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AMERICAN BRANCH OF THE
INTERNATIONAL LAW ASSOCIATION
INTERNATIONAL CRIMINAL COURT COMMITTEE*

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LIBYA & THE INTERNATIONAL CRIMINAL COURT
QUESTIONS & ANSWERS

THE LIBYAN DEATH SENTENCES AGAINST SAIF AL-ISLAM GADDAFI
AND ABDULLAH AL-SENUSSI & THE ICC’S ADMISSIBILITY RULINGS

DOES THE INTERNATIONAL CRIMINAL COURT HAVE JURISDICTION
OVER CRIMES IN LIBYA?
unanimously to refer the situation in Libya, for events occurring after February 15, 2011,
to the ICC, thereby creating ICC jurisdiction over the situation.1

HAS THE INTERNATIONAL CRIMINAL COURT ISSUED WARRANTS FOR
CRIMES COMMITTED IN LIBYA?
Yes. The International Criminal Court (“ICC”) issued warrants on June 27, 2011
covering: Saif Al-Islam Gaddafi (“Saif Gaddafi”), and Abdullah Al-Senussi (“Al-
Senussi”).2 The warrants allege that Saif Gaddafi exercised control over crucial parts
of the state apparatus, including finances and logistics and had the powers of a
de facto Prime Minister, and that Al-Senussi served as a Colonel in the Libyan Armed
Forces and head of Military Intelligence.3 The crimes alleged in the warrants are crimes
against humanity, including murder and persecution of civilians across Libya committed
through the state apparatus and security forces from February 15, 2011 until at least
February 28, 2011.4

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* This document is primarily the work of the Drafting Subcommittee, consisting of Jennifer Trahan, Linda
Carter, John Cerone, and Matthew Charity. Erin Lovall additionally provided research assistance, as did
Robert Murfeld. This document does not necessarily represent the views of the American Branch of the
International Law Association a whole.
2 A third warrant, against Muammar Mohammed Abu Minyar Gaddafi, was issued, but later, terminated on
November 22, 2011, after his death on October 20, 2011.
3 Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Warrant of
WHAT HAS THE ICC RULED AS TO WHERE SAIF AL-ISLAM GADDAFI SHOULD BE TRIED?
Under article 17 of the Rome Statute, a case will be “inadmissible” before the ICC if national courts are “willing” and “able” to try the accused.

As to Saif Gaddafi, after Libya’s challenge to the admissibility of the case, ICC Pre-Trial Chamber I ruled that he should be tried in The Hague – that the case was “admissible” before the ICC. Specifically, the Pre-Trial Chamber was not convinced that proceedings starting in Libya covered the same conduct as was at issue at the ICC,5 and secondly, because Gaddafi was held by the Zintan militia, and not the Government, and the Government continued to face substantial challenges regarding exercising its judicial powers across the nation, the Pre-Trial Chamber found the national judicial system to be “unavailable.”6

The Appeals Chamber affirmed, dismissing Libya’s appeal,7 holding that the Pre-Trial Chamber did not err in its finding that Libya had failed to demonstrate that it was investigating the same – or substantially the same conduct8 – as was covered by the ICC warrant. Because of that ruling, the Appeals Chamber did not reach the second question as to the “availability” of the national judicial system.9 Hence, the originally ICC request for Saif Gaddafi’s arrest and surrender to the Court10 remains in effect.11

WHAT HAS THE ICC RULED AS TO WHERE AL-SENUSSI SHOULD BE TRIED?
By contrast, as to Al-Senussi, again after Libya’s challenge to the admissibility of the case, ICC Pre-Trial Chamber I ruled that he could be tried in Libya – that the case was “inadmissible” before the ICC. Specifically, the Pre-Trial Chamber found that Libya was

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6 Id., ¶ 205.
7 The Defence requested the Appeals Chamber dismiss Libya’s arguments. The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Appeals Chamber, Judgment on the Appeal of Libya Against the Decision of Pre-Trial Chamber I of 31 May 2013 Entitled ‘Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi,’ ¶¶ 24-29 (May 21, 2014) (hereinafter, the “Gaddafi Admissibility Appeals Decision”).
8 The Appeals Chamber applied the test of whether “substantially the same conduct” was at issue, as had been used by the Appeals Chamber in the Ruto Admissibility Judgment. See Gaddafi Admissibility Appeals Decision, ¶ 59, citing Ruto Admissibility Judgment, ¶ 40.
9 Gaddafi Admissibility Appeals Decision, ¶¶ 213-14.
10 Situation in the Libyan Arab Jamahiriya, Case No. ICC-01/11, Pre-Trial Chamber I, Request to the Libyan Arab Jamahiriya for the Arrest and Surrender of Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi (May 16, 2011) (The request for arrest and surrender is no longer in effect as to Muammar Gaddafi due to his death; the request for Al-Senussi also is no longer in effect given the ruling he could be tried in Libya.)
11 Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Pre-Trial Chamber I, Decision on the Non-Compliance by Libya with Requests for Cooperation by the Court and Referring the Matter to the United Nations Security Council, ¶ 3 (December 10, 2014) (hereinafter, the “Gaddafi Non-Compliance Decision”) (“The case against Saif Al-Islam Gaddafi remains before the Court since . . . it was declared by the Chamber admissible before the Court.”).
investigating/prosecuting the “same” case as the ICC and that domestic authorities were not “unwilling” or “unable” to conduct the domestic proceedings.12

