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PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Reine Adélaïde Sophie Alapini-Gansou

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

Public

Public redacted version of "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'" filed on 28 September 2018 (ICC-01/11-01/11-653-Conf)

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A. INTRODUCTION

1. The Prosecution requests that Pre-Trial Chamber I (“PTC I” or “Chamber”) reject Saif Al-Islam Gaddafi’s (“Mr Gaddafi”) challenge to the admissibility of the case against him at the International Criminal Court (“ICC” or “Court”)¹ (“Admissibility Challenge”).

2. Mr Gaddafi does not have standing to make the Admissibility Challenge. He is subject to a public ICC arrest warrant that has been outstanding for seven years.² On 20 April 2015, the Tripoli Court of Assize deemed Mr Gaddafi “a fugitive from justice.”³ The Government of National Accord (“GNA”), as the competent authorities of Libya (“Government of Libya”),⁴ continues its efforts to secure the custody of Mr Gaddafi so that he may be prosecuted in Libya, or surrendered to the ICC.⁵

3. The Defence and Mr Gaddafi himself assert that he has been released from custody. His whereabouts are not known to the Prosecution. Despite the Defence claims that Mr Gaddafi was released from detention in Zintan on or about 12 April 2016,⁶ he has made no effort to surrender himself to either the Government of Libya or the ICC. There is no indication that he will surrender himself in the event that the Admissibility Challenge is unsuccessful. To the contrary, one of his lawyers

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

² *Situation in the Libyan Arab Jamahiriya*, Warrant of Arrest for Saif Al-Islam Gaddafi, 27 June 2011, ICC-01/11-01/11-3 (“Arrest Warrant”).

³ Tripoli Court of Assize Judgment, Annex B to the Admissibility Challenge, ICC-01/11-01/11-640-AnxB (“Tripoli Court of Assize Judgment”), p. 149 (p. 146 of judgment).

⁴ As PTC I noted on 21 November 2016, the competent national authorities of Libya are the Government of National Accord (“GNA”), which is recognised by the international community to represent the State. PTC I stated that “the Court cannot but deal with the *de jure* government” [REDACTED] See, *Prosecutor v. 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 (“Decision on Al-‘Atiri Request”), paras. 15-16. By contrast, throughout the Admissibility Challenge the Defence uses “Government of Libya” without distinguishing between the GNA, the Al-Bayda Transitional Government (defined in para. 39 below) and the House of Representatives (defined in para. 39 below).

⁵ Annex 8, Response of the Government of Libya to the OTP’s Request for Assistance, 18 September 2018, LBY-OTP-0065-0077 (Translation at LBY-OTP-0065-0426 at 0435-0436) (“Response to Request for Assistance”); [REDACTED]; *Prosecutor v. Gaddafi & Al-Senussi*, 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, 21 August 2017, ICC-01/11-01/11-612 (“Libya’s Response to Request for Order to Libya not to execute Mr Gaddafi”), paras. 2-3.

⁶ Admissibility Challenge, para. 26.

reportedly stated that Mr Gaddafi “would not be turning himself in to the International Criminal Court.”⁷ The Government of Libya is unable to substantiate reports that Mr Gaddafi has been released from custody.⁸

4. Should the Chamber find Mr Gaddafi has standing to make the Admissibility Challenge, his case remains admissible before the ICC because the proceedings in Libya before the Tripoli Court of Assize are not a “trial” for the purposes of articles 17(1)(c) and 20(3).

5. On 28 July 2015, the Tripoli Court of Assize issued an *in absentia* judgment against Mr Gaddafi.⁹ As the Government of Libya has made clear, pursuant to Libyan law, if Mr Gaddafi appears or is arrested, his *in absentia* conviction shall be annulled and the case retried.¹⁰ As a result, since Mr Gaddafi’s *in absentia* conviction is not “deemed a final judgment”, he cannot rely on the principle of *ne bis in idem* pursuant to articles 17(1)(c) and 20(3) to claim the proceedings in Libya bar his prosecution at the ICC.

6. Contrary to the Defence assertions,¹¹ there is no reason for the Chamber to determine whether, in issuing the judgment *in absentia*, the Tripoli Court of Assize interpreted and applied Libyan law correctly.

7. Despite Mr Gaddafi’s lack of standing, and the absence of a “trial” in Libya for the purposes of articles 17(1)(c) and 20(3), the Prosecution agrees with the Defence that based on the information contained in the judgment of the Tripoli Court of Assize, the proceedings in that case did relate to substantially the same conduct as Mr Gaddafi’s case before the ICC.

⁷ Annex 2, Reuters, “Gaddafi’s son Saif freed in Libya, whereabouts unclear: lawyer”, 11 June 2017, LBY-OTP-0064-3078.

⁸ Annex 8, Response to Request for Assistance, LBY-OTP-0065-0077 (Translation at LBY-OTP-0065-0426 at 0434).

⁹ Tripoli Court of Assize Judgment, p. 149 (p. 146 of judgment).

¹⁰ Annex 8, Response to Request for Assistance, LBY-OTP-0065-0077 (Translation at LBY-OTP-0065-0426 at 0428-0429); Libya’s Response to Request for Order to Libya not to execute Mr Gaddafi, para. 7.

¹¹ Admissibility Challenge, paras. 47-48.

8. Contrary to the Defence arguments,¹² the Government of Libya has stated that Law No. 6 of 2015 Regarding the General Amnesty¹³ (“Law No. 6 of 2015”) has not been applied to Mr Gaddafi’s case, and therefore has no impact on the *in absentia* judgment rendered against him.¹⁴ The Presidency Council of the GNA, [REDACTED],¹⁵ has stated that “no amnesty or pardon is applicable” to Mr Gaddafi.¹⁶ Similar statements have been issued by the General Prosecutor’s Office,¹⁷ the Municipal Council of Zintan and the Military Council of Zintan,¹⁸ and a committee of the House of Representatives.¹⁹

9. Furthermore, as stated by the Government of Libya,²⁰ and consistent with a plain reading of Law No. 6 of 2015, the substantive and procedural requirements for the application of that law to Mr Gaddafi’s case have not been met.

10. In the event the Chamber considers that Law No. 6 of 2015 has been validly applied to the proceedings relating to Mr Gaddafi in Libya, then this Chamber should find that such proceedings were undertaken for the purpose of shielding Mr Gaddafi from criminal responsibility for crimes within the jurisdiction of the Court. As a consequence, the first exception to the principle of *ne bis in idem* pursuant to article 20(3)(a) applies to Mr Gaddafi’s case, which thus remains admissible before the Court.

¹² Admissibility Challenge, paras. 25-26 and 48.

¹³ Law No. 6 of 2015 With Regard to the General Amnesty, Annex E to the Admissibility Challenge, ICC-01/11-01/11-640-AnxE (Better original version provided by Defence at ICC-01/11-01/11-650-AnxIII) (Revised Defence translation at ICC-01/11-01/11-650-AnxII) (Registry translation at ICC-01/11-01/11-650-AnxIII-tENG). For the purpose of this filing, the Prosecution relies on the translation provided by the Registry but retains references to sub-section numbers as per the original Arabic document.

¹⁴ Annex 8, Response to the Request for Assistance, LBY-OTP-0065-0077 (Translation at LBY-OTP-0065-0426 at 0432-0434).

¹⁵ [REDACTED].

¹⁶ Annex 3, Statement of the Presidency Council on the recent statement concerning the release of the Accused Saif al-Islam Gaddafi, 10 July 2016, LBY-OTP-0048-0404 (Translation at LBY-OTP-0063-0383).

¹⁷ Annex 4, Statement of Prosecutor General’s Office, 11 June 2017, LBY-OTP-0064-0981 (Translation at LBY-OTP-0064-3164).

¹⁸ Annex 5, Statement of the Municipal Council and the Military Council on Abu-Bakr al-Siddiq Battalion’s statement, 11 June 2017, LBY-OTP-0064-0982 (Translation at LBY-OTP-0064-3166).

¹⁹ Annex 6, Statement of the Libyan House of Representatives’ National Defence and Security Committee on the members of the previous regime, 11 June 2017, LBY-OTP-0064-0979 (Translation at LBY-OTP-0064-3160).

²⁰ Annex 8, Response to Request for Assistance, LBY-OTP-0065-0077 (Translation at LBY-OTP-0065-0426 at 0432-0434).

11. On the basis of the above, it is not necessary for the Chamber to consider the applicability of the second exception to the principle of *ne bis in idem* under article 20(3)(b) relating to the independence, impartiality and manner in which the Libyan proceedings against Mr Gaddafi were conducted. Therefore the Prosecution does not consider it necessary to take a position on this issue.

B. CLASSIFICATION

12. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this response is classified as confidential because it refers to other documents marked with the same classification. The Prosecution will file a public redacted version as soon as practicable.

C. PROCEDURAL HISTORY

13. On 16 May 2011, the Prosecution applied for warrants of arrest for Muammar Mohammed Abu Minyar Gaddafi (“Mr Muammar Gaddafi”), Mr Gaddafi and Abdullah Al-Senussi (“Mr Al-Senussi”).²¹

14. On 27 June 2011, PTC I granted the Prosecution’s application²² and issued warrants of arrest for Mr Muammar Gaddafi,²³ Mr Gaddafi²⁴ and Mr Al-Senussi.²⁵ PTC I found reasonable grounds to believe that:

- a. throughout Libya and in particular in Tripoli, Misrata and Benghazi as well as cities near Benghazi such as Al-Bayda, Derna, Tobruk and Ajdabiya, murders constituting crimes against humanity were

²¹ *Situation in the Libyan Arab Jamahiriya*, Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI, 16 May 2011, ICC-01/11-4-Red (“Article 58 Application”).

²² *Situation in the Libyan Arab Jamahiriya*, Decision on the “Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI”, 27 June 2011, ICC-01/11-01/11-1 (“Article 58 Decision”).

²³ *Situation in the Libyan Arab Jamahiriya*, Warrant of Arrest for Muammar Mohammed Abu Minyar GADDAFI, 27 June 2011, ICC-01/11-01/11-2.

²⁴ Arrest Warrant.

²⁵ *Situation in the Libyan Arab Jamahiriya*, Warrant of Arrest for Abdullah Al-Senussi, 27 June 2011, ICC-01/11-01/11-4.

committed from 15 February 2011 until at least 25 February 2011 by Security Forces²⁶ as part of the attack against the civilian demonstrators or alleged dissidents to the Libyan regime;²⁷

- b. several acts of persecution based on political grounds were committed by Security Forces throughout Libya, in particular in the towns of Benghazi, Tripoli, Misrata and other neighbouring towns, from 15 February 2011 until at least 28 February 2011, as part of the attack against the civilian demonstrators and/or perceived dissidents to the Libyan regime;²⁸ and
- c. Mr Gaddafi was criminally responsible as an indirect co-perpetrator, pursuant to article 25(3)(a) of the Statute²⁹ for his contributions to the common plan, which included: (i) support of and contribution to the design of the plan; (ii) use of his powers and authority to ensure the implementation of the plan; (iii) ordering the recruitment of mercenaries and the mobilisation of militias and troops; (iv) ordering the imprisonment and elimination of political dissidents; (v) providing resources to Security Forces; (vi) publicly addressing the population in order to threaten and scare demonstrators and mobilise Mr Muammar Gaddafi's supporters; and (vii) contributing to the cover-up campaign, notably by denying the commission of crimes by the Security Forces and shifting the responsibility to the demonstrators.³⁰

²⁶ “Security Forces” is defined as the military, intelligence, police and *ad hoc* militias of the Libyan security and military system, *see*, Article 58 Decision, para. 22.

²⁷ Article 58 Decision, para. 41.

²⁸ Article 58 Decision, para. 65.

²⁹ Article 58 Decision, para. 71.

³⁰ Article 58 Decision, para. 80.

15. On 4 July 2011, the Registrar filed a request to Libya to arrest and surrender Mr Muammar Gaddafi, Mr Gaddafi and Mr Al-Senussi.³¹
16. On 19 November 2011, Mr Gaddafi was captured in Libya.³²
17. On 1 May 2012, Libya filed a challenge to the admissibility of the case against Mr Gaddafi on the basis that its national judicial system was actively investigating him in relation to the same case.³³
18. Given that PTC I was unable to determine whether Mr Gaddafi wished to appoint any specific counsel, the Office of Public Counsel for the Defence (“OPCD”) was authorised by PTC I to represent the interests of Mr Gaddafi in relation to the admissibility challenge.³⁴
19. Mr Gaddafi was consulted and provided his views on the admissibility challenge to the OPCD on 3 March 2012 and confirmed them on 7 June 2012.³⁵ Consistent with those views, the OPCD argued in the admissibility proceedings that Mr Gaddafi should be tried before the ICC.³⁶
20. On 31 May 2013, PTC I determined that the case against Mr Gaddafi was admissible before the Court on the basis that:

³¹ *Prosecutor v. Muammar Gaddafi, Saif Al-Islam Gaddafi & Al-Senussi*, Request to the Libyan Arab Jamahiriya for the arrest and surrender of Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI, 4 July 2011, ICC-01/11-01/11-5.

³² *Prosecutor v. Gaddafi & Al-Senussi*, Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, 1 May 2012, ICC-01/11-01/11-130-Red (“*Gaddafi* Admissibility Challenge filed on behalf of Libya”), para. 22; Letter of Chairman of the National Transitional Council dated 23 November 2011, Annex to Implementation of the “Decision to Add Document to Case Record”(ICC-01/11-01/11-29-Conf-Exp), 28 November 2011, ICC-01/11-01/11-34-Anx.

³³ *Gaddafi* Admissibility Challenge filed on behalf of Libya, para. 1.

³⁴ *Prosecutor v. Gaddafi & Al-Senussi*, Public Redacted Version of Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi, 6 December 2011, ICC-01/11-01/11-39-Red, para. 10 and p. 6.

³⁵ *Prosecutor v. Gaddafi & Al-Senussi*, Corrigendum to the “Defence Response to the ‘Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute’” (ICC-01/11-01/11-190-Conf), 31 July 2012 (“*Gaddafi* Response to Admissibility Challenge filed on behalf of Libya”), ICC-01/11-01/11-190-Conf-Corr, paras. 1-11.

³⁶ *Gaddafi* Response to Admissibility Challenge filed on behalf of Libya, in particular, paras. 1-20.

- a. although the evidence demonstrated that an investigation was ongoing at the domestic level, it did not allow the Chamber “to discern the actual contours of the national case against Mr Gaddafi 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”;³⁷ and
- b. Libya’s national system could not yet “be applied in full in areas or aspects relevant to the case, being thus ‘unavailable’ within the terms of article 17(3) of the Statute”.³⁸ Specifically, the Chamber found that: (i) Libya was “unable to secure the transfer of Mr Gaddafi from his place of detention under the custody of the Zintan militia into State authority”;³⁹ (ii) Libya lacked the capacity to obtain the necessary testimony “due to the inability of judicial and governmental authorities to ascertain control and provide adequate witness protection”;⁴⁰ and (iii) Libya had not yet shown “whether and how it [would] overcome the existing difficulties in securing a lawyer for Mr Gaddafi”.⁴¹

21. On 7 June 2013, Libya filed an appeal against the admissibility decision.⁴²

22. On 21 May 2014, the Appeals Chamber confirmed the decision of PTC I on the grounds that Libya had not shown that it was investigating substantially the same conduct.⁴³

23. On 5 June 2018, the Defence submitted the Admissibility Challenge.⁴⁴

³⁷ *Prosecutor v. Gaddafi & Al-Senussi*, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, 31 May 2013, ICC-01/11-01/11-344-Red (*Gaddafi Admissibility Decision*), paras. 132-135.

³⁸ *Gaddafi Admissibility Decision*, para. 205.

³⁹ *Gaddafi Admissibility Decision*, paras. 206-208 and 215.

⁴⁰ *Gaddafi Admissibility Decision*, paras. 209-211 and 215.

⁴¹ *Gaddafi Admissibility Decision*, paras. 212-215.

