

# **ANNEX F**

## **(Public)**

# Trial of the Libyan regime

An investigation into international fair trial standards



Dr Mark S Ellis

November 2015



# **Trial of the Libyan regime**

**An investigation into  
international fair trial standards**

**Dr Mark S Ellis**

**November 2015**

Cover image: Gaddafi-era officials wait for their trial in a prison cage in Tripoli, Libya, 28 July 2015 © Xinhua News Agency/REX Shutterstock



## Table of Contents

<b>Author's Preface</b> .....	7
<b>FOREWORD</b> .....	9
What are the requirements of a fair trial? .....	10
ICCPR Article 14 .....	11
ACHPR Article 7 .....	12
Other Human Rights Instruments .....	13
<b>1. THE RIGHT TO A FAIR AND PUBLIC HEARING</b> .....	14
Case Reports .....	15
Summary of Findings .....	20
<b>2. INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY</b> .....	20
Case Reports on the Issue of Independence .....	21
Case Reports on the Issue of Impartiality .....	25
Summary of Findings .....	27
<b>3. THE RIGHT TO A COMPETENT TRIBUNAL</b> .....	27
Case Reports .....	28
Summary of Findings .....	28
<b>4. THE RIGHT TO BE PRESENT AT TRIAL</b> .....	28
Case Reports .....	29
Specifically Regarding Saif al-Islam Qaddafi .....	31
Summary of Findings .....	32
<b>5. THE RIGHT TO BE REPRESENTED BY COUNSEL</b> .....	32
Case Reports .....	33
Summary of Findings .....	37
<b>6. THE RIGHT TO ADEQUATE TIME AND FACILITIES TO PREPARE A DEFENCE</b> .....	37
Case Reports .....	38
Summary of Findings .....	39
<b>7. EQUALITY OF ARMS</b> .....	40
Case Reports .....	41
Summary of Findings .....	43
<b>8. THE RIGHT TO CALL AND EXAMINE WITNESSES</b> .....	44
Case Reports .....	44
Summary of Findings .....	45
<b>9. THE RIGHT TO APPEAL</b> .....	45
Case Reports .....	46
Summary of Findings .....	47
<b>10. THE RIGHT TO A PUBLIC JUDGMENT</b> .....	47
Summary of Findings .....	48
<b>11. DETENTION CONDITIONS</b> .....	48
Case Reports .....	49
Summary of Findings .....	51
<b>12. THE DEATH PENALTY</b> .....	51
Case Reports .....	51
Summary of Findings .....	53
<b>CONCLUSION</b> .....	54



## Author's preface

This report is the result of my own interest in the area of international criminal justice. As an outspoken proponent of international justice as a way to counter impunity and support accountability, I believe strongly in the role of the international, mixed and domestic war crimes tribunals.

Certainly, international justice took a leap forward on 1 July 2002 with the establishment of the International Criminal Court (ICC). Created as a permanent institution to prosecute individuals accused of the most egregious international crimes – namely, genocide, war crimes, and crimes against humanity – this vanguard court is a remarkable development in international law.

Of course, international, mixed and domestic courts must ensure that the trials they undertake are consistent with international standards of independence and fairness. The assumption is that most of these courts – certainly the international and mixed courts – diligently apply international standards to their judicial proceedings. However, this assumption is not always correct. These courts, on occasion, fail to adhere to international standards of justice. Yet, advocates of international justice often remain silent in their criticism of these failures, which reflects poorly on the international community. If we are serious in promoting international justice, we must also be willing to criticise those courts that do not meet international standards.

I was an early supporter of Libya's efforts to bring to justice those who committed atrocities during the years of Muammar Qaddafi's dictatorial rule. Consistent with my belief that we must fight impunity through accountability, I believed in Libya's overall mission, including its ability to help bring justice to victims, and accuracy to the historical record. The ICC too supported Libya's efforts through the Court's principle of complementarity. Between March 2014 and July 2015, 37 Qaddafi-era officials, including Saif al-Islam Qaddafi and Abdullah al-Senussi, were tried on charges of war crimes and other offences by a Libyan court in Tripoli. The Court, however, did not agree to the proceedings against Saif al-Islam Qaddafi himself, as he was being held in Zintan, controlled by militia forces.

This report details findings regarding the fairness of the trial and the degree to which it adhered to international legal standards of fairness and impartiality as required by the ICC's complementarity principle. I involved three highly competent lawyers – Mariya Peykova, Katherine Mozynski and Robert Murtfeld – to work with me on interviewing key individuals and groups, researching relevant international and domestic laws, and drafting the final assessment report.

This report does *not* represent the views, or the opinion of the International Bar Association (IBA), or any single individual who assisted me in the drafting process, or any individual who was interviewed for the report. I take full responsibility for the report's content and conclusions.

In the end, this was a personal journey, reflecting my desire simply to raise concerns about the establishment and operation of domestic war crimes courts, so that future efforts toward embracing international justice mechanisms can be improved. I hope this report contributes to that effort.

**Dr Mark Ellis**  
**Executive Director, IBA**



## FOREWORD

Between March 2014 and July 2015, thirty-seven Qaddafi-era officials, including Saif al-Islam Qaddafi and Abdullah al-Senussi, were tried on charges of war crimes and other offences by a Libyan court in Tripoli. This report details the findings of an investigation into the fairness of the trial proceedings and the degree of adherence to international legal standards.

It is essential to note that Libya's tense security situation has cast a constant shadow, making access to the proceedings difficult and the gathering of information challenging. Since the 2011 overthrow of Muammar Qaddafi's dictatorship, Libya has been immersed in regional power struggles and civil war. It is for others to assess the full implications of this violence, as well as ongoing efforts to produce a political consensus, on the Libyan Court and its case against former regime officials. This report focuses *solely on the legal issues surrounding the trial proceedings*.

The conclusions contained in this report are based, *where possible*, on independent, first-hand accounts. The analysis is based primarily on trial observations by the United Nations Support Mission in Libya (UNSMIL)<sup>1</sup> and No Peace Without Justice (NPWJ), as well as on reports by trial observers whose credibility was assessed and evaluated by legal professionals.<sup>2</sup> For security reasons, it is noted that the identity of observers is confidential and cannot be disclosed.<sup>3</sup> Some attention has been given to accounts and reports by human rights organisations and NGOs, as well as certain newspapers, where such reports and accounts have been corroborated by additional evidence.<sup>4</sup>

As this report is based solely on information that is *currently available*, the findings and analysis presented herein are subject to amendment should further

---

<sup>1</sup> Priority is given to the observations made by UNSMIL, as they are, to the best of our knowledge, first-hand accounts. Any other evidence will be regarded as secondary, and be accorded such weight as appropriate under the circumstances.

<sup>2</sup> Our team has conducted a series of interviews with independent observers.

<sup>3</sup> Where reference is made to 'a source' or 'other sources', it refers to independent observers who were interviewed within the scope of this investigation, and whose identity is protected.

<sup>4</sup> Such evidence could be in the form of corroborated testimony, or reports by different organisations alluding to the same or similar facts.

information become available at a later stage. To date, court documents have not been made available. It is unknown whether a written verdict was ever produced or will be published at a later date.

Following the investigation the case against Saif al-Islam Qaddafi, Abdullah al-Senussi and others was found to be severely compromised in several ways, including, *inter alia*, the failure to adequately publicize the hearings, the frequent absence of lawyers and defendants from the proceedings, and the lack of written judicial reasoning.

This report looks systematically at the requirements of a fair trial and the extent to which those requirements were met in the current case. Reference is made throughout to the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (ACHPR), both of which are legal instruments signed and ratified by Libya. Other human rights instruments and sources of law have been referenced where appropriate.<sup>5</sup>

## **WHAT ARE THE REQUIREMENTS OF A FAIR TRIAL?**

Every case must be evaluated on its own merits and according to the full circumstances of a trial. The gravity of crimes being considered, as well as the potential sentence and consequences must also be taken into account. To be considered fair under international standards, the conduct of a hearing must comply with requirements set out in various international human rights instruments, including Article 14 of the ICCPR and Article 7 of the ACHPR.

---

<sup>5</sup> The Fair Trial Manual published by Amnesty International (Second Edition) has also been used as a source. The manual can be accessed [here](#). Particular reference is also made to Article 6 of the ECHR, as it uses the same wording as Article 14 of the ICCPR. In this context, even though Libya is not a signatory to the ECHR, case law relevant to Article 6 of the ECHR is relevant to demonstrate how the right to a fair trial has been understood and interpreted by other international tribunals. In addition, reference is made to the Arab Charter on Human Rights.

## ICCPR Article 14

Article 14(1) of the ICCPR sets out the right to a fair trial and depicts the core principles of fairness as recognized by the international community. Notably:

*All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*

Because the right to a fair trial is a derogable right, Article 14(1) of the ICCPR also sets out the scope of its application and the circumstances under which governments can temporarily derogate from it.<sup>6</sup>

Article 14(3) of the ICCPR further states:

*In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*

- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;*
- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;*

---

<sup>6</sup> Even though the right to a fair trial is a derogable right, the Human Rights Committee in its [General Comment 29](#) recognized that certain peremptory norms could never be derogated from. An example of such peremptory norms would be the right to be presumed innocent until proven guilty found in Article 14(2) of the ICCPR.

- (c) *To be tried without undue delay;*
- (d) *To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;*
- (e) *To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
- (f) *To have the free assistance of an interpreter if he cannot understand or speak the language used in court;*
- (g) *Not to be compelled to testify against himself or to confess guilt.*

Article 14(3) of the ICCPR lists the ‘minimum guarantees of fairness’ in criminal trials. The wording of Article 14(3) suggests that there exist different thresholds of fairness, and that compliance with ‘minimum guarantees’ secures the lowest threshold of fairness at a *criminal* hearing. However, compliance with Article 14(3) does not *always* ensure compliance with fairness as required by Paragraph 14(1) of the ICCPR.<sup>7</sup> The fairness of a hearing will thus be assessed on its merits, and based on the particular circumstances of each case. For example, in trials leading to the imposition of the death penalty, scrupulous respect of fair trial guarantees is essential.<sup>8</sup>

### **ACHPR Article 7**

Because Libya signed and ratified the African Charter of Human and Peoples’ Rights, this analysis draws also on the rights and requirements of the African Charter. Article 7, which guarantees the right to a fair trial, states:

*Every individual shall have the right to have his cause heard. This comprises:*

<sup>7</sup> Office of the High Commissioner of Human Rights, Human Rights Committee, Twenty-first session, General Comment No 13, HRI/GEN/1/Rev.9 (Vol. I), which has been replaced by [General Comment No 32](#). Please note that General Comment No 32 does not reiterate this assertion.

<sup>8</sup> Human Rights Committee, [General Comment No. 32](#) Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007).

- (a) *The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;*
- (b) *The right to be presumed innocent until proved guilty by a competent court or tribunal;*
- (c) *The right to defence, including the right to be defended by counsel of his choice;*
- (d) *The right to be tried within a reasonable time by an impartial court or tribunal.*

Article 7(2) of the ACHPR reads:

*No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.*

The content of Article 7 of the ACHPR is *prima facie* more limited than the content of Article 14 of the ICCPR. The rights guaranteed under the ACHPR, however, have been widely interpreted by the African Commission on Human and Peoples' Rights.

### **Other Human Rights Instruments**

Where appropriate for comparative purposes, this report references other regional or international human rights instruments, even where these have not been signed or ratified by Libya. The European Convention of Human Rights and relevant case law is very useful in this respect, as there is helpful authority on the issue of trial fairness. This report also references the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa,<sup>9</sup> and the Arab Charter on Human Rights.

---

<sup>9</sup> African Commission on Human and People's Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2003, accessible [here](#).