The Appeals Chamber affirmed this finding,13 holding that in evaluating whether Libyan courts were “willing” and “able” to try the accused, generally “due process rights of the suspect were not relevant,” as article 17 was primarily concerned with the accused “evading justice.”14 At that point in time, one of the key arguments as to whether Libya was “willing” and “able” to try Al Senussi related to Al-Senussi’s lack of counsel in early phases of his Libya15 (as well as ICC) proceedings.16 Other issues, such as whether Al-Senussi would be unable to call witnesses in the Libya proceedings, were deemed at that point to be “speculative.”17

As a result, “[p]roceedings against Abdullah Al-Senussi before the ICC came to an end on 24 July 2014 when the Appeals Chamber confirmed Pre-Trial Chamber I’s decision declaring the case inadmissible before the ICC.”18

WHY HAS SAIF GADDAFI NOT BEEN TRANSFERRED FOR TRIAL IN THE HAGUE?
Under current court rulings, Saif Gaddafi should long ago have been transferred to the ICC to stand trial. However, complicating that result is the fact that (as noted above) he is held, not by any governmental authority in Libya, but by the Zintan militia, which has not transferred him to The Hague, and refuses to hand him over to any Libyan authorities.19 He has been held by this group in the northwestern city of Zintan, since his capture in November 2011.

(This document refers to “governmental authorities” because, in the chaotic situation in Libya, there are two competing de facto governments.)20

14 Al-Senussi Admissibility Appeals Decision, ¶ 2 & 218.
15 Id., ¶ 133 et seq.
16 Id., ¶ 26 et seq.
17 Id., ¶ 244 (i).
20 “The hostilities have led to the emergence of two de facto governments, an internationally recognized government based in Tobruk and al-Bayda that nominally controls much of eastern Libya, and a rival self-declared authority based in Tripoli that controls swathes of western Libya, where the trial took place.” Human Rights Watch, Libya: Flawed Trial of Gaddafi officials, (July 28, 2015),
DOES THE US HAVE A WAR CRIMES REWARDS PROGRAM?
Yes. The U.S. has a War Crimes Rewards Program ("WCRP") through which persons who provide information leading to the arrest or conviction of a foreign national charged by an international or hybrid tribunal can receive monetary payments of up to $5 million.21 The Department of State’s Office of Global Criminal Justice manages the WCRP. 22

COULD SAIF GADDAFI BE COVERED UNDER THE U.S. WAR CRIMES REWARDS PROGRAM, THEREBY INCENTIVIZING HIS SURRENDER TO THE ICC?
Yes. The U.S. could help incentivize transfer of Saif Gaddafi from the Zintan militia to the ICC by designating him as covered under this program.23 This would not involve an amendment to any legislation, but a simple designation by the Secretary of State, as the Program already permits rewards covering:

[information leading to] the arrest or conviction in any country, or the transfer to or conviction by an international criminal tribunal including a hybrid or mixed tribunal, of any foreign national accused of war crimes, crimes against humanity, or genocide . . . .24

SHOULD SAIF GADDAFI BE TRANSFERRED FOR TRIAL IN THE HAGUE?
Yes. The ICC’s ruling that the case is admissible in The Hague, and its outstanding arrest warrant, and request for arrest and surrender,25 should be respected.

The Court has also made a formal finding of non-cooperation with respect to the case against Saif Gaddafi – namely the failure by Libya to surrender him to the Court, which finding has been referred to the U.N. Security Council.26 Rome Statute article 87(7) specifically permits the Court to make a finding of non-cooperation and refer the matter to the ICC’s Assembly of States Parties ("ASP"), or “where the Security Council referred the matter to the Court, to the Security Council.”27 The U.N. Security Council responded

https://www.hrw.org/news/2015/07/28/libya-flawed-trial-gaddafi-officials. This document takes no position on which is the de jure government.
22 Id.
23 See, e.g., Beth van Schaak, ICC Fugitives: The Need for Bespoke Solutions (Santa Clara Univ. Legal Studies Research Paper No. 06-14), http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1856&context=facpubs (2014) (“In April 2013, Secretary of State John Kerry designated the ICC’s LRA defendants into the expanded program”).
24 Department of State Rewards Program Update and Technical Corrections Act of 2012, Pub. L. 112-283, 112th Congress, http://www.gpo.gov/fdsys/pkg/PLAW-112publ283/html/PLAW-112publ283.htm (emphasis added). The legislation expanding the Arrest Rewards Program also states that the designation should serve the "national interests of the United States." Id. Here, the designations of Libya accused would serve US national interests by furthering justice in a situation where the U.S. voted for ICC referral, and where the U.S. was militarily engaged.
25 ICC Warrant, supra note 25.
26 Gaddafi Non-Compliance Decision, supra note 11, ¶ 4. The finding of non-cooperation also covered the failure to return certain documents that were seized in Zintan by the Libyan authorities from former Defense counsel.
in Resolution 2238, adopted in September 2015, calling upon Libya to cooperate fully with the ICC and ICC Prosecutor.28

Since the U.S. was a member of the U.N Security Council that referred the situation in Libya to the ICC, U.S. assistance by designating any ICC Libyan accused as covered by the WCRP would be particularly helpful and appropriate.

