

1 International Criminal Court

2 Appeals Chamber

3 Situation: Libya

4 In the case of The Prosecutor v. Saif Al-Islam Gaddafi - ICC-01/11-01/11

5 Presiding Judge Chile Eboe-Osuji, Judge Howard Morrison, Judge Piotr Hofmański,

6 Judge Luz del Carmen Ibáñez Carranza and Judge Solomy Balungi Bossa

7 Appeals Hearing - Courtroom 1

8 Tuesday, 12 November 2019

9 (The hearing starts in open session at 9.35 a.m.)

10 THE COURT USHER: [9:35:30] All rise.

11 The International Criminal Court is now in session.

12 Please be seated.

13 PRESIDING JUDGE EBOE-OSUJI: [9:35:53] Thank you very much.

14 We will, without further ado, proceed where we left off yesterday. This morning,

15 we'll receive submissions from the representatives of the State of Libya.

16 But before we call on them, Mr Faal, you will have another opportunity to speak later,

17 you may want to look at the record of your submissions yesterday, when you said

18 that the filing that was made by the OPCD before the Pre-Trial Chamber, which is

19 part of the records of this Court, were not made on instructions of Mr Gaddafi the

20 first time.

21 Look at that to see whether you really meant to say that and the implications of it and

22 see -- well, I'll just leave it at that, when you speak. One of the difficulties with this

23 sort of thing is we don't know what will happen in this case and we'll be

24 reluctant to -- it will be a little strange if another lawyer -- not you -- comes up later

25 and says that what you said before this Chamber were not made on instructions of

1 Mr Gaddafi.

2 Think about that and then speak to it when it's your turn.

3 Now, the State of Libya.

4 MR EL-GEHANI: [9:37:55] Good morning, Mr President, and distinguished

5 members of the Appeals Chamber. My name is Ahmed El-Gehani, the

6 representative of the State of Libya to the ICC. I appear today before your Court

7 with His Excellency, the minister of justice, Mr Mohamed Abd Alwahed Lamlom.

8 Mr Lamlom, a former judge in the Bayda court, and he worked before as a prosecutor

9 in the same district.

10 We are very honoured to have the opportunity to address the Court on the subject of

11 the admissibility challenge submitted by Mr Saif Gaddafi.

12 The head of the Libyan delegation, Mr Lamlom, will address your Court in order to

13 express and update you about the Libyan government's view regarding the subject.

14 And in his speech, you will find answers - maybe direct or indirect - on the points or

15 the questions raised by the Court.

16 After that, may I take the floor from him to explain and to make clear some points.

17 I give the floor now to His Excellency, Mr Mohamed Lamlom, to address you in the

18 Arabic language.

19 PRESIDING JUDGE EBOE-OSUJI: [9:39:42] Thank you very much.

20 You may proceed, but remember you have 45 minutes.

21 MR EL-GEHANI: [9:39:43] Yes.

22 PRESIDING JUDGE EBOE-OSUJI: [9:39:44] Thank you.

23 MR EL-GEHANI: [9:39:45] Thank you.

24 PRESIDING JUDGE EBOE-OSUJI: [9:39:45] Between the both of you.

25 MR EL-GEHANI: [9:39:51] Yes, okay.

1 MR LAMLOM: [9:40:03] (Interpretation) Your Honours, distinguished members  
2 of the Appeals Chamber, ladies and gentlemen, good morning to you all.  
3 I am honoured to stand before the ICC here alongside Mr Ahmed El-Gehani, the  
4 representative of the State of Libya, in this hearing dedicated to the hearing filed by  
5 Mr Saif Al-Islam Gaddafi, which is the second filing of such nature on the matter of  
6 admissibility.  
7 In my capacity as minister of justice in the State of Libya and as a former judge in the  
8 Al-Bayda court in eastern Libya, I would like to point out the following elements to  
9 Your Honours. First, my government is strongly -- is a strong believer in the  
10 principle of the administration of justice via domestic judiciary and that is one way in  
11 which States manifest their sovereignty.  
12 However, States can go through emergencies or force majeure, which puts them in  
13 situations where the administration of criminal justice in a timely fashion becomes  
14 difficult. And that as far as the perpetrators of the most heinous and serious crimes  
15 are concerned, and these are war crimes, crimes against humanity and genocide.  
16 This is true, particularly when a domestic judiciary faces insurmountable challenges  
17 like the inability to bring defendants before courts, which provided that is not due to  
18 any willing underperformance or miscarriage of justice.  
19 In such situations, should the domestic judiciary be seriously willing and interested in  
20 prosecuting these criminals, then such a judiciary should make use of all legal means  
21 through national laws, including trialing people *in absentia*.  
22 And this is what the Libyan judiciary did, by trialing people on the most serious  
23 crimes while *in absentia*. And one example of that was Mr Saif Al-Islam Gaddafi,  
24 who was sentenced and convicted on the crimes attributed to him in absentia.  
25 This sentence is more -- is, rather, a deterrent sentence and not a sentence to be

1 implemented. Should he be apprehended, should he turn up to the court, this  
2 sentence becomes null and void and has no consequences as per the rules of Libyan  
3 judiciary and as per the rights of convicts.  
4 These convicts must be retrialled *in presentia* so that they can defend themselves  
5 directly *in presentia* through their own defence representatives that they choose,  
6 without any interference from any other party.  
7 Should they refrain or should they be unable to appoint their own defence lawyers  
8 under Libyan law, like all modern laws, obligates the court to assign him a defence  
9 team before the trial takes place. The Libyan judiciary cannot be -- the Libyan  
10 judiciary has not carried out all possibilities unless a trial *in presentia* is held.  
11 My government and, in particular, the ministry of justice and the public prosecutor's  
12 office, represented in the attorney general's office, have always been steadfast in  
13 cooperating with international law in the proper administration of criminal justice  
14 and in providing justice for victims and to ensure that impunity -- to ensure that there  
15 is no impunity.  
16 And this is particularly true in the most serious and heinous crimes, and this is  
17 particularly true as well in our relationship with States, international organisations  
18 with whom we have relations and this is especially with the ICC, with whom we have  
19 had a relationship since UN Security Council Resolution 1970 of 2011.  
20 Since that resolution has been issued, we have had a good relationship built on trust  
21 and mutual cooperation, exchange of information, with the aim of achieving justice  
22 and granting justice for victims.  
23 This is manifested by Ms Fatou Bensouda's briefing, regular briefing before the UN  
24 Security Council and her constant commendations of the cooperation witnessed from  
25 Libyan authorities.

1 This cooperation, as previously stated, has been going on since 2011, on the basis of  
2 the principle of complementarity between the Libyan judiciary and the International  
3 Criminal Court. Libya is the first country to achieve the principle of  
4 complementarity when it filed a challenge to the admissibility of the case of  
5 Mr Abdullah Al-Senussi.

6 The Court ruled the case inadmissible and that the Libyan judiciary is the judiciary  
7 that has jurisdiction to carry out such a trial, which means that the Libyan judiciary is  
8 capable of carrying out such a fair and transparent trial as per international standards.  
9 And Libya takes pride in that ruling and we consider it as a testimony by an  
10 international body of justice, which is the ICC, a testimony to the integrity and  
11 capability of the Libyan judiciary.

12 Your Honours, honourable Judges, the Libyan judiciary and the attorney general's  
13 office continue to exert strenuous efforts in the protection of human rights, whether  
14 concerning violations affecting Libyans or foreigners, including immigrants who  
15 witness violations while on Libyan territory. This continues to be a subject of  
16 concern and interest for us because of its relevance to human rights and human  
17 dignity.

