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PRE-TRIAL CHAMBER I

Before: **Judge Péter Kovács, Presiding Judge**
Judge Marc Pierre Perrin de Brichambaut
Judge Reine Alapini-Gansou

SITUATION IN LIBYA

IN THE CASE OF
THE PROSECUTOR v. SAIF AL-ISLAM GADDAFI

Public Document
with public Annexes A and B

Observations on behalf of victims on the "Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute"

Source: **Office of Public Counsel for Victims**

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

The Office of the Prosecutor
Ms Fatou Bensouda
Mr Julian Nicholls

Counsel for the Defence
Ms Dató Shyamala Alagendra
Mr Essa Faal
Mr Khaled Al Zaidy

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victim

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims
Ms Paolina Massidda
Ms Sarah Pellet

The Office of Public Counsel for the Defence

States' Representatives
Competent authorities of the State of Libya

Amicus Curiae
Lawyers for Justice in Libya/REDRESS Trust

REGISTRY

Registrar
Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. INTRODUCTION

1. The Principal Counsel of Office of Public Counsel for Victims (respectively the "Principal Counsel" and the "OPCV") submits her observations on behalf of victims[1] on the "Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute" filed on 6 June 2018 (the "Admissibility Challenge").[2]

2. Mr Gaddafi posits that he has been tried in Libya for the same conduct for which he is sought by the Court, and, accordingly, the case is inadmissible pursuant to articles 17(l)(c) and 20 of the Rome Statute (the "Statute"). The Principal Counsel argues that the Admissibility Challenge should be dismissed because the individual circumstances of the proceedings held against Saif Al-Islam Gaddafi ("Mr Gaddafi" or the "Suspect") in Libya demonstrate that he cannot invoke the *ne bis in idem* principle under article 20(3) of the Rome Statute. Indeed, (i) the Libyan proceedings did not cover the 'same conduct' as the one for which Mr Gadhafi is sought by the Court; (ii) Libyan proceedings were conducted in flagrant disregard and egregious breaches of all universally recognised fair trial rights inconsistent with an intent to bring Mr Gadhafi to justice; (iii) the Libyan proceedings did not reach the status of *res judicata* and thus were ongoing at the time the Amnesty Law was passed, rendering Libya "*inactive*" in relation to the investigation and prosecution of the case; and, in any event (iv) international law does not recognise as valid amnesties for the gravest crimes as they result in *de facto* impunity and deprive victims of their right to justice and redress.

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[1] See the "Decision of the Conduct of the Proceedings following the 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute'" (Pre-Trial Chamber I), No. ICC-01/11-01/11-641, 14 June 2018, p. 6, appointing the Principal Counsel as legal representative of victims in the admissibility proceedings.

[2] See the "Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute", No. ICC-01/11-01/11-640, 6 June 2018 (the "Admissibility Challenge"). The document was reclassified as "public" pursuant to Pre-Trial Chamber I's instruction dated 8 June 2018.

3. The Principal Counsel recalls that the victims of the crimes committed in the wake of the 2011 revolution are waiting for justice to be done. They are waiting for Mr Gaddafi to face *justice*, and to be tried in an impartial, transparent manner that also recognises their rights and allows them to express their views and concerns. In this regard, she refers the Chamber to its previous submissions filed at the time of the first admissibility challenge in the case.[3] It is particularly defeating of the rights of victims if a man who, in 2012, claimed to want to face justice,[4] could essentially escape it now. Libyan proceedings did not take into account the rights of victims and did not bring justice as, *inter alia,* evidenced by the judgment of the African Court on Human and Peoples' Rights (the "ACtHPR") that declared said proceedings "*illegal*" and invalid;[5] a fact that is completely, and conveniently, omitted by the Defence in its submissions.

4. The Principal Counsel also stresses that it is imperative for the victims that Mr Gaddafi is apprehended and immediately surrendered to the custody of the ICC so that fair proceedings in which victims will be heard can be conducted by an independent and impartial Court.

II. PRELIMINARY MATTERS

5. As a preliminary matter, the Principal Counsel notes that the Defence submits materials in support of the Admissibility Challenge in a language other than the working languages of the Court. An official translation of the Libyan Amnesty Law was filed only two days before the applicable deadline for the submission of the

[3] See the "Corrigendum to the public redacted version of ICC-01/11-01/11-166 - Observations on behalf of the victims on the Government of Libya's Application pursuant to Article 19 of the Rome Statute", No. ICC-01/11-01/11-166-Red-Corr, 5 June 2012 (the "OPCV 2012 Observations"), paras. 50 *et seq*.
[4] See the "Public Redacted Version of the Corrigendum to the 'Defence Response to the "Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute"' (ICC-01/11-01/11-190-Conf)", No. ICC-01/11-01/11-190-Corr-Red, 31 July 2012 (the "2012 Defence Submissions"), para. 1.
[5] See ACtHPR, App No. 002/2013, *The African Commission on Human Rights v. Libya*, Judgment on the Merits, 3 June 2016, para. 98 (disposition). The French version should be consulted for accuracy.

observations to the Admissibility Challenge.[6] Accordingly, the present submissions refer to the draft translations previously provided.

6. In the absence of any concrete proof to the contrary, the present observations are made on the assumption that Mr Gaddafi has indeed been released from custody pursuant to the Amnesty Law in June 2017.[7] According to the Defence, he has been released by the Zintan brigade on or around 12 April 2016.[8] The exact date of his release is thus not entire clear.

7. The Principal Counsel further assumes – but questions – that Law No. 6 of 2015 (the "Amnesty Law") was duly passed by the competent Libyan parliament. At the time, Libya was effectively fragmented and operating with two 'governments', namely the so-called House of Representative in Tobruk and the General National Congress in Tripoli,[9] and only established a transitional unity government on 15 February 2016[10] after the signing of the UN-backed Libyan Political Agreement on 17 December 2015.[11] Accordingly, the Amnesty Law passed on 28 July 2015 was adopted at a time when Libya was operating in a "*vaccum of authority*" that, in the words of the UN Special Representative for Libya, characterised a deteriorating political fragmentation.[12] Even in December 2016, a year after the Libyan Agreement was signed, the United Nations Special Representative still characterised the new

[6] See the "Annex III to the Defence Submission of i) translations of Annexes to 'Admissibility Challenge by Dr, Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute' and ii) better version of document", No. ICC-01/11-01/11-650-AnxIII-tENG, 25 September 2018.
[7] See *e.g.* the "ICC Prosecutor calls for the immediate arrest and surrender of the suspects, Mssrs Saif Al-Islam Gaddafi and Al-Tuhamy Mohamed Khaled to the Court", 14 June 2017. There are also open source reports as to his reported release in June 2017. See *e.g.* INTERNATIONAL JUSTICE MONITOR, "Saif Al-Islam Gaddafi Plans to Return to Libya's Political Life", 11 May 2018.
[8] See the Admissibility Challenge, paras. 2 and 26.
[9] See *e.g.*, EUROPEAN PARLIAMENT, "Briefing – Political developments in Libya and prospects of stability", June 2017, p. 3.
[10] *Idem*, p. 4.
[11] See the Libyan Political Agreement, 17 December 2015.
[12] See the "Briefing of the Special Representative of the Secretary-General for Libya and Head of UNSMIL to the Security Council", 15 July 2015, para. 1.

institutions "*work*[ing] *far below expectations*".[13] Against this background, questions necessarily arise in relation to the propriety and validity of the amnesty legislation, all the more that, even in December 2016, the new Government of National Accord was reported to be operating with "*limited authority*".[14]

8. The Principal Counsel avers said matters should play a role in the Chamber's determination. The documentation submitted by the Defence asserts a correctness of the procedures that have been followed and applied in the *Gaddafi* case in Libya that certainly should not be taken at face value. As the omission to mention the judgment of the ACtHPR[15] – to name but one example – illustrates, there are other important matters, facets, and considerations that are omitted from the version of events put forth by the Defence in the Admissibility Challenge. The Principal Counsel therefore respectfully requests the Chamber to take these elements, illustrated in more detail *infra*, into consideration when making its decision on the matter *sub judice*.

III. LEGAL SUBMISSIONS

9. The Admissibility Challenge is made on the grounds that Mr Gaddafi has purportedly been tried in Libya for the same conduct for which he is sought by the Court, and, accordingly, the case is inadmissible pursuant to articles 17(l)(c) and 20 of the Statute.[16]

A. Criteria to be met for an admissibility challenge

10. The requirement that "*the case is being investigated or prosecuted by a State which has jurisdiction over it*" according to article 17(l)(a) of the Statute has been the subject of various decisions of the Court. As observed by the Appeals Chamber, said article

[13] See the "Statement of SRSG Martin Kobler to the Security Council of 6 December 2016 – 'Moving Beyond Containment'", 6 December 2016.
[14] *Idem.*
[15] See ACtHPR, App No. 002/2013, *The African Commission on Human Rights v. Libya*, *supra* note 5, para. 69.
[16] See the Admissibility Challenge, para. 1.

contemplates a two-step test, according to which the relevant Chamber shall address: (i) whether, at the time of the proceedings in respect of a challenge to the admissibility of a case, there is an ongoing investigation or prosecution of the case at the national level (first limb); and, in case the answer to the first question is in the affirmative, (ii) whether the State is unwilling or unable genuinely to carry out such investigation or prosecution (second limb).[17]

11. The Principal Counsel thus summarises the main principles that have arisen in the jurisprudence of the Court, relevant to this assessment:

- the parameters of a 'case' are defined by the suspect under investigation and the conduct that gives rise to criminal liability under the Statute;[18] for the relevant Chamber to be satisfied that the domestic investigation covers the "*same case*" as that before the Court, it must be demonstrated that the person subject to the domestic proceedings is the "*same person*" against whom the proceedings before the Court are being conducted; and the conduct that is subject to the national investigation is "*substantially the same conduct*" that is alleged in the proceedings before the Court;[19] to assess whether the case investigated sufficiently mirrors the one that the ICC Prosecutor is investigating, it is necessary to use, as a comparator, the underlying incidents under investigation both by the Prosecutor and the relevant State, alongside the conduct of

[17] See the "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case" (Appeals Chamber), No. ICC-01/04-01/07-1497 OA8, 25 September 2009 (the "*Katanga* Admissibility Judgment"), paras. 1 and 75-79.
[18] See "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'" (Appeals Chamber), No. ICC-01/11-01/11-547-Red OA4, 21 May 2014 (the "*Gaddafi* First Admissibility Judgment"), para. 61.
[19] See the "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'" (Appeal Chamber), No. ICC-01/09-02/11-274 OA1, 30 August 2011 (the "*Kenya* Admissibility Judgment"), paras. 39 and 40 and the *Gaddafi* First Admissibility Judgment, para. 63.

the suspect under investigation that gives rise to his or her criminal responsibility;[20]

- if the underlying incidents are identical, the case will be inadmissible before the Court. If there is no overlap between the incidents under investigation, it would be hard to conclude that the same case is being investigated. If the overlap is minor, the State may still be investigating substantially the same conduct where the investigated incidents form the crux of the ICC Prosecutor's case and/or represent the most serious aspects of the case;[21]
- the assessment of the subject matter of the domestic proceedings must focus on the alleged conduct and not on its legal characterisation.[22] A domestic investigation or prosecution for 'ordinary crimes', to the extent that the case covers the same conduct, shall be considered sufficient;[23]
- the parameters of the 'conduct' alleged in the proceedings before the Court are those set out in the document that is statutorily envisaged to define the factual allegations against the person at the phase of the proceedings in question.[24] In the present case, it continues to be the Warrant of Arrest;[25]
- a challenge to the admissibility of the case must be based on the circumstances prevailing at the time of the proceedings concerning the admissibility challenge;[26]
- the expression "*the case is being investigated*" must be understood as requiring the taking of "*concrete and progressive investigative steps*" to

