

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 20 November 2018

PRE-TRIAL CHAMBER I

Before: Judge Peter Kovacs, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Reine Alapini-Gansou

SITUATION IN LIBYA

IN THE CASE OF

THE PROSECUTOR V. SAIF AL-ISLAM GADDAFI

**Public
with Public Annexes 1 to 7**

Second Redacted Version of Corrigendum of Defence Consolidated Reply to Prosecution "Response to 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute" and Response to "Observations by Lawyers for Justice in Libya and the Redress Trust pursuant to Rule 103 of the Rules of Procedure and Evidence"

Source: Defence for Dr. Saif Al-Islam Gadafi

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

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I. Introduction

1. The defence for Dr. Saif Al-Islam Gaddafi (“Defence”), pursuant to Rule 103(2) of the Rules of Procedure and Evidence, regulations 24(1) and 34(b) of the Regulations of the Court, and further to the Pre-Trial Chamber’s decisions of 5 September 2018¹ and 24 October 2018,² submits this consolidated response to the “Observations by Lawyers for Justice in Libya and the Redress Trust pursuant to Rule 103 of the Rules of Procedure and Evidence”³ (“Amici Observations”) and reply to the Prosecution “Response to ‘Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3)of the Rome Statute” (“Prosecution Response”).⁴

2. Fundamentally, the position of the Libyan Attorney General’s Office set out in its 18 September 2018 response (“Attorney General’s Response”)⁵ to the Prosecutor’s request for assistance,⁶ and upon which the Prosecution heavily relies in its response,⁷ as well as the observations of Lawyers for Justice in Libya and the Redress Trust (“the Amici”), are incorrect as a matter of law and fact and only deflect attention from the heart of Dr. Gaddafi’s admissibility challenge (“Admissibility Challenge”).⁸ Dr. Gaddafi was detained and imprisoned in November 2011 pursuant to the orders and authority of the Libyan Attorney

¹ Decision on the “Application by Lawyers for Justice in Libya and the Redress Trust for leave to submit observations pursuant to Rule 103 of the Rules of Procedure and Evidence” and the “Defence Request for Leave to Respond to the Application”, ICC-01/11-01/11-649 (granting the Amici permission to submit observations and confirming the Defence’s right to respond to such observations).

² Decision on the “Defence Application for 1) Leave to Reply to Legal Representative of Victims filing 652 and Prosecution filing 653-Conf, and 2) Extension of Time to Respond to Observations of amici Lawyers for Justice in Libya and Redress Trust (filing 654)”, and other related matters, ICC-01/11-01/11-659 (granting the Defence leave to Reply to new issues of fact or law arising from documents which were not available to the Defence at the time of the admissibility challenge).

³ 28 September 2018, ICC-01/11-01/11-654.

⁴ 28 September 2018, ICC-01/01/11-653-Conf. A public redacted version of the Prosecution Response was filed on 11 October 2018.

⁵ Annex 8 to the Prosecution Response. Reference’s hereafter to the Libyan Attorney General’s Response will be to the Prosecution’s English translation of the Arabic original (LBY-OTP-0065-0426).

⁶ See Annex 7 to the Prosecution Response.

⁷ See Prosecution Response, paras. 2, 3, 5, 8, 9, 43, 47, 80-82, 85, 86, 105, 106, 108-110, 126, 127, 128, 146, 156, 161, 162, 165.

⁸ Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3)of the Rome Statute, 5 June 2018, ICC-01/11-01/11-640.

General's Office. He was tried before the Tripoli Court of Assize, in proceedings that related to substantially the same conduct as Dr. Gadafi's case before the ICC, and was convicted for relevant crimes in a judgment issued on 28 July 2015 ("Libyan Judgment"). He remained imprisoned until April 2016, by which time he had been incarcerated for close to four and a half years. This admissibility challenge is not about impunity. Dr. Gadafi has been tried – and punished – in accordance with national law, within the permissible bounds of the Rome Statute's complementarity framework.

3. First, both the Libyan Attorney General's Office⁹ (upon whose advice the Prosecution relies) and the Amici¹⁰ are incorrect in asserting that legal proceedings against Dr. Gadafi arising from his conviction and sentencing by the Tripoli Court of Assize in Case 630/2012 are either ongoing or not final pursuant to Libyan law. As submitted in the Admissibility Challenge, the Libyan Judgment became final by virtue of the application of Law No. 6 of 2015 on General Amnesty¹¹ to Dr. Gadafi by the Minister of Justice of the Transitional National Government based in Al-Bayda. Indeed, neither the Libyan Attorney General's Office, through its representatives in the courtroom (the 'public prosecution'), nor the Libyan judiciary challenged Dr. Gadafi's standing to bring a criminal false accusation claim in September 2017,¹² an action which is explicitly barred by the Amended Libyan Code of Criminal Procedure where an individual has been convicted *in absentia*.¹³

⁹ Attorney General's Response, pp. LBY-OTP-0065-0428 to 0430.

¹⁰ Amici Observations, paras. 17-23.

¹¹ Annex E to Admissibility Challenge with a clearer copier provided in ICC-01/11-01/11-650-AnxIII. The Registry's official English translation of Law No. 6 of 2015 is provided in ICC-01/11-01/11-650-AnxIII-tENG.

¹² See **Annex 1** (**Annex 1A** containing Dr. Gadafi's complaint submitted to the Attorney General's Office and **Annex 1B** the Bailiff's service of process report) and **Annex 2** (containing the judgment of the Tobruk Sub-District Court in the case).

¹³ See Amended Code of Criminal Procedure, Article 353.

4. Similarly, in response to a separate complaint filed by Dr. Gadafi against another individual, the Head of the Investigations Section within the Libyan Attorney General's Office issued a direction in January 2017 to the Head of Control Unit within the Attorney General's Office, ordering the Head to summon the defendant for investigation purposes.¹⁴ Once again, no indication is given that Dr. Gadafi's claim was deemed legally invalid per the clear requirements of Article 353 of the Amended Code of Criminal Procedure. This is despite the fact that the Head of the Investigations Section who signed the order – Mr. Sidieg Alsour – was the main prosecutor in charge of Case 630/2012¹⁵ and the same official who signed the Attorney General's Response to the Prosecution on 18 September 2018.¹⁶
5. The Libyan Attorney General's Office must be held to positions consistently taken, either directly or indirectly, by its personnel or the administrative entities within the Office. The preponderance of the evidence – as indicated above with respect to the finality of the Libyan Judgment regarding Dr. Gadafi, and as submitted below on the validity of Law No. 6 of 2015 on General Amnesty and its proper application to Dr. Gadafi – demonstrates that the Attorney General's Response, as provided to the Prosecution, is not consistent with the Libyan Attorney General's Office's consistent position and actions within the Libyan judicial system.

¹⁴ See **Annex 3 (Annex 3A** containing Dr. Gadafi's complaint submitted to the Attorney General's Office and **Annex 3B** containing the order of the Head of the Investigation Department).

¹⁵ See United Nations Support Mission in Libya, Report on the Trial of 37 Former members of the Qadhafi Regime (Case 630/2012), 21 February 2017 (Annex D to Admissibility Challenge), pp. 5-6 ("*Throughout the proceedings and afterwards, UNSMIL kept in close contact with and welcomes the cooperation of Counsellor Al-Siddiq al-Sur, Director of the Investigations Office at the Office of the Prosecutor General, and main prosecutor of the case.*").

¹⁶ Attorney General's Response, p. LBY-OTP-0065-0436.

6. Second, contrary to the Prosecution's submission,¹⁷ the 14 September 2018 decision of Pre-Trial Chamber II in the *Simone Gbagbo* case lends no support to the Prosecution's contention that a final national decision is required in order to trigger Article 20(3) of the Statute. Pre-Trial Chamber II simply sought information on all pertinent judicial decisions without, at that stage, making any determination on the meaning of Article 20(3).