⁴² *Prosecutor v. Gaddafi & Al-Senussi*, The Government of Libya’s Appeal against Pre-Trial Chamber I’s ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’, 7 June 2013, ICC-01/11-01/11-350.

⁴³ *Prosecutor v. Gaddafi & 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-01/11-01/11-547-Red (“*Gaddafi Admissibility Judgment*”).

⁴⁴ Admissibility Challenge.

24. On 14 June 2018, PTC I issued the “Decision on the Conduct of the Proceedings following the ‘Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute’”, which, among other things, requested the Prosecutor, the Security Council and victims who had already communicated with the Court in relation to this case, should they wish to do so, to submit written observations on the Admissibility Challenge no later than 28 September 2018 at 16h00.⁴⁵

25. On 26 July 2018, the Prosecution requested the assistance of the Government of Libya to provide information and documentation in relation to the factual and legal issues raised by the Admissibility Challenge.⁴⁶ On 18 September 2018, the Government of Libya provided a response to the Prosecution’s request for assistance, including six annexes.⁴⁷

⁴⁵ *Prosecutor v. Gaddafi & Al-Senussi*, Decision on the Conduct of Proceedings following the “Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c) and 20(3) of the Rome Statute”, 14 June 2018, ICC-01/11-01/11-641.

⁴⁶ Annex 7, OTP Request for Assistance to the Government of Libya, 26 July 2018, [REDACTED].

⁴⁷ Annex 8, Response to Request for Assistance, LBY-OTP-0065-0077 (Translation at LBY-OTP-0065-0426); Annex 8.1, Annex 1 to the Response to Request for Assistance, Letter from the Prosecutor General’s Office to the Head of the Judicial Police in Zintan, 15 December 2015, LBY-OTP-0065-0087 (Translation at LBY-OTP-0065-0437); Annex 8.2, Annex 2 to the Response to Request for Assistance, Letter from the Head of the Judicial Police in Zintan to the Prosecutor General’s Office, 14 April 2015, LBY-OTP-0065-0088 (Translation at LBY-OTP-0065-0439). In relation to annexes 8.3-8.6, the Prosecution relies on the translation already in the court record, *see*, Annex 8.3, Annex 3 to the Response to Request for Assistance, Law No. 6 of 2015, LBY-OTP-0065-0089 (Registry translation at ICC-01/11-01/11-650-AnxIII-tENG); Annex 8.4, Annex 4 to the Response to Request for Assistance, Article 358 of the Libyan Code of Criminal Procedure, LBY-OTP-0065-0093 (Translation at Annex A to Libya’s Response to Request for Order to Libya not to execute Mr Gaddafi, 21 August 2015, ICC-01/11-01/11-612-AnxA); Annex 8.5, Annex 5 to the Response to Request for Assistance, Article 359 of the Libyan Code of Criminal Procedure, LBY-OTP-0065-0094 (Translation at Annex G to the Admissibility Challenge, ICC-01/11-01/11-640-AnxG), Annex 8.6, Annex 6 to the Response to Request for Assistance, Article 348 of the Libyan Code of Criminal Procedure, LBY-OTP-0065-0095 (Translation at Annex G to the Admissibility Challenge, ICC-01/11-01/11-640-AnxG). Note that the Response to the Request for Assistance lists Annex 6 as a copy of Article 384, however, the provision provided in the annex is Article 348.

D. FACTUAL BACKGROUND

1) 2011 – 2013: Mr Gaddafi’s arrest, pre-trial detention and hearings before the Accusation Chamber in Libya

26. On 19 November 2011, Mr Gaddafi was arrested in Libya by the militia headed by Al-’Ajami Al-’Atiri (“Mr Al-’Atiri”).⁴⁸ On 20 November 2011, Mr Gaddafi was transferred to a detention facility in Zintan.⁴⁹

27. On 21 November 2011, the National Transitional Council (“NTC”) issued a decision to create a Reform and Rehabilitation Institution in Zintan (“ZRRI”).⁵⁰ The Director of the ZRRI was [REDACTED].⁵¹ The NTC created the Abu-Bakr al-Siddiq Battalion in Zintan to guard the ZRRI and Mr Al-’Atiri was appointed as its commander.⁵²

28. On 21 November 2011, the Deputy Prosecutor in the Prosecutor General’s Office⁵³ of the NTC instructed the warden of the ZRRI to detain Mr Gaddafi [REDACTED].⁵⁴ The Prosecutor General subsequently extended this period of pre-trial detention through a series of orders, the last of which was made on [REDACTED].⁵⁵

29. On 15 September 2013, the Prosecutor General requested the Accusation Chamber to refer 38 former members of the regime of Mr Muammar Gaddafi, including Mr Gaddafi, to the Tripoli Court of Assize for crimes committed in relation

⁴⁸ See e.g. Letter of Chairman of the National Transitional Council dated 23 November 2011, Annex to Implementation of the “Decision to Add Document to Case Record” (ICC-01/11-01/11-29-Conf-Exp), 28 November 2011, ICC-01/11-01/11-34-Anx; [REDACTED].

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

⁵¹ [REDACTED].

⁵² [REDACTED].

⁵³ The translations “Prosecutor General’s Office”, “Attorney General’s Office” and “Chief Prosecutor’s Office” are all references to the same entity, which is written in Arabic as مكتب النائب العام and can be transliterated as “Maktab Al-Na’ib Alam”. For the purpose of this application, the Prosecution has used “Prosecutor General’s Office” and “Prosecutor General”.

⁵⁴ See, Exhibit 1 to Witness Statement of Alatairi, p. 14-20 (Translation at p. 21-30).

⁵⁵ See, [REDACTED]. See also, Exhibit 8 to Witness Statement of Alatairi, p. 55-89 (Translation at p. 90-122).

to the 2011 events.⁵⁶ The Accusation Chamber held three hearings with the last on 24 October 2013.⁵⁷ [REDACTED],⁵⁸ but he did not attend any hearings before the Accusation Chamber.⁵⁹

30. On 24 October 2013, the Indictment Chamber of the South Tripoli Court decided to refer 37 of the 38 accused, including Mr Gaddafi, to the Tripoli Court of Assize.⁶⁰

31. During 2013 it appears that the NTC made payments for expenses relating to the “Prison Guarding” of Mr Gaddafi.⁶¹

2) 2014: Mr Gaddafi’s hearings before the Tripoli Court of Assize and the establishment of rival governments in Libya

32. The first two hearings in the case against the 37 accused in the Tripoli Court of Assize (“Case 630/2012”) took place on 24 March 2014 and 14 April 2014. Mr Gaddafi was not present at either session and he was not represented by counsel.⁶²

33. During the session on 14 April 2014, the Prosecution referred the Tripoli Court of Assize to article 1 of Law No. 7 of 2014. It noted that this article provided for an accused to be tried via CCTV if he could not be brought before the court, and requested that the court enforce this article in relation to among others, Mr Gaddafi, who was detained at the ZRRI.⁶³

⁵⁶ UNSMIL, Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012), 21 February 2017, Annex D to Admissibility Challenge, ICC-01/11-01/11-640-AnxD (“UNSMIL Report”), p. 18.

⁵⁷ UNSMIL Report, p. 18.

⁵⁸ [REDACTED].

⁵⁹ UNSMIL Report, p. 18.

⁶⁰ See, Tripoli Court of Assize Judgment, p. 14 (p. 11 of judgment); UNSMIL Report, p. 19.

⁶¹ Exhibit 31 to Witness Statement of Alatairi, p. 233-235 (236-240).

⁶² Tripoli Court of Assize Judgment, p. 15-16 (p. 12-13 of judgment).

⁶³ Tripoli Court of Assize Judgment, p. 16 (p. 13 of judgment).

34. The next court session took place on 27 April 2014 and the court record indicates that Mr Gaddafi was “tried via CCTV without counsel and said that God is his defender.”⁶⁴

35. [REDACTED].⁶⁵ Following these requests, Mr Gaddafi attended, via CCTV and without counsel, the hearings on 11 and 25 May 2014.⁶⁶

36. During the session in the Tripoli Court of Assize on 25 May 2014, the Prosecution was ordered to provide to the relevant reform and rehabilitation institutions in Libya copies of the indictments for each accused.⁶⁷ [REDACTED].⁶⁸

37. Mr Gaddafi attended the next session in the Tripoli Court of Assize on 22 June 2014, via CCTV, together with legal counsel. The court noted that Mr Gaddafi was confronted with the charges against him, and that “he said he confessed to some of the charges before the Prosecution and denied the others”.⁶⁹

38. In July 2014, following June 2014 elections for a new parliament called the House of Representatives, a coalition of armed groups comprising “Libya Dawn” fought and evicted Zintan-based armed groups from Tripoli.⁷⁰ As a result of the fighting, two separate governments in Libya were created.⁷¹ In Tripoli, the “outgoing” parliament, the General National Congress, reconvened to establish the “Government of National Salvation” and took control of Tripoli-based ministries and other institutions.⁷²

⁶⁴ Tripoli Court of Assize Judgment, p. 18 (p. 15 of judgment).

⁶⁵ [REDACTED].

⁶⁶ Tripoli Court of Assize Judgment, p. 20-21 (p. 17-18 of judgment)

⁶⁷ Tripoli Court of Assize Judgment, p. 22 (p. 19 of judgment).

⁶⁸ [REDACTED].

⁶⁹ Tripoli Court of Assize Judgment, p. 23 (p. 20 of judgment).

⁷⁰ UNSMIL Report, p. 8; Annex 9, Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya: detailed findings, A/HRC/31/CRP.3, 23 February 2016 (“OHCHR 23 February 2016 Report”), LBY-OTP-0053-0990 at 1003, paras. 42-44.

⁷¹ UNSMIL Report, p. 8; Annex 9, OHCHR 23 February 2016 Report, LBY-OTP-0053-0990 at 1003, paras. 42-44.

⁷² UNSMIL Report, p. 8; Annex 9, OHCHR 23 February 2016 Report, LBY-OTP-0053-0990 at 1003, para. 44.

39. In eastern Libya, a transitional government relocated to Al-Bayda (“Al-Bayda Transitional Government”⁷³). The Al-Bayda Transitional Government was subsequently sworn in by the newly convened House of Representatives based in Tobruk (“House of Representatives”) and this remained the internationally recognised government until 17 December 2015 when the Libyan Political Agreement was signed and the GNA was established as the internationally recognised government of Libya.⁷⁴ These parallel structures of government in Libya led to the creation of rival ministries, including two ministries of justice.⁷⁵

40. As stated in a telephone call with an investigator in the Office of the Prosecutor of the ICC (“OTP”), Mr Al-‘Atiri ceased all cooperation with the Tripoli Court of Assize in July 2014 after militias took control of Tripoli. Mr Al-‘Atiri stated that he had previously cooperated with the court in Tripoli to facilitate the video link for Mr Gaddafi’s trial, however, since July 2014 he no longer recognised the court or the authorities in Tripoli.⁷⁶

41. Following the conflict in Tripoli in July 2014, hearings in Case 630/2012 before the Tripoli Court of Assize were adjourned until October 2014.⁷⁷ The session on 22 June 2014 was the last hearing that Mr Gaddafi attended in the proceedings in Case 630/2012, via video link or otherwise. There were six further court sessions in 2014. Despite requests from the Prosecutor General’s Office to the ZRRI to enable Mr Gaddafi to attend at least two of these court sessions via video link,⁷⁸ Mr Gaddafi did

⁷³ The Prosecution notes that the term “transitional” is also sometimes translated as “interim” or “provisional”.

⁷⁴ UNSMIL Report, p. 8-9.

⁷⁵ UNSMIL Report, p. 9; Annex 9, OHCHR 23 February 2016 Report, LBY-OTP-0053-0990 at 1004, para. 47.

⁷⁶ Declaration of OTP investigator, Annex A to Request for an order directing the Registrar to transmit the request for arrest and surrender to Mr al-‘Ajami AL-‘ATIRI, Commander of *Abu-Bakr al-Siddiq* Battalion in Zintan, Libya, 26 April 2016, ICC-01/11-01/11-624-AnxA-Red (“Declaration of OTP investigator”), paras. 50-51.

⁷⁷ Tripoli Court of Assize Judgment, p. 24 (p. 21 of the judgment); UNSMIL Report, p. 22.

⁷⁸ See, Letter from Prosecutor General’s Office to the Head of the ZRRI dated 28 September 2014, Annex A-3 to the 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, 26 April 2016, ICC-01/11-01/11-624-Conf-AnxA-3 (in relation to the hearing on 12 October 2014); Letter from Prosecutor General’s Office to the Head of the ZRRI dated 11 November 2014, Annex A-5 to the 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, 26 April 2016, ICC-01/11-01/11-624-Conf-AnxA-5 (in relation to the hearing on 16 November 2014).

not attend any further sessions.⁷⁹ It appears that his counsel attended only one of the remaining sessions in 2014.⁸⁰

42. [REDACTED]⁸¹

43. On 15 December 2014, the Prosecutor General's Office sent a letter to the Head of the Judicial Police in Zintan noting that Mr Gaddafi had been absent from a number of hearings in Case 630/2012, and requesting him to take all necessary measures to transfer Mr Gaddafi from the ZRRI to custody in Tripoli.⁸²

3) 2015: Mr Gaddafi is convicted *in absentia*; the Government of Libya confirm that there is no final judgment in the case and that Mr Gaddafi will have a new trial when it obtains custody of him

44. In 2015, Mr Gaddafi did not attend any of the 12 hearings in Case 630/2012 before the Tripoli Court of Assize or the announcement of the judgment on 28 July 2015.

45. From January to March 2015, seven hearings took place, in which Mr Gaddafi was represented by counsel on three occasions.⁸³

46. A two-day hearing was held on 12 and 13 April 2015. Mr Gaddafi was represented by legal counsel only on the first day.⁸⁴ On the second day, the Tripoli

⁷⁹ These remaining six hearings in 2014 took place on 12 October (video link not functioning), 2 November, 16 November, 30 November, 14 December and 28 December 2014, *see*, Tripoli Court of Assize Judgment, p. 24-34 (p. 21-31 of the judgment) and p. 37-41 (p. 34-38 of the judgment). Note the chronology of hearings detailed in the Tripoli Court of Assize Judgment appears to incorrectly insert the hearings on 20 November 2014 and 14 December 2014 between the hearings on 25 January 2015 and 8 February 2015, *see*, Tripoli Court of Assize Judgment, p. 37-41 (p. 34-38 of the judgment).

⁸⁰ It appears that Mr Gaddafi's counsel was present on 14 December 2014, *see*, Tripoli Court of Assize Judgment, p. 38 (p. 35 of the judgment).

⁸¹ [REDACTED].

⁸² Annex 8.1, Annex 1 to Response to Request of Assistance, Letter from the Prosecutor General's Office to the Head of the Judicial Police in Zintan, 15 December 2015, LBY-OTP-0065-0087 (Translation at LBY-OTP-0065-0437).

⁸³ These seven hearings took place on 11 January (Mr Gaddafi's counsel present), 25 January (Mr Gaddafi's counsel present), 8 February, 22 February, 8 March (Mr Gaddafi's counsel present), 22 March and 30 March 2015, *see*, Tripoli Court of Assize Judgment, p. 31-53, (p. 28-50 of the judgment).

⁸⁴ Tripoli Court of Assize Judgment, p. 56 (p. 53 of the judgment).

