

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 Tuesday, 9 October 2012  
10 (The hearing starts in open session at 10.02 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: I would ask the court officer to  
15 call the case, please.  
16 THE COURT OFFICER: Thank you, Madam President. Situation in Libya, in the  
17 case of The Prosecutor versus Saif Al-Islam Gaddafi and Abdullah  
18 Al-Senussi - ICC-01/11-01/11.  
19 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Good morning to you all.  
20 Welcome to this hearing. For the record, I would ask first the parties and  
21 participants to introduce themselves, starting with the representatives of the  
22 Government of Libya, please.  
23 MR EL-GEHANI: Thank you, Madam President. I'm Ahmed El-Gehani, Professor  
24 of Law in Benghazi University and in Rome University of (indiscernible). I'm the  
25 Libyan representative before the ICC and the Libyan national co-ordinator with the

1 ICC. Thank you.

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

3 Could you please introduce your team for the record, all of you.

4 MR EL-GEHANI: So our team is composed from, first of all, Philippe Sands, QC,  
5 and Payam Akhavan, and Michelle Butler, and Paul Clark. Thank you.

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

7 Thank you very much, Mr El-Gehani. I see that you speak very good English but  
8 still we have made arrangements for Arabic interpretation if needed.

9 MR EL-GEHANI: Thank you. Okay.

10 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: So if there is any problem with  
11 it, just let us know.

12 MR EL-GEHANI: Thank you.

13 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: I will now turn to the Office of  
14 the Prosecutor.

15 MS CRISCITELLI: Thank you. My name is Sara Criscitelli. With me is Antoinette  
16 Issa, Rod Rastan, Jennifer Schense, Nelly Corbin, Meritxell Regue and Selam Yirgou,  
17 our case manager. Thank you.

18 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you very much. I turn  
19 now to the Office of Public Counsel for Victim, OPCV. Ms Massidda, you have been  
20 appointed by the Chamber as legal representative of victims who have already  
21 communicated with the Court in relation to the case against Saif Al-Islam Gaddafi.  
22 Would you introduce the members of your team, please?

23 MS MASSIDDA: Good morning, Madam President, your Honours. The Office of  
24 Public Counsel for Victim is composed today by Ms Sarah Pellet, counsel;  
25 Mr Mohamed Abdou, associate legal officer; and I am Paolina Massidda, principal

1 counsel. Thank you.

2 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you. Now I turn to  
3 the principal counsel of the Office of Public Counsel for the Defence, OPCD. Would  
4 you please introduce yourself and the members of your team, please?

5 MR KEÏTA: Thank you, Mrs President, your Honours. I would like to introduce,  
6 Mrs Melinda Taylor, counsel; Mrs Vedrana Residovic, case manager; Mrs Avidéh  
7 Moussavian, she is visiting professional; and Mr Mohamed Youssef, who is legal  
8 assistant; and I am myself the principal counsel in the case in -- of OPCD, Xavier-Jean  
9 Keïta.

10 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you. Now let me  
11 introduce the Chamber. To my right, Judge Hans-Peter Kaul; to my left, Judge  
12 Christine Van den Wyngaert and I am Judge Silvia Fernández. The Chamber is also  
13 assisted today by Gilbert Bitti, Bruno Zehnder, Silvestro Stazzone, Matt Halling,  
14 Alejandro Kiss, Simon Grabrovec .

15 Now that we have all introduced the teams for the record, and before we listen to  
16 your submissions, may I recall that on 1 May 2012 Libya challenged the admissibility  
17 of the case against Saif Al-Islam Gaddafi under Article 19(2)(b) of the Statute on the  
18 ground that at the time its national judicial system was actively investigating the  
19 same allegations that form the basis of the case against Saif Al-Islam Gaddafi before  
20 this Court.

21 The responses to the admissibility challenge by the Prosecutor and by the OPCD were  
22 filed on 4 June 2012. The response by the OPCD was filed on 24 July 2012 and  
23 observations on the challenge were also presented on June 2012 by Lawyers for  
24 Justice in Libya and the Redress Trust acting as amici curiae.

25 The Chamber subsequently granted Libya the opportunity to reply to the responses

1 by the other parties and participants. Pursuant to requests from Libya, the time limit  
2 for the provision of such reply has been extended a number of times. At this point in  
3 time, this reply is yet to be provided.

4 The present hearing was convened by an order of the Chamber dated  
5 17 September 2012 with a view to giving Libya the opportunity to reply orally to the  
6 responses, as well as to discussing all issues relevant to the challenge to the  
7 admissibility of the case against Saif Al-Islam Gaddafi.

8 In the same order, the Chamber set the date of Wednesday, 3 October 2012 as the time  
9 limit for the submissions of any additional evidence upon which the parties and  
10 participants intend to rely at the hearing.

11 In this respect, the Chamber notes that only the OPCD submitted its evidence within  
12 the set time limit, whilst the other parties and participants chose not to complement  
13 their previous submissions with any additional evidence for the purpose of the  
14 present hearing.

15 The Chamber expects that this hearing will enable it to receive relevant additional  
16 information to that already filed in the record of the case, and to clarify a certain  
17 number of points in relation to the admissibility of the case. The Chamber likewise  
18 expects that the parties and participants strictly adhere to the scope and purpose of  
19 the present hearing, which is limited to discussing issues relevant to the Chamber's  
20 determination on whether the case against Saif Al-Islam Gaddafi is being investigated  
21 by the Libyan national authorities as advocated in the admissibility challenge, and if  
22 this is the case whether Libya is not unwilling or unable to genuinely carry out such  
23 investigation within the meaning of Article 17 of the Statute.

24 As all parties and participants have been informed, the schedule -- sorry, the hearing  
25 is scheduled for two days, today and tomorrow, and will be held in three sessions per

1 day of up to one hour-and-a-half each.

2 Last week, the Chamber distributed an agenda for the hearing to the parties and  
3 participants. As per the agenda, counsel for Libya will take the floor first, in order to  
4 reply to the responses filed by the parties and participants to the admissibility  
5 challenge, as well as to complement their initial submissions.

6 Following Libya's submissions, the Prosecutor, the OPCV and the OPCD will be given  
7 the floor, in this order. Finally, Libya, as the entity challenging the admissibility of  
8 the case, will have a final opportunity to present submissions limited to issues raised  
9 by the other parties and participants in the course of the present hearing. The  
10 Chamber will also make questions and seek any necessary clarifications from Libya  
11 and the other parties and participants, should the need arise.

12 The Chamber wishes to clarify that, as already indicated, a decision as to whether and  
13 to what extent further steps in the admissibility proceedings, including whether to  
14 receive further written submissions or hold another hearing, will be taken after  
15 receiving the oral submissions of the parties and participants and on the basis thereof.

16 Before giving the floor to counsel for Libya, I would like to remind all parties and  
17 participants that this is a public hearing and therefore that they shall exercise due care  
18 to avoid reference to information that must remain confidential. In case any of the  
19 parties or participants intends to refer to confidential information, they shall inform  
20 the Chamber in advance so that the Chamber can order a private or closed session, if  
21 necessary.

22 And finally, in order to facilitate the interpretation and court reporting, I would ask  
23 the parties and participants to speak slowly, like I'm speaking now, and to observe a  
24 brief pause of five seconds before responding to any question.

25 So now, I would give the floor to the representatives of Libya.

1 MR SANDS: Good morning, Madam President, distinguished members of Pre-Trial  
2 Chamber. It's a privilege for me to appear before this Court on behalf of the  
3 Government of Libya to address the Court on Libya's admissibility challenge with  
4 respect to the case of Saif Al-Islam Gaddafi. The head of the Libyan government  
5 delegation is Professor Ahmed El-Gehani and he will address you first this morning  
6 to give you an update on recent political justice and security issues in Libya.  
7 We are extremely grateful for the list of topics which the Pre-Trial Chamber has  
8 provided to us and to the other parties inviting us to address a number of issues,  
9 including the status of domestic proceedings in Libya, the subject matter of the  
10 domestic investigation in Libya, issues of national law in Libya, and the authorities  
11 currently holding Saif Al-Islam Gaddafi in custody.  
12 After Professor El-Gehani's presentation, I will return to each of these topics in turn.  
13 After addressing these matters I then with your permission would like to take you  
14 briefly to a closed session in which I would like to raise a matter on which we invite  
15 the Pre-Trial Chamber to give the most careful consideration, and finally I'll make  
16 some closing submissions as to the law on the principle of complementarity and what  
17 we say is the proper approach for the Pre-Trial Chamber to take in progressing this  
18 case forward henceforth.  
19 With your permission, I now invite you to give the floor to Professor El-Gehani.  
20 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you.  
21 Mr El-Gehani, you have the floor.  
22 MR EL-GEHANI: (Interpretation) Good morning, your Honours. Good morning  
23 to everybody here today in this courtroom. I have the honour of being here with a  
24 view to taking the floor with this issue and talking from the perspective of the  
25 Government of Libya for what concerns the challenge to admissibility in this case

1 against Saif Al-Islam Gaddafi.

2 Presiding Judge, ladies and gentlemen, you know that Libyans can have freedom  
3 today for the first time for 42 years, but they are still affected by fear as a result of the  
4 Gaddafi government. They still have painful memories of the past. In 2011, there  
5 was the liberation struggle. Indeed, during the five decades of Gaddafi's murderous  
6 regime, thousands of Libyan citizens were victims of murder, torture, rape, enforced  
7 disappearances, persecution and other serious human rights abuses. The reach of  
8 Gaddafi was total. His crimes against his people were a national tragedy that  
9 scarred the lives of virtually every Libyan citizen also outside the territory.

10 Given this legacy of tyranny and oppression in Libya, the positive political  
11 developments were very encouraging and exceptional. Proof of that is what  
12 happened under the National Transitional Council, the NTC, when we organised for  
13 the first time in our history democratic elections which were free. These elections,  
14 which selected a 200 member General National Congress, is called the GNC.

15 The whole world has praised these elections. They were lauded by the international  
16 community and they were described as free and fair. Indeed, US President Barack  
17 Obama described them as a democratic maelstrom which underscores that the future  
18 of Libya is in the hands of the people of Libya.

19 Your Honour, on 9 August 2012 the General National Congress, the parliament in  
20 Libya, had one of its first sessions when Mohamed Yousef el-Magariaf was elected as  
21 its president. As you know, this person is a foremost thinker who has a long history  
22 of fighting against tyranny and dictatorship under Gaddafi. Mr Magariaf for  
23 30 years was in exile in the United States and in other countries where he was  
24 defending the Libyan cause. Then he was the leading figure in the National Front  
25 for the Salvation of Libya, which was a prominent opposition group to Colonel

1 Gaddafi's regime.

2 Since its first meeting, the GNC -- at the first meeting of the GNC at the beginning of  
3 August, it has held many public sessions which were broadcast live on television with  
4 a view to guaranteeing transparency. This is totally the opposite of what the  
5 situation was previously under Gaddafi, where decisions were taken in secret in the  
6 Gaddafi era.

7 Your Honours, after consultation and discussions which were complex, the Congress  
8 chose Mr Abu Shagur as the Prime Minister. According to the law in force in the  
9 new Libya, the tasks of the Prime Minister consist in that person presenting a list with  
10 the names of ministers, and if the Congress considers that this list is appropriate then  
11 it is adopted and if it's seen as inappropriate then it is rejected.

12 If this task of the Prime Minister can seem easy, I think, ladies and gentlemen, you can  
13 evaluate the difficulty and the sensitiveness as well as the impact on political action  
14 thereof and particularly within the framework of democracy; the oldest democracy.

15 And now when we're talking about a State which recently discovered democracy and  
16 which is in a post-armed conflict situation, where you have a geographical  
17 representation of all parts, this is necessary in this government in order to guarantee  
18 the necessary expertise for all of the ministers, and that is the reason why this task has  
19 not -- has not been an easy task by any means.

20 It proposed a list for government with 29 members on 4 October, following  
21 consultations and negotiations, and thereafter this list was modified in order to come  
22 to ten members - ten ministers - with a view to it being a crisis management  
23 government. This was on 7 October, and that's the reason why the Congress decided  
24 to proceed with a motion against Mr Shagur, he no longer enjoyed its confidence, and  
25 then a new Prime Minister would be appointed by the GNC within a maximum time

1 frame of four weeks.

2 Regardless of which particular individuals will be appointed positions in the  
3 government, the Prime Minister, the Minister of Justice and the Prosecutor-General, it  
4 is very clear from the agenda pursued by the transitional government, which taking  
5 into account the prerogatives and tasks that are being carried out under the  
6 stewardship of Mr el-Magariaf, the aim of this new government in Libya is to usher in  
7 a legal and political culture which is based on the rule of law and tolerance.

8 This has been recognised by expert commentators and is confirmed by the position of  
9 the GNC. They had a motion which barred members - its members - from running  
10 for the post of Prime Minister; that is to say that all members of the National Council  
11 do not have the right to be Prime Minister. This is something that is clear and it was  
12 published in the Libya Herald. As reported by the Libya Herald on  
13 2 September 2012, these efforts reflect a commitment to progress within the  
14 establishment of institutions which are based upon the rule of law.

15 In past weeks a committee was created to monitor the Interior Ministry, we have  
16 evidence of accountability of all those who hold interim ministerial posts and this  
17 new government has made efforts in order to hold accountable those people  
18 responsible for attacks against mosques for which it has received the support from the  
19 international community.

20 Furthermore, we have also appointed an investigating judge, who is independent, in  
21 order to carry out investigations on the attacks against the American Embassy in  
22 Tripoli. Efforts have also been made to reinforce the human rights culture, and we  
23 can give an example thereof, among many examples. This is the decree of the  
24 Supreme Court indicating that Law 37, 2012, is unconstitutional as it limits freedom of  
25 expression, or free speech.

1 Ladies and gentlemen, your Honours, if you would allow me now to deal with  
2 developments in Libya's security situation. Despite all these momentous  
3 achievements, it is a matter of public record that Libya has faced a host of serious  
4 security challenges over the last 11 months since the fall of Gaddafi's regime,  
5 including by pro-Gaddafi individuals seeking to destabilise the new government and  
6 to harm the lives of Libyans, despite the efforts that have been made by the new  
7 government and the National Congress with a view to ensuring the rule of law and to  
8 reinforce order and everything that has been carried out with regards to collecting  
9 weapons.

10 This is a complicated process which requires time and effort. The new government  
11 represented by the National Congress is continually fighting armed militias, with a  
12 view to limiting their influence, and including those who carried out attacks in  
13 numerous Libyan towns and cities; in particular the attack in Benghazi which led to  
14 the murder of US Ambassador Chris Stevens.

15 In the past two weeks the Libyan army, under the direction of the new government,  
16 has spear-headed a large scale disarmament drive targeting militia groups. As a  
17 result of this, people have been persuaded to hand in their weapons and hundreds of  
18 citizens have responded to this call. They've handed in weapons, thousands of  
19 weapons indeed, light weapons, heavy weapons, and this also includes many  
20 different types of weapons and even tanks. This initiative will contribute to the  
21 elimination of illegal militias and make it possible to restore security for all in Libya.

22 Your Honours, if you would allow me, I will now speak about Libya's justice sector.  
23 It is a key priority as regards this hearing.

24 Now, among the tasks incumbent upon the government is to ensure that symbols of  
25 the Gaddafi regime and those people who are responsible for allegedly committing

1 crimes that they will be brought to justice in accordance with international standards.  
2 The Government of Libya is committed to carry out a fair trial for ex-Gaddafi regime  
3 officials, and it is not to guarantee that one or two people are tried. What we want to  
4 do is to create a judicial system which is fair, and this is in contrast with the situation  
5 under the Gaddafi era and this will be the proof of the commitment to rule of law for  
6 all Libyans and in Libya as a whole. The investigation and as appropriate  
7 prosecution of former Gaddafi officials in Libyan trials that meet international  
8 standards of fairness will be a unique opportunity for national reconciliation by a  
9 community that wishes to have justice done at home in Libya.  
10 Moreover, achieving domestic justice, particularly where it concerns the symbols of  
11 the Gaddafi era and those officials, this will empower and it will strengthen the  
12 capacity of our judicial, prosecutorial and investigative organs, and this will lead to  
13 the setting up of a new Libya, the Libya that we are struggling to build. The Libyan  
14 government has no intention of carrying out rushed investigations of such  
15 individuals, rushed investigations and trials of such individuals, which would not  
16 immediate minimum international standards of due process. However, conducting  
17 proper investigations and prosecutions will take time and this time must be accorded  
18 to Libya.  
19 The fact that we need additional time to conduct fair and comprehensive trials of such  
20 officials is made manifest by the recent extradition of Abdullah Al-Senussi to Libya on  
21 5 September 2012. Mr Al-Senussi's extradition indicates that countries such as  
22 Mauritania do have confidence in Libya's ability to hold fair trials for people  
23 suspected of committing crimes during the Gaddafi era. The extradition of Senussi  
24 also signals an important new phase in the investigation of Saif Al-Islam Gaddafi, in  
25 order to clarify the situation. This has led us to appeal for the necessity to have a

1 joint trial for the two people. Libya needs to have the necessary time to be granted to  
2 it by the International Criminal Court so that the new government has -- must achieve  
3 justice. A few days, or just a few months after the removal of Gaddafi, the time is  
4 not enough for the process to be complete, and even the ICC, with its considerable  
5 resources, has required many years to bring accused persons to justice in significantly  
6 less complex cases. Swift justice does not allow for due process and that is plainly  
7 not desirable.