7. Third, contrary to the assertion of the Libyan Attorney General's Office,¹⁸ Law No. 6 of 2015 was validly enacted, as confirmed by several Libyan court cases dating from 20 September 2015 (within two weeks of passage of the Law) to January 2018, in which this law has been applied to criminal defendants, and where the Libyan Attorney General's Office (through the 'public prosecution') was a party to the proceedings.¹⁹ Letters issued by the Tobruk Court of Appeal and Bayda Court of Appeal, both dated 31 October 2018, likewise confirm that Law No. 6 of 2015 is being implemented before these courts.²⁰

8. Fourth, to the extent that the Court's powers of review over the "proceedings in the other court" for the purposes of Article 20(3) of the Statute permit consideration of post-conviction executive action,²¹ the Libyan Attorney General's Office and the Amici are incorrect in asserting that Law No. 6 of 2015 was not validly applied to Dr. Gaddafi. It was not the "Batallion of Abu Bakr" that applied Law No. 6 of 2015 to Dr. Gaddafi,²² but the Minister of Justice acting under the *de facto* authority of the Al-Bayda Transitional Government of Libya,²³

¹⁷ Prosecution Response, para. 115.

¹⁸ Attorney General's Response, pp. LBY-OTP-0065-0430 to 0432. See also Prosecution Response, para. 146 ("The Government of Libya has also stated that Law No. 6 of 2015 is not valid.")

¹⁹ See **Annex 4 (Annexes 4A to 4F)** containing six Libyan court judgments)

²⁰ See **Annex 5 (Annex 5A)** containing the letter from the Tobruk Court of Appeal and **Annex 5B** containing the letter from the Al Bayda Court of Appeal). These letters were provided to the Defence by a legal researcher who requested certain information from these courts and was provided with the attached official letters in response.

²¹ Admissibility Challenge, paras. 69-78.

²² Amici Observations, paras. 16(c), 87,

²³ Admissibility Challenge, para. 26.

whose internal exercise of power should be recognised as legitimate for purposes of domestic legal acts even if it may not have been considered at that time the internationally recognised Government of Libya. Further, the Libyan Attorney General's Office²⁴ and the Amici's²⁵ claims or suggestions that there were procedural irregularities in the application of Law No. 6 of 2015 to Dr. Gaddafi are without merit, and should not be entertained given that Article 8 of the Law provides for domestic adjudication procedures in the event of any disputes concerning the application of the Law.

9. Lastly, with respect to the Amici's submissions on the 'wider application' of any rulings the Pre-Trial Chamber may make in relation to amnesties and pardons for international crimes and gross violations of human rights,²⁶ these are inapposite. They overlook the particular circumstances of Dr. Gaddafi's case and overstate the current status of customary international law on the matter of amnesties and pardons in the context of crimes against humanity.

II. Classification

10. Pursuant to Regulation 23bis(2), this filing is classified as confidential because it refers to other information or documents in the case record that are likewise classified. The Defence shall submit a public redacted version of its filing as soon as possible.

III. Procedural Position

11. On 24 October 2018, Pre-Trial Chamber I issued its "Decision on the 'Defence Application for 1) Leave to Reply to Legal Representative of Victims filing 652 and Prosecution filing 653-Conf, and 2) Extension of Time to Respond to

²⁴ Attorney General's Response, pp. LBY-OTP-0065-0433 to 0434.

²⁵ Amici Observations, paras. 39-45.

²⁶ Amici Observations, paras. 46-85.

Observations of amici Lawyers for Justice in Libya and Redress Trust (filing 654)', and other related matters",²⁷ in which it, *inter alia*:-

- i. Rejected the Defence request to file a general reply;²⁸
- ii. Permitted the Defence to reply to "new issues of facts or law arising from documents which were not available to the Defence at the time of the Admissibility Challenge" and identified those documents;²⁹ and
- iii. Granted extensions so that the Defence may file a consolidated reply and response to the Amici Observations of no more than 50 pages by no later than 4.00pm on 9 November 2018.³⁰

12. Pursuant to the normal rules governing the filing of a response, the Defence has the right to rely upon and submit into the record materials and sources that assist the filing party in addressing the facts and issues raised in the underlying submission that is being responded to. The Defence has done so here. The fact that some of these sources and materials may be relevant to the broader submissions made in the Prosecution Response and the response of the Legal Representative of Victims³¹ to the Admissibility Challenge is neither surprising, nor can they be considered a "circumvent[ion] [of] the Chamber's decision in relation to the [Defence's] application for leave to reply".³²

13. Similarly, while the parameters of a reply are strictly limited by the relevant decision of the Chamber, it is permissible to rely upon sources and materials not

²⁷ ICC-01/11-01/11-659.

²⁸ *Id.*, paras 14-15.

²⁹ *Id.*, para. 16.

³⁰ *Id.*, para. 17 and disposition.

³¹ Victims' Response to the "Defence Application for 1) Leave to Reply to Legal Representative of Victims filing 652 and Prosecution filing 653-Conf, and 2) Extension of Time to Respond to Observations of amici Lawyers for Justice in Libya and Redress Trust (filing 654)" (No. ICC-01/11-01/655-Conf), 8 October 2018.

³² *Id.*, para. 20.

already in the record if such references can reasonably be said to assist in addressing the new issues of fact or law with respect to which leave to reply has been granted. Here, the critical new document to which the Defence is permitted to reply is the Response of the Libyan Attorney General's Office to the Prosecutor's request for assistance. Since receiving that new document, the Defence has carried out further investigations. As set out in more detail below, the contents of the Attorney General's Response are incomplete and, at times, inaccurate. In replying to the new issues of fact and law raised by this new document, the Defence seeks to put the complete picture before the Pre-Trial Chamber – without overstepping the bounds of the limited Reply which was permitted.

14. Lastly, in the unique circumstances of this reply, where the Defence is addressing submissions or information originating from entities who are not parties to the proceedings, the annexed materials relating to Libyan law have the additional permissible purpose of assisting the Chamber in assessing the credibility of the submissions and the *bona fides* of these entities. It should be expected that the Libyan Attorney General's Office is in a privileged position with respect to knowledge of criminal procedure and criminal proceedings in Libya, including proceedings to which it was a party through the representatives of the public prosecution. Similarly, the Amici Lawyers for Justice in Libya submits that it "maintains a growing network of over 70 Libyan lawyers and activists, who work across Libya".³³ Although this Amici's "core values are independence and integrity",³⁴ the Defence notes that the Amici's Advisory Board includes Alex Whiting (Prosecutions Coordinator at the Court at the time of the original admissibility proceedings) and Hassan Al-Amin and Mervat

³³ Application by Lawyers for Justice in Libya and the Redress Trust for leave to submit observations pursuant to Rule 103 of the Rules of Procedure and Evidence, 30 August 2018, ICC-01/11-01/11-64, para. 11.

³⁴ *Id.*, Para. 12.

Mhanni (activists and opponents of the former Libyan regime).³⁵ It is surprising that these connections were not disclosed by the Amici in seeking leave to file their Observations. Pre-Trial Chamber II previously recognised that the core rationale of Rule 103 is to allow the Court to be assisted by an “independent and impartial intervener”.³⁶ In the light of the Amici’s highly questionable independence and impartiality, and the failure to disclose these connections to the Chamber,³⁷ the Defence invites the Chamber to treat the Amici’s Observations with caution.

15. The Defence’s human resources pale in comparison to that of the Libyan Attorney General’s Office, the Amici, and indeed the ICC Office of the Prosecutor; it is regrettable that the Libyan-law related materials annexed to this reply were not brought to the Chamber’s attention via the Attorney General’s Response and the Amici Observations given that the materials are directly relevant to the information provided and arguments put forward by these entities.

IV. Submissions

a. The Libyan national proceedings against Dr. Gaddafi are final

16. The Amici and the Libyan Attorney General’s Office assert, for different reasons, that the Libyan Judgment is not final or that proceedings are ongoing against Dr. Gaddafi. The Amici, like the Defence,³⁸ consider that the correct position under Libyan law is that Dr. Gaddafi was tried and convicted *in presentia*. However, the

³⁵ See **Annex 6** (containing a copy of the following webpage: www.libyanjustice.org/en/about#team).

³⁶ ICC-01/01-35 para. 6.

³⁷ The failure to disclose prior associations with a party has been relied on by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia as an additional reason to deny a request to file an amicus curiae brief: Decision on Application and Proposed Amicus Curiae Brief, *Prosecutor v Gotovina*, IT-06-90-A, 14 February 2012, para. 12.

³⁸ Admissibility Challenge, para. 47.

Amici assert that the criminal case against Dr. Gadafi “is [] ongoing given that he still has avenues of appeal and the Court of Cassation has still not verified his conviction and sentence”³⁹ – provisions that apply to *in presentia* judgments and sentences of death under the Amended Libyan Code of Criminal Procedure (articles 381 and 385*bis*).

