

**ANNEX D**  
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**UNITED NATIONS  
SUPPORT MISSION IN LIBYA**



**UNITED NATIONS  
HUMAN RIGHTS  
OFFICE OF THE HIGH COMMISSIONER**

**REPORT ON THE TRIAL OF 37 FORMER MEMBERS  
OF THE QADHAFI REGIME (CASE 630/2012)**

**21 February 2017**

**United Nations Support Mission in Libya**

**Office of the United Nations High Commissioner for Human Rights**



# Report on the trial of 37 former members of the Qadhafi regime (Case 630/2012)

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## 1 Introduction

This report is published by the United Nations Support Mission in Libya (UNSMIL) in cooperation with the Office of the United Nations High Commissioner for Human Rights (OHCHR). The report provides an assessment of the trial, held between March 2014 and July 2015, before the Tripoli Court of Assize, of 37 members of the Qadhafi regime accused of committing crimes during the 2011 uprising and armed conflict. The trial is currently before the Criminal Chamber of the Supreme Court as a court of cassation (“Court of Cassation”).

This report assesses the trial before the Court of Assize in light of Libya’s obligations under international human rights law and standards and Libyan legislation, and on the basis primarily of monitoring conducted by the Human Rights, Transitional Justice and Rule of Law Division of UNSMIL and discussions held with Libyan officials and experts.

## 2 Executive Summary

On 28 July 2015, the Tripoli Court of Assize issued its judgment in Case 630/2012 involving 37 leading figures of the regime of Colonel Muammar Qadhafi on trial on charges linked to the attempted suppression of the “17 February Revolution.” The Court sentenced to death by firing squad nine defendants, including Muammar Qadhafi’s son, Saif al-Islam Qadhafi; former intelligence chief, Abdullah al-Senussi; and former Prime Minister, Al-Baghdadi al-Mahmudi. The Court handed down life sentences to eight other defendants, and prison sentences ranging from five to 12 years to 15 others. Four defendants were acquitted of all charges and one was referred to a mental health institution. The Court also declared Saif al-Islam Qadhafi and five others to have been tried *in absentia*, paving the way for their retrial.

The trial, which commenced on 24 March 2014, comprised of 25 sessions, held in a courtroom within the Al-Hadhba compound, which hosts the Al-Hadhba Correction and Rehabilitation Institution (Al-Hadhba prison), where the majority of defendants were detained during the trial. The defendants faced a wide variety of charges related to the killing of civilians, ordering the shooting of protesters, incitement to civil war, incitement to rape, arbitrary deprivation of liberty, distribution of drugs, repression of political rights, misuse of public money, booby-trapping vehicles and preparation of a plan for blowing up prisons, among other offences.

UNSMIL and OHCHR call for the bringing to justice of all perpetrators of serious violations and abuses of human rights. Trials should be conducted fairly in full respect of due process to attain their legitimate objective to deliver justice.

The trial in Case 630/2012 represents so far the most prominent effort by the Libyan judiciary to bring high-profile former regime officials to account for crimes that also amount to gross human rights violations committed during the 2011 uprising and armed conflict. The context of ongoing armed conflict and political polarization presented clear challenges to the conduct of the trial. The trial of Case 630/2016 represented significant progress compared to the trials held under Muammar Qadhafi’s regime as well as an unprecedented opportunity to contribute to the historical record of the 2011 Revolution.

However, this opportunity for justice and truth was undermined by serious due process concerns during the pre-trial phase and the trial proceedings. UNSMIL and OHCHR find that the proceedings in the trial of Case 630/2012 fell short of international standards for fair trial as well as Libyan law in some respects. These concerns also illustrate major flaws in the criminal justice system that need to be addressed through legislative and institutional reform.

The trial took place inside the Al-Hadhba compound. The compound is controlled by an armed group that was opposed to the Qadhafi regime, creating an intimidating environment for defendants and their families, as well as their lawyers. Access to the Court was controlled by prison staff who, on a number of occasions, hindered entry for observers, media, and defendants' relatives.

Many of the defendants were apprehended in the wake of the taking over of Tripoli by fighters opposing the Qadhafi regime ("*thuwwar*") in August 2011 without warrant. They were initially held by a multitude of armed groups for prolonged periods of time, in some cases nearly two years, before being brought before the public prosecution exercising the functions of an investigating judge. As such, their right to prompt judicial review of their detention was violated, even by making allowance for the months of the armed conflict in 2011.

Many of the defendants were held in prolonged incommunicado detention, without access to their families or lawyers, and often in isolation, including at unofficial detention facilities, amidst allegations of torture and other ill-treatment. Of major concern are reports that initial interrogations of suspects were carried out by members of armed groups and other non-judicial actors, without the presence of lawyers, before the defendants were brought before the prosecutor. The Court dismissed arguments linked to the illegality of arrest, detention and interrogation procedures and the prosecutor gave assurances that he conducted new interrogations without any coercion and without relying on any initial interrogation records of armed groups. He also told UNSMIL that defendants who complained about torture did not say they confessed as a result of torture.

While noting the public prosecution's assurances, the circumstances of detention in the hands of armed groups and the specific reports of threats by such groups, for example should the defendants change their statements before the prosecutor, raise questions about how the defendants could have felt safe giving evidence to the prosecution, and indeed later the Court. However, some defendants did complain in court about torture and other ill-treatment in detention. Such allegations are all the more concerning, given the known pattern of torture and other human rights abuses by armed groups since 2011<sup>1</sup> in a climate of total impunity for the perpetrators, and the fact that many of the defendants remained held under the effective control of armed groups even during the trial.

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<sup>1</sup> See for example, UNSMIL and OHCHR, *Torture and Deaths in Detention in Libya*, October 2013. The findings described in the report were based on regular visits to places of detention, testimonies of former detainees and their relatives, the examination of forensic and medical reports, as well as photographic and other visual evidence. The report is available at [www.ohchr.org/Documents/Countries/LY/TortureDeathsDetentionLibya.pdf](http://www.ohchr.org/Documents/Countries/LY/TortureDeathsDetentionLibya.pdf)

The prosecution and the Court should have investigated the allegations of torture brought to their attention by defendants and their lawyers and whether they had a direct bearing on the proceedings in Case 630/2012. However, no allegations were investigated. Instead the Court dismissed them and placed the burden of proof on the defence. The court subsequently found that the burden was not met, in contravention of international standards which stipulate that the State has the burden of proof.

The information available and reviewed by UNSMIL suggests that the defendants were not informed of their right not to incriminate themselves or confess guilt, as required by international law and standards, throughout the interrogation stage.

Most defendants were not promptly informed of the exact reasons for their arrest and the charges against them. Even once formally charged, concerns remain that not all defendants could fully comprehend the exact charges against them, their legal characterization, and the factual basis of the accusations. The vagueness of some of the charges, the complexity of the case, and the lack of sufficient specificity in defining the individual roles played by each defendant in the common criminal plan described by the prosecutor contributed to the difficulties. Delays in obtaining the full Accusation File, and the apparent lack of structure in the way some of the hearings were conducted by the Court, added to the difficulties of ensuring a complete defence.

Despite concerns about the physical access to the court room, the initiative of broadcasting the trial sessions via Libyan television channels is to be commended. However, the prosecution's case and inculpatory evidence remained largely unknown to the public, as it was only presented orally by the prosecutor in about 45 minutes in one hearing. The failure to present the prosecution evidence in court undermined the victims' and public's right to truth, in addition to the defendants' ability to challenge evidence against them in court.

The failure of the Prosecution to present the evidence and therefore the absence of any debate thereof in court constitutes also a crucial missed opportunity to provide the victims and the public with the opportunity to confront and reflect on the crimes of the former regime. The full judicial record of the trial including the evidentiary basis on which the Court made its decisions would have contributed significantly to shedding light on the history of the 2011 revolution, allowing the Libyan and international public to observe and learn directly from the trial hearings what happened during the conflict and the role of those on trial. The judicial record of the trial would thus have constituted an important part of Libya's historical record for future generations.

The right to counsel appears to have been violated during the investigation phase, including during interrogations carried out by armed groups, as many of the defendants were not represented by defence lawyers during interrogations. A number of defendants were also not represented during hearings before the Accusation Chamber. The hearing before the Chamber appears to have been the first time many defendants had access to a lawyer. Some defendants remained not represented for several hearings of the trial itself. Several high profile defendants were not able to engage and retain the same lawyers throughout the trial, possibly as a result of threats and intimidation faced by lawyers. The Court made efforts to appoint lawyers to represent defendants and acceded to requests for extra time to prepare the defence, as requested by some of the lawyers.

During the trial, the quality of the defence may have been affected by the difficulties experienced by some defendants in hiring and retaining lawyers of their own choosing. The security and political climate in Libya may have limited the pool of experienced lawyers willing to represent these defendants, particularly high-profile senior figures of the former regime, and this might have impacted on the defendant's right to complete and meaningful defence. There are also concerns about possible conflict of interest for lawyers who represented multiple defendants.

Several key elements of the right to have adequate time and facilities for the preparation of the defence were not fully upheld. Despite assurances by the prosecutor and interventions by the Court, lawyers appear to have experienced difficulties in accessing in a timely matter the full documentation of the trial. The right to communicate in confidence with one's lawyer appears to have been repeatedly violated, as defendants and lawyers complained about guards being present during their meetings or obstacles being placed in arranging for such meetings in the place of detention. In an effort to facilitate access by lawyers, the prosecutor organized transport for lawyers from the Tripoli Court Complex to the Al-Hadhba compound.

The principle of equality of arms and the right to complete defence appear to have been compromised by the fact that no prosecution witnesses were called or examined in court, not even those whose credibility was questioned by the defence. This meant that the defendants and their defence lawyers were not able to cross examine witnesses during the trial despite several requests to the prosecution and the Court to question those testifying against them. The defendants and their counsel were therefore limited in their ability to challenge the testimonies provided. Several lawyers and defendants raised points related to these testimonies, questioning the credibility of witnesses, or the conditions under which witness statements were taken, particularly for testimonies of individuals deprived of their liberty. However, not all lawyers who questioned the credibility of the prosecution's witnesses in court explicitly asked to examine a prosecution witness. Given this reality, the Court should have been more proactive in scrutinizing the prosecution's case, including by calling in prosecution witnesses, with a focus on witnesses whose credibility was questioned by the defence, or when allegations of torture or coercion were made.

The right of defence was further compromised by the apparently arbitrary restriction to two defence witnesses per defendant decided by the Court. The restriction on the number of witnesses clearly impeded the work of the defence lawyers. Further obstacles included the lack of witness protection measures, which possibly affected the willingness of defence witnesses to come forward. Some lawyers said that witnesses were reluctant to appear in court due to fears for their safety.

Despite attempts to facilitate attendance at the trial for some defendants through video-link, the right to be tried in one's presence was undermined with at least nine defendants, held in Misrata and Mitiga, missing hearings of the trial, and Saif al-Islam Qadhafi, held in Zintan, being connected by video-link for only four out of 25 trial sessions.

Case 630/2012 is at the time of publication before the Court of Cassation for review. The Court's review is limited to the procedures followed by the Court of Assize and its application and



interpretation of Libyan law, and does not include a review of facts and evidence. As such the review does not constitute a full appeal as required by international standards.

With the objective of strengthening the rule of law, promoting respect for human rights and ensuing accountability, UNSMIL provided recommendations to the Libyan authorities before and during the trial. UNSMIL and OHCHR now urge that the review by the Court of Cassation take into full account the serious violations of due process identified in this report and provide effective remedies, pending the adoption of the legislative amendments needed to bring the Libyan system in full compliance with international human rights law and standards, in particular in relation to the right of appeal. The full set of recommendations addressed to the legislative and executive branches, as well as to the Prosecutor General and other members of the judicial branch, are set out in section 12 of this report.

### 3 Mandate and methodology

Since its establishment in 2011, and in line with its human rights, transitional justice and rule of law mandate, UNSMIL has advised and provided other support to the Libyan authorities on these matters, including by monitoring trials and visiting detention centres. UNSMIL monitored Case 630/2012 from the pre-trial phase until the first instance verdict was delivered in July 2015. UNSMIL staff attended in person the first six hearings. During the sixth hearing, on 22 June 2014, UNSMIL staff were present simultaneously at the three trial locations: the main courtroom at the Al-Hadhba compound; the courtroom in Misrata where eight defendants were brought in and connected to the main courtroom via video-link; and the makeshift courtroom in Zintan used to connect Saif al-Islam Qadhafi. After fighting broke out in Tripoli in July 2014 and UNSMIL international staff were evacuated, UNSMIL staff observed the remainder of trial proceedings that were broadcast by the media.

In the course of its regular detention monitoring activities, UNSMIL staff visited detention facilities in 2013 and 2014 in Tripoli, Misrata and Zintan, interviewing most of the defendants in Case 630/2012. While UNSMIL staff requested and were granted permission to meet detainees with no one else present in the room, they progressed on the assumption that their encounters were monitored and possibly filmed. Detainees interviewed were also likely to assume so. In the Al-Hadhba compound, UNSMIL staff noticed surveillance cameras and attempts by guards to overhear conversations. On one occasion in Zintan, where Saif al-Islam Qadhafi was held, UNSMIL staff were told before interviewing him that the interview would be listened to or recorded. In all cases UNSMIL staff sought the informed consent of the detainees before proceeding with the interviews. None refused, although most defendants UNSMIL staff met in Al-Hadhba and in Al-Jawiya prisons appeared uncomfortable during interviews and reluctant to discuss sensitive issues such as their treatment. UNSMIL also interviewed a number of defence lawyers and relatives, many of whom also expressed anxiety about their safety.

UNSMIL staff discussed issues linked to the trial with representatives of the Ministry of Justice, the Prosecutor General, the Bar Association, the Judicial Police (Libya's prison service) and the National Council for Civil Liberties and Human Rights. Throughout the proceedings and afterwards, UNSMIL kept in close contact with and welcomes the cooperation of Counsellor Al-Siddiq al-Sur, Director of the Investigations Office at the Office of the Prosecutor General, and

main prosecutor of the case. He provided UNSMIL with the main parts of the case dossier, minutes of most of the court hearings and additional documentation, which UNSMIL reviewed together with the written verdict in preparation for this report. UNSMIL did not meet or seek to meet with the judges out of concern that such discussions may be perceived as undue interference in the proceedings.

In May 2014, UNSMIL sent preliminary observations to Salah Marghani, then Minister of Justice, on developments in the case. In January 2015, having monitored more than 10 hearings of the trial and interviewed numerous stakeholders, UNSMIL shared further observations on the trial in a memorandum delivered to Counsellor Ibrahim Besheia, acting Prosecutor General; Ali Hmeida, President of the Supreme Judicial Council; and Professor Ahmed Jehani, Libya's representative to the International Criminal Court (ICC). The memorandum highlighted concerns about breaches of fair trial standards and presented a number of recommendations to address these concerns. UNSMIL did not receive any written reply, and its recommendations do not seem to have been implemented. UNSMIL did however discuss the trial with prosecutor Al-Siddiq al-Sur in several meetings in Tripoli and Tunis between November 2014 and November 2016, and regularly exchanged correspondence with him about aspects of the case. An advanced draft of this report was shared with him and with Libya's representative to the ICC on 20 September 2016 requesting comments. Prosecutor Al-Siddiq al-Sur provided written comments and organized a meeting with UNSMIL in Tripoli on 2 November 2016 with a team of prosecutors. The report was also reviewed by a number of Libyan and international legal experts

Since its establishment in 2011, UNSMIL has advised the Libyan authorities on the development of an overall prosecutorial strategy; on undertaking investigations into the conduct of former regime officials; on the treatment of persons deprived of their liberty; on the judicial screening of detainees; and on legal reform, including the penal code and code of criminal procedure (CCP). As part of this work UNSMIL organized missions for international consultants to visit Libya. UNSMIL also advised the authorities on conducting a threat assessment and adopting appropriate security plans for the protection of the judiciary and courts. The response from the judicial authorities to offers of technical assistance from UNSMIL was limited to participating in a number of workshops for prosecutors – although to the knowledge of UNSMIL most prosecutors assigned to the investigation of Case 630/2012 did not participate in these workshops.

## 4 Background

### 4.1 The 2011 uprising and armed conflict

On 17 February 2011 major demonstrations took place in Al-Baida, Benghazi and Al-Zawiya against the repressive regime of Muammar Qadhafi, with thousands of protestors taking to the streets. Protests quickly spread across the country, including Tripoli and Misrata, and were met with excessive and at times lethal force.

On 22 February 2011, Qadhafi announced in a live broadcast speech that he would lead millions to purge Libya *“house by house, room by room, alley by alley, inch by inch.”* He questioned the legitimacy of the protesters and their demands, calling them *“rats”* who should be crushed.

Despite the crackdown on protests, by late February the opposition to Qadhafi increased. By then most of eastern Libya and other parts of the country had fallen under the control of the opposition. The protests quickly escalated into armed conflict as Qadhafi's forces launched offensives against the opposition and were met with armed resistance. A National Transitional Council (NTC) was formed in Benghazi representing the opposition.

The United Nations International Commission of Inquiry on Libya, established pursuant to Human Rights Council resolution S-15/1 of 25 February 2011, found that the Qadhafi regime's forces committed "international crimes, specifically crimes against humanity and war crimes." It found specifically that there had been "acts of murder, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, persecution, enforced disappearance committed by Government forces within the context of a widespread or systematic attack against a civilian population, with knowledge of the attack".<sup>2</sup> The Commission also found that there had been "many serious violations of international humanitarian law by Government forces which amount to war crimes" including "violence to life and person, outrages upon personal dignity in particular humiliating and degrading treatment...."<sup>3</sup>

The Commission concluded that: "The consistency of patterns of violations creates an inference that they were carried out as a result of policy decisions by Colonel Qadhafi and senior leadership. Further investigation is required in definitively establishing who is responsible for the crimes committed. The Commission has received some information concerning individual perpetrators of crimes, but more investigation is required on this topic."<sup>4</sup>

The Commission also examined the conduct of the opposition and indicated that "[t]he Commission received fewer reports of facts which would amount to the commission of international crimes by forces connected with the opposition than connected to the Government forces. It has established that some acts of torture and cruel treatment and some outrages upon personal dignity in particular humiliating and degrading treatment have been committed by opposition armed forces, in particular against persons in detention and migrant workers. Those which occurred during the period of armed conflict constitute war crimes under the Rome Statute."<sup>5</sup>

By the end of August 2011, armed groups opposing Muammar Qadhafi controlled most of the country, including Tripoli, and many regime officials had fled abroad or gone into hiding. Muammar Qadhafi was captured in Sirte on 20 October 2011 and killed. His son Mu'tasim Qadhafi was also killed after capture in a separate incident. No investigations into their deaths are known to have been carried out. On 23 October 2011, the NTC declared that Libya had been liberated.

Following their take-over of Tripoli and the NTC declaration of liberation, opposition forces

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<sup>2</sup> UN, A/HRC/17/44, 28 Jan. 2014, Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, paras. 246 and 247.