18 While being cognizant of the importance of respect for human rights, we have  
19 created -- we have designated a new position in the ministry of justice, which is the  
20 deputy minister for human rights. Since 2017, exerting its -- the position is exerting  
21 its functions through designated subcommittees.

22 The current deputy minister for human rights has achieved significant progress and is  
23 now in the process of filing their first reports on their assigned tasks.

24 The ministry of justice has been working to activate the transitional justice process to  
25 ensure that the national transitional justice process becomes fruitful and provides real

1 remedies for what the Libyans suffered from during the former -- in the time of the  
2 former regime.

3 We have also enacted regulations for transitional justice by Law No. 29 of 2013, and  
4 filed that to the competent authorities to ensure the activation and full enforcement in  
5 the forum of creating truth commissions as well as commissions for reconciliation,  
6 reparations and justice for victims.

7 In a nutshell, my government is serious in ensuring -- in working towards justice and  
8 fair treatment for victims whose suffering we feel, given the violations that they  
9 incurred. We also believe that justice and ending impunity must be achieved  
10 whether through domestic judiciary or international judiciary of which we are part.  
11 Therefore, any measure, any action that cripples that process is a measure that we can  
12 never accept or acquiesce to. The attempts to circumvent the law to justify impunity,  
13 these attempts must be repelled in every -- with every legal means possible.

14 I would like to recall here that amnesty Law No. 6 of 2015 is one of the laws that has  
15 been misinterpreted to achieve impunity. This law does not apply to arbitrary  
16 killing, identity-based murder and crimes against humanity in general, and this is  
17 clear -- this is in the explicit text of Article 3, paragraph 4 and 6 of the said law.

18 These paragraphs exclude identity-based murder, kidnapping and forced  
19 disappearance, torture and all corruption crimes from the applicability of the said law.  
20 This is as far as the merits are concerned.

21 PRESIDING JUDGE EBOE-OSUJI: [9:50:17] Yes, Counsel, if you can speak more  
22 slowly because your speech is being interpreted by the interpreters and they need to  
23 be able to catch up with you. Thank you. Not very slowly, but at a pace that they  
24 can manage. Thank you.

25 MR LAMLOM: [9:50:40] (Interpretation) I would like to recall here, that Law No. 6

1 of 2015 is one of these means that has been used -- has been misused and  
2 misinterpreted to achieve impunity. Therefore, this law does not apply to crimes of  
3 arbitrary killing, murder based -- identity-based murder and crimes against humanity  
4 in general.

5 This is in the explicit terms of Article 3, paragraphs 4 and 6, which exclude -- this  
6 article excludes murder, identity-based murder, kidnapping, forced disappearance,  
7 torture and corruption in all its forms from the applicability of the amnesty law.

8 This is as far as the merits are concerned and as far as procedures are concerned.

9 And -- well, let's suppose that some of the crimes Mr Saif Al-Islam Gaddafi's charged  
10 with, let's assume that some of these crimes can be -- can have amnesty. The  
11 prerequisites for amnesty do not apply to him because the said law requires in its  
12 second article to grant amnesty; that the person repent and refrain from going back to  
13 wrongdoing and reconcile with the victim or the succeeding blood holder, which  
14 Mr Saif Al-Islam Gaddafi did not do.

15 PRESIDING JUDGE EBOE-OSUJI: [9:52:41] One second, please. Did you say this  
16 other condition is in Article 2? You said earlier that Article 3 has some exceptions  
17 and those exceptions are arbitrary killing, murder, torture, crimes against humanity.  
18 And then you also now are saying that there's another condition, that a person has to  
19 express remorse or something of that nature.

20 In what provision is this second condition? Article 2 or still Article 3?

21 MR LAMLAM: [9:53:29] (Interpretation) It is the second article indeed of Law No.  
22 6 of 2015. The provision in question is very clear. I will read it out to you. I will  
23 read out this article, quote:

24 For the applicability of the amnesty law -- for beneficiaries of the amnesty law must  
25 fulfil the following requirements:

1 First, to express remorse in written format; to refrain from going back to old -- to -- to  
2 their wrongdoing, to their criminal conduct.

3 This commitment on not going back to wrongdoing does not apply to  
4 misdemeanours or crimes punishable only by fines.

5 Second, in financial crimes, assets that are subject of the crime must be returned.

6 Third, reconciliation with the victim or his custodian or a pardon or -- unless a pardon  
7 is provided by the succeeding blood holder or custodian of the victim.

8 Fourth, the handover of weapons or objects that were used for the crime or in the  
9 place where the crime has taken place.

10 Fifth, to return the subject in question to its original state, and this applies to crimes  
11 that pertain to land or to transportable assets.

12 These are prerequisites for the application of the said law as per its -- Article 2.

13 PRESIDING JUDGE EBOE-OSUJI: [9:55:37] All right. Can you help us again,  
14 please. If you can repeat the same exercise for Article 3, it will be very very helpful.  
15 What you've just done with Article 2, you read out the text of the provision. Can  
16 you assist us to do the same with the text of the provision of Article 3 that you spoke  
17 to earlier. You gave us the summary of it. Can you read it out, please, the actual  
18 text, if it is not too long.

19 MR LAMLON: [9:56:08] (Interpretation) Yes, with pleasure I will read out  
20 Article 3.

21 The provisions of this law do not apply to the following crimes: First, crimes of  
22 terrorism as per the law -- as per Law No. 3 of 2014.

23 Second, crimes of drugs, smuggling and trafficking and all related crimes in general.

24 Third, improper conduct, possibly fornication and any similar crimes.

25 Fourth, identity-based murder, kidnapping, forced disappearance and torture.



1 Fifth, border-related crimes whenever filed to the judiciary.

2 Sixth, all kinds of corruption crimes.

3 These crimes are excluded from the applicability of the amnesty law, your Honours.

4 PRESIDING JUDGE EBOE-OSUJI: [09:57:37] Thank you very much.

5 MR LAMLOM: [09:57:45] (Interpretation) I will resume where I stopped.

6 And as far as the procedural aspect is concerned and suppose -- assuming that some

7 of the crimes that Mr Gaddafi is charged with are covered by the amnesty law, the

8 prerequisites for applying such law do not exist in his case because the said law

9 requires in its second article that the person provide a written -- in written format

10 states remorse, commit not to go back to the -- to his criminal conduct and reconcile

11 with the victims or his succeeding blood owner, which Mr Gaddafi did not do.

12 And he continues to deny having committed such crimes and has not made any effort

13 to reconcile with the victims or their families, and continues to try to escape the

14 Libyan judiciary, international -- Libyan justice and international justice alike.

15 Regardless of these prerequisites for granting amnesty, for anyone to benefit from

16 such amnesty, there needs to be a relevant decision issued by the competent judicial

17 authority, as per Article 6 and 9 of the same law.

18 And I would like to remind you in this regard that the judicial authorities in Libya

19 have not issued any decision to consider Mr Saif Al-Islam Gaddafi -- to grant Mr Saif

20 Al-Islam Gaddafi amnesty as part of the amnesty law. And there cannot be any

21 other decision, and there can be -- any other decision by any other institution cannot

22 be taken into consideration.

23 In fact, the Libyan judiciary has confirmed that Mr Saif Al-Islam Gaddafi is not

24 benefiting from any amnesty by continuing to prosecute him under reference 525 of

25 2013, the Court of Assize of Tripoli, and has sentenced him *in absentia* on July 28, 2015,

1 and convicted him on the crimes he was charged with.

