standards, would be guaranteed the rights under Article 67(1) in domestic proceedings, whereas other defendants may not.
44. Victims and defendants in Africa have just as much a right to justice as those in any other part of the world. The fact that many African States were the first to ratify the

²⁴ Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, ICC-01/04-01/06-772 at para. 37.

²⁵ At para. 39.

Rome Statute demonstrates their desire that there would be an effective mechanism for ensuring independent, impartial and fair trials, irrespective of the political will of the government of the day. Representatives of Libya also heralded the referral of the situation to the ICC;²⁶ having requested the international community to apply ‘justice to Libya’, the Libyan authorities cannot seek to claim that it would now be somehow ‘neocolonialistic’ to do so.

45. Indeed, in an article which coincided with Mr. Gaddafi’s arrest, Mr. Phillipe Sands Q.C., the British counsel for the Libyan authorities, proclaimed that:

The ICC intervention helped transform the outcome in Libya by contributing to the delegitimisation of the Gaddafi regime. Military action followed and was decisive. But the ICC's role made the crimes an international matter, and in staying the hand of vengeance the Hague judges will have to be involved.²⁷

46. Moreover, since Libya has ratified certain human rights instruments such as the ICCPR and the African and Arab Charters on human rights and internalized their application,²⁸ its ability to adhere to the standards therein in this particular case is directly relevant to the question as to whether they are *willing* to investigate this particular case in an impartial and independent manner, and the extent to which they are *able* to carry out their proceedings in the manner required by their own domestic legal obligations.²⁹

47. In this connection, the African Commission on Human Rights has emphasized that “a State party to the African Charter regardless of its level of development must meet certain minimum standards *regarding fair trial or due process conditions*” The [Human Rights] Committee concluded that “the legitimate objective of safeguarding

²⁶ Mr. Dabbashi (Libyan Arab Jamahiriya) addressing the Security Council on 26 February 2011. http://www.un.org/ga/search/view_doc.asp?symbol=S/PV.6491

²⁷ P. Sands, ‘Where Should Saif Gaddafi Be Put on Trial?’, *The Guardian* 20 November 2011.

²⁸ According to the report submitted by the Libyan government to the Human Rights Committee, every international instrument which is ratified by the People’s Congress and published in the Official Gazette becomes binding and enforceable by the country’s judiciary, in the same way as domestic legislation, with effect from the date of its publication in the Official Gazette. Consequently, the provisions of the ICCPR and African Charter must be applied by the country’s judiciary, and any interested party has the right to invoke them before the Libyan judges at any level of the judiciary hierarchy (Libyan Arab Jamahiriya third periodic report to the Human Rights Committee, CCPR/C/102/ADD.1, 15/10/1997, paras. 31 and 32).

²⁹ J. O’Donohue and S. Rigny, ‘The ICC must consider fair trial concerns in determining Libya’s application to prosecute Saif al-Islam Gaddafi nationally’ *EJIL Talk*, 8 June 2012, <http://www.ejiltalk.org/the-icc-must-consider-fair-trial-concerns-in-determining-libyas-application-to-prosecute-saif-al-islam-gaddafi-nationally/>

and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle ... democratic tenets and human rights".³⁰

48. Although Article 67(1) of the Rome Statute exceeds human rights standards in certain discrete aspects (for example, as concerns the use of the word 'fully' in Article 67(1)(a)), it hews closely to the principles set out in Article 14(1) of the ICCPR. The fair trial rights set out in Article 14(1) of the ICCPR, which Libya has ratified, are considered to be reflective of internationally recognized standards,³¹ and fundamental aspects, such as the presumption of innocence and the right to appear before a judge to challenge the legality of detention, are considered to be peremptory norms of international law.³² For this reason, in determining whether individual cases could be referred back to domestic authorities, the ICTY and ICTR have explicitly considered whether the defendant's rights under Article 14(1) of the ICCPR (which are encapsulated in Articles 20 and 21 of the ICTR and ICTY Statutes) would be respected in the domestic proceedings in question.³³
49. Fair trial rights are not just limited to those which apply to the trial proceedings. In the aforementioned Lubanga judgment, the Appeals Chamber emphasised that the right to a fair trial inheres in all stages of the proceedings as reflected in Article 55 and Article 67(1),³⁴ and further cited "unfairness in the treatment of a suspect" as grounds for staying the process.³⁵
50. Article 55(1) of the Statute applies to any investigation under the Statute, irrespective of whether it is conducted by domestic authorities in connection with domestic proceedings, by the ICC, or domestic authorities at the request of the ICC.³⁶ An investigation, which triggers the applicability of Article 17(1) is necessarily an investigation under the Statute, and must therefore comport with the requirements of

³⁰ Article 19 v. The State of Eritrea, African Commission on Human and Peoples' Rights, Communication No. 275/ 2003 (2007), citing the Human Rights Committee Albert Mukong case.

³¹ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 2 May 1993, at para. 106.

³² Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N.Doc. CCPR/C/21/Rev.1/Add.11 (2001), at paras. 11 and 16.

³³ Rule 11 bis was amended in September 2004 to provide that the case of an accused can be referred to "any national jurisdiction with the judicial capacity to afford the accused a fair trial and which does not have the death penalty." Eleventh annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 16 August 2004, at para. 10.

³⁴ Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, ICC-01/04-01/06-772 at para. 37.

³⁵ At para. 39.

³⁶ C. Hall, 'Article 55', in O. Triffterer (ed.) Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article (Hart Publishers 2nd ed. 2008) at p. 1092.

Article 55(1). This is consistent with the fact that the prohibitions on arbitrary detention, and cruel and inhumane treatment, as set out in Article 55(1), are considered to be peremptory norms, which cannot be derogated from in times of emergency or during armed conflict.³⁷

51. Notwithstanding the fact that the defendant is physically within the custody of the Libyan authorities, the ICC exercises jurisdiction over the case, and must consider the implications for the rights of the defendant if jurisdiction were to be ceded to the Libyan authorities. This is consistent with the principle that the legal act of transferring jurisdiction can trigger extradition protections, even if the physical location of the defendant remains unchanged.³⁸
52. The principle of *refoulement*, according to which a person cannot be extradited to a country in which they could face torture or cruel and inhumane treatment, is an intrinsic component of the *jus cogens* prohibition on torture.³⁹ Pursuant to Article 53 of the Vienna Convention on the Law of Treaties, the ICC Statute must be construed in a consistent manner with this prohibition. Trial Chamber II has further recognised that “as an international organisation with a legal personality, the Court cannot disregard the customary rule of *non-refoulement*.”⁴⁰
53. It therefore follows that in line with the Chamber’s obligation to give ‘regard to principles of due process recognized by international law’, the Chamber must interpret the reference to ‘due process’ and the term ‘justice’ in article 17(2)(b) and (c) in a manner which is consistent with the Appeals Chamber’s definition of justice – that is, a verdict based on the minimum fair trial rights set out in Article 14(1) of the ICCPR, and the protections set out in Article 55 of the Statute.
54. Similar, in construing the ability of a State to carry out its proceedings, the ICC must take into consideration the extent to which the State can comply with its own domestic legal obligations, and peremptory norms of international law.

³⁷ General Comment No. 29 States Of Emergency (Article 4), 31 August 2001, at paras. 7 and 11.

³⁸ Al-Saadoon & Mufdhi v. the United Kingdom (application no. 61498/08) 30 June 2009, at para. 88.

³⁹ J Dugard and C Van Den Wyngaert, “Reconciling Extradition with Human Rights”, 92 AM. J. INT’L L. 187, 198 (1998); Report of the Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 28, U.N. Doc. A/59/324 (1 September 2004); Article 4(2) of the ICCPR; Human Rights Committee General Comment No. 20 on Article 7 (No. 20, of 10 March 1992); Human Rights Committee, *Jama Warsame v. Canada* (21 July 2011) CCPR/C/102/D/1959/2010 (Communication No. 1959/2010), at para. 8.3; *Saadi v. Italy* [GC], no. 37201/06, §§ 125 and 138, ECHR 2008.

⁴⁰ *Prosecutor v. Katanga and Ngudjolo*, Decision on an Amicus Curiae application and on the “Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d’asile” (articles 68 and 93(7) of the Statute), ICC-01/04-01/07-3003 ,at para. 64.

55. To hold otherwise would undermine the very credibility and legitimacy of the ICC. Article 8(2)(c)(iv) of the the Rome Statute explicitly sanctions the failure to try prisoners of war in accordance with the requisite precepts of due process.⁴¹ The ICC cannot very well prosecute persons for failing to comport with these due process requirements whilst at the same time, give its blessing to States to conduct domestic proceedings, which also fail to comport with these standards.
56. The relevance of fair trial guarantees is also confirmed by the jurisprudence of the ICC in the Katanga and Ngudjolo case, in which the Trial Chamber found that self-referrals, based on the fact that the “the State considers itself unable to hold a fair and expeditious trial or because it considers that circumstances are not conducive to conducting effective investigations or holding a fair trial”, were consistent with the notion of complementarity under article 17.⁴²
57. Similarly, Rule 51 of the Rules of Procedure and Evidence provides that in making its assessment under Article 17(1), the ICC may consider information that the challenging State’s “courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct”. Notably, this rule does not limit the ICC’s consideration of such matters to Article 17(2), but extends it to any determination on the willingness and ability of the State to genuinely investigate the case. The power to consider evidence on a particular matter necessarily translates to a right to base the admissibility decision on such matters.
58. The fact that Mr. Gaddafi faces the death penalty in connection with domestic proceedings both raises an independent barrier to the transfer of the case, and heightens the obligation to ensure the application of due process standards.
59. In terms of the former aspect, in the absence of a clear Statutory position, the Court must consider sources of customary international law, pursuant to Article 21(2).
60. There is a clear principle that international criminal courts and tribunals can neither apply the death penalty, nor transfer a defendant to the jurisdiction of a State, which applies the death penalty. When establishing the *ad hoc* Tribunals, the Secretary-General acknowledged that the Tribunals were bound by either conventional law

⁴¹ Although the wording of article 8(2)(c)(iv) refers to the passing of sentences and carrying out of executions, fn 59 to the Elements of the Crimes requires the ICC to consider whether “the cumulative effect of factors with respect to guarantees deprived the person or persons of a fair trial”. Paragraph 4. Elements of the Crimes, Article 8(2)(c)(iv)). See also K. Dörman Elements of War Crimes Under the Rome Statute of the International Criminal Court, Sources and Commentary (Cambridge University Press 2003) at p. 419-420.

⁴²Prosecutor v. Katanga and Ngudjolo, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute) ICC-01/04-01/07-1213, para. 80.

ratified by the States in question, or existing customary international law.⁴³ Notwithstanding the fact that Rwanda explicitly provided for the death penalty, the Statute for the ICTR (and that of the ICTY) expressly eschewed its use.⁴⁴

61. All international courts and tribunals established from this date have also explicitly precluded the use of the death penalty. Indeed, although the Special Tribunal for Lebanon applies Lebanese national law – which permits the imposition of the death penalty - the Statute explicitly prohibits the Tribunal from imposing such a measure.⁴⁵
62. Apart from the fact that these Courts and Tribunals have stipulated that they themselves should not apply the death penalty, Rule 11*bis* of the Statutes of the ICTY and ICTR further provides that the Tribunals may not refer cases to a country, where they could face the death penalty, even if the imposition of the death penalty is lawful in that country.⁴⁶
63. There are important reasons for distinguishing between the applicability of the death penalty to ordinary domestic crimes, as compared to international crimes related to armed conflict or widespread and systematic attacks against civilian populations. The death penalty is primarily an instrument of vengeance, which has no rehabilitative or reconciliatory virtues. In contrast, and as recognized by the Libyan authorities in their challenge,⁴⁷ the *raison d'être* of international criminal justice is to ‘stay the hand of vengeance’ by utilizing justice mechanisms to ultimately promote peace and reconciliation. A defendant who has been executed can no longer repent or issue an apology. Due to the fact that the death penalty is itself, inhuman and degrading treatment,⁴⁸ any statements made by the defendant during the trial would inevitably be tainted by the coercive effect of the prospect of facing the death penalty.
64. Its very finality may also be counterproductive to the goal of international courts and tribunals to eliminate impunity and to determine the truth. The arrest warrant against Mr. Gaddafi pertains to allegations of crimes against humanity. For such offences, the

⁴³Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 2 May 1993 at para. 29.

⁴⁴ ‘Letter from the Permanent Representative of Italy to the United Nations Addressed to the Secretary-General’, UN Doc. S/25300, Article 7 (1-2). UN Doc. S/PV.3453. p 16; ‘Report on the Mission to Rwanda on the Question of Violence Against Women in Situations of Armed Conflict’, UN Doc. E/CN.4/1998/54/Add.1, para. 40.

⁴⁵ Report of the Secretary-General on the establishment of a special tribunal for Lebanon, 15 November 2006, S/2006/893 at para. 22.

⁴⁶ Rule 11 *bis* (B) of the ICTY Rules of Procedure and Evidence, and Rule 11 *bis* (C) of the ICTR Rules of Procedure and Evidence.

⁴⁷ ICC-01/11-01/11-130-Red at para. 95.

⁴⁸ Al Sadoon and Mufhdi v. United Kingdom, no. 61498/08, 2 March 2010, at para. 120.

international community is itself a victim, and has a vested interest in ensuring that the correct person is convicted for the allegations in question. Due to the complex nature of these cases, it may be the case that evidence only emerges after the completion of the trial or appeal. This is demonstrated by the number of times which Rule 119, which permits the review of a final judgment if new facts have emerged, has been invoked at the international courts and tribunals. It is difficult for a case to be reopened if the defendant is no longer alive to agitate for such measures to be taken. The imposition of the death penalty would also frustrate the potential application of Article 19(10) of the Statute, which permits the Prosecutor to request the Chamber to review its admissibility decision on the basis of new facts or evidence.⁴⁹

65. Even if the Chamber were to find that the possible implementation of the death penalty does not in itself, act as a bar to Libya's challenge to admissibility, its possible implementation augments the importance of verifying whether the proceedings in Libya will comport to the requisite standards of due process and fairness.
66. The imposition of the death penalty without adhering to the requisite standards of due process and fair trial is no different than judicially sanctioned murder. For this reason, the Human Rights Commission has emphasized that the due process and fair trial rights set out in Articles 14 and 15 of the ICCPR are non-derogable in cases in which the defendant is facing the death penalty.⁵⁰ There is therefore a heightened obligation on the ICC to assess whether there are sufficient legal and practical guarantees in place to ensure that the defendant's right to a fair trial in Libya will be implemented in an effective manner; the simplistic recitation of legal provisions, which either will not or cannot be implemented, does not suffice.

4. Libya is not actively investigating the conduct related to the charges before the ICC

67. The ICC Appeals Chamber has confirmed that in order to challenge the admissibility of the case before the ICC, the national authorities must establish, through the

⁴⁹ Mr. Gaddafi informed the Defence on 7 June 2012 that the Prosecutors assigned to his case had indicated that they intended to expedite the trial so that he could be convicted and executed in order to forestall any potential Security Council action on behalf of the ICC. Irrespective of the likelihood of this happening, it is clear that providing such information to the defendant would generate significant emotional anguish.

⁵⁰ See also *Reid v. Jamaica*, the Human Rights Committee, (No. 250/1987) para. 11.5; and *Advisory Opinion of the Inter-American Court of Human Rights*, OC-16/99 of 1 October 1999, para. 136.

submission of credible and coherent evidence, that they are actively investigating the same person and same conduct, as the case before the ICC.⁵¹

68. In the present challenge, Libya has failed to meet the threshold requirement due to the fact that:

1. Libya has failed to adduce sufficiently comprehensive and credible evidence that it is actively investigating the case; and
2. there is insufficient correlation between the domestic investigations against Mr. Gaddafi and the case before the ICC.

4.1. Libya has failed to adduce sufficiently specific and probative evidence that it is investigating the case

69. In line with the fact that the burden of proof for the challenge of admissibility falls on Libya, the Libyan authorities cannot merely assert that investigations are ongoing; they must “provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case”.⁵² The statements of the authorities concerning the progress of the investigations or descriptions of activities by a Police commissioner will be insufficient to establish these elements.⁵³ Information must be provided in relation to both the content and date of witness statements.⁵⁴

70. The Libyan Application and its annexes do not include any evidence itself, or police reports; Annex C simply provides an extremely brief summary (as in one or two sentences) of witness statements, which was prepared by the Prosecutor-General. It therefore has no greater evidential value than the assertions of a State.

71. The names of the witnesses have been redacted (pseudonyms have been provided), and there is no indication as to the date on which the statements were taken, or indeed, whether the persons have actually provided signed statements, and are willing to testify. Many of these witness summaries lack a sufficient degree of specificity to determine whether there is any linkage with the allegations and time period of the ICC arrest warrant. The absence of dates concerning the witness statements also

⁵¹ ICC-01/09-01/11-307.

⁵² ICC-01/09-01/11-307 at para. 62.

⁵³ ICC-01/09-01/11-307 at para. 69.

⁵⁴ Prosecutor v. Ruto et al., Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ICC-01/09-01/11-101 at para. 68.

prevents the ICC from being able to assess whether the investigation is ongoing, and the timeliness of the investigative steps.

72. A vague summary of evidence cannot be considered to constitute evidence possessing a sufficient degree of specificity and probative value.
73. By referring to the ‘confidentiality of investigations’, the Libyan authorities are seeking to exempt themselves from an admissibility standard which applies to every other State seeking to challenge admissibility.
74. The civil law concept of ‘confidentiality of investigations’ is designed to protect the rights of the defendant by ensuring that his reputation is not publicly besmirched prior to the issuance of charges, and to prevent collusion between witnesses. This principle only applies vis-à-vis the public, and not other judicial authorities or the Defence.⁵⁵
75. Under domestic law, since Mr. Gaddafi is detained, he should have been provided with this evidence so that he can challenge the legality of his detention.⁵⁶ Conventions on mutual cooperation and extradition also require requesting parties – irrespective of their legal tradition - to adduce sufficient evidence to satisfy the requirements of any treaties concluded with the party, which has physical custody of the defendant.⁵⁷ In line with this principle, in its bilateral extradition treaty with the United Kingdom, Libya agreed to provide “such evidence as would justify committal for trial under the laws of the requested State”,⁵⁸ thereby demonstrating that the principle of ‘confidentiality of investigations’ is not a legal impediment to the provision of such evidence to a foreign judicial entity.
76. It is also notable that in considering whether domestic authorities have conducted effective and impartial investigations, the ECHR has held that the requesting State cannot cite ‘confidentiality of investigations’ as grounds for failing to disclose evidence or information, which is relevant to any allegations or complaints made by

⁵⁵ Article 61 of the Code of Criminal Procedure sets out the right of the defendant to participate in the investigation and to access evidence. Article 176 provides that the file shall be transmitted to the judge to decide upon any extensions of the detention order, and that the judge shall issue the decision after having heard from the Defence. Annex 1.

⁵⁶ Article 176 of the Criminal Procedure Code, Annex 1. Mr. Saleh Ibrahim Abduljawad, a Libyan lawyer who was sent by the Prosecution authorities on 8 June 2012 to speak to the four detained ICC staff, confirmed that under Libyan law, anyone who is being detained has a right to access the evidence which forms the basis of detention.

⁵⁷ United Nations Office on Drugs and Crime, Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters, Pt 1, at paras. 107-108. http://www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf

⁵⁸ Article 6(2)(b) of the Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Great Socialist People’s Libyan Arab Jamahiriya on Extradition London, 17 November 2008, <http://www.fco.gov.uk/resources/en/pdf/3706546/3892733/10149409/TrLibya3.2009Extrad>

the applicant concerning the effectiveness of the investigation.⁵⁹ Failure to disclose the information concerning the criminal investigations can give rise to adverse inferences against the State.⁶⁰

4.1.1. Internal indicia that the evidence lacks relevance and probative value

77. In any case, notwithstanding the brevity of the summaries, it is apparent that the following statements have no nexus with the ICC case:

- i. The information allegedly provided by Witness [Redacted] has no relation to the events in February 2012 or the ICC Prosecution allegations concerning the alleged suppression of protestors. The armed conflict between the revolutionaries and the Libyan army had a completely different factual matrix and legal framework than the allegations concerning the suppression of protestors, and as such, they cannot be considered to be part of the same transaction;⁶¹
- ii. Witnesses [Redacted], [Redacted]⁶² and [Redacted]⁶³ are too vague and contain insufficient information (such as dates and locations) to assess the relevance to the ICC arrest warrant;
- iii. Witnesses [Redacted], [Redacted], [Redacted], [Redacted],⁶⁴ [Redacted], [Redacted], [Redacted], [Redacted], [Redacted], [Redacted], [Redacted],⁶⁵ [Redacted], [Redacted], [Redacted] and [Redacted]⁶⁶ refer to allegations concerning events falling outside of the time period of the ICC arrest warrant, and which concern the factual matrix of the armed conflict rather than the allegations concerning the suppression of protestors (this can be deduced, *inter alia*, by the references to [Redacted]);⁶⁷

⁵⁹ *Khadisov and Tsechoyev v. Russia* (Application no. 21519/02), 5 February 2009 at para. 177, citing *Tanrikulu v. Turkey* [GC], no. 23763/94, § 71, ECHR 1999-IV.

⁶⁰ *Estamirov and others v. Russia*, application no. 60272/00, 12 October 2006, paras. 102 -103: see *al well inter alia Israilova and Others v. Russia*, no. 35079/04, 28 October 2010, para. 145, *Musikhanova and Others v. Russia*, no. 27243/03, 4 December 2008, para. 107; *Mikheyev v. Russia*, no. 77617/01, 26 January 2006 para. 104.

⁶¹ ICC-01/11-01/11-145-Conf-AnxC at p. 3.

⁶² ICC-01/11-01/11-145-Conf-AnxC at p. 3.

⁶³ ICC-01/11-01/11-145-Conf-AnxC at p. 4.

⁶⁴ ICC-01/11-01/11-145-Conf-AnxC at p. 4.

⁶⁵ ICC-01/11-01/11-145-Conf-AnxC at p. 5.

⁶⁶ ICC-01/11-01/11-145-Conf-AnxC at p. 6.

⁶⁷ [Redacted] .

- iv. Witness [Redacted] does not refer to any incriminating or exculpatory information concerning the defendant.⁶⁸

78. It therefore appears that whilst there may be some limited investigative activity, this investigative activity has not been directed towards the allegations, which form the basis of the ICC case.

79. There are clear indications in some of the summaries that the information is unreliable, and that the statements were taken by investigators or police who do not have the capacity to conduct effective investigations. For example, Witness [Redacted] asserts that Mr. Gaddafi promised “[Redacted]”, and that he “[Redacted]”.⁶⁹

80. As this Pre-Trial Chamber is aware, the [Redacted]. [Redacted].⁷⁰ [Redacted]. An experienced or capable investigator should have verified such key issues.

81. Again, it is clear that the Libyan investigating authorities do not have the capacity to sift through reliable evidence as compared to propaganda, and are therefore unable to adduce evidence of sufficient probative value to justify the inadmissibility of the case.

82. It should be noted that in its first report, the United Nations Commission of Inquiry explicitly found that much of the evidence which had been submitted by the NTC were “broad statements [...] based on unconfirmed reports, allegations or public rumours”, and further, that this evidence lacked the evidentiary standard of information submitted by NGOs.⁷¹

83. The Commission further found that evidence submitted by the NTC in support of its allegations concerning the use of mercenaries had incorrectly designated Libyan nationals as mercenaries.⁷² Notably, the Commission noted that this unreliable evidence originated from the Prosecutor’s office in Benghazi, which was the same office responsible for initiating proceedings against Mr. Gaddafi.⁷³ It is thus concerning that the Libyan authorities have sought to bolster the probative value of their evidence by referring to the fact that their evidence was cited by the

⁶⁸ ICC-01/11-01/11-145-Conf-AnxC at p. 4 -5.

