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Date: 18 February 2013

PRE-TRIAL CHAMBER I

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

SITUATION IN LIBYA

IN THE CASE OF

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

Public

**with Public Annexes 1, 2, 3, 5, 7, 8, 9, 10, and 12, Confidential Annexes 4 and 13,
and Annexes 6 and 11 confidential *ex parte* only available to the Representatives
of the Libyan Government, the Prosecution, the OPCV, and the Defence for Mr.
Saif Al-Islam Gaddafi**

**Public Redacted Version of the “Response to the “Libyan Government’s further
submissions on issues related to admissibility of the case against Saif Al-Islam
Gaddafi””**

Source: Defence of Mr. Saif Al Islam Gaddafi

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

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1. Introduction

1. On three separate occasions, over a period of fifteen months, the Government of Libya has employed legal sleight of hand in an attempt to conjure an admissibility challenge out of thin air, and distract the Court from the complete lack of progress in domestic proceedings, the lack of capacity, and the appalling legal conditions, to which Mr. Saif Al-Islam Gaddafi continues to be subjected.
2. On three separate occasions, they have completely failed to do so.
3. If the Government of Libya, with the assistance of a team of three international Counsel cannot substantiate even the basic threshold of an admissibility challenge after fifteen months, then it is clear that they completely lack either the willingness or the capacity to bring Mr. Gaddafi to justice in an independent, impartial, and reasonably expeditious manner.
4. An admissibility challenge cannot be constructed on the basis of empty rhetoric, and vague assurances. The Pre-Trial Chamber has underscored on multiple occasions that firstly, the burden for challenging admissibility falls squarely on the State,¹ and secondly, that in order to meet this burden, the State must adduce evidence of a sufficiently concrete, tangible and pertinent nature.²
5. In its 7 December 2012 decision, the Pre-Trial Chamber also very clearly demarcated the specific types of evidence that the Government of Libya would need to adduce in order to satisfy its burden of challenging the admissibility of this case.³
6. Notwithstanding these extremely clear judicial pronouncements, the Government failed to submit evidence and information in relation to several key questions, posited by the Chamber.
7. The Court also cannot accord any credibility to a challenge, which constantly mutates and contradicts itself, without explanation or justification.
8. Despite the Government's explicit promise to adhere to all the due process requirements set out in the Rome Statute, and international and regional human rights treaties, the Government has conceded that they have failed to comply with domestic requirements concerning the obligation to inform Mr. Gaddafi of the legal or factual

¹ ICC-01/11-01/11-159 at para. 9; ICC-01/11-01/11-239 at para. 8.

² ICC-01/11-01/11-T-3-Conf-Eng, p. 64. line 15 to p. 65, line 1; ICC-01/11-01/11-239 at para. 9.

³ ICC-01/11-01/11-239.

basis for his detention, and for almost a year, failed to bring Mr. Gaddafi before a judicial authority to review the legality of his detention.

9. After much prevarication, the Government has also acknowledged that the authorities of 'New Libya' have in fact applied an unconstitutional and discriminatory legal regime, which harkens back to the darkest days of the People's Court from 'Old Libya'.
10. Mr. Gaddafi has also been held in incommunicado detention, in a secret location, with no legal representation, for fifteen months. There is no indication that the Government has either the intention or the capacity to improve his situation.
11. Justice will not be served by domestic proceedings, which are so ineliminably tainted by violations of domestic law that either the defendant would have to be released, or, the proceedings will go down in history as a manipulated spectacle of victor's revenge.
12. Mr. Gaddafi's trial is ultimately about persons and not aspirational buzzwords – it is about the life of Mr. Gaddafi, the life of Court officials and Counsel, and the life of witnesses. The Government of Libya has provided absolutely no information or details as to how it intends to protect such persons, and has completely failed to address the very real impact which Libya's security problems will continue to have on its ability to do so.
13. If Libya cannot even protect its own police, what hope do they have of protecting sensitive witnesses, unpopular defence counsel, or Mr. Gaddafi from retaliation? If Libya is unable to exercise control over the building where the General National Congress sits, what hope do they have of exercising effective custody over Mr. Gaddafi in Zintan?
14. The ICC admissibility regime is premised on the principle that if a State is unable to satisfy the ICC that it is willing and able to investigate the defendant within an reasonably expeditious time frame, "the International Criminal Court must be able to step in".⁴
15. After fifteen months, the ICC can no longer wait in the wings. If it fails to step in now, it may be too late for any judicial forum to genuinely prosecute this case in an independent and impartial manner.

⁴ ICC-01/04-01/07-1497 at para. 85.

2. Preliminary issues

The Government of Libya's failure to disclose relevant information, and its consistent practice of submitting misleading or incorrect information

16. As will be elaborated in greater detail *infra*, the Government has failed to submit information in relation to the following:
- a. the Government has failed to provide the Chamber with information, which was specifically requested in relation to the witness summaries attached as Annex C to the 1 May 2012 challenge;
 - b. the Government has not responded to the Chamber's question as to whether statements, collected by entities other than the Prosecution, can be utilised at trial;
 - c. The Government has not indicated the manner in which the application of the People's Court procedures to Mr. Gaddafi's case would have deviated from normal criminal procedures; and
 - d. The Government has failed to provide specific information concerning the resources and qualifications of persons, specifically assigned to Mr. Gaddafi's case, and the investigative steps specifically taken in his case.
17. The Government has also failed to support a multitude of its assertions with evidence, of the type specifically requested by the Pre-Trial Chamber in its decision of 7 December 2012. Given that the Pre-Trial Chamber explicitly stated that "appropriate evidence needs to be provided by Libya in order to substantiate its assertions with respect to the following issues" (emphasis added),⁵ the Government's complete failure to address some of the issues in question should automatically result in the dismissal of the challenge.
18. Moreover, in considering the probative value of the information submitted by the Government,⁶ the Pre-Trial Chamber must take into consideration the clear evidence that the Government has either intentionally or negligently, submitted incorrect or misleading information to the Chamber, on a range of issues, over a significant time period.

⁵ ICC-01/11-091/11-239.

⁶ ICC-01/09-02/11-274, at para. 1.

19. In this regard, the Government has explicitly or implicitly acknowledged that it had previously misinformed the Chamber in relation to:
- a. whether Mr. Gaddafi's detention had ever been reviewed by a judge;
 - b. the application of standard criminal procedures, rather than the exceptional measures permitted pursuant to the People's Court regime, to Mr. Gaddafi's case;
 - c. the application of the protections under the Rome Statute, and Articles 9 and 10 of the ICCPR to Mr. Gaddafi's case;
 - d. whether the remand order dated 21 November 2011 can be considered to be the initial remand order against Mr. Gaddafi;
 - e. whether the defendant has been interrogated, and whether a confrontation with witnesses had occurred; and
 - f. whether the element of a 'public officer' in articles 435, 431, 433 and 434 of the Penal code is a pre-requisite or aggravating factor.
20. The Government has also failed to draw the attention of the Chamber to relevant legislation, which directly impacts on its admissibility challenge, such as the details of Sharia law, and the recent decision to adopt an Isolation law.
21. As the State bringing the challenge, the Government was in a privileged position concerning its access to relevant information concerning the status of the investigations, and the applicable law. The Chamber cannot but draw adverse inferences in light of the Government's submission of incorrect information, and its failure to refer to information or legal provisions, which could have potentially undermined its position.⁷
22. In assessing the weight which the Chamber should accord to the Government's assurances concerning its willingness to adhere to Libyan due process protections in the case against Mr. Gaddafi, the Chamber should take into consideration the fact that Mr. Gaddafi is facing the death penalty, which calls for heightened attention to his due process protections, the degree of specificity of the information provided by the Government (or lack thereof),⁸ and the Government's practice in other cases.
23. In terms of the latter aspect, the ECtHR has observed that,

⁷ ICC-01/11-01/11-152-Red at paras. 79-79; ICC-01/11-01/11-261-Red at paras. 55, and 58.

⁸ ICC-01/11-01/11-190 at fn. 20.

the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.⁹

24. Of particular relevance is the fact that the Government of Libya apparently gave express assurances to Tunisia that Mr. Baghdadi Al-Mahmoudi would be given all the protections of a fair trial on his transfer to Libya.¹⁰ However, according to Mr. Al-Mahmoudi's lawyer, after Mr. Al-Mahmoudi's transfer to Libya, neither his lawyer or anyone else were permitted to visit Mr. Al-Mahmoudi, and they were not informed where he was being detained.¹¹
25. The Government has also completely failed to comply with their very public assurances that they would respect Mr. Al-Senussi's rights.¹² Mr. Al-Senussi has been kept in isolation, has never been brought before a judge, has no domestic legal representation, and has no means to contact his family or a lawyer.¹³ His daughter, who was arrested on trumped up charges when she attempted to visit him,¹⁴ remains in detention in Tripoli, which would obviously have a significant, psychologically coercive impact on him.
26. The Government's assurances concerning the particular welfare of Mr. Gaddafi can also be given no weight given the fact that Mr. Gaddafi has not been visited or monitored by any independent observer, since 7 June 2012.¹⁵ Although the authorities disseminated stills from the court hearing of 17 January 2013 on a *post facto* basis, there is no indication that members of the public were notified of the hearing in advance, or permitted to attend. The Government also failed to respond to the request by the Chamber to provide information concerning Mr. Gaddafi's detention

⁹ Saadi v. Italy, Application no. 37201/06, 28 February 2008 at para. 147.

¹⁰ 'Baghdadi Al-Mahmoudi trial adjourned' Libya Herald 12 November 2012, <http://www.libyaherald.com/2012/11/12/baghdadi-al-mahmoudi-trial-adjourned/>

¹¹ 'Baghdadi Al-Mahmoudi trial adjourned' Libya Herald 12 November 2012

¹² ICC-01/11-01/11-205, at para. 13.

¹³ ICC-01/11-01/11-216-Anx3A.3a, p. 3; ICC-01/11-01/11-216-Anx3A.4; ICC-01/11-01/11-216-Conf-Anx8.2 at p. 5.

¹⁴ ICC-01/11-01/11-235-Red at para. 34.

¹⁵ Ryabikin v. Russia, ECtHR, Application no. 8320/04, 19 September 2008 at para 119: "the reports cited above noted that the authorities of Turkmenistan systematically refused access by international observers to the country, and in particular to places of detention. In such circumstances the Court is bound to question the value of the assurances that the applicant would not be subjected to torture, given that there appears to be no objective means of monitoring their fulfilment."

conditions,¹⁶ and persons, who exercise authority over Mr. Gaddafi's detention, have indicated their implacable opposition to the possibility of any NGOs or monitors visiting Mr. Gaddafi.¹⁷

27. In assessing the probability that Mr. Gaddafi will be mistreated if the jurisdiction of the case is ceded to Libya, it is not necessary to prove that Mr. Gaddafi has or will definitely be mistreated. It is sufficient to adduce reliable evidence concerning a system of mistreatment, which has been directed against persons associated with the former regime, and to establish that on the basis of the defendant's profile, he is particularly vulnerable to such mistreatment.¹⁸
28. As will be elaborated *infra*, there is a multitude of reliable evidence, which has been collected by the United Nations and reputable NGOs concerning extra-judicial executions, torture, and mistreatment, which has been directed against persons associated with the former Gaddafi regime. As the son of Muammar Gaddafi, Mr. Gaddafi has been the target of discriminatory legislation,¹⁹ and hate speech.²⁰
29. Article 17(3) of the Statute requires Libya to demonstrate that its legal system is available –but on the day that Muammar and Mutassim Gaddafi were killed, it was clear that Libya suspended the rule of law on matters concerning the Gaddafi family. In the 2012 Commission of Inquiry Report, the Commission found evidence that Muammar Gaddafi was shot at close range after his arrest.²¹ This is not a case of accidents happening in the theatre of war. Videos obtained by Human Rights Watch depict Mutassim Gaddafi alive in custody, without the wounds which caused his death.²²
30. Any independent and impartial legal system would have condemned such acts, and ordered an investigation into their deaths. Muammar Gaddafi was subject to an ICC arrest warrant – Libya was under an obligation to ensure his protection and transfer to the ICC. Rather than condemning such acts, the Libyan authorities allowed their bodies to be displayed as trophies, and subsequently issued a law, which granted immunity to any such crimes committed by the rebels.²³ President Maragarief recently

¹⁶ ICC-01/11-01/11-205.

¹⁷ ICC-01/11-01/11-T-3-Red-ENG at p. 29. See also Annex 5.

¹⁸ *Iskandarov v. Russia*, ECHR, Application no. 17185/05, 23 September 2012, at paras. 127, 131, 132.

¹⁹ NTC law 35, ICC-01/11-01/11-190-Anx8 at p. 8.

²⁰ ICC-01/11-01/11-190-Red-Corr at paras. 158-159; ICC-01/11-01/11-216-Conf-Anx8.1 at p. 5.

²¹ United Nations Commission of Inquiry Report, Libya, Advanced Unedited version, 2 March 2012, at paras. 243 and 247 (pp. 85-86).

²² *Death of a Dictator: Bloody Revenge in Sirte* Human Rights Watch October 2012 at p. 16.

²³ NTC law 38, ICC-01/11-01/11-190-Anx8.

staged a conference where he embraced two men, who claimed to be the killers of Muammar and Mutassim Gaddafi.²⁴

31. The Government of Libya's approach to the death of Muammar Gaddafi should in itself be enough to disqualify them from holding the trial of his son. If the authorities fail to condemn such crimes, they become complicit in the crime and the future perpetration of such crimes.
32. The Government's persistent failure to cooperate with extant surrender orders (whether it be of Mr. Gaddafi, Mr. Al-Senussi, or the ICC delegation detained for 26 days in Zintan) is also a factor, which is directly relevant to the Chamber's assessment of 'unwillingness' for the purposes of Article 17(2) of the Statute.²⁵
33. When these factors are assessed in their totality, it is abundantly clear that the Government has failed to discharge its burden in challenging the admissibility of the case.
34. There is also absolutely no legal or factual justification to allocate the Government more time, for the purpose of further substantiating its challenge. The Government has been accorded three separate opportunities to adduce evidence in support of its admissibility challenge, in the form of the initial challenge, the October 2012 admissibility hearings, and the 23 January 2013 further submissions.
35. The Pre-Trial Chamber established the 23 January 2103 deadline six and a half weeks in advance of the deadline. The Government had abundant time to request an extension of time, pursuant to Regulation 35 of the Regulations of the Court, which it failed to do. The Chamber has already accorded the Government an unusual degree of latitude in allowing it to file redacted versions of its evidence 15 days after the deadline, and legal provisions 14 days after the deadline.
36. The Government's offer to either provide additional investigative materials within six weeks, or to allow representatives of the Chamber to review the materials in person in Tripoli is at best, disingenuous, and potentially, an abuse of the Court's process, insofar as the Government is once again, attempting to use non-compliance in order to obtain more time.
37. The Government has failed to provide a cogent justification as to why it was not in position to submit this evidence contemporaneously with its 23 January submissions.

²⁴I. Murabit, 'Magarief drama at the One Voice conference closing ceremony', *Libya Herald*, 31 January 2013, <http://www.libyaherald.com/2013/01/31/magarief-drama-at-the-one-voice-conference-closing-ceremony/>

²⁵ICC-01/11-01/11-235-Red, at paras. 27-31; ICC-01/11-01/11-T-3-Red-ENG at pp. 27-28.

Although the Government has repeatedly cited Article 59 of the Criminal Procedure Code in order to inveigle the specter of sanctions for breaching ‘confidentiality of investigations, these sanctions only apply if disclosure is made to persons, who are not entitled to participate in the investigative process;²⁶ ‘confidentiality’ only applies vis-à-vis the public, and not vis-à-vis judicial officers or other persons, such as Defence counsel and experts, who are entitled to participate in the investigation.²⁷

38. Given that the Government has, through its challenge, expressly consented to the ICC scrutinizing its investigative process, Article 59 has no applicability as concerns ICC parties and participants in the admissibility proceedings. It also defies logic that this principle could have acted as a bar to the submission of some documents, but not others.
39. In terms of the Government’s proposal that a judicial representative view the dossier in Tripoli, Counsel for Libya would be aware from ICC litigation in the Lubanga case that an ICC Chamber cannot base decisions on evidence that the Chamber has merely viewed, but which does not form part of the court record.²⁸ Moreover, the *bona fides* of such a proposal must be questioned in light of the well-known security situation in Tripoli, and the fact that the Government has failed, at this point in time, to recognise the privileges and immunities of ICC officials in Libya.²⁹
40. In terms of the alternative offer, the Government’s offer to provide additional information was conditional on the possibility of being able to do so *ex parte* to the Defence of Mr. Gaddafi.³⁰ Since the Chamber has ruled that there are no factual or legal bases for filing evidential material on a purely *ex parte* basis (as concerns the parties to the admissibility challenge),³¹ the Chamber would be precluded from relying upon the putative materials in its ultimate decision.

²⁶ ICC-01/11-01/11-258-Conf-Red3 at para. 59.

²⁷ The translation of Article 59 of the Criminal Procedure Code, which has been submitted by the Government, is not correct. The full version is as follows:

Article 59: Investigation procedures and their results shall be considered confidential.

Investigators, prosecution members and their assistants of clerks and experts and **others** who are related to the investigation or attend it due to their profession or post shall undertake not to disclose them [procedures and results]. Any of them who breach this provision shall be punished in accordance with Article 236 of the Penal Code.

The term ‘others’ in Article 59 is further clarified by Article 61, which provides that the “ Public Prosecution, the accused, the victim, the civil rights party and their counsel and representatives can attend all the investigation procedures”. ICC-01/11-01/11-190-Anx1 at p. 3.

²⁸ ICC-01/04-01/06-T-91-ENG ET at p. 29.

²⁹ ICC-01/11-01/11-274.

³⁰ ICC-01/11-01/11-258 at para. 35.

³¹ ICC-01/11-01/11-262 at paras. 12 and 13; ICC-01/11-01/11-187-Red at para. 10.

41. Apart from being futile, in light of the haphazard and staggered manner in which the Government complied with the 23 January deadline, this proposal is also likely to generate even further delays beyond the estimated six weeks. This would result in an unacceptable protraction of the admissibility proceedings, which would be extremely deleterious to the rights and welfare of Mr. Gaddafi.³² It would also completely frustrate the statutory emphasis on expeditious resolutions of such challenges.³³
42. The Government's proposal that a degree of leeway should be given to the Government due to the fact that the admissibility of the case can only be challenged once as of right, whereas the a finding of inadmissibility can be challenged on multiple occasions,³⁴ finds no support in either the Statute or the jurisprudence of the Court.
43. Once the Chamber has found the case to be inadmissible, the defendant has no right to seek reconsideration of such a finding, or to challenge it anew. Although the Prosecution may request a review of a decision pursuant to Article 19(10), this must be based on new facts that arose after the admissibility determination. It therefore follows that the Chamber should not accord the challenging State with any deference concerning its appreciation of the facts; to do so, would render it impossible for the Prosecution to seek review in the future in connection with facts that were already known to the Chamber at the time of the initial decision.
44. For example, in the present case, it is patently clear that the Government lacks the capacity to ensure the protection and security of Court participants, such as judges, counsel and witnesses. Since this is a fact, which is known at the time of the present admissibility proceedings, the Prosecutor would be barred from raising this aspect in a future request for review.
45. It is for this reason that the Appeals Chamber has categorically stated that there was no merit to the argument that the ICC should accord States leeway in order to allow their domestic investigations to progress to the point where they would trigger the inadmissibility of the case.³⁵ The obligation falls on the State to bring a challenge which triggers the inadmissibility of the case - not to build one during the admissibility proceedings themselves.

³² ICC-01/11-01/11-255.

³³ ICC-01/11-01/11-243-Red at paras. 37-40, 49-56.

³⁴ ICC-01/11-01/11-258-Red- at para. 28.

³⁵ ICC-01/09-02/11-274 at para 44.