17. The Prosecution also submitted that the Libyan Judgment is not final.⁴⁰ That submission was wholly or substantially founded on the Attorney General’s Response, in particular that: Dr. Gadafi is not permitted to appeal the Libyan Judgment because it was rendered *in absentia*; the judgment *in absentia* against Dr. Gadafi has not lapsed; and Law No. 6 of 2015 has not validly been applied to Dr. Gadafi.⁴¹
18. As a preliminary matter, the Defence hereby confirms that Dr. Gadafi did not seek to appeal the Libyan Judgment. The right to an appeal is a discretionary right of the convicted person and there is no rule of national or international law requiring him to submit such an appeal.
19. More to the point, and regardless of the qualification of the Libyan Judgment as having been issued *in presentia* or *in absentia*, the Defence reiterates its position⁴² that the Libyan Judgment is a decision on the merits of the case against Dr. Gadafi after the conclusion of his trial which has in any event been rendered final by the application of Law No. 6 of 2015 to Dr. Gadafi’s case.
20. The Defence does contest⁴³ the Libyan Attorney General’s Office’s position that the Tripoli Court of Assize’s apparent qualification of the judgment against Dr.

³⁹ Amici Observations, para. 17.

⁴⁰ Prosecution Response para. 104.

⁴¹ Prosecution Response paras 106 – 111.

⁴² Admissibility Challenge, para. 48.

⁴³ Admissibility Challenge, para. 47.

Gadafi as having been issued *in absentia* was correct.⁴⁴ Firstly, the Libyan Attorney General's Office fails to address the compatibility of its present stance with the previous submissions of the Government of Libya to the Chamber, and which the Chamber previously relied upon, that under Libyan law *in absentia* trials are not permissible in circumstances where the defendant is present on the territory of Libya and his location is known to the authorities.⁴⁵ The Defence notes that the Libyan government representative who made these submissions to the Chamber in 2012,⁴⁶ is the same individual to whom the Prosecution addressed its request for cooperation in July of 2018.⁴⁷

21. Second, the Libyan Attorney General's Office ignores the clear requirement of Article 212 of the Amended Libyan Code of Criminal Procedure that mandates the issuance of a verdict *in presentia* for all defendants who appear before the court, even if the accused subsequently does not appear in later hearings without an acceptable excuse. As submitted by the Defence,⁴⁸ Dr. Gadafi's trial commenced *in presentia*, following the passage of Law No. 7 of 2014, which amended Article 243 of the Libyan Code of Criminal Procedure to permit an accused to appear by 'modern communication means' when the accused's safety is at stake. **For security reasons, Dr. Gadafi appeared on four occasions by video-link before the Tripoli Court of Assize⁴⁹ pursuant to Amended Article 243. Similarly the eight accused held in Al-Jawiya Reform and Rehabilitation Institution in Misrata also appeared by video-link during the case "for security reasons".⁵⁰** He was represented by counsel at relevant hearings when he could not appear by video-link.

⁴⁴ Attorney General's Response, pp. LBY-0065-0427 to 0428.

⁴⁵ See the argument set out fully at Admissibility Challenge, para. 47.

⁴⁶ Hearing of 10 October 2012, ICC-01/11-01/11-T-3-Red-ENG, p. 62, lines 10-14.

⁴⁷ ICC-01/11-01/11-653-Conf-Anx7.

⁴⁸ Admissibility Challenge, paras. 41, 101.

⁴⁹ See Libyan Judgment at pp. 0296; 0298; 0299; 0300.

⁵⁰ See Admissibility Challenge, para. 41 and footnotes.

22. Further, the Attorney General's Response ignores the fact that the Tripoli Court of Assize, at least in part, lays blame on Dr. Gadafi himself⁵¹ for having decided, when given the choice in the Al-Zawiyah Court of Appeal, Felonies Circuit, in Zintan in wholly different criminal proceedings, to remain in Zintan instead of being transferred to Tripoli to be tried in Case 630/2012. For the avoidance of doubt, it must be emphasised that Dr. Gadafi could not appear by video-link or in-person before the Tripoli Court of Assize, after the court session held on 22 June 2014, for reasons wholly outside his control – namely, the failure of the video-link equipment. This fact is very clearly acknowledged in the Libyan Judgment itself at page 0302 in the following terms: *"The Public Prosecution submitted a technical report issued by the specialized company in charge of linking CCTV systems between the Court and the Reform and Rehabilitation Institutes in Misratah and Zintan, stating that CCTV systems were not linked because of technical difficulties resulting from the damages incurred by the transmitter stations and post offices."* Also, the Judicial Police had failed to bring Dr. Gadafi from the Zintan Correction and Rehabilitation Institute to the al-Hadhaba Correction and Rehabilitation Institute.⁵²

23. In any event, a defendant having allegedly played a role in his absence from trial proceedings would, presumably, not be considered an 'acceptable excuse' under Libyan law, and the Attorney General's Response makes no indication that it would be a valid excuse. This position appears to be endorsed by the Amended Libyan Code of Criminal Procedure in analogous situations to the extent that Article 302 provides that in the case of multiple accused, some of whom appear before the Court and some of whom do not, "the order shall become final for those who failed to appear".⁵³ These provisions of the Code of Criminal

⁵¹ Libyan Judgment (English translation) (Annex B to Admissibility Challenge), pp. LBY-OTP-0062-0427 and 0625. The original of the Libyan Judgment is provided in Annex A to the Admissibility Challenge.

⁵² See Annex 8.1 to the Prosecution Response; Libyan Judgment (English translation) (Annex B to Admissibility Challenge), p. LBY-OTP-0062-0302.

⁵³ Amended Code of Criminal Procedure (Annex G to Admissibility Challenge), Article 302 ("In the event of multiple accused charged according to a criminal order decide to reject the same and some of them appear on

Procedure are inconsistent with the Libyan Attorney General's Office's position that Dr. Gaddafi's inability to attend the final hearing rendered the entire case a trial *in absentia*.

24. Even presuming, as the Amici argue,⁵⁴ that Dr. Gaddafi's sentence was subject to 'verification', this does not invalidate the Defence's submission that a reasoned verdict on the merits of Dr. Gaddafi's case was issued following trial proceedings, and which became final upon the application of Law No. 6 of 2015 to his case.
25. Indeed, even proceeding on the alternative basis that the position of the Libyan Attorney General's Office is correct – namely that the verdict and sentence against Dr. Gaddafi were correctly issued *in absentia* – the same result is reached that a judgment on the merits was issued against Dr. Gaddafi after the conclusion of trial proceedings and was rendered final by the application of Law No. 6 of 2015 to his case.⁵⁵
26. Notably absent in the Attorney General's Response (and the Amici Observations) is any reference to the criminal false accusation claim filed by Dr. Gaddafi against a member of the Libyan House of Representatives in September 2017, before the Tobruk Sub-District Court, and which was served upon the Tobruk Sub-District Prosecution Office.⁵⁶ A judgment in the case, dismissing Dr. Gaddafi's claim on parliamentary immunity grounds, was issued by the Tobruk Sub-District Court on 25 December 2017, in the presence of a representative of the Libyan Attorney General's Office, namely the local representative of the public prosecution.⁵⁷ The relevance of the determination of that claim on the merits is that under Libyan law a person convicted in absentia loses the right to

the designated date to deliberate the case and some others fail to appear, the case shall be deliberated through regular means for those who appear and the order shall become final for those who failed to appear.”).

⁵⁴ Amici Observations, paras 17, 19.

⁵⁵ Admissibility Challenge, para. 48.

⁵⁶ See **Annex 1B**.