Court of Assize asked the Prosecution to explain why it had not brought Mr Gaddafi before the court.⁸⁵

47. On 20 April 2015, the hearing resumed and it appears that Mr Gaddafi was not represented by legal counsel.⁸⁶ During this hearing, the Prosecution submitted a letter dated 14 April 2015, issued by the Head of the Judicial Police.⁸⁷ The letter stated, in relevant part:

As you are well aware, our country is going through some difficult and bitter times, which have led to the escalation of military operations in the West of the country, particularly after 15 July 2014, between the troops of Libya Dawn, under the command of the Libyan Army General Staff, and armed groups which, prior to 15 July of this year, had declared they would rebel and overthrow the legitimacy of the State of Libya. These groups currently control the town of Zintan, where the Accused in [Case 630/2012], Saif al-Gaddafi, is being held in one of its prisons. This means that, since 15 July 2014, the prisons located in the town of Zintan are no longer under the Government's authority or legitimacy, thereby complicating the transfer of the abovementioned individual to a prison in the capital, Tripoli, as requested in your letter. This matter is unlikely to take place unless the town of Zintan is liberated from the illegitimate groups which have taken control of it and unless the prisons fall back under our physical control and legal authority.⁸⁸

48. At the end of the session on 20 April 2015, the court decided to proceed with Mr Gaddafi's case in his absence.⁸⁹

⁸⁵ Tripoli Court of Assize Judgment, p. 66 and 72 (p. 63 and 69 of the judgment).

⁸⁶ Tripoli Court of Assize Judgment, p. 72 (p. 69 of the judgment).

⁸⁷ Tripoli Court of Assize Judgment, p. 73 (p. 70 of the judgment).

⁸⁸ Annex 8.2, Annex 2 to the Response to the Request for Assistance, Letter from the Head of the Judicial Police in Zintan to the Prosecutor General's Office, 14 April 2015, LBY-OTP-0065-0088 (Translation at LBY-OTP-0065-0439).

⁸⁹ Tripoli Court of Assize Judgment, p. 75 (p. 72 of the judgment).

49. On 3 and 20 May 2015, two final court sessions took place before the judgment was announced on 28 July 2015. Mr Gaddafi's counsel was present at the first session, during which the court noted it had already proceeded with the case against Mr Gaddafi in his absence. It appears that Mr Gaddafi's counsel was also present at the second session in May 2015.⁹⁰ The Prosecution has been unable to find any evidence in support of the assertion by the Defence that "*a lengthy murafa'a*" was submitted on behalf of Mr Gaddafi.⁹¹

50. On 28 July 2015, the Tripoli Court of Assize issued its judgment against Mr Gaddafi *in absentia* stating that "his non-appearance before the Court was the result of his own free will and his belief that his jailors do not have jurisdiction [...]. Therefore, he is deemed a fugitive from justice".⁹²

51. That same day, 28 July 2015, the Minister of Justice in the Al-Bayda Transitional Government, Dr Al-Mabrouk Grira Omrane ("Mr Omrane") released a statement on the judgment by the Tripoli Court of Assize.⁹³ The statement referred to the Tripoli court as being "under the control of outlawed militias", that the judgment was "neither safe nor subject to state control", that the convictions were "unsafe and unstable" and that the Tripoli courts were not independent.⁹⁴ The statement concluded by saying "[t]he Transitional Government reiterates the need for the accused to stand a fair trial in which all legal conditions provided for in the existing legislations in the State of Libya are observed."⁹⁵

⁹⁰ Tripoli Court of Assize Judgment, p. 75-76 (p. 72-73 of the judgment).

⁹¹ Admissibility Challenge, para. 40. The Defence cite to para. 31 of Ellis, M., "Trial of the Libyan regime, An investigation into international fair trial standards", November 2015, Annex F to the Admissibility Challenge, ICC-01/11-01/11-640-AnxF. No support is provided in the report for this assertion. The Prosecution was unable to find any reference in the Tripoli Court of Assize Judgment to any *murafa'a* being submitted on behalf of Mr Gaddafi.

⁹² Tripoli Court of Assize Judgment, p. 149 (p. 146 of the judgment).

⁹³ Annex 10, Statement No. 5/2015, the Ministry of Justice of the Al-Bayda Transitional Government, 28 July 2015, LBY-OTP-0064-0936 (Translation at LBY-OTP-0064-3023).

⁹⁴ Annex 10, Statement No. 5/2015, the Ministry of Justice of the Libyan Transitional Government, LBY-OTP-0064-0936 (Translation at LBY-OTP-0064-3023).

⁹⁵ Annex 10, Statement No. 5/2015, the Ministry of Justice of the Libyan Transitional Government, LBY-OTP-0064-0936 (Translation at LBY-OTP-0064-3023).

52. On 20 August 2015, the Government of Libya stated the following in its response to a filing by the Prosecution that requested the Chamber to order Libya to refrain from carrying out the death penalty issued by the Tripoli Court of Assize in relation to Mr Gaddafi:

The Libyan Code of Criminal Procedure, therefore, affords Mr. Gaddafi (as a person convicted *in absentia*) an absolute right to a new trial when he is transferred from Zintan into the custody of the Libyan Government. That is to say, it absolutely prohibits the application of the death penalty following a trial *in absentia*. Such a sentence is thus not deemed to be a final judgment. This is true even if the Supreme Court were to uphold the findings of the Court of Assize on appeal.⁹⁶

53. The filing on behalf of the Government of Libya also stated that “[a]s recognised by the Court, Mr. Gaddafi continues to be in custody in Zintan and is presently ‘unavailable’ to the Libyan State.”⁹⁷

54. The filing also made reference to the “serious deterioration in security and a period of acute political instability”⁹⁸ and to, on the one hand, the Parliament in Tobruk and the then internationally recognised government in Al-Bayda in the east, and on the other, the General National Congress, who then operated a legislature and a government based in Tripoli.⁹⁹

55. However, the Government of Libya made clear that:

Despite the conflict between these authorities, there is a degree of co-operation among them, and Professor El-Gehani has a concurrent mandate from both governments, with the approval of both Parliaments, to represent Libya in these proceedings before the ICC [footnote omitted].” Furthermore, the

⁹⁶ Libya’s Response to Request for Order to Libya not to execute Mr Gaddafi, para. 6.

⁹⁷ Libya’s Response to Request for Order to Libya not to execute Mr Gaddafi, para. 3.

⁹⁸ Libya’s Response to Request for Order to Libya not to execute Mr Gaddafi, para. 11.

⁹⁹ Libya’s Response to Request for Order to Libya not to execute Mr Gaddafi, para. 12.

Libyan prosecution authorities and the Libyan judiciary remain unified bodies headed in Tripoli, which, in accordance with the separation of powers principle, work independently from both of the two governments and legislatures. It is for this reason that the trial proceeded in Tripoli despite the lack of a unified Libyan Government.¹⁰⁰

4) 2015: The House of Representatives in Tobruk issues Law No. 6 of 2015

56. On 7 September 2015, the House of Representatives issued Law No. 6 of 2015.¹⁰¹ This law purported to provide, subject to certain conditions therein, a general amnesty for “all Libyans who committed crimes during the period from 15 February 2011 until the promulgation of the Present Law.”¹⁰²

57. [REDACTED]¹⁰³ [REDACTED]¹⁰⁴

58. The Defence have provided a letter, [REDACTED]¹⁰⁵ The Prosecution has no record of ever receiving this letter.

5) 2015: The GNA and the Presidency Council become the internationally recognised authorities in Libya

59. On 17 December 2015, the Libyan Political Agreement was signed.¹⁰⁶ This led to the establishment of the Presidency Council, which formed the GNA. The United Nations Support Mission in Libya’s “Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)”, dated 21 February 2017 (“UNSMIL Report”), noted that “[s]ince the signing of the LPA, the institutions it established have been the only ones to be internationally recognised.”¹⁰⁷ The UNSMIL Report further noted

¹⁰⁰ Libya’s Response to Request for Order to Libya not to execute Mr Gaddafi, para. 13.

¹⁰¹ Law No. 6 of 2015 (Registry translation at ICC-01/11-01/11-650-AnxIII-tENG).

¹⁰² Law No. 6 of 2015 (Registry translation at ICC-01/11-01/11-650-AnxIII-tENG), article 1.

¹⁰³ [REDACTED].

¹⁰⁴ [REDACTED].

¹⁰⁵ [REDACTED].

¹⁰⁶ UNSMIL Report, p. 9. The UNSMIL Report also notes that as at January 2017, the GNA had not yet been endorsed by the House of Representatives, p. 9.

¹⁰⁷ UNSMIL Report, p. 9.

that Libyan judicial institutions remained united, despite the rival governments in Libya, stating that “[a]lthough since 2014 Libya has had rival Ministers of Justice claiming legitimacy, the country still has a single Prosecutor General, Supreme Judicial Council and Supreme Court.”¹⁰⁸

6) 2016: Efforts are made by [REDACTED] and the Minister of Justice in the Al-Bayda Transitional Government to apply Law No. 6 of 2015 to Mr Gaddafi

60. [REDACTED].¹⁰⁹ [REDACTED].¹¹⁰

61. [REDACTED].¹¹¹

62. [REDACTED].¹¹²

63. On 11 March 2016, Mr Al-’Atiri told an OTP investigator that the House of Representatives in Tobruk had issued an amnesty around July or September 2015 in relation to all prisoners, including Mr Gaddafi, and that he was awaiting instructions from the Minister of Justice in Al-Bayda.¹¹³

64. On 10 April 2016, the Minister of Justice in the Al-Bayda Transitional Government, Mr Omrane, wrote to the Prosecutor’s Office at the Zintan Court of First Instance (“Zintan Prosecutor’s Office”) to request the release of Mr Gaddafi [REDACTED]¹¹⁴ [REDACTED].¹¹⁵

7) 2016: Mr Gaddafi is purportedly released for the first time by [REDACTED] and Mr Al-’Atiri pursuant to Law No. 6 of 2015 following requests by Mr Omrane, Minister of Justice in the Al-Bayda Transitional Government; in

¹⁰⁸ UNSMIL Report, p. 9.

¹⁰⁹ [REDACTED].

¹¹⁰ [REDACTED].

¹¹¹ [REDACTED].

¹¹² [REDACTED].

¹¹³ Declaration of OTP investigator, paras. 47-48.

¹¹⁴ [REDACTED].

¹¹⁵ [REDACTED].

response, the Zintan Prosecutor’s Office and the Presidency Council of the GNA condemn reports of the release and state that Law No. 6 of 2015 does not apply to Mr Gaddafi

65. [REDACTED]¹¹⁶

66. On 17 May 2016, the Zintan Prosecutor’s Office wrote to the Minister of Justice in the Al-Bayda Transitional Government in response to his 10 April 2016 letter that requested Mr Gaddafi’s release based on the Law No. 6 of 2015.¹¹⁷ In the response, also copied to the Director of the ZRRI and the Commander of the Abu-Bakr al-Siddiq Battalion, the Zintan Prosecutor’s Office rejected the application for Mr Gaddafi’s release on the basis that this did not fall within its jurisdiction. The response stated that it was well known that Mr Gaddafi had been tried before the Tripoli Court of Assize and that follow up in relation to these proceedings was under the jurisdiction of the Prosecutor General’s Office. The letter went on to say:

For you to apply to the Prosecutor’s Office to release the Accused in the manner set out in the letter constitutes interference by the executive authority in the jurisdiction of the judicial authority and an absolute bypassing of the entire judicial apparatus and its institutions. Never before has an application for this order’s execution been submitted directly and in this manner by the Prosecutor’s Office at the Court of First Instance.¹¹⁸

67. On 8 July 2016, Mr Al’Atiri stated in a telephone interview broadcast on France 24 that he had applied Law No. 6 of 2015 to Mr Gaddafi’s case, and appeared to confirm that he had released Mr Gaddafi.¹¹⁹

¹¹⁶ [REDACTED]. *See also*, Admissibility Challenge, para. 26.

¹¹⁷ Annex 11, Letter from the Zintan Prosecutor’s Office to the Minister of Justice in the Al-Bayda Transitional Government, 17 May 2016, LBY-OTP-0064-0983 (Translation at LBY-OTP-0064-3168).

¹¹⁸ Annex 11, Letter from the Zintan Prosecutor’s Office to the Minister of Justice in the Al-Bayda Transitional Government, 17 May 2016, LBY-OTP-0064-0983 (Translation at LBY-OTP-0064-3168 at 3170).

¹¹⁹ Annex 19, France 24, Video “Exclusive: Prison leader of Saif al-Islam Gaddafi confirms his release”, 8 July 2016, LBY-OTP-0065-0109 (Annex 19.1, Translation at LBY-OTP-0065-0422). *See esp.* at 0425, ln. 60-79.

68. On 10 July 2016, the Presidency Council of the GNA issued a statement in relation to the statement by Mr Al-'Atiri concerning the release of Mr Gaddafi.¹²⁰ In particular, the Presidency Council noted that Mr Gaddafi “is detained on charges of crimes against humanity, which are currently before Libyan courts. Pursuant to international agreements and to international human rights law, these are imprescriptible crimes to which no amnesty or pardon is applicable.” The Presidency Council condemned statements relating to Mr Gaddafi’s release as “irresponsible” and also referred to its “determination to prevent the impunity of criminals”. It also expressed its willingness to “fully cooperate with international organisations, particularly the [ICC], pursuant to the resolutions of the Security Council and to international covenants, without prejudice to Libyan law [...]”¹²¹

69. [REDACTED]¹²² [REDACTED]¹²³

70. In relation to the Pre-Trial Chamber’s query as to whether the Libyan authorities agree to the request for the arrest and surrender of Mr Gaddafi being transmitted to the local authorities in Zintan, [REDACTED]¹²⁴

71. On 21 November 2016, the PTC I ruled that the Court could only communicate officially with the internationally recognised government of Libya, the GNA:

[T]he official channel of communication between Libya and the Court are the competent national authorities, namely the GNA, which is recognised by the international community to represent the State. Accordingly, the Court cannot but deal with the *de jure* government and cannot direct its cooperation

¹²⁰ Annex 3, Statement of the Presidency Council on the recent statement concerning the release of the Accused Saif al-Islam Gaddafi, 10 July 2016, LBY-OTP-0048-0404 (Translation at LBY-OTP-0063-0383).

¹²¹ Annex 3, Statement of the Presidency Council on the recent statement concerning the release of the accused Saif al-Islam Gaddafi, 10 July 2016, LBY-OTP-0048-0404 (Translation at LBY-OTP-0063-0383).

¹²² [REDACTED].

¹²³ [REDACTED].

¹²⁴ [REDACTED].

requests to any other non-State entity claiming to represent the State, as suggested by the Prosecutor.¹²⁵

72. The Chamber further noted that other channels of communication would need to be clearly designated by the State but it could not determine with certainty that there had been any such alternative designation. [REDACTED]¹²⁶

8) 2017: Mr Gaddafi is purportedly released a second time by the Abu-Bakr al-Siddiq Battalion; the Prosecutor General’s Office, the Municipal Council of Zintan and the Military Council of Zintan, and the National Defence and Security Committee of the House of Representatives in Tobruk respond to reports of his release

73. In an interview broadcast by France 24 on 3 March 2017, Mr Al-’Atiri reportedly stated that “according to Libyan law, [Mr Gaddafi] is free and he is somewhere on Libyan territory”.¹²⁷

74. On 27 May 2017, the Undersecretary of the Ministry of Justice of the Al-Bayda Transitional Government gave a television interview in which he stated that he had recently visited Mr Gaddafi in the custody of the Abu-Bakr Al-Siddiq Battalion, headed by Mr Al-’Atiri, and that Mr Gaddafi should be released pursuant to Law No. 6 of 2015 and given free movement across Libya.¹²⁸

75. On 10 June 2017, the Abu-Bakr al-Siddiq Battalion issued a statement that “we have decided to release [Mr Gaddafi], and he is now free. We confirm that he left the town of Zintan since his release on [10 June 2017].” The statement claimed that this release was “based on the letters of the Minister of Justice in the Interim Government and the Under-Secretary’s demand, during his press conference, that [Mr Gaddafi]

¹²⁵ Decision on Al-’Atiri Request, para. 15.

¹²⁶ Decision on Al-’Atiri Request, para. 16.

¹²⁷ Annex 20, France 24, Video “Libya: Six years on, what remains of the revolution in the key city of Zintan”, 3 March 2017, LBY-OTP-0046-0580 at 01:40-02:45 (Translation to follow).

