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PRE TRIAL CHAMBER I

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

**SITUATION IN LIBYA
IN THE CASE OF
*THE PROSECUTOR v. SAIF AL-ISLAM GADDAFI and ABDULLAH AL-SENUSSI***

Public

**LAWYERS FOR JUSTICE IN LIBYA and REDRESS TRUST 'S OBSERVATIONS
PURSUANT TO RULE 103 OF THE RULES OF PROCEDURE AND EVIDENCE**

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Background

1. On 1 May 2012, the Government of Libya filed an application pursuant to article 19(2)(b) of the Rome Statute ("Statute") challenging the admissibility of the case concerning Saif Al-Islam Gaddafi and the case concerning Abdullah Al-Senussi ("Admissibility Challenge").
2. On 4 May 2012, the Chamber issued the "Decision on the Conduct of the Proceedings Following the *Application on behalf of the Government of Libya pursuant to Article 19 of the Statute*", wherein it invited the Office of the Prosecutor ("OTP"), the Office of Public Counsel for Defence ("OPCD"), the Security Council and the Office of Public Counsel for Victims ("OPCV") to submit any observations on the Admissibility Challenge, no later than 4 June 2012.
3. On 18 May 2012, Pre Trial Chamber I granted the request by Lawyers for Justice in Libya ("LFJL") and the Redress Trust ("REDRESS") (together, "the Amici") to present observations pursuant to Rule 103 relevant to issues of "ability" and "willingness" under Article 17 of the Statute, specifically on 4 issues, which are considered herein in turn.¹
4. The Amici underscore that, in their observations, they do not purport to speak on behalf of specific victims, victim-applicants or potential applicants who seek to participate in proceedings nor to take a position as to the merits of the Admissibility Challenge. The Amici also underscore that there may well be a variety of views amongst Libyan victims and other stakeholders about the best forum for accountability for recent alleged atrocity crimes in Libya. As there has thus far been only limited opportunity to canvass the views of such persons and groups, the Amici

¹ The fourth issue upon which the Amici were granted leave to present observations, 'The experiences of victims of crimes within the jurisdiction of the ICC in obtaining justice in Libya's domestic criminal jurisdictions and other fora, and the relationship between victims' rights and issues of admissibility under Article 17 of the Statute. This includes the capacity of the Libyan judiciary to afford justice to victims of serious international crimes (taking into account both tested capacity and plans for future prosecutions),' is dealt with under headings I and II.

do not put forward any summary of prevailing views, nor provide any broad observations on the merits of such matters.

5. The Amici note that the decision on the Admissibility Challenge to be taken by the Chamber will have wide-reaching implications in Libya and beyond and they seek to impart information to the Chamber to assist it to make an informed decision.
6. The Amici base their observations on targeted interviews and discussions with Libyan legal professionals, judges, prosecutors and law professors, living and working in Tripoli, Misrata, Benghazi, Albayda, Sabha and Sirte, carried out by the Amici in recent weeks; monitoring undertaken by LFJL on the evolving situation in the country; an analysis of existing legislation and recent reforms; the report of the International Commission of Inquiry on Libya² and the response of the Libyan government to that report³; reports of the UN Support Mission in Libya; fact-finding reports of human rights organizations; and media reports. The Amici have also had sight of the filings of the Government of Libya and other filings by the OTP, the OPCV and the OPCD.

THE AMICI RESPECTFULLY MAKE THE FOLLOWING OBSERVATIONS:

General observations relating to the transitional context in Libya

7. The political and security situation continues to evolve rapidly, as it has done since the end of the 17 February 2011 Revolution. There is much to demonstrate the will on

² HUMAN RIGHTS COUNCIL, Report of the International Commission of Inquiry on Libya, Nineteenth Session, U.N. Doc. A/HRC/19/68, 2 March 2012.

