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

Date: **30 April 2014**

**THE APPEALS CHAMBER**

**Before:** Judge Erkki Kourula, Presiding Judge  
 Judge Sang-Hyun Song  
 Judge Sanji Mmasenono Monageng  
 Judge Akua Kuenyehia  
 Judge Anita Ušacka

**SITUATION IN LIBYA**

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

**Public**

**Urgent Request for the Immediate Issuance of the Judgment on Libya's Appeal  
 against the "Decision on the Admissibility of the Case against Saif Al-Islam  
 Gaddafi", with Public Annex A**

**Source: Defence for Mr. Saif Al-Islam Gaddafi**

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

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## INTRODUCTION

1. Mr. Saif Al-Islam Gaddafi has been held in incommunicado detention in Libya for over 29 months.
2. The United Nations Working Group on Arbitrary Detention (UNWGAD) ruled that Mr. Gaddafi's detention was illegal and arbitrary, and further, that "the gravity of the violations, their nature in this case, and the Government's inability to rectify the violations, has made impossible to guarantee Mr. Gaddafi's right to fair trial in Libya".<sup>1</sup>
3. UNWGAD therefore determined that the only appropriate remedy in these circumstances would be to either release Mr. Gaddafi, or surrender him to the custody of the ICC, as required by the ICC surrender order, which was reactivated on 31 May 2013.
4. Libya has failed to take any steps to implement either the ICC surrender order, or the UNWGAD decision.
5. To the contrary, on 14 April 2014, Libya commenced the domestic trial against Mr. Gaddafi in violation of Libyan domestic guarantees concerning the right to legal representation, and the right to be tried in one's presence.
6. Whilst these facts fall outside the scope of the Appeal Chamber's consideration of the appeal against the admissibility decision, they do impel the Appeals Chamber and the ICC as a whole to address Mr. Gaddafi's situation as a matter of urgency.

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<sup>1</sup> ICC-01/11-01/11-491-AnxA, para. 43.

7. The Defence for Mr. Saif Al-Islam Gaddafi therefore respectfully moves the Appeals Chamber to issue, forthwith, its decision on Libya's appeal of the decision on the admissibility challenge.

## SUBMISSIONS

*The Appeals Chamber has a duty to issue an expeditious decision on the admissibility challenge*

8. Where the Statute or Rules vest the Chamber with a particular power or duty, the parties have a related right to move the Chamber to exercise this power or duty.<sup>2</sup>
9. Rule 156(4) of the Rules of Procedure and Evidence specifies that interlocutory appeals "shall be heard as expeditiously as possible". The Defence therefore has the right to request the Appeals Chamber to issue an expeditious judgment on Libya's appeal against the admissibility decision.
10. Both the Statutory framework of the ICC, and past practice and legal precedent militate in favour of an expeditious ruling on admissibility appeals.
11. In the present case, since the last appellate submissions were filed on 30 September 2013 – that is, approximately seven months ago - there does not appear to be any objective reason as to why the Appeals Chamber has not disposed of the appeal in the interim.
12. The admissibility decision was issued on 31 May 2013: the appeal has thus been pending for approximately 11 months.

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<sup>2</sup> ICC-01/04-168, para. 20.

13. This is the longest time period during which an interlocutory appeal on any subject has remained outstanding at the ICC.
14. In contrast, the Appeals Chamber issued its judgment on the Katanga admissibility appeal within two and a half months,<sup>3</sup> the Bemba admissibility appeal within four months (notwithstanding the interceding summer recess),<sup>4</sup> the Kenya admissibility appeals within three months,<sup>5</sup> and the Kony et al., admissibility appeal within approximately six months.<sup>6</sup>
15. The Appeals Chamber has also underscored firstly, that Chambers must dispose of applications in a manner which respects the Statutory emphasis on ensuring expeditious proceedings,<sup>7</sup> and secondly, that the Statutory provisions concerning admissibility challenges reflect the drafters' concerns to ensure expeditious proceedings.<sup>8</sup>
16. In terms of the latter aspect, it is clear that when faced with a potential conflict between the presumptive right of States to exercise jurisdiction over cases, and the objective of ensuring effective and expeditious investigations and prosecutions, the drafters deliberately prioritised the latter.