⁵⁷ See **Annex 2**.

file any case. Article 353 of the Amended Code of Libyan Criminal Procedure (“Effects of Convictions in Absentia”) provides, in relevant part, that: “A conviction in absentia shall entail a deprivation of the right to dispose of and manage money and deprivation of the right to file any case in the absent accused’s name, and any act or engagements undertaken by the convicted party shall be void.” (emphasis added)

27. As previously submitted to the Chamber by the internationally recognised Government of Libya in August 2015, and regarding which there is no indication in the Attorney General’s Response that the situation has changed: “the Libyan prosecution authorities and the Libyan judiciary remain unified bodies headed in Tripoli, which, in accordance with the separation of powers principle, work independently from both of the two governments and legislatures.”⁵⁸ A statement issued in August 2017 by the President of the Libyan Supreme Judiciary Council concerning the Council’s working visit to Benghazi, as well as a 2 April 2018 news report on a speech given by the President of the Supreme Judiciary Council, likewise confirm the continuing unitary nature of the Libyan judiciary and Libyan prosecution authorities.⁵⁹

28. The Defence notes, as was recognised by Trial Chamber V(a) in the *Ruto and Sang* case,⁶⁰ that the position put forward by the Attorney General of a State with respect to the status and meaning of a relevant provision of national law under consideration by the Court cannot automatically be accepted. The stated position must be evaluated in light of the submissions and information put forward by

⁵⁸ See Prosecution Response, para. 55, quoting from Response to Prosecution’s “Request for an Order to Libya to Refrain from Executing Saif Al-Islam Gaddafi, Immediately Surrender Him to the Court, and Report His Death Sentence to the United Nations Security Council”, 20 August 2015, ICC-01/11-01/11-612, para. 13. (underline added).

⁵⁹ See **Annex 7** (**Annex 7A** containing the August 2017 statement; **Annex 7B** containing a copy of a 2 April 2018 article published in ‘Alwasat’).

⁶⁰ *Prosecutor v. Ruto and Sang*, Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014, ICC-01/09-01/11-1274-Corr2, paras. 158-164.

the parties to the proceedings in order to reach the proper conclusion. With respect to the particular national law issue that was under consideration by Trial Chamber V(a), the Trial Chamber preferred the views put forward by the Legal Representatives of Victims and rejected the approach of the Attorney General of Kenya.⁶¹

29. The Libyan Attorney General's Office cannot have it both ways if it wishes to maintain the credibility of its position before the Chamber. It cannot, as noted above, make submissions on Libyan law that are convenient for the purposes of one set of proceedings, and then side-step these submissions when they become inconvenient to its position in another. It cannot selectively rely on the provisions of the Amended Libyan Code of Criminal Procedure. If Dr. Gaddafi's conviction *in absentia* remained in place notwithstanding the application of Law No. 6 of 2015 to his case, then, pursuant to the clear wording of Article 353 of the Amended Criminal Procedure Code, he had no legal right to file his false accusation claim and the Tobruk Sub-District Court and the Libyan Public Prosecutor should have immediately deemed his claim to be void as a matter of law.
30. The failure of the Attorney General's Office and its public prosecution representatives in the courtroom to act pursuant to Article 353 of the Amended Code of Libyan Criminal Procedure – *had the Attorney General's Office truly and formally held the position that Dr. Gaddafi's in absentia conviction in Case 630/2012 remained outstanding and that Law No. 6 of 2015 had not been validly applied to him* – is particularly difficult to explain in light of the 11 June 2017 statement issued by the 'Acting Chief Prosecutor'. This statement, relied upon by the Prosecution in its response,⁶² [REDACTED].

⁶¹ *Id.*, paras. 160, 164.

⁶² See Annex 4 to the Prosecution Response.

31. Instead, the judgment in the case establishes that the Tobruk Sub-District Court accepted Dr. Gadafi's standing to file his criminal false accusation claim. Nothing in the record indicates that the oral pleadings of the parties on 16 October 2017, 30 October 2017, 27 November 2017, 25 December 2017 or any written submissions, including those of the public prosecution and the defendant, challenged Dr. Gadafi's standing on the basis of Article 353. At the 30 October 2017 session, the representative of the public prosecution requested a stay in the proceedings pending resolution of the issue of the *defendant's* immunity. At the session of 27 November 2017, the representative of the public prosecution sought to have the charge re-characterised as one of defamation. Thus, despite actively participating in those proceedings in full knowledge of Dr. Gadafi's alleged status as a person convicted *in absentia*, the public prosecution never raised any issue in relation to Dr. Gadafi's alleged outstanding conviction *in absentia* as a bar to him filing the claim or being a party to those proceedings.
32. Similarly, in response to a separate complaint filed by Dr. Gadafi against Mr. Mohammed Abdul Muttalib El-Houni (*receipt acknowledged by Attorney General's Office on 3 November 2015 and additional note dated 3 November 2016 for action to be taken*),⁶³ the Head of the Investigations Section within the Libyan Attorney General's Office issued a direction in January 2017, to the Head of Control Unit within the Attorney General's Office, ordering the Head of Control Unit to summon the defendant for investigation purposes.⁶⁴ Once again, no indication is given that Dr. Gadafi's claim was deemed legally invalid per the clear requirements of Article 353 of the Amended Code of Criminal Procedure. This is despite the fact that the Head of the Investigations Section who signed the order

⁶³ See **Annex 3A**.

⁶⁴ **Annex 3B**. The Defence understands that no further action has been taken in the case as the defendant has remained outside of Libya.

– Mr. Sidieg Alsour – was the main prosecutor in charge of Case 630/2012⁶⁵ and the same official who signed the Attorney General’s Response to the Prosecution on 18 September 2018.⁶⁶

33. The only plausible conclusion to be drawn from the above legal proceedings and official actions of the representatives of the Libyan Attorney General’s Office taken within the Libyan judicial system, as well as their glaring omission from the Attorney General’s Response, is that the Tobruk Sub-District Court and the Attorney General’s Office (contrary to any mere public statements and the Office’s communication to the Prosecution) accepted that the Libyan Judgment issued against Dr. Gadafi in Case 630/2012 was deemed final under Libyan law further to the valid application of Law No. 6 of 2015.

b. Reply to Prosecution’s reliance on decision in *Simone Gbagbo* case

34. Contrary to the Prosecution submission,⁶⁷ Pre-Trial Chamber II’s “Order to the Registrar to Request Information from the Competent National Authorities of the Republic of Cote D’Ivoire” in the Simone Gbagbo case⁶⁸ lends no support to its contention that a final decision is required in order to trigger Article 20(3) of the Statute.⁶⁹ In that decision, Pre-Trial Chamber II duly observed that “the admissibility of a case is not static” and that it is for the Chamber to establish

⁶⁵ See United Nations Support Mission in Libya, Report on the Trial of 37 Former members of the Qadhafi Regime (Case 630/2012), 21 February 2017 (Annex D to Admissibility Challenge), pp. 5-6 (“Throughout the proceedings and afterwards, UNSMIL kept in close contact with and welcomes the cooperation of Counsellor Al-Siddiq al-Sur, Director of the Investigations Office at the Office of the Prosecutor General, and main prosecutor of the case.”).

⁶⁶ Attorney General’s Response, p. LBY-OTP-0065-0436.

⁶⁷ ICC-01/11-01/11-653, para. 115.

⁶⁸ ICC-02/11-01/12-84.

⁶⁹ This decision was specifically identified by the Pre-Trial Chamber as one of the documents which was not available to the Defence at the time of the admissibility challenge. It is therefore a document to which the Defence are permitted to reply: ICC-01/11-01/11-659 para. 16.

“whether the case is still admissible”.⁷⁰ In order to assist in that determination, Pre-Trial Chamber II sought:

*to receive information concerning any acts taken by the judicial authorities of Cote D'Ivoire after 11 December 2014, when the Court ruled on the admissibility of the case on Simone Gbagbo, which could impact on the admissibility of the case. The Chamber seeks to receive all pertinent judicial decisions rendered on Simone Gbagbo and any other relevant information, including if the concerned judgments have become final according to national law. Such information will assist the Chamber to determine whether the admissibility of the case ought to be reviewed.*⁷¹

35. The paragraph quoted above makes it clear that Pre-Trial Chamber II did not determine that only a “final” national decision was capable of engaging Article 20(3). Pre-Trial Chamber II in fact made no determination on the meaning of “has been tried” for the purposes of Articles 17(1)(c) and 20(3). The Pre-Trial Chamber simply sought to obtain *all* the relevant information to enable it to determine whether the admissibility of the case should be reviewed. Naturally, at the stage of gathering information, there was no detailed discussion – and no argument – on the issue of the meaning of Article 20(3).
36. Moreover, one cannot read into the phrase “including if the concerned judgments have become final” that Pre-Trial Chamber II concluded that only a final judgment could satisfy Article 20(3). To the contrary, Pre-Trial Chamber II expressly sought information on “all pertinent judicial decisions”. The request for “all pertinent judicial decisions” would be unnecessarily broad, if the Prosecution is correct that the only relevant information was whether a final judgment had been rendered.