46. The requirement under Article 19(5) that a State must challenge admissibility at the earliest opportunity also underscores the importance of legal certainty concerning the forum for the trial. The drafters of the Statute did not contemplate granting any exemptions to post-conflict States, or States experiencing transition between Governments. To the contrary, the absence of a functioning Government or a functioning Prosecutor's office were objective factors which the drafters explicitly contemplated would militate against a finding that the case was inadmissible before the ICC.³⁶
47. For example, the drafters considered that Rwanda – which concerned the situation of a Government that possessed the will to prosecute cases but lacked the means to do so - exemplified inability, as understood by Article 17(3) of the Statute.³⁷
48. The overarching goal of the Rome Statute to eliminate impunity requires the ICC to resolve such challenges in a timely manner so that if a domestic state has been unable to demonstrate its ability and willingness to prosecute the case, the ICC can step in, in order to ensure the expeditious and effective prosecution of Mr. Gaddafi's case.³⁸ The further protraction of the proceedings could potentially undermine the goal of eliminating impunity by jeopardising the ability of the ICC to subsequently prosecute Mr. Gaddafi. This would be the case if Mr. Gaddafi's rights under the ICC Statute have been egregiously violated in the interim, or if key ICC evidence had subsequently become unavailable.³⁹
49. Granting the Government, yet again, additional time to supplement their challenge would also contradict the recent statement by the Pre-Trial Chamber that,

[a]n incomplete challenge which needs to be supplemented in due course cannot be considered as having been "properly made within the terms of article 19 of the Statute and rule 58 of the Rules". In this regard, the Chamber finds of relevance the finding of the Appeals Chamber that a State has the duty to ensure that its admissibility challenge is sufficiently substantiated by evidence, as it has no right to expect to be allowed to present any additional evidence after the initial challenge.⁴⁰

³⁶ S. Williams, W. Schabas, 'Article 17 Issues of Admissibility', in Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court* (2008 2nd ed. Hart Publishers) at p. 623; J. Holmes, 'Complementarity: National Courts versus the ICC,' in Cassese, Gaeta, Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), vol. I, p. 677.

³⁷ J. Holmes, 'Complementarity: National Courts versus the ICC,' in Cassese, Gaeta, Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), vol. I, p. 677.

³⁸ ICC-01/04-01/07-1497 at para. 85. See also J. Pichon, 'The Principle of Complementarity in the Cases of the Sudanese Nationals Ahmad Harun and Ali Kushayb before the International Criminal Court', 8 *ICLR* 2008, pp 185-228, at p. 201.

³⁹ ICC-01/11-01/11-243-Red at paras. 73- 78.

⁴⁰ ICC-01/11-01/11-269 at para. 32.

The same person/same conduct test

50. The Defence incorporates its arguments on the same person/same conduct test as set out in its admissibility response,⁴¹ and further submits that in construing the parameters of this test, the Pre-Trial Chamber must give due consideration to the defendant's protection against *ne bis in idem*.

51. The Defence fully endorses the submissions of the Prosecution that

the admissibility regime is not exclusively concerned with the rights of the State: it also guarantees the rights of the accused/suspect against re-trial (*ne bis in idem*) while also ensuring the effective operation of the goal of the Statute to end impunity, by enabling the ICC to act where a State is inactive in relation to a particular case.⁴²

52. A failure to require a proper correlation between the domestic case and the ICC proceedings would render the defendant vulnerable to subsequently proceedings before the ICC, should he be acquitted in a domestic trial, which did not properly encompass the ICC case. Such a possibility would contravene the defendant's right to an expeditious trial, and would not constitute an efficient allocation of resources.

53. The Appeals Chamber's reference to 'substantially the same conduct' in the Kenya cases must also be construed in light of the particular submissions in that case. The Defence had argued that due to the particularly early timing of the admissibility challenge, it was entirely possible that pending a judicial determination of the challenge, the ICC Prosecutor's case might evolve to incorporate additional incidents, which were not part of the original arrest or summons decision.⁴³ The Prosecution should therefore not be permitted to defeat an existing admissibility challenge by changing the contours of its case during the admissibility proceedings.

54. However, given that the contours of the ICC Prosecution's case have not in any way changed or evolved in this particular case, there is absolutely no justification for exempting the Libyan Government from ensuring a correlation with the same person and same conduct, which forms the basis of the ICC case.

⁴¹ ICC-01/11-01/11-190, at pp. 116-133

⁴² ICC-01/09-01/11-183 at para 91, citing ICC-01/09-01/11-101 at para. 44, which in turn, cited ICC-01/04-01/07-1497, para.85.

⁴³ ICC-01/09-01/11-68 at para. 8.

Request for an extension of the page limit

55. Pursuant to Regulation 38(1)(c) of the Regulations of the Court, the page limit for challenges to the admissibility of the Court under article 19(2), and any responses, shall not exceed 100 pages. The Appeals Chamber has ruled that the term ‘challenge’ in Regulation 38(1)(c) should be interpreted to encompass filings under Article 19(2), including appeals, which require the Chamber to resolve the admissibility of the case.⁴⁴
56. In the absence of any contrary page limit imposed by the Pre-Trial Chamber, the Defence has therefore submitted its response in line with Regulation 38(1)(c).
57. Should this interpretation of Regulation 38(1)(c) be incorrect, then the Defence respectfully requests the authorisation of the Pre-Trial Chamber to exceed the page limit. The requested extension is justified by the complexity of the issues, the range of documents submitted by the Government of Libya, and the need to specifically incorporate multiple references to Libyan law, which were absent from the Government’s filing and related annexes.

3. The Government’s failure to satisfy the Pre-Trial Chamber’s questions

Issues related to the status of domestic proceedings

58. The Government has completely failed to discharge its burden of establishing, through the submission of concrete evidence, that it is actively investigating the case of Mr. Gaddafi.
59. Notwithstanding the Pre-Trial Chamber’s clear direction that mere assertions from a State would be insufficient to satisfy the Court on this issue,⁴⁵ the Government has sought to rely upon two documents (Annexes 2 and 3), which are effectively assertions that have been prepared specifically for the purpose of advancing the Government’s challenge to the admissibility of the proceedings. Reports prepared by a party for the express purpose of litigation generally have very low probative value.⁴⁶ They also do not fall within the category of documents delineated by the Chamber at

⁴⁴ ICC-01/04-01/06-717 at paras. 7-9.

⁴⁵ ICC-01/11-01/11-239 at para. 14.

⁴⁶ Prosecutor v. Milosevic, Decision on Admissibility of Prosecution Investigator’s Evidence, 30 September 2002.

paragraph 11 of the 7 December 2012 decision; they are not directions, orders or decisions, nor are they documents which form part of the “file arising from the Libyan investigation of the case”.

60. The information contained within the Government’s submissions and these reports also evidence that the prosecuting authorities are at best, adopting a lackadaisical approach, which is inconsistent with a detained person’s right to have their case prosecuted with due diligence.
61. The authorities have only interviewed 8 witnesses in 8 months, including [Redacted],⁴⁷ who, [Redacted] were both deprived of the right to legal representation and other key due process protections. Any statements obtained from them would, or at least should, be inadmissible.
62. Although the authorities indicate that they have now gathered a total of 50 statements, it is clear that some of these statements must refer to completely different proceedings against Mr. Gaddafi. On 1 May 2012, the Government informed the Court that it had only collected 27 statements, which were relevant to the admissibility challenge.⁴⁸ As set out in the Defence response, very few, if any of these 27 statements were relevant to the ICC charges.⁴⁹ If the Government has only collected a further eight statements since that date, then it would be impossible for the Government to be in the possession of 50 statements, which might be relevant to the ICC case.
63. None of the four evidential samples, which were allegedly obtained by the Government after the challenge was filed, demonstrate that the Libyan authorities have been actively investigating the ICC related case since 1 May 2012.
64. As concerns annexes 6 and 7, the Government had asserted that these documents were already in its possession when it filed its admissibility challenge on 1 May 2012.⁵⁰ Although the translations of these documents are dated, the documents are not, which renders it impossible to ascertain whether the Government misinformed the Court in its 1 May 2012 challenge or in its 23 January 2013 submissions.
65. In terms of Annex 4, [Redacted].
66. The only document which is reliably dated after 1 May 2012 is an ‘observation statement’, which would have absolutely no evidential value.⁵¹ The persons who

⁴⁷ ICC-01/11-01/11-258 at para. 48.

⁴⁸ ICC-01/11-01/11-145-Conf-AnxC.

⁴⁹ ICC-01/11-01/11-190 at para. 77.

⁵⁰ ICC-01/11-01/11-130 at para. 47.

⁵¹ ICC-01/11-01/11-258-Conf-Anx5.

provided it did not do so under oath, or in accordance with formal procedures (for example, their identity does not appear to have been verified), nor have they indicated that they might be willing in principle to testify to these matters. Even at its highest evidential value, it only suggests the possibility that [Redacted]. This document therefore fails to advance the domestic proceedings against Mr. Gaddafi for the ICC related charges.

67. With respect to the Chamber's queries concerning the status of the Government's questioning of [Redacted] and [Redacted], the Government has responded that it has been unable to do so because they are not yet in Government control.⁵² The Government has nonetheless failed to specify that these persons are actually detained in [Redacted], albeit in detention centres run by militia.⁵³
68. [Redacted].⁵⁴ [Redacted].⁵⁵ [Redacted].
69. [Redacted]. The logistical impediments that the Government would face in obtaining his physical testimony also calls into question the extent to which other detained witnesses listed in Annex C to the 1 May admissibility challenge would be physically available to testify in Tripoli or South Tripoli.
70. It is also disturbing that the Government was willing to name [Redacted] as a potential witness notwithstanding the clear indicia that he may have been mistreated in detention and coerced to provide a confession. Again, this raises the question as to how many other detained witnesses, referred to in Annex C, have been subjected to similar or worse treatment.
71. [Redacted].⁵⁶ [Redacted].⁵⁷ [Redacted]. [Redacted].
72. [Redacted] is but one example of several detained witnesses, whom the Government is relying upon. As is the case with him, in the absence of any concrete information that the witness has been transferred to a government-run detention and is available to testify, the presumption must be that they are not, and that they are still vulnerable to abuse, torture, and forcible confessions. On 6 February 2013, Human Rights Watch issued a report referring to the plight of thousands of detainees, who falls outside of either Government or military control, and the high incidence of human rights

⁵² ICC-01/11-01/11-258-Red at para. 50.

⁵³ [Redacted]

⁵⁴ [Redacted]

⁵⁵ [Redacted]

⁵⁶ [Redacted].

⁵⁷ Annex 6.

violations and deaths in custody during 2012.⁵⁸ At the end of January, the United Nations Special Representative for Libya estimated that approximately 7000 detainees are still being held in prisons, which are run by militia rather than the government.⁵⁹ On 28 December 2012, reports came out concerning the fact that former Gaddafi officials are still the subject of torture and forced confessions, and that this had occurred even in detention centres, which fall under the control of the Ministry of Interior.⁶⁰

73. The likelihood that several of the Government's witnesses are still not detained under Government control, and have been subjected to abuse or mistreatment in connection with their questioning, is heightened by the Government's refusal to disclose the dates of all the witness interviews summarised in Annex C to the 1 May 2012 challenge. The effect of this refusal is that it shields the Government from an assessment as to whether the detained witnesses were questioned immediately after their apprehension (which is when the probability of mistreatment was at its highest), and after or before their detention centres fell under government control.
74. In this regard, at paragraph 17 of the 7 December decision, the Chamber requested Libya to disclose the following information in relation to each witness statement referred to in Annex C: the date, whether the statement was witnessed, signed or sworn, the persons present, the modalities of recording the statement, how the statement came into possession of the investigating authorities, and whether any steps have been taken to verify accuracy. Apart from its failure to provide the dates, the Government did not address the remainder of these queries squarely.
75. The Government asserted at paragraph 51 that "all of the witness summaries referred to in the 1 May 2012 Admissibility challenge, together with all of the other testimonies in the Saif Al-Islam Gaddafi file, have been prepared by members of the Ministry of Justice prosecution team assigned to the Saif Al-Islam Gaddafi case." This wording is extremely misleading – the Government has only averred that that the summaries submitted in its challenge were prepared by the Ministry. That much is obvious as they were submitted in a document signed by members of the Prosecution. The Government has not, however, confirmed that the witnesses have been

⁵⁸ 'Libya: Slow Pace of Reform Harms Rights' Human Rights Watch 6 February 2013,

<http://www.hrw.org/news/2013/02/06/libya-slow-pace-reform-harms-rights>

⁵⁹ '200 000 armed Libyan fighters still at large: U.N. envoy' Al Arabiya 29 January 2013,

<http://english.alarabiya.net/articles/2013/01/29/263312.html>

⁶⁰ 'Torture continues in post-Gaddafi Libya', France 24 28 December 2012,

<http://observers.france24.com/content/20121228-pro-gaddafi-torture-videos-libya>

interviewed by members of the Prosecution or that the initial statements – upon which the summaries were based – were taken by members of the Prosecution.

76. There is a plethora of evidence concerning the use of torture against persons perceived to be affiliated with the Gaddafi regime, or wrongly believed to be mercenaries, in order to extract confessions.⁶¹ Accordingly, in the absence of the provision of the actual statements themselves demonstrating that they were taken by members of the Prosecution, the Chamber cannot but draw adverse inferences on this issue, in particular, as regards the probability that the statements may have been taken by coercive tactics or by militia.
77. Even if certain witnesses were re-interviewed by Prosecution authorities, the extent and duration of the mistreatment may have completely undermined the ability of the witness to give a voluntary and truthful statement, due to the witness's lingering fear of retaliation or further mistreatment.⁶²
78. It is also not clear from the Government's assertion at paragraph 51 as to whether actual statements exist with respect to witnesses for whom summaries were taken, as opposed to interrogation reports or hearsay. Moreover, although the Government states that witnesses, who were first interviewed by the commission of volunteers, have been re-interviewed by the Prosecution authorities, this does not exclude the possibility that detained witnesses, who were initially interviewed by *thuwar* or non-formal authorities rather than the commission of volunteers, have not been subsequently interviewed by the Prosecution authorities.
79. By utilising narrow language which only refers to the situation of persons interviewed by the commission of volunteers, the Government has avoided providing a comprehensive response in relation to the status of all of the witnesses included in Annex C of the 1 May admissibility challenge.
80. In this regard, there is clear evidence that at least one of the witnesses set out in Annex C was not formally interviewed by Prosecution authorities in accordance with correct procedures. [Redacted],⁶³ [Redacted].
81. [Redacted].⁶⁴

⁶¹ [Redacted]Annex 4.

⁶² See for example [Redacted]. Annex 4. See also case law concerning the legal impact of the lingering effects of torture: *Gäfgen v. Germany*, ECHR, App. No. 22978/05, (1 June 2010), para. 128; District Court of Columbia, Mohammed Parri Saeed Bin Mohammed, et. al., Petitioners, v. Civil Action No. Os-347 (Gk) Barack H. Obama, et. al., 19 November 2009

https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv1347-253

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

82. [Redacted].⁶⁵ [Redacted].⁶⁶ [Redacted].⁶⁷
83. The Government has also not supported its assertion concerning the re-interview of persons initially interviewed by volunteers, with evidence.
84. Although the Chamber expressly requested the Government to address the general issue as to whether witness statements collected by entities other than the investigative authorities can be relied upon at trial, the Government only responded in relation to the status of statements prepared by volunteers. The Chamber did not pose the narrow question as to whether volunteer statements were admissible, it framed the question broadly in relation to ‘entities other than the investigative authorities’, which includes interviews conducted by *thuwar* or local council members. The Government thus failed to respond to this question.
85. In terms of the admissibility of such statements, in accordance with article 1 of the Criminal Procedure Code, the Prosecutor has the sole authority to submit and proceed with a criminal action.⁶⁸ It follows that any procedures conducted outside this framework, such as interviews conducted by *thuwar* or local council members, would be invalid and could give rise to a nullity in proceedings. Since the Government has failed to confirm or establish that all of the witnesses in Annex C were interviewed by Prosecuting authorities, there is a strong likelihood that a significant component of its evidence would have to be excluded for the purpose of the trial.
86. In theory, article 2 of NTC law 38 could permit the Trial Chamber to rely on evidence compiled by *thuwar* or non-judicial officers, irrespective as to whether the manner in which the interviews were conducted complied with due process protections under Libyan law.⁶⁹ It has therefore been strongly critiqued by Amnesty International on the basis that it could green light the use of torture evidence in trials.⁷⁰ Nonetheless, the existence of a law, which creates the possibility that the trial record could be composed of evidence from persons, who have been tortured, or mistreated in the

⁶⁴ [Redacted]

⁶⁵ [Redacted].

⁶⁶ [Redacted].

⁶⁷ [Redacted].

⁶⁸ ICC-01/11-01/11-144-AnxH, p. 4.

⁶⁹ ICC-01/11-01/11-190-Anx8 at p. 17.

⁷⁰ ‘10 Steps For Human Rights: Amnesty International’s Human Rights Manifesto For Libya’ September 2012, p. 2, <https://doc.es.amnesty.org/cgi-bin/ai/BRSCGI/mde190172012en?CMD=VEROBJ&MLKOB=32032471414>

manner of [Redacted], constitutes an insurmountable barrier to the ICC transferring jurisdiction of the case to Libya.⁷¹

87. In response to the Chamber's detailed questions concerning the procedures utilised for witness interviews, the Government only provides general information as to how interviews are conducted in principle. The Government does not provide any concrete or relevant information in support of the application of such principles to each witness statement relied upon in Annex C.
88. It would seem, though, from the evidential samples attached that the Libyan authorities do not employ consistent or thorough investigative practices. [Redacted].
89. Moreover, according to the Government, all questions and answers are transcribed. However, for the witness included in Annex 4, the only questions which are recorded are [Redacted]. Apart from one leading question [Redacted], the prosecutor does not ask the witness to clarify the basis of [Redacted] knowledge, or in any way, test its reliability or possible sources of corroboration.
90. Similarly, for the statement included at Annex 16, very few questions have been transcribed, but those which have been included, are highly leading and prejudicial. For example, the witness is asked, [Redacted].
91. [Redacted]. It would thus appear that the persons conducting the investigation are utilising the premise that anyone dark-skinned can be considered to be a mercenary.
92. Prominent NGOs, such as Amnesty International, have publicly recognised that early reports concerning mercenaries were based on propaganda, racism towards dark-skinned Libyans, and xenophobia.⁷² The United Nations Commission of Inquiry also found that the evidence submitted by the National Transitional Council in support of

⁷¹ In the recent case of *Othman v. Secretary of State for the Home Department*, 12 November 2012, Appeal No: SC/15/2005, the Court found that the existence of legal provisions which permitted, in principle, the admission of witness statements, irrespective as to whether they had been obtained by torture, constituted a bar to the applicant's extradition to that country (at paras. 54 and 66). The existence of legal provisions, which permitted the defendant to challenge statements which had been obtained by duress, were not sufficient to discharge this risk (at paras. 72-73).

See also ICC-01/11-01/11-190 at paras. 92-93, and Transcript of 9 October 2012, ICC-01/11-01/11-T-2-Red at p. 90

⁷² Interview with the President of Amnesty International, France,

<http://www.youtube.com/watch?v=8FQQaD1r5g8> 3.30 minute mark

See also ' We are foreigners, we have no rights: the plight of refugees, asylum seekers, and migrants in Libya' *Amnesty International* 13 November 2012, at p.2.

<http://www.amnesty.org/en/library/asset/MDE19/020/2012/en/775a355f-61eb-41d8-a3d8-b96dffe17504/mde190202012en.pdf>

its allegations concerning the use of mercenaries had incorrectly designated Libyan nationals as mercenaries.⁷³

93. The Libyan authorities conducting these investigations against Mr. Gaddafi have nonetheless failed to recalibrate their questioning to take into consideration the possibility that witness testimony concerning mercenaries may have either been unduly influenced by media propaganda on this issue, or may be predicated on a false equation of dark-skinned Libyans or immigrants with mercenaries.
94. The continuation of domestic proceedings in Mr. Gaddafi's case is therefore likely to promulgate racist and xenophobic stereotypes, which will be deleterious to both the right of victims and the international community to know the truth, and the safety and security of darker-skinned Libyans and immigrants, who are been targeted for extrajudicial executions, torture and abuse in the wake of these mercenary myths.⁷⁴
95. The only technique which the Government appears to have employed to test the reliability of its evidence is the process of witness confrontation. According to the Government,

[d]uring this process the accused person in the investigation (i.e. Mr. Gaddafi is presented with each witness whose account differs from that given by him, and is given the opportunity to refute the testimony of that witness in front of one or more member of the prosecution investigation team.⁷⁵

96. However, as will be discussed below, the Government has indicated that due to witness concerns, the identities of witnesses are not disclosed to the defendant during the investigation phase, which would render it impossible for Mr. Gaddafi to exercise his right to be presented with such witnesses. It would therefore appear that the Libyan authorities have failed to employ any method for testing the reliability of their evidence, or for ensuring the impartiality of the process.