However, all members of the U.N. Security Council, and the Council as a whole, still need to work to ensure that situations that the Council refers to the ICC are able to proceed.29 Calling upon Libya to cooperate fully, as the Security Council has done, has not achieved the desired results.

To start with, it would be helpful if the Security Council would change its policy from simply referring situations to the ICC to a policy of using its Chapter VII powers to provide effective support and prompt states to assist the ICC in executing arrest warrants.30

**HAVE SAIF GADDAFI AND AL-SENUSSI NOW BEEN SENTENCED TO DEATH IN LIBYA?**

On July 28, 2015, Tripoli’s Court of Assize handed down a verdict sentencing both Saif Gaddafi and Al-Senussi to death by firing squad, as part of a trial against 32 Gaddafi-era officials for a wide variety of charges related to attempted suppression of the 2011 uprising.31 As part of the group trial, a total of nine were sentenced to death.32 While the verdict is still subject to some form of appeal in Libya,33 should the trial verdict be affirmed, there is a substantial chance of both Saif Gaddafi and Al-Senussi being

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27 Rome Statute of the International Criminal Court, U.N. doc. A/CONF. 183/9; 2187 UNTS 90, art. 87(7) (hereinafter, the “Rome Statute”). As a non-State Party, Libya has a duty to cooperate based on the Security Council’s referral resolution. U.N. SC Res. 1970, supra note 1 (“Libya shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor.”).


31 See HRW, supra note 20 (“Tripoli’s Court of Assize convicted 32 defendants, sentencing nine of them to death and 23 to prison terms ranging from five years to life imprisonment.”).

32 Id.

33 The case is set to go to “cassation chamber” review, but this appears limited to questions of law. See HRW, supra note 20 (“Under Libyan law, the cassation chamber’s consideration of verdicts issued by the Court of Assize appears limited to questions of law. However, to guarantee a genuine examination, the higher court should be competent to consider elements of both fact and law . . . .”); UNSMIL, Concerns About Verdict in Trial of Former Gadhafi-era Officials (July 29, 2015) (“the next step in the judicial process is only cassation – a review of the application of Libyan law, not of questions of fact – rather than a proper appeal as required by international standards.”); International Commission of Jurists, *Libya: Unfair Trial of Saif Al-Islam Gadhafi and Others a Missed Opportunity to Establish Truth, Violates Right to Life*, (July 28, 2015) (similar).
executed. (Because Saif Gaddafi is not in the hands of governmental authorities, it is unknown whether he would be transferred for execution, or the sentence would be carried out by the Zintan militia.)

WERE THE PROCEEDINGS IN LIBYA CONDUCTED FAIRLY, RESPECTING THE DUE PROCESS RIGHTS OF THE ACCUSED?

Concerns that the trials were unfair and violated due process protections have been expressed by: the Office of the U.N. High Commissioner for Human Rights,34 the U.N. Support Mission in Libya (“UNSMIL”),35 Human Rights Watch,36 Amnesty International,37 the International Bar Association,38 International Commission of Jurists,39 No Peace Without Justice,40 and Lawyers for Justice in Libya.41

Observer accounts42 suggest there were numerous due process/ fair trial rights violations associated with the trial in Libya. Human Rights Watch has concluded: “This trial has been plagued by persistent, credible allegations of fair trial breaches that warrant independent and impartial judicial review.”43 Specifically, observer and NGO concerns include - for those accused present at the trial:

■ inadequate assistance of counsel;44

■ lack of adequate time and facilitation to prepare the defense;45

34 UN Human Rights Officials Seriously Concerned by Verdicts in Trial of Former Members of Qadhafi Regime, U.N. News Center (July 28, 2015) (“the UN High Commissioner for Human Rights . . . told reporters that her Office (OHCHR) is ‘deeply disturbed’ at the verdicts and sentences handed down today.”).
35 UNSMIL, supra note 33; see also Chris Stephen, Gaddafi’s Son Saif al-Islam Sentenced to Death by Court in Libya, The Guardian (July 28, 2015) (“Claudio Cordone, from the UN mission [UNSMIL], said: ‘Given these shortcomings, it is particularly worrisome that the court has handed down nine death sentences.’”).
36 HRW, supra note 20.
37 Amnesty International, Libya: Flawed Trial of Al-Gaddafi Officials Leads to Appalling Death Sentences (July 28, 2015) (“Today’s convictions of more than 30 al-Gaddafi-era officials, including the imposition of nine death sentences, follow a trial marred with serious flaws, that highlight Libya’s inability to administer justice effectively in line with international fair trial standards. . . .”).
38 International Bar Association, Libya’s Trial of Former Regime Members Prompts Serious Concern (July 28, 2015).
39 ICIJ, supra note 33.
41 Lawyers for Justice in Libya, LFJL is Concerned that the Absence of Fair Trial Standards During Gaddafi Official Trials Will Jeopardise the Right of Victims to Justice (July 29, 2015).
42 The ABILA ICC Committee has no independent knowledge of the due process/fair trial rights violations, but refers to and relies on numerous publicly available and independent sources in its analysis.
43 See HRW, supra note 20 (“Tripoli’s Court of Assize convicted 32 defendants, sentencing nine of them to death and 23 to prison terms ranging from five years to life imprisonment.”).
44 UNSMIL, supra note 33 (“During their pre-trial detention defendants were denied access to lawyers . . .”).
45 Id. (“Defence lawyers said they faced challenges in meeting their clients privately or accessing the full case file, and some said they received threats.”).
- lack of an opportunity to present sufficient defense witnesses; 46
- lack of an opportunity to cross-examine prosecution witnesses; 47
- lack of impartial and transparent proceedings; 48 and
- lack of a reasoned ruling—the failure to make individualized determinations as to individual criminal responsibility. 49