[20] See the *Gaddafi* First Admissibility Judgment, para. 73.
[21] *Idem*, para. 72.
[22] See the "Decision on the admissibility of the case against Saif Al-Islam Gaddafi" (Pre-Trial Chamber I), No. ICC-01/11-01/11-344-Red, 31 May 2013 (the "*Gaddafi* First Admissibility Decision"), para. 77.
[23] *Idem*, paras. 85 and 88.
[24] See the *Kenya* Admissibility Judgment, paras. 38-40.
[25] See the "Warrant of Arrest for Saif Al-Islam Gaddafi" (Pre-Trial Chamber I), No. ICC-01/11-01/11-3, 30 June 2011.
[26] See the *Katanga* Admissibility Judgment, paras. 78 and 79.

ascertain whether the person is responsible for the conduct alleged against him or her before the Court;[27] as for instance "*interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses*";[28]

- the State must provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case;[29]
- finding that the domestic authorities are taking steps to investigate the person's responsibility in relation to the same case as the one before the Court "*would not be negated by the fact that, upon scrutiny, the evidence may be insufficient to support a conviction by the domestic authorities*";[30]
- in order to substantiate that there is not a situation of 'inaction' at the national level, the fact that an investigation is in progress needs to be substantiated;[31]
- evidence that the State is requested to provide in order to demonstrate that it is investigating or prosecuting the case is not only "*on the merits of the national case that may have been collected as part of the purported investigation to prove the alleged crimes*" but extends to "*all material capable of proving that an investigation is ongoing*";[32]
- the concept of proceedings "*being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice*" should generally be understood as referring to proceedings which will lead to a suspect evading justice, in the sense of not appropriately being tried genuinely to establish his or her criminal

[27] See the *Gaddafi* First Admissibility Decision, paras. 54, 55 and 73.
[28] See the *Kenya* Admissibility Judgment, paras. 1 and 40.
[29] *Idem*, paras. 2 and 61.
[30] See the *Gaddafi* First Admissibility Decision, para. 122.
[31] See the "Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi" (Pre-Trial Chamber I), No. ICC-01/11-01/11-239, 7 December 2012, para. 14.
[32] *Idem*, paras. 10 and 11.

responsibility, in the equivalent of sham proceedings that are concerned with that person's protection;[33]

- however, there may be circumstances, depending on the facts of the individual case, whereby violations of the rights of the suspect are so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the suspect so that they should be deemed, in those circumstances, to be "*inconsistent with an intent to bring the person to justice*".[34]

B. Inapplicability of article 20 of the Statute

12. The Principal Counsel avers the Admissibility Challenge shall fail because the legal criteria for declaring Mr Gaddafi's case before the Court inadmissible are not met. Contrary to his contentions, Mr Gaddafi cannot allege to have been tried in Libya such that the *ne bis in idem* principle becomes operative.

1. The trial in Libya did not cover the same crimes as the ones for which the Suspect is sought by the Court

13. The Principal Counsel submits that Mr Gaddafi was not indicted for the same crimes, incidents, and conduct in the Libyan case as those for which the ICC arrest warrant has been issued. Annex A to the present observations sets out the underlying acts and incidents in respect of which the Chamber found reasonable grounds to believe that Mr Gaddafi, as an indirect co-perpetrator, committed crimes against humanity of murder and persecution on the basis of the material submitted by the Prosecutor at that time. Although they do at times lack certain specificity, it is still abundantly clear that the acts cover different locations and/or times, and/or grave crimes not at all covered by the Libyan indictment and are thus not the same

[33] See *Al-Senussi* Judgment, para. 230(2).
[34] *Idem*, para. 230(3).

'incidents' and do not constitute substantial overlap.[35] The underlying acts as found established in the Libyan case are set out in Annex B to the present observations.[36] The joint reading of Annex A and Annex B demonstrates that while some incidents overlap, the specific incidents underlying both cases are not identical.

14. Moreover, a review of the Libyan indictment reveals that the 'conduct' captured by the constituent elements of the crime of persecution as a crime against humanity was not part of the 'proceedings' against Gaddafi *et al*. The indictment charged him – and 36 co-defendants – with[37] (i) committing arbitrary acts of sabotage, looting and homicide across the country in order to undermine State security; (ii) enlisting and equipping mercenaries and granting them Libyan citizenship; (iii) establishing armed tribal groups, equipping them with weapons and providing logistical support; (iv) rigging a number of vehicles with explosives in order to detonate them remotely; (v) devising a plan to blow up prisons containing a number of opposition members; (vi) using aircraft to bomb civilians and using internationally prohibited mines; (vii) attacks on aid vessels, broadcasting towers, and other civilian targets using civilian tugboats and speedboats and booby-trapping ports; (viii) broadcasting messages inciting murder through various means of communication; (ix) distribution of drugs amongst the armed forces and volunteers; (x) instigating arbitrary bombing of cities, using Scud missiles with highly destructive power to this end; (xi) adopting a plan to cut off water supplies to the eastern region; (xii) instructing a team of military engineers to blow up the Booster station in the Arabian Gulf Oil Company Sidrah field and killing its guards; (xiii) holding meetings at which it was decided to kill protestors in Tripoli and preventing them from accessing Green Square; (xiv) forming cells in charge of killings and sowing dissension in the eastern region.[38] These acts of sabotage, looting

[35] See the *Al-Senussi* Judgment, para. 100 reaffirming the *Gaddafi* First Admissibility Judgment, para. 72.
[36] These are reconstructed by the OPCV from the text of the factual findings of the Libyan judgment.
[37] The following list adheres to the order of charges adopted in the Libyan indictment. Similar charges are not grouped together.
[38] See LBY-OTP-0051-0004, pp. 0006-0007.

and murder were alleged to have been committed with the aim of undermining the safety of the Libyan people.[39] The Indictment further sets out that Mr Gaddafi and others were charged with (xv) committing acts aiming to ignite civil war through arming tribal groups in order to kill members of neighbouring tribes;[40] (xvi) incited, agreed and helped to perpetrate killings by forming revolutionary groups (Yellow Hats) and other formations comprised of the Libyan Security Forces. It is alleged that the accused, including Mr Gaddafi, "*provided these formations with weapons and ammunition to suppress protestors in various parts of Benghazi, such as Geliana Bridge, Jamal Abd al Nasir St., Sidi Husayn and Al Fadil Bu 'Umar Battalion*" and "*ordered them to open fire on the protestors in order to kill them. As a result, (107) persons* […] *were fatally injured*".[41] It is further alleged that Mr Gaddafi and others (xvii) incited, agreed and helped to perpetrate deliberate killings by mobilizing groups and ordered them to spread across Tripoli to kill "*whoever opposes the father of* [Saif Al-Islam Gaddafi]. *They killed (155) victims* […] *in various parts of Tripoli, such as the Airport Road, the highway, Gharghur and Bab al'Azizya, after they were shot at the command of* [Saif Al-Islam Gaddafi] *and with his full knowledge*";[42] (xviii) inciting, agreeing and helping to perpetrate attempted murder in various parts of Benghazi;[43] (xix) acting as accomplices by incitement, agreement and assistance to deliberate killings by targeting protestors in Tripoli and its suburbs as well as protestors heading towards Green Square and as a result killing (71) persons;[44] (xx) introducing and then removing illegal immigrants into the country; (xxi) acting as accomplices by way of incitement, agreement and assistance in deliberate killings of illegal African immigrants;[45] (xxii) acquiring and distributing illegal drugs and stimulants; (xxiii) acquiring and keeping in possession large quantities of drugs; (xxiv) inciting and agreeing to the rape and threating of "*others*";[46] the rapes are alleged to have been

[39] *Idem*, p. 0007.
[40] *Ibidem*, p. 0008.
[41] *Ibid.*, p. 0009.
[42] *Ibid.*
[43] *Ibid*.
[44] *Ibid.*, p. 0010.
[45] *Ibid.*
[46] *Ibid.*

used as a method to "*crush the 17 February Revolution*";[47] (xxv) inciting and agreeing to seize movable property by coercion and violent theft; (xxvi) inciting and agreeing to detain "*people*" by force under threat; these persons are alleged to have been rightfully or wrongfully accused of being opposition members and been imprisoned without trial;[48] (xxvii) causing serious damage to public funds; (xxviii) publicly insulting the Libyan people by referring to protestors as 'rats, traitors and children';[49] and (xxiv) preventing others from exercising their political rights.[50]

15. Whereas some charges do indeed concern alleged acts common to the conduct underlying the ICC proceedings, such as killing of protestors in Benghazi or Tripoli, as well as unlawful detention, it is notable that the persecution charge in the ICC proceedings predominantly relies on acts of torture committed on political grounds. The Defence, in its comparative chart, submits that torture is covered in the Libyan charges. However, the act it refers to – apart from having been committed at the end of August 2011 – outside the temporal scope of the ICC proceedings –would be characterised, more appropriately, as a rape charge. Torture charges are essentially not covered in the Libyan proceedings, particularly not during the relevant time frame.[51]

16. Significantly, the temporal scope of the Libyan indictment differs in many aspects to that relevant to the ICC arrest warrant as it extends well beyond February 2011.[52] A number of the most significant incidents are alleged to have occurred after February 2011, including allegations of key meetings at which the accused are said to have planned the acts.[53]

[47] *Ibid.*, p. 0011.
[48] *Ibid.*, pp. 0012-0013.
[49] *Ibid.*, p. 0013.
[50] *Ibid.*, p. 0014.
[51] See Annex H to the Admissibility Challenge, No. ICC-01/11-01/11-640-AnxH, p. 49.
[52] See Annex B to the present observations.
[53] See *i.e.* LBY-OTP-0051-0004, p. 0008.

17. The Principal Counsel also recalls the Defence's 2012 assessment on the potential effect declaring the case inadmissible before the Court on the basis of the similar conduct test. It stated that the result would be to "*deprive the alleged victims of such crimes of their right to the truth as concerns whether the alleged events involved discriminatory conduct*".[54] While these submissions were made in relation to the Libyan admissibility challenge based on investigative steps, as opposed to a verdict, it is nevertheless argued that the text of the Libyan judgment clearly establishes that persecution has indeed not been part of the charges and thus of the 'conduct'.

