

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/11-01/11

Date: 1 May 2012

**PRE-TRIAL CHAMBER I**

**Before:** Judge Silvia Fernandez 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 & Redacted, with 6 Public and 5 Confidential Annexes*

**Application on behalf of the Government of Libya  
pursuant to Article 19 of the ICC Statute**

**Source:** The Government of Libya, represented by:  
Professor Philippe Sands QC  
Professor Payam Akhavan  
Ms Michelle Butler

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

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Mr. Luis Moreno-Ocampo, Prosecutor  
Ms. Fatou Bensouda, Deputy Prosecutor

**Counsel for the Defence**

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

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**Amicus Curiae**

## **REGISTRY**

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**Registrar**  
Ms. Silvana Arbia

**Counsel Support Section**

**Deputy Registrar**  
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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. INTRODUCTION AND BACKGROUND

1. This Application is brought under Article 19(2)(b) of the Rome Statute, to challenge the admissibility before the ICC of the case concerning Saif Al-Islam Gaddafi ("Mr Gaddafi") and the case concerning Abdullah Al-Senussi ("Mr Al-Senussi"). In accordance with the principle of complementarity set forth in Article 17 of the Rome Statute, Libya respectfully submits that this case is inadmissible on the grounds that its national judicial system is actively investigating Mr Gaddafi and Mr Al-Senussi for their alleged criminal responsibility for multiple acts of murder and persecution, committed pursuant to or in furtherance of State policy, amounting to crimes against humanity. These acts, allegedly committed as part of a widespread or systematic attack against Libyan civilians, include but are not limited to crimes committed in Tripoli, Benghazi, and Misrata, during the period commencing from 15 February 2011 until the liberation of Libya.
2. The national proceedings concerning these matters are consistent with the Libyan Government's commitment to post-conflict transitional justice and national reconciliation. It reflects a genuine willingness and ability to bring the persons concerned to justice in furtherance of building a new and democratic Libya governed by the rule of law. To deny the Libyan people this historic opportunity to eradicate the long-standing culture of impunity would be manifestly inconsistent with the object and purpose of the Rome Statute, which accords primacy to national judicial systems.
3. This Application requests the Pre-Trial Chamber to give full effect to the principle of complementarity that is at the core of the ICC Statute. The Statute asserts that "every State" – including Libya - has "a duty ... to exercise its criminal jurisdiction over those responsible for international crimes". Libya seeks to fulfil that duty and is making every effort to take measures "at the national level", as required by the ICC Statute, and as intended by its drafters. This is a unique opportunity for the Court to uphold "positive

complementarity” and to encourage other States emerging from conflict and mass-atrocities in pursuance of genuine national proceedings.

4. Accordingly, for the reasons set out in detail in this Application, Libya seeks a ruling from the Chamber to:
  - i. declare the case inadmissible; and
  - ii. quash the Surrender Request.

*A. The Muammar Gaddafi regime’s gross human rights violations*

5. This Application must be seen against the background of the Muammar Gaddafi era. This forty-two year period was characterised by gross human rights violations that culminated with the events that transpired on and after 15 February 2011. From the 1970s to 2011, a great number of Libyan citizens were victims of murder, torture, rape, enforced disappearances, persecution, and other serious abuses, committed by Muammar Gaddafi’s security forces to silence all dissent. Even pursuit of the truth was criminalized: in one instance in 1996, following the notorious massacre of approximately 1200 prisoners at Abu Salim prison and the secret burial of the victims, family members were arrested and imprisoned for merely wanting to know the fate of their loved ones.<sup>1</sup>

*B. Libya’s 2011 national liberation struggle*

6. The 2011 Libyan revolution was a response to the tyranny of the Muammar Gaddafi regime. Inspired by the Arab Spring, major cities and towns across the country broke out in peaceful protests in virtual unison in mid-February 2011. By the end of February, the Muammar Gaddafi regime had lost control

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<sup>1</sup> Amnesty International, “Annual Report, 2011: Libya”, available at: <http://www.amnesty.org/en/region/libya/report-2011>; Human Rights Watch, “World Report 2011: Libya”, available at: <http://www.hrw.org/world-report-2011/libya>; See also the exhortations for improvement in these, and related areas, in Human Rights Council, “Report of the Working Group on the Universal, Periodic Review: Libyan Arab Jamahiriya”, UN doc. A/HRC/16/15, 4 January 2011.

of parts of Libya. By March 2011, Muammar Gaddafi's forces had unleashed a campaign of violence against civilians and pushed the emerging rebel forces back to Benghazi and Misrata.<sup>2</sup>

7. On 19 March 2011, in view of the escalating atrocities, an international coalition began a humanitarian intervention by armed force to protect Libyan civilians in accordance with United Nations Security Council Resolution 1973.<sup>3</sup> This followed the adoption of Resolution 1970, referring the Muammar Gaddafi regime's atrocities to the ICC Prosecutor.<sup>4</sup>
8. During the period that followed, the continuing attacks against peaceful protestors transformed the situation into a full-scale armed conflict. On 23 August 2011 rebels encircled the Gaddafi family compound in Tripoli and occupied Green Square. With the capture of Sirte on 20 October 2011 (the day on which Muammar Gaddafi was killed), the revolution ceased and the people of Libya entered a new phase of their history.<sup>5</sup>

### *C. The establishment of the NTC and challenges of post-conflict security*

9. The National Transitional Council ("NTC") was formed on 27 February 2011 to act as "the political face of the revolution".<sup>6</sup> On 23 March 2011, the NTC

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<sup>2</sup> International Crisis Group, "Holding Libya Together: Security Challenges After Qadhafi", Middle East/North Africa Report N. 115, 14 December 2011 ; Al Jazeera "Gaddafi defiant as state teeters", 23 February 2011, available at: <http://www.aljazeera.com/news/africa/2011/02/20112235434767487.html> ["International Crisis Group Report"]; BBC News, "Libya: Gaddafi forces attacking rebel-held Benghazi", 12 March 2011, available at: <http://www.bbc.co.uk/news/world-africa-12793919> ; Al Jazeera, "Gaddafi forces encroaching on Benghazi", 19 March 2011, available at: <http://www.aljazeera.com/news/africa/2011/03/201131934914112208.html>

<sup>3</sup> United Nations Security Council, Resolution 1973 (2011), UN Doc. S/RES/1973, adopted by the Security Council at its 6498th meeting, 17 March 2011

<sup>4</sup> United Nations Security Council, Resolution 1970 (2011), UN Doc. S/RES/1970, adopted by the Security Council at its 6491st meeting, 26 February 2011; United Nations Security Council, Press Statement On Libya, 22 February 2011, UN doc. no. SC/10180 AFR/2120, available at: <http://www.un.org/News/Press/docs//2011/sc10180.doc.htm> .

<sup>5</sup> International Crisis Group Report; BBC News, "Libya's new rulers declare country liberated", 23 October 2011, available at: <http://www.bbc.co.uk/news/world-africa-15422262>

<sup>6</sup> Al Jazeera, "The National Transitional Council in Benghazi", 21 June 2011, available online: <http://cc.aljazeera.net/asset/language/arabic/national-transitional-council-benghazi> ; Global

established an Executive Board to act as a transitional government for Libya.<sup>7</sup> As outlined above, the NTC gained control of the country following the events of 20 October 2011 and became the new Libyan Government. It is currently preparing for democratic elections to be held on 20 June 2012, and is engaged in a full-scale reform of the entire government. These reforms are being designed and implemented in the context of increasing peace and stability following the armed conflict and mass-atrocities of 2011, and the tyranny of the Muammar Gaddafi era. They are premised on a strong commitment to the rule of law, respect for fundamental human rights, and the eradication of impunity for international crimes, including those committed on 15 February 2011 and thereafter.<sup>8</sup>

#### *D. Progress already made in Libya*

10. On 2 March 2012, shortly after the collapse of the Muammar Gaddafi regime, the UN Human Rights Council adopted a “Report of the International Commission of Inquiry on Libya”.<sup>9</sup> This acknowledged the immense post-conflict challenges faced by Libya, and recognised the new Libyan Government’s commitment to restoring stability and improving the human rights situation.<sup>10</sup> It noted in particular that the new Libyan government had provided considerable assistance to the Commission.<sup>11</sup> The Human Rights Council recognised in particular that the Libyan Government “has taken positive steps to establish mechanisms for accountability” and “is gradually restoring the judiciary by reopening courts and recalling judges, and there has been some progress in the transfer of detainees to central government

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Progressive Forum, “Libya – Country Profile”, available online: <http://www.globalprogressiveforum.org/libya>

<sup>7</sup> Al Jazeera, “Libyan rebels form ‘interim government’”, 22 March 2011, available at: <http://www.aljazeera.com/news/africa/2011/03/2011322193944862310.html#>

<sup>8</sup> Press Statement of H.E. Dr Abdurrahim El-Keib, Prime Minister of the National Transitional Council of Libya, 23 April 2012, see Annex A.

<sup>9</sup> United Nations Human Rights Council, Report of the International Commission of Inquiry on Libya, UN Doc. A/HRC/19/68, 2 March 2012, [“UN Commission of Inquiry Report”].

<sup>10</sup> UN Commission of Inquiry Report, pp. 6, 20, 22, 40, 115-17.

<sup>11</sup> UN Commission of Inquiry Report, pp. 5, 31.

control”.<sup>12</sup> The Report referred to positive developments in the administration of criminal proceedings “against 41 Gaddafi loyalists accused of crimes during the conflict”,<sup>13</sup> and in the legal protection of human rights through the Libyan Government’s “law establishing the National Council for Civil Liberties and Human Rights” which “has authority to receive complaints on violations of human rights and to file cases in court”.<sup>14</sup>

*E. National “ownership” of the trials of Mr Gaddafi & Mr Al-Senussi as a foundation for reconciliation, democracy, and rule of law*

11. It has been just a few months since the collapse of the Muammar Gaddafi regime. In this light, the positive developments that have occurred in Libya over the past months are exceptional and encouraging. They are consistent with the steps taken by the Libyan Government with respect to investigating and prosecuting Mr Gaddafi and Mr Al-Senussi, which are part of the process of national reconciliation and progress towards building a democracy. The Libyan Government regards the trial of Mr Gaddafi and Mr Al-Senussi as a matter of the highest national importance, not only in bringing justice for the Libyan people but also in demonstrating that the Libyan justice system is capable of proper investigation and prosecution, and that it can conduct fair trials (that meet all applicable international standards). Indeed, Libya’s wish to investigate and prosecute Mr Gaddafi in Libya has also been supported by the Arab League.<sup>15</sup>

12. The Libyan Government has expended considerable efforts to ensure an effective and genuine investigation of both of these individuals in the expectation of being able to conduct fair trials for them in Libya. It should

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<sup>12</sup> UN Commission of Inquiry Report, p. 2.

<sup>13</sup> UN Commission of Inquiry Report, p. 20.

<sup>14</sup> UN Commission of Inquiry Report, p. 20; Report of the Secretary-General on the United Nations Support Mission in Libya, 1 March 2012, S/2012/129, paragraph 29.

<sup>15</sup> Washington Post, “Arab League backs Libya’s quest to try Gadhafi’s son at home, not at international court”, 30 April 2012, [http://www.washingtonpost.com/world/middle\\_east/arab-league-backs-libyas-quest-to-try-gadhafis-son-at-home-not-at-international-court/2012/04/30/gIQAabEtrT\\_story.html](http://www.washingtonpost.com/world/middle_east/arab-league-backs-libyas-quest-to-try-gadhafis-son-at-home-not-at-international-court/2012/04/30/gIQAabEtrT_story.html)

also be recalled that it was the NTC that initially assisted the Prosecutor of the ICC<sup>16</sup> and the UN International Commission of Inquiry to identify witnesses and gather evidence about events in Libya during the revolution.<sup>17</sup> This process thus originates in the earliest days of the democratic uprising, continues to this day, and has been significantly expedited now that the security situation has greatly improved and stability is being progressively restored. It is however, a complex, time-consuming and resource-intensive process. The Libyan Government has no intention of shielding such individuals so as to allow impunity, or to hold a rushed trial of these two persons that would not meet international minimum standards of due process. It is committed to attaining the highest international standards both for the conduct of its investigations and any eventual trials. Achieving this outcome will contribute to judicial capacity-building and will provide Libya's long-suffering people a unique opportunity to assume ownership over the past, to avoid impunity, and to build a better future based on respect for the rule of law and fundamental human rights.