³ Libya (concerned country), Commission of Inquiry on Libya Item:4, 28th Meeting, 09 March 2012, video testimony is available at: <http://www.unmultimedia.org/tv/webcast/2012/03/libya-concerned-country-commission-of-inquiry-on-libya-item4-28th-meeting.html>

the part of the Libyan National Transitional Council (“NTC”) to put in place procedures and systems that respect the rule of law and to end impunity for some of the main crimes perpetrated by the Gaddafi regime in its final stages. However, the implementation of this will is significantly hindered by the transitional context and the prevailing uncertainty resulting from political instability and increasing insecurity.

8. The Government of Libya is limited in its ability to exercise control over militia groups operating inside the country who continue to exert extensive power and constitute a *de facto* authority. There is a power imbalance between the NTC and the militias whereby the NTC as yet does not appear to have the ability to order, negotiate or confront the militias nor to prevent militias from attacking or intimidating the interim authorities or using force against them.⁴ This impacts not only on the overall security situation on account of the easy access to weaponry, but also on the functioning of the legal system as a whole, given the continued practice of militias to maintain control over certain detention centres and the potential for them to exert influence over and intimidate judicial actors. It has also been noted that the popularity of the Revolution and the role of the militias within it has made it difficult for certain members of the judiciary to take positions or make decisions which negatively impact on militias.
9. A major uncertainty concerns the upcoming elections, which is contributing to tensions and insecurity in the country. Whilst voter registration proceeded well with 2,728,240 persons registered at the end of the registration process,⁵ the process of vetting candidates has not yet been completed, and this is likely to delay the holding of the elections, currently scheduled for 19 June 2012.

⁴ This challenge has been highlighted in the media by both the NTC and the Government of Libya; See for example <http://www.news24.com/Africa/News/Libyan-leader-acknowledges-mistakes-20120222>.

⁵ Website of the High National Election Commission, <http://hnec.ly/en/modules/publisher/item.php?itemid=14>.

10. The legal framework put in place by the NTC is likely to be affected by the elections.

Pursuant to Law 4 of 2012, no NTC member is permitted to run in the Libyan elections, and thus the government that will ultimately be formed will, in many respects, start afresh. In particular, laws that have been enacted will be reviewed. This has been confirmed to the Amici by members of the NTC who have described the status of many laws as in 'moratorium' until the election of the national congress. This was affirmed by the Libyan Prime Minister on his recent trip to London where, when asked about Law 37 of 2012 criminalising the glorification of the dictator, he stated "I guarantee you that the sooner we get to the elections, and then have the general assembly formed, the congress, I guarantee you that such laws will disappear completely from the screen [sic]".⁶ The Special Representative of the United Nations in Libya, Mr. Ian Martin, has also stated that "Any legislation passed now by the National Transitional Council can obviously be reviewed and amended or replaced by the national congress."⁷ Thus, the Amici respectfully submit that the progress made by the NTC since the end of the Revolution must be viewed against the uncertainty posed by the upcoming elections. Whilst these are natural processes which will hopefully ultimately lead to a functioning democracy in Libya, and the NTC is to be commended for taking the initiative to enable Libya to move closer to this goal, the highly charged, transitional context is such that it is difficult to predict with any certainty the legal, political or security situation that will emerge post-elections.

⁶ Abdurrahim El-Keib, Transcript Q & A, *Libya: Re-establishing the State*, Chatham House, 25 May 2012, <http://www.chathamhouse.org/sites/default/files/public/Meetings/Meeting%20Transcripts/250512elkeibQ&A.pdf>

⁷ Ian Martin, UN Special Representative for Libya - Security Council Media Stakeout, 10 May 2012, video footage at: <http://www.unmultimedia.org/tv/webcast/2012/05/ian-martin-un-special-representative-for-libya-security-council-media-stakeout-2.html>