18. Furthermore, the modes of liability charged in the Libyan case are not the same as those in the ICC proceedings. Mr Gaddafi was indicted in Libya as a direct perpetrator (instigating, ordering and direct perpetration such as misappropriation of public funds), as an accessory, *i.e.* aider and abettor (helping), and a form of conspiracy to commit some of the crimes in concert with others by alleging agreements with other co-accused. What it is however not encapsulated in the Libyan indictment is the complex form of indirect co-perpetration which forms the basis of the ICC arrest warrant. In this regard, the Principal Counsel agrees once more with the submissions previously put forth by the Defence in 2012, namely that this complex form of liability, alleging a range of specific contributions to a common plan cannot easily be reflected by domestic modes of liability, which are not designed for complex crimes that involve multiple persons in multiple locations, with different positions of hierarchy.[55] Moreover, 'domestic modes of liability' fail to encapsulate the degree of culpability of the most responsible perpetrators at the top of the chain of command and at the core of the criminal plan who 'use' others to bring it about. This is another reason why more complex forms of liability are more adequate in the circumstances of cases such as the one pending against Mr Gaddafi before the ICC. Accordingly, it cannot be said that Mr Gaddafi has already been tried in Libya for the same conduct for which a warrant of arrest has been issued by the Court.

[54] See the 2012 Defence Submissions, para. 133.
[55] *Idem*, para. 123.

19. In any event, and as argued in detail *infra*, the 'trial' was so fundamentally unfair that it cannot be said that Mr Gaddafi has already been tried within the meaning of article 17(2)(c) of the Statute as interpreted by the Appeals Chamber in the *Al-Senussi* appeal.[56]

2. The egregious violations of the Suspect's rights are inconsistent with an intent to bring a person to justice

a) The legal standard

20. The Principal Counsel further posits that the egregious violations of the Suspect's rights during the proceedings held in Libya are inconsistent with an intent to bring a person to Justice and that it would plainly offend all principles of natural justice and due process if a suspect whose fair trial rights have been blatantly violated by the relevant national jurisdictions would be allowed to rely on the *ne bis in idem* principle and accordingly not be tried before the ICC.

21. It would equally run counter to the findings of the Appeals Chamber in the *Al-Senussi* Judgment, that proceedings being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice "*should generally be understood as referring to proceedings which will lead to a suspect* ***evading justice****, in the sense of* ***not appropriately being tried genuinely*** *to establish his or her criminal responsibility*".[57] Contrary to the submissions of the Defence,[58] Justice and 'being tried genuinely' do not equate to an accused being found guilty or acquitted. The notions of justice and a genuine trial are much broader and also encompass the victims' right to know the truth and the criminal liability of *those responsible* being

[56] See the *Al-Senussi* Judgment, para. 3.
[57] See the *Al-Senussi* Judgment, para. 2 (emphasis added).
[58] See the Admissibility Challenge, para. 87: "[…] *There is no indication that the court proceedings in Libya were anything other than a genuine prosecution of Dr. Gaddafi. Indeed, the very fact that Dr. Gaddafi was convicted and sentenced to death decisively undermines any attempt to suggest that the proceedings were for the purpose of shielding him*".

established. It also, importantly, entails respect for the rights of the suspect and the rule of law. In this regard, the Appeals Chamber clarified,

> "*there may be circumstances, depending on the* ***facts of the individual case****, whereby violations of the rights of the suspect are so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the suspect so that they should be deemed, in those circumstances, to be 'inconsistent with an intent to bring the person to justice'*".[59]

22. It is precisely this latter scenario that distinguishes Mr Al Senussi's case from that of Mr Gaddafi and establishes that the Libyan proceedings were entirely inconsistent with the intent to bring the latter to justice.

23. In the first place, the proceedings against Mr Al-Senussi were conducted in a strikingly different manner, evidenced, *inter alia*, by his presence during the trial and his counsel making submissions and questioning witnesses.[60] A faithful reading of the Appeals Chamber's findings in the *Al-Senussi* Judgment furthermore mandates a close examination of the *individual* facts and circumstances to allow a finding of whether or not the violations of the Suspect's rights were so egregious as to reach the required threshold.

b) The proceedings held in Libya cannot be reconciled with the legal standard

24. The records of the Libyan proceedings demonstrate that the violations of Mr Gaddafi's rights were manifold and grave. They were indeed so egregiously contravening all standards of due process that this Court cannot turn a blind eye to them, according to the standard set out in the *Al-Senussi* Judgment. Moreover, these violations were of such profound nature that the Court should not allow Mr Gaddafi to 'renounce' his rights[61] in order to benefit from the 2015 Amnesty Law.[62] Human

[59] See the *Al-Senussi* Judgment, para. 3.
[60] See the text of the Libyan Judgment, Annex B to the Admissibility Challenge, No. ICC-01/11-01/11-640-AnnxB.
[61] See the Admissibility Challenge, para. 99.

rights and due process rights are non-derogable.[63] The ACtHPR underlined that such non-derogable rights include "[…] *the right to life, the right not to be subjected to torture or to cruel treatment, inhuman and degrading punishment or treatment – rights mostly enshrined in Article 6 and 7 of the African Charter on Human and Peoples' Rights*".[64] The ACtHPR went on to state that "*despite the exceptional political and security situation prevailing in Libya since 2011, the Libyan State is internationally responsible for ensuring compliance with and guaranteeing the human rights enshrined in Articles 6 and 7 of the Charter*".[65]

25. Indeed, counsel for Mr Gaddafi previously also recalled that "[t]*he imposition of the death penalty without adhering to the requisite standards of due process and fair trial is no different than judicially sanctioned murder. For this reason, the Human Rights Commission has emphasized that the due process and fair trial rights set out in Articles 14 and 15 of the International Covenant on Civil and Political Rights (the "ICCPR") are* ***non-derogable*** *in cases in which the defendant is facing the death penalty*".[66] The Defence cannot at this juncture argue that Mr Gaddafi now believes that there were no egregious violations of his fair trial rights.[67] He cannot himself 'waive' his fair trial rights, simply because it will ensure his *de facto* impunity owing to the amnesty.

26. In this regard, the Principal Counsel contends that fundamental human rights cannot be waived or invoked whenever it is convenient; neither by States, nor by accused persons or suspects. The Court should not bow to such attempts. Fundamental human rights are norms of *jus cogens* and must be upheld by the Court to affirm its legitimacy in the international legal order. Victims have no interest in unfair proceedings with pre-judged outcomes and forced 'confessions'. They seek

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[62] See also *infra* paras. 92-101.
[63] See ACtHPR, App No. 002/2013, *The African Commission on Human Rights v. Libya*, *supra* note 5, paras. 76-77. It is submitted that the French version should be consulted for accuracy.
[64] *Idem*, para. 77.
[65] *Ibidem*.
[66] See the 2012 Defence Submissions, para. 66 (emphasis added).
[67] See the Admissibility Challenge, para. 99.

real justice, impunity, and accountability instead. They also seek that the breaches of their own human rights and those of their relatives who suffered harm are being impartially investigated and prosecuted so as to ensure possibilities of adequate redress.

27. The death penalty argument was not the only argument put forth by Mr Gaddafi and his Defence in support of countering Libya's admissibility challenge in 2012. It is indeed striking that Mr Gaddafi now seeks to invalidate all the serious matters that have previously been brought to the attention of the Chamber, that still apply, and have only been aggravated by the passing of time and further flagrant breaches of fair trial rights in the Libyan's proceedings.

28. In the absence of submissions or evidence to the contrary, it is reasonable to assume that the conditions surrounding Mr Gaddafi unlawful detention prevailing in 2012 still prevailed throughout 2014 and 2015 and up to the point of his release.[68] Indeed, already in 2012, Mr Gaddafi (i) was detained in an irregular, secret detention facility[69] which not only contravened the provisions of the Libyan Prisons Act, but also other Libyan law (and in any event, international human rights standards), as he was detained beyond 90 days without ever having been brought before a judge who would have conducted a review of his detention;[70] (ii) was held *incommunicado* and never saw a lawyer;[71] (iii) was held in solitary confinement and deprived of fresh air and sunlight;[72] (iv) was simply asserted by the Libyan authorities that he had 'waived his right to a lawyer' without any proof that he did so and, if he had done so, that it was of his own free will;[73] (v) was not accorded the right to have privileged

[68] See the OPCV 2012 Observations, paras. 45-47.
[69] See the 2012 Defence Submissions, para. 188.
[70] *Idem*, paras. 186, 187 and 192. See also the transcript of the hearing held on 9 October 2012, No. ICC-01/11-01/11-T-2-Red-ENG, p. 69.
[71] See the 2012 Defence Submissions, para. 193.
[72] *Idem*, para. 290.
[73] *Ibidem*, para. 193.

communications with counsel from OPCD when they came to meet him in Zintan;[74] (vi) was denied dental treatment.[75]

29. It is moreover, particularly noteworthy that the detailed illustrative submissions of Mr Gaddafi's Defence in 2012 on his illegal detention and other egregious rights abuses are simply brushed aside and even hailed as illustrations of the genuineness of the Libyan proceedings in the Admissibility Challenge.[76] In this regard, the Chamber should carefully consider the 2012 submissions put forth by the Defence, which stand in remarkably stark contrast with the characterisation of the circumstances presented in the Admissibility Challenge.

30. One particular example is the Defence's position concerning the "*establishment of detention facilities in Zintan*",[77] whereas the 2012 position was that Mr Gaddafi was not "*detained in a proper detention facility, and the location is secret* [in contravention of Article 4 of the Libyan Prisons Act]; […] *Libyan law requires the release of any person detained in violation of these provisions*".[78] In 2012, the Defence further submitted that Mr Gaddafi was detained *incommunicado*[79] and in solitary confinement[80] without being informed of the reasons for his detention[81] and without any possibility of detention review.[82] He was reportedly denied fresh air and sunlight for at least twenty days,[83] and was left without appropriate medical treatment.[84]

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[74] *Ibid.*, paras. 14, 19 and 195.
[75] *Ibid.*, para. 300. See also the transcript of the hearing held on 9 October 2012, No. ICC-01/11-01/11-T-2-Red-ENG, p. 71.
[76] See the Admissibility Challenge, para. 96: "[…] *Rather, the steps taken by Libya*, […] *make* […] *it abundantly clear that Libya was determined to bring him to justice* […]".
[77] *Idem*.
[78] See the 2012 Defence Submissions, paras. 186-188.
[79] *Idem*, para. 289.
[80] *Ibidem*, para. 290.
[81] *Ibid.*, paras. 95 and 169,
[82] *Ibid.*, paras. 181-182 and 186-188.
[83] *Ibid.*, para. 290.
[84] *Ibid.*, para. 300.

31. The second striking difference concerns the characterisation of the evidence against Mr Gaddafi. In the Admissibility Challenge the Defence refers to "*evidence presented by the Libyan prosecutor to support the indictment as detailed in the Judgment*".[85] In 2012, the Defence spoke of "*external indications that the evidence relied upon* […] *may have been derived from torture, from coercive circumstances, or extracted without due process protections (such as legal representation)* […]".[86] At that time, the Defence further brought to the attention of the Chamber that Mr Gaddafi had repeatedly been interrogated by Libyan Prosecutors without any lawyer being present.[87] This is all the more significant, since the Libyan judgment heavily relies on 'evidence of his confession' obtained in re-interrogation.[88]

32. Also remarkable is the fact that Mr Gaddafi, who co-signed these 2018 submissions, conveyed his own message to the Chamber in 2012 whereby he implored the Court to dismiss the Libyan admissibility challenge. In fact, the 2012 Defence's submissions begin with the resounding words of Mr Gaddafi who declared:

> "*I want to face Justice*";[89]
> "*I want to do so because I believe that Libya, the* ***victims in Libya****, the international community and myself – all have the right to the truth, and for the truth to be made public*";[90]
> "*The truth is only possible in a fair and impartial trial*";[91]
> "*There will be no truth if I am kept locked up* […] *with no or very limited possibility to speak to my lawyers in order to convey my defence*".[92]

33. Should the Court grant the Admissibility Challenge, Mr Gaddafi will not face justice. The victims in Libya, the international community, Mr Gaddafi, and the

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[85] *Ibid.*, para. 96.
[86] *Ibid.*, para. 89. See also the transcript of the hearing held on 9 October 2012, No. ICC-01/11-01/11-T-2-Red-ENG, p. 66.
[87] See the 2012 Defence Submissions, para. 236.
[88] See LBY-OTP-0051-0004, p. 0102.
[89] See the 2012 Defence Submissions, para. 1.
[90] *Idem*, para. 2 (emphasis added).
[91] See the 2012 Defence Submissions, para. 4.
[92] *Idem*, para. 5.

public will be deprived of their right to the truth. The efforts of the international community, which in a rare moment of unity referred the Libyan situation to the ICC, "[s]*tressing the need to hold to account those responsible for attacks, including by forces under their control, on civilians*",[93] will be duped. And some of the most serious crimes of concern to the international community as a whole will not be assessed by an impartial court of law.