2 Your Honours, we still need to clarify to the Court a few points and correct some of

3 the concepts that were brought up in yesterday's session.

4 Yesterday, there was a mention of Mr Saif Al-Islam Gaddafi's release from detention

5 and it was mentioned as if carried out by the judicial authorities, which did not

6 happen.

7 The term "release", when we hear the word "release", we would assume that some

8 court has ordered that. And in the case of Mr Saif Al-Islam Gaddafi, no court has

9 ordered such release. In fact, his detainers in Zintan released him. They decided to

10 do so without checking with any judicial authority.

11 And therefore, the proper qualification of this incident, as per the Libyan criminal law,

12 this is a crime of aiding a fugitive to escape justice, punishable by law, whoever they

13 may be, guardians or being -- or whether it's the victim himself who engaged in such

14 conduct. Again, this is punishable by the Libyan criminal law as per Article 279.

15 Something else that was brought up yesterday is that Mr Saif Al-Islam Gaddafi

16 served four -- or spent four years and a half in prison and that such time spent in

17 detention can be considered a penalty served in prison; while, in fact, it isn't. These

18 were provisional precautionary measures, which we commonly refer to as kept in

19 pretrial detention; so that was pretrial detention and was not sentence serving.

20 As per Libyan law, the Libyan law of criminal procedures, that time spent in

21 detention will be deducted from the sentence should he be sentenced with a sentence

22 that deprives him of liberty. But other than that, it cannot be qualified as a sentence,

23 a penalty served.

24 Yesterday, also there was a mention of -- with regards to the ruling against

25 Mr Gaddafi, whether it's a ruling *in absentia* or *in presentia*. This was brought up by

1 the Defence team of Mr Gaddafi, but I will leave that point to Dr Ahmed El-Gehani,  
2 who will further clarify how can a ruling be considered *in absentia* or *in presentia*.  
3 Your Honours, distinguished attendees, we, in the ministry of justice, shouldering our  
4 legal and ethical responsibility entrusted in us in ensuring the proper administration  
5 of justice and in granting access to justice, commit to cooperation with international  
6 organisations, with the aim of achieving the great goals of ending impunity and  
7 holding accountable criminals and providing justice for victims.  
8 In the end, we thank you for giving us this time and for listening and for your  
9 attention. Thank you all very much.

10 PRESIDING JUDGE EBOE-OSUJI: [10:05:40] Thank you very much, but before you  
11 sit, please help me understand something - you've helped us, you've been very clear  
12 in your submissions - on the matter of the time he spent in detention.

13 Do I understand you to have said that under Libyan law, if, at the end of a trial, an  
14 accused person is convicted and sentenced to say a prison sentence, that the time the  
15 person spent in pretrial detention will be deducted from the prison sentence, but if  
16 it is a sentence of the death penalty, obviously, there will be nothing to deduct. Is  
17 that what you are saying?

18 MR LAMLAM: [10:06:36] (Interpretation) Of course if sentenced to death, then of  
19 course that wouldn't apply.

20 PRESIDING JUDGE EBOE-OSUJI: [10:06:52] Yes, fair enough.

21 Now if you can help us then please understand, if possible, if you can help us with  
22 this: How long was it that Mr Gaddafi spent in detention from the beginning until  
23 the time of the release? Do you have information in that regard?

24 MR LAMLAM: [10:07:14] (Interpretation) I do not recall the time precisely, but  
25 that's definitely in the records of the Court. From 2011 till around 2017,

1 that's -- that's about the time.

2 PRESIDING JUDGE EBOE-OSUJI: [10:07:30] Fair enough, thank you very much.

3 MR EL-GEHANI: [10:07:46] Thank you, your Honours. There is or there are two  
4 points to make it clear, even in academic way, that the *presentia* and the *in absentia*,  
5 according to the Libyan law or Libyan systems, we have two systems: Civil and  
6 criminal system.

7 In the civil system, I mean contracts or compensation law, yes, the defendant, will be  
8 enough for him to attend only one session to get a *presentia* jurisdiction or judgment.

9 In the criminal system and criminal justice, according to our system, all the accused,  
10 the accused or suspects, should attend all the sessions; otherwise, regardless the  
11 reasons, otherwise they are -- the judgment should be qualified as *in absentia*. This is  
12 according to our system, and I heard yesterday many arguments about this issue. So  
13 I think that is clear for -- for what we intend of it.

14 PRESIDING JUDGE EBOE-OSUJI: [10:09:16] But what about video? The  
15 contention here, the Defence was submitting, that he was able to follow the  
16 proceedings through video link for some of it. Now, where that happened, would it  
17 qualify as *in absentia* or in the presence?

18 MR EL-GEHANI: [10:09:43] Yes, for the video link, the Libyan procedural law has  
19 been amended that any -- what we say, any audience by the video, the law, it's  
20 considered as a *presentia*. Okay? But even in the video law -- sorry, in video  
21 law -- link, the -- Mr Gaddafi having attended all the session, even by the  
22 video -- video link.

23 PRESIDING JUDGE EBOE-OSUJI: [10:10:14] Thank you very much.

24 MR EL-GEHANI: [10:10:20] Okay, thank you.

25 PRESIDING JUDGE EBOE-OSUJI: [10:10:24] Now, we will turn the audience over to

1 Lawyers for Justice in Libya and Redress.

2 You have 30 minutes.

3 MS MACDONALD: [10:10:36] Mr President, distinguished members of the

4 Appeals Chamber, as this Court knows, this is a joint amicus submission by Lawyers  
5 for Justice in Libya and Redress.

6 Lawyers for Justice in Libya, it's important to recall, does not take any position on the  
7 guilt or innocence of any individual. It is here to assist the Court with the legal issues  
8 which arise in this case, and so far as its intervention in these proceedings has an  
9 objective, it is simply that where there is sufficient evidence to charge a person with  
10 serious international crimes, that person should be fairly tried before a competent and  
11 impartial court.

12 Redress aims to ensure that survivors of torture and other international crimes are  
13 able to ensure justice and reparation through the courts. And it has previously  
14 intervened at numerous international courts on the question of amnesties and  
15 immunities.

16 Your Honours, the *amici* have carefully studied all of the Court's questions and we  
17 will answer the questions in which we are best placed to comment in the time  
18 available, with no discourtesy intended if we are not able to cover everything.

19 Starting with the Libyan law issues, counsel for the Prosecutor and the OPCV have  
20 addressed the Court on why the statute requires a conviction to be final in order for  
21 Article 17(1)(c) and 20(3) to apply, and we adopt those submissions.

22 Based on that requirement of finality, the Prosecution explained very clearly  
23 yesterday why the Pre-Trial Chamber was correct to find that the decision convicting  
24 the accused was not final in Libyan law.