13. In this regard, in November 2011 the UN Secretary-General published a report on the UN Support Mission in Libya<sup>18</sup> that highlighted and affirmed the need to uphold the "principles of Libyan ownership".<sup>19</sup> The Secretary-General's report recognises that Libya's post-conflict judicial sector reform is part of a "historic transition".<sup>20</sup> It notes that, "[a]fter 42 years of authoritarian rule and international isolation, Libya faces daunting challenges",<sup>21</sup> that there will

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<sup>16</sup> Second Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1970(2011), 2 November 2011, available at : <http://www.icc-cpi.int/NR/rdonlyres/2DD92A0A-AC5E-49D9-A223-5C50654F3C25/283921/UNSCreportLibyaNov2011ENG1.pdf> , paras 38-39.

<sup>17</sup> UN Commission of Inquiry Report, pp. 5, 31.

<sup>18</sup> United Nations Security Council, Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2011/727, 22 November 2011 ["Report of the Secretary-General, 22 November 2011"].

<sup>19</sup> Report of the Secretary-General, 22 November 2011, pp. 12, 16, 19.

<sup>20</sup> Report of the Secretary-General, 22 November 2011, pp. 1, 11, 12.

<sup>21</sup> Report of the Secretary-General, 22 November 2011, pp. 11, 12.

inevitably be setbacks.<sup>22</sup> In order “[t]o succeed, Libya must be given the space required to determine its future”, adding that “[i]n this context, the role of the United Nations should be to support Libyans in their efforts”.<sup>23</sup> He also stated that:

*The ultimate criterion for my recommendations is their appropriateness to the current Libyan context. I believe that not only the United Nations, but the international community as a whole, will best support Libya not by being driven by the supply side of post-conflict assistance, but by being responsive to Libya’s own emerging sense of its needs for international support.*<sup>24</sup>

14. The Libyan Government recognises that, in order to attain its goal of achieving the highest standards of fairness in its criminal justice system, support from the international community may be of assistance. It is fully receptive to such support and to this end has communicated with the UN High Commissioner for Human Rights in Geneva, the UN Office on Drugs and Crimes in Vienna,<sup>25</sup> as well as cooperating with the UN Support Mission in Libya<sup>26</sup> in order to seek such support from UN bodies as may be of assistance to Libyan prosecutors and the Libyan judiciary in meeting all appropriate standards.<sup>27</sup> The Libyan Government considers that openness and transparency in Libya’s criminal justice system is critical for ensuring that Libyan justice is not only done, but that it is also seen to be done. Libya is willing and able to investigate and, as appropriate, prosecute the allegations that are the subject of proceedings

<sup>22</sup> Report of the Secretary-General, 22 November 2011, pp. 11, 12.

<sup>23</sup> Report of the Secretary-General, 22 November 2011, pp. 11, 12.

<sup>24</sup> Report of the Secretary-General, 22 November 2011, p. 19

<sup>25</sup> Letters from Libyan Minister of Foreign Affairs and International Cooperation to (1) Executive Director of the United Nations Office on Drugs and Crime and (2) United Nations High Commissioner of Human Rights, see Annex B.

<sup>26</sup> Briefing by Special Representative of the Secretary-General for Libya, Meeting of the Security Council, 7 March 2012, available at: <http://unsmil.unmissions.org/LinkClick.aspx?fileticket=yCKqAArymCc%3d&tabid=3543&mid=6187&language=en-US>

<sup>27</sup> Report of the Secretary-General on the United Nations Support Mission in Libya, 1 March 2012, S/2012/129, paragraphs 27, 29.

before the ICC. In such circumstances, the requirements for national proceedings in Libya are met. There is no basis for the Chamber to decide otherwise. To do so would undermine Libya's efforts at national reconciliation and promotion of the fullest respect for the rule of law at the national level.

15. It is against this backdrop of challenges, progress and future opportunities that Libya submits its Article 19 admissibility challenge before the Court.

## II. PROCEDURAL HISTORY

16. On 26 February 2011 the Security Council adopted Resolution 1970, referring the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the ICC Prosecutor pursuant to Article 13(b) of the ICC Statute.<sup>28</sup> The situation underpinning this referral was the 2011 revolution, resulting from 42 years of tyrannical rule under Muammar Gaddafi.<sup>29</sup> The Security Council, acting under Chapter VII of the United Nations Charter, required the “the Libyan authorities [to] cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution”.<sup>30</sup>
17. On 3 March 2011, following a preliminary examination of available information, the ICC Prosecutor concluded that there was a reasonable basis to believe that crimes under the ICC’s jurisdiction had been committed in Libya from 15 February 2011 onwards. He opened an investigation in relation to the situation in Libya.<sup>31</sup>
18. On 16 May 2011, after an initial investigation – over a period of less than two and a half months – the Prosecutor sought arrest warrants against Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi for alleged criminal responsibility for the crimes against humanity of murder and persecution, throughout Libya including, *inter alia*, Tripoli, Benghazi, and Misrata.<sup>32</sup> On 27 June 2011, Pre-Trial Chamber I accepted this application.<sup>33</sup> The three warrants

<sup>28</sup> United Nations Security Council, Resolution 1970 (2011), UN Doc. S/RES/1970, adopted by the Security Council at its 6491st meeting, 26 February 2011 [“Resolution 1970”].

<sup>29</sup> See *Situation in the Libyan Arab Jamahiriya*, “Decision on the ‘Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi’”, Pre-Trial Chamber I, 27 June 2011, ICC-01/11-12, para. 72.

<sup>30</sup> Resolution 1970, para. 5.

<sup>31</sup> *Situation in the Libyan Arab Jamahiriya*, “Decision Assigning the Situation in the Libyan Arab Jamahiriya to Pre-Trial Chamber I”, Presidency, 4 March 2011, ICC-01/11-1 (with annex).

<sup>32</sup> *Situation in the Libyan Arab Jamahiriya*, “Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi”, Pre-Trial Chamber I, 16 May 2011, ICC-01/11-4-Red (with annexes).

<sup>33</sup> *Situation in the Libyan Arab Jamahiriya*, “Decision on the ‘Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi’”, Pre-Trial Chamber I, 27 June 2011, ICC-01/11-12.

relate to murders and persecutions allegedly committed from 15 February 2011 until at least 28 February 2011, through the State apparatus and Security Forces.<sup>34</sup> Pre-Trial Chamber I found that there were reasonable grounds to believe that Muammar Gaddafi and Saif Al-Islam Gaddafi were criminally responsible, under Article 25(3)(a) of the Statute, as indirect co-perpetrators and that Abdullah Al-Senussi was criminally responsible as indirect perpetrator, for one count of murder as a crime against humanity, and one count of persecution, under Article 7(1)(a) and (h) of the Statute, respectively.<sup>35</sup>

19. On 4 July 2011, the Registry filed its "Request to the Libyan Arab Jamahiriya for the arrest and surrender of Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi".<sup>36</sup>

20. Following the end of the revolution in late October 2011, on 28 October 2011, the Registry filed the "Report of the Registry regarding the execution of the requests for arrest and surrender", informing the Chamber that it had transmitted the requests for arrest and surrender.<sup>37</sup>

21. On 20 October 2011, Muammar Gaddafi was killed after his capture near his hometown of Sirte. Proceedings against him were accordingly terminated on 22 November 2011.<sup>38</sup>

22. On 19 November 2011, Saif Al-Islam Gaddafi ("Mr Gaddafi") was captured

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<sup>34</sup> Warrants of Arrest in respect of Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, 27 June 2011, ICC-01/11-01/11-2, ICC-01/11-01/11-3, ICC-01/11-01/11-4.

<sup>35</sup> *Situation in the Libyan Arab Jamahiriya*, "Decision on the 'Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi'", Pre-Trial Chamber I, 27 June 2011, ICC-01/11-12, para. 71.

<sup>36</sup> *Prosecutor v. Muammar Mohammed Abuminyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Request to the Libyan Arab Jamahiriya for the arrest and surrender of Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi", Registry, 4 July 2011, ICC-01/11-01/11-5.

<sup>37</sup> *Prosecutor v. Muammar Mohammed Abuminyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Report of the Registry regarding the execution of the requests for arrest and surrender", Registry, 28 October 2011, ICC-01/11-01/11-19.

<sup>38</sup> *Prosecutor v. Muammar Mohammed Abuminyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi", Pre-Trial Chamber I, 22 November 2011, ICC-01/11-01/11-28.

near the town of Obar apparently trying to flee to Niger.<sup>39</sup>

23. On 23 November 2011, confirmation of Mr Gaddafi's capture was given by the Libyan Government in a letter to Pre-Trial Chamber I.<sup>40</sup> The letter stated, with reference to Article 94 of the Statute, that the possibility of surrender to the ICC would be discussed and that the Court would be officially informed when a decision was made. On the same date, the Libyan Government commenced an investigation into criminal conduct (and in particular, allegations of corruption and other financial crimes) by Mr Gaddafi.<sup>41</sup> A decision was made to extend these investigations to also include investigations of "crimes against the person" under Libyan law in Decision Number 102 of 17 December 2011. Similar investigations relating to both financial crimes and crimes against the person were commenced by the Military Prosecutor on 3 April 2012 into the activities of Mr Al-Senussi following a Libyan delegation to Mauritania on 20 March 2012.

24. On 6 December 2011, Pre-Trial Chamber I issued its "Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi".<sup>42</sup> The Chamber thereby authorised the Office of Public Counsel for the Defence ("OPCD") to temporarily represent the interests of the Defence in the proceedings against Mr Gaddafi, and declined to appoint any other counsel in advance of receiving confirmation that a power of attorney had been given to a specific counsel. It also sought the following information from the Libyan authorities: (i) whether Mr Gaddafi was arrested on account of the Court's warrant of arrest; (ii) whether the information received by the Chamber as to

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<sup>39</sup> BBC News, "Gaddafi's son Saif-al-Islam captured in Libya", 19 November 2011, <http://www.bbc.co.uk/news/world-middle-east-15804299>

<sup>40</sup> *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Implementation of the 'Decision to Add Document to Case Record'", Registry, ICC-01/11-01/11-34-Anx, 29 November 2011, annex 1.

<sup>41</sup> Report by Prosecutor General as to Scope of Investigation of Saif Al-Islam Gaddafi and Libyan Criminal Procedure, see Annex C.

<sup>42</sup> *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi", Pre-Trial Chamber I, 6 December 2011, ICC-01/11-01/11-39-Red.

Mr Gaddafi being held incommunicado was true; (iii) when and where the Registrar, or one of her representatives, could meet Mr Gaddafi in order to seek his views on being assigned counsel from the Court for purposes of ICC proceedings, (iv) how, when and where an expert could be mandated by the Court to examine Mr Gaddafi in order to assess his physical and mental state and (v) whether and when the Libyan authorities intend to surrender Mr Gaddafi to the Court.

25. On 8 January 2012, the Libyan Prosecutor-General commenced an investigation of serious crimes (including murder and rape) allegedly committed by Mr Gaddafi during the 2011 revolution (including in the period between 15 February to 28 February 2011). A similar investigation in respect of Mr Al-Senussi by the Libyan Military Prosecutor was commenced on 3 April 2012. These investigations have continued and are now at an advanced stage. They are expected to be completed in the near future.

26. On 23 January 2012, the Libyan Government filed its response to the Chamber's inquiries.<sup>43</sup> It indicated, *inter alia*, that it was willing to facilitate a visit between Mr Gaddafi and the Registrar, or one of her representatives. It argued that Mr Gaddafi was not arrested on account of the Surrender Request; that he was currently being investigated for various crimes under national law; and that the Libyan Government was considering whether to also institute national proceedings "in relation to the same conduct for which he is sought by the Court". It stated that it was not, at that time, contesting the admissibility of the case, but sought postponement of the surrender of Mr Gaddafi to the Court, on the basis of Article 94(1) of the ICC Statute, in order for the Libyan Government to complete its investigation and prosecution.