34. Moreover, and particularly significantly, the breaches of Mr Gaddafi's fundamental rights have also been the subject of an application and judgment in his favour before the ACtHPR rendered in June 2016. In its judgement on the merits, the ACtHPR ultimately found that:

> "*According to available information, the Detainee* [i.e. Saif Al-Islam Gaddafi] *has not had access to a lawyer nor was he afforded the assistance of a counsel of his choice. He has therefore not been protected during the different stages of the investigation instituted against him. For example, he was interrogated in the absence of counsel and was not given the opportunity to examine the charges which would be brought against him at the start of the trial. The Detainee was arrested over two years ago and has been sentenced to death* in absentia".[94]

35. Indeed the ACtHPR went on to state that "[i]*t is quite obvious that none of the rights set forth in Article 7 of the Charter* […] *have been respected by the Respondent State with regard to the situation of the Detainee* [*i.e.* Saif Al-Islam Gaddafi]".[95]

36. There can be no doubt that the circumstances surrounding his unlawful detention and further serious breaches of his fair trial rights rise to the requisite level set by the Appeals Chamber in *Al-Senussi* Judgment, namely that the violations are of such egregious nature that they cannot be reconciled with the duty of providing any genuine form of justice.

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[93] See the United Nations Security Council Resolution 1970 (2011) of 26 February 2011, UN Doc. S/RES/1970 (2011), p. 2.
[94] See ACtHPR, App No. 002/2013, *The African Commission on Human Rights v. Libya*, *supra* note 5, para. 96.
[95] *Idem*, para. 97 (emphasis added).

37. In sum, it is simply incongruous and would utterly defeat the purpose of the Rome Statute to end impunity for the most heinous crimes known to mankind – and with it the mechanism of UN Security Council referral – if a suspect who has been subject to years of unlawful detention[96] could successfully invoke the *ne bis in idem* protection to benefit from an amnesty.

3. The conduct of the criminal proceedings in Libya further demonstrate that the *ne bis in idem* principle is not applicable

38. The Principal Counsel avers that the record of the Libyan proceedings further illustrates that Mr Gaddafi's fair trial rights were violated. In particular, regarding the Defence's assertion that Mr Gaddafi was tried *in presentia*,[97] the Principal Counsel submits that this characterisation constitutes a blatant misconstruction of the facts. Indeed, the draft translation of the Libyan judgment reveals that Mr Gaddafi did, essentially, not attend the trial hearings in Libya.

39. He did not attend the initial appearance before the Criminal Court on 24 March 2014.[98] In fact, he only 'appeared' before said court on 27 April 2014, when a CCTV link was established with Zintan.[99] He was not represented by counsel.[100] It is unclear, however, whether the CCTV link allowed for any two-way communication between the courtroom and Zintan or whether his 'statement' was inferred from the records of his various interrogations by the General Prosecutor while in detention (and in the absence of counsel). The indictment and referral of the Indictment Chamber were read to the defendants, including Mr Gaddafi, during the 27 April 2014 court session. Mr Gaddafi also 'attended' the next court session held on 11 May 2014 via CCTV link and without benefiting from legal representation by counsel.[101] It is further noteworthy that of the 37 defendants in the case, only Mr Gaddafi and two

[96] See the 2012 Defence Submissions, paras. 220-233.
[97] See the Admissibility Challenge, para. 47.
[98] See LBY-OTP-0051-0004, p. 0015.
[99] *Idem*, p. 0018.
[100] *Ibidem*.
[101] *Ibid.*, p. 0020.

others were unrepresented.[102] Mr Gaddafi also 'attended' via CCTV link from Zintan the next two sessions of the proceedings held on 25 May 2014,[103] and 22 June 2014 in Tripoli.[104] During the latter, he is recorded as having been represented by Mr Abd al-Salam al Hanashi, a member of the Public Attorney Department.[105] It is unclear under which circumstances said counsel was appointed; whether he had the opportunity to consult with his client and receive any kind of disclosure, and if so, at what time prior to the hearing, if at all.[106] By that time, other defendants had already submitted lists of "*rebuttal witnesses*".[107] Moreover, when in attendance, which seems to have been rare, the record is devoid of any contribution made by Mr Gaddafi's duty counsel from the Public Attorney Department, in contrast with lengthy and substantive contributions ostensibly made by counsel acting on behalf of other defendants.[108] In other words, other defendants properly represented were conducting their respective defences against the charges when Mr Gaddafi was, at best, a spectator at his own 'trial'.

40. Subsequently, Mr Gaddafi did not physically attend – or via CCTV link –the hearings held on 18 August 2014[109], 12 October 2014,[110] 2 November 2014,[111] 16 November 2014,[112] 28 December 2014,[113] 11 January 2015,[114] 25 January 2015,[115] 8

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[102] *Ibid.*
[103] *Ibid.*, p. 0021.
[104] *Ibid.*, p. 0022.
[105] *Ibid*.
[106] It would appear that his lawyer was appointed by the Prosecutor-General, contrary to his express wishes of being represented by a lawyer chosen by his family, as submitted by the Defence in 2012. See the Defence 2012 Submission, paras. 200 and 204.
[107] See LBY-OTP-0051-0004, p. 0022.
[108] *Idem*., p. 0034
[109] *Ibidem*.
[110] *Ibid.* The record states that the public Prosecutor submitted a technical report according to which it was not possible to link the CCTV systems of, *inter alia*, the Zintan detention facility, due to the damage incurred to the transmitter stations. There is no record of the reasons why his counsel did not appear before the court.
[111] *Ibid.*, p. 0025.
[112] *Ibid.*
[113] *Ibid.*
[114] *Ibid.*, p. 0031.
[115] *Ibid.*, pp. 0034.

February 2015,[116] 22 February 2015,[117] 8 March 2015, [118] 22 March 2015,[119] and 30 March 2015.[120]

41. Mr Gaddafi was only present again on 12 April 2015.[121] It is significant that during said hearing, the court heard extensive pleadings and adjourned to the next day "*so that the rest of the defence counsel may complete their pleading*".[122] There were however, no pleadings made on behalf of Mr Gaddafi. He was also not connected via CCTV link to the courtroom on 13 April 2015 and there is no record of his counsel attending the session either.[123] During this session, the court, heard, as it was the case previously,[124] highly incriminating pleadings implicating Mr Gaddafi, *i.e.* Defendant No. 1, from, *inter alia*, counsel representing Mr Al Senussi, including claims that "*his client had nothing to do with these operations and that* [sic] *were also carried out under the instructions of Muammar Gaddafi and his son Sayf*".[125]

42. There was no CCTV link on 20 April 2015 either and Mr Al-Hanashi was not in attendance.[126] It was at the end of this session, that the Court decided "*to proceed with the case in the absence of Defendant No. 1 and to postpone the hearing of the case until the last pleading session on 3/5/2015*".[127] No CCTV link to the courtroom was established on 3 May 2015. However, Mr Gaddafi appointed counsel is recorded as having been present.[128] The court adjourned one more time to afford another defendant a last opportunity to present her defence. No similar decision was taken in

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[116] *Ibid*., p. 0043.
[117] *Ibid*.
[118] *Ibid*., p. 0045
[119] *Ibid*., p. 0050.
[120] *Ibid*., p. 0053.
[121] *Ibid*., p. 0066
[122] *Ibid*., p. 0066.
[123] *Ibid*.
[124] Reference is made to hearings held on 8 March 2015 during which the Tripoli court, inter alia, heard statements of co-accused No. 3 which were highly incriminating with respect to Mr Gaddafi. See *ibid*., pp. 0046 and 0047.
[125] *Ibid*., pp. 0067-0070.
[126] *Ibid*., p. 0072.
[127] *Ibid*., p. 0075.
[128] *Ibid*.

respect of Mr Gaddafi.[129] The latter did also not attend the 20 May 2015 session[130] during which, the court, again, heard highly incriminating evidence against him.[131] It further proceeded to hearing the closing statements of all defendants starting with Defendant No. 2 in ordinal order. Accordingly, no pleadings were made on behalf of Mr Gaddafi during this session – or any other for that matter.[132] The court closed the hearing of evidence by setting the date of judgment for 28 July 2015.[133] It further authorised defence counsel "*who wished to do so*" to submit written closing submissions within 30 days. There is no record of Mr Gaddafi's counsel providing any such submissions, nor is there any indication as to whether Mr Gaddafi's appointed counsel had access to his client during the entirety of the proceedings and could thus have consulted with him. The Defence's submissions in this regard do not assist, as its assertion that Mr Gaddafi was able to consult with counsel[134] is not supported by the material on the record. Significantly, it should also be noted, in this regard, that the ACtHPR found[135] that Mr Gaddafi did not have access to counsel, nor to a judge reviewing his detention.[136]

43. It appears therefore to be plainly incorrect to assert, as the Defence does, that the only court sessions Mr Gaddafi did not attend, or his lawyer did not attend, were those that "*did not directly concern him*".[137] Mr Gaddafi (a.k.a. "Defendant No. 1") was due to present his case first, pursuant to the court's order of 22 June 2014. According to the available records, no such presentation occurred. To the contrary, the record establishes that Mr Gaddafi was never afforded an opportunity to present any defence to the charges against him, as the court proceeded to hear presentations of

[129] *Ibid.*, p. 0076.
[130] *Ibid*.
[131] *Ibid*.
[132] *Ibid.*, pp. 0080 *et seq*.
[133] *Ibid.*, p. 0082.
[134] See the Admissibility Challenge, para. 101.
[135] The 2013 application before the ACtHPR concerned the unlawful detention and violations of Saif-Al-Islam Gaddafi's detention in Zintan and violations of his procedural rights during the Libyan trial. See also *supra*, paras. 34-35.
[136] See ACtHPR, App No. 002/2013, *The African Commission on Human Rights v. Libya*, *supra* note 5, para. 69.
[137] See the Admissibility Challenge, para. 41.

other defendants. The material submitted by the Defence in support of the challenge further illustrates that trial monitors found that of the 24 court sessions held, Mr Gaddafi only 'attended' three or four, with one transmission from Zintan actually showing an empty room.