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<sup>3</sup> The oral decision on admissibility was issued on 12 June 2009, and the appeals judgment on 25 September 2009: ICC-01/04-01/07-1497.

<sup>4</sup> The decision of the Trial Chamber was issued on 24 June 2010, and the appeal was issued on 19 October 2010: ICC-01/05-01/08-962.

<sup>5</sup> The decision of the Pre-Trial Chamber was issued on 30 May 2011, and the appeal was issued on 30 August 2011: ICC-01/09-01/11-307.

<sup>6</sup> The decision of the Pre-Trial Chamber was issued on 10 March 2009, and the appeal was issued on 16 September 2009: ICC-02/04-01/05-408

<sup>7</sup> "Expeditionness is a recurrent theme in the Court's legal instruments. The Statute and the Rules of Procedure and Evidence place an onus on all those involved in the trial to act in a diligent and expeditious manner in the performance of their obligations. The duty applies to the Chambers of the Court, the parties and participants", ICC-01/04-01/07-2259, para. 43.

<sup>8</sup> ICC-01/04-01/07-2259, footnote 89.

17. For example, after the Prosecution notifies States that it has opened an investigation, Article 18(2) of the Statute specifies that a State has a deadline of one month within which to request the ICC Prosecution to defer to the State's domestic investigation.
18. Although the State in question may request the Prosecution to furnish additional information so that the State can decide whether a deferral is warranted, Rule 52(2) of the Rules of Procedure and Evidence specifies that the one month deadline for submitting a deferral request is not in any way extended or displaced in order to accommodate such a request.
19. As observed by the Appeals Chamber, Rule 52(2) embodies the overarching emphasis of the ICC legal framework on ensuring expeditious proceedings, and the corresponding obligation that this places on Court participants to assert their rights in a diligent and timely manner.<sup>9</sup>
20. Given that Article 18 admissibility proceedings govern the scenario in which suspects, generally, have not been identified or detained, it would be illogical to impose a higher standard of diligence and expedition on Article 18 proceedings, as compared to Article 19 case-related proceedings.
21. For this reason, the instigation of a case before the ICC triggers an onerous duty on the Court to avoid delays, and to take all necessary steps to ensure that efficient advancement of proceedings before the Court. As the Appeals Chamber has made clear:

It is vital for cases to be properly managed from the start to forestall unnecessary delays. Undoubtedly, delays in proceedings are inimical to

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<sup>9</sup> ICC-01/04-01/07-2259, footnote 89.

the proper administration of justice. For instance, witnesses to the alleged crime may become unavailable, or may, with the passage of time, forget what transpired. Material evidence, both incriminatory and exculpatory, may disappear or may be rendered useless by exposure to the elements. In this case, both the prosecution and the accused may be prejudiced.

An expeditious trial is beneficial to victims. It assures them of receiving justice and of going through the healing process quickly. For witnesses, it relieves them as soon as possible of the anxiety of having to appear in court to give evidence. Unreasonable delay in commencing or finalising a trial may also diminish public interest and public support for, and cooperation with, the Court. Without such support and cooperation the Court would find it difficult to have its decisions and orders respected or enforced.<sup>10</sup>

22. Article 19(4) of the Statute further stipulates that, absent exceptional circumstances, admissibility challenges must be filed (and by extension, adjudicated) prior to the commencement of trial.

23. The logic underpinning this requirement is that:

This emphasis, in article 19 of the Statute and rule 58 of the Rules, that challenges to admissibility be heard as early as possible and without undue delay, can be explained by the principle of complementarity. The drafters of the Statute clearly intended the Court to complement national courts, not to compete with them. Consequently, they endeavoured to avoid parallel and competing proceedings. In this regard, article 19(7) of the Statute specifically provides for the suspension of investigations by the Prosecutor when the admissibility of a case is challenged.