<sup>3</sup> Para. 248

<sup>4</sup> Para. 250

<sup>5</sup> Para. 251

captured thousands of actual or suspected regime supporters and former officials, including many of those accused in Case 630/2012. Saif al-Islam Qadhafi, son of Muammar Qadhafi, was captured near Sabha on 19 November 2011 by the Zintan-based Abu Bakr al-Siddiq armed group. Abdullah al-Senussi, Director of Military Intelligence under Qadhafi, was extradited to Libya from Mauritania on 5 September 2012. Al-Baghdadi al-Mahmudi, who served as Prime Minister under Qadhafi between 2006 and 2011, was handed over to Libya by the Tunisian authorities on 24 June 2012, despite protests by Tunisian and international human rights groups that he might be at risk of torture and unfair trial.<sup>6</sup>

After the fall of the Qadhafi regime, successive Libyan authorities expressed their determination to ensure that former officials and supporters of the Qadhafi regime would be held to account in fair trials, including for the violations committed in 2011. Since 2011, domestic criminal proceedings have been brought against several officials of the former regime, and Case 630/2012 is the most high profile and complex one, involving the largest number of senior officials.

However, thousands remain detained since 2011. The vast majority are yet to be referred to trial, and have had no opportunity to challenge the legality of their detention.

## 4.2 Security, political and judicial developments

During the 2011 conflict and in its aftermath, a plethora of armed groups were formed around frequently overlapping political, ideological, tribal, factional and regional lines. Despite successive governments' declared efforts to integrate fighters into government security structures or disarm and reintegrate them into civilian life, armed groups proliferated, grew in membership, accumulated weapons, and consolidated effective control over large swaths of territory, strategic installations and State institutions. Armed groups were paid salaries by successive governments and some were officially granted law enforcement and custodial functions under the Ministries of Justice, Defence or Interior. However, even in these cases, they have maintained their own command and control structures, and have operated largely independently of the State institutions they were nominally affiliated to. These armed groups resisted efforts by the Ministry of Justice and the Office of the Prosecutor General, which intensified between March and December 2012, to re-establish State control over the administration of justice.

In July 2014, following months of rising political tensions and deepening polarization, armed conflict broke out in Tripoli when a coalition of armed groups known as "Libya Dawn" fought and eventually evicted Zintan-based armed groups from the capital. The outgoing parliament, the General National Congress (GNC), reconvened and announced the establishment of a parallel "Government of National Salvation". It took control of Tripoli-based ministries and other institutions, while the "Interim Government" of incumbent Prime Minister Abdullah al-Thinni relocated to Al-Baida, eastern Libya. This government was subsequently sworn in by the House of Representatives, elected in June 2014, and remained the internationally-recognized Government until December 2015.

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<sup>6</sup> See for instance: <https://www.amnesty.org/en/press-releases/2012/06/tunisia-extradition-former-libyan-prime-minister-violates-human-rights-2012/>

Since 2014, UNSMIL facilitated a dialogue between rival factions and other Libyan stakeholders to reach a political solution to the conflict. Its efforts culminated with the signing of the Libyan Political Agreement (LPA) on 17 December 2015, and the establishment of a Presidency Council, which proceeded with forming a Government of National Accord which as of January 2017 had not received the endorsement by the House of Representatives. Since the signing of the LPA, the institutions it established have been the only ones to be internationally recognized. Efforts are continuing to ensure the implementation of the Agreement amidst continuing political divisions and military confrontations in the country.

The Libyan judicial institutions have so far remained united despite the political fragmentation of the country. Although since 2014 Libya has had rival Ministers of Justice claiming legitimacy, the country still has a single Prosecutor General, Supreme Judicial Council and Supreme Court. These institutions are all based in Tripoli.

The deteriorating security environment has however heavily impacted on the judiciary, undermining the effective administration of justice and leading to a generalized breakdown of the rule of law. Attacks on the judiciary increased since early 2013. Prosecutors, judges, Judicial Police officers and other employees of the justice sector have frequently been subjected to attacks in the form of court bombings, assassinations, other physical assaults, abductions and threats directed against them and/or their relatives. A number of courts have ceased functioning as a result of attacks, including in Derna, Sirte and Benghazi. Between January 2013 and March 2014, armed groups repeatedly attacked and occupied the offices of the Ministry of Justice, and physically attacked Ministry officials. UNSMIL documented cases where prosecutors were abducted or threatened after issuing release orders for suspects against whom they had decided there was no sufficient evidence to proceed. Some prosecutors told UNSMIL staff that they refrained from issuing release orders against certain detainees in fear of their own as well as the detainee's safety following release. UNSMIL had documented cases of detainees and prisoners being re-arrested or killed after having been released on prosecution or court orders. For instance, in June 2016, following the issuing of release orders by the Office of the General Prosecutor for 19 prisoners from the al-Ruwaimi prison in Tripoli, the bodies of 12 of the prisoners, all former Qadhafi regime members, were found in different locations in Tripoli bearing gunshot wounds.

UNSMIL has also documented widespread torture, including to death, and other ill-treatment committed by members of armed groups across Libya.<sup>7</sup> Armed groups initially targeted those suspected of loyalty to the Qadhafi regime but since the deepening of the political and security crisis in mid-2014, categories of victims have expanded to include individuals suspected of terrorism-related activities or simply those perceived as rivals by their captors. The purpose behind torture appears to be to extract information or confessions, as well as to punish detainees.

Despite the overwhelming evidence about the widespread use of torture by armed groups across Libya since 2011, successive Libyan governments have not actively tried to address it, with the notable exception of former Prime Minister Ali Zeidan and then Minister of Justice Salah

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<sup>7</sup> See for instance UNSMIL AND OHCHR, *Torture and Deaths in Detention in Libya*, October 2013, available at: <http://www.ohchr.org/Documents/Countries/LY/TortureDeathsDetentionLibya.pdf>.

Marghani, who publicly denounced torture and welcomed the efforts of UNSMIL on this and other abuses. Investigations have been opened into cases of allegations of torture, particularly when the practice led to death, but according to the best knowledge of UNSMIL and OHCHR, no member of any armed group had been referred to trial on charges of torture or other human rights abuses. This climate of impunity prevails to this day.

### 4.3 The international obligations of Libya

Libya is party to major international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). It is also party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, the four 1949 Geneva Conventions and their Additional Protocols I and II, and a number of international instruments regulating the use of weapons.

As party to these conventions, Libya is bound to respect, protect and fulfil the human rights of all persons within its jurisdiction. This includes the right to afford an effective remedy to those whose rights have been violated as well as the responsibility of the State to investigate and bring to justice perpetrators of specific violations. Libya is also bound by the rules of international human rights and humanitarian law which form part of customary international law.

ICCPR includes several provisions relating to pre-trial detention, treatment of detainees, and fair trial safeguards. Article 9 sets out the prohibition of arbitrary detention and the right to access a judicial officer to rule on the lawfulness of the detention. Article 14 specifies that the right to a fair trial includes, *inter alia*, the right to equality before the courts; the right to a fair and public hearing by a competent, independent and impartial tribunal; the right to be presumed innocent; the right to be informed promptly and in detail of the charges brought against them; the right to have adequate time and facilities for the preparation of the defence; the right to be tried in one's presence, and to defend oneself in person or through legal assistance of one's own choosing; the right to examine, or have examined, witnesses; the right not to be compelled to testify against oneself or to confess guilt; and the right of anyone convicted of a crime to have their conviction and sentence reviewed by a higher tribunal according to law.<sup>8</sup>

Article 7 of ICCPR stipulates that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. CAT prohibits torture and other ill-treatment under all circumstances. Article 15 of CAT stipulates that State parties: “shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made”.

Libya is also party to the African Charter on Human and Peoples' Rights and the Arab Charter on Human Rights. The African Charter prohibits arbitrary detention in Article 6 and enshrines a

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<sup>8</sup> For more information see UN CCPR/C/GC/32 General Comment no.32, Article 14: Right to equality before courts and tribunals and to a fair trial

number of fair trial guarantees in Article 7, including the rights to be presumed innocent; to defence, including the right to be defended by counsel of one's choice and to be tried promptly by an independent and impartial tribunal. The Arab Charter in Article 16 enshrines similar minimum safeguards for anyone charged with a criminal offence, including those relating to defence and to appeal to a higher tribunal.

International humanitarian law, which applies in times of conflict concurrently to international human rights law, also contains some due process guarantees. Common Article 3 to the four Geneva Conventions, which is applicable to non-international armed conflicts, prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." The same article also prohibits "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture," as well as "outrages upon personal dignity, in particular humiliating and degrading treatment". The Additional Protocol to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) enshrines in its Article 6 a number of fair trial guarantees, including the right of the defendant to be promptly informed of the charges, the rights of defence during the pre-trial phase and the trial, the presumption of innocence and the right not to incriminate oneself or confess guilt.

The Libyan Supreme Court rendered a decision on 23 December 2013 in Constitutional Challenge Case 01 of the Judicial Year 57, underlining that "it is established that international conventions adhered to by the Libyan State are directly applicable once ratified by the State's legislative power. They have supremacy over internal legislation. In case of contradiction between the provisions of the international conventions and those of internal legislation, the provisions of the international conventions have priority of application. [...]" This means that the provisions of the international instruments adhered to by Libya are directly applicable, even in the absence of a national law introducing them, and have supremacy over Libyan national legislation.

#### 4.4 The International Criminal Court

The United Nations Security Council referred the situation in Libya to the ICC on 26 February 2011.<sup>9</sup> On 27 June 2011, Pre-Trial Chamber I of the Court issued arrest warrants against Muammar Qadhafi, Saif al-Islam Qadhafi and Abdullah al-Senussi for crimes against humanity, including persecution and murder, allegedly committed by them from 15 February 2011 until at least 28 February 2011, in contravention of article 7(1)(a) of the Rome Statute. According to the Office of the Prosecutor of the ICC, these three men were among those who bear the greatest responsibility for the attacks on civilians in streets and houses of Benghazi, Tripoli and other areas in 2011. These constituted the first criminal proceedings against members of the Qadhafi regime. The case against Muammar Qadhafi was dropped following his death.

In 2012 and 2013, Libyan authorities filed admissibility challenges before the ICC, seeking to hold the trials of Saif al-Islam Qadhafi and Abdullah al-Senussi in Libya. The Government of

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<sup>9</sup> Security Council resolution 1970 (2011), para. 4.

Libya argued that the State had opened investigations into both cases and should be allowed to proceed with domestic trials. In the case of Saif al-Islam Qadhafi, who was arrested and detained in November 2011 by the armed group Abu Bakr al-Siddiq based in Zintan, the Pre-Trial Chamber rejected the admissibility challenge in May 2013, noting the Libyan authorities inability to carry out domestic proceedings in his case and highlighting, *inter alia*, the Government's inability to secure Qadhafi's transfer into state custody and the significant impediments to securing his legal representation given the security situation in the country.<sup>10</sup> The ICC Appeals Chamber confirmed the decision of the Pre-Trial Chamber in May 2014 and highlighted that the Government of Libya had not met the "same case requirement" in that they had failed to establish that the Libyan and ICC investigations were covering the same conduct.<sup>11</sup>

The Libyan Government has been unable to secure the arrest and surrender of Qadhafi, who remains in Zintan and is considered to be outside the control of the internationally-recognized Libyan authorities. In December 2014, Pre-Trial Chamber I issued a finding of non-compliance by the Government of Libya with respect to requests for the surrender of Saif al-Islam Qadhafi, and referred the matter to the Security Council.<sup>12</sup> The ICC Prosecutor has since continued to call for the surrender of Qadhafi to the ICC. In August 2015, in response to a request from the Prosecutor for his surrender, Libya submitted to the Court that "Mr. Gaddafi continues to be in custody in Zintan and is presently 'unavailable' to the Libyan State."<sup>13</sup> In the same filing, the Prosecutor also requested that the Libyan authorities refrain from executing Saif Al-Islam Gadhafi should he come into their custody. Libya confirmed that as he was convicted by *in absentia*, the death penalty cannot be imposed and Gaddafi would be entitled to a full trial *de novo*.

As part of its efforts to secure Saif al-Islam Qadhafi's surrender, in April 2016, the Office of the Prosecutor filed a request with Pre-Trial Chamber I for an order directing the Registry to transmit the request for arrest and surrender of Qadhafi directly to Mr. Al-'Ajmi al-'Atiri, the commander of the armed group detaining Qadhafi. The Pre-Trial Chamber rejected the Prosecutor's request in November 2016 noting that "the Court cannot but deal with the *de jure* government and cannot direct its cooperation requests to any other non-State entity claiming to represent the State".<sup>14</sup> Pre-Trial Chamber I further noted that the Chamber was unable to determine with certainty that an alternative channel of communication with the Court had been designated by the Libyan authorities. The Prosecutor continues to seek the surrender of Qadhafi to the Libyan authorities in order to proceed with his case.

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<sup>10</sup> Decision on the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-344-Red, 31 May 2013.

<sup>11</sup> Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al Islam Gaddafi', ICC-01/11-01/11-547-Red, 21 May 2014.

<sup>12</sup> Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council ICC-01/11-01/11-577.

<sup>13</sup> Government of Libya Response to Prosecution's 'Request for an Order to Libya to Refrain from Executing Saif Al-Islam Gaddafi, Immediately Surrender Him to the Court, and Report His Death Sentence to the United Nations Security Council' ICC-01/11-01/11-612, para. 3.

<sup>14</sup> Decision on the Prosecutor's "Request for an order directing the Registrar to transmit the request for arrest and surrender to Mr al-'Ajami AL-'ATIRI, Commander of the Abu-Bakr Al Siddiq Battalion in Zintan, Libya", ICC-01/11-01-11-634-Red, 21 Nov. 2016, para. 15.



With respect to the Al-Senussi case, Pre-Trial Chamber I found that the Libyan domestic investigations against Al-Senussi included the same conduct as that being investigated by the ICC, and concluded that Libya was willing and able to bring him to trial. The Pre-Trial Chamber considered that the difference with the Saif al-Islam Qadhafi case was that the authorities already had Al-Senussi in custody and had gathered considerably more evidence against him.<sup>15</sup> In July 2014, the Appeals Chamber confirmed the Pre-Trial Chamber's decision that Al-Senussi's case was inadmissible before the ICC as he was subject to ongoing domestic proceedings and that Libya was willing and able to genuinely carry out such an investigation, in part because he was considered to be in State custody.<sup>16</sup>

Under article 19(10) of the Rome Statute, “[i]f the Court has decided that a case is inadmissible under article 17, the ICC Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17”. The Prosecutor, therefore, continues to monitor developments to determine if new facts have arisen which would negate the basis on which Pre-Trial Chamber I found the case against Al-Senussi inadmissible before the ICC. Recalling jurisprudence from the ICC Appeals Chamber, the Prosecutor has noted that due process violations in a domestic trial must reach a high threshold in order for a case to be deemed admissible before the ICC. The Office of the Prosecutor continues to collect information and review its assessment as and when new information becomes known.<sup>17</sup>

While the unstable security situation in Libya precludes investigations within Libyan territory at this time, the Office of the Prosecutor continues to look for solutions that will permit the safe conduct of investigative missions. At the same time, the Office continues to conduct investigations and collect important information on crimes committed in Libya since 2011. The Prosecutor has made the Libya situation a priority for 2017 and has noted that the Office intends to expand significantly its investigations into crimes committed from 2011 that fall under the Court's jurisdiction and intends to apply for new warrants of arrest under seal as soon as practicable.<sup>18</sup>

## 4.5 The criminal justice system in Libya

The Constitutional Declaration issued by the NTC on 3 August 2011 states that “the State shall protect human rights and the basic rights of persons” and “shall seek to accede to international and regional declarations and conventions that protect such rights and freedoms” (Article 7). The Constitutional Declaration includes a chapter on Judicial Safeguards including a number of due process guarantees: “there is no crime and no punishment except on the basis of the law; the accused is innocent until proven guilty in a fair trial that guarantees him the necessary safeguards for defending himself; and each citizen shall have the right to resort to the judiciary in accordance with the law” (Article 31). Further, it states that “the judicial authority is independent, and is

<sup>15</sup> Decision on the admissibility of the case against Abdullah Al-Senussi, ICC-01/11-01/11-466-Red, 11 Oct. 2013.

<sup>16</sup> Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled ‘Decision on the admissibility of the case against Abdullah Al-Senussi’, ICC-01/11-01/11-565, 24 July 2014.

<sup>17</sup> Twelfth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011), para. 9.

<sup>18</sup> Ibid, paras. 13 and 19

exercised by courts of different categories and levels; their sentences are issued in accordance with the law; the judges are independent and no power is above their decisions except the law and conscience; the establishment of exceptional courts (*mahakem istiithna'iyah*) is prohibited” (Article 32).

The Libyan Penal Code and the CCP were adopted 1953 under the monarchy. The Penal Code was the subject of several amendments under the Qadhafi regime mainly aimed at increasing its repressive arsenal. Additional laws were adopted criminalizing further conduct, often in violations of the rights to freedom of expression and association. Thus, the Second Book of the Penal Code (Articles 165 to 368), “Felonies and Misdemeanors against the Public Interest”, includes the death penalty and life imprisonment for a wide range of crimes against the State. The criminal acts are vaguely described, a major source of concern and criticism by human rights activists and organizations, including United Nations mechanisms, before the 17 February Revolution.<sup>19</sup> During the final years of the Qadhafi regime, several committees were formed in order to review the Penal Code and the CCP. The declared objective of the legislative reform was to ensure the respect of Libya’s international obligations under human rights instruments, but this never materialized.

After the 17 February Revolution, the authorities exerted efforts to reform the legal legacy of the former regime. This resulted in the abolition of the Law on Criminalizing Party Affiliation and the adoption of Law No. 11 of 2013 on the Amendment of Some Articles in the Penal Code and Code of Criminal Procedure, which abolished the prosecution of civilians before military courts. However, the legislative reform process was limited in scope. Most laws adopted to serve the former regime remained in force although the Supreme Court declared the unconstitutionality of some of these laws in light of the Constitutional Declaration. Thus, the Supreme Court declared the unconstitutionality of Article 2 of Law No. 7 of 2006, which abolished the People’s Court but transferred some of its powers to relevant courts and the public prosecution, including allowing pre-trial detention without access to a lawyer for up to 90 days. The Supreme Court, in its ruling, underlined that the article violated equality before the law by depriving some defendants of the guarantees of fair trial, which are granted to others.

The Libyan CCP is influenced by the civil law tradition, based on the inquisitorial system. The CCP bestows on the public prosecution the mandate to investigate crimes (Article 172). The CCP allows the appointment of a judge to conduct the investigation (investigation judge), if requested by the public prosecution or the defendant in felony cases. This exception to the ordinary procedure aims at ensuring the neutrality of the investigation (Article 51). However, Law No. 3 of 2013 on Amending the Code of Criminal Procedure excluded the possibility of requesting the appointment of an investigating judge for crimes against the State and related crimes, stipulating that the “public prosecution shall initiate the investigation of the crimes stipulated in Section One of the Second Book of the Penal Code, as well as in related crimes. It shall have the full authority delegated to the public prosecution and investigation judge when investigating the mentioned crimes and when referring them to court” (Article 1).

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<sup>19</sup> CCPR/C/LBY/CO/4. See final observations of the Human Rights Committee on Libya’s 4<sup>th</sup> Universal Periodic Review under ICCPR and A/HRC/WG.6/9/LBY/2 prepared with information included in reports in relation to the 1<sup>st</sup> Universal Periodic Review on Libya.