27. On 3 February 2012, the Chamber issued a "Decision on the Registry-OPCD

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<sup>43</sup> *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Report of the Registrar on Libya's observations regarding the arrest of Saif Al-Islam Gaddafi", Registry, 23 January 2012, ICC-01/11-01/11-44, confidential annex 1.

Visit to Libya”,<sup>44</sup> ordering the Registry to make arrangements with the Libyan Government for a joint Registry-OPCD visit to Mr Gaddafi in Libya. The Chamber held that a personal visit from the Registry and the OPCD was the best mechanism by which to ensure that Mr Gaddafi was well informed about the current stage of the proceedings and of the appointment of the OPCD to represent his interests until he decided otherwise. From 29 February 2012 until 4 March 2012, the Registry-OPCD delegation visited Libya,<sup>45</sup> and met with Mr Gaddafi in Zintan on 3 March.

28. On 2 and 5 March 2012, the OPCD filed confidential reports concerning this visit. In these reports the OPCD made various unwarranted allegations against the Libyan Government in respect of the alleged poor treatment of Mr Gaddafi and its purported intention to charge him only with offences relating to camel licensing and the cleanliness of fish farms owned by Mr Gaddafi. As these allegations were made without any attempt to check their accuracy with the Libyan Government, and as they were filed with the Court confidentially, the Libyan Government did not become aware of them until public and redacted versions of the reports were filed on 4 and 10 April respectively.<sup>46</sup>

29. On 7 March 2012, Pre-Trial Chamber I issued its “Decision on Libya’s Submissions Regarding the Arrest of Saif Al-Islam Gaddafi”, rejecting Libya’s request for postponement pursuant to Article 94(1) of the Statute, stating that Libya must grant the surrender request and inform the Chamber of that within seven days, and arrange with Registry for Mr Gaddafi’s surrender to the court.<sup>47</sup> The Chamber found that Libya was under an obligation to co-

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<sup>44</sup> *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Decision on the Registry-OPCD Visit to Libya”, Pre-Trial Chamber I, 3 February 2012, ICC-01/11-01/11-52.

<sup>45</sup> *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Addendum to the Urgent Report Concerning the Visit to Libya”, 5 March 2012, ICC-01/11-01/11-70; “Report of the Registry on the Visit to Libya”, 6 March 2012, ICC-01/11-01/11-71.

<sup>46</sup> *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Addendum to the Urgent Report Concerning the Visit to Libya”, 5 March 2012, ICC-01/11-01/11-70.

<sup>47</sup> *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Decision on Libya’s Submissions Regarding the Arrest of Saif Al-Islam Gaddafi”, Pre-Trial Chamber I, 7 March 2012, ICC-01/11-01/11-72.

operate, and that while both Article 94(1) and Article 89(1) relate to situations where a co-operation request interferes with the requested State's domestic legal process, Article 89(4) is *lex specialis* concerning surrender requests. It concluded that Article 94(1) did not apply because the request at issue was a surrender request.<sup>48</sup>

30. On 17 March 2012 Mr Al-Senussi was arrested in Mauritania<sup>49</sup> The Government of Mauritania gave an assurance to the Libyan Government on 21 March 2012 to the effect that Mr Al-Senussi would be returned to Libya to face trial in due course.<sup>50</sup> Since that date, the severity of Mr Al-Senussi's liver disease has become apparent and his health condition is now such that it is understood that he cannot presently be investigated domestically for breaches of Mauritanian law, let alone transferred back to Libya. The justice ministries of both countries are in regular contact and are monitoring Mr Al-Senussi's condition in order to determine when his transfer will be possible.

31. On 22 March 2012, the Libyan Government filed the "Notification and Request by the Government of Libya in response to 'Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi'".<sup>51</sup> The Libyan Government thereby notified the Chamber of its intention to challenge the admissibility of the case concerning Mr Gaddafi pursuant to Articles 19(2)(b), (5), and (6) of the Statute on 30 April 2012; and requested that, pending the Chamber's decision, the surrender request be suspended, in accordance with, *inter alia*, Article 95 of the Statute and Rule 58 of the Rules of Procedure and Evidence.

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<sup>48</sup> *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi", Pre-Trial Chamber I, 7 March 2012, ICC-01/11-01/11-72, paras 12-16.

<sup>49</sup> BBC News, Gaddafi spy chief Abdullah Al-Senussi held in Mauritania, 17 March 2012, <http://www.bbc.co.uk/news/world-africa-17413626>

<sup>50</sup> Telegraph, Libya claims Mauritania will hand over Abdullah Al-Senussi, 21 March 2012, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/9158141/Libya-claims-Mauritania-will-hand-over-Abdullah-al-Senussi.html>

<sup>51</sup> *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Notification and Request by the Government of Libya in response to 'Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi'", 22 March 2012, ICC-01/11-01/11-82.

Having regard to the requirements of the ICC Statute, Libya wished to avail itself of a reasonable period of time in order to submit a complete admissibility challenge.

32. On 4 April 2012, Pre-Trial Chamber I rejected the Libyan Government's request, noting that neither Article 95 nor Rule 58 applies, as Rule 58 does not provide for postponements of requests for co-operation and Article 95 may be invoked only where an admissibility challenge is under consideration by the Court at the time.<sup>52</sup> It also reiterated its request that Libya make its decision to grant the Surrender Request and proceed immediately with the surrender of Mr Gaddafi to the Court.
33. On 10 April 2012, the Libyan authorities directly seized the Appeals Chamber, pursuant to Article 82(1)(a) of the Statute, of an appeal against the decision as to surrender of Mr Gaddafi to the Court.<sup>53</sup> An application for leave to appeal pursuant to Article 82(1)(d) of the Statute was also made to the Pre-Trial Chamber on the same day.
34. On 17 April 2012 two representatives of the OPCD were appointed by the Pre-Trial Chamber as counsel for Mr Gaddafi.<sup>54</sup>
35. On 25 April 2012 the Libyan Government filed a Response to the OPCD's allegations regarding their visit with Mr Gaddafi and annexed evidence showing the falsity of the OPCD's accusation of poor treatment. This filing recalled the measures the Government has taken to protect Mr. Gaddafi from harm or death at the hands of vigilantes against the backdrop of the chaos that prevailed in the immediate aftermath of the Muammar Gaddafi regime's

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<sup>52</sup> *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi", Pre-Trial Chamber I, 4 April 2012, ICC-01/11-01/11-100.

<sup>53</sup> *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Government of Libya's Appeal Against the Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi", 10 April 2012, ICC-01/11-01/11-103.

<sup>54</sup> *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision appointing counsel from OPCD as counsel for Saif Al-Islam Gaddafi, 17 April 2012, ICC-01/11-01/11-113.

mass-atrocities. It also emphasized the efforts that the Libyan Government is making in progressively restoring law and order in Libya while at the same time remaining focused on negotiating the safe and orderly transfer of Mr. Gaddafi with local authorities from a secret location to a specially constructed prison facility in Tripoli that meets all applicable international standards. The evidence provided in the filing demonstrated that despite the extreme circumstances prevailing at the time of his capture, Mr Gaddafi has been:

- i. kept in adequate conditions of detention (which will be improved even further upon his transfer to newly constructed prison facilities in Tripoli);
- ii. provided with sufficient and good quality food (the same food as that consumed by his prison guards);
- iii. given access to ICC lawyers and the option of retaining a domestic lawyer of his choosing;
- iv. able to receive visits from NGOs and family members;
- v. not subject to physical abuse during his detention;
- vi. provided with proper medical and dental care; and
- vii. investigated under Libyan law with respect to crimes arising out of the same serious conduct as that set forth in the arrest warrant issued by the International Criminal Court.

36. On 25 April 2012 the Appeals Chamber rejected the Libyan Government's appeal in relation to the application of Article 95 and the possibility of postponing the order to surrender on the basis that there was no admissibility

challenge “under consideration” at the time.<sup>55</sup>

37. Due to the ICC holiday on 30 April 2012 (during which the Registry was not open for receipt of filings), this Article 19 admissibility challenge on behalf of the Libyan Government has been formally filed with the Court on 1 May 2012 (although it was sent to the Court on 30 April 2012).

38. As the events outlined above demonstrate, this admissibility challenge has been prepared by a State which has only recently emerged from armed conflict, mass-atrocities, and a complete change of government after a period of forty-two years of dictatorship. It is particularly unfortunate that it brings its Article 19 application in the context of unverified and unwarranted allegations of bad faith made by the OPCD, an organ of the Court. The Libyan Government trusts that the Pre-Trial Chamber will not allow such baseless allegations to prejudice Libya’s Article 19 application. Stigmatizing a Government on the basis of unfair and untrue allegations when it is both willing and able to eradicate impunity would seriously undermine the principle of complementarity upon which the Court is founded.

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<sup>55</sup> *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Decision on ‘Government of Libya’s Appeal Against the ‘Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi’ of 10 April 2012’”, ICC-01/11-01/11-126.

### III. THE LIBYAN INVESTIGATION AND THE LIBYAN CRIMINAL JUSTICE SYSTEM

#### *A. Confidentiality of investigative materials under Libyan law during the investigation phase of proceedings*

39. The Libyan Code of Criminal Procedure,<sup>56</sup> which is based on the Italian model, provides close regulation of the four phases of Libyan criminal proceedings – investigation, accusation (this phase is similar to the confirmation phase of proceedings at the ICC), trial and appeal. During the investigation phase of proceedings, Article 59 of the Criminal Procedure Code mandates that:

*Investigation procedures and their results shall be considered confidential. Investigators, prosecution members and their assistants of clerks and experts who are related to the investigation or attend to their profession or post shall undertake not to disclose same. Anyone who breaches this provision shall be punished in accordance with Article 236 of the Penal Code.*

40. The practical effect of Article 59 of Libya's Criminal Procedure Code is that for the duration of the investigative phase of proceedings, the Libyan prosecution services (Prosecutor-General for civilians and Military-Prosecutor for military persons) may only disclose summary reports of their investigations to persons who are not involved in the Libyan investigative or prosecutorial team. Disclosure of actual evidence, including witness interviews or other documentary evidence, or even details such as witnesses' names and contact details before the case reaches the accusation stage of proceedings, would violate the Criminal Procedure Code. In order to provide the maximum possible cooperation with the ICC, the Prosecutor-General (who is leading the investigation of Mr Gaddafi) and the Military Prosecutor (who is leading the investigation of Mr Al-Senussi) have provided summary reports of their investigations for the purpose of this admissibility challenge, and these are annexed to this Article 19 application. The provision of these types of

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<sup>56</sup> A compilation of the relevant provisions from the Libyan Criminal Procedure Code will be filed with the Court in the very near future.

summary reports is an extraordinary measure: in order to ensure full compliance with the Article 59 of the Criminal Procedure Code these reports are being filed confidentially in these proceedings.

41. It is anticipated that the investigative phase of proceedings with respect to Mr Gaddafi will be completed within the next few weeks. At that stage, it will be possible – to the extent that the Court considers it to be necessary to assist in its determination of Libya’s admissibility challenge – for the Libyan Government to provide (on a confidential basis) examples of the evidence that has been produced pursuant to the investigation and that will be relied upon in the accusation, trial and appeal phases of the case. It will take longer for the investigative phase of proceedings relating to Mr Al-Senussi to be completed as he is presently outside Libya and yet to be transferred from Mauritania to Libya. His case cannot proceed to the accusation phase of proceedings until he is within Libyan custody.