This report focuses on the following rights:

- (i) The right to a **fair and public hearing**
- (ii) The right to an **independent and impartial tribunal**
- (iii) The right to a **competent tribunal**
- (iv) The right to be **present at trial**
- (v) The right to be **represented by counsel**
- (vi) The right to **adequate time and facilities** to prepare a defence
- (vii) **Equality of arms**
- (viii) The right to **call and examine witnesses**
- (ix) The right to **appeal**
- (x) The right to a **public judgment**

In addition, this report examines issues relating to the death penalty and detention conditions in the current case.

## 1. THE RIGHT TO A FAIR AND PUBLIC HEARING

Article 14(1) states that ‘everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.’ Thus, one requirement under Article 14(1) concerns *publicity* of a trial. It is important to note that Article 7 of the ACHPR does not *expressly* guarantee the right to a public trial. However, while there is no express guarantee in the text of the African Charter, the African Commission has held that failure to hold a public hearing violates Article 7(1) of the ACHPR.<sup>10</sup> Moreover, the Human Rights Committee (HRC) has clearly stated that all criminal trials and trials related to a suit at law must in principle be held orally and publicly.<sup>11</sup> The HRC expanded on this by stating that ‘*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. Courts must make information regarding the*

<sup>10</sup> See African Commission: *Media Rights Agenda v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 224/98 (2000), *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 218/98 (1998).

<sup>11</sup> General Comment no 32, paragraph 28.

*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, taking into account, inter alia, the potential interest in the case and the duration of the oral hearing.*<sup>12</sup> The publicity and ‘openness’ of trial proceedings are thus essential when assessing fairness, especially of criminal trials where the liberty - and sometimes life - of the accused is risk.

Article 14(1) also acknowledges that the right of an accused to a public trial is subject to certain exceptions. Courts generally have the power to exclude all or part of the public for reasons of morality, public order, or national security in a democratic society, or when privacy interests of the parties so require, or to the extent strictly necessary in the opinion of the Court where publicity might be prejudicial to the interests of justice.<sup>13</sup> Apart from situations where these exceptional circumstances apply, hearings must be open to the general public, including members of the media, and must not be limited to certain categories of people.<sup>14</sup> Even in situations where the Court has reason to exclude the general public, the evidence, legal reasoning, and final judgment must still be publicized, unless these would prejudice the interests of vulnerable individuals, such as children.<sup>15</sup>

## **Case Reports**

It is important to note that in the current case, the General National Congress in Libya<sup>16</sup> (GNC) amended Articles 241 and 243 of the Criminal Procedure Code. According to trial observers, the essence of the amendment is that a trial session is considered ‘open’ if it is broadcast live by TV satellite, or shown on public screens by any other means. Additionally, the amendment allows defendants to be connected to proceedings via video link or alternative means.

---

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*, paragraph 29

<sup>14</sup> HRC General Comment 32, paragraph 29.

<sup>15</sup> *Ibid.*

<sup>16</sup> This refers to the Libyan General National Congress that was elected by popular vote on 7 July 2012, taking over power from the National Transitional Council on 8 August 2012 in Tripoli.

The HRC held that the right to a public hearing is violated in situations where the hearing is not easily accessible. This applied, for example, in *Marinich v Belarus*<sup>17</sup> and *Kulov v Kyrgyzstan*,<sup>18</sup> where the HRC found that failure to provide access to the public constituted a violation of the right to a public trial. Furthermore, the HRC noted that the Court must consider the level of interest in a case, whether or not the defendant(s) are public figures, the duration of the hearing, and the time available once a formal request for publicity has been made.<sup>19</sup> Leading HRC case law suggests that, especially in cases of public interest, access to the proceedings is a key requirement for a public hearing under the ICCPR.

Regarding *The State of Libya v Saif al-Qaddafi, Abdullah al-Senussi and others*, a trial of great public interest, it is safe to conclude that hearings should be *open* to the general public under international law. According to trial observer accounts, the first two sessions were fully restricted. Those sessions were closed for security reasons; members of the public, including the defendants' families, were permitted at the entrance to the compound but not inside the courtroom.

According to reports, local and international NGOs were also barred from entering the compound. Observers from UNSMIL were the only members of the public allowed in the courtroom for the first two sessions.

While the HRC has held that hearings must be open and not limited to certain categories of people,<sup>20</sup> this does not automatically mean that the first two sessions were in breach of international law, particularly the right to a public trial.

In a criminal case, access to some or all of the proceedings could be restricted on grounds of morality, public order, national security in a democratic society, the parties' right to privacy, or where, in the opinion of the Court, publicity would prejudice the interest of justice.<sup>21</sup> At issue is whether restricted access at the first

<sup>17</sup> *Marinich v Belarus*, UN Doc. CCPR/C/99/D/1502/2006 (2010)

<sup>18</sup> *Kulov v Kyrgyzstan*, UN Doc. CCPR/C/99/D/1369/2005 (2010)

<sup>19</sup> See Communication No. 215/1986, *van Meurs v The Netherlands*, paragraph 6.2, *Kulov v Kyrgyzstan*, UN Doc. CCPR/C/99/D/1369/2005 (2010) paragraph 8.6, *Marinich v Belarus*, UN Doc. CCPR/C/99/D/1502/2006 (2010) paragraph 10.5.

<sup>20</sup> General Comment no 32, paragraph 28.

<sup>21</sup> See Article 14(1) of the ICCPR and Section A (3)(f)(ii) of the Principles on Fair Trial in Africa.

two sessions complied with international legal principles on the basis of the aforementioned exceptions.

According to trial observers, security guards in the court complex had wide, if not unchecked, discretion to deny entry to Court. Trial observers informed our team that guards often denied public access on security grounds. It is unknown whether or not these concerns were legitimate, but given the ongoing volatility in Libya, it is possible that concerns were justifiable and fall under the national security exception.

According to the Johannesburg Principles *‘a restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country’s existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.’*<sup>22</sup> Exceptions on the ground of national security are to be construed very narrowly, and must be invoked only when strictly necessary.<sup>23</sup> The Special Rapporteur on human rights and counter-terrorism has stated that to guarantee fairness, “[such exceptions] should be accompanied by adequate mechanisms for observation or review.”<sup>24</sup>

The first two sessions can be classified as ‘closed,’<sup>25</sup> public access was denied, and the sessions were not broadcast on television. Even if this was in breach of international law, it could be argued that such restrictions fall under the national security exception, given the precarious security situation at the time the trial commenced. International law recognises such exceptions in very narrowly defined circumstances, and as long as these restrictions are accompanied by adequate mechanisms for observation or review.

---

<sup>22</sup> Principle 2(a) of the Johannesburg Principles.

<sup>23</sup> Special Rapporteur on human rights and counter-terrorism: UN Doc. [A/63/223](#) (2008) §30

<sup>24</sup> *Ibid.*

<sup>25</sup> This memo takes the view that a ‘closed’ session is a session that is not open to any members of the public, and is not broadcast on any channel, so that access to the hearing is completely restricted. As international law defines publicity of a trial as free access to the general public, it is reasonable to take the view that a trial that is broadcast on various channels would fall under this definition.

Some may argue that the presence of trial observers in the courtroom qualifies as an ‘adequate mechanism for observation or review.’ Given that only two of the twenty-four sessions were ‘closed’ – and those two sessions were observed by trial observers – this report takes the view that restrictions on the first two sessions did not have a substantial impact on the adequacy of international monitoring and the overall publicity of the proceedings.

As has been mentioned, Libyan law was amended to reflect the notion that a hearing is deemed to be ‘open’ if it is broadcast live on television or by any other means. It remains unclear as to what those other means are, but in an increasingly interconnected and networked world, access could be facilitated in a number of ways. The legislative amendment in question could be an attempt to ensure compliance with international standards of fairness, even when *physical presence* at the hearings cannot be guaranteed.

It is essential to keep in mind that Libya’s security situation makes public access to the trial a difficult and dangerous exercise. In these circumstances and given that each case is to be assessed on its merits, it is possible that broadcasting the proceedings would be sufficient to satisfy the requirement of publicity under international law.

While the majority of hearings appear to have been broadcast on live television, a large number of those sessions were frequently interrupted by regular news broadcasts, or were not transmitted in their entirety.

More problematic than the transmission of the sessions were reports that security personnel arbitrarily managed entry to the proceedings. Sources have reported that guards had the authority to keep people out of the hearings at their discretion, despite a pre-approved list of individuals granted entry. The prison’s PR Office, not the Court, determined the list.

Sources report that those seeking access to the proceedings had to produce an explanatory letter providing prison officials with detailed information, such as who they are and why they wanted access to the proceedings. Further reports

highlighted that access to the Court was contingent upon a fairly invasive metal detector search. One source reported that they were asked to open their mouth, and were subjected to a dog sniff of their personal belongings.

Additionally, guards had discretion to conduct bag searches and to search any electronic device, such as mobiles, including the content of such devices (emails, messages etc.). A source reported in detail that after passing the initial security check, one was accompanied by a guard across the prison complex all the way to the Court building, where an additional security check was imposed.

According to multiple corroborated reports, journalists had limited access to the trial. Many chose, based on the volatile security situation in Tripoli, to relocate and observe the proceedings remotely. Others were discouraged by the complex and capricious ways in which entry was determined. Some journalists had prior approval to observe the trial but were turned away by security guards.

Many international organisations and NGOs were expressly barred from the proceedings, or were granted permission and then denied entry by security personnel.<sup>26</sup> There is also evidence to suggest that some observers were granted access to some sessions only and had to rely on telephone conversations with the Prosecutor to gather information about sessions they could not attend.

Together, these obstacles created a *de facto* barrier to public access, even if no formal restrictions were in place.

Reports also note that media outlets and trial observers were subject to unwarranted suspicion and detention by security forces. In one instance, which was corroborated by multiple sources, trial observers were detained for hours and interrogated regarding their affiliations to Western media and international organisations. Though the detained observers were eventually released, this incident created a culture of fear regarding openly discussing or commenting on the trial.

---

<sup>26</sup> See *The Guardian Report*, Monday April 14<sup>th</sup>, 2014, available [here](#).

This limited perspective on the proceedings does not encompass other noteworthy elements of the trial, such as the physical appearance of the defendants, or the treatment of legal professionals by security forces.

### **Summary of Findings**

The publicity of the proceedings was found to be consistently undermined. While security concerns presented a plausible extenuating circumstance, the public's limited access to the hearings, and failure to properly and consistently broadcast the proceedings compromised the defendants' right to a public hearing.

## **2. INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY**

Article 14(1) states that 'everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'. In addition, Article 26 of the ACHPR states that '*State Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.*'

The right to an independent and impartial tribunal requires states to ensure adequate human and financial resources for the judicial system to function effectively. This entails the provision of continuing legal education for judges, prosecutors, and other legal professionals, as well as prompt and effective action to deal with potential corruption and bias within the judicial system. The right to an independent and impartial tribunal is an absolute right and is non-derogable.<sup>27</sup>

---

<sup>27</sup> It is a customary international law principle, which means that it is obligatory for all states, irrespective of whether they have signed any treaties or not, and it is binding on states even during times of conflict and emergency. See [HRC General Comment 32](#), Paragraph 19.

The independence and impartiality requirement calls for objectivity and neutrality, both essential prerequisites for the rule of law. The decision-makers in judicial proceedings should be encouraged and enabled to make impartial and neutral judgments on the basis of objective criteria and facts. States should ensure that their courts and judges are separated from the government, and are able to produce judgments that are not influenced in any way by external pressure or motivated by political and personal persuasions. The most important principles on judicial neutrality and independence are expounded in a number of international non-treaty instruments,<sup>28</sup> upon which our investigation was based for purposes of this report.

### **Case Reports on the Issue of Independence**

#### *(a) Separation of powers*

The most important element of the independence requirement is the *separation of powers*. Separation of powers is necessary in a democratic society to ensure that no organ of government will exceed its power or infringe on the duties and responsibilities assigned to any of the other organs of the government.<sup>29</sup> Separation of powers means that an effective system of checks and balances is in place, so that the judiciary is enabled to carry out its duties without undue interference by political actors.