¹²⁸ Annex 14, Video7, Video “Libyan government official reveals new details on the fate of Saif Gaddafi”, 27 May 2017, LBY-OTP-0064-3067 (Annex 14.1, Translation at LBY-OTP-0065-0101 at 0104).

should be released as per the Amnesty Law adopted by the Libyan Parliament, the legitimate and competent authority.”¹²⁹

76. On 11 June 2017, the Libyan House of Representatives’ National Defence and Security Committee issued a statement from Tobruk, that included the following:

[W]ith a view to preserving the security of the nation and averting any sedition or chaos that aims to create confusion and obfuscation, we would like to draw your attention, given that you are agencies in charge of the prisoners who were members of the previous regime, that you are not authorised to release any such prisoners so long as no clear judgments have been issued acquitting them of the charges against them.¹³⁰

77. Also on 11 June 2017, the Municipal Council of Zintan and the Military Council of Zintan issued a statement, as follows:

We strongly condemn and denounce the statement issued by the Abu-Bakr al-Siddiq Battalion’s Outreach Office confirming the release of the detainee, Saif Gaddafi, under the pretext of implementing the Amnesty Law. This has nothing to do with legal procedures and is indeed a collusive behaviour, a betrayal of our fallen fighters and a stab in the back to the military establishment, to which they allegedly belong.¹³¹

78. The Prosecutor General’s Office also issued a statement on 11 June 2017 in response to the various reports of Mr Gaddafi’s purported release. The statement noted that Mr Gaddafi has been sentenced *in absentia* and that “an arrest warrant is therefore out for him pursuant to an in absentia judgment with a view to him being tried in person for the charges against him, in accordance with the requirements and

¹²⁹ Annex 13, Statement of the Abu-Bakr al-Siddiq Battalion, The Guard Company, 14 Ramadan 1438 (equivalent to 10 June 2017), LBY-OTP-0064-0980 (Translation at LBY-OTP-0064-3162).

¹³⁰ Annex 6, Statement of the Libyan House of Representatives’ National Defence and Security Committee on the members of the previous regime, 11 June 2017, LBY-OTP-0064-0979 (Translation at LBY-OTP-0064-3160).

¹³¹ Annex 5, Statement of the Municipal Council and the Military Council on Abu-Bakr al-Siddiq Battalion’s statement, 11 June 2017, LBY-OTP-0064-0982 (Translation at LBY-OTP-0064-3166).

conditions for a fair trial and the guarantees which the Law provides an accused in this regard.”¹³² In relation to Mr Gaddafi’s purported release, the statement provided:

Given that for the accused to be pardoned of some of the charges he was sentenced for, the persons avenging the blood of their loved ones must issue a withdrawal; that the Amnesty Law can only take effect through procedures and the fulfilment of legal requirements which can only be executed by the judicial authority, which has the sole and exclusive competence; and that the person in question is wanted by the International Criminal Court on charges constituting crimes against humanity,

The [Prosecutor General’s Office], in exercising its legal duty as custodian of this criminal case and its national role to enforce the rule of law and establish justice, is calling upon all official State entities and organisations to respect the competencies of the judicial authority and to keep it aloof from the mire of disagreements and political one-upmanship in order to ensure the independence and neutrality of the judiciary.

79. On 11 June 2017, Mr Gaddafi’s lawyer reportedly told Reuters that Mr Gaddafi could “play an important part in national reconciliation efforts because he was popular in Libya” and that he “would not be turning himself in to the International Criminal Court”.¹³³

9) 2018: The Government of Libya states that the judgment *in absentia* against Mr Gaddafi’s was not final, that Law No. 6 of 2015 has not been validly applied to his case, and that his custodial status is unclear

80. On 18 September 2018, the Government of Libya confirmed that the *in absentia* judgment against Mr Gaddafi was not final, stating:

¹³² Annex 4, Statement of Prosecutor General’s Office, 11 June 2017, LBY-OTP-0064-0981 (Translation at LBY-OTP-0064-3164).

¹³³ Annex 2, Reuters, “Gaddafi’s son Saif freed in Libya, whereabouts unclear: lawyer”, 11 June 2017, LBY-OTP-0064-3078.

[T]he judgment issued *in absentia* and convicting [Mr Gaddafi] is deemed of a threatening character and is wiped away by the rule of law once [Mr Gaddafi] appears before the court or is arrested in compliance with the rules governing criminal proceedings. It becomes irrevocably final once the sentence, for which [Mr Gaddafi] has been charged, is handed down by the criminal court in the presence of [Mr Gaddafi] and once he presents his defence.¹³⁴

81. The Government of Libya also confirmed that Law No. 6 of 2015 does not apply to Mr Gaddafi, and stated, in particular, that “the jurisdiction to apply provisions of this law lies with the competent judicial authority legally mandated to look into the case”, but that no such decision had been made in relation to Mr Gaddafi. It further stated that this law therefore “has no impact on the judgment handed down against [Mr Gaddafi] [...]”.¹³⁵ The Government of Libya further noted that Mr Gaddafi had been convicted of the crimes of murder and corruption, which were excluded from the application of the amnesty, pursuant to article 3 of Law No. 6 of 2015.¹³⁶

82. In relation to Mr Gaddafi’s custodial status, the Government of Libya stated that it does not have custody of Mr Gaddafi, and has not had contact with Mr Gaddafi “since the last video link from the court in the course of the trial proceedings”, which the Prosecution understands to mean since 22 June 2014.¹³⁷ It further stated that while it assumed that Mr Al-’Atiri continued to detain Mr Gaddafi, it could not provide a categorical answer on this issue, “given that the location of his detention falls outside the control of the Judicial Police.”¹³⁸ The Government of Libya concluded by stating “no decision has been issued by the

¹³⁴ See, Annex 8, Response to Request for Assistance, LBY-OTP-0065-0077 (Translation at LBY-OTP-0065-0426 at 0429).

¹³⁵ See, Annex 8, Response to Request for Assistance, LBY-OTP-0065-0077 (Translation at LBY-OTP-0065-0426 at 0434).

¹³⁶ See, Annex 8, Response to Request for Assistance, LBY-OTP-0065-0077 (Translation at LBY-OTP-0065-0426 at 0434).

¹³⁷ See, Annex 8, Response to Request for Assistance, LBY-OTP-0065-0077 (Translation at LBY-OTP-0065-0426 at 0435).

¹³⁸ See, Annex 8, Response to Request for Assistance, LBY-OTP-0065-0077 (Translation at LBY-OTP-0065-0426 at 0435).

competent judicial authority on the release of [Mr Gaddafi] pursuant to a judicial action or an authoritative legal situation that allows for such release.”¹³⁹

E. PROCEDURAL SUBMISSIONS

1) Mr Gaddafi does not have standing to bring an admissibility challenge because he is a fugitive

83. In principle, under article 19(2)(a) of the Statute, as a person for whom a warrant of arrest has been issued under article 58, Mr Gaddafi may bring a challenge to the admissibility of the case on the grounds referred to in article 17. Mr Gaddafi has not previously challenged the admissibility of the case and has filed the challenge prior to the commencement of trial, in accordance with the requirements of article 19(4) of the Statute. Furthermore, the Chamber is not prevented from revisiting the admissibility of the case on the basis of its previous admissibility determination in response to the challenge brought by Libya under article 19(2)(b) of the Statute.¹⁴⁰ Indeed, as Chambers of the Court have affirmed, the admissibility of the case is not static and must be determined on the basis of the facts as they exist at the time when admissibility is being assessed.¹⁴¹

84. Nevertheless, for the reasons set out below, since Mr Gaddafi is currently a fugitive from justice he does not have standing to bring an admissibility challenge. According to the Defence, Mr Gaddafi was released from custody on about 12 April 2016.¹⁴² Despite this, Mr Gaddafi has made no effort to surrender himself, either to the ICC or to the Government of Libya, and there is no indication that he will do so in the event that his admissibility challenge is unsuccessful. Indeed, as noted above,

¹³⁹ See, Annex 8, Response to Request for Assistance, LBY-OTP-0065-0077 (Translation at LBY-OTP-0065-0426 at 0435).

¹⁴⁰ *Prosecutor v. Ongwen*, Decision on the admissibility of the case under article 19(1) of the Statute, 10 March 2009, ICC-02/04-01/15-156, paras. 25-29.

¹⁴¹ *Prosecutor v. Katanga & Ngudjolo*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, ICC-01/04-01/07-1497, para. 56; *Prosecutor v. Simone Gbagbo*, Order to the Registrar to Request Information from the Competent National Authorities of the Republic of Côte d’Ivoire, 14 September 2018, ICC-02/11-01/12-84, para. 5.

¹⁴² Admissibility Challenge, para. 26.

one of Mr Gaddafi's legal counsel reportedly stated that Mr Gaddafi would not surrender to the Court.¹⁴³

85. The ICC warrant for Mr Gaddafi's arrest has been outstanding for seven years, since its issuance on 27 June 2011.¹⁴⁴ The Tripoli Court of Assize deemed Mr Gaddafi a "fugitive from justice" on 20 April 2015.¹⁴⁵ Since then, the Government of Libya has continued its efforts – to no avail – to secure custody of Mr Gaddafi so that he may be prosecuted in Libya, or surrendered to the ICC.¹⁴⁶ On 11 June 2017, in response to renewed reports of Mr Gaddafi's purported release pursuant to Law No 6 of 2015, the Libyan Prosecutor General's Office released a statement affirming that a warrant of arrest was still active for Mr Gaddafi as a result of his conviction and sentence *in absentia* on 28 July 2015.¹⁴⁷ That Mr Gaddafi is still wanted for arrest was re-affirmed by the Government of Libya on 18 September 2018.¹⁴⁸

86. Moreover, the Prosecution has been unable to confirm Mr Gaddafi's current whereabouts or custody status. According to the Government of Libya, it has been unable to substantiate reports that Mr Gaddafi has been released from custody.¹⁴⁹ However, the United Nations Panel of Experts on Libya, in its report dated 5 September 2018, noted that it had met with a lawyer for Mr Gaddafi who "confirmed that Saif al-Islam is in Zintan and now has freedom of movement there."¹⁵⁰

87. To allow Mr Gaddafi to challenge the admissibility of the case whilst a fugitive from justice would be entirely inconsistent with the object and purpose of

¹⁴³ Annex 2, Reuters, "Gaddafi's son Saif freed in Libya, whereabouts unclear: lawyer", 11 June 2017, LBY-OTP-0064-3078. *See above*, paras. 3 and 79.

¹⁴⁴ Arrest Warrant.

¹⁴⁵ Tripoli Court of Assize Judgment, p. 149 (p. 146 of judgment).

¹⁴⁶ Annex 8, Response to Request for Assistance, LBY-OTP-0065-0077 (Translation at LBY-OTP-0065-0426 at 0435-0436); [REDACTED]; Libya's Response to Request for Order to Libya not to execute Mr Gaddafi, paras. 2-3.

¹⁴⁷ Annex 4, Statement of Prosecutor General's Office, 11 June 2017, LBY-OTP-0064-0981 (Translation at LBY-OTP-0064-3164). *See above*, para. 78.

¹⁴⁸ Annex 8, Response to Request for Assistance, LBY-OTP-0065-0077 (Translation at LBY-OTP-0065-0426 at 0435).

¹⁴⁹ Annex 8, Response to Request for Assistance, LBY-OTP-0065-0077 (Translation at LBY-OTP-0065-0426 at 0434-0435).

¹⁵⁰ Annex 18, United Nations, Final report of the Panel of Experts on Libya established pursuant to resolution 1973(2011), S/2018/812, 5 September 2018, Annex 59, LBY-OTP-0065-0126 at 0369, para. 15.

the Rome Statute to ensure accountability for the most serious crimes of international concern.¹⁵¹ If Mr Gaddafi wishes to exercise these procedural rights, he must first surrender himself to the Government of Libya or to the ICC.

88. That Mr Gaddafi was permitted to participate in the admissibility proceedings following the challenge brought by Libya is inapposite to the current situation. Mr Gaddafi did not have an absolute right to participate in those proceedings under rule 58(3) of the Rules because he had not yet been surrendered to the Court.¹⁵² In exercising its broad discretion to decide on the procedure to be followed,¹⁵³ and given that Mr Gaddafi was in custody in Libya, the Chamber permitted Mr Gaddafi to participate – taking the view that “Mr Gaddafi’s exercise of procedural rights in relation to the Admissibility Challenge [could not] be made contingent on Libya’s compliance with the Surrender Request.”¹⁵⁴

89. There are further examples of the Pre-Trial Chamber permitting a suspect to participate in admissibility proceedings pursuant to rule 58(3) of the Rules following a challenge brought by a State despite that suspect not having been surrendered to the Court or having appeared voluntarily or pursuant to a summons. However, in each of these cases, the suspect was in the custody of the national authorities or was on summons and had not yet made their initial appearance before the Court.¹⁵⁵

¹⁵¹ Preamble, articles 1 and 5 of the Rome Statute.

¹⁵² *Prosecutor v. Gaddafi & Al-Senussi*, Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled “Decision on the admissibility of the case against Abdullah Al-Senussi”, 24 July 2014, ICC-01/11-01/11-565 (“*Al-Senussi* Admissibility Judgment”), paras. 146-149.

¹⁵³ *See, Al-Senussi* Admissibility Judgment, paras. 146-149.

¹⁵⁴ *Prosecutor v. Gaddafi & Al-Senussi*, Decision on the Conduct of the Proceedings Following the “Application on behalf of the Government of Libya pursuant to Article 19 of the Statute”, 4 May 2012, ICC-01/11-01/11-134, para. 11.

¹⁵⁵ *Prosecutor v. Muthaura et al.*, Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute, 4 April 2011, ICC-01/09-02/11-40, para. 12 (where the suspects were on summons and had not yet made their initial appearance before the Court); *Prosecutor v. Ruto et al.*, Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute, 4 April 2011, ICC-01/09-01/11-31, para. 12 (where the suspects were on summons and had not yet made their initial appearance before the Court); *Prosecutor v. Gaddafi & Al-Senussi*, Decision on the Conduct of the Proceedings Following the “Application on Behalf of the Government of Libya Relating to Abdullah Al-Senussi Pursuant to Article 19 of the Statute”, 26 April 2013, ICC-01/11-01/11-325, para. 8 (where the suspect was in custody in Libya); *Prosecutor v. Simone Gbagbo*, Decision on the conduct of the proceedings following Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo, 15 November 2013, ICC-02/11-01/12-15, para. 8 (where the suspect was in

90. There is no precedent for a Chamber to allow a suspect who is a fugitive from justice to participate in an admissibility challenge under rule 58(3) or, for that matter, to bring a challenge under article 19. If the present admissibility challenge was being brought by the Libyan State, Mr Gaddafi would not have an automatic right under rule 58(3) to participate in the proceedings.¹⁵⁶ Further, in circumstances where Mr Gaddafi is at liberty, is a fugitive from justice and has not surrendered himself to the ICC or the Government of Libya, it would be contrary to the interests of justice for the Chamber to exercise its discretion to allow Mr Gaddafi to do so.¹⁵⁷ It follows then that Mr Gaddafi should also be barred from bringing his own admissibility challenge under article 19.

91. This is consistent with the Appeals Chamber's jurisprudence that suspects at large do not enjoy the same rights as those who have appeared before the Court pursuant to a warrant of arrest or summons to appear. In determining that suspects who were at large did not have a right to individual legal representation in an admissibility challenge, the Appeals Chamber found that "internationally recognised human rights standards do not necessarily extend all the rights enshrined in article 67 of the Statute to persons who have not yet been surrendered to the Court or appeared voluntarily before it".¹⁵⁸ The Chamber also found that "Rule 103(2) determines who may respond to submissions of *amici curiae*, but does not extend that

custody in Côte d'Ivoire). See also, *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", 13 July 2006, ICC-01/04-169. In this case, the Appeals Chamber considered whether an initial determination of the admissibility of a case is a pre-requisite for the issuance of a warrant of arrest pursuant to article 58. The Prosecution notes reference in para. 51 of this judgment to the possibility of an admissibility challenge being brought by a suspect "before the person concerned has been surrendered to the Court and even before the person's arrest". Since the case did not turn on this issue, the Appeals Chamber did not provide further guidance on the meaning of this phrase, including whether it could be applied to a person who is a fugitive from justice.