Furthermore, given that investigations into crimes falling within the jurisdiction of the Court are very costly in terms of time and resources, it is in the interests of all, and primarily the suspects who have been deprived of their liberty, that the court with

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<sup>10</sup> ICC-01/04-01/07-2259, at para. 45-46, emphasis added.

jurisdiction to try the case be determined as quickly as possible.<sup>11</sup>

24. The need to avoid parallel and competing procedures demands equally that the ICC should issue its determination on any admissibility challenge prior to the commencement of a domestic trial. This is particularly the case where the admissibility challenge was rejected at first instance, and the only Court with legal competence to prosecute these allegations is the ICC.
25. The Security Council invoked its Chapter VII powers to refer the Libya situation to the ICC; the ICC Prosecution requested an arrest warrant against Mr. Gaddafi; the Pre-Trial Chamber then issued an arrest warrant against Mr. Gaddafi, and later rejected Libya's admissibility challenge.
26. The case against Mr. Gaddafi is squarely and intentionally before the ICC, and must be afforded the attention and consideration it deserves.
27. The Appeals Chamber rejected Libya's request for suspensive effect. The Court – in particular, the Appeals Chamber – is thus obliged to ensure that its actions pending the resolution of Libya's appeal are not inconsistent with Mr. Gaddafi's rights under the Rome Statute, and do not prejudice his right to fair, impartial, and expeditious proceedings before the ICC.
28. In this regard, although the Appeals Chamber affirmed the surrender order, delaying the issuance of the appeals judgment on the merits would undermine the very logic of the Appeals Chamber's decision on suspensive effect.
29. The Appeals Chamber ruled expressly that the "the purpose [of the appeal] is not to permit Libya to conduct its domestic criminal proceedings".<sup>12</sup> However,

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<sup>11</sup> ICC-01/04-01/07-1213-tENG, paras. 44-45.

it is quite apparent that Libya has exploited the length of the appellate process to do exactly that, in violation of its obligation to surrender Mr. Gaddafi to the ICC.

30. Even if the ICC cannot order Libya to desist from conducting any domestic proceedings against Mr. Gaddafi, the Appeals Chamber can and should conduct its own proceedings with the necessary degree of expedition and diligence in order to ensure that Mr. Gaddafi's rights before the ICC are not prejudiced through the commencement of such domestic proceedings.

31. Moreover, even though the Appeals Chamber rejected the request for suspensive effect submitted by the Senussi Defence, the Chamber impressed the requirement on Libya that:

throughout the duration of the proceedings relating to the Appeal, it is bound to abstain from any initiative, measure or action which could result in frustrating the Court's legitimate expectations that, should the Impugned Decision be reversed, it will be possible for the case against Mr Al-Senussi to actually resume before the Court.<sup>13</sup>

32. If this obligation applies in connection with a case that was found inadmissible at first instance, then it must apply with even more force as concerns Mr. Gaddafi's case.

33. As will be elaborated below, the commencement of trial proceedings in Libya - which could culminate in capital punishment - creates a risk of *ne bis in idem*, exposes persons associated with the Defence to unnecessary risks, and creates unfair trauma and hardship for Mr. Gaddafi and his close family members.

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<sup>12</sup> ICC-01/11-01/11-387, para. 24.

<sup>13</sup> ICC-01/11-01/11-480, para. 19.

34. If the Court is unable to secure Libya's compliance with either the surrender order, or the duty to abstain from acts which could prejudice Mr. Gaddafi's rights under the Rome Statute, then the only remedy is to issue an immediate judgment on the appeal.

*There are important grounds for issuing an immediate decision on the admissibility challenge*

35. Libya has now convened two trial hearings against Mr. Gaddafi, in the absence of his physical presence or participation, or any form of legal representation. It is also has announced its intention to reconvene hearings on 11 May 2014.

36. The continuation of the domestic trial against Mr. Gaddafi will, at a minimum, imperil:

- i. Mr. Gaddafi's protection against *ne bis in idem*, as enshrined in Article 20(3) of the Statute;
- ii. his right to silence under the Rome Statute as concerns events which form the subject of the ICC case against him;
- iii. the physical security and protection of actual and potential Defence witnesses, who names might be mentioned during the course of the domestic trial;<sup>14</sup> and
- iv. Mr. Gaddafi's physical and mental integrity.