25 The starting point is that the accused was, as a matter of fact and law, convicted *in*

1 *absentia* as the State of Libya has confirmed this morning. We do not repeat the  
2 analysis of this point or of its procedural consequences under Libyan law.  
3 As the honourable President put it to counsel for the Prosecutor yesterday afternoon  
4 and as she confirmed, the accused's rights to an appeal and to a review of his sentence  
5 are currently in abeyance while his conviction retains its *in absentia* status. So in  
6 short, there are multiple cumulative reasons why the process does not count as final  
7 in Libyan law.  
8 Moving briefly on to Law No. 6, the Pre-Trial Chamber was correct to conclude that it  
9 could not lawfully have been applied to Mr Gaddafi, and we've just heard the State of  
10 Libya analyse very clearly why this is the case, as well as yesterday's detailed  
11 submissions on the matter from the Prosecutor and the OPCV. And we would  
12 highlight three points which seem to us to have emerged very clearly from these  
13 submissions.  
14 Firstly, Article 6 of Law No. 6 requires that a decision issued under that law must  
15 come from a, quote, "judicial authority". The decision purporting to apply the  
16 amnesty to Mr Gaddafi is attributed to a minister of justice, a role which must, on any  
17 view, be considered part of the executive rather than the judiciary and which - on the  
18 particular facts of this case, as the State of Libya has made it clear - was not an  
19 individual who formed part of the internationally recognised government of Libya.  
20 Secondly, as you've heard, the law could not have properly been applied to  
21 Mr Gaddafi because the crimes with which he was charged in Libya, including  
22 murder and torture, are expressly excluded from the application of Law No. 6 by  
23 Article 3.  
24 And thirdly - and this is particularly important from the perspective of the victims of  
25 the alleged crimes - there is no evidence that any of the other legal requirements,

1 which you have heard read out in Article 2 of Law No. 6, have been fulfilled.

2 As you just heard, these include a written pledge to repent and not to reoffend; return  
3 of goods or money stolen; and very importantly, given the nature of these crimes,  
4 reconciliation with the victims of the offence or their legal survivor; and surrender of  
5 the weapons used in the offences.

6 So this failure to comply with the requirements of Law No. 6 is particularly serious in  
7 that it denies the victims of these crimes the rights which Law No. 6 expressly granted  
8 to them.

9 So for all these reasons, in our submission it's clear that the Pre-Trial Chamber was  
10 right to find that Law No. 6 does not apply to the accused's case, and this is  
11 significantly also the very clear position of the State of Libya as we've just heard.

12 The honourable President asked yesterday afternoon, "Well, why was Mr Gaddafi  
13 released then?" And we've just heard a little about this from the representatives of  
14 the State of Libya.

15 And the answer of course is that we do not know the underlying motivation for that  
16 decision and this Court is not called upon to make any pronouncements in that  
17 regard. The decision was taken by a person out in an area out with the control of the  
18 government of Libya, and all we know is that the purported basis for the decision was  
19 Law No. 6.

20 But the fact that that was the law that was pointed to as a legal basis for the release,  
21 does not of course prove that that law actually justified the release, and for all the  
22 reasons that we've heard in which I've tried to summarise, it plainly did not.

23 So, your Honours, the case could end there. But the Pre-Trial Chamber went on to  
24 consider whether even if Law No. 6 had applied to the accused under Libyan law, this  
25 will be enough to render the case inadmissible under the Rome Statute.

1 And this part of the decision, although strictly obiter, gives rise to some  
2 fundamentally important questions, which the Court has posed, beginning with  
3 question a).

4 Your Honours, as the distinguished Prosecutor of this Court told the UN  
5 Security Council when she addressed it last week on the situation in Libya:  
6 "Impunity serves both as an obstacle and a threat to stability and must be checked [by]  
7 the force of law."

8 In our submission, ending impunity requires that, in the words of the preamble,  
9 which the honourable President cited yesterday: "[...] the most serious crimes of  
10 concern to the international community as a whole must not go unpunished."

11 And the word which the framers of the Statute chose here is "unpunished". Not  
12 "untried".

13 I will look at the question of effective punishment shortly because it's clearly of  
14 significance on this issue. But keeping to complementarity for now, under the  
15 Statute the objective of ending impunity does not of itself dictate where an accused  
16 should be tried. That question is, of course, answered by the complementarity  
17 regime by which the framers of the Statute gave effect to their political judgment as to  
18 the proper balance between this Court and individual States.

19 Whether the complementarity regime actually serves to help close the impunity gap  
20 depends entirely on how its applied in practice. If the Court applies it in a way  
21 which gives undue deference to national proceedings, which do not truly fulfil the  
22 aims of the Statute, then complementarity is actually on a path to serious tension with  
23 the objective of ending impunity.

24 At this stage, one brief observation about the legitimacy of this Court's rule in  
25 deciding on admissibility.



1 The Defence in its appeal brief argues that the Court was intended to be  
2 complementary to national legal systems and not to sit in judgment upon them. But  
3 in our submission, sitting in judgment is nothing more than a pejorative way of  
4 describing a task which the Statute specifically entrusts to the Court. It would have  
5 been open to the framers of the Statute to make this Court's jurisdiction  
6 conditional on a referral or a request by a relevant State Party.  
7 Article 13 of the Statute would then have contained only option (a). But they did not  
8 do so. Rather, they empowered the Security Council to refer a situation and they  
9 empowered the Prosecutor to initiate investigations proprio motu.  
10 And this establishes the principle that this Court's jurisdiction is not conditional on  
11 the consent of States, and Article 17 and 20 make this Court - not states - the ultimate  
12 arbiter of complementarity.  
13 Now, in carrying out this important task, the Court necessarily examines the relevant  
14 facts and the law, including domestic law. It is positively required in appropriate  
15 cases to decide difficult issues, such as whether a State is willing and able to try the  
16 accused. This inevitably requires analysis of and decisions about a State's conduct  
17 and its legal framework.  
18 Now, these are sensitive issues, but phrases such as "sitting in judgment" cannot  
19 simply be deployed to try to deter this Court from doing the legitimate and important  
20 job which the international community has entrusted to it.  
21 The Court goes on to ask in question b) how the various competing interpretations of  
22 Article 17(1)(c) and 20(3) of the Statute accord with the Statute's object and purpose.  
23 The short answer in our submission is that if the proceedings in this case were held to  
24 be sufficient to take the case away from the Court, then the effectiveness of the Statute  
25 would be in grave doubt.

1 Answering this question in greater detail really takes me on to the Court's questions j)  
2 and k). In addressing those issues, I will begin with the status in international law of  
3 amnesties for crimes against humanity. The relevance of international law on this  
4 point stems, of course, from the definition of applicable law in Article 21(1)(a) of the  
5 Statute, particularly in light of the Statute's deliberate silence on the issue of  
6 amnesties.

7 The *amici* which I represent, the Prosecutor and the OPCV have all set out in their  
8 written submissions and in their oral submissions which you heard yesterday, very  
9 extensive materials showing that amnesties for international crimes and serious  
10 human rights violations are incompatible with international law. Now I say  
11 "incompatible with international law", that's a slightly loose phrase. Of course, it's  
12 critical here in this criminal court to frame the issue with some care. The specific  
13 question for this Court, of course, when considering its criminal jurisdiction over an  
14 individual accused is whether a domestic law amnesty applied to somebody charged  
15 with one of the crimes in the Rome Statute is such as to require this Court, an  
16 international court, to hold the case inadmissible.

17 So taking this question in stages to break it down; firstly, it's clear that whatever the  
18 position in domestic law, applying an amnesty to serious international crimes may  
19 conflict with a number of Libya's treaty obligations, including the torture and  
20 genocide conventions and its obligations under human rights instruments, including  
21 the ICCPR and the African Charter on Human and Peoples' Rights. The abundant  
22 authority to this effect is summarised in the written submissions.

23 And the common theme of these obligations is that States are required to ensure the  
24 effective trial and, if convicted, the effective punishment of those against whom there  
25 is sufficient evidence of serious crimes.

1 PRESIDING JUDGE EBOE-OSUJI: [10:24:11] Ms MacDonald, are  
2 victims -- assuming this is possible to establish, are victims of a situation free to  
3 renounce their requirement of punitive punishment in the sense of saying, Well,  
4 having considered the full circumstances of a particular case, we, the victims, without  
5 duress or pressure, we're happy to forgive and let things be?

