

Hearing

(Open Session)

ICC-01/11-01/11

1 International Criminal Court
2 Pre-Trial Chamber I - Courtroom 1
3 Situation: Libya
4 In the case of The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah
5 Al-Senussi - ICC-01/11-01/11
6 Presiding Judge Silvia Fernández de Gurmendi, Judge Hans-Peter Kaul and Judge
7 Christine Van den Wyngaert
8 Hearing
9 Wednesday, 10 October 2012
10 (The hearing starts in open session at 9.31 a.m.)
11 THE COURT USHER: All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Good morning.
15 I would ask the court officer to please call the case.
16 THE COURT OFFICER: Thank you, Madam President. Situation in Libya, in the case
17 of The Prosecutor versus Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ICC-01/11-01/11.
18 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you.
19 For the record, I would ask the parties and participants whether there is any change from
20 yesterday in the composition of the respective teams? The representatives of Libya, no
21 changes?
22 MR EL-GEHANI: (Speaks English) No changes, thank you.
23 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Office of the Prosecutor?
24 MS CRISCITELLI: No changes.
25 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: OPCV?

1 MS MASSIDDA: Good morning, your Honour.

2 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Good morning.

3 MS MASSIDDA: No changes in our team. Good morning.

4 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you very much.

5 MR KEÏTA: (Interpretation) Good morning, your Honour. Good morning, ladies and
6 gentlemen. No change. Thank you.

7 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Merci.

8 There are no changes in the Chamber's assistants either.

9 Now, I would now turn the floor to OPCD to complete your oral presentation. You still
10 have one hour. After that, we will go into a private session for half-an-hour to discuss
11 the matter brought by Libya in its filing yesterday. So you have one hour and please try
12 to stick to this hour limit, because then we need the half-an-hour for the private session.
13 You have the floor.

14 MS TAYLOR: Good morning, Madam President, your Honours. I will continue with
15 my submissions on the fairness of the proceedings.

16 Pursuant to Article 21(3), Article 17(2) and (3) of the Statute must also be interpreted in a
17 manner which is consistent with internationally recognised human rights.

18 In the Lubanga case, the Appeals Chamber explicitly acknowledged that human rights
19 underpin the Statute; every aspect of it including the exercise of the jurisdiction of the
20 Court. Its provisions must be interpreted, and more importantly applied, in accordance
21 with internationally recognised human rights, first and foremost in the context of the
22 Statute the right to a fair trial, a concept broadly perceived and applied embracing the
23 judicial process in its entirety, and it's Decision 772 at paragraph 37.

24 We couldn't have a clearer statement of the law. According to the dictates of the Appeals
25 Chamber in interpreting and applying every aspect of the Statute, which necessarily

1 includes Article 17 admissibility matters, the Court must consider first and foremost the
2 defendant's right to a fair trial.

3 The term "justice" in Article 17 must also be interpreted in accordance with the Appeals
4 Chamber's pronouncement that a fair trial is the only means to do justice, and that was at
5 paragraph 37.

6 As remarked by Justice Jackson, the Prosecutor at Nuremberg, "The world yields no
7 respect to courts that are merely organised to convict." How can the ICC achieve its
8 preambular objective of ensuring lasting respect for international justice if it cedes
9 jurisdiction to a domestic court which has been organised merely to convict rather than to
10 achieve justice?

11 In the Katanga case, both the Trial Chamber and the Appeals Chamber confirmed that the
12 object and purposes of the ICC considering the admissibility proceedings take precedence
13 over any drafting history. For example, the Defence referred to the commentary to the
14 effect that the drafters had not envisaged self-referrals as a means to trigger the
15 jurisdiction of the Court.

16 The Trial Chamber and Appeals Chamber nonetheless found that self-referrals were
17 consistent with the Statute's objective to eliminate impunity. In particular, the Trial
18 Chamber noted at paragraph 80 that self-referrals based on the fact that the State
19 considers itself unable to hold a fair trial were consistent with the notion of
20 complementarity.

21 As I mentioned, the Appeals Chamber found that a right to a fair trial must be broadly
22 interpreted to encompass all aspects of judicial process, including the arrest and treatment
23 of the defendant in domestic States. Indeed, the Appeals Chamber explicitly recognised
24 that the Statute does not permit the Court to turn a blind eye to violations of the
25 defendant's right occurring in a domestic arena if they pertain to the crimes that form the

1 subject matter of the proceedings before the Court.

2 In terms of the definition of a fair trial for the purpose of admissibility proceedings,
3 Article 17(2) specifies that the Court must have regard to the principles of due process
4 recognised by international law. This standard and not Libyan law should therefore
5 constitute the prism through which the proceedings against Mr Gaddafi should be
6 assessed.

7 The domestic proceedings do not need to satisfy the highest standards of fair trial, but
8 they must be consistent with the principles of due process recognised by international law,
9 and it's fairly uncontroversial that Article 14 of the ICCPR, which Libya has ratified,
10 represents the minimum yardstick under international law for such process rights and, as
11 mentioned earlier, Libya also expressly committed to meeting the obligations set out in
12 Articles 9 and 10 of the ICCPR.

13 The threshold used by the Court to assess fairness is also necessarily impacted by the
14 death penalty. Although the government tried to diplomatically dance around the issue
15 of the death penalty, let's be very clear. If convicted, Mr Gaddafi will be hanged.

16 The repeated manner in which the Libyan officials have referred to the fact that
17 Mr Gaddafi will receive the death penalty if convicted strongly suggests that this trial is
18 not motivated by a desire for justice, but a desire for revenge, and there is no right to
19 revenge under international law or Human Rights Law as recognised in the case of *Perez*
20 *v. France*.

21 As recently observed by Her Excellency Navi Pillay, and this is in Annex 3.2, "The death
22 penalty cannot be reconciled with fundamental human rights values. It is an affront to
23 human dignity; our shared human dignity. Every time the State drags a human being to
24 the execution site and kills him in the name of the people, our name, a piece of our own
25 human dignity, is shattered."

1 As an institution, the ICC must also carefully consider the impact of ceding jurisdiction to
2 a State which possesses the death penalty and intends to carry it out. Notwithstanding
3 the fact that members of the United Nations still carry out the death penalty, as an
4 organisation the United Nations will neither establish nor directly participate in any
5 judicial mechanism that allows for capital punishment, and I refer to Annex 3.2.
6 ICC arrest warrants tend to be the product of information and evidence which may have
7 been provided by various entities, including the United Nations. It would have been
8 unfair to elicit information and co-operation from the United Nations in order to instigate
9 or continuing a process which would end in a result which is repugnant to the very
10 principles and purposes of the United Nations.

11 The issuance of the ICC arrest warrant also had the impact of coalescing international
12 co-operation for the purposes of ensuring that Mr Gaddafi was not able to leave Libyan
13 territory.

14 Mr Gaddafi's arrest in November was not just attributable to specific Libyans who
15 arrested him, but the preceding military and intelligence assistance provided by NATO,
16 which is composed of States who are both members of ICC and members of the European
17 Court of Human Rights.

18 The latter has found that the death penalty constitutes inhuman and degrading treatment,
19 and I refer to the Defence response at paragraph 63, but the European Convention
20 prohibits States from assisting in the transfer of a person to a jurisdiction in which they
21 will face such treatment.

22 Moreover, their responsibility may be engaged on account of acts which have sufficiently
23 proximate repercussions on rights guaranteed by the Convention even if those
24 repercussions occur outside its territory, and I refer to the case of *Ilascu versus Moldova*
25 and *Russia*, paragraph 317.

1 It is a general principle of law concerning international organisations that Member States
2 cannot delegate to the organisation a power that they do not themselves possess, and I
3 refer to the article by D Sarooshi which is in our table of authorities. Accordingly, the
4 ICC cannot be used as a front to elicit co-operation from States and organisations that
5 would otherwise be prohibited in participating in any processes which resulted in the
6 death penalty.

7 To allow the ICC co-operation processes to be manipulated in this manner would
8 ultimately be counter-productive to the Court, as States and organisations may be
9 reluctant to assist the Court in a process which has an outcome which is antithetical to the
10 legal obligations of that State or organisation.

11 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: I am sorry to interrupt you.

12 MS TAYLOR: I'm sorry.

13 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: I take the time so that you have
14 five seconds to catch up. I suggest that you try to slow down and also to take some space
15 between sentences so that will allow the interpreters and the records, okay?

16 MS TAYLOR: Thank you very much, Madam President, and I apologise sincerely to the
17 interpreters.

18 Under International Human Rights Law and the ICCPR, which Libya has ratified and
19 incorporated in domestic law, the requirement that a criminal verdict must be based on a
20 fair trial is of heightened importance if the defendant is facing the death penalty. This is
21 not a neo-colonialistic standard. This is a standard which Libya has chosen to ratify and
22 bind itself by.

23 The principle of State sovereignty also does not mean that the ICC should simply accept
24 any information provided by Libya concerning the treatment they have accorded to
25 Mr Gaddafi, particularly if it is not supported by coherent and credible evidence.

1 The ICC was established to investigate and prosecute crimes which are often committed
2 by persons in command of a State apparatus. If such persons wish to evade the
3 jurisdiction of the Court, they could easily organise sham trials which create a semblance
4 of independent impartiality which is not reflected in the reality of the proceedings.
5 The ICC would be abdicating its duty to eliminate impunity if it were to accept such
6 information at face value. For this reason, the Appeals Chamber has held in the Kenya
7 cases that there is no presumption of good faith as concerns the submissions of States in
8 connection with admissibility proceedings. The burden rests squarely on the State to
9 ensure its challenge is supported by specifically credible and coherent evidence, and I
10 refer to the decision in the Muthaura case at filing number 274 at paragraph 83.
11 The Court cannot apply one standard to Kenya and another to Libya. The victims in
12 Libya have the same right to the truth and just as much of a right to ensure that the right
13 person is convicted for the right crimes.
14 In terms of the applications of such standards to Mr Gaddafi, he has been in detention
15 now for almost 11 months. It would appear that he is detained by himself in isolation.
16 He has not been accorded an opportunity to challenge the legality of his detention before
17 a Judge. Indeed, it would appear that he does not even have the right to see his own
18 detention orders. Mr Gaddafi has not been authorised to receive visits or speak to his
19 family and friends and has therefore been held in incommunicado detention for almost 11
20 months. The government acknowledged, at paragraph 35 of the admissibility challenge,
21 that the location of his detention is secret.
22 The statements to the ICC that Mr Gaddafi can, in principle, receive family visits are not
23 reflected in reality. Family members and friends have requested to visit Mr Gaddafi, to
24 no avail, and I refer to the Defence response at paragraphs 278 to 287.
25 As recognised by the ICC Presidency in the Ngudjolo case, the right to receive family

1 visits is enshrined in international law and this right must be implemented in a manner
2 which is effective and not illusory. That is at paragraph 27 and 31 of that decision.
3 Mr Gaddafi has made it abundantly clear that he wishes to have a counsel but that he
4 cannot select such a counsel in a vacuum. In the absence of the ability to obtain
5 information concerning independent counsel or the advice of his friends and family, he
6 appeared to remain unrepresented for the last almost 11 months. During this time he has
7 been interrogated on multiple occasions, but there is no indication that he was informed
8 of his rights or that a proper record was made of such interrogations.