⁶⁹ ICC-01/11-01/11-145-Conf-AnxC at p. 3.

⁷⁰ ICC-01/11-01/11-70-Conf-Exp at para. 46.

⁷¹ Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya 1 June 2011, A/HRC/17/44 at p. 3.

⁷² Paras. 195 and 196.

⁷³ ICC-01/11-01/11-130-Red at para. 12.

Commission of Inquiry,⁷⁴ without acknowledging that these allegations (and their evidential foundation) were discredited.

84. In the absence of the actual text of the statements, it is also impossible to determine whether the summaries accurately reflect the contents of the statements.
85. The fact that several of the summaries utilise similar language to impute broad responsibility to Mr. Gaddafi implies that the allegations may have been 'fed' to the witnesses, or that the witnesses do not have personal knowledge of the subject of their alleged testimony. For example, [Redacted].⁷⁵ [Redacted].⁷⁶
86. It is impossible to ascertain from this whether the witnesses are providing first-hand evidence or simply recounting conclusions they have heard on television, or indeed, second hand or third hand anonymous hearsay. The vague but definitive nature of the conclusions i.e., [Redacted] is also consistent with the type of testimony, which is compelled through coercion.
87. In terms of other evidence, purportedly relied upon by the Libyan authorities, although the introductory paragraph in Annex C asserts that the Libyan authorities have collected documents and recordings, there is no indication as to what time period these documents relate to, or which allegations. In terms of the latter aspects, since the Libyan authorities are also investigating Mr. Gaddafi for non-ICC related allegations, such as corruption, it cannot be presumed that the remainder of the evidence has any linkage to the ICC charges.
88. The Libyan authorities have also indicated that they intend to rely upon intercept evidence.⁷⁷ Under Libyan law, the prosecution cannot obtain access to personal communications in the absence of an order from the judge.⁷⁸ Failure to obtain such an order renders the evidence inadmissible.⁷⁹ Given that it is highly unlikely that a judge would have issued such an order in February and March 2011, it must be presumed that the domestic prosecutors will be precluded from relying upon any such intercepts.

⁷⁴ ICC-01/11-01/11-130-Red at paras. 10 and 12.

⁷⁵ ICC-01/11-01/11-145-Conf-AnxC at p. 3.

⁷⁶ ICC-01/11-01/11-145-Conf-AnxC at p. 3.

⁷⁷ ICC-01/11-01/11-130-Red at para 44; ICC-01/11-01/11-145-Conf-AnxC at p. 6; ICC-01/11-01/11-145-Conf-Annx1 at p. 2; Z. Verjee, 'Libya has 'great evidence' against Gadhafi's son, ICC prosecutor says', *CNN* 19 April 2012, http://articles.cnn.com/2012-04-19/africa/world_africa_libya-saif-gadhafi-trial_1_libyan-people-zintan-moammar-gadhafi?_s=PM:AFRICA

⁷⁸ Articles 79, 80 and 180 of the Libyan Criminal Procedure Code, Annex 1.

⁷⁹ Article 151 of the Criminal Procedure Code, Annex 1.

4.1.2 External indicia that the evidence lack probative value

89. Although the summaries are in themselves too vague to assess probative value, there are external indications that the evidence relied upon may have been derived from torture, from coercive circumstances, or extracted without due process protections (such as legal representation). The existence of any one of these factors would completely denude the statements of probative value.
90. The burden of demonstrating the statements have been obtained in voluntary circumstances rests on the party tendering the evidence,⁸⁰ which is in this case, the Libyan authorities. This is also consistent with the fact that the burden rests on the State challenging admissibility to tender evidence of sufficiently probative value. Human rights courts have also recognized the difficulty for applicants contesting extradition to establish torture and cruel treatment, due to the fact that it is often practiced in secret, with the complicity of public officials.⁸¹
91. Under Libyan law, the use of evidence obtained from torture or coercion can taint the entire case, and result in the release of the defendant. The Libyan authorities assert that if the Accusation/Indictment Judge finds the evidence to be illegally obtained, then they must dismiss the case pursuant to Article 151 of the Criminal Procedure Code.⁸² Accordingly, if the domestic judicial authorities apply Libyan law in an independent and impartial manner, then the referral of the case to Libya should result in the dismissal of the case against Mr. Gaddafi due to the existence of tainted evidence. Such a result would be contrary to the preambular objective of the ICC to eliminate impunity. Conversely, the failure of the domestic judge to dismiss the case for this reason would demonstrate the unwillingness or inability of the Libyan authorities to apply their domestic legal regime to Mr. Gaddafi in an independent and impartial manner.
92. The prohibition of torture is also a peremptory norm of international law; States must not aid or assist in the commission of acts of torture, or recognise such practices as lawful.⁸³ The ICC – as a judicial institution which is dedicated to eliminating

⁸⁰ Prosecutor v. Delalic et al, “Decision on Zdravko Mucic’s Motion for the Exclusion of Evidence”, 2 September 1997 at para. 42;

⁸¹ Al Qatada v. United Kingdom, 8139/09 17 January 2012, at para. 276.

⁸² ICC-01/11-01/11-130-Red at para. 61.

⁸³ Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, Report of the Special Rapporteur on the promotion and protection of human

impunity for torture and cruel and inhumane treatment– cannot place its imprimatur on domestic proceedings which have potentially involved the use of torture and cruel treatment. The fight against impunity for torture and cruel treatment has to be won by demonstrating that such practices have no place in any legal system, and that any legal system which employs them or turns a blind eye to them must be condemned and not rewarded, by being granted jurisdiction over the case.

93. For this reason, the European Court of Human Rights found that the prohibition on admitting evidence obtained from torture extended to a prohibition on extraditing someone to face trial, based on evidence from other persons, which may have been obtained from torture or, potentially, treatment falling short of torture.⁸⁴
94. Apart from the legal and policy aspects of condoning judicial proceedings which may have entailed the use of improper coercive tactics, it is also generally recognized that evidence obtained from torture or cruel, inhuman or degrading treatment has absolutely no probative value.⁸⁵
95. Article 435 of the Libyan Criminal Procedure Code,⁸⁶ also explicitly recognizes that statements obtained by coercive or oppressive circumstances should be excluded from criminal proceedings. Moreover, under Libyan law, any suspect interviewed by the Prosecuting authorities has the right to counsel,⁸⁷ and to appear before a judge to contest the legality of their continued detention.⁸⁸ Failure to comply with these requirements can render the statements inadmissible.⁸⁹
96. The rights under Article 55(1) of the Statute also apply irrespective as to whether the person in question is being interviewed by the ICC Prosecutor, or national authorities; it is triggered by virtue of the instigation of any investigation into crimes, which fall under the Rome Statute.⁹⁰ Its applicability is tied to the jurisdiction of the Court over the investigation, and not whether the State is a State party.

rights and fundamental freedoms while countering terrorism, Martin Scheinin, NHRCII 0/3, 4 February 2009, paras. 51,53,

<http://www2.ohchr.org/english/issues/terrorism/rapporteur/docs/A.HRC.I03.pdf>

⁸⁴ Al Qatada v. United Kingdom, 8139/09 17 January 2012 at paras. 266-7, 287.

⁸⁵ United Nations General Assembly, Torture and other cruel, inhuman or degrading treatment, UN Doc. No. A/61/1259, 14 August 2006, para. 45; Al Qatada v. United Kingdom, 8139/09 17 January 2012 at para 264.

⁸⁶ Annex 1.

⁸⁷ Article 106 of the Libyan Code of Criminal Procedure, Annex 1.

⁸⁸ Articles 122, 123 and 176, 177 of the Libyan Code of Criminal Procedure, Annex 1.

⁸⁹ Article 304 of the Code of Criminal Procedure, Annex 1.

⁹⁰ C. Hall, 'Article 55', in O. Triffterer (ed.) Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article (Hart Publishers 2nd ed. 2008) at p. 1092.

97. The Libyan authorities cannot on the one hand, assert that their investigations fall under the Rome Statute for the purpose of admissibility proceedings, whilst on the other, refuse to apply any of the applicable provisions of the Rome Statute to such investigations.
98. Concretely, the protection against arbitrary detention, as enshrined in Article 55(1)(d) and its human rights instrument equivalents, encompasses a right to be informed of the legal basis and reasons for the arrest, the right to be brought before a judge to verify the legality of the detention, and the right to counsel (which is an intrinsic element of the right to challenge the legality of detention).⁹¹
99. The privilege against self-incrimination in Article 55(1)(a) mandates that the person interviewed is informed of the fact that he or she is a potential suspect, and provided legal advice so that the suspect can gauge the consequences of waiving the privilege against self-incrimination.
100. In terms of the protection from coercion, duress, and torture, set out in Article 55(1)(b), coercive circumstances can range from threats to improper inducements to cooperate, which negate the person's consent.⁹² The ICTR has also found that the mere fact of interviewing a suspect in detention can create a presumption of coercive circumstances. A statement taken in such circumstances should be excluded - even if the defendant waives the right to counsel - if it is not clear that the waiver was informed and voluntary.⁹³
101. In terms of the specific evidence relied upon by the Libyan authorities, in a statement with CNN, the ICC Prosecutor noted that he had been informed by the Libyan authorities that they had collected statements from several high level Gaddafi officials, who were in detention in Libya.⁹⁴ In their application, the Libyan authorities confirm that some of their actual and potential witnesses are either detained under the

⁹¹ Principles 10, 1, 12, 15, 16 and 17 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, A/RES/43/173, 9 December 1988. Although Article 55(1) does not explicitly set out a right to representation, a right to counsel is necessary in order to ensure that the detainee is able to enforce his rights under article 55(1) in a manner which is real and practical, and not illusory: *Can v. Austria*, Report of the Commission, 12 July 1984, paras. 54 and 55.

⁹² *Prosecutor v. Halilovic* 'Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table', 19 August 2005, at para. 38; *Prosecutor v. Sesay*, 'Written Reasons - Decision on the Admissibility of Certain Prior Statements of the Accused Given to the Prosecution', 30 June 2008, at para. 52.

⁹³ *Prosecutor v. Bagasora*, Decision On The Prosecutor's Motion For The Admission Of Certain Materials Under Rule 89 (C), 14 October 2004 at para. 16.

⁹⁴ CNN broadcast, 19, April 2012, "Where should Gadhafi's son be extradited?," http://www.youtube.com/watch?v=_udOp6c1ums, (1 minute and 49 second mark).

custody of the Libyan government, or have been unwilling to be voluntarily interviewed by the ICC Prosecutor.⁹⁵

102. From the brief summaries, it also appears that many of them should be considered to be suspects. The fact that a witness is implicated in the events, and could face the death penalty if convicted, creates a significant incentive on the witness to shift responsibility to the accused in order to minimise the witness's own role, which in turn, significantly diminishes the probative value of their testimony.⁹⁶ [Redacted].⁹⁷
103. Moreover, since the Libyan authorities have not disclosed the statements of the witnesses, it is not possible to ascertain whether they were represented by lawyers, or informed that they were suspects and had a right to silence.
104. Over the course of the last eight months, the NTC has introduced a range of extremely coercive measures against anyone who is considered to be a pro-Gaddafi supporter, or former member of the regime. These measures have ranged from promulgating laws which penalize anyone who praises the former regime or opposes the current regime, confiscating the property of assets of specific members of the former regime, granting immunity to any acts of violence committed against members of the former regime, and failing to prevent a campaign of arbitrary arrest, torture and mistreatment of persons perceived to be aligned to the former regime.⁹⁸
105. In terms of the latter aspect, Amnesty International, which has reported several incidents of torture in detention centers in Libya, has observed that many detainees "had confessed to crimes they had not committed just to end the torture".⁹⁹ Due to racial discrimination, there has also been a particular pattern of torturing persons to confess to being a mercenary.¹⁰⁰
106. It is difficult to see how, in such circumstances, testimony procured from former associates or members of the regime could be considered to be reliable or voluntary, when the consequences for not cooperating with the regime can be so dire.
107. Although the Libyan authorities have not disclosed the names of the witnesses, the identity of some witnesses is self-evident from the initials provided, and their

⁹⁵ ICC-01/11-01/11-130-Red at para. 46.

⁹⁶ Prosecutor v. Bizimungu, Trial Chamber Judgement, 30 September 2011 at paras. 491 and 492; Prosecutor v. Zigiranyirazo, Trial Chamber Judgement, 18 December 2008 at para. 154-155.

⁹⁷ ICC-01/11-01/11-145-Conf-AnxC at p. 4.

⁹⁸ United Nations Security Council, "Report of the Secretary-General on the United Nations Support Mission in Libya" S/2012/129, 1 March 2012, para. 24.

⁹⁹ 'Libya: Deaths of detainees amid widespread torture' AI Report, 26 January 2012, <http://www.amnesty.org/en/news/libya-deaths-detainees-amid-widespread-torture-2012-01-26>

¹⁰⁰ 'Detention abuses staining the new Libya', Amnesty International Report, October 2011 at p. 15.

position. The Defence does not have the capacity to conduct investigations on the ground, and does not have access to detention centers in Libya, but has nonetheless ascertained through public access documents and NGO reports that there are clear indications that the following Libyan witnesses may have been tortured, subjected to coercive circumstances, interrogated without counsel, or detained in circumstances, which otherwise violated their rights.

Witness [Redacted]

108. [Redacted],¹⁰¹ [Redacted]. [Redacted].¹⁰²

Witness [Redacted]

109. Witness [Redacted], [Redacted],¹⁰³ [Redacted].¹⁰⁴ [Redacted].¹⁰⁵ [Redacted].¹⁰⁶
[Redacted].¹⁰⁷ [Redacted]. [Redacted],¹⁰⁸ [Redacted].¹⁰⁹

110. [Redacted],¹¹⁰ [Redacted].¹¹¹ [Redacted],¹¹² [Redacted].¹¹³

Witness [Redacted]

111. Witness [Redacted],¹¹⁴ [Redacted]. [Redacted].¹¹⁵

112. [Redacted],¹¹⁶ [Redacted]. [Redacted].¹¹⁷ [Redacted].¹¹⁸

Witness [Redacted]

113. Witness [Redacted],¹¹⁹ [Redacted].¹²⁰

¹⁰¹ ICC-01/11-01/11-145-Conf-AnxC at p. 3.

¹⁰² [Redacted], Annex 21.

¹⁰³ ICC-01/11-01/11-145-Conf-AnxC at p. 3.

¹⁰⁴ [Redacted], Annex 3.

¹⁰⁵ [Redacted]

¹⁰⁶ Annex 2, [Redacted].

¹⁰⁷ Annex 2, [Redacted].

¹⁰⁸ The Human Rights Committee has held that publicly displaying a detainee in a cage constitutes degrading treatment under article 7 of the ICCPR, and further violates article 10(1) of the ICCPR: *Polay Campos v. Peru*, Communication No 577/1994 at para. 8.5.

¹⁰⁹ [Redacted], Annex 4.

¹¹⁰ Annex 3.

¹¹¹ Report of the UN International Commission of Inquiry on Libya, A/HRC/19/68, 2 March 2012 at para. 9(d), p. 30.

¹¹² Libya: UN Mission Voices Concern Over Detainee Deaths Resulting From Torture UN News 1 May 2012.

¹¹³ 'Detention abuses staining the new Libya' Amnesty International Report, October 2011, at p. 15 http://www.amnestyusa.org/sites/default/files/mde190362011en_32.pdf

¹¹⁴ ICC-01/11-01/11-145-Conf-AnxC at p. 4.

¹¹⁵ [Redacted].

¹¹⁶ [Redacted].

¹¹⁷ [Redacted].

¹¹⁸ [Redacted].

114. [Redacted].¹²¹ [Redacted].¹²²

115. [Redacted].¹²³ [Redacted].¹²⁴ [Redacted].¹²⁵ [Redacted],¹²⁶ [Redacted],¹²⁷
[Redacted].¹²⁸

4.2. There is insufficient correlation between the domestic investigations against Mr. Gaddafi and the case before the ICC.

116. The term ‘case’ is defined by the ICC as including “specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects”.¹²⁹ In order to trigger the inadmissibility of a specific case, the domestic authorities must further establish that within the framework of such a case, they are pursuing the same person for the same or substantially the conduct as the ICC proceedings.¹³⁰

117. Accordingly, the domestic authorities must establish firstly, that they are investigating the same specific incidents, during which one or more crimes within the jurisdiction of the Court appear to have been committed, and secondly, that they are pursuing the same defendant for the same (or substantially the same) conduct as the ICC proceedings.

118. In line with this test, a preliminary bar to the challenge of the Libyan authorities is that in the absence of any formal decisions by the domestic authorities as to the precise scope of the investigation against Mr. Gaddafi, it is not possible to determine whether there is any overlap between the two proceedings.

119. In the decision on the arrest warrant against Mr. Saif Al Islam Gaddafi, the Pre-Trial Chamber found that there were reasonable grounds to believe that Mr. Gaddafi

¹¹⁹ ICC-01/11-01/11-145-Conf-AnxC at p. 4.

¹²⁰ [Redacted].

¹²¹ Annex 5, [Redacted].

¹²² [Redacted].

¹²³ [Redacted].

¹²⁴ [Redacted].

¹²⁵ Law no. 36 Annex 8; S Zaptia, NTC freezes 338 assets of which 260 are individuals and 78 are companies’ *Libya Herald* 21 May 2012, <http://www.libyaherald.com/ntc-freezes-329-assets-of-which-260-are-individuals-and-69-are-companies/>

¹²⁶ [Redacted].

¹²⁷ [Redacted].

¹²⁸ [Redacted].

¹²⁹ Prosecutor v. Lubanga, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006, and the Incorporation of Documents into the Record of the Case Against Mr. Thomas Lubanga Dyilo, ICC-01/04-01/06-8-US-Corr at para. 31.

¹³⁰ ICC-01/04-01/06-8-US-Corr at para. 31. This test was approved by the Appeals Chamber in ICC-01/09-01/11-307.

was responsible as an indirect co-perpetrator for the crimes of murder and persecution.¹³¹

120. The decision on the application for the arrest warrant details the specific incidents as concerns dates and locations, which Mr. Gaddafi is alleged to have contributed to, and the nature of his contribution, both as concerns his *mens rea* and the *actus reus*. The decision also sets out which evidence supports these allegations.
121. In contrast, the information provided by the Libyan authorities simply states that the Libyan authorities have considered evidence, which is related to the following domestic offences: killing (368 Penal), torture (434 Penal), incitement to civil war (203 Penal), destruction, elimination and stealing of corpses (293 Penal), random killings (296 Penal), the misuse of authority against individuals (431 Penal), arresting people without just case (433 Penal), power abuse against individuals (431 Penal), undue arrest of people (433 Penal), and the unjustified deprivation of personal liberty.¹³²
122. The fact that the Libyan authorities are not genuinely investigating this case based on the facts and evidence is exemplified by the random manner in which these offences have been listed. There appears to be duplication between offences (misuse of authority against individuals, and power abuse against individuals are the same offence, as are arresting people without just cause and undue arrest of people), some of the offences such as Article 431 of the Penal Code, are punishable only by a monetary fine, and some, such as Article 433 (arbitrary arrest) and Article 434 (torture), only apply to public officers, and are therefore inapplicable to the present case.
123. The Libyan authorities have also not provided any information concerning the mode of liability which might apply to Mr. Gaddafi. The allegations set out in the ICC arrest warrant are based on a complex form of liability (indirect co-perpetration), which attributes responsibility to Mr. Gaddafi's by virtue of a range of specific contributions to a common plan. This range of conduct cannot easily be reflected by domestic modes of liability, which are not designed for complex crimes that involve multiple persons in multiple locations, with different positions of hierarchy.

¹³¹ Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah ALSENUSSI", ICC-01/11-01/11-1, 27 June 2011.

¹³² ICC-01/11-01/11-145-Conf, Annex I.

124. There is also no indication as to the scope of the time period as concerns the different offences, the geographic location of any incidents, the identity of victims (by reference to them as a category if not as named individuals for protective reasons), or the manner in which the defendant is alleged to have contributed to these offences. In the absence of any case file or documentation, it also cannot be excluded that the final case against Mr. Gaddafi might not encompass the above-mentioned domestic offences.
125. As found by the Pre-Trial Chamber in the Ruto et al. case, in the absence of information concerning the conduct, crimes or incidents for which the suspects are being investigated or questioned, the Chamber cannot make a determination that the domestic authorities are investigating the same case.¹³³
126. Moreover, as noted above, for many of the brief summaries of the witness statements, there is insufficient information to determine whether there is a correlation with the ICC allegations. For many others, due to the reference to the existence of an armed insurrection and the location of the places named, it is clear that they fall outside of the scope of the ICC charges. The mere fact that the domestic authorities may have interviewed persons is irrelevant, unless it can be established that such steps were directed at establishing that Mr. Gaddafi was responsible for the same conduct as the ICC case.¹³⁴
127. Apart from the fact that there is insufficient information to determine whether the Libyan authorities are investigating the same 'specific incidents', which form the basis of the ICC arrest warrant, it is also apparent that the domestic proceedings are not pursuing Mr. Gaddafi for the same conduct as their ICC counterpart.
128. It is entirely possible that the domestic proceedings may have a wider scope, or may entail more serious charges or offences than the ICC case, but may, nonetheless, fail to trigger the inadmissibility of the case. The gravity of the domestic charges *vis-à-vis* the ICC charges is irrelevant, unless the State challenges admissibility on the basis of gravity, which Libya has not done. As demonstrated by the Lubanga case, if the domestic proceedings fail to encompass one specific offence (for example, the offence of child soldiers), which is not encompassed within the conduct comprising

¹³³ ICC-01/09-01/11-101 at para. 69.

¹³⁴ ICC-01/09-01/11-307 at para. 1.

the domestic proceedings, that will suffice to justify the continuation of the proceedings before the ICC.¹³⁵

129. The ICC arrest warrant against Mr. Gaddafi is based on murder and persecution, as crimes against humanity. Although persecution can be committed through acts of murder, it cannot be considered as an aggravated form of murder, or a variant thereof; they both contain materially distinct elements and conduct. In particular, the “definition of persecution contains materially distinct elements not present in the definition of murder, namely the requirement of proof that a particular group was targeted on the basis of certain discriminatory grounds described in article 7(1)(h) of the Statute.”¹³⁶
130. It is clear from the wording and structure of the definition of persecution delineated in the Elements of the Crime that the requirement that the group was targeted on discriminatory grounds is considered to be ‘conduct’.
131. Subparagraph 2 requires that the perpetrator targeted the alleged victim by reason of their identity in a group or collectivity, and subparagraph 3 stipulates the prohibited grounds for such targeting. Sub-paragraphs 4 and 5 of the elements of Article 7(1)(h) are preceded by the phrase “The conduct was committed in [...]” thereby confirming that subparagraphs 1 to 3 delineate the essential conduct of the crime of persecution, whereas 4 and 5 concern additional contextual elements.
132. In the present case, although the domestic authorities have set out a range of possible offences, which Mr. Gaddafi might be charged with, none of these offences involve the conduct that the defendant targeted the alleged victims by reason of their identity of a group or collectivity, or that such targeting was based on discriminatory grounds.
133. The domestic proceedings therefore do not encompass the same conduct as the ICC case. Trying Mr. Gaddafi in Libyan courts would therefore deprive the alleged victims of such crimes of their right to justice and their right to the truth as concerns whether the alleged events involved discriminatory conduct.

¹³⁵ Prosecutor v. Lubanga, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006, and the Incorporation of Documents into the Record of the Case Against Mr. Thomas Lubanga Dyilo, ICC-01/04-01/06-8-US-Corr at paras. 38-39.