¹⁵⁶ *Al-Senussi* Admissibility Judgment, paras. 146-149.

¹⁵⁷ Given that Mr Gaddafi is the party bringing the admissibility challenge, this is not a case in which denying him the opportunity to be heard would result in the pre-determination of the issue by the Pre-Trial Chamber, and possibly the Appeals Chamber, causing serious impairment of his right to bring any future challenge, see, *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision of the Prosecutor's Application for Warrants of Arrest, Article 58", 13 July 2006, ICC-01/04-169, para. 50.

¹⁵⁸ *Prosecutor v. Joseph Kony et. al.*, Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, 16 September 2009, ICC-02/04-01/05-408, para. 66.

right to persons who are not participating in proceedings and who have not been surrendered to the Court.”¹⁵⁹

92. Similarly, the International Criminal Tribunal for the former Yugoslavia (“ICTY”) has restricted the rights of a fugitive to participate in proceedings. In the case of Radovan Karadžić, then a fugitive from the ICTY, Trial Chamber I rejected a request from Mr Karadžić’s counsel to participate in proceedings being conducted under rule 61 of the ICTY Rules of Procedure and Evidence and to have access to all documents submitted as part of those proceedings. Trial Chamber I noted, in particular, that Mr Karadžić had been notified of the indictments against him and had the right to appear before the Tribunal, in which case he would be afforded all the guarantees inherent in an equitable trial.¹⁶⁰

93. Contrary to the Defence claims, requiring Mr Gaddafi to surrender himself prior to making an admissibility challenge would not deprive him of his liberty for a second time, thus infringing on his right not to be tried twice for the same conduct.¹⁶¹ First, as argued below, Mr Gaddafi has not been tried in Libya within the meaning of the principle of *ne bis in idem* under articles 17(1)(c) and 20(3).¹⁶² According to the Government of Libya, the domestic proceedings cannot continue whilst Mr Gaddafi is still a fugitive. Second, following Mr Gaddafi’s arrest or surrender, the appropriateness of his detention would be determined by the competent judicial authority either in Libya or at the ICC.

94. Should Mr Gaddafi surrender himself to the Libyan authorities, the Government of Libya may postpone the execution of the request to surrender him to the Court pending its determination of the Admissibility Challenge, pursuant to

¹⁵⁹ *Prosecutor v. Joseph Kony et. al*, Judgment on the appeal of the Defence against the “Decision on the admissibility of the case under article 19 (1) of the Statute” of 10 March 2009, 16 September 2009, ICC-02/04-01/05-408, para. 67.

¹⁶⁰ ICTY, *Prosecutor v. Karadžić & Mladić*, Decision Rejecting the Request Submitted by Defence Counsels Mr Medvene and Mr Hanley III for Radovan Karadžić, 5 July 1996, IT-95-5/18.

¹⁶¹ Admissibility Challenge, para. 36(ii).

¹⁶² *See below*, paras. 104-120.

articles 95 or 89(2)¹⁶³ of the Statute.¹⁶⁴ The Libyan State may also seek leave from the Chamber to bring a new admissibility challenge on the basis of “exceptional circumstances”, pursuant to article 19(4). In either case, Mr Gaddafi would have the right to apply for interim release pending his surrender to the ICC, pursuant to article 59(3) and (4) of the Statute.

95. In the event that Mr Gaddafi surrendered himself to the ICC, he would also have the right to apply for interim release, pursuant to article 60(2) of the Statute and rules 118 and 119 of the Rules.

96. Finally, the reference by the Defence to commentators having taken the view that “the person sought for surrender has a right to challenge admissibility *before the Court* under article 19 para. 2 (a) as soon as a warrant of arrest has been issued”¹⁶⁵ is taken out of context. This reference relates to the bringing of a *ne bis in idem* challenge in a national court under article 89(2), and does not address the specific point of whether a fugitive can bring an admissibility challenge before the ICC under article 19.

2) The burden and standard of proof

97. The Prosecution agrees with the Defence that Mr Gaddafi, as a person challenging the admissibility of the case against him, bears the burden of proof in the Admissibility Challenge.¹⁶⁶ With respect to the standard of proof, the Defence must establish the relevant facts underpinning the Admissibility Challenge “on the balance of probabilities”.¹⁶⁷ In order to satisfy this standard, the Defence must adduce

¹⁶³ Article 89(2) of the Statute would be relevant in the event that Mr Gaddafi brought a challenge before a Libyan national court on the basis of the principle of *ne bis in idem* as provided for in article 20.

¹⁶⁴ See also, *Prosecutor v. Gaddafi & Al-Senussi*, Decision on Libya’s postponement of the execution of the request for arrest and surrender of Abdullah Al-Senussi pursuant to article 95 of the Rome Statute and related Defence request to refer Libya to the UN Security Council, 14 June 2013, ICC-01/11-01/11-354, paras. 24-25.

¹⁶⁵ Admissibility Challenge, para. 36 and fn. 60, citing to Krefß, C. and Prost, K., “Article 89: Surrender of persons to the Court” in Triffterer, O. and Ambos, K., *Commentary on the Rome Statute of the International Criminal Court* (3rd edition, 2016), p. 2053-2054 (original emphasis).

¹⁶⁶ *Prosecutor v. Bemba*, Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010 (“*Bemba* Admissibility Decision”), ICC-01/05-01/08-802, para. 201. See also, Admissibility Challenge, para. 37.

¹⁶⁷ *Bemba* Admissibility Decision, para. 203.

“tangible and pertinent evidence” with “a sufficient degree of specificity and probative value”.¹⁶⁸

98. This standard of proof applies to all aspects of the Admissibility Challenge. That is, the Defence must establish, on the balance of probabilities, that (i) Mr Gaddafi has been tried by another court, (ii) for substantially the same conduct as the case before the Court, and (iii) that a trial by the Court is not permitted under articles 17(1)(c) and 20(3).

99. The Prosecution disagrees with the Defence contention that once it has established the first two elements, it need only establish on a *prima facie* basis that the two exceptions under article 20(3)(a) and (b) do not apply, and that the burden of proof then shifts to any other party or participant that submits that the exceptions do apply.¹⁶⁹

100. A plain reading of the Statute indicates that, in order for the case to be declared inadmissible before the Court pursuant to article 17(1)(c), the Defence must positively establish that a trial by the Court is not permitted under article 20(3). Thus, for the Defence to succeed in its Admissibility Challenge, it must establish to the same standard of proof as for any other aspect of its application that the exceptions under article 20(3)(a) and (b) do not apply.

101. As the party bringing the admissibility challenge, as for any State, the Defence must “substantiate all aspects of its allegations to the extent required by the concrete circumstances of the case”.¹⁷⁰ The facts and circumstances of the individual case will determine the nature and extent of the evidence necessary to prove each aspect of the

¹⁶⁸ *Gaddafi* Admissibility Judgment, para. 205; *Prosecutor v. Gbagbo*, Decision on the “Requête relative à la recevabilité de l’affaire en vertu des Articles 19 et 17 du Statut”, 11 June 2013, ICC-02/11-01/11-436-Red, paras. 24-25. The Prosecution submits 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, *see*, Hall C.K., Ntanda, D.D. and Ventura, M.J., “Challenges to the jurisdiction of the Court” in Triffterer O. and Ambos, K., *Commentary on the Rome Statute of the International Criminal Court* (3rd edition, 2016), p. 863-864.

¹⁶⁹ Admissibility Challenge, para. 39.

¹⁷⁰ *Gaddafi* Admissibility Decision, para. 52. *See also*, rule 58(1) of the Rules.

challenge. However, the standard of proof remains the same.

102. The finding relied on by the Defence that “any factual allegation raised by any party or participant must be sufficiently substantiated in order to be considered properly raised”¹⁷¹ is inapposite to the applicable standard of proof for admissibility challenges. The Appeals Chamber merely observed that any factual allegation raised by a party or participant must be adequately substantiated by evidence.

103. Further, the Defence is incorrect in its assertion that in order to prove that Mr Gaddafi has already been tried, it need only establish that “something that can recognizably be described as a trial has occurred”.¹⁷² This phrase was used by the Appeals Chamber in the limited context of assessing whether the trial proceedings in the *Al-Senussi* case had been or were being conducted independently or impartially, and in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.¹⁷³ Therefore, this phrase is only relevant to the Chamber’s consideration of whether the exception under article 20(3)(b) of the Statute applies to Mr Gaddafi’s case. In determining whether Mr Gaddafi has already been tried within the meaning of articles 17(1)(c) and 20(3), the Chamber should simply apply the ordinary balance of probabilities standard and arrive at its decision by weighing the merits of the competing submissions of the Parties on the issue.¹⁷⁴

F. SUBSTANTIVE SUBMISSIONS

1) Mr Gaddafi has not been “tried” in Libya for the purposes of articles 17(1)(c) and 20(3) of the Statute

a. There is no final judgment against Mr Gaddafi

104. Mr Gaddafi has not been “tried” in Libya for the purposes of articles 17(1)(c)

¹⁷¹ Admissibility Challenge, para. 39, referring to *Prosecutor v. Gaddafi & Al-Senussi*, Decision on the admissibility of the case against Abdullah Al-Senussi, 11 October 2013, ICC-01/11-01/11-466-Red, para. 208; *Al-Senussi* Admissibility Judgment, para. 167.

¹⁷² Admissibility Challenge, paras. 38-39.

¹⁷³ *Al-Senussi* Admissibility Judgment, para. 230 and fn. 458.

¹⁷⁴ *Bemba* Admissibility Decision, para. 203.

and 20(3) of the Statute because the judgment rendered against him by the Tripoli Court of Assize is not final.

105. On 28 July 2015, the Tripoli Court of Assize convicted Mr Gaddafi *in absentia* in relation to Case 630/2012 and sentenced him to death.¹⁷⁵ As stated by the Government of Libya in 2015, and confirmed in 2018, pursuant to article 358 of the Libyan Code of Criminal Procedure, the judgment against Mr Gaddafi is not final and the death sentence cannot be enforced against him. Once Mr Gaddafi is in the custody of the Libyan State, he will have an absolute right to a new trial, in person.¹⁷⁶

106. According to the Government of Libya, under the Libyan Code of Criminal Procedure, Mr Gaddafi is not permitted to appeal the judgment of the Tripoli Court of Assize to the Supreme Court of Libya because it was rendered *in absentia*.¹⁷⁷ In any event, this would not be determinative of the application of the *ne bis in idem* principle in this case. The Government of Libya has confirmed that even if the Supreme Court of Libya was to uphold the findings of the Tripoli Court of Assize, the judgment would still not be considered final under Libyan law.¹⁷⁸

107. Article 358 of the Libyan Code of Criminal Procedure states, in relevant part:

If a person convicted in absentia appears or is arrested prior to the lapse of the penalty by prescription, the previously issued judgment shall be inevitably annulled either in respect of the penalty or the damages, and the case shall be re-tried by the Court.¹⁷⁹

108. In relation to the operation of article 358, the Government of Libya has

¹⁷⁵ Tripoli Court of Assize Judgment, p. 149 (p. 146 of the judgment).

¹⁷⁶ Libya's Response to Request for Order to Libya not to execute Mr Gaddafi, paras. 1-2, 5-6 and 8; Annex 8, Response to the Request for Assistance, LBY-OTP-0065-0077 (Translation at LBY-OTP-0065-0426 at 0428-0429).

¹⁷⁷ Annex 8, Response to the Request for Assistance, LBY-OTP-0065-0077 (Translation at LBY-OTP-0065-0426 at 0430).

¹⁷⁸ Libya's Response to Request for Order to Libya not to execute Mr Gaddafi, para. 6.

¹⁷⁹ Article 358 of the Libyan Code of Criminal Procedure, Annex A to Libya's Response to Request for Order to Libya not to execute Mr Gaddafi, 21 August 2015, ICC-01/11-01/11-612-AnxA.

previously submitted to the Court that:

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.¹⁸⁰

109. The judgment *in absentia* against Mr Gaddafi has not lapsed in Libya pursuant to any prescription or statute of limitations.¹⁸¹

110. As discussed below at paragraphs 146-163, the Government of Libya has made clear that Law No. 6 of 2015 has not been validly applied to Mr Gaddafi's case.¹⁸² Thus, the Chamber need not speculate on the effect that Law No. 6 of 2015 could have on Mr Gaddafi's case should it be validly applied, and should reject the Defence submission that it has rendered the judgment *in absentia* final.¹⁸³

111. Thus, according to the Government of Libya, the Libyan Code of Criminal Procedure affords Mr Gaddafi, as a person convicted *in absentia*, a categorical right to a new trial once it obtains custody of him. It absolutely prohibits the application of the death penalty against him following the judgment *in absentia*. Such a sentence is thus not deemed to be a final judgment.

b. The principle of *ne bis in idem* under articles 17(1)(c) and 20(3) requires a final judgment

112. In order for a person to invoke the principle of *ne bis in idem* as provided for in articles 17(1)(c) and 20 of the Statute, a final judgment of conviction or acquittal must have been rendered against them by a criminal court. This is the only reasonable

¹⁸⁰ Libya's Response to Request for Order to Libya not to execute Mr Gaddafi, para. 7. *See also*, Annex 8, Response to Request for Assistance, LBY-OTP-0065-0077 (Translation at LBY-OTP-0065-0426 at 0428).

¹⁸¹ Annex 8, Response to Request for Assistance, LBY-OTP-0065-0077 (Translation at LBY-OTP-0065-0426 at 0428).

¹⁸² Annex 8, Response to Request for Assistance, LBY-OTP-0065-0077 (Translation at LBY-OTP-0065-0426 at 0432-0434).

¹⁸³ Admissibility Challenge, para. 48.

interpretation of these articles in light of the overarching principle of the Rome Statute to prevent impunity. In the circumstances of this case, as detailed in paragraph 106 above, it is not necessary for the Chamber to consider whether these provisions of the Statute require all appeals to have been exhausted.

113. Despite the fact that the word “final” does not feature in article 17(1)(c) or 20(3), jurisprudence of the Court is clear that this requirement must be read into the provisions. Trial Chamber III in the *Bemba* case, cited by the Defence,¹⁸⁴ previously held:

The decision at first instance in the CAR 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 the accused, given the successful appellate proceedings.¹⁸⁵

114. The Defence interpret this passage to mean that Trial Chamber III had “identified that the defining characteristic of a concluded trial is the existence of a decision on the merits”.¹⁸⁶ However, Trial Chamber III’s use of the words “final decision or acquittal” in the same sentence clearly shows that it considered that this element was also necessary to satisfy the *ne bis in idem* principle.

115. Most recently, Pre-Trial Chamber II sought to receive from Côte d’Ivoire information in relation to judicial decisions allegedly rendered against Ms Gbagbo, including “if the concerned judgments have become final according to national law”.¹⁸⁷ The purpose of this was to determine whether the admissibility of the case against Simone Gbagbo ought to be reviewed, with specific reference to articles

¹⁸⁴ Admissibility Challenge, para. 45.

¹⁸⁵ *Bemba* Admissibility Decision, para. 248.

¹⁸⁶ Admissibility Challenge, para. 45.

¹⁸⁷ *Prosecutor v. Simone Gbagbo*, Order to the Registrar to Request Information from the Competent National Authorities of the Republic of Côte d’Ivoire, 14 September 2018, ICC-02/11-01/12-84, para. 6.