9 In any case, even if he had selected a counsel, the prosecuting authorities have indicated
10 that it would not be possible for Mr Gaddafi to receive visits from such a counsel at this
11 stage of the proceedings or whilst he is detained in Zintan, and I refer to the Defence
12 response at paragraph 254.

13 It is also unclear whether any lawyer would be willing to represent Mr Gaddafi, given
14 that his Defence counsel was arrested and detained by the very same persons prosecuting
15 Mr Gaddafi's case.

16 There is no indication that Mr Gaddafi has received any evidence concerning allegations
17 against him. Indeed, when the Defence attempted to go through the annexes to the
18 admissibility challenge with Mr Gaddafi, the visit was terminated. Indeed, there would
19 seem to be a consistent pattern that if anyone visiting Mr Gaddafi attempts to inform him
20 of his rights or to discuss issues which are in any way critical of the government or
21 counter to government policy, the visit may be terminated, and I refer to Annexes 8.3 and
22 Annex 8.3 -- Annex 8.1 and Annex 8.3.

23 Without the ability to have access to Prosecution evidence and unmonitored visits with
24 his counsel prior to the commencement of the trial, it will be clear that Mr Gaddafi would
25 have no ability to formulate a defence strategy and investigate the credibility and liability

1 of Prosecution evidence. He will therefore be unable to effectively participate in his case.
2 The prosecutors assigned to Mr Gaddafi's case also employed the extremely coercive
3 tactics of arresting Mr Gaddafi's lawyer, seizing Defence documents at gunpoint,
4 threatening that counsel would not be released unless she agreed to be subject to
5 interrogation.
6 During this interrogation, counsel was not permitted to speak to a lawyer in advance or
7 on a privileged basis, and it was clear that the questioning was simply a fishing expedition
8 during which the Prosecution was attempting to extract information about potential
9 Defence witnesses and Defence activities, and I refer to the Defence response at paragraph
10 239.
11 These tactics will have inevitably prejudiced Defence strategy and frightened off potential
12 Defence witnesses. Indeed, persons who had indicated that they were willing to provide
13 statements to the Defence for the purpose of the admissibility proceedings subsequently
14 changed their minds because of these events.
15 It also does not appear that Mr Gaddafi will be able to rely upon exculpatory evidence
16 collected by the investigating authorities. None of the summaries submitted by the
17 government are exculpatory. It has not been disputed by any of the parties that the
18 earliest point the Libyan authorities commenced investigating Mr Gaddafi for serious
19 crimes was after he was first arrested. How could it be possible to conduct a mutual and
20 impartial investigation when it's directed to a specific defendant and is circumscribed by
21 the political imperative of challenging the admissibility of the case before the ICC?
22 This political objective has filtered through to the manner in which Mr Gaddafi's rights
23 are implemented. For example, it is clear that the prosecuting authorities will take any
24 measures to ensure that Mr Gaddafi is not advised of his rights to be tried before the ICC
25 or assisted in connection with his desire to be tried there.

1 These measures include preventing any organisations from visiting Mr Gaddafi, and I
2 refer to Annex 8.1 and 8.3. It also includes taking retaliatory measures against the
3 Defence for reporting Mr Gaddafi's concerns and wishes to the Chamber, and I refer to the
4 Defence response at paragraph 265.

5 Mr Gaddafi's ability to make independent choices concerning his Defence was also
6 compromised by the fact that the ICC focal point cautioned Mr Gaddafi that he should tell
7 the ICC that he preferred to be tried in Libya and that the OPCD was acting against
8 Mr Gaddafi's interests due to a desire for financial gain, and I refer to the Defence
9 response at paragraph 256.

10 The political influence on this case is also amply demonstrated by the fact that Counsel for
11 Libya have repeatedly claimed they were unable to obtain information concerning the
12 status of the proceedings because they needed to wait until the new government had been
13 constituted and new government policy concerning the case had been formulated, and I
14 refer to filing number 192 at paragraphs 11 to 13, and filing number 199, at paragraphs 8
15 and 13, and filing number 205, at paragraphs 12 and 17, 10 to 11 and 13 to 14.

16 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Ms Taylor, you need to make a
17 break between paragraphs. Maybe that is a better technique than trying to slow down
18 completely, just make breaks between paragraphs.

19 MS TAYLOR: Thank you, Madam President.

20 The ability of the present government to address this case in an impartial manner is also
21 quite suspect in light of the fact that the current president was linked to several
22 assassination attempts on the defendant's father. I refer to Annex 3.9 at page 1. The
23 willingness of the Libya authorities to expend significant sums of money in order to
24 circumvent the proper legal processes and extradition proceedings also suggests a
25 willingness to utilise executive influence and funds in order to improperly influence

1 judicial process. I refer to Annex 3.16 and Annex 8.2.

2 Various prosecuting authorities have also made several statements which clearly indicate
3 that they consider Mr Gaddafi's guilt to be predetermined. I refer to Annex 3.4 at page 3
4 and annex 8.1. It was also observed at a Chatham House experts meeting on Libya that
5 an innocent verdict might be impossible should the trial take place in Libya, as it would be
6 seen to betray the revolution. I refer to Annex 3.1 at page 4. Due to the specific
7 domestic charges which Mr Gaddafi is facing, there was, and will be, no judicial
8 supervision of the investigation prior to the commencement of the trial. As I mentioned
9 previously, if convicted, NTC law 35 also means that contrary to Human Rights Law,
10 Mr Gaddafi will not be allowed to seek a pardon or reprieve.

11 The violations of Mr Gaddafi's rights are corroborated by the reports by the reports that
12 throughout Libya detained former Gaddafi officials have been denied the right to be
13 brought before a judge, the right to legal representation, and the right to family visits, and
14 I refer to Annex 3A .1. Many of them have been severely mistreated and forced to sign
15 confessions. Those who are on trial have had their trial commence without being
16 granted a right to view the evidence against them, to be informed of the charges or to
17 have private meetings with their counsel, and I refer to Annex 3.8, 3.11, 3.21 and 3.22.

18 The few who have been tried have been subjected to special procedures with lower
19 evidentiary standards and procedural protections, and I refer to Annex 3.8 at page 4.

20 The Commission of Inquiry has also remarked that Libya is basically operating on a
21 presumption of guilt as concerns any former members of the Gaddafi regime, and that
22 this has directly translated into their mistreatment in judicial proceedings, and I refer to
23 the Defence response at paragraph 3.2.

24 As I mentioned, the Appeals Chamber has confirmed that a right to a fair trial must be
25 defined broadly to encompass all aspects including the arrest and pre-trial proceedings.

1 It is not enough for Libya to now say they intend to give Mr Gaddafi a fair trial. His
2 right to a fair trial has already been irretrievably compromised.
3 Being kept in isolation and in incommunicado detention for almost 11 months
4 significantly impacts on the mental state of a detainee and their ability to make informed
5 decisions concerning the future progress of the case. This mental stress is aggravated in
6 circumstances in which the defendant is facing the death penalty.
7 In this regard, an independent observer noted at the end of January that after only
8 two-and-a-half months of detention, Mr Gaddafi's composure had already been greatly
9 affected. I refer to Annex 8.3. Mr Gaddafi has also been interrogated several times
10 whilst being detained under such conditions. His confidence and his ability to
11 communicate with counsel in a free and independent manner in the future will also have
12 been complete destroyed by the fact that his visits have been covertly recorded on at least
13 two occasions, and I refer to Annex 8.3.
14 The fact that retaliatory actions have also been taken against both his defence and
15 organisations which attempted to discuss his rights or defence-related issues in an
16 independent manner will inevitably have a chilling effect on the independence of any
17 future Defence team. I refer to Annex 8.1 and Annex 8.3.
18 The seizure of confidential Defence documents and information will also act as a deterrent
19 against any person volunteering to assist or testify for the defence of Mr Gaddafi.
20 Article 17(2)(c) does not require the Court to definitively assess that it is impossible for
21 Mr Gaddafi to have a fair trial; it only requires the Court to determine that the
22 proceedings lack independence and impartiality and that the conduct of the proceedings
23 are not consistent with an intent to provide the defendant with a fair trial. It is
24 abundantly clear that the proceeding against Mr Gaddafi lack both independence and
25 impartiality and are not being conducted in a manner which is consistent with an attempt

1 to ensure his fair trial rights.

2 Even if the word "justice" in Article 17(2) should be interpreted narrowly to refer to
3 convictions, the aforementioned violations of Mr Gaddafi's right to a fair, independent
4 and impartial trial are still relevant to the admissibility of the case for the following
5 reasons:

6 Firstly, even a narrow reading of Article 17 requires Libya to be able to convict
7 Mr Gaddafi in an independent and impartial manner.

8 The ability of a Libyan Court to convict Mr Gaddafi will be fundamentally impeded if
9 Mr Gaddafi's rights under Libyan law are violated to such an extent that the Court either
10 has to declare a mistrial or nullify the procedure, or if there is insufficient or insufficient
11 admissible evidence to reach a conviction.

12 As observed by Kevin Heller in an *Opinio Juris* blog, "If a state's code of criminal
13 procedure authorizes the judiciary to dismiss charges against a suspect on the ground that
14 the executive has denied the suspect rights guaranteed to him under national law, the
15 executive's failure to provide the suspect with those rights means that the state is, in fact,
16 conducting the proceedings in a manner inconsistent with a desire -- with an intent to
17 bring the person concerned to justice. Intentionally or not, the state is making it more
18 difficult to convict the person and that is all that Article 17(2)(c) requires for the Court to
19 find a case admissible."

20 In the challenge to admissibility, the government acknowledges that if the rights of the
21 defendant are violated in certain regards, then the Court is obliged to exclude key
22 evidence which could result in acquittal, or declare a mistrial. The fact that Mr Gaddafi's
23 rights have not been respected by the prosecuting authorities is therefore directly relevant
24 to the question as to whether he will be convicted, or whether these abuses will, in effect,
25 shield him from justice.

