Separate concurring opinion by

Judge Marc Perrin de Brichambaut

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I. INTRODUCTION

1. I concur with the majority in all three of the operative paragraphs of its decision, deciding that Mr Gaddafi has a locus standi to lodge the admissibility challenge, rejecting the admissibility challenge and deciding that the case against Mr Gaddafi is admissible. However I have serious reservations about some of the legal underpinnings of the decision by the majority and about the way it is presented.[1]

2. I believe decisions by the Court should be drafted in a way which makes their legal reasoning and the use of available evidence and sources easily accessible and understandable for all parties and for a broad public. This is hopefully achieved when there is a table of contents for the decision and when at each step of the decision the applicable law, submissions by the parties and chamber's determination are presented clearly. The issues raised in this decision are delicate and many of them have not yet been addressed by the jurisprudence of the Court. This entails that the arguments raised by the different parties should be mentioned and addressed even when their consideration is not strictly indispensable to the outcome of the decision.

3. My separate opinion thus takes the form of an alternate decision where I have elected to present the decision as the Chamber might have drafted it if it had followed my suggestions. I abstained from repeating the procedural history which is adequately covered by the majority decision. Whenever this was appropriate, I have not hesitated to reproduce elements of the majority decision within my alternate text.[2] The alternate text starts from heading II of the majority decision. It does not reproduce the operative part of the majority decision which it shares.

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[1] I would have preferred to insert my views in a common text with the majority but since this did not prove to be possible I decided not to sign the majority decision and present this concurring opinion.
[2] This is the case for paras 6 to 10 and 67 to 79 where I made only a few editorial changes.

II. APPLICABLE LAW

4. The Chamber notes articles 17(1), 19(2)(a), 20(3), 21 of the Rome Statute (the "Statute") and rule 58 of the Rules of Procedure and Evidence (the "Rules").

III. THE CHAMBER'S DETERMINATION

5. The Chamber has carefully reviewed the parties' different submissions and the annexes appended thereto: in particular, the Admissibility Challenge,[3] 28 September 2018 Prosecution Response,[4] 28 September 2018 Victims' Observations,[5] Rule 103 Observations,[6] 20 November 2018 Defence Consolidated Reply[7] and all relevant material necessary for its determination. For the sake of judicial economy, the Chamber shall refer to these submissions only when relevant and to the extent necessary for its judicial reasoning.

A. Preliminary issues

1. Mr Gaddafi's standing to challenge the admissibility of the case

6. As a preliminary matter, the Chamber observes that the Defence advances a number of arguments in the Admissibility Challenge, one of which is procedural and relates to Mr Gaddafi's standing to challenge the admissibility of the case

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

[4] 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", 28 September 2018, ICC-01/11-01/11-653-Conf (hereinafter "Prosecution Response"). A public redacted version of the response was filed on 11 October 2018 (ICC-01/11-01/11-653-Red).

[5] Observations on behalf of victims on the "Admissibility Challenges by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute", 28 September 2018, ICC-01/11-01/11-652 (hereinafter "OPCV Observations").

[6] Observations by Lawyers for Justice in Libya and the Redress Trust pursuant to Rule 103 of the Rules of Procedure and Evidence, 28 September 2018, ICC-01/11-01/11-654 (hereinafter "Amici Curiae Observations").

[7] *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", 9 November 2018, ICC-01/11-01/11-660-Corr-Red2 (hereinafter "Defence Consolidated Reply").

before the Court. The Chamber shall therefore first rule on Mr Gaddafi's procedural standing, more particularly because the Prosecutor challenges this procedural aspect as an integral part of her overall request to reject the Admissibility Challenge.[8] In the 28 September 2018 Prosecutor's Response, the Prosecutor argues that Mr Gaddafi lacks procedural standing to lodge the Admissibility Challenge.

7. In supporting her view, the Prosecutor asserts that Mr Gaddafi "is subject to a public ICC warrant that has been outstanding for seven years [...] [and that by virtue of the judgment of 20 April 2015 rendered by] the Tripoli Court of Assize [...] Mr Gaddafi [was] deemed "a fugitive from justice". Referring to the Government of Libya's recent response to a Prosecutor's request for assistance dated 18 September 2018, and a letter from the Prosecutor General's Office dated 29 September 2016 as well as Libya's "Response to Prosecution's 'Request for an Order to Libya to refrain from Executing [Mr] [...] Gaddafi [...]'", the Prosecutor further argues that the "Government of National Accord [...], continues its effort to secure the custody of Mr Gaddafi" for the purposes of either prosecuting him or surrendering him to the Court. Despite the Defence's assertion that Mr Gaddafi was released from his detention in Zintan "on or around 12 April 2016", the suspect "made no effort to surrender himself either to the Government of Libya or to the ICC", the Prosecutor added. As such, there is no prospect that he "will surrender himself" in case the Admissibility Challenge "is unsuccessful".

8. The Chamber does not adhere to the Prosecutor's position, which suggests that lodging an admissibility challenge by the Defence is dependent on the person's arrest and surrender to the Court.[9] According to article 19(2)(a) of the Statute, "[a]n accused or a person for whom a warrant of arrest or a summons to appear has been

[8] Prosecution Response, paras 83-84.
[9] Prosecution Response, paras 87-90.

issued under article 58", may challenge the admissibility of the case on the grounds referred to in article 17 of the Statute. Since Mr Gaddafi had been subject to the 27 June 2011 Warrant of Arrest issued by the Chamber, he is entitled by virtue of article 19(4) of the Statute to challenge the admissibility of the case against him.

9. In this regard, the Chamber concurs with the position advanced by the Defence in this particular context that "[i]t is not a condition of making an admissibility challenge that [the suspect] must surrender himself to the Court [...] [and that][n]o such requirement is expressly or impliedly contained in Article 19 [...]".[10]

10. This conclusion stands notwithstanding the Chamber's previous reminder set out in the 31 May 2013 Decision, which calls for Libya's fulfilment of its "obligation to surrender [Mr Gaddafi] to the Court".[11] In this respect, the Chamber points out that the surrender of Mr Gaddafi to the Court, and Libya's compliance with its obligation arising from Security Council Resolution 1970 (2011) mainly pertains to cooperation, and as such, it is independent from challenges to the admissibility of one or more case before the Court. The former is not dependent on the latter more particularly, if the admissibility of the case has been challenged by the suspect as opposed to Libya, which is the State under the obligation to surrender Mr Gaddafi to the Court. Accordingly, the Chamber considers that Mr Gaddafi has procedural standing to lodge the Admissibility challenge pursuant to article 19(2)(a) of the Statute.

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[10] Admissibility Challenge, para. 36.

[11] Pre-Trial Chamber I, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Decision on the admissibility of the case against Saif Al-Islam Gaddafi, 31 May 2013, ICC-01/11-01/11-344-Red (hereinafter "Gaddafi Admissibility Decision"), p. 91.

2. Probative value of the submissions from the Attorney General of Libya

11. The Chamber takes note of the recent response from the Government of Libya to a Prosecutor's request for assistance dated 18 September 2018, issued by the Attorney General's Office of Libya.[12] The Chamber observes that the Attorney General forms part of the internationally recognised government of Libya, the GNA, which has been the sole interlocutor of the Court since 21 November 2016, in accordance with the decision of this Chamber from the same date.[13]

12. In this respect, the Chamber refers to the ruling from the Appeals Chamber in *Bemba* regarding an admissibility question, which stated as follows:

> It was *not* the role of the Trial Chamber to review the decisions of the [Central African Republic (CAR)] courts to decide whether those courts applied CAR law correctly. In the view of the Appeals Chamber, when a Trial Chamber must determine the status of domestic judicial proceedings, it should accept *prima facie* the validity and effect of the decisions of domestic courts, *unless presented with compelling evidence indicating* otherwise (emphasis added).[14]

13. The Chamber considers that the above conclusions from the Appeals Chamber apply *mutatis mutandis* to submissions from national governments regarding the interpretation of their domestic law. It is therefore not for this Chamber to challenge the correctness of the submissions of the Libyan Attorney General's Office in regards to the interpretation and application of Libyan law, unless there are compelling reasons to do so.

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[12] Prosecution Response, Annex 8, ICC-01/11-01/11-653-Conf-Anx8.

[13] Pre-Trial Chamber I, *The Prosecutor v. Saif Al-Islam Gaddafi,* Decision on the Prosecutor's "Request for an order directing the Registrar to transmit the request for arrest and surrender to Mr al-'Ajami AL-'ATIRI, Commander of the *Abu-Bakr Al Siddiq* Battalion in Zintan, Libya", 21 November 2016, ICC-01/11-01/11-634-Conf, paras 15-16.

[14] Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo, Corrigendum* to Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled 'Decision on the Admissibility and Abuse of Process Challenges", 19 October 2010, ICC-01/05-01/08-962-Corr (hereinafter "Bemba Judgment on the Appeal against the Decision on the Admissibility and Abuse of Process Challenges"), para. 66.

14. In this regard, the Chamber notes that the submissions from the Libyan Attorney General's Office are consistent with the different submissions from the Libyan Government that the Court has received since 2016. The Chamber thus considers that it is not necessary to further address the Defence's submissions on this matter, as the actions of the Attorney General's Office in the context of its domestic prerogatives are not determinative for the purpose of ruling on the present Admissibility Challenge.

15. In view of the above, the Chamber shall rely on the *bona fide* submissions from the Libyan Attorney General's Office and its interpretation of Libyan law to the extent necessary for its judicial reasoning.

B. Admissibility of the case before the Court pursuant to article 17(1)(c) and 20(3) of the Statute

16. Turning to the arguments regarding the admissibility of the case before the Court, the Defence argues that Mr Gaddafi was captured and detained "at the Zintan Reform and Rehabilitation Institution at the behest of the Government of Libya"[15] between 20 November 2011 and 12 April 2016.[16] According to the Defence, Mr Gaddafi was tried among other members of the former regime and was sentenced to death by the Tripoli Court of Appeal on 28 July 2015.[17] In view of these facts, the Defence "submits that the present case against Dr. Saif Al-Islam Gaddafi before the ICC must be declared inadmissible".[18]

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[15] Admissibility Challenge, para. 2.
[16] Admissibility Challenge, para. 2.
[17] Admissibility Challenge, para. 2, 24; Admissibility Challenge, Annex B, ICC-01/11-01/11-640-AnxB.
[18] Admissibility Challenge, para. 103.

17. The Chamber recalls article 17(1) of the Statute, which presents the standard governing admissibility challenges before the Court. Under this article, the Court shall determine that a case is inadmissible where:

> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it [...];
>
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned [...];
>
> (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
>
> (d) [...].

18. The text of article 17(1)(c) of the Statute incorporates article 20(3) of the Statute by reference, therefore indicating that the two provisions should be read together.

19. Article 20(3) of the Statute provides:

> 3. No person who has been tried by another court for conduct also proscribed under articles 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
>
> (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
>
> (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances was inconsistent with an intent to bring the person concerned to justice.

20. These two articles are the key provisions related to the Admissibility Challenge *sub judice*, as the latter revolves around the question of whether Mr Gaddafi has been previously tried by the Libyan national courts for the "same conduct" set out in the 27 June 2011 Warrant of Arrest issued by the Chamber.

21. What is clear from reading article 17(1)(c) and article 20(3) of the Statute together is that both contemplate a two-part test in admissibility challenges based on the principle of *ne bis in idem/non bis in idem* before the Court. In considering an admissibility challenge pursuant to these provisions, the Chamber shall address in turn two questions: (i) whether the person implicated in the proceedings before the

Court has been tried by another court and (ii) whether the proceedings before the Court relate to the same conduct as the proceedings before this other court. In the case both questions are answered in the affirmative—in theory precluding the Court from hearing the case—and only in that case, shall the Chamber then examine whether the two exceptions under article 20(3) of the Statute apply to render the case admissible nonetheless.