I. The current state of the judiciary in Libya and capacity building efforts undertaken since February 2011

A. The independence and impartiality of the justice system in Libya

The Judiciary

11. The independence and impartiality of the Libyan justice system may be a relevant factor for the Chamber to take into account. The Amici note that the lack of independence and impartiality of the judiciary was a defining feature of the previous regime.⁸
12. The NTC has taken important steps to demonstrate its intention to improve the independence of the judiciary. It promulgated the Constitutional Declaration of 3 August 2011, article 32 and 33 of which proclaimed the independence of the judiciary. Also, it issued Law 3 of 2011 adjusting law 6 of 2006 on the judiciary, with the aim of insulating the judiciary from the executive. The NTC also abolished the Internal Security Agency and the State Security Court and released numerous political prisoners.⁹
13. Yet, despite these legal and other pronouncements, challenges remain.¹⁰ Judge Marwan Tashani, head of the committee for documentation and follow-up of detainees and mercenaries in the NTC and head of the Libyan Judges Organization, cites examples of executive interference. This includes the investigation into the assassination of Colonel Abdulfatah Younis, public security minister under the

⁸ UN Human Rights Committee (HRC), Concluding observations of the Human Rights Committee: Libyan Arab Jamahiriya, CCPR/C/79/Add.101, para. 14, 6 November 1998, available at: <http://www.unhchr.ch/tbs/doc.nsf/0/de8b82142ebec610802566db00574644?OpenDocument>.

⁹ NTC Resolution No. 17 of 2 April 2011 on the cancellation of The Internal Security and The External Security and the transfer of their functions to the local councils.

¹⁰ HUMAN RIGHTS COUNCIL, Report of the International Commission of Inquiry on Libya, Nineteenth Session, U.N. Doc. A/HRC/19/68, 2 March 2012.

Gadaffi regime who defected and became commander in chief of Libya's revolutionary army, in which the head of the NTC "appeared alongside the investigation authority in the media and made accusations of people who were not called upon nor questioned". He also notes other challenges facing the independence of the judiciary, indicating that "the continuing detention of many of the members of Gaddafi's brigades and figures of his regime without questioning nor according them any due process further illustrates the weakened role of the judiciary in ensuring the supremacy of the rule of law."¹¹

14. The Amici have no knowledge of confirmed instances of bribery of judges or prosecutors since February 2011, however it is noted that judicial salaries range from 600-1400 LYD (475 – 1000 USD) per month which does not meet the standard of living. More significantly, while judges are appointed for an indefinite term, the ease with which they had been removed or sanctioned under the previous regime undermined their ability to act independently. As the vetting mechanisms have not yet been reinstated, it is as yet unclear whether the mechanisms will be utilised in a similar way and thus whether this will remain an issue in the current or future context.
15. There may be more subtle influences on judges which may impact on the independence and impartiality of their decision-making. The power of the militias continues to be strong, and numerous interviewees commented on the potential for militias to influence the judiciary and the administration of justice as a whole.
16. Although there are distinct civil and criminal courts, the Amici have been told that judges in Libya are able to sit on both benches. In order to be appointed as a judge, a person must first complete a law degree and then attend the High Institute for the

¹¹ Judge Marwan Tashani, 'The Revolution in Not Complete Without an Independent Judiciary', **Mizaan**: The Newsletter from Lawyers for Justice in Libya, April 2012 Issue 1, at: http://www.libyanjustice.org/downloads/Mizaan%20newsletter%2023rd%20april%20-%20FINAL.pdf?utm_source=smartmail&utm_medium=email&utm_campaign=Mizaan+-+Issue+1+.

Judiciary for a one year programme which focuses on theoretical knowledge and practical skills. The person is then appointed to the general prosecution office, a judicial administrative post, as a public defence lawyer or to one of the departments of the Ministry of Justice. After seven years experience in one of these judicial bodies, the person becomes eligible for nomination by the Authority for Judicial Inspection and, if such nomination is successful, the person would be appointed as a judge by the Supreme Council of Judicial Authority.

17. Many judges and lawyers noted to the Amici that, whilst the Institute teaches practical and theoretical skills relevant to judges, there is a significant deficit in capacity and there is no specific training that judges would have received to enable them to deal with the substantive international criminal law, the procedural intricacies and the practical challenges of presiding over cases involving the types of international crimes that fall within the jurisdiction of the ICC. Furthermore, it was noted to the Amici in several interviews that much of the justice system training that has been developed by international service providers since February 2011 has focused on training lawyers on human rights documentation (as opposed to technical training for judges or prosecutors on how to conduct mass atrocity crimes cases). The few instances of training sessions for judges and prosecutors have not focused on the prosecution of international crimes and have been “limited in scope” and the selection of attendees “arbitrary”.
18. There are presently members of the Supreme and other courts who were appointed by and served under the Gaddafi regime. At that time, it was possible to be appointed to the bench without following the traditional route set out in paragraph 16 above. In particular, judges with ‘parallel’ legal experience, including as a legal consultant as opposed to a practising lawyer and, in certain cases, persons engaged in the police, were appointed as judges. Some of these individuals remain on the

bench. It is unclear whether this parallel appointment process continues to be in place.