37. In terms of the latter aspect, Mr. Gaddafi has a right to know where he will be tried, and whether he will face the death penalty or not.

38. If the ICC has no intention of assuming jurisdiction in Mr. Gaddafi's case, then it is unfair to prolong the false hope of respite from trial on charges carrying the death penalty by deferring the Appeals Chamber's issuance of a final determination on the respective challenges.

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<sup>14</sup> ICC-01/11-01/11-201, paras. 31-38.

39. If, however, there is a likelihood that the admissibility decision will be confirmed, then deferring the judgment risks undermining the ability of the ICC to fulfil the goal of complementarity by 'stepping in' to ensure that Mr. Gaddafi is prosecuted in an independent and impartial manner.<sup>15</sup> This would be the case if Mr. Gaddafi's continued detention in conditions of isolation were to jeopardise his fitness to stand trial before the ICC.

40. As noted above, UNWGAD confirmed that Mr. Gaddafi's detention is illegal and arbitrary, and that his rights under Libyan law have been compromised irretrievably;<sup>16</sup> his right to a fair trial cannot be secured in Libya, irrespective as to what steps might be taken by the Libyan authorities to address (belatedly) these violations.

41. The fact that Libya has not resiled from its intention to seek the death penalty for Mr. Gaddafi, notwithstanding these significant due process violations, also engenders a separate form of mental anguish and inhuman treatment.<sup>17</sup>

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<sup>15</sup> "[T]he complementarity principle, as enshrined in the Statute, strikes a balance between safeguarding the primacy of domestic proceedings vis-à-vis the International Criminal Court on the one hand, and the goal of the Rome Statute to "put an end to impunity" on the other hand. If States do not or cannot investigate and, where necessary, prosecute, the International Criminal Court must be able to step in." ICC-01/04-01/07-1497, para. 85.

<sup>16</sup> ICC-01/11-01/11-491, para. 3.

<sup>17</sup> "In circumstances where there is a real possibility that the sentence will be enforced, that fear must give rise to considerable anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence. Indeed, as the Committee has previously observed, the imposition of any death sentence that cannot be saved by article 6 would automatically entail a violation of article 7. The Committee therefore concludes that the imposition of the death sentence on the author after the conclusion of proceedings which did not meet the requirements of article 14 of the Covenant amounts to inhuman treatment, in violation of article 7." *Larranaga v. Philippines*, Human Rights Committee, Communication No. 1421/2005 at para. 7.11.

42. Even if these violations are not attributable, *per se*, to the ICC, the *erga omnes* prohibition on arbitrary detention and inhumane treatment requires that the ICC should neither condone nor indirectly contribute to its prolongation.<sup>18</sup>
43. The Appeals Chamber cannot disregard the fact that the absence of a final ruling on the admissibility challenge appears to have encouraged Libya to maintain the *status quo* as concerns the detention and non-surrender of Mr. Gaddafi.
44. This is evidenced, *inter alia*, by the statement of the spokesperson of the Prosecutor-General concerning the fact that the Government deliberately abrogated Mr. Gaddafi's right, under Libyan Law, to be tried in his physical presence, in order to "strengthen[.] the Libyan position before the International Criminal Court".<sup>19</sup>
45. Rather than improving its judicial system in order to meet the admissibility criteria, Libya has, to the contrary, eliminated key due process protections in order to prove that it is capable to bringing Mr. Gaddafi to trial, in the most superficial sense of the word.

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<sup>18</sup> "[D]uties to comply with international human rights that are peremptory and *erga omnes* norms such as the prohibition on arbitrary detention rest not only on the Government but extend to all officials, including judges, police and security officers, prison officers with relevant responsibilities. No person can contribute to human rights violations." Opinion no. 60/2012, A/HRC/WGAD/2012/60, para. 21;

"[I]f an accused is arrested or detained by a state at the request or under the authority of the Tribunal even though the accused is not yet within the actual custody of the Tribunal, the Tribunal has a responsibility to provide whatever relief is available to it to attempt to reduce any violations as much as possible", Prosecutor v. Kajelijeli, Appeals Judgment, 23 May 2005, para. 223, citing with approval the Separate Declaration of Judge Vohrah, Semanza, Decision, 31 May 2000, para. 6

<sup>19</sup> Al-Ahrrar Debate, "Siddique Srouf: we consulted with legal experts and experts in human rights as well as our team before the International Criminal Court and concluded that this amendment strengthens the Libyan position before the International Criminal Court" [17:30 to 17:44]. ICC-01/11-01/11-533-Red, footnote 15.