22. In this context, the Chamber wishes to point out that the burden of proof lies on the challenging party, in this case the Defence. The Appeals Chamber has confirmed that "a State that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible [and in order] [t]o discharge that burden, the State must provide the Court with evidence of a sufficient degree of specificity and probative value […]".[19] Although the Appeals Chamber made this pronouncement in the context of an admissibility challenge lodged by a State, the Chamber agrees with the Prosecutor that "there is no reason why the standard of proof for an individual bringing an admissibility challenge should be different from that of a State".[20]

23. Thus, in order to discharge the burden of proof in the Admissibility Challenge *sub judice*, the Defence must provide the Chamber with evidence meeting the required degree of specificity and probative value demonstrating that the different elements under article 17(1)(c) and article 20(3) of the Statute have been met.

24. In the present case, the Chamber will first analyse whether the proceedings against Mr Gaddafi in Libya relate to the same conduct as the proceedings before the Court, before contemplating whether Mr Gaddafi has been tried by another

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[19] Appeals Chamber, *The Prosecutor v. Francis Muthaura et al.*, 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", 30 August 2011, ICC-01/09-02/11-274, paras 2, 61.
[20] Prosecution Response, para. 97, n. 168.

court. Indeed, the interpretation of the "same conduct" test forms part of the settled jurisprudence of the Pre-Trial Chambers, whereas the notion of "tried by another court" is novel and should be subject to an in-depth analysis. However, this analysis is only required if indeed the proceedings before the Court relate to the same conduct as the proceedings before this other court. Moreover, the Chamber notes that, in its 31 May 2013 Decision, the Chamber also applied the "same conduct" test to determine whether the Libyan and the ICC investigations covered the same case. Accordingly, it is appropriate for this Chamber to determine whether its findings regarding this question are still applicable in view of the current circumstances of the present case.

1. *Whether the proceedings against Mr Gaddafi in Libya relate to the same conduct as that alleged in this case*

i. Applicable law

25. The Pre-Trial Chamber adopted the "same conduct" analysis for the first time in *Lubanga* and since then has established it as part of its jurisprudence, as seen in the 2013 Admissibility Decision and the *Al-Senussi* admissibility decision.[21] For

[21] Gaddafi Admissibility Decision, para. 73; Pre-Trial Chamber I, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the admissibility of the case against Abdullah Al-Senussi, 11 October 2013, ICC-01/11-01/11 (hereinafter "Al-Senussi Admissibility Decision"), para. 66; *The Prosecutor v. Ahmad Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, ICC-02-05-01/07-1-Corr, para. 24; *The Prosecutor v. Germain Katanga*, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, 6 July 2007, ICC-01/04-01/07-4, para. 20 (public redacted version in ICC-01/04-01/07-55); *The Prosecutor v. Mathieu Ngudjolo Chui*, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, 6 July 2007, ICC-01/04-01/07-262, para. 21; *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-2-Conf, para. 50 (public redacted version in ICC-02/05-01/09-3); and *The Prosecutor v. Bahr Idriss Abu Garda*, Decision on the Prosecutor's Application under Article 58, 7 May 2009, ICC-02/05-02/09-1-Conf, para. 4 (public redacted version in ICC-02/05-02/09-12-Anx1). The same approach was taken by Pre-Trial Chamber II in *The Prosecutor v. Kony et al.*, Decision on the Admissibility of the Case under Article 19(1) of the Statute, 10 March 2009, ICC-02/04-01/05-377, paras 17-18; *The Prosecutor v. William Samoei*

purposes of an admissibility challenge under article 17 of the Statute, the relevant criterion in defining a "case" are whether the situation involves the "same individual" and "substantially the same conduct". As put by the Pre-Trial Chamber in *Lubanga*, for a case to be inadmissible before the Court, national proceedings must "encompass both the person and the conduct which is the subject of the case before the Court".[22]

26. In *Al-Senussi* the Chamber explained that "same person" means "the person subject to the domestic proceedings is the same person against whom the proceedings before the Court are being conducted".[23] "Same conduct" requires that "the conduct that is subject to the national investigation is substantially the same conduct that is alleged in the proceedings before the Court".[24] The Chamber does not expect the national investigation to mirror the exact events mentioned in the Article 58 Decision. Rather, the challenging party must demonstrate that the investigation covers the same conduct as that "set out in the document that is statutorily envisaged as defining the factual allegations against the person at the phase of the proceedings in question".[25] As such analysis is highly dependent upon the facts and circumstances of the case, identification of the conduct cannot be done in the abstract. It requires a case-by-case analysis.[26]

Ruto et al., Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, 30 May 2011, ICC-01/09-02/11-96, para. 48. Lastly, the same position was adopted by Pre-Trial Chamber III in *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, 10 June 2008, ICC-01/05-01/08-14-tENG (translation notified 17 July 2006), para. 16.

[22] Al-Senussi Admissibility Decision, para. 66(i), n. 135 (*quoting* Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, 24 February 2006, ICC-01/04-01/06-8-Corr, para. 31).

[23] Al-Senussi Admissibility Decision, para. 66(i).

[24] Al-Senussi Admissibility Decision, para. 66(i).

[25] Al-Senussi Admissibility Decision, para. 66(iii).

[26] Al-Senussi Admissibility Decision, para. 66(iii).

27. For example, in the 2013 Decision the Arrest Warrant and the Article 58 Decision were both relevant to the admissibility challenge analysis. In making a determination on the admissibility challenge, the Chamber explained:

> [T]he Chamber will assess, on the basis of the evidence provided by Libya, whether the alleged domestic investigation addresses the same conduct underlying the Warrant of Arrest and the Article 58 Decision, namely that: Mr Gaddafi used his control over relevant parts of the Libyan State apparatus and Security Forces to deter and quell, by any means, including the use of lethal force, the demonstrations of civilians, which started in February 2011 against Muammar Gaddafi's regime; in particular, that Mr Gaddafi activated the Security Forces under his control to kill and persecute hundreds of civilian demonstrators or alleged dissidents to Muammar Gaddafi's regime, across Libya, in particular Benghazi, Misrata, Tripoli and other neighbouring cities, from 15 February 2011 to at least 28 February 2011.[27]

28. In identifying the subject matter of the document used for the domestic investigation, the Chamber recalls that such analysis must focus on the alleged conduct, and not their legal characterisation. In other words, "[t]he question of whether domestic investigations are carried out with a view to prosecuting international crimes is not determinative of an admissibility challenge".[28] Rather, the Chamber may conclude that the domestic proceedings are addressing the same conduct even though the State characterises the allegations in its own criminal code as crimes of an ordinary or non-international character.[29]

29. The party raising the admissibility challenge need not provide evidence that is strong enough to prove criminal liability. Instead, the evidence need only be sufficient to support a finding that domestic authorities are taking concrete and progressive steps to investigate the conduct.[30]

30. In *Al-Senussi*, the Pre-Trial Chamber provided guidance as to what type of evidence may be relevant in an admissibility determination. Such evidence may include "evidence on the merits of the national case that may have been collected as

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[27] Gaddafi Admissibility Decision, para. 83.
[28] Al-Senussi Admissibility Decision, para. 66(iv); *see also* Gaddafi Admissibility Decision, para. 85.
[29] Al-Senussi Admissibility Decision, para. 66(iv).
[30] Al-Senussi Admissibility Decision, para. 66(vii); Gaddafi Admissibility Decision, para. 122.

part of the purported investigation to prove the alleged crimes" as well as "[a]ll material capable of proving that an investigation is ongoing".[31] Examples of these include directions, orders and decisions issued by authorities in charge of the investigation, as well as internal reports, updates, notifications or submissions contained in the file arising from the investigation of the case.[32]

31. Moreover, the evidence must sufficiently establish the scope and contours of the case to allow the Chambers to make a comparison between the domestic case and the proceedings before the Court. In the 2013 Decision, the Chamber held that the challenging party—in that case the State of Libya—had not met this burden. Libya had provided various excerpts, including documents, a summary of witness statements and intercepts of conversations involving the accused. Many of the documents, however, did not relate to the case against Mr Gaddafi himself, and some of the proffered evidence lacked either judicial authorisation or a clear chain of custody to trace them back to Mr Gaddafi.[33] Based on the evidence as a whole, the Chamber concluded that some of the evidence showed that Libya had taken a number of investigative steps with respect to certain, discrete aspects of the alleged conduct of Mr Gaddafi—particularly, his role in mobilising militias and equipment by air, certain events in Benghazi, and the arrest of journalists and activists against the Gaddafi regime. However, the Libyan Government did not provide evidence sufficient "to discern the actual contours of the national case against Mr Gaddafi

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[31] Al-Senussi Admissibility Decision, para. 66(viii).

[32] Al-Senussi Admissibility Decision, para. 66(viii). The Appeals Chamber confirmed the findings of the Pre-Trial Chamber in *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment on the Appeal of Mr Abdullah Al-Senussi against the decision of the Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi", 24 July 2014, ICC-01/11-01/11 OA6, para. 110.

[33] Gaddafi Admissibility Decision, paras 106, 114, 131.

such that the scope of the domestic investigation could be said to cover the same case as that set out in the Warrant of Arrest issued by the Court."[34]

32. The Chamber will render a decision on the admissibility of the case based on the circumstances prevailing at the time of issuing it.[35]

ii. Submissions

a. Defence

33. The Defence submits that the indictment and judgment rendered in the Libyan proceedings demonstrate that Mr Gaddafi was tried for the same conduct as that contained in the Arrest Warrant and the Article 58 Decision. It asserts that the domestic proceedings, just like the ICC documents, addressed his role in planning, instigating, inciting, funding or otherwise facilitating the commission of crimes including the murder and killing of civilian demonstrators opposed to the Gaddafi regime.[36]

34. In confidential Annex H to its submissions, the Defence compares side-by-side, on the one hand, the allegations against Mr Gaddafi in the Arrest Warrant and in the Article 58 Decision against, on the other hand, the indictment, facts and conclusions of the case conducted by national authorities. On the basis of this comparison, the Defence contends that it is clear that the domestic proceedings covered and in some cases went beyond the ICC case against Mr Gaddafi.

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[34] Gaddafi Admissibility Decision, para. 135; The Appeals Chamber confirmed the Pre-Trial Chamber's conclusion in *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, 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", 21 May 2014, ICC-01/11-01/11 OA 4, para. 86.

[35] Al-Senussi Admissibility Decision, para. 66(v).

[36] Admissibility Challenge, para. 56.

Accordingly, the Libyan proceedings sufficiently overlap with the case brought by the Prosecutor.[37]

35. The Defence moreover points to various concessions made by the Prosecutor that Mr Gaddafi was being investigated by Libyan national authorities for the same conduct.[38] It contends that this constitutes relevant evidence to its admissibility challenge. Indeed, on 5 June 2012, the Prosecutor conceded that the investigations Libya was conducting at the time of Libya's admissibility challenge in Gaddafi were "almost identical" to the case in this Court.[39]

b. Prosecution

36. The Prosecution submits that because Mr Gaddafi's *in absentia* conviction is not final within the meaning of "tried by another court," it is not necessary for the Chamber to rule on whether the national proceedings related to the same conduct as the case before the Court.[40] It nonetheless agrees with the Defence that based on the information contained in the judgment of the Tripoli Court of Assize, the domestic proceedings addressed the "same person" and related to "substantially" the same conduct as Mr Gaddafi's case before the Court.[41] The Prosecution also maintains that the comparative chart in Annex H demonstrates that the case prosecuted in Libya "sufficiently mirrors" Gaddafi's case in front of the Court.[42]

c. OPCV

37. The OPCV asserts that Mr Gaddafi was not tried for the same crimes.[43] According to its submission, the Warrant of Arrest and the Article 58 Decision

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[37] Admissibility Challenge, Annex H, ICC-01/11-01/11-640-conf-AnxH, paras 63-64.
[38] Admissibility Challenge, para. 55.
[39] Admissibility Challenge, para. 55.
[40] Prosecution Response, para. 134.
[41] Prosecution Response, para. 135.
[42] Prosecution Response, para. 139.
[43] OPCV Observations, para. 2.

address acts that occurred in different locations or times, as well as grave crimes not covered by either the Libyan indictment or judgment by the Tripoli Court of Appeal. In the view of the OPCV, the Libyan investigation and trial did not cover the same incidents and thus do not substantially overlap with Mr Gaddafi's case before the Court.