Admissibility of intercept evidence

97. Both the chain of custody and authentication measures employed by the Government with respect to intercept evidence are highly problematic. The Government has conceded that it has either acquired these recordings from *thuwar*, who happened upon

⁷³ ICC-01/11-01/11-190-Red-Corr at para. 83.

⁷⁴ See for example, [Redacted]Annex 4.

⁷⁵ ICC-01/11-01/11-258-Red3 at para. 52.

them in the “chaos which ensued after the fall of Tripoli”, or from unnamed individuals who acquired them from other unnamed persons in unknown circumstances.⁷⁶ Both scenarios obviously raise significant questions concerning the authenticity and reliability of the recordings, in particular, as regards the possibility that the recordings may have been forged or tampered with.

98. The Government has acknowledged that the transcriptions of the intercepts were prepared by the [Redacted], rather than by impartial investigating authorities.⁷⁷ It is apparent that the intercepts do not constitute the full-conversations. Without the full context, it is impossible to reliably ascertain the meaning of some phrases and words.
99. Of further concern is the fact that the intercepts have not been accurately transcribed. The transcriptions included in Annex 17 contain summaries and observations rather than verbatim transcripts. For example, the first sentence of all the intercepts appears to start with a summary of what the persons has said, rather than their actual words. There are also significant errors in the translation. For example, [Redacted].
100. In light of the dubious chain of custody of the intercepts, the Government should have given heightened attention to the process of authentication. However, in its submissions to the Chamber, the Government has conceded that the only form of authentication that it has employed is to confront the defendant with the intercepts and to play the intercepts for persons, who can allegedly confirm whether the voices are those of the Gaddafi officials. The former option would obviously violate Mr. Gaddafi’s privilege against self-incrimination/right to silence, by requiring him to confirm an issue, which could ultimately be used to incriminate him.⁷⁸
101. It also appears that the Libyan authorities have failed to follow standard domestic procedures for the authentication of intercepts. In a special feature related to their documentary, *Libya on the Line*, the Al Jazeera journalist, who obtained the intercepts, stated that the Libyan Prosecutor-General had informed her that the standard procedure for intercept authentication was to firstly, ensure that they were authenticated in scientific manner, and secondly, utilise witnesses who could authenticate them.⁷⁹

⁷⁶ ICC-01/11-01/11-258-Red3 at para. 53.

⁷⁷ ICC-01/11-01/11-258-Red3 at para. 54 and ICC-01/11-01/11-258-Conf-Anx 17.

⁷⁸ Prosecutor v. Mucic et al., ‘Decision on the Prosecution’s Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucic, to Provide a Handwriting Sample’, 19 January 1998.

⁷⁹ *Libya on the Line* - Discussion with Al Jazeera correspondent Hoda Abdel-Hamid, 13 minute mark. <http://www.youtube.com/watch?v=GjwgLFdEQ7w>

102. The Government has not, however, identified witnesses to testify in relation to chain of custody issues, it has not had the intercepts forensically tested in order to assess whether they may have been tampered with, and the ‘witnesses’ who have allegedly identified the voices of the participants, did not actually participate in the conversations, and are therefore not in a position to testify in relation to whether the conversations actually occurred.⁸⁰
103. In terms of the latter aspect, the Director of Lawyers for Justice in Libya noted that the ability of the Libyan authorities to impartially assess these intercepts would have been completely tainted by the fact that the ICC Prosecutor and Al Jazeera had very publicly attributed certain recordings to specific persons, in particular, as concerns alleged conversations between [Redacted]. Media articles, in which Mr. Ocampo described [Redacted] a ‘kill order’ from Mr. Gaddafi, were widely disseminated in Arabic media.⁸¹ It would therefore have been impossible for any witness to reliably identify the participants without being influenced by such extensive media coverage, [Redacted].
104. [Redacted],⁸² [Redacted].
105. In response to the Chamber’s question concerning the admissibility of intercepts which have not been authorised by a judge, the Government has claimed that the intercepts were authorised by an order issued by Muammar Gaddafi and Mr. Al-Senussi. They do, not, however, appear to have a copy of any such order. In any case, the Code of Criminal Procedure does not give Judges any discretion to admit intercepts, which have been illegally obtained. There are no exceptions to the requirement that such intercepts and recordings must be pre-authorised by order of an investigating judge, who can only authorise such measures upon demonstration of cause.⁸³

⁸⁰ In the absence of a judicial order approving the intercepts, the ICTY has required authentication through further evidence, which can be comprised of a combination of the intercept operator, persons participating in the conversation, and persons who can testify in relation to the chain of custody. Prosecutor v. Karadzic Decision on the Prosecution's First Motion for Judicial Notice of Documentary Evidence Related to the Sarajevo Component 31 March 2010 at para 9; Prosecutor v. Stanisic and Zupljanin, Decision Denying the Stanisic Motion for Exclusion of Recorded Intercepts, 16 December 2009 at para. 16.

⁸¹ See for example, Annex 8. [Redacted]

⁸² [Redacted]

⁸³ ICC-01/11-01/11-T-3-Red-ENG at p. 56. See also ICC-01/11-01/11-144 AnxH at p. 6, which emphasises that the Prosecutor cannot monitor conversations or utilise wire taps without the permission of the “judge of summary jurisdiction court”.

106. These is not a mere technical provision: it is a fundamental right, which is also enshrined in Article 12 of the 1969 Constitution,⁸⁴ Article 14 of Law no. 20 of 1991 on Promoting Freedoms,⁸⁵ and Article 13 of the 2012 Constitutional Declaration.⁸⁶ Moreover, according to the submissions of the Government in its 1 May challenge, if the evidence has been illegally obtained, the Accusation Chamber must dismiss the case (Article 151 of the Criminal Procedure Code).⁸⁷

Detention orders

107. In response to the Chamber's direct request for clarification as to the authority responsible for extending Mr. Gaddafi's detention, the Government has conceded that the detention orders submitted in support of the 1 May challenge had only been authorised by the Prosecutor-General rather than by a Court, and that the procedures under Article 176 had not been complied with.⁸⁸ This concession thereby demonstrates that the Government had misled the Chamber in its previous submissions.

108. In their submissions of 25 April, the Government claimed that Mr. Gaddafi "has had the continuation of his detention reviewed by prosecutors and by three judges in accordance with the provisions of Libyan law".⁸⁹ On 1 May 2012, the Government claimed on the basis of *pro forma* references to a summary judge, that a summary judge had travelled to Zintan for this purpose "in full conformity with articles 176 and 177 of the Criminal Procedure Code".⁹⁰ The Government repeated this assertion at the 9 October 2012 admissibility hearing.⁹¹

109. The initial remand order against Mr. Gaddafi also stated that it had been issued in accordance with Article 175, and Article 115 of the Libyan Criminal Procedure Code which stipulates that the initial remand of a suspect must be ordered by the investigating judge.⁹² At paragraph 42 of the 1 May challenge, the Government also attempted to simultaneously claim that the initial order fully confirmed to Article 115, whilst explicitly acknowledging that Mr. Gaddafi was detained under the authority of

⁸⁴ <http://unpan1.un.org/intradoc/groups/public/documents/cafrad/unpan004643.pdf>

⁸⁵ <http://www.ilo.org/dyn/natlex/docs/SERIAL/55306/65707/F837648216/LBY55306.PDF>

⁸⁶ ICC-01/11-01/11-144-AnxG.

⁸⁷ ICC-01/11-01/11-130 at para. 61.

⁸⁸ ICC-01/11-01/11-25-Red3 at para. 56.

⁸⁹ ICC-01/11-01/11-128 –Conf at p. 7 para. 7.

⁹⁰ ICC-01/11-01/11-130 at para 43.

⁹¹ ICC-01/11-01/11-T-2-CONF-ENG ET at p. 14.

⁹² ICC-01/11-01/11-145-Conf-AnxD at p. 2 .

the Prosecutor-General, and not an investigating judge. Given the number of blatant contradictions and deliberate obfuscations in the Government's submissions on this issue, absolutely no weight or credibility can be accorded to the Government's present submissions on his detention status.

110. In this connection, the Government has now asserted that Mr. Gaddafi has been brought before three judges, from the South Tripoli Court, in public sessions held on 30 October 2012, and 3 December 2012, and that another appearance had been scheduled for 30 January 2013.⁹³ Every court session of a former Gaddafi official has been widely publicised in Libya. Moreover, given the particular amount of media attention, which accompanied Mr. Gaddafi's appearance on Court in Zintan on 17 January 2013, and its description as the first time that Mr. Gaddafi had appeared in Court,⁹⁴ it beggars belief that Mr. Gaddafi could have been brought before three judges in open session, on two previous occasions, and subsequently on 30 January 2013, without any public dissemination of this fact.

111. The particular dates of the alleged court hearings are also revealing. For example, on 30 October 2012, the Government was engaged in hostilities in Bani Walid, and the Libyan Defence Minister, who is from Zintan, issued a public announcement decrying the fact that the Libyan army lacked the capacity to control the militia and the overall situation in Bani Walid.⁹⁵ It is therefore highly unlikely that the Government would have diverted its security resources during such a crisis for the purpose of transferring Mr. Gaddafi from Zintan to South Tripoli and back, in order to attend this hearing. Indeed, if the Government had the capacity to transfer Mr. Gaddafi to South Tripoli in the first place, then they would have obviously kept him there.

112. The content of the record of the alleged court hearings is also completely lacking in any credibility. On 30 October 2012, Mr. Gaddafi purportedly confessed to the first, second, fifth, sixth, seventh, ninth, and eleventh charges. Although the Government has not provided a break-down of the charges, it is abundantly clear that it would have been legally and factually impossible for Mr. Gaddafi to confess to some of them. For example, Mr. Gaddafi allegedly confessed to participating in the shooting of persons at the Juliyana Bridge in Benghazi, even though he was never present in Benghazi. It would also appear from the wording of charge 11 that Mr.

⁹³ ICC-01/11-01/11-258 at para. 57, ICC-01/11-01/11-258-Anx9, and ICC-01/11-01/11-25-Anx10

⁹⁴ ICC-01/11-01/11-255-AnxB at p. 2.

⁹⁵ Libya army has 'no control' in Bani Walid: defence minister' *Agence France Press* 30 October 2012; G Grant, 'Defence Minister says army chief has 'no control' over Bani Walid' *Libya Herald* 30 October 2012.

Gaddafi has been charged with the offence of 'killing' Mr. Mismari, rather than the charge of 'attempted killing',⁹⁶ notwithstanding the fact that Mr. Mismari is alive and well, and heading Libyan cultural delegations to Cairo.⁹⁷

113. The court report referring to the 3 December 2012 hearing also records Mr. Gaddafi confessing to completely different charges, and professing his innocence, to charges he had allegedly confessed to on 30 October 2012.⁹⁸ For example, on 3 December 2012, he denied the sixth and seventh, ninth, and eleventh charge, which he had confessed to on 30 October 2012. In terms of the latter, whereas Mr. Gaddafi had allegedly asserted on 30 October that he had tried to personally kill Mr. Mismari, on 3 December, he not only professed his innocence, but asserted that he had tried to help Mr. Mismari and his wife.

114. Even if these court hearings had occurred, the absence of legal representation and transparent proceedings would have completely undermined their efficacy as a forum for enabling the defendant to challenge the legality of his continued detention. Mr. Gaddafi's ability to assert his rights at such a hearing would also have been severely undermined by the fact that he had been arbitrarily detained for almost a year at this point, in isolation, with no access to legal advice.

115. During the June 2012 visit, Mr. Gaddafi indicated that he had been informed that if he confessed to such offences, he could expect leniency, but if he insisted on defending himself, he would be kept in jail without any visits from lawyers or friends until he confessed.⁹⁹ When the Defence met with Mr. Gaddafi in March and in June, he vigorously protested his innocence. However, during the last eight months, he has remained completely shut off from the outside world. Any faith that he may have had in the prospect of being able to defend himself in Libya would have been completely eroded by the fact that he is being prosecuted for simply attempting to convey his concerns to his ICC lawyer.¹⁰⁰

116. Although the Defence disputes the authenticity and reliability of the detention orders, which purportedly reflect Mr. Gaddafi's 'confessions', if it is correct that these confessions took place, then it would lead to the disturbing conclusion that Mr.

⁹⁶ Annex 9 utilises the Arabic word " " (killing), rather than the phrase " ", which is utilised for attempted killings: ICC-01/11-01/11-258-Anx9 at p. 8.

⁹⁷ 'Major Libyan delegation in Cairo for Book Fair' Libya Herald 22 January 2013, <http://www.libyaherald.com/2013/01/22/22366/>

⁹⁸ ICC-01/11-01/11-258-Anx10 at p. 3.

⁹⁹ ICC-01/11-01/11-255 at para. 57.

¹⁰⁰ ICC-01/11-01/11-255 at paras. 60-61.

Gaddafi has been psychologically compelled to provide false confessions due to sheer desperation concerning his predicament, and his exclusion from all legal due process protections. The fact that Mr. Gaddafi was not brought before a judge until he allegedly confessed, support's Mr. Gaddafi's complaint that the authorities were subjecting him to coercion by refusing to implement his fundamental rights, unless he first confessed. The ICC cannot possibly countenance the continuation of procedures, which have led to such a nadir in the defendant's due process protections.

117. Despite the fact that the Government has effectively conceded that Mr. Gaddafi was illegally detained for almost a year, due to the fact that his detention was not supervised by a competent magistrate, they have sought to justify this fact by reference to their ability to apply procedures from the People's Court.¹⁰¹ In so doing, the Government is implicitly acknowledging that the assurances set out in its 1 May challenge concerning the abolition of special procedures, and the application of standard due process protections under the Criminal Procedure Cod to Mr. Gaddafi,¹⁰² were completely specious.

118. The Government has further sought to argue that although the Supreme Court declared in its 23 December 2012 decision that the application of special procedures is unconstitutional and discriminatory, this decision does not invalidate the period of detention during which Mr. Gaddafi was detained under these procedures.¹⁰³ The Defence will address the correctness of this interpretation in its section concerning the consequences of this decision. Nonetheless, even if the 23 December decision has no retrospective application in Libyan courts, the Supreme Court's finding that the legal regime, which has been applied to former Gaddafi officials thus far is discriminatory and unfair, is directly relevant to the ICC Pre-Trial Chamber's assessment as to whether the proceedings against Mr. Gaddafi have been conducted in an impartial and independent manner.

119. In this regard, apart from finding that the application of the People's court procedures violated article 6 and 7 of the constitutional declaration, the Supreme Court also found that it violated the "principles of equality before law and judiciary and protection of human rights and basis rights [which] are among the principles enshrined

¹⁰¹ ICC-01/11-01/11-258-Red3 at para. 56.

¹⁰² ICC-01/11-01/11-130 at paras. 55, 59-61.

¹⁰³ ICC-01/11-01/11-258 at para. 56.

by all Libyan basic laws starting from the constitution of 1951 to the current constitutional declaration”.¹⁰⁴

120. The judges also stressed that “the type of crime and degree of gravity do not justify the law’s violation of the constitutional rules which are superior to them”.¹⁰⁵

121. The application of these procedures would have also contravened the Government’s assurance that Mr. Gaddafi had a constitutional right of recourse to the judiciary,¹⁰⁶ and the Government’s express commitment that it would apply all the fair trial requirements set out in international instruments ratified by Libya, “including the International Covenant on Civil and Political Rights, the United Nations Convention Against Torture, the International Convention on the Elimination of Racial Discrimination, the African Charter on Human and People’s Rights, the Arab Charter on Human Rights and resolutions such as the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa adopted by the African Union in 2003”.¹⁰⁷ The Government singled out Article 9 and 10 of the ICCPR in particular, the former of which guarantees the right of a defendant to be brought promptly before a judge, and to challenge the legality of their detention before a judge.

122. As underscored by the ICC Appeals Chamber, the right to a fair trial, including the right to independent and impartial proceedings, embraces the judicial process in its entirety.¹⁰⁸ In assessing whether the Libyan authorities are either willing or able to conduct proceedings against Mr. Gaddafi in an independent and impartial manner, the Pre-Trial Chamber must take into consideration the fact that the Libyan authorities have applied discriminatory and highly prejudicial special procedures to Mr. Gaddafi’s case. This is consistent with the fact that Article 17(2)(c) utilises the past and present tense conjunctively – “ were not or are not being conducted independently or impartially”. The fact that the proceedings were not conducted independently and impartially thus suffices to warrant the rejection of the admissibility challenge.

123. Moreover, in assessing the likelihood that the future proceedings will be conducted independently and impartially, the Chamber must also take into consideration the fact that the authorities directly contravened the express commitment

¹⁰⁴ ICC-01/11-01/11-258 Anx 8 at p. 7.

¹⁰⁵ At p.7.

¹⁰⁶ ICC-01/11-01/11-130 at para. 56.

¹⁰⁷ ICC-01/11-01/11-130 at para. 57

¹⁰⁸ ICC-01/04-01/06-772 para. 37

that they gave to the ICC to apply the protections of Article 9 of the ICCPR, *inter alia*, to Mr. Gaddafi's case.

124. Finally, if it is indeed correct that the 23 December Supreme Court decision affirms the validity of the procedures applied to the cases of former Gaddafi officials, notwithstanding the fact that they violated the Constitution and human rights enshrined in all basic Libyan laws,¹⁰⁹ then Mr. Gaddafi would have no domestic judicial recourse as concerns such egregious violations. This would constitute a legal impediment, which renders the Libyan judicial system unavailable, as understood by Article 17(3) of the Statute, for the purposes of conducting independent and impartial proceedings.¹¹⁰

125. Similarly, if it is correct that findings of the 23 December 2012 Supreme Court decision cannot be applied in the individual cases of former Gaddafi officials in order to remedy the violation of their rights, then it would seem that the Libyan authorities are continuing to apply unequal treatment to persons associated with the former regime as compared to those, who were affiliated to the 17 February revolution. For example, former NTC chairperson Mr. Mustapha Jalil was brought before a military court in connection with his alleged involvement in the death of General Younes. In December, the Ministry of Justice proposed the adoption of a new law preventing civilians from being brought before military courts. The Ministry of Justice announced that this law would be applied to retrospectively invalidate the proceedings against Mr. Jalil.¹¹¹ Such unequal treatment demonstrates the continued unwillingness of the Libyan authorities to prosecute the cases of persons associated with the former regime in an impartial manner, which is consistent with their desire to bring them to justice.

126. The Government has also failed to provide a lucid or consistent response to the Chamber's query as to whether detention orders, which fail to include information concerning the legal and factual basis for detention, are valid. The Government has claimed that Article 108 of the Libya Criminal Procedure Code, which requires such information, only applies to original detention orders, where a person has been investigated at the instigation of the Prosecution, and not the extension of detention

¹⁰⁹ ICC-01/11-01/11-258 Anx 8 at p. 7

¹¹⁰ ICC-01/11-01/11-160 at para. 11; J. O' Donohue, S Rigney, '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/author/odonohuerigney/>

¹¹¹ 'Libya: Halt Military Trial of Ex-Transition Chief' *Human Rights Watch* 20 December 2012

orders.¹¹² However, the Government's claims that "there was no original detention order issued by the Prosecutor because he was captured in combat", and that in "such circumstance there was no need for the Prosecutor's office to issue a detention order under articles 108 and 109",¹¹³ bear no reality to either Libyan law, the actual documents issued in Mr. Gaddafi's case, or international humanitarian law.

127. With respect to the specific requirements under Libyan law for detention orders, the first sentence of Article 108 does not provide for any distinction between original orders and extensions: it is drafted in broad terms to stipulate that "[e]very order must include [...] the charges".¹¹⁴ The last sentence of Article 108 further provides that "[a]n order for detention must include the request to the prison warden to accept the accused, to put him in prison and the legal provisions applicable to the facts".¹¹⁵ The detention orders included in Annex D to the 1 May challenge are clearly detention orders, which must comport to Article 108.

128. Moreover, in contradistinction to the Government's current assertion that 'there is no original detention order', the Government had previously consistently referred to the document attached at page 2 of Annex H as the original detention/remand order. For example, at paragraph 42 of the 1 May challenge, the Government asserted that the Prosecutor-General issued an original remand order on 21 November 2012.¹¹⁶ Annex D of the 1 May challenge included remand order dated 21 November 2011, which expressly required the authorities to indicate what the detainee is accused of, which articles of the penal code are applicable, and whether the remand order was served on the detainee and the prison authority.¹¹⁷ The Prosecutor-General therefore utilised the template, which directly corresponded to Article 108 original detention orders, albeit one which was not properly completed.