*B. The progress of the Libyan investigation with respect to Mr Gaddafi*

42. As outlined above in the section entitled ‘Procedural History’, very shortly after Mr Gaddafi’s capture on 19 November 2011, an investigation was commenced by the Prosecutor-General (the most senior civilian prosecutor in Libya) into allegations against Mr Gaddafi of corruption and other financial crimes. In accordance with this investigation, and in full conformity with Articles 115 and 175 of the Criminal Procedure Code, Mr Gaddafi was detained on the authority of the Prosecutor General for an initial 45 day period commencing on 21 November 2012 and ending on 5 January 2012.<sup>57</sup>

43. This original detention period was extended on the authority of the Prosecutor General (after being issued with permission to do so by a summary judge who travelled to Zintan for this purpose) and in full conformity with articles 176

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<sup>57</sup> Provisional Detention Orders relating to Saif Al-Islam Gaddafi, page 1, see Annex D.

and 177 of the Criminal Procedure Code on 4 January 2012 for a further 45 day period<sup>58</sup> and again on 15 February 2012 for a final 45 day period.<sup>59</sup> The most recent extension of Mr Gaddafi's detention, for a 30 day period commencing on 2 April 2012, was issued by the Prosecutor (also after being issued permission to do so by a summary judge who travelled to Zintan for this purpose) on the basis of a further investigation into allegations of the commission of "blood crimes" during the 2011 revolution.<sup>60</sup>

44. This second investigation was instigated by the Prosecutor-General on 17 December 2011 by virtue of Decision No. 102 of 2011 and was to relate to "all crimes committed by Mr Gaddafi during the revolution ... starting from 17 February 2011". Two members of the Prosecutor-General's staff – [REDACTED] – commenced work on this investigation on 8 January 2012. On this date these individuals began to:

- i. analyse intercept evidence of the speeches and telephone calls of Mr Gaddafi during February 2011 and thereafter; and
- ii. conduct interviews with potential witnesses with first-hand knowledge of the crimes alleged.<sup>61</sup>

45. There are several categories of witnesses whom the Prosecutor-General and his team have interviewed. These include:

- iii. Friends and associates of Mr Gaddafi (including those who remained with him until he fled Tripoli in late August 2011) and those who left Libya before the end of February 2011. Four such individuals (three of whom have also given witness statements to the ICC Prosecutor) have been interviewed by the Prosecutor-General in relation to crimes that

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<sup>58</sup> Provisional Detention Orders relating to Saif Al-Islam Gaddafi, page 4, see Annex D.

<sup>59</sup> Provisional Detention Orders relating to Saif Al-Islam Gaddafi, page 2, see Annex D.

<sup>60</sup> Provisional Detention Orders relating to Saif Al-Islam Gaddafi, page 3, see Annex D.

<sup>61</sup> Report by Prosecutor General as to Scope of Investigation of Saif Al-Islam Gaddafi and Libyan Criminal Procedure, Annex C.

took place in February 2011 and thereafter. Without wishing to give identifying details in respect of such witnesses, these individuals have given evidence in relation to Mr Gaddafi's:

- i. [REDACTED];
- ii. [REDACTED];
- iii. [REDACTED];
- iv. [REDACTED];
- v. [REDACTED];
- vi. [REDACTED];
- vii. [REDACTED];
- viii. [REDACTED];
- ix. [REDACTED].<sup>62</sup>

iv. Members of the Libyan military (including very senior officers such as military commanders and members of the High Security Committee, as well as ordinary soldiers. Nine such individuals have been interviewed by the Prosecutor-General to date. Again without wishing to give identifying details in respect of such witnesses, these individuals have given evidence in relation to Mr Gaddafi's:

- i. [REDACTED];
- ii. [REDACTED];

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<sup>62</sup> Report by Prosecutor General as to Scope of Investigation of Saif Al-Islam Gaddafi and Libyan Criminal Procedure, Annex C.

- iii. [REDACTED];
- iv. [REDACTED];
- v. [REDACTED];
- vi. [REDACTED];
- vii. [REDACTED];
- viii. [REDACTED];
- ix. [REDACTED];
- x. [REDACTED];
- xi. [REDACTED];
- xii. [REDACTED].<sup>63</sup>

- v. “Volunteers” who were not members of the military but who were armed directly by Mr Gaddafi, some of whom accompanied him following his departure from Tripoli in late August 2011. Eight such witnesses have been interviewed by the Prosecutor-General. They have given evidence in relation to the following matters:

- i. [REDACTED];
- ii. [REDACTED];
- iii. [REDACTED];
- iv. [REDACTED];

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<sup>63</sup> Report by Prosecutor General as to Scope of Investigation of Saif Al-Islam Gaddafi and Libyan Criminal Procedure, Annex C.

v. [REDACTED];

vi. [REDACTED];

vii. [REDACTED].<sup>64</sup>

vi. Civilians who did not take any part in the fighting such as family members of victims. Six individuals who fall into this category have been interviewed by the Prosecutor-General. They have given evidence in relation to the following events:

i. [REDACTED];

ii. [REDACTED];

iii. [REDACTED];

iv. [REDACTED].<sup>65</sup>

46. The Prosecutor-General and his team plan to conduct further interviews with potential witnesses including with [REDACTED].<sup>66</sup> Such individuals (like some of the witnesses in the four categories referred to above) are potential witnesses who the ICC Prosecutor has not yet had the opportunity to interview because they are either detained under the custody of the Libyan Government or who were not willing to be interviewed by the ICC Prosecutor. It is for this reason that the Libyan Prosecutor-General has been able to obtain witness testimony as to Mr Gaddafi's direct involvement in killings whereas

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<sup>64</sup> Report by Prosecutor General as to Scope of Investigation of Saif Al-Islam Gaddafi and Libyan Criminal Procedure, Annex C.

<sup>65</sup> Report by Prosecutor General as to Scope of Investigation of Saif Al-Islam Gaddafi and Libyan Criminal Procedure, Annex C.

<sup>66</sup> Report by Prosecutor General as to Scope of Investigation of Saif Al-Islam Gaddafi and Libyan Criminal Procedure, Annex C.

such evidence is not included in the ICC Prosecutor's Article 58 application.<sup>67</sup> In this way, the Libyan Prosecutor-General's investigation not only covers all of the factual incidents described in the ICC Article 58 decision,<sup>68</sup> but also includes further allegations of responsibility for other serious crimes.

47. The investigative team is also intending to continue the collation and analysis of photographs of the various geographic locations which were the subject of crimes in the period from 17 February 2011 onwards. These locations include Benghazi, Tripoli, Albayda, Bani Walid, Zintan and Misrata. The Prosecutor-General's team will additionally prepare full transcripts of the vast quantity of intercept evidence which is in their possession and which consists of recordings in which Mr Gaddafi, *inter alia*, issues direct orders to security brigades to kill protestors.<sup>69</sup> The Prosecutor-General also has other documentary evidence that is presently being obtained, including passenger manifests and payment records for the transport of mercenaries on Afriqiyah Airways from various African countries to Libya, in order to help Gaddafi forces during the revolution.

48. It is apparent from this brief summary that the Prosecutor-General has committed very substantial resources into interviewing witnesses and gathering other evidence in pursuit of his independent investigation of the acts of Mr Gaddafi during the 2011 revolution. The next step in the investigation is to conduct an interview with Mr Gaddafi in person at which point his identity will be confirmed and he will be confronted with the allegations against him. Pursuant to Article 105 of the Criminal Procedure Code, Mr Gaddafi will be questioned in detail about each of the allegations

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<sup>67</sup> *Situation in the Libyan Arab Jamahiriya*, "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi", Office of the Prosecutor, 16 May 2011, ICC-01/11-4-Red & annexes.

<sup>68</sup> *Situation in the Libyan Arab Jamahiriya*, "Decision on 'Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi'", Pre-Trial Chamber I, 27 June 2011, ICC-01/11-12, paras 15-65; 72-90.

<sup>69</sup> Report by Prosecutor General as to Scope of Investigation of Saif Al-Islam Gaddafi and Libyan Criminal Procedure, Annex C.

which the investigation relates to, and covering the period from 17 February 2011 onwards. If it is deemed necessary, in accordance with Article 106 of the Criminal Procedure Code, the Prosecutor-General will arrange for Mr Gaddafi to be confronted with the witnesses who have indicated that they are willing to testify in relation to these allegations.<sup>70</sup>

49. Once these final steps are completed (estimated to be within the next few weeks), the case can move onto the accusation stage of proceedings: this is a very similar procedure to the confirmation of charges phase at the ICC. If the case succeeds at the accusation stage, it can then proceed to trial. Further detail as to Libyan criminal procedure is provided below.

### *C. The progress of the Libyan investigation of Mr Al-Senussi*

50. The Chamber will be aware that Mr Al-Senussi remains outside Libya and is not currently subject to any control by or contact on behalf of the Libyan authorities. Nevertheless, the investigation of his involvement in alleged crimes is proceeding with due commitment. As noted above, Mr Al-Senussi was a member of the Libyan armed forces at the relevant time. Accordingly, as is required by the applicable regulations of Libyan law, his investigation is being conducted by the Military Prosecutor and not by the Prosecutor-General. The Military Prosecutor commenced his investigation of Mr Al-Senussi in relation to allegations of both financial crimes and crimes against the person on 3 April 2012, following a Libyan delegation visit to Mauritania on 20 March 2012. The crimes against the person alleged in relation to Mr Al-Senussi are in respect of many of the same factual matters as Mr Gaddafi arising during the 2011 revolution – including those appearing in the ICC Article 58 Decision.<sup>71</sup> Accordingly, there is close cooperation between these

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<sup>70</sup> Report by Prosecutor General as to Scope of Investigation of Saif Al-Islam Gaddafi and Libyan Criminal Procedure, Annex C.

<sup>71</sup> *Situation in the Libyan Arab Jamahiriya*, "Decision on 'Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi'", Pre-Trial Chamber I, 27 June 2011, ICC-01/11-12.

two judicial proceedings in this regard. In particular, the investigations carried out by the Prosecutor-General in relation to Mr Gaddafi will be referred to the Military-Prosecutor for potential use with respect to crimes alleged to have been committed by Mr Al-Senussi in due course.<sup>72</sup> One notable allegation against Mr Senussi which is being investigated by the Military Prosecutor and is mentioned in a report by the Prosecutor-General is the shooting of a number captured rebels *hors de combat* by Mr Al-Senussi, his son Mohamed and other supporters at Geleana Bridge in Benghazi.<sup>73</sup> The Prosecutor-General has witness evidence in relation to this incident, which has also been made available to the ICC Prosecutor.

51. In addition to being investigated for crimes allegedly taking place during 2011, Mr Al-Senussi is also being investigated for other serious crimes taking place in Libya prior to the revolution. One such crime is the massacre at Abu Selim prison which took place on 27 June 1996 and which resulted in the massacre of 1270 prisoners in the prison yard following their complaints about poor treatment. Statements of six eyewitnesses have been taken in relation to this incident and these statements attest to the personal involvement of Mr Al-Senussi in the mass killing that day.<sup>74</sup>

52. Finally, like the investigation into Mr Gaddafi, Mr Al-Senussi is additionally being investigated for various financial crimes, including an allegation of [REDACTED]. There are also many other allegations of embezzlement, including using large amounts of foreign currencies, which are under investigation. These alleged crimes are the subject of a separate investigation.<sup>75</sup>

#### *D. The independence of the Libyan Judiciary*

53. The importance of the independence and impartiality of the judiciary has

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<sup>72</sup> Report by Prosecutor General regarding OPCD and Abdullah Al-Senussi, Annex E.

<sup>73</sup> Report by Prosecutor General regarding OPCD and Abdullah Al-Senussi, Annex E.

<sup>74</sup> Report by Military Prosecutor regarding Abu Selim and Abdullah Al-Senussi, Annex F.