This law, adopted after the 17 February Revolution, rendered the public prosecution the sole authority for investigating crimes against the State and related crimes, with which many of the defendants in Case 630/2012 were charged. In addition, while the law abolished some powers that were previously granted to the public prosecution, including the power to refer a case directly to the Court of Assize without prior review by the Accusation Chamber, it granted the public prosecution powers that were given to the investigation judge, such as the power to order the search of non-accused persons and their houses as well as the seizure of letters and other correspondence. The law also expanded the procedural powers granted to the public prosecution regarding interrogation and pre-trial detention (Article 1). The changes introduced by this law therefore deprived defendants of guarantees that were previously available, raising concerns in relation to the respect of the principle of equality before the law as well as fair trial standards enshrined in the Constitutional Declaration of 2011 and in international instruments.

According to the CCP, the public prosecution, once completed its investigation, refers the case file to the Accusation Chamber (*ghurfat al-ittiham*) requesting the referral to court (Article 136). The Accusation Chamber in each first instance court is composed of the president of the court or another judge assigned by the general assembly of the court (Article 145). It examines the case file in private sessions (Article 147) and may conduct a supplementary investigation (Article 148). It then refers the case for trial before the Court of Assize if it finds that the facts constitute a felony and there is sufficient evidence for a conviction to be likely. Otherwise the Chamber would rule that there are no grounds for trial and order the release of the defendants unless they are to be held for other reasons (Article 153).

The Court of Assize (*mahkamat al-jinayat*) is a section within the Court of Appeal – there are seven Courts of Appeal in Libya. The Court of Assize hears felony cases and is composed of three judges of the rank of counsellor (*mustashar*) (Articles 331-333). It directs the hearings, allowing the prosecution to read the indictment, outline its case and submit its investigation records and other evidence (Article 349). The court must then ensure that the defence also presents its case, and allows the examination of witnesses (Articles 244-248). The court issues its verdict orally in a public session and must release a written verdict within eight days from its oral issuance (Article 285).

Both the public prosecution and those convicted may submit a challenge to the Criminal Chamber of the Supreme Court (Court of Cassation) if they believe that the verdict was grounded on “a violation of the law or an error in its application or interpretation, or in case of the nullity of the verdict or the procedures in a manner that influenced the verdict” (Article 381). The law specifies that the legal challenge may be filed within 60 days from the day the verdict was issued (Article 385). In case of death sentences imposed on defendants who were present at their trial, the public prosecution has the duty to submit the challenge to the Court of Cassation within 30 days, and submit its arguments within the following 15 days. It is not admissible to submit other arguments than the ones submitted within 60 days from the day the verdict was issued (Article 386).

The Court of Cassation may reject the verdict of the Court of Assize, if based on its review it concludes that the verdict was based on a violation of a law; an error in its application or

interpretation of the law; if the composition of the court was not in line with the law; if the court did not have jurisdiction to decide on the case; or if after the verdict an applicable law was adopted which is in favour of the defendant (Article 386).

The Court of Cassation decides that the challenge is inadmissible if it was submitted after the deadline or if it discusses the substance of the case. In case the challenge is admissible and reveals that “the verdict was based on a violation of a law or an error in its application or interpretation”, the Court of Cassation “rectifies the error and decides in line with the law”. If the challenge is admitted due to “the nullity of the verdict or the procedures in a manner that influenced the verdict”, the Court of Cassation annuls the verdict and returns it to the same court with a different composition, or to a different court of Assize (Article 393).

Further aspects of the Libyan criminal justice are reviewed in Section 8 in relation to international standards. Since 2011, numerous Libyan lawyers, academics, human rights defenders as well as UNSMIL have underlined the need to review the criminal justice framework in Libya to ensure its compliance with such standards.

## 5 The Accusation File of the prosecution and the decision of the Accusation Chamber

### 5.1 The Accusation File of the prosecution

The investigation in Case 630/2012 was carried out over 22 months and involved obtaining statements of over 250 witnesses and accused. The investigation is documented over 4,000 pages with annexes comprising over 1,000 documents. The Prosecutor General provided UNSMIL with a copy of the Accusation File comprising his memorandum as well as 1,738 further pages which include the prosecution’s investigation records, the testimonies of witnesses and the interrogation of defendants, and the decision of the Accusation Chamber. The investigation records refer to evidence collected before the prosecution’s examination, including investigations by military intelligence. They also refer to other evidence, such as the content of phone conversations, memoranda, minutes of meetings, official correspondence and expert reports, including reports of forensic medicine.

The memorandum submitted by the Prosecutor General constitutes the core of the Accusation File. It comprises 1,031 pages and is divided in three main parts:

Firstly, “The Summary of the Facts” (pages 1 to 415) part of the memorandum includes a summary of the testimonies, the interrogation of defendants by the public prosecution and their confrontation with witnesses or other defendants’ statements. The memorandum does not indicate which crimes were admitted by the accused and which ones were denied. There is a discrepancy in the description and analysis of the same crimes attributed to some defendants. For example, the description of the crimes attributed to the second defendant Abdullah al-Senussi and his confrontation with other witnesses is significantly greater than the description of the same crimes allegedly committed by the first defendant Saif al-Islam Qadhafi. The public prosecution informed UNSMIL that this is due to the different length of the statements provided by the first and the second defendants, without explaining why the analysis of the same criminal

conduct should be solely dependent on the length of the statements of the defendants during the investigation. The prosecution also presented the main statements, testimonies and pieces of evidence in a scattered manner, without categorizing them in relation to each defendant or each charge, making it difficult to follow the case. For example the interrogation of the second defendant and his confrontation with witnesses and other defendants occur in six different parts of the memorandum.

This section of the memorandum also includes a summary of statements and supporting documents, with a brief conclusion attributing a criminal conduct to more than one defendant. However, the memorandum does not include sufficient analysis explaining the prosecution's conclusion. Given the complexity of case 630/2012, the considerable number of defendants and witnesses and the difference between the defendants' and witnesses' statements describing the role of each of them in the criminal plan, it would have been necessary to provide a detailed analytical presentation of each aspect of the criminal conduct for each defendant - especially given the scattered information on the corresponding charge or the lack of clarity when the charge is attributed to more than one defendant.

In some instances, however, a specific description of the criminal conduct is provided. This is the case with the third defendant, former Prime Minister Al-Baghdadi al-Mahmudi. In page 443 the memorandum says that he and others prepared communication material inciting hatred and killing, which was broadcast on Libyan TV channels, including after paying TV presenters in return for their service. According to the memorandum, Al-Baghdadi al-Mahmudi also "held a meeting with leaders of the Tribes of Janzur and Warshafana on 18 August 2011, to incite them to fight other tribes which rose against the regime, claiming they have committed acts of killing, looting, theft, rape and putting fire in the towns of Sabratha and Sorman as explained in the file". He is also said to have agreed with others to "form armed criminal groups to randomly kill people, aiming at violating the security of the State, inciting civil war, fragmenting national unity and dividing citizens, as explained in the file".

Secondly, the "Legal qualification" (pages 416-437) part of the memorandum addresses legal aspects, especially the material, moral and special elements of the crimes as well as the justification for the use of the concept of crimes against the State. This part provides the legal qualification of the charges of perpetrating acts that aim to sabotage and loot as well as kill people indiscriminately with intention to violate the integrity of the State; participating in voluntary homicide and the killing of peaceful demonstrators; inciting civil war; agreement to commit crimes and assisting criminal groups in committing crimes; bringing and promoting narcotics and psychotropic substances; and intentionally causing damage to public finances.

Thirdly, the "Attribution and Description" (pages 438-1031) part of the memorandum contains the decision of the public prosecution to separate certain incidents from the case, pending further investigation. These incidents are considered without relation to the facts of the case. This includes selling the Libyan school in London which constitutes the crime of causing intentional damage to public finances and abuse of power, attributed to defendants Muhammad Yusuf al-Zwei and Hosni al-Wahayshi al-Kabir, as well as the killing of individuals in the area of Al-Qala and Beni. This part of the memorandum describes the incidents and establishes a list of 40 defendants. This is followed by three lists namely 1) the names of 107 victims of the crime of

participating in voluntary homicide in Benghazi during the period from 12 February 2011 until the end of the month, a crime attributed to Saif al-Islam Qadhafi, Abdullah al-Senussi and Mansur Daw; 2) the names of 71 victims of the crime of participating, instigating and agreeing on killing during the period from 20 February 2011 until March 2011 in Tripoli attributed to Saif al-Islam Qadhafi, Abdullah al-Senussi, Abu Zeid Dorda, Mansur Daw, Milad Salem Daman, Al-Baghdadi al-Mahmudi, Muhammad Yusuf al-Zwei and Bashir Ali Humeidan; and 3) the names of 155 victims of the killings during the period from 16 August 2011 until the end of the month in Gharghur, Airport Road, Bab al-Aziziya and Abu Salim attributed to Saif al-Islam Qadhafi, Abdullah al-Senussi and Mansur Daw. A list of the evidence is also included noting the testimonies of 238 witnesses; the statements of the defendants, including against each other; a list of 18 items referring to hundreds of reports and recordings; a list of 523 items referring to over 1000 documents; and a list of 18 items referring to preliminary interrogation.

## 5.2 The decision of the Accusation Chamber

On 15 September 2013, following two years of criminal investigations, then Prosecutor General Abdulqader Jum'a Radwan, requested the Accusation Chamber to refer 38 former regime members to the Tripoli Court of Assize for crimes committed in relation to the 2011 armed conflict. The Prosecutor General confirmed that there were no grounds to proceed against Muammar Qadhafi and his son Mu'tasim as they had died.

The Accusation Chamber convened on 19 September 2013 and held three hearings, the last one on 24 October 2013. According to the Chambers' decision issued on 24 October, all defendants appeared before the Chamber except the first, thirtieth, thirty-seventh and thirty-eighth. All defendants present before the Accusation Chamber denied the charges against them. All defendants appeared before the Chamber with lawyers, except the first, second, fourth and nineteenth. The lawyers of 18 defendants asked and were granted time to prepare their defence but did not submit anything to the Chamber; the lawyers of the rest of defendants submitted their defence case.

The decision of the Accusation Chamber issued on 24 October 2013 runs into 121 pages. It includes the names and details of the defendants, the charges and relevant legal articles, and the facts of the case presented through a summary of statements given before the public prosecution by defendants and witnesses, as well as other prosecution evidence. The Accusation Chamber expressed the view that the evidence against all defendants, with the exception of the thirty-seventh defendant, was sufficient "based on their admission before the public prosecution of the charges against them", and "on their statements before the public prosecution against each other", among other evidence presented by the Prosecutor.

The Accusation Chamber amended the charges levelled against some defendants by adding charges that it believed the public prosecution neglected. The Chamber added to the fifth defendant the charge of "formation of an armed group from the tribe to which he belongs and providing it with arms and equipment as well as logistic support"; and to defendants sixth and twenty-third the charge of "mobilization of the public force affiliated with both and providing it with arms and ammunition". It is apparent from the decision that the Accusation Chamber did not conduct a new investigation, as required by the law if a new charge is added. The Accusation

Chamber decided that there was no basis for a criminal case against defendant number thirty-seven in terms of the charges levelled against him.

The Accusation Chamber accordingly referred the case of the 37 defendants to the Court of Assize for trial and ordered that all remain in custody, except the thirtieth, thirty-fifth, thirty-sixth and thirty-eighth. The Chamber also asked the public prosecution and the defendants to prepare a list of witnesses whom they wanted to testify before the court, and tasked the Department of Public Lawyers to appoint defence lawyers to defend the first, second, fourth and nineteenth defendants.

## 6 The accused and the charges

Case 630/2012 thus involved 37 defendants, including senior leaders of the former regime. Some of the most prominent defendants included Saif al-Islam Qadhafi; Abdullah al-Senussi, former Director of Military Intelligence; Al-Baghdadi al-Mahmudi, former Secretary of the General People's Committee (Prime Minister); Mansur Daw, former head of the Revolutionary Guards; and Abu Zeid Dorda, former head of External Security. The full list of defendants and their sentences is included in Annex I.

During the sixth hearing on 22 June 2014, the prosecutor gave a 45-minute presentation of the charges as outlined in the decision of the Accusation Chamber. The charges generally related to actions undertaken to suppress the 2011 revolution, including:

- Committing acts on the territory of the State to destroy, plunder and indiscriminately killing people with the intention to violate the integrity of the State
- Instigating civil war, undermining national unity, and provoking war against those tribes that revolted against the regime
- Conspiracy on the crushing and killing of people, and forming tribal armed groups and equipping them with various weapons, providing them with logistical support, wages, grants, benefits and rewards to attack those areas revolting against the regime
- Instigating and forcibly having sexual intercourse and threatening to rape as a means to suppress the revolution
- Booby-trapping a number of vehicles to be remotely detonated
- Preparing plans to blow up prison facilities where thousands of opponents were detained
- Using fighter jets to strike civilian targets and using internationally-banned mines, and acting to spread poisonous gas
- Cutting off water, electricity and fuel from rebellious cities
- Instigating and agreeing to forcibly seize the properties of revolutionary citizens
- Causing serious harm to public funding and carrying out financial transactions in violation of applicable financial procedures of the State
- Instigating and agreeing on the detention and imprisonment of innocent people by force and intimidation
- Completely depriving others from exercising their political rights by using violence and threats
- Taking no precautions towards military camps and locations containing armed forces and volunteers despite knowing they would be affected by the NATO bombing

- Trafficking, providing and distributing narcotic drugs and psychotropic substances among soldiers and volunteers
- Insulting Libyan people publicly
- Engaging in the illegal movement of migrants, including by placing them on unseaworthy boats towards Europe, by endangering their lives
- Recruiting and equipping mercenaries, granting Libyan citizenship to some of them
- Establishing an electronic army and media cells that broadcast messages, speeches and images inciting sedition, murder and civil war via internet and satellite channels, and providing material means and paying generous amounts to presenters of these programs

Some charges appeared to be vague or political in nature, including “starting a civil war in the country”; “undermining national unity”; “dividing the Libyan citizens”; and “publicly humiliating the Libyan people” by describing them as “rats and traitors”. The Accusation Chamber’s decision explicitly refers to article 203 of the Penal Code entitled “Civil War”, which makes “punishable by death anyone who commits an act aimed at provoking civil war in the country, undermining national unity or causing division between the citizens”. Article 203 does not describe precisely the criminal conduct, despite the stipulation of the death sentence. The decision also refers to Article 205 of the Penal Code which criminalizes “publicly offending the Libyan nation”. The court in its session of 12 October 2014 attached two other related cases to the main case 630/2012, i.e. case 177/2012 against the third defendant and case 1033/2012 against the fifth defendant.

Since 2011, UNSMIL, as well as Libyan lawyers, academics and human rights defenders have raised with the authorities the need to review the Penal Code in light of international standards, *inter alia*, to ensure that it only includes clearly defined criminal conduct. In its discussions on prosecutorial strategies with prosecutors in 2013, including during workshops organized with the High Judicial Institute, UNSMIL recommended a focus on actions that clearly constitute crimes, such as the killing of civilians.

Few charges in Case 630/2012 were directly linked with specific provisions of the Penal Code and other Libyan laws in a way that illustrates each criminal act, the material and moral elements of the crime, and the analysis of the evidence for each criminal act. This level of analysis would have been required to ensure the attribution of responsibility of each crime to each individual defendant, especially given the complexity and the importance of Case 630/2012.

The combination of numerous defendants with differing levels of responsibility, facing a complex web of multiple charges, created a challenge for the Court. The Court had to balance not wanting to prolong the trial of those accused of less serious offences because of those accused of more serious ones, while not rushing the trial of the most senior officials. In its January 2015 memorandum submitted to the Ministry of Justice, UNSMIL recommended the separation of defendants to ensure that their rights were protected, given the different charges that they faced and the differing levels of responsibility. However, the judicial authorities chose to maintain the case joint.



## 7 Composition of the Court and location of the trial

A matter currently before the Court of Cassation is whether the Court was the “natural judge” in this case. In his challenge before the Court of Cassation, the lawyer of Muhammad Ahmad Mansur al-Sharif asked the Court declare the trial null and avoid for having been rendered by an “exceptional court”. The lawyer stated that “on 7 January 2014 the Supreme Judicial Council issued a decision to transfer Judge Addulqader Qadur from the Court of Appeal of the Green Mountain to the Court of Appeal of Tripoli and Judge Al-Siddiq Badi from the Court of Appeal of Misrata to the Court of Appeal of Tripoli. On 4 March 2014 the General Assembly of the Court of Appeal of Tripoli created the 15<sup>th</sup> Circuit, which later became the 14<sup>th</sup> Circuit”, comprising the two judges in addition to Judge Naji al-Amin, “as some cases require one or more dedicated circuits given the number of defendants, documents and investigations”. The lawyer argued that even if the circuit in question appears to be legally created, it is “an exceptional circuit with unnatural judges, circumventing the constitutional prohibition of establishing exceptional courts. Legally, the defendants should be tried by an active circuit of the Court of Appeal of Tripoli, at the moment of the referral of the case”. The lawyer considered the court to “be exceptional as it has been formed after the decision of referral, with two newly transferred judges being assigned to judge specific files and a specific category of defendants”. Other lawyers had raised this argument with UNSMIL in 2015.

The prosecutor informed UNSMIL that “the case has been examined by a number of circuits before being combined for direct linkage before the 15<sup>th</sup> Circuit of the Court of Appeal of Tripoli. The judges including the reserve judge are original members of the Court of Appeal and were not seconded to examine this case. They examined other cases, which were judged by the same circuit”. Thus, the “court was correctly formed and has jurisdiction over the case. It was not a special or exceptional court, as it applied the regular procedure of a natural judge”.

In terms of the location, the trial was held at the Al-Hadhba compound in Tripoli, which had been formerly the place of a police academy. The compound includes the Al-Hadhba prison, a high security prison where the majority of defendants in Case 630/2012 were held. While the Al-Hadhba prison has nominally been under the control of the Judicial Police under the Ministry of Justice since 2012, prison guards and administration do not answer to the head of the Judicial Police but to Khaled Sherif, a Deputy Minister of Defence until 2014 and a former leader of the Libyan Islamic Fighting Group. Members of this group opposed, at times with the use of force, the Qadhafi regime in years prior to the 2011 uprising as well as during the conflict, and are currently mostly members of an armed group called “National Guard”, which physically controls the Al-Hadhba compound. During a meeting with UNSMIL in May 2014, Khaled Sherif confirmed that he had a special role in overseeing the Al-Hadhba prison. He is still in control of the prison although no longer undertaking official government functions.

Holding the trial inside the Al-Hadhba compound had an impact on public access to hearings as the Public Relations Office of the prison authorized attendance, while prison security guards physically controlled entry. Lawyers informed UNSMIL that the environment deterred defendants from raising concerns regarding their treatment and other abuses in detention, given the presence of prison guards and administrators in the courtroom. UNSMIL staff also noticed that those responsible for securing the court premises were not wearing Judicial Police uniforms

as is common practice during other trials in Libya. They also occasionally witnessed prison guards and other officials commenting on and discussing proceedings during trial hearings, amid the failure of judges to order them to keep silent.

The requirements of ensuring a secure location for the trial, including to prevent absconding or external attacks, should have been counterbalanced by ensuring the establishment of an environment more conducive to impartial proceedings within the courtroom. Lawyers told UNSMIL staff that the intimidating atmosphere of a courtroom established inside a complex controlled by an armed group discouraged defence witnesses from coming forth with their testimony in favour of senior former regime figures. These concerns were further compounded by allegations of torture occurring within Al-Hadhba (see Section 8.2 below).