129. It should also be noted that the fact that the Government was applying the People's Court procedures to Mr. Gaddafi's case did not exempt them from complying with the requirements of Article 108, as Article 108 does not fall within the exceptions listed in Article 187 bis(A).

¹¹² ICC-01/11-01/11-258 at para. 58.

¹¹³ Para 58.

¹¹⁴ Icc-01/11/01/11-190-Anx1 at p4. The English translation filed by the Government on 11 February 2013 incorrectly translates it as "an order" rather than "every order".

¹¹⁵ ICC-01/11/01/11-190-Anx1 at p4

¹¹⁶ ICC-01/11-011/1-130 at paras. 42 and 43. Paragraph 43 explicitly refers to it as the "original detention period".

¹¹⁷ ICC-01/11-01/11-145-Conf-AnxD at p. 2.

130. Of further relevance is the fact that in Annex C to the 1 May admissibility challenge, the Government asserted that a defendant can never be imprisoned without a written order signed by the Public Prosecutor, which complies with Article 9 of Law no. 5, of 2005 (the Prisons law), and Article 118 of the Criminal Procedure Code.¹¹⁸ Article 9 of the Prisons law stipulates that no-one can be detained without an order which has been signed by the Public Prosecutor.¹¹⁹ This is consistent with Article 30 of the Criminal Procedure Code, which provides that no-one shall be arrested or detained without a valid order.¹²⁰
131. Article 118 of the Criminal Procedure Code further specifies that a copy of the detention order must be provided to the detaining authorities as soon as the detainee is placed in jail, and the detaining authority must sign the original order for verification. This did not occur, as demonstrated by the initial detention order included in Annex D.¹²¹
132. Article 70 of Law no. 5 of 2005 (the Prisons law) also dictates that any order or court document must be notified and explained to the detainee. The fact that it has been so notified must also be registered.¹²² It was therefore obligatory for the detention authorities to complete the section of the remand order (and extensions) concerning notification to the defendant. This did not occur, as evidenced by the remand order (and extensions) included in Annex D.

¹¹⁸ ICC-01/11-01/11-145-Conf-AnxC at p. 8.

¹¹⁹ Article 9 (Prison act)

No person shall be put in a prison unless pursuant to a written order signed and stamped by the Public Prosecution, and he shall not remain [in prison] beyond the prescribed period. The order shall precisely state the name of the person wanted to be imprisoned, and the name shall be written in full [four names].

¹²⁰ Article 30 The legality of the arrest

No person shall be arrested or detained unless by an order from the legally competent authorities.

Article 31

The place of detention

No person shall be detained unless in prisons designated for such purposes. No prison sheriff shall accept any person in prison unless pursuant to an order signed by the competent authorities, and he shall not keep him in custody beyond the prescribed period

¹²¹ ICC-01/11-01/11-145-Conf-AnxD at p. 2

¹²² Article 70: Notification to detainees about judicial documents and other such documents shall be done by handing a copy of the notification to the Head of the institute [prison] or who is acting on his behalf, and he shall take all measures ensuring the immediate access of the detainee to the copy of any court decision or any document notified to him and their content must be explained to him [the detainee]. If the detainee expressed his wish to send a copy of the notification to a specific person it must be sent to him in registered writing. Notification and mailing procedures must be registered in the record of the judicial appeals and notifications. The Head of the institute [prison] is considered responsible for any negligence or failure occurring without informing the detainee about these procedures or about executing his wishes in this regard.

133. In accordance with Article 381 of the Criminal Procedure Code, the presumption that correct procedures were followed does not apply if a required action is not mentioned in official minutes of a hearing or procedures.¹²³

134. A failure to inform the defendant of the factual and legal basis for detention would be incompatible with the right of the defendant to contest their detention, which is enshrined in articles 31 and 33 of the Constitutional Declaration.¹²⁴ Article 14 of the Basic law of 1991 on Freedoms further provides that:

No person may be deprived of his freedom, or have it restricted; neither can he be searched or questioned unless charged with an act punishable by law, or by order of a competent judicial authority within the terms and reasons set out by law [...].¹²⁵

135. As noted above, the Government claimed in the 1 May admissibility challenge that the Libyan legal system contained all the guarantees set out in the Rome Statute (which presumably includes Articles 55 and 67(1) of the Statute), and Articles 9 and 10 of the ICCPR.¹²⁶ Notably, Article 9 provides that a defendant has the right to be promptly informed of the reasons for their arrest.

136. The African Commission on Human and Peoples' Rights has also found that either a deliberate or negligent failure on the part of national authorities to 'scrupulously' comply with the requirements that a detainee must firstly, be informed of the reasons for arrest at the time of the arrest, and secondly, be informed promptly of the nature of the charges, would violate the detainee's fair trial rights under the African Charter.¹²⁷ The Government has therefore contravened its express undertaking

¹²³ Article 381 Objection for Cassation

The Public Prosecution, as well as the convicted person and the civil rights claimant with regards their rights only may file an objection for Cassation against final decisions issued in last resort, and that is in the following cases:

1- If the judgment against which the objection is filed was based on a breach of law, or on an error of application or interpretation.

2- If a nullity occurred in the judgment, or if the procedures contained a nullity that affected the judgment.

The principle is to consider that procedures were properly conducted during the case, therefore the concerned person shall prove, in all ways possible, that the procedures were neglected or breached, and that is if they were not noted in the minutes of the hearing or the judgment; if they were mentioned in one of them that they were followed, then their breach cannot be proven unless through a challenge of authenticity.

¹²⁴ See ICC-01/05-01/08-323 at para. 32, and also *Stasaitis v. Lithuania*, Application no. 4767/99, 21 March 2002, in which the ECHR found that "[a]lthough a period of detention is, in principle, lawful if it is based on a valid court order [...] the Court considers that the absence of any grounds given by the judicial authorities in their decisions authorizing detention for a prolonged period of time may be incompatible with the principle of protection from arbitrariness, enshrined in article 5 para 1".

¹²⁵ <http://www.ilo.org/dyn/natlex/docs/SERIAL/55306/65707/F837648216/LBY55306.PDF>

¹²⁶ ICC-01/11-01/11-130 at paras. 56 and 57.

¹²⁷ *Huri-Laws v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 225/98 (2000) at paras. 45-46, <http://www1.umn.edu/humanrts/africa/comcases/225-98.html>

to ensure that the proceedings against Mr. Gaddafi complied with the African Charter on Human and Peoples' Rights.¹²⁸

137. The Government's contention that Mr Gaddafi was arrested as a prisoner of war also bears no correlation to reality. The National Transitional Council announced the cessation of hostilities, as of the date of Muammar Gaddafi's death.¹²⁹ At the same time, the NTC Vice-Chairperson expressed the NTC's intention to conform to all of their obligations set out in international instruments, including Article 9 of the ICCPR, which contains safeguards that are non-derogable in times of emergency or armed conflict.¹³⁰ As noted above, in its decision of 23 December, the Supreme Court also emphasised that the nature and gravity of the crime for which a person has been arrested does not permit the authorities to deviate from the protections enshrined in the law.¹³¹

138. In any case, if Mr. Gaddafi was arrested as a prisoner of war, then the principles of international humanitarian law should have been applied, including the corollary protections for prisoners of war, which are afforded under the war crimes provisions of the Statute. This includes a protection against arbitrary detention, and the right to be informed promptly of the nature of the charges against the person.¹³²

139. The unjustified failure of the Libyan authorities to comply with the requisite provisions of domestic law triggers the possibility that both Mr. Gaddafi's detention, and any consequences of his detention, can be declared null and void.¹³³ At Annex H to the 1 May challenge, the Libyan judge briefed by the Government explained that the entity tasked with investigating the case is precluded from investigating any incidents, which were not included in the order of remittal.¹³⁴ It follows that the absence of any details concerning the factual basis for Mr. Gaddafi's detention in the detention orders would render the subsequent investigative actions of the prosecuting authorities *ultra vires*.

¹²⁸ ICC-01/11-01/11-130 at para. 57.

¹²⁹ 'NTC declares 'Liberation of Libya' *Al Jazeera* 24 October 2011, <http://www.aljazeera.com/news/africa/2011/10/201110235316778897.html>

See also ICC-01/11-01/11-190 at para. 220.

¹³⁰ General Comment No. 29 States Of Emergency (Article 4), 31 August 2001, at para. 16, and footnote 9.

¹³¹ ICC-01/11-01/11-258 Anx 8 at p. 7

¹³² ICC-01/11-01/11-51 at para. 25 and footnote 22.

¹³³ ICC-01/11-01/11-190 at para. 217.

¹³⁴ ICC-01/11-01/11-144-AnxH at p. 5. Although this summary refers to the powers of the investigating judge, pursuant to article 187(1)bis, the powers and obligations of the investigating judge were vested in the prosecutor-general for this case.

Timeline of proceedings

140. With respect to the general timing of the proceedings, the Government has estimated that the case will be transferred to the Accusation Chamber by approximately mid-February, and that if approved for trial, the trial could commence approximately three months subsequently, that is, by mid-May.¹³⁵ This trial is expected to take place in either South Tripoli, if he is tried alone, or in Tripoli.¹³⁶
141. At no point in its submissions has the Government addressed the legal and logistical issue associated with the fact that Mr. Gaddafi is also scheduled to stand trial for security violations in May, in Zintan. The relationship between these proceedings and the subject matter of the admissibility proceedings is somewhat muddled by the fact that the Government has included the charges concerning the security challenge, which fall under Article 195 of the Criminal Procedure Code, in its list of potential offences set out at paragraph 82.¹³⁷
142. If it is assumed, however, that the proceedings will be conducted separately, then in light of the fact that these security allegations have been brought immediately before the Criminal Court (i.e. the Trial Chamber),¹³⁸ it is reasonable to predict that this trial will take precedence in terms of timing. This in, turn, will inevitably delay and potentially frustrate the commencement of the proceedings related to the ICC case, and would thus be likely to generate ‘unreasonable delay’ for the purposes of article 17.
143. The Government has also for the first time announced its intention to seek the joinder of Mr. Gaddafi’s case to that of 9 or more persons. It is extremely dilatory and prejudicial to the defendant to devise such a proposal at this stage of the proceedings. The trial of Mr. Baghdadi Mahmoudi has already commenced; it was governed by the

¹³⁵ At para. 60.

¹³⁶ At para. 102.

¹³⁷ ICC-01/11-01/11-258-Red3 at para. 82.

¹³⁸ ICC-01/11-01/11-255-AnxB. Article 131 of the Criminal Procedure Code distinctively employs the terms “Accusation Chamber”, “Court” (Paragraph 1) and “Criminal Court” (Paragraph 2) to denote the difference in competence between the Courts. If the case has been referred to the Accusation Chamber (as required by the 23 December 2012 decision), then the Criminal Court would have no competence.

Article 131

If the Accused is referred to the Accusation Chamber or to the Court, the authority to which he is referred shall be competent to release him if he is detained or detain him if his released.

If the referral was to the Criminal Court composed outside session, the competence shall be of the Accusation Chamber.

In case of a judgment of no jurisdiction, the Accusation Chamber shall be competent to view requests for release or detention until they are submitted to the competent court.

People's Court procedures, and was therefore not reviewed by an Accusation Chamber. The Government has not, however, provided any information as to what stage these other cases are at, whether the defendants have actually been arrested and are being held under the authority of the government, and the impact which joinder would have on the time frame for the proceedings. Notably, Annex 11 does not exclude the possibility that "other figures of the previous regime" could also be joined to the proceedings,¹³⁹ although again, the Government has failed to specify whether such persons are in the custody of the Government, and the stage of the proceedings of their respective cases.

144. The trial of Mr. Al-Mahmoudi was initially adjourned due to the fact that the authorities could not obtain the transfer of his co-defendants to the courtroom.¹⁴⁰ If Mr. Gaddafi's trial is joined to that of Mr. Al-Mahmoudi and 'other' co-defendants, which the Government has failed to name, the prospect of a joint trial involving persons being held in multiple locations under multiple authorities is also likely to engender significant adjournments and delays in the proceeding. This would constitute unjustified delay, which is inconsistent with an intent to bring Mr. Gaddafi to justice, as understood by Article 17(2)(b) of the Statute.

145. Annex 11 also includes no information concerning the positions of the persons (for example, whether they are members of the government, or military) and the likely articles of the penal code which could be applied. In light of the fact that certain provisions can only be applied to public officials, the absence of this information renders it impossible to ascertain the suitability of their cases for joinder. Although this falls for the Accusation Chamber to determine, these factors are nonetheless relevant to the ICC Pre-Trial Chamber's assessment as to whether the Libyan authorities have the capacity to prosecute a case of such proportions, and whether their attempt to do so would be likely to generate unreasonable delay.

146. In addressing the likely schedule of the hearing, the Government also failed to address the impact of issues concerning the custody of Mr. Gaddafi, the implementation of protective measures, or the logistical impediments concerning the assignment of counsel. The Defence will elaborate on these issues *infra*.

147. The ICC Pre-Trial Chamber cannot but draw adverse inferences concerning the possibility of unreasonable delay in such circumstances.

¹³⁹ ICC-01/11-01/11-258-Anx11 at p. 3.

¹⁴⁰ Annex 10.

Issues related to the subject-matter of the domestic investigation

148. In requesting information concerning the subject matter of investigations, the Chamber stressed that “Libya shall be mindful that a mere assurance that the national investigation covers the same conduct as the case before the Court cannot be deemed sufficient to discharge its burden of proof in this regard. Conversely, Libya shall substantiate its claim by providing evidence in support thereof, within the meaning clarified in paragraphs 10 to 12 of the present decision”.¹⁴¹
149. Notwithstanding this clear warning, the Government attempted to meet this burden by relying upon mere assertions from the Ministry of Justice that the domestic investigation covers the same contours as the ICC case.¹⁴² Apart from this, the Government has not adduced any evidence or concrete information of the type referred to at paragraphs 11 of the of the Chamber’s decision in relation to the Pre-Trial Chamber’s questions concerning the geographic scope of the investigation and whether investigate steps are taken throughout Libya or are limited to specific locations.
150. Similarly, the Government’s attempt to rely in Annex 11 on assertions from members of the Attorney General’s office concerning the existence of a systematic policy is both evidentially inadequate, and a damning indictment on the manner in which the Prosecutors assigned to these cases adhere to the duty of impartiality. There is also no information in Annex 11 concerning the geographic or temporal scope of this systematic policy, what its objective were, and what the individual contributions of the accused were towards the realisation of this policy.
151. The evidential samples adduced by the Government in support of its claim that the Libya is investigating the same conduct as the ICC either fail to establish such a correlation, or are completely lacking in probative value.
152. In terms of the lack of nexus, the Government conceded that Annex 15 has no temporal overlap with the ICC case, as it concerns events, which took place during Ramadan. The Government nonetheless attempted to utilise this sample at footnotes 94, 95, and 96 in order to demonstrate that Mr. Gaddafi allegedly “mobilized militias

¹⁴¹ ICC-01/11-01/11-239 at para. 28.

¹⁴² ICC-01/11-01/11-258-Red3 at para. 67. The Pre-Trial Chamber explicitly indicated in its decision of 7 December 2012 that such mere assertions would be insufficient to meet the burden of challenging the admissibility of the case. ICC-01/11-01/11-239 at para 8, citing ICC-01/9-02/11-274, para. 1.

and troops”, was involved in the “ elimination of political dissidents”, and “ provided resources to Security Forces”. The events referred to by the witness occurred within the context of an armed conflict, rather than the civil disturbances that characterise the ICC case, and therefore have no relevance to paragraph 80 of the Article 58 decision.

153. The statement of the witness does, however, reflect the complete inability of the Libyan authorities to conduct proper witness interviews, and moreover, displays hallmarks of coercion or witness interference. In terms of the latter aspect, the witness commences the interview with [Redacted].¹⁴³ [Redacted]. The Prosecutor interviewing the witness also failed to ask the witness to clarify the source of indirect evidence ([Redacted]). The statement is not dated, and it does not list all the persons present.

154. In terms of the Government’s reliance on Annex 16, the statement is completely lacking in reliability, and only has limited relevance. The person is [Redacted].

155. [Redacted],¹⁴⁴ [Redacted].

156. [Redacted].

157. The statement in Annex 16 also only addresses one geographic location [Redacted] and a very circumscribed time period – that is, the time period until [Redacted]. It also does not support the factual allegations, which the Government has attributed to it. For example, [Redacted].

158. In terms of the Government’s reliance on Annex 17, for the reasons set out above, these intercepts are inadmissible under Libyan law, and are completely lacking in reliability. In any case, the temporal scope of the intercepts ([Redacted]) fails to overlap with the ICC case, and concerns a different factual matrix (internal armed conflict, which was internationalised by virtue of NATO intervention in mid-March).

159. Finally, it is significant that the ICC Prosecution, which has had access to both the un-redacted versions of the Government’s evidence, and the ICC Prosecution case file, has concluded that the supporting evidence provided is insufficient to conclude on a balance of probabilities that Libya is indeed investigating substantially the same conduct as the one described in the Article 58 Decision.¹⁴⁵

¹⁴³ ICC-01/11-01/11-258-Conf-Anx15-Red, p. 3.

¹⁴⁴ ICC-01/11-01/11-258-Conf-Anx16-Red at p. 2.

¹⁴⁵ ICC-01/11-01/11-276-Conf-Red at para. 38.

Issues related to Libyan law

160. The Government's response to the question as to whether the People's Court procedures are applicable to Mr. Gaddafi's case is extremely disingenuous, and underscores the Government's complete lack of candour in apprising the ICC as to the procedures and content of the domestic proceedings against Mr. Gaddafi.
161. The Government completely failed to respond to the Chamber's question as to whether the prosecuting authorities have applied the regime from the People's Court to Mr. Gaddafi, and if so, the manner in which this regime deviates from normal criminal procedures. Indeed, the Government explicitly recharacterised the Chamber's question in order to avoid directly responding to it. Whereas the Chamber inquired as to "whether the People's Court procedures are applicable in the case against Mr. Gaddafi",¹⁴⁶ the Government has reframed the question as "whether or not the trial of Saif Al-Islam Gaddafi will be governed by Peoples' [sic] court procedures".
162. As noted above, the Government recognised in its section on detention orders that the People's Court regime had been applied to Mr. Gaddafi's detention.¹⁴⁷ The Government has, nonetheless, skirted around the issue in the section on Libyan law in order to avoid addressing the question as to the extent to which this regime deviated from normal criminal procedures. The Government has also failed to provide any explanation as to why it misled the Chamber in both the 1 May challenge and the 9 and 10 October admissibility hearing in relation to the legal regime, which was applicable to Mr. Gaddafi.¹⁴⁸
163. The Chamber must therefore take into account the Government's unexplained lack of candour on these issues, in assessing the accuracy and veracity of its present response, and in drawing adverse inferences concerning the extent to which Mr. Gaddafi's rights were prejudiced by the application of the People's Court procedures to his case.
164. In terms of the implications of the Supreme Court's decision for the proceedings against Mr. Gaddafi, the Supreme Court's decision was not issued in the context of a specific case. It was a private application filed by the lawyer of Mr.

¹⁴⁶ At para. 31.

¹⁴⁷ ICC-01/11-01/11-258-Red3 at para. 56.

¹⁴⁸ ICC-01/11-01/11-T-2-CONF-ENG ET, p. 24-26.

Dorda, on an issue concerning the interpretation of the law. Nonetheless, the Trial Chamber in Mr. Dorda's case granted a Defence application to adjourn the proceedings on the grounds that the Supreme Court decision would necessarily have implications for his case, and the prior conduct of the case, even though the decision itself was not automatically enforceable in the case.¹⁴⁹

165. The Government has asserted that the Supreme Court decision is not retrospective, and that it in fact, expressly validates the procedures which have been taken thus far in individual cases.¹⁵⁰ The judgment does not make such a finding; the sentence that the “judicial should judge the unconstitutionality of the appealed text without affecting the validity of the procedures taken thereunder” simply means that the Supreme Court's decision is without prejudice to the duty of the individual Chambers to assess the consequences of this decision as concerns the validity of the procedures taken thus far. Accordingly, the Supreme Court has merely observed that since this is a decision on the interpretation of a legal provision, which has been rendered outside of the context of a case, its findings are without prejudice to the duty of case-specific Chambers to determine the legal consequences of such matters within the context of a specific case, as will occur in the Dorda case.