Additional fair rights violations are thought to include denial of the right “to remain silent, to be promptly informed of the charges against [one], [and] to challenge the evidence brought against [one].” 50

The IBA has also collected information that defence attorneys may not have been able to perform their professional duties during the trial fully. The IBA has corroborated reports that lawyers’ private access to their clients may have been circumvented by security forces, and that lawyers may also have had undue difficulty in receiving access to essential trial documents, such as the prosecution’s case file.

IBA, supra note 38.
46 UNSMIL, supra note 33 (defendants “were constrained by the court to two or three witnesses per defendant and some said that witnesses were reluctant to appear in court due to fears about their safety.”).
47 Id. (“The prosecution did not present any witnesses or document in court, confining itself entirely to the written evidence available in the case file . . . .”); id. (“The court did not respond to defence counsel requests to examine prosecution witnesses.”).
48 Heba Saleh, Gaddafi’s Son Sentenced to Death in Libya, FINANCIAL TIMES (July 28, 2015) (“Al-Mabrouk Ghrira Omran, the Beida government’s justice minister, was quoted in the Libya media condemning the trial as illegal and saying that the judges were acting under duress. He called on the international community to refuse to recognise the verdict . . . .”); Tarek El-Tablawy, Libya Court Sentences Son of Gaddafi to Death, BLOOMBERG NEWS (July 28, 2015) (“Judges in the capital faced pressure from the Islamists to reach a guilty verdict, the Tobruk government’s justice minister said in comments carried by the Libya Herald. . . . Rights groups have also criticized the proceedings as biased and lacking due process.”); Libyan Court Sentences Gaddafi Son Saif, 8 Other Ex-Officials to Death, REUTERS (July 29, 2015) (“The trial process and outcome drew condemnations abroad, with Human Rights Watch and a prominent international lawyer saying it was riddled with legal flaws and carried out amid widespread lawlessness undermining the credibility of the judiciary.”); id. (“legal experts and rights advocates said the proceeding was tainted and politicised from the start.”); Stephen, THE GUARDIAN, supra note 35 (“Senussi’s London-based lawyer, Ben Emmerson QC, said ‘extreme fear, insecurity and intimidation’ had dominated the trial.”); ICA, supra note 33 (“The ICJ is concerned that political and security instability in Libya continues to undermine the ability of the judiciary to function and administer justice independently and impartially.”); IBA, supra note 38 (“of particular concern are the restrictions placed on trial observers, journalists, family members and others on attending the trial proceedings . . . .” “Despite the general lack of information, a picture has emerged suggesting public access to the proceedings has been systematically compromised by the unsupervised security situation that continues to prevail throughout the country.”); id. (“The trial proceedings raise substantial concern regarding transparency.”).
49 UNSMIL, supra note 33 (“The evidence of criminal conduct was largely attributed to the defendants in general, with little effort to establish individual criminal responsibility.”).
50 Amnesty International, supra note 37 (also noting “[i]n some cases, detainees were held incommunicado and in unofficial detention places for extended periods.”).
WAS SAIF GADDAFI PRESENT FOR HIS TRIAL?
No. Saif Gaddafi was tried and sentenced in absentia. While trials in absentia are not necessarily illegitimate, and are permitted under Libyan law, under Libyan law there were certain procedural protections that should have been followed, but were not. In fact, Saif Gaddafi was only able to have video access to (according to some accounts) 3 of 24 sessions – so that he was unable to follow most of the trial. In these circumstances, many of Saif Gaddafi’s fair trial rights were violated – as he was not able to meaningfully participate in the proceedings.

The International Bar Association concludes:
Reports confirm that Mr. Gaddafi was never physically present during the trial and that he was not connected via video link for at least 17 of the 24 court sessions. This strongly indicates that his right to be present at trial, which is protected under international law, was violated by his continuing absence. Furthermore, despite the court appointing a lawyer on Mr. Gaddafi’s behalf, it remains uncertain if the accused was able to consult properly with his lawyer and, if so, whether the nature of the contact was sufficient to enable him to engage his right to participate in his own defence fully.