⁷⁰ ICC-02/11-01/12-84 para. 5.

⁷¹ *Ibid.*, para. 6.

37. The Defence accordingly submits that the relevant issue – the meaning of “has been tried” within Article 20(3) of the Statute” – remains a live issue in the *Simone Gbagbo* case, which Pre-Trial Chamber II will determine in all the circumstances of that case having considered all the relevant information on the national proceedings.

c. Law No. 6 of 2015 is a valid law, properly enacted

38. As noted in the Prosecution Response, the Libyan Attorney General’s Office asserts that “Law No. 6 of 2015 is not valid”.⁷² The Libyan Attorney General’s Office’s claim⁷³ is without basis. It is directly contradicted by several Libyan court judgments from the Tobruk Court of Appeal, Jebel Akhdar Court of Appeal, Benghazi Court of Appeal, and Bayda Court of Appeal, dating from 2015 to 2018,⁷⁴ which demonstrate that far from being “not valid” this law has been applied to criminal defendants on various occasions. The Attorney General’s Office, through the representatives of the public prosecution, was a party to the proceedings.⁷⁵

39. Despite being a party to all of these proceedings, it appears the public prosecution did not challenge the validity of Law No. 6 of 2015, nor did the Libyan courts raise this issue *proprio motu*. Indeed, the Tobruk Court of Appeal and Bayda Court of Appeal, in letters issued by their respective clerks dated 31 October 2018, likewise explicitly confirm that Law No. 6 of 2015 is being implemented before these courts.⁷⁶

⁷² Prosecution Response, para. 146.

⁷³ Attorney General’s Response, pp. LBY-OTP-0065-0430 to 0432.

⁷⁴ See **Annex 4**.

⁷⁵ In this regard, see the Defence’s submission at *supra* paragraph 27 regarding the previous position of the internationally recognized government of Libya on the unity of the Libyan prosecution authorities and the Libyan judiciary.

⁷⁶ See **Annex 5**. These letters were provided to the Defence by a legal researcher who requested certain information from these courts and was provided with the attached official letters in response.

40. Additionally, the previously discussed criminal false accusation claim filed by Dr. Gaddafi in September 2017, as well as the process regarding the second complaint filed by Dr. Gaddafi, likewise confirm the validity of Law No. 6 of 2015 on General Amnesty and its lawful application to Dr. Gaddafi (see paragraphs 26 to 33 above). Nor is there anything in the letter from the Zintan Prosecutor's Office issued on 17 May 2015 (Annex 11 to the Prosecution's Response), calling into question the validity of Law No. 6 of 2015.

41. The failure of the Libyan Attorney General's Office to note and address these numerous Libyan court cases that implement or otherwise confirm the validity of Law No. 6 of 2015, the contents of the decision themselves, the letters from the Bayda Court of Appeal and Tobruk Court of Appeal, and the proceedings related to the complaints filed by Dr. Gaddafi, conclusively negate the Libyan Attorney General's Office's position on this issue.

d. The application of Law No. 6 of 2015 to Dr. Gaddafi is settled as a matter of Libyan law and not subject to review before the Court

42. The Amici submit that Law No. 6 of 2015 was 'inappropriately' applied to Dr. Gaddafi, and specifically assert that certain alleged requirements of the Law were not met in Dr. Gaddafi's case.⁷⁷ The Attorney General's Response also argues that the release of Dr. Gaddafi was incorrect because "it was issued by an executive authority lacking legal jurisdiction over the case and in circumstances which saw political tension between the different parties and divisions within the ranks of the executive authority".⁷⁸ The Defence understand this to reflect the Prosecution's submission that the Al-Bayda Transitional Government had ceased to be the internationally recognised government of Libya following the

⁷⁷ Amici Observations, paras. 39-45.

⁷⁸ GoL Response, LBY-OTP-0065-0433 para. 2.

Libyan Political Agreement on 17 December 2015 – hence before Dr Gaddafi was released.⁷⁹

43. The Defence disputes this characterisation, and in any event recalls its submission that the consideration of post-conviction executive action falls outside the scope of the Court’s powers of review over the “proceedings in the other court” for the purposes of Article 20(3) of the Statute.⁸⁰
44. The Defence also notes, as submitted at paragraphs 26 to 33 above, that the criminal false accusation claim filed by Dr. Gaddafi in September 2017, as well as the process regarding the second complaint filed by Dr. Gaddafi, likewise confirm the validity of Law No. 6 of 2015 on General Amnesty and its lawful application to Dr. Gaddafi.
45. Furthermore, Article 8 of Law No. 6 of 2015 provides for a specific domestic mechanism in the event of any disagreements regarding the application of the law: *“The competent prosecutorial authority shall be responsible for adjudicating disputes arising from the application of the provisions of this Law. Its decision shall be subject to appeal in accordance with the general rules.”*⁸¹ The Libyan Attorney General’s Office does not state that any competent prosecutorial authority in Libya has adjudicated any dispute or issued a decision (to be contrasted with the aforementioned press release relied upon by the Prosecution)⁸² invalidating the application of Law No. 6 of 2015 to Dr. Gaddafi. As the Prosecution itself notes,⁸³ the letter from the Zintan Prosecutor’s Office dated 17 May 2016 merely indicated that the request for Dr. Gaddafi’s release did not fall within its jurisdiction; it does not constitute a decision within the meaning of Article 8.⁸⁴

⁷⁹ Prosecution Response, para. 59.

⁸⁰ Admissibility Challenge, paras. 69-78.

⁸¹ An official court translation of Law No. 6 of 2015 is available in ICC-01/11-01/11-650-AnxIII-tENG.

⁸² See Annex 4 to the Prosecution Response.

⁸³ Prosecution Response, para. 66.

⁸⁴ See Annex 11 to the Prosecution Response (to which the Defence has been granted leave to reply).

Instead, as submitted above,⁸⁵ the litigation involving Dr. Gaddafi's false accusation claim, which would have been precluded by an outstanding *in absentia* conviction, underlines the legal validity of the application of Law No. 6 of 2015 to Dr. Gaddafi in relation to the Libyan Judgment.

46. While the Libyan Attorney General's Office asserts that Law No. 6 of 2015 is itself invalid, as submitted at paragraphs 38 to 41 above, this position is without basis and directly refuted by several court cases in which the law has been applied and the public prosecution was a party to the proceedings. In view of the *prima facie* application of Law No. 6 of 2015 to Dr. Gaddafi – established unequivocally by his release from prison pursuant to the instructions of the Minister of Justice of the Libyan Transitional Government – the Defence submits that the Chamber should be slow to consider in any greater detail and pass judgment on whether a national authority has correctly implemented its own national law.⁸⁶ The Court should be especially cautious to question the validity of a national legal act where the legislation in question provides for a specific dispute settlement mechanism and no evidence exists that any formal challenge or decision has been made regarding the validity of the legal act pursuant to said mechanism.
47. In the event the Chamber considers that it is entitled to consider post-conviction executive action and can review a domestic legal act even where existing domestic dispute settlement processes have not been engaged to challenge the act, the Defence submits that the submissions and observations of the Libyan Attorney General's Office and Amici on the alleged improper application of the Law No. 6 to Dr. Gaddafi are without merit.

⁸⁵ See submissions at *supra* paragraphs 24 to 31.

⁸⁶ A submission embraced by the Prosecution in a different but analogous context (see Prosecution Response, paras. 122-125).