The doctrine of separation of powers is a key component of the rule of law. Libya has a duty under international law to respect and uphold this principle, which has been recognised and embraced by the African Commission of Human and Peoples' Rights. In the Commission's own words, "*the main raison d'être of the principle of separation of powers is to ensure that no organ of government becomes too powerful and abuses its power. The separation of powers between the three organs*

---

<sup>28</sup> See *Basic Principles on the Independence of the Judiciary*, *Principles of Fair Trials in Africa*, the *Bangalore Principles*, the *IBA Minimum Standards of Judicial Independence*, the *Commonwealth Principles of the Three Branches of Government*, and the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* [1995] CCJAPRes 1 (19 August 1995).

<sup>29</sup> This notion was also expressed by the African Commission for Human and Peoples' Rights in *Lawyers for Human Rights v Swaziland* (251/2002), African Commission (2005) paragraph 56.

*of government – executive, legislature and judiciary – ensures checks and balances against excesses from any of them.*”<sup>30</sup>

To evaluate the separation of powers in Libya, this report relies on an assessment of Libya’s justice sector by the International Legal Assistance Consortium (ILAC).<sup>31</sup> There is no updated information available regarding how the various rule of law institutions in Libya currently operate, or whether there is sufficient separation of powers between key institutions in the country.

According to the ILAC assessment,<sup>32</sup> the justice sector in Libya lacks legitimacy, in part due to the ongoing and incomplete process of many institutions to attain full independence.<sup>33</sup> Lower courts in Libya are still funded by the Ministry of Justice, while the Supreme Court is financially independent and funded by the GNC.<sup>34</sup> The Supreme Court is the highest judicial body in the country, and its decisions are final and binding on all judicial bodies and institutions in Libya. The fact that the Supreme Court is funded by the GNC is problematic, as this raises questions about the degree of separation of powers, and ultimately the Court’s independence.

However, the Ministry of Justice was officially separated from the High Judicial Council (HJC) in Libya, in an attempt to separate the judiciary from the executive. The HJC’s primary role is to supervise the judiciary, including making personnel decisions concerning appointments, promotions, transfers and secondments.<sup>35</sup> The Ministry handles the budget for the judiciary, controls several bodies that assist the judiciary, pays salaries, and is responsible for the upkeep of judicial premises.<sup>36</sup> According to the ILAC report, despite the fact that the Ministry of Justice is responsible for the payment of judicial and prosecutorial salaries, these are

---

<sup>30</sup> *Ibid.*

<sup>31</sup> For the most part, excerpts from the ILAC report have been copied out for the purposes of this assessment. The information contained in these excerpts is treated as factually sound, and has been assessed as such.

<sup>32</sup> *ILAC Rule of Law Assessment Report: Libya 2013*, accessible [here](#). This report details the findings of a team of experts from member organisations of the International Legal Assistance Consortium (ILAC) based on an assessment of justice sector institutions in Libya.

<sup>33</sup> ILAC Report, *supra*, at 8.

<sup>34</sup> *Ibid.*, at 42.

<sup>35</sup> *Ibid.*, at 41.

<sup>36</sup> *Ibid.*, at 41.

determined by the HJC, without any influence from the executive.<sup>37</sup>

Ordinarily, judicial officials begin their career as prosecutors and are eligible to be promoted to positions as judges once they have attained seniority. Those who seek promotion and qualify must submit to a performance review by the Judicial Inspectorate.<sup>38</sup>

The Judicial Inspectorate is an internal peer review system that applies HJC criteria to analyse the performance of members of the judiciary for purposes of promotion or demotion. Judicial Inspectorates are organized by Appeals Courts and their review powers extend only to members of the judiciary. Inspectors must be senior judges who have attained the rank of ‘consultant’, meaning that they have over 22 years of service and are qualified to sit in cases involving serious crimes.

The Judicial Inspectorate department in the Tripoli Court of Appeals, for example, consists of 45 consultant judges who remain active on the bench while conducting their Inspectorate duties.<sup>39</sup> It appears that a systematic review of judges was carried out after the 2011 uprising. In accordance with a decision by the HJC, judges deemed to be political extremists or incompetent were retired or sent to other departments, particularly the Directorates of Law and People’s Lawyers.<sup>40</sup> Ten to fifteen judges were affected in the Tripoli Court of Appeals region, according to the ILAC report.<sup>41</sup>

On the basis of the ILAC report, and in the absence of evidence to the contrary, it appears that post-Qaddafi Libya has made considerable efforts to ensure greater separation of powers between the executive and the judiciary. The detachment of the HJC from the Ministry of Justice is an important step toward ensuring that full separation of powers will ensue. Factors such as the financial link between the GNC and the Supreme Court indicate possible lack of independence, an issue that cannot be ignored. On the other hand, it appears that there is an overall structure to

---

<sup>37</sup> *Ibid.*, at 55.

<sup>38</sup> *Ibid.*, at 53.

<sup>39</sup> *Ibid.*, at 53.

<sup>40</sup> The concept of People’s Lawyers arose when the Qaddafi regime abolished the private Bar in 1981. During this time, revolutionary committees established revolutionary courts that held public, sometimes televised, trials of those charged with crimes against the revolution. Lawyers were needed to provide at least the appearance of a defence for the accused. Law No. 4 of 1981 accordingly established the Directorate of People’s Lawyers within the Ministry of Justice, and accorded it judicial status.

<sup>41</sup> ILAC report, *supra*, at 53.

encourage and promote greater separation of powers. Most issues identified in the ILAC report, such as lack of security and instability due to the general atmosphere of mistrust,<sup>42</sup> cannot be attributed to a deficiency in the system as structured, but is rather due to the general feelings of instability and uncertainty common in conflict-ridden or post-conflict societies.

Thus, on the basis of the ILAC report, *and in the absence of evidence to the contrary*, it can be concluded that there is a general framework for separation of powers in Libya, albeit imperfect and subject to improvement.

*(b) Independence of individual judges*

The independence of individual judges is essential in a democratic society that upholds and respects the rule of law. In order to ensure that judges are independent, they must be selected on the basis of their qualifications, experience, and integrity.<sup>43</sup> To satisfy international standards, states should ensure that judges are paid adequate salaries and pensions to protect their independence and reliability, and such safeguards should be protected by law.<sup>44</sup> In addition, judges should enjoy a secure tenure, to safeguard them from fears that their posts may be terminated due to political upheaval or in response to their decisions.

In the case of *The State of Libya v Saif al-Gaddafi, Abdullah al-Senussi and others*, the panel is made up of three judges, identified as Naji al-Amin, al-Sadeeq Badi and Badoura.<sup>45</sup> Despite efforts to secure credible information on the background of the judges, such information is not publicly available. We have thus relied on the knowledge of trial observers. Little is known about the judges' background, even though trial observers reported that the panel in question was

---

<sup>42</sup> *Ibid.*, at 37.

<sup>43</sup> Principle 10 of the *Basic Principles on the Independence of the Judiciary*, Section A(4)(i)-(k) of the *Principles on Fair Trial in Africa*.

<sup>44</sup> Principles 7 and 11-13 of the *Basic Principles on the Independence of the Judiciary*, Sections A(4)(l)-(m) and B(a)-(c) of the *Principles on Fair Trial in Africa*; and Article 12 of the *Arab Charter*.

<sup>45</sup> As named in the UNSMIL observations.

comprised of professional judges.<sup>46</sup> This is particularly important in light of the requirement that judges are appointed on the basis of their training, experience, and qualifications.<sup>47</sup>

Given the severity of the crimes that the defendants have been charged with, as well as the ramifications of the verdict, this requirement becomes even more important. A source also reported that there is a close relationship between judges and prosecutors in the Libyan justice system, as the majority of judges are former prosecutors. Additionally, we received credible information that the Prosecutor and Judges used a common entrance to the Court,<sup>48</sup> and the Prosecutor also used this entrance when the Judges were deliberating. Even though we are told this practice is not unique to this trial, it is still a cause for concern, especially given the apparent lack of judicial rulings.<sup>49</sup>

Even though information on how judges are selected in Libya is made available by the ILAC report, there are legitimate concerns as to whether this system of judicial appointment is still in place, especially since the change of regime that took place in August 2014. Furthermore, in the absence of written judicial rulings and a published verdict, a full assessment of the independence of the Judges in this context is not possible.

### **Case Reports on the Issue of Impartiality**

International law requires that tribunals be impartial, and they must clearly convey a sense of impartiality within and outside the courtroom.<sup>50</sup> Actual impartiality and the appearance of impartiality are fundamental to a fair trial.

---

<sup>46</sup> Our source, whose identity will not be revealed for the purposes of this report, has also informed us that very little is known about one of the three judges sitting on the panel.

<sup>47</sup> Principle 10 of the *Basic Principles on the Independence of the Judiciary* and Section A(4)(i)-(k) of the *Principles on Fair Trial in Africa*.

<sup>48</sup> Other parties to the proceedings, including defence lawyers, used a different entrance.

<sup>49</sup> We have received information that the judges have produced written rulings. It remains unknown whether the rulings have been made available to the parties to the proceedings, or whether the relevant parties can access them upon request. At this stage, we don't have access to the written rulings.

<sup>50</sup> HRC: *Karttunen v Finland*, UN Doc. CCPR/C/46/D/387/1989 (1992) paragraphs 7.2-7.3, *Collins v Jamaica*, UN Doc. CCPR/C/43/D/240/1987 (1991) paragraph 8.4; CoE CM/Rec (2010)12, paragraph

The right to an impartial tribunal requires that judges have no interest in the proceedings, and no pre-formed opinions about the case. A judge should not hear a case if he or she is unable to decide the matter on the basis of objective and available evidence. The judiciary's role is to ensure that proceedings are conducted fairly and the rights of all parties are respected, without discrimination.<sup>51</sup>

International law requires that the decisions rendered by judges be made solely on the basis of the available evidence, without consideration to external factors or personal opinions that the judges may hold about a case.

In addition, states must have an effective legal mechanism that allows the parties to challenge judges' impartiality.<sup>52</sup> International law takes the view that a judge is impartial unless a party to the proceedings provides evidence in proof of the contrary, usually through a process made available under national law.<sup>53</sup>

It is noted that reports highlighting the relationship between the prosecution and the judiciary are unsettling in light of the requirement of impartiality. The appearance of impartiality is crucial in judicial proceedings, as even the slightest indication of bias could be destructive to the Court's reputation. In view of this, allegations that the Judges in the current case used the same entrance as the Prosecutor raise legitimate questions as to the appearance of impartiality. Furthermore, the lack of written judicial reasoning raises questions as to the degree of transparency in the proceedings.

On the other hand, we noted a strong tendency by the Judges in this case to challenge the prosecution, as well as to ensure that defence counsel were allowed access to documents in the possession of the prosecution. Judges began

---

60; European Court: *Piersack v Belgium* (8692/79), (1982) paragraph 30; *Kyprianou v Cyprus*, (73797/01) Grand Chamber (2005) paragraphs 118-121.

<sup>51</sup> Principle 5 of the *Bangalore Principles*, and see Special Rapporteur on the Independence of Judges and Lawyers, UN Doc. A/66/289 (2011) paragraph 17.

<sup>52</sup> Section A(5)(b) of the *Principles on Fair Trial in Africa*

<sup>53</sup> *Prosecutor v Anto Furundžija* (IT-95-17/1-A), ICTY Appeals Chamber (July 2000) paragraphs 189-191, 196-197.

almost every session by calling out the defendants' names and ensuring that each was represented by counsel.