166. Any other interpretation of the decision would be incompatible with Article 304 of the Libyan Criminal Procedure Code, which provides that any breach of any disposition of the law concerning substantial procedures gives rise to nullity of the procedure. Article 306 provides that the right of the defendant to raise arguments based on nullity of procedure only expires if the defendant had a lawyer, and did not contest the breach. This exception would not apply to Mr. Gaddafi's case. Article 309 also specifies that if a specific act is found to be a nullity, it impacts on every procedure which is a consequence of the original procedure. The incorrect application of the People's Court procedures to Mr. Gaddafi's case could thus invalidate the investigative proceedings in their entirety. This is consistent with the views expressed by the former NTC Minister of Justice, namely, that the incorrect application of the People's Courts proceedings had the impact of invalidating the procedures.¹⁵¹

¹⁴⁹ ICC-01/11-01/11-235-AnxC; Gaddafi spy chief's trial indefinitely adjourned Al Akhbar 11 September 2012, <http://english.al-akhbar.com/node/11979> ;

¹⁵⁰ ICC-01/11-01/11-258-Red3 at para. 77

¹⁵¹ 'Libya suspends trial of top Gaddaf-era official' Reuters 11 September 2012, citing Justice Minister Mohammed Al-Alagy. <http://www.reuters.com/article/2012/09/11/us-libya-trials-suspension-idUSBRE88A0ZU20120911>

167. In the same manner, if the prosecuting authorities had incorrectly applied the People's Court procedures to Mr. Gaddafi, then the Accusation Chamber would still be obliged to take into consideration the impact of the Supreme Court decision on the validity of the investigations and evidence gathered thus far in his case. Under the People's Court procedures, the investigations were not supervised by an impartial investigating judge, Mr. Gaddafi's detention was not reviewed by a judge, and he was interrogated and confronted with witnesses without the benefit of legal representation. These violations of his rights under the normal provisions of the Criminal Procedure Code invite the possibility that the procedure and results could be declared a nullity.
168. In light of such a possibility, the ICC has a clear duty to step in, in order to avoid the possibility that Mr. Gaddafi might be released, and therefore avoid justice. Alternatively, the proceedings might be restarted, which would clearly constitute unreasonable delay, which is inconsistent with an intent to bring Mr. Gaddafi to justice.
169. Of further concern is the fact that it appears that the Libyan authorities have continued to disregard the dictates of the 23 December 2012 decision in subsequent proceedings concerning Mr. Gaddafi. On 15 January 2013, the Government submitted a statement from the President of the Supreme Court indicating that thenceforth, every defendant needed to be brought before an Accusation Chamber before the case could proceed to trial.¹⁵² Nonetheless, a mere two days later, Mr. Gaddafi was brought straight before a Criminal Court i.e. a Trial Chamber and not an Accusation Chamber,¹⁵³ to be prosecuted for charges concerning alleged national security violations.¹⁵⁴ The proceedings against Mr. Gaddafi therefore appear to be conducted without due regard to judicial developments, and in a manner, which is completely divorced from the official position of the Government.
170. The Government has also failed to draw the attention of the Chamber to the recent decision to adopt an 'Isolation Law', which is a legal development that will significantly impact on the independence and impartiality of the judiciary and members of the Ministry of Justice. The law, as currently envisaged, is not just restricted to politicians; it encompasses all public officials and acts as a broad form of lustration against anyone who is perceived to be associated with the Gaddafi regime.

¹⁵² ICC-01/11-01/11-251-AnxA

¹⁵³ See para. 142 *supra*.

¹⁵⁴ ICC-01/11-01/11-251-AnxA.

171. The momentum to adopt such a law gathered pace after the Supreme Court issued the decision on 23 December 2012. A group of member of the GNC publicly demanded on 24 December that the adopted of the law be expedited in order to ensure that anyone perceived to be associated with the former regime could be removed from the judicial establishment.¹⁵⁵ In terms of the nexus between this decision and the adoption of the law, protests demanding the adoption of the law commenced on the day the decision was issued, and the GNC approved the passage of the law three days later.¹⁵⁶
172. On the same day that the decision to adopt such a law was approved, the GNC created a Justice and Judicial Affairs committee, which “discussed the fact that the judges presiding in some of the trials of the former regime officials had taken part in the “special courts” of the Gaddafi era. [...] the committee said that it was important to exclude these figures from the current trials to ensure the transparency and integrity of the process”.¹⁵⁷
173. Notably, the judges referred to were the ones who had granted adjournments in the trials of former Gaddafi officials, due to the fact that the defendants had not been accorded legal representation during the pre-trial phase, and had not had access to evidence or information concerning the charges. It would therefore seem that the Isolation Law is being used as a stick to threaten or remove any judges, who attempt to issue independent decisions, which uphold the rights of highly unpopular defendants.
174. The current draft implementing legislation concerning the law targets persons due to their mere association with the former regime, and does not require proof that the officials were in any way implicated in crimes alleged against the former regime.¹⁵⁸ For this reason, the Isolation Law has been criticised by international and national NGOs, such as HRW and Lawyers for Justice in Libya, due to the breadth of its application, which is potentially unconstitutional and discriminatory, and the lack of procedural safeguards for vetting officials.¹⁵⁹

¹⁵⁵ M. Ellawati ‘GNC members issue statement on ‘isolation law’ [Libya Herald](#) 24 December 2012

¹⁵⁶ T. Little, ‘GNC approves legislation for “Isolation Law” targeting Qaddafi officials’ [Libya Herald](#) 26 December 2012.

¹⁵⁷ ‘GNC committee urges exclusion of former regime judges’ [Libya Herald](#) 26 December 2012

¹⁵⁸ ‘New law must protect human rights, say Lawyers’ [Libya Herald](#) 25 January 2013.

¹⁵⁹ ‘Libya: Ensure ‘Political Isolation Law’ Respects Rights’ [Human Rights Watch](#) 22 January 2013; New law must protect human rights, say Lawyers’ [Libya Herald](#) 25 January 2013.

175. Although lustration laws are not *per se*, illegal, the absence of such safeguards can render them incompatible with the rule of law, and transform them into a tool for revenge or political interference.¹⁶⁰ At the same time, the existence of laws, which create the appearance that the executive can exert undue pressure on the judiciary, violate the defendant's right to be tried by independent and impartial judges.¹⁶¹ The existence of the Isolation law therefore acts as a direct impediment as concerns the ability of the Libyan judiciary to try Mr. Gaddafi in an independent and impartial manner, which is consistent with an intent to bring him to justice.

The Law on International Crimes

176. As conceded by the Government, the international crimes bill has not yet been debated by the GNC, and there is no indication that this could occur in the near future. Given the longstanding inactivity on this bill, the only reasonable conclusion in these circumstances is that the draft was prepared solely for the purposes of the admissibility proceedings, and does not in any way reflect the intention of the GNC or the Libyan people.

177. In any case, the Pre-Trial Chamber cannot base its decision on hypothetical domestic advances; it can only consider the state of the Libyan judicial system at the time of the admissibility proceedings. Consequently, the Pre-Trial Chamber must address the inevitability that Mr. Gaddafi will face the death penalty if tried in Libyan courts.

178. Libya has ratified the ICCPR, which stipulates that the death penalty can only be applied after a fair proceeding. The practice of Libyan judiciary in other cases demonstrates, however, a willingness to impose the death penalty in circumstances which fail to comport to the requirements of fair trial. For example, in Benghazi, five persons, who were allegedly Gaddafi army officers, were sentenced to death by firing squad after an *in absentia* trial (they were not present in Libya).¹⁶²

179. The fact that Mr. Gaddafi will face the death penalty will also have direct consequences as concerns the ability of the Government to receive assistance from the

¹⁶⁰ Parliamentary Assembly of the Council of Europe Resolution 1096 (1996) on measures to dismantle the heritage of former communist totalitarian systems,
<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta96/ERES1096.htm>

¹⁶¹ *Volkov v. Ukraine*, ECHR, Application no. 21722/1, 9 January 2013 at para. 103.

¹⁶² 'Libya court condemns 5 army officers to death in absentia' *Agence France Presse* 8 November 2012,
<http://www.arabnews.com/libya-court-condemns-5-army-officers-death-absentia>

United Nations, and certain States. This will be further developed in the section on capacity building.

Issues related to the definition of crimes under Libyan law

180. Although the Government has now conceded that the public officer aspect of articles 435, 431, 433 and 434 is a requisite element of these offences, and not just an aggravating factor, it has not provided any explanation as to why it misled the Chamber on this issue. The Chamber must take into consideration the failure of the Government to provide any explanation or justification of this incorrect information, in assessing the veracity of the Government's current assertions to the Chamber.
181. In particular, the Chamber can give absolutely no credence to the Government's assertion that Libyan law recognises the concepts of *de jure* and *de facto* authority,¹⁶³ particularly as the Government has not cited any legal articles, case law, or expert opinion in support of such a proposition.
182. In contrast to the Government's assertion that the notion of 'public officer' can implicitly be deemed to include persons exercising *de facto* authority, it would appear that when the Libyan Penal code wishes to extend liability to persons exercising *de facto* authority, it does so expressly. For example, articles 167 and 174 of the code impose particular punishments for 'public officers' and persons who have been assigned by the government to perform a particular task.¹⁶⁴ In accordance with the *expressio unius est exclusion alterius* canon of statutory construction, the explicit inclusion of separate terminology for persons exercising *de facto* authority, excludes the implicit incorporation of such notions into the term 'public officer'.

¹⁶³ ICC-001/11-01/11-258-Red at para. 85.

¹⁶⁴ Article 167 Conspiring with a Foreigner against the Military and Political Standing of the Country

Any person who conspires, in times of peace, with a foreign state or one of its officials with the intent to harm the military, political or diplomatic standing of Libyan Arab Republic shall be punishable by imprisonment.

The same penalty shall apply to any person who wilfully destroys, hides or falsifies documents that may be presented as proof of the rights of the Libyan Arab Republic before a foreign state.

Should the aforementioned crimes be committed in times of war, or should the perpetrator be a public officer or envoy on a public mission or the government had assigned him to perform a task of any nature, the punishment shall be life imprisonment.

Article 174 Disclosing or diffusing any Defense secrets

It shall be a prison sentence, and a fine ranging from 500 and 1000 dinars, for any person who diffuses, in any way, secrets related to the country's defense or in its same category.

The punishment shall be life sentence should the perpetrator be a public officer or have a parliamentary function or be an envoy in a mission or have been assigned to a task by the government, or should the crime cause harm to military preparations for defending the country.

The punishment shall be the death penalty should the crime be committed at times of war.

183. Moreover, as explained by the Government in its 1 May admissibility challenge, “there shall be no crime or penalty except by virtue of the text of the law”,¹⁶⁵ and “[a]nalogy shall not be allowed in incrimination and punishment issues”.¹⁶⁶ Extending the ambit of penal articles, which are expressly drafted to refer to public officers, to persons who exercise ‘*de facto*’ authority, would constitute an extension of the legal provision by analogy. Moreover, by creating a hitherto unknown offence under Libyan law, it would violate the above-mentioned principle of legality.
184. The existence of contrary legislative intention and the absence of any legal precedent concerning the possibility of applying these legal provisions to persons exercising *de facto* authority is thus a clear legal impediment, which renders the Libyan judicial system unavailable for the purposes of prosecuting the ICC-related conduct in Libyan courts.¹⁶⁷
185. Finally on this point, although the Government has asserted that the criminal investigation against Mr. Gaddafi “includes significant and compelling evidence on his *de facto* position as a senior public official”, the Government has only adduced one unreliable statement in support of such a proposition. Given that this issue forms the crux as to whether Mr. Gaddafi can be effectively prosecuted before domestic courts, the Chamber should not rely on mere assurances from the Government concerning the theoretical existence of an evidential basis for this issue.
186. With respect to the Pre-Trial Chamber’s query concerning the applicability of the provision on random killings, the Government merely asserted that this provision applies to Mr. Gaddafi, again without providing any legal expertise or precedent. The Government’s explanation is also completely lacking in logic: the question as to whether the acts were directed against protestors or state officials is completely irrelevant. As is clear from the translation conducted by the OPCV,¹⁶⁸ Article 296 expressly excludes from its ambit acts which are committed in connection with assaults against State security. A police officer, who kills a protestor or person, who is attempting to enter or breach the security of a police station or military post, could not be convicted under this provision, nor could Mr. Gaddafi be convicted for providing

¹⁶⁵ ICC-01/11-01/11-130 at para. 56.

¹⁶⁶ ICC-01/11-01/11-145-AnxH at p. 3.

¹⁶⁷ Policy Paper on Preliminary Examinations 4 October 2010, at para. 59,

http://www.icc-cpi.int/NR/rdonlyres/E278F5A2-A4F9-43D7-83D2-6A2C9CF5D7D7/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf

See also ICC-01/11-01/11-167-Red at para. 24.

¹⁶⁸ ICC-01/11-01/11-166-AnxA at p.2.

any assistance to this police officer. Article 296 also does not include any assessment of proportionality or necessity: all acts committed in connection with assaults against State security are excluded. The explicit existence of this caveat in Article 296 there constitutes a legal impediment as concerns the availability of the Libyan judicial system to effectively prosecute Mr. Gaddafi.

187. In terms of the question as to whether and how Libyan law imposes criminal responsibility for “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”,¹⁶⁹ the Government has claimed that although the conduct is not penalised under Libyan law, it can be taken into consideration as an aggravating factor pursuant to articles 27 and 28 of the Libyan Criminal Code.¹⁷⁰ Article 17 requires the challenging State to demonstrate that it is actively investigating or prosecuting the same conduct: a result which is contingent on a conviction is patently inadequate, and does not satisfy the victims’ right that this conduct be adjudicated in a fair and impartial manner.

188. A further impediment is that Articles 27 and 28 of the Libyan Criminal Code do not permit the Judge to take into consideration discriminatory intent as an aggravating factor in sentencing. Article 27 merely states that the Judges are prescribed by the limits set out in the law.¹⁷¹ Article 28, which is defined in exhaustive terms, provides that the Judges shall base their decision on the gravity of the crime, and the criminal’s tendency to commit the crime.¹⁷² Although the Judges may take into consideration the defendant’s motive in committing the crime –motive is not the same as intent for the purposes of persecution.¹⁷³ It is entirely possible for a person to intentionally engage deprive persons of their fundamental rights, without possessing discriminatory motive or without this being the objective of their behaviour. In such a scenario, Libyan law would not capture the defendant’s responsibility for engaging in the intention and severe deprivation of fundamental rights, contrary to international law by reason of the identity of the group or collectivity.

189. The Government has for the first time also referred to additional charges, which will be brought against Mr. Gaddafi should he be tried in Libya. These include Article 195 (insulting constitutional authorities). The Government has not specified

¹⁶⁹ ICC-01/11-01/11-239 at para. 37.

¹⁷⁰ ICC-01/11-01/11-258-Red at para. 87.

¹⁷¹ ICC-01/11-01/11-273-AnA p. 2.

¹⁷² ICC-01/11-01/11-273-AnA p. 2.

¹⁷³ Prosecutor v. Tadic, Appeals Judgment, 15 July 1999, at para. 270; Prosecutor v. Krnojelac, Appeals Judgment, 17 September 2003, at paras. 99-103.

the factual basis for these charges, but since it is unlikely that they are alleging that Mr. Gaddafi insulted Muammar Gaddafi or the Fateh revolution led by Muammar Gaddafi, the charge is probably being levelled against Mr. Gaddafi simply because he allegedly insulted the Libyan flag during a privileged meeting with his defence team. As set out in the Defence filing on this issue, this charge is predicted on illegally obtained evidence, and coercive interviews, concerning a meeting which should have been protected by legal professional privilege.¹⁷⁴

190. In terms of the other provisions cited by the Government, many provisions appear to be directly targeted at persons agitating against the Government, rather than the reverse situation of the Government allegedly applying force to ensure its territorial integrity. As such, Articles 202 and 203 do not seem to be applicable to Mr. Gaddafi's case scenario. It is also impossible to assess their relevance to the ICC case in the absence of any corollary factual allegations, which could relate to these provisions.¹⁷⁵

191. Finally, the Government has for the first time announced its intention to prosecute Mr. Gaddafi utilising precepts of Sharia law, in particular, as concerns retaliation and compensation for killings¹⁷⁶ Although the Government promised that it would file a compilation of all additional provisions of Libyan law,¹⁷⁷ it has failed to submit any information concerning the parameters of Sharia law or Law No. 7 of 1988. This omission once again, demonstrates the failure of the Government to apprise the Pre-Trial Chamber of highly relevant legal provisions, which might undermine its challenge.

192. The Government omitted to explain that the application of Sharia law principles would denude the proceedings of the procedural protections set out in the Criminal Procedure Code. The Libyan Supreme Court recently confirmed that Sharia law should be considered to be at the apex of the hierarchy in the Libyan legal system; in case of conflict between Sharia law and legislation, the former prevails.¹⁷⁸ The

¹⁷⁴ ICC-01/11-01/11-255 at para. 54.

¹⁷⁵ For example, article 362 concerns the spreading of diseases of plants or animals. The only known factual allegations which could be remotely relevant to such a charge would concern camels and fish farms.....

¹⁷⁶ ICC-01/11-01/11-Red3 at para. 82.

¹⁷⁷ At footnote 106.

¹⁷⁸ 'Wives can no longer stop husbands taking second wives' Libya Herald 8 February 2013, <http://www.libyaherald.com/2013/02/08/wives-can-no-longer-stop-husbands-taking-extra-brides/>.

See also Article 14 of the Penal Code, which provides that "In no case shall the provisions of this Code derogate from personal rights recognized by the Sharia." Article 1 of the Constitutional Declaration further specifies that "Islam is the Religion of the State and the principal source of legislation is Islamic Jurisprudence (Shari'a)": ICC-01/11-01/11-144-AnxG.

decision of the prosecuting authorities to pursue Mr. Gaddafi under Sharia law would thus displace the application of charges under the Penal Code.

193. In Libya, Sharia law is not written or codified – it is based on hadiths and religious interpretations of the Koran. According to Sharia retaliatory principles, the victims, and not the Judge, determine the penalty, which can include execution in exchange for killing.¹⁷⁹ The potential application of such principles adversely impacts on the independence and impartiality of the proceedings, and the extent to which Sharia legal provisions will sufficiently encompass the conduct set out in the ICC charges. In this connection, in accordance with Law no. 7, Sharia law automatically displaces the penal code for intentional and non-intentional homicide.¹⁸⁰

194. Since the victims have an unfettered discretion to determine the penalty, without any consideration of mitigating or aggravating circumstances, articles 27 and 28 of the Penal Code would have no application. The defendant’s alleged responsibility for “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity” would fail to be considered or adjudicated as part of the domestic proceedings.

195. The application of Sharia law principles of *Diya* is particularly significant if the authorities are unable to establish evidence of intent. For example, in a situation analogous to articles Article 25(3)(c) or 25(3)(d) of the Rome Statute, where the defendant possesses knowledge but not intent, Sharia law prescribes a maximum penalty of two months fasting.¹⁸¹ This penalty can, however, be completely waived through the payment of blood money to the victims. The possibility that the defendant could effectively ‘bribe’ the victims through an offer to pay blood money in lieu of a particular penalty also raises the question as to whether such procedures would be consistent with an intent to bring the defendant to justice, in an impartial manner.

Issues concerning the exercise of Mr. Gaddafi’s rights under domestic law

196. The Government has acknowledged that Mr. Gaddafi has been interviewed on multiple occasions since 1 May 2012, the last occasion being 13 November 2012.¹⁸² Notwithstanding the fact that under Libyan law, an official record would have to be

¹⁷⁹ Annex 9.

¹⁸⁰ Annex 9.

¹⁸¹ Annex 9.

¹⁸² ICC-01/11-01/11-258-Red3 at para. 88.

complied of any such interrogations,¹⁸³ the Government has not adduced any evidence or documentation establishing that Mr. Gaddafi has indeed been officially interrogated.

197. Notably, the Government does not include any information concerning the subject matter of the questioning, without which, it is not possible to ascertain whether these steps had any correlation to the ICC case. Given that the Government has indicated at paragraph 48 that the charges include the allegations that Mr. Gaddafi contravened article 195 of the Criminal Procedure Code, which presumably relates to the charge that he allegedly played with a Libyan flag during a privileged meeting, and Article 362, which concerns ‘spreading diseases of animals and plants’, it is entirely possible that Mr. Gaddafi has only been interrogated in connection with allegations which have no substantive, geographic, or temporal link to the ICC case.