¹³⁶ Prosecutor v. Ruto et al., Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373 23 January 2012, at para. 280.

134. Although the Libyan authorities have indicated that it has submitted a proposal for the incorporation into domestic law of international crimes, no weight can be given to the information.
135. Firstly, there is no indication that the Libyan authorities have either the intention or the evidence to pursue Mr. Gaddafi for the crime of persecution or that they have any evidence of chapeau elements, which are necessary for international crimes. Secondly, it is entirely speculative as to whether this law will be passed. As confirmed in the Kony case, the Pre-Trial Chamber cannot base its decision on hypothetical possibilities concerning future law reform.¹³⁷
136. It also cannot be presumed from the fact that the transitional government has submitted a law for adoption that the future government will continue to sponsor the law or advocate for its adoption.

5. The Libyan authorities are not actively investigating the case

137. The existence of active and ongoing investigations at the time of the admissibility challenge is the *sine qua non* for a successful admissibility challenge.¹³⁸ Investigative steps must also be directed towards the allegations, which are the subject of the ICC case.
138. In the absence of any information concerning the dates on which the witnesses were allegedly interviewed, or the precise relevance of the future activities referred to by the Libyan authorities to the ICC allegations, the Libyan authorities have failed to establish that their investigations into the ICC related allegations are an ongoing process.¹³⁹
139. There is also no nexus between the documentation submitted by the Libyan authorities and their actions thus far, and the allegations, which are the subject of the ICC case.
140. Although the Libyan authorities argued before the Pre-Trial Chamber and the Appeals Chamber that they needed to retain physical custody over Mr. Gaddafi in

¹³⁷ Prosecutor v. Kony et al., Decision on the admissibility of the case under article 19(1) of the Statute, 10 March 2009, ICC-02/04-01/05-377, at para. 49.

¹³⁸ Prosecutor v. Katanga and Ngudjolo, 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, ICC-01/04-01/07-1497, at para. 78.

¹³⁹ Cf Prosecutor v. Ruto et al., Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ICC-01/09-01/11-101, paras. 68 and 69.

order to facilitate their investigations, it appears from the information attached by the Libyan authorities that at the time of the challenge, he was only interviewed in connection with [Redacted],¹⁴⁰ and [Redacted],¹⁴¹ for which no particulars are provided. When the Defence recently met Mr. Gaddafi, he stated that Dr. Gehani had informed him that the allegations concerning financial crimes were the main focus of the investigations, and had been utilized to attempt to justify his detention, and that at the time of the admissibility challenge, he had only been questioned in connection with allegations concerning financial crimes.

141. At paragraph 44 of the Application, the Libyan authorities assert that a “second investigation was instigated by the Prosecutor-General on 17 December 2011 by virtue of Decision No. 102 2011 [which] was to relate to “all crimes committed by Mr. Gaddafi during the revolution....starting from 17 February 2011”. However, a contemporaneous New York Times article reports that the Libyan authorities had indicated that whilst they intended to open an investigation into offences other than corruption, they had not yet done so at that time.¹⁴² [Redacted].¹⁴³

142. In an interview with CNN, the ICC Prosecutor also stated that he was not informed of a decision opening the investigation into Mr. Gaddafi for crimes relating to the ICC case until mid-April 2012.¹⁴⁴ In light of the fact that the Prosecutor has acknowledged that he has been in close contact with the Libyan authorities concerning the admissibility of the case,¹⁴⁵ it beggars belief that if the Libyan authorities were actually investigating Mr. Gaddafi for ICC related allegations, that the Prosecutor would not have been informed until mid-April 2012.

143. Apart from the letter of the prosecuting authorities to a member of their legal team,¹⁴⁶ the Libyan authorities have not submitted any legal documentation which confirms the decision of the Public Prosecutor to open investigation into these crimes.

¹⁴⁰ ICC-01/11-01/11-145-Conf-AnxE at p. 2.

¹⁴¹ ICC-01/11-01/11-145-Conf-AnxE at p. 2.

¹⁴² “Officials said the prosecutor planned two parallel investigations of Mr. Qaddafi, one into corruption before the Libyan revolution and the other into crimes committed during the conflict. The first is under way, they said, but it was not clear when the second would begin,” L. Stack, Qaddafi Son Being Held by Rebels, Rights Group Says, *New York Times* 21 December 2012.

http://www.nytimes.com/2011/12/21/world/africa/qaddafi-son-seif-al-islam-is-alive-and-held-by-rebels-rights-group-says.html?_r=1

¹⁴³ ICC-01/11-01/11-146-Conf-AnxA at para. 28.

¹⁴⁴ CNN broadcast, 19, April 2012, “Where should Gadhafi's son be extradited?” http://www.youtube.com/watch?v=_udOp6c1ums, 1 minute 23 seconds.

¹⁴⁵ Prosecution’s Comments to the Request to Disqualify the Prosecutor from Participating in the Case against Mr. Saif Al-Islam Gaddafi, ICC-01/11-01/11-139, at para. 24.

¹⁴⁶ ICC-01/11-01/11-145-Conf-AnxI.

Adverse inferences concerning the genuineness of the Libyan authorities' assertion that they were investigating the ICC allegations from this date should be drawn from the absence of such documentation, and the inconsistency of the information provided.¹⁴⁷

144. In their 23 January 2012 submissions to the Court concerning their Article 94 request, the Libyan authorities explicitly indicated that they had not yet decided whether to open an investigation into the underlying allegations concerning the ICC case.¹⁴⁸ Either the Libyan authorities misstated the true position of the domestic proceedings on 23 January 2012 in order to support their Article 94 application, or they have done so now in order to support the current challenge to admissibility. Either conclusion militates against accepting their assurances concerning the future progress of the case.
145. The 23 January 2012 filing also indicated that once a case is formally opened into specific crimes, a case number would be assigned, and the ICC would be duly informed of the relevant case number.¹⁴⁹ [Redacted].¹⁵⁰ [Redacted].
146. As set out on the OPCD Report of 2 March 2012, when the OPCD met with the Libyan coordinator for the ICC and the Libyan prosecutors assigned to the case on 29 February 2012, the OPCD was "informed that Mr. Gaddafi was under arrest by the Prosecutor General for financial crimes."¹⁵¹
147. On 3 and 4 March 2012, the Libyan coordinator for the ICC informed both Mr. Gaddafi and the OPCD independently that the investigations against Mr. Gaddafi for more serious crimes had been terminated due to lack of evidence.¹⁵² Although the Libyan authorities have recently attempted to assert that Dr. Gehani would not have been in a position to know the status of domestic proceedings, Dr. Gehani has himself indicated that he was present when every single witness in the domestic proceedings was interviewed.¹⁵³ Dr. Gehani's apparent authority to speak on such matters was demonstrated by the fact that when the OPCD met the Libyan prosecutors assigned to the case, Dr. Gehani specifically responded to questions concerning the status of the

¹⁴⁷ Case of Musayev and others v. Russia, "Judgement", 26 July 2007, Applications nos. 57941/00, 58699/00, 60403/00, para. 179.

¹⁴⁸ ICC-01/11-01/11-44-Conf-Anx1 at p. 3.

¹⁴⁹ ICC-01/11-01/11-44-Conf-Anx1 at p. 3.

¹⁵⁰ ICC-01/11-01/11-145-Conf-AnxD at p. 2.

¹⁵¹ ICC-01/11-01/11-69-Red at para. 24.

¹⁵² ICC-01/11-01/11-70 at paras. 39, and 49.

¹⁵³ Annex 6.

proceedings, and at no point did the prosecutors indicate that he did not have the authority to do so.

148. The circumscribed nature of the domestic investigations was also consistent with the fact that at this point in time, the Libyan authorities were seeking to postpone the surrender of the defendant under Article 94 of the Statute, which permits them to do so only if they are investigating the defendant for crimes unrelated to the case before the ICC.
149. In contrast, the OPCD had submitted that the Article 94 request should be rejected *inter alia* due to the fact that it was unclear as to whether the domestic investigations were unrelated to the ICC proceedings.¹⁵⁴ Given that the restriction of the domestic proceedings to corruption offences would have impacted negatively on the litigation position of the OPCD, there would have been no reason for the OPCD to have misstated or misconstrued this information in its Reports to the Chamber.
150. Libyan officials have also publicly acknowledged that they have not been actively investigating the allegations underlying the ICC case. In an article with Al Jazeera, Dr. Gehani acknowledged the absence of any practical steps, which had been taken by domestic authorities in order to support their legal right to challenge admissibility.¹⁵⁵ In a subsequent interview, which post-dated Libya's admissibility challenge, Dr. Gehani stated that "the main focus of the Libyan investigation was now financial. The investigators are concentrating on the case of the financial crimes, having realised how huge this issue is in relation to Saif" Gehani said. "It's important that the money trail is discovered before it's too late and it's lost."¹⁵⁶
151. On the basis of the above, it appears that Libya has not been directing its investigative activity towards the ICC allegations from December 2011. Whilst there may have been a short spurt of activity after Libya was ordered to surrender Mr. Gaddafi to the ICC, such activity seems to have been purely designed to stave off the surrender order, rather than constituting a genuine, ongoing investigative proceeding.
152. The underlying principles of complementarity also do not require the Court to interpret the reference to an admissibility challenge in Article 95 in a flexible manner. As found by the ICC Appeals Chamber, the so called 'presumption in favour of domestic jurisdictions' does not oblige the Court to accord domestic authorities

¹⁵⁴ ICC-01/11-01/11-51-Red at para. 34.

¹⁵⁵ Annex 6.

¹⁵⁶ Annex 15.

leeway to allow domestic investigations to progress to such a point, where they would trigger the admissibility threshold; this presumption in favour of domestic jurisdictions only applies when there is, or has been, a concrete investigation and prosecution against the defendant.¹⁵⁷

153. At this point in time, there is insufficient evidence to conclude that there is a concrete investigation against the defendant for the ICC related allegations, and as such, the challenge must be dismissed.

154. The above-mentioned factors are also directly relevant to the Chamber's assessment as to whether there are investigative actions taken thus far are 'genuinely' directed at bringing him to justice, and whether there has been an unjustified delay in the proceedings, which is inconsistent with an intent to bring the person concerned to justice, which will be discussed below.

6. Libya is not willing to genuinely prosecute the case with an intent to bring the person to justice

155. Even if the Chamber finds that Libya is actively investigating the case against Mr. Gaddafi, the admissibility challenge should still be dismissed due to the fact that the Libyan authorities have failed to establish that they are willing to genuinely investigate the case.

6.1 The case is admissible under article 17(2)(a) because the domestic proceedings have been initiated for the sole purpose of justifying Mr. Gaddafi's non-transfer to the ICC, which in turn, will have the consequence of shielding him from effective accountability or justice

156. Although the Libyan authorities clearly do not wish to surrender Mr. Gaddafi to the ICC, the actions undertaken thus far objectively indicate that they lack the will to genuinely investigate him for ICC related offences. Rather, it appears from the chronology of investigative actions in the above section that the Libyan authorities have included additional allegations into their financial related proceedings for the purpose of justifying the temporary and ultimately permanent deferral of his surrender to the ICC, which will in turn, shield him from responsibility for the ICC related allegations.

¹⁵⁷ ICC-01/09-01/11-307 at para. 44.

157. At the same time, it would appear that due to concerns regarding the unavailability or poor quality of the evidence, or the possible involvement of current members of the NTC regime, there is no genuine will for these ICC allegations to be litigated in domestic courts.
158. In terms of the latter aspect, in an interview with Al Jazeera, the former spokesperson for the NTC also indicated that he did not believe that there was any political will to actually have a trial against Mr. Gaddafi due to the fact that he could implicate persons in the 'hierarchy', and that in the absence of any concrete action taken by the government, it was more likely that Mr. Gaddafi would end up dead or escape.¹⁵⁸
159. There also appears to be a strong popular sentiment, directed to the public authorities, that Mr. Gaddafi should be killed rather than tried in a court of law.¹⁵⁹ The former NTC spokesperson's prediction that Mr. Gaddafi would either end up dead or escape acquires a chilling dimension in light of public suggestions posted on the Zintan media site that the Zintan brigade should "[k]ill that rotten one and say that he tried to escape."¹⁶⁰

6.2. The case is admissible pursuant to Article 17(2)(b) because there has been an unjustified delay in the proceedings, which is inconsistent with an intent to bring the person concerned to justice.

160. Even if the Chamber were to find that the Libyan authorities are currently investigating the proceedings, the significant delays in taking crucial investigative steps are both unjustified, and inconsistent with a genuine intent to bring Mr. Gaddafi to justice. These delays have prevented the Libyan authorities from bringing Mr. Gaddafi to justice both in the narrowest sense of word (i.e. to ultimately obtain a verdict), and in terms of their obligation to comply with procedural requirements, which are intrinsic elements of the process of justice.
161. In particular, there have been unjustified delays in:
- i. commencing and taking active steps in the investigations into the ICC allegations, and opening the case in relation to relevant crimes (which had not occurred at the time of the admissibility challenge);

¹⁵⁸ 'Libya on the Line: the War Retold', Part I, (approx 26 minutes mark). Annex 16.

¹⁵⁹ Comment posted on the Zintan media center Facebook site, the same day as the Zintan Brigade Press Conference concerning the detention of the four ICC officials. Annex 25.

¹⁶⁰ Annex 25.

- ii. notifying Mr. Gaddafi of the nature of the charges against him and the legal basis for his detention (there is no evidence that this has occurred);
- iii. bringing Mr. Gaddafi before a judge; and
- iv. facilitating his ability to obtain legal representation in connection with domestic proceedings.

162. The potential dilatory impact of failures to notify the defendant of the nature of the charges or to facilitate effective representation is amply illustrated by the [Redacted] Dorda case, in which the trial proceedings have been delayed three times already because of such violations.¹⁶¹

163. In terms of the delays in the commencement of the investigations into the ICC allegations, as set out above, no case number has been assigned to the investigation against Mr. Gaddafi, and notwithstanding the fact that he was arrested over six and a half months ago, it appears from the evidence submitted by the Libyan authorities that it is in the preliminary stages of investigation.

164. There is no information concerning the dates on which the witness statements were taken, but, on the basis of the information set out in Libya's 23 January 2012 observations, it would appear that the Libyan authorities only commenced their investigations into the ICC related allegations after the Chamber issued its decision rejecting their Article 94 request for postponement.

165. This is consistent with the fact that the day after the Libyan authorities were notified of the ICC decision rejecting their request to postpone the surrender of Mr. Gaddafi pursuant to Article 94, the Libyan authorities also sent an SMS to all mobile phones in Libya requesting "all citizens to come forward with any information, complaints or documents related to the former regime aides so as to enable the Public Prosecutor to bring them to trial as soon as possible."¹⁶²

166. The Libyan authorities have not provided any justification as to why they were not in a position to conduct investigative steps at an earlier point in time. As acknowledged by the Libyan authorities, many of their witnesses are in custody (and appear to have been in custody prior to Mr. Gaddafi's arrest). The Libyan authorities

¹⁶¹ A. Shuiab, 'Ex-Gaddafi spy chief on trial says rights denied' *Reuters* 10 July 2012.

¹⁶² ICC-01/11-01/11-94-Conf-Anx1. This text message was sent by the Prosecutor General Abdelaziz Al Hasadi, 'Libya ready to try Gaddafi aide; Ex-spy chief to face court before polls. (Agence France-Presse/Gulf News, 23 March, 2012).

provided evidence concerning the post-February 2011 events to the Commission of Inquiry and the ICC, and as such, would have been in possession of this evidence at the time of Mr. Gaddafi's arrest.

167. Mr. Gaddafi has also been available to them since mid-November 2011, and yet, at the time of the admissibility challenge, had not been questioned in relation to any ICC-related allegations or informed of any non-financial charges or allegations against him.¹⁶³
168. As observed by an ICC informal expert paper on complementary, “[l]ongstanding knowledge of crimes without action, and investigation launched only when ICC took action” is an indicia of unwillingness to conduct genuine investigations and prosecutions.”¹⁶⁴
169. The current pace of the investigations is also fundamentally incompatible with the Libyan authorities' obligation to exercise special diligence in investigating and prosecuting the case of a detained person.¹⁶⁵ It is also fundamentally incompatible with Mr. Gaddafi's right to be informed promptly of the legal basis for his detention, and the nature of the charges against him.
170. It is also apparent from the text of the detention orders included in Annex D to the admissibility challenge that the orders were never served on Mr. Gaddafi, as required by Article 109 of the Criminal Procedure Code, or provided to the detaining authority, who must sign the order.¹⁶⁶ The minutes portion of the remand order,¹⁶⁷ which verifies that the remand order was served on the defendant and the detaining authority, has not been completed either in connection with the initial order or its extensions.
171. Indeed, when the Defence attempted to show this remand order to Mr. Gaddafi to inquire as to whether it had ever been served on him, it was confiscated by the guard, who informed the Defence that “it did not concern Mr. Gaddafi”, and that that “he did not have the right to see it”, although this annex was later waved around on Libyan television.¹⁶⁸

¹⁶³ Meeting with Mr. Gaddafi, 7 June 2012.

¹⁶⁴ OTP Informal Expert Paper, 'The Principle of Complementarity in Practice', 2003, at p. 30.

¹⁶⁵ *Assenov and Others v. Bulgaria* ECHR, Judgment 28 October 1998, Report 1998-VIII, p. 3300, para. 154; Principle E, Section H, The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

¹⁶⁶ Article 118 of the Criminal Procedure Code, Annex 1.

¹⁶⁷ ICC-01/11-01/11-145-Conf-AnxD at p. 2.

¹⁶⁸ The enlarged photograph of the document can be seen in ICC-01/11-01/11-179-Conf-AnxA.

172. The initial remand order and its extensions fail to specify for what Mr. Gaddafi was accused, or the legal basis under the Penal Code for his detention. This violates Article 108 of the Criminal Procedure Code, which stipulates that the detention order must specify the charges and the legal provisions, which are applicable to the facts.
173. Moreover, in contradistinction to the assertion of the Application that Mr. Gaddafi was detained on the basis “of a further investigation into allegations of the commission of “blood crimes” during the 2011 revolution”,¹⁶⁹ none of the detention orders, including the most recent, specify the factual basis for his detention or the nature of the investigation. As recently found by Pre-Trial Chamber I, in line with the right to be informed of the nature, cause and content of the charges, “an application seeking the arrest of a person and a warrant of arrest if issued respectively, should comply with the legal requirement for specificity.”¹⁷⁰
174. It was also clear from the OPCD’s meeting with Mr. Gaddafi on 3 March 2012 that he was unaware of the precise legal basis for his detention. He indicated to both the OPCD that he had only been interviewed in connection with licences for camels, and fish farms. Mr. Gaddafi also informed the OPCD that Dr. Gehani had stated that the Libyan authorities had decided to terminate/not to pursue investigations for serious crimes because of the lack of evidence.¹⁷¹ This information was independently and spontaneously confirmed to the OPCD by Dr. Gehani.¹⁷²
175. [Redacted].¹⁷³ The fact that Mr. Gaddafi was not clearly informed that he may have been detained for other crimes therefore violated his right to be informed promptly of the reasons for his arrest and detention, and his ability to challenge its legality.
176. The Libyan authorities also failed to respond to requests from the OPCD for information concerning the nature of the domestic charges against Mr. Gaddafi.¹⁷⁴
177. There have also been significant delays in terms of Mr. Gaddafi’s right to be informed of the allegations set out in the ICC arrest warrant itself. The Libyan authorities assert that Mr. Gaddafi was notified of the ICC arrest warrant on 3 March 2012. Mr. Gaddafi was notified on this date because both the Registry and the OPCD provided him with a copy; Dr. Gehani did not take any ICC documentation with him,

¹⁶⁹ At para. 43.

¹⁷⁰ DRC situation, Decision on the Prosecutor’s Application under Article 58, ICC-01/04-613, at para. 5.

¹⁷¹ ICC-01/11-01/11-70 at para. 39.

¹⁷² ICC-01/11-01/11-70 at para. 49.

¹⁷³ ICC-01/11-01/11-146-Conf-AnxA at p. 22.

¹⁷⁴ ICC-01/11-01/11-152-AnxB at p. 2; ICC-01/11-01/11-152-AnxC at p. 2.

and had indicated on a meeting on 29 February 2012 that the Libyan authorities had not previously served the ICC arrest warrant on him.¹⁷⁵

178. The prejudice suffered by Mr. Gaddafi due to the delays in fulfilling these rights has been compounded by the fact that he has not been brought before a judge.
179. Although the Libyan authorities have sought to interpolate that a summary judge travelled to Zintan in order to permit the Prosecutor to issue an extension order for Mr. Gaddafi's detention,¹⁷⁶ this assertion has not been verified by any documentation concerning the role of this person (apart from a *pro forma* reference in the detention orders) or verification that Mr. Gaddafi physically appeared before this person. This recent assertion also completely contradicts the information previously provided by the Libyan authorities to the ICC, and is inconsistent with information provided by independent and impartial observers.
180. Under Articles 122, 123 and 176 and 177 of the Criminal Procedure Code, any detention order must be extended by a judge, after hearing from the defendant, and considering whether provisional release is warranted. These provisions were clearly violated. Article 115 of the Criminal Procedure Code stipulates that a suspect can only be placed in detention if there is 'sufficient evidence' to justify his detention. There is no indication that such a finding was made, or that the Libyan authorities were in possession of any evidence justifying his detention at the time of his arrest.
181. Any detention beyond the maximum period of 90 days must be justified by the circumstances of the investigation.¹⁷⁷ There is no indication that such a judicial order was made.
182. Both Human Rights Watch and the United Nations Commission of Inquiry confirmed in their respective reports that Mr. Gaddafi had not been brought before a judge or accorded an opportunity to challenge his detention before an independent body.¹⁷⁸
183. When the OPCD met with the Libyan prosecutors assigned to the case on 29 February 2012, the OPCD was informed that such a right did not exist under Libyan law.¹⁷⁹

¹⁷⁵ ICC-01/11-01/11-69-Red at para. 26.

¹⁷⁶ ICC-01/11-01/11-130-Red at para. 43.

¹⁷⁷ Article 177(2) of the Code of Criminal Procedure, Annex 1.

¹⁷⁸ F. Abraham, 'In His First Interview, Saif al-Islam Says He Has Not Been Given Access to a Lawyer', *The Daily Beast* 30 December 2011; Report of the UN International Commission of Inquiry on Libya, A/HRC/19/68, 2 March 2012 at para. 787.

¹⁷⁹ ICC-01/11-01/11-69-Red at para. 25.

184. The Pre-Trial Chamber also expressly requested the Libyan authorities to bring Mr. Gaddafi immediately before a judge pursuant to Article 59. There is no indication that this order has ever been implemented. The Libyan authorities have never requested nor been granted suspensive effect for this essential step in rendering justice before the ICC, nor have they provided any explanation for why they were not in a position to do so.
185. In line with Rule 51 of the ICC Rules of Procedure and Evidence, the conclusion that the Libyan authorities have not brought Mr. Gaddafi before a judge to determine the legality of his detention is supported by the fact that when the four ICC officials were recently detained, they were never provided with any explanation or written documentation concerning the legal basis for their arrest, or brought before a judge. Indeed, the ICC focal point publicly indicated that the Libyan authorities had deliberately decided not to do so because it is likely that a judge would have ordered their release.¹⁸⁰
186. Apart from contravening domestic law, Libya's failure to bring Mr. Gaddafi before an independent judicial authority violates internationally recognized principles of due process. Libya's obligations under the ICCPR required it to bring Mr. Gaddafi before a judicial authority to determine the legality of his detention no later than 4 days after his arrest.¹⁸¹ In *Kulomin v. Hungary*, the Human Rights Committee found that the relevant authority for reviewing detention could not be the public prosecutor who was responsible for the investigation of the suspect's case as that prosecutor did not have the necessary objectivity and impartiality.¹⁸² This maximum period of 4 days can be contrasted to the 8 months during which it appears that Mr. Gaddafi has not been brought before a judge.
187. The right to be brought before a judge to challenge the legality of detention also requires that the defendant is brought to a court for this purpose; a judicial review carried out solely on papers without the participation of the defendant, will not suffice.¹⁸³

¹⁸⁰ M. Vincent, "Melinda Taylor unlikely to be welcome to return to Libya," *ABC News*, 2 July 2012, <http://www.abc.net.au/pm/content/2012/s3537317.htm>

¹⁸¹ *Freemantle v. Jamaica*, 625/1995; *Grant v. Jamaica*, 597/1994; *Stephens v. Jamaica*, 373/1989), and eight days (*Stephens v. Jamaica*, 373/1989). See also *O'Hara v. the United Kingdom*, no. 37555/97, ECHR 2001-X, 16 October 2001, and the General Recommendations of the United Nations Special Rapporteur on Torture E/CN.4/2003/68, paragraph 26(g)), and Article 8 of the Arab Charter on Human Rights.