38. The OPCV asserts that what is "still abundantly clear [is] 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 'incidents' and do not constitute substantial overlap".[44]

39. The OPCV emphasises that the Libyan proceedings diverge from the case before the Court because they do not cover torture charges. The OPCV submits that while some of the charges address alleged acts common to those underlying the ICC proceedings, the ICC proceedings predominantly rely on acts of torture committed on political grounds. In contrast, the OPCV asserts that the acts referred to in the Libyan proceedings would be more appropriately characterised as a rape charge. Thus, the Libyan proceedings did not sufficiently overlap with the persecution charge against Mr Gaddafi before the Court.[45]

40. Additionally, the OPCV argues that the Libyan proceedings did not address the same conduct because they did not charge the same mode of liability as the case before the Court.[46] The Libyan proceedings charged Mr Gaddafi as a direct perpetrator, an aider and abettor, as well as a co-conspirator to the alleged crimes. The OPCV contends that these charges, however, did not encapsulate the complex form of indirect co-perpetration involving multiple persons in multiple locations

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[44] OPCV Observations, para. 13.
[45] OPCV Observations, paras 14-15.
[46] OPCV Observations, para. 18.

with different positions of hierarchy.[47] It submits that domestic modes of liability do not adequately address "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".[48]

d. Amici Curiae

41. The Amici Curiae make no submissions on the same conduct question. For them, the admissibility issue turns on whether Mr Gaddafi has been tried by another court.[49]

iii. Findings of the Chamber

42. The Chamber recognises that the Defence has raised the present admissibility challenge pursuant to article 17(1)(c) rather than article 17(1)(a) of the Statute. The Chamber agrees with the Defence's submission that it is reasonable to assume that article 17(1)(a), article 17(1)(c), and article 20(3) of the Statute were intended to have the same meaning.[50] Each of these provisions relate to different manners in which a criminal procedure initiated by domestic authorities may bar the proceedings before this Court. By contributing various requirements that a case must satisfy to be admissible before this Court, it is clear all three provisions embody a similar intent to ensure that the principle of complementarity is realised. The Chamber thus acknowledges that the standard applicable in an admissibility challenge pursuant to article 17(1)(a) of the Statute[51] is equally applicable to a challenge pursuant to article 17(1)(c) and, relatedly, article 20(3) of the Statute.

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[47] OPCV Observations, para. 18.
[48] OPCV Observations, para. 18.
[49] Amici Curiae Observations, paras 15-16.
[50] Admissibility Challenge, para. 50.
[51] *See* paragraph 25 above. An analysis under article 17(1)(a) of the Statue asks whether the case involves the "same individual" and "substantially the same conduct".

43. The Chamber notes that both Defence and Prosecution agree that the proceedings against Mr. Gaddafi in Libya relate to "substantially the same conduct" as that alleged in this case.[52] That being said, the Chamber's conclusion is based on application of the admissibility challenge criteria detailed above.[53]

44. As stated earlier,[54] the party raising the admissibility challenge must provide sufficient evidence to allow the Chamber to discern the actual contours of the national case. In prior cases, the Chamber has not elaborated on the elements it would examine to determine whether it could discern the contours. It takes the opportunity now to provide some guidance for future situations.

45. In discerning the actual contours of a case, the Chamber aims to create a cohesive picture of the domestic proceedings by weaving together the relevant, probative evidence available to it. The Chamber may take into account a variety of factors: evidence that the investigation covers a specific time frame or geographic area, a list of the particular acts being examined, or the overall subject matter of the investigation. These are only examples of elements the Chamber may consider and by no means form an exhaustive list. It follows, then, that the actual contours of a case cannot be quantitatively determined. There is neither a formula nor an exact quantity of evidence that a challenging party must satisfy to demonstrate that the scope of the national investigation is discernible. What is important is that the evidence as a whole permits the Chamber to identify how the national government or judiciary presents the case and make an informed assessment as to whether it sufficiently overlaps with the proceedings before the Court.

46. Here, the Chamber concludes that the proffered evidence sufficiently defines the contours of the case, allowing the Chamber to determine which conduct is

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[52] Admissibility Challenge, para. 51; Prosecution Response, para. 141.
[53] *See* paragraph 25 above.
[54] *See* paragraph 31 above.

being analysed. Specifically, in Annex H the Defence provides information regarding the time frame and locations of interest.[55] It states that the domestic proceedings addressed events occurring from 15 February 2011 onward and lists particular cities and regions where the alleged conduct occurred. Although the Defence does not specify a date marking the end of the period investigated, the Defence's inclusion of the geographic scope of the conduct sufficiently corroborates the general subject matter of the conduct before domestic authorities.[56] While evidence of exact start and end dates of alleged crimes are helpful in demonstrating to the Court the scope of investigation, defining an exact frame may not always be possible as authorities learn of new or more incidents. Thus, in contrast to the facts presented in the 2013 Decision in which Libya only provided examples of the crimes charged without an indication as to when the alleged acts occurred, the Chamber here can determine that the allegations at issue cover the same subject matter as the Court proceedings.[57]

47. Based on the scope of the domestic proceedings and the evidence provided by the Defence, it is clear that the Libyan authorities addressed the charges of murder and persecution as crimes against humanity contained in the Arrest Warrant and Article 58 Decision. In Annex H, the Defence lays out in detail how the domestic charges and evidence address the crimes of concern in the relevant Court documents.[58] The Defence points to the language of the indictment and evidence proffered during the proceedings, including witness testimony, testimony of accused individuals and facts established at trial. Moreover, it highlights the relevant language in the judgment, showing the conclusions of the Tripoli Court of Appeal as well as the facts and reasoning underlying them. Comparing this evidence with the allegations contained in the Arrest Warrant and the Article 58

[55] Admissibility Challenge, Annex H.
[56] Admissibility Challenge, Annex H.
[57] Gaddafi Admissibility Decision, paras 115-118.
[58] Admissibility Challenge, Annex H.

Decision, it is clear that the Libyan proceedings have addressed the subject matter of concern to this Court.

48. The Chamber notes that unlike in the 2013 Decision, the evidence now proffered by the Defence does relate to the case at hand.[59] In providing excerpts from the Tripoli Court of Appeal's analysis and conclusions—both of which discuss the conduct at issue—the Defence has demonstrated that the evidence is directly relevant to the allegations against Mr Gaddafi.

49. The Chamber recognises that the alleged acts addressed in the Libyan proceedings are not identical to the case before the Court. The Chamber reiterates, however, that the standard is whether the conduct at issue substantially overlaps between the two cases. Here, the Defence manages to demonstrate how the evidence and charges in the domestic proceedings address the crux of the charges against Mr Gaddafi before the Court.

50. The Chamber further observes that in multiple instances the Defence has provided the exact page number of the indictment and decision to corroborate its position. Although page numbers or other forms of citation are not determinative of the probative value of the proffered evidence in an admissibility inquiry, they may reassure the Chamber that the evidence does not raise issues relating to judicial authorisation or chain of custody.

51. The Chamber also takes note that Annex H indicates as well where the domestic charges exceeded the scope of the Court's investigation.

52. For the reasons stated, the Chamber concludes that the evidence is sufficient to support a finding that, pursuant to article 17(1)(c) of the Statute, the Libyan case against Mr Gaddafi did review the same conduct as the matter before the Court.

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[59] Gaddafi Admissibility Decision, para. 135.

The Chamber's analysis need not go further. It is not the role of the Chamber to weigh in on how a State conducts its criminal trials beyond those exceptions listed in article 20(3) of the Statute.[60] What is at stake is whether Libya fulfilled its responsibility to its people and the international community to try the most serious crimes.

53. The OPCV's observations do not change the outcome of this analysis. It is true that there are some minor differences in the time period and the exact crimes examined by the Libyan court.[61] Overall, however, they point to the subject matter—murder and persecution as crimes against humanity—addressed in the proceedings before this Court.

54. What the OPCV's submissions highlight is that not all of the same crimes were adjudicated in the Libyan proceedings as in the case before the Court. However, the relevant test does not ask whether the same *crimes* have been tried; it asks whether the case amounts to the same *conduct*, i.e., whether it captures the same nature of charges as those before the Court.

55. To require more of the Defence when it has already thoroughly showed the substantial overlap between the cases would create too rigid a standard. It would require any domestic criminal prosecution to exactly mirror the case before the Court to succeed in an admissibility challenge. But this may create more problems than it would solve. Namely, a requirement that the domestic proceedings be almost identical to those before the Court would lead to this Court playing a larger role in dictating and shaping domestic criminal proceedings. This would not be consistent with the notion of complementarity.

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[60] *See* Bemba Judgment on the Appeal against the Decision on the Admissibility and Abuse of Process Challenges, para. 66 and discussion on the extent of a Chamber's analysis in an admissibility challenge, paragraph 12 above. Concerning the exceptions to article 20(3), *see* paragraphs 150-152 below.

[61] OPCV Observations, para. 13.

56. The Chamber believes that the acts tried in the domestic proceedings amount to the same conduct as in the case before the Court. The Chamber now turns to the second part of its analysis, namely whether Mr Gaddafi has been tried by another court.

2. Whether Mr Gaddafi has been tried by another court

i. The trial of Mr Gaddafi in Libya

57. The Chamber recalls that article 17(1)(c) of the Statute refers to a person who "has already been tried [...] and a trial by the Court is not permitted under article 20, paragraph 3". Article 20(3) of the Statute comes into play to impose a restriction for a second trial when the person "has been tried by another court for conduct also proscribed under article[s] 6, 7, 8 or 8*bis*".