19. Trials are generally held in public.¹² Exceptions are where the holding of a public trial would impact on public policy or where there is a need to protect public morality or the dignity of the family, especially if involving minors. In addition, a party to proceedings may request that proceedings are held in confidence. This is decided at the discretion of the presiding judge.
20. No special measures exist under Libyan law to afford victim or witness protection, neither in-court procedures to protect the privacy or dignity of vulnerable victims or witnesses as appropriate, nor out-of-court systems of protection such as special police protection, relocation services or other measures to ensure victims' and witnesses' safety from reprisals. Threatening a witness is considered a crime which may be separately prosecuted, however there are no existing frameworks to offer victims who are subjected to threats with measures to ensure their safety.

Prosecution

21. A number of prosecutors fought during the conflict with the revolutionary brigades and it has been indicated to the Amici that there is a disparity in how suspects are investigated, depending on whether they are understood to be Gaddafi loyalists or members of revolutionary brigades. In general terms, there has been a tendency to overlook or minimise crimes alleged to have taken place in the context of revolutionary activities whereas alleged crimes carried out by Gaddafi loyalists are subjected to much more rigorous scrutiny. This approach was highlighted in the response of the Government of Libya to the Report of the International Commission of Inquiry where the Deputy Minister of Justice stated that the actions of the revolutionaries should not be viewed in the same light as those of the Gaddafi forces

¹² Article 276 of the Code of Criminal Procedure.

as they were merely ‘reacting’ to the attacks of those forces, implying that such alleged crimes should be assessed based on the identity of the perpetrator and not the nature of the crime.¹³ Indeed, this lack of consistency in approach was formally sanctioned by the NTC with the introduction of laws 35 and 38 of 2012, with law 38 of 2012 instituting a blanket amnesty for “acts made necessary by the 17 February revolution” for its “success or protection,” whether such acts are of a military, security or civil nature.¹⁴

Defence lawyers

22. Under Libyan criminal procedure, there are four main phases of procedure, the investigation phase being the first. Defence lawyers have a limited role during the investigation phase. In this phase, they may be present and counsel clients when there is an interview by the Office of the Prosecutor General and/or a confrontation with witnesses. As this phase may be lengthy given the detention rules that have been appropriately explained in the Admissibility Challenge, the impact of the limitations on the rights of the defence may be significant. In practice, the right to have access to a lawyer before being questioned is often disregarded.¹⁵ Fuller rights exist in the accusation phase.

23. The prevailing security situation makes representation of Gaddafi loyalists difficult, though in practice, there is at least one instance in which prominent Libyan lawyers have agreed to represent such clients.¹⁶ Law 37 of 2012 on the criminalisation of the

¹³ Libya (concerned country), Commission of Inquiry on Libya Item:4, 28th Meeting, 09 March 2012, video footage available at: <http://www.unmultimedia.org/tv/webcast/2012/03/libya-concerned-country-commission-of-inquiry-on-libya-item4-28th-meeting.html>.

¹⁴ Law 35 provides an amnesty for crimes and punishments other than Hudud crimes (crimes for which Islam proscribes punishment), murder, rape, torture, drug trafficking and the infecting of water and food. It does not apply to crimes committed by Col. Gaddafi, his children, children in law or loyalists. Law 38 provides an absolute amnesty for all actions necessitated for the success and maintenance of the 17 February Revolution. There is concern amongst legal professionals that, given that Law 38 post-dates Law 35, crimes under international law for which there is a clear obligation to investigate and prosecute, such as torture, disappearances and other crimes against humanity, are not specifically excepted from falling within the amnesty provisions.