6 MS MACDONALD: [10:24:48] Mr President --

7 PRESIDING JUDGE EBOE-OSUJI: [10:24:48] As a general proposition to whether  
8 or not amnesty is consistent with international law as well as whether there is an  
9 inevitable obligation on States to always prosecute.

10 MS MACDONALD: [10:25:12] Mr President, it may depend on which -- so the  
11 question as I understand it, is: Is the victim or the victims of international crimes  
12 able to say or to renounce their rights, thus to extinguish the obligations on the State  
13 in question to --

14 PRESIDING JUDGE EBOE-OSUJI: [10:25:36] Indeed, yes.

15 MS MACDONALD: [10:25:38] -- punish?

16 PRESIDING JUDGE EBOE-OSUJI: [10:25:42] Indeed. South Africa, for example,  
17 without pressing it too much, but that comes to mind.

18 MS MACDONALD: [10:25:46] Mr President, clearly there is a fertile and important  
19 debate about broader measures of national reconciliation. Truth commissions, for  
20 example. A great deal of academic writing on, for example, the South African  
21 experience of trying to reconcile a society there, which had been fundamentally  
22 divided in trying to bring peace for the future.

23 In my submission, when one keeps it to the nest of issues which are in the purview of  
24 this case, in my submission it may depend on - one, the obligation in question; so  
25 where the victim has a specific human right, for example. So where the victim has

1 an individual human right to, for example, make a complaint to a regional human  
2 rights mechanism --

3 PRESIDING JUDGE EBOE-OSUJI: [10:26:39] Redress.

4 MS MACDONALD: [10:26:42] -- for example, yes, then that victim, any victim of  
5 a human rights violation can accept measures of reparation, which will foreclose that  
6 victim's right then to complain that there's been a violation to that regional human  
7 rights mechanism.

8 PRESIDING JUDGE EBOE-OSUJI: [10:26:59] The point of my question, of course, is  
9 whether we can state in categorical terms that international law is against amnesties  
10 and patents. That's what I'm trying to verify by that question.

11 MS MACDONALD: [10:27:15] In my submission, it entirely -- that's a case-specific  
12 question. It entirely depends on the facts of the case. So it entirely depends on how  
13 an amnesty has been applied, what the impact is of that on the victims, what the  
14 impact is of that on the effective punishment of the accused and whether, in the  
15 circumstances, looking at all the circumstances, ending impunity -- the objective of  
16 ending impunity has been served by that amnesty.

17 The Court is not called upon in this case to say, "No State could ever institute an  
18 amnesty in any circumstances." But the Court would have to look very very  
19 carefully when one is dealing with the types of crimes which are, by definition, going  
20 to be before the Court, the Court would have to look extremely carefully and with  
21 great caution at any measure of general application, whether or not supported by the  
22 victims, which led to no -- or no significant punitive measures being applied to those  
23 who were responsible for the greatest crimes shocking the conscience of humanity.

24 So there will be a presumption of, I think, very great care in analysing that situation.

25 PRESIDING JUDGE EBOE-OSUJI: [10:28:36] Thank you. You may proceed.

1 MS MACDONALD: [10:28:38] So looking at the types of obligations which oblige  
2 a State to take punitive measures against this type of conduct - and as we just  
3 discussed, the common theme of these obligations is that States have to ensure  
4 effective trial and punishment - and when one looks at the nature of the crimes that  
5 will be coming before the Court, it's clear that in respect of crimes of universal  
6 jurisdiction, as a starting point, a domestic amnesty cannot prohibit other States from  
7 choosing to prosecute.

8 And the Appeals Chamber of the Special Court for Sierra Leone in the Kallon  
9 and Kamara case put it very well in my submission, when they said:  
10 "A State cannot bring into oblivion and forgetfulness a crime, such as a crime against  
11 international law, which other States are entitled to keep alive and remember."  
12 And building on that point, it would apply in our submission, even more strongly to  
13 international tribunals. The Extraordinary Chamber in the Courts of Cambodia put  
14 it this way in the Ieng Sary case in the context of a genocide conviction, which then  
15 received a royal pardon. They considered that State practice demonstrates, I quote:  
16 "[...] at a minimum a retroactive right for third States, internationalised and domestic  
17 courts to evaluate amnesties and to set them aside or limit their scope should they be  
18 deemed incompatible with international norms."  
19 Such norms include those, of course, which oblige States to hold perpetrators of  
20 serious international crimes to account.

21 So that general analysis then takes us on to the question of how these principles of  
22 international law would work within the architecture of the Statute. And starting  
23 with Article 17, this would depend, we would suggest, at what stage of the process of  
24 investigation or prosecution an amnesty was applied.

25 If there was a decision not to prosecute in the first place or an investigation was

1 terminated on the basis of an amnesty, then the State in question may be considered  
2 on the facts -- and, it would depend on the facts of the case, may be considered  
3 unwilling or unable genuinely to carry out the investigation or prosecution within the  
4 meaning of Article 17(1)(a).

5 When applying the criteria for unwillingness in Article 17(2), the Court could find on  
6 the facts that the application of an amnesty amounted to shielding in an appropriate  
7 case or it may also conclude that subsection (c) applies.

8 Now if there has, in fact, been a trial process, such as in this case, then the analysis  
9 would shift to 17(1)(c) and 20(3) and the Court's question k) relates to these provisions.  
10 And at the heart of this issue really, is whether proceedings which terminate in an  
11 amnesty after trial are such as to trigger the *ne bis in idem* principle enshrined in the  
12 Statute.

13 This could be considered in several ways under Article 20(3) depending on the  
14 circumstances of the particular case. The Pre-Trial Chamber took the amnesty into  
15 account as part of its decision that no final decision on the merits had been rendered  
16 such as to trigger the *ne bis in idem* principle.

17 This follows the strong trend in international law to refuse to allow a domestic  
18 amnesty to form any sort of procedural bar to the jurisdiction of an international  
19 tribunal over international crimes.

20 That chain of reasoning would mean that proceedings which ended in amnesty after  
21 trial do not engage the main body of Article 20(3). In other words, they are not such  
22 as to trigger the *ne bis in idem* principle, and that was the Pre-Trial Chamber's analysis.  
23 In such a case, the Court would not need to go on to apply subparagraphs (a) or (b),  
24 but it is clear that an amnesty may, in appropriate cases, amount to shielding within  
25 the meaning of subparagraph (a) or be inconsistent with an intent to bring the person

1 concerned to justice within the meaning of subparagraph (b).

2 Now, in respect to these two subparagraphs, the Court asks again in question k)  
3 whether developments outside the judicial proceedings, such as the passing of an  
4 amnesty law, may be taken into account bearing in mind the overall purpose of the  
5 complementarity regime.

6 And this question arises because the main body of Article 20(3) refers, of course, to  
7 the proceedings in the other court. In our submission, despite the use of the term  
8 "court" here, developments outside the judicial proceedings can and must be taken  
9 into account by this Court in applying Article 20.

10 And there are two reasons for this. Firstly, amnesties are often -- perhaps most often  
11 applied by legislative or executive act and confining scrutiny here to the acts of the  
12 courts would clearly allow impunity to flourish.

13 In this regard, the Court asked the Defence yesterday several times what it would say  
14 about a situation where the courts of a State tried a person in good faith, perfectly  
15 properly, convicted him, sentenced him to a lengthy sentence of imprisonment for an  
16 international crime and the next day, the government released him.

17 The Defence had no real answer to this for the obvious reason that on their case, there  
18 is no answer to this. On their case, when a person is released by the government the  
19 day after they are convicted for crimes against humanity, or genocide, or war crimes,  
20 there is absolutely nothing that this Court can do about it.