¹⁸² Communication No. 521/1992.

¹⁸³ *Öcalan v. Turkey*, Judgment of 12 May 2005, Application no. 46221/99, at para. 68.

188. Mr. Gaddafi's ability to avail himself of this right in an effective manner was particularly important in light of the fact that he has not been detained in a proper detention facility, and the location is secret. The Libyan authorities have conceded that domestic law requires that detainees "should only be imprisoned in a purpose built facility unless this requirement is waived by the Prosecutor-General in exceptional circumstances (Article 4 of the Prisons Act)."¹⁸⁴ Nonetheless, the Libyan authorities have provided no information as to whether such a waiver was issued, or if so, the nature of the exceptional circumstances justifying its issuance. Libyan law further specifies that such a waiver can only be for a maximum period of 15 days,¹⁸⁵ which has been greatly exceeded in the present case. Libyan law requires the release of any person detained in violation of these provisions.¹⁸⁶
189. Mr. Gaddafi's release due to procedural defects could impede the ability of either domestic courts or the ICC to render justice. The likelihood that the unjustified delay in regularizing his detention could result in Mr. Gaddafi's impunity directly militates against transferring the case to the jurisdiction of Libya.
190. In this connection, it is notable that in requesting the arrest warrant against Thomas Lubanga Dyilo, the Prosecutor argued that such action was necessary to address the possibility that Mr. Dyilo might be released due to the fact that his domestic detention had exceeded the acceptable custodial limits.¹⁸⁷
191. The African Commission on Human and Peoples' Rights has also emphasized that the 'poor state of criminal justice' in a country is not an excuse for failing to secure a person's detention rights in an expeditious manner: "whenever there is a crime that can be investigated and prosecuted by the State on its own initiative, the State has the obligation to move the criminal process forward to its ultimate conclusion."¹⁸⁸
192. Even if Mr. Gaddafi had been brought before a judge, the effectiveness of such a remedy would have been undermined by the failure of the Libyan authorities to facilitate Mr. Gaddafi's right to legal representation in connection with the domestic proceedings in a timely manner.¹⁸⁹

¹⁸⁴ ICC-01/11-01/11-130-Red at para. 59.

¹⁸⁵ Article 4 of the Prisons Act (Law No. 5), Annex 14.

¹⁸⁶ Article 33 of the Code of Criminal Procedure, Annex 1.

¹⁸⁷ Prosecutor v. Lubanga, 'Prosecution's Submission of Further Information and Materials', 25 January 2006, ICC-01/04-01/06-32-AnxB, at para. 13.

¹⁸⁸ Article 19 v. The State of Eritrea, African Commission on Human and Peoples' Rights, Communication No. 275/ 2003 (2007).

¹⁸⁹ Öcalan v. Turkey, Judgment of 12 May 2005, Application no. 46221/99.

193. Although the Libyan authorities assert that Mr. Gaddafi waived the right to have counsel, a waiver of such a fundamental right must be voluntary and unequivocal,¹⁹⁰ and the suspect must be informed of the charges against him.¹⁹¹ The waiver must also be in writing, or video- or audio-recorded.¹⁹² These safeguards are of particular importance when the suspect is in a vulnerable position, for example, when kept incommunicado or in isolation.¹⁹³
194. When the OPCD met with Mr. Gaddafi on 3 March 2012, he stated that he had been informed by the Attorney-General (Prosecutor-General) that he would not be permitted to receive visits from a lawyer whilst he was detained in Zintan.¹⁹⁴
195. This statement is corroborated by information which was independently provided to the OPCD by the Libyan authorities, and from other sources, such as Human Rights Watch.
196. During the meeting between the OPCD and the prosecuting authorities assigned to his case on 29 February 2012, the OPCD was informed that it would not be possible for Mr. Gaddafi to have privileged communications with a lawyer, whilst he is being detained in Zintan.¹⁹⁵
197. This is consistent with the fact that in December 2011, Fred Abrahams from Human Rights Watch was informed by prosecuting authorities that “the state will allow Saif a lawyer after he is transferred to a more secure facility in Tripoli”.¹⁹⁶ The 2012 Commission of Inquiry Report referred to the fact that “[u]ntil now [Mr. Gaddafi] has been held by *thuwar* in Zintan, without any access to a lawyer or to his family.”¹⁹⁷
198. Although the Libyan authorities assured the ICC that they would facilitate a privileged visit between Mr. Gaddafi and his Counsel, the manner in which they

¹⁹⁰ Prosecutor v. Bagosora, Decision on the Prosecutor’s Motion for the Admission of Certain Materials Under Rule 89 (C), Case No. ICTR-98-41-T, 14 October 2004, para. 42 and Prosecutor v. Bagosora et al., Decision on the Prosecutor’s Motion for the Admission of Certain Materials Under Rule 89 (C), Case No. ICTR-98-41-T, 14 October 2004, para. 18.

¹⁹¹ Prosecutor v. Karemera, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ndirumpatse, Case No. ICTR-98-44-T, 2 November 2007, para. 30.

¹⁹² Rule 112(1)(b) of the Rules of Procedure requires that “A waiver of the right to be questioned in the presence of counsel shall be recorded in writing and, if possible, be audio- or video-recorded”. See further, Prosecutor v. Kajelijeli, Judgement, Case No. ICTR-98-44A-A, 23 May 2005, paras. 235-236 and Prosecutor v. Kanyabashi et al., Decision on Kanyabashi’s Oral Motion to Cross-Examine Ntahobali Using Ntahobali’s Statements to Prosecution Investigators in July 1997, Case No. ICTR-96-15-T, 15 May 2006, paras. 69, 71-72.

¹⁹³ Prosecutor v. Kabiligi, Decision on the Prosecutor’s Motion for the Admission of Certain Materials under Rule 89(C), Case No. ICTR-98-41-T, 14 October 2004, para. 16.

¹⁹⁴ ICC-01/11-01/11-70-Red2 at para. 35.

¹⁹⁵ ICC-01/11-01/11-69-Red at para. 22.

¹⁹⁶ ICC-01/11-01/11-70-Red2 at para. 35.

¹⁹⁷ Report of the UN International Commission of Inquiry on Libya, A/HRC/19/68, 2 March 2012 at para. 787.

implemented this visit further underscores the fact that they do not have a genuine intention to facilitate privileged visits between Mr. Gaddafi and his Counsel. This will be further elaborated in section 6.3.2 below.

199. It is also notable that although the Libyan authorities asserted that Mr. Gaddafi has a theoretical right to counsel, they have provided absolutely no information in their challenge as to how the right to freely choose a counsel would be implemented in practice in terms of either the lawyer's ability to communicate with him, or Mr. Gaddafi's ability to designate a lawyer in the absence of any assistance or advice from friends and family, or means to make external communications.
200. From the very beginning of his detention, Mr. Gaddafi indicated that he needed to speak to his friends and family in order to select a lawyer to represent him.¹⁹⁸
201. Mr. Gaddafi informed the OPCD on 3 March 2012, he does not know any lawyers, and for that reason, needed assistance in designating one, but that he expressly wished to be represented in connection with the domestic proceedings in Libya by a lawyer chosen by his family.¹⁹⁹
202. In line with the fact that Mr. Gaddafi had indicated that he required assistance to designate a lawyer for the domestic proceedings, the OPCD contacted the Libyan authorities in April 2012 in order to ascertain the requirements for such a lawyer, and to arrange to visit Mr. Gaddafi so that the OPCD could facilitate his choice.²⁰⁰
203. The OPCD was given contradictory information concerning the requisite qualifications,²⁰¹ and almost two months elapsed from the date on which the OPCD first requested to visit Mr. Gaddafi for the purpose of facilitating his right to effective representation, and the actual date of the visit.
204. Although the Libyan authorities had been explicitly informed of the fact that the OPCD intended to discuss options for domestic representation with Mr. Gaddafi during the visit of 7 June 2012,²⁰² Mr. Gaddafi informed the Defence that three days before the ICC visit, the Prosecutor assigned to his case met with Mr. Gaddafi to inform him that in the absence of any power of attorney from him, they had decided to appoint a lawyer to represent him in the domestic proceedings.

¹⁹⁸ F. Abraham, 'In His First Interview, Saif al-Islam Says He Has Not Been Given Access to a Lawyer', The Daily Beast 30 December 2011.

¹⁹⁹ ICC-01/11-01/11-70-Red2 at paras. 37 and 41-42.

²⁰⁰ ICC-01/11-01/11-152 at paras. 40-58.

²⁰¹ ICC-01/11-01/11-152 at paras. 40-58.

²⁰² ICC-01/11-01/11-152-Red at paras. 74-76.

205. During the meeting with Mr. Gaddafi on 7 June 2012, a document, which explicitly noted that it had been prepared by a member of the Defence team, and which set out the views of his family and friends concerning his options for legal representation and other issues concerning the admissibility of the case, was confiscated and declared to violate national security. The *curriculum vitae* of a lawyer, who friends and family had proposed in connection with domestic proceedings, was also confiscated by the guard. Due to the injury to his right hand, which impedes his ability to write, Mr. Gaddafi had instructed the ICC interpreter to complete a statement (confirming his wish to be tried before the ICC) and two powers of attorney for him (one for domestic proceedings and one for the ICC). The interpreter had been unable to do so because of the fact that the meeting was constantly disrupted and abruptly terminated after only 45 minutes. The papers signed by Mr. Gaddafi were subsequently confiscated from the ICC interpreter after the meeting. As such, Mr. Gaddafi presently has no means to designate a lawyer of his choice or to have one designated by persons he trusts.
206. Given the consistent manner in which Mr. Gaddafi has indicated that he wishes to be represented in domestic proceedings by a lawyer chosen by his family, the assertion by the Libyan authorities that Mr. Gaddafi refused representation lacks any credibility. Rather, it seems that in the absence of the ability to communicate with the OPCD, or his family and friends, Mr. Gaddafi's right to freely choose a counsel has been rendered illusory.
207. In light of the above difficulties, Mr. Gaddafi has not yet received any legal advice in connection with the domestic proceedings. As confirmed by the Libyan authorities, the case cannot progress to the next stage (confirmation of the charges) until this occurs. Given the gravity of the charges, any counsel now appointed would require a significant amount of time to acquaint themselves with the case file, and to seek instructions from Mr. Gaddafi, which will in turn, delay the further progress of the proceedings. The fact that the lawyer has apparently been appointed by the Prosecutor without any consultation with him is also likely to impede his ability to establish an effective rapport.
208. Although the Libyan authorities have asserted that Mr. Gaddafi may be represented by an international lawyer, in light of the fact that the OPCD and subsequently the Registry liaised with the Libyan authorities for almost two months in order to arrange one 45 minute legal visit (which was illegally monitored), there does not appear to be

any reasonable prospect that Mr. Gaddafi will have access to effective legal advice concerning the domestic proceedings in a timely or consistent manner.

209. In this connection, on 18 April 2012, the Chairperson of the African Commission on Human Rights requested Libya to take the following provisional measures *inter alia*: ensure that Mr. Gaddafi has access to his lawyers and can receive visits from friends and family.²⁰³ The Libyan authorities did not respond to this decision. Their failure to do so speaks volumes about the likelihood that the Libyan authorities will take the necessary measures to secure Mr. Gaddafi's rights, with the diligence required by the right to an expeditious trial, once the spotlight of international attention and potential disapprobation of the Security Council has been removed from this case.

210. Prior to the arbitrary arrest of Mr. Gaddafi's counsel on 7 June 2012, the Libyan authorities were aware that the Pre-Trial Chamber had granted the Defence an extension of time to file its response to the admissibility challenge two working days after the return of his counsel to The Hague.²⁰⁴ The Libyan authorities were therefore aware that arbitrarily detaining his counsel for almost a month would significantly delay the ability of the ICC to expeditiously resolve the admissibility challenge, which in turn, affected Mr. Gaddafi's right to be expeditiously brought to justice before the ICC, should the challenge be rejected.

211. The Libyan authorities have also failed to adduce any objective justification for the delays in the above matters. Although they have repeatedly sought to attribute responsibility for such delays to the Zintan brigade, the responsibility for authorizing visits rests exclusively with the Prosecutor-General.²⁰⁵ There is no objective reason as to why the Prosecutor-General was not able to expeditiously respond to the multiple OPCD requests to visit Mr. Gaddafi over the course of April, and those submitted by the Registry in May; indeed, many of the reasons provided by the Libyan focal point for the ICC as to why the matter had not been decided by the Prosecutor-General were either incorrect,²⁰⁶ or insufficiently important to warrant the delay in implementing such a crucial right.²⁰⁷

²⁰³ Decision of the Chairperson of the African Commission on Human and Peoples' Rights, 18 April 2012, Annex 7.

²⁰⁴ ICC-01/11-01/11-165.

²⁰⁵ D. McElroy 'Saif Gaddafi to be tried in remote mountain top town', 2 May 2012, The Telegraph.

²⁰⁶ ICC-01/11-01/11-152 at paras. 42 and 47.

²⁰⁷ ICC-01/11-01/11-152 at paras. 40-69.

212. The ICC Prosecutor also announced that the Prosecutor-General had offered to facilitate a visit between the Prosecutor and Mr. Gaddafi when he visited Tripoli in November 2011.²⁰⁸ The Libyan authorities therefore have the capacity to organize such visits at short notice, where they have the will to do so. It is also apparent that the Zintan authorities have been willing to facilitate visits with Mr. Gaddafi but have considered themselves constrained by the authority of the Prosecutor-General from doing so.²⁰⁹

6.3 The proceedings have not and are not being conducted independently and impartially, or in a manner which is consistent with an intent to bring the person concerned to justice

213. Libya's failure to conduct the proceedings against Mr. Gaddafi in an independent and impartial manner will fundamentally impact on its ability to bring him to justice.

214. In particular, Mr. Gaddafi has been held in detention for almost 8 months, during which time, he has been

1. not brought before a judge;
2. not granted effective access to lawyers;
3. denied the means to communicate with friends and family for the purpose of selecting lawyers,
4. questioned (apparently on multiple occasions) without the presence of a lawyer and without any waiver being obtained;
5. not provided any written information or evidence concerning the status of domestic proceedings (and requests for the same by the OPCD on his behalf have been rebuffed);
6. provided oral promises and information, which were misleading and deceptive;
7. held in isolation in a facility which is not a designated detention facility, the location of which is secret and has not been disclosed to anyone including visiting officials;
8. harassed and attacked by persons from Misrata;
9. denied access to appropriate dental treatment in a timely manner.

²⁰⁸ ICC-01/11-01/11-31 at para. 3.

²⁰⁹ ICC-01/11-01/11-156-Anx1 item 23 at p. 4.

215. Irrespective as to the precise cause of these problems (i.e., whether it was due to deliberate violations by the NTC or attributable to security concerns), Libya is ultimately responsible for their consequences, and any domestic court before which Mr. Gaddafi appears would be obliged to provide a remedy.
216. The combination of the above factors should – if the Libyan authorities apply their domestic law in an impartial and independent manner – result in a finding that the proceedings thus far have flagrantly violated Mr. Gaddafi’s rights, and have failed to comply with fundamental tenets of the law.
217. Article 304 of the Libyan criminal procedure stipulates that the “breach of any disposition of law concerning essential procedures gives rise to the nullity of the procedure.”²¹⁰ Article 305(1) states that “the breach of a provision concerning the composition of the tribunal, his functions, his competence in the qualification of the crime or, in any case, any matter related to public order gives rise to nullity.” Article 309 further provides that the declaration that a certain procedure is null, also affects any consequences of that procedure.
218. The finding by a domestic court that there has been a miscarriage of justice, that the proceedings are a nullity, or that the Prosecution is precluded from resurrecting charges that it had promised Mr. Gaddafi were terminated, would frustrate the ability of the domestic authorities to bring Mr. Gaddafi to ‘justice’, and deny alleged victims their right to the truth.
219. The retention of this case by the ICC is therefore necessary to ensure that Libya’s failure to comport with essential domestic requirements does not frustrate the overarching goal of the ICC to eliminate impunity.

6.3.1 The legality of Mr. Gaddafi’s detention and his right to be brought promptly before a judge

220. As noted above, the remand orders against Mr. Gaddafi do not specify the allegations or legal provisions, which formed the basis for his detention. In their 23 January 2012 observations, the NTC informed the Pre-Trial Chamber that Mr. Gaddafi had been detained as a ‘prisoner of war’, which strongly implies that the sole basis for his detention was the fact that he was a ‘combatant’ rather than the existence of any evidence or independent grounds for his detention.²¹¹ Since the NTC declared

²¹⁰ Articles 304, 205(1) and 309 are in Annex 1.

²¹¹ ICC-01/11-01/11-44

that the hostilities had ceased on the death of Muammar Gaddafi,²¹² it was illegal for the Libyan authorities to detain Mr Gaddafi on this basis.

221. The first detention orders in Annex D are addressed [Redacted], which is not the location where Mr. Gaddafi was detained.²¹³
222. The most recent detention order is also invalid to the extent that it fails to specify any location for Mr. Gaddafi's detention and the specific detention authority, which is responsible for implementing the order.²¹⁴
223. As noted above, the arbitrary nature of Mr. Gaddafi's detention is further aggravated by the fact that he has not been detained in a proper detention facility (and the temporary period permitted by a waiver has expired), and the location is secret.
224. [Redacted].²¹⁵ If this is the case, then it means that Mr. Gaddafi's detention location is entirely secret, and its propriety as a place of detention has never been independently assessed or monitored.
225. [Redacted].²¹⁶ The ICC therefore has no information concerning the conditions of detention or security mechanisms which will be in place, whether he will be detained in isolation or with other detainees, and its overall propriety as a place of detention.
226. In any case, the location of his detention has never been disclosed to his family and friends, in contradiction of their right to be so informed. Detaining someone in a secret location – when viewed in light of the inability of family members to contact Mr. Gaddafi (as will be elaborated in the section below) - can cause severe emotional distress for both the defendant and his family.
227. As concerns Mr. Gaddafi, although he expressed his concerns regarding his security to the OPCD, he was not visited by either the OPCD or any independent officials for over three months since that occasion. Mr. Gaddafi therefore had no method for verifying whether these concerns were ever heard by the ICC, and whether any measures were or could be taken to ensure his safety.
228. He therefore existed in a constant state of fear and insecurity – on 7 June 2012, Mr. Gaddafi informed the Defence that he was “worried that the ICC had completely forgotten about him”.

²¹² “NTC Declares Liberation of Libya”, *Al Jazeera* 24 October 2011, <http://www.aljazeera.com/news/africa/2011/10/201110235316778897.html>

²¹³ ICC-01/11-01/11-145-Conf-AnxD at pp. 3 and 5.

²¹⁴ ICC-01/11-01/11-145-Conf-AnxD at p. 4.

²¹⁵ ICC-01/11-01/11-146-Conf-AnxA at para. 14.

²¹⁶ ICC-01/11-01/11-146-Conf-AnxA at para. 15.

229. During this time period, his family members also had no mechanism for verifying whether Mr. Gaddafi was still alive and whether he was protected under the law. Given the circumstances of the death of Muammar and Mutassim Gaddafi (who died in what can only be described as extremely suspicious circumstances whilst in custody), there was an objective basis for them to have profound concerns regarding his well-being.
230. Although the Libyan authorities have asserted that his location has remained secret for 'security reasons', this can never be cited as a justification for keeping someone for prolonged periods in secret detention. As forcefully concluded in a United Nations report,

No jurisdiction should allow for individuals to be deprived of their liberty in secret for potentially indefinite periods, held outside the reach of the law, without the possibility of resorting to legal procedures, including habeas corpus. [...] Even if detainees are criminally charged, the secrecy and insecurity caused by the denial of contact to the outside world and the fact that family members have no knowledge of their whereabouts and fate violate the presumption of innocence and are conducive to confessions obtained under torture or other forms of ill-treatment.[...]. Every instance of secret detention is by definition incommunicado detention. Prolonged incommunicado detention may facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment, and may in itself constitute such treatment. The suffering caused to family members of a secretly detained (namely, disappeared) person may also amount to torture or other form of ill-treatment, and at the same time violates the right to the protection of family life.²¹⁷

231. Libyan law also specifies that relatives must be informed of the location of detention.²¹⁸

²¹⁷Joint Study on Global Practices in Relation to Secret Detention, A/HRC/13/42

19 February 2010, pp. 2-3 <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf>

²¹⁸ Article 14 of Law No. 20 of 1991 on the Promotion of Freedom, Annex 17.

232. The fact that the ICRC has been able to access the detainee does not mitigate the effects of secret detention if they are not in a position to inform the family of the location of the detention,²¹⁹ if they are not permitted to visit the detainee in his usual place of detention,²²⁰ if the duration of the visit is disturbingly short,²²¹ and potentially illegally monitored.

233. The arbitrary nature of Mr. Gaddafi's detention was further exacerbated by the failure of the Libyan authorities to accord Mr. Gaddafi an effective judicial remedy for addressing it.²²²

6.3.2. Denial of the right to effective representation and the right to silence

234. Mr. Gaddafi has been denied effective access to his defence counsel before the ICC, and has furthermore, been prevented from being able to select a counsel to represent him in connection with domestic proceedings.

235. As set out *infra*, the Libyan authorities' assertion that Mr. Gaddafi waived his right to counsel is neither credible, nor supported by any evidence, such as a written waiver.

236. Notwithstanding the fact that the Libyan authorities have postulated in their challenge to admissibility that Mr. Gaddafi has the right to a lawyer in connection with interviews with the Prosecutor-General,²²³ he was interviewed on several occasions by the Prosecutor-General, Dr. Gehani, and the Prosecutors assigned to his case without any lawyer being present.²²⁴ After the cessation of the ICC visit on 7 June 2012, the Prosecutor, Mr.[Redacted], also interrogated Mr. Gaddafi for several hours without any lawyer being present.

237. Of further concern is that fact that although the Remand order against Mr. Gaddafi requires the prosecuting authorities to specify whether the detainee was interrogated, this portion has not been completed.²²⁵ According to Libya's application, under domestic law, the prosecuting authorities are obliged to take minutes of any such

²¹⁹ Joint Study on Global Practices in Relation to Secret Detention, at para. 11.

²²⁰ [Redacted].

²²¹ [Redacted].

²²² *Al Moayad v. Germany*, decision of 20 February 2007, application number 35865/03 at para. 101.

²²³ ICC-01/11-01/11-130 at para. 59.

²²⁴ Mr. Gaddafi informed the Defence that he had been interviewed by Mr. [Redacted] and Mr. [Redacted] three days before the ICC visit on 7 June 2012. Although he had been informed on this date that a lawyer had been appointed for him, the lawyer was not present.