58. As the Chamber has found that the Libyan proceedings related to substantially the same conduct as in the case before the Court, the Chamber now needs to ascertain whether Mr Gaddafi has already been tried by the Libyan national courts for that conduct. As this is the first time an admissibility challenge pursuant to articles 17(1)(c) and 20(3) of the Statute comes before the Court, the Chamber must seek to determine the applicable law in relation to the notion of "tried by another court" under article 20(3) of the Statute in light of the submissions received in this case.

a. Submissions

1) Defence

59. According to the Defence, "[t]he ordinary meaning of 'has been tried by another court' is that court proceedings in relation to the relevant person have been instigated by national authorities and have concluded with a verdict convicting or

acquitting that person".[62] Citing an earlier decision issued by Trial Chamber III, the Defence further argues that the Trial Chamber "correctly identified that the defining characteristic of a concluded trial is the existence of a decision on the merits."[63] Thus, in the Defence's opinion, article 20(3) of the Statute is triggered once "a decision on conviction or acquittal by a trial court" is rendered.[64]

60. In addition, the Defence submits that the Libyan court was not correct in regarding the trial of Mr Gaddafi as a trial *in absentia* and considers that compelling evidence should lead the Chamber to reject the qualification of Mr Gaddafi's conviction as issued "in absentia".[65] Indeed, the Defence argues that trials *in absentia* cannot take place in Libya when the location of the accused is known, as was the case with Mr Gaddafi, and that, in any case, Mr Gaddafi attended the trial by video-link as permitted under the Libyan Code of Criminal Procedure.[66]

2) Prosecution

61. The Prosecution argues that Mr Gaddafi has not been "tried" in Libya for the purposes of the *ne bis in idem* principle under articles 17(1)(c) and 20(3) of the Statute, as there has been no final judgment against Mr Gaddafi.[67] In the view of the Prosecution, for an admissibility challenge to be successful under articles 17(1)(c) and 20(3) of the Statute, "a final judgment of conviction or acquittal must have been rendered [...] by a criminal court".[68]

62. Referring to the Libyan Attorney General's submissions, the Prosecution maintains that the Libyan judgment convicting Mr Gaddafi is not final since he was

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[62] Admissibility Challenge, para. 43.
[63] Admissibility Challenge, para. 45.
[64] Admissibility Challenge, para. 46.
[65] Admissibility Challenge, para. 47.
[66] Admissibility Challenge, para. 47.
[67] Prosecution Response, para. 104.
[68] Prosecution Response, para. 112.

convicted *in absentia,* which grants him an absolute right to a new trial in person once Libya obtains custody of him and results in an unenforceable sentence.[69] Indeed, as Mr Gaddafi's conviction was issued *in absentia,* the death sentence cannot be enforced against him.[70]

63. The Prosecution further argues that, contrary to the Defence's submissions, the Chamber should not review the *in absentia* nature of the decision of the Libyan Court against Mr Gaddafi, as there exists no compelling evidence in this case that would compel the Chamber to undertake such a review.[71]

3) OPCV

64. The OPCV asserts that the judgment from the Libyan court condemning Mr Gaddafi is not sufficient for purposes of the *ne bis in idem* principle and cannot lead to the conclusion that Mr Gaddafi "has been tried" pursuant to article 20(3) of the Statute.[72] A final judgment, having acquired force of *res judicata,* is necessary to find that a suspect "has been tried by another court" and thus render the case inadmissible before the Court.[73]

65. According to the OPCV, the Chamber should not assess this question in the abstract, but should instead focus on the specific circumstances of the national decision for whom *ne bis in idem* is invoked, taking into account the applicable domestic provisions regarding the finality of decisions and judgments.[74] In the present case, the OPCV concludes that the conviction issued *in absentia* against Mr Gaddafi in Libya is not final, as he should be subject to a mandatory and

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[69] Prosecution Response, para. 105.
[70] Prosecution Response, para. 111.
[71] Prosecution Response, para. 126.
[72] OPCV Observations, paras 60-70.
[73] OPCV Observations, paras 60-70.
[74] OPCV Observations, para. 71.

automatic retrial following his conviction *in absentia* and, further, mandatory review by the Libyan Court of Cassation is still pending.[75]

4) Amici Curiae

66. The Amici Curiae submits that there has been no final decision in the case against Mr Gaddafi, as he has not exhausted all avenues of appeal in Libya.[76] The Amici Curiae further argues that the Libyan Court of Cassation has not verified Mr Gaddafi's conviction and sentence, which is necessary pursuant to Libyan law for the conviction to be deemed final and for the sentence to be implemented.[77]

b. Findings of the Chamber

1) The notion of "tried by another court"

67. Concerning the nature of the decision required in order to satisfy article 20(3) of the Statute, the Chamber considers that the reference to "a trial by the Court is not permitted under article 20, paragraph 3" suggests that the person has been subject to a completed trial with a *final* conviction or acquittal, which bars a second trial before the Court, and not merely "with a verdict on the merits" or a mere "decision on conviction or acquittal by a trial court" as the Defence suggests. In other words, what is required is a judgment which acquired a *res judicata* effect.[78]

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[75] OPCV Observations, paras 73, 79-80.

[76] Amici Curiae Observations, paras 17-23.

[77] Amici Curiae Observations, paras 17-23.

[78] This is the case "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". *See* ECtHR, *Sergey Zolotukhin v. Russia*, Judgment, 10 February 2009, Application No. 14939/03, para. 107; *Nikitin v. Russia*, Judgment, 15 December 2004, Application No. 50178/99, para. 37; *see also* International Court of Justice, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Judgment on Preliminary Objections, 17 March 2016, para. 58 (noting that "[T]he principle of *res judicata* […] 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 […]. This principle establishes the finality of the decision adopted in a particular case"). The Chamber also

68. In its decisions of 24 June 2010, Trial Chamber III took a similar view when it rejected an argument advanced by the Defence of Mr Jean Pierre Bemba that an order issued by the Senior Investigating Judge on 16 September 2004 "terminated finally the criminal proceedings against" him.[79] According to the Trial Chamber:

> The decision at first instance in the [Central African Republic] was not in any sense a decision on the merits of the case – instead it involved, *inter alia*, a consideration of the sufficiency of the evidence before the investigating judge who was not empowered to try the case – and it did not result in a *final* decision or acquittal of [Mr Jean Pierre Bemba]" (emphasis added).[80]

69. In this respect, although the Chamber agrees with the Defence that a decision on the merits of the case "on conviction or acquittal" is required,[81] it still considers, contrary to the Defence's position,[82] that *finality* of such decision or judgment on the merits is equally required. As such the Chamber construes the quoted paragraph from the Trial Chamber decision as clearly calling for a final judgment on the merits, where it has acquired a *res judicata* effect. This is so notwithstanding the Defence's argument that if finality was required, the text of article 20(3) of the Statute would have expressly required so.

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notes that the *ad hoc* tribunals adhered to the same interpretation for the *ne bis in idem* provisions in their Statutes. *See* International Criminal Tribunal for Rwanda (the "ICTR"), *Laurent Semanza v. The Prosecutor*, Decision, 31 May 2000, Case No. ICTR-97-23-A, paras 74-75; ICTR, *The Prosecutor v. Joseph Nzabirinda*, Sentencing Judgement, 23 February 2007, Case No. ICTR-2001-77-T, para. 46; International Residual Mechanism for Criminal Tribunals (the "IRMCT"), *The Prosecutor v. Naser Orić*, Decision on an application for Leave to Appeal The Single Judge's Decision of 10 December 2015, 17 February 2016, Case No. MICT-14-79, para. 13, respectively interpreting article 9(2) of the ICTR Statute and article 7(2) of the IRMCT Statute. *See also* International Criminal Tribunal for the Former Yugoslavia (the "ICTY"), *The Prosecutor v. Duško Tadić*, Decision on the Defence Motion on the principle of *non bis in idem*, 14 November 1995, Case No. IT-94-1-T, para. 22, for the interpretation of article 10(2) of the ICTY Statute.

[79] Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010, ICC-01/05-01/08-802 (hereinafter "Bemba Decision on the Admissibility and Abuse of Process Challenges"), para. 88.

[80] Bemba Decision on the Admissibility and Abuse of Process Challenges, para. 248.

[81] Admissibility Challenge, para. 46.

[82] Admissibility Challenge, paras 43-44.

70. In accordance with article 21(3) of the Statute and the jurisprudence of the Appeals Chamber,[83] this interpretation provided by the Chamber is inspired by and follows internationally recognised human rights norms, which envisage a prohibition of a second trial when there is a *final* decision or judgment of acquittal or conviction. This reflects the text of article 14(7) of the International Covenant on Civil and Political Rights (the "ICCPR")[84], but also other core human rights instruments such as article 4(1) of Protocol 7 of the European Convention on Human Rights[85] as well as article 8(4) of the American Convention of Human Rights.[86]

71. In this respect, the Chamber cannot agree with the Defence that the "language of Article 20(3) of the Statute should be contrasted, for instance, with Article 14(7)

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[83] Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé,* Judgment on the Prosecutor's appeal against the oral decision of Trial Chamber I pursuant to article 81(3)(c)(i) of the Statute, 21 February 2019, ICC-02/11-01/15-1251-Red2, para. 50; *The Prosecutor v. Jean-Pierre Bemba Gombo et al.,* Judgment on the appeal of Mr Aimé Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled "Decision on the "Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba", 11 July 2014, ICC-01/05-01/13-558, para. 67; *The Prosecutor v. Germain Katanga,* Judgment on the appeal of the Prosecutor against the decision of the Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, ICC-01/04-01/07-475, para. 57; *The Prosecutor v. Thomas Lubanga Dyilo,* Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, ICC-01/04-01/06-1486, para. 46.

[84] International Covenant on Civil and Political Rights, 16 December 1966, 999 United Nations Treaty Series 14668, article 14(7).

[85] Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), 22 November 1984, as amended by Protocol No. 11, ETS No. 117, article 4(1). *See* Explanatory Report to Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms. *See also inter alia* ECtHR, *A and B v. Norway*, Judgment, 15 November 2016, Applications No. 24130/11 and 29758/11, para. 27; ECtHR, *Sergey Zolotukhin v. Russia,* Judgment, 10 February 2009, Application No. 14939/03, para. 107.

[86] American Convention on Human Rights 'Pact of San Jose, Costa Rica', 22 November 1969, 1144 United Nations Treaty Series 17955, article 8(4). *See inter alia,* Inter-American Commission on Human Rights, *Garcia v. Peru*, 17 February 1995, Case 11.006 (Peru), IACHR Annual Report 1994, No. 1/95, pp. 1-2.

of the [ICCPR] which applies where a person 'has already been *finally* convicted or acquitted'".[87]

72. Thus, although article 20(3) of the Statute does not expressly refer to a final conviction or acquittal, practice consistent with international human rights standards support an interpretation of the *ne bis in idem* provisions to that effect. Therefore, the Chamber considers that the interpretation of article 20(3) of the Statute should be in harmony with universal human rights standards mirrored in, *inter alia*, article 14(7) of the ICCPR.

2) The trial of Mr Gaddafi before the Tripoli Court

73. Based on a review of the material available before the Chamber,[88] it is clear that Mr Gaddafi has been subject to trial and conviction on 28 July 2015 by the Tripoli Criminal Court. This judgment has been passed by a first instance Tripoli Court of Assize, and in principle, should still be subject to appeal before the Court of Cassation due to the nature of sentence passed (death penalty). Moreover, as indicated by the submission of the Libyan Attorney General, this judgment has been rendered *in absentia*, which is a further reason to demonstrate that it is not a final judgment of conviction. This is so because, according to the Libyan national law, once the person is arrested his trial should start anew.

74. This conclusion stands despite the Defence's argument that Mr Gaddafi's trial should have been deemed *in presentia*,[89] given that he attended a number of hearings via video-link "for security reasons", according to the new "Law No. 7 of

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[87] Admissibility Challenge, para. 44.

[88] *See particularly* paragraphs 11-15 above and Prosecution Response, Annex 8, pp. 14-16. *See* also OPCV Observations, paras 51-53 and Transcript of hearing, 9 October 2012, ICC-01/11-01/11-T-2-Red-ENG, p. 27 (where the Libyan Government representative explained the procedure that follows a conviction to the death penalty).

[89] Admissibility Challenge, para. 47; Defence Consolidated Reply, para. 21.