Evidence suggests that the Judges actively safeguarded the rights of the defendants; they allowed them added time to call witnesses, ruled on motions to release for medical reasons, and questioned defendants individually. Defence lawyers were allowed to present their *muraf'as*<sup>54</sup> and were rarely interrupted, unless the Court deemed it necessary for purposes of clarification.

### **Summary of Findings**

Despite the appearance of impartiality during formal court proceedings, the lack of written judicial reasoning makes it difficult to assess the actual impartiality of the judges. While the judicial panel appears to have made commendable efforts to uphold essential fair trial principles, it is impossible to assess whether these were applied consistently throughout the proceedings.

The paucity of details regarding the judges' background also makes it difficult to evaluate their independence. Taken together with the lack of judicial reasoning and questions surrounding the relationship between the judiciary and the prosecution, there are serious concerns regarding the impartiality of the judges and the transparency of the proceedings.

### **3. THE RIGHT TO A COMPETENT TRIBUNAL**

The right to a hearing before a competent tribunal<sup>55</sup> requires that the tribunal has jurisdiction. A tribunal that is *competent in law* to hear a case has jurisdiction over the *subject matter* and the *person*, and the trial may be conducted within any time limit prescribed by the law.<sup>56</sup> A judicial body must decide whether a tribunal has jurisdiction over a matter or person *in accordance with the law*.<sup>57</sup>

---

<sup>54</sup> Defence arguments or defence case.

<sup>55</sup> Article 14(1) of the ICCPR.

<sup>56</sup> [Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v Republic of Zimbabwe](#), (248/2003), African Commission, paragraph 172.

<sup>57</sup> Section A(4)(b) and (d) of the *Principles on Fair Trial in Africa*.

## Case Reports

The Libyan Court's jurisdiction over Saif al-Islam Qaddafi is problematic. There is currently an arrest warrant issued against him by the International Criminal Court (ICC),<sup>58</sup> as well as a finding of non-compliance by the ICC against Libya<sup>59</sup> for its failure to surrender Qaddafi to the ICC, where he is due to be tried for crimes against humanity and war crimes.

## Summary of Findings

The order of non-compliance issued against Libya means that the Court in Tripoli does not have proper jurisdiction to try Saif al-Islam Qaddafi. This strongly indicates that Qaddafi's right to be tried by a competent tribunal may have been violated. It appears on the facts that the Court in Tripoli has jurisdiction over the other defendants.

## 4. THE RIGHT TO BE PRESENT AT TRIAL

Everyone charged with a criminal offence has the right to be tried in person, or in an oral hearing, in order that they can challenge the prosecution's case and present their defence.<sup>60</sup> HRC case law suggests that this right does not necessarily require the defendant's physical presence at trial, as long as the defendant is represented by counsel and has the opportunity to state his or her case and challenge arguments brought forth by the prosecution.

In fact, the HRC was explicit in stating that 'all criminal proceedings must provide the accused with the right to an oral hearing, at which he or she may appear in person or be represented by counsel and may bring evidence and examine witnesses.'<sup>61</sup> The main purpose of the right is not so much to ensure the

---

<sup>58</sup> Warrant of Arrest for Saif al-Islam Qaddafi, 27 June 2011, [ICC-01/11-14](#).

<sup>59</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*, 10 December 2014, [ICC-01/11-01/11](#).

<sup>60</sup> Article 14(3)(d) of the ICCPR, Section N(6)(c) of the *Principles on Fair Trial in Africa*.

<sup>61</sup> *Guerra de la Espriella v Colombia*, HRC, UN Doc. CCPR/C/98/D/1623/2007 (2010) §9.3; See HRC General Comment 32, §§23, 28, *Domukovsky, Tsiklauri, Gelbakhiani and Dokvadze v Georgia*, HRC, UN Docs, CCPR/C/62/D/623/1995, (1998) §18.9.

*physical presence* of the accused, as to ensure that the accused has *access* to the trial proceedings and can adequately follow them for purposes of instructing his or her counsel. This usually is achieved if the accused is physically present at the hearings,<sup>62</sup> but is not necessary, as the wording of the HRC suggests.

### *Trials in absentia*

Although international law does not generally permit trials *in absentia*, and some law instruments go so far as to expressly prohibit the practice,<sup>63</sup> the HRC has made it clear that proceedings *in absentia* may be permitted in exceptional circumstances. This is the case, for example, when the accused, despite having been informed of the charges and the date and place of the hearing, nevertheless chooses not to attend.<sup>64</sup> In situations where the accused fails to attend due to circumstances beyond his or her control, the exception does not apply.

### **Case Reports**

In the case of *The State of Libya v Saif al-Islam Qaddafi, Abdullah al-Senussi and Others*, evidence has been collected which reveals that several defendants were not always tried in person.<sup>65</sup> Trial observers reported that some defendants were released and never appeared at any of the proceedings, while eight defendants were detained in Misrata and not brought in due to security concerns. After their absence from the initial proceedings, the eight Misrata defendants were connected to the proceedings via video link.

Notably, we received credible reports that the electricity in the courtroom was at times unreliable, though there is not enough information to assess the extent to

---

<sup>62</sup> It is generally easier for the accused to communicate with and instruct his or her counsel if he or she is physically present at the hearings. An accused who is absent from the proceedings will not automatically be held to have been tried *in absentia* if there is effective communication between the accused and counsel, and this enables the lawyer to present a defence of the same quality as if the accused had been present in Court. Physical absence from the trial, however, is a strong indicator that the right to be tried in one's presence has been breached.

<sup>63</sup> Section N(6)(c)(ii) of the *Principles on Fair Trial in Africa*.

<sup>64</sup> HRC: General Comment 32, paragraphs 36, 31, *Mbenge v Zaire* (16/1977), (1983) 2 Sel. Dec.76, p78, paragraph 14.1, *Salikh v Uzbekistan*, UN Doc. CCPR/C/95/D/1382/2005 (2009) paragraph 9.4.

<sup>65</sup> The investigating team has corroborated reports that a number of defendants were often absent from the proceedings.

which power outages compromised the ability of the Misrata defendants to understand and participate in their trial. After several sessions, the Misrata defendants appeared physically in Court for the remainder of the trial. Despite initial absences, reports indicate that the number of defendants who were present in Court increased after the first two sessions, though trial observers noted that some sessions were held with as few as 21 of the 38 defendants.

Although a defendant's absence may not in itself be problematic,<sup>66</sup> the available evidence has revealed that a number of defence lawyers also occasionally failed to appear. The Court imposed a fine of 50 Libyan dollars on the absent lawyers. Reports indicate that defence lawyers failed to provide the Court with an acceptable reason or notification of their absence. On one occasion, when six defence witnesses were said to have testified in Court, trial observers informed us that five lawyers were absent. The reports are not always clear as to which lawyers were absent, or whether their clients were present at the session in question. Physical absence from the proceedings, both of defendants and lawyers, has been widely reported by various trial observers.

Trial observers have also reported that at the end of the *murafa'a* for each defendant, the Court allowed the defendant to speak, challenge the prosecution, and make requests.<sup>67</sup> Although reports indicate that a significant number of defendants were given this opportunity, it is unclear whether *all* defendants had the chance to do so.

Relevant reports received raise concerns relating to the defendants' ability to follow the proceedings and participate effectively in preparation of their defence. It is unclear whether the defendants' absence was voluntary or involuntary, and the frequency of such absences has not been recorded with precision. While occasional or even frequent absences do not, perhaps, rise to the level of a trial *in absentia*, they may have had an adverse effect on the defence of certain defendants. This is especially worrisome in light of reports noting the occasional

---

<sup>66</sup> This may not be problematic where the accused in question is represented by counsel, and counsel is present at the proceedings.

<sup>67</sup> Under international law, all those tried with a criminal offence are entitled to an oral hearing, so that they can hear and challenge the prosecution case and present their defence. See Article 14(3)(d) of the ICCPR and Section N(6)(c) of the *Principles on Fair Trial in Africa*.

absence of lawyers from trial sessions and the lack of opportunity for defendants and counsel to confer confidentially.

### **Regarding Saif al-Islam Qaddafi**

In the case of Saif al-Islam Qaddafi, evidence collected within the scope of this investigation indicates that he was *de facto* tried *in absentia*. What separates Qaddafi from the other defendants is that militia forces detained him in Zintan for the duration of the proceedings so that he was not physically present for any of the sessions.

Because trial observers recorded the pattern of Qaddafi's absence, we were able to corroborate accounts of Court attempts to establish a video link. Though Saif al-Islam Qaddafi was allegedly observing the proceedings remotely, trial observers reported that Qaddafi was linked to the proceedings for only three or four of the 24 sessions held, and his absence was consecutive for the last 17 sessions of the trial. During those sessions where he did appear via video link, trial observers reported that the quality of the connection was poor, and on one occasion the proceedings appear to have been transmitted to an empty courtroom in Zintan.

As Qaddafi's detention is presumably beyond his control, his absence from the proceedings can be characterised as involuntary. Qaddafi did have a Court-appointed lawyer who presented a lengthy *murafa'a* on his behalf. It remains unknown, however, whether Qaddafi had a chance to properly instruct his lawyer, or whether he was even aware of the contents of the defence being argued on his behalf. At this stage it is not possible to ascertain whether Qaddafi had any contact with his lawyer, and if so, whether that contact was sufficient for him to understand the nature of the arguments against him.

Moreover, it is noted that in its latest submission<sup>68</sup> to the International Criminal Court, the Libyan state<sup>69</sup> acknowledges that Saif al-Islam Qaddafi was tried *in*

---

<sup>68</sup> *Response to Prosecution's 'Request for an Order to Libya to Refrain from Executing Saif al-Islam Qaddafi, Immediately Surrender Him to the Court, and Report His Death Sentence to the United Nations Security Council'*, 20 August 2015, ICC-01/11-01/11-612.

*absentia*, which means that the current judgment is not final, and Qaddafi is entitled to a new trial, in person, as prescribed by Libyan law.<sup>70</sup>

### Summary of Findings

Based upon investigation findings, the conclusion arrived at is that Saif al-Islam Qaddafi was effectively tried *in absentia*. It is noted that available evidence highlights the frequent absence of defendants and lawyers from the proceedings, which strongly suggests that the defendants' rights under international law may have been violated.

## 5. THE RIGHT TO BE REPRESENTED BY COUNSEL

The right to be represented by counsel is a fundamental right guaranteed by international law.<sup>71</sup> It is a right that applies to all stages of proceedings, and the HRC has held that the presence of counsel is often a determining factor in whether an individual can participate in the proceedings in a meaningful way.<sup>72</sup>

In the matter of two separate preliminary hearings, the HRC held that the absence of defence counsel during the cross-examination of witnesses violates the right to legal assistance and representation by counsel.<sup>73</sup> This finding is important as it demonstrates that the HRC applies a high standard of scrutiny in relation to the right to counsel, and it indicates that the absence of counsel will generally not be tolerated, even where preliminary matters are at issue in the proceedings.

The right to legal assistance and representation by counsel applies even where the accused has chosen not to appear, or is absent from the proceedings for other

---

<sup>69</sup> Referring to both the Tripoli and the Tobruk-Bayda governments, as the two governments are jointly represented at the ICC.

<sup>70</sup> Article 358 of the *Libyan Criminal Code*.

<sup>71</sup> Article 14(3)(d) ICCPR, Article 7(1)(c) of the *African Charter*, Section N(2)(a) and (c) of the *Principles on Fair Trial in Africa*.

<sup>72</sup> HRC General Comment 32, paragraph 10.

<sup>73</sup> HRC: *Brown v Jamaica*, UN Doc. CCPR/C/65/D/775/1997 (1999) paragraph 6.6. Also see *Hendricks v Guyana*, UN Doc. CCPR/C/75/D/838/1998 (2002), paragraph 6.4.

reasons that are no fault of his or her own.<sup>74</sup> In cases where the death penalty is among the possible sentences,<sup>75</sup> the right to counsel is of paramount importance and further entails the right of the accused to counsel of his or her choosing, the right to confidential communication with counsel, and the right to adequate time and facilities (see Section 6) during a trial.<sup>76</sup>

Furthermore, international law requires that where the accused is without legal representation, he or she must be provided with free legal assistance, and be assigned counsel by the state.<sup>77</sup> Every defendant has the right to competent and effective legal representation.