8 Although we hope that there will be fair justice in Libya, this does not mean that we  
9 should exclude the involvement of the ICC in the relevant cases. From our point of  
10 view, the international community has an important role to play in helping the  
11 Libyan people to achieve their justice-related goals. In the past year, the transitional  
12 council co-operated with the ICC Prosecutor and with the UN Commission of Inquiry  
13 in their investigations of crimes committed in Libya. I strongly believe that the  
14 Prosecutor-General in Libya will continue to carry out the necessary activities  
15 regarding the Gaddafi trial and will collaborate with the international bodies,  
16 including the International Criminal Court and the UN High Commission for Human  
17 Rights, as well as the Arab League States. In fact Libya has started contacts with  
18 other countries so as to draw from their experience, and this includes Argentina,  
19 South Africa and Colombia, in the area of proceedings with armed groups and also in  
20 South Africa with the case of national reconciliation. These contacts will enable  
21 Libya to achieve stability and lead to fair trials for all those figures of the Gaddafi era.  
22 I can confirm to you that in the case of success in this admissibility challenge at the  
23 ICC, if Libya achieves its aim, then based on transparency Libya will open up all its  
24 courts and tribunals to the international community and to the ICC. The Libyan  
25 people are entitled to have the opportunity to restore justice in this area, and this is as

1 stipulated by the principle of complementarity, no more, no less.

2 A rush to judgment by the ICC, without granting Libya the necessary time, would be  
3 contrary to the necessity to co-operate with a post-conflict government facing serious  
4 security problems. Such an outcome will not make it possible for Libya to develop  
5 its capacities in the area of trials and jurisdictions. It would be a missed opportunity  
6 for Libya and its judicial system. It would render the principle of complementarity  
7 meaningless in the future international criminal justice cases.

8 Thank you for your attention. Now I will give the floor to Mr Philippe Sands, QC, so  
9 that he should give you further clarifications on this issue concerning Saif Al-Islam  
10 Gaddafi. Thank you once again for your kind attention.

11 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you.

12 MR SANDS: Madam President, members of the Chamber, we all know that the  
13 transition from the rule of dictatorship to the rule of law is not an easy one and it's not  
14 a smooth one. It was learned in the aftermath of the Second World War, when a new  
15 system of international criminal justice began to take root. It was learned in your  
16 country, in your region, in the 1980s. It was learned again in Yugoslavia and in  
17 Rwanda. We know these things are not easy.

18 As outlined this morning, in my submissions I'm primarily going to address the  
19 Pre-Trial Chamber's list of questions with respect to the national proceedings in Libya.  
20 I'm then going to make some brief submissions on an important but confidential  
21 matter in closed sessions, and then deal with the question of complementarity.

22 Let me begin with the status of domestic proceedings in Libya and the Libyan  
23 criminal process in relation to the alleged crimes committed by Mr Saif Al-Islam  
24 Gaddafi. This of course has its origins in the actions that were taken in the weeks  
25 and the months that followed the country's revolution and the collapse of the Gaddafi

1 regime; a regime which had over a period of many decades entrenched - totally  
2 entrenched - the submersion of domestic, legal and political processes.

3 The initiation of a Libyan prosecution of Mr Gaddafi's own son was a remarkable and  
4 symbolic event for all people in Libya, a first crucial step to assuming ownership of a  
5 process that will avoid impunity.

6 Saif Al-Islam Gaddafi was captured on 19 November 2011 near the town of Obar,  
7 apparently trying to flee to Niger. As Professor El-Gehani has explained, before his  
8 capture the NTC had provided very considerable assistance to both the Prosecutor of  
9 the ICC and the UN International Commission of Inquiry in their efforts to identify  
10 witnesses and to gather evidence about events in Libya during the period of the  
11 revolution.

12 There was a willingness to engage in such efforts, and it signalled a strong and  
13 continuing commitment on the part of the new emerging Government of Libya to due  
14 process, to the rule of law and to fundamental human rights. All of this was  
15 expressed by the NTC.

16 It's an extraordinary feature of the investigation the extent to which the Libyan  
17 authorities have proceeded on the basis of proper procedure as enacted in domestic  
18 criminal law, notwithstanding very considerable challenges of which we are all  
19 aware.

20 Two days after Mr Gaddafi was captured, the first of several provisional detention  
21 orders were rendered in Libya on the basis of Articles 115 and 175 of the Criminal  
22 Procedure Code. The first of these orders provided for the detention of Mr Gaddafi,  
23 on the authority of the Prosecutor-General, for a initial period of 45 days; that's to say  
24 until 5 January 2012. It was then extended by a further 45 days, by a summary judge  
25 who travelled to Zintan for this purpose, in full conformity with Articles 176 and 177

1 of the Criminal Procedure Code, and more recently this period of pre-trial detention  
2 has been lawfully extended as necessary by the Prosecutor-General in accordance  
3 with Article 177 of the Criminal Procedure Code.

4 Now, as this Court is aware, domestic criminal investigations in Libya are regulated  
5 by the Libyan Code of Criminal Procedure. It's based on the Italian model. Anyone  
6 who's got a familiarity with proceedings before the European Court of Human Rights  
7 will know that Italian justice doesn't always move as fast as one might wish.

8 Nevertheless, the instrument does provide for close regulation and oversight of the  
9 four phases of Libyan criminal proceedings: First an investigation phase; second an  
10 accusation phase, similar to the confirmation phase of proceedings in this Court; third  
11 a trial phase; and fourth and finally, if appropriate, an appeal phase.

12 Now, only two days after the first provisional detention order, the Libyan  
13 government sent a letter to Chamber I confirming Mr Gaddafi's capture, immediate  
14 co-operation. This referred to Article 94 of the ICC Statute and the possibility of  
15 surrender to the ICC. Again, it demonstrated a full co-operative approach.

16 At the same time, the Libyan Prosecutor-General, the most senior civilian Prosecutor  
17 in Libya, began an investigation into allegations of corruption and other financial  
18 crimes by Mr Gaddafi, and soon after on 17 December 2011 a decision was made by  
19 the Prosecutor-General to extend these investigations to allegations of crimes against  
20 the person under Libyan law to cover, and I quote, "... all crimes committed by  
21 Mr Gaddafi during the revolution starting from 17 February 2011," end of quote.

22 The investigative processes concerning Mr Gaddafi were further extended on  
23 8 January 2012, when the Prosecutor-General commenced an investigation into  
24 allegations of serious crimes, including murder and rape, allegedly committed by  
25 Mr Gaddafi during the 2011 revolution, including in the period between 15 February

1 and 18 February 2011.

2 Now, at this time two of the Prosecutor's general staff commenced work on the  
3 second investigation. In particular, they began to analyse intercept evidence of the  
4 speeches and telephone calls of Mr Gaddafi during the month of February 2011 and  
5 thereafter, and also to conduct interviews with potential witnesses based both within  
6 Libya and outside of Libya.

7 During the end of February and the first week of March a delegation, comprised of  
8 representatives of the ICC Registry and the OPCD, visited Libya, meeting Mr Gaddafi  
9 in Zintan.

10 The Libyan authorities co-operated fully in this regard, and were deeply disappointed  
11 to discover that, following this visit, the OPCD confidentially filed with the Court  
12 various unwarranted allegations against the Libyan government in respect of the  
13 alleged treatment of Mr Gaddafi, as well as a supposed intention to charge him only  
14 with offences relating to camel licensing and the cleanliness of fish farms owned by  
15 Mr Gaddafi.

16 Given the efforts that the new Libyan government had already invested in the  
17 criminal process concerning Mr Gaddafi up to that point, as well as its willingness  
18 and ability to pursue such challenging criminal proceedings in the immediate  
19 aftermath of the revolution, these false and inflammatory allegations and accusations  
20 were a considerable disappointment in Libya and they began the process of  
21 undermining public confidence in the ICC, for the simple reason that most people  
22 cannot distinguish between different organs of the International Criminal Court.

23 They had a severely negative impact in Libya. Fine distinctions, OPCD, OTP,  
24 ICC, OPCV, are not understood. People just lump it together and say, this is the ICC,  
25 acting in this way.

1 For many, and I say this with considerable regret, the wholly unprofessional  
2 allegations of the OPCD were taken as actions of the ICC itself and they began the  
3 unfortunate set of events that have led to what is now a complete collapse of  
4 confidence in Libya in the performance of the OPCD. From the point of view of the  
5 NTC, the criminal process with respect to Mr Gaddafi has shone a very bright light on  
6 the country's refusal to shield individuals from prosecution so as to allow impunity  
7 and its commitment to proper procedure pursuant to domestic Libyan law, whilst  
8 also in good faith seeking the assistance of the international community Professor  
9 El-Gehani has mentioned to further its efforts in this regard.

10 Equally apparent from the criminal process that has been followed was Libya's  
11 refusal - refusal - despite very significant domestic political pressure, to hold a rushed  
12 trial that would not meet international minimum standards of due process. We are  
13 aware, many other parts of the world, what such a rushed trial leads to.

14 Libya could have ignored the ICC, could have ignored the ICC. It has not done so.  
15 Instead, it has retained outside counsel. It has sought to engage properly and fully  
16 with all aspects of the ICC proceedings.

17 Libya filed a response to those early OPCD accusations. It is abundantly clear now,  
18 as it should have been then, that accusations of mistreatment and the pursuit of trivial  
19 criminal charges were patently false. They were also unbecoming of any organ that  
20 is associated with the International Criminal Court. I do say this with the greatest  
21 regret, as a litigator who has appeared before nearly every international court in the  
22 world, but I am bound to invite you to treat with the very greatest caution any  
23 pleading that is filed by, or on behalf of, the OPCD in these proceedings. We will  
24 say more about that in the closed part of this hearing.

25 By the end of April 2012, having committed very substantial resources to conducting

1 investigations and gathering evidence, the Prosecutor General had made considerable  
2 progress in the case. Despite a difficult security situation during which these  
3 investigations were taking place, a very wide range of significant evidence had been  
4 gathered.

5 With regard to providing specific examples of evidence to the ICC in order to show  
6 the extent of the progress of the Libyan criminal investigation, it's imperative to  
7 recognise and understand the constraints of Libyan law, no different from many other  
8 legal systems. During the investigation phase of proceedings, Article 59 of the  
9 Criminal Procedure Code mandates that investigation procedures and their results  
10 are confidential until the end of the accusation phase of proceedings; that is to say  
11 until after the charges are confirmed by the Chambre d'Accusation and the case is  
12 ready to proceed to trial. Any breach of this confidentiality is treated as a criminal  
13 act. That's Article 236 of the penal code.

14 Consequently, during the investigation phase, because of its desire to cooperate fully  
15 with the ICC, Libya took the extraordinary step - the extraordinary step - of disclosing  
16 summary reports of their investigation to the ICC. Ordinarily, even such summary  
17 reports would not be provided before the end of the accusation phase of proceedings.  
18 Disclosure of information beyond such summary reports, including of actual evidence  
19 or details such as witnesses' names, would violate the Criminal Procedure Code, and  
20 understanding the relevant Libya law demonstrates that the maximum possible  
21 cooperation with the ICC in terms of provision of information about ongoing  
22 investigations was made by Libya as part of its 1 May 2012 admissibility challenge.  
23 This disclosure indicates an openness in Libya's criminal justice system, a move away  
24 from the secretive and procedurally unfair criminal proceedings that were held  
25 during the Gaddafi era.

1 The evidence accrued by the Prosecutor General, even as early as April 2012, included,  
2 for example, statements from friends and associates of Mr Gaddafi, both those who  
3 remained with him until he fled Tripoli in late August 2011 and those who left Libya  
4 before the end of February 2011. It included statements from senior members of  
5 Libya's military, statements from volunteers who were armed directly by Mr Gaddafi,  
6 statements by family members of victims. The evidence gathered included a vast  
7 quantity of photographic and intercept evidence dealing with communications  
8 between Mr Gaddafi and other former Gaddafi regime officials during the 2011  
9 uprising, as well as video and news clips showing Mr Gaddafi's movements and  
10 activities in that period.

11 In addition to this evidence, the Prosecutor General has in his possession flight  
12 manifests which show the transport arrangements made by Mr Gaddafi for the use of  
13 mercenaries against protesters, as well as bank payment transaction records showing  
14 payments of funds to engage those mercenaries. Much of this evidence, and the  
15 more than 100 statements derived from witnesses, is material to which the ICC  
16 Prosecutor did not have access, either because the individuals concerned were  
17 detained under the custody of the Libya government, and thus not available for  
18 interview by the ICC Prosecutor, or because, quite simply, they were not willing to be  
19 interviewed by the ICC Prosecutor's office.

20 Since the filing of Libya's 1 May 2012 challenge, the investigation of Mr Gaddafi has  
21 continued to progress and other arrangements for his trial have been made by the  
22 new government. These arrangements include the building of a courtroom complex  
23 and prison facility in Tripoli, which is known as Tajura, and although there's been  
24 some recent contention in the press as to the planned location of any future trial,  
25 President el-Magariaf confirmed to the press on 22 September 2012 that there is no

1 prospect of a trial taking place in Zintan due to inadequate courtroom facilities and  
2 the other infrastructure that will be needed for a trial.

3 Turn to the appointment of defence counsel in the local proceedings, a matter to  
4 which we attach the greatest importance. Mr Gaddafi has made contradictory  
5 statements in this regard. On the one hand, he has indicated to the Libya authorities  
6 that he does not wish to appoint defence counsel for the national proceedings. On  
7 the other hand, he has apparently complained to the OPCD that he's not yet had the  
8 benefit of defence counsel. Despite these contradictory statements, once the case  
9 reaches the trial stage, which it has not yet done, should Mr Gaddafi continue to  
10 refuse to appoint defence counsel, a lawyer will be appointed for him to protect his  
11 interests in any subsequent proceedings, because under Libyan law the trial cannot  
12 proceed without the appointment of a defence lawyer.

13 Accordingly, although the detailed modalities of cooperation with the ICC await the  
14 appointment of the new government and its cabinet, the investigation of Mr Gaddafi  
15 is continuing to progress in the intervening period.

16 With respect to the Pre-Trial Chamber's question regarding the size and shape of the  
17 prosecution team going forward, we wish to bring two points to your attention.

18 First, as previously mentioned, under Libyan procedural law, the case does not  
19 proceed to the trial phase until confirmation by the accusation chamber, and that has  
20 not happened, so it is premature to discuss the constitution of a prosecution team.

21 Second, and significantly, the constitution of the prosecution team will be a matter for  
22 the Prosecutor General to be appointed by the new cabinet. Like others, of course  
23 we wish that matters might have proceeded more expeditiously, but we know that  
24 the transition from dictatorship to democracy, from terror to the rule of law, does not  
25 happen overnight. It has to be built step by step. Some of the steps are painful and

1 difficult, but Libya is entitled to expect the support of the international community to  
2 that end. That support includes the significant role the Judges of this Court can play  
3 in helping Libya achieve that goal.

4 Turn now to the subject matter of domestic investigation. It has already produced  
5 considerable results. It is a wide range of evidence. It constitutes the basis for an  
6 indictment with respect to the same conduct as that which would be covered by an  
7 indictment from the ICC Prosecutor. We believe - we believe - that the Libyan  
8 evidence is as comprehensive, if not more so, significantly more so, than that which  
9 has been gathered to date by the ICC Prosecutor's office. Moreover, any Libyan  
10 proceedings against Mr Gaddafi would also include other conduct which is outside  
11 the scope of the charges presently envisaged by the ICC Prosecutor.

12 Now, although not yet ratified by the new Libyan government, the legislative  
13 committee of the transitional government, the TNC, undertook a detailed  
14 consideration of a law reform measure that was designed to fully incorporate  
15 international crimes as defined under the Statute of the ICC into Libyan law. It is  
16 anticipated that the draft bill to effect this change will become part of Libya law once  
17 the new government has come into being and the cabinet has commenced its  
18 day-to-day work.

19 Once it is law, in addition to other crimes under investigation, Mr Gaddafi could be  
20 charged with the same legal category of crimes for which the ICC Prosecutor sought  
21 an arrest warrant for him, namely, crimes against humanity, of murder, and  
22 persecution in Tripoli, Benghazi and Misrata. In the unlikely event that the draft bill  
23 were not enacted in Libyan law, it's envisaged that Mr Gaddafi would be charged  
24 under the Libyan Criminal Code with a number of possible crimes, including but not  
25 limited to, intentional murder, torture, incitement to civil war, indiscriminate killing,

1 abuse of authority against individuals, arresting people without just cause, and  
2 unjustified deprivation of personal liberty.

3 Whilst investigations are still ongoing and notwithstanding the prohibition against  
4 disclosure of the particulars of the investigative file until the trial stage, the Libyan  
5 government can confirm that the file includes, but is not limited to, the incidents of  
6 murder and persecution that are listed at paragraphs 36 to 65 of the 27 June 2011  
7 Article 58 decision. Examples of incidents of murder which are included in the  
8 Libyan investigation are, A, the killing of civilian demonstrators by security forces  
9 between 16 and 20 February 2011 in and near Benghazi, including in the Birka area, at  
10 the Juliyana Bridge, and during a funeral procession, following which many bodies  
11 were received at the Al-Jalaa Hospital; B, the killing of civilian demonstrators by  
12 security forces between 17 and 25 February 2011, in Tripoli, including in the Gurji,  
13 Ghot al-Sha'l, Fashloum, Ben Ashour, and Al-Dribi areas, as well as in Al-Qadisya  
14 Square, in Al Syahya, Gergaresh Road, in Souk al-Jomaa in Green Square, in Maydan  
15 al-Jaza'ir Square and also outside several mosques after Friday prayers; and thirdly,  
16 the killing of civilian demonstrators by security forces on 19 and 20 February 2011 in  
17 Misrata, including in the area of Mosque Al-Sheikh next to the corner of Al-Bey, and  
18 during a funeral procession for other victims of killings by security forces. Without  
19 wishing to belabour the point by reading out a lengthy list of individual acts and  
20 alleged crimes, the Libyan government can also confirm that the incidents of  
21 persecutions which are referred to in paragraphs 42 to 64 of the 27 June 2011 Article  
22 58 decision are also included in the Libyan Prosecutor General's investigation.