17(1)(c) and 20(3) of the Statute.¹⁸⁸

116. At the ICTY in the *Tadić* case, also relied on by the Defence,¹⁸⁹ the Trial Chamber found that there had been no violation of the principle of *ne bis in idem* in circumstances where Mr Tadić had been indicted in Germany prior to his case being deferred to the ICTY. Since Mr Tadić had not even been “the subject of a judgement on the merits on any of the charges for which he had been indicted”, it was unnecessary for the Trial Chamber to specifically consider whether any such judgment was final.¹⁹⁰ In its reasoning, the Trial Chamber noted that even the broader transnational formulation of the principle of *ne bis in idem* as contained in the European Convention On The Transfer of Proceedings In Criminal Matters of 1992 applies only to a “person in respect of whom a *final and enforceable* criminal judgement has been rendered”.¹⁹¹

117. The *Tadić* case was relied on by the Appeals Chamber of the International Criminal Tribunal for Rwanda (“ICTR”) to support its conclusion in the *Semanza* case that the application of the *ne bis in idem* principle at the ICTR requires “a final judgement”.¹⁹² As with the Rome Statute, the provisions of the ICTY and ICTR Statutes relating to *ne bis in idem* do not include the word “final”.¹⁹³ Nevertheless, the ICTR Appeals Chamber reasoned that:

[T]he non bis in idem principle only applies where a person has effectively already been tried. The term ‘tried’ implies that proceedings in the national Court constituted a trial [...] at the end of which a final judgement is

¹⁸⁸ *Prosecutor v. Simone Gbagbo*, Order to the Registrar to Request Information from the Competent National Authorities of the Republic of Côte d’Ivoire, 14 September 2018, ICC-02/11-01/12-84, para. 5.

¹⁸⁹ Admissibility Challenge, para. 45.

¹⁹⁰ ICTY, *Prosecutor v. Tadić*, Decision on the defence motion on the principle of non-bis-in-idem, 14 November 1995, IT-94-1-T, para. 24.

¹⁹¹ ICTY, *Prosecutor v. Tadić*, Decision on the defence motion on the principle of non-bis-in-idem, 14 November 1995, IT-94-1-T, paras. 21-22 (emphasis added).

¹⁹² ICTR, *Prosecutor v. Laurent Semanza*, Decision, 31 May 2000, ICTR-97-20-A (“*Semanza* Decision”), paras. 74-75. Cited with approval in ICTR, *Prosecutor v. Nzabirinda*, Sentencing Judgment, 23 February 2007, ICTR-2001-77-T, para. 46 and ICTY, *Prosecutor v. Karadžić*, Decision on the accused’s motion for finding of *non-bis-in-idem*, 16 November 2009, IT-95-5/18-T, para. 13.

¹⁹³ ICTR Statute, article 9; ICTY Statute, article 10.

rendered.¹⁹⁴

118. This interpretation is consistent with the provisions concerning double jeopardy contained in the International Covenant on Civil and Political Rights and the European Convention on Human Rights, which both refer to a person being *finally* convicted or acquitted.¹⁹⁵ As previously found by the Appeals Chamber, the application and interpretation of law under the Statute “must be consistent with internationally recognised human rights”, in accordance with article 21(3).¹⁹⁶

119. It is clear that Mr Gaddafi’s conviction *in absentia* affords him an absolute right to a re-trial and results in an unenforceable sentence. Domestic proceedings of this nature cannot in any way be deemed a final judgment, and thus do not satisfy the principle of *ne bis in idem* as provided for in articles 17(1)(c) and 20(3) of the Statute.

120. As the facts enunciated above demonstrate, it would be wholly inconsistent with the interests of justice to consider that Mr Gaddafi was protected by the principle of *ne bis in idem* given that he is a fugitive from justice both in Libya and before the ICC, there has been no final judgment rendered against him by any court, an enforceable sentence has not been imposed, and, if ever captured, he would be entitled to a new trial.

c. The Pre-Trial Chamber should not review the decision of the Tripoli Court of Assize to convict Mr Gaddafi *in absentia*

121. The Defence submits that “it is not at all clear to the Defence that the Libyan Court was correct to regard the trial of Dr. Gaddafi as a trial in absentia” and invites the Chamber to “reject the Libyan Trial Judgement’s apparent qualification of Mr.

¹⁹⁴ *Semanza* Decision, para. 74.

¹⁹⁵ ICCPR, article 14(7) (“No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with law and penal procedure of each country.”); Protocol No. 7 to the European Convention on Human Rights, article 4(1) (“No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which [a person] has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.”)

¹⁹⁶ *Al-Senussi* Admissibility Judgment, para. 229.

Gaddafi's conviction as issued 'in absentia', and instead accept that the verdict against him was 'in presentia' pursuant to Libyan law".¹⁹⁷

122. As per the applicable jurisprudence of the Court, it is not for this Chamber to review the decision of the Tripoli Court of Assize to convict Mr Gaddafi *in absentia*. To do so would require the Chamber to pronounce on the correctness of the Libyan national court's implementation of its own domestic laws and procedures. The Court would, in effect, be substituting its own decision for that of the national court. This would vest in the Court a power of review over the application of national law not contemplated by the Statute.

123. The Appeals Chamber has made it clear that in determining an admissibility challenge under article 17:

It was *not* the role of the Trial Chamber to review the decisions of the 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.¹⁹⁸

124. In determining what might constitute "compelling evidence", the Chamber should take into consideration the prohibition in article 69(8) against ruling on the application of State's national law.¹⁹⁹ Although article 69(8) concerns decisions on the relevance or admissibility of evidence collected by a State, the principle underpinning the provision is highly relevant. Article 69(8) was "designed to make sure that the Court would not interfere with State sovereignty and 'get involved in

¹⁹⁷ Admissibility Challenge, para. 47.

¹⁹⁸ *Prosecutor v. Bemba*, 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", 23 October 2010 ("*Bemba* Admissibility Judgment"), ICC-01/05-01/08-962, para. 66.

¹⁹⁹ *Prosecutor v. Bemba, Kilolo, Mangenda, Babala & Arido*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", 8 March 2018, ICC-01/05-01/13-2275-Red ("*Bemba* Appeals Judgment"), para. 287.

intricate inquiries about domestic laws and procedures’’.²⁰⁰ This principle militates in favour of the Chamber applying a high threshold when considering what might constitute “compelling evidence” within the meaning of the *Bemba* Admissibility Judgment.

125. Further guidance may be found in Trial Chamber III’s decision on this same issue, which stated “[t]he Chamber has not attempted, nor should it attempt, to provide a definitive interpretation of the criminal law of the CAR”.²⁰¹ It further found that “only in exceptional circumstances should this Chamber seek to go behind a national judicial decision”, noting in that case the “lack of evidence of material impropriety or irregularity in those proceedings”.²⁰²

126. 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. The facts outlined in paragraphs 127-130 below demonstrate that the Tripoli Court of Assize came to a reasoned decision on the matter based on available facts and applying Libyan procedural law.²⁰³ There is no evidence to suggest any material impropriety or irregularity in the Tripoli Court of Assize’s decision to characterise the proceedings as undertaken *in absentia*.

127. As detailed in the Factual Background, Mr Gaddafi attended four sessions of his trial proceedings before the Tripoli Court of Assize by video-link from the Zintan Court.²⁰⁴ In July 2014, Mr Al-’Atiri ceased cooperation with the Libyan authorities.²⁰⁵ Following this, Mr Gaddafi did not attend any further sessions.²⁰⁶ On 14 December 2014, the Prosecutor General’s Office requested the Head of the Judicial Police in

²⁰⁰ *Prosecutor v. Bemba, Kilolo, Mangenda, Babala & Arido*, Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7), 29 April 2016, ICC-01/05-01/13-1854, para. 37. *See also, Bemba Appeals Judgment*, para. 287 and fn. 653-654.

²⁰¹ *Bemba Admissibility Decision*, para. 233.

²⁰² *Bemba Admissibility Decision*, para. 235.

²⁰³ *See also*, Annex 8, Response to Request for Assistance, LBY-OTP-0065-0077 (Translation at LBY-OTP-0065-0426 at 0428).

²⁰⁴ *See above*, paras. 34-35 and 37.

²⁰⁵ *See above*, para. 40.

²⁰⁶ *See above*, para. 41.

Zintan to transfer Mr Gaddafi from the ZRRI to custody in Tripoli.²⁰⁷

128. On 13 April 2015, the Tripoli Court of Assize issued a decision requesting the Prosecution to ask the Head of the Judicial Police why Mr Gaddafi had failed to appear.²⁰⁸ On 14 April 2015, the Head of the Judicial Police responded to the Prosecutor General's Office that Mr Gaddafi could not be transferred to custody in Tripoli because "the prisons located in the town of Zintan are no longer under the Government's authority or legitimacy".²⁰⁹ [REDACTED].²¹⁰

129. On 20 April 2015, the Prosecution submitted the response of the Head of the Judicial Police to the Tripoli Court of Assize, which decided to continue Mr Gaddafi's trial proceedings in his absence.²¹¹

130. In its judgment rendered on 28 July 2015, the Tripoli Court of Assize detailed its reasons for proceeding *in absentia*:

Whereas it has come to the knowledge of the Court through briefings on public affairs that Defendant No. 1 [Sayf] al-Islam Muammar Gaddafi said during one of his trial sessions before the Court of Appeal in al-Zawiyah, Zintan Criminal Circuit, that he wishes to be prosecuted in that city. Therefore, his non-appearance before the Court was the result of his own free will and his belief that his jailers do not have jurisdiction, as was mentioned by the [Head] of the Judicial Police in his Letter No. 8-9-1648 dated 14/4/2015 AD attached to the case file. Therefore, he is deemed a fugitive from justice.

²⁰⁷ Annex 8.1, Annex 1 to Response to Request for Assistance, Letter from the Prosecutor General's Office to the Head of the Judicial Police in Zintan, 15 December 2015, LBY-OTP-0065-0087 (Translation at LBY-OTP-0065-0437).

²⁰⁸ [REDACTED]; Tripoli Court of Assize Judgment, p. 72 (p. 69 of the judgment). The date of the hearing is found at p. 66 (p. 63 of the judgment).

²⁰⁹ Annex 8.2, Annex 2 to the Response to the Request for Assistance, Letter from the Head of the Judicial Police in Zintan to the Prosecutor General's Office, 14 April 2015, LBY-OTP-0065-0088 (Translation at LBY-OTP-0065-0439). *See also*, Tripoli Court of Assize Judgment, p. 73 (p. 70 of the judgment).

²¹⁰ [REDACTED].

²¹¹ Tripoli Court of Assize Judgment, p. 75 (p. 72 of the judgment). The date of the hearing is found at p. 72 (p. 69 of the judgment).

Whereas the Court decided in the session held on 16/4/2015 AD²¹² to proceed with his case in his absence. Therefore, based on the above and in conformity with Article (211) of the Code of Criminal Procedure, a judgement in absentia shall be issued regarding the accused as described in the Statement.²¹³

131. Even if, hypothetically, the Tripoli Court of Assize had erred in rendering a judgment against Mr Gaddafi *in absentia*, there is no factual or legal basis for the Chamber to conclude, as asserted by the Defence,²¹⁴ that the judgment was thus issued *in presentia*.

132. Further, it is significant that the Tripoli Court of Assize did not render its judgment pursuant to article 212 of the Libyan Code of Criminal Procedure, which provides for the issuance of verdicts *in presentia*.²¹⁵

133. The fact that Mr Gaddafi was convicted *in absentia* and is entitled to a new trial in person appears to have been acknowledged by Mr Gaddafi's legal counsel. The United Nations Panel of Experts on Libya, in its report dated 5 September 2018, noted that it had met with a lawyer for Mr Gaddafi who stated that Mr Gaddafi had been sentenced to death *in absentia* but that "[s]ince due process was not followed in the conduct of the trial, he would be eligible for a re-trial." At the same time, however, the lawyer reportedly stated that Mr Gaddafi was free by virtue of Law No.

²¹² The reference to the date of 16 April 2015 appears to be a mistake as the record of the trial proceedings indicates that the decision to proceed in the absence of Mr Gaddafi was made on 20 April 2015, *see*, Tripoli Court of Assize Judgment, p. 75 (p. 72 of the judgment). The date of the hearing is found on p. 72 (p. 69 of the judgment).

²¹³ Tripoli Court of Assize Judgment, p. 149 (p. 146 of the judgment). Article 211 of the Libyan Code of Criminal Procedure provides "In the event the subpoenaed litigant does not duly appear before the court at the date mentioned in the subpoena and does not send an attorney in cases where he is authorised to do so, an *in absentia* verdict shall be rendered after reviewing the documents. However, if the subpoena was delivered to the litigant in person, the court shall – if he did not submit an excuse justifying his absence – decide to consider the verdict in *presentia*, while revealing the reasons upon which it has based its decision." *See*, Annex G to Admissibility Challenge, ICC-01/11-01/11-640-AnxG, p. 46.

²¹⁴ Admissibility Challenge, para. 47.

²¹⁵ Libyan Code of Criminal Procedure, Annex G to Admissibility Challenge, ICC-01/11-01/11-640-AnxG, p. 46. Article 212 provides "Persons for Whom the Verdict Shall Be Considered *in Presentia*: The verdict shall be considered *in presentia* for all litigants appearing upon summons on the action, even if the litigant leaves the hearing afterwards or does not appear in deferred hearings without an acceptable excuse."

6 of 2015.²¹⁶

2) The proceedings against Mr Gaddafi in Libya relate to “substantially the same conduct” as the case before the Court

134. Mr Gaddafi’s *in absentia* conviction is not final for the reasons discussed above. Therefore, to decide the Admissibility Challenge, it is not necessary for the Chamber to make a determination of whether Mr Gaddafi’s case before the Tripoli Court of Assize related to the same conduct as his case before the ICC. Nevertheless, to the extent it may assist the Chamber the Prosecution will address this argument.

Mr Gaddafi’s case before the Tripoli Court of Assize relates to “substantially” the same conduct as the case as alleged at the ICC

135. On the basis of the information provided in the judgment of the Tripoli Court of Assize, and consistent with the position taken in relation to the investigation of this case, the Prosecution agrees that Mr Gaddafi’s case before that court relates to “substantially” the same conduct as alleged at the ICC.²¹⁷

136. In the *Gaddafi* case, the Appeals Chamber repeated the finding of the Appeals Chamber in the *Ruto* case²¹⁸ that the “national investigation must cover the same individual and substantially the same conduct as alleged in proceedings before the Court”.²¹⁹

137. The Appeals Chamber further found that:

²¹⁶ Annex 18, United Nations, Final report of the Panel of Experts on Libya established pursuant to resolution 1973(2011), S/2018/812, 5 September 2018, Annex 59, LBY-OTP-0065-0126 at 0369, para. 15.

²¹⁷ *Prosecutor v. Gaddafi & Al-Senussi*, Prosecution response to Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, 4 June 2012, ICC-01/11-01/11-167-Red, para. 2, in which the Prosecution stated, on the basis of investigation reports received from the Government of Libya, that the “case being investigated by Libyan authorities is substantially the same, almost identical, as the case presented by the Office of the Prosecutor.”

²¹⁸ *Prosecutor v. Ruto, Kosgey & Sang*, 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-01/09-01/11-307, para. 40.

²¹⁹ *Gaddafi* Admissibility Judgment, para. 63.

[T]he parameters of a “case”, as referred to in article 17(1)(a) of the Statute, are defined by the suspect under investigation and the conduct that gives rise to criminal liability under the Statute. The “conduct” that defines the “case”, in situations such as the present, is both that of the suspect and that described in the incidents under investigation which is imputed to the suspect. In assessing admissibility, what is required is a judicial assessment of whether the case that the State is investigating sufficiently mirrors the one that the Prosecutor is investigating.²²⁰

138. The Prosecution agrees with the Defence that this reasoning by the Appeals Chamber in relation to an admissibility challenge pursuant to article 17(1)(a), is equally applicable to a challenge pursuant to article 17(1)(c).²²¹

Mr Gaddafi’s conduct and the conduct described in the incidents imputed to Mr Gaddafi in the Tripoli Court of Assize case sufficiently mirrors the ICC case

139. There is no dispute that Mr Gaddafi is the “person concerned” for the purposes of article 17(1)(c). As regards the “conduct” that defines the case, the judgment of the Tripoli Court of Assize suggests that Mr Gaddafi’s trial *in absentia* concerned substantially the same conduct at issue in the case before the ICC, in terms of both Mr Gaddafi’s conduct and the conduct described in the incidents that are imputed to Mr Gaddafi.