46. Indeed, the commencement of the trial proceedings has amply demonstrated Libya's lack of willingness or ability to conduct genuine trial proceedings.

47. In contrast to Libya's submissions to the Appeals Chamber in February 2014,<sup>20</sup> it would appear that both Mr. Gaddafi and Mr. Al-Senussi remain unrepresented.<sup>21</sup>

48. Even though Mr Al-Senussi apparently signed a power of attorney for a lawyer prior to the first hearing, the authorities failed to recognise it in a timely manner.<sup>22</sup> The lawyer also subsequently withdrew due to "health reasons".<sup>23</sup>

49. The belated appointment of a lawyer at this juncture also cannot remedy nor alleviate the severe mental pain and psychological affects resulting from the fact that Mr. Gaddafi has been held incommunicado, in isolation, for almost two and a half years.<sup>24</sup>

50. A lawyer appearing at this stage of the proceedings would also have no ability to contest the confirmation of the charges, or raise challenges, which fell within the purview of the Accusation Chamber, for example, concerning the illegality of investigative acts undertaken during the preliminary process, or the authenticity of evidence.

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<sup>20</sup> ICC-01/11-01/11-519-Red, para. 17.

<sup>21</sup> Annex A.

<sup>22</sup> C. Stephen, Chaos as Libya's war crimes 'trial of the century' fails to produce Gaddafi's sons', The Guardian 14 April 2014, <http://www.theguardian.com/world/2014/apr/14/libya-war-crimes-trial-gaddafi-sons-observers-barred>

<sup>23</sup> S. Zway, 'Qaddafi Son Appears on Screen at His Trial', New York Times, 27 April 2014, [http://www.nytimes.com/2014/04/28/world/africa/qaddafi-son-appears-on-screen-at-his-trial.html?\\_r=0](http://www.nytimes.com/2014/04/28/world/africa/qaddafi-son-appears-on-screen-at-his-trial.html?_r=0)

<sup>24</sup> ICC-01/11-01/11-386-Red, paras. 174-176.

51. Notwithstanding the fact that Mr. Gaddafi did not participate in the first trial hearing either in person or by video link, the Trial Chamber has already ruled on the legality of the video link mechanism.<sup>25</sup>

52. The appointment of legal representation is also a superficial act, which does not secure effective representation in the absence of a genuine will to create an environment in which defendants can enjoy their rights in an effective manner, and without fear of retaliation.

53. In this regard, journalists reported that security officials prevented several lawyers from attending the first hearing.<sup>26</sup> Other lawyers did not attend the hearings due to security risks, and fears for their safety.<sup>27</sup> Although it is the role of the Accusation Chamber to consider challenges to the admissibility of evidence and exclude any illegally obtained evidence, one of the Defence counsel for a co-defendant in Mr. Gaddafi's case complained that:

“the pretrial chamber convened three times, the last session only to pronounce the charges – not enough time for the lawyers to prepare their defense. He said several of the defendants' lawyers asked the judge to be heard, but were refused. He said neither defense lawyers nor the judge summoned a single witness, and lawyers' requests to review court documents for authenticity, content, and contradictions

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<sup>25</sup> C. Stephen, Chaos as Libya's war crimes 'trial of the century' fails to produce Gaddafi's sons', The Guardian 14 April 2014, <http://www.theguardian.com/world/2014/apr/14/libya-war-crimes-trial-gaddafi-sons-observers-barred>

<sup>26</sup> Rana Jawad@Rana\_J01

Prison authorities also prevented some lawyers of defendants on trial from going in and some family members. #libya