WERE THERE ALLEGATIONS OF ILL-TREATMENT OF THE ACCUSED?
Yes. There are also concerns whether Saif Gaddafi and Al-Senussi were subjected to torture or ill-treatment while in detention.

ARE DEATH SENTENCES INCREASINGLY DISFAVORED INTERNATIONALLY?
Yes. While certain countries still utilize the death penalty (such as Libya), no current international tribunal authorizes death as a sentence, and there is growing consensus to abolish the death penalty at the national level. It is not an available punishment before the ICC, nor was it an option at the International Criminal Tribunal for the former Yugoslavia (“ICTY”), the International Criminal Tribunal for Rwanda (“ICTR”), the Special Court for Sierra Leone, or the Extraordinary Chambers in the Courts of Cambodia (“ECCC”). The U.N. General Assembly and the African Commission on Human and Peoples’ Rights have issued resolutions calling for a moratorium on the death penalty. Amnesty International reports that there are presently 140 countries that do not use the death penalty either by law or by practice. Of the 123 States-Parties to the

51 Id.
52 HRW, supra note 20.
53 IBA, supra note 38. (Any numerical inconsistency between the HRW and IBA figures is from those sources.)
54 UNSMIL, supra note 33 (some defendants “reported that they were beaten or otherwise ill-treated”); David D. Kirkpatrick, Son of Muammar el-Qaddafi Sentenced to Death in Libya, NY TIMES (July 28, 2015) (Rodney Dixon, one of Mr. Senussi’s lawyers at the International Criminal Court, said by telephone that they had information that Mr. Senussi had been mistreated while in prison and had photos showing bruising on his head and face. Mr. Dixon said he had tried numerous times to see his client but had been refused.”); HRW, supra note 20.
Rome Statute, 73 have abolished the death penalty entirely and another 22 states do not actively impose it.57

**DOES CASE LAW SUPPORT IMPOSITION OF THE DEATH PENALTY WHERE THERE WERE SYSTEMATIC DUE PROCESS VIOLATIONS?**

No. Imposition of the death penalty against an accused whose fair trial rights appear to have been systematically violated or who was not even present at his trial appears wholly unwarranted.58 It violates, or is inconsistent with, accepted international human rights, such as the provisions of the International Covenant on Civil and Political Rights that guarantees no arbitrary deprivation of life.59

The Inter-American Commission on Human Rights60 has repeatedly found human rights violations to exist where the death penalty is imposed after a trial with due process violations.61

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56 Death Penalty Information Center, Abolitionist and Retentionist Countries [viewed 10/20/15], at http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries?scid=50&did=140. Of the 140 countries, 98 prohibit the death penalty by law for all crimes; 7 prohibit the death penalty for ordinary crimes, retaining it for crimes such as treason; and 35 are abolitionist in practice, which means that they have not had an execution in the last 10 years and probably have established a practice against using the death penalty. Only 58 countries retain the death penalty. The majority of executions internationally occur in China, Iran, Saudi Arabia, Iraq, and the United States. Amnesty International, Death Sentences and Executions 2014, at http://www.amnestyusa.org/research/reports/death-sentences-and-executions-2014?page=show [viewed 10/24/15]. Even in the United States, where 31 states and the federal government retain the death penalty, executions have decreased. http://www.deathpenaltyinfo.org/executions-year. Moreover, there continues to be reconsideration of the death penalty. For example, within only the last six years, five states have abolished it, bringing the total today of 19 states in the U.S. with no death penalty. Death Penalty Information Center, States with and without the Death Penalty [viewed 10/24/15], at http://www.deathpenaltyinfo.org/states-and-without-death-penalty.

57 Of the 123 States-Parties: 24 are retentionist countries (active death penalty including for ordinary crimes); 73 are abolitionist for all crimes; 4 are abolitionist for ordinary crimes (but would still have it for crimes such as treason or military crimes); 22 are "abolitionist in practice," which means they have the death penalty for ordinary crimes, but "have not executed anyone during the last 10 years and are believed to have a policy or established practice of not carrying out executions." On the basis of these numbers, only 24 of 123 States Parties are actively using the death penalty. See Death Penalty Information Center, Abolitionist and Retentionist Countries, supra note 56.

58 IBA, supra note 38 (in the circumstances, "the court’s imposition of the death penalty is wholly unwarranted.").

59 All major human rights treaties prohibit the arbitrary deprivation of life, such as the International Covenant on Civil and Political Rights (ICCPR), with 168 States Parties. ICCPR, 999 U.N.T.S. 171, 6 I.L.M.368, art. 6(1) (Mar. 23, 1976). It provides: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” Similar provisions exist in the Universal Declaration of Human Rights, the American Convention on Human Rights, the European Convention on Human Rights, and the African Charter on Human and Peoples’ Rights. The European Convention goes further in its Protocols 6 and 13, requiring the abolition of the death penalty both in peace and in war time. The Second Optional Protocol to the ICCPR also effectively calls for the abolition of the death penalty. There are presently 81 States Parties to the Protocol. See L. CARTER, E. KREITZBERG, & S. HOWE, UNDERSTANDING CAPITAL PUNISHMENT LAW 445-447 (LexisNexis 3d ed. 2012) and http://indicators.ohchr.org/ (updated statistics).