<sup>75</sup> Report by Prosecutor General regarding OPCD and Abdullah Al-Senussi, Annex E.

recently been enshrined in the Libyan Constitutional Declaration of 2011.<sup>76</sup> Article 32 of that decree provides that:

*“The Judiciary Authority shall be independent. It shall be exercised by courts of justice of different sorts and competences. They shall issue their judgments in accordance with the law. Judges shall be independent, subject to no other authority but the law and conscience. Establishing Exceptional Courts shall be prohibited.”*

54. The prohibition on the establishment of exceptional courts is of critical importance to the current application, as it was the “exceptional” or “special” courts which were operational in the Muammar Gaddafi era and which carried out human rights violations against persons considered to be enemies of the regime. These extraordinary courts were staffed not by ordinary judicial officers (who reported to the Ministry of Justice and who still work as judges in Libya today) but were presided over by court officials specially appointed by Muammar Gaddafi’s security apparatus. This is confirmed by a report by the UK Foreign and Commonwealth Office which states as follows:

*“In the experience of UK officials in previous negotiations with Libya, there were effectively two states in operation: the relationship with the Ministry of Justice was positive and constructive (the former Minister is now in the Interim Transitional National Council); the other ‘shadow state’, accountable to [Gadd]afi and operated by the security apparatus had its own police, court and prison systems, which dealt with political prisoners and any individual deemed a threat to the regime. The UK Government had limited ability to engage with this ‘Libya’ on any level. This experience was reflected by non-governmental organisations (NGOs) which had similarly made limited*

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<sup>76</sup> NTC Constitutional Declaration of 2011, Annex G.

*progress with the security services over human rights issues.”<sup>77</sup>*

55. The abolition of extraordinary courts has had a positive and transformative effect on the Libyan judiciary as a whole. This prohibition has confirmed, as a central principle of the new Libya, that in the future, no judge is to act on the instructions of the executive and that they are instead to act independently and only in accordance with “law and conscience”. Indeed, the independence of the judiciary is not merely now constitutionally enshrined but is also protected under several provisions of domestic Libyan law, including Article 52 of the Judicial System Law and Article 31 of the Freedoms Act.

*E. Libya’s general fair trial guarantees*

56. Suspects and defendants within the Libyan criminal justice system benefit from similar procedural rights and protections to those set out in the Rome Statute. Indeed, Libya’s 2011 Constitutional Declaration has a specific provision upholding human rights and freedoms (Article 7)<sup>78</sup> and also has an entire Part dedicated to Judicial Guarantees. As well as providing for judicial independence and the abolition of exceptional courts, as described above, Articles 31 and 33 of this Part provide for the following due process guarantees:

- i. “There shall be no crime or penalty except by virtue of the text of the law”;
- ii. “Any defendant shall be innocent until he is proved guilty by a fair trial wherein he shall be granted the guarantees necessary to defend himself”;

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<sup>77</sup> FCO Conference Report, Libya and Human Rights: the way forward, 11 April 2011, p. 2 of 6, available at: <http://m.fco.gov.uk/travel;letter=A/http%3Acentralcontent.fco.gov.uk/resources/en/pdf/mena/wilton-park-libya-report>

<sup>78</sup> NTC Constitutional Declaration of 2011, Annex G.

- iii. "Each and every citizen shall have the right to recourse to the judiciary authority in accordance with the law";
- iv. "Right of resorting to judiciary shall be preserved and guaranteed for all people";
- v. "Each and every citizen shall have the right to resort to his natural judge";
- vi. "The State shall guarantee to bring the judiciary authorities near the litigants and shall guarantee the swift determination on lawsuits"; and
- vii. "Laws shall not provide for the prohibition of judiciary authority to control any administrative decree".

57. Likewise, Libya is a party to several international and regional human rights instruments which guarantee the right to a fair trial, 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 Peoples' Rights, the Arab Charter on Human Rights and resolutions such as the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa adopted by the African Union in 2003. The Libyan Government is committed to meeting all the fair trial requirements set out in these instruments, including in particular Articles 9 and 10 of the ICCPR.

*F. Libyan criminal procedure and the specific due process guarantees applicable during the various stages of a domestic criminal case*

58. As outlined above, the civilian criminal justice system in Libya (which is modelled on the Italian criminal justice system) consists of four phases: investigation, accusation (also referred to as indictment), trial and appeal. The Prosecutor-General has the power to commence investigations in relation to

any particular incident or individual and also has the power to initiate criminal proceedings against defendants (Article 1 Criminal Procedure Code 1953).<sup>79</sup> The Prosecutor-General acts independently from the judiciary in carrying out this role and must be neutral in their work.<sup>80</sup> The Libyan military criminal justice system operates in a similar fashion to the civilian criminal justice system apart from the fact that there is no accusation phase used in military criminal justice proceedings.

59. During the investigation phase of the case, a suspect has the right to a lawyer both in interviews with the Prosecutor-General (or Military Prosecutor) and during the confrontation of the defendant with witnesses by the Prosecutor-General (Article 106 of the Criminal Procedure Code). Suspects also have the right to view all the investigative materials relating to their case, and any confessions that are obtained from them through duress are inadmissible in criminal proceedings against them (Article 435 Criminal Procedure Code). The investigator is obliged to write down all investigative procedures undertaken in relation to a suspect's case and not to publish or otherwise distribute details of the investigation (Articles 57 and 59 of the Criminal Procedure Code). Suspects may not be imprisoned without due process and a written order signed by the Prosecutor-General which is in compliance with Article 118 of the Criminal Procedure Code And article 9 of the Prisons Act (Law No. 5 of 2005). Likewise, a suspect should only be imprisoned in a purpose built facility unless this requirement is waived by the Prosecutor-General in exceptional circumstances (Article 4 of the Prisons Act).<sup>81</sup>

60. Where a serious crime has been alleged, once an investigation has been completed by the Prosecutor-General and they are of the view that there is sufficient evidence to warrant the case proceeding, the Prosecutor-General

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<sup>79</sup> A compilation of the relevant provisions from the Libyan Criminal Procedure Code will be filed with the Court in the very near future.

<sup>80</sup> Report by Senior Libyan Judge regarding Libyan criminal law and procedure, Annex H

<sup>81</sup> Report by Prosecutor General as to Scope of Investigation of Saif Al-Islam Gaddafi and Libyan Criminal Procedure, Annex C.

refers the case to the Accusation Chamber (also known as the Indictment Division). This Chamber is a court of first instance and is composed of an independent and impartial judge who is appointed by the Supreme Council of Judicial Authority at the annual conference of Libyan Courts (which is known as the General Assembly of the Court) (Article 145 Criminal Procedure Code).

61. It is the role of the Accusation/Indictment Judge to review the investigation conducted by the Prosecutor-General and if they find the evidence to be insufficient or illegally obtained, they must dismiss the case (Article 151 Criminal Procedure Code). If, on the other hand, there is deemed to be sufficient lawfully obtained evidence to found a criminal case, or if after supplementary investigations such evidence is found to exist, then the defendant will be given the opportunity to select a lawyer so that the case may be remitted to trial (Article 106 Criminal Procedure Code). It is the Accusation / Indictment Judge's role to ensure that any cases referred to trial are adequately and neutrally investigated, that the investigation has remained confidential, that a lawyer has been appointed for the suspect and that the investigation has been properly recorded.<sup>82</sup>

62. The Criminal Trial Court in Libya is also a court of first instance. When it sits in cases of serious crimes it is comprised of three judges, each of which has attained the title of 'Counsel', which is awarded to judges who have at least twenty-four years of judicial experience. If a defendant has indicated that they do not wish to appoint a lawyer, the court will appoint a lawyer (a People's Attorney appointed free of charge pursuant to Law No 4 of 1981) to represent their interests during the trial, so that the case may proceed (Article 162 and 187 Criminal Procedure Code)). Defendants may appoint foreign lawyers as long as consent is provided to their appointment by the Libyan law society. Any lawyer appointed to represent the interests of a defendant at trial has the right to ask for sufficient time to prepare the case. If a trial were to proceed

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<sup>82</sup> Report by Senior Libyan Judge regarding Libyan criminal law and procedure, Annex H.

without a lawyer being appointed, or without allowing a lawyer sufficient time to prepare the case, the trial verdict would be quashed as a nullity by an appellate court (Article 304 and 305 of the Criminal Procedure Code).

63. Other rights granted during trial proceedings include the right to a public hearing; the right to have proceedings recorded; the right to be presented with the indictment and all evidence presented by the Prosecution; the right to remain silent; the right to present defence evidence and the right to a written judgment (Articles 241, 247, 251, 266, 276 Criminal Procedure Code).<sup>83</sup> In relation to the presentation of evidence, the defendant has the right to call witnesses (who may be questioned by the Prosecution through the judges) and to ask questions of witnesses relied upon by the Prosecution through the judges (Article 69, 93 244 of the Criminal Procedure Code). Defendants are additionally permitted to call expert evidence to support their case and where expertise by a witness is established the Court is bound to accept the views of the expert witness (Articles 72 and 93 of the Criminal Procedure Code). The rights of a defendant to present evidence are also applicable to suspects during the accusation phase of proceedings.

64. If a verdict of acquittal is given by the Trial Court, in cases of serious crimes,<sup>84</sup> the Prosecutor has the right to appeal this verdict to the Supreme Court which is comprised of three senior counsels (Article 381 Criminal Procedure Code). If the Supreme Court determines that the not guilty verdict was unlawful, it has the power to nullify the decision and order the case to be remitted to the Trial Court for rehearing in front of different judges (Article 393 Criminal Procedure Code).

65. If, however, the judgment of the Trial Court is to convict the defendant, in cases of serious crimes,<sup>85</sup> they have a right to appeal this verdict to the

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<sup>83</sup> Report by Senior Libyan Judge regarding Libyan criminal law and procedure, Annex H.

<sup>84</sup> In less serious cases an appeal lies to the Libyan Court of Appeal.

<sup>85</sup> In less serious cases an appeal lies to the Libyan Court of Appeal.

Supreme Court. Again, if there is an error of law found by the Supreme Court, the judgment will be quashed and the defendant will be released (Articles 365 and 381 of the Criminal Procedure Code).

66. Where a death penalty has been imposed following conviction, the sentence cannot be carried out until the case has been considered by the Supreme Court. Even if the defendant does not appeal the sentence, the Prosecutor is obliged to do so before the sentence can be implemented (Articles 385bis and 429 Criminal Procedure Code). In appeals involving the death penalty, the Supreme Court is not only limited to considering errors of law, but will instead review all factual, legal and procedural matters leading to the verdict and sentence. Where an error is detected, the Supreme Court has the power to nullify the verdict, amend the sentence or remit the case for re-hearing at the Trial Court by different judges. The sentence may not be executed until all potential avenues of legal appeal have been exhausted (Article 400 Criminal Procedure Code).

67. There is also a possibility under Libyan law for commutation of a death sentence to one of life imprisonment in cases where the family members of victims "forgive" the convicted person. In such cases, the correct procedure – consistent with Article 6 of the International Covenant on Civil and Political Rights - is for the case to be brought back before the Trial Court to hear evidence of the family members and to impose a new sentence on the convicted person.

#### **IV. THE SCOPE OF LIBYA'S CHALLENGE TO ADMISSIBILITY BEFORE THE ICC**

##### *A. Scope of challenge*

68. Libya is exercising its sovereign right to challenge admissibility pursuant to Article 19(2)(b) of the Statute "on the ground that it is investigating or prosecuting the case". It is necessary, at the outset, to specify the subject of inquiry – i.e., to define the word "case" in this provision. The Government of Libya makes two broad submissions in this regard.

69. First, the term "case" in Article 19(2)(b) necessarily refers to the individual case against each individual suspect and must be considered separately in respect of every such individual. Consequently, where there are two or more suspects, the admissibility assessment must consider the case against each suspect as separate and distinct inquiries. Indeed, the Appeals Chamber has clarified that Article 19 applies to "concrete cases", the defining elements of which are "*the individual and the alleged conduct*".<sup>86</sup> Pre-Trial Chamber I has also held that, in order to potentially render an ICC case inadmissible, the domestic proceedings must "encompass both *the person* and the conduct which is the subject of the case before the Court".<sup>87</sup>

70. Any other reading would mean that a State would be put in a position where it would be forced to challenge admissibility in respect of the cases brought by the Prosecutor against several persons, even where one or more such persons is either not yet within the custody of either the State concerned or the ICC (as here), or where the State intends to investigate or prosecute some but not all of the same persons as the ICC Prosecutor. As the text of the Statute makes clear, such an "all or nothing" interpretation of Article 19 was not contemplated by

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<sup>86</sup> Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', Muthaura and others (ICC-01/09-02/11-274), Appeals Chamber, 30 August 2011, para. 39 (emphasis added).