23 It is therefore quite clear that beyond covering substantially the same conduct and  
24 acts as are contained in the ICC arrest warrant, Libyan investigation includes exactly  
25 the same incidents being investigated by the ICC. Of course, these were very

1 notorious events which occurred during the first days of the revolution. Libyan  
2 investigation thus covers a far broader range of conduct beyond the period in view of  
3 the many atrocities that were committed in the months that followed. Libyan  
4 investigation has also gathered considerable evidence concerning Mr Gaddafi's  
5 participation in those crimes. It is anticipated that this evidence and further  
6 evidence that will be gathered in the ongoing investigation will be a solid basis for  
7 charging Mr Gaddafi with all the above acts, whether through joint commission,  
8 planning, instigation, command responsibility, aiding and abetting, and, in some  
9 cases, direct commission.

10 The Government of Libya can confirm that the investigative file contains evidence  
11 that Mr Gaddafi engaged in the following acts: First, he provided financial resources  
12 and other support to individuals in Benghazi to mobilize supporters to carry out acts;  
13 second, that he mobilised, recruited and armed supporters to fight against protesters,  
14 and directly ordered certain crimes; third, that he ordered the imprisonment and  
15 killing of political dissidents; fourth, through a broadcast on Libyan television on or  
16 after 15 February 2011, he incited the security forces to use violence against  
17 demonstrators; and fifth, that he issued orders between February and April 2011 to  
18 officers and soldiers of the Libyan Armed Forces in Benghazi, Misrata and Tripoli, for  
19 civilian demonstrators to be fired at, using live ammunition.

20 Further particulars include evidence that he armed men with AK-47s for three days  
21 from a van outside Ba-al-Aziziya, a Gaddafi family compound, that he attended  
22 meetings for the purpose of procuring mercenaries and volunteers, that he instructed  
23 and paid Pakistani nationals to bring mercenaries from Pakistan to kill protesters, and  
24 that he distributed heavy weaponry to young men in Abu Salim and procured men at  
25 the same location to come to the Gaddafi compound to collect wooden boxes full of

1 light ammunition, other arms, and cars, in order to fight the rebels. It will be readily  
2 apparent that these particulars cover substantially the same conduct as that contained  
3 in the ICC arrest warrant, but the conduct is broader than that being investigated by  
4 the ICC Prosecutor, both in time and in terms of subject matter.

5 In view of the prohibitions on disclosure prior to the trial stage and further to the  
6 reports of the Prosecutor-General and other officials included in the 1 May  
7 admissibility challenge, these representations on evidence are made in good faith to  
8 this Chamber to confirm that Libya's ongoing investigation covers substantially the  
9 same conduct as the ICC case.

10 I turn now to issues of national law in Libya. The civilian criminal justice system is  
11 modelled on that of Italy, and is obviously central to Libya's transition. The Libyan  
12 process consists of four phases: Investigation, accusation, trial, and appeal. The  
13 Prosecutor-General holds an office that is functionally similar in some respects to that  
14 of the ICC Prosecutor in terms of the power to commence investigations and  
15 subsequently to launch criminal proceedings.

16 As noted already, the GNC now, and the NTC before it, is centrally involved in the  
17 creation of the new Libya, has shown itself to be strongly committed to due process  
18 and to the rule of law. That explains the profound importance of the Gaddafi case  
19 within Libya, whilst also demonstrating that it will be conducted in full compliance  
20 with due process standards under Libyan law and under international law. To this  
21 Libya is committed, it has publicly declared that, and through me it is publicly  
22 declaring it again.

23 As to domestic law, the Prosecutor-General acts independently from the judiciary in  
24 carrying out this role and must be neutral. During the investigation phase, a suspect  
25 has a right to a lawyer, both in interviews with the Prosecutor-General and during the

1 confrontation of the defendant with witnesses by the Prosecutor-General. Suspects  
2 also have the right to view all of the investigative materials relating to their case, and  
3 any confessions that are obtained from them through duress are inadmissible in  
4 criminal proceedings against them.

5 The investigator must write down all investigative procedures undertaken and must  
6 not publish or otherwise distribute details of the investigation. Suspects must not be  
7 imprisoned without due process, and a written order signed by the  
8 Prosecutor-General which complies with the Criminal Procedure Code and with the  
9 Prisons Act and, likewise, a suspect shall only be imprisoned in a purpose-built  
10 facility, unless this requirement is waived by the Prosecutor-General in exceptional  
11 circumstances.

12 Mr Gaddafi is entitled to a lawyer right now, if he wants one. Once that case gets to  
13 trial, he has to have a lawyer, even if he doesn't want one.

14 The next step in the present investigation is for the Prosecutor-General appointed by  
15 the new cabinet to conduct an interview with Mr Gaddafi in person in which he will  
16 be confronted with the allegations against him. In accordance with Article 105 of the  
17 Criminal Procedure Code, Mr Gaddafi will be questioned in detail about each of the  
18 allegations which the investigation relates to and covering the period that I've already  
19 referred to. This interview has not yet taken place. If it is deemed necessary, in  
20 accordance with Article 106 of the Criminal Procedure Code, the Prosecutor-General  
21 will arrange for Mr Gaddafi to be confronted with the witnesses who had indicated  
22 they are willing to testify in relation to these allegations.

23 Where the Prosecutor completes an investigation concerning a serious crime and  
24 forms the view that there is sufficient evidence to warrant the case proceeding, the  
25 Prosecutor-General must then refer the case to the accusation chamber, which is also

1 known as the indictment division. This is a court of first instance, and that court  
2 ensures four things: First, that any cases referred to trial are adequately and  
3 neutrally investigated; second, that the substance of the investigation has remained  
4 confidential; third, that the investigation has been properly recorded; and fourth and  
5 significantly, that a lawyer has been appointed for the suspect.

6 That body is composed of an independent and impartial judge appointed by the  
7 Supreme Council of Judicial Authority at the annual conference of Libyan courts.

8 The accusation judge will then review the Prosecutor's investigation, and if the case  
9 involves insufficient or illegally obtained evidence, can dismiss the case. If there is  
10 sufficient lawfully obtained evidence to found a criminal case, then the defendant will  
11 be given an opportunity to select a lawyer so that the case can go to trial.

12 There is also under Libyan law the possibility of supplementary investigations at that  
13 point. The criminal trial court in Libya is also a court of first instance. When it sits  
14 in cases of serious crime, it is composed of three judges who must possess, at a  
15 minimum, 24 years of judicial experience. If a defendant has indicated that he does  
16 not wish to appoint a lawyer, the court will appoint one, at no cost to the defendant,  
17 to represent his interests during the trial so the case can proceed.

18 A defendant can appoint a foreign lawyer, or lawyers, with the consent of the Libyan  
19 Law Society. If a lawyer is not appointed or if a lawyer is not given sufficient time to  
20 prepare, the trial verdict can be quashed as a nullity by an appellate court. Now, I'm  
21 not going to give you a PhD on Libyan criminal procedure, nor is Professor El-Gehani.  
22 It's necessarily just a brief overview. But there are also things to be said about  
23 procedural guarantees. The rights that a defendant has during the trial proceedings  
24 include the right to a public hearing, the right to have proceedings recorded, the right  
25 to be presented with the indictment and all evidence presented by the prosecution,

1 the right to remain silent, the right to present defence evidence, and the right to a  
2 written judgment. The defendant also, of course, has a right to call witnesses,  
3 including experts, and to ask questions of witnesses relied upon by the prosecution,  
4 through the control of the judges.

5 The rights of a defendant to present evidence are also applicable to suspects during  
6 the accusation phase of proceedings.

7 If a verdict of acquittal is given by the trial court in a case of a serious crime, the  
8 prosecutor can appeal the verdict to the Supreme Court on a panel of three judges. If  
9 the Supreme Court determines that the acquittal was unlawful, it can nullify the  
10 decision and remit the case to the trial court for a re-hearing in front of different  
11 judges. But if the judgment of the trial court is to convict the defendant in a case of  
12 serious crime, the defendant has a right of appeal to the Supreme Court. If there's an  
13 error of law found by the Supreme Court, the judgment will be quashed and the  
14 defendant can be released.

15 Let me say something about the death penalty, which is not prohibited, as we all  
16 know, by international law, but where it exists, the issue of due process in relation to  
17 a crime for which the death penalty applies does assume even greater importance.

18 In Libya, if a death penalty has been imposed following conviction, the sentence  
19 cannot be carried out until the case has been considered by the Supreme Court. This  
20 procedural step is, of course, of great significance in the context of a new  
21 administration which does not intend to disregard procedural justice, and it signals  
22 the seriousness with which Libyan criminal process takes the issue of capital  
23 punishment.

24 Even if the defendant does not appeal the sentence, the prosecutor is obliged to do so  
25 before the sentence can be implemented.

1 In appeals involving the death penalty, the Supreme Court is not only limited to only  
2 considering errors of law, but will review all factual, legal and procedural matters  
3 that led to the verdict and the sentence. Where an error is detected, the Supreme  
4 Court has the power to nullify the verdict, amend the sentence, or remit the case for  
5 re-hearing at the trial court by different judges. A sentence cannot be carried out  
6 until all potential avenues of legal appeal have been exhausted.

7 Libyan law also provides the important possibility of commutation of a death  
8 sentence to life imprisonment, where the family members of victims forgive the  
9 convicted person. In such cases the correct procedure, consistent with Article 6 of  
10 the International Covenant on Civil and Political Rights, is for the case to go back to  
11 the trial court to hear evidence of family members and to impose a new sentence on  
12 the convicted person. Experience shows that in jurisdictions with capital  
13 punishment, the possibility of commutation of sentence is a major factor in  
14 preventing wrongful death sentences. So, in answer to the Pre-Trial Chamber's  
15 question about penalties under Libyan law for the crimes for which Mr Gaddafi is  
16 currently being investigated, it is envisaged that these will be exactly the same as  
17 under those under the ICC Statute for the crimes against humanity of murder and  
18 persecutions; that is to say, a term of imprisonment. This is because, as outlined  
19 above, there is presently a bill under consideration which is intended to bring these  
20 international crimes within the scope of Libyan law.

21 In the event that the bill incorporating international crimes and their respective  
22 sentences as set out in the ICC Statute is not brought out into law in Libya,  
23 Mr Gaddafi will instead be charged with the correlative constituent crimes taken from  
24 the Libyan Criminal Code.

25 Apart from the crimes of intentional murder and indiscriminate killing under the

1 Libyan Criminal code which carry a potential penalty of capital punishment, all of the  
2 other crimes with which Mr Gaddafi could potentially be charged impose varying  
3 periods of imprisonment or fine.

4 I now turn to the Pre-Trial Chamber's question regarding the authorities presently  
5 having control over Saif Al-Islam Gaddafi's detention.

6 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: I'm sorry to interrupt you at  
7 this moment, but I'm afraid that we will need to suspend the session now because we  
8 have run out of the tape, and so maybe it's a good moment now, since you are going  
9 into a different subject, so I would suggest that we suspend now and we will come  
10 back at 12.

11 MR SANDS: Absolutely. What I would say is that the next subject I was going to  
12 deal with is less than a minute, and I was then going to turn to the closed session.

13 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Okay, you have a minute then.

14 MR SANDS: So it's very quick what I have to say about the question of control over  
15 Mr Gaddafi's detention.

16 It is correct that he presently remains in the custody of the Zintan Brigade. Once the  
17 Prosecutor-General is appointed by the new cabinet, that Prosecutor-General is  
18 expected to prioritise, working with the Zintan Brigade, to effect the transfer of  
19 Mr Gaddafi from Zintan to Tripoli and, in particular, to the purpose-built trial and  
20 detention facilities there.

21 This engagement with the Zintan Brigade will form part of the new government's  
22 commitment to demobilising the various militia groups which remain active across  
23 Libya, as discussed earlier by Professor El-Gehani, and you will appreciate the  
24 significance of that for the present delicate situation in which Libya finds itself.  
25 That brings me to an end. I would then now invite, when we resume, to go into

1 closed session, with your permission, for the next phase of our submissions. Thank  
2 you very much.

3 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: I thank you very much, and  
4 we will come back at 12 for a private session. So we have now a break of  
5 half-an-hour.

6 THE COURT USHER: All rise.

7 (Recess taken at 11.29 a.m.)

8 (Upon resuming in open session at 12.01 p.m.)

9 THE COURT USHER: All rise.

10 Please be seated.

11 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: We are going to resume our  
12 session. We are going to go into a closed session for the next 15 to 20 minutes, so we  
13 apologise to the public in the galleries. You're going to be seeing us, but not hear  
14 what is going on in the courtroom. We will go back to an open session after this is  
15 finished in 15/20 minutes.

16 (Private session at 12.02 p.m.)

17 (Redacted)

18 (Redacted)

19 (Redacted)

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Page 31 redacted – Private session.

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Page 32 redacted – Private session.

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Page 35 redacted – Private session.

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Page 36 redacted – Private session.

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Page 37 redacted – Private session.

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4 (Redacted)

5 (Open session at 12.23 p.m.)

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

7 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: We are now in open session,  
8 so we can come back to our five-seconds rule. I really beg you to speak as slowly as  
9 you can.

10 Now you have skipped many pages of your document, so you can go very slowly  
11 because there are problems with interpretation. So please proceed in a slowly  
12 manner. Thank you.

13 MR SANDS: Thank you, Madam President. I will -- well, not quite as slowly as I  
14 can, because I really could make it slow, but I'm going to make it as slow as is  
15 reasonable in the circumstances.

16 Let me turn to the law of complementarity and how they shape these admissibility  
17 proceedings moving forward from this status hearing until the Chamber renders its  
18 decision on the merits of Libya's application, and to be clear we will of course reserve  
19 the right to make more material available to the Chamber in due course under  
20 appropriate conditions of confidentiality.

21 The text of Article 17(1)(a) of the Statute is clear and simple. It provides, "The Court  
22 shall determine that a case is inadmissible where (a) the case is being investigated or  
23 prosecuted by a State which has jurisdiction over it, unless the State is unwilling or  
24 unable genuinely to carry out the investigation or prosecution."

25 This principle follows from the preamble of the Statute, which emphasises in clear

1 terms that the Court's actions and jurisdiction are, and I quote, "... complementary to  
2 national criminal jurisdictions," end of quote.

3 It has been pointed out by a distinguished commentator that complementarity is, and  
4 I quote, "... the underlying principle, the corner-stone of the Rome Statute or the key  
5 concept of the ICC, which permeates the entire structure and functioning of the  
6 Court," end of quote. You can't get more central than that.

7 The ICC's jurisprudence further underscores the centrality of national jurisdictions to  
8 the scheme established by the Statute. The Appeals Chamber in the Katanga case  
9 referred to the primacy of national courts and concluded that the ICC should exercise  
10 jurisdiction only, and I quote, "... if States do not or cannot investigate and where  
11 necessary prosecute," end of quote.

12 In the Kenya judgment, the Appeals Chamber further clarified that Article 17(1), and I  
13 quote, "... does indeed favour national jurisdictions," end of quote, to, and I quote, "...  
14 the extent that there actually are or have been investigations and/or prosecutions at  
15 the national level," end of quote. The Kenya case is obviously easily distinguishable  
16 from the present case.

17 As one member of the Canadian delegation at the Rome Conference in 1998 put it  
18 rather succinctly, "The Court should not interfere with national investigations or  
19 prosecutions, except in the most obvious case," and this in brief defines the core right  
20 and obligation that all States consented to when they ratified the Statute. The  
21 function of the Statute is to enable national criminal jurisdiction, not to undermine it.  
22 The function of this Court is to enable national criminal jurisdiction, not to undermine  
23 it.

24 The concept of complementarity gives rise to a series of questions of fundamental  
25 importance to the Chamber's determination in any given case. Let me identify three

1 questions to focus on as we proceed.

2 Firstly we recognise that all criminal processes face practical difficulties, but the  
3 question is what difficulties are of such seriousness that they indicate an inability or  
4 unwillingness such as to give rise to admissibility of a case before the ICC?

5 Secondly, question: What kinds of factors could indicate inability or unwillingness?  
6 And the third question: How should the procedure for determining inability and  
7 unwillingness be administered?

8 If the importance of complementarity needed any clarification with regard to the  
9 Libyan situation in particular, the United Nations Secretary-General has himself  
10 provided that clarification in the clearest possible terms.

11 In November 2011, well after the Security Council had referred the Libyan situation to  
12 the ICC, Secretary-General Ban Ki-moon affirmed the need for the UN to uphold, as  
13 he put it, "... the principles of Libyan ownership with respect to post-conflict  
14 assistance." He made clear his view that in order to succeed, and I quote him, "...  
15 Libya must be given the space required to determine its future," end of quote. A  
16 decision in favour of admissibility now would not, in our submission, be consistent  
17 with giving Libya the space which it is entitled to have to determine its own future.