60 The Inter-American Commission can hear individual complaints against members of the Organization of American States.
Similarly, mandatory death sentences without the ability to consider mitigating circumstances have been repeatedly held to be in violation of treaties and national constitutions. In the United States, for example, death penalty sentences have been overturned for due process violations, such as ineffective assistance of counsel and failure to provide the defense with exculpatory evidence.

Additionally, the Human Rights Committee, interpreting the International Covenant on Civil and Political Rights (ICCPR), has found that a State without the death penalty violates the prohibition on the arbitrary deprivation of life if the State extradites an individual to a country with the death penalty unless assurances are obtained that death will not be imposed as a punishment.

This Committee takes no position on whether or not it is appropriate for the ICC to rule a case “inadmissible” and thereby implicitly sanction a domestic court trial in a death penalty imposing country—a position that warrants further consideration. Certainly, the existence of a domestic death penalty ought to be a concern for the Court in any admissibility proceedings, and the ICC’s standards for deferring to such a domestic court process should be even-the-more exacting in such circumstances.

**DID THE ICC CORRECTLY RULE THAT AL-SENUSSI SHOULD BE TRIED IN LIBYA?**

An argument could be made that, in its original admissibility rulings, the ICC was insufficiently concerned with the potential due process rights of the accused, as to the trial that might occur in Libya, when the Libyan judiciary was in a state of turmoil.

As noted above, under article 17, the ICC will not hear a case where the national court is “willing” or “able” to do so. Article 17 is somewhat problematic in that it appears not to recognize a third category—where the national court, is “all too willing” to convict, without adherence to due process concerns.

61 It has held the American Convention on Human Rights violated by imposition of the death penalty where there has been undue delay in bringing the person to trial, failure to provide an impartial tribunal, incompetent counsel, failure to provide notice of consular assistance to foreign nationals, racial bias in the proceedings, or inhuman conditions on death row. See The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition, Inter-American Commission on Human Rights (2012), at http://www.oas.org/en/iachr/docs/pdf/deathpenalty.pdf.
62 See Carter, supra note 59 (noting national decisions and decisions from the Human Rights Committee and the Inter-American Court of Human Rights).
64 The Human Rights Committee monitors implementation of the ICCPR and can hear individual complaints about compliance with the treaty.

Alternatively, at least one scholar has written (albeit regarding a different context) that the language of Article 17 is not an exclusive list of what constitutes “unwilling.” See Darryl Robinson,
AREN'T DUE PROCESS CONCERNS INHERENTLY A CONCERN OF THE ICC?
The sources of law that the ICC applies are first, the “[Rome] Statute, Elements of Crimes and its Rule of Procedure and Evidence.” 67 Yet, it also applies “where appropriate, applicable treaties and the principles and rules of international law.” 68

Due process norms are enshrined in article 14 of the International Covenant on Civil and Political Rights69 – as well as many other sources, including Article 67 of the Rome Statute. They require numerous due process protections be observed in order for fair trial rights not to be violated.

In addition to article 17 (or in interpreting article 17), an argument could be made that article 21 of the Rome Statute requires that the Court interpret the Rome Statute (thus, Article 17) “consistent with internationally recognized human rights.” Article 17 requires “genuine” proceedings, an independent and impartial proceeding, and repeatedly refers to whether the proceedings are “inconsistent with an intent to bring the individual to justice.” All of these terms could, and should, be interpreted to take into account the rights of the accused.

As noted above, concerns about due process appear to be particularly warranted where the death penalty is an available punishment in national court proceedings.

DID THE AL-SENUSSI APPEALS CHAMBER HAVE ANY CONCERNS HE MIGHT NOT RECEIVE DUE PROCESS IN LIBYA?
Yes. The Appeals Chamber did leave an opening in its July 24, 2014 ruling, suggesting that it would not utterly ignore due process violations by a national court:

It is clear that regard has to be had to ‘principles of due process recognized by international law’ for all three limbs of article 17(2), and it is also noted that whether proceedings were or are ‘conducted independently or impartially’ is one of the considerations under article 17(2)(c). . . . As such, human rights standards may assist the Court in its assessment of whether the proceedings are or were conducted ‘independently or impartially’ within the meaning of article 17(2)(c). 70

To the extent the Appeals Chamber also suggested the national proceedings would have to be “completely lack[ing in] fairness” such that they fail to provide “any genuine form

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67 Rome Statute, art. 21.1(a).
68 Id., art. 21.1(b).
69ICCR, supra note 59.
70 Al-Senussi Admissibility Appeals Decision, ¶ 220.
of justice,”71 before the ICC can be the proper venue, the Judges are setting the threshold too high.