1 Turning to paragraph 61 of the challenge, if the accusation or indictment judge finds the
2 evidence to be illegally obtained, then they must dismiss the case pursuant to Article 151
3 of the Criminal Procedure Code. As mentioned previously, the use of intercepts would
4 violate this provision, as would the use of statements obtained through coercive tactics.
5 Article 435 of the Libyan Criminal Procedure Code also explicitly recognises that
6 statements obtained by coercive or oppressive circumstances should be excluded from
7 criminal proceedings. Any suspect interviewed by the Prosecuting authorities has the
8 right to counsel, that's Article 106, and to appear before a judge to contest the legality of
9 their continued detention. That is Articles 122, 123, 176 and 177 of the Criminal
10 Procedure Code. These are in Annex 1 of the Defence response.
11 According to Article 304 of the Criminal Procedure Code, failure to comply with these
12 requirements can render the statements inadmissible. There is no evidence that
13 Mr Gaddafi is currently represented by counsel, a fact which has been confirmed by the
14 government. At paragraph 62 of the admissibility challenge, the government specified
15 that if a trial were to proceed without a lawyer or without a lawyer having sufficient time
16 to prepare the case, then the trial verdict would be quashed as a nullity by an appellate
17 court. So it's not sufficient to appoint the lawyer at the day of the trial, they must be
18 appointed sufficiently in advance so they can effectively prepare the case. This is
19 Article 304 and 305 of the Criminal Procedure Code.
20 In terms of Mr Gaddafi's detention rights, it is apparent from the text of the detention
21 orders included in Annex D that the orders were never served on Mr Gaddafi, as required
22 by Article 109 or the Criminal Procedure Code, nor were they provided to the detaining
23 authorities who must sign the order.
24 The minutes of the remand order, which verifies that the remand order was served on the
25 defendant and the detaining authority, have not been completed either in connection with

1 the initial order or their extensions. The initial order and its extensions fail to specify for
2 what Mr Gaddafi was accused, or the legal basis under the Penal Code for his detention.
3 This violates Article 108 of the Criminal Procedure code. Although the remand
4 authorities require the prosecuting authorities to specify whether he was interrogated, this
5 component has not been completed.

6 As confirmed by the Libyan focal point in his filing 146, Annex 2, page 22, allegations such
7 as those pertaining to licences for camels and fish farms could not have formed a legal
8 basis for his detention under domestic law. However, it was confirmed by a Libyan
9 authority that for at least the first couple of months of his detention, Mr Gaddafi was only
10 interrogated in connection with being a camel trader and fish farms. I refer to Annex 8.3.
11 The ICC focal point had also both informed Mr Gaddafi and the ICC -- his ICC lawyer
12 that the Libyan authorities did not intend to pursue him for more serious charges. The
13 provision of such misinformation violated Article 105 of the Criminal Procedure Code,
14 which requires the prosecuting authorities to clearly and accurately inform a detainee of
15 the charges and to take minutes of any meeting during which the detainee is informed of
16 the charges.

17 There is no evidence that Mr Gaddafi has ever been brought before a judge to determine
18 whether the detention orders should be extended or whether he should be provisionally
19 released. This violated Articles 122, 123, 176 and 177 of the Criminal Procedure Code.

20 As mentioned previously, the prosecuting authorities also violated Libyan law by covertly
21 monitoring a privileged visit and by seizing Defence documents, in contravention of
22 Article 80 of the Criminal Procedure Code.

23 Article 304 of the Criminal Procedure Code specifies that the breach of any disposition of
24 the law concerning essential procedures gives rise to the nullity of the procedure. The
25 failure to respect Mr Gaddafi's key rights as concerns these matters could therefore result

1 in the proceedings being quashed. At paragraph 35 of the challenge, the government
2 acknowledged that Mr Gaddafi was detained in secret detention. At paragraph 59 of the
3 challenge, the government further conceded that domestic law requires that detainees
4 should only be imprisoned in a purpose built facility unless this requirement is waived by
5 the Prosecutor-General.

6 No information has been provided as to whether such a waiver was provided or, if so, the
7 nature of the exceptional circumstances justifying such a waiver. Article 33 of the Libyan
8 Criminal Procedure Code further specifies that such a waiver can only be granted for a
9 maximum of 15 days, which has been greatly exceeded in the current circumstances. The
10 same article mandates the release of any person detained in violation of these provisions.

11 As previously mentioned, the current regime is improperly and illegally utilising the
12 procedure from the people's court to former members of the Gaddafi regime.

13 It would seem from the fact that, in August, the prosecuting authorities announced
14 Mr Gaddafi's trial would start in a number of weeks, even though he had not been
15 brought before an accusation chamber, that they are applying the same procedure to his
16 case, and I refer to Annex 2.1.

17 Under Article 305(1) of the Criminal Procedure Code, any breaches concerning the correct
18 composition of the Chamber and their competence to qualify the charges gives rise to a
19 nullity of the proceedings.

20 Lack of judicial oversight during the investigation face has also meant that every single
21 case against former Gaddafi's officials has been adjourned after its commencement due to
22 the fact that the rights of the Defence were not respected during the investigation face.

23 For example, the defendants were not permitted access to a lawyer, or the counsel were
24 not permitted access to evidence, and I refer to Annex 3.8, 3.11, 3.21 and 3.22.

25 This suggests that if, as has been reported, the trial against Mr Gaddafi will not commence

1 for another five months, there may be further adjournments which, when viewed in light
2 of the length of his pre-trial detention, would equate to an unjustified delay in the
3 proceedings which, in the circumstances, is inconsistent with an intent to bring the person
4 to trial.

5 The former justice minister, who had been appointed by the NTC, has publicly stated that
6 for the trials of former Gaddafi officials, the prosecuting authorities had
7 unconstitutionally resurrected the laws and procedures from the people's court. I refer
8 to Annex 3.21. He has complained that Libya is now employing an exceptional justice
9 system which lacks the basis of a fair trial and which is bypassing the necessary steps
10 required by Libyan law. I refer to Annex 3.19.

11 The trial against Abuzaid Dorda has recently been put on indefinite hiatus due to the need
12 for the Supreme Court to review the legality of these exceptional procedures, which are
13 derived from the people's court. I refer to Annex 3.21. The this is the fifth time that his
14 case has been adjourned.

15 On 18 September 2012, Kevin Heller opined in connection with the Dorda case that the
16 ICC could find in such circumstances, either that "... there has been unjustified delay in the
17 proceedings which in the circumstances is inconsistent with an intent to bring the person
18 to justice" or that the proceedings have been conducted in a manner in which in the
19 circumstances is inconsistent with bringing the person concerned to justice.

20 Given that Mr Gaddafi's case has been plagued by the same violations, the same
21 conclusions must apply.

22 A second scenario in which the fairness of the proceedings is relevant to the admissibility
23 of the case is the scenario in Article 17(3). This concerns the situation in which the State
24 may be unable to carry out its proceedings due to the unavailability of its judicial
25 system - in particular, if due process protections are simply not being provided or applied

1 or otherwise unavailable.

2 O'Donohue and Rigny have commented in this regard that fair trial concerns are both a
3 symptom of a substantially collapsed justice system and, particularly when systematic,
4 can cause the substantial collapse of the justice system. Furthermore, fair trial concerns
5 can render the justice system unavailable to the accused who relies on the fairness of the
6 proceedings to establish his or her guilt or innocence.

7 The government conceded the relevance of due process violations in this context to the
8 admissibility of the case at paragraph 11 of Filing 160.

9 In the present case, the protection of Libyan law and, in particular, its due process
10 provisions, have been rendered unavailable to former Gaddafi officials. They have been
11 systemically denied the right to be brought before a judge, to have effective legal
12 representation, or to have proper time and facilities for the preparation of their defence.
13 They have also been subjected to special procedures which violate the constitutional
14 declaration. I refer to Annex 3.8.

15 As illustrated by the trials of Dorda, Obeidi and Zwai, these significant due process
16 violations have directly impeded the ability of their trial chambers to carry out the
17 proceedings, and are likely to obstruct the future conduct of Mr Gaddafi's case.

18 There also seems to be a systemic inability within Libya for authorities to understand the
19 proper procedures which should be applied within a criminal trial and to persons
20 detained under the protection of the State.

21 A prominent Libyan human rights activist recently recalled the following: "In one
22 incident, I asked a military brigade if they torture inmates. One man said, 'No, we don't.
23 We only do falaqa', beating prisoners' feet. What struck me is that he didn't comprehend
24 this is wrong." I refer to Annex 4D.19.

25 The fact that potential prosecution witnesses have been subjected to mistreatment in

1 detention and, in some cases, torture whilst in detention, has also rendered their evidence
2 unavailable for the purposes of Article 17(3), as the trial court would have to exclude
3 evidence obtained from duress.

4 In terms of Libya's capacity to try this case, the government's challenge and related
5 submissions are peppered by references to New Libya, democratic ownership and Libya's
6 struggles to overcome the legacy of the Gaddafi regime.

7 There is however very little concrete information as to the actual procedures that the
8 Libyan authorities have employed to genuinely investigate and prosecute this case, nor is
9 there any information concerning the capacity of Libya to genuinely investigate and
10 prosecute the case.

11 The government has repeatedly referred to abstract reform efforts in order to distract the
12 Court from the paucity of information provided by it concerning the current state of play.
13 The fact that Libya may have had a tumultuous and tragic past and that it may be
14 attempting to improve its institutions does not in any way exempt it from complying with
15 the same burden and standard of proof which would apply to any other State challenging
16 the admissibility of the case.

17 The ICC appeals Chamber in decision ICC-02/04-179 emphasised, "Providing evidence to
18 substantiate an allegation is a hallmark of judicial proceedings. Courts do not base their
19 decisions on impulse, intuition and conjecture, or on mere sympathy or emotion. Such a
20 course would lead to arbitrariness and would be antithetical to the rule of law."

21 Similarly, in the case of *Brown and others versus Government of Rwanda*, the High Court
22 observed at paragraph 120, "We have not forgotten the scale of the dreadful tribulations
23 suffered in Rwanda in 1994. Nor have we ignored the real and substantive measures
24 taken to establish a judicial system capable of delivering criminal justice to acceptable
25 standards. But our duty is to apply an objective test - real risk of flagrant denial of justice.

1 We certainly cannot sanction extradition as a means of encouraging the Rwandan
2 authorities to redouble their efforts to achieve a justice system that guarantees due process.
3 That might serve a political aspiration, but would amount to denial of legal principle."
4 The test which is applied by the ICC is not whether Libya is in the process of obtaining
5 national institutions, but whether it has satisfied the Court that it possessed them at the
6 time of the admissibility proceedings.
7 However, throughout the challenge and related filings, the government has effectively
8 acknowledged that their institutions are in a nascent or weak state and they lack the
9 capacity to effectively prosecute the case. For example, the government has admitted in
10 several admissibility related filings that it has not yet exercised effective authority over the
11 defendant.
12 At paragraph 10, Annex A to Filing 146, Professor El-Gehani stated that, "Mr Saif Al-Islam
13 Gaddafi is not yet being detained by the Libyan authorities," and that's in an April filing.
14 In Filing 160 at paragraph 20, this was in a May filing - end of May filing - the
15 Government of Libya also expressed the view because Mr Gaddafi is in Zintan "... he is
16 not yet in the custody of the interim Libyan government."
17 The government averred during yesterday's hearing that, once a new Prosecutor-General
18 has been appointed, this person would prioritise negotiation with the Zintan Brigade.
19 Given that the government has not yet been able to select a Prime Minister, it beggars
20 belief that the government can in any way attempt to predict or bind the actions of an as
21 yet unnamed Prosecutor-General. This averral therefore has absolutely no weight.
22 The government was also unable recently to update the ICC in relation to the detention
23 conditions of Mr Gaddafi, and I refer to filing number 205. How can the government
24 claim to be able to exercise effective jurisdiction over this case when they do not have the
25 means to ascertain basic information concerning the case which is directly relevant to the

1 defendant's well-being?