198. The Government has not specified whether Mr. Gaddafi was ever interrogated by persons, who fall outside the official authority of the Prosecutor-General, which could have rendered him vulnerable to illegal or coercive questioning.¹⁸⁴

199. The Government has also failed to provide any information concerning the dates of these alleged interrogations. This information is necessary to assess the legality of Mr. Gaddafi’s detention. Pursuant to Article 112 of the Criminal Procedure Code, a detainee must be questioned within 24 hours of his detention.¹⁸⁵ None of the remand orders appended to the 1 May admissibility challenge refer to the defendant being interrogated, notwithstanding the fact that the remand orders stipulate that any such formal interrogations must be recorded on the remand order in question.¹⁸⁶ A failure to follow the appropriate procedures set out in this article can result in the release of the detainee.¹⁸⁷

200. Of further concern is the fact that the Government has acknowledged that Mr. Gaddafi participated in these interrogations without the assistance of counsel. At Annex C to the 1 May admissibility challenge, the Prosecutors assigned to Mr.

¹⁸³ Article 57 of the Criminal Procedure Code, as referred to at ICC-01/11-01/11-130 at para. 59.

¹⁸⁴ Commission of Inquiry statement, 00299; ICC-01/11-01/11-190-Red-Corr at paras. 241-247; ICC-01/11-01/11-255 at para. 57.

¹⁸⁵ Article 112 of the Criminal Procedure Code

The *juge d’instruction* shall immediately interrogate the arrested suspect, and if not possible he shall be put in detention until interrogated, and this detention shall not exceed 24 hours. If this period is exceeded, the prison Guard shall hand him over to the Public Prosecution which shall immediately request the *juge d’instruction* to interrogate him, and where appropriate it shall request so from the Auxiliary judge or the President of the Court or another judge appointed by the President of the Court, or it shall order his release.

¹⁸⁶ ICC-01/11-01/11-145-Conf-AnxD.

¹⁸⁷ Article 112 of the Criminal Procedure Code.

Gaddafi's case acknowledged that a defendant in custody must be informed of their rights and duties, which includes the right to counsel.¹⁸⁸ Under article 57 of the Criminal Procedure code, as referred to at paragraph 59 of the 1 May challenge, all investigative procedures taken in the case must be written down. Accordingly, if the defendant had been advised of the right to counsel and waived this right, this should have been recorded. As noted *supra*, if required steps have not been recorded in the investigative record of minutes, than it is presumed that they were not followed.¹⁸⁹

201. The Government's assertion that Mr. Gaddafi waived the right to counsel on a voluntary and informed basis can therefore be given no credence, in light of firstly, the Government's failure to adduce any evidence in support of such a waiver, as required by Article 57 of the Libyan Criminal Procedure Code, and secondly, the Government's refusal to respond to the question of the Chamber as to the manner in which the People's Court procedures would have deviated from regular procedures, if they had been applied to Mr. Gaddafi's case.

202. In terms of the latter aspect, in its 23 December 2012 decision, the Supreme Court observed that a consequence of the illegal and unconstitutional application of the People's Court procedures was that defendants were deprived of an essential guarantee of the criminal process, namely, the right that any deprivation of liberty should be accompanied by a right to effective legal representation.¹⁹⁰ The Supreme Court underscored the particular importance of this right in connection with investigative acts, such as interrogations and the confrontation of witnesses.¹⁹¹

203. Mr. Gaddafi has consistently indicated to the OPCD that he wishes to be assisted by Counsel in connection with the Libyan proceedings, and has never intimated anything to the contrary.¹⁹² The fact that the Libyan authorities have applied the unconstitutional and unfair regime of the People's Court in order to stymie his unequivocal desire for legal representation is evidenced by the fact that Mr. Gaddafi was informed by the Prosecutor-General that he would not be permitted to have access to counsel due to the fact that his case was 'special' i.e. special court procedures were being applied.¹⁹³ This is consistent with the fact the Prosecutor-General informed Human Rights Watch that Mr. Gaddafi would not be authorised to have access to

¹⁸⁸ ICC-01/11-01/11-145-Conf-Anxc-at p. 8.

¹⁸⁹ Article 381 of the Criminal Procedure Code, *ibid.*

¹⁹⁰ ICC-01/11-01/11-258-Anx8 at p. 6.

¹⁹¹ ICC-01/11-01/11-258-Anx8 at p. 6.

¹⁹² ICC-01/11/01/11-70-Red2 at paras. 37 and 41-42.

¹⁹³ ICC-01/11-01/11-70-Red2 at para. 35.

counsel whilst he was detained in Zintan.¹⁹⁴ The Prosecutors assigned to Mr. Gaddafi's case also informed the OPCD that it would not be possible for Mr. Gaddafi to have privileged communications with his lawyers, whilst he is detained in Zintan.¹⁹⁵ On 7 June 2012, Mr. Gaddafi was also immediately interrogated by the Libyan authorities without the presence of a lawyer, and before he would have had any opportunity to request and designate a lawyer.¹⁹⁶

204. Moreover, as observed by Amnesty international in July 2012, “[w]ith rare exceptions, detainees have no access to lawyers and are interrogated alone, despite guarantees stipulated in the Libyan Code of Criminal Procedure”.¹⁹⁷ Notably, the trial of the first Gaddafi official was adjourned due to *inter alia*, the fact that he had been denied access to a lawyer prior to the commencement of the trial.¹⁹⁸ The lawyers for Baghdadi Mahdmoudi have also complained that they were denied the right to visit their client.¹⁹⁹ This is thus a clear pattern that the Government was applying these illegal procedures across the board to all persons associated with the former Gaddafi regime, including Mr. Gaddafi and presently, Mr. Al-Senussi.

205. Of further concern is the fact that the Government has acknowledged that it has not yet been able to identify a suitably qualified counsel, who is willing and available to represent Mr. Gaddafi in domestic proceedings.²⁰⁰ If the Government, which has an unfettered power to communicate with potential lawyers, has been unable to identify a lawyer, how could they expect Mr. Gaddafi – who is being held in incommunicado detention – to do so?

206. The fact that the prosecuting authorities interrogated Mr. Gaddafi on multiple occasions and apparently confronted him with witnesses, without first ensuring that he was in a position to exercise his right to be represented by counsel in an effective manner, as stipulated by Article 106, creates the strong possibility that these

¹⁹⁴ F. Abraham, “In his first interview, Saif Al-Islam says he has not been given any access to a lawyer” The Daily Beast 30 December 2011.

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

¹⁹⁶ ICC-01/11-01/11-255 at par. 24.

¹⁹⁷ Amnesty International, ‘Libya: Rule of Law or Rule of Militias?’ July 2012, p. 7, <http://www.amnesty.org/en/library/asset/MDE19/012/2012/en/f2d36090-5716-4ef1-81a7-f4b1ebd082fc/mde190122012en.pdf>

¹⁹⁸ ICC-01/11-01/11-216-Anx3.8 at p. 3;

¹⁹⁹ H. Mzouidet, ‘Baghdadi Al-Mahmoudi trial adjourned as defence lawyer decries extradition as “illegal”’, Libya Herald 12 November 2012, <http://www.libyaherald.com/2012/11/12/baghdadi-al-mahmoudi-trial-adjourned/>

²⁰⁰ ICC-01/11-01/11-258-Red3 at para. 97.

procedures will be deemed coercive, and declared a nullity, pursuant to article 304 of the Libyan Criminal Procedure Code.²⁰¹

207. In response to the Chamber's question as to whether Mr. Gaddafi has been able to exercise his right to view all of the investigative materials in his case, the Government's claim that Mr. Gaddafi has not exercised this right²⁰² can also be given absolutely no credence in light of their failure to adduce any proof that he was informed of this right, and failed to exercise it, as required by Articles 57 and 381 of the Criminal Procedure Code.

208. On multiple occasions in April 2012, the Defence requested the Libyan authorities to disclose to them information concerning the nature and detail of the charges, so that they could give informed advice to Mr. Gaddafi, in the event that a visit was authorised.²⁰³ The Government completely failed to respond to these requests.

209. In a recent filing the Government also completely undermined its claim that the defendant could, in principle, access the dossier and exercise the right to confrontation in an effective manner. The Government asserted that:

the fact that Mr Gaddafi is only able, during the investigative phase of proceedings, to view the investigative file in a restricted manner (ie. with all witness identifying information being withheld from him) while in custody provides a means of protecting its confidentiality during this phase.²⁰⁴

210. The Government has not cited any legal provisions in support of its apparent right to withhold the identity of witnesses or identifying information from the defendant. Such a practice would clearly contravene article 68 of the Criminal Procedure Code, which sets out an unqualified right for the defendant to obtain copies of documents in the case file, "regardless of their type".²⁰⁵

211. It is also self-evident that Mr. Gaddafi would not have been in a position to exercise his right to confront witnesses, if he has not been authorised to receive any

²⁰¹ See K. Heller, 'Saif Has Been Repeatedly Interrogated Without Counsel', *Opinio Juris* 3 February 2013, <http://opiniojuris.org/2013/02/02/saif-has-been-repeatedly-interrogated-without-counsel/>

²⁰² ICC-01/11-01/11-258-Red at para. 93.

²⁰³ ICC-01/11-01/11-152-AnxB at p. 2, ICC-01/11-01/11-152-AnxC at p. 2.

²⁰⁴ ICC-01/11-01/11-265-Red2 at para 17

²⁰⁵ Article 68 Copies of [case file] documents

The defendant, victim and civil rights claimants may request at their own expense during the investigation copies of the [case file] documents regardless of their type, unless the investigation is conducted in their absence pursuant to a relevant order.

identifying information in relation to them. In this connection, Article 106 of the Criminal Procedure Code refers to the right to confront ‘witnesses’ not just their statements. In its decision of 23 December 2012, the Supreme Court also referred to a defendant’s right to confront witnesses or co-accused as a guarantee, which was necessary to ensure the fairness of the proceedings.²⁰⁶

212. In the absence of any information concerning the date and subject matter of such confrontations, and in light of the aforementioned confidentiality restrictions and infeasibility that witnesses were physically brought to Mr. Gaddafi’s secret detention location in Zintan, it is entirely possible that the only ‘confrontation’ organised thus far concerned trivial, or peripheral matters, which have no correlation to the ICC case, such as Mr. Gaddafi’s alleged insult of the Libyan flag during his privileged meeting with his counsel.²⁰⁷

Issues related to the capacity of the Libyan authorities to investigate and prosecute

213. The Government has completely failed to provide concrete information in relation to the Pre-Trial Chamber’s questions on these issues.
214. In response to the Chamber’s question as to the resources allocated to the investigation, the Government indicated the number of total persons working in the Investigation Committee of the Prosecutor-General’s office,²⁰⁸ but it failed to specify how many of those persons are assigned to the individual case of Mr. Gaddafi. Similarly, although the Government asserted that the Investigation Committee “benefits from all of the financial and other resources available to the Prosecutor-General’s office”,²⁰⁹ it failed to specify any concrete figures or details concerning these resources, nor does it indicate what proportion of the resources available to the Investigation Committee are allocated to the persons investigating the case of Mr. Gaddafi.
215. In terms of the Chamber’s question concerning the powers of the individuals responsible for investigating the case, the Government response again lacked concrete

²⁰⁶ ICC-01/11-01/11-0258-Anx8 at pp. 6-7.

²⁰⁷ The Defence is aware that a confrontation process was arranged in Zintan, in which the defendant was ‘confronted’ with t-shirts, books, socks, shoes, deodorant, a box of Kit Kats, and a video allegedly depicting him playing with the Libyan flag during a privileged meeting. This is something which would presumably be recorded in any official Libyan case file concerning these proceedings.

²⁰⁸ ICC-01/11-01/11-258-Red at para. 94.

²⁰⁹ ICC-01/11-01/11-258-Red at para. 94.

details, and in addition, failed to refer to the legal provisions, which regulate these powers.

216. The lack of clarity on this issue is especially troubling in light of the Government's assertion that the Investigation Committee are members of, and exercise the full powers of the Prosecutor-General's office, which allegedly includes the power to execute searches and seizures. Under Article 180 of the Criminal Procedure Code, the Prosecution cannot exercise such powers in the absence of a prior judicial order.²¹⁰

217. The Government's response to the Chamber's query concerning the expertise of the members of the investigation team also lacks clarity. Again, the Government has failed to distinguish between persons who are members of the general Investigations committee, and those who are assigned to Mr. Gaddafi's case. The Government has also provided no information concerning the extent of the investigators' and prosecutors' prior expertise in criminal investigations, in particular, whether they have experience with complex crimes as opposed to misdemeanours.

218. Of further concern is the Government's failure to refer to the potential repercussions of the above-mentioned 'Isolation Law' on the composition and qualifications of the Investigation Committee. The law targets persons due to their mere association with the former Gaddafi regime rather than their actual involvement in any alleged crimes or wrongdoing. A concern has therefore been raised that it will have the consequence of denuding the public service (including the prosecutor-general's office and investigations committee) of qualified persons,²¹¹ which would inevitably render the Libyan judicial system unavailable to effectively investigate and prosecute this case.

219. Although the Government has asserted that the Investigation Committee has conducted on-site investigations *et cetera*, again, it has failed to specify whether these have occurred in the specific context of Mr. Gaddafi's case, and when they occurred.

220. The Government has also failed to give any precision concerning the methods, which the Investigations Committee has employed to collect and preserve evidence. Indeed, the reference to 'regular criminal investigative procedure' fails to take into

²¹⁰ ICC-01/11-01/11-190-Anx1 at p. 7.

²¹¹ M. Kersten, 'Lustration in Libya: Ruling Congress Passes "Political Isolation Law"' Justice in Conflict Blog 28 December 2012, <http://justiceinconflict.org/2012/12/28/lustration-in-libya-ruling-congress-passes-political-isolation-law/> ; International Legal Assistance Consortium Report November 2011, at p. 12. http://www.ilac.se/download/reports_documents/mission-reports_documents/LIBYA_FF_REPORT_111221.pdf

consideration the unique challenges associated with gathering evidence, and ensuring a reliable chain of custody in a conflict situation.

221. The Government has also failed to address the impact of past or present security issues on its ability to obtain and preserve evidence. In this regard, it would seem that the investigation into the attack on the United States Embassy was significantly impeded by the failure of Libyan authorities to secure key sites in Benghazi, or prevent persons from tampering with physical evidence.²¹² ‘Regular criminal procedures’ have thus proved to be patently inadequate for the effective investigation and prosecution of sensitive or complex crimes.

Witness protection and security

222. Once again, the Government has failed to provide concrete or detailed responses to the Pre-Trial Chamber’s questions concerning witness protection and security. The Government has thereby deprived the Chamber of being able to make a meaningful assessment as to the Libyan authorities’ capacity in this key area.

223. The Government has provided absolutely no information as to which criteria and methods are employed to determine which witnesses should benefit from protective measures, and which measures would be most appropriate.

224. The Government recently averred to the Pre-Trial Chamber that their public disclosure concerning the interrogation of high level Mr. Gaddafi officials in connection with Mr. Gaddafi’s case was not problematic because persons in custody do not require protection.²¹³ Such a position betrays the authorities’ complete lack of understanding concerning the requirements of an effective witness protection scheme.

225. Mr. Gaddafi is not a threat to any persons, whether they are in custody or not. Nonetheless, as a general principle, detained insider witnesses are extremely vulnerable to retaliation from fellow detainees, prison guards, or visitors.²¹⁴ This would particularly be the case if the insider witness is being detained at the same

²¹²S. Sotloff, ‘The Benghazi Consulate: Has the Crime Scene Been Contaminated?’ *Time* 5 October 2012, <http://world.time.com/2012/10/05/the-benghazi-consulate-has-the-crime-scene-been-contaminated/#ixzz2LBwcS0eQS>; ‘Libya Consulate Not Secured Days After Attack, Journalists Say’ *Huffington Post* 24 September 2012, http://www.huffingtonpost.com/2012/09/24/libya-consulate-chris-stevens-journal_n_1910116.html

²¹³ ICC-01/11-01/11-265-Red3 at para. 17.

²¹⁴ As set out in the Defence admissibility response, the Libyan authorities appear to be particularly lax in allowing persons to have ingress into detention facilities for the purposes of harassing detainees. ICC-01/11-01/11-190-Conf-Corr at para. 296.

facility as the accused. Given the psychological harm and punitive effects of isolation, it is also not an appropriate response to maintain either the insider witness or the defendant in isolation. The absence of appropriate security and psychological protection for such persons will have a direct impact on their willingness to testify, and the reliability of their testimony.

226. The Government has also failed to address the particular sensitivities of Defence witnesses, who may be unwilling to disclose their names to the very authorities, who are responsible for implementing measures, such as police protection. Any person who elects to testify for Mr. Gaddafi will – rightly or wrongly – be perceived to be a loyalist or a Gaddafi supporter. There is substantial evidence concerning threats and reprisals, which have made against persons perceived to be either loyalists or in any way affiliated to the former regime.²¹⁵

227. A common characteristic of such occurrences is that the victims were unable to obtain any redress or protection from the authorities.²¹⁶ In many cases, the threats or retaliatory actions emanated from the authorities themselves,²¹⁷ and the mistreatment was exacerbated if the victim attempted to submit a formal complaint.²¹⁸

228. It is also notable that the Libyan authorities do not have the capacity to hear the testimony of persons, who reside outside of Libya, and who have a real fear of reprisals or physical threats if they were to return to testify in the trial.²¹⁹ Moreover, even if Libya were to explore the option of utilising video-link testimony, no weight could be accorded to such a possibility, in the absence of firstly, domestic legislation permitting the use of such measures, and secondly, the existence of bilateral agreements with States, in which the witnesses reside, permitting the witnesses' testimony to given in such a manner.²²⁰

229. The absence of any Defence-oriented measures, which address these specific concerns, will render the testimony of Defence witnesses “otherwise unavailable” for the purposes of article 17(3) of the ICC Statute, and would fundamentally undermine the fairness of the proceedings by violating equality of arms.²²¹ As set out in a draft Prosecution policy paper on preliminary examinations, in considering whether the

²¹⁵ [Redacted], Annex 4.

²¹⁶ [Redacted], Annex 4.

²¹⁷ [Redacted] Annex 4.

²¹⁸ [Redacted], Annex 4.

²¹⁹ ICC-01/11-01/11-190 at paras. 394-400; ICC-01/11-01/11-228-Conf-Anx7.

²²⁰ *Brown and others v. Government of Rwanda and Secretary of State* (8 April 2009) - [2009] EWHC 770 (Admin) at para. 64.

²²¹ ICC-01/11-01/11-190-Red-Corr at para. 401.

‘inability’ Article 17 criteria are met, “the Office may consider, *inter alia*, the absence of conditions of security for witnesses, investigators, prosecutors and judges or lack of adequate protection systems”.²²² Defence teams and Defence witnesses are intrinsic elements of any criminal trial; without adequate security for the Defence, a State cannot be considered to be ‘able’ to conduct criminal trials.

230. The Government’s failure to address these issues most likely derives from the apparent absence of persons, associated with the Ministry of Justice, who possess any relevant expertise in this area. The absence of dedicated resources and expertise in this important area, in itself, warrants the rejection of the admissibility challenge.²²³

231. In terms of the range of measures available, the Government has not cited any legal provisions or jurisprudence, which would support their right to implement these measures. Of particular concern is their reference to ‘witness anonymity’ and their failure to clarify whether this will translate to anonymity vis-à-vis the public, or whether it extends to the Defence and other court participants.

232. As noted above, the Government recently informed the Pre-Trial Chamber that the identities of all witnesses and related identifying information should be withheld from the defendant,²²⁴ notwithstanding the fact that Mr. Gaddafi is presently held in incommunicado detention and has had no communications with a lawyer. If the Government is either unwilling or unwilling to disclose confidential information to a person, who is completely cut-off from the outside world, then it is clear that they would unlikely to do so if at any point Mr. Gaddafi has a right to contact his lawyer, or to appear in public court hearings. The authorities’ disproportionate reliance on this measure at the trial phase would turn the trial into a secret inquisition, which would be a complete travesty of the principles of independent and impartial justice.

233. Anonymity also provides no protection for witnesses, for whom the source of the threat emanates from the authorities themselves. At the very least, the Prosecution and the Defence would be required to disclose the names of their witnesses to the judicial authorities, and their staff. In the absence of proper confidentiality protocols and training on witness security, there is a high risk that sensitive details concerning

²²² Policy Paper on Preliminary Examinations 4 October 2010, at para. 59, http://www.icc-cpi.int/NR/rdonlyres/E278F5A2-A4F9-43D7-83D2-6A2C9CF5D7D7/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf

²²³ This would be in line with the fact that the ICC prosecutor took into consideration “limited resources, a lack of expertise and security issues”, in determining that special courts set up in Sudan failed to satisfy the Article 17 standards. S. Williams, W. Schabas, ‘Article 17 Issues of Admissibility’, in Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court* (Hart Publishers 2008) at p. 624.