2014, amending Article 234 of the Code of Criminal Procedure of Libya".[90] Indeed, the Libyan Government confirmed the Chamber's position when it stated:

> The fact that [Mr Gaddafi] participated in some proceedings by video-conference from Zintan does not affect his categorical entitlement under Article 358 of the Libyan Code of Criminal Procedure to a trial in-person before there would be any possibility of a sentence being carried out.[91]

75. The Libyan Attorney General also stated:

> It must be underlined at this juncture that the sentence is rendered *in absentia* of the sentenced person is absent from all hearing sessions or has been present in some, without giving him the opportunity to defend himself. Accordingly, the trial of an Accused who is absent is subject to a number of procedural rules which should be observed and exercised by the court that has pronounced the sentence. That is effectively what the court did, precisely after it had established that the facility where the convict was detained was outside the control of the Judicial Police, the judiciary and the Public Prosecution. It had to move ahead with the proceedings in a bid not to affect those amongst the Accused who were present and also to avoid inflicting on them a situation worse than the one encountered by the Accused-who is either absent or kept away-by delaying their proceedings.[92] […] [i]n the case of the Convict Saif […] Gaddafi, the sentence is either nullified when the period of time he is to serve as part of his punishment lapses-this does not apply to the case concerned under the general rules governing this process-or that the person convicted in absentia appears, voluntarily or coercively, before the court that has handed down the judgment in absentia. Thereupon, the previously delivered judgment shall irrevocably be null and void, whether in relation to the sentence or damages. The case, brought up again, shall then be reheard before the Court.[93]

76. In this respect, the Chamber notes that the copy of the judgment issued against Mr Gaddafi and submitted by the Defence as part of its evidence reveals that the Tripoli Court passed this judgment *in absentia*, and thus, it is not for this Chamber to challenge the correctness, nature or qualification of judgments passed by national courts of States, unless there are compelling reasons to do so.

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[90] Admissibility Challenge, para. 41; Defence Consolidated Reply, paras 21-23.

[91] Libya's 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. 7; Prosecution Response, para. 108.

[92] Prosecution Response, Annex 8, p. 14.

[93] Prosecution Response, Annex 8, p. 15.

77. As recalled by this Chamber in a previous section,[94] in *Bemba*, the Appeals Chamber ruling on an admissibility question, stated in similar terms:

> It was *not* the role of the Trial Chamber to review the decisions of the [Central African Republic (CAR)] courts to decide whether those courts applied CAR law correctly. In the view of the Appeals Chamber, when a Trial Chamber must determine the status of domestic judicial proceedings, it should accept *prima facie* the validity and effect of the decisions of domestic courts, *unless presented with compelling evidence indicating* otherwise (emphasis added).[95]

78. In the present case, the Chamber considers that it is clear from the submissions of the Libyan Attorney General that the judgment of conviction rendered against Mr Gaddafi is regarded under Libyan law as a judgment *in absentia*, which by its very nature is far from being final. Moreover, the text of the judgment provided in the material submitted to the Chamber demonstrates that the national judges decided that the trial judgment has been rendered *in absentia*.[96]

79. Thus, the Chamber agrees with the Prosecutor that "it is not for this Chamber to review the decision of the Tripoli Court of Assize to convict Mr Gaddafi *in absentia*",[97] because there "is no compelling evidence in this case which would impel the Chamber to examine the *in absentia* nature of the judgment against Mr Gaddafi by the Tripoli Court of Assize".[98] In the view of this Chamber, to do so in the present case would amount to an unwarranted interference in the judicial domestic affairs of Libya.

80. In addition to the judgment being rendered *in absentia*, the Chamber makes note of the judgment rendered by the African Court on Human and Peoples' Rights in *African Commission on Human and Peoples' Rights v. Libya*, in which the African

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[94] *See* paragraph 12 above.
[95] Bemba Judgment on the Appeal against the Decision on the Admissibility and Abuse of Process Challenges, para. 66.
[96] Admissibility Challenge, Annex A, ICC-01/11-01/11-640-AnxA, p. 352; Admissibility Challenge, Annex B, p. 353.
[97] Prosecution Response, para. 122.
[98] Prosecution Response, para. 126.

Court found that Mr Gaddafi had not been afforded adequate procedural protections during the different stages of the Libyan investigation. The Chamber deems that this finding strengthens the idea that Mr Gaddafi has not been "tried by another court" in the sense of article 20(3) of the Statute.[99]

81. While the Chamber considers that the *in absentia* judgment issued against Mr Gaddafi does not amount to a final judgment as required under article 20(3) of the Statute, it must now turn to the impact that the Libyan Law No. 6 of 2015 may have had on the finality of that judgment. The Defence of Mr Gaddafi indeed develops a further argument apart from the nature of the judgment passed, to the effect that by passing Law No. 6 of 2015 "any further criminal proceedings against Dr. Gadafi are conditionally 'dropped' and sentence effectively suspended," thus rendering the Libyan judgment against Mr Gaddafi final.[100]

ii. Impact of Libyan Law No. 6 of 2015

82. In view of the submissions, the Chamber has identified two main categories of arguments regarding the potential impact of Law No. 6 of 2015 on the finality of the *in absentia* judgment from the Tripoli Court: the first concerns the applicability of Law No. 6 of 2015 to Mr Gaddafi with respect to the domestic charges, while the second relates to the compatibility of said law with international law. The Chamber will entertain these two elements in turn.

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[99] African Court of Human and Peoples' Rights, *African Commission on Human Rights v. Libya*, Judgment on Merits, 3 June 2016, Application No. 002/2013, para. 96 ("According to available information, the Detainee [Mr 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 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*").

[100] Admissibility Challenge, para. 48.

a. Applicability of Libyan Law No. 6 of 2015 to Mr Gaddafi with respect to the domestic charges

1) Submissions

i. Defence

83. The Defence submits that Law No. 6 of 2015 ended the investigation and suspended the sentence against Mr Gaddafi.[101] The law had the effect of rendering the judgment on the merits against Mr Gaddafi final, preventing him from being able to request a new trial.[102]

84. According to the Defence:

> [E]ven if Dr. Gadafi had a hypothetical right to ask for a re-trial because the judgment was pronounced *in absentia*, Law No. 6 of 2015 takes away that possibility and so renders the existing Judgment final (subject only to the possible re-opening of proceedings should Dr. Gadafi commit a further offence within the relevant five year period).[103]

85. Thus, the Defence of Mr Gaddafi believes "[i]t cannot be right that this case remains admissible before this Court because there remains a hypothetical possibility of the re-opening of proceedings in Libya in the event of future re-offending".[104] For the Defence, the Admissibility Challenge "should be judged on the current position; the current position is that national proceedings against Dr. Gadafi have been concluded with judgment on the merits".[105]

86. Concerning the application of Law No. 6 of 2015 to Mr Gaddafi, the Defence argues that only the crime of "identity-based murder" (and not "murder" broadly speaking) is excluded from the ambit of Law No. 6 of 2015 pursuant to article 3 of said law. It thus submits that Law No. 6 is applicable to Mr Gaddafi since he was

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[101] Admissibility Challenge, paras 48, 88.
[102] Admissibility Challenge, paras 48, 88.
[103] Admissibility Challenge, para. 48; Defence Consolidated Reply, paras 3, 19.
[104] Admissibility Challenge, para. 48.
[105] Admissibility Challenge, para. 48.

charged for crimes of murder but not of identity-based murder.[106] The Defence adds that Mr Gaddafi was not convicted of "corruption" related crimes, but rather of crimes related to the provision of financial and material support to armed groups.[107]

87. The Defence further claims that Law No. 6 of 2015 was applied to Mr Gaddafi "by the Minister of Justice acting under the *de facto* authority of the Al-Bayda Transitional Government of Libya", which fulfils the procedural condition provided in article 6 of Law No. 6 of 2015.[108]

88. Finally, the Defence submits that the law was validly enacted and is currently being applied in Libya in other criminal cases, referring to letters from the Tobruk Court of Appeal and the Bayda Court of Appeal, which "explicitly confirm that Law No. 6 of 2015 is being implemented before these courts".[109]

ii. Prosecution

89. The Prosecutor refers to the submissions from the Libyan Attorney General, submitting that Mr Gaddafi's case satisfied neither the substantive nor the procedural requirements of the Libyan law.

90. According to the Prosecutor, the crimes of murder and corruption—for which Mr Gaddafi was granted amnesty—are normally excluded from the application of Law No. 6 of 2015 as indicated in article 3 of this same law.[110] The Prosecutor points to the statements of the Libyan Attorney General, arguing that it confirmed that "[p]ursuant to the provisions of Article 3 of Law No. 6 of 2015 in respect of

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[106] Defence Consolidated Reply, para. 60.
[107] Defence Consolidated Reply, para. 60.
[108] Defence Consolidated Reply, para. 51
[109] Defence Consolidated Reply, para. 39; Defence Consolidated Reply, Annexes 5A and B, ICC-01/11-01/11-660-Anx5.
[110] Prosecution Response, para. 81.

amnesty, the crimes involving murders and corruption attributed to the Accused Saif al-Islam Gaddafi are excluded from the application of law provisions".[111]

91. Concerning the procedural requirements, the Prosecutor refers to the submissions from the Attorney General of Libya, which states that, according to article 6 of Law No. 6 of 2015, "the jurisdiction to apply provisions of this law lies with the competent judicial authority legally mandated to look into the case".[112] Thus, under article 6 of the law, a reasoned decision by the competent judicial authority terminating the criminal case is a prerequisite.[113] However, no such decision has been made in relation to Mr Gaddafi, as "no decision has been issued by the competent judicial authority on the release of Mr Gaddafi pursuant to a judicial action or an authoritative legal situation that allows for such release".[114]

iii. OPCV

92. The OPCV argues that the crimes for which Mr Gaddafi was convicted by the Tripoli Court of Appeal fall under the exceptions of the application of the amnesty law, as indicated by article 3 of Law No. 6 of 2015.[115] In this sense, the OPCV joins the submissions of the Attorney General of Libya and the Prosecutor.[116]

iv. Amici Curiae

93. The Amici Curiae argues that the application of Law No. 6 of 2015 would be inappropriate in the case of Mr Gaddafi.[117] First, the Amici Curiae argues that the procedural conditions found in article 2 of Law No. 6 of 2015 have not been met in this case. There does not exist any publicly accessible document concerning a

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[111] Prosecution Response, Annex 8, p. 20.
[112] Prosecution Response, para. 81.
[113] Prosecution Response, Annex 8.3, ICC-01/11-01/11-653-Conf-Anx8.3, p. 3.
[114] Prosecution Response, para. 82.
[115] OPCV Observations, para. 84.
[116] Prosecution Response, Annex 8, p. 20.
[117] Amici Curiae Observations, paras 39-45.

"written pledge of repentance", a return of money or goods obtained by way of the crimes committed, a reconciliation with the victims or a surrender of the arms used to commit the crimes. Any one of these four actions would satisfy the procedural conditions of Law No. 6 of 2015.[118]

94. Further, contrary to what is required by article 6 of the law, the Amici Curiae note that the amnesty afforded to Mr Gaddafi was not granted by a competent judicial authority on the basis of a reasoned decision. Noting the Supreme Court a competent judicial authority, the Amici Curiae observes that "[a]t time of writing, no information of such a decision implementing Law No. 6 of 2015 by the Supreme Court has been publically issued".[119] On this basis, as well as the fact that Mr Gaddafi was simply liberated by the battalion of Abu Bakr, the conditions of article 6 of Law No. 6 of 2015 have not been fulfilled.[120]

95. The Amici Curiae also submits that among the members of this previous government only Mr Gaddafi has benefitted from Law No. 6 of 2015. This selective application of the law again raises the question of its legitimacy.[121]

2) Findings of the Chamber

96. Upon reviewing the submissions, the Chamber notes that both substantive and procedural requirements need to be fulfilled for Law No. 6 of 2015 to apply and for amnesty to be granted to Mr Gaddafi under said law.

97. Concerning the substantive requirements provided under Law No. 6 of 2015, the Chamber observes that article 3 of the law excludes from its application a certain number of crimes, among which the crimes of "murders of identity" and

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[118] Amici Curiae Observations, para. 40.
[119] Amici Curiae Observations, paras 41-42.
[120] Amici Curiae Observations, paras 41-42.
[121] Amici Curiae Observations, para. 44.