140. As the Defence note,²²² the Pre-Trial Chamber has stated that in making a comparison between the conduct covered by Libya’s investigation and Mr Gaddafi’s ICC case:

[T]he Chamber will assess, on the basis of the evidence provided by Libya, whether the alleged domestic investigation addresses the same conduct

²²⁰ *Gaddafi* Admissibility Judgment, para. 85 (footnotes omitted).

²²¹ Admissibility Challenge, para. 50.

²²² Admissibility Challenge, para. 59. Note that fn. 107 of the Admissibility Challenge appears to mistakenly refer to the *Al-Senussi* Admissibility Decision instead of the *Gaddafi* Admissibility Decision.

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 in Benghazi, Misrata, Tripoli and other neighbouring cities, from 15 February 2011 to at least 28 February 2011.²²³

141. The Prosecution agrees with the Defence that based on the judgment of the Tripoli Court of Assize, including the Indictment,²²⁴ the Facts of the Case²²⁵ and the Grounds of the Judgment²²⁶ referenced therein, the proceedings in that case covered substantially the same conduct that underlies the Warrant of Arrest and the Article 58 Decision.

142. The Defence provide, in Annex H to the Admissibility Challenge, a chart that compares Mr Gaddafi's case, as described in the Article 58 Application, the Warrant of Arrest and the Article 58 Decision, with Mr Gaddafi's case, as detailed in the Tripoli Court of Assize judgment.²²⁷

143. The Prosecution agrees that the comparative chart in Annex H²²⁸ demonstrates that the case prosecuted in the Tripoli Court of Assize sufficiently mirrors Mr Gaddafi's case before the ICC.²²⁹ The Prosecution takes this position notwithstanding

²²³ *Gaddafi* Admissibility Decision, para. 83.

²²⁴ Tripoli Court of Assize Judgment, p. 6-14 (p. 3-11 of the judgment).

²²⁵ Tripoli Court of Assize Judgment, p. 83-148 (p. 80-145 of the judgment).

²²⁶ Tripoli Court of Assize Judgment, p. 149-347 (p. 146-344 of the judgment).

²²⁷ The Prosecution also does not dispute the accuracy of paras. 60-62 of the Admissibility Challenge which addresses the evidence led at trial, and the findings of the Tripoli Court of Assize in Mr Gaddafi's *in absentia* judgment.

²²⁸ Annex H to the Admissibility Challenge, ICC-01/11-01/11-640-AnxH.

²²⁹ The Prosecution notes that in relation to the attack on Jamal Abdun Naser Street on 16 February 2011 (referred to in the Article 58 Decision, para. 36), p. 31 of Annex H to the Admissibility Challenge should include a reference to the section of the Indictment contained in the Tripoli Court of Assize Judgment at p. 6. This section also relates to the attack on Juliyana/Geliana Bridge on 17 February 2011 (referred to in the Article 58 Decision, paras. 36 and 53).

the fact that certain incidents imputed to Mr Gaddafi in the Article 58 Decision are not referred to in the Tripoli Court of Assize judgment in relation to Mr Gaddafi.²³⁰

144. The Prosecution also notes that the Arrest Warrant and the Article 58 Decision determined that there were reasonable grounds to believe that Mr Gaddafi committed crimes of persecution, although he was not prosecuted for persecution in his domestic case. Nevertheless, in relation to this same issue, the *Al-Senussi* Appeals Chamber has made it clear that it is not necessary for a crime to be prosecuted as an international crime domestically, but instead, “what is required is that the crimes prosecuted at the domestic level cover ‘substantially the same conduct’ as those charged by the Court.” On this basis, the Prosecution agrees with the Defence that “the substance of the charge of persecution, specifically the directing of violent attacks against civilian demonstrators resulting in killings and the kidnapping of individuals, formed part of the Libyan national proceedings.”²³¹

145. On the basis of the above, the Prosecution agrees that the proceedings that resulted in the Tripoli Court of Assize judgment, issued *in absentia* in relation to Mr Gaddafi, did relate to substantially the same conduct as Mr Gaddafi’s ICC case.

3) Whether the proceedings against Mr Gaddafi in Libya were for the purpose of shielding him from criminal responsibility for crimes within the jurisdiction of the Court – article 20(3)(a) of the Statute

a. Law No. 6 of 2015 was not validly applied to Mr Gaddafi’s case and has no effect on the judgment rendered by the Tripoli Court of Assize

²³⁰ See e.g. in relation to attacks on journalists (referred to in the Article 58 Decision, paras. 30 and 43), p. 48 of Annex H to the Admissibility Challenge refers to the Tripoli Court of Assize’s findings in relation to Milad Daman, rather than Mr Gaddafi. See also, in relation to torture (as referred in the Article 58 Decision, paras. 46-48), p. 49-50 of Annex H refer to “Facts” cited by Defence that do not appear to relate to Mr Gaddafi, who does not appear to have been charged with or convicted of torture in the domestic case. In addition, as the Defence notes, the “cover-up” campaign (referred to in the Article 58 Decision, para. 40) was not part of Mr Gaddafi’s domestic case, see, Annex H, p. 63.

²³¹ Admissibility Challenge, para. 63.

146. The Government of Libya has stated that Law No. 6 of 2015 does not apply to Mr Gaddafi's case and has no impact on the *in absentia* judgment rendered against him by the Tripoli Court of Assize.²³² The Government of Libya has also stated that Law No. 6 of 2015 is not valid.²³³ Regardless of the law's validity, consistent with statements by various other authorities in Libya, the Government of Libya has also made clear that the substantive and procedural requirements for the application of Law No. 6 of 2015 to Mr Gaddafi's case have not been met. This position is also supported by a plain reading of Law No. 6 of 2015.

147. As the Factual Background makes clear, after the House of Representatives in Tobruk issued Law No. 6 of 2015 on 7 September 2015, two attempts were made to apply it to Mr Gaddafi's case: first in April 2016, and then again in June 2017.

148. Mr Gaddafi's first purported release pursuant to Law No. 6 of 2015 took place on 12 April 2016. [REDACTED]²³⁴ [REDACTED].²³⁵

149. [REDACTED].²³⁶ [REDACTED].²³⁷

150. On 10 April 2016, Mr Omrane, Minister of Justice in the Al-Bayda Transitional Government, wrote to the Zintan Prosecutor's Office to request the release of Mr Gaddafi under Law No. 6 of 2015 [REDACTED].²³⁸ [REDACTED].²³⁹ [REDACTED].²⁴⁰

151. On 15 May 2016, the Zintan Prosecutor's Office responded to the request from Mr Omrane, Minister of Justice in the Al-Bayda Transitional Government, to release Mr Gaddafi pursuant to Law No. 6 of 2015, rejecting the application for amnesty of

²³² Annex 8, Response to the Request for Assistance, LBY-OTP-0065-0077 (Translation at LBY-OTP-0065-0426 at 0432-0434). *See also*, Annex 3, Statement of the Presidency Council on the recent statement concerning the release of the accused Saif al-Islam Gaddafi, 10 July 2016, LBY-OTP-0048-0404 (Translation at LBY-OTP-0063-0383).

²³³ Annex 8, Response to Request for Assistance, LBY-OTP-0065-0077 (Translation at LBY-OTP-0065-0426 at 0430-0432).

²³⁴ Exhibit 25 to Witness Statement of Alatairi, p. 200-201 (Translation at p. 202-203).

²³⁵ Exhibit 25 to Witness Statement of Alatairi, p. 200-201 (Translation at p. 202-203).

²³⁶ Exhibit 26 to Witness Statement of Alatairi, p. 204-208 (Translation at p. 209-213).

²³⁷ Exhibit 26 to Witness Statement of Alatairi, p. 204-208 (Translation at p. 209-213).

²³⁸ [REDACTED].

²³⁹ [REDACTED].

²⁴⁰ [REDACTED].

Mr Gaddafi because the proper procedure was not followed. The Prosecutor's Office stated:

For you to apply to the Prosecutor's Office [in Zintan] to release the Accused in the manner set out in the letter constitutes interference by the executive authority in the jurisdiction of the judicial authority and an absolute bypassing of the entire judicial apparatus and its institutions.²⁴¹

152. On 8 July 2016, Mr Al-'Atiri stated in a telephone interview broadcast on France 24 that he had applied Law No. 6 of 2015 to Mr Gaddafi's case, and appeared to confirm that he had released Mr Gaddafi.²⁴²

153. On 10 July 2016, the Presidency Council of the GNA issued its statement, referred to above, which made clear "no amnesty or pardon is applicable" to Mr Gaddafi.²⁴³

154. On 10 June 2017, the Abu-Bakr al-Siddiq Battalion again announced the release of Mr Gaddafi, and stated this decision was based on letters from the Minister of Justice in the Al-Bayda Transitional Government and the demand for Mr Gaddafi's release under the amnesty law made by the Undersecretary of the Ministry of Justice in a press conference.²⁴⁴ The Defence have offered no explanation for this second purported release of Mr Gaddafi.

²⁴¹ Annex 11, Letter from the Zintan Prosecutor's Office to the Minister of Justice in the Al-Bayda Transitional Government, 17 May 2016, LBY-OTP-0064-0983 (Translation at LBY-OTP-0064-3168 at 3170).

²⁴² Annex 19, France 24, Video "Exclusive: Prison leader of Saif al-Islam Gaddafi confirms his release", 8 July 2016, LBY-OTP-0065-0109 (Annex 19.1, Translation at LBY-OTP-0065-0422). *See esp.* at 0425, ln. 60-79.

²⁴³ Annex 3, Statement of the Presidency Council on the recent statement concerning the release of the Accused Saif al-Islam Gaddafi, 10 July 2016, LBY-OTP-0048-0404 (Translation at LBY-OTP-0063-0383).

²⁴⁴ Annex 13, Statement of the Abu-Bakr al-Siddiq Battalion, The Guard Company, 14 Ramadan 1438 (equivalent to 10 June 2017), LBY-OTP-0064-0980 (Translation at LBY-OTP-0064-3162). *See also*, Annex 14, Video7, Video "Libyan government official reveals new details on the fate of Saif Gaddafi", 27 May 2017, LBY-OTP-0064-3067 (Annex 14.1, Translation at LBY-OTP-0065-0101 at 0104).

155. Various Libyan authorities issued statements denouncing this second purported release of Mr Gaddafi, including the Municipal and Military Councils of Zintan,²⁴⁵ and the Libyan Prosecutor General's Office in Tripoli.²⁴⁶

156. The Government of Libya, which the Chamber has recognised as the official channel of communication between Libya and the Court, has stated that Law No. 6 of 2015 does not apply to Mr Gaddafi.²⁴⁷ The Government of Libya's position is supported by a number of authorities in Libya, including the National Defence and Security Committee of the House of Representatives.²⁴⁸

157. By contrast, it appears that the only proponents for the application of Law No. 6 of 2015 to Mr Gaddafi are [REDACTED], together with the Minister of Justice and his Under-Secretary in the Al-Bayda Transitional Government – a government that the Chamber has ruled is not an avenue of communication available to the Court since the GNA is the body recognised by the international community to represent Libya.²⁴⁹

158. On this basis, the Defence is incorrect in their assertion that "Dr. Gaddafi was released from prison in Zintan on the authority and upon the instruction of the Government of Libya, pursuant to Law 6 of 2015."²⁵⁰

The substantive and procedural requirements of Law No. 6 of 2015 have not been met

159. The Government of Libya has made it clear that the substantive and procedural requirements for the application of Law No. 6 of 2015 to Mr Gaddafi's

²⁴⁵ Annex 5, Statement of the Municipal Council and the Military Council on Abu-Bakr al-Siddiq Battalion's statement, 11 June 2017, LBY-OTP-0064-0982 (Translation at LBY-OTP-0064-3166).

²⁴⁶ Annex 4, Statement of Prosecutor General's Office, 11 June 2017, LBY-OTP-0064-0981 (Translation at LBY-OTP-0064-3164).

²⁴⁷ Annex 8, Response to Request for Assistance, LBY-OTP-0065-0077 (Translation at LBY-OTP-0065-0426 at 0432-0434).

²⁴⁸ Annex 6, Statement of the Libyan House of Representatives' National Defence and Security Committee on the members of the previous regime, 11 June 2017, LBY-OTP-0064-0979 (Translation at LBY-OTP-0064-3160).

²⁴⁹ Decision on Al-'Atiri Request, paras. 15-16.

²⁵⁰ Admissibility Challenge, para. 26.

case have not been met. This is supported by a plain reading of Law No. 6 of 2015.

160. In referring to Law No. 6 of 2015, the Defence note that article 1 provides that all Libyans who committed offences during the period from 15 February 2011 until the issuance of the law “should be eligible for a general amnesty and that received sentences and their subsequent criminal impact should be dropped.” The Defence simply note that articles 2 and 3 place “certain conditions” on the application of article 1, and that article 7 provides “that any amnesty [...] was conditional and would no longer apply if the person included in the general amnesty committed a ‘wilful’ felony within 5 years from the date of when the proceedings of the relevant criminal case were discontinued.”²⁵¹

161. In its statement on 10 July 2016, the Presidency Council of the GNA stated that “no amnesty or pardon” could apply to Mr Gaddafi’s crimes.²⁵² More specifically, the Government of Libya has stated that, pursuant to article 3 of Law No. 6 of 2015, “the crimes involving murders and corruption attributed to [Mr Gaddafi] are excluded from the application of [this law]”.²⁵³

162. Furthermore, the Government of Libya, by reference to articles 6 and 9 of Law No. 6 of 2015, has stated that “the jurisdiction to apply provisions of this law lies with the competent judicial authority legally mandated to look into the case.”²⁵⁴ Similarly, the Acting Prosecutor General has noted that “the Amnesty Law can only take effect through procedures and the fulfilment of legal requirements which can only be executed by the judicial authority, which has the sole and exclusive

²⁵¹ Admissibility Challenge, para. 25.

²⁵² Annex 3, Statement of the Presidency Council on the recent statement concerning the release of the Accused Saif al-Islam Gaddafi, 10 July 2016, LBY-OTP-0048-0404 (Translation at LBY-OTP-0063-0383).

²⁵³ Annex 8, Response to Request for Assistance, LBY-OTP-0065-0077 (Translation at LBY-OTP-0065-0426 at 0434). The Prosecution notes that Mr Gaddafi was also convicted of other crimes which appear, on its face, to be excluded from the amnesty pursuant to article 2. *See e.g.* rape/sexual violence (Annex H, p. 55-60 and Tripoli Court of Assize Judgment, p. 152-161 (p. 149-158 of the judgment)).

²⁵⁴ Annex 8, Response to Request for Assistance, LBY-OTP-0065-0077 (Translation at LBY-OTP-0065-0426 at 0434).

competence.”²⁵⁵ The Government of Libya has stated that the competent judicial authority has not issued a decision applying Law No. 6 of 2015 to Mr Gaddafi’s case.²⁵⁶

163. This interpretation of Law No. 6 of 2015 by the Libyan authorities, together with a plain reading of the law, establishes that Law No. 6 of 2015 excludes the types of crimes that Mr Gaddafi was convicted of and that the procedures set out in the law have not been followed. As such it has no impact on the *in absentia* judgment rendered against Mr Gaddafi.

b. Any application of Law No. 6 of 2015 to Mr Gaddafi’s case was for the purpose of shielding him from criminal responsibility for crimes within the jurisdiction of the Court

164. In the event the Chamber finds that Mr Gaddafi has been tried and a final judgment rendered within the terms of articles 17(1)(c) and 20(3), and that Law No. 6 of 2015 has been validly applied to his case, the Chamber should conclude that the national proceedings, including the purported application of Law No. 6 of 2015, were undertaken for the purpose of shielding Mr Gaddafi from criminal responsibility for crimes within the jurisdiction of the Court.