## 8 The trial: from the investigation to the verdict

On 24 March 2014, the Court of Assize held the first hearing of the trial, with 23 defendants present in the courtroom. The Court was composed of judges Naji Muhammad al-Amin, Abdulqader Qadur and al-Siddiq Badi. The day before the hearing, Law No. 7 of 2014 amending Article 243 of the CCP was promulgated, granting the Court discretion to use “advanced communication means” to link the accused to trial hearings if there were fears regarding their security or that they may escape. This amendment provided the legal basis for connecting Saif al-Islam Qadhafi and other defendants not detained at the Al-Hadhba prison to the courthouse in the Al-Hadhba compound.

Over the course of the next 16 months, the Court of Assize held 25 trial sessions, including the opening hearing and the last session when the verdict was announced on 28 July 2015. On average, the Court had hearings for half a day every two weeks, but in the wake of the violence in Tripoli in July 2014, hearings were adjourned until October 2014.

UNSMIL and OHCHR call for the bringing to justice of all perpetrators of serious violations and abuses of human rights. All trials should be conducted fairly in full respect of due process to attain their legitimate objective. Based on extensive monitoring of trial hearings; a review of the Accusation File and verdict; interviews with defendants and defence lawyers; and discussions with members of the public prosecution, Judicial Police officers and other Libyan officials and Libyan and international legal experts, UNSMIL and OHCHR find that the trial in Case 630/2012 did not meet international fair trial standards, as outlined below, and also breached Libyan law in some respects.

### 8.1 Prohibition of arbitrary detention and the right to judicial review of the detention

Article 9(1) of ICCPR states: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”. In the view of the Human Rights Committee, the body of independent experts that monitors the implementation of ICCPR, “48 hours is ordinarily sufficient to transport the individual and to

prepare for the judicial hearing; any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances”.<sup>20</sup>

Article 9(3) of ICCPR states: “Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.” Further, Article 9(4) of ICCPR provides: “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.” The Committee has found that a delay of over two months in bringing a detainee before a judicial officer constitutes a violation of Article 9(4).<sup>21</sup>

The African Commission on Human and People’s Rights has also held in its Resolution on the Right to Recourse and Fair Trial that persons “arrested or detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within reasonable time or to be released”.<sup>22</sup> In the case of Huri-Laws against Nigeria, the Commission concluded that Nigeria had violated the right to be tried within a reasonable time by detaining two alleged victims for weeks and months respectively without any charges being brought against them.<sup>23</sup>

Under the Libyan CCP, “the investigating judge has to interrogate the suspect immediately after arrest. If this is not possible, the suspect is held in prison until his interrogation for a period of up to 24 hours. After this period, the suspect should be handed over to the public prosecution, which shall immediately request the interrogation by the investigating judge, or if needed by a judge at the court of first instance, the head of the court or a judge appointed by the head of the court” (Article 112). Under the CCP as amended by Law No. 3 of 2013, the accused in the case of crimes against the State should be referred to the prosecutor within seven days, and the prosecutor has three days to question the accused and decide on release or detention for up to two weeks. Any further extension of such preventive detention must be decided by a judge for periods of no more than 45 days each “until completion of the investigation” (Article 1).

The CCP requires an arrest warrant issued by the competent judicial authority, unless the person is caught red handed (Article 30). The detainees shall be only held in “prisons designed for that purpose” (Article 31). The CCP stipulates that in criminal cases, the detainee has the right to have their lawyer present during the interrogation or when confronting other defendants or witnesses (Article 106). The public prosecution or the investigating judge may order that an accused does not communicate with other inmates or receive visits, but “without prejudice to the

<sup>20</sup> General Comment No. 35 CCPR/C/GC/35, para. 33.

<sup>21</sup> CCPR/C/50/D/330/1988, Communication No. 330/1988, para. 11.1

<sup>22</sup> For the text of the resolution see [www.achpr.org/sessions/11th/resolutions/4](http://www.achpr.org/sessions/11th/resolutions/4)

<sup>23</sup> ACHPR, Huri-Laws (on behalf of Civil Liberties Organization) v. Nigeria, Communication No. 225/98, decision adopted during the 28th Ordinary session, 23 October – 6 November 2000, paras. 45 and 46 available at <http://hrlibrary.umn.edu/africa/comcases/225-98.html>

right of the accused to always communicate with his lawyer without the presence of anyone” (Article 121).

These guarantees, however, have been restricted by Law No. 38 of 2012 Concerning Some Procedures for the Transitional Phase adopted by the NTC on 2 May 2012. The law was issued to address the situation of civil war and breakdown in law and order which occurred in 2011. Article 1 stipulates that “the Ministers of Interior and Defence, or whomever they delegate each within their authority, shall take the necessary measures against officials of the former regime who were detained and restrained by the *thuwwar* (revolutionaries) during the combat operations associated with the 17 February Revolution, or because of the Revolution, until the date this law comes into effect. These detainees should be referred to the competent prosecutor where there is sufficient legal evidence about their crimes, or should be released within a period not exceeding two months from the date this law comes into effect”.

The Law adds in Art. 4 that “there shall be no punishment for what the 17 February Revolution has deemed necessary in terms of any necessary military, security or civil actions carried out by the *thuwwar* for the success or protection of the Revolution”. Article 5 prescribes that “if for any substantive or legal reason, an order is issued stating that the person is not guilty, or a sentence is issued declaring the innocence of one of the persons referred to in Article 1 of this Law, such persons shall have no right to launch a review through criminal or civil means against the State or against those who arrested or restrained them, unless the decision of the prosecution or court proves that the event they were accused of is trumped-up or malicious.”

Article 1 of the law provided a two-month deadline from when it was issued in 2 May 2012 for bringing the detainees before the prosecutor if there was sufficient evidence or release them. As this provision remained largely non-implemented, Law No. 29 of 2013 on Transitional Justice provided in Article 26 a new three-month deadline from December 2013 for such a screening, but the process again remained largely unimplemented. Finally, Law No. 9 of 2014 issued in March set another deadline as follows: “The Ministers of Justice, Interior, and Defence, or those mandated by them, must each take the necessary measures, each within their mandate, to end the detention of accused persons associated with the former regime. Within a maximum of 120 days from the date on which this law is issued, such detainees must be referred to the relevant prosecution or released. Their detention shall not be considered illegal if there is sufficient evidence that they have committed acts considered to be crimes under the law.” (Article 1).

A number of defence lawyers stated in court that the CCP was violated in relation to their clients’ arrest, detention and interrogation procedures.<sup>24</sup> However, the Court dismissed these concerns on the basis of Law No. 38 of 2012.

Many defendants were held for prolonged periods without access to judicial authorities. Saif al-Islam Qadhafi has been held apparently in isolation in the city of Zintan since his arrest in November 2011. So far he had only a handful of meetings with external actors which took place in the presence of his captors or otherwise under surveillance. To the knowledge of UNSMIL, he

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<sup>24</sup> Several lawyers raised such concerns including those representing Al-Baghdadi al-Mahmudi, Mansur Daw, Abu Zeid Dorda, Milad Daman, Muhammad Mansur al-Sharif, Husni al-Wahayshi and al-Mabruk Muhammad al-Mabruk

has not been seen by independent observers since appearing at the Court hearing on 22 June 2014. In April 2016 his captor Al-‘Ajmi al-‘Atiri announced that Saif al-Islam Qadhafi had been released on the basis of an amnesty law, but did not disclose his whereabouts. The Prosecutor in Tripoli informed UNSMIL that such a law had not been published in the Official Gazette and therefore was not in force. UNSMIL is not aware of any credible information to date which suggests that Qadhafi has actually been released.

In the immediate aftermath of the taking over of Tripoli by the *thuwwar* in August 2011, eight defendants were captured by armed groups and taken to Misrata. Among them were six former employees of intelligence agencies<sup>25</sup> captured by armed groups in September. These armed groups subsequently operated under the umbrella of the Supreme Security Committee, under the Ministry of Interior. Despite several attempts, UNSMIL could not ascertain the whereabouts of these six defendants or visit them in detention until May 2014, when they were transferred to Al-Jawiya Correction and Rehabilitation Institution in Misrata (Al-Jawiya prison). UNSMIL staff gathered information suggesting that they had been held at a number of facilities in Tripoli and Misrata, including secret ones, in virtual isolation, in some cases for periods of almost two years before being brought before the Prosecutor.

Relatives, lawyers, and defendants indicated to UNSMIL that most defendants met their lawyers for the first time during their indictment hearings before the Accusation Chamber, in Tripoli, in September and October 2013.

Many Tripoli-based defendants had little or no contact with the outside world for periods of up to 18 months and were not brought promptly before a judge, according to information available to UNSMIL. For instance, one defendant told UNSMIL staff that after his arrest in August 2011, he was transferred to two detention facilities and then to the Al-Hadhba prison. He was first brought before the prosecutor a year and-a-half after his arrest.

The Court dismissed arguments made by defendant Muhammad Yusuf al-Zwei’s lawyers in their plea regarding the unconstitutionality of Law 38 of 2012, expressing its view that the law did not contradict any constitutional or basic laws. Nonetheless, the Court emphasized that it was within the remit of the Constitutional Court to consider unconstitutionality challenges. UNSMIL is not aware of a challenge submitted by defence lawyers to the Constitutional Court on this matter.

Based on the available information, UNSMIL and OHCHR find that many defendants in Case 630/2012 were arbitrarily detained by armed groups acting nominally on behalf of the State for prolonged periods of time, in some cases nearly two years, before being brought before the prosecutor exercising the functions of an investigating judge. As such their right to prompt judicial review of their detention was violated, even by making allowance for the months of armed conflict in 2011.

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<sup>25</sup> Said Ibrahim al-Gharyani, Mohsen al-Hadi al-Lamuji, Jamal Ali al-Shahed, Abuajila Muhammad al-Kheir, Abdullah Abu al-Gasem al-Sha’lani and Muhammad Khalifa al-Waer.

## 8.2 Prohibition of torture and other ill-treatment

ICCPR in Article 7 and CAT in Article 2 include an absolute prohibition of torture and other ill-treatment. Article 15 of CAT prohibits the use of any statements obtained under torture as evidence, except against a person accused of torture as evidence that the statement was made. This rule also applies to evidence gathered or derived from information obtained under duress. States must carry the burden of proving that confessions were obtained without duress, intimidation or inducements.<sup>26</sup> The United Nations Committee against Torture and the Human Rights Committee has concluded that once a defendant has made an allegation of torture, the burden of proof rests with the State to show whether or not evidence was gained through the use of torture.<sup>27</sup>

According to the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, any confession or other evidence obtained by any form of coercion or force may not be admitted as evidence or considered as probative of any fact at trial or in sentencing. Any confession or admission obtained during incommunicado detention shall be considered to have been obtained by coercion. The Principles and Guidelines oblige prosecutors to take all necessary steps to ensure that those responsible for using such methods are brought to justice. The prosecutors shall refuse to use such evidence against anyone other than those who used such methods, or inform the judicial body accordingly.

The Human Rights Committee notes that prolonged solitary confinement may amount to acts prohibited by Article 7 of ICCPR.<sup>28</sup> The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)<sup>29</sup> define solitary confinement as the confinement of prisoners for 22 hours or more a day without meaningful human contact – it is prolonged when imposed for a time period in excess of 15 consecutive days (Rule 44). The Mandela Rules also state that “solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority. It shall not be imposed by virtue of a prisoner’s sentence” (Rule 45). Family contact may only be restricted for a limited time period and as strictly required for the maintenance of security and order” (Rule 43).

The Committee against Torture has recognized the harmful physical and mental effects of prolonged solitary confinement and recommended the abolishment of the use of solitary confinement, particularly during pre-trial detention.<sup>30</sup> The United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has also stated that the prolonged isolation of detainees may amount to cruel, inhuman or degrading treatment or

<sup>26</sup> See for example A/71/298, paras. 96 and 98.

<sup>27</sup> A/58/44, Committee against Torture, *G.K. v. Switzerland*, No. 219/2002, para. 6.10; A/59/40 Human Rights Committee, *Nallaratnam v. Sri Lanka*, No.1033/2001, 23 August 2004, para. 7.4.

<sup>28</sup> CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), HRI/GEN/1/Rev.9 para. 6.

<sup>29</sup> A/RES/70/175

<sup>30</sup> See for example A/52/44, paras. 188, 186, 220 and 226

punishment and, in certain instances, may amount to torture because of its harmful physical and mental effects.<sup>31</sup>

The Libyan Penal Code considers torture a crime punishable by three to ten years of imprisonment (Article 435). In April 2013, Law No. 10 of 2013 Criminalizing Torture, Forced Disappearance and Discrimination was promulgated. The law criminalizes ordering, committing or acquiescing to torture. It defines torture as “any act that inflicts physical or mental suffering for the purpose of extracting confessions, seeking revenge, or as a result of discrimination or any other motive.”

The CCP in Article 61 stipulates that the individuals entitled to attend the investigation include the public prosecution, the accused, the victim, the civil party and their representatives.

Libyan law limits the use of solitary confinement and places certain safeguards on its use. Law No. 5 of 2005 on Correction and Rehabilitation Institutions states that the Director of the institution has the right to impose solitary confinement as a punishment for a period not exceeding 15 days against any inmate who violates the rules and regulations of the institution (Article 59). This penalty can be imposed upon an inmate for a period not exceeding one month by a decision of the Director of the Department of Judicial Police (Article 58). The penalty may not be imposed, unless the inmate is informed about the charge and given the opportunity to present a defence (Article 61).

There are concerns that Law 38 of 2012 Concerning Some Procedures for the Transitional Period may be interpreted as allowing the use of confessions or other statements extracted under torture practiced by armed groups. Article 2 of the law states that “minutes taken by the *thuwwar* with regard to establishing facts, witness testimonies and statements of detained supporters of the former regime shall be as valid as the gathering of evidence carried out by police officers in accordance with the CCP, provided that they are considered trustworthy by the trial judge based on the judge’s discretionary power of evaluation.” However, the Libyan authorities informed UNMSIL at the time of the adoption of the law that this law would not be implemented in a way that would lead to impunity for perpetrators of gross human rights violations or abuses, and indeed UNSMIL is not aware of instances in which this law was applied to grant immunity. In any case, Law No. 10 of 2013 should dispel any doubt that torture remains a crime under Libyan law.

It appears that in most cases initial arrests and interrogations of suspects in Case 630/2012 were carried out by members of armed groups and other non-judicial actors, and without the presence of lawyers. The prosecutor stressed to UNSMIL that no interrogation conducted by armed groups were used in case 630/2012 and that he conducted his own interrogations.

Some defendants told UNSMIL staff that they were interrogated by the prosecution at their place of detention, raising concerns about their ability to complain about their treatment and possible

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<sup>31</sup> See A/47/40, and A/66/268, the report of Juan Ernesto Mendez, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, presented to 66th Session of the General Assembly. Also see Istanbul Statement on the Use and Effects of Solitary Confinement, A/63/17, and General Comment of Human Rights Committee No. 20.

pressure not to change statements or confessions previously made to non-judicial actors holding them in custody. The prosecutor has maintained throughout that the accused were interrogated by the public prosecution exclusively in the offices of the prosecution.

The lawyer of the ninth defendant argued in Court at the hearing on 14 December 2014 that the statement of his client was taken in a place of detention and not the premises of the public prosecution. The prosecutor replied that all interrogations were conducted in the offices of the public prosecution.

UNSMIL also received allegations that some defendants were beaten or otherwise ill-treated, particularly upon arrest and during their initial period in detention. While most did not discuss their treatment in interviews, at least four defendants indicated that they were abused by individuals interrogating them during their initial period of detention.

Some defendants and their lawyers made allegations of torture in court. For instance, during the hearing of 20 May 2015 Abu Zeid Dorda repeated his claims of torture to the Court of Assize, reiterating his wish to have justice served. He had formally complained about beatings during a 15 January 2014 hearing in a separate trial, stating: “on 28 December 2013, I was beaten badly by an unknown person. He beat my head. For the next seven days, I experienced pain in my body and head.” To the knowledge of UNSMIL, no investigation was ordered by the Court or otherwise carried out, even though a medical report was completed, following instructions of the then Minister of Justice, and sent to the public prosecution for follow up.

In its written verdict, the Court stated that Abu Zeid Dorda’s defence lawyers failed to provide any evidence to substantiate the claim that their client’s interrogations took place under coercion and dismissed the claims without taking any action to investigate them.

During the hearing on 28 December 2014, the lawyer of defendant 19, al-Mabruk Muhammad al-Mabruk, also raised concerns regarding his client having been tortured, threatened and blackmailed. He highlighted that his client was only seen by the prosecutor in September 2012, although he had been detained since July 2011. The defence lawyer alleged that al-Mabruk signed a blank paper under duress, while in the custody of the Supreme Security Committee. He was also threatened by members of the Committee not to change his testimony during interrogation by the prosecutor. In particular, al-Mabruk’s lawyer argued that his client’s confession before the prosecutor should be dismissed on the grounds that it was made under coercion as “the group that arrested him threatened to hurt his family if he changed his confession in front of the public prosecution.” During the hearing on 25 January 2015, his lawyers also claimed that the prosecutor was accompanied by members of the Supreme Security Committee, when he conducted the interrogation of his client.

Despite these allegations, the Court did not take any steps to investigate the claim, dismissing the defence’s arguments on the grounds that there was no proof. The Court also argued that the fact that the defendant was brought to the prosecutor by “*thuwwar*” did not mean that they had attended the investigation, implying that the defendant had no reason to feel coerced. In its verdict, the Court explained that it did not believe that the defendant was coerced “in front of the public prosecution because it [public prosecution] does not commit coercion.” The Court did not



address the claims that some defendants were threatened by armed groups not to change their statement when asked by the prosecutor.

During the hearing on 13 April 2015, Abdullah al-Senussi's lawyer also claimed that his client had been beaten and interrogated by "individuals who do not belong to the judicial authority". The verdict did not address this claim. Abdullah al-Senussi had complained several times in court about being held in solitary confinement for prolonged periods of time, and being subjected to discriminatory treatment. A guard at the Al-Hadhba compound acknowledged to UNSMIL that Al-Senussi had been singled out for abuse including by families of victims of the 1996 Abu Salim Prison massacre, and by former detainees at the prison. During the investigation with the public prosecution on 17 September 2012, Al-Senussi said, "upon my arrival in Tripoli, I was beaten on my eye, my legs and my head and I was interrogated by a non-judicial committee". UNSMIL is not aware of any investigation into these allegations. In response to the written plea submitted by Abdullah al-Senussi's lawyers, expressing concerns that investigations had taken place inside the Al-Hadhba prison while their client was in "poor health", the Court stated in its verdict: "concerning the statement of the defendant [Al-Senussi] that the confessions attributed to him are an alteration of his statements and that they were opposite to the truth, this allegation is unacceptable as the investigation records of the public prosecution are official records, the content of which may only be proven false by challenge of forgery. As such, the statement of the defendant should not be taken into account."

On 26 October 2015, Human Rights Watch<sup>32</sup> reported that during their visit to the Al-Hadhba prison, Al-Baghdadi al-Mahmudi had claimed that he had been tortured during interrogation, including with electric shocks. No investigations are known to have taken place since these claims.