2 The government has also implicitly recognised in several filings that its institutions do not
3 apparently fulfil the admissibility criteria. At paragraph 79 to their challenge, the
4 government cites a quotation from the Prime Minister of the NTC to the effect that, if
5 Libya were granted the right to try Mr Gaddafi "... it will strengthen the capacity of our
6 judiciary in furtherance of the new Libya we are struggling to build."

7 Four-and-a-half months later these institutions were still struggling. At paragraph 19 of
8 Filing 205, the government requested once again further time. In so doing it argued, "A
9 modest delay would be supportive of the interests of the Libyan people in obtaining
10 national institutions that are capable of administering a proper prosecutorial process and
11 trial." By stating that Libya needed more time to obtain institutions which could
12 administer a proper prosecutorial process, the government was effectively conceding that
13 it currently lacks such institutions.

14 Mr Gaddafi is not a guinea pig. He is a person with rights. He shouldn't have to
15 languish in detention whilst the Libyan government attempts to build a functioning
16 system from scratch. Granting Libya one month here and there might not seem much in
17 the overall scheme of things, but even one month of incommunicado detention is
18 extremely difficult. To that must be added the mental strain and frustration of knowing
19 that he is facing the death penalty, whilst having no means to do anything to start
20 preparing his defence.

21 Libya has had custody over Mr Gaddafi for almost 11 months. If the government had
22 the genuine will and capacity to address these institutional shortcomings, then they
23 would have done so by now. Any promises concerning their wish to do so in the future
24 must therefore be judged against the credibility of past assurances that they have
25 provided to the Court.

1 The Prime Minister's line of reasoning that Libya must be granted the right to try
2 Mr Gaddafi so that it can develop the capacity to try him also puts the cart before the
3 horse. The admissibility test requires a State to demonstrate that the State currently
4 possesses the capacity to genuinely prosecute the case, not that it might at some
5 undisclosed point in time.

6 The underlying premise of these assertions is also fundamentally flawed. Granting
7 Libya jurisdiction over Mr Gaddafi's case, which is a high profile and extremely
8 resource-intensive case, will not enhance the institutional development of new Libya, it
9 will simply strain and exhaust Libya's resources. This in turn will prevent Libya from
10 addressing more pressing concerns such as its current security situation, or the plight of
11 thousands of detainees who are languishing in jail, many of whom have yet to be charged
12 or brought before a judge. And I refer to Annex 3.8 and 3A.1.

13 Even if Libya were to obtain international assistance that assistance should be applied to
14 remedy the plight of these persons in jail. It should be used to improve the fairness and
15 effectiveness of the proceedings against Mr Dorda, Mr Obeidi and Mr Zwai. Mr Gaddafi
16 can be tried before the ICC. They can't. Concentrating international assistance on the
17 trial of Mr Gaddafi would therefore divert it from cases in Libya which have greater need
18 of it. As remarked by O'Donohue and Rigny, "In situations like Libya where the justice
19 system has been so eroded, re-establishing the rule of law to address impunity should be
20 given priority. The overriding benefit of the ICC is that when national authorities are not
21 yet in a position to conduct criminal investigations and prosecutions the Court can step in
22 to investigate and prosecute some cases in accordance with fair trial standards."

23 Placing an international stamp of approval on the manner in which the proceedings
24 against Mr Gaddafi have been conducted so far will also retard rather than advance the
25 development of democracy and the rule of law in Libya.

1 It will create an extremely damaging legal precedent which will negatively influence the
2 progress of present and future proceedings against other members of the former regime.
3 The legacy of the Gaddafi era does not exempt the current document from any form of
4 accountability or international scrutiny as concerns crimes and violations of due process
5 which have occurred under their watch.

6 The government cannot simultaneously claim that the revolution was a fight for justice
7 whilst at the same time denying the full protection of justice to former members of the
8 Gaddafi regime, including Mr Gaddafi. If history has taught us anything, it is that as
9 accountability and due process are applied in a uniform manner yesterday's victims can
10 easily become today's victimisers. And this was observed in a recent UN report on Libya,
11 that in some cases perpetrators of past crimes became victims, whilst victims also became
12 perpetrators. And I refer to Annex 5B.2 at pages 1 to 2.

13 The fact the Libyan authorities have not only failed to denounce crimes committed against
14 members of the former regime, have enacted a law granting immunity for such crimes,
15 has given the green light to the future perpetration of crimes such as arbitrary detention,
16 extra-judicial executions and torture. I refer to Annex 5B.1.

17 It is not possible to have a fair and impartial trial in a climate where confessions are
18 routinely extracted by torture and anyone captured and detained by rebels knows that
19 they risk such mistreatment if they appear to sympathise with or exculpate the Gaddafi
20 regime.

21 It would also be misguided to believe that given time, the gap between Libya's
22 aspirational statements to the Court, and the reality on the ground, will lessen or
23 disappear. Since the challenge was filed there have been no indications that there have
24 been genuine improvements and institutional developments as concerns the willingness
25 or ability of Libyan authorities to genuinely investigate and prosecute this case.

1 For example, as concerns the legal structure, in 2009, it was widely recognised by many
2 people, including Mustapha Abdul Jalil, the United States of America, and Human Rights
3 Watch, and Mr Gaddafi, that the Penal Code for Libya was archaic and unfair, and needed
4 to be reformed. And I refer to Annex 3.12. Although a project was drafted at the time,
5 no effort had been made by the current authorities to resurrect the project or to initiate
6 new reform.

7 As mentioned previously, there have been no discussions before the GNC or the NTC
8 concerning this draft proposed law on crimes against humanity.

9 Apart from the unavailability of the protection of the law, Libya is also unable to
10 genuinely carry out proceedings or obtain necessary evidence because of a complete lack
11 of security in Libya, and the unavailability of qualified impartial law enforcement officers.
12 This is in line with the commentary of John Holmes and Roy Lee's commentary, pages 48
13 to 49 that when the drafters were considering how to define a total or partial collapse of
14 the national judicial system, States proposed that the Counsel should examine -- the Court
15 should examine the extent to which the State was exercising effective control over its
16 territory and the existence of a functioning law enforcement mechanism.

17 Adequate security is a sine qua non for an effective legal proceeding. Without security,
18 judges cannot act independently if they are subjected to threats and retaliation. The
19 Court will not be able to implement orders. Witnesses will not be available to testify in
20 the absence of any proper protection scheme. The assassination of potential Defence
21 witnesses will render their testimony unavailability in a very definitive manner. Counsel
22 will not be willing to represent the defendant or act in an independent manner. The life
23 and integrity of the defendant may be at risk and the Defence will not have the ability to
24 travel to key locations to obtain physical evidence or interview witnesses.

25 The existence of a functioning law enforcement mechanism is also necessary to ensure the

1 detainees are not mistreated, to ensure the integrity and impartiality of the evidence
2 collection process, to ensure that confidential information is not leaked or misused, and to
3 ensure that judicial orders are carried out.

4 For this reason, ICC Prosecutors took into consideration limited resources, a lack of
5 expertise and security issues in determining that special court set up in Sudan failed to
6 satisfy Article 17. I refer to Williams and Schabas at page 624.

7 Libyan officials quite candidly admit that there is no security in Libya and that they lack
8 expertise on judicial matters. Dr Ali Tarhouni, the President of the National Centrist
9 Party, and former interim Prime Minister, has opined, "The problem is that there is a
10 security breakdown. There is no national army. There is no brigade. There is no
11 internal security agency. There is no police." And I refer to Annex 4D, 27A.

12 In a Guardian commentary, Abdel Hakim Belhaj, the President of the Tripoli Military
13 Council, wrote in unequivocal terms, "The State is virtually absent, and there is
14 proliferation of weapons, especially among the young." I refer to Annex 7.2.

15 In terms of its control over its territory, Libya's Deputy Ambassador to United Nations
16 recently stated, "We have to say the reality, that the authority of the government is still not
17 covering the whole territory of Libya." And I refer to Annex 4D14.

18 According to Colonel Doghman, who was appointed to take over security in Benghazi,
19 "When you go to the police headquarters you will find there are no police." I refer to
20 Annex 4D18.

21 The absence of a functioning police will inevitably impact on Libya's ability to identify
22 relevant witnesses and physical evidence and to monitor the security and safety of
23 witnesses. In a recent interview, Professor El-Gehani recognised that Libya does not
24 have the current capacity to address security threats, and that they do not have
25 well-trained police, and I refer to Annex 4D30.

1 Professor El-Gehani also acknowledged early in the proceedings that Libya lacks the
2 security apparatus under its command and through which its judgments and orders can
3 be implemented. And I refer to paragraph 406 of the Defence response.

4 An UNSMIL report dated 17 September concludes at page 3 that "Libya's legal institutions
5 are still weak and rule of law remains a fundamental challenge. Since the demise of the
6 old regime revolutionary forces have continued to substitute for the role of the State."

7 And I refer to Annex 5B.2.

8 In the last couple of months there have been at least 14 reported assassinations in
9 Benghazi of intelligence and security officials who were linked to the former Gaddafi
10 regime, and I refer to Annex 4A.1, Annex 4A.2 and 4D.1.

11 There have been absolutely no statements condemning this violence, nor have there been
12 any announcements of investigations or arrests. And I refer to Annex 4D.16.

13 These persons could have been potential Defence witnesses. At the very least their death
14 and a subsequent lack of action by the Libyan authority creates a powerful disincentive
15 for anyone to assist in Mr Gaddafi's defence, or testify as a witness and acknowledge any
16 link or former association with Mr Gaddafi.

17 The Libyan researcher for Amnesty International has also recently reported that the
18 volatile combination of a lack of security and popular anti-Gaddafi sentiment has directly
19 impacted on the fairness and viability of effective proceedings in Libya. And I refer to
20 Annex 3.15.

21 She refers to several incidents in which armed groups have directly intervened in judicial
22 proceedings; for example by threatening a judge who gave what they considered to be a
23 light sentence for an alleged Gaddafi supporter.

24 A member of Al Zawaiya's lawyers association also informed the researcher that one of
25 his colleagues was approached by armed men who offered him money or other work

1 opportunities in return for dropping his defence of alleged Gaddafi loyalists. Judges
2 have been attacked, threatened and had their homes burnt down. I refer to Annex 3.8
3 page 5, and Annex 3A.2.

4 There was also an armed attack at the end of August on Benghazi's Criminal Investigation
5 Department. I refer to Annex 4B.1.