[https://twitter.com/Rana\\_J01/status/455646214667501568](https://twitter.com/Rana_J01/status/455646214667501568) (Rana Jawad is a journalist from BBC)

<sup>27</sup> Amnesty International, Questions and Answers, 26 April 2014, (Response to Question 5), <http://www.amnesty.org/en/library/asset/MDE19/003/2014/en/d3532c39-6150-48d0-84ef-69bf7840599a/mde190032014en.pdf>

“Hanan Salah @hananHRW · Apr 27

PT only handful of family members of defendants/ex officials case attended session today and some lawyers did not appear #Tripoli #Libya” <https://twitter.com/hananHRW/status/460400010937790464>

See also ICC-01/11-01/11-469-Conf-Exp, and ICC-01/11-01/11-501-Conf-Exp.

were denied. He also questioned the ability of the judge to read 70,000 pages of evidence and statements and 4,000 pages of testimonies submitted by the prosecution in the span of a few weeks.”<sup>28</sup>

54. There also does not appear to be any consistency regarding the presence or participation of defendants, as illustrated by firstly, Mr. Gaddafi’s absence from the video link in the first hearing, and secondly, the lack of any certainty or clarity concerning the identity of the defendants who are actually being prosecuted.<sup>29</sup> During the most recent hearing, at least one lawyer appeared to have had no contact with his client, and to be uncertain as to whether his client was mentally or physically fit to stand trial, or deceased.<sup>30</sup>

55. Defendants have also complained about missing key hearings due to the fact that the security officials failed to bring them to the courtroom.<sup>31</sup>

56. Given the security situation, and the atmosphere of intimidation, fear of retaliation and threats against lawyers defending persons associated with the former regime, which has been allowed to fester over the last two and half years,<sup>32</sup> any lawyer appointed to represent Mr. Gaddafi will face an impossible choice: either they must risk their life and security in a futile attempt to secure Mr. Gaddafi’s fair trial rights, or they must meekly play their appointed role

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<sup>28</sup> Human Rights Watch, Libya: Gaddafi Son, Ex-Officials, Held Without Due Process, 13 February 2014; <http://www.hrw.org/news/2014/02/13/libya-gaddafi-son-ex-officials-held-without-due-process>

<sup>29</sup> C. Stephen, Chaos as Libya's war crimes 'trial of the century' fails to produce Gaddafi's sons', The Guardian 14 April 2014, <http://www.theguardian.com/world/2014/apr/14/libya-war-crimes-trial-gaddafi-sons-observers-barred>

<sup>30</sup> Annex A.

<sup>31</sup> Human Rights Watch, Libya: Gaddafi Son, Ex-Officials, Held Without Due Process, 13 February 2014; <http://www.hrw.org/news/2014/02/13/libya-gaddafi-son-ex-officials-held-without-due-process>

<sup>32</sup> 'Libya: Fair Trial Concerns for Ex-Officials Authorities Ignore ICC Ruling to Send Gaddafi's Son to The Hague', HRW 14 April 2014, <http://www.hrw.org/news/2014/04/14/libya-fair-trial-concerns-ex-officials>

in what bears all the hallmarks of a show trial, acquiescing in what Amnesty International has described as a “farce”.<sup>33</sup>

57. Finally, the Appeals Chamber must take into consideration the possibility that its failure to issue a judgment could be construed as an implicit benediction of the domestic proceedings against Mr. Gaddafi, which are predicated on evidence that appears to have been obtained directly or indirectly through torture, duress or forms of ill-treatment, or from persons who are mentally unfit to testify.<sup>34</sup>

58. Amnesty International, which has reported several incidents of torture in detention centers in Libya, has also observed that many detainees “had confessed to crimes they had not committed just to end the torture”.<sup>35</sup>

59. Libya has confirmed publicly that its evidence against Mr. Gaddafi is comprised of “confessions” from co-defendants.<sup>36</sup> There are strong indicia that such confessions were elicited through duress or mistreatment.<sup>37</sup>

60. Although Libya is a signatory to the Torture Convention, it has not only failed to implement any legal restrictions concerning the use of such evidence in

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<sup>33</sup> Amnesty International, ‘Libya: Trial of former al-Gaddafi officials by video link a farce’, 14 April 2014, <http://www.amnesty.org/en/news/libya-trial-former-al-gaddafi-officials-video-link-farce-2014-04-14>

<sup>34</sup> See para. 54 *infra*.