One defendant told UNSMIL staff that he had been beaten on at least two occasions since his detention in 2012. He had been transferred to several facilities before being brought to an official prison. Another defendant held at the Al-Hadhba prison also told UNSMIL staff that detainees were subjected to ill-treatment in the prison.

UNSMIL and OHCHR are also concerned that solitary confinement appears to have been used extensively at the Al-Hadhba prison, where the majority of the defendants were held. According to several detainees, they were kept in solitary confinement for extended periods of up to eight months, leaving them vulnerable to intimidation. During UNSMIL visits to the prison, a number of interviewees said they had been held in solitary confinement, some on more than one occasion.

Al-Baghdadi al-Mahmudi's lawyer raised concerns about his client not feeling at ease in defending himself given the location of the Court, stressing this was undermining his right to defence. The Court dismissed these concerns on the grounds that the Court can change its location, if necessary, and that it had taken necessary steps to ensure that defendants could deal

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<sup>32</sup> See Human Rights Watch, Libya: Gaddafi Son Speaks From Jail, 26 October 2015, <https://www.hrw.org/news/2015/10/26/libya-gaddafi-son-speaks-jail>

with the situation and bring defence witnesses. The Court did not elaborate on what necessary steps it had taken.

Concerns about torture and other ill-treatment in Al-Hadhba prison were substantiated by information which emerged shortly after the verdict in Case 630/2012. On 2 August 2015, a video clip filmed at the prison was released, showing Al-Sa'di Qadhafi, on trial in a separate case, being interrogated, slapped, beaten on the soles of his feet, and forced to watch and hear the screams of two other detainees apparently being beaten. A number of prison staff are seen in the footage participating in the mistreatment of the detainee. The public prosecution announced an investigation. In response to a letter from UNSMIL urging for a prompt and effective investigation and the removal of individuals appearing in the video from contact with inmates pending the outcome of criminal investigations, the prosecution stated that arrests had been carried out, while two other wanted men remain at large. Prosecutor Al-Siddiq al-Sur confirmed that Salah D'iki, the head of prisoners' affairs in Al-Hadhba, had been arrested and held for six days. He was provisionally released while investigations were ongoing. However, Salah D'iki has returned to a leadership position in Al-Hadhba at least since September 2016.

In March 2014, UNSMIL had asked to visit Al-Sa'di Qadhafi, among others, following reports that he had been tortured in Al-Hadhba prison, but permission was denied by prison administrators and guards on the grounds that he was under investigation. When UNSMIL raised concerns with prosecutor Al-Siddiq al-Sur, he noted that the reasons provided by administrators and guards were valid. During their last visit to Al-Hadhba prison in October 2014, UNSMIL staff briefly saw Al-Sa'di Qadhafi and other detainees, but were unable to interview them in private.

Prosecutor Al-Siddiq al-Sur underlined to UNSMIL staff that the public prosecution does not accept any acts of coercion, that the statements it received in Case 630/2012 were provided voluntarily, and that the accused were interrogated in the public prosecution's offices. He also said that the defendants who complained about torture did not say they confessed because of torture.

UNSMIL and OHCHR are concerned by the allegations of torture of defendants in Case 630/2012. Such allegations are all the more to be taken seriously given the known pattern of torture and other human rights abuses by armed groups since 2011<sup>33</sup> in a climate of total impunity for the perpetrators; the fact that many of the defendants remained held under the control of armed groups even during the trial; and the specific evidence of torture in Al-Hadhba prison.

UNSMIL and OHCHR note the public prosecution's assurances that it exercised no coercion against the defendants, but the circumstances of their detention in the hands of armed groups and the specific reports of threats by such group should the defendants change their statements raise questions about how the defendants could have felt safe from possible retaliation when giving

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<sup>33</sup> See for example, UNSMIL/OHCHR, *Torture and Deaths in Detention in Libya*, October 2013 at [www.ohchr.org/Documents/Countries/LY/TortureDeathsDetentionLibya.pdf](http://www.ohchr.org/Documents/Countries/LY/TortureDeathsDetentionLibya.pdf)

their statements to the prosecution, and indeed later the court. However, some defendants did complain in court about torture and in detention. The prosecution and the Court have a duty to investigate the torture allegations brought to their attention by defendants and their lawyers, irrespective of whether or not they had a direct bearing on the proceedings in Case 630/2012, but none of the allegations were investigated – indeed the court dismissed them, placing the burden of proof on the defence and finding that such proof was not provided.

### 8.3 The right not to be compelled to confess guilt or incriminate oneself

ICCPR states in its Article 14(3)(g) that one of the minimal guarantees of fair trial is that the accused shall not be compelled to testify against themselves or to confess guilt. Further, the UN Body of Principles for the Protection of All Persons Deprived of their Liberty specifies that “it shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.”<sup>34</sup>

The right not to incriminate oneself includes the prohibition of the use of any physical or mental coercion and is related to the right not to confess guilt as well as the right to remain silent. Article 55(2) of the ICC Statute provides for additional guarantees for potential suspects, which they have to be informed about, namely, “the right to remain silent, without such silence being a consideration in the determination of guilt or innocence”. The Human Rights Committee also recalls that “the wording of article 14(3)(g)(i)(e), that no one shall “be compelled to testify against himself or to confess guilt”, must be understood in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused with a view to obtaining a confession of guilt. A fortiori, it is unacceptable to treat an accused person in a manner contrary to article 7 of the Covenant in order to extract a confession”.<sup>35</sup>

The Arab Charter on Human Rights provides in Article 16(6) “the right not to be compelled to testify against himself or to confess guilt.”

There are no explicit provisions in Libyan legislation protecting the right not to confess guilt, incriminate oneself or remain silent. Article 244 of the CCP states that, “the accused will then be asked whether he admits to committing the act with which he is charged and, if he does so, the court may be satisfied with his admission and issue a judgment against him without hearing the witnesses, otherwise it will hear the testimony of the prosecution witnesses.”

According to information received by UNSMIL, detainees in Case 630/2012 interrogated by individuals not belonging to the public prosecution were not made aware of this right or allowed to exercise it. Defendants held incommunicado and in solitary confinement prior to their interrogation by the prosecution were exposed to abuse and hindered in their right of contacting their lawyers to seek their assistance during interrogation sessions. Even if the public prosecution stressed that it did not use any records of preliminary interrogations conducted by armed groups,

<sup>34</sup> See A/RES/43/173, GA Res 43/117, 9 December 1988

<sup>35</sup> See Paul Kelly v. Jamaica, Communication No. 253/1987, CCPR/C/41/D/253/1987, para. 5-5.

such interrogations may have led defendants to maintain their initial statements, even if given under coercion, give the possible threat of reprisals.

In building the case the prosecutor relied heavily on testimonies, stating in court that it had gathered 238 witness and defendant statements. These include testimonies of individuals deprived of their liberty, including fellow accused in Case 630/2012. On 22 June 2014, the prosecutor stated in Court, “there are large numbers of documents proving the witnesses’ testimonies and the defendants’ confessions regarding the facts. These documents were shown to the defendants and they confirmed that they were true.” The investigation records made available to UNSMIL contained no reference to the accused being informed of their right not to confess guilt, incriminate oneself or remain silent.

One of the defendants told UNSMIL staff that he had signed an interrogation record without being allowed to read it. In its verdict the Court rejected the claim by defendant Abdullah al-Senussi that what was attributed to him in his confession had been changed and was the opposite of his statement. The Court also rejected the claim by defendant Muhammad Abu Bakr al-Ali al-Dhib that what was attributed to him in the prosecution’s interrogation record was not his statement but was fabricated by the prosecution.

Several defendants told the Court that they were called in as witnesses, and subsequently found themselves among the accused. While the Court noted in its verdict that it was within the prosecutor’s prerogative to bring charges against any suspect, including based on the discovery of additional evidence, there are concerns that these defendants might have incriminated themselves, particularly when no lawyers were present when many of them were interrogated.

UNSMIL and OHCHR are concerned that the available information suggest that the defendants were not informed of their right not to incriminate themselves or confess guilt as required by international law and standards.

## 8.4 The right to be informed promptly and in detail of the charges

Article 9(2) of ICCPR states that “Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.” The Human Rights Committee specified that “one major purpose of requiring that all arrested persons be informed of the reasons for the arrest is to enable them to seek release if they believe that the reasons given are invalid or unfounded. The reasons must include not only the general legal basis of the arrest, but also enough factual specifics to indicate the substance of the complaint, such as the wrongful act and the identity of an alleged victim. The ‘reasons’ concern the official basis for the arrest, not the subjective motivations of the arresting officer”.<sup>36</sup>

ICCPR stipulates in its Article 14(3)(a) that everyone shall be entitled to be informed promptly and in detail of the nature and cause of the charge against them. Suspects must be informed of the applicable legal provisions under which they are being charged, and the facts forming the basis of individual accusations, including the date and place of the alleged criminal incident, the

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<sup>36</sup> CCPR/C/GC/35 para. 25

identity of the victims, and the means used to commit the alleged crime. The right to be informed of the charges is closely linked to the right to a complete defence.<sup>37</sup>

The African Commission on Human and Peoples' Rights held that the failure of security officials of a State party to provide the exact grounds of detention and promptly informing the detainees about the charges against them constitutes a violation of fair trial right guaranteed by the African Charter of Human and Peoples' Rights.<sup>38</sup>

Libyan law also includes similar guarantees. The CCP stipulates that, “when the accused attends the investigation for the first time, the investigator shall verify his identity, inform him about the charges of which he is accused and document his statements” (Article 105). The CCP provides that the arrest warrant must include, *inter alia*, the name of the accused, his profession, his domicile, and the charges (Article 108). The investigating judge's orders must include, *inter alia*, the name of the accused, the incident attributed to him, and its legal qualification (Article 138). The decision of referral to the Accusation Chamber must also identify the alleged crimes with all its elements, all aggravating and mitigating circumstances, and the applicable provisions of the law (Article 155).

A large number of defendants were arrested by members of armed groups, apparently without any warrant, and were held for prolonged periods of time without being brought before a prosecutor or informed of the exact charges they faced. Consequently, they were denied the opportunity to challenge the legality of their detention and the opportunity to begin preparing their defence. At least six defendants arrested in September 2011 said they were not aware of the exact crimes of which they were being charged until they were first brought before the prosecutor in late 2013. Two other defendants told UNSMIL staff that they were unaware of the charges they faced until they were first brought before the prosecutor a year and six months, and a year and three months after their arrest. Furthermore, Muhammad Ahmed al-Sharif's lawyer said in court that his client was held for 12 months without referral to the judicial authorities. Therefore, he would have been unaware of the charges he faced during this period. On 28 December 2014, defendant Milad Daman told the Court that he was accused of two charges, yet he found himself accused of six charges in front of the Accusation Chamber, adding that he signed the minutes of the interrogation without reading them.

Defendants were formally informed of the charges when they appeared in front of the Accusation Chamber in September and October 2013. However, the repeated requests by lawyers for a copy of the Accusation File during the first hearings before the Court suggest that even at that stage of the trial defendants were not clearly informed about the details of the charges they faced.

In the Court of Assize, the presiding judge read out a full copy of the indictment for the record during the hearings of 27 April and 25 May 2014. He asked the defendants to respond to the charges by answering "yes" or "no". UNSMIL staff observed that it was not clear which

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<sup>37</sup> Ibid.

<sup>38</sup> See ACHPR, Huri-Laws (on behalf of the Civil Liberties Organisation) v. Nigeria, Communication No. 225/98 [http://www.achpr.org/files/sessions/28th/comunications/225.98/achpr28\\_225\\_98\\_eng.pdf](http://www.achpr.org/files/sessions/28th/comunications/225.98/achpr28_225_98_eng.pdf)

defendant responded to which charges. Moreover, the judge did not systematically put the questions to all defendants. Defendants connected via video-link to the main courtroom in Al-Hadhba were at an additional disadvantage and were particularly unclear about which charges they were answering to, given the poor quality of the connection, as observed by UNSMIL staff. Some defendants were only confronted with their charges at a later stage. This was during the sixth hearing for first, second and ninth defendants and during the ninth hearing for the tenth defendant.

The right to be informed in detail of the charges against an accused is particularly important in complex crimes, where numerous individuals may bear different levels of responsibility for the same crime. In such cases, it is important to specify how it is alleged that the accused participated in the crime. International criminal tribunals consistently held that there must be sufficient detail about the nature and the cause of the charges, so that defendants can respond to specific accusations about their roles – for example, the higher-level accused may be in a different position to the lower-level accused.

As explained, the evidence of criminal conduct outlined in the Accusation File was often attributed to several defendants and did not systematically analyse each criminal act for each defendant. Similarly, the manner in which the case was presented in Court made it difficult to fully comprehend the case against each individual defendant – a point raised by several defence lawyers during the trial hearings. The Court should have explained in detail how the process did not contravene the right to be promptly informed in detail of all charges if it believed the arguments of the lawyers were unfounded.

At the hearings on 27 April and 22 June 2014, the prosecutor alluded to the defendants being part of a "criminal plan" in which each one "played a role", but did not present, in the Accusation File or orally before the Court, the features of such a plan and each defendant's specific role in it. The number of defendants, the variety of the charges, the multiplicity of pieces of evidence and the complexity of the decision-making structure of the Qadhafi regime, as presented by the prosecutor, would have required under any legal system a detailed examination before the Court. UNSMIL underlined this aspect during some of the workshops it organized for Libyan prosecutors in 2012.

UNSMIL and OHCHR are concerned that most defendants in Case 630/2012 were not promptly informed of the exact reasons for their arrest and the charges facing them. Even once formally charged, concerns remain that not all defendants could fully comprehend the exact charges against them, their legal characterization and the factual basis of the accusations. The vagueness of some of the charges; the lack of sufficient specificity in defining the individual roles played by each defendant in the common criminal plan alleged by the prosecutor; and delays in obtaining the full Accusation File, contributed to undermining the ability of the accused to exercise their right to a complete defence.

## 8.5 The right to a public hearing

The right to a fair and public hearing is provided for by Article 14(1) of ICCPR. The Human Rights Committee requires that "[a]ll trials in criminal matters or related to a suit at law must in

principle be conducted orally and publicly. The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large”.<sup>39</sup> The Committee also explains, “[t]hat is a duty upon the State which is not dependent on any request, by the interested party, that the hearing be held in public. Both domestic legislation and judicial practice must provide for the possibility of the public attending, if members of the public so wish”.<sup>40</sup> The Committee observes “that courts must make information on the time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits”.<sup>41</sup>

The updated Set of principles for the protection and promotion of human rights through action to combat impunity reaffirm the inalienable right to know the truth vis-à-vis gross human rights violations and serious crimes under international law, and the obligation of the State to fulfil such right.<sup>42</sup>

The Libyan CCP in Article 241 safeguards the right to a public hearing with exceptions relating to public order or morality. The CCP in Article 242 requires the presence of the public prosecution in all criminal hearings.

Access to the hearings was granted by the Public Relations Department of the Al-Hadhba prison administration. The Court could only be physically accessed by going through the same entrance of the Al-Hadhba compound – which is also the same entrance used for Al-Hadhba prison. The entrance was controlled by security guards who appeared to exercise a degree of discretion in permitting entry. While UNSMIL staff were granted access to the trial from the outset, other members of the international community, relatives of the defendants and the public were granted access on an inconsistent basis. International and local media representatives attended the trial sessions in a room in Al-Hadhba near the Court through closed-circuit television.

UNSMIL staff received reports of several incidents involving observers. Two representatives from the non-governmental organization No Peace Without Justice, who were attending the 22 March 2015 hearing, were asked to leave the Court by a guard in a military uniform. He escorted them out of the courtroom to a nearby building where they were held and questioned for several hours before being released later that day. One UNSMIL staff member was detained by the prison administration for about one hour when attending the hearing on 11 May 2014, in spite of his immunity as a United Nations official. On one occasion, an UNSMIL staff member was arbitrarily asked to leave the courtroom. On another occasion a foreign woman journalist was asked to cover her head as a condition of entry. The 14 April 2014 hearing appears to have been closed to all except UNSMIL staff members and few selected journalists, while other media and families were not allowed to enter. Few observers were able to attend after the outbreak of violence in Tripoli in July 2014 due to the security situation.

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<sup>39</sup> CCPR/C/GC/32 para. 28

<sup>40</sup> Communication 215/1986, U.N. Doc. (A/45/40), paras. 6-1.

<sup>41</sup> Communication 215/1986, U.N. Doc. (A/45/40), paras. 6-2.

<sup>42</sup> E/CN.4/2005/102/Add. 1

Before the trial started on 24 March 2014, Article 241 of the Libyan CCP was amended so that a trial hearing would be considered public if it was “broadcast live on television, on public screens, or through any other method.” While the broadcast of the trial was a welcome development, and most of the hearings were broadcast live on al-Nabaa television station or other television stations, the decision to broadcast appeared to be at the discretion of the concerned television stations. Some broadcasts were interrupted for breaking news or were otherwise incomplete. According to the best knowledge of UNSMIL, at least two hearings – those of 14 April and 14 December 2014 – were not broadcast. Power cuts and other technical problems also hindered the full broadcast of hearings.

UNSMIL and OHCHR appreciate the initiative of broadcasting the trial sessions via Libyan television channels, despite concerns about the actual access to the court room. However, the prosecution's case and evidence remained largely unknown to the public, as it was only presented orally in about 45 minutes in one hearing. The failure to present the prosecution evidence in court undermined the victims’ and public’s right to truth, in addition to the defendants’ ability to challenge evidence against them in court.

UNSMIL and OHCHR believe that the failure to present and debate the evidence in court constitutes also a crucial missed opportunity to provide the victims and the public with the opportunity to confront and reflect on the crimes of the former regime. The full judicial record of the trial including the evidentiary basis on which the Court made its decisions would have contributed significantly to shedding light on the history of the 2011 revolution, allowing the Libyan and international public to observe and learn directly from the trial hearings what happened during the conflict and the role of those on trial. The judicial record of the trial would thus have constituted an important part of Libya’s historical record for future generations.

## 8.6 The right to be represented by counsel

International law and standards provide for the right to counsel at various stages of the investigation and trial and the State’s obligation to inform defendants of that right, including before questioning. Articles 14(3)(b) and (d) of ICCPR protect the right to have adequate time and facilities for the preparation of the defence and to court-appointed legal assistance without payment. The Human Rights Committee in the examination of the report of a State party expressed concern about a delay of up to 36 hours prior to access to a lawyer and the prohibition of access to a lawyer during police interrogation.<sup>43</sup>

The Basic Principles on the Role of Lawyers state that, “[g]overnments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence” (Principle 5). “Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention” (Principle 7).

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<sup>43</sup> CCPR/C/MLT/CO/2



Article 1(f) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa states that “any person arrested or detained shall have prompt access to a lawyer and, unless the person has waived this right in writing, shall not be obliged to answer any questions or participate in any interrogation without his or her lawyer being present.”

Article 106 of the CCP stipulates that, “with the exception of the case of a defendant caught *in flagrante* or in case of urgency due to fear of loss of evidence, the investigator of a felony may not interrogate the accused or confront him with another accused or witness before summoning his lawyer, if he has a lawyer. The accused shall notify the name of his lawyer to the court’s clerk or in a letter to the prison warden.” Article 162 of the CCP ensures that the Accusation Chamber appoints a defence lawyer for each person charged with a felony who is referred to the Court of Assize, if the person had not chosen a lawyer.