18 Of course the Court must exercise its function - its judicial function - in accordance  
19 with all the requirements of the Statute. Those requirements include a suitable role  
20 for national legal systems for countries in time of transition.

21 Giving that enablement to national courts is a central object and purpose of the  
22 Statutes. Given a commitment of the Statute reflected in the speech of the United  
23 Nations Secretary-General to the idea of Libya ownership of the dispensation of  
24 justice, how is this Court to interpret the requirements of admissibility? How  
25 exacting should you be in determining whether Libya is indeed investigating

1 Mr Gaddafi for the same conduct as an ICC case and that it's doing so properly and in  
2 good faith? How should the limitations that are inherent in national courts during a  
3 situation of transition be assessed one way or another, either to enable or to  
4 undermine national jurisdictions?

5 We can't address all of these issues in full and of course the Libyan government is not  
6 proposing to do so right now, but I do want to make some general submissions on  
7 each of these matters to clarify the legal framework which is applicable to Libya's  
8 particular situation as it will develop in the coming weeks and months.

9 Let me turn first to the substantive nature of the complementarity issue. Large  
10 sections of the OPCD's submissions on the issue of admissibility have involved  
11 assertions concerning the quality of Libyan institutions and procedures and the  
12 integrity of those who hold office therein. We don't think those assertions are true,  
13 or helpful, to this process.

14 In the absence of instructions from the new Government of Libya we can't address all  
15 of these matters in substance and in detail right now, but we can provide some  
16 further clarity as to their relevance to the case at hand.

17 The OPCD has a very far-reaching approach with respect to Libya. It basically wants  
18 you to function as a human rights court. It basically wants you to review Libya's  
19 criminal justice system and find that it is inadequate.

20 That is not what States signed up to when they ratified -- when they negotiated,  
21 adopted and ratified the Rome Statute. There is no support whatsoever in the text  
22 for such an approach. There is no support for such an approach in the negotiating  
23 history of the Rome Statute. There is no support in the Vienna Convention on the  
24 Law of Treaties for the interpretation of the Statute to lead to such a conclusion.

25 I can do no better than refer you to the words of four distinguished commentators in

1 the second edition of their book, "An Introduction to International Criminal Law and  
2 Procedure," published in 2010. The authors include a distinguished Swedish jurist,  
3 Mr Hakan Friman, and a distinguished British jurist, Elizabeth Wilsmhurst, and I will  
4 quote what they say about this.  
5 "The better view ...", and they are responding to the kinds of arguments we hear from  
6 the other side of the room, "... is that delay and lack of independence are relevant only  
7 insofar as either of them indicates an intention to shield the person concerned from  
8 justice. There does not appear to be anything in the Statute ...", they write, "... to  
9 make the Court responsible for the protection of the human rights of the accused in  
10 the national enforcement of international criminal law. The principle of  
11 complementarity addresses the particular aspect of the proceedings which are  
12 referred to in Article 17, whereas more general human rights considerations about the  
13 conduct of national prosecutions are more properly addressed by human rights  
14 treaties and bodies," end of quote.  
15 Let me go back to those words again, "... an intention to shield the person concerned  
16 from justice." Is that what Libya is doing? You only need to ask yourself that  
17 question to recognise that the answer is abundantly clear. It is a matter of evident  
18 common sense that Libya has no intention to shield Mr Gaddafi from justice.  
19 We note on this point the Office of the Prosecutor has explicitly acknowledged in its  
20 response to Libya's admissibility application that there is no suggestion that the  
21 applicant's effort lacks genuineness. "To the contrary ...", they write, "... it's genuine  
22 interest in pursuing the case is demonstrated by its commitment of very substantial  
23 resources to the investigation."  
24 The Prosecutor's office has likewise observed that, and I quote, "There is no indication  
25 that the applicant is trying to shield the suspect. As the applicant has demonstrated,

1 it has taken concrete steps to investigate the same person for the same conduct at  
2 issue in the case before the ICC. Further "...", the Prosecutor's office has written, "...  
3 there is no evidence to suggest the applicant is not genuine in its investigation and  
4 prosecution of Saif Al-Islam. However, there remain questions about its ability to  
5 advance the investigation and prosecution of Saif Al-Islam," end of quote.

6 We think it is notable that the Office of the Prosecutor has recommended that the  
7 Court should accept the applicant's offer to provide further information, including we  
8 would say in due course the testimony of the General Prosecutor to provide clarity on  
9 its ability to advance its case, and plainly sufficient time needs to be granted by the  
10 Court to the Libyan government to enable such a course of action to be followed.

11 Putting the Office of the Prosecutor's view to one side for a moment, even if there  
12 were to remain any shortcomings in Libya's judicial system as it builds new  
13 democratic institutions, the Human Rights Committee established by the  
14 international covenant and other monitoring mechanisms, such as the African Court  
15 on Human and People's Rights, can make appropriate recommendations within their  
16 mandate on such shortcomings. We say it is not the role of this Court to exercise that  
17 function. You are called only to determine whether there are genuine national  
18 proceedings or not; nothing more and nothing less.

19 As Libya explained in its application of 1 May, paragraph 38, this admissibility  
20 challenge has been prepared by a State which has only recently emerged from armed  
21 conflict, mass atrocities and a complete change of government after a period of 42  
22 years of dictatorship. The situation is blindingly obvious, but its significance may be  
23 overlooked.

24 Complementarity is intended as a dynamic process; a dynamic process. It's not  
25 about a snapshot rush to judgment. This is a moment in this case for the Court to

1 give effect to this core principle of the Statute, by encouraging and enabling Libya's  
2 national judicial system, by giving time and support.

3 In this regard Libya notes with great respect the Chamber's recognition of what it  
4 called the exceptional transitional circumstances faced by Libya, and we are grateful  
5 in that regard for your decisions to extend certain time limits in these proceedings.

6 We also observe with real appreciation the clarification given by you in your decision  
7 of 2 October 2012 that admissibility is to be determined by circumstances prevailing at  
8 the time the decision is rendered, not at the time that the challenge is made.

9 Nonetheless, Libya is of the view plainly that the evidence which we have already  
10 submitted in our application is sufficient now, as it stands, to establish conclusively  
11 that the case is inadmissible before the ICC.

12 Is Libya genuinely investigating Mr Gaddafi? If the answer to that question is "Yes,"  
13 it is the end of the matter we say. The proper course of action if you're not sure - and  
14 we say you should be sure - is to allow more time for the Prosecutor-General, once  
15 appointed by the new cabinet and after that person has established an office and has a  
16 reasonable opportunity to get to grips with the dossier, to submit further evidence in  
17 full reply to the responses of the OPCD, the OPCV and the OTP, assuming that other  
18 matters can be resolved in a manner that is fair and allows Libya to make material  
19 available to this Chamber as it wishes to be able to do.

20 It would be manifestly procedurally unfair to treat these oral submissions as Libya's  
21 final opportunity to plead in the very exceptional circumstances in which the Libyan  
22 State now finds itself. We understand from the Chamber's recent decisions that it  
23 has no intention of adopting such an approach.

24 To the extent that you do not now feel able to declare this case inadmissible in this  
25 Court and you feel you do want more time and more material, if given sufficient time

1 to do so and provided that the conditions allow Libya to do so, the Libyan  
2 government is confident that it will be able to satisfy this Pre-Trial Chamber to the  
3 extent necessary that its national judicial system is both willing and able to properly  
4 conduct the trial of Mr Gaddafi.

5 For this reason we submit that the appropriate next step -- but only if you don't  
6 already think the case is inadmissible on the strong body of evidence that is before  
7 you, the appropriate step would be to seek the submission by Libya of a written reply  
8 to the other submissions in due course and at a reasonable time. This would either  
9 be when Libya is able to submit further summary reports of the progress of the  
10 investigation by a Prosecutor-General after appointment by the new cabinet, or  
11 during the trial phase of the proceedings in Libya which are currently scheduled to  
12 begin, if it gets to that point, in February 2013, not any earlier.

13 At that time the underlying evidence will be disclosable under Libya's domestic laws.  
14 Either way, we think that the Chamber should approach its relationship with Libya as  
15 one of constructive engagement, a process which allows it to receive periodic reports  
16 until such time as it has satisfied itself that Libya has had a reasonable opportunity to  
17 pursue a case at which time the Chamber can then make a decision on admissibility.  
18 Indeed, in all jurisdictions, where crimes against humanity have been committed, the  
19 domestic judicial system requires time and support to enable justice to be done. It is  
20 this context that's at the core of these proceedings: Namely, will this Court adopt a  
21 reasonable and realistic view of complementarity, or will it adopt the utopian and  
22 wholly unrealistic vision that the OPCD calls for, a vision which will make it  
23 impossible, impossible for any national jurisdiction to be allowed to exercise  
24 jurisdiction and do justice in such circumstances of transition?

25 This Chamber cannot remain oblivious to the exact same challenges facing

1 international criminal jurisdiction in their formative periods.

2 Take, for example, the case of Jean-Bosco Barayagwiza, before the Rwanda Tribunal,  
3 who was in pre-trial detention without criminal charges from 15 April 1996 to  
4 23 October 1997. Or consider the decade that it took to convict Thomas Lubanga  
5 before this Court.

6 Is it really to be the case, as the OPCD argues, that a national legal system of a country  
7 like Libya, coming out of the period it has lived through, is to be held to a higher  
8 standard than international courts when it comes to the delivery of justice? You only  
9 have to ask that question to recognise the place to which the answer must lead.

10 Let me say something now about the same conduct test. In the Kenya judgment the  
11 Appeals Chamber clarified that for a case to be inadmissible under Article 17(1)(a) of  
12 the Statute, "The national investigation must cover the same individual and  
13 substantially the same conduct as alleged in the proceedings before the Court."

14 Well, it is obviously the same individual and it is obviously, we say, substantially the  
15 same conduct.

16 Does substantially the same conduct mean exactly the same conduct, to the point  
17 where national prosecutors must mirror the exact same underlying incidents  
18 contained in an ICC arrest warrant? Of course not. That would be an absurd  
19 situation. It is a formalistic and simplistic approach. It is the one adopted by the  
20 OPCD.

21 In our submission, the test developed by the Appeals Chamber requires the Court to  
22 be satisfied that the case at the national level is substantially the same. This indicates  
23 the national authorities have some leeway. They are not required to charge the  
24 suspect under the exact same legal qualification.

25 While the conduct itself must necessarily be substantially the same, meaning

1 substantially the same underlying acts, the legal characterisation of such conduct may  
2 differ. A more rigorous approach to this question, the one called for by the OPCD,  
3 would constrain national authorities and would serve no useful purpose to giving  
4 effect to the concept of complementarity. It would drive a coach and horses through  
5 the Statute, and that would have significant consequences.

6 What evidence is relevant in your determination? The events that have unfolded in  
7 Libya at various times during the summer have been repeatedly referred to in written  
8 submissions before this Court in an attempt to bring these admissibility proceedings  
9 to a premature end.

10 However, as this Chamber held just over a week ago, a decision on the admissibility  
11 of the case must be based on the circumstances prevailing at the time of its issuance.

12 We say this ruling by this Chamber makes it very clear the admissibility assessment is  
13 not a means for exacting punishment, for example, as the OPCD may wish, for prior  
14 events upon a new government which is yet to take office, which has no role or  
15 responsibility for them, and where the circumstances of those events and the factors  
16 leading up to them remains unclear.

17 Such events cannot militate in favour of admissibility in ICC law properly understood.

18 In fact, the only aspect of what has happened in Libya to date that matters, we say, is  
19 the matter of time, not any isolated events which may have occurred for whatever  
20 reasons.

21 And secondly, the amount of time so far is relevant only, only to the extent that it  
22 provides evidence as to the prospects of a genuine investigation and prosecution at  
23 the time of the issuance of the decision on admissibility. This makes sense in the  
24 context of a jurisdiction based upon complementarity.

25 As to the amount of time itself, it is worth noting for example before the European

1 Court of Human Rights delay in domestic remedies of a duration far, far longer than  
2 the admissibility challenge has been running have not so far been held to have  
3 amounted to a failure of a domestic remedy. Indeed, the majority of cases in which  
4 ECHR admissibility has arisen from undue delay in domestic proceedings concerns a  
5 period of five to seven years, and that is a human rights court. Given that the ICC is  
6 not such a court, we say it should allow Libya considerably greater scope to complete  
7 its admissibility challenge given its post-conflict situation.

8 Let me turn to the procedural side of complementarity. The OPCD has argued that,  
9 as the entity challenging admissibility, the responsibility for establishing the elements  
10 of the admissibility challenge rest squarely on the Libyan authorities.

11 That, we say with great respect, is erroneous. The law provides only that a State  
12 challenging admissibility simply bears the burden of demonstrating that the case is  
13 inadmissible on the ground that it is investigating or prosecuting a case.

14 Like other proceedings involving States, the appropriate standard is one of balance of  
15 probabilities. Beyond that, the burden of proof rests on the party arguing for  
16 admissibility to establish that a State is unwilling or unable.

17 We say the OPCD is also wrong to assert that the Libyan authorities have sought to  
18 diminish their evidential burden by repeatedly citing a so-called presumption of  
19 primacy for domestic investigations. So be it if they want to disparage the so-called  
20 primacy but, if you want to disparage it, you ignore a concept which is at the heart of  
21 a complementarity-based jurisdiction. We say you simply cannot ignore it.

22 What about the level of evidentiary demands? In its Kenya judgment, the Appeals  
23 Chamber clarified that the challenging State must provide the Court with evidence of  
24 a sufficient degree of specificity and probative value that demonstrates that it is  
25 indeed investigating the case. It is not sufficient merely to assert that investigations

1 are ongoing.

2 Libya is not merely asserting. It has made material available to you within the limits  
3 of what it is able to do up until now having regard to its domestic law and, as to the  
4 future, that will turn on what it is able to provide to the extent that it is necessary  
5 under conditions of suitable confidentiality.

6 Complementarity in substance would be rendered wholly illusory if in obtaining  
7 information regarding national proceedings the ICC were to disregard limitations  
8 imposed by well-established national procedure laws, such as in the Libyan context  
9 the confidentiality of investigations pursuant to Article 59 of the criminal procedure.

10 And confidentiality is absolutely central. Individuals have come forward to assist in  
11 a domestic investigation in Libya who are at risk, and if that confidentiality is not  
12 respected by all parties in these proceedings those individuals will be at direct  
13 personal risk. I cannot overstate the significance of respect for confidentiality.

14 In our view, evidence of a sufficient degree of specificity and probative value must be  
15 interpreted to mean that a report by a Prosecutor-General is sufficient alone, where  
16 the national law prohibits disclosure of particular examples of evidence until a  
17 subsequent stage of domestic proceedings. Until the trial phase of proceedings,  
18 these summary reports are all that Libya can legally provide to the Court.

19 I would -- I would at this stage have made further submissions in relation to matters  
20 which have been held over, but I will put a square bracket around those submissions  
21 and I hope we will have an opportunity to come back to them later today, or  
22 tomorrow, because they are directly relevant to the admissibility issue that you have  
23 to decide.

24 What about the temporal frame? How much time is reasonable in a transitional  
25 situation to allow for an investigation or prosecution to materialise, or to be brought

1 to term? In a sense, that has a philosophical dimension to it. Time is always  
2 difficult.

3 You could put it another way. How much time qualifies as haste in such  
4 circumstances? Time, frankly, is a tough concept in this situation. It's less than a  
5 year since the Gaddafi regime collapsed. It's less than a year since an estimated  
6 30,000 people were massacred simply because they wanted their freedom.

7 It's only three months since the extraordinary and successful elections leading to the  
8 establishment of the General National Congress.

9 It's less than three months since the beginning of this new and promising chapter in  
10 Libya's new democratic era, after more than five decades of dictatorship.

11 Complementarity has to be a dynamic process, not a rush to judgment. As was put  
12 in the Kony case, and I quote, "The determination of admissibility is meant to be an  
13 ongoing process throughout the pre-trial phase, the outcome of which is subject to  
14 review, depending on the evolution of the relevant factual scenario. Otherwise  
15 stated, the Statute as a whole enshrines the idea that a change in circumstances allows,  
16 or even, in some scenarios, compels the Court to determine admissibility anew."

17 Article 19(4) makes it clear that a State can only challenge admissibility once, save in  
18 exceptional circumstances, so, in principle, a finding of admissibility is final, whereas  
19 a finding of inadmissibility is provisional. A Chamber may find that a case is  
20 inadmissible because of ongoing investigations, but that can be subject to  
21 reconsideration, in light of the progress of national proceedings.

22 We say the drafting of the Statute, which is not accidental, militates against a rush to  
23 judgment. It points compellingly towards a dynamic process in which the Court  
24 engages and empowers the national judicial system, through periodic review or  
25 consideration of proceedings, at reasonable levels. That is what complementarity

1 means, in practice, and it points decisively against a finding of admissibility at this  
2 stage or even soon, certainly not before a new democratically-elected Libyan  
3 government has had the opportunity to ensure that the process is taken forward  
4 appropriately in Libya.

5 Let's put this case in context. The challenges of transitional justice encountered by  
6 Libya will be encountered by almost every other nation that will appear before this  
7 Court in the future that finds itself in a similar situation. More so than in any other  
8 case that has come before this Court so far, the Libyan situation reminds us of the care  
9 with which complementarity must be treated.