<sup>87</sup> *Prosecutor v. Lubanga*, Decision on the Prosecutor's Application for a warrant of arrest, Article 58, Lubanga, ICC- 01/04- 01/06-8-US-Corr, Pre-Trial Chamber I, 10 February 2006, paras. 39, 40 (emphasis added).

the drafters of the Statute. Indeed, particular unfairness would arise in the Libyan situation where the prosecutions of Mr Gaddafi and Mr Al-Senussi (who is not yet in Libyan or ICC custody) are, by necessity of Libyan law, being pursued separately (albeit in cooperation) in the civilian and military courts.

71. It would be wholly unreasonable and contrary to the complementarity principle to maintain that unless there are national proceedings with respect to each and every person included in an arrest warrant, then an admissibility challenge as a whole must fail; namely, even with regard to suspects that are in custody and being investigated at the relevant time. The same applies to the proposition that a separate admissibility challenge cannot be made in regard to a different suspect at a later stage of proceedings. In effect, such an approach would force States to make premature Article 19 applications that are bound to fail because there is an inadequate opportunity to commence a full and proper investigation.

72. If the term "case" under Article 19 is interpreted to encompass the "case" against all suspects authorised by the Pre-Trial Chamber in its Article 58 Decision, it would also mean that an individual suspect seeking to challenge admissibility under Article 19(2)(a) would be bound to challenge not just his own case, but also the case of any other co-suspects accused of crimes in the same Article 58 decision. This would be an absurd situation: it confirms the conclusion that the only proper way to construe the term "case" within Article 19 is to restrict it to particular individual suspects, and for States and suspects to be capable of challenging admissibility in relation to each such individual.

73. For these reasons, on 22 March 2012, the Libyan Government specifically notified the Chamber only of its intention to challenge the admissibility of the

case against Mr Gaddafi.<sup>88</sup> It may be recalled that the Article 95 submission to suspend the Surrender Request only applied to Mr. Gaddafi since Mr. Al-Senussi was not in Libya's custody. As a consequence, it is the Libyan Government's principal submission that the proper scope of this admissibility challenge, relates only to the case against Mr Gaddafi.

74. In the alternative, if, notwithstanding the above, the Chamber considers that the term "case", within the meaning of Article 19 does refer to the proceedings against both Mr Gaddafi and Mr Al-Senussi as a whole, the Government of Libya has provided sufficient evidence concerning the investigation and prosecution of both individuals and hereby challenges the admissibility of the case against each and both of these two persons.

75. As set forth above, the Prosecutor-General and Military Prosecutor of Libya are respectively and actively investigating these persons. This investigation includes the same allegations of murder and persecutions that form the basis for the arrest warrants of 27 June 2011.<sup>89</sup> Under Libyan domestic law, these murders and persecutions as well as other criminal acts not included in the ICC Article 58 Decision, are likely to be charged as: intentional murder; torture; incitement to civil war; indiscriminate killings; misuse of authority against individuals; arresting people without just cause; and the unjustified deprivation of personal liberty pursuant to Articles 368, 435, 293, 296, 431, 433, 434 of the Libyan Criminal Code 1953.<sup>90</sup> As set out below, it is manifest that such judicial "action" by Libya satisfies the requirements of Article 17(1)(a) of the Statute. The case is therefore inadmissible before the Court.

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<sup>88</sup> Notification and Request by the Government of Libya in response to Decision on Libya's postponement request, 22 March 2012, ICC-01/11-01/11-82.

<sup>89</sup> Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI", Gaddafi and others (ICC-01/11-01/11-1), Pre-Trial Chamber I, 27 June 2011.

<sup>90</sup> Report by Prosecutor General regarding possible charges under Libyan Criminal Code, Annex I. A compilation of the relevant provisions from the Libyan Criminal Procedure Code will be filed with the Court in the very near future.

### ***B. Inadmissibility of Security Council referrals***

76. The Court's jurisdiction with respect to Libya is based on Security Council resolution 1970 (2011),<sup>91</sup> incorporated in relevant part under the Statute pursuant to Article 13(b). The *Al-Bashir Decision* held that in making such referrals:

*the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole.*<sup>92</sup>

77. The principle of complementarity therefore, applies with equal force and effect irrespective of the purported basis for the exercise of jurisdiction under Article 13.<sup>93</sup>

78. In this regard, it bears emphasizing that Security Council resolution 1970 was adopted *because* the Muammar Gaddafi regime was still ruling Libya, and committing State-sponsored mass-atrocities. In that context, the Security Council members were mindful that the Libyan judicial system was not carrying out an investigation against the leadership, and that it was obviously unwilling to do so. At that time a referral to the Court by the Security Council was the only viable option for eradicating impunity.<sup>94</sup>

79. Following liberation and the establishment of the NTC, however, those circumstances have fundamentally changed. Indeed, bringing the persons concerned to justice is at the core of the new Government's transitional justice

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<sup>91</sup> S/RES/1970 (2011) (26 February 2011).

<sup>92</sup> Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Al Bashir (ICC-02/05-01/09-3), Pre-Trial Chamber I, 4 March 2009, para. 45.

<sup>93</sup> The applicability of complementarity in the context of Security Council referrals is clear from Art. 53 (3) (a), which allows a review of admissibility considerations under Article 17 in the context of Security Council referrals. It is further supported by para. 4 of SC Res. 1593 and ICC practice in the Darfur and the Libyan situations respectively.

<sup>94</sup> See several statements concerning resolution 1970 and referral of crimes against humanity to the International Criminal Court in: Security Council, Provisional Verbatim Records of 6491<sup>st</sup> meeting (26 February 2011), S/PV.6491

policy, consistent with the democratic aspirations of the Libyan people. As stated by the NTC Prime Minister in a press release on 23 April 2012 following a visit by the ICC Prosecutor, holding national trials is seen as being essential to post-conflict judicial capacity-building, national reconciliation, and the establishment of the rule of law:

*... as I discussed with the [ICC] Prosecutor, we will make every necessary effort to ensure a fair trial for these two defendants, in connection with their alleged commission of crimes against humanity during the Libyan peoples' struggle for freedom in 2011. Just as the Libyan people celebrate their freedom and prepare for democratic elections in June of this year, they are still haunted by the terrible atrocities and suffering of the past. In the liberation struggle, thousands upon thousands lost their children, their family and loved ones. The murderous campaign of the Gaddafi regime was a national tragedy that has touched the lives of virtually every Libyan citizen. Amidst the many challenges that it faces in rebuilding the country and creating security, the investigation and prosecution of Saif Al-Islam Gaddafi and Abdullah Al-Senussi has been a priority. It is imperative for Libya to come to terms with past human rights abuses and to create a new culture in which the rule of law is allowed to flower and prevail. The investigation and, as appropriate, prosecution of these two defendants in a trial in Libya that meets the highest standards of international law will be a unique opportunity for national reconciliation. It will strengthen the capacity of our judiciary in furtherance of the new Libya that we are now struggling to build. The Libyan people are entitled to have a chance to do justice in this matter – that is what the principle of complementarity requires, no more and no less. Justice in Libya is what our people demand, it is what the victims of these terrible crimes demand, and it is our job to ensure that it is achieved in accordance with international standards.*

80. The initial Security Council referral, and the admissibility requirements under

the Statute, must be interpreted in light of this fundamental change of context in Libya. That change of context demonstrates that the Security Council resolution has achieved its objectives, contributing to the establishment of conditions in which the fair and proper investigation of conduct constituting crimes against humanity, and alleged to have been committed in Libya from 17 February 2011 onwards, is occurring.

81. Providing *primacy* to domestic jurisdiction in these circumstances is consistent with the object and purpose of the Statute and the intentions of the Security Council in referring the situation to the Court. The Appeals Chamber held in the *Katanga Case* that “the complementarity principle [...] strikes a balance between safeguarding the *primacy* of domestic proceedings vis-à-vis the International Criminal Court on the one hand, and the goal of the Rome Statute to ‘put an end to impunity’ on the other hand”.<sup>95</sup> It follows from this recognition of the ‘primacy’ of domestic jurisdiction that the Court should only exercise jurisdiction “[i]f States do not or cannot investigate and, where necessary, prosecute”.<sup>96</sup>

### *C. The Same Person/Same Conduct test*

82. In order to succeed in its admissibility challenge, Article 19(2)(b) requires Libya to establish “that it is investigating or prosecuting the case or has investigated or prosecuted”. In the *Judgment on Kenya Appeal*, the Court clarified that Article 19 applies to “concrete cases” the defining elements of which are “the individual and the alleged conduct”:

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<sup>95</sup> Appeals Chamber, *Katanga*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, para. 85.

<sup>96</sup> *Ibid.*

*It follows that for such a case to be inadmissible under article 17 (1) (a) of the Statute, the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.<sup>97</sup>*

83. As set forth above, the investigations in Libya cover the same individuals – Mr Gaddafi and Mr Al-Senussi – and “substantially the same conduct” as that forming the basis for the arrest warrants of 27 June 2011. In particular, they include but are not limited to the multiple commission of acts of murder and persecution as part of a widespread or systematic attack against a civilian population, pursuant to or in furtherance of the State policy of the Muammar Gaddafi regime. They also cover the same period, namely events alleged to have occurred from 15 February 2011 onwards.

84. To date, the investigation that has taken place in Libya is based on the characterization of the conduct as “ordinary crimes” under the Penal Code of Libya (ie. intentional murder; torture; incitement to civil war; indiscriminate killings; misuse of authority against individuals; arresting people without just cause; and the unjustified deprivation of personal liberty pursuant to Articles 368, 435, 293, 296, 431, 433, 434 of the Libyan Criminal Code).<sup>98</sup> However, the National Transitional Council is currently considering adoption of a draft Decree that formally incorporates into Libyan national law international crimes, modes of criminal responsibility and penalties under the Rome Statute. The proposal for this draft Decree was put to the National Transitional Council on 10 April 2012 and the draft text which incorporates Articles 6, 7, 8, 25, 28 and 77 of the Rome Statute<sup>99</sup> is presently awaiting approval from the

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<sup>97</sup> See Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’, Muthaura and others (ICC-01/09-02/11-274), Appeals Chamber, 30 August 2011, para. 39.

<sup>98</sup> Report by Prosecutor General regarding possible charges under Libyan Criminal Code, Annex I

<sup>99</sup> Draft Decree on International Crimes, Annex J. A compilation of the relevant provisions from the Libyan Criminal Code will be filed in the very near future.

NTC's legal committee.<sup>100</sup> It is intended that this draft Decree, when enacted into Libyan law, would allow for the prosecution of Mr Gaddafi and Mr Al-Senussi for both domestic crimes and, in the alternative, for crimes against humanity as principal and indirect perpetrators respectively.

85. Application of the Decree to the present case is consistent with the *nullem crimen sine lege* principle under Article 15(1) of the ICCPR.<sup>101</sup> This provision states in relevant part that no one shall be held guilty of any criminal offence "which did not constitute a criminal offence, under national or international law, at the time when it was committed."<sup>102</sup> Article 15(2) further clarifies that:

*Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.*

In addition to international criminal jurisdictions, national courts have also applied this standard with respect to crimes against humanity.<sup>103</sup>

86. Even without adoption of the draft Decree, however, the investigation would plainly relate to "substantially the same conduct" in terms both of context and gravity. Its specific legal categorization in terms of crimes identical to those in the arrest warrant is not determinative of whether the case is admissible or

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<sup>100</sup> Letter from NTC to Libyan ICC Coordinator regarding draft Decree on international crimes, Annex K.

<sup>101</sup> It is also consistent with Libya's obligations under the other international human rights and international humanitarian law treaties to which it is a State party including: the Geneva Conventions of 1949, the Additional Protocols to the Geneva Conventions of 1977, the Genocide Convention of 1951, the International Covenant on Economic and Social Rights of 1966, the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity of 1968, the Convention on the Elimination of all Forms of Discrimination Against Women of 1979, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, the Convention on the Rights of the Child 1989.