48. First, the Amici's specific claim that it was the "Battalion of Abu Bakr" that applied Law No. 6 of 2015 to Dr. Gaddafi⁸⁷ is incorrect. As set out in the Admissibility Challenge, Dr. Gaddafi was released from prison on the authority and upon the instruction of the Government of Libya – acting through the Minister of Justice of the Libyan Transitional Government, Mr. Mabrouk Grira Omran, based in Al-Bayda – pursuant to Law No. 6 of 2015.⁸⁸
49. Second, and contrary to the submission of the Amici that "Law No 6 of 2015 has solely been applied to Mr. Gaddafi",⁸⁹ any possible doubt about the validity of Law No. 6 is removed by the fact that it has been applied on multiple occasions to various defendants by various Libyan courts within the unified Libyan judiciary.⁹⁰ It might be thought surprising that neither the Amici nor the Libyan Attorney General's Office sought to bring these decisions, which are directly relevant to the views they seek to advance, to the Chamber's attention.
50. Third, the Amici's broad claim that, apart from Dr. Gaddafi, Law No. 6 of 2015 "is yet to be applied to any other member of the former regime", is made without any explanation or analysis whatsoever as to which former regime members the Amici believe meet the requirements to be considered for the general amnesty. The Defence recalls again its concerns regarding the independence and impartiality of the Amici.⁹¹
51. Fourth, Law No 6. of 2015 was applied to Dr. Gaddafi by the Minister of Justice acting under the *de facto* authority of the Al-Bayda Transitional Government of Libya.⁹² For the purposes of domestic legal acts affecting the rights of private

⁸⁷ Amici Observations, paras. 16(c), 87.

⁸⁸ Admissibility Challenge, para. 26 and confidential Annex C thereto.

⁸⁹ Amici Observations, para. 44. See also paras 47, 87.

⁹⁰ See submissions at *supra* paragraphs 38 to 41.

⁹¹ See submissions at *supra* paragraph 14.

⁹² Admissibility Challenge, para. 26.

individuals, this internal exercise of power by a *de facto* government – that was recognised as the legitimate government by local officials in certain parts of the country, including Zintan⁹³ – should be recognised as legitimate even if the Al-Bayda Transitional Government of Libya may not have been considered to be the internationally recognised Government of Libya at the material time.

52. International courts have repeatedly held that the non-recognition of a government at the international level does not mean the internal acts of that government should all be disregarded, at least in so far as they affect the rights of private individuals. Thus, in the *Namibia Advisory Opinion*, having determined that the continued presence of South Africa in Namibia was unlawful and that States should therefore not take any steps to recognise the South African administration in Namibia, the International Court of Justice added that:

*[T]he non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.*⁹⁴

53. To the same effect, the European Court of Human Rights (“ECtHR”) has held that: *“the obligation to disregard acts of de facto entities is far from absolute. Life goes on in the territory concerned for its inhabitants. That life must be made tolerable and be protected by the de facto authorities, including their courts; and, in the very interest of*

⁹³ In this regards, see witness statement of Colonel Alajmi Alatairi (Annex C to the Admissibility Challenge).

⁹⁴ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970), International Court of Justice, 21 June 1971, para. 125.

the inhabitants, the acts of these authorities related thereto cannot be simply ignored by third States or by international institutions, especially courts, including this one. To hold otherwise would amount to stripping the inhabitants of the territory of all their rights whenever they are discussed in an international context, which would amount to depriving them even of the minimum standard of rights to which they are entitled."⁹⁵ As a result, in assessing whether the applicants had exhausted local remedies, the ECtHr had regard to the availability of local remedies through the judicial organs of the Turkish Republic of Northern Cyprus (a *de facto* government not recognised by the international community).⁹⁶

54. The decision to apply Law No 6 of 2015 to Dr. Gaddafi was exclusively an internal (as opposed to international) act of a *de facto* government affecting the rights of a private individual (Dr. Gaddafi himself). Accordingly, the Chamber should not disregard the application of Law No 6. of 2015 to Dr. Gaddafi simply because it was applied by the Al-Bayda Transitional Government rather than by the internationally recognised government.
55. In any event, to the extent there is uncertainty regarding the validity of the amnesty applied to Dr. Gadafi arising from its application by the Al-Bayda Transitional Government, and as has been submitted above, there is no evidence (provided by the Libyan Attorney General's Office or otherwise) of any official challenge by or before any 'competent prosecutorial authority' (Law No. 6 of 2015, Article 8) or the Libyan judiciary to the application of the amnesty to Dr. Gadafi.
56. The validity of Law No. 6 of 2015 and its application to Dr. Gadafi was also confirmed by Aguila Saleh Issa, Speaker of the House of Representatives, who confirmed earlier this year that Dr. Gadafi was eligible to contest in the elections

⁹⁵ *Cyprus v Turkey*, App No. 25781/94, Judgment (merits), Grand Chamber, 10 May 2001, para. 96.

⁹⁶ *Id.*, para. 98.

by virtue of Law No. 6 of 2015. He is quoted as stating: *“We adopted a law on amnesty and a law on suspending political isolation. Now each Libyan citizen, who is not prosecuted under law, has a right to run [for president]. The voting will show whether Saif is popular among people.”*⁹⁷

57. The Amici also appear to make an issue of the fact that Dr. Gaddafi was imprisoned for less than a year following his conviction by the Tripoli Court of Assize.⁹⁸ Apart from the duration of imprisonment and severity of sentence not being a relevant factor, the Amici ignores the total effective period that Dr. Gaddafi has served of close to four and a half years since his arrest in November 2011, and subsequent detention pursuant to the orders and instructions issued by the Libyan Attorney General’s Office.
58. Lastly, both the Amici and Libyan Attorney General’s Office question whether the procedural requirements of Law No. 6 of 2015 were met when applied to Dr. Gaddafi. The Defence must, once again, reiterate that both the Amici and Libyan Attorney General’s Office ignore the fact that Article 8 of the Law specifically provides for a legal mechanism – which is not the ICC – to settle disputes over the application of the Law; no evidence is provided by either the Amici or Libyan Attorney General’s Office that this mechanism has been engaged domestically. In effect, neither the validity of Law No. 6 of 2015 nor its application to Dr. Gaddafi has been formally challenged by the Libyan Attorney General’s Office or any ‘competent prosecutorial authority’ to date.
59. In any event, the alleged procedural defects appear to be unfounded. The claim that a competent judicial authority must issue a reasoned decision to stay the criminal proceedings is limited, by the very text of Article 6 of the Law, to a

⁹⁷ See www.africanews.com/2018/02/14/gaddafi-s-son-can-contest-for-libyan-president-speaker-of-parliament/; www.sabcnews.com/sabcnews/gaddafis-son-allowed-run-president-parliaments-speaker/.

⁹⁸ Amici Observations, para. 39.

situation where criminal proceedings are ongoing and there are accordingly proceedings to be “stayed”. Dr. Gaddafi had already been convicted and sentenced. There were no criminal proceedings to be stayed. Accordingly, the Minister of Justice of the Al-Baydah Transitional Government was properly empowered, pursuant to Article 1 of the Law, to ensure that a “sentence[] [that had been] handed down” was “revoked” in the case of Dr. Gaddafi, once the Minister had been requested to consider Dr. Gaddafi’s situation under the general amnesty law. To be clear, this is not to say that a Libyan court could not have applied Law No. 6 of 2015 to Dr. Gaddafi – for example if he had appeared before a court and his alleged *in absentia* conviction was first vacated per Article 358 of the Amended Code of Criminal Procedure. However, this in no way means that it was improper or otherwise in contravention for the Minister of Justice of the Al-Baydah Transitional Government to apply Law No. 6 of 2015 in the circumstances set out above, and pursuant to Article 1 of the Law.

60. Moreover, in relation to the offences for which Dr. Gaddafi was convicted, the Defence notes that while Dr. Gaddafi was convicted of responsibility for murders in Case 630/2012, only the crime of “identity-based murder” – which he was not convicted of – is excluded from the ambit of Law No. 6 of 2015. Similarly, and contrary to the claim of the Libyan Attorney General’s office,⁹⁹ Dr. Gaddafi was not convicted of ‘corruption’ related crimes, but only in respect of crimes related to the provision of financial and material support to armed groups.¹⁰⁰

61. Turning to the actual decision of the Minister of Justice of the Al-Baydah Transitional Government implementing Law No 6. of 2015 to Dr. Gaddafi, the Minister stated: [REDACTED]¹⁰¹ The Minister of Justice of the Al-Baydah

⁹⁹ Attorney General’s Response, p. LBY-OTP-0065-0434.

¹⁰⁰ Libyan Judgment, pp. LBY-OTP-0062-0439.

¹⁰¹ Exhibit 28 to Annex C to the Admissibility Challenge. The Prosecution has provided its own translation of this document at Annex 12 to the Prosecution Response.