Alternatively, it is conceivable that, given the proceedings in Libya, even that very high threshold may have been met. (Presciently, Al-Senussi’s defense counsel at the ICC predicted that he would be “convicted and sentenced to death in proceedings [in Libya] falling well below any acceptable standard [of due process].”72)

**HAVE CONDITIONS IN LIBYA BECOME MUCH MORE CHAOTIC AND UNSTABLE SINCE THE AL-SENUSSI APPEALS CHAMBER RULING?**

Yes. To the extent that the Appeals Chamber perceived that Libya was “willing” and “able” to prosecute through its national courts, the Appeals Chamber was ruling at a different period of time.

Since that ruling, the situation in Libya has become much more chaotic and unstable. The internationally recognized Government was forced to retreat to the Eastern Libyan town of Beida, and the Al-Senussi et al. trials have been held in the militia-controlled areas beyond the reach of the Government. To the present day, the Government has no control over the trial process or the defendants and the Justice Minister openly condemned the continuation of the proceedings in Tripoli.73 Already at the time of the Pre-Trial Chamber ruling in October 2013, Judge van den Wyngaert issued a declaration stating that she worried whether Libya’s security problem compromised the ability of the state to prosecute Al-Senussi through its national courts.74

Indeed, concerns expressed in the Saif Gaddafi admissibility challenge as to whether the State could exercise its judicial power over his trial—which was part of the logic for finding the Libya judicial system “unavailable” in his case75—has applied equally to Al-Senussi, since the Government has not been able to exert control over his trial either.

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71 Id. ¶ 190 and 229.
72 Id., ¶ 234.
73 Stephen, THE GUARDIAN, supra note 35.
74 She stated:
   I cannot help but note the widely reported abduction and release of Libyan Prime Minister Ali Zeidan on 10 October 2013. It is unclear, at this point in time, what effect these events might have on the already precarious security situation in Libya. Further deterioration of the security situation could extend to Mr Al-Senussi’s legal proceedings and, accordingly, affect Libya’s ability to carry out those proceedings.
   . . . Prior to ruling on the present challenge, I would have preferred to seek submissions from the parties and participants as to whether Libya’s security situation remains sufficiently stable to carry out criminal proceedings against Mr Al-Senussi.
75 Gaddafi Admissibility Decision, ¶ 205.
WERE THE DUE PROCESS CONCERNS AT ISSUE DURING THE AL-SENUSSI ADMISSIBILITY CHALLENGE MUCH MORE LIMITED THAN THE VIOLATIONS THAT OCCURRED?

Yes. As noted above, when the Appeals Chamber affirmed the Pre-Trial findings, key issues included: (1) whether Al-Senussi’s lack of counsel during investigation stages of proceedings in Libya,76 or (2) the anticipation that he might not be able to call defense witnesses due to lack of adequate witness protection measures,77 would render Libya “unwilling” or “unable” to conduct proceedings.

As detailed above, the due process violations that occurred appear to have been far more extensive than those that the Pre-Trial Chamber and Appeals Chamber considered. While it was then speculative whether Al-Senussi would be able to call defense witnesses, or how the proceedings in Libya would be conducted, there is now no need to speculate, as there is actual information that could be the basis of a more informed ruling.

WHO COULD REQUEST REVIEW OF THE ADMISSIBILITY ISSUE IN THE AL-SENUSSI CASE?

Article 19(10) of the Rome Statute provides that “[i]f the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.”78 Thus, the Prosecutor clearly could, and should, request review of the admissibility issue.

Potentially, Al-Senussi’s counsel also could challenge the inadmissibility finding. Rome Statute Article 19(4) states that “[i]f the admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State . . . .” But “in exceptional circumstances, the Court may grant leave for a challenge to be brought more than once . . . .” Thus, Al-Senussi would need to demonstrate that “exceptional circumstances” warrant bringing a second admissibility challenge (since the first admissibility challenge was already brought by Libya).79

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76 See, e.g., Al-Senussi Admissibility Appeals Decision, ¶ 191 (examining the lack of defense counsel and finding it would not reach the “high threshold” for finding Libya unwilling genuinely to investigate or prosecute).
77 Id., ¶ 244.
78 Rome Statute, art. 19 (10) (emphasis added).
79 One authority interprets Article 19(4) as inapplicable, because technically Senussi would be challenging “inadmissibility” – so his is an “inadmissibility” challenge, not an “admissibility” challenge; see Kevin Jon Heller, It’s Time to Reconsider the Al-Senussi Case. (But How?) OPINIOJURIS, http://opiniojuris.org/2014/09/02/time-reconsider-al-senussi-case/. However, it is unclear that such a hyper-technical reading of the Rome Statute is warranted. See also id. (“To be sure, it’s possible to read ‘admissibility’ more generally, as encompassing any challenge involving the admissibility or inadmissibility of a case. That’s probably the better reading, given that the drafters of the Rome Statute could easily have imagined a situation in which a suspect would prefer to be prosecuted by an international tribunal than by a domestic court.”).