<sup>102</sup> Emphasis added. See also: Decision of the Spanish Supreme Court in re *Judge Batasar Garzon*, Case No 101/2012, 27/02/2012.

<sup>103</sup> See e.g. *Barbie*, Court of Cassation (Criminal Chamber), 26 January 1984, 78 ILR 125 (1998), at pp. 131-132, holding that crimes against humanity are exempted from the strict prohibition of non-retroactivity.

not. In this regard, it is significant that while earlier jurisprudence adopted the general term “conduct”,<sup>104</sup> the *Judgment on Kenya Appeal* referred specifically to “substantially the same conduct”.<sup>105</sup> The test therefore is whether the judicial action covers “substantially” the same conduct, indicating that the test to be applied is one of *substance* rather than *form*. Charging Mr Gaddafi and Mr Al-Senussi with “ordinary crimes” would not “deprive the alleged offence of its essential features”: the accused would be charged with crimes committed pursuant to or in furtherance of State policy and their conduct would be assessed by the Libyan courts in the context of their widespread and systematic commission during the relevant events and periods of 2011.<sup>106</sup>

87. Unlike the ICTY and ICTR Statutes<sup>107</sup>, there is no “ordinary crime” exception with respect to admissibility in the Rome Statute. The complementarity principle does not impose a specific obligation on States to investigate and prosecute under an “international crimes” label.<sup>108</sup> The Statute is concerned with substance, not form. Furthermore, “there is no rule, either in customary or in positive law, which obliges States to prosecute acts which can be characterized as war crimes [or crimes against humanity] solely on the basis of international humanitarian law, completely setting aside any characterizations of their national criminal law”.<sup>109</sup> This flexibility is particularly important in the case of a Security Council referral, where the relevant State will invariably *not* be a party to the Statute. Under such circumstances, a strict requirement of identical legal categorization would mean that even a State without a prior

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<sup>104</sup> Prosecutor v Lubanga, Decision on the Prosecutor’s Application for a Warrant of Arrest (ICC-01/04-01/06-8), 10 February 2006, Pre-Trial Chamber I, paras. 31 & 38.

<sup>105</sup> Judgment on Kenya Appeal, para. 39.

<sup>106</sup> Rastan, R., “Situations and case: defining the parameters”, in Stahn and El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice*, 2011, Cambridge University Press, pp. 452-453; El Zeidy, M., “The Principle of Complementarity in International Criminal Law: Origin, Development and Practice”, 2008, Brill, pp. 282-293.

<sup>107</sup> See ICTY Statute, Article 10(2)(a), and ICTR Statute, Article 9(2)(a).

<sup>108</sup> See e.g. J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions* (2008), at 336.

<sup>109</sup> See e.g. ICTY, Trial Chamber, *Prosecutor v. Hadzihasanovic*, 15 March 2006, IT-01-47-T, para. 260.

obligation to implement crimes within the Court's jurisdiction into its domestic law would be bound to fail in an admissibility challenge. Such a result would be wholly unreasonable and manifestly inconsistent with the object and purpose of the Rome Statute and the intentions of its drafters: to adopt a rigid and formalistic approach with respect to "ordinary crimes" would undermine "complementarity", not be consistent with it.

#### *D. Burden of proof*

88. The Court held in the *Judgment on Kenya Appeal* that:

*a State that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible. To discharge that burden, the State must provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case. It is not sufficient merely to assert that investigations are on-going.<sup>110</sup>*

89. The Court further clarified with respect to the quality of proof that:

*'a statement by a Government that it is actively investigating is not [...] determinative. In such a case the Government must support its statement with tangible proof to demonstrate that it is actually carrying out relevant investigations.' In other words, there must be evidence with probative value.<sup>111</sup>*

90. In the present case, Libya has submitted substantial evidence – all of it having a sufficient degree of specificity and probative value – to demonstrate that "it is actually carrying out relevant investigations" with respect to the same persons and the same conduct. The evidence that Libya has put before the Court is consistent with the requirements of Libyan law concerning the investigation phase of proceedings. Pursuant to article 59 of the Libyan

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<sup>110</sup> Judgment on Kenya Appeal, para. 61.

<sup>111</sup> Id., para. 62.

Criminal Procedure Code, it is impermissible for prosecutors to disclose details of investigation procedures or results to persons outside of the investigation. This rule applies until the completion of the investigation phase and it is for this reason that the Government of Libya has provided summary reports as to its investigations in confidential annexures to this Article 19 application.

91. Once the accusation phase of proceedings has been reached (estimated to be in the next three weeks for Mr Gaddafi but longer for Mr Al-Senussi, as he is not yet in the custody of Libya and his case cannot progress to the accusation phase of proceedings until he is in Libyan custody, these restrictions will not apply. Should it be necessary to do so, the Libyan Government will be at liberty at this later stage of national proceedings to file copies of witness interviews and other types of evidence which will be relied upon during the trial proceedings against Mr Gaddafi and Mr Al-Senussi. In order to protect the safety and security of witnesses, it will remain necessary to file such reports confidentially with the Court. However, even at this nascent stage of disclosure it can be readily seen that the Libyan Government has more than amply demonstrated that it has undertaken concrete investigative steps with respect to both Mr Gaddafi and Mr Al-Senussi and that it has therefore discharged its burden of proof with respect to the inadmissibility of the case.

*E. "Genuineness" of judicial action*

92. Beyond evidence of judicial action, Libya is not required at this stage of this Article 19 proceeding to provide any further proof that its national judicial system is *not* "unwilling or unable genuinely to carry out the investigation or prosecution"<sup>112</sup> within the meaning of Article 17(1)(a). This follows from several considerations:

- i. *First*, the plain wording of Article 19(2) requires a State challenging

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<sup>112</sup> See Appeals Chamber, Judgment on Kenya Appeal, para. 40.

admissibility only to establish that “it is investigating or prosecuting the case”. Neither this provision, nor Rule 51 of the Rules of Procedure and Evidence, contain a further requirement of proof in regard to “genuineness” or a duty by the State to positively prove “willingness” or “ability”.

- ii. *Second*, to require such proof would be inconsistent with Article 17 which is framed – where there is proof of judicial action – in terms of “inadmissibility” as the rule, rather than the exception. The underlying premise of complementarity is to ensure that the Court does “not interfere with national investigations or prosecutions except in the most obvious cases”.<sup>113</sup> According to the wording of Article 17(1)(a), a case is deemed admissible before the ICC if there is inaction by a national judicial system. However, a case is presumed to be inadmissible if it “is being investigated or prosecuted by a State which has jurisdiction over it”, “unless” such judicial activity is not genuine. This is consistent with Appeals Chamber jurisprudence that “Article 17 (1) (a) to (c) of the Statute does indeed favour national jurisdictions” to “the extent that there actually are, or have been, investigations and/or prosecutions at the national level”.<sup>114</sup> It is further supported among the “most highly qualified publicists”<sup>115</sup> who concur that “[i]f investigations or trials are underway, there would seem to be a presumption that the case is inadmissible”.<sup>116</sup>
- iii. *Third*, consistent with the principle of complementarity, Articles 19(2) and 17(1)(a) should be interpreted in light of “a policy of giving the benefit of doubt to States exercising jurisdiction and assuming that they

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<sup>113</sup> See J. Holmes, ‘Complementarity: National Courts Versus The ICC’, in A. Casasse et al., *The Rome Statute of the International Criminal Court: A Commentary, Volume I* (2002), at 675.

<sup>114</sup> Judgment on Kenya Appeal, para. 43.

<sup>115</sup> Cf Statute of the International Court of Justice, Article 38(1)(d).

<sup>116</sup> See e.g. William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 2010, p. 345; see also Sharon A. Williams & William A. Schabas, Article 17, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2<sup>nd</sup> ed.), 2008, p. 616.’

are acting in good faith.”<sup>117</sup> The suspect treatment of judicial action by States would be manifestly contrary to the expressly stated “primacy” of domestic jurisdictions<sup>118</sup> and the object and purpose of the Rome Statute to encourage national proceedings.

- iv. *Fourth*, it is a general principle of law – *onus probandi actori incumbit*<sup>119</sup>– that the burden of proof rests with the party making an allegation; namely, it is for the party alleging that State judicial action is not “genuine” to provide supporting evidence. It would be absurd if the converse were true, since a State would have to anticipate and respond – both *ex hypothesi* and *in abstracto* – to each and every possible allegation of bad faith in relation to its judicial actions.

93. Irrespective of the burden of proof however, there can be little doubt that Libya is *genuinely* investigating allegations of crimes against humanity, consistent with an intention and willingness to bring the concerned persons to justice within the meaning of Article 17(2) of the Statute. The NTC emerged from a liberation struggle against the tyranny of the Muammar Gaddafi regime. Its *raison d’être* is to ensure justice for the victims of State-sponsored human rights abuses and to usher in a new era of democracy and prosperity for the Libyan people. It is plain that there is no motive whatsoever to allow Mr Gaddafi or Mr Al-Senussi to enjoy impunity.

94. The inappropriate and unsubstantiated allegations by the OPCD against Libya in this regard have been prejudicial and contradictory.<sup>120</sup> On the one hand,

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<sup>117</sup>Informal expert paper: The principle of complementarity in practice, ICC-01/04-01/07-1008-AnxA 30-03-2009, para. 55.

<sup>118</sup> See Appeals Chamber, *Katanga*, para. 85.

<sup>119</sup> See e.g. *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, International Court of Justice, Judgment of 20 April 2010, para. 162 (‘in accordance with the well-established principle of *onus probandi incumbit actori*, it is the duty of the party which asserts certain facts to establish the existence of such facts’).

<sup>120</sup> See: OPCD Report and OPCD Addendum Report concerning visit to Libya, 3 and 5 March 2012, ICC-01/11/01/11/69-Red & ICC-01/11-01/11-70-Red2; see also: Libyan Government Response to OPCD

there are allegations that Mr. Gaddafi stands accused of trivial regulatory offences relating to the licensing of camels and fish farms, suggesting that he is being shielded from justice. On the other hand, there are allegations of physical abuse and a rushed trial in violation of international standards of due process. These allegations are irresponsible and patently false. No evidence has been tendered to support them. Amidst the chaos prevailing in the immediate aftermath of the Muammar Gaddafi regime's overthrow, the NTC and local authorities in Zintan have gone to extraordinary lengths to protect Mr. Gaddafi against vigilante violence, given the strong feelings among some sections of the population regarding his alleged role in mass-atrocities. Despite the significant resource constraints of the NTC, the investigation of these crimes has been prioritized, but they have not been rushed, out of concern for ensuring that justice is not only done, but also seen to be done. A delay of a number of months following the removal of the Muammar Gaddafi regime in the context of post-conflict stabilization cannot in any way be considered unreasonable. Even this Court with its considerable resources has required several years to bring accused persons to justice in less complex cases. Libya is meeting the requirements of due process in accordance with international standards, and cannot be held to a requirement of achieving swift justice in circumstances that neither other States nor the ICC itself are required to meet.

95. The Libyan Government has taken all necessary steps to stay the hand of vengeance in favour of a fair trial, and is genuinely committed to bringing the persons concerned to justice. There can be no doubt that its judicial action is an expression of its willingness and good faith within the meaning of Article 17(2) of the Statute.

96. There is also no issue with respect to "inability" under Article 17(3) of the

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Reports on visit to Libya, 25 March 2012, ICC-01/11-01/11-128-Conf with annexes & ICC-01/11-01/11-128-Red.