10 Let me come to some brief conclusions, Madam President, distinguished members of  
11 the Chamber.

12 This is an unprecedented case; it's a first. It's a case where there is no doubt that  
13 Libya has jurisdiction. There is no doubt that Libya is acting in good faith, in  
14 difficult circumstances, to investigate and prosecute conduct that constitutes, it is said,  
15 a crime against humanity.

16 It's plainly a case in which the national proceedings are in relation to the same person  
17 and the same conduct. It's plainly a case where there is evidence of sufficient  
18 specificity and probative value to determine that Libya is investigating the case.

19 It's plainly a case where a country and a people have, against overwhelming odds,  
20 won their freedom through tremendous national sacrifice. The country and the  
21 people have earned the right to do justice for themselves. By contrast, the OPCD  
22 urges upon you a course that would make future referrals from the Security Council  
23 impossible, certainly far less likely, a course that would raise the most serious  
24 concerns in the court of international public opinion, and most significantly of all, a  
25 course that is not required by the State of the Court. The Pre-Trial Chamber, we say,

1 has not shut its eyes to those factors, cannot shut its eyes to those factors, and we  
2 hope will not shut its eyes to those factors.

3 The arguments put by bodies such as the OPCD would, in effect, deprive any country  
4 that is emerging from this kind of situation from taking ownership over issues of  
5 justice and the avoidance of impunity.

6 Let me be very clear, Madam President: We are not saying that there may not come  
7 a time in the future when it can be said, reasonably, that Libya has foregone an  
8 opportunity to do justice because it can no longer reasonably be said that Libya is  
9 willing and able to investigate the matters that are also before the ICC. What we are  
10 saying is that that time is plainly, plainly, not now, and it's not to say for the Court  
11 cannot play an important role. It is already playing an important role in reminding  
12 Libya that it has to do justice, and it is enabling the Libyan judicial system by giving it  
13 direction and time and support and by engaging with Libya in a process of  
14 complementarity that empowers those in Libya who are committed to supporting the  
15 Court's role in their democratic transformation.

16 We are inviting you not to short-circuit those efforts by an early and erroneous  
17 decision. It would simply cut the ground from under the feet of those in Libya who  
18 are trying to do the right thing.

19 This case determines whether complementarity becomes a realistic, reasonable and  
20 effective system or merely some utopian concept, with no practical application or  
21 consequence in the realities of a real world situation. The common law has a  
22 reasonable person test to judge negligence. It could be said that the drafters of the  
23 Rome Statute envisaged the notion of a reasonable state, to test and to adjudge the  
24 genuineness of national legal proceedings.

25 We respectfully submit that on the basis of the evidence that is already before you,

1 Libya is behaving reasonably in all the circumstances and should be given the benefit  
2 of the doubt in moving forward in this challenging situation. It has provided  
3 information, and it is intends to proceed to an investigation which will be completed  
4 and, as appropriate, to prosecution in accordance with its national legal system, and it  
5 invites this Chamber to allow it to do so.

6 Unless I can assist any further, that brings to an end our submissions for the first  
7 round. I do apologise for having taken more time. I'd forgotten about the  
8 translation into two languages, and that caused me to speak too fast, for which I  
9 extend my apologies.

10 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you very much. The  
11 Chamber will refrain at this point from asking too many questions because we believe  
12 it's probably better to allow all parties and participants to submit their views. So I  
13 only have at this stage some very brief questions, very concrete questions, for  
14 clarification.

15 One is that you have submitted that you were not in the position now to give us an  
16 idea on how the prosecutorial or the prosecution team would look like because, of  
17 course, it's premature at this stage, but actually the Chamber had wished to know,  
18 and I don't know if you are in a position to tell us now or maybe later in your final  
19 submissions, we wanted to know what are the resources allocated to the investigation  
20 team, the investigative team, not the Prosecution team, because we see, that's what  
21 you have at least indicated, maybe, that the investigation is now ongoing; is that  
22 correct?

23 MR SANDS: The investigation is ongoing.

24 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Continuing?

25 MR SANDS: Absolutely, the investigation is ongoing. I've shared with you what

1 I'm able to share with you at this point. We've heard your question and we will  
2 reflect, both over the lunch-break and over the course of the day, to see whether we  
3 can provide you with more specificity.

4 Can I just reiterate again: We do find ourselves in some difficulty, for a number of  
5 reasons. One of those of course is the fact the future direction and the existing  
6 direction is dependent on the outcome of political processes, in the sense that we lack  
7 a Minister of Justice and the cabinet has not appointed a new Prosecutor-General, but  
8 we are also in difficulty on this issue of confidentiality, but to not put too fine a point  
9 on it, we are being very careful in what we say because we have concerns about the  
10 confidentiality of material that is being shared.

11 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you very much. The  
12 second question is a clarification also, because you have said, and I think it is also in  
13 your written submission, that the Libyan evidence is significantly more  
14 comprehensive than which has been gathered today by the Office of the Prosecutor of  
15 the ICC. We would like to know on what type of evidence? I don't know how  
16 much you can go into these details, but on what basis are you indicating that you  
17 have more evidence than OTP? Because we also understand that OPT, at least in the  
18 submission, in their submission, has indicated that they have not shared evidence  
19 with you. Maybe when the time comes for the OTP, they will also clarify this to us,  
20 but then on what evidence are you saying that you have more evidence?

21 MR SANDS: I think I chose my words very carefully in saying that I -- well, I'll put it  
22 like this, I don't think we've got less evidence than the OTP. There is not a process of  
23 sharing of all evidence either way. Again, I've said what I can say up to this point.  
24 It may be that the most helpful way as we go forward, and I have taken a note of your  
25 question, is to hear what the OTP has to say and in due course, and I think you

1 indicated there may be an opportunity for us to have a second round, we may be able  
2 to add more, but I can say with a high degree of confidence that we do not have less  
3 evidence than the OTP and it may be that I can take it further after we've heard from  
4 the OTP and sort it out, other issues.

5 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: I thank you very much. I  
6 now turn to the Office of the Prosecutor. We have now 15 minutes, so maybe I  
7 would suggest that maybe you start and then we will continue after the break, yes?

8 MS CRISCITELLI: Sorry, let me sort myself out here. Thank you.

9 We are actually prepared to address the specific questions that the Chamber directed  
10 to us but we also note that many of those questions, in fact, were answered by the  
11 Libyan representatives, so to a certain extent the information that is before the Court  
12 now, on the basis of the representations made today, exceeds the information that  
13 was available at the time of the briefing.

14 But let me first address the questions. The first question was with respect to a  
15 paragraph in our filing that said that we have not had access to the witness interview  
16 records and have not shared with the Libyan authorities the evidence. The  
17 information arising from the summary reports is nonetheless consistent with the type  
18 and information collected by the Prosecution. This in fact has been augmented by  
19 more clarification and more detail today.

20 What we meant by that is that the type of information and evidence we collected were  
21 statements from crime-base witnesses, from insider witnesses, and our point in that  
22 was not to say that our evidence itself is parallel, but that we see parallels in the way  
23 the investigations are proceeding, sufficient to give us confidence that at least on the  
24 face, and through the statement summaries that were prepared, the Libyan  
25 investigation is taking the same serious tack and the serious approach that the OTP

1 brought to this investigation, but in terms of actual details we don't have that. We  
2 have not swapped evidence and swapped statements.  
3 The second statement we made that there was no question that the national  
4 authorities are investigating the same person before the Court, I think that is  
5 self-explanatory. The summary of the evidence provided by the applicant shows  
6 that it has taken concrete steps to investigate the suspect for substantially the same  
7 conduct.  
8 Again, looking at the summaries, looking at the identification -- sorry, "Slow down."  
9 That was just sent to me. I apologise to the -- they are supposed to wave but I can't  
10 see it with these glasses so I apologise, I will slow down.  
11 It is by reference to the locations, to the time frame, and to what Libya itself has  
12 conceded are notorious incidents, and it has stated today, in Court, that it has gone  
13 down the list of the items that the Chamber relied on in its Article 58 decision, and it  
14 has, in a sense, checked them off in its investigation.  
15 So our statement was based upon the locations and the time frame and the notoriety.  
16 That statement in our filing is now confirmed by the representations made orally in  
17 this Court.  
18 The next question in the Court related to paragraph 36, the same conduct part of the  
19 test must be analysed with respect to the suspect's alleged role in the case, and that  
20 almost -- I mean it is sort of a mode of liability, it is the connection of the suspect to  
21 the crimes, and again I think we have heard elaboration today, as well as in the prior  
22 statements that were filed, that there is a focus on that. And indeed, what we heard  
23 today is that it has expanded from this focus and is looking at incidents in which it  
24 can identify the suspect as directly committing the crimes, and not just part of this  
25 co -- as a co-perpetrator, indirect co-perpetrator. They have other instances after the

1 cut-off in the OTP investigation that goes into the role of the suspect in the suspected  
2 criminal activity.

3 In the final -- I take that back, not final - paragraph 37 of our submission had to do  
4 with the categories of witnesses and the overlap, and the fact that these categories of  
5 witnesses together provide information that's probative of elements of the crimes.  
6 What we list in terms of the specificity, some of it has been raised here today; others  
7 may be part of the redacted filings, and not publicly available. I'm a little bit  
8 uncomfortable ticking through because I didn't tick through as the oral presentation  
9 was made but we would certainly rely on what was orally asserted today to indicate  
10 that the categories of witnesses, and the substance of what they can provide,  
11 demonstrates a parallel between their investigation and the OTP's investigation.  
12 And then finally, it was that the applicants submitted information, somewhat  
13 overlapping a prior statement, indicating that it was investigating crimes committed  
14 in the same localities and that has been verified. It's stated in their statements, in  
15 their submissions, and it was verified. In fact they have made statements that go  
16 beyond the localities that the Prosecution identified. They brought in two other  
17 locations for crimes. We focused, in our investigation, on Benghazi, Tripoli, Misrata,  
18 and there was some reference to Al-Bayda but not other locations that in fact are part  
19 of the Libyan investigation.

20 So to the extent that the submissions here are that we have looked at this, and at least  
21 from the specification presented orally, we see that the case that has been presented  
22 appears to be on track.

23 Now, of course they have not, and they have explained the reason for not being able  
24 to do it but they have not yet submitted much more concrete information that the  
25 Court can touch that will say, "Yes, we hear what you say but we also read what

1 you've gathered and we read your information."  
2 We are, however, very sympathetic to the transitional justice issue and the need to  
3 give Libya a little bit more space. We recognise the limitations under their domestic  
4 law against revealing.  
5 I might also add their concern here is obviously for the security of their evidence, but  
6 non-disclosure of a confidential investigation also protects other persons who may be  
7 wrongly accused or wrongly implicated against whom there is not going to be  
8 sufficient evidence and charges are not going to be brought forward. So in my  
9 domestic system, for example, we do protect very heavily investigative material in  
10 order to protect persons who have not yet been accused and may not be accused.  
11 So it is security plus the respect for the rights of the persons who may be investigated  
12 that I think are legitimate factors, and when Libya comes forward and says their  
13 statutes prohibit this kind of disclosure, this kind of production of its actual  
14 investigative materials that, in our view, is an interest that is worth taking into  
15 account and considering that's facially a legitimate concern. So as to those points we  
16 would adhere to our prior filing.  
17 We have not gotten additional evidence from the Libyans; they have not shared their  
18 case with us. We have not produced our evidence to the Libyans, as far as I'm aware,  
19 and I think that's right, so that question from the Court about the degree of  
20 co-operation, it has not extended to that.  
21 The admissibility arguments and the standards for complementarity, we do accept  
22 that this is -- that there is a requirement that there be genuine domestic proceedings  
23 and, as the Prosecution, we are probably -- this is sort of an odd case, if I can go off a  
24 little bit, because normally one would expect that the Defence would not be pushing  
25 for a prosecution here in order that the Defence would avoid impunity. The Defence

1 wouldn't come in and say, "The national proceedings are not going anywhere so,  
2 please, Court, prosecute me here," because the purpose of the ICC and the Statute is to  
3 avoid impunity, and the Prosecution, fearing a state that in fact is not going to take  
4 active steps, who is not going to affirmatively seek to prosecute and not shield the  
5 wrongdoer, the OTP would be a little bit more skeptical about a requirement -- about  
6 the other State's intercession to ensure that it has the right to have primary  
7 prosecution of the person.

8 In this instance, we are confident that Libya is interested in prosecuting these crimes  
9 and this offender in the time period that we cover and in fact beyond our time frame,  
10 and we are confident that it meets the admissibility standards.

11 We recognise that the Court might want more tangible proof. We think it is  
12 appropriate to give Libya additional time to sort itself out. You know, 42 years of  
13 repression, I don't know that you can say given one week for every year that Libya  
14 has been oppressed is enough time for it to be ready to come forward. I think that's  
15 a little harsh, at least speaking for myself, maybe not for the Prosecutor, but I think it's  
16 reasonable to recognise the very complicated situation and reasonable to respect what  
17 we think the Prosecution is supposed to be, which is to make sure that persons do not  
18 escape impunity. Make sure that people are held criminally accountable for  
19 repression, but not to push ourselves to the front and elbow aside the States that are  
20 genuinely able and willing to prosecute their nationals for their crimes.

21 If the Court has any other questions, any questions?

22 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you very much. So, if  
23 we understand correctly, that would be the end of your  
24 submission?

25 MS CRISCITELLI: Yes.

1 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: So we are now at the end of  
2 our session in the morning, so we will have some questions to you, but maybe we can  
3 raise them after the break. So we will continue this afternoon. Yes? Sorry, at  
4 3 o'clock this afternoon.

5 Thank you very much.

6 THE COURT USHER: All rise.

7 (Recess taken at 1.28 p.m.)

8 (Upon resuming in open session at 3.01 p.m.)

9 THE COURT USHER: All rise.

10 Please be seated.

11 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: So good afternoon. We will  
12 continue our hearing this afternoon. The Office of the Prosecutor had finished their  
13 submissions in the morning and --

14 MS CRISCITELLI: May I interrupt? I have a --

15 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Yes.

16 MS CRISCITELLI: -- tiny, maybe not so tiny, mea culpa. There's somewhat of a  
17 misstatement that, in reviewing the transcript, I would like to clarify a little bit and  
18 this, certainly the impression that I conveyed, which I think is not what the office  
19 would want to convey and I want to convey.

20 When we noted this morning that the limitations that Libya may be under in the  
21 context of its procedures in terms of providing information on its investigations, we  
22 did not mean to suggest that these confidentiality considerations will apply across the  
23 board and forever. Our only intent was to discuss why Libya to date has not  
24 provided the Court with more information, but it is not the position of the Office of  
25 the Prosecution that a State can continually refuse to provide additional information

1 at any stage, claiming confidentiality, or that it satisfies its duty simply by making a  
2 conclusory assertion, whether it is made by the Prosecutor General himself or any  
3 other official that it's able and willing to take affirmative steps and to investigate and  
4 to prosecute.

5 We do adhere to what we said in our filing and what the courts have said, which is  
6 that the party challenging admissibility, which here is the State, bears the burden to  
7 demonstrate that the case is inadmissible and must discharge its burden in relation to  
8 the limbs of the inquiry.

9 In our view, this means that it is not simply the existence of national investigations  
10 and/or prosecutions in relation to the case at hand, but also that the State is genuinely  
11 willing and able to carry it out. So the Government of Libya does maintain a burden  
12 with respect to it. It has to satisfy the Court that it has taken concrete investigative  
13 steps and it is obligated to provide the Court with evidence of sufficient probative  
14 value. Whether under these unique circumstances there is leeway to permit Libya to  
15 do this not instantly, but within a reasonable amount of time, is a different question,  
16 and that was our submission, but I did not mean to suggest that it never has to do this.  
17 So to the extent that it may have been interpreted that way, I do apologise. That was  
18 not what we wanted to say. Thank you. Now I'll answer your questions.

19 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: I thank you very much for this  
20 clarification. Actually, our question is also a clarification on something that you  
21 have indicated in your written submission. In two paragraphs of your written  
22 submission, paragraphs 22 and 45, you make references to monitoring, and actually it  
23 is not very clear to the Chamber what do you mean exactly. For instance, at  
24 paragraph 22 - you may have it in front of you, but then I can read it - you stated that  
25 "The Prosecution is committed to reopen the discussion on the admissibility of the

1 case if it is considered necessary as a consequence of the monitoring activities."

2 It is not clear to the Chamber whether you are undertaking now any kind of  
3 monitoring activities, if it is your intention to do it in the future, if you are doing it  
4 now. What did you really -- what did you mean in your submission?

5 MS CRISCITELLI: (Microphone not activated)

6 MR RASTAN: Thank you, Madam President. Apologies for the logistical  
7 considerations to set the microphone up. The Prosecution was making, in relation to  
8 the monitoring activities, a general assertion. Of course, it will be necessary if a case  
9 is found to be inadmissible before the Court and if there are national proceedings,  
10 obviously, it will be necessary to continue a monitoring role in relation to those  
11 proceedings, both to see that they proceed in the manner anticipated and to continue  
12 to assess issues of genuineness. The question I think your Honours are asking is:  
13 Who will do the monitoring?

14 The Office of the Prosecutor has some capacity to examine national proceedings and  
15 we do some of that from the seat of the Court in The Hague, but of course the OTP  
16 may not be in a position to permanently monitor proceedings in court every day, and  
17 the situation may be compared perhaps with the Yugoslavia and Rwanda tribunals in  
18 their 11 bis proceedings, whereas your Honours know the Court had requested the  
19 Prosecutor to enter into arrangements with other organisations. In the case of the  
20 Former Yugoslavia, it was the OSCE, and the case of the Rwanda tribunal, I believe it  
21 was the African Union, but I may be mistaken on that front. So the issue we would  
22 believe would be also open for this Court to consider, with submissions from the  
23 parties and participants, to consider, should that eventuality arise, who would be  
24 most appropriately placed to monitor.