As noted, according to the information available to UNSMIL many of the defendants were not represented by defence lawyers during interrogations by the prosecutor, let alone during questioning by members of armed groups. A number of defendants were also not represented during hearings before the Accusation Chamber. Some remained not represented for several hearings of the trial itself. Some defendants experienced difficulties in hiring and retaining lawyers. The Court made efforts to appoint lawyers to represent defendants and acceded to requests for extra time to prepare the defence, as requested by some of the lawyers.

Abdullah al-Senussi stated during the first trial hearing on 24 March 2014 that he had no lawyer and had been deprived of legal advice during the investigation, despite asking for a lawyer. The judge said that the Court was going to appoint public lawyers for those defendants who still had no lawyers.

Defendant Muhammad Ahmad al-Sharif’s lawyer argued that the absence of legal representation invalidated investigations. The Court dismissed this argument, stating that there was no record of the defendant making a request to the prosecutor to have a lawyer present or the prosecutor denying such a request and therefore Article 106 of the CCP was not breached. While Article 106 appears to allow the questioning of a defendant to go ahead without a lawyer, if the defendant did not request one, additional efforts should have been made by the judicial authorities to guarantee the presence of lawyers throughout all phases of the investigation and trial, and not place the burden on the defendants. A similar argument was made by the lawyer of defendant Abdul Hamid Ammar Awhidal, and rejected on the grounds that the presence of a lawyer during investigation was not a condition to validate the investigation. It appears therefore that a defendant’s right to legal assistance is not adequately protected in law or in practice, allowing pre-trial interrogations to proceed without the presence of a lawyer.

Once the trial began, defendants were able to appoint lawyers, with the Court appointing lawyers for defendants who lacked counsel of their choosing, including Saif al-Islam Qadhafi (during the third hearing) and Al-Mabruk Muhammad al-Mabruk. Nonetheless, not all defendants were represented by lawyers during all hearings.

During the second hearing on 14 April 2016, many defendants requested to be allowed to be in contact with their lawyers. A lawyer initially hired by a defendant’s family recused himself on 27

April 2014, amid reports that he might have been intimidated. A staff member of the Al-Hadhba prison informed UNSMIL that the lawyer was physically attacked in the streets some two days before the hearing. When Saif al-Islam Qadhafi was asked in court at the third hearing of the trial, on 27 April 2014, whether he had legal representation, he stated “Allah is my lawyer”. Apparently, on 14 May 2014, his publicly appointed lawyer, along with a colleague appointed to represent Al-Mabruk Muhammad al-Mabruk, was prevented from entering the Al-Hadhba compound, although in subsequent hearings they were able to enter the complex. In an effort to facilitate access by lawyers, the prosecutor also organized transport for lawyers from the Tripoli Court Complex to the Al-Hadhba compound.

Abu Zeid Dorda said at the hearing on 3 May 2015 that he selected four lawyers who all withdrew upon receiving threats. The prosecutor said that no lawyer submitted a complaint for being the subject of a threat, and had they done so he would have ensured their protection.

Some of the lawyers represented several defendants who may have had conflicts of interests between them. When one lawyer sought to have separate trials so that he could offer better legal advice to his individual clients, the prosecutor argued that this was not possible because all the defendants were part of the same “criminal plan”. Even if this argument were to be followed, further effort could have been made to ensure that all defendants had proper legal representation.

Given the political sensitivity of the case, in some instances it was difficult to find Libyan lawyers willing to represent the defendants. Some defendants, including Abdullah al-Senussi and Al-Baghdadi al-Mahmudi, expressed an interest in being represented by foreign lawyers. A number of foreign lawyers were willing to join Libyan defence teams, but none were able to do so although Libyan law allows and regulates the appearance of foreign lawyers.

In the case of Al-Baghdadi al-Mahmudi, the Libyan Bar Association did not grant the required authorization for Tunisian lawyers to represent him on the grounds that not all requirements were met. The Tunisian lawyers concerned have repeatedly declared that they were not able to defend him despite having followed all required procedures and despite the extradition agreement with Tunisia appearing to foresee that right. The extradition request, dated 17 November 2011, signed by the Libyan Prosecutor General and addressed to the Tunisian judicial authorities, stated that “the Libyan judiciary is recording its commitment to allow the defence team, which is handling the responsibility of his defence in Tunisia, other foreign lawyers or national or international rights organizations, to actively attend the investigation and trial procedures”. In its verdict, the Court stated that the defence’s argument “that the authorities prevented him from using a foreign lawyer is not true, because Libyan law allows the accused to use a foreign lawyer, if the procedures foreseen by the law have been followed and the foreign defence team appears in front of the Court” (page 197). The verdict does not indicate what investigation if any was conducted by the Court on the matter.

UNSMIL and OHCHR find that the right to counsel appears to have been violated during the investigation phase, certainly during interrogations carried out by armed groups. During the trial, the quality of the defence may have been affected by the difficulties experienced by some defendants in hiring and retaining lawyers of their own choosing. The security and political climate in Libya may have limited the pool of experienced lawyers willing to represent these

defendants, particularly high-profile senior figures of the former regime, and this might have impacted on the defendant's right to complete and meaningful defence. There are also concerns about possible conflict of interest for lawyers who represented multiple defendants.

## 8.7 The right to adequate time and facilities for the preparation of defence

The fundamental principle of equality of arms between the prosecution and the defence requires that both parties have a reasonable opportunity to prepare and present their case in a manner that does not put one of them in a less favourable position compared to the other party. This right is protected under article 14(3)(b) of ICCPR, which refers to the need to give each person accused of a criminal act the right to "adequate time and facilities to prepare his defence and to communicate with counsel of his own choosing."

The African Commission on Human and Peoples' Rights has held that "the right to fair trial involves fulfilment of certain objective criteria, including the right to equal treatment." The Commission added that "the right to equal treatment by a jurisdiction, especially in criminal matters, means, in the first place, that both the defence and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial".<sup>44</sup> The Arab Charter in Article 16(2) provides for "the right to have adequate time and facilities" for the preparation of the defence.

The Basic Principles on the Role of Lawyers stipulate that "governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential" (Principle 22). The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa stipulate in Principle 3(a) that, "[s]tates shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential."

The Human Rights Committee noted that adequate facilities must include access to documents and other evidence, including "all materials that the prosecution plans to offer in court against the accused or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defence (e.g. indications that a confession was not voluntary). In cases of a claim that evidence was obtained in violation of article 7 of the Covenant, information about the circumstances in which such evidence was obtained must be made available to allow an assessment of such a claim."<sup>45</sup>

In cases with large amounts of information, the prosecution must identify and disclose the incriminating and exculpatory evidence relevant to the case. The duty is not satisfied by providing the defence with large volumes of documents, including those on a searchable

<sup>44</sup> ACHPR, *Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v. Burundi*, Communication No. 231/99, para. 29

<sup>45</sup> CCPR/C/GC/32 paragraph 33

computerized database, whose relevance or usefulness to the case may be difficult for the defence to identify; this may prejudice the rights to a defence and delay the proceedings.<sup>46</sup>

According to the Libyan CCP, the accused may request copies of all documents during the investigation (Article 68). The lawyer of a defendant may review the case file by request to the Accusation Chamber or the Court (Article 163). The parties have the right to see the case documents once summoned to appear before the Court (Article 209). The public prosecution or the investigating judge may order that an accused does not communicate with other inmates or receive visits, but “without prejudice to the right of the accused to always communicate with his lawyer without the presence of anyone” (Article 121).

Most defendants in Case 630/2012 experienced severe delays in getting lawyers to represent them. Most complained of insufficient access to their lawyers and that they were not permitted to consult and communicate with their lawyers in confidence – prison guards appeared to have been invariably present or within earshot in violation of the right of defendants to confidential communication with their lawyers. Lawyers told UNSMIL that the intimidating environment of the Al-Hadhba compound and occasional difficulties in securing entry appear to have dissuaded some lawyers from visiting their clients more frequently. Defendants also complained that conditions of detention, including prolonged periods in solitary confinement, and lack of access to basic materials such as pen and paper, further impinged on their rights to prepare their defence.

Complaints by defendants and lawyers over the access to each other were frequently raised in court. Defendant Said Ibrahim al-Garyani stated on 11 May 2014 that he had yet to meet his lawyer. Muhammad Ahmed Mansur al-Sherif’s lawyer asked the Court to ensure the respect of the CCP and allow him to meet with his client privately. He added that when he met his client last, a police officer was present. Similar concerns were raised by Abu Zeid Dorda’s and al-Mabruk Muhammad al-Mabruk’s lawyer, as well as by lawyer Ali al-Daba’a, who represented several defendants, including Al-Baghdadi al-Mahmudi. The latter specifically requested the Court to ensure that a private space would be made available. Some referred to the presence of surveillance cameras.

On 3 May 2015, Abu Zeid Dorda said that the prison administration insisted on having a police officer present during the meeting with his lawyer, and his lawyer confirmed that she had not been able to have a private conversation with her client when she had visited him recently because they would have to meet in a place with surveillance cameras and in the presence of prison guards. Abu Zeid Dorda added that he wanted to meet privately with his lawyer and to have a notebook to write his notes. The prosecutor said he had already provided the defendants with pens and notebooks. The Court ordered the prosecutor to ensure that the defendant met with his lawyer in private, is able to write his defence and present it to his lawyer.

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<sup>46</sup> Prosecutor v Bemba, (ICC-01/05-01/08-55), ICC Pre-Trial Chamber, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties (31 July 2008) para. 20-21, 67; Prosecutor v Karemera et al, (ICTR-98-44-AR73.7), ICTR Appeals Chamber, Decision of the Appeals Chamber on Interlocutory Appeal Regarding the Role of the Prosecutor’s Electronic Disclosure Suite in Discharging Disclosure Obligations (30 June 2006) para 9-15; Amnesty International, Fair Trial Manual, second edition, 2014, page 77.

Salah Marghani, Minister of Justice from November 2012 to August 2014, proposed to facilitate privileged meetings between lawyers and defendants at Al-Hadhba compound, including by building adapted visitation rooms, but this proposal appears not to have been pursued.

The detention of defendants at facilities under the control of different armed groups, even if affiliated to different ministries, also hindered defendants' access to lawyers. For instance, during the tenth hearing on 30 November 2014, Mondher Mukhtar al-Ghneymi's lawyer expressed concerns about his inability to meet his client until then. He noted that he had gone to the Al-Hadhba prison to meet his client, only to find that the latter was not detained there. It transpired that Mondher Mukhtar al-Ghneymi continued to be detained at a facility in Mitiga, despite judicial orders to transfer him to the Al-Hadhba prison.

The Court attempted to rectify these shortcomings by ordering access between lawyers and their clients. At the 22 June 2014 hearing, it asked the Judicial Police to facilitate the work of the defence, including by providing defendants with pens and paper to facilitate the preparation of their defence. Nonetheless, fundamental concerns especially regarding private meetings remained and it does not appear that the Court looked into these issues thoroughly enough.

In addition to needing information on exact charges, to be able to meaningfully prepare one's defence, defendants and their lawyers must have access to all relevant information, including witness testimony and other evidence. Defence lawyers complained that they were only able to receive all relevant material upon which the prosecution relied to build its case after delays, in some cases several months after the beginning of trial proceedings. Until May 2014, most defence lawyers interviewed by UNSMIL staff stated that the prosecutor had allowed them to examine the dossier at the Court and Prosecution Complex, but that they were not permitted to take a copy. During the second hearing of the trial, on 14 April 2014, the prosecutor argued that the dossier contained confidential information on suspects not yet in custody, and that disclosing it might endanger the process. At the third hearing on 27 April 2014, the Court allowed the defence lawyers to make a photocopy of the case file, and at the following fourth hearing on 11 May 2014, the lawyers were allowed to obtain a copy of the case file on a CD.

The lawyer of Mansur Daw said that she was not able to have access to the medical reports related to the assassinated demonstrators. The prosecutor said that the lawyer could have come to the office of the public prosecution to have access to these documents. The prosecution repeatedly gave assurances that lawyers who submitted official requests had access to the dossier of Case 630/2012, although complaints regarding delays and missing documents in this regard persisted. For instance, in the 25 May 2014 hearing, one defence lawyer said that the dossier he was given did not contain copies of all documents. The prosecutor told UNSMIL that lawyers exaggerated their difficulties in having access to the relevant material as a defence tactic.

Lawyers who eventually received the full Accusation File maintained that they did not have time to adequately investigate or respond to all the evidence. During the hearing of 22 June 2014, several lawyers complained that they had had insufficient opportunity to study the case file. The Court in some cases allowed extra time for the lawyers to present their defence.

UNSMIL and OHCHR are concerned that several key elements of the right to have adequate time and facilities for the preparation of the defence were not fully upheld. Despite assurances by the prosecutor and interventions by the Court, lawyers appear to have experienced difficulties in accessing the full documentation of the trial, and the right to communicate in confidence with one's lawyer appears to have been repeatedly violated.

## 8.8 The right to call and examine witnesses

The right to call witnesses and examine them is a main pillar of the principle of equality of arms between defence and prosecution. Article 14(3)(e) of ICCPR provides for the right of accused persons to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them. This guarantee is important for ensuring an effective defence by the accused and their counsel, guaranteeing the accused the same legal powers of compelling the attendance of witnesses and of examining or cross examining any witnesses as are available to the prosecution.<sup>47</sup> The right to defence includes the right to challenge the credibility and probity of prosecution witnesses. Bringing witnesses to court hearings at which the defendants are present enables the questioning and cross-examination by both prosecution and defence, and allows judges to hear evidence and challenges and observe the demeanour of those testifying. The reliance on absent witnesses raises difficulties for the defence, as the evidence is not tested before defendants and judges.

The Arab Charter on Human Rights in Article 16(5) also stipulates the right of the accused or the defence to examine the prosecution witnesses and to call defence witnesses under the same conditions applied to the prosecution witnesses.

The ICC Rules of Procedure and Evidence find previously recorded testimony (either through video, audio, or written transcript) admissible in the absence of the witness in court only if the prosecution and defence have had the opportunity to examine the witness at the time when the testimony was taken.<sup>48</sup> The European Court of Human Rights admits statements from witnesses absent from trial only as a measure of last resort, if there are good reasons for the witness' absence and if the Court took measures to ensure a fair assessment of the witness' credibility. Due consideration must also be given to the weight that was given to the witness' statement in deciding the outcome of a case. In a case where a conviction was based decisively on statements made before the trial by witnesses whom the accused had not had an opportunity to question and whom the Court never questioned, the European Court has concluded that the accused's rights to examine witnesses and to a fair trial were violated.<sup>49</sup> While not directly applicable, the jurisprudence of the European Court is particularly relevant as Libya follows a civil law system.

International standards also require States to protect victims and witnesses against threats and retaliation. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of

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<sup>47</sup> CCPR/C/GC/32, para. 39

<sup>48</sup> Rule 68 of ICC Rules for Procedures and Evidence

<sup>49</sup> *Taal v Estonia* (13249/02), European Court (2005) §§31-36; See, European Court: *Balsán v Czech Republic* (1993/02), (2006)

International Humanitarian Law require States to “[t]ake measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims” (Principle 12-6).<sup>50</sup>

Libyan law does not require that witnesses who have been questioned prior to trial by the prosecution be cross examined by the defence at any stage of the legal process. Article 159 of the CCP states that the Accusation Chamber is to prepare a list of witnesses to be notified that they may be heard before the Court, unless "it decides the testimony does not have any effects on the case." The right to hear prosecution and defence witnesses at trial is also stipulated in Articles 244 and 245 of the CCP, which specify that the prosecution and defendants have the right to call witnesses, including more than once if necessary, for example to clarify points they made in previous testimonies.

The Libyan Supreme Court decided on 26 April 2016 in case 2482 for judicial year 57 that “the principle in criminal trials is that they are based on an oral plea listened to by the Court, as this ensures the confrontation between the adversaries. The is the best way to allow the judge to build his conviction after listening to the pleas, discussing with the adversaries, questioning the witnesses and experts, clarifying any ambiguity surrounding the investigation, examining the faces and exploring the depth of their personality. This allows building a conviction as close as possible to truth, in comparison to deaf papers without sound or life. The verbal form also ensures the publicity of the trial, without it the public cannot follow what takes place in court”. This decision was rendered in a case of drug trafficking. It is not conceivable that a more complex case in terms of the charges and number of defendants such as Case 630/2012 could be conducted fairly without the need for a full examination of witnesses in open court.

During the hearings in Case 630/212, no prosecution witness testified in court, although the Court’s verdict heavily relied on testimonies of witnesses. The court did not call any prosecution witness or facilitate discussion or questioning of prosecution evidence. Several defence lawyers raised concerns in court regarding the credibility of the witnesses and of the evidence they provided, including information obtained from persons deprived of their liberty. Some lawyers also alleged that some testimonies were obtained under duress and challenged the use of only written testimonies of witnesses. A significant number of testimonies seemed to have come from former security and military officials, many of whom were detained.

In its verdict, the Court generally dismissed these concerns, stating that it was either satisfied by the testimonies or that it was exercising its prerogative in deciding which evidence to accept. In some instances, it clarified that the challenged testimonies were not the only evidence used in its decision. The Court also noted that defence lawyers did not provide any evidence to substantiate claims that witnesses were untruthful, had personal grudges against the defendants, or were coerced during questioning.

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<sup>50</sup> A/RES/60/147.

In the case of one of the defendants, Hosni al-Wahayshi al-Kabir, who was later sentenced to life imprisonment, the Court dismissed concerns raised by his lawyers regarding reliance on a witness statement which, the defence stated, was extracted under torture and duress. The defence further argued that, as the witness had died, it was not possible to cross-examine him. The Court justified its decision by stating that the lawyer's claims were not substantiated by evidence, and that the inability to cross-examine a witness did not constitute grounds to dismiss his testimony.

Several defendants and their lawyers questioned the credibility of written testimonies gathered by the public prosecution. The Court dismissed these arguments, frequently without providing a thorough justification and apparently without making efforts to scrutinize the information.

During the hearing on 28 December 2014, Abu Zeid Dorda requested to meet with his lawyer so that he could obtain a list of the defendants whose testimonies were used as evidence against him and whom he wished to question during the trial. The prosecutor opposed this, arguing that this would amount to a new interrogation to which the defendant was not entitled. It appears that the Court took no action on Abu Zeid Dorda's request, not even after witness and defendant Al-Mabruk Muhammad al-Mabruk stated at the hearing on 14 January 2015 that "he was innocent of any word mentioned against Abu Zeid Dorda" during interrogations.

Another defendant told UNSMIL staff during a prison visit that he had asked to question those testifying against him, but that the request had been denied by the prosecution. In one instance where the prosecutor did grant defendant Muhammad Ramadan Ishtiba's lawyer the right to question a prosecution witness in detention, the lawyer complained that the Al-Hadhba prison administration refused to grant him access. It appears that the Court took no action to rectify the matter. Ultimately, no prosecution witnesses were heard by the Court or cross-examined by the defence outside of court.

In its January 2015 memorandum to the Ministry of Justice, UNSMIL had recommended that the prosecution presents its evidence including its key witnesses in court, even if not requested by the defence. This did not happen.