### Case Reports

Based on evidence collected during our investigation all defendants in *The State of Libya v Saif al-Qaddafi, Abdullah al-Senussi and others* were represented by a lawyer, whether by private counsel of their own choosing, or a public defender appointed by the Court. Trial observers informed us that all defendants were given the freedom to choose their own lawyer. Where preferred counsel was unavailable, or the defendant could not afford representation, the Court appointed a public defender.

Under international law, the accused's right to counsel of choice applies even if that requires a hearing to be adjourned.<sup>78</sup> It is a right more strictly adhered to where the defendant faces the death penalty. Notwithstanding the state's obligation to provide

<sup>74</sup> European Court: *Poitrimol v France* (14032/88), (1993) paragraphs 34-39. *ECHR case law is relevant in this context, as the ECHR has copied the text of the ICCPR, thus any interpretation of the rights to fair trial by the ECtHR will be relevant, even though not binding on, or directly applicable to Libya.*

<sup>75</sup> *Avocats Sans Frontières (on behalf of Bwampamye) v Burundi* (231/99), African Commission, 14th Annual Report (2001) paragraphs 29-31, also see *Robinson v Jamaica*, HRC, UN Doc. CCPR/C/35/D/223/1987 (1989) paragraph 10.3.

<sup>76</sup> See Article 14(3)(d) of the ICCPR, Article 7(1)(c) of the *African Charter*, Principle 1 of the *Basic Principles on the Role of Lawyers*, and Section N(2)(a) and (d) of the *Principles on Fair Trial in Africa*.

<sup>77</sup> Article 14(3)(d) of the ICCPR, Article 16(4) of the *Arab Charter*, Section H(a) of the *Principles on Fair Trial in Africa*.

<sup>78</sup> See *Pinto v Trinidad and Tobago*, HRC, UN Doc. CCPR/C/39/D/232/1987 (1990) paragraph 12.5. See African Commission: *Avocats Sans Frontières (on behalf of Bwampamye) v Burundi* (231/99) 14th Annual Report (2000) paragraphs 5, 27-30, *Amnesty International and Others v Sudan* (48/90, 50/91, 52/91 and 89/93) 13th Annual Report (1999) §§64-66, *International Pen et al on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v Nigeria* (137/94, 139/94, 154/96 and 161/97) 12th Annual Report (1998) paragraphs 97-103.

free legal representation where counsel of choice is unavailable, the state is under a stricter obligation to consider the preferences of the accused, including for any subsequent appeals.<sup>79</sup>

Trial observer reports indicate that the Court appointed a lawyer for al-Senussi because counsel of choice at the time was unavailable. It is unknown whether any other defendants, who were ultimately sentenced to death, had a preference regarding who would represent them, or how much time, if any, they were given to secure counsel of choice before being appointed a public defender. Trial observers reported that when Qaddafi was asked whether he had a lawyer or if the Court should appoint one, Qaddafi responded that ‘Allah was his lawyer’.

Sources have reported that security guards barred Qaddafi’s original lawyer from the courtroom, after which she did not return. Trial observation notes further reveal that a Tunisian lawyer volunteered to represent Qaddafi, but the Court deemed her unqualified to appear before Libyan Courts. The Court subsequently appointed a lawyer on Qaddafi’s behalf. However, in light of Qaddafi’s absence from the proceedings, it is unclear whether he was aware of the appointment, or if he had any contact with his court-appointed lawyer.

In addition, trial observers informed us that al-Senussi’s representation was inconsistent. His original lawyer, a well-known Libyan defence attorney, recused himself for medical reasons following a leg injury.<sup>80</sup> Following his departure from the case, al-Senussi was appointed a public defender for the remainder of the proceedings, though there are reports that on one occasion he claimed in Court that no Libyan lawyer was willing to represent him. Reports allege that al-Senussi requested to be turned over to the ICC, or that international counsel be allowed to represent him in Libya. Trial observers claim that the Court gave al-Senussi until the next trial session to secure counsel of choice, after which he was appointed a public defender.

---

<sup>79</sup> See *Pinto v Trinidad and Tobago*, HRC, UN Doc. CCPR/C/39/D/232/1987 (1990) paragraph 12.5; *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria* (218/98), African Commission, 14th Annual Report (2001) paragraphs 28-31.

<sup>80</sup> There were allegations that a security guard in the prison compound broke his leg. The investigating team has been unable to ascertain the veracity of these reports.

Based on the available evidence, it appears that defendants generally were given time to secure counsel of choice, and the Court was active in ensuring that unrepresented defendants were appointed counsel as soon as possible. However, it is not known whether those who faced the death penalty were given adequate time to secure counsel of choice. Also, it is unclear whether and to what extent the Court took into account the defendants' preferences when appointing public defenders.

*Competent and effective legal representation*

Under international law, any individual who is arrested, detained, or charged with a criminal offence is entitled to a lawyer of competence and experience proportionate to the severity and nature of the offence.<sup>81</sup> This principle applies to all defence lawyers, whether privately hired or appointed by the Court.

Lawyers are expected to act freely and in accordance with standard legal principles. They must represent their clients competently by advising them as to their legal rights and obligations, assisting them in every appropriate way, and acting to safeguard and advance their interests; they should also seek to promote and uphold human rights recognised by national and international law.<sup>82</sup>

Moreover, court authorities have a duty to ensure that a defendant is effectively represented.<sup>83</sup> When appointed counsel represents a defendant, the authorities must ensure that the lawyer in question has the requisite skills, training, experience, and competence for the case.<sup>84</sup>

Another factor bearing on competence and a lawyer's ability to effectively represent a client is the presence of risk or threats to the lawyer's safety. States should ensure that lawyers are able to advise and represent their clients without improper

---

<sup>81</sup> Principle 3 of the *Basic Principles on the Role of Lawyers*, Principle 10, Paragraph 33, and Guidelines 11 and 12 of the *Principles on Legal Aid*.

<sup>82</sup> Principles 13-14 of the *Basic Principles on the Role of Lawyers*, Section I(i) of the *Principles on Fair Trial in Africa*.

<sup>83</sup> [Kelly v Jamaica](#), HRC, UN Doc. CCPR/C/41/D/253/1987 (1991), Paragraph 5.10.

<sup>84</sup> HRC General Comment 32, Paragraph 38.

restrictions, undue influence, pressure, or threats to their safety.<sup>85</sup> States have a positive obligation to safeguard lawyers who face threats as a result of discharging their duties.<sup>86</sup> In post-conflict regimes, especially where the defendants may be associated with a former oppressive regime, threats to the safety of lawyers are common. Apart from the implicit danger of such threats, they can scare lawyers into withdrawing from a case or improperly discharging their duties.

In the current case, there are corroborated accounts alleging that a number of lawyers were regularly absent from the proceedings. These raise legitimate concerns regarding the overall effectiveness of legal representation.

Our investigation has not revealed specific information about the lawyers' experience or training, and there is no evidence that the Court was active in ensuring the defendants were provided with effective representation. Trial observers highlighted a general culture of fear surrounding the proceedings, which may have had an impact on the effectiveness of legal representation.

As mentioned above, we received uncorroborated reports alleging that a lawyer was physically and verbally harassed outside the courtroom. While we have been unable to corroborate these allegations, the fact that such rumours were circulating at the time could have been sufficient to instill fear in the minds of lawyers, irrespective of whether or not they were true.

Several reports received during our investigation emphasized restrictions on access to counsel. Specifically, reports indicated that defendants were deprived of their right to confidential communications with counsel, and were given inadequate time and facilities to meet (*see* Section 6).

---

<sup>85</sup> Principle 16 of the *Basic Principles on the Role of Lawyers*, Principles 2 §16 and 12 of the *Principles on Legal Aid*, Sections H(e)(iii) and I(b) of the *Principles on Fair Trial in Africa*. Also see HRC General Comment 32, Paragraph 38.

<sup>86</sup> Principle 17 of the *Basic Principles on the Role of Lawyers*, Section I(f) of the *Principles on Fair Trial in Africa*. Also see *Special Rapporteur on the independence of judges and lawyers*, UN Doc. A/64/181 (2009) Paragraphs 68-69; *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v Nigeria* (137/94, 139/94, 154/96 and 161/97), African Commission, 12th Annual Report (1998) Paragraphs 97-101.

On several occasions, lawyers informed the Court that they did not have access to key witnesses and affidavits necessary to build their defence. Even though trial observers reported that judges were willing and eager to grant additional time for lawyers to prepare their arguments, the lack of access to vital information and key pieces of evidence appears to have been an issue throughout the proceedings.

Despite a plethora of difficulties faced by defence lawyers, trial observers told us that the majority of lawyers spoke up in Court and were not afraid to challenge the prosecution when necessary. While this is as it should be, it does not alleviate concerns about effective representation by other lawyers involved in the case.

### **Summary of Findings**

Report findings strongly indicate that legal representation in the current case may have been severely compromised by alleged attempts to intimidate lawyers, limited access to counsel, insufficient time and facilities for lawyers to confer with clients, and limited access to evidence.

## **6. THE RIGHT TO ADEQUATE TIME AND FACILITIES FOR PREPARATION OF A DEFENCE**

Every person accused of a criminal offence must be given adequate time and facilities to prepare a defence.<sup>87</sup> This right is closely linked to a defendant's right to defend oneself,<sup>88</sup> as well as the principle of equality of arms, which requires that the prosecution and defence are given an equal chance to present their case (*see* next section).

A defendant's right to adequate time and facilities also encompasses the right to communicate with counsel.<sup>89</sup> When the accused is detained, the conditions of detention must be such that confidential communications with counsel can still take

<sup>87</sup> Article 14(3)(b) of the ICCPR, Section N(3) of the *Principles on Fair Trial in Africa*.

<sup>88</sup> Article 14(3)(d) of the ICCPR, Section N(2)(a) of the *Principles on Fair Trial in Africa*, and Article 7(1) (c) of the *African Charter*.

<sup>89</sup> The right to communicate with counsel under the ICCPR includes the right to confidential communication, even though not expressly stated in the treaty. See [HRC: General Comment 32](#), Paragraph 34, *Gridin v Russian Federation*, UN Doc. CCPR/C/69/D/770/1997 (2000) paragraph 8.5, and *Fair Trials Manual*, Second Edition, Amnesty International, accessible [here](#).

place for purposes of preparing a defence.<sup>90</sup> This might mean face-to-face communication, telephone or written communication.<sup>91</sup> Meetings or telephone calls may be conducted within sight of others, but not within hearing.<sup>92</sup> Any practices that allow authorities to monitor communications between the accused and his or her counsel are in violation of international law.<sup>93</sup>

In addition, given the nature of criminal proceedings, and the nature of communications between counsel and the accused, the latter must be given the opportunity to choose his or her own counsel.<sup>94</sup> According to the Principles of Fair Trial in Africa, a judicial body may not assign a lawyer to represent an accused if a qualified lawyer of the accused's own choosing is available.<sup>95</sup> Even though the right to counsel of one's own choosing is not absolute, and can be restricted in the interests of justice, the HRC has held that it becomes particularly important in death penalty cases where courts should give preference to counsel chosen by the accused, including at appeal.<sup>96</sup> Notably, the African Commission reiterated this principle by stating that even in cases where counsel is appointed free of charge, and particularly where the accused may face a death sentence, "the individual should be able to choose out of a list the preferred independent counsel 'not acting under the instructions of government but responsible only to the accused.'"<sup>97</sup>

## Case Reports

In *The State of Libya v Saif al-Islam Qaddafi, Abdullah al-Senussi and others*, there is strong evidence suggesting that the accused in the current case were not provided

<sup>90</sup> See *Modarca v Moldova* (14437/05), European Court (2007) Paragraphs 84-99.