"corruption of all its kinds".[122] The Chamber also takes note of the statement from the Libyan Attorney General, which indicated that "the crimes involving murders and corruption attributed to the Accused Saif al-Islam Gaddafi are excluded from the application of law provisions".[123]

98. While this statement goes against the Defence's position that article 3 of Law No. 6 excludes only identity-based crimes,[124] the Chamber recalls that it should not challenge the correctness of the Libyan Attorney General's interpretation of Libyan law if there are no compelling reasons to do so.[125] In the present case, the Defence does not substantiate its claim and makes no attempt to explain why the statement from the Libyan Attorney General regarding the exclusion of murders (and not just identity-based murders) from the scope of Law No. 6 of 2015 would be erroneous.[126] The Chamber therefore cannot adhere to the Defence's claim that article 3 has a more specific, nuanced application.

99. Accordingly, in line with the submissions from the Libyan Attorney General, the Chamber considers that Law No. 6 of 2015 does not apply to Mr Gaddafi due to the nature of the crimes for which he was charged domestically.

100. Concerning the procedural requirements provided under Law No. 6 of 2015, the Chamber notes that, under article 6 of the law, a decision from the competent judicial authority is also required for the provisions of the law to apply. The Chamber nonetheless finds that a conclusion as to whether a decision has been rendered on the application of Law No. 6 of 2015 to Mr Gaddafi is not determinative for the purpose of ruling on the Admissibility Challenge. As noted

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[122] Admissibility Challenge, Annex E, ICC-01/11-01/11-640-AnxE.
[123] Prosecution Response, Annex 8.
[124] Defence Consolidated Reply, para. 60.
[125] *See* Bemba Judgment on the Appeal against the Decision on the Admissibility and Abuse of Process Challenges, para. 66 and discussion on the extent of a Chamber's analysis in an admissibility challenge, paragraph 12 above.
[126] Defence Consolidated Reply, para. 60.

above, it is indeed clear based on the material available before the Chamber that Law No. 6 of 2015 does not apply to Mr Gaddafi in any case due to the exclusion of some of the crimes he is charged with from the scope of the amnesty law.

101. This conclusion stands despite the Defence's assertion that the law is currently being applied in Libyan courts on the basis of the two letters issued by the Tobruk Court of Appeal and the Al Bayda Court of Appeal.[127] Indeed, regardless of the accuracy of the information related to the implementation or activation of Law No. 6 of 2015, what is of interest to the Chamber is foremost whether the law is applicable to Mr Gaddafi himself in the context of the domestic charges against him, taking into account the substantive and procedural requirements outlined in said law. Since Law No. 6 of 2015 does not apply to Mr Gaddafi, there is no need for the Chamber to examine whether the law is valid under Libyan law.

102. The Chamber thus considers that Law No. 6 of 2015 does not apply to Mr Gaddafi at a minimum due to the nature of the crimes for which he is domestically charged as mentioned above. It follows that Law No. 6 of 2015 does not render the existing judgment against Mr Gaddafi final and, accordingly, Mr Gaddafi cannot claim the benefit of this law to challenge the investigation before the Court.

103. Despite the aforementioned conclusion and although the present case does not strictly require it,[128] the Chamber deems it appropriate to undertake a careful review of the compatibility of Law No. 6 of 2015 with international law, in order to contribute to the clarification of legal issues at stake. This is particularly justified in

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[127] Defence Consolidated Reply, paras 7, 39; Defence Consolidated Reply, Annexes 5A and B, ICC-01/11-01/11-660-Anx5.

[128] *See* Dov Jacobs ("Puzzling Over Amnesties: Defragmenting the Debate for International Criminal Tribunals", in L. van den Herik and C. Stahn (ed.), *The Diversification and Fragmentation of International Criminal Law* (2012), pp. 305-345) who explains that "[i]ndeed, international criminal tribunals are not courts set up to investigate or adjudicate upon the international legality of acts of states. They have a mandate to prosecute individuals for the commission of international crimes, and their pronouncements on the legality of state acts are necessarily ultra vires. Nothing in the Statute of international criminal tribunals grants the judges with a power to pronounce on this issue", p. 333.

light of the fact that the Statute, the Elements of Crime and the Rules all lack explicit references to amnesties and the Court's jurisprudence has not yet addressed this issue.

b. Compatibility of Law No. 6 of 2015 with international law

1) Applicable law

i. Hierarchy of sources under article 21 of the Statute

104. To determine the applicable law with regards to amnesties, the Chamber resorts to the hierarchy of sources contained within article 21 of the Statute.

105. Article 21 of the Statute provides:

> 1. The Court shall apply:
>
> (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
>
> (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
>
> (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
>
> 2. The Court may apply principles and rules of law as interpreted in its previous decisions.
>
> 3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

106. According to article 21(1)(a) of the Statute, "[t]he Court shall apply [i]n the first place, this Statute, Elements of Crime and its Rules of Procedure and Evidence". The Chamber notes, however, that none of these texts explicitly refer to

amnesties. Thus, there exists a lacuna on this subject in the primary sources of the Court.

107. The fact that the Statute and accompanying operative texts of the Court do not mention amnesties should bring the Chamber to consider, in accordance with article 21(1)(b) of the Statute, applicable treaties and principles and rules of international law, to the extent possible, including those addressing armed conflict. Reference to these sources, however, is only subsidiary and is at the discretion of the Chamber, which may decide to rely upon them "where appropriate".[129]

108. According to the Pre-Trial Chamber in *Al Bashir*, the Court should only apply these subsidiary sources when two conditions are fulfilled: first, where the Statute, the Elements of Crime and the Rules are silent on the subject in issue, and second, where this absence cannot be filled by the interpretive rules of treaties found in articles 31 and 32 of the Vienna Convention on the Law of Treaties and article 21(3) of the Statute.[130]

109. In analysing principles and rules of international law, the Chamber may refer to the jurisprudence of other international criminal tribunals. However, this jurisprudence is not binding on the Chambers at this Court and is not automatically applicable under article 21(1)(b) of the Statute, but would rather require a detailed analysis.[131]

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[129] Article 21(1)(b) of the Statute.

[130] Pre-Trial Chamber I, *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3, paras 44, 126.

[131] Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo,* Decision regarding the practices used to prepare and familiarise witnesses for giving testimony at trial, 30 November 2007, ICC-01/04-01/06-1049, para. 44; Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo,* Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, ICC-01/04-01/06-3121-Red, para. 472 ("Nevertheless, the Appeals Chamber does not consider that it is legally bound to follow the particular approach of the *ad hoc* tribunals").

110. Where articles 21(1)(a) and 21(1)(b) of the Statute fail to provide elements that would guide the Chamber in the determination of the applicable law, the Chamber then resorts to "general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime [...]". In other words, article 21(1)(c) of the Statute is only applicable where there exists a gap in the Statute that international treaties and the principles and rules of international law are not able to fill. The Chamber has discretion as to how it proceeds to identify general principles; it may choose to consider the national laws of the States that would normally exercise jurisdiction over the crime, but it may never apply those laws directly.[132]

111. Pursuant to article 21(2) of the Statute, the Chamber may then decide to apply principles and rules of law as interpreted in the prior jurisprudence of the Court. Such reference is simply a means of analysis and the Chamber is not in any case bound by its prior decisions. However, as indicated above,[133] amnesties have not yet been addressed by any decision of the Court.

112. Finally, article 21(3) of the Statute provides that the application and interpretation of "law pursuant to this article" must be consistent with internationally recognised human rights. This obligation of consistency with human rights does not only concern the textual base—the primary sources of the Court—but rather all law that has been identified as applicable pursuant to the preceding subparagraphs of article 21 of the Statute. In the present case, in the absence of textual references to amnesties in the primary sources of the Court, it is mainly treaties, principles and rules of international law, as well as general

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[132] Appeals Chamber, *The Prosecutor v. Francis Kirimi Muthaura et al.*, Decision on the "Request to Make Oral Submissions on Jurisdiction under Rule 156(3)", 1 May 2012, ICC-01/09-02/11-421 OA4, para. 11.
[133] *See* paragraph 103 above.

principles derived from national laws that must be applied and interpreted in a manner consistent with internationally recognised human rights.

113. The Chamber recalls that it is not the role of this Chamber *per se* to pronounce on the application of Libya's national laws within its jurisdiction.[134] However, where national laws may impact the proceedings before this Court, the Chamber should ensure that these laws are not inconsistent with the State's obligations to cooperate with the Court, international law or recognised international rules and norms.[135]

114. In view of the above, to determine the applicable law when it comes to the compatibility of Law No. 6 of 2015 with international law in the context of prosecutions before the Court for crimes within its competence, the Chamber will follow the well-established hierarchy imposed by article 21 of the Statute and elaborated upon above. Starting with a definition of the concept of amnesties, the Chamber will then delve into the different sources outlined under articles 21(1)(b) and 21(1)(c) of the Statute, before analysing the compatibility of the rules identified with internationally recognised human rights, in accordance with article 21(3) of the Statute.

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[134] *See* paragraph 12 above.

[135] Libya has not ratified the Statute. However, under article 13 of the Statute, "[t]he Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if [a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations". The Security Council referred the situation in Libya to the Court in Resolution 1970(2011). As a member of the United Nations and thereby bound by the United Nations Charter, Libya is required to comply with the Security Council Resolution. *See* Security Council Resolution 1970, para. 5, U.N. Doc. S/RES/1970 (26 February 2011) ("The Security Council [d]ecides that Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organisations to cooperate fully with the Court and Prosecutor").

ii. Definitions

115. Because the Statute is silent on the topic of amnesties, it is necessary to define what they are. In this respect, it would appear to be useful to recall first the definition of the United Nations Office of the High Commission for Human Rights (the "OHCHR").

116. The OHCHR defines an amnesty as a legal measure having the effect of preventing criminal prosecutions and civil actions against authors of particular criminal activity. It can also have the effect of retroactively annulling a declaration of responsibility established in relation to the person who has benefitted from an amnesty.[136]

117. Amnesties are to be distinguished from pardons and commutations of sentence that affect the inflicted penalty and its execution but have no effect on the responsibility of the person. In the latter case, the individual remains culpable but a pardon or commutation of sentence may either completely annul the penalty as a whole or reduce the punishment to be served.

iii. Sources under articles 21(1)(b) and 21(1)(c) of the Statute

118. In the first place, and as mentioned above, the texts referenced by article 21(1)(a) of the Statute make no reference to amnesties. To know whether amnesties may be admitted before the Court, it is therefore necessary to refer to article 21(1)(b) of the Statute relative to applicable treaties, principles and rules of international law, including those addressing armed conflicts.

119. There exists no general textual prohibition against amnesties in the main international treaties regarding the crimes which fall within the Court's

[136] United Nations. Rule-of-Law Tools for Post-Conflict States: Amnesties, 2009, HR/PUB/09/1, p. 5.

jurisdiction. To the contrary, addressing the protection of victims during non-international armed conflicts, article 6(5) of Additional Protocol II to the Geneva Conventions of 1949 provides that "[a]t 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, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained". However, according to the International Committee of the Red Cross, this provision only encourages States to grant amnesties to members of armed groups who have participated in the internal conflict for that sole fact or for committing minor crimes associated to it, and is not intended to protect perpetrators of grave violations to international humanitarian law.[137]

120. At the same time, the four Geneva Conventions of 1949 and Additional Protocol I to the Geneva Conventions provide that States have a duty to prosecute the perpetrators of grave breaches of international humanitarian law.[138] For instance, according to article 146(2) of Geneva Convention IV, "[e]ach High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a 'prima facie' case".

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[137] ICRC, Letter from the Legal Division to the Prosecutor of the ICTY, 24 November 1995.

[138] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 United Nations Treaty Series 970 (Geneva Convention I), article 49; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 United Nations Treaty Series 971 (Geneva Convention II), article 50; Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949, 75 United Nations Treaty Series 972 (Geneva Convention III), article 129; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 United Nations Treaty Series 973 (Geneva Convention IV), article 146; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I), 8 June 1977, 1125 United Nations Treaty Series 17512, article 85.