165. Mr Gaddafi was convicted *in absentia* after having been found a fugitive from justice by the Tripoli Court of Assize and sentenced to death on 28 July 2015. Less than a year later, he was purportedly amnestied pursuant to Law No. 6 of 2015 by authorities who were not part of the GNA, the *de jure* recognised authority

²⁵⁵ Annex 4, Statement of Prosecutor General’s Office, 11 June 2017, LBY-OTP-0064-0981 (Translation at LBY-OTP-0064-3164). The Acting Prosecutor General also stated that “for the accused to be pardoned of some of the charges he was sentenced for, the persons avenging the blood of their loved ones must issue a withdrawal”, which appears to be a reference to article 2(3) of Law No. 6 of 2015.

²⁵⁶ Annex 8, Response to Request for Assistance, LBY-OTP-0065-0077 (Translation at LBY-OTP-0065-0426 at 0434).

representing Libya.²⁵⁷ Mr Gaddafi continues to be considered a fugitive from the State.²⁵⁸

166. The Defence claim that any executive decision made by Libya after the trial verdict was pronounced is immaterial to this application, as the decision is not a judicial act and does not form part of the ‘proceedings’ within the meaning of article 20(3). As a result, according to the Defence, the Chamber should determine whether the proceedings were for the purpose of shielding, without taking into account Law No. 6 of 2015.²⁵⁹

167. The Defence’s position is untenable. Assuming *arguendo* that Law No. 6 of 2015 had been applied and the procedure followed, a plain reading of Law No. 6 of 2015 indicates that judicial intervention is required to terminate the proceedings. In particular, article 6 requires the competent judicial authority to provide a reasoned decision staying the criminal proceedings once the conditions for amnesty have been met.”²⁶⁰ In addition, according to article 7, the competent Prosecutor General would cancel the amnesty if the convicted person re-offends within a five-year probation period.²⁶¹

168. As noted above, the Defence have not provided any reasoned decision by the competent judicial authority in Libya, as appears to be required under article 6 of Law No. 6 of 2015. Any such decision would be considered part of the “proceedings of the court” under article 20(3).

²⁵⁷ *Prosecutor v. 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, para. 15.

²⁵⁸ Annex 8, Response to Request for Assistance, LBY-OTP-0065-0077 (Translation at LBY-OTP-0065-0426 at 0435).

²⁵⁹ Admissibility Challenge, para. 69.

²⁶⁰ Law No. 6 of 2015, article 6 (Registry translation at ICC-01/11-01/11-650-AnxIII-tENG).

²⁶¹ Law No. 6 of 2015, article 7 (Registry translation at ICC-01/11-01/11-650-AnxIII-tENG). In the Admissibility Challenge, the Defence recognise that a decision made pursuant to Law No. 6 of 2015 is part of, and affects, the proceedings in the Tripoli court. *See e.g.* at para. 26 the Defence assert that “[t]he effect of Law 6 of 2015, as it is applied to Dr. Gaddafi, was thus not *stricto sensu* an ‘amnesty’ (since he had already been convicted), but instead that any further criminal proceedings against him were ‘dropped’, save that, as provided by the law, they could be re-opened and the sentence imposed in full if he committed any new offences within a five year period.” *See also*, Admissibility Challenge, paras. 67, 87 and 88.

169. The Defence assert that the drafting history of article 20(3) confirms that article 20(3) was not intended to embrace executive action taken after the end of court proceedings.²⁶² However, a review of the drafting history does not support the Defence's proposition. Instead, it reveals that the drafters decided to "deliberately not include", as opposed to "deliberately reject" the addition of amnesties, pardons and alternative measures into the provision and leave such determination to the Chambers. Darryl Robinson, who assisted with the coordination of the relevant negotiations and the drafting of article 17,²⁶³ notes competing views on the issue of national amnesties and alternative measures to prosecution. He notes the drafters "wisely choose not to delve into these difficult questions" because agreement would have likely been impossible and it would have been "unwise to codify a comprehensive test to distinguish between acceptable and unacceptable reconciliation measures [...]."²⁶⁴

170. The Triffterer/Ambos commentary on the Rome Statute confirms that the Statute does not give a clear answer on the question of whether "proceedings" in article 20(3) cover the enforcement or penalty stage, and that this was deliberately not included in the final text. The margin notes explain that the comparison of the severity of sentences as a clear-cut rule was deemed too ambitious and controversial because of differences in criminal policies internationally.²⁶⁵

171. The Defence has referred to a number of cases before the European Court of Human Rights ("ECHR") and the Inter-American Court of Human Rights which provide criteria indicative of sham proceedings. The Prosecution observes that there are also a number of decisions from these bodies which have deemed amnesties and

²⁶² Admissibility Challenge, paras. 71-78.

²⁶³ D. Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, EJIL (2003), Vol. 14 No. 3, 481-505, at 483, fn. 6.

²⁶⁴ D. Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, EJIL (2003), Vol. 14 No. 3, 481-505, at 483.

²⁶⁵ Tallgren, I. and Reisinger Coracini, A., 'Article 20', in Triffterer, O. and Ambos, K., *Commentary on the Rome Statute of the International Criminal Court* (3rd edition, 2016), p. 925, margin note 44 and p. 930, margin note 55.

pardons as invalid because they prevent or exclude criminal responsibility but also because they “suppress the effects of a conviction” and are thus incompatible with the States’ duty to investigate, prosecute and punish serious crimes.²⁶⁶ In *Margus v Croatia*, the ECHR found that there was no *ne bis in idem* and the applicant could be re-tried even though he had been granted amnesty.²⁶⁷

172. Contrary to the Defence argument, the determination of shielding does not require the whole proceedings to be a sham.²⁶⁸ In some cases, shielding may result from a combination of factors that occurred throughout the proceedings. In others, shielding may result from one decision at a particular point in time that changes everything that has come before.

173. In the *Al-Senussi* Admissibility Judgment, the Appeals Chamber did not deal specifically with the issue of what was or was not included in “proceedings”, as it was concerned with the question of whether article 17 guaranteed the rights of the suspect.²⁶⁹ However, the Chamber did note that in early discussions in the Preparatory Committee on the Establishment of the International Criminal Court on what has become article 17, some discussion focused on whether the Court should

²⁶⁶ Inter-Am. Court H.R., *Barrios-Altos v. Peru*, Merits, Judgment of 14 March 2001, Series C, No. 75. At para. 41, the Court concluded “that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.” See also, *Huilca-Tecse v. Peru*, Merits, 3 March 2005, Series C No. 121, at para. 108 “[t]he State must guarantee that the domestic proceedings to investigate, prosecute and punish those responsible for the facts will be effective. As the Court has noted in other cases, it must abstain from using figures such as amnesty and prescription, and the establishment of measures designed to exclude responsibility, or measures intended to prevent criminal prosecution or suppress the effects of a conviction.”

²⁶⁷ ECHR, *Marguš v. Croatia*, Application No. 4455/10, Judgment, 27 May 2014. At para. 139, the Court noted: “[I]n the present case the applicant was granted amnesty for acts which amounted to grave breaches of fundamental human rights such as the intentional killing of civilians and inflicting grave bodily injury on a child, and the County Court’s reasoning referred to the applicant’s merits as a military officer. A growing tendency in international law is to see such amnesties as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights. Even if it were to be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims, the amnesty granted to the applicant in the instant case would still not be acceptable since there is nothing to indicate that there were any such circumstances.

²⁶⁸ Admissibility Challenge, paras. 67 and 86.

²⁶⁹ *Al-Senussi* Admissibility Judgment, para. 224.

intervene “where an operating national judicial system was being used as a shield” or to safeguard against sham trials or against “the risk of perpetrators of serious crimes being protected by national judiciaries or authorities.”²⁷⁰ Article 17(2)(a) reflects this. When determining “unwillingness”, the Court shall consider whether 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.

174. Thus, even if, contrary to the position of the Government of Libya, the Chamber considers that Law No. 6 of 2015 was validly applied to Mr Gaddafi’s domestic case, the application of this law should be considered part of the “proceedings” within the meaning of article 20(3), and the Chamber should find that these proceedings were undertaken for the purpose of shielding Mr Gaddafi from criminal responsibility.

4) Whether the trial proceedings against Mr Gaddafi were otherwise not conducted independently or impartially in accordance with the norms of due process recognised by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring Mr Gaddafi to justice – article 20(3)(b) of the Statute

175. On the basis of the above reasoning, the Chamber is not required to consider the applicability of the second exception to the principle of *ne bis in idem* contained in article 20(3)(b). Thus, the Chamber need not make a determination on whether the proceedings in Libya were conducted “independently or impartially in accordance with the norms of due process recognized by international law” and “in a manner which [...] was inconsistent with an intent to bring [Mr Gaddafi] to justice.”

176. This issue is moot since Mr Gaddafi has not been “tried by another court” for the purposes of articles 17(1)(c) and 20(3) and, if the Chamber considers that Mr

²⁷⁰ *Al-Senussi* Admissibility Judgment, para. 224, fn. 451-452.

Gaddafi has benefitted from the Law No. 6 of 2015, then this would amount to shielding for the purposes of the first exception to *ne bis in idem* contained in article 20(3)(a).

177. In reference to the high threshold articulated by the *Al-Senussi* Appeals Chamber in relation to article 17(2)(c),²⁷¹ the Prosecution notes the Defence position that, despite the existence of procedural flaws and infringements on Mr Gaddafi's rights, "[n]evertheless, a recognisable trial did occur, *prima facie* the violations were not so egregious that the national proceedings could be said to provide 'no genuine form of justice'".²⁷²

178. The Defence further state that:

Dr Gaddafi does not argue that his fair trial rights were egregiously violated. His instructions in this regard are specific and he signs this filing along with counsel. The right to a fair hearing is invested in him. It would be unusual to find a situation in which another party or participant could challenge the fairness of a trial, in circumstances where the victim of that alleged unfairness has made an informed choice not to do so.²⁷³

179. In relation to Mr Gaddafi's fair trial rights, the Prosecution notes the report by Mark Ellis²⁷⁴ and the UNSMIL Report,²⁷⁵ annexed to the Admissibility Challenge, as

²⁷¹ In *Al-Senussi*, the Appeals Chamber observed the similarity between article 17(2)(c) and article 20(3)(b) and concluded "it is reasonable to assume that they were intended to have the same meaning." See, *Al-Senussi* Admissibility Judgment, para. 222. The Appeals Chamber went on to conclude that "[t]here may be circumstances, depending on the facts of the individual case, whereby violations of the rights of the suspects are so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the suspects so they should be deemed, in those circumstances, to be "inconsistent with an intent to bring that person to justice." See, *Al-Senussi* Admissibility Judgment, para. 230.

²⁷² Admissibility Challenge, para. 91.

²⁷³ Admissibility Challenge, para. 99. At para. 94, the Defence cite para. 222 of the *Al-Senussi* Admissibility Judgment in which the Appeal's Chamber observed that "[i]t is less easy to imagine that there was an intention for an accused to be tried again at this Court for the same conduct that had already been tried nationally on the basis that the domestic trial did not fully comply with international standards of due process."

²⁷⁴ Ellis, M., "Trial of the Libyan regime, An investigation into international fair trial standards", November 2015, Annex F to the Admissibility Challenge, ICC-01/11-01/11-640-AnxF.

²⁷⁵ UNSMIL Report. See also, Annex 15, African Court on Human and People's Rights v. Libya, Application 002/2013, Judgment, LBY-OTP-0064-3110. This judgment, referred to in the UNSMIL Report, found that Libya had violated the rights to liberty and fair trial by holding Mr Gaddafi in secret detention.

well as the observations of the Libyan Prosecutor General's Office on an advance copy of the UNSMIL Report.²⁷⁶

180. Given that it is not necessary for the Chamber to make a determination in relation to whether the exception under article 20(3)(b) applies to Mr Gaddafi's case, the Prosecution does not consider it necessary to take a position on this issue.²⁷⁷

5) The case against Mr Gaddafi remains admissible before the Court under any provision of article 17 of the Statute

181. The Defence has not discharged its burden of proof to show that the case against Mr Gaddafi is inadmissible before the Court under articles 17(1)(c) and 20(3) of the Statute. In the event that the Chamber wishes to consider whether articles 17(1)(a) and (b) apply on the present facts,²⁷⁸ the Prosecution submits that, although the Government of Libya is attempting to prosecute Mr Gaddafi in relation to the same case as before the Court²⁷⁹ it remains "unable" to genuinely to carry out the prosecution within the meaning of article 17(3), or, depending on the Chamber's findings in relation to Law No. 6 of 2015, "unwilling", within the meaning of article 17(2)(a).

182. Libya remains unable to prosecute Mr Gaddafi because it cannot secure the custody of him into State authority.²⁸⁰ In the *Gaddafi* Admissibility Decision, Pre-Trial Chamber I found that Libya's inability to "secure the transfer of Mr Gaddafi from his

²⁷⁶ Annex 16, Letter from Libyan Prosecutor General's Office to the ICC Prosecutor, 13 July 2017, LBY-OTP-0053-0259 (Translation at LBY-OTP-0064-0940). *See also*, Annex 17, Letter from the Libyan Prosecutor General's Office to UNSMIL, 19 April 2016, LBY-OTP-0064-0887 (Translation at LBY-OTP-0064-0967).

²⁷⁷ While the Prosecution considers this issue moot and therefore takes no position, the Prosecution notes that contrary to the Defence argument in para. 100 of the Admissibility Challenge, the fact that the Prosecution has not requested the Chamber to review the admissibility of the case against Mr Al-Senussi does not mean that the Prosecution "must be presumed [...] to have accepted [...] that any violations of due process rights were not so egregiously unfair that the national proceedings were incapable of providing justice" in relation to Mr Gaddafi's case. The Tripoli Court of Assize judgment demonstrates that on the facts, the proceedings in relation to Mr Al-Senussi differed significantly from the proceedings against Mr Gaddafi. For example, unlike Mr Gaddafi, Mr Al-Senussi was not deemed a fugitive from the proceedings and convicted *in absentia*.

²⁷⁸ Under article 19(1), the Chamber may exercise its *proprio motu* power to determine the admissibility of the case under article 17.

²⁷⁹ *See above*, paras. 134-145.

²⁸⁰ *See above*, paras. 83-96.

place of detention under the custody of the Zintan militia into State authority”²⁸¹ was a consequence of its national system not yet being able to be applied “in full in areas or aspects relevant to the case, being thus “unavailable” within the terms of article 17(3) of the Statute”.²⁸² Since Mr Gaddafi is presently a fugitive from justice, the Government of Libya is now even less able to prosecute him.

183. Furthermore, in the event that the Chamber finds that Law No. 6 of 2015 has been validly applied to Mr Gaddafi’s case, then the Prosecution relies on the same arguments as detailed above at paragraphs 164-174 to show that this would form part of the “proceedings” or constitute a “national decision” made for the purpose of shielding Mr Gaddafi from criminal responsibility, and thus would amount to unwillingness within the meaning of article 17(2)(a) of the Statute.

184. Thus, under any provision of article 17, Mr Gaddafi’s case would remain admissible before the Court.

G. CONCLUSION

185. For the reasons set out above, the Prosecution requests that the Chamber reject the Defence’s challenge to the admissibility of the case against Mr Gaddafi given: (i) Mr Gaddafi is a fugitive from justice and does not have standing to bring the Admissibility Challenge; (ii) the principle of *ne bis in idem* does not apply to Mr Gaddafi because there has been no final judgment rendered against him; and (iii) Law No. 6 of 2015 does not apply to Mr Gaddafi’s case, however, if the Chamber finds otherwise, it was applied for the purpose of shielding him from criminal responsibility. Thus, the Chamber should rule that the case against Mr Gaddafi remains admissible before the Court.

²⁸¹ *Gaddafi* Admissibility Decision, para. 206.

²⁸² *Gaddafi* Admissibility Decision, para. 205.



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Dated this 11th day of October 2018

At The Hague, The Netherlands