25 And, finally, the only reason that we have mentioned this is because of course, under

1 Article 19, paragraph 11 and paragraph 10, there is this procedure for saying of course  
2 that the Prosecutor could request for the Chamber to reconsider a decision in relation  
3 to admissibility based upon new facts arising that would negate the basis for the  
4 original decision, and on that basis the Chamber may decide to recall the case to the  
5 Court. So we are merely responding to the provisions and the procedure outlined in  
6 Article 19, rather than indicating at this stage who would be best placed to monitor on  
7 a daily basis such national proceedings as may be referred to the national level.

8 Thank you, your Honours.

9 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you.

10 Yes.

11 JUDGE VAN DEN WYNGAERT: Mr Rastan, on what would be the legal basis for  
12 the Court to monitor Libyan proceedings, because we don't have an equivalent of  
13 Article 11 bis of the ad hocs?

14 MR RASTAN: I think it is -- one would say at this moment it's open for the Court to  
15 consider whether such arrangements would be appropriate. Certainly, the  
16 Prosecutor has the ability to request the Court to reconsider this issue, as was  
17 mentioned, and whether it's the Court that would suggest that the parties and  
18 participants make submissions to the Chamber so that the Chamber decides who  
19 would be the monitor or whether this is solely the responsibility of the Prosecution  
20 and that we contact relevant third parties who could assist in this process, or in the  
21 alternative, ourselves on an ongoing basis have somebody in the courtroom, these are  
22 all matters that at this stage one can imagine are still hypothetical and speculative, but  
23 such arrangements one can imagine can be concluded, even if it is not explicitly set  
24 out in the statutory regime.

25 Thank you.

1 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you very much. That  
2 clarifies these paragraphs. So if I understand correctly, you were thinking of  
3 monitoring eventually, eventual monitoring, of trial proceedings. It's not that you  
4 are undertaking now any kind of monitoring of the investigative activities?

5 MR RASTAN: Thank you, your Honour. I think that's the scenario that most easily  
6 comes to mind. Of course, monitoring of investigative proceedings will be difficult  
7 in the sense that they are not open and public to scrutiny. Perhaps the applicant  
8 might be in a better position to inform the Chamber to what extent that may be  
9 possible, particularly if there is international assistance with such activities, but  
10 principally our submissions were in relation to trial proceedings which would then be  
11 done in public and open forum. Thank you, your Honour.

12 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you very much. Yes,  
13 at this stage we just wanted to clarify the meaning of these paragraphs.  
14 So if there is no further submissions from the Office of the Prosecutor, we will now  
15 turn to the OPCV. Ms Massidda, you have the floor.

16 MS MASSIDDA: Thank you very much, Madam President.

17 Madam President, your Honours, the OPCV is somehow sympathetic to the fact that  
18 the transition from the rule of the dictatorship to the rule of law is not an easy one and  
19 it's obviously not a smooth one, as it was clearly stated this morning by the  
20 representative of the Libyan government. However, it seems to us that the Libyan  
21 representatives are merely convening promises that, given the political current  
22 situation in Libya, cannot be relied upon by victims in this case.

23 What we have understood from Professor Sands' intervention this morning is that the  
24 only certainty is that Mr Gaddafi has not yet been officially charged with any of the  
25 crimes at stake before this Court since the relevant bill has not yet been passed. It is

1 symptomatic that hiding behind Libyan's procedural criminal law, we have been  
2 explained that it is based on the Italian one and incidentally that even Italian justice  
3 doesn't always move as fast as one might wish.  
4 Being very familiar with the Italian justice system, I will not comment on the non-PhD  
5 for Professor Sands, but I will just limit my observation in saying that victims wish  
6 that justice moves fast.  
7 Now, the only thing that we can reasonably say today is that these proceedings is not  
8 at all moving fast and victims' concern is mainly that the challenge of the Libyan  
9 authorities was just merely raised too early.  
10 Your Honours, we have heard today what I could define an expression of intentions.  
11 We have heard today that Libya is still in the process of adopting the legal instrument  
12 which might in the future allow the judiciary to try the case of Mr Gaddafi for the  
13 same crimes alleged against him in the warrant of arrest issued by Pre-Trial Chamber;  
14 crimes which I quote "are still not in the scope of the Libyan law." The quote is from  
15 the English unrevised transcripts of this morning, page 35.  
16 We have also heard that the investigation phase is not yet finalised and it is our  
17 understanding that charges have not yet been brought, or in any case confirmed,  
18 against Mr Gaddafi and that arrangements for the further custody of the suspect will  
19 be made at a later stage in due course with the Zintan Brigade which continue to  
20 detain Mr Gaddafi.  
21 Libya itself has indicated today that it wants, and I quote again "... to create a judicial  
22 system which is fair. However, conducting proper investigation and prosecutions  
23 will take time." Quotes are from the transcript of this morning, English unrevised,  
24 page 12 and 13.  
25 On this basis, your Honours, we cannot but reiterate our previous submissions in

1 relation to the inability at this point in time of Libya to genuinely investigate and  
2 prosecute the case against Mr Gaddafi.

3 We do not question, your Honours, the willingness of the Libyan government in this  
4 regard, but we are still unconvinced of a possibility of Libya to proceed against  
5 Mr Gaddafi in the current circumstances. Libya is yet again requesting more time to  
6 address the issues arising from its admissibility challenge without even attempting to  
7 provide a time frame within which the Libyan authorities will be in the position to  
8 provide the Court with more information as to the national proceeding.

9 The mere explanation heard today of what has been initiated at the national level  
10 without any substantial evidence of the willingness of the Libyan government cannot  
11 be sufficient, in our opinion, for the Pre-Trial Chamber to find that it has no  
12 jurisdiction over the case. Libya filed its admissibility challenge on 1 May 2012.

13 Five months later no substantial developments have been brought to the attention of  
14 the Chamber and therefore we see no reason to depart from our original submissions  
15 according to which Libya lacks today the capacity and ability to investigate and  
16 prosecute the case against Mr Gaddafi.

17 In these circumstances, the OPCV cannot but reiterate in full its previous submissions  
18 on the issues as filed on 4 June 2012 and submits that the main issue at stake is just the  
19 fact that Libyan authorities submitted their admissibility in a non-timely manner  
20 despite their attachment to time being a philosophical attachment or else.

21 The office contends that Libyan authorities' way of shielding themselves behind the  
22 hazards of their newly established criminal system, or rather uncertainties as to this  
23 very same system, is the consequence of their own choice to raise this challenge  
24 before the Court at a time it could not be substantiated.

25 In conclusion, your Honours, the office see no reason to depart from its previous

1 submission and I would like finally to address one minor matter with the Chamber.  
2 We have assisted this morning to an exchange of arguments between the  
3 representative of the Libyan authorities and the Defence. Victims wish to make clear  
4 that notwithstanding the confidentiality issues undergoing between the Libyan  
5 authorities and the Defence in the present case, they shall not be hampered to  
6 participate in these proceedings due to the lack of information.  
7 This concludes, Madam President, your Honours, my brief submissions. I will be  
8 more than happy to answer any question that you might have. Thank you.  
9 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you very much.  
10 I thank you very much. We, the Chamber, does not have any questions at this point  
11 to OPCV, so we would now turn to OPCD. You have the floor, please.  
12 MR KEÏTA: (Interpretation) Thank you, your Honour, your Honours.  
13 I'll just make an introduction and my co-counsel will continue in order to  
14 demonstrate the elements which I would like to introduce. The International  
15 Criminal Court is a court, as its name says, and not a diplomatic round table. Even  
16 less so, it is based and it bases its decisions on concrete evidence which is reliable.  
17 The challenge to admissibility which has been submitted by Libya is based on  
18 completely empty rhetoric. It raises aspirations which are divorced from reality and  
19 takes positions with regards to information which is erroneous concerning the state of  
20 the proceedings underway against our client, Mr Saif Al-Islam Gaddafi.  
21 The Government of Libya has failed in its obligation to fulfil the conditions with  
22 regards to the threshold for its challenge to be admissible and that is to show that  
23 investigations are currently underway with regard to the same charges as in  
24 investigations before the ICC and which have been started by the Office of the  
25 Prosecutor.

1 Furthermore, while the Government of Libya constantly reiterates its willingness to  
2 apply the highest standards of due process to Mr Gaddafi's case, we have to say that  
3 its actions do speak louder than its words. Indeed, we will demonstrate that on  
4 multiple occasions the Libyan authorities have failed to comply with their own  
5 national law in the way in which they carry out the proceedings, and taking into  
6 account the way in which Mr Gaddafi's rights have been violated under Libyan law, it  
7 is clear that the Libyan State cannot organise a fair trial which is impartial and  
8 independent.

9 Indeed, you will note that there is a high probability that the proceedings be quashed  
10 or declared null to the extent that there is indicia that some of the evidence obtained  
11 against our client may have been obtained by (indiscernible) circumstances which  
12 could potentially constitute torture or cruel and inhumane treatment. Ultimately,  
13 the Government of Libya has completely failed to meet its burden of proof to  
14 demonstrate that its judicial system has the capacity to genuinely try this case. The  
15 Libyans have provided no concrete information, while on multiple occasions this  
16 Chamber gave them the opportunity to do so right until 3 October in a way to prove  
17 that they could conduct a trial in a secure and safe manner.

18 You just have to look at the level of instability there is currently in Libya that we all  
19 know and the level of security there is there, which we hear about constantly in the  
20 news every day.

21 Furthermore, these last five months no progress, no new stage, has taken place in the  
22 proceedings that the Libyans are meant to be conducting in Libya. Since they have  
23 made their challenge to admissibility before this Chamber no step, apart from  
24 promises, apart from draft laws, apart from assurances have been made. The Libyan  
25 counsel have brought no new evidence as to progress since its challenge was made

1 and Mr Gaddafi in place still has no counsel, still does not have access to a judge, and  
2 he still has not been transferred to Tripoli, while the Libyan State says that it is in  
3 Tripoli that they intend to try our client.

4 I will finish by maintaining that the Office of the Prosecutor, a moment ago they said,  
5 "Well, it's the Defence paradoxically who are asking for this to be tried before the  
6 ICC." Normally it's the opposite, but the Defence is seized that the Prosecutor, who  
7 required this arrest warrant and initiated the proceedings, was the first person to say  
8 "No, no, no, let's let Libya do that."

9 Thank you very much for your attention.

10 MS TAYLOR: Good afternoon, Madam President, your Honours.

11 It is the submissions of the Defence that the challenge to admissibility is essentially, in  
12 our view, a house of cards and it has been built on what we consider to be false and  
13 misleading premises.

14 When any of these premises are examined or scrutinised in any detail, they don't hold  
15 up and the challenge collapses on itself. Unfortunately, the type of criminal  
16 proceedings that have been promised to the ICC and the international community  
17 bear no relationship to reality on the ground. It is clear that it is a challenge drafted  
18 in a vacuum and which is lacking in authority and credibility.

19 The government has tried to turn this around by arguing that the Defence has made  
20 false allegations to the Court. What they have overlooked though is that in many  
21 instances their submissions are contradicted by the very evidence and statements they  
22 are relying upon, and these are not just minor transgressions.

23 It has appeared that the government may have provided incorrect or misleading  
24 information to the Chamber in relation to key issues such as whether Mr Gaddafi is in  
25 incommunicado detention, the nature of the charges against Mr Gaddafi, the specific

1 procedural rights which will be accorded to Mr Gaddafi under Libyan law and the  
2 issue as to whether the death penalty can be commuted.

3 In terms of Mr Gaddafi's ability to communicate with the outside world, after  
4 Mr Gaddafi was first arrested the Prosecutor General informed Human Rights Watch  
5 that contact with family and friends was not possible at this time due to security  
6 concerns, and this is cited in ICC Filing 128, Annex D.

7 Nonetheless, in ones of the very first filings to the Court, the government claimed that  
8 Mr Gaddafi had not been in incommunicado detention because he had been visited  
9 by a specific family member whilst in Zintan, and that was Filing number 44 at Annex  
10 1. This filing was signed by the ICC focal point, Professor El-Gehani.

11 A week after this filing, during a meeting between Mr Gaddafi and representatives of  
12 an independent international entity, Mr Gaddafi indicated that he had not been  
13 allowed to make any contacts with the outside world. The Libyan authority who  
14 was activity monitoring the visit and vetting the contents of any statements made by  
15 Mr Gaddafi did not contradict this position, and I refer to Annex 8.3.

16 Prior to the filing of the admissibility challenge, the OPCD submitted a request to  
17 Professor El-Gehani to enquire whether family members of Mr Gaddafi who resided  
18 in Libya could visit him, and this can be find in Filing 152 at Annex F.

19 In a later statement submitted by Professor El-Gehani, Professor El-Gehani conceded  
20 that although a specific family member had requested to visit Mr Gaddafi,  
21 Mr Gaddafi had not actually received any visits from family or friends, and this is  
22 Filing 146 at Annex A.

23 Notwithstanding this concession, at Annex E to the admissibility challenge, the Public  
24 Prosecutor's Office stated that there had been no visits to Mr Gaddafi due to the fact  
25 that no one had requested to visit him. As concerns medical visits, in the initial

1 filing to the Court Professor El-Gehani claimed that Mr Gaddafi was receiving visits  
2 from a specific specialist on a weekly basis. This is Filing number 44, Annex 1. This  
3 claim was reiterated in the admissibility challenge.

4 On 9 March, the Chamber ordered that the Libyan authorities should give  
5 Mr Gaddafi medical and dental treatment. The decision was notified at a later date.

6 On 28 March, the Registry informed the OPCD that the most recent information  
7 received from the authorities indicated that the decision had not yet been  
8 implemented.

9 On 13 April, Professor El-Gehani informed the Registry that a visit from the specific  
10 doctor and dentist had occurred four days ago and that follow-up treatment would  
11 occur in a week concerning Mr Gaddafi's tooth. However, in a later statement filed  
12 before the Court, Dr Gehani claimed that the medical and dental treatment had  
13 occurred on 12 and 8 March, that is before the decision had actually been notified to  
14 them. When the ICC delegation visited Mr Gaddafi on 7 June, he was still missing a  
15 tooth. A member of the Zintan council which is responsible for overseeing the  
16 welfare of Mr Gaddafi stated that he was unaware of Mr Gaddafi receiving any dental  
17 treatment. He also confirmed that Mr Gaddafi was not receiving visits from a doctor  
18 on a weekly basis and that the specialist had not come in March.

19 I refer to our response at paragraphs 301 to 305.

20 With respect to the criminal procedures governing Mr Gaddafi's case, a fair amount of  
21 time is spent in the challenge to describing -- in today's hearing, to describing the  
22 procedural rights which should, in principle, be accorded to Mr Gaddafi if he is tried  
23 in Libya. The government has averred that the proceedings will be comprised of  
24 four stages: The investigation phase; accusation phase; trial and appeal phase. The  
25 government has described the accusation phase as being analogous to the ICC

1 confirmation phase.

2 At paragraph 61 of the challenge, they've also emphasised that the accusation judge  
3 plays an important role in ensuring the neutral and adequate investigation of the case  
4 and that the defendant's rights are being respected.

5 The government also proclaimed at paragraph 56 of the challenge the suspects and  
6 defendants within the Libyan Criminal Justice System benefit from similar procedural  
7 rights and protections to those set out in the Rome Statute. Importantly, at  
8 paragraph 54, the government asserted that the prohibition on the establishment of  
9 exceptional courts is of critical importance to the current application, and further, at  
10 paragraph 55, that the abolition of extraordinary courts has had a positive and  
11 transformative effect on the Libyan judiciary.

12 What the government has not mentioned though is that although the former Gaddafi  
13 regime abolished the people's court, the current authorities are applying the  
14 procedures from the people's court to specific categories of crime. As a result, the  
15 litany of procedural rights extolled by the government do not apply to Mr Gaddafi.

16 Indeed, at page 6 to Annex C of the challenge filed by the government, the  
17 Prosecutors assigned to Mr Gaddafi's case specifically confirm that due to the type of  
18 charges which are likely to be brought against Mr Gaddafi, his case will be governed  
19 by the people's court procedures.

20 It further asserts that if the authorities were to follow another procedure, for example,  
21 the four-phase model which has been described today, the proceedings against  
22 Mr Gaddafi would in fact have to be nullified.

23 In terms of the practical implications of this distinction, as acknowledged in Annex C  
24 to the challenge filed by the government, the case will proceed straight from the  
25 investigation phase to the trial phase without any judicial supervision of the

1 proceedings prior to the commencement of the trial, and as I will discuss later, this  
2 lack of judicial oversight can have significant consequences for both the fairness and  
3 the effectiveness of the proceedings.

4 Under the people's court procedures, the prosecuting authorities can also suspend  
5 key due process rights of the defendant, such as the right to counsel and access to  
6 evidence, and this is set out in our admissibility response at paragraph 312.

7 It was therefore completely misleading for the government to refer to procedural  
8 guarantees and protections which will not apply to Mr Gaddafi under the current  
9 legal regime.