6 Although in their recent report to the Chamber the government attempted to rely upon
7 the reaction of authorities to recent attacks on mosques to demonstrate their
8 accountability efforts the opposite is true. Several mosques and shrines were attacked in
9 the full view of members of the Ministry of Interior and reportedly with the assistance of
10 members of the Ministry of Interior. And I refer to Annex 4C.2 and Annex 4C.3. There
11 have been no follow up investigations or arrests. And I refer to Annex 4C4 and Annex
12 4C6. It has also been reported --

13 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: I am sorry to interrupt you. You
14 will need to start summarising your arguments. We are already past the hour and I take
15 the chance so you make a break or so for the interpreters to catch up.

16 MS TAYLOR: Okay, thank you very much.

17 Your Honour, I would just like to summarise with the proposal that there can be some
18 kind of form of international involvement or monitoring the proceedings, and the
19 question as to whether that would be effective. And we respectfully submit that the
20 possibility of it being effective is unrealistic, it's a pipe dream as demonstrated by the
21 following indicia:

22 Firstly, although the government claims to be willing to co-operate with the ICC such an
23 assertion is not reflected by the following facts: From mid-November until end of May
24 Libya was under a binding obligation to surrender Mr Gaddafi to the ICC, which they
25 failed to comply with. At no point were they exempted from this obligation. They have

1 failed to surrender Mr Al-Senussi to the ICC, notwithstanding the point they have not
2 requested an exemption from doing so. Indeed, the very fact that they have announced
3 their intention to interrogate him demonstrates an intent not to surrender him to the ICC.
4 They have never brought Mr Senussi or Mr Gaddafi before a judge, as required by Article
5 59. At a time when Libya was subject to an order to surrender Mr Gaddafi to the ICC the
6 Libyan focal point unequivocally stated that Libya will never transfer Mr Gaddafi to the
7 ICC. And I refer to Annex 7.1.

8 It was also quite disturbing to hear the submissions of Counsel for Libya at page 20 of the
9 transcript that Libya could have ignored the ICC. No, Libya couldn't. It was and
10 continues to be bound by Security Council Resolution. If the government is indeed
11 serious about co-operating with the ICC then they should be willing to give a
12 commitment on the record that firstly, they will immediately surrender Mr Al-Senussi to
13 the ICC and, secondly, that if the admissibility charge fails they will also surrender Mr
14 Gaddafi forthwith. If they cannot give such an unequivocal undertaking then it's
15 absolutely meaningless to refer to monitoring or international co-operation as being an
16 effective means to ensure their capacity.

17 Secondly, the government has a very poor track record with monitoring and involvement.
18 The United Nations Commission of Inquiry was tasked with investigating and reporting
19 on violations in Libya. As set out in the Defence response, after the commission issued
20 its report, the government asked to be exempted from monitoring because it gave its
21 assurances they would implement the recommendations. Seven months after the
22 issuance of the report it is apparent that they had not done so. They have not conducted
23 any investigation into the crimes committed by rebels.

24 This has prompted the Secretary-General of the United Nations to remark that
25 "Assurances from Libyan authorities that incidents of torture or mistreatment will be

1 investigated, have not been translated into effective action." And I refer to Annex 3A.2.
2 They have also failed to respond to orders for provisional measures from the African
3 Court of Human Rights, concerning Mr Gaddafi's case specifically.
4 They have also displayed a consistent reluctance to allow international officials, NGOs, or
5 journalists to cover or monitor sensitive issues if there was any indication that such
6 coverage might be critical to the government. For example, although the authorities
7 initially allowed Human Rights Watch to visit Mr Gaddafi they subsequently refused to
8 allow Human Rights Watch or other organisations to visit Mr Gaddafi, because they
9 accused Human Rights Watch of being spies and transmitting information to Mr Gaddafi.
10 I refer to Annex 8.3 and 8.1. Similarly, when representatives from independent
11 international entity met with Mr Gaddafi the visit was almost terminated because the
12 authorities were upset when Mr Gaddafi attempted to raise his concerns regarding
13 human rights violations. I refer to Annex 8.3.
14 It also appears that the visit was covertly monitored without the prior knowledge or
15 agreement of the international entity. I refer to 8.3.
16 More recently, when the ICC met with Mr Gaddafi, the visit was also terminated when the
17 Defence attempted to discuss the admissibility. The Libyan authorities have also
18 arrested journalists who attempted to cover issues which were not favourable to the
19 government such as destruction of mosques or GNC sessions on security matters, and
20 these are set out in annexes.
21 International aid workers, such as the seven members of the ICRC have been subjected to
22 arbitrary arrests and detention. Page 6 of the July Amnesty report on militia notes that
23 when both Amnesty and Médecins Sans Frontières reported on the use of torture they
24 were accused by the head of interrogations of being pro-Gaddafi supporters. I refer to
25 the Defence response at paragraph 365.

1 The government has also introduced a draft law on emergency on national security which
2 allows the government to expel any foreigners that they consider to be a threat to national
3 security. There is therefore a substantial risk to the independence and impartiality of any
4 international NGO or entity covering such a trial, they will be compromised by the
5 implicit threat that such measures could be taken.

6 Thank you, your Honour.

7 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: I thank you very much. I would
8 now ask the court officer to move into private session. We apologise to the public. This
9 means that you are not going to be hearing what is discussed in this Courtroom and we
10 are going to come back at 11.30 from a break. So we go now into the Court session, into
11 the private session.

12 (Private session at 10.41 a.m.)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

Page 31 redacted – Private session.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

Page 32 redacted – Private session.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

Page 33 redacted – Private session.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

Page 34 redacted – Private session.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

Page 35 redacted – Private session.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

Page 36 redacted – Private session.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

Page 37 redacted – Private session.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

Page 38 redacted – Private session.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

Page 39 redacted – Private session.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

Page 40 redacted – Private session.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

Page 41 redacted – Private session.

Hearing

(Private Session)

ICC-01/11-01/11

1 (Redacted)
2 (Redacted)
3 (Redacted)
4 (Redacted)
5 (Redacted)
6 (Redacted)
7 (Redacted)
8 (Redacted)
9 (Redacted)
10 (Redacted)
11 (Redacted)
12 (Redacted)
13 (Redacted)
14 (Redacted)
15 (Redacted)
16 (Redacted)
17 (Redacted)
18 (Redacted)
19 (Redacted)
20 (Redacted)
21 (Redacted)

22 (Open session at 11.47 a.m.)

23 THE COURT OFFICER: We are in open session, your Honours.

24 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: As we had already announced in
25 the agenda that was distributed and the order that convened this hearing, we would now

1 give the floor again to Libya to give its final submissions and hopefully also to reply to
2 some of the issues that have been raised during this debate. You have the floor.

3 MR SANDS: Thank you very much, Madam President, members of the tribunal. We're
4 going to be very brief, you'll be pleased to know. It will be an early lunch for everybody.
5 Firstly, can I begin by turning to your questions yesterday, and two in particular. You
6 asked a question, Madam President, about the size and the composition of the
7 investigation team. I do have a bit more information.

8 There are four senior individuals whose have responsibility for investigating the Saif
9 Gaddafi case. Each of those have two juniors, at least, available to assist them, we are
10 told on a full-time basis, so the team comprises no less than 12 people. We do have
11 names, but for reasons you will understand, we prefer not to go into that direction.

12 The second question that was raised concerned the relationship between the investigation
13 in this Court and the investigation in Libya. To summarise the differences and the
14 reason that we put it that our investigation in Libya was no less far-reaching than the ICC
15 OTP investigation, it is simply that the differences are in three major respects, which we
16 suspect means that ours is more extensive, and I share what was said by counsel for the
17 OTP yesterday. We have not -- we don't know the details of their investigation, so we
18 are not able to say precisely what is the degree of overlap, but it does appear there is a
19 very high degree of overlap from the material that is publicly available.

20 The differences between the Libyan investigation and the OTP investigation are in three
21 areas: Firstly, in the temporal scope, the OTP investigation is limited to the period
22 around February 2011. Libya's investigation goes significantly beyond to the events over
23 the rest of the year.

24 Secondly, there is a significant difference in terms of the geographic scope. The Libyan
25 investigation is not limited, as we understand the OTP investigation to be to three areas,

1 Tripoli, Misrata and Benghazi. The Libyan investigation covers a great number of other
2 areas. And, thirdly, the differences in relation to the modes of commission of the alleged
3 crime, the Libyan investigation covers, as you will have heard yesterday and from earlier
4 submissions, Mr Gaddafi's alleged personal participation in the crimes and not just
5 co-perpetration.

6 So I turn from those two answers to your questions yesterday to say very brief words
7 about the submissions of the OPCV. We wish to express our gratitude to the OPCV for
8 the important work that it does. The delegation of Libya attaches very great importance
9 to the interests of victims, and irrespective of the differences in relation to the
10 fundamental issue that you are addressing, we recognise the vital importance of the role
11 of victims in this process.

12 On the central issue, we stand accused of going too early or coming too early to you on
13 this application. I must say I was a little surprised to hear that. We were at the time, as
14 counsel I suspect will be aware, subject to a surrender order for Mr Gaddafi. Counsel for
15 the OPCD made a great deal of that and accused Libya of violating that surrender order
16 and alleging that we were not co-operating with the ICC.

17 I think OPCD will appreciate that the only way Libya could address that issue of
18 surrender was to launch the admissibility application that it did. It may be that it is a
19 design flaw in the Statute and it may be also that the design of the Statute militates the
20 kind of approach that your question to the OTP raised yesterday; namely, avoiding a rush
21 to judgment, and finding ways, whether through monitoring or other means, to continue
22 to exercise oversight, and I'm going to come back to that. But the bottom line is we had
23 no option. If we didn't launch the admissibility application, we would extend the period
24 of either being accused of not co-operating, or handing over Mr Gaddafi, so that I think is
25 the simple explanation about what happened. Having been required by the Statute to

1 make the application as early as we could, I don't think we can reasonably be accused of
2 going prematurely in all the circumstances.

3 I turn now to the OPCD. I suppose that we too could spend two hours going through
4 each and every allegation of the horrors of everyday life in Libya today. We could
5 respond to each and every example of alleged wrongdoing, of alleged violation, of alleged
6 naughtiness. We're not going to do that. We've set out our pleadings. We think that
7 the OPCD is creating a smoke screen dealing with minutiae, not very persuasively, and
8 has simply failed to grasp the realities of the situation that exists in any country that finds
9 itself in the unfortunate situation of transitional justice after a major conflict.

10 One only needs to look at the unfortunate circumstances in Iraq ten years after the
11 invasion, which is what we are approaching, or in Afghanistan, to see that, by comparison,
12 we would submit Libya is doing remarkably well after 42 years of dictatorship.

13 Let me, instead of addressing the minutiae of thousands of points of detail, most of which
14 we say are wholly irrelevant, I'll just give you three examples that remind me of what I
15 did say in open court yesterday, which is to treat with very real caution what you hear
16 from the OPCD. It may be a lack of experience. It may be something else.