44. Not only was Mr Gaddafi illegally tried *in absentia*, but it appears that he was never properly and in detail informed of the charges and the evidence against him, nor does it appear that he ever received any disclosure that would have enabled him to prepare a defence; let alone being in a position to benefit from counsel who could and would effectively represent him upon his instructions. Against this background and in the absence of evidence to the contrary, it must also be assumed that Mr Gaddafi had no say in the appointment of his counsel who occasionally appeared in the Tripoli courtroom on his behalf. Mr Gaddafi had – at least in 2012 – repeatedly requested to have a lawyer selected by his family to represent him in domestic proceedings.[138] In the absence of convincing evidence to the contrary, and having particular regard to the circumstances of his detention at the time, it appears that he was denied his right to freely choose counsel. This is even more compelling when considering that Mr. Al Hanashi was 'appointed' to represent him during the 'trial' by no one other than the Libyan Prosecutor himself;[139] only started attending the trial at a late stage and in an erratic manner, not being present at hearings during which highly incriminating evidence against his purported client was heard. Furthermore, he made no recorded contributions or interventions of note throughout the trial.

45. Therefore, it must also be questioned whether Mr Gaddafi in fact ever obtained any genuine legal advice and ever had the possibility of having privileged communications with counsel. The paragraphs of Annex C to the Admissibility Challenge cited by the Defence in support of its assertions that lawyers were "*permitted to consult with* [Mr Gaddafi] *in private*" are not capable of rebutting this

[138] See the 2012 Defence Submissions, paras. 199-200.
[139] *Idem*, paras. 204 *et seq*.

assumption. They merely state that Mr Gaddafi met with and had lunch with a female volunteer lawyer "*in good conditions*" on more than one occasion.[140] They do not attest to meetings with his purported counsel, Mr Al-Hanashi.

46. The Principal Counsel submits that to ensure compliance with human rights standards and the requirements of due process and fair trial, the defendant has a right to an oral hearing at which he or she may appear in person or be represented by counsel and at which he or she may bring evidence and examine witnesses. This necessarily includes the physical presence of the defendant, so as to enable him or her to have access to the proceedings, to adequately follow them and to instruct his or her counsel. Trials *in absentia* may be permitted in exceptional circumstances, "*for example when the accused, despite having been informed of the charges and the date and place of the hearing, nevertheless chooses not to attend. In situations where the accused fails to attend due to circumstances beyond his or her control, the exception does not apply*".[141]

47. Contrary to the submissions of the Defence, Mr Gaddafi was indeed tried *in absentia*, despite his whereabouts being known, without benefiting from genuine legal advice. Therefore, the Defence's argument that he has been lawfully tried in Libya is inapposite and should be dismissed. In fact the repeated violations of the suspect's rights in the Libyan proceedings, on their own, invalidate his Libyan trial.

4. The Libyan proceedings cannot be regarded as *res judicata*

48. Should the Chamber not be persuaded that the Admissibility Challenge is grounded on false assumptions and the honey-coated, one sided presentation of the facts to achieve a particular outcome, the Principal Counsel submits that said Challenge must still fail. Indeed, it cannot be said that the Libyan proceedings have

[140] See the Admissibility Challenge, para. 101 and paragraphs 21-23 of Annex C to the Admissibility Challenge, No. ICC-01/11-01/11-640-Conf-AnxC.
[141] See Annex F to the Admissibility Challenge, No. ICC-01/11-01/11-640-AnxF, p. 30 (emphasis added).

come to an end. Accordingly, said proceedings cannot be regarded as *res judicata* which could trigger *ne bis in idem* protection under article 20(3) of the Statute.

a) Criminal proceedings under Libyan law

49. For the purpose of the present analysis, it is important to set out the procedural steps, required by Libyan law, leading to a decision on the guilt or innocence and the sentence applicable to a convicted person, particularly where death penalty is at stake. In this regard, the Principal Counsel posits that the Defence is misconstruing both the national and the ICC procedural frameworks in order to obtain from the Chamber a finding that Mr Gaddafi can continue, as free man, to enjoy his release from custody.

50. As part of the Admissibility Challenge, Mr Gaddafi filed a translation of the Libyan Code of Criminal Procedure (the "Code of Criminal Procedure").[142] Compilations of relevant provisions of Libyan law had been filed as part of the previous admissibility challenge by Libya,[143] together with other documents discussing Libya's procedural framework and the internal proceedings that have been conducted in the case.[144] Furthermore, during the hearing held before Pre-Trial Chamber I on 9 October 2012, the representatives of the Libyan Government summarised the manner in which the domestic procedures should be conducted in the case pursuant to national legislation and practices.[145]

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[142] See the Annex G to the Admissibility Challenge No. ICC-01/11-01/11-640-AnxG.
[143] See also Annex B to the "Libyan Government's filing of compilation of Libyan law referred to in its admissibility challenge", No. ICC-01/11-01/11-158-AnxB, 28 May 2012. See also No. ICC-01/11-01/11-190-Anx1; No. ICC-01/11-01/11-273-AnxA; No. ICC-01/11-01/11-273-AnxB; No. CC-01/11-01/11-130-AnxH and their perfected translations: No. ICC-01/11-01/11-144-AnxH; No. ICC-01/11-01/11-190-Anx8 and No. ICC-01/11-01/11-640-AnxF.
[144] See the "Report on the Trial of 37 former members of the Qadhafi Regime (case 630/2012)" No. ICC-01/11-01/11-640-AnxD, 5 June 2018.
[145] See the transcript of the hearing held on 9 October 2012, No. ICC-01/11-01/11-T-2-Red-ENG.

51. The Libyan criminal justice system, modelled on that of Italy, consists of four phases: investigation, accusation, trial, and appeal.[146] The *investigations* may be conducted by an investigating magistrate or the prosecution, subject to the criteria set out in the Code of Criminal Procedure. In the present instance, the investigations have been conducted by the Prosecutor-General, who not only has the power to pursue the investigations but also to subsequently launch criminal proceedings.[147] The Prosecutor-General is supposed to be independent from the judiciary and must be neutral. During the investigation phase, the Prosecutor gathers evidence and produces a record of investigative procedures, which should not be published or otherwise disclosed.[148] The suspect has a right to be assisted by a lawyer; confront witnesses; review the investigative materials; and have confessions obtained through duress found inadmissible. Once the Prosecutor completes the investigation, and provided there is sufficient evidence, the case is referred to the Accusation (or Indictment) Chamber.[149]

52. The Accusation or Indictment Chamber is a Court of First Instance. Its main function is to check, before being submitted to trial, whether the investigation was sufficient and neutral. Also, it must ensure that the confidentiality of the investigations has been preserved; that the investigation has been recorded properly and that the suspect has been appointed counsel. Supplementary investigations are permissible at this juncture.[150]

53. The trial in Libya is conducted by a Criminal Court or Court of First Instance, composed of three judges. The defendant must have a lawyer and must be provided sufficient time to prepare. He or she has the right to: a public hearing; have proceedings recorded; to be presented with the indictment and the evidence; to

[146] *Idem*, p. 24, lines 10-12.
[147] *Ibidem*, p. 24, lines 10 to 15.
[148] *Ibid.*, p. 24, line 15 to p. 25, line 4.
[149] *Ibid.*, p. 25, line 4 to p. 26, line 1.
[150] *Ibid.*, p. 26, lines 1 to 17.

confront prosecution witnesses; to remain silent; to present defence evidence including witnesses; and to receive a written judgment.[151]

54. The trial may be conducted *in absentia*. Where it is possible to execute the verdict following a trial held *in absentia*, pursuant to article 355 of the Code of Criminal Procedure, the verdict shall be executed. Article 357 provides that the lapse of time does not extinguish a verdict issued *in absentia*. It clarifies that the verdict and the penalty shall become final when the penalty expires. Moreover, article 358 of the Code of Criminal Procedure regulates the procedures applicable where a person who has been convicted *in absentia* makes himself or herself available or is arrested, before the penalty expires. It provides that in such circumstances, "*the prior verdict shall automatically be annulled, either with regards to penalty or compensation, and the case shall be heard again before the court*". If compensation awards were made as a result of the verdict, the court shall order that the paid amounts be returned. If the convicted person, having absconded, dies before appearing in court, the compensation shall be re-tried against the heirs.

55. Article 415 of the Code of Criminal Procedure deals with the finality of verdicts and provides that the criminal case and the crime attributed to a person shall expire upon the issuance of a 'final' acquittal or conviction. If a verdict has been issued, the case cannot be reconsidered except through appeal. In turn, article 416 of the Code of Criminal Procedure clarifies that a case that has been closed with a final verdict may not be reopened upon the emergence of new evidence, change of circumstances, or a revised legal description of the crime.

56. In the event of an acquittal, the Prosecutor can appeal the verdict to the Court of Cassation. If the Court of Cassation determines that the acquittal was unlawful, it can reverse the decision and remand the case for a re-trial before different judges.[152]

[151] *Ibid.*, p. 26, line 17 to p. 27, line 6.
[152] *Ibid.*, p. 27, lines 7 to 11.

In the event of a conviction for a serious crime, the defendant has the right to appeal before the Court of Cassation. If the Court of Cassation finds "*an error of law*", it may reverse the judgment in which case the defendant can be released.[153]

57. The Code of Criminal Procedure establishes deadlines for the filing of such appeals. Pursuant to article 369, appeals shall be filed within 10 days from the pronouncement of the judgement for verdicts made *in presentia*. The Prosecutor-General may appeal within 30 days from the issuance of the verdict. In relation to verdicts issued *in absentia*, article 370 of the Code of Criminal Procedure provides that the deadline for appeals shall begin from the date in which the verdict is communicated to the accused.

58. Where death penalty convictions are concerned, the provisions relevant to appeal proceedings show a number of particularities. As provided for in article 429 of the Code of Criminal Procedure, the execution cannot be carried out until the case has been considered by the Court of Cassation. The file must be sent to the Court of Cassation and the Prosecutor is obliged to file his or her opinion related to the case. The convicted person, the defence counsel and the Prosecutor can appeal the verdict before the sentence is implemented. Even the court can trigger the cassation review. In appeals involving the death penalty, the Court of Cassation does not only consider errors of law, but reviews all factual, legal and procedural matters that led to the verdict and the sentence. [154] Where an error is detected, it has the power to nullify the verdict, amend the sentence, or remit the case for re-trial by different judges. The sentence cannot be carried out until all potential avenues of appeal have been exhausted.[155] Article 430 of the Code of Criminal Procedure provides that, once the death penalty "*becomes final*", the case file shall be submitted to the General

[153] *Ibid.*, p. 27, lines 11 to 14.
[154] See the transcript of the hearing held on 9 October 2012, No. ICC-01/11-01/11-T-2-Red-ENG, p. 28, lines 1 to 3.
[155] *Ibid.*, p. 27, line 14 to p. 28, line 6.

Secretariat of the General People's Congress and the execution shall not be carried out without the approval of the General Secretariat.