10 At paragraph 67 of the challenge and again during today's hearing, the government  
11 avowed that under Libyan law it is possible for the death penalty to be commuted to  
12 life imprisonment if the victims forgive the defendant, and in this manner Libyan law  
13 complies with Article 6 of the ICCPR. However, the government failed to inform the  
14 Chamber that this possibility can never be applied to Mr Gaddafi. NTC law 35  
15 expressly stipulates that no child of Muammar Gaddafi can ever benefit from any  
16 form of leniency or forgiveness, and this was included in Annex 8 of the Defence  
17 admissibility response. A Prosecution official has also subsequently confirmed that,  
18 if convicted, Mr Gaddafi will be executed by hanging, and I refer to Annex 2.1.

19 Concerning the nature of the charges and the factual basis for Mr Gaddafi's detention,  
20 when the Defence visited Mr Gaddafi in March, he informed them at that stage he'd  
21 only been questioned in relation to licences for camels and issues concerning fish  
22 farms. Professor El-Gehani also informed both Mr Gaddafi and the Defence on  
23 independent occasions that they had decided not to proceed against Mr Gaddafi for  
24 more serious offences because no one had filed any complaints, and the reliability of  
25 this information is corroborated by the fact that representatives of an independent

1 international entity were informed at the end of January by a Libyan official who had  
2 been present during the interrogations that Mr Gaddafi had only been interrogated in  
3 relation to the possession of fish farms and camels, and I refer to Annex 8.3.

4 At paragraph 94 of the admissibility challenge, the government sought to discredit  
5 both the Defence and Mr Gaddafi by asserting that it is patently false that Mr Gaddafi  
6 was ever accused of such trivial regulatory offences. Nonetheless, in an annex  
7 attached to their own filing, that is Annex E, page 2, the Public Prosecutor explicitly  
8 acknowledge that Mr Gaddafi was questioned in relation to practising the profession  
9 of a camel trader without a licence, and graft, which would pertain to the fish farms.

10 The Public Prosecutor also does not deny the Defence report concerning Professor  
11 El-Gehani's promise that the authorities had decided not to pursue Mr Gaddafi for  
12 more serious crimes, but the Public Prosecutor simply asserts that Dr Gehani did not  
13 review the criminal investigations in this regard. This was Annex E, page 3.

14 However, in a later newspaper interview, Professor El-Gehani claimed that he had  
15 been present when every witness in Mr Gaddafi's case was interviewed, and the  
16 reference for this is set out in the Defence admissibility response at paragraph 147.

17 One of them would have to be incorrect, otherwise, the only way to reconcile the  
18 statement of the Public Prosecutor that Professor El-Gehani was not privy to any  
19 criminal investigations into serious crimes and the claim of Professor El-Gehani to be  
20 present during every single witness interview is to conclude that there were no  
21 witness interviews in relation to serious crimes.

22 The Libyan government also appears to have misled and misinformed the Court in  
23 relation to key issues which are directly linked with the admissibility proceedings.

24 As noted above, Libya had declared that it was willing to apply to Mr Gaddafi the  
25 same due process standards as apply in the Rome Statute or the ICCPR. These

1 standards include the right to communicate with counsel in a privileged setting. In a  
2 filing dated 30 May 2012, counsel for Libya explicitly assured the Court that pending  
3 Mr Gaddafi's transfer to Tripoli, it will do all that it can to grant access by the ICC,  
4 OPCD and Registry to Mr Gaddafi consistent with international law. The  
5 Government of Libya makes this undertaking without hesitation, or caveat. That's  
6 Filing 160.

7 At paragraph 26 of the same filing, the government confirmed that the visit would be  
8 privileged and repeatedly emphasised their willingness to comply with the  
9 Chamber's order, which was to the effect the Defence should have a privileged visit  
10 with Mr Gaddafi.

11 The Defence had previously raised concerns regarding the potential application of  
12 NTC law 37, which imposes criminal penalties on anyone who criticised the Libyan  
13 government or praises the defendant. In response, the government further asserted  
14 at paragraph 29 that any statements made by the Defence in their remit of defending  
15 Mr Gaddafi would not trigger the application of such a law.

16 Libya was obliged pursuant to Article 96(3) of the Statute to proactively advise the  
17 ICC of any specific requirements in national law that may have been relevant to its  
18 ability to implement the order to allow the Defence to visit Mr Gaddafi on a  
19 privileged basis.

20 Neither the government nor Professor El-Gehani informed the Court of any  
21 requirements under domestic law or any legal impediments which would prevent the  
22 Defence from meeting Mr Gaddafi on a privileged basis.

23 To the contrary, in a statement filed to the Chamber Professor El-Gehani stated at  
24 paragraph 23 that "As a Professor of criminal law I am well aware of the right of  
25 defendants to defend themselves and so, of course accept and uphold the right of

1 such defendants to receive documents and to keep these in his place of detention in  
2 order to prepare his case." That was Filing 146, Annex A.

3 Dr Gehani also explicitly acknowledged, at paragraph 25 of the same statement, that  
4 the Defence could transmit privileged documents to Mr Gaddafi in person.

5 Article 80 of the Libyan Code of Criminal Procedure further prohibits the confiscation  
6 or seizure of documents which are communicated between counsel and client.

7 Regrettably, for both Mr Gaddafi and the Defence, assurances provided by Libya on  
8 this matter proved to have no weight. The Defence accepted Libya's word they  
9 would be able to conduct a privileged visit which would respect international  
10 standards and that it would not in any way be criminally sanctioned for its duty to  
11 represent the best interests of its client.

12 As a result, counsel ended up spending 26 days in jail in Zintan and is still facing  
13 domestic prosecutions. This wasn't just a misunderstanding. In a press conference  
14 convened a couple of days after the arrest of the ICC delegation, the Libyan  
15 authorities happily broadcasted to the world that they had deliberately deceived the  
16 ICC delegation by placing someone in the room who pretended not to understand  
17 English, but actually speaks five languages, and that this was for the purpose of  
18 monitoring what was supposed to have been a privileged visit, and I refer to Annex  
19 19 of the Defence admissibility response.

20 They also covertly filmed the visit using a keyring camera.

21 The delegation was subsequently informed that these measures had been decided and  
22 installed in advance, although no written order was ever shown to the delegation  
23 explaining the legal basis for such measures.

24 In direct contravention to their written assurance the visit between OPCD and  
25 Mr Gaddafi would be privileged, Professor El-Gehani tried to claim after the trick had

1 been discovered that the OPCD was not entitled to privilege because it was only the  
2 temporary counsel of Mr Gaddafi.

3 In direct contravention to the guarantee that the Libyan authorities would never  
4 impose any measures or sanctions against the Defence because of the representation  
5 of Mr Gaddafi, Professor El-Gehani informed both the Defence and the ICC  
6 interpreter that these actions had been taken in retaliation for the Defence report  
7 concerning the first visit to Mr Gaddafi.

8 The above matters are set out in paragraphs 264 to 265 to the Defence response.

9 The fact that the authorities searched the delegation without any judicial order  
10 contravene Article 13 of the interim constitutional declaration, and this was a  
11 document that the government relied upon in its admissibility challenge to prove to  
12 the Court its commitment to the rule of law.

13 The Libyan authorities arrested all four ICC officials and held them in an  
14 incommunicado detention. The government then misled the Security Council. For  
15 example, Libya claimed that only the Defence counsel and the ICC interpreter had  
16 been arrested and that the other two officials had voluntarily decided to stay.

17 It would also appear that the Libyan authorities may have attempted to exploit the  
18 situation of the detained persons in order to extract concessions regarding the  
19 admissibility of the case.

20 According to a statement issued by Senator Bob Carr, after meeting with Prime  
21 Minister Keib and the Deputy Foreign Minister Aziz, he was led to believe that the  
22 release of the four ICC officials could be secured if, amongst other things, Australia  
23 facilitated discussions between the government and the ICC to ensure Libyan  
24 concerns and perspectives were heard in respect to the criminal proceedings against  
25 Saif Al-Islam Gaddafi. I refer to Annex 3.7.

1 In another interview, Senator Carr was more explicit. He informed The Guardian  
2 that the Libyan authorities had indicated that they would be likely to release the  
3 counsel for Mr Gaddafi if the ICC agreed that Saif could be tried in Libya rather than  
4 The Hague. This is cited at Defence response paragraph 17. Notwithstanding the  
5 fact that the Libyan authorities were unsuccessful in requesting the ICC to waive the  
6 immunity of its officials, the authorities have nonetheless continued to pursue all four  
7 officials in domestic courts in violation of their privilege.

8 In an interview Professor El-Gehani acknowledged that if the four officials had ever  
9 been brought before a judge, they would have been released because of these  
10 privileges and immunities, and the reference for this is in Defence response  
11 paragraph 185.

12 The fact that the Libyan authorities constantly adjourned the hearing and thereby  
13 prevent a judge from dismissing the case, which is what Professor El-Gehani has said  
14 that they would do, therefore creates the impression that they are using the threat of  
15 such proceedings against the ICC officials to improperly influence the independence  
16 of the ICC.

17 The fact that one of the counsel was detained obviously impacted on the ability of the  
18 Defence to file its response which in turn delayed the ability of the Court to  
19 expeditiously resolve the admissibility challenge. Rather than complying with their  
20 duty of diligence by trying to mitigate the effects of this delay, the government filed  
21 successive requests for further delay which were predicated on partial and  
22 misleading information.

23 For example, although the Prosecution and OPCV responses were filed on 2 June, and  
24 the Defence response on 24 July, the government claimed that because of the political  
25 handover on 8 August they had been unable to obtain any instructions for their reply.

1 They further claimed that they would be unable to do so until a new Ministry of  
2 Justice team had been appointed.

3 The government nonetheless failed to draw the attention of the Chamber to the fact  
4 that Article 30 of the constitutional declaration provides that the ministers who are  
5 appointed by the NTC had full legal authority to carry out their work until the  
6 interim government was formed.

7 During the time when counsel for Libya professed that they were unable to obtain  
8 instructions from the Prosecutor-General or the Ministry of Justice team, the  
9 Prosecutor assigned to Mr Gaddafi's case, the spokesperson for the  
10 Prosecutor-General and the Minister of Justice all made statements concerning the  
11 status of the proceedings against Mr Gaddafi.

12 Indeed, at the same time that counsel for Libya were effectively stalling for more time,  
13 these respective officials were announcing their intention to start the trial of  
14 Mr Gaddafi in September in complete disregard for the status of the ICC admissibility  
15 hearings.

16 When the Defence raised these matters before the Chamber, the government once  
17 again tried to discredit the Defence. The government claimed that President  
18 Magariaf confirmed that speculation by the OPCD that Mr Gaddafi's trial will be held  
19 imminently is baseless and false. This is in Filing 205.

20 If they had examined the actual quotation of President Magariaf, they would have  
21 seen that he was responding to statements provided by a spokesperson for the  
22 Prosecutor-General and the ICC focal point, Professor El-Gehani, that the trial would  
23 start in September. President Magariaf was claiming that these statements were  
24 rumours and lies.

25 In dismissing such statements as rumours and lies, President Magariaf effectively

1 indicated that information provided by members of the Prosecutor-General's office  
2 and Professor El-Gehani lack credibility.

3 It should also be noted that in addition to the spokesperson for the  
4 Prosecutor-General and Dr Gehani, the Minister of Justice and the Prosecutor  
5 co-ordinating the case had all provided official statements that Mr Gaddafi's case  
6 would start at some point in September. And I refer to Annex 2.1, 2.2, 2.4 and 3.4.  
7 If these persons were all, as asserted by President Magariaf, lying this would cast  
8 substantial doubt over the credibility of the admissibility challenge as it was  
9 constructed on the basis of information provided by these persons.

10 It would also appear to suggest that Professor El-Gehani currently lacks either the  
11 authority or credibility to speak on behalf of the government as concerns  
12 Mr Gaddafi's case. It is therefore arguably problematic that counsel have elected to  
13 rely upon Professor El-Gehani to present submissions concerning the future course of  
14 proceedings.

15 Apart from the statement of President Magariaf, which questions the credibility of  
16 Professor El-Gehani, the head of the Zintan Brigade has also indicated that Professor  
17 El-Gehani does not represent Libya in connection with Mr Gaddafi's case. And I  
18 refer to Annex 3.29.

19 Over a week after President Magariaf issued his statement, it was subsequently  
20 announced by other officials that the trial of Mr Gaddafi would in fact be delayed by a  
21 further five months. However, this delay had nothing to do with the pending  
22 admissibility proceedings. The delay was directly attributed to the authority's desire  
23 to first extract evidence from Mr Abdullah Al-Senussi who had recently been  
24 transferred to Libya. This is regrettably another matter on which the government  
25 misled the Court. At paragraph 30 of the admissibility challenge, the government

1 asserted that since Mr Senussi's arrest in Mauritania the severity of Mr Al-Senussi's  
2 liver disease has become apparent. His health condition is now such that it's  
3 understood that he cannot presently be investigated domestically for breaches of  
4 Mauritanian law, let alone be transferred back to Libya.

5 However, during the time when the government had informed the ICC that the  
6 Ministry of Justice team did not have the ability to instruct counsel for Libya, the  
7 same Ministry of Justice team travelled to Mauritania for the purposes of extracting  
8 Mr Al-Senussi.

9 Mr Al-Senussi was deceived into believing that he was meeting a Mauritanian official  
10 and was not given any effective ability to contest his extradition. I refer to Annex  
11 3.17 and Annex 8.2.

12 It has also been reported that the Libyan authorities made significant financial  
13 contributions to Mauritania in order to obtain his extraction in this manner, and I  
14 refer to Annex 3.16, 3.18, 3.20 and Annex 8.2.

15 Whereas the government had informed the ICC on 1 May that Mr Al-Senussi was too  
16 ill to travel, or to participate in domestic investigations, as soon as he was transferred  
17 to Libya the authorities announced that they had commenced interrogating him; that  
18 is before it would have been possible for him to have a thorough medical examination  
19 or to have had the opportunity to select counsel. And I refer to Annex 3.14 at page 4.

20 Due to the circumstances of his extradition, Mr Al-Senussi's medical records and  
21 medications were not taken with him. Although a preliminary medical examination  
22 was conducted, the results were sent off for analysis and diagnosis. I refer to Annex  
23 3A.3A at page 2.

24 The interrogations nonetheless commenced immediately, that is before a proper  
25 assessment could be done as to whether Mr Al-Senussi had the capacity to

1 understand his rights and could give information in a voluntary and informed  
2 manner, and I refer to Annex 3A.3A at page 3.

3 A Libyan authority who was present during his initial interrogation noted that  
4 Mr Al-Senussi was in a complete state of shock during the interrogation, and I refer to  
5 Annex 3.24. Mr Al-Senussi also requires daily medication. Any stressful  
6 circumstances could trigger significant adverse medical consequences. I refer to  
7 Annex 8.2.

8 It is self-evident that it was completely unfair and coercive to interrogate him in such  
9 circumstances. Nonetheless, in a provisional report to the Chamber, the government  
10 attempted to demonstrate its commitment to respecting Mr Gaddafi's rights by citing  
11 a statement from Prime Minister Kieb regarding Libya's commitment to treating  
12 former Gaddafi officials such as Mr Al-Senussi in a fair manner. This was Filing 205  
13 at paragraph 13.

14 Ironically, in the very same statement concerning its commitment to treat  
15 Mr Al-Senussi fairly, the Prime Minister also expressed the view that, "I guarantee  
16 he ...", being Mr Al-Senussi, "... was almost directly or indirectly involved in most, if  
17 not all, of the crimes."

18 Sorry, your Honours, are we sitting to 4.30 or 4? 4.30, sorry. I apologise for that.

19 Moreover, in terms of the practical implementation of its abstract promise to treat  
20 Mr Al-Senussi fairly, an Al Jazeera journalist overheard a guard boasting upon  
21 Mr Al-Senussi's arrival that he had beat Mr Al-Senussi on the neck - I refer to Annex  
22 3.3 - and this is an extremely degrading act in Arabic culture.

23 It has been reported by the warden for Mr Al-Senussi's prison that Mr Al-Senussi is  
24 kept in isolation in a cell with no outside access and that he does not have any  
25 facilities, that is access to a telephone, to communicate with his family. I refer to

1 Annex 3A.3A and Annex 3A.4. Nor does he have access to television, or the news.  
2 I refer to Annex 3A.4.  
3 Although his warden asserted that they had conducted Mr Al-Senussi's family on his  
4 behalf, this is not correct. I refer to Annex 8.2.  
5 The same warden confirmed that subsequent interrogations were conducted with no  
6 lawyer present and he was confronted by witnesses and victims with no lawyer being  
7 present. When Mr Al-Senussi attempted to assert his innocence, he was harassed  
8 and intimidated by his interrogators. These persons were not neutral and impartial  
9 officials, but persons who were the alleged victims of the crimes for which he was  
10 accused. I refer to Annex 3A.3A and Annex 3A.4.  
11 The Libyan government's repeated commitment to conduct the investigations against  
12 Mr Gaddafi and Mr Al-Senussi in a neutral and impartial manner and treat them  
13 fairly is double-speak which bears no correspondence to the reality on the ground.  
14 By consistently providing the Court with misleading and contradictory information,  
15 the government has demonstrated that their commitments to the Court and the  
16 information underlying the challenge are fundamentally lacking in credibility and  
17 coherence.  
18 It is not an excuse for the requesting State to claim that it's unable to provide certain  
19 information because of a vacuum regarding political or legal authority in the country.  
20 Rather, the fact that certain officials might not have the authority to bind the State as a  
21 whole will itself impact adversely on the weight of the assurances as it reflects  
22 negatively on the ability of the State to enforce its assurances, and I refer to the case of  
23 Baysakov and others versus Ukraine and these are in the table of authorities which  
24 were distributed.  
25 The Defence trusted the Government of Libya's written guarantees and as a result

1 spent 26 days in jail, but if the Court accepts Libya's assurances concerning the  
2 willingness and ability of Libya to genuinely prosecute this case, the consequences for  
3 Mr Gaddafi could be far more dire. He could stand to lose his life in a completely  
4 arbitrary manner which has nothing to do with justice.