Transitional Government accordingly reviewed the provisions of Law No. 6 of 2015 and determined that Dr. Gadafi qualified for and should benefit from the general amnesty provided by Law No. 6 of 2015. Once again, the Defence underscores that disputes regarding the application of the provisions of Law No. 6 are to be settled pursuant to the procedures of Article 8 of the Law, not by the ICC.

e. The Amici's broader submissions on the lawfulness and validity of amnesties and pardons are inapposite and overstated with respect to the relevant circumstances of Dr. Gadafi's case

62. The Amici's submissions on the 'wider application' of any rulings the Pre-Trial Chamber may make in relation to amnesties and pardons for international crimes and gross violations of human rights¹⁰² overstate the current state of customary international law on the matter of amnesties and pardons in the context of crimes against humanity and are inapposite to the particular circumstances of Dr. Gadafi's case.

63. For the avoidance of doubt, the Defence do not argue that this case is inadmissible before the ICC because of the direct effect of a national amnesty law. Rather, this case is inadmissible because Dr. Gadafi has already been tried by the national courts in Libya. The relevance of the national amnesty law is solely that as a matter of Libyan national law it renders the Libyan judgment final. The Defence maintain that consideration of the application of the national amnesty law is outside the scope of the "proceedings in the other court" so that it is not relevant to the issue of "shielding" in Article 20(3)(a).¹⁰³ Given the limited relevance of the national amnesty law to this admissibility challenge, the

¹⁰² Amici Observations, paras. 46-85.

¹⁰³ Admissibility Challenge, paras. 69-78.

Defence maintain the Amici's submissions on the wider application of any ruling by the Chamber are not strictly relevant to the resolution of this admissibility challenge.

64. Notwithstanding the Defence's above stated position, the Amici's position on this issue is incorrect for the following reasons. First, contrary to the Amici's submission that there is an "emerging international standard" prohibiting amnesties for serious international crimes,¹⁰⁴ no rule of customary international law has yet crystallised which prohibits amnesties for crimes against humanity following a Non-International Armed Conflict.
65. In support of the asserted 'emerging international standard', the Amici rely on a claimed prohibition of amnesties in relation to genocide,¹⁰⁵ torture,¹⁰⁶ and grave breaches of the Geneva Conventions.¹⁰⁷ Those are special cases. In each of those cases, the treaties defining those crimes also impose an express obligation on States to investigate, prosecute or extradite persons suspected of committing those offences.¹⁰⁸ As a result, an amnesty in relation to those specific offences may be unlawful to the extent that it runs contrary to the treaty obligation to investigate, prosecute or extradite. But any unlawfulness of those amnesties only arises from the relevant treaties; it does not support a broader prohibition of amnesties in relation to the crimes against humanity of murder or persecution.
66. For the avoidance of doubt, there is no treaty which expressly or implicitly prohibits amnesties in relation to crimes against humanity. Indeed, the Defence

¹⁰⁴ Amici Observations, para. 89.

¹⁰⁵ Amici Observations, paras. 46, 56, 80-81.

¹⁰⁶ Amici Observations, paras. 46, 56, 63-64, 76.

¹⁰⁷ Amici Observations, paras. 48-54.

¹⁰⁸ Convention on the Prevention and Punishment of the Crime of Genocide, Articles 1, 5-7; Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Article 7(1); First Geneva Convention Article 49, Second Geneva Convention Article 50, Third Geneva Convention Article 129, Fourth Geneva Convention Article 146.

note that Article 6(5) of Additional Protocol II to the Geneva Conventions expressly provides that: “At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict [...]”. That provision was relied upon by the Constitutional Court of South Africa to justify the use of amnesties in relation to non-international armed conflicts.¹⁰⁹ Thus, in relation to Non-International Armed Conflicts such as the one in Libya,¹¹⁰ the use of amnesties is not expressly prohibited in any treaty and their use, at least in certain circumstances, is acknowledged to be legitimate.

67. The Amici also overstate the conclusions of human rights courts and international criminal tribunals in relation to the legal status of amnesties in relation to crimes against humanity. There is no consistent pattern of rulings holding that all amnesties are necessarily unlawful; to the contrary, the *dicta* of various courts and tribunals expressly holds or suggests that conditional amnesties are lawful in certain circumstances. In relation to the cases relied on by the Amici:-

- i. At the ECtHr, in *Margus v. Croatia*,¹¹¹ while finding that the amnesty in that case was not lawful, the ECtHr expressly reserved the possibility of other amnesties being valid: “*Even if it were to be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process*”

¹⁰⁹ *Azanian Peoples Organisation and Others v Prseident of the Republic of South Africa*, Constitutional Court, 27 July 1996, paras. 30 – 31. The Constitutional Court explained the potential importance of amnesties in internal armed conflicts in these terms: “*The erstwhile adversaries of such a conflict inhabit the same sovereign territory. They have to live with each other and work with each other and the state concerned is best equipped to determine what measures may be most conducive for the facilitation of such reconciliation and reconstruction. That is a difficult exercise which the nation within such a state has to perform by having regard to its own peculiar history, its complexities, even its contradictions and its emotional and institutional traditions.*” (para. 31).

¹¹⁰ The Court previously accepted that “there are reasonable grounds for believing that an armed conflict not of an international character has been ongoing on the territory of Libya, from at least early March 2011”: ICC-01/11-01/17-2 para. 25.

¹¹¹ *Marguš v. Croatia*, App. no. 4455/10 (27 May 2014).

*and/or a form of compensation to the victims, the amnesty granted to the applicant in the instant case would still not be acceptable since there is nothing to indicate that there were any such circumstances.”*¹¹² While the allegations in *Marguš* concerned war crimes, the court’s reference in the same paragraph to “grave breaches of fundamental human rights” suggests that the reservation that amnesties may be possible in particular circumstances would include crimes against humanity.

- ii. Similarly, the African Commission on Human and Peoples’ Rights (“ACHPR”), in the *Zimbabwe Human Rights NGO Forum* case, concluded that: “[B]y enacting Decree No. 1 of 2000 which foreclosed access to any remedy that might be available to the victims to vindicate their rights, and without putting in place alternative adequate legislative or institutional mechanisms to ensure that perpetrators of the alleged atrocities were punished, and victims of the violations duly compensated or given other avenues to seek effective remedy, the Respondent State did not only prevent the victims from seeking redress, but also encouraged impunity, and thus reneged on its obligation in violation of Articles 1 and 7 (1) of the African Charter. The granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy.”¹¹³ This finding was based on the absolute nature of the amnesty on the facts of that case and the absence of alternative institutional mechanisms. It does not exclude the possibility that other more limited amnesties could be granted lawfully.

Consistent with that line of reasoning, in other cases the ACHPR has expressly endorsed the legality of conditional amnesties. In *Kwoyelo v*

¹¹² *Marguš v. Croatia*, App. no. 4455/10 (27 May 2014), para. 139.

¹¹³ *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Comm. No. 245/02, Decision (ACHPR, 15 May 2006) para. 215.

Uganda,¹¹⁴ the ACHPR upheld a complaint that the State's decision not to apply its national amnesty law to the victim violated the victim's right to equal treatment before the law.¹¹⁵ Having reached that decision on the facts of the case, in view of the "lack of clear guidance on ensuring compliance with the requirements of the African Charter when states resort to the use of amnesties", the ACHPR went on to assess the legality of amnesties more broadly.¹¹⁶ It concluded:-

It is, therefore, the considered view of the Commission that blanket or unconditional amnesties that prevent investigations (particularly of those acts amounting to most serious crimes referred to in Article 4(h) of the AU Constitutive Act) are not consistent with the provisions of the African Charter. African states in transition from conflict to peace should at all times and under any circumstances desist from taking policy, legal or executive/administrative measures that in fact or in effect grant blanket amnesties, as that would be a flagrant violation of international law. When they resort to amnesties as necessary measures for ending violence and continuing violations and achieving peace and justice, they should respect and honor their international and regional obligations. Most particularly, they should ensure that such amnesties comply with both procedural and substantive conditions. In procedural terms, conditional amnesties should be formulated with the participation of affected communities including victim groups. Substantively speaking, amnesties should not totally exclude the right of victims for remedy, particularly remedies taking the form of getting the truth and reparations. They should also facilitate a measure of reconciliation

¹¹⁴ *Thomas Kwoyelo v Uganda*, Comm. No. 431/12, Decision (ACHPR, 17 October 2018).

¹¹⁵ *Ibid.*, para. 195.