<sup>91</sup> *Fair Trials Manual*, Second Edition, Amnesty International.

<sup>92</sup> Section N(3)(e) of the *Principles on Fair Trial in Africa*, see *Fair Trials Manual*, Second Edition, Amnesty International, page 152. Also see *Öcalan v Turkey* (46221/99), European Court Grand Chamber (2005) paragraphs 131-148; See, *Arutyunyan v Uzbekistan*, HRC, UN Doc.CCPR/C/80/D/917/2000 (2004) paragraph 6.3.

<sup>93</sup> CAT Concluding Observations: *Austria*, UN Doc. CAT/C/AUT/CO/4-5 (2010) paragraph 9; See also *WGAD Opinion 33/2006 (Iraq and USA)* concerning Tariq Aziz, UN Doc. A/HRC/7/4/Add.1 (2008) pp 4-9 paragraph 19; *Moiseyev v Russia* (62936/00), European Court (2008) paragraph 210; See HRC Concluding Observations: *Netherlands*, UN Doc. CCPR/C/NLD/CO/4 (2009) paragraph 14.

<sup>94</sup> See Article 14(3)(d) of the ICCPR, Article 7(1)(c) of the *African Charter* and Section N(2)(a) and (d) of the *Principles on Fair Trial in Africa*.

<sup>95</sup> Section N2(d) of the *Principles on Fair Trial in Africa*.

<sup>96</sup> See *Pinto v Trinidad and Tobago*, HRC, UN Doc. CCPR/C/39/D/232/1987 (1990) §12.5.

<sup>97</sup> *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria* (218/98), African Commission, 14th Annual Report (2001) paragraphs 28-31. Also see *Fair Trials Manual*, page 150.

with adequate time and facilities to prepare their defence. Trial observers reported a number of instances in which defence lawyers were not given adequate time to consult with their clients, and where such time was allotted, prison security personnel listened in on meetings. Defence lawyers complained of this frequently, both privately and during court sessions.

On one occasion, a defendant asked to communicate with his lawyer via a formal court request, and the Judge refused the defendant's request without providing any oral reasoning. Trial observers reported that some lawyers were allowed to meet with their clients individually, while others were not. On another occasion, a lawyer asked the Judges for a formal ruling that she be allowed to consult with her client confidentially. While the Court did grant the order, it is unclear to what degree she was actually able to consult confidentially with her client.

At the present time, it is impossible to determine the reasoning behind judicial rulings regarding attorneys' access to their clients. Given the general lack of judicial reasoning throughout the proceedings, however, it is unlikely that the judges provided any reasoning to support their decisions.

Additionally, it is unclear whether lawyers had adequate time to prepare their defence. In early sessions, several lawyers expressed frustration at the difficulty in obtaining evidence from the prosecution's case file. While this eventually was resolved through a judicial order, the paucity of witnesses at the trial, especially in light of delayed access to affidavits and written testimony from various prosecution witnesses, may have significantly limited the defence's ability to adequately prepare their case. In addition, sources noted that several lawyers privately complained about the lack of accessible evidence.

### **Summary of Findings**

Evidence gathered in the context of our investigation reveals that lawyers faced a number of difficulties, such as limited access to vital evidence and scarcity of available witnesses. In addition, reports highlighting the shortage of suitable facilities and the lack of adequate time to prepare a defence are highly problematic.

In light of these shortcomings, and despite the paucity of information, this report finds that the absence of essential fair trial guarantees in this context undoubtedly had a negative impact on the overall fairness of the proceedings.

## 7. EQUALITY OF ARMS

Equality of arms is of paramount importance in all trials, but it becomes essential in criminal trials where inequality between the parties is an inherent risk of the proceedings. It is arguable that the prosecution has an advantage given that it has the support of the machinery of government, which could, if not properly regulated by the Court, result in inequality between the parties. Thus, the principle of equality of arms has been recognised in international law as an essential element of a fair trial.<sup>98</sup> It ensures that the defence can access documents and evidence available to the prosecution, in order to present its case on a footing equal to the prosecution.

The principle of equality of arms does not require that the parties have equal financial or human resources,<sup>99</sup> only that the parties have equal *opportunity* to prepare and present their case, in that they have, *inter alia*, adequate time and facilities (discussed above), equal access to evidence, and equal opportunity to be heard by the Tribunal.

Violations of the principle of equality of arms have been found in cases where the defence was denied the opportunity to present witnesses under the same conditions as the prosecution,<sup>100</sup> or when the defence lawyer or the accused were excluded from a hearing where the prosecutor was present.<sup>101</sup>

Violations have also been found in circumstances where the accused was not given access to information necessary for the preparation of a defence, and as a result, the

---

<sup>98</sup> Section A(2)(a) of the *Principles on Fair Trial in Africa*.

<sup>99</sup> *Nahimana et al v The Prosecutor* (ICTR-99-52-A), ICTR Appeals Chamber (28 November 2007) paragraph 220; *Prosecutor v Kordić and Mario Čerkez* (IT-95-14/2-A) ICTY Appeals Chamber (2004) paragraphs 175-176.

<sup>100</sup> WGAD Opinion 24/2008 (Syria), UN Doc. A/HRC/13/30/Add.1 (2010) §27; *Prosecutor v Orić* (IT-03-68-AR73.2), ICTY Appeals Chamber, Interlocutory Decision on Length of Defence Case (20 July 2005) paragraphs 6-11.

<sup>101</sup> *Becerra Barney v Colombia*, HRC, UN Doc. CCPR/C/87/D/1298/2004 (2006) paragraph 7.2; *Zhuk v Ukraine* (45783/05), European Court (2010) paragraphs 25-35.

accused was unable to properly instruct counsel.<sup>102</sup> In addition, this principle can be violated when the accused is not granted a postponement of the hearing if defence counsel is absent.<sup>103</sup> It is the Court's duty to safeguard this principle throughout the proceedings, so that failure to ensure equality of arms constitutes a violation of international standards and could potentially render a trial unfair.

## Case Reports

While the lack of recorded judicial reasoning renders it difficult to comprehensively assess equality of arms in the current case, a number of reports from trial observers raised concerns in relation to the defendants' access to counsel, access to evidence, fair trial practices, judicial concern with defendant welfare, and judicial intervention, or lack thereof, during formal proceedings.

We received corroborated accounts alleging that the Judges took active steps to ensure that defendants had access to counsel. According to trial observers, the presiding Judge began each session by calling out the name of each defendant and inquiring whether he was represented. Trial observation notes reveal that the Court appointed public defenders for defendants who did not have lawyers, and the Judges appear to have suspended the first session because defence counsel was absent.

Reports have highlighted that judges attempted to ensure the presence of lawyers in Court, and even imposed a fine of LD 50 for lawyers who were absent without cause. Though there are reports of lawyers being harassed and denied access to the trial, it is notable that judges in the case appear to have made a good faith effort to ensure that defendants were represented. The presence of attorneys in Court was certainly influenced by Libya's deteriorating security situation and the political sensitivity of the case.

Regarding access to evidence and case files, trial observation notes reveal that defence counsel had significant difficulty early in the proceedings. The Judges ruled

---

<sup>102</sup> *Wolf v Panama*, HRC, UN Doc. CCPR/C/44/D/289/1988 (1992) paragraph 6.6; *Moiseyev v Russia* (62936/00), European Court (2008), paragraph 224.

<sup>103</sup> *Robinson v Jamaica*, HRC, UN Doc. CCPR/C/35/D/223/1987(1989) paragraph 10.4.

that defence lawyers should be allowed to read the dossier, though the order did not require that defence counsel be given copies of the file. After defence lawyers continued to press their lack of access to key documents, the judges allowed them to have CD copies of the case file.

In the following session, judges ordered that defence attorneys be allowed to photocopy the indictment and records of the investigations against defendants. However, a lawyer complained that the relevant evidence against her client was not contained on her disk. Observation notes provided by trial observers do not specify how the issue was resolved, but it appears that defence lawyers were given (albeit belatedly) access to the case files against their clients.

Trial observers informed us that Judges generally allowed defence counsel ample time to present their *murafa'as*, and the evidence suggests that judicial intervention was limited to instances when it was necessary for purposes of clarification.

Reports suggest that Judges actively tried to safeguard defendants' rights. For example, trial observers reported that, in one instance when a defence lawyer was unable to have a private conversation with her client, the Court allowed the lawyer additional time to prepare her case, and requested that the Prosecutor facilitate a private meeting between the client and his lawyer. It is not clear whether this meeting took place or not.

Furthermore, it has been reported that when witnesses were unavailable, the Judges were willing to adjourn hearings or take a liberal approach in admitting written affidavits and witness statements in lieu of live testimony. It was also reported that the panel took an interest in the defendants' welfare, evidenced by several rulings releasing defendants for medical reasons. For purposes of this assessment, it should be noted that the reasoning behind these rulings has not been made available and therefore cannot be analysed.

Despite the good effort made by the Judges in this case, there remain legitimate concerns relating to issues beyond the Court's control, such as access to evidence and the availability of witnesses – factors that could have tipped the scale in favour

of the prosecution. Trial observers alerted us that on several occasions defence counsel complained to the Court that they could not access important documents that were deemed necessary for the preparation of the defence.

Furthermore, the unavailability of witnesses was widely reported throughout the proceedings. Even though the Court allowed written documents in lieu of live testimony, there are still concerns as to the impact this may have had on the right of defendants to confront and challenge adverse witness testimony. At this stage, it remains unknown whether the lack of live witness testimony and general lack of access to vital evidence had an impact on *either* the defence or the prosecution, or the degree to which this may have affected parties to the proceedings. However, the very fact that such issues have been reported raises concerns regarding equality of arms, especially in relation to those who were sentenced to death.

Trial observers reported defence lawyers' complaints about having insufficient time to prepare their arguments. However, the Court was generally tolerant and even lenient regarding such requests, and the panel expressed an eagerness to allow both the defence and prosecution to present their case in full. However, it is noted that reports highlighting the lack of access to evidence and live witness testimony raise serious concerns as to the existence of *actual equality* between the defence and the prosecution.

### **Summary of Findings**

On the face of the available evidence, there is no indication that the Judges treated the prosecution and the defence differently. Without evidence to the contrary, the conclusion of this report is that there was a general, if imperfect, appearance of equality of arms during formal proceedings. However, we note with concern issues such as defence lawyers' access to evidence and to their clients. This may have compromised equality of arms outside of formal proceedings.

## 8. THE RIGHT TO CALL AND EXAMINE WITNESSES

Closely linked to equality of arms, the right to call and examine witnesses is a fundamental element of a fair trial. This right ensures that the accused is granted “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>104</sup>

The right to examine or have examined prosecution witnesses is a means of ensuring that the accused has an opportunity to challenge any evidence presented against him or her. Likewise, the right to call a defence witness is fundamental. Even though international law is flexible regarding the means by which witnesses are examined - for example, permitting examination by video link<sup>105</sup> - live testimony is generally preferred.

### Case Reports

In *The State of Libya v Saif al-Islam Qaddafi, Abdullah al-Senussi and others*, one of the biggest issues was the scarcity of witnesses. The Court’s decision to allow written statements in lieu of live testimony partially rectified the problem. However, the use as evidence of written statements from absent witnesses is problematic as it poses challenges to the defence, because the credibility of such evidence cannot be tested through questioning before a judge or jury.

Trial observers reported that a number of witnesses appeared in Court, and the Judges took an active role in examining them. Reports also indicate, however, that several witnesses were unavailable, and as a result the parties were forced to seek adjournments and request that the Court allow them to submit written witness statements. It is unknown how many, if any, such statements were admitted by the prosecution, and how many by the accused.