5 The Court should now be well aware of the inconsistencies and inaccuracies in the  
6 information provided by the government. If the Court were to ignore or turn a blind  
7 eye to such matters, the Court would potentially undermine the integrity and  
8 reliability of its decisions and the judicial processes. Justice should be blind as  
9 concerns any predeterminations regarding the case, but it cannot blindly judge the  
10 case itself.

11 Apart from impacting on the credibility of the government's assurances and  
12 submissions, the fact that various Libyan authorities have provided misleading or  
13 incorrect information to the Court is also directly relevant to the question as to  
14 whether they are willing and able to genuinely investigate and prosecute the case.

15 The question of whether a State is genuinely able, and in particular if it is genuinely  
16 willing, looks beyond the general semblance of an investigation or prosecution and  
17 into the deeper and subjective question of the State's motives. It addresses whether  
18 in earnest the State's actions are ultimately in good faith, or with inappropriate  
19 intentions.

20 Williams and Schabas, in Triffterer's commentary on the ICC, have characterised this  
21 as "... requiring proof of devious intent on the part of the State, contrary to its  
22 apparent actions." Ultimately the term "genuinely" was meant to root out bad faith,  
23 regardless of the degree.

24 The choice of the term "genuinely" also reflects the drafter's attempt to strike a balance  
25 between two equally crucial concepts: On the one hand the desire to respect the

1 principle of complementarity and State sovereignty; and on the other hand the  
2 legitimate fear that some States' actions or inaction may give rise to serious doubts  
3 about their motives and the manner in which they plan to follow through with an  
4 investigation.

5 According to Kirsch and Robinson, the term "genuinely" is a test of whether or not a  
6 national investigation or prosecution if left to its conclusion would result in a travesty  
7 of justice.

8 The ICTR Appeals Chamber has stated in the Barayagwiza case that a travesty of  
9 justice would occur if the international tribunal were to place its imprimatur in  
10 violations of the defendant's rights to be promptly informed of the charges and  
11 brought before a judge to challenge the legality of his detention.

12 In the current case, the term "genuinely" requires the Court to look beyond the  
13 superficial level of the government's promises to do justice to examine more closely  
14 whether justice is in fact being done in Mr Gaddafi's case and, as I will discuss later,  
15 due to the repeated manner in which the Libyan authorities have failed to comply  
16 with their commitment to respect Mr Gaddafi's rights, or to apply Libyan law to his  
17 case in an independent and impartial manner, it is clear that they do not wish to  
18 genuinely achieve justice in this case and the case, if left to its conclusion, would  
19 result in a travesty of justice.

20 Apart from the fact that the overall challenge lacks credibility, the challenge must  
21 specifically fail because the government has failed to establish that the domestic  
22 proceedings relate to the same conduct as the ICC case. The ICC arrest warrant  
23 relates to specific crimes of murder and persecution. The crime of persecution  
24 requires the Prosecution to prove that the defendant engaged in discriminatory  
25 conduct. Libya does not have persecution in its domestic criminal code, nor any

1 crime which penalises murder or other acts committed with discriminatory intent on  
2 prohibited grounds. The domestic proceedings will therefore not encompass the  
3 same conduct as the ICC case. Many of the charges which the Libyan government  
4 has indicated that it intends to pursue are also invalid because their application is  
5 restricted to government officials.

6 The fact that the Libyan penal code is ill-equipped to address a case of this nature also  
7 triggers the application of Article 17(3). Due to the archaic nature of the Libyan legal  
8 system and the unavailability of appropriate criminal procedures, the Libyan  
9 authorities will be unable to carry out the procedures against -- the proceedings  
10 against Mr Gaddafi. The government has even acknowledged in Filing 160, at  
11 paragraph 11, that fundamental systemic issues such as a lack of substantive or  
12 procedural penal legislation may be relevant in assessing inability for the purposes of  
13 admissibility.

14 Although the government promised in its challenge and today that it would propose  
15 an amendment to the law, the authorities have not taken any steps towards adopting  
16 the proposed amendment to incorporate crimes against humanity into domestic law  
17 and there's no indication that the draft law has been put before the GNC for  
18 consideration.

19 The adoption of such a law at this point in time would also be likely to significantly  
20 protract the proceedings, as it will be necessary for the prosecuting authorities to  
21 reorient their investigations in order to address chapeau elements of crimes against  
22 humanity.

23 The government has also failed to demonstrate there's collective credible evidence  
24 which concerns the same conduct as the ICC case against Mr Gaddafi. The burden  
25 falls on the government to provide such a correlation, but for many of the witness

1 summaries there was insufficient information to determine if there's a geographic and  
2 temporal overlap with the ICC case.

3 In this regard, although counsel for Libya have verbally asserted on behalf of the  
4 government that there is a correlation between their investigations and the ICC arrest  
5 warrant, such uncorroborated assertions are not sufficient, and this was confirmed by  
6 the Appeals Chamber in the Muthaura and Ruto et al cases.

7 The government's assertions must also be weighed against the fact that firstly the  
8 government has not referred to any further investigative developments since 1 May  
9 and, secondly, the evidence submitted on 1 May did not support such a correlation.

10 In terms of this confidentiality of obligations which has been invoked by the  
11 government once again to justify non-disclosure, it is notable that the Libyan  
12 authorities have on a number of occasions referred to specific evidential items and  
13 witnesses in the media. For example, the authorities have announced that they  
14 consider Mr Baghdadi Mahamoudi and Mr Al-Senussi to be potential witnesses.

15 The authorities have also discussed various intercepts on a public Al Jazeera  
16 documentary and they have also referred to video evidence in public interviews.

17 Moreover, in terms of the government's rather belated claim that it was somehow  
18 prejudiced in terms of its ability to file more concrete information or evidence due to a  
19 document discovered after 3 October, it is clear that they had already made a  
20 conscious decision prior to the receipt of this document not to file evidence. The  
21 dead-line expired before they received the document in question, according to their  
22 own submissions.

23 It also bears noting that the requirement of adversarial proceedings has impacted  
24 equally on the Defence. The Defence was in possession of highly probative and  
25 credible evidence which pertained to the admissibility of the case, and it had to forego

1 reliance on this evidence due to the fact that it could not ensure security of the  
2 witnesses if the statements were provided to Libya.

3 Moreover, any specific concerns that the government had in relation to filing sensitive  
4 government -- sorry, sensitive documents before the Court could also have been  
5 addressed by filing a request for a protocol to govern the treatment of such  
6 information. The fact that they failed to do so, the fact that they failed to request any  
7 orders for non-disclosure, but tried to ambush the Court mid-session, suggests that  
8 the current approach on this point has more to do with strategic considerations of  
9 once again trying to discredit the Defence and trying to obtain more time.

10 It is also clear that many of the summaries have no nexus with the ICC case, but  
11 instead relate to a later time period when there was an armed conflict in Libya. The  
12 evidence itself must be credible and coherent. This is consistent with the fact that,  
13 unless the evidence underlying the case is potentially admissible under Libyan law,  
14 Libya would be unable to bring Mr Gaddafi to justice.

15 For example, in its challenge and today during the hearing, the government has  
16 indicated that it may rely upon intercept evidence which was collected during the  
17 conflict. However, under both its interim constitutional declaration and its criminal  
18 procedure code, such evidence is inadmissible unless a judge gave prior authorisation  
19 for the intercepts. The Libyan authorities would be unable to genuinely bring  
20 Mr Gaddafi to justice if they were to base their case on inadmissible evidence.

21 In terms of the witness summaries, in the absence of signed statements it cannot be  
22 determined whether the witnesses are actually willing and available to testify for the  
23 prosecuting authorities. It is also not clear whether the summaries refer to what the  
24 witnesses will say or what the authorities would like them to say or believe that they  
25 could say. Indeed, the gap between the aspirational desire of the Libyan authorities

1 concerning the evidence they would like to have and the evidence they actually have  
2 is illustrated by the fact that immediately after Mr Al-Senussi's extradition, the  
3 authorities indicated that the trial against Mr Gaddafi would be delayed, to give them  
4 more time to obtain the testimony of Mr Al-Senussi.

5 It would have been impossible for them to have ascertained at this point in time  
6 whether Mr Al-Senussi had any relevant information, nor would they have known  
7 whether he would be willing to provide such testimony. Of further concern is the  
8 fact that the government freely admits that most of the witnesses are detained former  
9 officials from the Gaddafi regime. As set out in the Defence response, there's been  
10 an extremely high incidence of mistreatment of former Gaddafi officials in detention,  
11 and I refer to annex 3.2A, 3A .1 and 3A. 2.

12 Dark-skinned Libyans have also been subjected to particularly egregious  
13 mistreatment and have been forced to sign confessions that they are mercenaries. I  
14 refer to the Defence response at paragraphs 83 and 105.

15 Mr Gaddafi has been charged with recruiting mercenaries, but at this point it's  
16 impossible to separate the existence of credible evidence on this point and evidence  
17 which may have been procured through duress or influenced by discriminatory  
18 preconceptions.

19 In the confidential version of its response, the Defence referred to indicia which  
20 suggested the persons listed as prosecution witnesses may have been subjected to  
21 mistreatment or that they may have been interrogated in coercive circumstances.

22 The Libyan authorities have also publicly announced that they intend to interrogate  
23 Mr Al-Senussi to extract evidence which can be used against Mr Gaddafi. The  
24 manner in which Mr Al-Senussi has been interrogated is therefore, to some degree,  
25 reflective of the possible treatment which other witnesses may have received.

1 Mr Al-Senussi is an extremely high profile detainee whom the Libyan authorities  
2 promised to treat in a fair manner. If Mr Al-Senussi could be subjected to such  
3 mistreatment whilst under the control and custody of the Central Government, then  
4 it's highly likely that other lower profile witnesses who were detained by militia in  
5 places such as Misrata potentially may have been subjected to far more grave  
6 violations of their rights.

7 Even if the witnesses were subsequently interrogated by Prosecution authorities in a  
8 manner which did not involve duress or mistreatment, their initial mistreatment and  
9 potential fear of further mistreatment would inevitably taint the reliability of their  
10 future testimony. As observed in the US Supreme Court of Bin Mohamed versus  
11 Obama, the existence of torture or mistreatment can impact upon the reliability of  
12 future statements which are given in non-coercive circumstances. This will  
13 particularly be the case if the early abuse dominates the mind of the witness such as  
14 to an extent that the later statements are unreliable.

15 The European Court of Human Rights has also recognised in the case of Gäfgen v.  
16 Germany that later statements could be excluded even if obtained without violating  
17 Article 3 of the Convention because the initially coercive tactics could be viewed as  
18 having continuing impact which tainted the subsequent statements.

19 The government expressly conceded in its challenge that evidence obtained through  
20 duress would be inadmissible in Libyan courts. Libya has also ratified the torture  
21 convention which precludes Libyan courts relying upon any evidence obtained  
22 through torture or cruel and inhumane treatment.

23 Article 7 of the African Charter, which Libya has ratified, provides that every  
24 individual shall have the right to have his case heard. In the 2011 case of Egyptian  
25 Initiative for Personal Rights, the African Commission has interpreted Article 7 to

1 mean that any confession or other evidence obtained by any form of coercion, or force,  
2 may not be admitted as evidence or considered as probative of any fact or in  
3 sentencing. That's at paragraph 212 of that decision.

4 In particular, the African courts' principles and guide-lines on the right to a fair trial  
5 and legal assistance in Africa states that any confession or admission obtained during  
6 incommunicado detention shall be considered to have been obtained by coercion.

7 In the same case, the commission further found that when allegations are made by an  
8 accused that a confession or other statement was obtained through the use of torture  
9 or other coercive treatment, the burden of proof then lies on the State to demonstrate  
10 that the confession in question was freely made, and that was at paragraph 216.

11 When a confession is obtained in the absence of certain procedural guarantees against  
12 such abuse, for example, during incommunicado detention, it should not be admitted  
13 as evidence. That was at paragraph 218.

14 In assessing whether the evidence submitted in support of the challenge is credible  
15 and coherent, the Pre-Trial Chamber cannot ignore any indicia of coercion and  
16 mistreatment. This is consistent with the fact that the Convention against Torture,  
17 which Libya has ratified, excludes courts from relying upon evidence which may  
18 have been obtained through torture for the purpose of extradition proceedings, and I  
19 refer to the case of *GK v. Switzerland*.

20 The Pre-Trial Chamber also cannot disregard the fact that if the case were to proceed  
21 to trial in Libya, Libya would be unable to genuinely bring Mr Gaddafi to justice due  
22 to the fact that wide swathes of Prosecution evidence would be likely to be declared  
23 inadmissible.

24 It would also be a travesty of justice for this Court to place its stamp of approval on  
25 proceedings which have been tainted by such mistreatment and due process

1 violations, and I refer to annex 3.1 at page 14.

2 The government has also failed to demonstrate that it is willing to investigate and  
3 prosecute Mr Gaddafi in an independent and impartial manner, which is consistent  
4 with an intent to bring him to justice. The term "justice" in Article 17 must be given  
5 its ordinary meaning; that is a verdict based on a fair trial, and this is consistent with  
6 the primary objective to the Statute which is to eliminate impunity. Impunity will  
7 not be eliminated if domestic courts convict the wrong person for the wrong crimes  
8 due to a lack of fairness and due process.

9 The objective to eliminate impunity also requires the Court to act in a manner which  
10 is consistent with the condemnation of crimes falling within its remit. Depriving  
11 prisoners of war or protected persons of the right to a fair and regular trial is  
12 specifically penalised by the Statute. If the Court were to authorise States to  
13 prosecute defendants in a manner which deprives them of a right to a fair and regular  
14 trial, it would become complicit in the very crimes which the Court was set up to  
15 eliminate. This would directly contravene the objective and the preamble to the  
16 Statute that the Court should contribute to the prevention of such crimes.

17 As a matter of statutory interpretation, if the word "justice" in Article 17(b) and (c)  
18 were to be defined narrowly in the sense of securing a conviction, and the inclusion of  
19 Article 17(b) and (c) would unnecessarily duplicate Article 17(a). 17(a) refers to the  
20 situation in which the manner in which the proceedings are being undertaken has a  
21 purpose of shielding the person from criminal responsibility. For instance, the  
22 authorities are taking measures which render difficult or impossible to obtain a  
23 conviction against the person.

24 17(b) governs the situation in which there's been unjustified delay in the proceedings  
25 which is inconsistent with an intent to bring the person to justice. If justice is defined

1 narrowly to equate to a conviction, then the scenario in Article 17(b) would already be  
2 addressed by the broad terms of Article 17(a). For example, if the State takes steps to  
3 indefinitely delay the commencement of the trial against the defendant, then that  
4 would be a measure which would shield the person from criminal responsibility for  
5 the purposes of 17(a). 17(b) would therefore be superfluous.

6 17(c) refers to the scenario in which the proceedings are not been conducted  
7 independently or impartially and they are being conducted in a manner which is  
8 inconsistent with an intent to bring them to justice. If the executive were to interfere  
9 in the proceedings in order to secure an acquittal or if the judges are clearly biased in  
10 favour of the defendant, and this is again a scenario which would already be  
11 addressed by 17(a), as it has the objective of shielding the person from criminal  
12 responsibility. It would therefore have been unnecessary for the drafters to include  
13 17(c) as a separate provision. It would only have been logical to include Article 17(b)  
14 and (c) if the phrase "inconsistent with an intent to bring the person concerned to  
15 justice" in these subarticles has a different and broader meaning than "shielding the  
16 person concerned from criminal responsibility". The terms "justice" in Articles 17(b)  
17 and (c) must therefore be defined broadly to equate to a decision based on a fair and  
18 impartial procedure.

19 In this regard, during the hearing the government attempted to argue that Article 17(2)  
20 is limited to situations in which the State in question wishes to shield the defendant  
21 from justice. It is at page 51 of the transcript. This phrase does not exist in the  
22 Statute. The Statute uses the distinct phrases "shield the person from responsibility"  
23 and "bring the person to justice". "Responsibility" thus clearly has a distinct meaning  
24 from "justice". It is therefore clear that the Statute does not equate justice to a finding  
25 that the defendant is responsible, but considers them to be distinct concepts. And

- 1 Madam President, I see it is 4.30. Should we --
- 2 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: I thank you very much. Yes,
- 3 indeed, we have reached the end of our session, so you may continue tomorrow.
- 4 Can you give us an estimate of how long it will take you tomorrow so we can
- 5 organise our time tomorrow?
- 6 MS TAYLOR: Madam President, I think it's about another hour. I have to check,
- 7 I'm sorry.
- 8 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you very much.
- 9 So we will -- we have reached the end of our session today. We will continue
- 10 tomorrow at 9.30. Tomorrow it's 9.30 and so -- and we will consider the document
- 11 that you have submitted in order to decide how we will proceed further on.
- 12 So the meeting is now adjourned until tomorrow.
- 13 THE COURT USHER: All rise.
- 14 (The hearing ends in open session at 4.30 p.m.)