59. Based on the applicable Libyan legislation, the Principal Counsel submits that the Admissibility Challenge must be rejected. Indeed,

- the guilty verdict entered by the First Instance Court is *not* sufficient to conclude that Mr Gaddafi "has been tried" for purposes of the *ne bis in idem* principle;
- the 2015 Amnesty Law discontinued the criminal proceedings that were ongoing in Libya and, as a result, Libya became 'inactive'; and
- Libya's 'inaction' means that the case remains admissible before the Court.

b) *The guilty verdict entered by the First Instance Court is not sufficient for purposes of the* ne bis in idem *principle*

60. The Defence submits that the terms 'has been tried' in article 20(3) of the Statute "*means simply that the trial proceedings have concluded with a verdict on the merits*".[156] Mr Gaddafi was imposed, by a First Instance Court, a death penalty sentence as a result of a trial held *in absentia*. As set out *supra*, specific proceedings are provided for in the Code of Criminal Procedure for the review by the Court of Cassation of First Instance convictions and death penalty sentences. Moreover, specific proceedings are provided for in relation to *in absentia* convictions. The Principal Counsel contends that said specificities render the *ne bis in idem* defence unavailable for Mr Gaddafi. Indeed, for the reasons set out *infra*, he cannot be considered to "*have been tried*" pursuant to articles 17(1)(c) and 20(3) of the Statute.[157]

61. Criminal proceedings against Mr Gaddafi were initiated in Libya and progressed to a stage where he was convicted and sentenced by a First Instance

[156] See the Admissibility Challenge, para. 44.
[157] See also *supra* paras. 20-47.

Court. Yet, as noted by the Appeals Chamber, the *res judicata* principle, which is an essential feature of judicial proceedings and well established in international law,[158] is interwoven with the *finality* of judicial determinations.[159] Finality is fundamental to the efficacy of the judicial process[160] and to legal certainty.[161] Both under common law[162] and Romano Germanic legal systems,[163] judgment – and decision – making within the judicial process are institutionally associated with finality.[164] It is not permissible to re-litigate or proceed to a re-determination of a matter decided upon, unless "*jurisdiction is specifically conferred upon the court to revisit an issue under given circumstances*".[165] In the view of the Principal Counsel, the exception set out by the Appeals Chamber is clearly applicable where jurisdiction is conferred upon an appeal court to review a judgment and it is also applicable where jurisdiction is conferred for the re-trial of a person convicted *in absentia*.

62. The interpretation of the Appeals Chamber is consistent with the jurisprudence of the European Court of Human Rights (the "ECtHR"). Indeed, the latter explicitly ruled that the *ne bis in idem* principle does not apply where an ordinary appeal lies against:

> "*Decisions against which an ordinary appeal lies are excluded from the scope of the guarantee contained in Article 4 of Protocol No. 7 [*non bis in idem*] as long as the time-limit for lodging such an appeal has not expired. On the other hand, extraordinary remedies such as a request for reopening of the proceedings or an application for extension of the expired time-limit are not taken into account for the purposes of determining whether the proceedings have reached a final*

[158] See the "Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled 'Judgment pursuant to article 74 of the Statute'" (Appeals Chamber), No. ICC-01/04-02/12-271-Corr A, 7 April 2015, para. 246.
[159] See the "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence'" (Appeals Chamber), No. ICC-01/04-01/06-568 OA3, 13 October 2006, para. 16.
[160] *Idem*.
[161] *Ibidem*, para. 18.
[162] *Ibid.*, para. 17; as associated with the concept of "*estoppel*".
[163] *Ibid.*, para. 18.
[164] *Ibid.*, para. 16.
[165] *Ibid.*, para. 19. See also the "Decision on the Admissibility and Abuse of Process Challenges" (Trial Chamber III), No. ICC-01/05-01/08-802, 24 June 2010, paras. 236-248.

> *conclusion* […]. *Although these remedies represent a continuation of the first set of proceedings, the 'final' nature of the decision does not depend on their being used*".[166]

63. Similarly, at the *ad hoc* International Criminal Tribunals, the *ne bis in idem* principle was also interpreted to require a final judgment:

> "*Article 9(2) of the Statute sets a limit on the extent to which the Tribunal can prosecute persons who have been tried by a national Court for acts constituting serious violations of international humanitarian law* […] [t]*he* non bis in idem *principle applies only where a person has effectively already been tried. The term 'tried' implies that proceedings in the national Court constituted a trial for the acts covered by the indictment brought against the Accused by the Tribunal and at the end of which trial a final judgement is rendered*".[167]

64. One of the important steps relevant to "complementarity" in the drafting history of the Rome Statute is to be found in the Summary of the Proceedings of the Preparatory Committee on the Establishment of an International Criminal Court during the period 25 March-12 April 1996. The *ne bis in idem* principle was discussed, at the time, under article 42 and clearly said defence was meant to apply only in *res judicata* situations:

> "*As regards article 42, the remark was made that, the principle of non bis in idem was closely linked with the issue of complementarity. This paragraph it was noted should apply only to res judicata and not to proceedings discontinued for technical reasons. In addition, non bis in idem should not be construed in such a way as to permit criminals to escape any procedure*".[168]

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[166] See *e.g.* ECtHR, *Fäkkä v. Finland* (Application no. 758/11), Judgment, 20 May 2014, para. 44. At paragraph 43, the Court indicated that "[a] *decision is final 'if, according to the traditional expression, it has acquired the force of res judicata. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them'*".

[167] See ICTR, *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-A, Decision (Appeals Chamber), 31 May 2000, para. 74. See also ICTY *Prosecutor v Duško Tadić*, IT-94-1-T, Decision on the Defence Motion on the principle of *non bis in idem*, 14 November 1995, para. 22.

[168] See the Summary of the Proceedings of the Preparatory Committee on the Establishment of an International Criminal Court during the Period 25 March-12 April 1996, UN doc. A/AC.249/1, 7 May 1996, para. 124 (emphasis original).

65. In the same vein, the International Court of Justice ruled that the protective function of the *res judicata* principle attaches to a judgment that is final and without appeal:

> "*The Court recalls that the principle of res judicata, as reflected in Articles 59 and 60 of its Statute, is a general principle of law which protects, at the same time, the judicial function of a court or tribunal and the parties to a case which has led to a judgment that is final and without appeal*".[169]

66. Similarly, the Inter-American Court of Human Rights ("IACtHR") found that a judgment cannot become *res judicata* before the right to appeal has been observed:

> "*The Court considers that the right to appeal a judgment is an essential guarantee that must be respected as part of due process of law, so that a party may turn to a higher court for revision of a judgment that was unfavorable to that party's interests. The right to file an appeal against a judgment must be guaranteed before the judgment becomes res judicata. The aim is to protect the right of defense by creating a remedy to prevent a flawed ruling, containing errors unduly prejudicial to a person's interests, from becoming final*".[170]

67. The European Court of Justice in turn concluded that the *res judicata* principle applies if, and only where, decisions have become final after all rights of appeal have been exhausted:

> "*In that regard, attention should be drawn to the importance, both for the Community legal order and national legal systems, of the principle of res judicata. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that*

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[169] See ICJ, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, 7 March 2016, para. 58.

[170] See IACtHR, *Herrera-Ulloa v. Costa Rica*, Judgment of 2 July 2004, para. 158. See also *Vélez Loo r v. Panama*, Judgment, 23 November 2010, paras. 178 and 179. See also IACtHR, *La Cantuta v. Perú*, Separate Opinion of Judge Sergio García Ramírez to the Judgment of 29 November 2006 (Merits, Reparations, and Costs), para. 9: "[t]*he Inter-American Court –as has also been the case with other international and domestic courts— has laid down certain criteria regarding* res judicata *and the related principle of* ne bis in idem. Res judicata *and the principle of* ne bis in idem *support legal certainty and entail guarantees that are of major importance to all citizens and, specifically, to defendants. However,* res judicata *involves a judgment carrying that effect: definition of a right, immutability, finality. The guarantee of* ne bis in idem *is based on that assumption: the prohibition of a new trial based on the same facts that were the subject matter of a judgment that has the authority of a final judgment (not open to appeal)*".

> *judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time- limits provided for in that connection can no longer be called into question* [...]".[171]

68. Finally, Protocol No. 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention"), adopted in 1984, also embraces *ne bis in idem* guarantees in its article 4, which states:

> "[n]*o one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State*".

69. According to the Explanatory Report on the European Convention, the principle established in article 4 applies when a final decision has been issued and a decision is final "*'if, according to the traditional expression, it has acquired the force of* res judicata. *This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them'. It follows therefore that a judgment by default is not considered as final as long as the domestic law allows the proceedings to be taken up again*".[172]

70. Consequently, the concept "*has been tried by another Court*" is not applicable where the question of guilt or innocence and the sentence issued against the convicted person can still be the subject of an appeal within the domestic jurisdiction. Therefore, the person should not be considered to have been tried until the decision becomes *res judicata*.[173]

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[171] European Court of Justice, Case 234/04, *Rosmarie Kapferer v. Schlank & Schick GmbH*, Judgment, 16 March 2006, para. 20. See also Case 224/01, Judgment, 30 September 2003 and Case C 224/01, para. 38.

[172] See the Explanatory Report of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 22 (footnote omitted). See also paras. 26 and 29.

[173] See EL ZEIDY (M.M.), "The Principle of Complementarity: A New Machinery to Implement International Criminal Law", *Michigan Journal of International Law*, vol. 23, 2002, according to whom although article 20(3) of the Statute is silent with respect to whether the relevant national court should reach a decision and if it must, whether said decision should be final (p. 937), the norms of due process support the need for finality of the decision (p. 939).

71. The Principal Counsel contends that the Chamber needs not entertain said question in an abstract, all-encompassing, manner. Rather, the determination of the Chamber must, instead, focus on the specific circumstances of the present case taking into account the domestic provisions regarding the finality of decisions and judgments. As indicated by one commentator:

> "*Whether the Court's jurisdiction will be precluded on grounds of* non bis in idem *will depend on its interpretation of the notion of 'has been tried'. The ICC will need to carefully scrutinize the national decision in question, also taking due account of domestic provisions regarding the finality of decisions and judgments*".[174]

72. As mentioned *supra*,[175] the Code of Criminal Procedure provides that:

- an acquittal or conviction does not reach 'finality' until it has been reviewed by the Court of Cassation or the deadlines for appeal have expired;
- where a death penalty has been imposed, the sentence cannot be carried out until the case has been considered by the Court of Cassation, which has jurisdiction:
  - to review the judgment even if no appeal has been lodged;
  - to review all factual, legal and procedural matters that led to the verdict and the sentence; and
  - to nullify the verdict, amend the sentence, or remit the case for re-trial by different judges.

73. This legal framework applies to the present case.[176] Accordingly, the death penalty conviction issued against Mr Gaddafi by the First Instance Court was not

[174] See TALLGREEN (I.) and RIESINGER CORACINI (A.), "Article 20", in TRIFFTERER (O.) and AMBOS (K.) (eds.), *Commentary of the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, C.H. Beck, Hart, Nomos Verlagsgesellschaft, Baden-Baden, 2016, p. 921, para. 37.
[175] See *supra* paras. 49-58.
[176] See the Report on the Trial of 37 former members of the Qadhafi Regime (case 630/2012), 5 June 2018, No ICC-01/11-01/11-640-AnxD, p. 50 "*Following the verdict of the Tripoli Court of Assize, the sentences are now under consideration by the Court of Cassation which is to undertake a review of the procedures and the application of the law. Libyan law does not impose a timeframe for the decision of the Court of Cassation and a date for the beginning of hearings has not been set*".

final pending review by the Court of Cassation. Such mandatory review, one which projected upon all questions of law, fact and procedure, is still pending.