---

<sup>104</sup> HRC General Comment 32, Paragraph 39.

<sup>105</sup> See Article 36(2)(b) of the CoE *Convention on Sexual Abuse of Children*, Article 56(1)(i) of the CoE *Convention on Violence Against Women*, Article 68(2) of the ICC Statute, Rule 67 of the ICC *Rules of Procedure and Evidence*, Rule 75 of the Rwanda Rules, and Rule 75 of the Yugoslavia Rules.

## Summary of Findings

Given the importance of live testimony in criminal proceedings and its noted absence in the current case, there are serious concerns as to the defendants' ability to challenge adverse accounts and present adequate evidence. This is particularly worrisome in light of the heavy sentences that were handed out, including the death penalty and life imprisonment. The conclusion reached is that the lack of live testimony likely had a negative impact on the overall fairness of the proceedings.

## 9. THE RIGHT TO APPEAL

Anyone convicted of a criminal offence has the right to have his or her conviction and sentence reviewed by a higher tribunal.<sup>106</sup> The right to appeal applies regardless of the seriousness of the crime, and anyone convicted of an offence characterised as 'criminal' under international law *must* have the right to appeal.<sup>107</sup> To ensure that a conviction and sentence are reviewed by judicial authorities at multiple levels, it is essential that the review be carried out by a higher tribunal.

A state's obligation to guarantee the right of appeal extends beyond just ensuring that there is a legal framework for appeals; it requires that states take positive action to ensure that appeals can be brought and processed effectively. The appeals system must be structured in a way that permits adequate time and access to court materials such as transcripts, judicial rulings, and judgments.<sup>108</sup>

Fair trial guarantees need to be satisfied during appeals, and the appeal itself must be a genuine review of the relevant issues in the case.<sup>109</sup> A review that is limited to

---

<sup>106</sup> Article 14(5) of the ICCPR, Section N(10)(a) of the *Principles on Fair Trial in Africa*, and Article 7(1)(a) of the *African Charter*.

<sup>107</sup> [HRC General Comment 32](#), paragraph 24.

<sup>108</sup> See [HRC Concluding Observations: Barbados](#), UN Doc. CCPR/C/BRB/CO/3 (2007), paragraph 7, [HRC: General Comment 32](#), paragraph 49, *Mennen v the Netherlands*, UN Doc. CCPR/C/99/D/1797/2008 (2010) paragraph 8.2, *Lumley v Jamaica*, UN Doc. CCPR/C/65/D/662/1995 (1999) paragraph 7.5, *Henry v Jamaica*, UN Doc. CCPR/C/43/D/230/1987 (1991) paragraph 8.4, *Little v Jamaica*, UN Doc. CCPR/C/43/D/283/1988 (1991) paragraph 8.5, see *Fair Trials Manual*, Second Edition, by Amnesty International, accessible [here](#).

<sup>109</sup> Usually this includes a review of both the facts and the law.

questions of law, which is common in *cassation* courts, is unlikely to satisfy this guarantee and may violate international law.<sup>110</sup>

## Case Reports

Following the 28 July 2015 verdict in the case of *The State of Libya v Saif al-Islam Qaddafi, Abdullah al-Senussi and others*, a number of organisations<sup>111</sup> and newspapers<sup>112</sup> reported on the conviction and sentencing by the Tripoli Court of Assize. Nine defendants were sentenced to death (including Saif al-Islam Qaddafi, al-Senussi, al-Baghdadi al-Mahmoudi, and Abuzaid Dorda), and 23 were sentenced to prison terms ranging from five years to life. Four defendants were acquitted, and one defendant appears to have been referred to a medical institution.<sup>113</sup>

There are discrepancies regarding the number of defendants sentenced to death.<sup>114</sup> The number varies between eight and nine, with all reports concluding that Qaddafi and Senussi are among them. The lack of consistency in reporting highlights one of the major issues surrounding the case, that of limited access to the proceedings. This has resulted in limited and inconsistent information about the particulars of the verdict and the proceedings in general. Absent a published written verdict, this report has relied on the various reports and publications referred to above.<sup>115</sup>

Of particular concern are reports claiming that the parties' right to appeal is limited to a review in the Supreme Court's *cassation* chamber. Courts of cassation do not

---

<sup>110</sup> HRC: *Domukovsky et al v Georgia*, UN Doc. CCPR/C/62/D/623/1995, CCPR/C/62/D/624/1995, CCPR/C/62/D/626/1995 and CCPR/C/62/D/627/1995 (1998) paragraph 18.11; See HRC: *Saidova v Tajikistan*, UN Doc. CCPR/C/81/D/964/2001 (2004) paragraph 6.5, *Gómez Vázquez v Spain*, UN Doc. CCPR/C/69/D/701/1996 (2000) paragraph 11.1; See also *Special Rapporteur on human rights and counter-terrorism*, Spain, UN Doc. A/HRC/10/3/Add.2 (2008) paragraphs 16-17, 30, 57; *Gelazauskas v Lithuania*, HRC, UN Doc. CCPR/C/77/D/836/1998 (2003) paragraphs 7.1-7.6. Also see *Fair Trials Manual*, Second Edition, Amnesty International, page 184, accessible [here](#).

<sup>111</sup> Including, but not limited to Human Rights Watch, UNSMIL, International Commission of Jurists, Council of Europe, No Peace Without Justice, Amnesty International, and FIDH.

<sup>112</sup> Including, but not limited to the Middle East Eye, the Guardian, the Libya Herald, the New York Times, the Telegraph, the Wall Street Journal and others.

<sup>113</sup> See *Libya: Flawed Trial of Gaddafi Officials*, 28 July 2015, accessible [here](#), also see *Concerns About Verdict in Trial of Former Qadhafi-era Officials*, 28 July 2015, accessible [here](#), and *Libya: unfair trial of Saif Al-Islam Gadhafi and others a missed opportunity to establish truth, violates right to life*, 28 July 2015, accessible [here](#).

<sup>114</sup> Human Rights Watch reported that nine defendants were sentenced to death, while UNSMIL reported that number to be eight. Despite the small inconsistency, it is still indicative of a major issue surrounding the proceedings, that of limited access to verified and consistent information.

<sup>115</sup> A written verdict has not been published yet.

usually re-examine the facts of the case, as they are limited to verifying the interpretation of law in a given case.

The Human Rights Committee has consistently held that appeals limited to a review of the law do not meet the requirements set by the ICCPR.<sup>116</sup> In addition, the African Commission has held that a court hearing an appeal must objectively and impartially consider both the elements of fact and law presented to it.<sup>117</sup>

Furthermore, international law requires that proceedings in capital cases scrupulously adhere to all international standards safeguarding the right to a fair trial, including the right to appeal. In consideration of the death penalty, it is essential that defendants in capital cases are given every opportunity to appeal their conviction and sentence, and that such appeals encompass the full scope of appealable elements.

### **Summary of Findings**

In light of the above, and on the basis of the available evidence, it is concluded that the defendants in the current case were deprived of their right to properly appeal their convictions, irrespective of the nature of their sentence.

## **10. THE RIGHT TO A PUBLIC JUDGMENT**

Everyone tried by a court of law is entitled to a public and reasoned judgment. Judgments in criminal proceedings *must* be made public,<sup>118</sup> even though exceptions may be permissible in order to protect vulnerable individuals, such as children.<sup>119</sup>

The European Court of Human Rights has held that a judgment is considered to be public if it is pronounced orally in a court session that is open to the public, or, if the judgment is in writing, if it is provided to the parties and also made available to

---

<sup>116</sup> Ibid, *see* 97. Also see *Carpintero Uclés v Spain*, HRC, UN Doc. CCPR/C/96/D/1364/2005 (2009) paragraphs 11.2-3.

<sup>117</sup> *Malawi African Association and Others v Mauritania* (54/91, 61/91, 98/93, 167/97-196/97 and 210/98), African Commission, 13th Annual Report (2000) paragraph 94.

<sup>118</sup> Article 14(1) of the ICCPR, Section A(3)(j) of the *Principles on Fair Trial in Africa*.

<sup>119</sup> Article 40(2)(b)(vii) of the *Convention on the Rights of the Child* and ICCPR Article 14(1).

others.<sup>120</sup> A reasoned judgment must be made public even in situations where the trial proceedings were not public.<sup>121</sup> The right to a public judgment entails the right of an accused to be given the reasons behind the conviction and sentence.<sup>122</sup> This is essential in criminal proceedings, where it also forms the essential basis for appeal.<sup>123</sup> A reasoned judgment includes the fundamental findings, relevant evidence, legal reasoning, and the Court's conclusions.<sup>124</sup>

## Summary of Findings

We have been unable to secure a copy of the written verdict, and at this stage it is unknown whether a written verdict has even been produced. If a written verdict does exist, it is unknown whether it has been made available to the parties and the public. At present we have no information on the matter.

As it has so far been impossible to secure information on the written verdict, this report is based on the assumption that if such a verdict exists, it has not been made public. Failure to publish a judgment in criminal proceedings is a violation of international law, which has a severe impact on the fairness of trial proceedings, especially in capital cases. In the absence of a written verdict, it has not been possible to proceed to a full assessment of the fairness of the trial, which brings into question the overall degree of transparency of the proceedings.

## 11. DETENTION CONDITIONS

Every person deprived of liberty has a right to be detained and tried in conditions that are consistent with international law standards. While proportionate limitations commensurate with the lawful deprivation of liberty are permissible, the human rights of prisoners should be respected and safeguarded.<sup>125</sup> Detained individuals

---

<sup>120</sup> *Sutter v Switzerland* (8209/78), European Court (1984) paragraphs 31-34.

<sup>121</sup> HRC General Comment 32, paragraph 29.

<sup>122</sup> Section A(2)(i) of the *Principles on Fair Trial in Africa*.

<sup>123</sup> Section N(3)(e)(vii) of the *Principles on Fair Trial in Africa*, *Hadjianastassiou v Greece* (12945/87), European Court (1992) paragraph 33; See, Special Rapporteur on human rights and counter-terrorism, *UN Doc. A/63/223* (2008), paragraph 15.

<sup>124</sup> *García Ruiz v Spain* (30544/96), European Court (1999) §§26, 29-30.

<sup>125</sup> Principle 5 of the *Basic Principles for the Treatment of Prisoners*.

must be treated with respect for the dignity of the human being.<sup>126</sup> The right to humane treatment is expressly non-derogable.<sup>127</sup>

In addition, any facility at which people are deprived of their liberty must be monitored by impartial and independent bodies.<sup>128</sup> Inspections should be open, unrestricted, and regular, and individuals tasked with monitoring should be granted access to all detainees for purposes of interviewing them, as well as access to all documents and records.<sup>129</sup> Moreover, mechanisms should exist within the domestic legal system for the submission of complaints regarding the treatment of individuals in detention.<sup>130</sup>

International law requires that an individual may only be detained by an officially recognised detaining authority,<sup>131</sup> and that states' duty to uphold this requirement applies not solely within their territory, but also in areas that fall under the state's effective control. States must further ensure that no individual is *secretly* detained,<sup>132</sup> a duty which applies even where the individual is detained in a privately owned facility.<sup>133</sup>

## Case Reports

There are legitimate concerns regarding detention in the current case. Although we have not corroborated allegations of torture and mistreatment, one source reported that defendants complained about the conditions in detention, alleging that they

---

<sup>126</sup> Rules 9-22 and 37-42 of the *Standard Minimum Rules for the Treatment of Prisoners (the Standard Minimum Rules have been revised, a process that has led up to the publication of a new set of rules to be implemented at the end of 2015, known as the 'Mandela Rules')*, Principles 19 and 28 of the *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*; See Guideline 33 of the *Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa*.

<sup>127</sup> Article 4(2) of the *Arab Charter*.