¹⁵ Amnesty International, *Libya of Tomorrow: What Hope for Human Rights*, (2010), p. 39.

¹⁶ The Dorda case, which commenced on 5 June 2012. [case number 723/2012]

glorification of the dictator¹⁷ has been cited by many lawyers as a potential impediment to the defence of Gaddafi loyalists, with the prohibition on praising the previous regime being regarded as a possible obstacle to constructing a defence which may, for example, rely on the belief in the ideology of the Gaddafi regime. It was stated to the Amici that, in fact, the situation may occur where in attempting to put forward a defence in relation to a criminal charge, a new crime is committed. It was further highlighted that, although Libyan law protects defence lawyers when putting forward a defence, this law was likely to have the effect of deterring some lawyers from representing Gaddafi loyalists. They have also noted that should more senior Gaddafi loyalists be prosecuted, there may be increased security threats. Thus far, as noted, this has not yet proved to be an insurmountable problem.

24. It has been noted that there is no legal impediment for an accused person to call witnesses from outside Libya, or for witnesses to testify by video-link from outside the country. However, there is no specific allowance for the use of video-link testimony nor any precedent for such use.
25. In addition, it is possible for foreign lawyers to represent clients in Libya with leave of the Libyan Law Society. The key criterion to obtain leave is a provision requiring reciprocity: that Libyan lawyers would have the ability to act similarly in the home jurisdiction of the foreign lawyer. In his last statement on the situation in Libya, Mr Ian Martin stated that “the chairman of the NTC has stated to me that [Mr Gaddafi] has been told that he can have any lawyer, international or national, that he wishes.”¹⁸ It is unclear on which legal provision the chairman of the NTC was relying in making this statement or whether there is a suggestion that special dispensation has been granted in this case.

¹⁷ The law is now before the Supreme Court to review its constitutionality, with 17 judges presiding. The hearing commenced on 3 June, and the ruling is scheduled for 14 June 2012.

¹⁸ Ian Martin, UN Special Representative for Libya - Security Council Media Stakeout, 10 May 2012, video footage at: <http://www.unmultimedia.org/tv/webcast/2012/05/ian-martin-un-special-representative-for-libya-security-council-media-stakeout-2.html>.

b. The functioning of the legal system

26. At present, as has been underscored by all interviewees, the criminal courts are only beginning to function, and mainly for *de minimus* crimes. There is a long and complicated task of processing files which is still underway. Judges have thus far, with some exceptions, refrained from presiding over high profile cases, though this is possibly beginning to change. While there are a small number of such cases that have been initiated, few are known to the Amici to have progressed beyond the investigation stage. For example, a complaint has been filed with the Prosecutor General in the Yarmouk case, which concerns allegations relating to Gadaffi loyalists burning 153 persons in detention. In February 2012, a military trial of 41 Gadaffi loyalists commenced in Bengazi; however, the proceedings have halted pending the transfer of the case to a civilian jurisdiction. On 8 May 2012, the Zawiya case, which concerns allegations that Gadaffi loyalists were leading criminal gangs and possessing illegal weapons in order to destabilise Libya, was adjourned in order to enable the defence to prepare its case.
27. On 5 June 2012, the Dorda prosecution commenced in Tripoli. Abu Zaid Omar Dorda was the external intelligence chief under the Gaddafi regime. He was arrested in September 2011 and faces six charges: conspiracy to kill; arming of individuals to murder civilians; planning civil war; denying individuals their ability to protest; illegal arrest; and abuse of authority including mis-management of public funds. Despite the extreme sensitivity of the case and the charges, Mr Dorda has retained a prominent Libyan defence team. Dorda was allowed to be questioned by journalists and organisations on his treatment. Significant security protocols were employed to enable Dorda to come in and out of court, including the use of gun-mounted vehicles in the streets around the Court, snipers on the roofs of nearby buildings and a

helicopter overhead throughout the hearing. Dorda is the most high profile defendant to date.¹⁹