²²⁵ ICC-01/11-01/11-145-Conf-AnxD at p. 2.

interrogations.²²⁶ In contravention to this requirement, Dr. Gehani met the defendant alone on 3 March 2012, without the knowledge or approval of the OPCD, and did not prepare any record or minutes of their meeting.

238. The absence of legal representation during such interrogations rendered the right to silence completely ineffective.

239. The Libyan authorities recently adopted the inflexible position that as a precondition for any discussions regarding the potential release of the four detained ICC staff,²²⁷ Mr. Gaddafi's counsel had to speak to and cooperate with the prosecuting authorities, without the benefit of being able to meet with a lawyer on a privileged basis before being interrogated as a 'suspect'. The Libyan authorities thereby demonstrated that the right to silence does not exist in practice in any shape or form in Libyan domestic proceedings. The Prosecutor assigned to Mr. Gaddafi's case also exploited the situation of the four detained ICC staff by interrogating all four ICC officials as 'suspects' in order to obtain information concerning the privileged content of communications between Mr. Gaddafi and his counsel, the names and details of all persons whom the Defence had communicated with in connection with the case, and potentially incriminating information (*vis-à-vis* political offences, such as disrespecting the new flag), which derived from a privileged meeting.

240. Mr. Gaddafi's ability to make informed decisions concerning the domestic proceedings, for example, whether to waive his right to silence and speak to the investigating authorities or whether he preferred to be tried in Libyan courts or before the ICC, was also fundamentally compromised by the fact that he was promised by Dr. Gehani that the Libyan authorities had decided not to pursue him for serious crimes due to lack of evidence.

241. As noted above, on 3 March 2012, Dr. Gehani met with Mr. Gaddafi for 45 minutes without informing the OPCD or seeking the consent of the OPCD. No records or minutes were taken of this meeting. After this meeting, Mr. Gaddafi informed the

²²⁶ ICC-01/11-01/11-130-Red at para. 59.

²²⁷ Registry official [Redacted] confirmed to the Defence that at 12pm on 11 June 2012, [Redacted] met with Prosecutor [Redacted] who said it was necessary for the four detained ICC officials to discuss with him all the details of the situation. Later that evening, [Redacted] met with the Libyan Prosecutor General who stated that, "There needs to be full cooperation." [Redacted] confirmed that "They (the Libyans) had no intention to release the four unless there was cooperation from Melinda."

(Telephone conversation between [Redacted] and Mr. Xavier-Jean Keita, 10 July 2012 at 5pm).

See also M. Vincent, "ICC demands release of Australian lawyer Melinda Taylor", ABC Australia, 12 June 2012, <http://www.abc.net.au/am/content/2012/s3522897.htm>

OPCD that he had been informed by Dr. Gehani that he was the ‘architect’ of the charges against him.²²⁸

242. Even if Dr. Gehani did not have the authority to speak to Mr. Gaddafi on issues concerning the case, it is clear that he held himself out to the defendant as possessing such authority.²²⁹ As noted above, he has also subsequently indicated that he was ‘present’ when all witness statements were taken in Mr. Gaddafi’s case.

243. In light of the fact that the ICC arrest warrant alleges that Mr. Gaddafi made financial and logistical contributions to the common plan, questioning confined to financial issues could have a direct bearing on his responsibility for the events, which are the subject of the ICC arrest warrant. During the 3 March 2012 meeting with Mr. Gaddafi, Mr. Gaddafi indicated to the OPCD that he had believed that it was not prejudicial to his interests to speak to the domestic Prosecutors or to sign documentation because of the trivial nature of their inquiries. Mr. Gaddafi therefore acted to his detriment on the basis of the Prosecutor’s assertions that the domestic inquiries would be limited to these allegations.

244. Given the fact that Dr. Gehani repeatedly asked the OPCD after the interview whether Mr. Gaddafi had agreed to be tried in Libya, and spontaneously proffered the view that it was in Mr. Gaddafi’s interest to be tried in Libya due to the fact that they had decided to terminate the serious charges against him,²³⁰ it is clear that Dr. Gehani gave this information to Mr. Gaddafi with a view to influencing his position concerning the forum for the trial.

245. On 7 June 2012, Mr. Gaddafi informed the Defence that Dr. Gehani had subsequently instructed him that Mr. Gaddafi should inform the ICC that he wished to be tried in Libya. The credibility of this assertion is evidenced by the aforementioned reaction of the Libyan authorities when Mr. Gaddafi attempted to sign a statement indicating a contrary preference to be tried before the ICC.

246. Under Article 105 of the Libyan Criminal Procedure Code, the Prosecuting authorities have an obligation to clearly and accurately inform a detained person of the nature of the charges, and to take minutes of such a meeting.²³¹ If Mr. Gaddafi is prosecuted in Libya, it is possible that the Court might find that the provision of such

²²⁸ ICC-01/11-01/11-70-Red2 at para. 39.

²²⁹ In the case of *R v Croydon Justices Ex p. Dean* [1993] Q.B. 769 (DC), the Court found that it was not essential that the promisor should have the power to decide whether or not to prosecute, or that the case should be akin to one of bad faith.

²³⁰ ICC-01/11-01/11-70-Red2 at paras. 49-50.

²³¹ Annex 1.

promises to an unrepresented defendant - during an unrecorded meeting - constitutes a miscarriage of justice, and therefore terminate the case, or limit its scope to the corruption charges. In this connection, the ICC Appeals Chamber has explicitly mentioned “broken promises to an accused with regard to his prosecution” as an example of the abuse of process doctrine.²³² The European Court of Human Rights has also stated that it could not “exclude the possibility that, if a defendant were given an assurance by the prosecuting authorities that he would not be prosecuted for certain offences and the authorities subsequently reneged on that assurance, the subsequent criminal proceedings would be unfair.”²³³

247. The fact that such promises were made ‘off the record’ and in the absence of the presence of counsel, also constitutes a significant breach of the defendant’s rights. The ICTY Appeals Chamber has emphasized that the “purpose of requiring that an interview with an accused be recorded is to ensure that the accused’s rights are respected at all times”;²³⁴ failure to ensure that all relevant communications are recorded can result in the Chamber drawing adverse inferences against the Prosecution concerning the existence of improper inducements.²³⁵
248. The unwillingness of Libyan authorities to accord Mr. Gaddafi due process protections is also reflected by their actions, which have frustrated his ability to effectively represent himself before the ICC.
249. On 6 December 2012, the Pre-Trial Chamber appointed the OPCD to represent the interests of Mr. Gaddafi in the proceedings before the ICC. In January 2012, the OPCD liaised with the Libyan authorities in order to establish contact with Mr. Gaddafi with a view to advising him on his rights before the ICC.
250. The Prosecutor-General refused to conduct communications with the OPCD by telephone or to confirm by facsimile whether it would be possible for the OPCD to

²³² Prosecutor v. Lubanga, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, at para. 29.

²³³ Mustafa Kamal Mustafa (Abu Hamza) (No. 1) v. UK (Application no. 31411/07 (Decision on inadmissibility, 18 January 2011) See also R v Croydon Justices ex parte Dean [1993] Q.B. 769; In R v Bloomfield [1997] 1 Cr. App. R. 135; R v Abu Hamza [2007] 1 Cr. App. R. 27, at para. 50, R v (Nadarajah) v SoS Home Department, R (Abdi) v Same [2005] TLR 14 December 2005. Musoke v. Uganda [1972] E.A. 137 (Uganda); Director of Public Prosecutions v. Mehboob Akbar Haji & Another, Cr. App. No. 28 of 1992 (Tanzania) (The latter two cases are cited in D. Nsereko, ‘The Abuse of Process Doctrine in the Administration of Criminal Justice Before National Courts and International Tribunals’, 7 U. Botswana L.J. 29 2008).

²³⁴ Prosecutor v. Halilovic, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005, at para. 41.

²³⁵ At paras. 41-46.

visit Mr. Gaddafi.²³⁶ The OPCD was eventually instructed to liaise with Dr. Gehani. Dr. Gehani informed the OPCD that it would not be feasible for the OPCD to communicate with Mr. Gaddafi due to the fact that Mr. Gaddafi had refused to see any ICC officials.²³⁷

251. On 19 January 2012, the OPCD requested Dr. Gehani to convey a letter to Mr. Gaddafi, explaining the appointment and mandate of the OPCD, so that Mr. Gaddafi could make an informed decision regarding a potential visit.²³⁸ It is, however, apparent that Dr. Gehani failed to convey this letter to Mr. Gaddafi.²³⁹

252. On 23 January 2012, the Libyan authorities averred to the Pre-Trial Chamber that Mr. Gaddafi had apparently refused to receive visits from a local or international lawyer, or from any ICC officials.²⁴⁰

253. Pursuant to an order of the Chamber, the Libyan authorities arranged for representatives of the Registrar and the OPCD to meet with Mr. Gaddafi on 2 March 2012, that is 1 month after the Chamber had ordered that the visit be implemented 'as soon as possible'.²⁴¹

254. During a preliminary meeting with the prosecuting authorities, the OPCD attempted to obtain clarification as to how the OPCD could maintain privileged communications with Mr. Gaddafi. The OPCD was informed quite bluntly that such communications would not be possible whilst Mr. Gaddafi was detained in Zintan,²⁴² and continuous requests for access to a mechanism for transmitting privileged materials to Mr. Gaddafi were ignored,²⁴³ as were subsequent requests.²⁴⁴

255. During the meeting with the OPCD, Mr. Gaddafi indicated that he had never informed the Libyan authorities that he did not wish to meet with officials of the ICC.²⁴⁵ Moreover, in contradistinction to the assertion of the Libyan authorities that Mr. Gaddafi did not wish to meet with or cooperate with any ICC officials, Mr. Gaddafi specifically requested the OPCD to visit him again, and indicated that he did

²³⁶ Annex 10.

²³⁷ Annex 10.

²³⁸ Annex 11.

²³⁹ The OPCD transmitted to Dr. Gehani the request, and correspondence addressed to Mr. Gaddafi, on 19 January 2012, but received no response from Dr. Gehani.

²⁴⁰ ICC-01/11-01/11-44.

²⁴¹ ICC-01/11-01/11-52 at p. 4. [Redacted].

²⁴² ICC-01/11-01/11-69-Red at para. 22.

²⁴³ ICC-01/11-01/11-69-Red at paras 20 and 22. ICC-01/11-01/11-70-Red2 at para. 48.

²⁴⁴ ICC-01/11-01/11-152-AnxD; ICC-01/11-01/11-152-AnxE; ICC-01/11-01/11-152-AnxD; ICC-01/11-01/11-152-AnxE; ICC-01/11-01/11-152-AnxH.

²⁴⁵ ICC-01/11-01/11-70-Red2 at para. 34.

not object to the OPCD continuing to represent him until he was in a position to be represented by counsel of his choice.²⁴⁶

256. Mr. Gaddafi also alerted the Defence on 7 June 2012 that Dr. Gehani had informed Mr. Gaddafi that he should not trust the OPCD because the OPCD would convince him to be tried before the ICC so that the OPCD could receive more money. The likelihood that Dr. Gehani would have made such an insinuation is corroborated by the fact that after the termination of the Defence and Registry visits with Mr. Gaddafi, Dr. Gehani and the prosecuting authorities claimed that the Defence had obtained signatures from Mr. Gaddafi for the purpose of extracting money!²⁴⁷ During an interview with BBC, Dr. Gehani had also publicly claimed that the Principal Counsel of the OPCD was endeavouring to convince Mr. Gaddafi to be tried before the ICC because the Principal Counsel wanted to be his counsel before the ICC.²⁴⁸

257. By incorrectly portraying Mr. Gaddafi as someone who did not wish to be represented or to cooperate with the Court, failing to take measures which were necessary to realize his right to legal representation before the ICC, trying to interfere in Mr. Gaddafi's confidence in his Counsel, and seeking to impugn the credibility of the Defence, the Libyan authorities have failed to respect Mr. Gaddafi's right to counsel in an impartial manner.

258. The Libyan authorities have also flagrantly violated Mr. Gaddafi's right to conduct privileged communications with his counsel, his right to an independent defence, and have compromised the security and availability of Defence witnesses, in a manner which will render it impossible for him to effectively defend himself before domestic courts.

259. On 27 April 2012, the Pre-Trial Chamber ordered the Libyan authorities to implement a privileged visit between the Defence and Mr. Gaddafi.²⁴⁹ After several weeks had elapsed, the Libyan authorities explicitly confirmed to the Pre-Trial Chamber that they would implement a 'privileged visit', which respected 'international law', and that "any statements made by the OPCD which are made

²⁴⁶ ICC-01/11-01/11-70-Red2 at paras. 41 and 42.

²⁴⁷ OPCD counsel receive a fixed ICC salary, which is based on United Nations salary scales. The decision of the Pre-Trial Chamber to appoint the OPCD to represent Mr. Gaddafi increased the workload of the OPCD, but had no impact on either the individual salaries of OPCD counsel, or the overall resources allocated to the OPCD. As ICC staff members, ICC counsel cannot and do not receive funding from external sources. Mr. Gaddafi has maintained that he is currently indigent, and the OPCD has not received or become aware of any information that would contradict this claim.

²⁴⁸ BBC Arabic interview, minute 48:43, 14 April 2012, Annex 24.

²⁴⁹ ICC-01/11-01/11-129.

within their proper remit of defending Mr Gaddafi in criminal proceedings would not and cannot constitute a violation of Law No. 37”, thereby implying that there would not be any sanctions or retaliatory action taken against the Defence for its legal positions.²⁵⁰

260. During the course of the organization of this visit, the ICC focal point was explicitly informed in advance by the Registry Representative tasked with organising the mission that the Defence wished to go through documents with Mr. Gaddafi related to the admissibility challenge, discuss issues relating to his representation concerning domestic proceedings,²⁵¹ and bring personal items for Mr. Gaddafi, and that due to the complexity of the issues which would be discussed and the volume of documents, the Defence required more than one day to meet with Mr. Gaddafi.²⁵²

261. At no point in time did the ICC focal point, Dr. Gehani, raise any objections to these requests or inform the ICC Registry of any specific domestic legal requirements which would prevent the Libyan authorities from implementing the privileged visit in a manner which was consistent with international law. In addition, the four ICC officials were – to the explicit knowledge of the Libyan authorities – travelling on United Nations *laissez passer* passports. [Redacted].²⁵³

262. Although Dr. Gehani had arranged with the Representative of the Registrar to discuss further details concerning the procedures for the visit on the morning of 7 June 2012, Dr. Gehani arrived late to the rendezvous point, and insisted that the ICC delegation depart immediately for Zintan without discussing the procedures in advance. Upon arrival in Zintan, Dr. Gehani also blatantly denied that the ICC Registry representative had ever liaised with him in advance concerning the requests of the Defence.

263. Irrespective of the propriety of Counsel’s actions, the Defence strongly refutes that any actions on the part of the Defence were the trigger for the decision of the Libyan prosecuting authorities to run roughshod over the principle of legal professional privilege by:

- deceptively monitoring the visit *via* the presence of guards,
- covertly filming the visit,

²⁵⁰ ICC-01/11-01/11-160 at paras 5, 26, and 29.

²⁵¹ ICC-01/11-01/11-152-Red at para. 76.

²⁵² The Defence was not copied to correspondence with the ICC focal point, but the Registry representative explicitly confirmed that these requests had been transmitted to Dr. Gehani.

²⁵³ ICC-01/11-01/11-146-Conf-Anx-A at para. 23.

- seizing and reviewing all documents on the Defence counsel irrespective as to whether they were brought into the meeting with Mr. Gaddafi or not,
- subsequently interrogating both the ICC interpreter and the guard concerning the content of the conversations between Mr. Gaddafi and his counsel, and,
- arbitrarily arresting and detaining all four ICC officials for twenty-six days.

264. The four ICC officials were explicitly informed that everything (i.e. the hidden camera, the designation of a guard who understood multiple languages) had been set up by the prosecuting authorities in advance of the ICC visit. In contradistinction to the explicit recognition by the Libyan authorities in their filing to the Pre-Trial Chamber that the OPCD was entitled to meet with Mr. Gaddafi on a privileged basis,²⁵⁴ Dr. Gehani and the prosecuting authorities initially attempted to assert that since the OPCD was only appointed on a temporary basis, the OPCD was not entitled to the protection of legal professional privilege. Dr. Gehani and the prosecuting authorities also tried to compel the ICC interpreter to respond to questions concerning the content of the communications between the Defence and Mr. Gaddafi by claiming that the interpreter was not an ICC official, and was thus not covered by either confidentiality or the privileges and immunities of the ICC.

265. Dr. Gehani also informed both the Counsel for Mr. Gaddafi and the ICC interpreter on independent occasions that the actions of the Libyan authorities were 'retaliation' for the allegations, which had been set out in the OPCD report of 7 March 2012. Dr. Gehani spoke to the ICC interpreter in Arabic, and as such, his words cannot be attributed to a misunderstanding or a mistranslation.

266. The continued incommunicado detention of all four ICC officials allowed the Libyan authorities to pre-empt any criticism of their actions by proactively attributing blame to the ICC, whilst at the same time, preventing the four ICC officials from recounting the events to either the ICC or the international community.

267. At the same time, in order to avoid potential repercussions from the Security Council, the Libyan authorities falsely informed the Security Council that only one ICC official had been arrested, and that the other three officials had stayed in detention 'out of solidarity'.²⁵⁵

268. On 7 June 2012, Mr. [Redacted] and Dr. Gehani informed the ICC delegation that all four ICC officials were detained under the authority of the Prosecutor-General,

²⁵⁴ ICC-01/11-01/11-160.

²⁵⁵ Annex 20.

and that the Counsel and the ICC interpreter were suspects, although no written orders were provided to them nor was the legal basis for their detention explained. Dr. Gehani also informed the ICC delegation that the NTC Chairperson had confirmed their detention. After the Prosecutor finished interrogating the guard and Mr. Gaddafi, the ICC delegation was informed that it could in principle leave, but since it was late at night, it would be necessary to stay in Zintan and depart the next morning.

269. The next morning, Dr. Gehani informed the ICC delegation that only Mr. Peralta Losilla and Mr. Khodakov were free to leave; Counsel and the ICC interpreter were required to stay until the prosecutors returned, and then they could leave. The four ICC officials decided that Mr. Peralta Losilla should travel to Tripoli in order to liaise with the ICC and authorities there, however, when Mr. Peralta Losilla tried to leave, he was then informed that all four ICC officials were under arrest, and Mr. Peralta Losilla was prevented from departing. At no point in time were the four officials provided with any legal documentation concerning the basis for detaining them, and, on 10 June 2012, they were transferred to a jail, which was surrounded by tanks.

270. The Libyan authorities have also never provided a cogent explanation as to how the documents in the possession of the Defence violated domestic law or national security. Rather, it appears from the respective statements of the first guard (Mr. Ahmed Amer),²⁵⁶ Captain Al-Ajami,²⁵⁷ the Minister of Defence,²⁵⁸ and Mr. [Redacted],²⁵⁹ that the Libyan authorities consider that either providing assistance to Mr. Gaddafi or advising him to be tried before the ICC in itself violates national security and/or constitutes treason.

271. The Libyan authorities were informed from the outset that the seized documents had been prepared directly under the auspices of the Defence, concerned Defence issues, and were covered by legal professional privilege. The documents subsequently

²⁵⁶ See para. 12 *infra*.

²⁵⁷ Press conference by the Zintan Brigade Commander, Captain Al-Ajami, Annex 19 at pp. 2 and 3. V. Walt, 'Can Gaddafi's Son Receive a Fair Trial if His Lawyers Are Arrested?' TIME, 10 June 2012, <http://world.time.com/2012/06/10/can-gaddafis-son-receive-a-fair-trial-if-his-lawyers-are-arrested/#ixzz20Ea7EFJX>

²⁵⁸ On 29 June 2012, the Minister of Defence, Minister of Health, and a member of the Zintan Council visited the four detained ICC officials. During this meeting, the Minister of Defence announced that 'Anyone who assists former members of the Gaddafi regime is a traitor, and they consider this to be a crime worse than murder'. This statement was filmed, but the Representative of the Registrar, Mr. Khodakov, requested them not to broadcast it, and they agreed.

²⁵⁹ Mr. [Redacted] – who is the prosecutor assigned to the case of Mr. Gaddafi - interrogated Counsel with the question as to whether she was aware that a document in her possession contained a sentence, which violated national security. Although Mr. [Redacted] did not initially read out the sentence, it was later revealed by the interpreter to be a sentence to the effect that Mr. Gaddafi's friends and family wanted him to live, and therefore supported him being tried before the ICC.

seized from the Defence also fell squarely within the mandate of the Defence, and many were covered by ICC protective orders (*ex parte* and *under seal*). The Libyan prosecutor was explicitly informed of these facts but completely disregarded them.

272. Article 80 of the Libyan Code of Criminal Procedure explicitly prohibits the investigative judge from seizing documents, which are communicated between counsel and client,²⁶⁰ and the Libyan authorities failed to provide any written orders or explanation of the legal basis for covertly and deceptively monitoring the visit or seizing Defence documents and property.

273. The Libyan authorities also violated their explicit assurance that they would implement the visit in a manner which respected international law. The prosecuting authorities were informed from the outset that the ICC Code of Professional Conduct precludes Counsel from disclosing privileged or confidential issues in the absence of the consent of the client or a Court order. Under the Rome Statute, if the Libyan authorities wished to obtain access to confidential information, or information which they claimed fell outside the scope of legal professional privilege, then the appropriate procedure would have been to file a request to the Pre-Trial Chamber pursuant to Article 93(10) of the Statute.

274. When the ICC delegation attempted to contact the Presiding Judge of the Pre-Trial Chamber to obtain further clarification or confirmation concerning the correct procedures in such a situation, the telephones of the four ICC officials were confiscated at the very moment that the Presiding Judge was about to speak to the Counsel for Mr. Gaddafi.

275. The fact that the Prosecuting authorities blatantly disregarded the possible existence of legal procedures - which are designed to protect the rights of the defendant and due process - by subsequently ordering that all the Defence documents should be seized and reviewed by persons armed to the teeth with AK47s is certainly not consistent with an intent to respect the rights of the Defence in an independent and impartial manner.

6.3.3. Mr. Gaddafi has been denied the ability to receive family visits, and has been kept in isolation

²⁶⁰ Annex 1.

276. Although four days is the maximum time within which, under Libyan law, the detainee must be able to communicate with counsel and family,²⁶¹ Mr. Gaddafi has been unable to communicate with any family members for over 8 months.
277. The Libyan authorities misleadingly assert in their challenge that Mr. Gaddafi “is able to receive visits from NGOs and family members”.²⁶² It is completely incorrect that Mr. Gaddafi has either received any visits from family members, or that he has been permitted to do so. As was the case with issues concerning legal representation, any requests for such visits have either been ignored or rejected.
278. As noted above, when Mr. Gaddafi met with Human Rights Watch in December 2011, he complained about the fact that he had been kept in isolation, and was not permitted to receive any visits from friends and family. Although Mr. Gaddafi has received some visits from international organizations, these visits had been organised independently of the wishes of Mr. Gaddafi.²⁶³ Human Rights Watch have indicated that they were informed by the Prosecutor-General and members of the Zintan Council that “contact with family and friends was not possible at this time due to security concerns”.²⁶⁴ This position is consistent with the fact that the same Prosecutor-General informed the ICC delegation on 12 June 2012 that it is not possible for suspects (in that case, the four ICC officials) to receive any visits or telephone calls during the initial investigation stage, even if they were monitored.²⁶⁵
279. During a telephone conference on 19 January 2012, Dr. Gehani informed the OPCD that it had not been possible to organise any family visits due to the fact that Mr. Gaddafi’s family was not physically present in Libya.²⁶⁶ The OPCD was further informed that there are no telephone facilities that can be used by Mr. Gaddafi in his current detention facility in order to contact friends and family residing outside of Libya, who may fear reprisals or retaliation if they were to return to Libya.