17 Firstly, fish farms. You will have heard how counsel for the OPCD sought to defend
18 itself against our charge that it had raised public allegations that the only thing that Libya
19 was investigating was camel trading and fish farms. Basically, what they said was that
20 Mr Gaddafi was interviewed and the only thing he was asked about in those interviews
21 was fish farming and camel trading. Now, that may or may not be the case, but there is a
22 world of difference between questions that may or may not have been put to Mr Gaddafi
23 on those issues and the subject matter of an investigation, and if the OPCD is saying that it
24 believes that those interviews reflected the full extent of Libya's investigations, which we
25 have shared in summary form with this Court, it say rather more about the OPCD's

1 understanding of these matters than it does about wrongdoing or limited investigation by
2 Libya.

3 Second example: Much was made by the OPCD, it is page 89 of the transcript, and I
4 should say that in relation to fish farms, it was page 92 to 94 of the transcript. Medical
5 treatment and examinations, we were criticised, this is page 89, on the basis that reports of
6 medical treatment predated request from the Trial Chamber to provide such treatment.

7 There's a very simple answer to this, and it is that Libya made medical treatment available
8 to Mr Gaddafi on its own initiative, not on the compulsion of the ICC. It's as simple as
9 that.

10 Third example why one would treat with caution what our distinguished friends say from
11 the other side of the room, there's a serious complaint about NTC law number 37
12 jeopardising their ability to carry out their role as defence counsel. Law number 37, you
13 will recall, criminalised the glorification of the dictator. Well, Madam President, that law
14 was quashed by the Libyan Supreme Court on 14 June 2012 as being unconstitutional, so
15 please treat every example that is given to you with absolute caution.

16 I turn now to NTC law number 35, I promise you I am not going to be comprehensive on
17 everything, which concerns the ability of a judge to commute a death penalty that might,
18 totally hypothetical and theoretical, be imposed on any person including Mr Gaddafi.

19 We were told that this is apparently not possible for Gaddafi family members and that
20 law number 35 extinguishes that possibility.

21 Well, I am certainly not an expert on Libyan criminal law, but Professor El-Gehani is, and
22 what he advises me and our team is that the right of commutation, if there has been
23 forgiveness by the family members of a victim, is a general principle in Libyan criminal
24 law and it trumps any specialised law, and that if that situation were to arise the general
25 principle would continue to apply.

1 Next point. Much was made about procedural guarantees or their inapplicability to
2 Mr Gaddafi because of the continued role of people's court procedures. Well, this is
3 obviously a matter of detailed and complex law and it would take some time to go
4 through the law and our explanation of why we say the OPCD is wrong, but let us put it
5 like this: Much has been made of the fact that this is in issue in a case currently before
6 the Libyan Supreme Court, the case of Mr Dorda, who is challenging the application of
7 the people's court laws and their complaint was made that it's taking very long to decide,
8 but the simple fact is there's a procedure available. Contrary to all of the arguments
9 made there is obviously a functioning legal system. You don't make applications to a
10 Supreme Court that isn't functioning, and rather like the judgment of the Supreme Court
11 on law number 37, there is every possibility that Mr Dorda will prevail in his application.
12 It shows that the system is working, not that it is non-existent or completely broken.
13 They can't have their cake and eat it. They can't say there's no functioning legal system
14 on the one hand and then complain that there have been a small number of adjournments
15 in the Dorda case. So to summarise in relation to factual submissions, and submissions
16 on Libyan law, please treat them with caution.

17 Let me turn to a separate matter, and can I just say both on behalf of our entire delegation
18 and me personally, we really do find the personalised attacks against Professor El-Gehani
19 to be really unacceptable.

20 He stands here as the head of a delegation. He has plainly participated in good faith
21 throughout these proceedings from their outset. I have to say that personally, I have
22 found him to be entirely reliable. If you put a question to him and he doesn't know the
23 answer he says so and he goes and finds it out. If he has fallen into error, he corrects
24 himself. If he says he's going to do something he does it. So I want to make sure in
25 open court that everyone hears very clearly that Professor El-Gehani, in the view of his

1 counsel, is performing his functions admirably in very difficult circumstances.
2 I would go a step further in saying that I am well aware of Professor El-Gehani's role
3 when there have been difficult moments over the summer and at other times in always
4 playing a constructive role to sort them out.
5 That has exposed him to the kinds of attacks that have been made, references to comments
6 by the commander of the Zintan Brigade as to Professor El-Gehani's authority, frankly
7 they're not helpful, they're not relevant. You are a court that proceeds on the basis of
8 evidence, not on the basis of submission or assertion by way of newspaper reports.
9 Much was made of statements sometimes attributed to Professor El-Gehani in the media.
10 We all know, we all have experience, that media does not accurately or always or even
11 often convey what has actually been said. There is very significant confusion.
12 To cut to the chase, to the extent that the OPCD is suggesting that somehow Professor
13 El-Gehani has no authority to be here, he was appointed initially by NTC decree to this
14 post that he currently holds on 10 July 2011 and more recently, and we can make it
15 available to the Chamber if you wish to have it, on 11 September 2012, the new General
16 National Congress adopted decree number 12 which provides him with full authority and
17 powers in this matter. So can we please end those conversations.
18 Similarly, and perhaps slightly more personally, we were pretty surprised to hear
19 suggestions - I don't put it any higher than that - that we as counsel, with our names to
20 pleadings, were drafting things in an inaccurate or inappropriate manner.
21 Let me just give you one example. Page 99 of the transcript, counsel for the OPCD said,
22 and I quote from the uncorrected transcript, "During the time when counsel for Libya
23 professed, professed they were unable to obtain instructions from the Prosecutor-General
24 or the Ministry of Justice team, the Prosecutor ..." and then they go on to explain why we
25 could have got instructions.

1 Madam President, if I sign a document that says we are unable to get instructions, it
2 means we are unable to get instructions. I may often be accused of making hopeless
3 arguments or being a useless advocate, but I have never been accused of making
4 arguments that are untruthful, and I hope that counsel for the OPCD will consider very
5 carefully before they go down that route in the future.

6 On which note can we say, since it happened in open court, our regret that matters that
7 are not directly relevant to this admissibility hearing that occurred over the summer were
8 the subject of extensive submission by the OPCD. We carefully avoided dealing with
9 those issues. You heard what OPCD had to say and you saw the remarkable spectacle of
10 the same person acting as witness and counsel in her own defence. I need say nothing
11 more about that. You have far more experience than I do on how these matters are
12 probably conducted in ordinary criminal procedures.

13 I turn finally to the question that you put to the OTP yesterday afternoon which we
14 listened to with great interest, and we listened with equal interest to the response of the
15 OTP, and that question it seemed to us raised very reasonable considerations as to what is
16 the sensible way forward in a situation which any reasonable person would recognise is
17 difficult.

18 You raised in your question I think the meaning of the word "monitoring" and we've
19 thought about this overnight in terms of what is a sensible way to go forward? And
20 we've identified three possibilities. It may be that there are others or variations of these
21 themes.

22 Possibility number 1: To just prolong the decision on the admissibility challenge. It
23 may be said that there's no reason to bring the admissibility proceedings to an abrupt and
24 swift end at this juncture. We say it is self-evident that you cannot possibly conclude
25 that the Libyan investigation has failed and equally there's nothing in the Statute or Rules

1 which requires a swift or immediate decision.

2 I come back to the point that I make in relation to the OPCV's submissions yesterday, it
3 may well be there's a modest gap in the design of the Statute which forces a State to come
4 very early on this issue when things are still being sorted out domestically. So that's
5 option number 1. We say that's available to you.

6 Option number 2 is simply to declare the case before the ICC inadmissible. We say that
7 option is available to you on a strict reading of the Statute. The OTP will then be free to
8 monitor what happens in Libya, including any subsequent trial, and it will be free to
9 report back to you if circumstances have changed and if they do that you can then review
10 the issue of admissibility de novo. That is provided for in the Statute.

11 And then there's a third possibility, which is to declare the case before this Court
12 inadmissible, but to attach strings or conditions. Keep Libya on a leash.

13 The Pre-Trial Chamber, for example, could order the OTP to monitor the case, or it could
14 order all parties to monitor the case and to report back periodically to the PTC if that is
15 needed.

16 Another variation on that theme is for the Pre-Trial Chamber itself to monitor the case as
17 it proceeds in Libya with perhaps quarterly or half-yearly reports being required from
18 Libya to report back on what happens.

19 We appreciate that there is no precedent for this, but we do think the Pre-Trial Chamber
20 would be making an historic and potentially significant decision which could assist in the
21 future conduct of complementarity decisions and issues. So the outcome of that
22 approach would be to find that there is at this stage inadmissibility, but to remain seized
23 of the matter as things go forward.

24 I hope you will have understood from our submissions on this that we are trying to be
25 helpful in terms of the difficult challenge the Pre-Trial Chamber apparently sees itself in in

1 trying to work constructively on a way forward not just for the Pre-Trial Chamber, but for
2 the Court as a whole as it moves forward in the next decade of its existence, recognising
3 that this is not likely to be the last time issues of this kind come up, and in that regard the
4 delegation of Libya undertakes, as Libya undertakes, to continue to work co-operatively
5 with the Pre-Trial Chamber and with the Court as co-operatively as is possible in coming
6 to a sensible and pragmatic outcome of this situation.

7 That's all I have to say. Unless you've got any further questions, that concludes our
8 second round submission?

9 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: I thank you very much and we do
10 have some questions - additional questions - some points of clarifications that we would
11 like to raise. Some of them have been already addressed. Those will make the
12 questions less long, but we still have additional questions.

13 Yesterday you indicated that the trial of Saif Al-Islam Gaddafi is planned for
14 February 2013, but also you said that the extradition of Al-Senussi to Libya makes it
15 necessary to have a joint trial for him and Saif Al-Islam Gaddafi, and at the same time you
16 indicated in your admissibility challenge, paragraphs 50 and 70, you stated that under
17 Libyan law the two cases shall be pursued separately in the civilian and military courts
18 because of Mr Al-Senussi being a member of the Libyan armed forces. So maybe you
19 could clarify this point and also give just a little bit more information on the basis of what
20 is the basis for its estimation of February 2013. Thank you.

21 MR SANDS: Thank you, Madam President.

22 The situation when we filed our admissibility challenge was that Mr Al-Senussi was in
23 Mauritania and at that time was subject to a military investigation, although he was out of
24 the country, because he is a member of the military.

25 What we are told now is that there is both a military and a civilian investigation taking

1 place in relation to Mr Al-Senussi and so that raises the possibility whether it is joinder or
2 at the same time or in some other format that any future trial could occur together. What
3 couldn't happen, as I understand it, is that a military trial of one and a civilian trial of the
4 other would have to be separate proceedings because they would be before separate
5 courts, but since Mr Al-Senussi is now also being investigated in relation to civilian
6 matters that is the basis for the possibility of a joint trial.