28. In another development, on 4 June 2012, nineteen Ukrainians as well as three Belarusians and a Russian accused of being mercenaries for the Gadaffi regime during the Revolution were found guilty by a military court in Tripoli and sentenced to 10 years imprisonment with hard labour. Another Russian national, said to be the leader and coordinator of the group, was given life imprisonment. The men were arrested last August and charged with a number of offences, among them the setting-up of surface-to-air missile launching platforms to target NATO aircraft.²⁰
29. The Amici underscore that no cases against revolutionaries have commenced.
30. In some cases, there appears to be a strong reliance on confession evidence in which allegations of ill-treatment and torture have been made, which may eventually impact on the ability to use the evidence to substantiate the claims. The existence of numerous allegations of torture of detainees has been acknowledged by the Minister of Justice.²¹
31. There are approximately 6,000 – 10,000 individuals who are in detention as a consequence of, or in relation to, acts connected to the Revolution.²² Some of these detainees are held in detention centres controlled by the state – the Ministries of Justice and of the Interior. However, numerous detainees are held by militia groups, including Mr Gaddafi, and there is currently little, if any, ability for the state to exercise control over detention facilities run by militias, though militias have begun in certain, though not all instances, to hand over detainees to the state. Additionally, there are reported to be secret places of detention in which detainees' status is

¹⁹ Libya Herald, Dorda trial opened – and adjourned, 5 June 2012, <http://www.libyaherald.com/dorda-trial-opened-and-adjourned/>.

²⁰ Libya Herald, Ukrainians sentenced to 10 years hard labour, 4 June 2012, <http://www.libyaherald.com/ukrainians-sentenced-to-10-years-hard-labour/>.

²¹ Interview with Justice Minister Ali Humaida, Ashour: Exclusive, Libya Herald, <http://www.libyaherald.com/interview-with-justice-minister-ali-humaida-ashour/>.

²² HUMAN RIGHTS COUNCIL, Report of the International Commission of Inquiry on Libya, Nineteenth Session, U.N. Doc. A/HRC/19/68, 2 March 2012, para 105.

unregulated. Law 38 of 2012 was enacted by the NTC, among other things, to regularise the detention of detainees. The law sets out that the competent authorities have 60 days to review the evidence relating to detainees and for a judge to confirm their continued detention in accordance with law or, otherwise, to order their release. This law is in force but has not yet begun to be applied, as has been indicated by interviewees. There are logistical and practical challenges relating to the review process, namely the significant time and effort it would require to review the high number of cases, many of which rely exclusively on confession evidence. Given the numerous allegations of ill-treatment and torture meted out to secure the confessions, it will be necessary to review the veracity of all confession evidence, which may further delay the review process.

32. It is unclear how the NTC will be able to enforce the law for the benefit of detainees held by militia groups. This challenge has been noted by the Minister of Justice, who has indicated that 'Revolutionaries cannot act as judicial officers; therefore, whoever handles the investigations must be a judicial officer recognized by Libyan law.'²³ The NTC has sought to negotiate the transfer of detainees held by militia groups to official state detention facilities, however, to date, this has not yet occurred uniformly. A case in point is the detention of Mr Saif Gadaffi in Zintan; the NTC has built a facility especially for his detention however to date efforts to give effect to his transfer have stalled.

²³ Interview with Justice Minister Ali Humaida, Ashour: Exclusive, Libya Herald, <http://www.libyaherald.com/interview-with-justice-minister-ali-humaida-ashour/>.

II. The extent to which the present Libyan legal framework for the prosecution of the crimes contained in the Rome Statute complies with principles of accountability contained in the ICC Statute and other international treaties binding on Libya as well as principles of general international law