<sup>35</sup> ‘Libya: Deaths of detainees amid widespread torture’ AI Report, 26 January 2012, <http://www.amnesty.org/en/news/libya-deaths-detainees-amid-widespread-torture-2012-01-26>

<sup>36</sup> Al-Ahrar Debate, “Siddique Sour: The majority of the accused have confessed to the crimes and I can tell you in full confidence that there is a lot documenting proof, statements and specific confessions including from Saif Al-Islam, Abdullah Senussi, Baghdadi Mahmoudi, Mansour Dou- confessions concerning themselves and against other accused- we cannot disseminate the documents to news agencies but the court will review it” [52:00 to 52:42]; ICC-01/11-01/11-533-Red, footnote 23.

<sup>37</sup> ICC-01/11-01/11-190-Conf-Corr, paras. 101-115; ICC-01/11-01/11-281-Conf-Exp, paras. 70-72; Human Rights Watch, Libya: Gaddafi Son, Ex-Officials, Held Without Due Process, 13 February 2014; <http://www.hrw.org/news/2014/02/13/libya-gaddafi-son-ex-officials-held-without-due-process>

criminal proceedings,<sup>38</sup> but has approved expressly, the reliance on evidence obtained by revolutionary militia (*thumar*), irrespective of the means by which such evidence was procured.<sup>39</sup>

61. It is axiomatic that the ICC Appeals Chamber should dismiss immediately, with prejudice, any admissibility challenge built on information or evidence obtained directly or indirectly by any form of torture or ill-treatment.<sup>40</sup>

62. However, *per* article 21(3) of the Statute, the ICC Appeals Chamber is also under a separate, positive obligation to avoid encouraging, approving or condoning any domestic legal proceedings in which there is any suspicion

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<sup>38</sup> Although Libya claimed before the ICC that Article 435 of the Libyan Criminal Procedure Code prohibits the use of evidence obtained from duress, it would appear that the article cited by Libya only prohibits the imposition of the death penalty on public holidays (ICC-01/11-01/11-158-AnxB, p 9). <http://www.amnesty.org/en/library/asset/MDE19/003/2014/en/d3532c39-6150-48d0-84ef-69bf7840599a/mde190032014en.pdf>

<sup>39</sup> Article 2 of NTC law 38 specifies that “[w]ith regards to documentation of facts, deposition of witnesses and affidavits made by supporters of the former regime, minutes and records organized by the rebels shall have the same legal weight as those organized by the judicial officer as per the penal procedures and in due process – provided that they are deemed credible under the discretionary powers granted to the trial judge.”, ICC-01/11-01/11-190-Anx8 at p. 17.

Amnesty International has also criticised Law 38 on the basis that it “gives “legal weight” to interrogations conducted by militias, legitimizing their actions of seizing, detaining and interrogating detainees outside the framework of the law and disregarding evidence of the widespread pattern of torture or other ill-treatment during interrogations.” Amnesty has also confirmed that the legislation on torture “fails to clearly state that no evidence obtained under torture or other ill-treatment can be admissible in any proceedings.” Amnesty International, Questions and Answers, 26 April 2014, (Response to Question 6), <http://www.amnesty.org/en/library/asset/MDE19/003/2014/en/d3532c39-6150-48d0-84ef-69bf7840599a/mde190032014en.pdf>

<sup>40</sup> The exclusionary rule imposes an absolute prohibition on using any statements which have been directly or indirectly obtained through torture and other forms of ill-treatment (including psychological mistreatment). It applies to all proceedings – including extradition proceedings. It mandates the exclusion of such evidence, even it was obtained by third parties (i.e militia or volunteers) and also statements and information, which might be ‘torture free’ in themselves, but which were generated by an act of torture or ill-treatment, and is thus the ‘fruits’ of torture or ill-treatment. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 4 March 2014, A/HRC/24/60, paras. 4, 17, 25-27, 29.