Defendants' right to call and examine witnesses on their behalf was also hindered by the Court's decision to limit the number of defence witnesses allowed to testify. At the fourth hearing on 11 May 2014, the Court rejected requests by defence lawyers to call three defendants and witnesses arguing that the reasons needed to examine the witnesses were not clearly articulated. During the sixth hearing on 22 June 2014, the Court did allow three defence lawyers to call two witnesses each. During the hearing on 30 November 2014, the prosecutor objected to some defence witnesses testifying in court on behalf of Radwan al-Hadi al-Hamali, stating that they constituted character witnesses and that their testimony was irrelevant. However, despite his request to the Court to no longer accept lawyers' requests to examine "irrelevant witnesses", the Court held that all lawyers could bring two witnesses per defendant without the need to submit their names in advance. The judges did not explain the rationale for limiting the number of defence witnesses to two. One lawyer speculated that this limitation was due to the Court's intention not to prolong the trial.



Attempts by the Court to arbitrarily limit the number of defence witnesses constitute a direct violation of the rights of the defendants, who are entitled to examine or have examined the witnesses against him and to obtain the attendance of witnesses on his behalf under the same conditions as witnesses against him. In its memorandum of January 2015 to the Ministry of Justice, UNSMIL had recommended that measures be taken to ensure equality of arms, including not to limit the number of defence witnesses.

In accordance with the principle of equality of arms, defence lawyers should have been entitled to resources and facilities to conduct their own fact-finding and call their own witnesses. The resources need not be equal to the prosecution but should not place the defence at a substantial disadvantage. Defence lawyers did raise concerns regarding difficulties in bringing witnesses to court citing that some resided abroad or in other parts of Libya. During the hearing on 28 December 2014, the Court expressed its willingness to receive written testimony by defence witnesses unable to physically attend. However, UNSMIL staff saw no indication that the Court took any further steps to facilitate defence lawyers' task in gathering testimonies that would benefit their defence arguments.

For example, when Abdullah al-Senussi's lawyer complained that he was unable to have a witness testimony certified at the Libyan consulate in Egypt, the Court merely stated that the lawyer had one more chance to present witnesses without considering further measures to facilitate the gathering of the testimony or to ensure that the Libyan consulate in Cairo would certify the testimony. Further, while the Court heard two defence witnesses during the hearing on 30 November 2014, it devoted only a few minutes to the testimony of each.

The restrictions on the number of witnesses clearly impeded the work of the defence lawyers. However, not all lawyers who questioned the credibility of the prosecution's witnesses in court explicitly asked to examine a prosecution witness. Given this reality, the Court should have been more proactive in scrutinizing the prosecution's case, including by calling in prosecution witnesses, with a focus on witnesses whose credibility was questioned by the defence, or when allegations of torture or coercion were made.

UNSMIL and OHCHR are gravely concerned that the principle of equality of arms and the right to complete defence were compromised by the fact that no prosecution witnesses were called or examined in court, not even those whose credibility was questioned by the defence. Another major obstacle to a complete defence was the apparently arbitrary restriction to two defence witnesses per defendant decided by the Court. Further obstacles included the lack of witness protection measures, which possibly affected the willingness of defence witnesses to come forward.

## 8.9 The right to be tried in one's presence

Under Article 14(3)(d) of ICCPR, the defendant has the right to be present at trial. This right can be temporarily restricted in exceptional circumstances, for instance if the defendant repeatedly disrupts proceedings and obstructs the course of justice. Trials *in absentia* are permitted in exceptional circumstances, as set out the Human Rights Committee, when the "accused persons,

although informed of the proceedings sufficiently in advance, decline to exercise their right to be present”.<sup>51</sup>

The Arab Charter for Human Rights in Article 16(3) stipulates the right “to be tried in one’s presence before an ordinary court and to present one’s defence in person or through a lawyer of one’s own choosing with whom one can communicate freely and confidentially.”

The CCP requires that the accused be present, in person or using "advanced communication means" (Article 243) and that the accused's lawyer also be present (Article 162).

In the course of the trial in Case 630/2012, several defendants and defence lawyers were absent for a number of hearings. The absence of a number of defendants who were not in custody seems to have been voluntary, while for those in custody, the absence appears to be linked to the failure of those holding them to transfer them to the Court. The Court found that six defendants were tried *in absentia*, including Saif al-Islam Qadhafi; four defendants who had been released prior to the trial and who did not appear in court; and one whom the Court sent to a mental health institution. However, it did not consider other defendants who missed a number of hearings to have been tried *in absentia*. Under Libyan law, if a defendant is convicted *in absentia*, a retrial is to take place once the defendant is apprehended. The prosecutor told UNSMIL that the verdict *in absentia* is only meant to have a “threatening effect” on the defendants.

From March 2014 until violence broke out in Tripoli in July 2014 leading to the withdrawal of Zintan-based armed groups from the capital, Saif al-Islam Qadhafi participated in four out of the six hearings held in that period via video-link, in accordance with the amended CCP.

Several other defendants were absent from individual hearings. The starkest example is that of Mondher Mukhtar al-Ghneymi, who was not present for half of the trial, reportedly due to the refusal of his captors to transfer him to the Court. Unlike other Tripoli-based detainees, he was held by the Tripoli Revolutionaries armed group under the command of Haitham al-Tajuri in Mitiga. Despite numerous requests, UNSMIL staff were unable to visit him in detention. During the fourth hearing on 11 May 2014, the Court ordered that Mondher Mukhtar al-Ghneymi be brought before the Court. He first heard his charges at the 9th hearing, on 16 November 2014, but was not consistently brought to Court afterwards. While his lawyer attended several hearings during his client’s absence, he stated on 30 November 2014 that he had not been able to meet his client, and noted that this was compromising his ability to prepare a complete defence. The impact of Mondher Mukhtar al-Ghneymi’s absence in many hearings on his right to complete defence is particularly concerning given that he was sentenced to death.

Several other defendants periodically missed hearings. The eight defendants who were held in Misrata until 2 November 2014 missed the first two hearings before being connected by video-link. However, they were then faced with difficulties given the poor quality of the sound. During the hearing on 22 June 2014, UNSMIL observers in Misrata struggled to hear what was being said in the Court in Al-Hadhba. This problem was resolved when the eight Misrata-based

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<sup>51</sup> CCPR/C/GC/32, para.36.

defendants were brought to Tripoli for the eighth hearing on 2 November 2014. They remained in Tripoli thereafter.

In the case of the detained defendants in Case 630/2012, their absence from hearings cannot be reasonably attributed to their free choice. In a letter dated 8 May 2014 addressed to Minister of Justice Salah Marghani, UNSMIL underlined that the absence of the defendants from individual hearings should only take place in exceptional circumstances and should not become a rule. The absence of defendants during parts of the trial undermine their ability to follow proceedings and prepare their defence adequately. Given the poor connections and technical problems, video-link participation also restricted the defendants' ability to participate in the trial, and limited the judges' ability to monitor their physical and psychological well-being.

The right to be tried in one's presence also requires that defendants are mentally and physically capable of defending themselves. The Court referred the 23<sup>rd</sup> defendant, Nuri al-Hadi al-Jatlawi, to a mental health institution, in order to prepare a report on his condition. The medical report concluded that he suffered from severe mental disorders and lacked the ability to discern or control his actions. However, the court convicted him *in absentia* of charges relating to killing and detaining demonstrators without pronouncing any sentence against him, and indeed recognizing that he suffered from severe mental disorders.

The prosecutor told UNSMIL that the trial did not discuss any charges related to a defendant if he was not present during the relevant hearing. However, the prosecutor's case was that all defendants were part of a "criminal plan", making it difficult to envisage that there could have been hearings that were not relevant to each defendant.

UNSMIL and OHCHR are concerned that not enough efforts were made to ensure the full participation of the defendants at trial hearings. Despite attempts to facilitate attendance at the trial for some defendants through video-link, the right to be tried in one's presence was undermined with at least nine defendants, held in Misrata and Mitiga, missing hearings of the trial, and Saif al-Islam Qadhafi, held in Zintan, being connected by video-link for only four out of 25 trial sessions.

## 9 Verdict and sentencing

On 28 July 2015, the Court read out its verdict in Case 630/2012. Nine defendants were sentenced to death by firing squad, including senior figures Saif al-Islam Qadhafi; Abdullah al-Senussi; Al-Baghdadi al-Mahmudi; Mansur Daw; Abu Zeid Dorda; Milad Daman; Omran Muhammad al-Ferjani; Awaydat Ghandur al-Nubi Abu Sufa, and Mondher Mukhtar al-Ghneyni.

Eight defendants were sentenced to life imprisonment and 15 other individuals were handed prison sentences ranging from five to 12 years. All those sentenced to prison terms had their civil rights revoked for periods ranging from the length of their imprisonment plus an additional year, to life. As such, they would be denied the right to stand or be elected for office or to be appointed or remain in any official position. Many were also given fines and asked to return public monies.

Four defendants were acquitted of all charges, including Abdul Ati al-Obeidi, whose lawyers raised concerns about his mental health and memory loss through the trial. Another defendant was referred to a mental health institution. The list of defendants and sentences is set out in Annex I.

The Court also held that Saif al-Islam Qadhafi and five other defendants had been tried *in absentia*. As such, according to Article 358 of the CCP, “if a person convicted in absentia appears or is arrested prior to the lapse of the penalty by passage of time [statute of limitation], the judgment issued previously, whether it relates to the penalty or the damages, will be annulled and the case will be reheard before the court”.

The fair trial concerns outlined in this report are all the more serious given the imposition of the death penalty on nine defendants. The United Nations Human Rights Committee stated: “In cases of trials leading to the imposition of the death penalty scrupulous respect of the guarantees of fair trial is particularly important. The imposition of a sentence of death upon conclusion of a trial, in which the provisions of article 14 of the Covenant have not been respected, constitutes a violation of the right to life (article 6 of the Covenant)”.<sup>52</sup> The Committee also specified that, “[i]n cases involving capital punishment, it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings”.<sup>53</sup>

The written verdict contains 353 hand-written pages divided into the following parts:

Pages 1-2:	The names of the judges, prosecutor, secretary and defendants
Pages 3-11:	The Accusation
Pages 12-79:	The Trial Procedures
Pages 80-145:	The Facts
Pages 145-344:	The Justification
Pages 344-349:	The Civil Claims
Pages 350-353:	The Decision

The part entitled “The Trial Procedures” contains a synopsis of the transcript of the court hearings. In its January 2015 memorandum to the Ministry of Justice, UNSMIL had asked for the transcripts and other records of the trial to be made available online for maximum public exposure.

The part entitled “The Justification” (or legal motivation) constitutes the central part of the verdict, and explains the Court’s legal reasoning. It lists each defendant, examining the evidence brought against him and his defence lawyers’ arguments, and outlining the conclusion and sentence. The verdict leads to a clearer explanation of the criminal conduct attributed to each individual than the indictment, although it does not provide a detailed explanation of what is described as the “criminal plan” and the role of each defendant in its implementation. “The Justification” was largely based on the confessions and testimonies provided during the investigation conducted by the public prosecution.

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<sup>52</sup> CCPR/C/GC/32 para. 59

<sup>53</sup> CCPR/C/GC/32 para 38

The Court has discretion in evaluating the strength of the evidence submitted by the prosecution. It may have been satisfied by the investigation conducted by the prosecutor, which is a judicial body under the Libyan legal system. However, given the nature and volume of the case, and the complexity of the “criminal plan”, it is difficult to understand how the Court did not see any need to request further explanation from any of the defendants or accusation witnesses. It would have also been crucial to respond to the allegations of torture, other ill-treatment and intimidation, which were raised during the trial by some of the defendants and their lawyers, as the evidence was largely based on confessions and testimonies. The Court dismissed these concerns on the grounds that no evidence was provided to substantiate claims of ill-treatment or other duress, but failed to order independent investigations.

The verdict also addressed allegations of bias raised by the fifth defendant, Abu Zeid Dorda, who claimed that the prosecutor took an extreme position against the defendants while it omitted “to take any action against armed groups that destroyed the State and created chaos” (page 225). In the verdict the Court simply responded that “this is a political discussion, which the Court is not concerned with” (page 225), despite the allegations raised before it of coercion, torture and other ill-treatment by armed groups.

“The Justification” also addressed the arguments of the defence. For instance, in line with international criminal law, the Court refused to consider instructions or orders from Muammar Qadhafi or any other superior as a justification for committing crimes (page 199). It also refused to accept that some defendants were under duress, explaining that duress requires that the defendants prove that taking the actions in question was the only way to prevent an imminent danger to them or their families (page 199).

On several instances, defence lawyers put forward arguments which appear to have been summarily dismissed by the Court. For example, on 27 April 2014, the lawyer representing Abdul Majid Salem al-Mezwighi, Abuajila Muhammad Mas’ud and Amer Ali al-Abani asked to separate the trial of the defendants that he was representing.

The Court did not systematically analyse each crime attributed to each defendant. The verdict often examines specific charges attributed to a given defendant and concluded that “as for the other charges attributed to the defendant, except what has been previously mentioned, the Court contemplated them, revealing that part of the charges are a duplicate description of the charges examined by the Court in its justification, while another set of the charges were committed by the defendant jointly with other crimes examined by the Court, as part of one “criminal revolt”. Lawyers informed UNSMIL that the Court failed to analyse all charges in the same manner, as in some cases the Court did not discuss its evaluation of the evidence.

A key concern throughout the trial was the absence of Saif al-Islam Qadhafi from all hearings except for four. The Court justified its failure to have him before the Court by concluding that it “knows through its access to public information that the first accused Saif al-Islam Qadhafi mentioned in one of the sessions in front of the Court of Appeal of Zawiyah/the Court of Assize of Zintan that he wishes to be tried in that town, which means that his failure to appear in front of the Court is due to his wish, and therefore he is in the position of the fugitive from the judicial

authority” (page 145). The legal reasoning used by the Court surprisingly considers an alleged statement, not tested for its veracity or voluntariness, by Saif al-Islam Qadhafi, declaring his wish to be tried in Zintan, as equivalent to evading justice, and thereby justifying continuing with a trial *in absentia*. A possible legal solution would have been the separation of his case from the remainder of the defendants.

On the day of the verdict on 28 July 2015, the Ministry of Justice in Prime Minister Abdullah al-Thinni’s government, based in al-Baida in eastern Libya, issued a statement that the verdict was null and void,<sup>54</sup> arguing that the judges were under duress and criticizing the defendants’ conditions of detention and their insufficient access to lawyers. This followed a 5 December 2014 statement by the Minister of Justice declaring that the Ministry was not responsible for trials taking place in areas outside its control, including the trial of former officials of the Qadhafi regime.<sup>55</sup> It added that it was impossible to issue fair and independent verdicts under the security situation prevailing in western Libya, which he characterized as under the control of armed groups.

## 10 Cassation and the right to appeal

Following the verdict of the Tripoli Court of Assize, the sentences are now under consideration by the Court of Cassation which is to undertake a review of the procedures and the application of the law. Libyan law does not impose a timeframe for the decision of the Court of Cassation and a date for the beginning of hearings has not been set.

Cassation in Libya’s legal system is the only ordinary form of challenging a verdict in the case of felonies. It does not allow for a review of the facts, evidence and testimony that led to the Court’s verdict. For instance, the procedure does not allow for reviewing the substance of witness testimony. The position held by some judicial authorities in Libya that the review of the application of the law is at times used by Court of Cassation as an entry point to review facts does not address the concern, as Cassation remains an inadequate process to ensure a review of facts.

Following the verdict, a number of defence lawyers informed UNSMIL staff that they had submitted written arguments claiming procedural flaws and inadequate application or interpretation of the law during the trial. A number of defendants submitted a request for the suspension of their prison sentence asking to be released. On 1 June 2016, the Court of Cassation accepted the request for release of six defendants: Muhammad Yusuf al-Zwei , Abdul Hafidh Mahmud al-Zeleytini, and Muhammad Ahmed al-Sharif , Abdul Majid al-Mezwighi, and Ammar al-Mabruk al-Nayed , and Hosni al-Wahayshi al-Kabir.<sup>56</sup>

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<sup>54</sup> See statement 5/2015 on the Facebook page of the Ministry of Justice: <https://www.facebook.com/918143241537221/photos/pcb.1010614705623407/1010613928956818/?type=3&theater>. At the time of the statement, the government led by Abdullah al-Thinni was considered to be the internationally recognized government of Libya.

<sup>55</sup> Statement 2/2014

<sup>56</sup> See [http://tripoli4libya.blogspot.com/2016/06/blog-post\\_94.htm](http://tripoli4libya.blogspot.com/2016/06/blog-post_94.htm) dated 2 June 2016

The Cassation procedure in Libyan law falls short of Libya's obligations under international law, specifically Article 14(5) of ICCPR, which stipulates that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law". The review must be genuine and substantive and not limited to the review of points of law. In interpreting the right of appeal, the Human Rights Committee specified in its General Comment 32 that, "[t]he right to have one's conviction and sentence reviewed by a higher tribunal established under article 14, paragraph 5, imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case. A review that is limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient under the Covenant".<sup>57</sup>

The Committee goes on to state that, "[t]he right to have one's conviction reviewed can only be exercised effectively if the convicted person is entitled to have access to a duly reasoned, written judgment of the trial court, and, at least in the court of first appeal where domestic law provides for several instances of appeal, also to other documents, such as trial transcripts, necessary to enjoy the effective exercise of the right to appeal. The effectiveness of this right is also impaired, and article 14, paragraph 5 violated, if the review by the higher instance court is unduly delayed in violation of paragraph 3 (c) of the same provision".<sup>58</sup>

The Committee found in one instance that the "review conducted by the Supreme Court was limited to a verification of whether the evidence, as assessed by the first instance judge, was lawful, without assessing the sufficiency of the evidence in relation to the facts that would justify the conviction and sentence imposed. It did not, therefore, constitute a review of the conviction as required by article 14 (5) of the Covenant".<sup>59</sup>

The African Charter on Human and Peoples' Rights also provides for the right to appeal. The African Commission on Human and Peoples' Rights found that the failure to equally review legal and factual aspects of the judgment constitutes a violation of the African Charter on Human and Peoples' Rights.<sup>60</sup> The Arab Charter of Human Rights also provides for the right of appeal to a higher tribunal in Article 16(7).

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa further expand on fair trial rights and specify that "everyone convicted in a criminal proceeding shall have the right to review of his or her conviction and sentence by a higher tribunal". The article also underlines that "anyone sentenced to death shall have the right to appeal to a judicial body of higher jurisdiction, and States should take steps to ensure that such appeals become mandatory".

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<sup>57</sup> CCPR/C/GC/32 para. 48

<sup>58</sup> CCPR/C/GC/32 para. 49

<sup>59</sup> A/64/40, Communication No. 1364/2005, *Carpintero Uclés v Spain*, paragraph 11-3

<sup>60</sup> Mauritania: Malawi African Association and Others v Mauritania (2000) AHRLR 149 (ACHPR 2000)

<http://www.chr.up.ac.za/index.php/browse-by-institution/achpr-commission/361-mauritania-malawi-african-association-and-others-v-mauritania-2000-ahrlr-149-achpr-2000.html>

Since 2011, UNSMIL had advocated with the Libyan authorities for the introduction of a full appeal in cases of felonies. This advocacy included regular meetings with the Legislative Committee of the National Transitional Council and the General National Congress' Legislative and Constitutional Committee and the Committee on the Judiciary. However, Libya still needs to amend its appeal procedure to bring it into compliance with international law.