121. An obligation for States to prosecute or to extradite the perpetrators of serious crimes is also enshrined in article 5(2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[139] concerning the crime of torture and article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide[140] concerning the crime of genocide.

122. The duty embodied in the above treaties, also known as the principle of *aut dedere aut judicare*,[141] appears to be at odds with the passing of amnesty laws by States at least when these laws concern serious violations of international humanitarian law and international human rights, as they would impede any potential prosecution and result in impunity for those who have committed serious crimes. In any case, these amnesty laws would not prevent other jurisdictions from prosecuting the people who have benefited from such amnesties.

123. Having analysed the content of the international treaties and principles and rules of international law that relate to the obligation for States to prosecute or extradite, the Chamber deems that it is not necessary to examine whether there exist general principles of law relating to the amnesty issue, as provided under article 21(1)(c) of the Statute. As mentioned above, the Chamber should only rely on this provision where there exists a gap in the Statute that international treaties and the principles and rules of international law are not able to fill, which is not the case here.

124. The application and interpretation of these treaties, principles and international rules must then be consistent with internationally recognised human

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[139] UN General Assembly, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 United Nations Treaty Series 85.

[140] UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 United Nations Treaty Series 277.

[141] For further details *see* M. C. Bassiouni and E. M. Wise, "Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law" (1995), providing an overall survey on the principle of *aut dedere aut judicare*.

rights. In its analysis, the Chamber will refer to the practice of intergovernmental organs concerned with the protection of human rights, such as the United Nations Commission on Human Rights and Human Rights Committee, as well as the jurisprudence of regional courts and commissions for human rights that have dealt with the topic of amnesties, including the European Court of Human Rights (the "ECtHR"), the Inter-American Court of Human Rights (the "IACtHR") and the African Commission on Human and Peoples' Rights (the "ACHPR").

iv. Consistency with internationally recognised human rights pursuant to article 21(3) of the Statute

125. The Chamber will first look into the practice of intergovernmental organs concerned with the protection of human rights such as the UN Commission on Human Rights and Human Rights Committee. It seems relevant for the Court to take into consideration these two actors in view of their purpose. Indeed, they are the main organs monitoring the enforcement of the treaties related to human rights and their respective mandates are quasi-universal, which falls in line with the mandate of the Court. Then, the Chamber will look into the jurisprudence of regional courts and commissions for human rights.

126. According to the UN Commission on Human Rights, amnesties should not be afforded to those who have committed violations of human rights or humanitarian law.[142] Instead, there is an obligation to limit their application and their effects: "[a]mnesties should not be granted to those who commit violations of human rights and international humanitarian law that constitute crimes[.] [...] [The Commission] urges States to take action in accordance with their obligations under

[142] UN Commission on Human Rights, Human Rights Resolution 2004/72: Impunity, 21 April 2004, E/CN.4/RES/2004/72; UN Commission on Human Rights, Human Rights Resolution 2005/81: Impunity, 21 April 2005, E/CN.4/RES/2005/81.

international law and welcomes the lifting, waiving, or nullification of amnesties and other immunities".[143]

127. The UN Commission on Human Rights equally emphasises that peace agreements ratified by States can never promise amnesty for genocide, crimes against humanity, war crimes or flagrant violations of individual rights: "[the Commission] recognises [...] the Secretary-General's conclusion that United Nations-endorsed peace agreements can never promise amnesties for genocide, crimes against humanity, war crimes, or gross violations of human rights".[144]

128. Subsequently, the Chamber deems that it is relevant to look into the general observations made by the UN Human Rights Committee because they provide an in-depth analysis about the application of the ICCPR and because the ICCPR is silent on the subject of amnesties. The UN Human Rights Committee has found in its General Comment No. 31 that article 2 of the ICCPR entails an obligation for States to take appropriate measures to prevent, punish and conduct investigations on the infringement of this article and to show proof of such diligence.[145] Failures to investigate or to bring perpetrators to justice could give rise to violations of the ICCPR, particularly when the failure concerns crimes of torture and similar cruel, inhuman and degrading treatment, summary and arbitrary killing and enforced disappearance.[146] The UN Human Rights Committee therefore seems to emphasize an obligation to prosecute, especially in the case of these human rights violations.

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[143] UN Commission on Human Rights, Human Rights Resolution 2004/72: Impunity, 21 April 2004, E/CN.4/RES/2004/72, para. 3.
[144] UN Commission on Human Rights, Human Rights Resolution 2005/81: Impunity, 21 April 2005, E/CN.4/RES/2005/81, para. 3.
[145] UN Human Rights Committee, General Comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, paras 8, 18; *see also* Amici Curiae Observations, para. 60.
[146] UN Human Rights Committee, General Comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 18.

129. In addition, according to Human Rights Committee General Comment No. 20 related to the prohibition of torture, "[a]mnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future".[147]

130. Certain regional courts, especially the ECtHR, have a more developed practice and UN bodies often draw on this practice in their analysis of human rights situations. For the ECtHR, granting amnesties for serious violations of human rights would be contrary to the European Convention of Human Rights[148] as well as international law on human rights.[149] The ECtHR also emphasises the fact that amnesties are generally incompatible with States' obligation to prosecute those committing serious human rights violations.[150]

131. The IACtHR in its jurisprudence has consistently recognised amnesties as an obstacle to States realising their obligations to investigate, prosecute and punish serious violations of human rights.[151] It insists on this fact by affirming that amnesty laws are prohibited because they violate inderogable rights recognised by the international law on human rights.[152]

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[147] UN Human Rights Committee, General Comment No. 20, Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, in United Nations, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 27 May 2008, HRI/GEN/1/Rev.9 (Vol. I), pp. 234-236.

[148] European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, as amended by Protocols No. 11 and No. 14, 213 United Nations Treaty Series 2889.

[149] ECtHR, *Ould Dah v. France*, Judgment, 17 March 2009, Application No. 13113/03, p. 17.

[150] ECtHR, *Ould Dah v. France*, Judgment, 17 March 2009, Application No. 13113/03, p. 17; ECtHR, *Margus v. Croatia*, Judgment, 25 May 2014, Application No. 4455/10, para. 139.

[151] IACtHR, *The massacres of El Mozote and Nearby Places v. El Salvador*, Judgment on Merits, Reparations and Costs, 25 October 2012, para. 283; IACtHR, *Gelman v. Uruguay*, Judgment on Merits and Reparations, 24 February 2011, para. 190; IACtHR, *Myrna Mack Chang v. Guatemala*, Judgment on Merits, Reparations and Costs, 25 November 2003, para. 276.

[152] IACtHR, *The massacres of El Mozote and Nearby Places v. El Salvador*, Judgment on Merits, Reparations and Costs, 25 October 2012, para. 283; IACtHR, *Gelman v. Uruguay*, Judgment on Merits and Reparations, 24 February 2011, para. 195; IACtHR, *Anzualdo Castro v. Perú*, Judgment on Preliminary Objections, Merits, Reparations and Costs, 22 September 2009, para. 182; IACtHR,

132. Furthermore, in *Almonacid Arellano et al.*, the IACtHR revealed the direct link between crimes against humanity and serious human rights violations. It said, "[a]ccording to the international law *corpus juris*, a crime against humanity is in itself a serious violation of human rights and affects mankind as a whole […]. The adoption and enforcement of laws that grant amnesty for crimes against humanity prevents the compliance of [States'] obligations",[153] for the investigation and punishment of those persons accused of certain international crimes such as crimes against humanity.[154]

133. The IACtHR has also affirmed that amnesties prevent the establishment of judicial truth and the victims' right to reparation.[155] The IACHR indicates that despite this, based on Protocol II of the Geneva Conventions of 1949, amnesty laws may however be adequate to achieve national reconciliation and the restoration of peace.[156]

134. The ACHPR has also opposed general amnesty laws when they concern serious human rights violations such as the right to life set out in article 4 of the African Charter of Human and Peoples Rights,[157] as ruled in the *Malawi African Association et al.* case.[158]

135. Similarly, in the *Zimbabwe Human Rights NGO Forum v. Zimbabwe* case, the ACHPR stated that it is generally accepted that to guarantee impunity for

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Trujillo-Oroza v. Bolivia, Judgment on Reparations and Costs, 27 February 2002, para. 106; IACtHR, *La Cantuta v. Peru*, Judgment on Merits, Reparations and Costs, 29 November 2006, para. 152.

[153] IACtHR, *Case of Almonacid-Arellano et al v. Chile,* Judgment on Preliminary Objections, Merits, Reparations and Costs, 26 September 2006, para. 108.

[154] IACtHR, *Case of Almonacid-Arellano et al v. Chile,* Judgment on Preliminary Objections, Merits, Reparations and Costs, 26 September 2006, paras 110-111.

[155] IACtHR, *Barrios Altos et al. v. Peru*, Judgment on the Merits, 14 March 2001, paras 41-44.

[156] IACtHR, *The massacres of El Mozote and Nearby Places v. El Salvador*, Judgment on Merits, Reparations and Costs, 25 October 2012, para. 284.

[157] African Charter on Human and Peoples' Rights, 27 June 1981, 1520 United Nations Treaty Series 26363.

[158] ACHPR, *Malawi Africa Association et al. v. Mauritania,* Decision, 11 May 2000, Communications No. 54/91, 61/91, 96/93, 98/93, 164/97 to 196/97 and 210/98, para. 83.

individuals who have committed human rights violations is an important factor of proliferation of these violations and that to grant clemency for these violations encourages *de facto* impunity and prevents victims from benefitting from an effective reparation.[159]

136. Although amnesties for serious international crimes seem incompatible with international law *ab initio,* the Chamber notes that there is an ongoing political debate about the conditions in which amnesties may interfere with the duty to prosecute.[160]

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[159] ACHPR, *Zimbabwe Human rights NGO Forum*, Decision, 15 May 2006, Communication No. 245/2002, para. 200: "[i]t is generally believed that the single most important factor in the proliferation and continuation of human rights violations is the persistence of impunity, be it of a de jure or de facto nature. Clemency, it is believed, encourages de jure as well as de facto impunity and leaves the victims without just compensation and effective remedy." *See also* ACHPR, *Mouvement Ivoirien des Droits Humains (MIDH) v Cote d'Ivoire,* 29 July 2009, Decision, Communication No. 246/02, paras 96-98: "[t]he granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy."

[160] Concerning the political debate and developments on the topics of peacebuilding and reconciliation *see* UN Press Release, "Secretary-General Urges 'Like-Minded' States to Ratify Statute of International Criminal Court", SG/SM/6686, 1 September 1998 ("The purpose of that clause in the Statute is to ensure that mass murderers and other arch-criminals cannot shelter behind a State run by themselves or their cronies, or take advantage of a general breakdown of law and order. No one should imagine that it would apply to a case like South Africa's where the regime and the conflict which caused the crimes have come to an end, and the victims have inherited power. It is inconceivable that, in such a case, the Court would seek to substitute its judgment for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future"); *see also* S. M. H. Nouwen, "Is there Something Missing in the Proposed Convention on Crimes Against Humanity" in *Journal of International Criminal Justice* (2018), pp. 7-10. Nouwen examines the duty to prosecute through South Africa's decision to pursue a transitional justice process focused on peace and reconciliation. During apartheid, many crimes had been committed which constituted crimes against humanity, including widespread and systematic persecution on racial grounds, torture, enforced disappearances and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health. Although the commission of these crimes would normally give rise to a duty for South Africa to prosecute the perpetrators, other States did not push back on South Africa's choice to pursue transitional justice by exchanging amnesty for truth-telling. Rather, Nouwen says, by neither arguing that South Africa had a duty to prosecute nor by pursuing extraterritorial grounds of jurisdiction to do so on their own, States respected South Africa's course of action.