21 In our submission, that's a textbook case of impunity.

22 Leading on from that point, international courts have directed specific attention, not  
23 only to the trial process, but to the effective implementation of the sentence. And  
24 before I deal with the legal aspects of that, it's important for the *amici* to make clear  
25 that they are firmly opposed to capital punishment. They take the position that no

1 accused should be sentenced to death and that any sentence of death should be  
2 commuted to an appropriate period of imprisonment.

3 The question before you is one of effective punishment, and this brings us to some of  
4 the questions which the Court raised yesterday.

5 PRESIDING JUDGE EBOE-OSUJI: [10:36:12] Before you proceed, keep in mind you  
6 have only five minutes thereabouts now. But I hope you can take in one more  
7 question from me and that not only arises from the run of submissions you've just  
8 made about shielding and all that, but as well as your opening lines when you  
9 introduced your mission as an organisation. So you take no position on the -- your  
10 main interest is to ensure that trials are fair.

11 Now, when you look at Article 20, if you can help us, please, Article 20 of the Rome  
12 Statute, I believe I asked this question of one of the counsel yesterday when I was  
13 speaking about a high-handed process.

14 Now, Article 20 says, paragraph -

15 "(3) No person who has been tried by another court for conduct also proscribed [...]  
16 shall be tried by the Court with respect to the same conduct unless the proceedings in  
17 the other court:"

18 And then we move to -

19 "(b) Otherwise were not conducted independently or impartially in accordance with  
20 the norms of due process [...]"

21 Let's assume in a case that the conduct of the trial in the national court was  
22 conceivably done in a high-handed way; due process right denied, perhaps to ensure  
23 that the person truly does get convicted in the end and the death penalty imposed.

24 After a while, amnesty is imposed and the person released.

25 Now speaking in a manner of a hypothesis, *ne bis in idem* - by any other expression - is



1 called double jeopardy. Would it be correct to say that the person should still be  
2 exposed to a further jeopardy because the trial was not conducted fairly at first  
3 instance?

4 It just -- we're trying to make sense of Article 20(3)(b) --

5 MS MACDONALD: [10:39:01] Yes --

6 PRESIDING JUDGE EBOE-OSUJI: [10:39:03] -- so it needs to be redone again at the  
7 ICC.

8 MS MACDONALD: [10:39:15] Mr President, in our submission, there are two  
9 separate but related issues here. The first - and it's an important question of  
10 principle for the resolution of this appeal - is whether this -- regardless of the  
11 character of the trial that takes place in the domestic jurisdiction, whether this Court  
12 stops its analysis at the moment of the verdict.

13 So the first instance verdict *in presentia, in absentia* - whatever it is - whether this Court  
14 stops at that moment because of an interpretation of Article 20, which says tried by  
15 another court means a trial ending in a verdict. Regardless of what further domestic  
16 law process there may be to make that final; regardless of what the government may  
17 do further down the line; regardless of whether the trial was good or bad, the trial  
18 was fair or unfair; regardless of whether any sentence passed, is ever served or not.  
19 You just put down the guillotine at the moment of the pronouncement of the verdict.  
20 So that's one question that arises centrally in this case. And you've heard the  
21 submissions yesterday, and you've heard briefly from me in the time I have as to why  
22 that must be wrong and why it would be utterly inconsistent with the architecture of  
23 the Statute for this Court to read tried by a court to mean we will close our eyes to  
24 anything that happens after the moment of verdict.

25 So that's the first point.

1 I understand your Honour's question now to be, does that analysis change depending  
2 on what the character of the trial is? In other words, you've got the submission that  
3 those who happen to be on this side of the room say that you must look beyond the  
4 moment of verdict in your analysis, but how do you take into account, or do you take  
5 into account how the first trial has gone?

6 In that situation, in our submission, you then go to Article 20(3) and you find  
7 additional reasons where, regardless of what happens beyond the moment of verdict,  
8 such as in this case; so beyond the executive -- any subsequent executive conduct  
9 there may be, which may mean that the case needs to remain before this Court  
10 because there has not been effective justice in the domestic situation as required by  
11 the Statute.

12 But Article 20(3)(a) and (b) provide additional reasons why this Court may consider  
13 a case to be admissible on the basis of facts which occur even before the  
14 pronouncement of the verdict.

15 So in other words, it would be a cumulative requirement. So you, in that case, look  
16 at -- and again, in our submission you would need to look at matters which go both to  
17 the conduct of the court itself and broader issues to decide whether that process  
18 leading up to that point was for the purpose of shielding, was not conducted  
19 independently and impartially et cetera.

20 I appreciate that's a lengthy answer. I hope it's answered the Court's question but if  
21 it hasn't, then I will be very pleased to continue.

22 PRESIDING JUDGE EBOE-OSUJI: [10:42:44] It's a matter of jeopardy. All that's  
23 happened in the trial, earlier trial, the cumulative fact of it -- factors, including  
24 detention, including any period served after verdict until released by amnesty,  
25 whether that -- all that does not comprise jeopardy, first, in the national jurisdiction.

1 And whether we need now to come and say, "Yes, we will have another trial because  
2 if you really examined how the trial was done, it wasn't really according to fair  
3 standards of due process and international law."

4 Are we free to keep saying, "Yes, we have to retain jurisdiction at the ICC for  
5 purposes of another trial that may be more correct and according to the due process  
6 standards of international law?"

7 MS MACDONALD: [10:43:53] There is a textual answer to that and then there is, of  
8 course, the broader concern of fairness to the accused, which may underlie also this  
9 question.

10 Dealing with the textual point first, the Court is -- under Article 20(3)(b), the Court is  
11 mandated to consider, among other matters, whether the trial, the domestic trial was  
12 conducted independently or impartially in accordance with the norms of due process  
13 recognised by international law. So in other words, the framers of the Statute  
14 require this Court to consider that.

15 Now, in all instances where a court sits -- an international court sits as  
16 a supra-national body and is scrutinising the conduct of domestic courts - or, indeed,  
17 any other domestic authorities, then of course there are principles which a whole  
18 range of international courts apply to say they are not sitting as the court of appeal of  
19 that jurisdiction.

20 So in other words, they are not looking at whether there have been minor, relatively  
21 minor procedural breaches. This Court would be looking at - in a broader brush  
22 way - whether there's a really fundamental departure from the standards of due  
23 process.

24 And I think the broader question of fairness, which the Court raises here, is the  
25 concern, "Well, has an accused suffered enough"?

1 If they are captured, for example, in a State, if they are subjected to an unfair trial, is it  
2 not a bit much to say that they should go through the whole process again in  
3 The Hague.

4 Well, that is an understandable concern, but equally victims of crimes are not served  
5 where there's an unjust process. Where there's a hasty process; where proceedings  
6 are just pushed through to get a conviction without a fair and impartial analysis of the  
7 facts.

8 That's not justice for either side. And, of course, if the Court were to say, "Well, we  
9 have to defer to a show trial", for example - and we don't use that characterization  
10 about any particular case, we're just talking hypothetically - if this Court has to defer  
11 to a show trial, what it would mean is that this Court could hold that proceedings are  
12 admissible before it, and could be completely thwarted by a State which was  
13 overeager to retain its jurisdiction. It didn't accept this Court's  
14 decision (Overlapping speakers)

15 PRESIDING JUDGE EBOE-OSUJI: [10:46:33] Is the term "show trial", does it fall into  
16 the same category as your reproach of the Defence about sitting in judgment over  
17 a court, a national court? The people who are conducting a trial will not agree that  
18 they were doing a show trial for the most part; that's what I'm saying.