33. Of relevance for the Chamber, Libya has acceded to the International Covenant on Civil and Political Rights,²⁴ the UN Convention Against Torture,²⁵ the Genocide Convention²⁶ and the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity.²⁷ It has also ratified or acceded to the four Geneva Conventions of 1949²⁸ and Protocols I and II of 1977.²⁹
34. Torture is recognised as a crime under Libyan law,³⁰ and it applies both to the direct perpetrator and to individuals who order or instigate torture. Even during the Gadaffi regime, the Amici have been informed that there was at least one successful prosecution for torture.
35. Other international crimes including those in the ICC arrest warrant are not specifically recognised under Libyan law, and this is an issue taken up in the filings of the Government of Libya as well as the OTP and the OPCV. The Amici do not purport to comment on whether the complementarity test may be met by resort to an investigation based on ‘ordinary’ as opposed to ‘international crimes’. However, the Amici respectfully draw the Court’s attention to the potential symbolic weight of prosecutions based on ‘international’ as opposed to ‘ordinary’ crimes. Indeed, whilst they were considering the issue in a different context, the International Criminal

²⁴ Acceded 15 May 1970. Acceded to the First Optional Protocol on 16 May 1989.

²⁵ Acceded 16 May 1989.

²⁶ Acceded 16 May 1989.

²⁷ Acceded 16 May 1989.

²⁸ Ratified or acceded on 22 May 1956.

²⁹ Both ratified or acceded on 7 June 1978.

³⁰ Article 435 of the Penal Code.

Tribunal for Rwanda (ICTR) refused to transfer Michel Bagaragaza to Norway pursuant to the Rule 11bis of the ICTR's Rules of Procedure and Evidence providing, *inter alia*, for the transfer of an accused to a state 'having jurisdiction and being willing and adequately prepared to accept such a case',³¹ because Norwegian criminal law did not specifically criminalise genocide though the underlying conduct was prohibited under the law. The Trial Chamber in its decision on 19 May 2006 acknowledged that Norway could exercise jurisdiction over the alleged criminal conduct, but that it lacked jurisdiction within the meaning of Rule 11bis, as it could not charge the crime of genocide as defined in the Statute, noting that the crime of homicide did not require proof of genocidal intent, an essential element of the crime of genocide. This was confirmed by the Appeals Chamber, which held that it could not 'sanction the referral of a case to a jurisdiction for trial where the conduct cannot be charged as a serious violation of international humanitarian law.'³² Another attempt to transfer the accused to The Netherlands failed on similar grounds, the Trial Chamber holding that 'jurisdiction to prosecute the acts of an accused as international crimes is a minimum requirement for the referral of a case pursuant to Rule 11bis.'³³

36. As has been noted in the Government of Lybia, OTP and OPCV filings, the NTC has drafted a decree to incorporate articles 6, 7, 8, 28 and 77 of the Rome Statute into domestic law. It is noted however that the Decree is not in force and unlikely to become law in advance of the elections. As the Amici already indicated, the prevailing uncertainty relating to elections makes it impossible to speculate as to whether this draft Decree may become law in future. As the current draft excludes the death penalty and thus would create a two tier system whereby premeditated

³¹ ICTR, Rules of Procedure and Evidence, Rule 11bis, at <http://unictr.org/Portals/0/English%5CLegal%5CROP%5C100209.pdf>.

³² ICTR, The Prosecutor v Michel Bagaragaza, Case No. ICTR-05-86-AR11bis, 30 August 2006, para.19, at <http://unictr.org/Portals/0/Case%5CEnglish%5CBagaragaza%5Cdecisions%5C300806.pdf>.

³³ ICTR, Trial Chamber, The Prosecutor v Michel Bagaragaza, Case No ICTR 2005-86-11bis, 17 August 2007, para.14, at <http://unictr.org/Portals/0/Case%5CEnglish%5CBagaragaza%5Cdecisions%5C070817.pdf>.

murder would give rise to a mandatory death sentence under ordinary criminal law and acts of genocide, war crimes and crimes against humanity would give rise to maximum prison terms under the current draft, it is highly uncertain that the draft will be adopted.

37. The Amici further notes that the draft Decree does not make specific reference to the retrospective application of the legislation. The view of a senior legal expert consulted by the Amici was that, even having regard to Article 15(2) of the International Covenant on Civil and Political Rights, the prior ratification by Libya of numerous relevant treaties, and the fact that the crimes in question constitute general principles of law recognized by the community of nations, under the internal legal system, the Decree would nonetheless need to allow specifically for retrospective application for judges to apply it in this way.