Statute. Libya is clearly “able to obtain the accused or the necessary evidence and testimony”. Mr. Gaddafi is under custody in Libya and an extradition request to Mauritania for Mr. Al-Senussi is pending. Furthermore, the necessary evidence and testimony is available and readily accessible in Libya, and is being collected pursuant to the investigations being conducted by the Prosecutor General (with respect to Mr Gaddafi) and the Military Prosecutor (in relation to Mr Al-Senussi). It is only a question of providing sufficient time for the investigation to be properly concluded. As set forth above, the evidence and testimony forming the basis of the Court’s arrest warrant is largely based on the product of cooperation with the Libyan Government and its associates. Such cooperation with the Libyan Government has been a significant factor in the ability of the ICC Prosecutor to request arrest warrants with unprecedented expedition in May 2011.<sup>121</sup>

97. There is also no basis to conclude that Libya is “otherwise unable to carry out its proceedings.” As set forth above, Libya has requested the assistance and cooperation of the UN High Commissioner for Human Rights and other organizations with respect to strengthening the capacity of the judiciary and the legal profession in general and to provide specialized training for judges and prosecutors, with a particular focus on litigation related to transitional justice. With the support of the international community, including the Court, the UN, and civil society, and taking into account the expertise presently existing within the Libyan criminal justice system, Libya is able to carry out proceedings in accordance with international standards, and is committed to doing so.

98. The question of “inability” in the Libyan context and the Court’s admissibility decision in this regard will have far-reaching consequences on whether the

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<sup>121</sup> Second Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1970(2011), 2 November 2011, available at : <http://www.icc-cpi.int/NR/rdonlyres/2DD92A0A-AC5E-49D9-A223-5C50654F3C25/283921/UNSCreportLibyaNov2011ENG1.pdf>, paras 38-39.

complementarity principle becomes a realistic and reasonable system, or a utopian concept with no practical application. In the vast majority of situations, States emerging from mass-atrocities will not possess a sophisticated or functional judicial system. Indeed, the purpose of transitional justice is to provide an opportunity for post-conflict judicial capacity-building in the broader context of national reconciliation and democratization. Where a national judicial system is clearly able to carry out investigations and prosecutions, and could strengthen such capacity with international cooperation and assistance, it would be manifestly at variance with the principle of complementarity to deny the State the opportunity to do so.

99. As noted by highly qualified publicists, “there is a danger that the provisions of Article 17 will become a tool for overly harsh assessments of the judicial machinery in developing countries.”<sup>122</sup> It is not the function of the ICC to hold Libya’s national legal system against an exacting and elaborate standard beyond that basically required for a fair trial. As other distinguished commentators (including drafters of the Rome Statute) have noted generally in regard to due process considerations,

*“Arguments have been made that the Court is thus given a general role in monitoring the human rights standards of domestic authorities. The better view is that delay and lack of independence are relevant only in so far as either of them indicates an intention to shield the person concerned from justice. There does not appear to be anything in the Statute to make the Court responsible for the protection of the human rights of the accused in the national enforcement of international criminal law; the principle of complementarity addresses the particular aspects of the proceedings which are referred to in Article 17, whereas more general human rights considerations about the conduct of national prosecutions are more properly addressed by human rights*

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<sup>122</sup> Sharon A. Williams & William A. Schabas, Article 17, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2<sup>nd</sup> ed.), 2008, p. 624.

*treaties and bodies.*"<sup>123</sup>

100. There is no evidence to indicate that Libya is "unable" to deliver justice. Quite the contrary. It has indicated its ability and willingness despite difficult circumstances. Indeed, the Court's jurisprudence indicates that even in post-conflict circumstances that are far more difficult than that prevailing in Libya at present, there can be no rush to conclude that national judicial systems are "unable". In particular, in the *Lubanga Case*, the Pre-Trial Chamber held (in 2006, just two years after an Article 13(a) State referral by the Democratic Republic of Congo) that "the DRC national judicial system has undergone certain changes, particularly in the region of Ituri where a *Tribunal de Grande Instance* has been re-opened in Bunia". It concluded that "the Prosecution's general statement that the DRC national judicial system continues to be unable in the sense of Article 17(1) (a) to (c) and (3), of the Statute does not wholly correspond to the reality any longer."<sup>124</sup>

101. Clearly, Libya is able to carry out national proceedings within the meaning of Article 17(3) of the Statute, under conditions that meet all the requirements for the exercise of complementarity. Denying the Libyan State and its people the opportunity to carry out national proceedings, in accordance with all the procedural safeguards and protections afforded by Libyan law, would likely mean that no State emerging from conflict could ever benefit from the complementarity principle. This would undermine a core objective of the ICC Statute and would be contrary to the intentions of the drafters of the Statute. The Preamble to the Statute recognises that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level", that the ICC "shall be complementary to national criminal jurisdictions", and that "it is the duty of every State to

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<sup>123</sup> Robert Cryer, Hakan Friman, Darryl Williams & Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (2<sup>nd</sup> ed.), 2010, p. 156.

<sup>124</sup> Lubanga Decision, para. 37.

exercise its criminal jurisdiction over those responsible for international crimes” (emphasis added). These guiding principles would be rendered futile and meaningless if Libya is not entitled to exercise its right and duty under the Statute to continue national proceedings concerning alleged crimes against humanity committed on its territory in the period from 15 February 2011 onwards.

102. Finally, it must be recognised that the vast majority of victims of the events occurring on the territory of Libya in the period from 15 February 2011 onwards seek national proceedings in Libya. Respect for the ICC Statute and State sovereignty in this instance is not deference to a mere abstraction. It is respect for the wishes of the Libyan people and their aspirations for a better future. The UN Secretary-General has “emphasized the need for the international community to approach Libya with full respect for the importance of Libyan ownership and for its own capabilities.”<sup>125</sup> In upholding the principle of complementarity under the Rome Statute, this Court should do no less and recognize the “importance of Libyan ownership” by declaring this case inadmissible.

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<sup>125</sup> Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2011/27, 22 November 2011, para. 63.

## V. POSTPONEMENT OF SURRENDER REQUEST

103. The Libyan Government is cognisant of the previous rulings of the Appeals Chamber and the Pre-Trial Chamber that prior to the filing of an Article 19 application there is no admissibility challenge under consideration by the Chamber.<sup>126</sup> With the filing of this Article 19 application on 1 May 2012, an admissibility challenge can now be definitively said to be “before the Chamber” for the purposes of interpretation of Article 95 of the Statute. Accordingly, the Libyan Government respectfully requests postponement and suspension of the Pre-Trial Chamber’s order to surrender Mr Gaddafi<sup>127</sup> pending a final determination of this challenge.

104. The Libyan Government is mindful of the fact that in its 4 April 2012 Decision regarding Libya’s Second Postponement Request, the Pre-Trial Chamber:

- i. observed that in its Request, Libya “makes no substantive arguments as to why Article 95 of the Statute ... applies in the present circumstances”;<sup>128</sup> and
- ii. specifically declined to consider whether Article 95 of the Statute applies to surrender requests.<sup>129</sup>

105. In order to assist the Chamber with its determination on the proper

<sup>126</sup> *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi”, Pre-Trial Chamber I, 4 April 2012, ICC-01/11-01/11-100; “Decision on ‘Government of Libya’s Appeal Against the ‘Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi of 10 April 2012’”, Appeals Chamber, 25 April 2012, ICC-01/11-01/11-126

<sup>127</sup> *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Decision on Libya’s Submissions Regarding the Arrest of Saif Al-Islam Gaddafi”, Pre-Trial Chamber I, 7 March 2012, ICC-01/11-01/11-72.

<sup>128</sup> *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi”, Pre-Trial Chamber I, 4 April 2012, para 10.

<sup>129</sup> *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi”, Pre-Trial Chamber I, 4 April 2012, para 18.

scope of Article 95 of the Statute, the Libyan Government submits that Article 95 is applicable to surrender requests for the following reasons.<sup>130</sup>

*First*, Article 95 specifically states that it applies to requests under Part 9 of the Statute. Part 9, of course, includes Article 89, entitled “Surrender of persons to the court”.

*Second*, application of Article 95 to surrender requests is consistent with other provisions of the Statute. Article 19(8)(c) allows the Prosecutor to take steps to prevent “absconding” where an investigation has been suspended due to an admissibility challenge. If such a suspension did not allow for the invocation of Article 95 to prevent surrender, there would be no reason for the existence of Article 19(8)(c).<sup>131</sup>

*Third*, application of Article 95 to surrender requests is necessary for consistency in the approach to (i) state challenges to admissibility under Article 19; and (ii) *ne bis in idem* challenges brought by a suspect in a national court under Article 89(2).<sup>132</sup>

*Fourth*, this interpretation of Article 95 upholds the principle of complementarity. A more restrictive interpretation, such that surrender requests are not covered by Article 95, would be contrary to this principle.

*Fifth*, the argument that the exception provided by Article 95 applies to requests for surrender is supported by distinguished commentators.<sup>133</sup>

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<sup>130</sup> For further details see: Libyan Government’s Document in Support of Appeal, ICC-01/11-01/11-127, 25 April 25 1012, paras 45-50.

<sup>131</sup> See Dapo Akande, “Is Libya Under an Obligation to Surrender Saif Gaddafi to the ICC? Part I (What Does the Rome Statute Say?)” <http://www.ejiltalk.org/is-libya-under-an-obligation-to-surrender-saif-gaddafi-to-the-icc-part-i-what-does-the-rome-statute-say/>

<sup>132</sup> See Kress & Prost, “Article 95” in Triffterer, “Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article”, 2<sup>nd</sup> edition, p. 1538, at 2.

<sup>133</sup> See, for example, Kress & Prost, “Article 95” in Triffterer, “Commentary on the Rome Statute of the

106. For these reasons, the Libyan Government respectfully requests the Chamber to postpone the order for surrender of Mr Gaddafi pending final resolution of this admissibility challenge.

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International Criminal Court: Observers' Notes, Article by Article", 2<sup>nd</sup> edition, p. 1538; Carsten, S., Libya, the International Criminal Court and Complementarity: A Test for 'Shared Responsibility', *Journal of International Criminal Justice*, 2012, Vol 10, Issue 2 (May); Akande, D., 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC', *Journal of International Criminal Justice*, 2012, Vol 10, Issue 2 (May).

## VI. CONCLUSION

107. For the reasons set forth above, the Libyan Government requests the Chamber to postpone the order for surrender, pursuant to Article 95 of the Statute, pending a determination of the Government's Article 19 admissibility challenge.

108. Furthermore, with respect to the admissibility challenge under Article 19, the Libyan Government requests the Chamber to:

- i. declare the case inadmissible; and
- ii. quash the Surrender Request.

Respectfully submitted:



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Professor Payam Akhavan

Michelle Butler

Counsel on behalf of the Government of Libya

Dated this 1<sup>st</sup> day of May 2012

At London, United Kingdom

## LIST OF ANNEXES

**Annex A (Public)** – Press Statement of H.E. Dr Abdurrahim El-Keib, Prime Minister of the National Transitional Council of Libya, 23 April 2012 (Draft translation only)

**Annex B (Public)** – Letters from Libyan Minister of Foreign Affairs and International Cooperation to (1) Executive Director of the United Nations Office on Drugs and Crime and (2) United Nations High Commissioner of Human Rights (Draft translation only)

**Annex C (Confidential)** – Report by Prosecutor General as to Scope of Investigation of Saif Al-Islam Gaddafi and Libyan Criminal Procedure (Draft translation only)

**Annex D (Confidential)** – Provisional Detention Orders relating to Saif Al-Islam Gaddafi (Draft translation only)

**Annex E (Confidential)** – Report by Prosecutor General regarding OPCD and Abdullah Al-Senussi (Draft translation only)

**Annex F (Confidential)** – Report by Military Prosecutor regarding Abu Selim and Abdullah Al-Senussi (Draft translation only)

**Annex G (Public)** – NTC Constitutional Declaration of 2011

**Annex H (Public)** – Report by Senior Libyan Judge regarding Libyan criminal law and procedure (Draft translation only)

**Annex I (Confidential)** – Report by Prosecutor General regarding possible charges under Libyan Criminal Code (Draft translation only)

**Annex J (Public)** – Draft Decree on International Crimes

**Annex K (Public)** – Letter from NTC to Libyan ICC Coordinator regarding draft Decree on international crimes (Draft translation only)