19 MS MACDONALD: [10:46:51] It's a term which counsel may feel free to use in an  
20 hypothetical argument, but which I'm sure this dignified tribunal would never use  
21 in its analysis. But where a State has been -- but the essence of that concept in  
22 history has been the State is overeager to get to pronounce a conviction against  
23 somebody for political reasons, irrespective of the evidence or any careful impartial  
24 weighing of the evidence.

25 And in that situation, the Court is simply required to say, "Well, if we held a case

1 admissible, are we to be thwarted by the fact that the State doesn't accept our decision,  
2 presses ahead not in good faith, not to try, not to carefully analyze the evidence."

3 Now of course, putting an accused through that process domestically is a hardship,  
4 but it's also a hardship for the victims to see this Court's decision thwarted in that  
5 way.

6 And this Court, in our submission, should strive to find an interpretation of the  
7 Statute that wouldn't allow a prior admissibility decision to be derailed by unfair  
8 proceedings that would fall foul of 20(3)(b).

9 PRESIDING JUDGE EBOE-OSUJI: [10:48:08] Thank you. You may proceed.

10 MS MACDONALD: [10:48:10] Mr President, I fear that's used up almost all of my  
11 time in a way that I hope is helpful to the Court. So I will conclude very briefly with  
12 the question of effective punishment because this was something that -- and tie it very  
13 briefly to the facts of this case, because that was something which was of significance I  
14 think in the exchanges yesterday afternoon between members of the Court and  
15 various counsel.

16 There are a number of international tribunals - including, of course the  
17 Inter-American Court of Human Rights in the Barrios Altos case - that have focused  
18 specifically on the passing of sentences for serious human rights violations, serious  
19 crimes, which are not duly enforced by the State, including by reason of pardons.

20 The Inter-American Court in that case drew attention to the duty of the State to  
21 abstain from recurring to structures that pretend to cancel the effects of a sentence.

22 It put the matter very clearly in the case of Manuel Cepeda Vargas v. Colombia,  
23 where it said:

24 "Even though the Court cannot substitute the domestic authorities in determining the  
25 punishment for the crimes established by domestic law, and has no intention of doing

1 so, an analysis of the effectiveness of criminal proceedings and of access to justice can  
2 lead the Court, in cases of serious human rights violations, to examine" --  
3 And this is the point to which we'd draw the Court's attention --  
4 "to examine the proportionality between the State's response to the unlawful conduct  
5 of a State agent and the legal right allegedly affected by the human rights violation.  
6 Under the [principle] of proportionality, in the exercise of their obligation to  
7 prosecute such serious violations, States must ensure that the sentences imposed and  
8 their execution do not constitute factors that contribute to impunity, taking into  
9 account aspects such as the characteristics of the crime, and participation and guilt of  
10 the accused."  
11 And I took the liberty of reading out a slightly long paragraph there because in our  
12 submission that is a perfect encapsulation of the exercise that this Court will be doing  
13 in looking at effective punishment.  
14 And when one looks very very briefly at the facts of this case, one sees that the  
15 accused was released from detention nine months after his conviction for the gravest  
16 of crimes.  
17 And Judge Morrison raised yesterday the point that he did spend a period of time  
18 under sentence of death, and of course when one looks at the overall punishment - I  
19 use that in the broadest sense, not in the Libyan legal sense - the overall penalty or  
20 suffering that he has had to date, one of course takes into account the fact that any  
21 period of that, nine months of that, was under sentence of death.  
22 But in our submission, a period of detention of four and a half years, even with nine  
23 months of that under sentence of death, does not come anywhere near - on any  
24 formulation of the test - manifest disproportionality, any way that the Court would  
25 choose to frame the question of proportionality.

1 And the facts of this case do not come anywhere close to effective punishment for the  
2 crimes against humanity, which the Court will see detailed in the arrest warrant  
3 decision of the Pre-Trial Chamber back in 2011, manifestly not effective punishment  
4 for these crimes. And to hold otherwise, in our submission, would be to undermine  
5 the very object and purpose of the Statute.

6 PRESIDING JUDGE EBOE-OSUJI: [10:51:54] Do we have any sampling of what  
7 might be considered as the appropriate tariff for the offences in question here? I  
8 mean, looking -- we may begin with the ICTY and ICTR.

9 This may also be for the Prosecution during your next time up. What source of  
10 sentences have been passed in the ICTY and ICTR and national jurisdictions, so that  
11 sentence may speak to whether or not four and a half years might be considered as  
12 manifestly disproportionate?

13 If you have it, you can let --

14 MS MACDONALD: [10:52:37] Yes.

15 PRESIDING JUDGE EBOE-OSUJI: [10:52:38] -- us know, if not (Overlapping  
16 speakers)

17 MS MACDONALD: [10:52:38] We have of course looked at some decisions.

18 Given the small number of prosecutions at any international tribunal for international  
19 crimes of this nature, it's difficult to find parallels. And we certainly haven't drawn  
20 up a tariff or table or analysis of whether one can draw out, if one likes, sentencing  
21 guidelines or rough bands of sentence in the way that domestic court judges would be  
22 able to be guided by them. That would be something which of course could be done  
23 after this hearing, if that was considered useful to the Court.

24 PRESIDING JUDGE EBOE-OSUJI: [10:53:14] I remember some complaints a while  
25 back - this is anecdotally speaking now - when it was said that the ICTY was

1 considerably more generous in sentencing than the ICTR. But whatever that means  
2 may well have some importance in this case if verified, but we'll leave it at that for  
3 now.

4 MS MACDONALD: [10:53:37] Well, Mr President, members of the Court, I  
5 thank you for your attention. If there are no other matters in which the *amici* could  
6 assist, then those are our submissions.

7 PRESIDING JUDGE EBOE-OSUJI: [10:53:47] Thank you very much.

8 (Appeals Chamber confers)

9 PRESIDING JUDGE EBOE-OSUJI: [10:54:07] We will take our morning break now  
10 and we will come back at 11.30, at which time the Libyan Cities and Tribes Supreme  
11 Council will make their submissions.

12 So the Court will rise.

13 THE COURT USHER: [10:54:31] All rise.

14 (Recess taken at 10.54 a.m.)

15 (Upon resuming in open session 11.32 a.m.)

16 THE COURT USHER: [11:32:46] All rise.

17 Please be seated.

18 PRESIDING JUDGE EBOE-OSUJI: [11:33:16] Thank you very much.

19 We will now take submissions from the Libyan Cities and Tribes Supreme Council.

20 You have 30 minutes. I see there are more people today with you than yesterday, if  
21 you want to put everyone's name on the record. Thank you.

22 MR SAAD: [11:33:47] (Interpretation) Your Honours, distinguished Judges, I would  
23 like to first present my team. My name is Abdussalam Altaif Ammara, member of  
24 the legal team of the council. Alongside of me, Mr Mustafa Fetouri, a media expert,  
25 and Ms Hind Fetouri, a journalist correspondent for the council.



1 The Supreme Council of Libyan Cities and Tribes is delighted to extend its gratitude  
2 to the Presidency of the Court for allowing this opportunity to express its  
3 observations and provide answers to questions that you have asked related to the  
4 appeal to the Pre-Trial -- to the Pre-Trial Chamber's decision on the admissibility  
5 challenge in the case of Dr Saif Al-Islam Al-Gaddafi.