III. The current security situation in Libya

38. As already indicated, the security situation in Libya is precarious and in flux. In recent weeks there are indications of worsening trends in the security situation. The Amici take note of, and agree with, the references to the security situation set out in the OPCV filing,³⁴ and thus do not repeat these in its observations. Several recent incidents reported in local and international media not contained in their filing include:

- i) The 5 June 2012 attack on the United States diplomatic office in Benghazi with an improvised explosive device. While no one was said to be injured in the explosion, the front gates of the consulate were damaged.³⁵

³⁴ Paras 36-38.

³⁵ Jomana Karadsheh and Nic Robertson, 'U.S. mission in Benghazi attacked to avenge al Qaeda', CNN, 7 June 2012, at: <http://edition.cnn.com/2012/06/06/world/africa/libya-violence/index.html>.

- ii) The 4 June 2012 occupation of Tripoli's international airport. The airport was occupied by the Al-Awfa brigade, from the western town of Tarhouna, in retaliation for the kidnapping of their commander, Abu-Alija Habshi, by unknown assailants. The Al-Awfa brigade used armoured vehicles, heavy machine guns and a tank to close down the airport for several hours. As a result, flights were cancelled or forced to divert to Tripoli's Metiga air base. A gun-battle ensued with the arrival of Government-controlled forces. The Government managed to retake control of the airport and several members of the Tarhouna militia group were reportedly captured.³⁶
- iii) The 22 May 2012 attack on the International Committee of the Red Cross office in Benghazi. A rocket-propelled grenade hit the offices, leaving a small hole in the side of the building but causing no casualties.³⁷
- iv) The 8 May 2012 attack by gunmen from a former rebel militia group, who stormed and occupied the office of Libya's Prime Minister, Abdurrahim al-Keib. Several dozen pickup trucks with heavy machine guns surrounded the building. It was reported that at least one guard was killed and several others wounded. Streets around the office were closed by local militias.³⁸
- v) The 26 April 2012 explosion of a bomb at a courthouse in Benghazi, wounding four people and damaging nearby buildings. A security official said three explosive devices were planted near a courthouse wall. The blasts shattered windows of a nearby hospital, wounding one person inside.³⁹

³⁶ George Grant and Rida Akil, 'New details emerge about Tripoli airport seizure as Libya Herald gains access to prisoners at Metiga airbase', Libya Herald, 6 June 2012, <http://www.libyaherald.com/exclusive-new-details-emerge-about-tripoli-airport-siege-as-libya-herald-gains-access-to-metiga-airbase/>.

³⁷ Rocket damages Red Cross office in Libya's Benghazi, Reuters, 22 May 2012, <http://www.libyaherald.com/exclusive-new-details-emerge-about-tripoli-airport-siege-as-libya-herald-gains-access-to-metiga-airbase/>.

³⁸ Libya PM office attacked by gunmen in Tripoli, BBC, 8 May 2012, <http://www.bbc.co.uk/news/world-africa-17995427>.

³⁹ Mohammed al-Tommy, Courthouse bomb in Libya's Benghazi wounds four, Reuters, 27 April 2012, <http://news.yahoo.com/blasts-courthouse-libyas-benghazi-injure-one-091956146.html>.

vi) The 26 April 2012 kidnapping of the deputy to the Prosecutor General (he has subsequently been released).

vii) The 21 January 2012 storming by protesters of the Benghazi headquarters of the NTC while its chairman was still in the building. Protesters threw stones and metal bars at the building, breaking its windows, before storming the headquarters.⁴⁰

Conclusion

39. The Amici have sought to bring to the attention of the Chamber information relevant to the issues before it. The Amici wish to underscore that the situation continues to evolve quickly. They stand ready to supply any clarification as may be required.

For the Amici



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REDRESS
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Director

Dated this 8 June 2012
In London, United Kingdom

⁴⁰ Mohammad Al Tommy, UPDATE 2-Protesters storm Libyan government HQ in Benghazi, Reuters, 22 January 2012, <http://ph.news.yahoo.com/1-protesters-storm-libyan-government-hq-benghazi-191701415.html>.