²⁶¹ N. Rodley, The Treatment of Prisoners under International law (Oxford University Press 2009) p. 454.

²⁶² ICC-01/11-01/11-130-Red at para. 35.

²⁶³ F. Abrahams, In His First Interview, Saif al-Islam Says He Has Not Been Given Access to a Lawyer, 30 December 2011, <http://www.hrw.org/news/2011/12/30/his-first-interview-saif-al-islam-says-he-has-not-been-given-access-lawyer>

²⁶⁴ ICC-01/11-01/11-128-Conf-AnxD at p. 2.

²⁶⁵ The four detained ICC Staff were only able to receive one 5-minute (monitored) telephone call after the investigation concluded, and through sustained pressure from the ICC and diplomatic community.

²⁶⁶ ICC-01/11-01/11-51-Red at para. 18.

280. Notwithstanding the fact that Dr. Gehani had informed the OPCD that Mr. Gaddafi had not received any family visits, in their observations of 23 January 2012, the Libyan authorities asserted that Mr. Gaddafi had received a visit from [Redacted].²⁶⁷
281. During the meeting with prosecuting authorities on 29 February 2012, the OPCD was informed that direct family members such as Mr. Gaddafi's sister, Ms. Aisha Gaddafi, would not be able to communicate with him because they were considered to be suspects. As noted above, no contact details were provided to the OPCD by the Libyan authorities to enable other family members to organize visits or submit correspondence either during the mission in Tripoli or afterwards.
282. Mr. Gaddafi subsequently confirmed to the OPCD that he had not been able to receive any visits from family members,²⁶⁸ and further indicated that he had been advised by the Prosecutor General that it would not be possible for him to receive family visits.²⁶⁹
283. On 24 April 2012, the OPCD wrote to Dr. Gehani to inquire as to whether Mr. Gaddafi could receive a visit from his cousins, who live in Libya.²⁷⁰ These persons have had no political or military involvement, and could not conceivably be considered to be suspects. The OPCD did not receive any response to this email, and attempts to contact the Prosecutor-General (*per* the suggestion of Dr. Gehani) were entirely unsuccessful.
284. [Redacted]. [Redacted].²⁷¹ Notably, Dr. Gehani implicitly recognizes that [Redacted] would not have fallen into the category of persons who would automatically be precluded from visiting him due to their potential involvement in the case.
285. [Redacted].²⁷²
286. The Defence is attaching a statement from [Redacted], which confirms that he submitted multiple requests to the Libyan authorities to visit Mr. Gaddafi, which have all been rejected, and consequently, that [Redacted] has never visited Mr. Gaddafi. [Redacted] resided in Libya at the time that the requests were submitted, and as such, this was not an impediment to him visiting Mr. Gaddafi.²⁷³

²⁶⁷ ICC-01/11-01/11-44-Conf-Anx1 at p. 2.

²⁶⁸ ICC-01/11-01/11-70-Red2 at para. 45; ICC-01/11-01/11-71-Red-Conf at para. 33.

²⁶⁹ ICC-01/11-01/11-70-Red2 at para. 45.

²⁷⁰ ICC-01/11-01/11-152-AnxF.

²⁷¹ ICC-01/11-01/11-146-Conf-Anx-A at paras. 20-21.

²⁷² ICC-01/11-01/11-145-Conf-AnxE at p. 3.

²⁷³ Annex 9.

287. It is also apparent that other requests to visit Mr. Gaddafi – which have been addressed to all possible channels - have been obstructed and constructively rejected.²⁷⁴
288. The term ‘incommunicado detention’ generally refers to a “person held with no contact with anyone apart from other detainees and officials in the place where he is detained”,²⁷⁵ the fact that Mr. Gaddafi has received visits from officials from international and local organizations therefore does not obviate the fact that he has been detained on an incommunicado basis. Incommunicado detention also “includes situations where a detainee’s family is informed that the person is “safe”, without disclosure of the location or nature of the person’s detention.”²⁷⁶
289. Prolonged incommunicado detention can also constitute cruel and inhumane treatment, and constitute a violation of article 10(1) of the ICCPR.²⁷⁷ The particular circumstances of detention can also constitute aggravating factors, which are more likely to justify the designation of the treatment as being cruel and inhumane. For example, denying the defendant access to fresh air and sunlight, and keeping them in isolation can constitute inhumane treatment.²⁷⁸
290. In the present case, Mr. Gaddafi informed the OPCD that he had been denied access to fresh air and sunlight for twenty days as of 3 March 2012, and that he was detained by himself.²⁷⁹ Due to the brevity and circumstances of the most recent meeting with Mr. Gaddafi, it was not possible to elicit information concerning his current detention conditions.
291. Irrespective as to where he is detained, in the absence of any evidence that his detention conditions had changed since the March visit, it is reasonable to conclude that he has been detained in isolation for over 8 months. The Human Rights Committee has concluded that “prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7 of the ICCPR.”²⁸⁰ The

²⁷⁴ ICC-01/11-01/11-156-Anx1. See also D. McElroy ‘Saif Gaddafi to be tried in remote mountain top town, 2 May 2012, The Telegraph, in which the journalist confirms – based on interviews with authorities – that due to security reasons, the defendant has not received any visits from family or friends.

²⁷⁵ N. Rodley, The Treatment of Prisoners under International law (Oxford University Press 2009) p. 461.

²⁷⁶ Joint Study on Global Practices in Relation to Secret Detention at para. 31.

²⁷⁷ Polay Campos v. Peru, Communication No 577/1994 at para. 8.4; Velasquez Rodriguez case, Judgement of 29 July 1988, Inter-American Court of Human Rights, (Ser. C); No. 4 (1988), para. 187. The Human Rights committee has also found violations of Article 10 in cases of incommunicado detention of two weeks, and fifteen days in the respective cases of Arutyunyan v. Uzbekistan (917/00), and Arzuaga Gilboa v. Uruguay (147/83).

²⁷⁸ Polay Campus v. Peru, Decision of HRC 6 November 1997, Communication No 577/1994 at para. 8.7.

²⁷⁹ ICC-01/11-01/11-71-Red-Conf at para. 28; ICC-01/11-01/11-70-Red2 at para. 28.

²⁸⁰ General Comment No. 20 on Article 7, U.N. Doc. HRI/GEN/1/Rev. 1 at para. 6.

ICTR Appeals Chamber has also recognized that solitary confinement, if employed for prolonged periods, and without regard to the criterion of necessity and proportionality, could constitute a serious violation of internationally recognized standards.²⁸¹ The ICTR therefore has a duty not to transfer the jurisdiction of a case to domestic authorities if the defendant faces the prospect of prolonged solitary confinement.

6.3.4 Other relevant violations of Mr. Gaddafi's rights: physical attack, general insecurity, lack of access to appropriate medical treatment

292. Due to the nature of the case and the volatility of popular sentiment in Libya, it is clear that the rights of Mr. Gaddafi cannot be ensured in a manner which complies with internationally recognized due process, irrespective as to where he is detained in Libya. Mr. Gaddafi's rights have also been violated by domestic authorities to such an extent that his right to a remedy in domestic proceedings would outweigh the imperative to prosecute him in domestic courts.

293. The Defence would nonetheless like to underscore that Mr. Gaddafi is very grateful for the efforts of the Zintan brigade to ensure his security and physical integrity, and he has clearly indicated that he would prefer to be detained in Zintan rather than anywhere else in Libya, particularly in light of security risks in Tripoli. The Zintan brigade also treated the four detained ICC officials well, within the strictures of the detention regime imposed *per* the orders of the Prosecutor-General.

294. In considering whether Mr. Gaddafi's current detention conditions violate his right to such an extent that the proceedings as a whole cannot be said to comply with the requisite standards of due process, it is also necessary to consider the cumulative effect of these conditions.²⁸²

²⁸¹ Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-R11bis, Decision On The Prosecution's Appeal Against Decision On Referral Under Rule 11bis, 30 October 2008 at para. 15, citing Ramirez Sanchez v. France, ECHR, App. No. 59450/00, Judgement, 4 July 2006, paras. 121, 136, 145; Inter-American Court of Human Rights: Case of Castillo Petruzzi et al. v. Peru, Judgement (Merits, Reparations and Costs), 30 May 1999, Series C, No. 52, paras. 194-199; Case of Miguel Castro-Castro Prison v. Peru, Judgement, 25 November 2006, Series C, No. 160, para. 315; Case of García Asto and Ramirez Rojas, Judgement, November 25 2005, Series C, No. 137, para. 221; Case of Raxacó Reyes, Judgement, 15 September 2005, Series C, No. 133, para. 95; Case of Fermín Ramírez, Judgement of 20 June 2005, Series C, No. 126, para. 118. Concluding Observations of the Human Rights Committee: Denmark, 31 October 2000, UN Doc. CCPR/CO/70/DNK; UN Committee against Torture (CAT), Conclusions and Recommendations of the Committee against Torture: Japan, 3 August 2007, UN Doc. CAT/C/JPN/CO/1, para. 18.

²⁸² Dougoz v. Greece, no. 40907/98, § 46, ECHR 2001-II

295. During the OPCD visit on 3 March 2012, Mr. Gaddafi informed the OPCD that at the beginning of his detention, he had been attacked from persons visiting from Misrata, although the Commander of the Zintan brigade intervened to protect him against them.²⁸³ When questioned about this incident on Al Jazeera, Dr. Gehani responded that “[w]hen Saif Al-Islam was arrested by the Zintan rebels; they arrested him in a battle, this may have happened during the battle, because it is a military battle, where killings and assaults occur”.²⁸⁴ Contemporaneous news articles concerning the arrest of Mr. Gaddafi also describe the fact that when he arrived in Zintan, there was a mob waiting for him, comprised of ‘angry’ persons trying to hit him and attack the plane,²⁸⁵ as illustrated by a video-recording of this event.²⁸⁶
296. It is also apparent from the above-cited videos and reports concerning the detention of [Redacted], [Redacted] and [Redacted]/[Redacted], that vigilantes have visited former Gaddafi officials in detention for the purpose of insulting and abusing them.²⁸⁷
297. As conveyed by contemporaneous recordings of his arrest, in light of the fate of his father and brother, Mr. Gaddafi is labouring under the apprehension that it is inevitable that he will suffer the same fate.²⁸⁸ Over the course of the last couple of months, the Libyan authorities have repeatedly announced his pending transfer to Tripoli, and three days before the recently scheduled meeting with the ICC, the Prosecutor informed him that he would be transferred to Tripoli in ten days, that they would request the death penalty in his case, and expedite his trial to avoid any intervention by the Security Council. In Mr. Gaddafi’s circumstances, such announcements are the equivalent of being placed on death row, and being constantly told that his execution is nigh.
298. Cruel and inhumane treatment can be comprised of verbal threats and mental suffering.²⁸⁹ Subjecting a detainee to continuing uncertainty and anguish concerning his fate can constitute cruel and inhumane treatment.²⁹⁰ The ICTY Appeals Chamber

²⁸³ ICC-01/11-01/11-70-Red2 at para. 27.

²⁸⁴ Annex 12.

²⁸⁵ P. Hackett, ‘Angry crowd attacks plane with arrested Gaddafi’s son’, Reuters 19 November 2011. ‘Saif Gaddafi’s fear of his fate exposed in recording’, The Telegraph 20 November 2011, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8902574/Saif-Gaddafis-fear-of-his-fate-exposed-in-recording.html>

²⁸⁶ http://www.youtube.com/watch?feature=endscreen&NR=1&v=OaSMg_IsoGM. This video has been submitted for the visual images only, and not the contents of the report, and has therefore not been translated.

²⁸⁷ See para. 115 *infra* and Annexes 2, 4, and 21.

²⁸⁸ Saif Gaddafi’s fear of his fate exposed in recording’, The Telegraph 20 November 2011.

²⁸⁹ Human Rights Committee, General Comment no. 20 on Article 7 at para. 7.

²⁹⁰ *Chisanga v. Zambia*, Communication No. 1132/2002 (18 Nov. 2005) CCPR/C/85/D/1132/2002 (2005).

has also recently confirmed that mental suffering can reach the level of gravity to be considered as cruel treatment.²⁹¹ Of relevance is the victim's subjective belief concerning the probability that he may be subjected to physical harm, based on the circumstances and the reputation of the persons involved.²⁹²

299. As noted above, the circumstances of the death of Muammar and Mutassim Gaddafi would lead Mr. Gaddafi to believe that there was a realistic prospect that he would be subjected to the same fate. It is also apparent from his interview with the representative of HRW that he was aware of the fact that former Gaddafi officials had been subjected to torture and mistreatment in detention,²⁹³ which would have exacerbated any apprehension he had regarding his possible transfer to the custody of other militia in Tripoli.

300. Lack of access to appropriate medical treatment can also constitute an aggravating factor, which can transform solitary and incommunicado detention into cruel and inhumane treatment.²⁹⁴ Mr. Gaddafi informed the OPCD on 3 March 2012 that he was suffering from severe pain due to the fact that he had not had access to a dentist.²⁹⁵

301. In light of these concerns, the Chamber issued an order on 9 March 2012 for the Registry to make arrangements with the Libyan authorities for Mr. Gaddafi to receive appropriate medical care to address concerns regarding his teeth and his hand.²⁹⁶

302. Although the OPCD was not provided with any correspondence between the Libyan authorities and the Registry, the OPCD liaised with the Registry on a frequent basis concerning the implementation of the decision. According to the information received by the OPCD, at no point during the month of March did the Libyan authorities inform the Registry that the order was moot, or that it had already been implemented; to the contrary, on 28 March 2012, the Registry informed the OPCD that the most recent information received from the Libyan authorities indicated that the decision had not yet been implemented.

303. [Redacted].²⁹⁷

²⁹¹ Prosecutor v. Haradinaj, Appeals Judgment, 19 July 2010, at para. 95.

²⁹² At para. 95.

²⁹³ F. Abraham, 'In His First Interview, Saif al-Islam Says He Has Not Been Given Access to a Lawyer', *The Daily Beast* 30 December 2011

²⁹⁴ Kudła v. Poland [GC], no. 30210/96, §§ 92-94158, ECHR-XI, and Cenbauer v. Croatia, no. 73786/01, § 44, ECHR 2006-III. See also In Keenan v. the United Kingdom, in which the ECtHR held that "lack of appropriate medical care may amount to treatment contrary to Article 3". [Application No. 27229/95, 3 April 2001, para. 111].

²⁹⁵ ICC-01/11-01/11-70-Red2 at para. 29.

²⁹⁶ ICC-01/11-01/11-75.

304. In their 25 April 2012 filing, in complete contradiction to all the information that they had previously provided to the Registry, the Libyan authorities asserted that they had arranged for Mr. Gaddafi to receive medical and dental treatment on 12 and 8 March 2012 respectively – that is, before the Chamber’s decision was issued, and before they were actually notified of the Chamber’s decision. [Redacted],²⁹⁸ [Redacted],²⁹⁹ [Redacted].³⁰⁰ [Redacted].
305. When the ICC delegation met with Mr. Gaddafi on 7 June 2012, Mr. Gaddafi was still missing his tooth, and indicated that he had not received a visit from the dentist. Mr. Ahmed Amer (the first ‘guard’, who is actually a member of the Zintan Council) informed the four ICC officials that he was not aware of any dentist visit to Mr. Gaddafi and that he would normally be in a position to know such matters. He also specified that he believed that Dr. [Redacted] visited in April and not March 2012.
306. In the absence of any indication that the dental problem of Mr. Gaddafi was actually fixed, it also cannot be presumed that he has ceased to suffer dental pain. The filing of medical reports concerning the nature of the medical problem and the treatment advised – in the absence of the consent of the defendant or an order of the Court – constitutes a violation of the defendant’s right to medical privilege, and demonstrates the unwillingness or inability of the Libyan authorities to comply with the rights of the defendant in criminal proceedings.
307. The Libyan authorities have also sought to rely upon Mr. Gaddafi’s interview with HRW to assert that he has received weekly medical visits for the duration of his detention. Mr. Gaddafi was interviewed by HRW three weeks after his fingers were declared gangrenous and amputated – a surgery which took place in a detention facility rather than in a hospital – at a time when there was a significant degree of media attention on the condition of his hand.³⁰¹
308. In their 23 January 2012 observations, the NTC asserted that the doctor seeing Mr. Gaddafi on a weekly basis was Dr. [Redacted].³⁰² If this was or is the case, then it would have been completely illogical for Dr. [Redacted] not to have mentioned his ongoing treatment of Mr. Gaddafi in his certificate [Redacted]. Indeed, it is clear from

²⁹⁷ ICC-01/11-01/11-120-Conf-Anx1.

²⁹⁸ [Redacted].

²⁹⁹ [Redacted], Annex 13.

³⁰⁰ [Redacted].

³⁰¹ F. Abraham, ‘In His First Interview, Saif al-Islam Says He Has Not Been Given Access to a Lawyer’, *The Daily Beast* 30 December 2011.

³⁰² ICC-01/11-01/11-44-Conf-Anx1

the wording of his certificate that he had not seen Mr. Gaddafi for some time before that visit (for example, “[Redacted]”).

309. The provision of such incorrect and inconsistent information by the Libyan authorities necessarily impacts on the credibility of their assurances regarding the current and future welfare of Mr. Gaddafi, and their intention to conduct the case in an impartial manner.

6.4. Legislative and executive actions, which will prevent the defendant from being genuinely tried in an independent and impartial manner

310. Although the Libyan authorities extol the virtues and due process protections of Libyan law, the likelihood that these protections will be applied to Mr. Gaddafi in an independent and impartial manner is completely eroded by the following:

- i. The Libyan authorities have failed to accurately describe the specific procedures which would apply to Mr. Gaddafi’s case;
- ii. Apart from the constitutional declaration, the general legal framework and the persons who apply it remain unchanged from May 2011, when the ICC Prosecutor declared that the case was admissible due to the fact that it would be impossible for the case to be tried independently and impartially in Libya.³⁰³ The only real amendments, which have been made to the Libyan legal framework, have been designed to deny the defendant and any persons associated with him from being accorded the protection of the law in an impartial manner; and
- iii. It is manifestly apparent from the statements and actions of Libyan authorities that Mr. Gaddafi will not be afforded the protections of Libyan law (including the human rights conventions ratified by it) in an impartial manner.

6.4.1 The specific regime, which would be applied to Mr. Gaddafi’s case, would not comply with the due process norms referred to in Libya’s challenge

³⁰³ ICC-01/11-4-Red at para, 53.

311. Although Mr. Gaddafi was not, at the time of the admissibility challenge, charged with any specific crimes, if he is charged with some of the crimes cited as applying to his case, then he would be subjected to a different procedural regime than the one described by the Libyan authorities in their challenge.
312. Specifically, the Public Prosecutor has announced that Mr. Gaddafi could be charged with offences under article 431 of the Penal Code, which concern abuse of authority,³⁰⁴ and are considered to be offences against the State.³⁰⁵ With respect to such offences, Article 187 bis (a)–(c) delineates a parallel procedure of investigation, which derogates from the rights normally afforded to the suspect during the investigation phase. For example, Article 187 bis (a) establishes that the Prosecutor (and not an investigating judge or indictment Chamber) will be the authority responsible for supervising and confirming the results of the investigation (the charges). Additionally, under paragraph 3 of this provision, several guarantees such as those related to legal representation, access to investigative material, and provisional detention, may be suspended or do not apply.³⁰⁶
313. [Redacted].³⁰⁷ [Redacted],³⁰⁸ which will impact on the extent to which the case is investigated in a neutral and impartial manner, and the ability of Mr. Gaddafi to have recourse to an independent judicial authority.
314. By failing to either raise this issue or address its implications, the Libyan authorities have failed to meet their burden of satisfying the Chamber that they will genuinely investigate Mr. Gaddafi in an independent and impartial manner. The existence of such a specific legal framework, which is geared towards ‘political offences’, also creates a legal impediment in terms of whether they are *able* to do so.

6.4.2 The current Libyan legal framework violates the presumption of innocence, the defendant’s right to an impartial trial, and the independence of the judiciary, and is indicative of the unwillingness of the Libyan authorities to investigate and prosecute this case in an independent and impartial manner

³⁰⁴ ICC-01/11-01/11-145-Conf-Anx1.

³⁰⁵ Part 1 of Volume II of the Libyan Penal Code of General Crimes and Criminal Legislations, 2007, <https://www.unodc.org/tldb/showDocument.do?documentUid=8542>.

³⁰⁶ Article 187 bis (a) of the Libyan Code of Criminal Procedure, Annex 1.

³⁰⁷ ICC-01/11-01/11-145-Conf-AnxC at p. 7.

³⁰⁸ ICC-01/11-01/11-145-Conf-AnxC at p. 7.

315. Since the date on which the Libyan authorities filed their admissibility challenge, they have promulgated several laws, which are deliberately targeted at persons associated with the former Gaddafi regime, and individually and collectively, completely deprive the defendant of the right to impartial and independent proceedings.
316. Although the Libyan Supreme Court has overturned NTC law 37, which penalizes anyone who praises Muammar Gaddafi or his sons, or refers to them as ‘reformers’, or states anything against the interests of the State or the February revolution, it is clear that the legislative intent behind this law continues to guide the actions of Libyan authorities, and, as noted above, that the Libyan authorities consider that any assistance to Mr. Saif Al Islam Gaddafi constitutes a crime, which could result in a potential sentence of 25 years.³⁰⁹
317. The willingness of the Libyan authorities to employ spurious claims in order to invoke ‘national security’ measures as a basis for contravening fundamental Defence rights also illustrates the difficulty which will be faced by Mr. Gaddafi’s domestic counsel in obtaining assistance from potential witnesses, who may fear the repercussions for their security should their cooperation with the Defence be divulged to the Libyan authorities.
318. The Libyan authorities also aver in their challenge to admissibility that the death penalty can be commuted if “family members of victims ‘forgive’ the convicted person”.³¹⁰ However, by virtue of Law no. 35, which stipulates that no member of the Gaddafi family can avail themselves of measures aimed to promoting reconciliation, Mr. Gaddafi will be denied the equal protection of the law on this issue.³¹¹
319. The existence of a legal impediment to the possibility of a reduction or commutation of a sentence transforms a legitimate penalty into one which constitutes either cruel and inhumane punishment,³¹² or, in the case of the death penalty, an arbitrary and illegal deprivation of life.³¹³

³⁰⁹ This was the sentence, which Counsel for Mr. Gaddafi was threatened with.

³¹⁰ ICC-01/11-01/11-130-Red at para. 67.

³¹¹ Section 1 (1) of Law no. 35 provides that “The crimes committed by the children (whether of his bloodline or adopted) or wives of Moammar Gaddafi will not receive any sort of forgiveness under this or any other law.” Annex 8.

³¹² *Kafkaris v. Cyprus*, European Court of Human Rights (Application no. 21906/04)(12 February 2008) at paras. 97-98.

³¹³ Article 6(4) of the ICCPR, *Thompson v. St. Vincent and the Grenadines*, Communication No. 806/1998, (18 October 2000) UN Doc. CCPR/C/70/D/806/1998; Article 4(6) of the Inter-American Convention on Human Rights, IACHR, Report No. 48/01, Case N° 12.067 and others, *Michael Edwards et al v. The Bahamas*, April 4, 2001 at para. 70.