²²⁴ ICC-01/11-01/11-265-Red3 at para. 17.

Defence witnesses might be deliberately or inadvertently leaked, which could create a significant risk to their life. This risk could equally apply to Prosecution witnesses, who are former members of the regime or who could be perceived to be affiliated to the former regime or implicated in its alleged crimes.

234. The Government's myopic focus on threats emanating from the Defendant betrays its failure to comprehend the complex risks faced by witnesses testifying in a post-conflict situation, which could deter witnesses from testifying, and thus render their testimony unavailable for the purposes of article 17(3) of the Statute.

235. If the authorities do possess a genuine intention to disclose the identities of witnesses to the Defence, then it should, in principle, occur before the defendant is brought before the Accusation Chamber. To hold otherwise would completely deprive this phase of the proceedings of any legal import. Without the identities of witnesses, the Defence would be unable to exercise their right to contest the admissibility of evidence, in particular, to raise issues as to whether statements were obtained by coercion. As noted above, it is also self-evident that the defendant cannot exercise the right to confront witnesses if the witnesses are anonymous. The Criminal Procedure Code further stipulates that some of these challenges must be made as soon as the evidence is disclosed to the defendant, even if he is not represented by Counsel.²²⁵ It is thus clear from the existence of such provisions that the drafters of the Penal Code never envisaged the use of partial disclosure or redactions vis-à-vis the Defence, as opposed to the public.

236. The Government's failure to specify any viable alternatives for this phase of the proceedings therefore strongly suggests that the authorities do not, at present, have the capacity to move this case forward to the next stage, in a manner which respects both the rights of the defendant under Libyan law, and the protection and security of witnesses.

237. The most glaring omission is the Government's failure to acknowledge or address the impact of security measures on the progress of the investigation, or in relation to their capacity and resources to implement witness protection measures. This lack of security has effectively rendered the judicial system unavailable, in particular, as concerns cases related to former Gaddafi officials or persons associated with the Gaddafi regime, such as Mr. Gaddafi.

²²⁵ Article 306 of the Criminal Procedure Code, ICC-01/11-01/11-190-Anx1 at pp. 8-9.

238. Although the Government has referred to the possibility of police protection,²²⁶ in reality, there continues to be no effective protection for police themselves, or investigators, judges or witnesses, with some courts shutting down due to the lack of adequate security.²²⁷ How can the Government run an effective witness protection programme when police, and security officials are regularly targeted for assassination,²²⁸ or kidnapped,²²⁹ either due to their perceived affiliation with the former Gaddafi regime, or their attempts to uphold the rule of law.
239. For example, the Chief of Security in Benghazi was assassinated due to his efforts to reign in militia, and because he previously served in the Gaddafi administration.²³⁰ When local police arrested a suspect in connection with this assassination, suspected Islamic militants attacked the compound where he was believed to be held in order to attempt to release him, and killed four additional policemen.²³¹ A week later, suspected Islamic militants again attacked the police compound, which resulted in more than four additional deaths.²³² A week after that, the Prosecutor's office was bombed.²³³ In such an environment of violence and impunity, what police or security officer would risk their life in order to protect a witness testifying for the Defence of Mr. Gaddafi?
240. There is no evidence that any of these attacks have any links to Gaddafi loyalists. To the contrary, many are caused by *thumar* or militia, with links to the Supreme Security Committee.²³⁴ If disgruntled revolutionaries or fundamentalists are willing and able to launch assassination attempts against President Magarief,²³⁵ Prime Minister Zeidan,²³⁶ and the Italian Consul-General,²³⁷ and bomb a United Nations

²²⁶ ICC-01/11-01/11-258 at para. 95.

²²⁷ 'Jebel Akhdar courts suspend work over security situation' Libya Herald 30 December 2012.

²²⁸ 'Car bomb explodes outside Benghazi police station injuring three' Libya Herald 4 November 2012; 'Benghazi security chief assassinated' Agence France Press 21 November 2012; 'S. Sotloff, 'Libya's New Crisis: A Wave of Assassinations Targeting its Top Cops' Time 26 November 2012; M. Ellawati, 'Police officer shot dead in Al-Ablar' Libya Herald 27 December 2012; G. Shennib, H Al-Shalchi 'Libyan policeman shot dead in latest Benghazi attack' Reuters 5 January 2013; M. Ellawati, 'Police car bombed in Benghazi: one officer reported killed', Libya Herald 14 January 2013.

²²⁹ M. Ellawati, S. Zaptia 'Benghazi CID chief abducted by armed men' Libya Herald 3 January 2013.

²³⁰ C. Stephen 'Libyan security chief assassinated in Benghazi' The Guardian 21 November 2012

²³¹ '4 Killed in Clashes in Libya's Benghazi' Associated Press 20 December 2012; '4 police killed in attack in Benghazi in eastern Libya; southern border closed' Associated Press 16 December 2012.

²³² '4 Killed in Clashes in Libya's Benghazi' Associated Press 21 December 2012; 'Army calls for calm in Benghazi as details of attack emerge' Libya Herald 21 December 2012

²³³ M. Ellawati, 'Bomb targets North Benghazi Prosecutor's Office' Libya Herald 31 December 2012

²³⁴ K. Fahim, 'Clashes and Car Bombing Highlight Insecurity Across Libya' New York Times 4 November 2012; B. Daraghi, 'Libya outlaws and raids militia groups' Financial Times 4 November 2012; 'Locals reported killed in central Tripoli gun battle with rogue SSC brigade', Libya Herald 4 November 2012.

²³⁵ 'Details emerge of attack on Margarief in Sebha' Libya Herald 6 January 2013.

²³⁶ A. Wahab, M. Eljarh, 'Ali Zeidan attacked in Beida' Libya Herald 5 December 2012.

compound in Tripoli,²³⁸ what would they be likely to do sensitive witnesses, Defence Counsel, or Judges, who render unpopular verdicts?

241. Regrettably, many militia and security forces operating under the apparent colour of the law, are in fact, responsible for crimes and violations of the law,²³⁹ and only follow government directives when the orders are consistent with their own militia-specific objectives.²⁴⁰ As very recently decried by Prime Minister Zeidan in relation to an incident in which journalists were attacked by GNC security forces,

“But you know the general situation of Libya”, he continued. “You know those in charge of security are either *thumar* (ex-fighters) or untrained security personnel. We are in a Revolutionary situation and many things happen that are unplanned or unintended”, he explained.²⁴¹

242. Such forces cannot be entrusted with the duty of securing sensitive witnesses, or protecting the persons involved in Mr. Gaddafi’s court proceedings in an impartial manner, as illustrated by the fact that the spate of assassinations of persons associated with the former Gaddafi regime continues unchecked,²⁴² with no arrests having been made.²⁴³ The Government clearly does not have the capacity to conduct independent and impartial investigations if the persons responsible for implementing the law and enforcing judicial orders are the very persons responsible for committing crimes with impunity. For this reason, the ICC Prosecution has opined that ‘unwillingness’, for the purposes of Article 17(2) of the Statute, should be assessed in light of “intimidation of victims, witnesses or judicial personnel”.²⁴⁴

²³⁷ ‘Italy’s Consul-General om Benghazi shot at’ [Libya Herald](#) 12 January 2013.

²³⁸ ‘Bombs thrown at unused UN compound’ [Libya Herald](#) 29 January 2013

²³⁹ ‘Incident between SSC and police to be investigated’ [Libya Herald](#) 29 December 2012; R. Bouvier, ‘Fashloum youth demand government action against Nawasi brigade; others support it’ [Libya Herald](#) 12 January 2013; G. Grant, ‘Social networking activist freed following Margarief intervention: SSC responsible’ [Libya Herald](#) 5 December 2012.

²⁴⁰ A. Hauslohner, ‘US-backed force in Libya faces challenges’ [Washington Post](#) (reported in [Guardian Weekly](#)) 13 November 2012.

²⁴¹ S. Zaptia, “The government is protective of the freedom of expression and the safety of media personnel” – Prime Minister Zeidan’ [Libya Herald](#) 6 February 2013, <http://www.libyaherald.com/2013/02/06/the-government-is-protective-of-the-freedom-of-expression-and-the-safety-of-media-personnel-prime-minister-zeidan/>

²⁴² ‘Qaddafi-era official slain in Derna’ [Libya Herald](#) 31 October 2012; ‘Car bomb explodes outside Benghazi police station injuring three’ [Libya Herald](#) 4 November 2012; ‘Benghazi security chief assassinated’ [Agence France Press](#) 21 November 2012; ‘S. Sotloff, ‘Libya’s New Crisis: A Wave of Assassinations Targeting its Top Cops’ [Time](#) 26 November 2012; M. Ellawati, ‘Police officer shot dead in Al-Ablar’ [Libya Herald](#) 27 December 2012; G. Shennib, H Al-Shalchi ‘Libyan policeman shot dead in latest Benghazi attack’ [Reuters](#) 5 January 2013; M. Ellawati, ‘Police car bombed in Benghazi: one officer reported killed’, [Libya Herald](#) 14 January 2013; ‘Another Benghazi assassination’ [Libya Herald](#) 25 January 2013

²⁴³ C. Stephen ‘Libyan security chief assassinated in Benghazi’ [The Guardian](#) 21 November 2012

²⁴⁴ Policy Paper on Preliminary Examinations 4 October 2010, *ibid.* at para. 61.

243. It is highly improbable that the situation will improve in the near future. Although the Government has attempted to disband militia and assert government control over the exercise of force in Libya, it has not been successful. Militia appear to have the ability to regularly storm the GNC in order to use a display of force to achieve political outcomes.²⁴⁵ For example, on 2 January 2013, militia associated with the Supreme Security Committee stormed the General National Congress to protest the government decree requiring that the Security Committee dissolve and merge with the police.²⁴⁶ The GNC building is currently occupied by protestors, after the most recent incursion on 3 February 2013.²⁴⁷
244. According to the United Nations Special Representative for Libya, Mr. Tarek Mitri as of the end of January, there are still approximately 200 000 armed fighters in ‘revolutionary brigades’, which do not fall under Government control.²⁴⁸ Government officials had also acknowledged to Mr. Mitri that “they cannot extend the authority of the state to the whole Libyan territory, they are aware that they do not have the monopoly of the use of force”.²⁴⁹
245. Libya is still clearly ruled by militia, which completely frustrates the impartial application and protection of the rule of law.
246. Moreover, when the aforementioned ‘Isolation Law’ is implemented, it will have the consequence of excluding numerous persons with police and investigative experience, simply due to the fact that the officials obtained this experience during the Gaddafi regime. It has been predicted that this will increase the government’s dependence on revolutionary militia, who not only lack proper training, but have a deep-seated animus against anyone remotely associated with the Gaddafi regime.²⁵⁰
247. The impact of this anti-Gaddafi animus on the ability of the Government to execute law enforcement measures in an impartial manner was amply demonstrated last year by the attack launched against Bani Walid, which demonstrated a

²⁴⁵ M. Cousins, ‘Congress Stormed Again’ Libya Herald 3 February 2013

<http://www.libyaherald.com/2013/02/03/congress-stormed-again/>; S. Zaptia, ‘GNC suspends Thursday session due to security incursions’ Libya Herald 1 November 2012

²⁴⁶ ‘Supreme Security Committee refuses the Interior Minister’s decrees and demands the dismissal of Ashur Shwayel’ Al-Watan, 2 January 2013, Annex 12; A. Alshariff, ‘Opinion: An eyewitness account of the SSC demonstration outside congress’ Libya Herald 3 January 2013

²⁴⁷ M. Cousins, ‘Congress Forced to Move; Margarief and Zeidan Condemn Occupier’s behaviour’ Libya Herald 5 February 2013 <http://www.libyaherald.com/2013/02/05/congress-forced-to-move-margarief-and-zeidan-condemn-occupiers-behaviour>

²⁴⁸ ‘200 000 armed Libyan fighters still at large: U.N. envoy’ Al Arabiya 29 January 2013.

²⁴⁹ Mr. Mitri cited in ‘200 000 armed Libyan fighters still at large: U.N. envoy’ Al Arabiya 29 January 2013.

²⁵⁰ B. Daraghi, ‘Libya: Armed and Dangerous’ Financial Times 10 October 2012.

predisposition to resolve judicial issues by military means,²⁵¹ and the absence of a judicial system which has the capacity to fairly arrest and detain suspects.²⁵²

248. The situation arose in connection with Government's request that certain suspects should be arrested. The authorities of Bani Walid had agreed to surrender the suspect in question to neutral authorities in Benghazi, but not Misrata, due to the possibility that the suspects might be mistreated. Rather than resolving the issue through political dialogue, militia associated with the Libya Shield, which acts as a *de facto* army affiliated with the Ministry of Interior,²⁵³ attacked Bani Walid and exacted collective reprisals.²⁵⁴

249. The UN Secretary General called for the cessation of hostilities and for the parties to respect international law.²⁵⁵ However, rather than condemning the attack, officials, including President Margaref, fuelled the propaganda justifying the attack, which was that Bani Walid was a safe-haven for anti-Government Gaddafi officials that was impeding the 'liberation' of Libya.²⁵⁶

250. The Deputy Prime Minister even exploited the anniversary of Muammar and Mutassim Gaddafi's killing to announce that the militia had successfully captured Muammar Gaddafi's son, Khamis Gaddafi, and killed him in custody.²⁵⁷ The Deputy Prime Minister later conceded that the reports concerning either his or Moussa Ibrahim's (the former spokesperson for the regime) alleged presence in Bani Walid, were completely incorrect.²⁵⁸ The Minister of Defence also publicly acknowledged that the army had absolutely no control over the militia attacking the town.²⁵⁹

²⁵¹ G Grant, G Gelber, 'Inside Bani Walid' Libya Herald 10 October 2012

<http://www.libyaherald.com/?p=15090>

²⁵² 'Libyan Residents of Bani Wali at Risk' Human Rights Watch 24 October 2012

²⁵³ B. Garagahi 'Libya army has 'no control' in Bani Walid' Financial Times 30 October 2012

²⁵⁴ M. Gumuchian H Al Shalchi 'Capture of Libyan town smacks of revenge not reconciliation' Reuters 26 October 2012

²⁵⁵ 'UN chief 'alarmed by Libya fighting, calls on Libyans to resolve Bani Walid standoff peacefully' Al Arabiya 22 October 2012

²⁵⁶ A Shuaib 'Civilians flee besieged former Gaddafi stronghold in Libya' Reuters 22 October 2012; Confusion over Gaddafi spokesman's capture Al Jazeera 21 October 2012,

<http://www.aljazeera.com/news/africa/2012/10/2012102014924315670.html> ; J. Dettmar, 'Skepticism Abounds About the Death of Gaddafi's Son Khamis' The Daily beast 21 October 2012,

<http://www.thedailybeast.com/articles/2012/10/21/skepticism-abounds-about-the-death-of-gaddafi-s-son-khamis.html>

²⁵⁷ J. Dettmar, 'Skepticism Abounds About the Death of Gaddafi's Son Khamis' The Daily beast 21 October 2012, <http://www.thedailybeast.com/articles/2012/10/21/skepticism-abounds-about-the-death-of-gaddafi-s-son-khamis.html>

²⁵⁸ Former Gadhafi spokesman denies capture in Libya CNN 21 October 2012,

<http://edition.cnn.com/2012/10/20/world/africa/libya-capture> ;

²⁵⁹ 'Libya army has 'no control' in Bani Walid: defence minister' Agence France Press 30 October 2012; G Grant, 'Defence Minister says army chief has 'no control' over Bani Walid' Libya Herald 30 October 2012

251. It is clear from the Government's reaction to this event that it has neither the will nor the capacity to ensure the impartial execution of law enforcement mechanisms, or the protection of persons associated with the Gaddafi regime from attacks and reprisals.
252. The negative impact of the continuing security imbroglio on judicial processes is also evidenced by the failure of the Libyan Government to effectively investigate the bombing of the US Embassy in Benghazi. According to reports, "police and legal experts have shied away from investigating the attack because they say they have not been guaranteed protection from the groups they believe were responsible".²⁶⁰ The absence of security and any witness protection programme has meant that witnesses are "too fearful to talk and key police officers targeted for violent retribution."²⁶¹
253. A New York Times article, which interviewed senior American law enforcement officials, noted that there was a "fear among Libyan witnesses about revealing their identities or accounts in front of Libyan guards protecting the American investigators, because the potential witnesses fear that other Libyans might reveal their participation and draw retribution from the attackers."²⁶²
254. If the Libyan authorities lack the will or capacity to effectively investigate such an attack, notwithstanding their explicit assurances to the United States' Government that they would do so, how can the ICC give any weight to their vague assurances that they have the willingness and capacity to effectively investigate and prosecute Mr. Gaddafi's case?
255. By asserting that the "security situation in Libya has gradually improved and it has not inhibited the progress of the investigation in any way", the Government is seeking to have the Pre-Trial Chamber adopt a completely naive, utopian vision of Libya, which bears no resemblance to the realities on the ground.
256. In this regard, a US State Department report concerning the attack on the United States Embassy underscored the dangers involved in firstly, becoming desensitised to the continuing risks in Libya due to the sheer number of violent incidents, and secondly, confusing an optimistic desire to see 'new Libya' succeed, with a duty to ensure the security and protection of persons engaged in Libya.²⁶³ The reports also

²⁶⁰ G. Shennib, H Al-Shalchi 'Libyan policeman shot dead in latest Benghazi attack' Reuters 5 January 2013

²⁶¹ V. Walt, 'In Libya: Why the Benghazi Investigation is Going Nowhere' Time 10 January 2013.

²⁶² ICC-01/11-01/11-216-Anx4D.25.

²⁶³ State Department Report pp. 15-17, <http://www.state.gov/documents/organization/202446.pdf>

assessed that the Libyan government's response to the event "reflected both weak capacity and a near total absence of central government influence" in the area.²⁶⁴

257. The ICC has a policy that the Court should, to the extent possible, minimise the possibility of harm occurring to witnesses and persons at risk because of the proceedings.²⁶⁵ The ICC Prosecutor has very recently expressed the position that the "provision of adequate safety and security to witness, victims and ICC staff is a necessary pre-condition to determining that the trial take place" *in situ*.²⁶⁶ Libyan witnesses and Court participants deserve no less consideration and protection.

The Defence of Mr. Gaddafi

258. It is absolutely unacceptable that Mr. Gaddafi has been detained for fifteen months without having access to a lawyer. As submitted above, the Government's claim that Mr. Gaddafi has waived the right to legal assistance lacks any semblance of credibility. The absence of such legal representation, when coupled with the failure of the Libyan authorities to bring Mr. Gaddafi before a judge, has rendered his detention illegal and arbitrary.²⁶⁷

259. The Government's claim that it has undertaken considerable effort to identify an appropriate counsel for Mr. Gaddafi also lack credibility. The Libyan authorities have taken no steps to facilitate Mr. Gaddafi's ability to select a counsel, but to the contrary, have actively impeded it. In April 2012, the Libyan authorities failed to respond to a request from the OPCD for information concerning the criteria for domestic counsel, and the procedure for appointment.²⁶⁸ The Head of the Investigations Committee also completely failed to respond to a more recent request, in which the OPCD again requested information concerning the criteria and procedure for the appointment of domestic counsel, and whether any security measures would be provided for domestic counsel.²⁶⁹

²⁶⁴ State Department Report, p. 36.

²⁶⁵ Strategic Plan of the International Criminal Court, Fifth session, The Hague 23 November to 1 December 2006, ICC-ASP/5/6, p 6 at para. 31; Report of the Court on the strategy in relation to victims, 10 November 2009, ICC-ASP/8/45, p.5 at para. 24.

²⁶⁶ ICC-01/09-02/11-631 at para. 3.

²⁶⁷ ICC-01/11-01/11-51 at para. 28.

²⁶⁸ ICC-01/11-01/11-152-AnxF at p. 2.

²⁶⁹ Annex 1.

260. As set out in the Defence response to the admissibility challenge, the Libyan authorities also deliberately obstructed Mr. Gaddafi from being able to give a power of attorney in relation to prospective counsel for domestic proceedings.²⁷⁰

261. It is also clear from the Government's submissions on protective measures and the security situation in Libya that the authorities are either unwilling or unable to address a key impediment to Mr. Gaddafi's ability to obtain effective representation – the security environment in Libya, and the related risk faced by lawyers who act for persons associated with the Gaddafi regime.