74. Quoting article 14(7) of the ICCPR – which applies where a person "*has already been* finally *convicted or acquitted*",[177] the Defence argues that, had the drafters of the Rome Statute wished for the *ne bis in idem* defence to be available only where the judgment is 'final', they would have made explicit reference to it.[178] As demonstrated *supra*, this interpretation has no standing as it contradicts: (i) the jurisprudence of the Appeals Chamber, (ii) the interpretation of the *res judicata* principle in international law; and (iii) the drafting history of the Statute.

75. Moreover, the Defence alleges that article 17(1)(c) of the Statute is applicable where the national decision was "*on the merits of the case*", with no need for the decision to be final.[179] The Defence wrongly bases this assertion on a ruling by Trial Chamber III in which the latter explicitly established that the decision under examination was not "*a decision on the merits of the case*" and "*did not result in a* final *decision or acquittal*".[180] The Defence alleges that because ultimately the decision under examination was not on the merits of the case, the matter was adjudicated without consideration of whether it was final or not.[181] However, Trial Chamber III was unambiguous in its interpretation of article 17(a) and (c) of the Statute and referred to the need for finality.[182]

[177] See the Admissibility Challenge, para. 44.
[178] *Idem*, para. 26.
[179] See the Admissibility Challenge, para. 45 (emphasis added).
[180] See the "Decision on the Admissibility and Abuse of Process Challenges", *supra* note 165, para. 248. See also, paras. 236-248.
[181] See the Admissibility Challenge, para. 45.
[182] See the "Decision on the Admissibility and Abuse of Process Challenges", *supra* note 165, paras. 237 and 248.

76. Recalling a decision of the ICTY in the *Prosecutor v. Duško Tadić* case (the "*Tadić* case"),[183] the Defence also tries to convince the Chamber that the application of the *ne bis in idem* principle before that Tribunal was permissible so long as there was a "*judgment on the merits*" before the relevant national jurisdiction.[184] The Principal Counsel posits that the Defence also misconstrues said ruling. Indeed, the ICTY Trial Chamber acknowledged that the German authorities had already issued an indictment against the accused by the time they decided to defer the case to the ICTY. However, the Chamber merited that the deferral took place well before the trial of the accused in Germany for the same charges.[185] In this context, the trial chamber found that, "*while the proceedings may have passed beyond the purely investigative phase, it is undisputed that the accused had not been tried in the full sense; he was neither convicted nor acquitted by the German Court*".[186] Because the accused had not been the subject of a domestic judgment on the merits on any of the charges for which he had been indicted, the chamber concluded that he had not yet been "*tried*" for purposes of the *ne bis in idem* principle.[187] Obviously, Mr Gaddafi's Defence is decontextualizing said jurisprudence. The holding of the ICTY ruling is that a first instance judgment on the merits is necessary, albeit not sufficient, to trigger the *ne bis in idem* principle. Moreover, paragraph 22 of the ruling is explicit in requiring a final and enforceable judgment for purposes of the *ne bis in idem* principle.[188]

77. Finally, the Defence tries to support its interpretation resorting to a systematic reading of article 17 of the Statute. In particular, the Defence submits that the distinction between article 17(1)(a) and article 17(1)(c) is that article 17(1)(a) addresses national trial proceedings prior to the conclusion of trial, while article

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[183] See the Admissibility Challenge, footnote 77, referring to *Prosecutor v. Duško Tadić*, IT-94-1-T, *supra* note 167, para. 24 (determining that the application of the principle of *ne bis in idem* requires a "judgment on the merits"). However at para. 22 of the same, the Trial Chamber is explicit in requiring a final and enforceable judgment.
[184] See the Admissibility Challenge, para. 45.
[185] *Idem*, para. 8
[186] *Ibid*.
[187] *Idem*, paras. 9-12.
[188] See *supra* note 183.

17(1)(c) addresses national proceedings after the conclusion of the trial. So understood, the Defence submits, there is no overlap between these subsections.[189] In the view of the Principal Counsel, there is no overlap either if the *ne bis in idem* principle is interpreted to require a final decision. The investigation and prosecution pursuant to article 17(1)(a) will come to an end when the case is finished, because only then there would be no jurisdiction conferred to revisit the judgment.[190] Hence, a systematic reading of the provisions is inconclusive to this determination; none of the competing interpretations prevail over the other on the basis of a systematic reading.

78. Furthermore, the interpretation proposed by the Defence leads to results that are manifestly defeating the object and purpose of the ICC complementarity system. A person judged by a domestic jurisdiction acting genuinely may be acquitted by a domestic Appeals Chamber in sham appeal proceedings. This notwithstanding, the case would be inadmissible before the ICC since the sham acquittal, intervened after a lawful trial (in the construction of the Defence), would escape the exceptions set out in article 20(3)(a) and (b) of the Statute. The same logic would apply to a sham conviction on appeal, one entered upon such egregious violations of the rights of the Suspect that the proceedings can no longer be regarded as being capable of providing any genuine form of justice.[191]

79. Moreover, as set out *supra*, and contrary to the submissions of the Defence, Mr Gaddafi has been convicted *in absentia*.[192] The Principal Counsel submits again that the Chamber needs not entertain in the abstract, in an all-encompassing manner the question of whether trials *in absentia* have the effect that the person "*has been*

[189] See the Admissibility Challenge, para. 46.
[190] See the "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence'", *supra* note 159, para. 19. See also the "Decision on the Admissibility and Abuse of Process Challenges" (Trial Chamber III), No. ICC-01/05-01/08-802, 24 June 2010, paras. 236-248.
[191] See the *Al-Senussi* Judgment, para. 230(3).
[192] See *supra* paras. 38-47.

tried" for purposes of article 20 of the Statute. Rather, the determination of the Chamber may, instead, focus on the specific circumstances of the case taking particularly into account the domestic provisions regarding *in absentia* trials. The Code of Criminal Procedure does not only grant persons convicted *in absentia* the right to be retried in his or her presence unless the judgement is accepted;[193] it makes the judgment null and retrial mandatory and automatic. This feature is significant to the Chamber's assessment of the finality of the judgment issued against Mr Gaddafi in Libya.

80. The Principal Counsel posits that the effect pursuant to Libyan law of the appeal proceedings pending against the death penalty judgment and the provision for automatic retrial as per the *in absentia* character of the proceedings must be assessed cumulatively. Accordingly, the Chamber cannot but reach the conclusion that Mr Gaddafi has *not* been tried such that proceedings before the Court would infringe the *ne bis in idem* rule.

c) The 2015 Amnesty Law discontinued the Libyan criminal proceedings and as a result Libya became "inactive"

81. The Defence further submits that article 17(a) of the Statute cannot apply because "*no investigation or prosecution is ongoing*".[194] The Principal Counsel fully agrees with this factual statement and discusses its legal implications *infra*.

82. The Defence alleges that Libya promulgated the Amnesty Law according to which all Libyans who committed offences from 15 February 2011 until the issuance of the law (2015) should be eligible for a general amnesty and that sentences they received should be dropped.[195] The Defence indicates that the Amnesty Law had the effect that the charges against Mr Gaddafi were "*dropped*".[196]

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[193] See article 22(3) of the Statute of the Special tribunal for Lebanon.
[194] See the Admissibility Challenge, para. 46.
[195] *Idem*, para. 25 referring to Annex G to the Admissibility Challenge, No. ICC-01/11-01/11-640-AnxG, pp. 6 *et seq*. See also Annex II of the "Defence Submission of i) translations of Annexes to

83. The Principal Counsel notes that, pursuant to Article 3 of the Amnesty Law, amnesty has *not* been granted in relation to the following crimes:

- terrorism as stated in Law No. 3, year 2014;
- drug smuggling and trafficking and dealing in drugs;
- sexual intercourse and sexual harassment;
- identity-based crimes, abduction, forced disappearance and torture;
- sharia law whenever presented to the judiciary; and
- corruption crimes.[197]

84. The Principal Counsel contends that the judgment issued by the Tripoli Court of Appeal on 28 July 2015 contains, among the charges for which Mr Gaddafi has been convicted,[198] allegations that fall under the Article 3 exceptions.[199] It is therefore unclear whether the Amnesty Law could have served as proper basis for Mr Gaddafi's release in Libya.[200]

85. In any case, the Court issued decisions in relation to the definition of the limb "*the case is being investigated or prosecuted by a State which has jurisdiction over it*". As noted *supra*, this requires the taking of "*concrete and progressive investigative steps*" to ascertain whether the person is responsible for the conduct alleged against him or her before the Court,[201] as for instance "*interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses*".[202]

'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3)of the Rome Statute' and ii) better version of document", No. ICC-01/11-01/11-650-AnxII, 13 September 2018.

[196] See the Admissibility Challenge, para. 26.

[197] See the Annex II of "Defence Submission of i) translations of Annexes to 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3)of the Rome Statute' and ii) better version of document", *supra* note 195, p. 4.

[198] See the "Indictment", Annex B to the Admissibility Challenge, No. ICC-01/11-01/11-640-AnnxB, p. 353.

[199] *Idem*, pp. 6-14.

[200] The Principal Counsel notes, however, with concern, the indication according to which: "*In April 2016 his captor Al-'Ajmi al-'Atiri announced that Saif al-Islam Qadhafi had been released on the basis of an amnesty law, but did not disclose his whereabouts. The Prosecutor in Tripoli informed UNSMIL that such a law had not been published in the Official Gazette and therefore was not in force. UNSMIL is not aware of any credible information to date which suggests that Qadhafi has actually been released*". See the Report on the Trial of 37 former members of the Qadhafi Regime (case 630/2012), 5 June 2018, No. ICC-01/11-01/11-640-AnxD, p. 29. See also *supra* para. 6.

[201] See the *Gaddafi* First Admissibility Decision, paras. 54-55 and 73.

[202] See the *Kenya* Admissibility Judgment, paras. 1 and 40.

86. Article 4 of the Amnesty Law clarifies that the amnesty also applies to persons against whom sentences have been issued and judicial decisions were taken. It is evident that the main purpose of the Amnesty Law included exempting from criminal liability those found guilty in the judgment issued by the Tripoli Court of Appeal on 28 July 2015. As a result, the subsequent proceedings provided for in Libyan law to ascertain whether Mr Gaddafi is responsible for the crimes can no longer take place and he is reported to have been released from custody.

87. In this regard, the Principal Counsel notes that it is not impossible that the domestic judiciary, the parliament or a regional Court invalidate the Amnesty Law subsequently. As elaborated by one academic:

> "[A]*mnesties no longer afford the perpetrators of serious human rights violations the iron-clad protection they once did. With a range of political actors going to increasing lengths to find ways to circumvent, overturn and resist existing amnesty laws, some individuals who have lived under an assumed guarantee of impunity now have very good reasons to be nervous about the continued freedom*".[203]

88. However, a challenge to the admissibility of the case must be based on the circumstances prevailing at the time of the proceedings concerning said challenge.[204] In the present circumstances, the Amnesty Law as it stands entails that appeal proceedings are discontinued and fresh criminal proceedings ensuing the *in absentia* trial are precluded. Therefore, Libya became practically and technically "inactive" in relation to the investigation and prosecution of the case against Mr Gaddafi.

d) Libya's "inaction" entails that the case remains admissible before the Court

89. In a case where a State had conducted investigations against the person but such investigations were closed when the suspect was surrendered to the ICC, the

[203] See JEFFERY (R.), "Amnesties, Accountability, and Human Rights", University of Pennsylvania Press, Philadelphia, 2014, p. 170.
[204] See the *Katanga* Admissibility Judgment, paras. 78 and 79.