320. In the present case, this impediment is intentionally directed against a specific category of persons, which includes Mr. Gaddafi, and therefore exemplifies an unwillingness to genuinely prosecute the case in an impartial manner. At the same time, independent of the legislative intent, it also constitutes an objective impediment to the ability of the Libyan authorities to genuinely prosecute the case.
321. Law 36 also seizes the assets and property of a vast range of persons and their families, simply by virtue of their association with the Gaddafi regime.³¹⁴ This law constitutes a form of collective punishment of anyone associated with the Gaddafi regime, and is completely devoid of any due process protections. Article 8 of this law specifies that targeted individuals cannot contest these measures in regular courts, but must follow a mechanism, which is specific to this law.
322. Irrespective as to whether there is a trial against Mr. Gaddafi, he has already been adjudicated guilty of corruption, theft and abuse of power by virtue of this law. He has also been financially penalized in advance of any litigation and in violation of his right to be heard. Although the law seizes assets, they are not held for the benefit of victims' reparations, but can be disposed of at the whim of the administering judge.
323. Again, such draconian measures will render it impossible for the Defence to obtain cooperation from sources or potential witnesses, who will be reluctant to be seen to align themselves with the Defence, lest they be subjected to the same penalties. The lack of transparency concerning the manner in which the list of persons was decided upon also demonstrates the inherent lack of impartiality in the manner in which the law is currently applied in Libya.³¹⁵
324. Judges are considered to be public officials in Libya. In accordance with NTC Law 26, anyone who is known for glorifying the former regime, was a member of the revolutionary committee, or who stood against or currently colludes against the 17 February 2011 revolution is not eligible for public office.³¹⁶ This law will have a chilling effect on the independence of the judiciary. In light of the fact that the government is in the process of re-establishing the judiciary, judicial candidates will have a clear vested interest in declaring their allegiance to the factual narrative of events sponsored by the NTC. There is also an extremely strong disincentive for any

³¹⁴ Annex 8.

³¹⁵ 'Demonstration at NTC HQ over Law No. 36', Libya Herald 23 May 2012, <http://www.libyaherald.com/demonstration-at-ntc-hq-over-law-no-36/>

³¹⁶ Annex 8.

judge to make findings in favour of Mr. Gaddafi given the clear professional ramifications that it could have.

325. NTC law 38 also provides immunity from prosecution for any crimes committed by the rebels and *thuwar* post February 2011, thereby demonstrating that the Libyan authorities have no intention to investigate or prosecute the events post February 2011 in an independent and impartial manner, as recommended by the 2012 UN Commission of Inquiry Report.³¹⁷

326. After the issuance of the Commission of Inquiry Report, there was a vigorous debate in the Human Rights Council as to whether there should be an oversight mechanism to monitor whether Libya implemented its recommendations.³¹⁸ Libya's assurances that it could be relied upon to do so ultimately prevailed, and no such mechanism was proposed.³¹⁹ Once the possibility of international oversight was taken off the table, Libya completely reneged on its assurance by promulgating Law 38. It has also failed to follow through on its promise to conduct an effective investigation into the deaths of Muammar and Mutassim Gaddafi, as will be discussed below.

327. The vague assurance of the Libyan authorities that they will accord Mr. Gaddafi with due process must therefore be viewed in the light of their failure to comply with other assurances that they would investigate and prosecute crimes in an independent and impartial manner.

328. It would also appear from a recently publicized intercept of a conversation between a suspect (who was being investigated for the killing of General Younes) and a Prosecutor,³²⁰ that Law 38 was promulgated in order to protect certain specific individuals from accountability, who have been accused of committing crimes allegedly under the directive of members of the National Transitional Council. This conversation displays a disturbing level of corruption and complicity within the Prosecution services. The Prosecutor further alludes to the fact that the Prosecution Council as a whole, including the Prosecutor-General, is in agreement with the plan to promulgate law 38, and that as a result, the suspect can rest assured that he will be 'clear'. A Prosecution service which is willing to advocate for the adoption of a

³¹⁷ At pp. 4-5.

³¹⁸ Human Rights Council Concludes General Debate on the Promotion and Protection of all Human Rights and Interactive Dialogue on Libya 12 March 2012, [http://www.unog.ch/80256EDD006B9C2E/\(httpNewsByYear_en\)/A5E9667038000802C12579BF0039F61B?OpenDocument](http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/A5E9667038000802C12579BF0039F61B?OpenDocument)

³¹⁹ At p. 5.

³²⁰ Annex 23.

highly problematic law, which has the effect of shielding persons affiliated with one side of the conflict from criminal responsibility, would be both unwilling and unable to prosecute Mr. Gaddafi in an impartial and independent manner.

329. Concretely, the granting of such an immunity also means that the prosecuting authorities will not investigate the actions of armed protestors or *thuwar* in the post February 2011 events, notwithstanding the fact that existence of crimes committed by protestors or *thuwar* could be exculpatory or mitigating for Mr. Gaddafi. When combined with the fact that the above laws will render it difficult, if not possible for the Defence to investigate the actions of the NTC (and *thuwar*), it is clear that the current legal framework in Libya will render it impossible for there to be an independent and impartial determination of the truth.
330. In terms of the promulgation of the Constitutional Declaration, it is notable that the declaration is temporary, and is not binding on the future government. The permanent constitution will be proposed after the election of the National Public Conference, and must be submitted for ratification to a plebiscite of the Libyan people.³²¹ A two-thirds majority is required for adoption.
331. The preamble to the Declaration also crystallises in legislation the Manichean narrative concerning the absolute presumption of guilt of the Gaddafi regime, and the absolute innocence and righteousness of any actions associated with the *thuwar* and 17 February revolution.³²²

6.4.3 The actions and statements of Libyan officials demonstrate that they lack the requisite level of impartiality and independence

332. The Libyan authorities assert in their challenge to admissibility that prosecuting investigations are required to investigate in a neutral manner.³²³ It is nonetheless apparent from the summary of the evidence submitted by them that there have been absolutely no efforts made to either verify the credibility and accuracy of incriminating evidence, or to investigate exculpatory issues.
333. From the beginning of his detention, Mr. Gaddafi was informed by the Prosecutor-General that his case was 'special' and that as such, he would not be entitled to

³²¹ Article 30 of the Constitutional Declaration, ICC-01/11-01/11-144-AnxG.

³²² For example, "due to our faithfulness to the martyrs of this blessed Revolution who sacrificed their lives for the sake of freedom, living with dignity on the land of home as well as retrieving all the rights looted by Al-Gaddafi and his collapsed regime. Based on the legitimacy of this Revolution [...]".

³²³ ICC-01/11-01/11-130-Red at para. 58.

receive visits from a lawyer or from family members.³²⁴ Mr. [Redacted], the Prosecutor assigned to Mr. Gaddafi's case recently interrogated Counsel for Mr. Gaddafi with the question, "How could you provide this letter to the internationally and nationally recognized criminal Saif Gaddafi?"³²⁵

334. The public legal submissions of the Libyan authorities are also replete with presumptions concerning the guilt of Mr. Gaddafi and that the crimes occurred.³²⁶

335. Although Dr. Gehani has sought to attribute an earlier statement that Mr. Gaddafi committed crimes on translation difficulties,³²⁷ in the same statement, he asserts that "it is an unfortunate fact that in Zintan, Muammar Gaddafi used a lot of male foreign mercenaries from African countries to suppress the population",³²⁸ thereby indicating his belief that key allegations concerning Mr. Gaddafi (that mercenaries were used against the civilian population) are 'facts', rather than allegations which need to be established in a court of law.

336. The perception that Mr. Gaddafi's responsibility is predetermined has also been mirrored in the statements of other Libyan authorities.³²⁹

337. The proclamation of assumptions of guilt by high profile public officials undermines the legitimacy and enforceability of any future verdict issued in this case. If Mr. Gaddafi is convicted, then the legitimacy of the verdict will be fundamentally undermined by the perception that it was just a 'show-trial'. If Mr. Gaddafi is acquitted, then the fact that popular opinion has been stirred up in advance to presume that he is guilty may render it impossible to enforce the acquittal, as his release may risk destabilizing the country. The recent protests in Egypt illustrate the popular pressure to overturn judgments of acquittal, which contradict some of the assumptions, which were the catalyst for the uprising and overthrow of the former government.³³⁰

³²⁴ ICC-01/11-01/11-70-Red2 at para. 32.

³²⁵ Counsel for Mr. Gaddafi found the question to be so striking that she asked the Prosecutor to repeat it several times to ensure it was not a translation error, and wrote it down.

³²⁶ Paras 6-8, 35, and 79.

³²⁷ ICC-011/01/11-146-Conf-AnxA at para. 5.

³²⁸ At para. 12.

³²⁹ Saif al-Islam "has to be tried in Libya where it is a well-known fact that he has committed more crimes against the Libyan people than he did to others" [...] "It's a priority to try him under the Libyan law by Libyan judges on Libyan soil." Mr Mohammed al-Hareizi (spokesman of the ruling National Transitional Council) cited in 'Gaddafi son to face Libyan trial', The Irish Examiner, 10 April 2012 <http://www.irishexaminer.com/breakingnews/world/gaddafi-son-to-face-libyan-trial-546827.html>

³³⁰ H. Hendawi, 'Life sentence for Egypt's Mubarak; sons acquitted' *Guardian* 3 June 2012, <http://www.guardian.co.uk/world/feedarticle/10270577>

338. The reaction of the NTC to the death of Muammar and Mutassim Gaddafi is also demonstrative of their general approach to judicial proceedings concerning the Gaddafi family, and their notion of ‘justice’. Notwithstanding the fact that Muammar Gaddafi was the subject of an ICC arrest warrant, and the ICC Pre-Trial Chamber had ordered the Libyan authorities to transfer Muammar Gaddafi (alive) to the ICC to face proceedings, in August 2011, the NTC chairperson, Mr. Jalil, placed a bounty on his head of two million dinars - ‘dead or alive’.³³¹ Mr. Jalil also publicly indicated in advance that “[t]he National Transitional Council announces that any of his (Gaddafi's) inner circle who kills Gaddafi or captures him, society will give amnesty or pardon for any crimes”.³³²
339. Such a bounty and promise of amnesty for crimes, which implicitly included the death of Muammar Gaddafi himself, gave a green light to any potential captors to ignore or openly violate the safety or security of Muammar Gaddafi in securing his capture.
340. Both Muammar and Mutassim Gaddafi were potentially key witnesses in the case against Saif Al Islam Gaddafi. The fact the Libyan authorities have conducted no investigation into their deaths, but have to the contrary, through the promulgation of NTC law No. 38 granted amnesty for such brutal events, acts as a clear disincentive to other potential Defence witnesses to put themselves at risk for the defendant. It has also evidenced their willingness to manipulate investigative and judicial processes in order to silence certain inconvenient truths.
341. By allowing the bodies of Muammar and Mutassim Gaddafi to be publicly displayed in a horrendous lack of respect of human dignity, the Libyan authorities have also promulgated the public perception that the life of a Gaddafi family member is meaningless, and that their deaths should be exulted. This not only endangers the security of Mr. Gaddafi, but it will also render it impossible for Mr. Gaddafi to ever benefit from the commutation of the death penalty from victims’ families.
342. The UN Commission of Inquiry has also concluded that there is a prevalent presumption of guilt concerning Gaddafi supporters or members of the former regime, and that this has directly translated into their mistreatment in judicial

³³¹ Martin Evans, “Libya: £1 million bounty for Col Gaddafi – dead or alive”, The Telegraph, 24 August 2011 <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8721058/Libya-1-million-bounty-for-Col-Gaddafi-dead-or-alive.html>

³³² R. Birsal, “Bounty placed on Gaddafi’s head, rebel council says”, Reuters, 24 August 2011 <http://www.reuters.com/article/2011/08/24/us-libya-gaddafi-bounty-idUSTRE77N4UO20110824>

proceedings for example, through arbitrary arrests and enforced disappearance, or their retention outside the framework of the protection of the law.³³³

343. It is also apparent from the manner in which the Libyan authorities have reacted to the legal submissions of the OPCD that the ability of Mr. Gaddafi to access his rights is contingent on whether the Libyan authorities ‘agree’ or ‘approve’ of the submissions of his defence. In April 2012, Dr. Gehani repeatedly referred to his disagreement with the report prepared by the OPCD and announced his intention to ‘sue’ the Principal Counsel of the OPCD.³³⁴ As noted above, Dr Gehani also informed Counsel for Mr. Gaddafi and the ICC interpreter independently that the measures taken against them on 7 June 2012 were ‘retaliation’ for the OPCD report.
344. The inability of the Libyan authorities to comprehend the scope and requirements of an independent defence is reflected in the outlandishness of the claims for the justification for the arrest and detention of Mr. Gaddafi’s Counsel: for example, that the Defence advised Mr. Gaddafi to be tried before the ICC,³³⁵ and informed him that he is “not guilty” (which is the position of any suspect at this stage of the proceedings!).³³⁶
345. The right to an independent defence is the cornerstone of the right to impartial and independent and impartial proceedings. The ability of the Defence to litigate certain issues before an independent and impartial tribunal should not be restricted: it is for the judges to determine questions of fact based on the submissions put before them. Any intimidation, impediments or deterrents placed on the ability of the defence to raise relevant issues will ultimately affect the ability of domestic court to render independent and impartial justice.
346. Statements that it is inappropriate for the Defence to raise relevant issue are fundamentally incompatible with the rights of the Defence, and should be condemned.³³⁷ However, rather than condemning such statements, the Libyan authorities fully endorsed them in their challenge to admissibility.³³⁸ The Chairman of

³³³ A/HRC/19/68 p. 11, para. 43.

³³⁴ ICC-01/11-01/11-152-Red at paras. 41, 48, and 59.

³³⁵ Annex 19; See also V. Walt, ‘Can Gaddafi’s Son Receive a Fair Trial if His Lawyers Are Arrested?’ Time 10 June 2012.

³³⁶ ‘Australian lawyer ‘free if she reveals Libya’s most wanted man’ The Telegraph 12 June 2012.

³³⁷ Prosecutor v. Popovic, Oral decision, Transcript of 26 March 2007; Report of 31 March 1963, Pfunders (Austria v Italy), Yearbook VI (1963), p.740(784); report of 15 March 1961, Neilsen, Yearbook IV (1961), p490 (568), cited in Van Dijk, P., van Hoof, F., van Rijn, A. & Zwaak, L. “Theory and Practice of the European Convention on Human Rights” (2006) (Intersentia Publishers, Belgium), 627.

³³⁸ ICC-01/11-01/11-130-Red paras 28 and 38

the NTC also replicated them in an official press-statement, which was attached in support of the challenge.³³⁹

347. The OPCD March 2012 report was based on information provided by the defendant. By publicly denouncing the OPCD report as being based on ‘lies’ and ‘false allegations’, the Libyan authorities irretrievably damaged the standing of the Defence in domestic proceedings and the credibility of the defendant.

348. In terms of the willingness of Libyan authorities to exert their influence over prosecuting authorities, as set out in the OPCD report of 2 March 2012, the Libyan authorities freely conceded that key decisions concerning whether Mr. Gaddafi could exercise his rights (i.e. the right to receive a visit from his ICC lawyers) were tied to political and financial negotiations.³⁴⁰

349. [Redacted].³⁴¹ In so doing, Dr. Gehani confirms that the Libyan government has a clear position on issues concerning the case, and that the views of the prosecuting authorities should be subordinated to this position.

350. When the four ICC officials were recently arrested, the Chairperson of the NTC also directly intervened to confirm that they should continue to be arrested and detained, thereby demonstrating the extent of executive influence over the case.

351. As noted above, NTC Law 26, which excludes from public office anyone who supports the Gaddafi family or colludes against the revolution, will affect the independence of the judiciary. The Libyan government is also in the process of selecting and designating judicial and prosecution officers, which gives the government the opportunity to utilise this regulation to ‘cherry pick’ judges according to their political leanings.

352. It is also apparent from the above-cited intercept between a suspect and the Deputy Prosecutor that the Prosecutor-General and the Prosecution council are amenable to taking key legislative decisions based on lobbying from rebel/*thumar* groups.³⁴²

353. The ability of the prosecuting authorities and the judiciary to exercise their functions in an independent manner is also intrinsically linked to security conditions in Libya. In recent months, the judge, who had issued an arrested warrant against General Younes (before his demise) was killed,³⁴³ and there have been a spate of

³³⁹ ICC-01/11-01/11-144-AnxA at p. 4

³⁴⁰ ICC-01/11-01/11-69-Red at para 30 and 35.

³⁴¹ ICC-01/11-01/11-146-Conf-AnxA at para. 7.

³⁴² Annex 23.

³⁴³ ‘Libyan judge who ordered arrest of Qaddafi’s interior minister killed’, AFP, Al-Arabiya, 22 June 2012,

attacks by *thumar* or former *thumar*, which have been directed at forcing the government to accede to certain demands. In light of the prevalent anti-Gaddafi sentiment, which has been enflamed by the authorities, the judiciary would find it difficult to render and implement impartial justice in the absence of appropriate security conditions. This will be further elaborated in the section below.

7. Libya is unable to genuinely carry out the investigation or prosecution against the defendant

354. Although the Libyan authorities assert that they are able to genuinely investigate and prosecute this case, they have failed to adduce any evidence or explanation as to how they would be in a position to do so.
355. In the Bemba case, the Trial Chamber held that the domestic prosecuting or judicial authorities' belief as to their capacity to try the case is irrelevant: it is the responsibility of the ICC Chamber to make such a determination, based on the capacity of the State.³⁴⁴
356. In terms of the assessment of such capacity, the Trial Chamber observed that cases concerning conduct falling under the ICC Statute, "if handled in a way that does justice to the parties, involve lengthy live testimony and substantial presentation and consideration of documentary evidence, lasting inevitably many months, and the necessary protective measures for witnesses may prove extremely difficult or impossible to implement by the national authorities in the CAR in these particular circumstances [lack of security and continued presence and activity from supporters of the defendant]".³⁴⁵ In light of these deficiencies, the Chamber concluded that the national judicial system of the CAR is "unavailable", because it does not have the capacity to handle these proceedings".³⁴⁶
357. In the present case, the current circumstances in Libya lead to the inevitable conclusion that the Libyan authorities are similarly unable to genuinely carry out the investigation or prosecution against the defendant, due to the following factors, inter alia:

<http://english.alarabiya.net/articles/2012/06/22/221984.html>; 'Libyan rights group condemns killing of judge al-Jazwi', BBC 22 June 2012 <http://www.bbc.co.uk/news/world-middle-east-18551094>

³⁴⁴ Prosecutor v. Bemba, Decision on the Admissibility and Abuse of Process Challenges, ICC-01/05-01/08-802, 24 June 2010, at para. 247.

³⁴⁵ At para. 246.

³⁴⁶ At para. 246.

- a) they lack effective custody over the defendant;
- b) their judges and prosecuting authorities lack the capacity to genuinely investigate and prosecute the case;
- c) the Libyan authorities do not have the capacity to implement judicial orders;
- d) there is insufficient security and infrastructure to guarantee the independence of the judges, prosecution and the defence, and the protection of witnesses and victims; and
- e) due to security and political conditions in Libya, the Libyan authorities will not be able to obtain relevant testimony and evidence from potential witnesses.

7.1 The Libyan authorities lack effective custody over the defendant

358. Libyan law does not permit *in absentia* proceedings unless the accused is outside the country itself. Unless the defendant is transferred to the custody of the prosecuting authorities in Tripoli, it will not be possible for the case to proceed.

359. Although the Libyan authorities have made various announcements over the course of the last eight months that Mr. Gaddafi's transfer to Tripoli was imminent, it has not occurred. Moreover, in light of the fact that the Pre-Trial Chamber has ordered the Libyan authorities to give them reasonable advance notice of any such transfer,³⁴⁷ it does not appear that it will occur before this challenge is judicially determined.

360. For their part, the Zintan brigade has evidenced a clear unwillingness to transfer Mr. Gaddafi to Tripoli at this point in time due to security concerns, which will not resolve themselves in the near future.³⁴⁸ On 28 May 2012, Dr. Gehani confirmed that

³⁴⁷ ICC-01/11-01/11-129 at p. 7.

³⁴⁸ Interview with Commander Al-Ajami Al-Eteiri, Annex 18; Annex 19; D. McElroy, 'Saif al-Islam Gaddafi 'to be tried in remote mountaintop town,' The Telegraph, 2 May, 2012; L. Stack, 'Qaddafi Son Being Held by Rebels, Rights Group Says', New York Times, 21 December, 2011.

<http://www.nytimes.com/2011/12/21/world/africa/qaddafi-son-seif-al-islam-is-alive-and-held-by-rebels-rights-group-says.html?ref=seifalislamqaddafi>; R. Spencer, 'Libya: conflict brewing over trial of Saif al-Islam Gaddafi,' The Telegraph, 20 November, 2011, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8902994/Libya-conflict-brewing-over-trial-of-Saif-al-Islam-Gaddafi.html>

the Zintan brigade remained unwilling to transfer Mr. Gaddafi to Tripoli,³⁴⁹ and on 2 July 2012, the Commander of the Zintan brigade confirmed this stance.³⁵⁰

361. Article 17(3) of the Statute expressly lists the inability of the State to obtain custody of the defendant as grounds for declaring the case to be admissible before the ICC. In the Kony et al. case, the Pre-Trial Chamber's confirmation of the admissibility of the case was predicated on a statement from Uganda that although the judiciary was fair and impartial, it did not possess the means to secure the arrest of the defendants.³⁵¹ It should be noted that for the purposes of admissibility proceedings, the Chamber is only examining whether the State meets the relevant criteria; it does not consider whether the ICC can.³⁵²
362. Since the Chamber must base its determination on the facts in existence at the time of the challenge, the admissibility challenge must be rejected due to the fact that the Libyan authorities currently lack the ability to exercise jurisdiction over Mr. Gaddafi before their courts in Tripoli.
363. Even if Mr. Gaddafi is transferred to Tripoli, the Libyan authorities clearly lack the capacity to ensure that he will not escape, or be tortured, killed, or otherwise mistreated.
364. In terms of the first aspect, the Zintan brigade has repeatedly cited their concern that the current authorities in Tripoli lack the capacity to ensure that pro-Gaddafi supporters do not attempt to liberate him.³⁵³ The former spokesperson of the NTC also opined that due to widespread practices of corruption in detention centers, if sent to Tripoli, there was a high probability that the detention guards could be bribed to release Mr. Gaddafi.³⁵⁴
365. There have also been numerous credible reports of deaths and mistreatment of detainees in Libya, and in Tripoli in particular.³⁵⁵ Notwithstanding repeated promises

³⁴⁹ 'Pay row puts on hold Gaddafi son's transfer to Tripoli' middle-east-online.com, 28 May 2012 (ICC Press Review, 29 May 2012).

³⁵⁰ 'International Criminal Court staff freed from Libyan prison after painstaking international negotiations', The Independent, 2 July 2012, <http://www.independent.co.uk/news/world/africa/international-criminal-court-staff-freed-from-libyan-prison-after-painstaking-international-negotiations-7904317.html>

³⁵¹ Prosecutor v. Kony et al, Decision on the admissibility of the case under article 19(1) of the Statute, 10 March 2009, ICC-02/04-01/05-377 at paras. 37 and 38.

³⁵² Prosecutor v. Katanga Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, ICC-01/04-01/07-1497 at para. 113.

³⁵³ 'Saif Al-Islam will escape if handed over: Zintan' Libya Herald 15 April 2012, <http://www.libyaherald.com/saif-al-islam-will-escape-if-handed-over-zintan/>

³⁵⁴ 'Libya on the Line' Part I, (26 minute 30 seconds) Annex 16.