7 Now, you will appreciate also that the arrival of Mr Al-Senussi in the territory of Libya
8 means that he can now be subject to more complete investigation, including questioning
9 and no doubt at some point the issue will arise as to the relationship between Libyan
10 proceedings and proceedings in this Court. No doubt that will be next on the agenda.
11 But necessarily, as with any criminal process, you can imagine that there is a relationship
12 between factual matters relating to the two separate individuals, so I would say that there
13 is no certainty as to how the civilian process, if we focus on that, will pan out but, on the
14 basis of our best estimate, having regard to the advice given to us by Professor El-Gehani,
15 that date, that is Professor El-Gehani is telling me that that comes from his conversations
16 with the Prosecutor, the best estimate for a start date is February 2013.

17 Now, in relation to the military trial, if there is to be one of Mr Al-Senussi, I'm not in a
18 position to give you any information because I don't have instructions on that. You can
19 probably appreciate that for non-military external counsel from a foreign country there is
20 perhaps an even greater sensitivity about making information available, but we will
21 certainly do our best to find out and to the extent that the Pre-Trial Chamber needs more
22 information on that we of course will undertake to try to provide you with as much
23 information as we can give you.

24 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: I have some very specific questions,
25 so maybe I will put some of them together so that will give also the time to think about the

1 replies.

2 In your -- you attach to your admissibility challenge as Annex C a report of the
3 Prosecutor-General on the investigation against Saif Al-Islam Gaddafi. We would like to
4 understand better whether this report was prepared specifically for the purpose of being
5 submitted to the ICC or are these types of reports prepared routinely as part of the
6 investigation? And actually we would also want to know, because it's not in the report,
7 we would like to know the date? When was this report prepared?

8 Also in a previous submission Libya has stated that according to Libyan law a case
9 number is assigned when crimes are fixed permanently, so we would like to know more
10 of what that is -- what does this mean? At which stage of the proceedings is a case
11 number assigned?

12 And then complementing this question, we would like to know whether the case against
13 Gaddafi has a case number and, if so, when this number was given?

14 MR SANDS: Perhaps I can deal with the first question and Professor El-Gehani will deal
15 with the related second and third questions.

16 The answer to your first question is that the annex was prepared specifically for this
17 procedure for the obvious reason that counsel to Libya made it very clear that the
18 Pre-Trial Chamber would want to have some information as to what was going on and we
19 therefore worked with the Prosecutor-General's office to get the report put together as
20 quickly and as comprehensively as we could.

21 In relation to its date, we don't have a specific date to give you, but what I can tell you
22 from the best of my recollection is that it was completed very shortly before the
23 submission because we were under considerable pressure to file as soon as we could in
24 order to avoid being accused of not co-operating because we're not surrendering
25 Mr Gaddafi.

1 There has been a constant issue, frankly, of translation which has made things rather
2 difficult for us in terms of getting texts that are received by us in Libyan, then translated
3 into English, and making sure that the translations are as accurate as possible and that has
4 proved to be difficult. So I would say certainly in the period of the ten days before our
5 submission would have been the period when this was finalised, translated and made
6 available for submission, but it was a bit of a rush before 1 May. I don't think that's a
7 State secret that I'm prohibited from sharing with you.

8 I wonder if Professor El-Gehani could answer your second and third questions about case
9 numbers and whether a case number has been assigned?

10 MR EL-GEHANI: (Interpretation) Presiding Judge, Honourable Judges, with regards
11 to the question pertaining to the case number and how it is assigned, in accordance with
12 the Libyan legal system the case is not considered as a final case and then assigned a
13 number unless the charges are being confirmed by the chamber of accusation, and it is
14 similar to the Pre-Trial Chamber which adopts the charges but in a different manner. So
15 the case in Libya, when it is in the investigation phase, it is assigned temporary numbers
16 that are constantly changed and the final number is not assigned until it is transferred or it
17 passes through this gate to the trial. This is why with regards to Mr Saif Al-Islam
18 Gaddafi it's -- his case or his file is still in the investigation phase and it is not yet in the
19 accusation phase, so once the investigation phase is over and we get to the accusation
20 phase this is when the case number or the final one is assigned.

21 Is this a clear answer, or do I need to clarify it further? Thank you.

22 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you very much. We have
23 some additional questions also very specific, so in this report of this Prosecutor-General,
24 the report contains a brief summary of a number of witness statements allegedly collected
25 as part of the investigation against Gaddafi. We would like to know more, if possible, on

1 when were they collected, which authority received the statements and whether these
2 statements were provided orally? We also have additional questions on intercepts, so if
3 you prefer I can also ask that one, unless you want to respond now on the witness
4 statements?

5 MR SANDS: Perhaps it would be sensible to ask that additional intercept question
6 because I am going to have speak to Professor --

7 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Yes, I know. That's why I suggest
8 that maybe I'll ask this question.

9 MR SANDS: I mean, it may be helpful for you to know the way that we have worked to
10 make sure that we can be as accurate as possible. Professor El -- we have had conduct,
11 obviously a lot with Professor El-Gehani who spends a lot of time, lives in Libya, and
12 through him he has been our main point of contact with the Prosecutor-General, but we
13 have had also some contact with the Prosecutor-General and also some contact with the
14 Ministry of Justice, so we have some direct personal knowledge that we can bring to bear
15 to your answer, but often it's Professor El-Gehani who has gone through the process of
16 filleting out things into a condition that things that we're asking for are then made
17 available. So maybe it's a combination of both of us who will answer your questions.

18 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: There's no problem with that. So
19 I will ask also the following one, which is related to intercept evidence. Maybe we
20 would like to know more about what is the procedure that is envisaged in Libyan law
21 with respect to conducting intercepts and, again, when were those recordings taken and
22 under which authority? And we would like also to know whether these intercepts were
23 conducted according to the domestic procedural law and, if not, what could be the
24 consequence?

25 MR SANDS: If I could just have a moment to have a word with Professor El-Gehani just

1 to see how we can best divide up? I would simply say this about intercept: We were
2 going to make a brief response on it. We noted with interest the suggestion from the
3 OPCD that all intercept evidence had to be approved by a judge.
4 You will appreciate that in the period from 17 February onwards there was a situation of
5 conflict in Libya and the idea that one would at that time obtain the prior approval of a
6 judge would of course raise considerable issues of practicality, so we are in a situation that,
7 you know, raises certain practical as well as legal considerations, but if I can just have a
8 moment we will respond to both questions?

9 MR EL-GEHANI: (Speaks English) Madam President, can I add something to what
10 Professor Sands said?

11 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Yes, please.

12 MR EL-GEHANI: Thank you. Back in Arabic. (Interpretation) With regards to the
13 intercepts and the recording method, in normal circumstances, yes, the Libyan law
14 requires an authorisation by the investigative judge. Even the General Prosecutor or
15 Prosecutor-General cannot give such an authorisation.
16 However, following the events of 15 February and ongoing, I mean by that February 2011,
17 the instructions given by General Gaddafi that all phone calls should be recorded, and in
18 Libya there is only two companies, mobile or GSM companies and fixed line companies,
19 so all the phone -- telephone conversations were recorded, including the personal
20 conversation I had with the Italian television on 9 March 2011.

21 Following the fall of the Gaddafi regime and the liberation of Tripoli, these recordings
22 were available to all. There was a chaos prevailing following the liberation of Tripoli, so
23 there are many even official documents that were available to the public. However,
24 these recordings were acquired in such a manner. So all the Libyans, or let's say most of
25 the Libyans, have copies of these recordings on their CDs, UPCs, et cetera, and they are

1 available to all. They are public. They are available to all as if they are general
2 information.

3 In my car I listen sometimes to these recordings while driving in Benghazi so thus, the
4 recordings are available and even (Redacted) I used to receive them in
5 Libya, didn't have any difficulty of acquiring them because they were available to all.
6 Presiding Judge, with regards to the witness recordings and documentation, we in Libya,
7 in the eastern region, in the east side of Libya, which is a very big area equal to European
8 countries, for six months we were separated from the western region and the southern
9 region. During this six-month period, Libya in the eastern part was not subject at all to
10 the Gaddafi regime, so there were commissions or committees of volunteers, especially of
11 lawyers, who were collecting evidence and documenting them, whether it's witness
12 statements, or victim -- evidence related to victims, so they were orally taken, or by filling
13 forms, or as I said evidence pertaining to victims.

14 When Tripoli was liberated and Libya was one state again, all these documents were
15 submitted to different offices, including the judiciary and the Prosecutor-General's office,
16 so these documents are available in different places and many of examples were
17 recovered, whether they were oral recordings or written forms signed, et cetera.

18 Thank you.

19 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you very much.

20 I have --

21 (Pre-Trial Chamber confers)

22 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: I have -- we have some questions
23 on the potential offences with which Saif Al-Islam Gaddafi might be charged and we have
24 heard submissions on particular crimes under Libyan law for which Saif Al-Islam Gaddafi
25 could be charged, but however, it seems that some of the crimes referred to would apply

1 only to acts committed by public officers, such as torture of prisoners, abuse of power
2 against individuals, arrest of people without cause, restraint of personal liberty without
3 justification, so we would like to know whether Saif Al-Islam Gaddafi would qualify as a
4 public officer within the Libyan legal system -- in the Libyan legal system and,
5 furthermore, the provision on random killings explicitly excludes from its scopes the acts
6 of random killing constituting assault against State security, so we would like to also have
7 a clarification whether this exclusion is relevant to the case against Saif Al-Islam Gaddafi
8 before the national authorities.

9 And we have another question, so I raise two related to -- which is on the potential
10 offences, which is the crime of persecution. The ICC warrant of arrest includes the crime
11 of persecution, which is defined under the Statute essentially as severe deprivation of
12 fundamental rights by reason of the identity of a group or collectivity in terms of, inter
13 alia, political affiliation.

14 We would like to have more clarifications on whether the Libyan law provides an
15 adequate legal basis to allow for investigation and prosecution of such conduct.

16 MR EL-GEHANI: (Interpretation) Thank you. Presiding Judge, Excellencies, with
17 regards to the first question which is the situation of Saif Al-Islam Gaddafi in Libya, as to
18 his function, his position, or the function he was in charge of, of course with regards to the
19 theoretical part Saif Al-Islam Gaddafi does not have any other job other than being the son
20 of General -- Colonel Gaddafi. Of course he has coverage like the Defence representative
21 says, which is the Gaddafi Foundation for Human Rights and from the theoretical point of
22 view it is an NGO. It is not a governmental organisation.

23 However, everyone knows that its budget is in billions, and it is financing all the terrorist
24 activities and groups abroad under the coverage of the human rights foundation. So
25 even in the investigations, and even the OPCD understands that, that when he was asked

1 about his function he said that he was the host -- sorry, that he was raising camels and he
2 was only asked about the number of camels that he owns and he said that there are more
3 than a thousand camels.