262. A July 2012 Amnesty International Report recounted that:

A lawyer representing alleged al-Gaddafi soldiers and loyalists described to Amnesty International the challenges facing the work of defence teams, including the presence of armed men inside prosecution offices and courts, during investigations and hearings. The lawyer said: "They told me inside the courtroom, 'if they walk free, you will pay the price'. I also got several anonymous calls telling me 'leave the case, or face consequences'..."²⁷¹

263. In October 2012, after a more recent fact finding mission, Amnesty International confirmed that there had been no improvements in the interim:

Very few lawyers are willing to represent alleged "Gaddafi loyalists" either for ideological reasons or out of fear of reprisals. Such fears are justified as Amnesty International has documented several instances of violence, threats and harassment against lawyers defending alleged Gaddafi supporters. Relatives of individuals accused of having supported the former government complained that they were either unable to find lawyers or were asked for exorbitant fees.²⁷²

264. Although the Government and Prosecution authorities have failed to clarify whether Mr. Gaddafi would be permitted to be represented by an international lawyer if an appropriate Libyan lawyer cannot be identified, it is clear that the security situation would also render it impossible for an international lawyer to be present in Libya.

265. Several countries have recently issued strict travel warnings against any travel to Benghazi, and Zintan, and all but essential travel to Tripoli due to the risk of

²⁷⁰ ICC-01/11-01/11-190 at paras. 204 and 205.

²⁷¹ Amnesty International Report, 'Rule of law or rule of militias?' MDE 19/012/2012, 6 July 2012, p. 33

²⁷² 'Libya must seek justice not revenge in case of former al-Gaddafi intelligence chief' Amnesty International 18 October 2012

attacks, which are likely to be directed against foreigners.²⁷³ In a congressional hearing, Secretary of State Hilary Clinton conceded that the Libyan authorities lacked the capacity to provide security for diplomats in Benghazi.²⁷⁴ According to a British foreign office travel advisory, there continues to be violent clashes, law and order is still in the process of being re-established, police lack capacity to prevent crimes, and there is a high threat of attacks against symbolic and western targets, and a threat of kidnapping.²⁷⁵

266. Any lawyer agreeing to represent Mr. Gaddafi outside of the framework of the ICC will have no external security or support, and would not necessarily be covered by insurance for emergency relocation if they decided to travel to Libya in the face of such travel warnings. Counsel appearing before domestic courts would also have no legal protection or immunity from retaliatory actions or litigation that might be instigated by the Libyan authorities. The fact that the Libyan authorities arrested Mr. Gaddafi's Counsel and are currently prosecuting members of the Defence and Mr. Gaddafi for matters, which fall squarely within their right to communicate under Libyan law, would therefore act as a powerful disincentive for any lawyer to opt to represent Mr. Gaddafi, or to do so in an independent and vigorous manner.²⁷⁶

267. In any case, the Pre-Trial Chamber must base its decision on the factual matrix, which exists at the time of the admissibility challenge. The Government has failed to procure counsel for Mr. Gaddafi and the possibility that they might do so in the near future is completely hypothetical. In the absence of this fundamental guarantee for fair proceedings, and pre-requisite for the commencement of trial proceedings, the Government has failed to discharge its burden that it is capable of moving the case forward in the manner required by Libyan law.

268. In June 2012, the ICC Prosecution opined that the lack of progress concerning the appointment of counsel to Mr. Gaddafi "raises questions about whether the Applicant is able to "otherwise carry out its proceedings" within the meaning of

²⁷³ I. Black, ' Britons should leave Benghazi immediately, says Foreign Office' The Guardian 24 January 2013; M. Gumuchian and M. Abbas, ' Europe urges citizens to leave Libya's Benghazi' Reuters 24 January 2013; A. Cowell and R. Gladstone, ' US and 3 European Countries Warn that Westerners are Facing Threats in Libya' , The New York Times 24 January 2013; A. Spillius, ' Threats made against British embassy in Libya' Telegraph 28 January 2013; Libya Travel Advice, current as of 3 February 2013, <http://www.fco.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/middle-east-north-africa/libya>

United States Travel Warning (2 January 2012) http://travel.state.gov/travel/cis_pa_tw/tw/tw_5853.html

²⁷⁴ I. Black, ' Britons should leave Benghazi immediately, says Foreign Office' The Guardian 24 January 2013.

²⁷⁵ Libya Travel Advice, current as of 3 February 2013, <http://www.fco.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/middle-east-north-africa/libya>

²⁷⁶ ICC-01/11-01/11-255 at paras. 62-64

Article 17(3).”²⁷⁷ Eight months later, the failure of the Libyan government to address this issue must be considered as dispositive of their inability to carry our proceedings within the meaning of Article 17(3) of the Statute.

The custody of the defendant

269. Although the Government has indicated that the accusation phase and trial of Mr. Gaddafi will take place at either South Tripoli court, or Tripoli, they have completely failed to demonstrate that they possess the capacity to effectuate his transfer to either of these two locations.

270. In January 2012, the Government informed the ICC that arrangements were being made to transfer Mr. Gaddafi to Tripoli.²⁷⁸ At the beginning of March 2012, the ICC focal point assured the OPCD that Mr. Gaddafi would be transferred from Zintan to Tripoli in a matter of two weeks.²⁷⁹ In the May 2012 admissibility challenge, the Government indicated that it was “focused on negotiating the safe and orderly transfer of Mr. Gaddafi from a secret location to a specially constructed prison facility in Tripoli”.²⁸⁰

271. During the October admissibility hearings, the Government expressed its view that it would not be possible for the trial of Mr. Gaddafi to take place in Zintan due to the lack of appropriate infrastructure.²⁸¹ The Government further confirmed that Mr. Gaddafi remained in the custody of the Zintan brigade, but averred that “[o]nce the Prosecutor-General is appointed by the new cabinet, that Prosecutor-General is expected to prioritise working with the Zintan Brigade, to effect the transfer of Mr Gaddafi from Zintan to Tripoli”.²⁸²

272. Over four months later, a new Prosecutor-General has not been appointed and there is not even a glimmer of the possibility that an agreement will be reached between the Government and the Zintan authorities to transfer Mr. Gaddafi to Tripoli. The Libyan Prime-Minister has even publicly acknowledged that the Government is not pressuring the Zintan authorities to transfer Mr. Gaddafi to Tripoli,²⁸³ and further

²⁷⁷ ICC-01/11-01/11-167-Red at para. 41.

²⁷⁸ ICC-01/11-01/11-44-Anx1-Red at p. 2.

²⁷⁹ ICC-01/11-01/11-69-Red at para. 22.

²⁸⁰ ICC-01/11-01/11-130 at para. 35.

²⁸¹ ICC-01/11-01/11-T-2-Red-ENG at pp. 19-20.

²⁸² ICC-01/11-01/11-T-2-Red-ENG at p. 29.

²⁸³ **Interviewer:** Yes, but there was pressure to transfer Saif to Tripoli and conduct his trial there, but this failed.

conceded that the Government lacked the capacity to ensure the security of a trial in Tripoli.²⁸⁴ Representatives from Zintan have also consistently indicated that they will not transfer Mr. Gaddafi due to the security situation in Tripoli, and the attendant danger that he could escape or be liberated.²⁸⁵

273. This risk has increased rather than diminished in the interim time period. In October, approximately 120 persons escaped from a prison in Tripoli, in December 2012, approximately 200 persons escaped from a prison in Sabha,²⁸⁶ and in February 2013, persons wearing military uniforms attacked a detention center in Benghazi in order to free several inmates.²⁸⁷ On 5 February, the son of a GNC member and two colleagues were kidnapped by persons demanding the release of detainees, who had been transferred from Tripoli to Zawia prison.²⁸⁸

274. It would appear from the statements of the Prosecutor-General that Mr. Gaddafi's trial concerning alleged national security contraventions will continue in May 2013 in Zintan, and that these trial proceedings are scheduled to precede Mr. Gaddafi's potential trial for the charges, which form the basis of the admissibility

Mr. Zeidan: Let me tell you something, there is no pressure, they were some efforts and it was found that it is safer to keep him where he is, on a security level and many other levels.

"Special Interview" Programme Interview on Libya TV Channel with Prime Minister Mr. Ali Zeidan, 15 January 2013, Annex 2.

²⁸⁴ **Interviewer:** *Interrupting*

"It is safer on a security level" Do you mean that the State is not able to secure Saif and other the wanted persons?

Mr. Zeidan: And are you saying that the Libyan State is now complete? It is not a secret. The Libyan State was destroyed and was...

Interviewer: *Interrupting*

So it is not the State that protecting Saif, it is the brigades there.

Mr. Zeidan:

Madam, the Libyan State, nobody is in the capacity to say that the Libyan State has recovered in full *vis-à-vis* all its institutions, the Libyan State is experiencing, every day, sit-ins even in the Oil sector. We are following a revolution and this revolution... right now we are trying to find a way out of the consequences it created. It is like a wound, it has infections, infections (*in English*). This is our reality. If you are asking about a stable Libya, a country that has full structure and institutions, this does not exist. This government came in order to face these issues, in the best it could, and in order to face this, different skills are required, not only force: force and others. Therefore, we deal with these issues with the capabilities we have and the available powers, there is nothing wrong about this, and we are not saying that Libya is in its full shape and capabilities and in its best situation.

Annex 2.

²⁸⁵ ICC-01/11-01/11-190-Red-Corr at para., 360; ICC-01/11-01/11-216-Anx4E.1 at p. 3; and Annex 5, in which a military leader from Zintan states that Mr. Gaddafi will only leave Zintan "in a coffin, after the death penalty is imposed on him by Libyan Law".

²⁸⁶ M. Gumuchian, 'Nearly 200 prisoners escape from Libyan jail' *Reuters* 5 December 2012

²⁸⁷ M. Ellawati, 'Benghazi Detention Center Attacked', *Libya Herald* 3 February 2013,
<http://www.libyaherald.com/2013/02/03/benghazi-detention-centre-attacked/>

²⁸⁸ A. Elhumami, 'Zawia congressman's son kidnapped: report' *Libya Herald* 6 February 2013,
<http://www.libyaherald.com/2013/02/06/zawia-congressmans-son-kidnapped-report/>

challenge.²⁸⁹ This demonstrates that the authorities have no intention of effectuating his transfer to Tripoli or South Tripoli during at the very least, the first part of 2013.

275. The Government has expressly conceded that a trial in Zintan would not satisfy the admissibility criteria before the ICC.²⁹⁰ The admissibility challenge must therefore be dismissed due to the absence of any concrete evidence that the Government has the current capacity to bring Mr. Gaddafi to trial in an environment that satisfies the Court's admissibility criteria.

276. The Defence also respectfully disagrees with the interpretation of Libyan law advanced by the Prosecution, namely, that it is possible to render a judgment *in absentia* against a defendant who resides in Libya. Although Article 348 might allow for the convocation of particular hearings, it is clear from Article 350 that the right to issue a judgment in absentia is reserved for defendants who reside abroad.²⁹¹

277. The practice of the Libyan authorities in this regard is illustrated by the fact that the trial against Mr. Bagdadi Mahmoudi had to be adjourned because of two of his co-defendants had not been physically transferred to the courtroom, because they were not at that point, detained under Government control.²⁹² Similarly, as noted above, the only *in absentia* judgments that have been rendered thus far in connection with post-February 2011 events have concerned persons who reside abroad.²⁹³

278. In any case, as observed by Kevin Heller, even if Libyan law permits trials in *absentia*, the ICC Statute does not.²⁹⁴ Article 17(3) expressly provides that in determining inability, "the Court shall consider whether [...] the State is unable to obtain the accused". It was for this reason that Pre-Trial Chamber II affirmed the admissibility of the proceedings before the ICC in the Kony *et al.* case.²⁹⁵

279. Even if the Libyan authorities did possess the capacity to transfer Mr. Gaddafi outside of Zintan, which they clearly do not, the absence of any information concerning his prospective detention conditions if he were to be tried before the South Tripoli Criminal Court renders it impossible for the Chamber to assess whether the

²⁸⁹ "Libyan spokesman Baara said the Zintan tribunal would convene again on 2 May. "Investigations for trying him for war crimes are over and he will be put on trial for that at a later time," Baara told Reuters." A. Shuaib, 'Gaddafi's son appears in Libyan court for first time', Reuters 17 January 2013. See also ICC-01/11-01/11-255-AnxB.

²⁹⁰ Transcript of 9 October 2012, ICC-01/11-01/11-T-2-Red-ENG, pp. 19-20.

²⁹¹ ICC-01/11-01/11-276-AnxB at p. 3.

²⁹² Annex 10.

²⁹³ Libya court condemns 5 army officers to death in absentia' Agence France Presse 8 November 2012.

²⁹⁴ K. Heller, 'The OTP makes a serious legal error concerning Libya and Saif', Opinio Juris, 14 February 2013, <http://opiniojuris.org/2013/02/14/the-otp-makes-a-serious-legal-error-concerning-libya-and-saif/>

²⁹⁵ ICC-02/04-01/05-366 at paras. 37 and 38.

Government has the capacity to detain Mr. Gaddafi in a secure and humane environment at this location. The Government has thus failed to discharge its burden as concerns its proposal to conduct a single trial at this location.

280. The submissions of the Government concerning the facilities at Al-Hadba have absolutely no correlation to the actual detention regime, which is administered there by the authorities. According to interviews with the actual authorities responsible for governing this detention facility, high profile detainees such as Mr. Al-Senussi are kept in isolation, are not permitted any visits or communications with the outside world, and do not have access to television or radio.²⁹⁶ This prison facility is governed by the National Guard, which is a militia formed by persons, who were aligned to the Libyan Islamic Fighting Group.²⁹⁷ Although they do not fall under the Ministry of Justice, members of the National Guard have apparently been allowed to participate in the interrogation of detainees.²⁹⁸
281. The Chamber cannot base its decision on submissions, which are patently lacking in detail and credibility.

Capacity building

282. In addressing the actual and potential assistance, which the Libyan Government could receive from the United Nations and third States, the Government failed to address the impact of the death penalty on any such assistance. The United Nations has a policy that it cannot participate in any judicial mechanism, which permits the death penalty.²⁹⁹ Members of the Council of Europe (which necessarily encompasses the European Union) would also be similarly prohibited from providing assistance to a particular judicial process, which could culminate in the death penalty.³⁰⁰ South Africa is also precluded from assisting a judicial process, which

²⁹⁶ ICC-01/11-01/11-216-Anx3A.4

²⁹⁷ U. Khan, 'Head of National Guard says its future will be decided by government committee', *Libya Herald* 8 January 2013. <http://www.libyaherald.com/2013/01/09/head-of-national-guard-says-its-future-will-be-decided-by-government-committee/>

²⁹⁸ U. Khan, 'Head of National Guard says its future will be decided by government committee', *Libya Herald* 8 January 2013.

²⁹⁹ ICC-01/11-01/11-216-Anx3.2 at p. 2.

³⁰⁰ ICC-01/11-01/11-T-3-Red-ENG pp. 5-6. Members of the European Union are required to work towards the universal abolition of the death penalty. Their participation in a judicial process which sanctions it would obviously violate this obligation. EU Guidelines on the Death Penalty: revised and updated version, General Affairs Council of 16 June 2008, <http://www.consilium.europa.eu/uedocs/cmsUpload/10015.en08.pdf>

would entail the imposition of the death penalty, or cruel and inhumane treatment.³⁰¹ As eloquently stated by the Constitutional Court of South African, “we will not be party to the killing of any human being as a punishment – no matter who they are and no matter what they are alleged to have done.”³⁰²

283. It would therefore be illegal for such entities or countries to provide any assistance, which could directly advance the capacity of the Libyan authorities to ultimately inflict the death penalty on Mr. Gaddafi.

284. In this regard, it is notable that the particular types of assistance referred to by the Government are framed in vague terms, and do not specifically concern the proceedings against Mr. Gaddafi, the investigators, prosecutors or judges assigned to his case. For example, the fact that members of UNMSIL may have visited detention centers in Zintan has no relevance in the absence of any proof that they have visited Mr. Gaddafi, who continues to be held in a secret location in Zintan. Similarly, United Nations assistance on law reform is clearly irrelevant in the absence of any proof that the Libyan authorities have reformed their law to improve the independence and impartiality of the proceedings.

285. The Pre-Trial Chamber is also precluded from basing its assessment on the potential impact, which such capacity building *could* have on the proceedings.³⁰³ At present, any such impact is purely aspirational. In a briefing to the Security Council,³⁰⁴ the Special Representative of the Secretary-General explicitly acknowledged continuing concerns regarding the treatment of detainees, in particular, the use of torture and deaths in custody,³⁰⁵ the “precarious” security situation,³⁰⁶ and the as yet, unfulfilled need for the Libyan authorities “to fully activate the judiciary so that perpetrators are held to account and the rule of law is upheld”.³⁰⁷

286. In a more recent briefing, which occurred on 29 January 2013, the UNMSIL Special Representative reiterated that the security situation was still “precarious” and

³⁰¹ *Mohamed and Another v President of the Republic of South Africa and Others* (CCT 17/01) [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) (28 May 2001) at paras. 38, 53, 55, and 56. It should be noted that South Africa considers that the death penalty constitutes ‘cruel and inhumane treatment’ (see para. 55). <http://www.saflii.org/za/cases/ZACC/2001/18.html>

³⁰² *Minister of Home Affairs and Others v Tsebe and Others, Minister of Justice and Constitutional Development and Another v Tsebe and Others* (CCT 110/11, CCT 126/11) [2012] ZACC 16; 2012 (5) SA 467 (CC); 2012 (10) BCLR 1017 (CC) (27 July 2012), at para. 68. <http://www.saflii.org/za/cases/ZACC/2012/16.html>

³⁰³ ICC-2/04-01/05-377 at para. 49.; *Brown and others v. Government of Rwanda and Secretary of State* (8 April 2009) - [2009] EWHC 770 (Admin), at para 12.

³⁰⁴ ICC-01/11-01/11-258-Anx21.

³⁰⁵ At paras. 15 and 27-29.

³⁰⁶ At para. 22.

³⁰⁷ At para. 27.

“remains problematic”, in particular, as concerns the frequency of attacks on police officers,³⁰⁸ and further noted that the “continued detention without due process and mistreatment of several thousand people stemming from the conflict remains a source of deep concern”.³⁰⁹ The Special Representative also underscored that initiatives concerning the promotion of the rule of law were potentially undermined by the promulgation of the above-mentioned Isolation law, and by divisive views and popular pressure concerning the treatment of former Gaddafi officials.³¹⁰ Notably, the Special Representative concluded his presentation with the caveat that:

[w]hile the determination of the authorities and its many initiatives may augur greater capability of moving forward in institution building, it is worth insisting that many difficult decisions have, yet to be taken in the areas of constitution-making, transitional justice, reconciliation and, it goes without saying, security sector reform. In going forward, broad based support to these decisions is necessary.³¹¹

287. Essentially, the Special Representative is explicitly cautioning the Security Council to lower its expectations for Libya’s prospects: whilst Libyan authorities may pay lip service to the need for reform, and indeed, whilst some officials may genuinely desire such reform, the Government has yet to translate these words into the action required to move the country forward. It is also not apparent that the Government possesses the ‘broad based support’ required to do so.

288. These cautionary words apply equally if not more so to the admissibility proceedings before the ICC. Notwithstanding the elapse of fifteen months from the arrest of Mr. Gaddafi, and over nine and a half months from the filing of the admissibility challenge, the Government has failed to translate its endless promises into concrete action. There are clear indicia in many areas that it lacks either the will or the capacity to do so. There is thus no reasonable prospect that the Government’s capacity to investigate and adjudicate this case will improve, in the time frame required to ensure Mr. Gaddafi’s right to expeditious proceedings, safeguarded by the rule of law.

³⁰⁸Briefing by Mr. Tarek Mitri SRSG for Libya - Meeting of the Security Council 29 January 2013, at paras. 6, 13, and 15.
<http://unsmil.unmissions.org/Default.aspx?tabid=3543&ctl=Details&mid=6187&ItemID=933780&language=en-US>

³⁰⁹ At para. 19.

³¹⁰ At para. 18.

³¹¹ At para. 22.

4. Relief Sought

289. For the reasons set out above, the Defence for Mr. Saif Al-Islam Gaddafi respectfully requests the Honourable Pre-Trial Chamber to:

- i. reject the admissibility challenge; and
- ii. order the Libyan Government to immediately surrender Mr. Gaddafi to the custody of the ICC.



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

Dated this, 18th Day of February 2013

At The Hague, The Netherlands