that any such mistreatment occurred, or where is a possibility that the defendant could be subjected to continuing mistreatment.<sup>41</sup>

63. The former Libyan Prime Minister acknowledged in a recent interview that he had heard that Mr. Saadi Gaddafi was mistreated and possibly tortured by his prison guards.<sup>42</sup> He attributed this mistreatment to the fact that Saadi is a 'Gaddafi', and that "prison guards [...] were prisoners during Gaddafi's era and now they are trying to take revenge."<sup>43</sup>

64. The reports of Mr. Saadi Gaddafi's mistreatment coincided with the filming of a video "confession",<sup>44</sup> and a refusal by the Libyan authorities to allow monitors to access Mr. Gaddafi in order to assess his health or well-being.<sup>45</sup>

65. Although Mr. Saadi Gaddafi was later recorded reading what appeared to be a prepared statement to the effect that he had not been mistreated, the United Nations Commission of Inquiry observed that many detainees being held by

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<sup>41</sup> Emphasizes that States must take persistent, determined and effective measures to prevent and combat all acts of torture and other cruel, inhuman or degrading treatment or punishment [...]", General Assembly Resolution, 68/156. Torture and other cruel, inhuman or degrading treatment or punishment, adopted on 18 December 2013, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N13/448/81/PDF/N1344881.pdf?OpenElement> "States have not only the obligation to "respect", but to "ensure respect" for the absolute prohibition against torture. In this context, the Human Rights Committee has authoritatively interpreted Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and found that it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. States shall take measures to prevent and punish acts of torture or other ill-treatment in any territory under their jurisdiction."

Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 4 March 2014, A/HRC/24/60, para. 40.

<sup>42</sup> ICC-01/11-01/11-533-Red, para. 26.

<sup>43</sup> ICC-01/11-01/11-533-Red, para. 26.

<sup>44</sup> H. Salah, 'Libya's Justice Pandemonium' *Jurist* 12 April 2014, <http://jurist.org/hotline/2014/04/hanan-salah-libyan-government.php>

<sup>45</sup> Amnesty International, Questions and Answers, 26 April 2014, (Response to Question 12), <http://www.amnesty.org/en/library/asset/MDE19/003/2014/en/d3532c39-6150-48d0-84ef-69bf7840599a/mde190032014en.pdf>

the NTC /*thumar* were compelled by their detention centre guards to tell the Commission “how well they were being treated”.<sup>46</sup>

66. As long as Libya is given grounds to believe that it can prosecute Mr. Gaddafi, itself there will be both an incentive for Libya to continue to collect evidence, in particular evidence of so-called “confessions” (with the attendant risk that torture will be used, in time-honoured fashion, to procure those confessions), and a corollary risk that other potential witnesses and co-defendants could be subjected to further mistreatment in the process of such “evidence” gathering.

67. The ICC, as an institution established to eliminate impunity for the commission of torture and other inhumane acts,<sup>47</sup> cannot justly ignore this risk or, having ignored it, emerge with its reputation intact.

#### RELIEF SOUGHT

68. The Defence for Mr. Saif Al-Islam Gaddafi respectfully requests the Honourable Appeals Chamber to issue an urgent ruling on Libya’s admissibility appeal.

69. In the event that the Appeals Chamber deems it necessary to receive further submissions in order to dispose of this request, the Defence further requests the Appeals Chamber to establish an expedited time frame for doing so, in order to ensure that the object of the request is not rendered moot by virtue of the time required to receive such submissions.

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<sup>46</sup> Report of the UN International Commission of Inquiry on Libya, A/HRC/19/68, 2 March 2012 at para 9(d), p. 30.

<sup>47</sup> Article 5(1)(f) and (k) of the Statute.

A handwritten signature in black ink, appearing to read 'John Jones', written in a cursive style.

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John R.W.D. Jones QC, Counsel for Mr. Saif Al-Islam Gaddafi

Dated this, 30th Day of April 2014

At London, United Kingdom