<sup>128</sup> [CAT General Comment 2](#), paragraph 13; also see [Human Rights Council resolution 21/4 \(2012\)](#) paragraph 18(a).

<sup>129</sup> Section M(8) of the *Principles on Fair Trial in Africa*.

<sup>130</sup> Principle 33 of the *Body of Principles*, Guidelines 17 and 40 of the *Robben Island Guidelines*, Section M(7)(g)-(h) of the *Principles on Fair Trial in Africa*. Also see [HRC General Comment 20](#), paragraph 14; [Human Rights Council resolution 21/4](#) paragraph 18(a); [CAT General Comment 2](#), paragraph 13; [HRC Concluding Observations: Kenya](#), UN Doc. CCPR/CO/83/KEN (2005) paragraph 18.

<sup>131</sup> Section M(6)(a) of the *Principles on Fair Trial in Africa*, see [HRC General Comment 20](#), paragraph 11; [Special Rapporteur on torture](#), UN Doc. E/CN.4/2003/68 (2002) paragraph 26(e).

<sup>132</sup> Guideline 23 of the *Robben Island Guidelines*.

<sup>133</sup> See *Fair Trials Manual*, Amnesty International, Second Edition, page 87.

were forced to swallow tablets against their will. Further allegations of mistreatment revealed the practice of public shaving, an act that could amount to degrading treatment.<sup>134</sup>

Our investigation has not revealed information regarding domestic legal mechanisms for resolving detainee complaints,<sup>135</sup> and there is no evidence to suggest that detainees attempted to lodge any such complaints. It is possible that the general atmosphere of fear and uncertainty in Libya served to discourage detainees from making formal complaints against the authorities, but there is no evidence of this.

However, trial observers reported that on one occasion Abdullah al-Senussi complained to the judges about his detention conditions. According to trial observation notes, al-Senussi told the Court that he had requested to be transferred to a different facility. Al-Senussi also informed the Court that he was under great pressure, and that he suffered from a mental disorder.<sup>136</sup> He complained to the Court that the prison authorities had not given him a new set of clothes, forcing him to wear the same clothes every day.<sup>137</sup>

Trial observers additionally reported that another defendant complained to the Judges, alleging that the prosecution's investigation was characterised by intimidation and pressure and he needed medication to cope. We have been unable to corroborate such stories, mainly because trial observers did not have access to the facilities where the defendants were detained, and very little is known regarding the actual state of the detention facilities. The lack of adequate information is in itself cause for concern, especially in light of the requirement that facilities be open for inspection and monitoring by independent observers.<sup>138</sup>

---

<sup>134</sup> *Yankov v Bulgaria*, no. 39084/97, paragraph 154, ECHR, 2003.

<sup>135</sup> Principle 33 of the *Body of Principles* and Guidelines 17 and 40 of the *Robben Island Guidelines* require that such mechanisms are put in place by states for the effective resolution of complaints brought by detainees.

<sup>136</sup> Trial observation notes are not clear as to what type of mental disorder he was allegedly suffering from.

<sup>137</sup> States have an obligation to ensure that detainees have access to basic necessities and services. See Rules 9-22 and 37-42 of the *Standard Minimum Rules*, Principles 19 and 28 of the *Body of Principles*, Rules 5-6, 10-17, 26-28, 48, 54 of the *Bangkok Rules*, and Guideline 33 of the *Robben Island Guidelines*.

<sup>138</sup> [CAT General Comment 2](#), paragraph 13; also see [Human Rights Council resolution 21/4 \(2012\)](#) paragraph 18(a).

## Summary of Findings

Given the lack of sufficient information and evidence, comment on the conditions of detention in the current case is not possible. Allegations of torture, mistreatment, and intimidation - made by a number of individuals and reported by trial observers - raise a degree of suspicion, as well as a number of questions regarding Libya's compliance with international standards. In light of the above, it is recommended that the matter be further investigated.

## 12. THE DEATH PENALTY

Libya has not signed the Second Optional Protocol to the ICCPR, which calls for the abolition of the death penalty. Thus, under the ICCPR, the death penalty is permissible only for the most serious crimes in accordance with the law in force at the time of the commission of the crime. Article 6(2) of the ICCPR reads: *'In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.'*<sup>139</sup> The African Commission encourages the abolition of the death penalty, and has called on states that have not yet abolished it to establish a moratorium on executions.<sup>140</sup>

## Case Reports

Libya still has a *mandatory* death penalty for the most serious of crimes.<sup>141</sup> International law prohibits the imposition of a mandatory death penalty, even for the most serious crimes.<sup>142</sup>

---

<sup>139</sup> Article 6(2) of the ICCPR.

<sup>140</sup> African Commission: resolution 136, (2008) paragraph 3, *Interights et al v Botswana* (240/2001) (2003) paragraph 52.

<sup>141</sup> *Death Penalty Database*, see *Death Penalty Worldwide*.

<sup>142</sup> Special Rapporteur on extrajudicial executions: UN Doc. A/HRC/14/24 (2010) §51(d), UN Doc. A/HRC/4/20 (2007) paragraphs 55-66; HRC Concluding Observations: Botswana, UN Doc. CCPR/C/BWA/CO/1 (2008) paragraph 13; Special Rapporteur on torture, UN Doc. A/67/279 (2012) paragraph 59.

A mandatory death sentence prevents the Court from considering relevant circumstances and potentially mitigating factors, removing the Court's ability to consider different levels of culpability when sentencing an individual.

In the absence of a written verdict, it is impossible to ascertain whether the Judges handed out mandatory death sentences in the current case. Based on widely available information, and to the best of our knowledge, Libya still retains the mandatory death penalty for serious offences such as *murder*. Given that a number of defendants were charged with *murder*, there is a high possibility that they were given a mandatory death sentence, but this remains unknown in the absence of a full verdict.

Furthermore, international law prohibits imposition of the death penalty on certain categories of people, such as the elderly,<sup>143</sup> minors,<sup>144</sup> pregnant women and mothers of young children,<sup>145</sup> as well as people with mental illnesses or disorders.<sup>146</sup>

Trial observers reported that some defendants – including Abdullah al-Senussi – informed the Court on a few occasions that they suffered from a mental disorder. We do not have information about the type of disorder or disorders allegedly afflicting the defendants, and there is no evidence to suggest that the Court took such claims into account when deliberating.

It remains unknown whether the defendants had access to medical care, which raises the question of whether such claims by the defendants were even investigated. Access to medical care at all stages of the proceedings is crucial, especially in capital cases, as the prohibition on executions of mentally vulnerable individuals

---

<sup>143</sup> HRC Concluding Observations: [Japan](#), UN doc. CCPR/C/JPN/CO/5 (2008) paragraph 16.

<sup>144</sup> Article 6(5) of the ICCPR, Article 5(3) of the *African Charter on the Rights of the Child*, Rule 17.2 of the *Beijing Rules*, paragraph 3 of the *Death Penalty Safeguards*. Also see UN General Assembly resolution 63/241, paragraph 43(a); Human Rights Council resolution 10/2, paragraph 11; *Johnson v Jamaica*, HRC, UN Doc. CCPR/C/64/D/592/1994 (1998) paragraphs 10.3-10.4.

<sup>145</sup> Article 6(5) of the ICCPR, Article 4(2) of the *Protocol to the African Charter on the Rights of Women in Africa*, Article 7(2) of the Arab Charter, paragraph 3 of the *Death Penalty Safeguards*, Section N(9)(c) of the *Principles on Fair Trials in Africa*.

<sup>146</sup> See paragraph 3 of the *Death Penalty Safeguards*. Also see CHR resolution 2005/59, paragraph 7(c); HRC: Concluding Observations: [USA](#), UN Doc. CCPR/C/USA/CO/3/Rev.1 (2006) paragraph 7, [Japan](#), UN Doc. CCPR/C/JPN/CO/5 (2008) paragraph 16, *Sahadath v Trinidad and Tobago*, UN Doc. CCPR/C/78/D/684/1996 (2002) paragraph 7.2; Special Rapporteur on extrajudicial executions, UN Doc. A/51/457 (1996) paragraphs 115-116.

also applies to people who have developed mental disorders *after* being sentenced to death.<sup>147</sup>

## Summary of Findings

At this stage it is unknown whether those sentenced to death were given mandatory death sentences, but it is highly possible that they were. The general lack of information makes it difficult to assess whether the death penalty was an appropriate sentence in the context of each defendant's individual circumstances.

We currently do not have access to a written verdict, which makes it difficult to evaluate the legal reasoning in the case. In addition, incomplete and inconsistent information makes it difficult to assess whether the rights of individual defendants were violated, including whether they had adequate access to medical care for the purpose of assessing their fitness for execution.

In general, fair trial standards must be scrupulously adhered to in capital cases, as even minor violations may render the whole trial unfair in these circumstances. The Human Rights Committee and the African Commission have found violations of the right to life in situations where fair trial standards were not strictly observed in capital cases.<sup>148</sup>

The Human Rights Committee has also held that imposition of the death penalty following an unfair trial violates the prohibition on inhuman and degrading treatment.<sup>149</sup>

---

<sup>147</sup> *Ibid.*

<sup>148</sup> See e.g., HRC: *Mbenge v Zaire* (16/1977), UN Doc. A/38/40 Supp.No 40 (1983) paragraphs 14.1-14.2, 17, *Idieva v Tajikistan*, UN Doc. CCPR/C/95/D/1276/2004 (2009) paragraph 9.2-9.7, *Aliiev v Ukraine*, UN Doc. CCPR/C/78/D/781/1997 (2003) paragraph 7.2-7.4; African Commission: *Malawi African Association and Others v Mauritania* (54, 61/91, 98/93, 164/97-196/97 and 210/98) 13th Annual Report (2000) paragraphs 9, 120; *International Pen, Constitutional Rights Project, Interrights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v Nigeria* (137/94, 139/94, 154/96 and 161/97), 12th Annual Report (1998) paragraph 103.

<sup>149</sup> HRC: *Larrañaga v Philippines*, UN Doc. CCPR/C/87/D/1421/2005 (2006) §7.11, *Mwamba v Zambia*, UN Doc. CCPR/C/98/D/1520/2006 (2010) paragraph 6.8.

On the basis of information, albeit incomplete, that we collected from trial observers, it is highly likely that the current proceedings failed to meet international standards. As a result, there is a *high probability* that those sentenced to death were deprived of their right to a fair trial, as guaranteed by international law. We believe further investigation is necessary for a full assessment.

## CONCLUSION

Following our investigation, a number of issues have been identified in the current case that have proven problematic in assessing the trial's compliance with international fair trial standards. In particular, it is noted that the following factors compromised the fairness of the proceedings:

- The lack of available information due to restrictions on the publicity of the proceedings;
- The volatile security situation in Libya, which significantly hampered the presence of witnesses at the trial;
- The trial of defendants, most notably Saif al- Islam Qaddafi, *in absentia*;
- The inability of counsel to fulfill their professional duties due to lack of access to evidence, lack of access to their clients, and inadequate time and facilities for the preparation of a defence; and
- The denial of the right to appeal and the right to a public judgment.

Further, noted with concern are:

- Uncorroborated allegations of abuse and mistreatment of defendants in detention;
- The lack of available written judicial reasoning, including a verdict, which raises legitimate concerns regarding the impartiality of the judiciary; and
- Uncorroborated allegations of intimidation and physical abuse of defence lawyers.

However, we did receive evidence that judges and lawyers actively attempted to safeguard the rights of defendants, and that judges made commendable efforts to ensure that proceedings were handled with professionalism and defendants had

access to counsel. Additionally, evidence suggests that the judges made a significant effort to promote the appearance of equality of arms during formal proceedings.

*Nevertheless, and in the absence of evidence to the contrary, it has been found that, on balance, shortcomings in the proceedings and the volatile security situation have severely compromised the fairness of the trial.*