2) Submissions

i. Defence

137. Regarding the amnesty question the Defence raises several arguments. The Defence first submits that amnesties came up in the *travaux préparatoires* of the Statute and were then not included in the Statute. This indicates that the drafters deliberately rejected the idea that they could be questioned by the Court.[161]

138. Second, the Defence contends that the Chamber should not examine the validity of amnesties with respect to international law for crimes against humanity. If it chooses to do so, however, its approach should be casuistic or case-based, and the validity of amnesties should be appreciated *in concreto*. For the Defence, amnesty laws can be used in certain cases under certain conditions to promote national reconciliation.[162]

ii. Prosecution

139. For the Prosecution, the fact that the drafters of the Statute did not wish to integrate amnesties into the Statute does not means that the Court authorises them de facto. For the Prosecution, the Statute is silent on the question of amnesties because there had not been consensus between the various delegations.[163]

140. The Prosecution moreover submits that, contrary to the arguments of the Defence, the international instruments relative to the protection of human rights have also deemed invalid those amnesties and pardons which "suppress the effects of a conviction".[164]

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[161] Admissibility Challenge, paras 72-75.
[162] Admissibility Challenge, para. 90.
[163] Prosecution Response, para. 169.
[164] Prosecution Response, para. 171.

iii. OPCV

141. For the OPCV, amnesties would deprive the victims of their right to demand reparations, and this would be contrary to international law. It also submits that amnesties cannot apply to international crimes of the most serious nature. According to the OPCV, this is because there exist treaties and an international custom unequivocally requiring States to punish serious crimes and violations of human rights.[165]

142. In addition, the OPCV takes issue with the Defence's argument that crimes against humanity and a requirement on States to prosecute them do not make up the central object of any specific convention, unlike the crimes of genocide, war crimes or torture. Rather, the OPCV submits, there exists sufficient *opinio juris* creating a custom that has expanded the obligation to prosecute crimes against humanity.[166]

iv. Amici Curiae

143. The Amici Curiae highlights that treaties recognise an absolute prohibition against granting amnesties for serious violations of human rights, genocide and torture. It also contends that there is equally an emerging international standard toward prohibiting amnesties for serious crimes. Moreover, the Amici Curiae claims the goal of article 20(3) of the Statute is incompatible with and contradictory to amnesty laws.[167] It also submits that granting amnesties for serious crimes would permit individuals to evade justice before the Court by hiding behind these laws.[168]

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[165] Prosecution Response, paras 93-94.
[166] Prosecution Response, para. 94.
[167] Amici Curiae Observations, paras 44, 88.
[168] Amici Curiae Observations, para. 88.

3) Findings of the Chamber on Libyan Law No. 6 of 2015

144. Under the framework created by the Geneva Conventions, the Convention against Torture and the Convention on the Punishment and Prevention of Genocide, States have an obligation to prosecute or extradite individuals who have committed crimes of a serious nature. Indeed, the principle of *aut dedere aut judicare* requires States to act on their duty to investigate the most serious crimes and prosecute or extradite their perpetrators, in line with the necessity to ensure that these crimes do not go unpunished and to prevent similar crimes from being recommitted in the future.

145. Libya ratified the Geneva Conventions, the Convention against Torture and the Convention on the Prevention and Punishment of the Crime of Genocide. Thus, it is bound by these obligations. The Chamber recalls that this Court should refrain from pronouncing on the legality of amnesty laws under national law. However, due to the existence of a gap in the Statute, an analysis under international law may be appropriate.

146. Amnesties, which have the effect of preventing criminal prosecutions and civil actions against perpetrators of serious crimes, fundamentally contradict the duty to prosecute or extradite individuals who have committed crimes of a serious nature. Granting amnesties for serious crimes such as murder constituting a crime against humanity appears to be incompatible with regards to States' obligation under the Convention against Torture, the Geneva Conventions and the Convention on the Prevention and Punishment of Genocide to prosecute or extradite those who have committed serious crimes.

147. This interpretation is consistent with States' obligations under international human rights law. As indicated earlier, there is a consensus among international human rights organs that amnesties for serious crimes and human rights violations should generally not be permitted. Further, there exists an obligation as much

"moral" as judicial compelling States, which have ratified the main instruments related to the protection of human rights, to respect, enforce and ensure respect of human rights.[169] Passing amnesty laws seems *a priori* contrary to a State's obligation to enforce human rights arising from its ratification of human rights instruments. In this respect, the Chamber recalls that Libya has ratified the ICCPR and the African Charter of Human and Peoples Rights.

148. Therefore, upon conducting an analysis under article 21 of the Statute, the Chamber concludes that amnesties are generally incompatible with the duty to prosecute or extradite. In an admissibility challenge, the Chamber should take into account this duty when it examines whether domestic amnesty laws would create an obstacle to proceedings before this Court. It follows that where there are proceedings before this Court following or concurrent with a State's use of an amnesty law, these proceedings do not necessarily give rise to a violation of the *ne bis in idem* principle.[170] Accordingly, a State's decision to enact an amnesty law does not automatically affect the admissibility of a case before this Court pursuant to articles 17(1)(c) and 20(3) of the Statute.

149. In view of the foregoing, the Chamber concludes that the judgment from the Tripoli Court of Appeal convicting Mr Gaddafi is not a final judgment—one with *res judicata* effect—which entails that Mr Gaddafi has not been "tried by another court" within the meaning of article 20(3) of the Statute. Further, the Chamber considers that Libyan Law No. 6 of 2015 did not have the effect of rendering the judgment against Mr Gaddafi final, as said law is not applicable to Mr Gaddafi due to the nature of the crimes he committed. Finally, it would appear contrary to Libya's duty to prosecute or extradite the perpetrators of the most serious crimes.

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[169] G. B. Koudou, "Amnistie et impunité des crimes internationaux" in *4 Droits Fondamentaux* (4 January 2004), pp. 75-76.
[170] *See* paragraphs 16-21 above.

3. Exceptions under article 20(3) of the Statute

150. The Chamber recalls the relevant parts of article 20(3) of the Statute, which provide that a person may be tried again before the Court if the national proceedings in the other court:

> (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
>
> (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

151. As indicated above,[171] the two exceptions under article 20(3) of the Statute are to be considered only if the person implicated in the proceedings before the Court has already been tried by another court for the same conduct.

152. Since the elements or criteria set out in article 20(3) of the Statute are cumulative, and given that the Defence failed to satisfy the second element of said provision, there is no need for the Chamber to examine whether the two exceptions under article 20(3) of the Statute apply in this case.[172]

4. Conclusion of the Chamber regarding the admissibility of the case before the Court pursuant to articles 17(1)(c) and 20(3) of the Statute

153. After examining the submissions before the Court, the Chamber rejects the Defence's Admissibility Challenge under articles 17(1)(c) and 20(3) of the Statute. The Chamber finds that the case does not satisfy both prongs of the admissibility challenge standard, as is required under article 17(1)(c) of the Statute.

154. While the Chamber finds that the proceedings against Mr Gaddafi in the Tripoli Court of Appeal concerned the same conduct, the Chamber considers that

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[171] *See* paragraph 21 above.
[172] *See* paragraph 31 above.

Mr Gaddafi has not been tried by another court. To conclude that an individual has been tried by another court, as required under the principle of *ne bis in idem* encompassed in article 20(3) of the Statute, the judgment rendered by the national tribunal must be final with *res judicata* effect. Upon analysing the evidence, the Chamber concludes that the judgment against Mr Gaddafi was not a final judgment satisfying this requirement, considering that trial against Mr Gaddafi was conducted *in absentia* and should still be subject to appeal before the Libyan Court of Cassation in view of the nature of sentence passed (death penalty). As a result, the proceedings conducted against Mr Gaddafi in Libya do not satisfy this prong of the admissibility challenge standard.

155. This conclusion holds notwithstanding Libyan Law No. 6 of 2015, as the Chamber considers that said law did not have the effect of rendering the judgment against Mr Gaddafi final. Indeed, the Chamber notes that Law No. 6 of 2015 is not applicable to Mr Gaddafi as the crimes for which he was domestically charged are excluded from the application of the law.

156. Finally, even assuming that the substantive and procedural conditions of Law No. 6 of 2015 are fulfilled in Mr Gaddafi's case, the Chamber deems granting amnesties for serious crimes incompatible with Libya's obligations under international law. Although the Statute is silent as to amnesties, the Chamber finds in the aforementioned international treaties[173] a duty to prosecute or extradite those who have committed serious crimes. As amnesties prevent the investigation or prosecution of an individual, they generally come into conflict with this duty by allowing perpetrators of serious crimes to benefit from impunity.

157. In light of the above, the Chamber finds that the Defence has not shown that Mr Gaddafi was tried by another court. Because both requirements for an

[173] *See* paragraphs 120-121 and 145 above.

admissibility challenge pursuant to articles 17(1)(c) and 20(3) of the Statute have not been satisfied, the Chamber need not examine whether the exceptions under article 20(3) of the Statute apply to Mr Gaddafi's case.

158. Therefore, the case remains admissible before the Court, subject to a last point raised by the Prosecutor and as analysed below.

C. Admissibility of the case before the Court pursuant to articles 17(1)(a) and 17(1)(b) of the Statute

159. As a final point, the Chamber notes that the Prosecutor submits that the case against Mr Gaddafi remains admissible before the Court under any provision of article 17 of the Statute, as the Government of Libya remains "unable", within the meaning of article 17(3) of the Statute, and "unwilling", within the meaning of article 17(2)(a) of the Statute, to genuinely carry out the prosecution of Mr Gaddafi in relation to the same case as before the Court.[174]

160. The Defence asserts that the Pre-Trial Chamber is not bound by its conclusion on Libya's Admissibility Challenge of 31 May 2013.[175] As this is a new challenge to admissibility, the Defence contends that the Chamber's determination must be based on the facts as they exist at the time of current admissibility challenge. It further argues that the evidence relied upon in this application is fundamentally different from that relied upon the Government of Libya in its 2012 challenge as since then, the investigation of Mr Gaddafi has concluded, and the domestic court system has tried him and rendered a verdict.

161. In this regard, the Chamber recalls that, in accordance with article 19(1) of the Statute, "[t]he Court may, on its own motion, determine the admissibility of a case in accordance with article 17". This provision underlines that the Chamber has

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[174] Prosecution Response, paras 181-184.
[175] Admissibility Challenge, paras 65-66.

discretion to exercise its *proprio motu* power to determine the admissibility of a case in accordance with article 17 of the Statute.

162. Turning to articles 17(1)(a) and 17(1)(b) of the Statute, the Court shall determine that the case is inadmissible where:

> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
>
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.

163. These articles should be read in conjunction with articles 17(2) and 17(3) of the Statute:

> 2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
>
> (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
>
> (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
>
> (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
>
> 3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

164. The Chamber observes that, since its 31 May 2013 Decision, the circumstances of the case have not changed. As indicated by the submissions of the Libyan Government, Mr Gaddafi remains at large and, while the Libyan Government continues to deploy efforts to secure his custody, Libya is currently unable to prosecute Mr Gaddafi as he is not detained under State authority. The Chamber

thus refers to its findings in the 31 May 2013 Decision regarding the admissibility of the case under article 17(1)(a) of the Statute.[176]

165. Accordingly, in view of the circumstances of the present case, the Chamber elects not to exercise its discretionary power and analyse the admissibility of the case under articles 17(1)(a) and 17(1)(b) of the Statute.

[176] Gaddafi Admissibility Decision, paras 204-215.

Judge Marc Perrin de Brichambaut

Dated this 8 May 2019

At The Hague, The Netherlands