Under that author’s reading, because Senussi’s challenge would be brought subsequent to the commencement of his domestic trial in Libya, Senussi should bring a challenge under Article 20 (ne bis in idem) – the prohibition on double-jeopardy. This author thinks a better reading is to first reopen admissibility and then examine double-jeopardy. In other words, the case has to be admissible, and, if it is, the Court would also need to ensure that double-jeopardy would not bar it.
WOULD NE BIS IN IDEM (THE PROHIBITION AGAINST DOUBLE-JEOPARDY) PREVENT ICC TRIALS SUBSEQUENT TO TRIALS IN LIBYA?
No. It is true that a defendant may not be prosecuted twice for the same conduct by two different courts. However, the Rome Statute provides an exception to double-jeopardy (ne bis in idem) in article 20(3)(b) if the initial trial was not “conducted independently or impartially in accordance with the norms of due process recognized by international law and [was] conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concern to justice.” While this language could be read narrowly as concerned only with national court proceedings that are too lenient on the accused, it need not be read so restrictively. Arguably, an overzealous national court trial that violates due process protections is also “inconsistent with an intent [genuinely] to bring a person concerned to justice.”

SHOULD THIS ISSUE ONLY BE REVIEWED WHEN THE DEATH SENTENCES ARE FINALIZED?
While ideally review would happen after appellate proceedings in Libya are finalized, because of the substantial risk of execution, there is reason to raise this issue now. Time might simply be too short, between finalization of Libyan sentences for the ICC to receive submissions and rule upon them. Given the obviously irreversible nature of the death penalty, and the limited ability of the Court to control events in the chaotic situation in Libya (i.e., a request to stay execution during pending ICC proceedings might or might not be respected), these particular circumstances merit current attention and resolution.

COULD THE ICC EXPAND ITS WARRANTS TO COVER ADDITIONAL CRIMES COMMITTED IN LIBYA RELATED TO 2011 EVENTS?
Yes. The ICC could issue additional warrants for additional crimes and/or perpetrators, such as crimes committed by pro-Gaddafi forces after February 28, 2011 or crimes committed by opposition (anti-Gaddafi) forces in conjunction with the 2011 uprising.

The Office of the Prosecutor (“OTP”), under its prior Prosecutor, chose to issue only three warrants related to the 2011 uprising. It is possible in light of what is currently known, that more of the Libyans who were sentenced to death should also be tried at the ICC.

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80 See Rome Statute, art 20 (ne bis in idem).
81 See supra note 33 (concerns with the limited cassation chamber review that may occur).
82 See Warrant of Arrest, supra note 3; see also note 2.
ARE THERE ADDITIONAL CRIMES BEING PERPETRATED IN LIBYA TODAY – INCLUDING CRIMES BY THE SO-CALLED “ISLAMIC STATE” — THAT THE ICC COULD OR SHOULD EXAMINE?

Reports suggest that a wave of murders, including beheadings, have been committed by members of the so-called “Islamic State” (ISIS). There are also reports of indiscriminate shelling, and targeting of residential communities and hospitals.83 Human Rights Watch maintains that over the last year attacks by armed groups on civilians and civilian property in some cases amount to war crimes, and that arbitrary detention, torture, forced displacement, and unlawful killings may amount to crimes against humanity.84

These crimes, as well as any other instances of war crimes, crimes against humanity, or genocide perpetrated in Libya subsequent to the U.N. Security Council’s referral, are subject to ICC jurisdiction.

CAN THE ASSEMBLY OF STATES PARTIES PLAY A ROLE IN ENSURING THE AL-SENUSSI AND SAFI GADDAFI TRANSFERS?

Yes, as to Saif Gaddafi. That he has not been transferred is a failure of cooperation. Thus, it is quite appropriately an issue for the ASP and the U.N. Security Council to address. The U.N. Security Council—which so far has called for Libya to cooperate—could expressly call for the accused’s transfer to The Hague; the ASP could do likewise. The ASP could also encourage the help of non-States Parties, such as the U.S., by noting the U.S.’s ability to cover Saif Gaddafi in the expanded WCRP, and/or encourage other states to develop similar programs vis-à-vis ICC fugitives (or those subject to transfer to the ICC). While the Court, to date, has referred Libya’s non-cooperation to the UNSC, not the ASP, that would not preclude the ASP from taking action “so long as it does not conflict with a Security Council decision.”85

The ASP should not intervene in the Al-Senussi situation at present, as it is a judicial matter where he should be tried. (As noted above, the current ICC proceedings came to an end after the decision of inadmissibility was affirmed.)86 Rather, it would be for the OTP or Al-Senussi’s counsel to reopen the admissibility challenge, and the Court to expeditiously rule on it. Should the ICC rule that his case – given the state of proceedings in Libya – now has become “admissible” in The Hague (and is not barred by

83 Lawyers for Justice, Lawyers for Justice in Libya Calls for Accountability and Caution in Response to the Ongoing Violence in Sirte (Aug. 19, 2015) (“between 12 and 15 August 2015, 57 individuals have died, 12 of whom were allegedly crucified and beheaded by actors affiliated with ISIS.”).
84 HRW, supra note 20.
86 Gaddafi Non-Compliance Decision, supra note 11, ¶ 3.
ne bis in idem), it would then be for States Parties, as well as non-States Parties, and/or members of the U.N. Security Council to similarly call for his immediate transfer and ensure that it occurs (including, at that point, through his designation into the U.S. WCRP).

-- Jennifer Trahan
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