## 11 Decisions of international and regional human rights mechanisms

### 11.1 The United Nations Working Group on Arbitrary Detention

On 27 January 2016, the United Nations received a complaint from 12 persons, including four defendants in Case 630/2012; Mansur Daw Ibrahim, Abu Zeid Dorda, Jibril Abdul Karim al-Kadiki and Abdul Ati al-Obeidi. On 19 April 2016, the Working Group rendered the opinion that the deprivation of liberty of all the applicants has been arbitrary, being in contravention with articles 9 and 10 of the Universal Declaration of Human Rights (UDHR) and articles 9 and 14 of ICCPR. It considered that “the non-observance of the international norms relating to the right to a fair trial, established in the UDHR and ICCPR in the case under consideration, namely Article 10 of the UDHR and Article 14 of the ICCPR, is of such gravity as to give the deprivation of liberty of the 12 individuals an arbitrary character.”

Accordingly, the Working Group requested the Government to take the necessary steps to remedy the situation of the applicants and bring it into conformity with the standards and principles set forth in UDHR and ICCPR. The Working Group further noted that it believed that, “taking into account all the circumstances of the case, the adequate remedy would be to release them. Pursuant to article 9.5 of ICCPR, they have an enforceable right to compensation.” In addition, the Working Group considered it “appropriate to refer the allegations of torture to the Special Rapporteur on torture for appropriate action.”<sup>61</sup>

### 11.2 The African Commission and the African Court on Human and Peoples' Rights

On 3 June 2016, the African Court on Human and Peoples' Rights ruled over a number of legal aspects related to the trial in Case 630/2012 following its examination of a communication filed on behalf of Saif al-Islam Qadhafi. According to the communication, the National Transitional Council had kept Saif al-Islam Qadhafi in secret detention since November 2011 without allowing him to seek counsel or contact the outside world. The case was referred to the African Court by the African Commission on Human and Peoples' Rights (ACHPR) and decided on the merits without participation by the State, resulting in a judgment by default against Libya.<sup>62</sup> The Commission found that Libya had breached Saif al-Islam Qadhafi's rights by repeatedly failing to comply with the Court's 2013 order for provisional measures – on 15 March 2013 the African Court had issued an order “to refrain from all judicial proceedings, investigations or detention

<sup>61</sup> Opinion No.4/2016, A/HRC/WGAD/2016/4. paras. 44, 48 and 49.

<sup>62</sup> AFCHPR, African Commission on Human and Peoples' Rights v. Libya, App. No. 002/2013, Judgment of 3 June 2016).



that could cause irreparable damage to the detainee”, including “allowing the detainee access to a lawyer of his choosing” and “allow the detainee visits by family members”.

In reaction to the verdict of the Court of Assize of Tripoli, the African Court issued a second order on 10 August 2015 asking Libya “to take all necessary measures to preserve the life” of Saif al-Islam Qadhafi and “to ensure that the accused is given fair trial in accordance with internationally recognized fair trial standards, including the independence of the judiciary and impartial proceedings as well as the possibility of counsel for the accused, his family or witnesses, if any is to attend the hearings”.

On 3 June 2016, the African Court decided that Libya had violated the rights to liberty and fair trial by holding Saif al-Islam Qadhafi in secret detention. The Court determined that these breaches violated Libya’s international obligations under the African Charter on Human and Peoples’ Rights, which secures the fundamental rights to liberty and to have one’s cause heard in articles 6 and 7, respectively. The Court considered that “incommunicado detention constitutes in itself a human rights violation that can lead to other violations such as torture, ill treatment or interrogation without appropriate due process safeguards”. It also found that the “detainee was not afforded the minimum guarantees of a fair trial at the time of his arrest, during the period of his detention and at the time he was convicted”, reiterating Article 14 of ICCPR. The Court also noted that “the accused has a right to adequate time for preparation of a defence commensurate with the nature of the proceedings and the factual circumstances of the case... he was interrogated in the absence of a counsel and was not given the opportunity to examine the charges which would be brought against him at the start of the trial”.

The conditions that led to this judgement, especially the interrogation in the absence of a counsel, are also applicable for other defendants in Case 630/2012.

The Secretariat of the African Commission on Human and Peoples’ Rights received another complaint on 15 October 2015 on behalf of ten complainants, including Abu Zeid Dorda, Jibril al-Kadiki and Mansur Daw. The complainants claimed that Libya has violated their rights in virtue of the African Charter, requesting the African Commission to order Libya “to ensure fair trial proceedings (...) ensure a functioning judicial system, which offers the protection of independence and impartiality; ensure that the Victims are not detained in a legal vacuum with no effective protection until Libya as a functioning State exists again, and the Libyan judicial system is rebuilt from scratch. Their continued detention in facilities governed by militia exposes them to further physical abuse and (...) undertake an immediate and effective investigation into the allegations of mistreatment and abuse set out in the Complaint”.<sup>63</sup> The Commission found during the 57<sup>th</sup> Ordinary Session from 4 to 18 November 2015 that “the Complaint reveals *prima facie* violation of the African Charter”. The Commission also requested on 17 November 2015 the suspension of the death sentences.<sup>64</sup>

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<sup>63</sup> Communication 581/15 – Abu Zaid Omar Doha and 9 Others (represented by John Jones Q.C and Others) v. Libya.

<sup>64</sup> ACHPR/PROVM/LBY/581/15/1868/2015.

## 12 Conclusion and recommendations

UNSMIL and OHCHR attach great importance to alleged perpetrators of grave human rights violations being brought to justice and recognize that conducting a trial of members of the former regime would be difficult under any circumstances, but particularly so in the context of an ongoing armed conflict and political polarization. The trial of Case 630/2012 represented significant progress compared to the trials held under Muammar Qadhafi's regime as well as an unprecedented opportunity to contribute to the historical record of the 2011 Revolution.

However, this opportunity for justice and truth was undermined by a number of violations of fair trial guarantees both in the pre-trial and trial proceedings. UNSMIL and OHCHR find that the proceedings in the trial of Case 630/2012 fell short of international norms and standards for fair trial and also breached Libyan law in some respects. These concerns also illustrate major flaws in the criminal justice system that would need to be addressed through legislative and institutional reform.

With the objective of strengthening the rule of law, promoting respect for human rights and ensuing accountability, UNSMIL and OHCHR provided recommendations to the Libyan authorities before and during the trial. In the report of the OHCHR investigation on Libya<sup>65</sup> presented to the Human Rights Council in March 2016, the United Nations High Commissioner for Human Rights recommended that, *inter alia*, the Government of Libya “[c]onsider the establishment of a specialized judicial structure within Libyan courts to focus specifically on crimes under international law, supported by specifically appointed judges, prosecutors, investigators and lawyers, with the possibility of at least initially embedding foreign advisers or experts to work in tandem with Libyan officials”. The High Commissioner also recommended that the international community “[s]upport the convening of a high-level meeting in consultation with the Libyan authorities to bring together Libyan actors and international partners to discuss initiatives to increase accountability in Libya”. UNSMIL and OHCHR reiterate the aforementioned recommendations.

With regard to the trial in Case 630/2012, UNSMIL and OHCHR urge that the review by the Court of Cassation take into full account the serious violations in due process identified in this report and provide effective remedies, pending the adoption of the legislative amendments needed to bring the Libyan system in full compliance with international human rights law and standards, in particular in relation to the right of appeal.

In addition, UNSMIL and OHCHR make the following recommendations:

### **To the legislative branch:**

1. Review the Penal Code to ensure all crimes are based on a clearly defined criminal conduct, avoiding general definitions that could open the door to extensive interpretation;

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<sup>65</sup> A/HRC/31/47

2. Include in Libyan legislation crimes under international criminal law such as crimes against humanity, genocide and war crimes.
3. Establish a moratorium on the use of the death penalty, aiming to abolish it. Pending abolition, ensure full compliance with the restrictions prescribed in particular in Article 6 of ICCPR, including by limiting the use of the death penalty only to the most serious crimes and by ensuring scrupulous respect of due process guarantees and the possibility for clemency.
4. Review the CCP and other legislation to ensure their compliance with international law and standards in the administration of justice, and in particular:
  - a. Amend Article 106 of the CCP to ensure that defendants are guaranteed access to lawyers and informed of their rights during the pre-trial phase, and that in absence of a lawyer of own choosing, legal aid and State-appointed lawyers during questioning by police or judicial authorities;
  - b. Amend the CCP to ensure that all criminal investigations are conducted by an investigating judge without exceptions related to crimes against the State;
  - c. Introduce further safeguards in the CCP, including the right not to be compelled to incriminate oneself, confess guilt and to remain silent, as well as an explicit prohibition on the use of statements extracted under any form of coercion or any other breach of due process.
  - d. Amend Article 381 of the CCP to guarantee that the right to appeal in felony cases includes a review of facts and evidence, and not merely of procedures and the application of the law;
5. Repeal or amend Law 38 of 2012 on Some Special Procedures for the Transitional Period to ensure that there is no immunity for individuals who have committed crimes under international law, and that information obtained through the use of torture or other forms of coercion be inadmissible in any judicial proceedings except as evidence of torture;
6. Introduce legislation to ensure the establishment and implementation of measures for effective victim and witness protection, including physical protection and psychological support, taking into account gender perspectives;
7. Adhere to the Rome Statute of the International Criminal Court and core international human rights treaties including the Optional Protocol to the Convention against Torture;

**To the executive branch:**

8. Take steps to ensure that all those detained, including those in Case 630/2012, are held in facilities under the effective control and oversight of the Ministry of Justice or Defence, and that in particular the Judicial Police has effective control of the Al-Hadhba Correction and Rehabilitation Institution.
9. Take steps to ensure the surrender of Saif al-Islam Qadhafi to the International Criminal Court, in compliance with Libya's international obligations.
10. Take measures to provide protection to members of the judiciary and ensure the security of court functions, as well as the protection of defendants, lawyers and witnesses.
11. Build the capacity of the police to conduct preliminary criminal investigations in line with international law and standards.

**To the Prosecutor General and other members of the judicial branch:**

12. Carry out a full, impartial and independent investigations into all allegations of torture and other ill-treatment made by defendants in Case 630/2012, including ex officio.
13. Establish and maintain an on-line or other system whereby the Accusation File is made promptly and fully available to defence lawyers.
14. Establish and maintain a system whereby verbatim written transcripts of public court proceedings are prepared and made available online to all parties, together with any other evidentiary document.
15. Apply the ruling of the Libyan Supreme Court reminding that in criminal trials all evidence should be discussed in court.
16. Ensure that the written and audiovisual documentation of Case 630/2012, with the exception of confidential information to ensure the protection and rights of victims, witnesses, and defendants, is placed on an official website, so that it can be made available to the public.
17. Develop the capacity of prosecutors and judges to handle complex cases involving major crimes, including international crimes, such as war crimes and crimes against humanity.
18. Ensure that any retrial of those convicted in Case 630/2012 is fair and carried out in accordance with international standards, taking into account the recommendations in this report.

## Annex I: Defendants, their functions, places of detention and verdict

No.	Name	Function	Place of detention	Verdict
1	Saif al-Islam Qadhafi	Engineer	Zintan	Death Penalty, sentenced in absentia.
2	Abdullah Imuhammad al-Senussi	Director of Military Intelligence	Al-Hadhba	Death Penalty; 50,000 dinars fine; compensation for public moneys estimated at approximately 24.5 million dinars.
3	Al-Baghdadi Ali al-Mahmudi	Secretary of the General People's Committee	Al-Hadhba	Death Penalty; 50,000 dinars fine; compensation of public moneys, estimated at approximately 906 million dinars; obligated with the fourth defendant to pay 110 dinars as a temporary compensation to civil complainant Mohammed Ali Ramadan Qadh and obligated with the fourth defendant to pay expenses divided equally between them.
4	Mansur Daw Ibrahim Mansur	Commander of the Popular Guard	Sikt (Misrata); Al-Hadhba	Death Penalty; 50,000 dinars fine; obligated to compensate public moneys estimated at approximately 62.6 million dinars; obligated with the third defendant to pay 110 dinars as a temporary compensation to civil complainant Mohammed Ali Ramadan Qadh and obligated with the third defendant to pay expenses divided equally between them.
5	Abu Zeid Omar Dorda	Head of External Security	Al-Hadhba	Death Penalty
6	Milad Salem Daman	Head of Internal Security, Tripoli Branch	Sikt (Misrata); Al-Hadhba	Death Penalty
7	Muhammad Yusuf Abu al-Qasem al-Zwei	Secretary of the General People's Congress	Al-Hadhba	12 years imprisonment and permanent deprivation of civil rights
8	Muhammad Ahmad Mansur al-Sharif	Secretary of the Islamic Call Society	Al-Hadhba	12 years imprisonment and permanent deprivation of civil rights; 50,000 dinars fine; obligated to compensate public moneys estimated at approximately

No.	Name	Function	Place of detention	Verdict
				2.6 million dinars.
9	Hosni al-Wahayshi al-Sadeq al-Kabir	Secretary of the Legal Affairs and Human Rights in the General People's Congress	Al-Hadhba	Life sentence and permanent deprivation of civil rights
10	Mondher Mukhtar al-Ghneymi	Clerk General People's Committee for Security	Mitiga; Al-Hadhba; Mitiga	Death Penalty
11	Abdul Hafidh Muhammad Ihmeida al-Zeleytni	Secretary of the General of People's Committee, for Planning & Finance	Al-Hadhba	10 years imprisonment and permanent deprivation of civil rights; 50,000 dinars fine; obligated to compensate public moneys estimated at approximately 193.7 million dinars.
12	Amer Ali Farag al-Dlewi	General Director of the Dept. of Customs	Al-Hadhba	Life sentence and permanent deprivation of civil rights
13	Radwan al-Hadi al-Hamali	Commander of the Armament Dept. of the Military Intelligence	Al-Hadhba	Life sentence and permanent deprivation of civil rights
14	Bashir Ali Muftah Humeydan	Commander of the Patrols Dept. of the Military Intelligence	Al-Hadhba	Life sentence; permanent deprivation of civil rights; 32,000 dinars fine
15	Abdul Hamid Ammar Awhida Omar	Administrative Affairs Officer in the Dept. of Military Intelligence	Al-Hadhba	Death Penalty; 50,000 dinars fine; obligated to compensate public moneys estimated at approximately 3.1 million dinars.
16	Jibril Abdul Karim al-Kadiki	Assistant of the Air Defense Chief for Aviation Affairs	Al-Hadhba	12 years imprisonment and permanent deprivation of civil rights
17	Abdul Ati Ibrahim al-Obeidi	Secretary of the General People's Committee for External Relations and International Cooperation	Al-Hadhba	Acquitted
18	Muhammad Abu Bakr al-Ali al-Dhib	General Clerk of the General People's Committee	Al-Hadhba	Life sentence; permanent deprivation of civil rights; 50,000 dinars fine; obligate to compensate public moneys estimated at approximately 10 million dinars
19	Al-Mabruk Muhammad al-Mabruk Mas'ud	Captain in External Security responsible for the protection of the Head of External Security	Al-Hadhba	Life sentence and permanent deprivation of civil rights
20	Abdul Majid Salem	Commander of the	Al-Hadhba	5 years imprisonment; deprivation

No.	Name	Function	Place of detention	Verdict
	al-Mezwighi	Financial Division in the Military Intelligence Dept.		of civil rights throughout the penalty period in addition to one year after that; 10,000 dinars fine; obligated to compensate public moneys estimated at approximately 110,000 dinars.
21	Omran Muhammad Omran al-Ferjani	Commander, Coastal Guard and Ports' Security	Al-Hadhba	Life sentence and permanent deprivation of civil rights
22	Ali al-Maqtuf al-Zawi	Chief of Staff of the Head of the External Security	Al-Hadhba	Acquitted
23	Nuri al-Hadi al-Taher al-Jatlawi	Director of the General Administration of Central Patrols		Prosecution suspended; placed in Al-Razi mental health facility until he recovers. Sentenced in absentia
24	Jamal Ali Hmeida al-Shahed	Technical Operations Dept. staff, External Security	Al-Jawiya (Misrata); Al-Hadhba	12 years imprisonment and permanent deprivation of civil rights
25	Abdullah Abu al-Qasem al-Sha'ani	External Security Officer	Al-Jawiya (Misrata); Al-Hadhba	12 years imprisonment and permanent deprivation of civil rights
26	Mohsen al-Hadi Muhammad al-Lamuji	External Security Officer, Dept. of technical operations	Al-Jawiya (Misrata); Al-Hadhba	12 years imprisonment and permanent deprivation of civil rights
27	Muhammad Khalifa Muhammad al-Wa'er	Head of the Technical Operations Dept., External Intelligence	Al-Jawiya (Misrata); Al-Hadhba	Acquitted
28	Abujila Muhammad Kheir Mas'ud	Deputy Director of the Technical Operations Dept., External Security	Al-Jawiya (Misrata); Al-Hadhba	10 years imprisonment and permanent deprivation of civil rights
29	Said Ibrahim Sa'dallah al-Gharyani	Assistant Head of the Technical Operations Dept., External Security	Al-Jawiya (Misrata); Al-Hadhba	12 years imprisonment and permanent deprivation of civil rights
30	Muhammad Imhammad Daw al-Hannashi	Office Manager of the Secretary of the General People's Committee		Life imprisonment and permanent deprivation of civil rights. Sentenced in absentia
31	Awaydat Ghandur al-Nubi Abu Sufa	Director of Administrative and Financial Affairs in the Liaison Office, Revolutionary Committees	Al-Hadhba	Death penalty; 50,000 dinars fine; obligate to compensate public moneys estimated at approximately 5 million dinars.
32	Ammar al-Mabruk al-Nayed	Member of the Coordination Committee,	Al-Hadhba	10 years imprisonment and permanent deprivation of civil

No.	Name	Function	Place of detention	Verdict
		People's Leadership-Tarhouna		rights
33	Amer Ali Madi al-Abani	Colonel, Operations Division, Military Intelligence	Al-Hadhba	Acquitted
34	Muhammad Ramadan Abdullah Ishtiba	Captain, 32 Brigade	Al-Hadhba	10 years imprisonment and permanent deprivation of civil rights.
35	Abdul Rahman Abdul Salam al-Gmati	Accountant in the Dept. of Administrative and Financial Affairs in the General People's Committee	Sentenced in absentia	6 years imprisonment; deprivation of civil rights throughout the penalty period in addition to one year after that; 50,000 dinars fine; obligate to compensate public moneys estimated at approximately 51.1 million dinars. Sentenced in absentia
36	Ali Abdul Salam al-Lid	Staff in the Dept. of Administrative and Financial Affairs in the General People's Committee	Sentenced in absentia	6 years imprisonment, deprivation of civil rights throughout the period of sentence and one additional year after that; 50,000 dinars fine; obligate him to compensate public moneys, estimated at approximately 1.5 million dinars. Sentenced in absentia.
37	Abdul Ra'uf Mas'ud Ali al-A'war	Staff, Treasury Dept. in the General People's Committee	Sentenced in absentia	6 years imprisonment, deprivation of civil rights throughout the penalty period in addition to one year after that; 50,000 dinars fine; obligated to compensate public moneys estimated at approximately 2.3 million dinars. Sentenced in absentia.