¹¹⁶ *Ibid.*, para. 284.

with perpetrators acknowledging responsibility and victims getting a hearing about and receiving acknowledgment for the violations they suffered.

The Defence submits that this is a clear determination that a conditional amnesty will be lawful, provided that it does not totally exclude the victims' right to a remedy (including getting to the truth) and facilitates a measure of reconciliation. Law No. 6 of 2015 meets these criteria.

- iii. The Inter-American Court of Human Rights ("IACtHr"), which has arguably offered the strongest critique of amnesty laws, has also taken a more nuanced approach to amnesty provisions in certain cases. In *the case of the Rochela massacre v Colombia*, concerning a partial amnesty law which restricted sentences imposed following conviction to 5 to 8 years imprisonment in consideration of a contribution to reconciliation,¹¹⁷ rather than finding that such a provision was inevitably contrary to the Inter-American Convention on Human Rights, the Court instead set out the "principles, guarantees and duties" that must accompany the application of the law in that case.¹¹⁸ It follows that, providing the principles, guarantees and duties were followed, the partial amnesty would be deemed lawful. The Defence further rely on the thoughtful discussion of this issue in the concurring opinion of Judge Garcia-Sayan in *the case of the massacres of El Mozote and nearby places v El Salvador*,¹¹⁹ which also suggests that in certain circumstances a partial amnesty may not be unlawful.

- iv. The Extraordinary Chambers in the Courts of Cambodia adopted a similar position. In the *Ieng Sary* case, the Trial Chamber concluded that State

¹¹⁷ *The Case of the Rochela Massacre v Colombia*, Judgment (merits) 11 May 2017, IACtHR, para. 182.

¹¹⁸ *Ibid.*, paras 192-198.

¹¹⁹ *The Case of the Massacres of El Mozote and nearby places v El Salvador*, Judgment of 25 October 2012, IACtHR, concurring opinion of Judge Garcia-Sayan.

Practice regarded “blanket amnesties for serious international crimes to be in breach of international norms”.¹²⁰ However, in relation to conditional amnesties, it concluded: “Such amnesties have generally not been invalidated, but rather, applied on a case by-case basis, depending on a number of factors, including the process by which the amnesty was enacted, the substance and scope of the amnesty, and whether it provided for any alternative form of accountability”.¹²¹

- v. At the International Criminal Tribunal for the Former Yugoslavia, the consideration of the amnesty issue in the *Furunzija* Trial Judgment related specifically to the crime of torture. The paragraph cited by the Amici begins “The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels”.¹²² As explained above, the crime of torture is a special case benefitting from the specific provisions of the Conventions against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹²³ The ad hoc Tribunal’s conclusion cannot simply be transposed to different offences.

Further, the reference to the *Erdemovic* sentencing judgment¹²⁴ adds nothing of relevance because it does not address the question of amnesty at all, but instead deals simply (and uncontroversially) with the severity of crimes against humanity from a sentencing standpoint.¹²⁵

¹²⁰ Decision on Ieng Sary’s Rule 89 Preliminary Objections, No. 002/19-09-2007/ECCC/TC 3 November 2011, para. 49.

¹²¹ *Ibid.*, para. 52

¹²² *Prosecutor v Furunzija*, Judgment, IT-95-17/1-t (10 December 1998), para. 155; Amici Observations, para. 76.

¹²³ See submissions at *supra* para. 65.

¹²⁴ Amici Observations, para. 77.

¹²⁵ *Prosecutor v. Erdemovic*, Sentencing Judgment, IT-96-22-T (29 November 1996), para. 28.

vi. The Special Court for Sierra Leone (“SCSL”) amnesty decision determined only that the national amnesty provision in Article IX of the Lomé Accord did not bar prosecution before an international tribunal.¹²⁶ In so doing, the Appeals Chamber of the SCSL gratefully adopted the opinion of Judge Cassese expressed extra-judicially that there is “not yet any general obligation” to refrain from granting amnesty in relation to crimes against humanity.¹²⁷

68. In sum, outside the specific treaty regimes applicable to certain crimes, these cases establish no more than that in certain circumstances blanket amnesties have been considered unlawful by various courts and tribunals. They do not establish that a rule of customary international law has crystallised which prohibits all amnesties, including conditional amnesties. Further, they do not establish that conditional amnesties are necessarily unlawful in relation specifically to crimes against humanity or in relation to a non-international armed conflict.

69. Moreover, it is noteworthy that despite attempting to establish an “emerging international standard”, presumably intending an emerging rule of customary international law, the Amici do not attempt to show how the existence of such a rule can be seen in the actual practice and opinio juris of States.¹²⁸ States continue to grant amnesties in relation to serious international crimes, including crimes against humanity. Commentators have concluded from empirical studies that “amnesties have increased in number or persisted at the same rate during this same era marked by an increase in prosecutions and domestic and international

¹²⁶ *Prosecutor v. Kallon and Kamara*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, paras. 72-74.

¹²⁷ *Id.*, para. 71.

¹²⁸ See, for instance, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, International Court of Justice, para. 64.

pressure for prosecutions”.¹²⁹ The fact that State practice has continued to be to grant amnesties cannot be consistent with the emergence of a prohibition of such amnesties in customary international law.

70. In fact, the true status of the law in this area is thus that no absolute prohibition of amnesties in relation to crimes against humanity exists, either as a matter of treaty or as a matter of customary international law. Whilst a blanket amnesty may in some circumstances be contrary to international law, any such prohibition is not absolute and a national measure promoted in order to assist in reconciliation, and which provides for a national investigation and the establishment of the truth would not automatically run contrary to international law.

71. As regards the facts of the case *sub judice*, Law No. 6 of 2015 is not inconsistent with any existing or emerging international norm. It is not a blanket or unconditional amnesty. It was issued in the context of a national reconciliation process and does not “prejudice the right of an affected person to restitution and compensation”.¹³⁰

72. Second, the Amici’s analysis of the application of these rules to the concrete circumstances of this case is flawed. The Defence recalls that, before the Court, Dr. Gaddafi has been charged with the crimes against humanity of murder and persecution.¹³¹ He was detained on 19 November 2011 in Libya and imprisoned. He was tried. He was convicted at the end of the trial process, following a reasoned judgment. As noted above, he remained under imprisonment until his

¹²⁹ Amnesty in the age of Human Rights Accountability, ed. Francesca Lessa and Leigh A. Payne, 2012, p. 7.

¹³⁰ Law No. 6 of 2015, Art. 10 (official Court translation provided in ICC-01/11-01/11-650-AnxIII-tENG).

¹³¹ Decision on the “Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Sennusi”, ICC-01/11-01/11-1, paras. 41, 65, 71, 80.

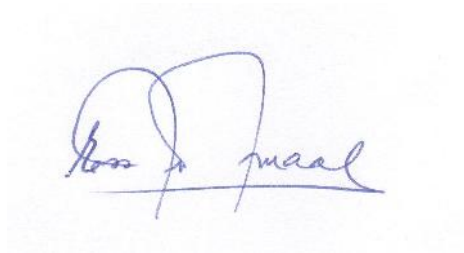
release, at which point he had served approximately 4 years and 5 months imprisonment in total.

73. In the case of Dr. Gadafi: there was a complete national investigation of the alleged crimes; there was a trial; there was a reasoned judgment which meets the victims' legitimate interest in uncovering the truth; and there was punishment of the convicted person in that Dr. Gadafi was imprisoned for a number of years. In the concrete circumstances of this case, Law No. 6 of 2015 was not a blanket or unconditional amnesty. It was a commutation of sentence following a reasoned trial Judgment and period of imprisonment. As a result, on its proper construction, Law No. 6 of 2015 is not inconsistent with the various authorities cited by the Amici.

Relief Requested

74. The Defence respectfully requests the Pre-Trial Chamber to take into account these submissions in considering the Amici Observations and the Prosecution Response, and reiterates its submission in the Admissibility Challenge that the present case against Dr. Saif Al-Islam Gadafi before the Court must be declared inadmissible.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Essa M. Faal', is centered on the page. The signature is written in a cursive style with a horizontal line underneath.

Essa M. Faal
Counsel for Dr. Saif Al-Islam Gadafi

on behalf of
Dato' Shyamala Alagendra
Lead Counsel for Dr. Saif Al-Islam Gadafi

Dated this 20th Day of November 2018
At Banjul, The Gambia