4 This is why many only focused on the fact that the charges addressed against him is camel
5 trading. In Libya, Presiding Judge, Honourable Judges, is not a crime, camel trading or
6 cattle, et cetera, or even owning fish farms, but in the investigation he -- when he was
7 asked to prove what his function was he said "I'm just a camel raiser or trader."

8 The second question, when he was asked to identify a title, he said "I don't have any title
9 in" sorry, "an address in Libya, because I follow the camels and when camels stay in a
10 place I stay with them, so I take a break when they stop." This is why he does not have
11 official position that was given to him from a legal point of view, or as we say in Latin de
12 juris, so de juris there is no job de facto. He has the second highest almost important job
13 in Libya, so in fact he is truly the second man in Libya and he controls all the Libyan
14 government, but officially he is not in charge. This is with regards to the position of Saif
15 Al-Islam Gaddafi.

16 With regards to the charges addressed against him, starting from the instigation to
17 arbitrary or random killing, this is actually proved in recordings where the TV -- Libyan
18 TV channels were under his control. He used to appear on these TV channels and
19 instigate his army, what we call "the brigade" in Libya, so he used to instigate security
20 forces to random killing which means that all those who go to the street will be thus killed,
21 and his orders were enforced because of the de facto status of Gaddafi.

22 The potential crimes that he could be accused of, they were part of the investigation right
23 from the start, so they started investigating with random killing and investigating random
24 killing in particular, and with persecution crimes the Libyan law actually includes such
25 crimes, even if the elements, as we say in the criminal law, the elements of this crime

1 differ from those of the crimes stated in other laws and they are taken from the Italian law,
2 the "reato de oppresione."

3 If my answer is clear, I will stop at this point. However, if you need any further
4 clarification, I'm at your disposal.

5 I apologise. Persecution, with regards to persecution, maybe there is no explicit text
6 using this term, but there are other texts that lead to the incrimination of persecution
7 which is pertaining to severe deprivation of personal rights, and I would like to mention
8 two texts mentioned in the criminal proceeding code and the text that incriminated the
9 public servant if he or she deprives an individual of his rights without any legal ground.
10 There are -- there is also another text that criminalised the public servant if he or she
11 arrests an individual and prohibits them from making or contacting anyone for no legal
12 basis, so these are texts that exist in the legal law and they are similar to the persecution
13 principle if we understand by that the severe deprivation of liberal -- of personal or
14 fundamental rights.

15 MR SANDS: Madam President, could I just -- could I just follow up very briefly just to
16 say that, if it would be helpful to have any further written submissions on any of these
17 matters, we would be very pleased to do that. I am conscious that because of the range
18 of questions perhaps Professor El-Gehani wasn't specific on the random killing issue, that
19 part of your question that related to the State -- attacks on State security, and he could
20 either continue now, or if you think it would be helpful and indicate we can give you a
21 detailed answer with references to the specific laws if you wish?

22 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you very much. As we
23 said before, we will -- at the end of the hearing we will consider how we will proceed
24 further, whether we will ask for written submissions, whether we will have another
25 hearing, so for the time being we will just try to elicit as much information as we can and

1 then we will see how we can supplement this information in the best possible way.

2 At this stage, going back to the answers of Mr Gehani, we just -- I want to just make sure
3 that we understood correctly that, in light of his explanation, is it understood that
4 Mr Gaddafi would be considered as a public officer de facto?

5 MR EL-GEHANI: (Interpretation) The offences or the charges that have been given to
6 Mr Gaddafi can be charges against a public officer, or any other individual. The public
7 officer is only a matter of aggravanti, as we say it in Italian, if he is a public officer, but
8 what can be committed by a public officer is the same like any offences to be committed
9 by any other person, but there is aggravation of the penalty if he is a public officer.

10 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you very much. So that
11 means that, for instance, torture could be committed by a private individual under the
12 definition of the crime?

13 MR EL-GEHANI: (Interpretation) Yes. Yes, torture can be committed by any
14 individual.

15 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you very much.
16 Going back to another question that we raised with relation to the Prosecutor-General's
17 report and the witness, a little -- another clarification would like to be -- we would like to
18 know whether the team of the Prosecutor-General interviewed directly any witnesses?

19 MR EL-GEHANI: (Interpretation) To answer this question, there were a number of
20 trips in Tripoli and Benghazi to the office of the Prosecutor-General. There was meetings
21 with a number of NGOs that worked in the field of human rights and the protection of
22 victims. I do believe that they met a number of those, but during the interviews, as was
23 the meetings of the Defence, we were not present and this is really a very important
24 matter.

25 Presiding Judge, if you allow me, the members of the team reminded me of a point which

1 is related to the fact that whether statements of specific and single witnesses were taken or
2 not. I would like to answer by saying, yes, it happened, but in many cases we do not
3 attend such meetings. We arrange the environment which is appropriate, but we do not
4 attend these meetings. The fact is that during the trips to Libya they got some of these
5 statements.

6 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you very much.

7 Another question of law. Under Libyan law is the inability to obtain custody of the
8 accused a bar to the continuation and completion of the investigation, or to move further
9 in the case, for instance into trial?

10 MR EL-GEHANI: (Interpretation) Under the Libyan law, as it is in other Latin law,
11 those two types of trials unlike the ICC. We know the trial with the presence of the
12 accused and in absentia trials, but in the case of Saif Al-Islam Gaddafi we cannot have in
13 absentia trials as long as he is present and the location of his presence is known on the
14 Libyan territory, if this is what you meant, madam?

15 Madam, we are waiting for his transfer to Tripoli and, as we said yesterday, we said that
16 the new president, el-Magariaf, has spoken on 22 September and he said that Saif Al-Islam
17 Gaddafi will be transferred to Tripoli and he will be put in a specific facility determined
18 by the Libyan authorities.

19 Thank you.

20 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you very much.

21 I have two final questions, also points of clarification on the submissions. In your
22 admissibility challenge, and also yesterday, you have stated that there is a series of
23 detention orders that has been issued for Mr Gaddafi. More specifically, you stated
24 yesterday that recently this period of pre-trial detention has been lawfully extended as
25 necessary by the Prosecutor-General in accordance with Article 177 of the Criminal

1 Procedure Code. This is page 17 of the transcript.

2 We would like to know on whose authority and until when has this detention been
3 extended?

4 MR EL-GEHANI: (Interpretation) Your Honour, I'm going to answer this question.

5 Yes, Mr Gaddafi is still under the detention authorities in Libya. He is still in the
6 investigation phase. He hasn't yet entered into the accusation phase.

7 This period was extended because of the extradition of Abdullah Al-Senussi to Libya.

8 This matter has affected greatly the approach of the investigation with Mr Gaddafi.

9 Therefore, it is within the authorities of the Prosecutor-General to extend from time to
10 time the detention.

11 There is a law which allows him to extend for 30 days and another law which allows for
12 the extension of 45 days in each time. The Libyan law has this provision. This might
13 not satisfy some persons, but this is the case in Libya, so in this case these extensions and
14 this renewal of the detention period is issued by the order of the Prosecutor-General in
15 Libya.

16 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you very much.

17 When -- you have described at length the relevant features and procedural steps provided
18 by the Libyan Criminal Procedure Code. However, in its report on the scope of the
19 investigation the Prosecutor-General's team states that, in light of the charges which most
20 likely will be brought against Saif Al-Islam Gaddafi, there will be a different procedural
21 regime than the one described in the challenge. This is in the Annex C, page 7.

22 Can you explain a little bit further how this procedural regime could deviate from the
23 regular one?

24 MR EL-GEHANI: (Interpretation) Presiding Judge, yes. As I said, we have more than
25 one procedural system with regard to investigation. The Libyan law gives the flexibility

1 to the investigators in this regard. While answering the first question, I said that we have
2 a system, we have rules, for the extension and renewal of the detention periods. We
3 have the 30-day rule and we have the 45-day rule.

4 Likewise, in this case we have more than one method or approach to carry out the
5 investigation, especially when the offences or the crimes have political nature. These
6 have been inherited from the previous regime. Therefore our investigators are following
7 more than one approach with regard to investigation, especially in the period before the
8 adoption of the charges during the investigation periods. Even the police and the
9 judicial police can play a role in this regard. So in the investigation phase and before the
10 adoption of the charges we have more than one method and approach that has been
11 enshrined in the Libyan law, so that's why we are very flexible in this regard.

12 Thank you.

13 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you very much.

14 (Pre-Trial Chamber confers)

15 JUDGE KAUL: Yes. Mr Gehani, Mr Sands, I would like to ask an additional question.

16 In a way it's a quite general question and it also is underlying the many questions that the
17 Presiding Judge has put to you.

18 The question is: Are the Libyan authorities - are all concerned in Tripoli - really aware
19 that your side, the Libyan side, in these proceedings is under an obligation to provide
20 concrete, tangible and pertinent evidence that -- to demonstrate to this Chamber that
21 proper investigations are currently ongoing and proper and concrete preparations for the
22 trial are ongoing?

23 This is the question that I would like to ask you and, if there is any doubt, I would -- I
24 would hope that counsel would do all to ensure that the Libyan side and the authorities in
25 Tripoli understands this necessity which is really very important for the outcome of these

1 proceedings. Please.

2 MR SANDS: Judge Kaul, thank you very much for that question. I hope I can reassure
3 you in this sense. Counsel are acutely aware of this need. That acute awareness has
4 been communicated, is being communicated and will continue to be communicated.

5 I want to be very careful what I say in open court, because there are circumstances that
6 shall we say have given rise to certain concerns about the fulfilment of that duty not as a
7 matter of principle, but in terms of timeliness, but in short the authorities are acutely
8 aware, we are acutely aware and we remain absolutely committed to meeting Libya's full
9 responsibilities in reaching the appropriate standard as determined by the Pre-Trial
10 Chamber.

11 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: I thank you very much and since
12 we only have a few minutes left we do have more questions to ask, but they are probably
13 more appropriate for a closed session since they relate to confidentiality issues related to
14 the investigation.

15 So in order to make these questions, this afternoon we will have -- between 2.30 and 4 an
16 ex parte status conference will be held in this courtroom in the presence of the
17 representatives of Libya and the OTP to discuss issues related to the confidentiality of the
18 Libyan investigation. I say between 2.30 and 4, probably it will be much shorter than
19 that, but this is the time that at least we have allocated.

20 And this brings us to the end of this hearing. We will consider the submissions and, in
21 light of the debates we have had, we will decide how to proceed further in terms of
22 additional submissions, if any, in writing or oral submissions.

23 I would like to thank you all. I would like to thank the interpreters and court reporters.
24 I particularly thank the interpreters and court reporters because they've had a very
25 difficult task in following the speed of the speakers, of all of us, and I thank of course all

Hearing

(Open Session)

ICC-01/11-01/11

- 1 the parties and participants. This hearing is adjourned.
- 2 THE COURT USHER: All rise.
- 3 (The hearing ends in open session at 1.03 p.m.)