Appeals Chamber concluded that, for that reason alone, and irrespective of the willingness of the State to investigate or to prosecute the person, article 17(1)(a) of the Statute does not bar the person's prosecution before the ICC.[205]

90. In particular, the Appeals Chamber clarified that "*in case of inaction*", the question of unwillingness or inability does not arise. Inaction on the part of a State having jurisdiction (*i.e.*, the fact that a State is not investigating or prosecuting including when it has ceased to do so) renders a case admissible before the Court and:

> "[…] *in considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17 (1) (d) of the Statute. This interpretation of article 17 (1) (a) and (b) of the Statute also finds broad support from academic writers who have commented on the provision and on the principle of complementarity*".[206]

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[205] See the *Katanga* Admissibility Judgment, para. 80.

[206] See the *Katanga* Admissibility Judgment, paras. 78. The Appeals Chamber clarified that it "[…] *is therefore not persuaded by the interpretation of article 17 (1) of the Statute proposed by the Appellant, according to which unwillingness and inability also have to be considered in case of inaction. Such an interpretation is not only irreconcilable with the wording of the provision, but is also in conflict with a purposive interpretation of the Statute. The aim of the Rome Statute is 'to put an end to impunity' and to ensure that 'the most serious crimes of concern to the 1 68 international community as a whole must not go unpunished'. This object and purpose of the Statute would come to naught were the said interpretation of article 17 (1) of the Statute as proposed by the Appellant to prevail. It would result in a situation where, despite the inaction of a State, a case would be inadmissible before the Court, unless that State is unwilling or unable to open investigations. The Court would be unable to exercise its jurisdiction over a case as long as the State is theoretically willing and able to investigate and to prosecute the case, even though that State has no intention of doing so. Thus, a potentially large number of cases would not be prosecuted by domestic jurisdictions or by the Intentional Criminal Court. Impunity would persist unchecked and thousands of victims would be denied justice*", *idem*, para. 79.

91. The Principal Counsel requests the Chamber not to deviate from said jurisprudence. Accordingly, the case continues to be admissible before the Court and Libya continues to be under the obligation to surrender Mr Gaddafi to the Court.

C. Amnesties deprive victims of their right to redress

92. In any event, international law does not recognise as valid 'amnesties' for the gravest crimes, such as crimes against humanity, war crimes, and genocide for those most responsible in respect of their commission.

93. Amnesties for grave crimes against humanity not only undermine the fight against impunity, but also "*deprive victims of their right to seek redress before a court of law*".[207] The right to redress for wrongs committed is at the same time a duty placed upon States by international instruments, such as the ICCPR.[208] The amnesty applied in the case of Mr Gaddafi is a glaring example of an attempt "*to enforce a total amnesia regarding* [the] *crimes*"[209] committed in the wake of the 2011 revolution. It is furthermore striking that the Amnesty Law was passed the very day Mr Gaddafi's death sentence was issued, which in turn further questions Libya's intent to genuinely bring him to justice.

94. The Principal Counsel recalls that "*the duty to punish grave violations of comprehensive human rights treaties surely would be breached by a State party's* […] *failure to impose punishment commensurate with the gravity of the crimes*".[210] Amnesties cannot apply to the most serious international crimes. States are under an international law –

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[207] See PORTILLA (J.C.), "Amnesty: Evolving 21st Century Constraints Under International Law", *Fletcher Forum of World Affairs*, vol. 38(1), 2014, p. 169.
[208] See MÉNDEZ (J.E.), "Accountability for Past Abuses", *Human Rights Quarterly*, vol. 19(2), 1997, p. 259.
[209] See WESCHLER (L.), "Afterword", in JUSTICE AND SOCIETY PROGRAM OF THE ASPEN INSTITUTE, *State Crimes: Punishment or Pardon*, 1989, p. 92.
[210] See ORENTLICHER (D. F.), "*Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*", *Yale Law Journal*, vol. 100, 1991, p. 2605. See also LESSA (F.) and PAYNE (L.A.)(eds.) *Amnesty in the Age of Human Rights Accountability – Comparative and International Perspectives*, Cambridge University Press, 2012, p. 338.

both treaty and customary – obligation to punish notoriously grave crimes and human rights violations.[211] The validity of an amnesty measure under international law depends on whether the measure extends to offenses for which convention or custom requires prosecution.[212] While it has been argued that crimes against humanity, unlike genocide or torture, are not the subject of a specialised convention compelling States to take particular action,[213] there exists *opinio juris* sufficient to create a custom, further evidenced, *inter alia*, in the wording of several Security Council resolutions[214], including Resolution 1970 (2011).[215]

95. The United Nations Security Council referred the Libyan situation to the ICC precisely for the purposes of filling the impunity gap and holding those most responsible for the atrocious crimes committed in the wake of the February 2011 uprising criminally accountable. Whereas, general amnesties, as a matter of fact, must be viewed as giving effect to impunity for political, economic or other considerations. In fact, the Human Rights Committee and the Inter-American Commission have condemned amnesty laws that have been very broad in their effects.[216] Whether these are legitimate from the perspective of the state in question or not is both irrelevant in the instant case and not for this Court to judge. What is, however, for the Chamber to decide upon is whether the application of the 2015 Amnesty Law may lawfully trump the requirements of article 17 of the Statute. The Principal Counsel argues that said law is *per se* inconsistent with an intent to bring Mr Gaddafi to justice under article 17(2)(c) of the Statute.

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[211] See *e.g.*, PORTILLA (J. C.), *op. cit. supra* note 207, p. 176. See also ORENTLICHER (D. F.), *op. cit. supra* note 210, p. 2537.
[212] See BOED (R.), "The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations", *Cornell International Law Journal*, vol. 33(2), 2000, p. 313.
[213] *Idem*, p. 316.
[214] *Ibidem*, p. 315.
[215] See *supra* note 93.
[216] See O'SHEA (A.), *Amnesty for Crime in International Law and Practice*, Kluwer Law International, Leiden, 2004, p. 171.

96. Just as "[d]*omestic amnesties cannot disable prosecution of an alleged offender in another State for conduct that must be prosecuted under international law*",[217] the 2015 Amnesty Law should not be allowed to bar ICC proceedings. This principle applies, for instance, to the prohibition of torture and the auxiliary obligation to prosecute the authors of such crime which is enshrined into customary international law. It should likewise be recalled that alleged acts of torture are underlying the persecution charge against Mr Gaddafi in the ICC arrest warrant. The Convention against Torture requires States parties to investigate, prosecute, and punish instances of torture perpetrated on their territory.[218] Thus, ICC prosecution would ensure that acts of torture would be prosecuted and victims would obtain justice and eventually redress for the crimes they suffered from. Additionally, human rights conventions, such as the ICCPR, impose duties upon States parties to give effect to the right to compensation to victims of unresolved disappearances and torture. Libya is a state party to the Covenant.[219] This in itself negates the lawfulness of the 2015 Amnesty Law.

97. Furthermore, it must be recognised that despite the dichotomy between the international law position towards genocide and torture on the one hand and crimes against humanity on the other hand, customary international law is evolving and particularly so since the inception of the ICC. In 2009, the United Nations itself recognised that:

> "*Most importantly, amnesties that prevent the prosecution of individuals who may be legally responsible for war crimes, genocide,* ***crimes against humanity*** *and other gross violations of human rights are inconsistent with State's obligations under various sources of international law as well as United Nations policy*".[220]

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[217] See JEFFERY (R.), *op. cit. supra* note 203, p. 143.
[218] *Idem*, p. 321.
[219] See LESSA (F.) and PAYNE (L.A.) (eds.), *op. cit. supra* note 210, p. 339.
[220] See PILLAY (N.), "Foreword", in OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *Rule-of-Law Tools for Post-Conflict States – Amnesties*, United Nations publications, New York, 2009, p. V (emphasis added).

98. It has even been argued that the establishment of the Court marked the dawn of a new era in customary international law that resulted in countries abolishing amnesty laws for serious human rights violations, such as for instance in Argentina, Peru,[221] and Uruguay.[222] Indeed, prosecutions of those most responsible for designing and implementing a past system of State violence or for the most notorious violations of human rights would best comport with common standards of justice.[223]

99. For instance, the IACtHR ruled in the *Barrios Altos* case that "*all amnesty provisions* […] *are inadmissible, because they are intended to prevent the investigations and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance*".[224] Significantly, the court also held that the amnesty laws adopted prevented the victims' next of kin and surviving victims in that case from being heard and obstructed clarification of the facts.[225] ICC proceedings in the *Gaddafi* case would ensure that the victims may express their views and concerns and have a legitimate expectation for reparations.

100. Last but not least, the Defence argues that the amnesty from which Mr Gaddafi benefits is not an amnesty but rather a commutation of sentence. The Principal Counsel questions this assertion. Rather, it appears that the 'general amnesty' is merely *subject to* the condition that the person benefiting from it must not reoffend (wilful felony) within 5 years.[226] Thus, it is not a commutation of sentence. Be that as it may, the core of the matter remains that regardless of its label, it

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[221] See MALLINDER (L.), "Perspectivas transnacionais sobre anistias", in COMISSÃO DE ANISTIA MINISTÉRIO DA JUSTIÇA (BRASIL) E CENTRO DE ESTUDOS LATINO-AMERICANOS UNIVERSIDADE DE OXFORD, *A Anistia na Era da Responsabilização:*O Brasil em Perspectiva Internacional e Comparada, Oxford University Press, Brasilia and Oxford, 2011, p. 474.
[222] See JEFFERY (R.), *op. cit. supra* note 203, p. 143.
[223] See ORENTLICHER (D. F.), *op. cit. supra* note 210, p. 2541.
[224] See IACtHR, *Barrios Altos v. Peru*, Judgment (Merits), 14 March 2001, para. 41.
[225] *Idem*, para. 42.
[226] See Annex II to the "Defence Submission of i) translations of Annexes to 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute' and ii) better version of document", No. ICC-01/11-01/11-650-AnxII, 13 September 2018.

constitutes a "*failure to impose punishment commensurate with the gravity of the crimes*".[227]

101. Finally, it must also be recalled that in 2012, the Defence strongly condemned an amnesty announced by the Libyan National Transitional Council for anyone who would kill a member of Mr Gaddafi's inner circle.[228] While such condemnation is to be endorsed, it also illustrates that the justification of the 2015 Amnesty Law is not based on legal considerations, but is rather purely motivated by its *de facto* result of Mr Gaddafi escaping justice and victims not having the possibility to know the truth of what happened.

102. The Principal Counsel lastly underlines that it is imperative for the victims that Mr Gaddafi is apprehended and immediately surrendered to the custody of the ICC so that fair proceedings in which victims will be heard can be conducted by an independent and impartial Court.

FOR THE FOREGOING REASONS the Principal Counsel respectfully requests the Pre-Trial Chamber to declare that the case against Mr Saif Al-Islam Gaddafi is admissible before the Court.

Paolina Massidda
Principal Counsel

Dated this 28th day of September 2018

At The Hague, The Netherlands

[227] See ORENTLICHER (D. F.), *op. cit. supra* note 210, p. 2605.
[228] See 2012 Defence Submissions, paras. 338 and 339.