³⁵⁵ Amnesty International Report "Rule of law or rule of militias?" 6 July 2012, MDE 19/012/2012

by the NTC to bring the militia under the control of the central government, and ensure that appropriate detention conditions are applied to all detainees, the NTC has been unable (or unwilling) to do so, with the United Nations recently reporting three more deaths of Gaddafi supporters in custody due to torture,³⁵⁶ and the continued practice of torture in detention facilities in Tripoli, and Zawiya.³⁵⁷ A video of the torture of a person suspected to be a pro-Gaddafi supported also surfaced in mid-May 2012.³⁵⁸ The forces appointed by the Libyan authorities to rein in the militia has also been accused of committing human rights violations, including a recent attack on a human rights activist, who was threatened with reprisals by government security forces.³⁵⁹

366. The UN Commission of Inquiry also concluded that rather than diminishing, instances of arbitrary arrest, enforced disappearance and the mistreatment of detainees by *thuwar* had “considerably increased” since it published its first report in 2011.³⁶⁰
367. The fact that the Libyan authorities have declared an amnesty for acts committed by *thuwar*, including acts of torture and cruel treatment, denies victims of torture the right to an effective remedy or form of redress,³⁶¹ and in turn, propagates the likelihood that such practices will continue unabated.³⁶²
368. The possible death of Mr. Saif Al Islam Gaddafi in custody would be a travesty for international justice, and for the right of alleged victims in Libya to know the truth. It is therefore a risk that the ICC cannot afford to take.

7.2 The judges and prosecuting authorities lack the capacity to genuinely investigate and prosecute the case

369. As set out in section 4.1, the prosecuting authorities do not appear to have the capacity to verify or assess the credibility of witnesses. It is also apparent from the

³⁵⁶ ‘UNSMIL calls on Libyan Government to hold to account those responsible for deaths in custody and torture of detainees’ *Libya Herald* 1 May 2012, <http://www.libyaherald.com/unsmil-calls-on-libyan-government-to-hold-to-account-those-responsible-for-deaths-in-custody-and-torture-of-detainees/>

³⁵⁷ M. Nichols, U.N. says three Libya prisoners likely tortured to death *Reuters* 10 May 2012.

³⁵⁸ ‘Seven months after Gaddafi’s death, Libyan rebels still out for revenge’ 21 May 2012, <http://observers.france24.com/content/20120518-seven-months-after-gaddafi-death-libyan-rebels-still-out-revenge-misrata-video-torture-mercenaries-human-rights>

³⁵⁹ C. Stephen, ‘Libya sees claims of beatings and human rights abuses as elections near’, *Guardian* 3 June 2012, <http://www.guardian.co.uk/world/2012/jun/03/libya-security-force-kidnapping-surgeon>.

³⁶⁰ UN Commission of Inquiry Report 2 March 2012, Summary of findings, at para. 41.

³⁶¹ Human Rights Committee General Comment No. 20 on Article 7 at para. 14.

³⁶² Amnesty international Report “Rule of law or rule of militias?”, MDE 19/012/2012, 6 July 2012, p. 10.

repeated manner in which Mr. Gaddafi's rights have been violated that the authorities do not have a clear understanding of basic human rights or the role of the Defence.

370. This is consistent with the finding of the Commission of Inquiry 2012 report that:

Few officials spoken to by the Commission have demonstrated a real understanding of basic legal and human rights standards. Most existing prisons do not meet basic standards. Prison guards and police exhibited little concept of prisoners' rights. Judges, prosecutors, the judicial police and others involved in the administration of justice and detention centres require training in human rights standards.³⁶³

371. The paucity of the investigative techniques utilized by the Libyan authorities is exemplified by the fact that the day after the Libyan authorities were notified of the ICC decision rejecting their request to postpone the surrender of Mr. Gaddafi pursuant to Article 94, the Libyan authorities also sent an SMS to all mobile phones in Libya requesting citizens to come forward with evidence.³⁶⁴ It is self-evident that it is not possible to conduct an independent, effective, and impartial investigation in such a manner, and that such an approach will not capture exculpatory evidence from persons, who may fear retaliation or prosecution if they come forward.

372. A recently issued United States State Department report on human rights in Libya also noted that "[u]nidentified and sometimes bound corpses found across Tripoli, including in hospitals following the seizure of the city by the opposition, were attributed to killings by regime or opposition forces, depending on the source of the reporting."³⁶⁵ There therefore does not appear to be an effective and impartial mechanism for identifying the cause of the death of victims, or for assessing the identity of the perpetrators.

373. Libyan authorities have also acknowledged that they lack the capacity to effectively prosecute the case: indeed, their imperative seems to be to take sufficient steps to placate the public and the ICC rather than to genuinely move the case forward. Fathi Baja, a member of the NTC, informed the New York Times that they were

³⁶³ UN Commission of Inquiry Report, March 2012, Summary of findings, at para. 12.

³⁶⁴ ICC-01/11-01/11-94-Conf-Anx1. This text message was sent by the Prosecutor General Abdelaziz Al Hasadi, 'Libya ready to try Gaddafi aide Ex-spy chief to face court before polls. (Agence France-Presse/Gulf News, 23 March, 2012).

³⁶⁵ United States Country Report on Human Rights, Libya 2011
http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dynamic_load_id=186437&anchor=executive#executive

responding to public pressure but that “the Libyan authorities did not yet have the ability to properly gather evidence or present a case. “If you bring him to trial under these conditions, I think he will be found innocent” ”.³⁶⁶

374. During the OPCD March 2012 mission to Libya, Dr. Gehani acknowledged that the Libyan authorities had been unable to find evidence of serious crimes against Mr. Gaddafi,³⁶⁷ and in a more recent article, confirmed that the evidence collected by the Libyan authorities might not suffice for ‘condemnation’.³⁶⁸

375. In meetings with representatives of the UN Commission of Inquiry, “government officials emphasized the precariousness of the security situation, the weakness of the national police and judicial police force, and the inability of the central authorities to enforce rule of law.”³⁶⁹

376. The statement in their admissibility challenge that the Libyan authorities will request assistance to conduct their investigations and prosecution from United Nations bodies, such as UNHCR, is an implicit recognition of the fact that without such assistance, the Libyan authorities lack the capacity to conduct genuine investigations and prosecutions themselves.³⁷⁰

377. Nor can the Chamber rely on such assistance being requested or granted. In his press-release, the President of the NTC asserts that the Libyan authorities ‘will’ request assistance, not that they have done so.³⁷¹ The letters are not dated, and there is no indication that they have actually been sent, or if they have, whether the relevant entities have agreed to provide such assistance. In line with the Chamber’s duty to assess the facts at the time of the application, the hypothetical possibility that domestic authorities may receive cooperation or assistance concerning their investigations is irrelevant to the Chamber’s decision on the admissibility of the case.³⁷²

³⁶⁶ D. Kirkpatrick and M. Simons, ‘Libya Resists International Court’s Claim on War Crimes Case’, 21 March 2012, New York Times.

³⁶⁷ ICC-01/11-01/11-70-Red2 at para. 49.

³⁶⁸ H. Jaber, ‘Saif Gaddafi ‘will not be executed’ for war crimes’ Sunday Times, 13 May 2012, Annex 15.

³⁶⁹ Commission of Inquiry Report, 2 March 2012, at p. 6, para. 13.

³⁷⁰ In the Ruto et al. case, the Appeals Chamber found that it “was not erroneous for the Chamber to state that Kenya’s proposal to submit additional reports was actually an acknowledgment that there were no such investigations at that time”. ICC-01/09-01/11-307 at para. 82. Moreover, as found by the Pre-Trial Chamber in the Ruto et al. case, the domestic authorities should in principle, be capable of conducting investigations without external assistance. Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ICC-01/09-01/11-10 at para. 34.

³⁷¹ ICC-01/11-01/11-144-AnxA at p. 3.

³⁷² ICC-01/09-01/11-307, at para. 123.

378. This lack of capacity has been demonstrated by the inability of the Libyan authorities to conduct other criminal proceedings relating to the post-February 2011 events, or to process the cases of thousands of persons who have been detained by the *thumar*.

379. For example in January this year, Amnesty International reported that “[t]he police and the judiciary remain dysfunctional across the country [...] while in some areas courts are reportedly processing civil cases, so-called “sensitive” cases related to security and political issues are not being addressed.”³⁷³

380. The proceedings commenced in February 2012 against 41 persons accused of being Gaddafi loyalists was stopped due to the fact that it had been incorrectly initiated in military courts.³⁷⁴ The accused in that case also “alleged that they have been tortured and their right to adequate defence is not fully respected”.³⁷⁵ NTC member Fathi Baaja explained that the “trials of Gaddafi loyalists have so far lagged in Libya due to inadequate prison infrastructure and a paralysed judiciary.”³⁷⁶

381. The inability of the particular prosecution authorities assigned to the case of Mr. Gaddafi to conduct credible or effective investigations and prosecutions is amply demonstrated by the fact that these same prosecution authorities claimed that an ordinary swatch watch worn by the ICC interpreter, was in fact a ‘spy watch’ (with video or GPS capabilities so hidden that even she and the swatch makers were unaware of them), and proceeded to detain her and charge her on this patently fallacious basis. The decision of the Libyan authorities to tender medical certificates, which both predated the decision ordering the medical visits, and contradicted the information submitted by the ICC focal point, Dr. Gehani, also displays an inability to verify the reliability and probative value of documentary evidence.

7.3 There is insufficient security and infrastructure to guarantee the independence and safety of the judges, prosecution and the defence, and the protection of witnesses and victims.

382. Although it was later overturned, NTC law no. 37 explicitly recognized that Libya is in a state similar to an armed conflict or a state of emergency.³⁷⁷ There have also

³⁷³ ‘Libya: Deaths of detainees amid widespread torture’ AI Report, 26 January 2012.

³⁷⁴ Commission of Inquiry Report 2 March 2012 p. 20, at para. 106.

³⁷⁵ Commission of Inquiry Report, at p. 40, para. 48.

³⁷⁶ ‘Libya ready to try Gaddafi aide: Ex-spy chief to face court before polls’ AFP 23 March 2012.

³⁷⁷ Article 1, “In the circumstances similar to war in which the country finds itself [...]”. Annex 8.

been several recent reports of armed violence in Tripoli and surrounding areas by former revolutionaries (*thumar*).³⁷⁸ Many of these incidents have been directly tied to political demands:³⁷⁹ as remarked by a member of the NTC, ““You know that security here is a big joke,” Fathi Baja, a council member, said at the time. With an antiaircraft gun mounted on a pickup truck, he said, “you can do whatever you want — nobody can stop you.”³⁸⁰

383. The fact that former *thumar* militia are willing to resort to violence in order to express their dissatisfaction with political issues casts a disturbing pall over the ability of any court in Libya to issue or implement decisions, which may be politically unpopular (such as the acquittal or release of Mr. Saif Al Islam Gaddafi).

384. These issues of security have also directly impacted on the work of the judiciary in Libya. According to the US State Department Report on Libya, “judges cited concerns about the overall lack of security in cities and around the courts as one of the reasons that they had not yet returned to work, further hindering the reestablishment of the judiciary”.³⁸¹

385. Local prosecutors also informed Amnesty International that due to lack of security and a functioning police force, prosecuting authorities were unable to conduct investigations or implement necessary actions.³⁸² In many cases, they were dependent on local militia or security brigades to do so, which had impacted on their ability to conduct impartial and effective investigations.³⁸³

386. Despite the manifest problems with security, the Libyan authorities have not adopted measures to ensure the security of participants in the domestic proceedings concerning Mr. Gaddafi. When questioned about the ability of the Libyan authorities to provide adequate security to defence counsel, Dr. Gehani responded that “[a]ny Libyan lawyer who feels he is in danger by taking Saif’s case then he has the right to

³⁷⁸ P. Osborne, R. Cookson, ‘Libya still ruled by the gun’, *The Telegraph* 18 May 2012

³⁷⁹ ‘Clashes in Tripoli’, *Libya Herald* 1 May 2012, <http://www.libyaherald.com/clashes-in-tripoli/>

C. Stephens, ‘Libyan rebels storm prime minister’s office’ *The Guardian* 8 May 2012

³⁸⁰ D. Kirkpatrick, ‘Offices of Premier Attacked in Libya’, *New York Times*, 8 May 2012, http://www.nytimes.com/2012/05/09/world/africa/truckloads-of-libyan-militiamen-attack-prime-ministers-office-in-tripoli.html?_r=4&ref=daviddkirkpatrick

³⁸¹ United States Country Report on Human Rights, Libya 2011 at p. 9.

³⁸² ‘Militias threaten hopes for new Libya’ AI Report February 2012, at p. 40, <http://www.amnesty.org/en/library/asset/MDE19/002/2012/en/dd7c1d69-e368-44de-8ee8-cc9365bd5eb3/mde190022012en.pdf>

³⁸³ At p. 40.

refuse,” he said. “If all Libyan lawyers refuse then he can have a foreign lawyer, that way he will be safe after he leaves the country.”³⁸⁴

387. Given that the proceedings will be based on Libyan criminal and procedural law, and the ability of Mr. Gaddafi to be represented by a foreign lawyer falls to the discretion of the bar association, it is no answer to suggest that Mr. Gaddafi can hire a foreign lawyer in order to alleviate the security issues. Moreover, even if his defence team is comprised of some foreign lawyers, the fact that they can leave the country after the conclusion of the trial does not obviate the security risk, which they would face during the trial itself (and possible appeal).

388. If the Libyan authorities were committed to holding a fair and impartial trial, the domestic proceedings would last at least several months, during which it would be necessary for the Defence to be based in Tripoli. In order to investigate the case, it would also be necessary for the Defence to travel to various areas in Libya, including Misrata, in which the militia has reportedly displayed particularly virulent anti-Gaddafi proclivities.³⁸⁵ The Defence should not be compelled to risk their lives in order to satisfy the Libyan government’s desire to hold the trial in Libya.

389. The fact that the Counsel for Mr. Gaddafi was also detained, arrested and is now facing an extant criminal prosecution – arguably for professing sentiments which were not favourable to the position of the Libyan authorities - would have also cast a disturbing pall on the willingness of international counsel to defend Mr. Gaddafi in a fully independent manner in domestic proceedings.

390. For this reason, the ICTR Appeals Chamber found that the prospective difficulty faced by the defence in meeting their client in a domestic detention setting, was directly relevant to the fairness of the proceedings, and could be taken into consideration by the Chamber in deciding whether the case could be referred to domestic authorities pursuant to Rule 11 *bis*.³⁸⁶

391. The challenge to admissibility also provides absolutely no information concerning the existence of protective measures for either Prosecution or Defence witnesses. The

³⁸⁴ H. Al Shalchim M. Gumuchian, ‘Libya: Wrangling hampers drive to try Gadhafi’s son Government needs to prove it has means to try Saif al-Islam fairly’, Reuters 29 April 2012
<http://www.vancouversun.com/news/Libya+Wrangling+hampers+drive+Gadhafi/6538434/story.html#ixzz1wG4oo53o>

³⁸⁵ D. Williams, ‘The Murder Brigades of Misrata’ Human Rights Watch 28 October 2011,
<http://www.hrw.org/news/2011/10/28/murder-brigades-misrata>

³⁸⁶ Prosecutor v. Kanyarukiga, Decision On The Prosecution’s Appeal Against Decision On Referral Under Rule 11*bis*, 30 October 2008, at para. 21.

availability of effective protective measures will influence both the ability of witnesses to testify in an accurate and non-coerced manner (i.e. free of political pressure), and the availability of witnesses, who might not otherwise be willing to testify (in particular, to travel to Libya to testify).

392. In terms of the first aspect, as noted in section 4, there has been a campaign of collective punishment, which has been applied to anyone who is considered to be pro-Gaddafi, or who is otherwise associated with Mr. Saif Al Islam Gaddafi.

393. The fact that the prosecuting authorities were willing to arrest the Counsel for the Defence, seize confidential documents and contact details, and demand details concerning person assisting the Defence in a very public manner, will have completely undermined the willingness of any actual or potential witnesses to cooperate with a Defence counsel, who could be vulnerable to such arbitrary measures. Whereas Counsel before the ICC should, in principle, have privileges and immunities, a domestic counsel has no ability to legally defend themselves against such coercive techniques.

394. The existence of security threats against persons considered to supporters of the Gaddafi regime in general and Mr. Saif Al Islam Gaddafi in particular, and the recent measures taken against the Defence will inevitably impact on the availability of potential defence witnesses during the trial if it is held in Libya, and the willingness of witnesses outside of Libya to travel there to testify.³⁸⁷

395. For example, it has been indicated on behalf of Defence witness D001 that notwithstanding the fact that this person is able to testify in relation to a fundamental aspect of the case, it would not be feasible for this witness to testify for the Defence if the trial is in Libya because of threats and violent actions, which have been directed towards this witness in the witness's current location, and as such, the possibility of testifying by video-link would not eliminate the risk.

396. D002 has stipulated that although this witness has first hand knowledge of facts related to the case from January until October 2011 and is in a unique position to testify in relation to several important aspects of the case, this witness would never testify either in person or by video link if the trial were to be held in Libya. D002 has

³⁸⁷ The statements of D001, D002, and D003 and details concerning the threat to the potential Defence witness have been submitted to the Victims and Witnesses Unit for a risk assessment – Annex 22. The Defence notes that the OPCV has been permitted to submit the views and concerns of victims to the Pre-Trial Chamber, even though the original views and applications forms are not submitted to the parties. Similarly, the Libyan authorities have relied upon summaries of witnesses without submitting the actual witness statements.

fears for the witness's personal safety due to the lack of control of armed militias in the country as well as the lack of any central authority with the power to ensure the witness's safety. D002 believes that there is no way that that the witness could enter the country during the time of a trial without it becoming public information and any video conferencing mechanism would likely be monitored by a Libyan entity. D002 is aware of persons who have been threatened with assassination due to their ties to the defendant.

397. Defence witness D003 has indicated to the Defence that if the trial were to be held in Libya, it would be impossible for this witness to testify on the relevant facts concerning Mr. Gaddafi's actions, direct conversations, and state of mind from January to August of 2011. This witness believes that the witness's personal safety and professional activities would be jeopardised due to the fact that the witness is aware of multiple persons having been threatened in various countries. The witness has personal knowledge of direct violent actions occurring against two persons in countries outside of Libya.
398. The Defence is also aware that a potential Defence witness/source was threatened that there would be consequences if this person cooperated with the Defence.
399. Witnesses outside of Libya may also have family members in Libya, who may be vulnerable to possible retaliatory measures.
400. Under Libyan law, the Trial Chamber can only base its decision on evidence heard before the Chamber or an investigating judge;³⁸⁸ there is no provision for the admission of documentary evidence or video-link evidence. Even if the Judges were able to accept documentary statements in lieu of oral testimony, this would inevitably impact on the weight of such testimony. The Defence would therefore be severely handicapped in terms of its ability to present its case under the same conditions as the Prosecution, in violation of the fundamental principle of equality of arms.
401. In line with this reasoning, the ICTR Appeals Chamber refused to transfer a case back Rwanda, because of the inadequacy of protection services within Rwanda meant that the defendant would have difficulty in obtaining witnesses, who resided in Rwanda,³⁸⁹ and concerning those witnesses, who resided outside of Rwanda, "it would be a violation of the principle of the equality of arms if the majority of Defence

³⁸⁸ Articles 252, 254 and 262 of the Libyan code of criminal procedure. Annex 1.

³⁸⁹ Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-R11bis, Decision On The Prosecution's Appeal Against Decision On Referral Under Rule 11bis, 30 October 2008 at paras. 26 and 27.

witnesses would testify by video-link while the majority of Prosecution witnesses would testify in person”.

402. Even if Libya were to amend its legislation in the present case to permit video link testimony, for many potential defence witnesses, their security concerns stem from the possibility of the Libyan authorities becoming aware of the fact that they are cooperating with the Defence, and the location from which they are testifying. It is, however, impossible to remain anonymous vis-a-vis the very authorities which are prosecuting the case. The lack of security and infrastructure in Libya also strongly suggests that it would be difficult to maintain the confidentiality of the identity of witnesses, even if they testify by video-link.

403. [Redacted].³⁹⁰ [Redacted].

404. Unlike the ICC, Libya has not demonstrated that it has any in-country systems in place or the capacity to liaise with other States to ensure Defence witnesses’ security in other countries, should the witnesses’ location and cooperation with the Defence become known to Libyan diaspora or persons travelling to the countries, where the witnesses reside.

7.4 The Libyan authorities lack the capacity to implement judicial orders

405. The Libyan authorities cannot consistently refer to the fact that it Libya is recovering from an armed conflict in order to justify their failure to comply with orders and deadlines,³⁹¹ whilst at the same time, seeking to escape from the consequences of such on its ability to be able to try Mr. Gaddafi in accordance with the standards required by article 17.

406. In an interview with Al Jazeera, Dr. Gehani freely conceded that:

The Libyan judicial system from a legal point of view is capable of conducting the trial but from the actual material point of view, it lacks the security apparatus under its command and through which its judgments and orders and decision can be implemented.³⁹²

³⁹⁰ Annex 22.

³⁹¹ ICC-01/11-01/11-41-Conf-Exp-Anx2 (extension of time for ‘security reasons’); ICC-01/11-01/11-103, at paras. 3-4 (inability to surrender Mr. Gaddafi because of changing security environment, and difficulties with negotiating with the Zintan brigade); ICC-01/11-01/11-146-Conf-AnxA ([Redacted]); ICC-01/11-01/11-149, at para. 33 (lack of cooperation from Zintan brigade).

³⁹² Annex 12.

407. In time, it is possible that Libya might achieve the capacity to conduct fair and impartial trials, but the fundamental right of the defendant to be tried in an expeditious manner should not be sacrificed at the altar of their national pride.

408. As recognized by the ICC Appeals Chamber, the capacity to ensure the implementation of judicial orders is the *sine qua non* for criminal justice: no judicial system can effectively function if the participants are either unwilling or unable to implement such orders.³⁹³

8. Related procedural issues

409. The Libyan authorities have requested the Chamber to convene an oral hearing. This request was not submitted prior to or contemporaneously with the admissibility challenge, and no justification was provided for why it was not possible to either submit the additional information contemporaneously, or seek confirmation as to whether the Prosecutor-General would be permitted to testify before filing the challenge. The decision of the Libyan authorities to file their challenge without seeking such advance confirmation demonstrates that they did not consider this testimony to be necessary or relevant to the admissibility criteria. It would also be a fundamental violation of the principle of adversarial proceedings to allow the Prosecutor-General to testify concerning issues, in relation to which the Prosecutor-General has - through the illegal monitoring of a privileged visit - prevented the Defence from being able to obtain instructions from the defendant in an effective manner.

410. The request of the Libyan authorities to file a reply to the Defence response should also be rejected. When the Pre-Trial Chamber recognized the right of the Libyan authorities to postpone cooperation with the ICC pending the resolution of the admissibility challenge, the Chamber stipulated that "it was expected that Libya will provide all required assistance in order to facilitate an expeditious determination of the Admissibility Challenge".³⁹⁴ The failure of the Libyan authorities to immediately surrender Mr. Gaddafi's counsel significantly delayed the ability of the Defence to

³⁹³ Prosecutor v. Lubanga, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", 8 October 2010, ICC-01/04-01/06-2582

³⁹⁴ ICC-01/11-01/11-163 at para. 41.

file its response, which in turn, has impeded the ability of the Chamber to render an expeditious resolution of the challenge. The granting of a right to reply would therefore be contrary to the underlying intent in Rule 58 that admissibility issues should be resolved expeditiously.

9. Relief Sought

411. For the reasons set out above, the Defence of Mr. Saif Al Islam Gaddafi requests the Honourable Pre-Trial Chamber to reject the Libyan admissibility challenge.³⁹⁵



Xavier-Jean Keita, Counsel for Mr. Saif Al Islam Gaddafi

Dated this, 31st Day of July 2012

At The Hague, The Netherlands

³⁹⁵ The Defence would like to express its appreciation for the dedication and efforts of the following *pro bono* assistants and OPCD interns: Alessandro Pizutti, Avidah Moussavian, Mohamed Youssef, Li Tian, Daniel Rogers, Mona Mohanna, Tamara Kasic.