6 Before carrying on with my remarks, I would like to comment on something that the  
7 OPCV representative said yesterday when she said that her chief agreed with the  
8 recommendation filed by our council, and I think she misunderstood something,  
9 which is that amnesty can be granted to criminals and those who committed  
10 misdemeanours. We did say so, but there's also another law on pardon and  
11 retaliation which allows for -- which allows for granting pardon in certain situations  
12 and this is largely enforced in Libya and it is part of Libya's customary laws.

13 I go back to my observations.

14 Members of the Bench, we were keen on delivering remarks in this hearing because  
15 we believe this case is very relevant to the sovereignty of the Libyan State and  
16 independence of its institutions, especially its judiciary, and is also relevant to the  
17 issue of accord and reconciliation between the different factions of Libyan society as  
18 well as the willingness of Libyans to resolve their political, social and legal conflicts  
19 without foreign intervention.

20 The supreme council, being a social body representing Libyan cities and tribes, we in  
21 this council are committed to achieving justice and ending the crisis that has caused  
22 discord in the fabric of Libyan society and has led the country to conflicts and  
23 deadlocks that are unwitnessed -- that were not witnessed before by Libyan society.  
24 The idea behind creating this council emerged in 2014 after the develop -- the serious  
25 developments of violations to human rights, including torture, ill-treatment,

1 kidnapping, murder and other developments that led to a new civil war which  
2 further widened the gap between Libyans. We have called for resorting to justice to  
3 ensure everybody receiving fair treatment and ending the conflict between tribes and  
4 cities through reconciliatory justice.

5 Our programme which we announced in our ambitious plan to lead Libya out of this  
6 crisis is a programme based on social peace and justice. In the beginning we have  
7 called on the judiciary to bring before trial those detained in non-governmental  
8 detention facilities so that people can be either convicted or acquitted. But given the  
9 weakness of these successive governments and the proliferation of weapons, many  
10 detainees continue to suffer from torture and many Libyans continue to be displaced.

11 We have called for cooperation with the UN mission in Libya in 2015. We have also  
12 called on parliament to enact a general amnesty for all detainees and allowing the  
13 return of all displaced people. And we also called on parliament to revoke the  
14 political dismissal law which has crippled State institutions.

15 We have followed closely the work of the Libyan judiciary whose work we continued  
16 to support, and despite the political division and the lack of security, the Libyan  
17 judiciary continued to operate independently and in a unified fashion thanks to the  
18 loyalty of the people working in the judiciary. However, its rulings and sentences  
19 were not enforced, given the dominance of armed groups and outlawed factions.

20 And in this regard we have followed also closely the case of Mr Saif Al-Islam  
21 Al-Gaddafi and we have seen how serious the judiciary was in undertaking the  
22 legal -- necessary legal measures in investigation and prosecution in accordance with  
23 the rules in place in Libya and also with human rights conventions ratified by Libya.

24 The Libyan judiciary has taken decisive steps by investigating this defendant and by  
25 holding long sessions of investigation and interrogation and by putting him in -- and

1 by deciding to put him in pretrial detention and also trialling him by internet  
2 connection and later, because of the power cut, by -- indirectly from his detention  
3 facility.

4 And according to -- and in light of the above, the ruling issued against him is  
5 considered a ruling *in presentia* on the merits of the person deemed present. The  
6 supreme court has addressed the distinction between *in presentia* and *in absentia*  
7 rulings in many of its decisions. And I would like to recall only one example of that  
8 from 2006 from the challenge filed under number 1518/53. Quote: It is sufficient to  
9 qualify a ruling as an *in presentia* ruling if the defendant attends the session where  
10 this -- where such trial has taken place, attends the session of the trial and if given the  
11 chance to defend himself as per Article 212 of the Code of Criminal Procedure and  
12 that such rulings shall be considered ruling *in presentia* on the merits of the person  
13 being deemed present whenever he is not able to attend such sessions where the case  
14 was supposed to end.

15 And this happened in the case of Dr Gaddafi who attended court sessions via CCTV,  
16 but given technical difficulties, he was not able to carry out that till the end.

17 The measures taken by the Libyan authorities, the amendment of Article 243 of the  
18 criminal procedures code before holding the trial shows that the Libyan authorities  
19 were indeed committed to ensuring his trial and to ensure the end of impunity, and  
20 that in itself is an end that your honourable Court seeks to achieve.

21 This was upon request by the judiciary and was fulfilled by the political -- by the  
22 executive branch and executed by the legislative branch which -- and all of this  
23 testifies to the Libyan State's commitment to achieving justice.

24 The UN mission in Libya issued a report stating that Mr Saif Al-Islam Gaddafi did  
25 attend his trial by video connection and this included several people who attended

1 trials in the same fashion, including Mr Saif Al-Islam Al-Gaddafi. Nine people,  
2 including Mr Saif Al-Islam Al-Gaddafi. And we confirm that some of these people  
3 who were trialled by CCTV, several of them received *in presentia* sentences. We  
4 must take into consideration that the situation in Libya is a transitional situation that  
5 must fulfil certain constitutional legal rules that are flexible and consensual in  
6 consistence with the ongoing situation of the country.

7 The Court of Tripoli, by calling its ruling an *in absentia* ruling, despite compelling  
8 evidence that the ruling was in fact *in presentia*, we believe that the Court's  
9 qualification as such is wrong and immaterial.

10 PRESIDING JUDGE EBOE-OSUJI: [11:45:10] Counsel, one second, please. That  
11 judgment of the supreme court you just discussed, the one you say explains what trial  
12 *in presentia* means, do you have it, did you file it with the Court? Did you file that  
13 judgment, a copy of it? Even if it's in Arabic, do you have it? Or if you have a copy,  
14 you can also hand it up later for us, we would appreciate it.

15 MR SAAD: [11:45:43] (Interpretation) Yes, I will work on that.

16 PRESIDING JUDGE EBOE-OSUJI: [11:45:46] Thank you.

17 MR SAAD: [11:45:48] (Interpretation) And as stated by the supreme council in the  
18 criminal challenge filed under reference 717/52 qualifying a ruling as an *in presentia* or  
19 *in absentia* ruling shall count in the de facto fashion only, not in the de jure fashion. It  
20 is what things are like; in fact, not what the court says.

21 This ruling cannot be qualified as *in absentia*. *In absentia* applies to fugitives and  
22 those undetained in detention centres, while in fact Dr Gaddafi was in detention  
23 under the authority of the attorney general's office while his trial was going on.

24 On the basis of the above, the judicial authorities in Libya have carried out their full  
25 duties in prosecuting this defendant, which fulfils Article 17(c) of the Rome Statute

1 and which fulfils the complementarity principle enshrined in the Rome Statute. Of  
2 course there may be an intervention if that ruling is considered to be incomplete or  
3 lacking in any way, but we do not think so.

4 In the -- in Article 17 there is a use of the word "or". The article states or says  
5 investigation or prosecution. So I think the decisive element in this article is  
6 beginning the prosecution, that's what counts. And if we read Article 17(c) with  
7 Article 20(3), it shows that the ICC's jurisdiction ends when the trial begins in the  
8 concerned country.

9 Recognising the Libyan Court's ruling provides necessary grounds for reconciliation  
10 of which the general amnesty is part. The general amnesty law enacted by Libyan  
11 parliament did not aim for protecting these defendants. Instead, it is a fulfilment of  
12 a call, an urgent call by the Libyan people convinced that peace cannot be brought  
13 back and heinous violations of human rights cannot be stopped unless that direction  
14 is taken. The UN security -- the UN has confirmed this view by stating that  
15 stabilising the country and achieving peace and bringing back security is achievable  
16 only through general national reconciliation.

17 This explanation is based on the idea that Libyan law is a law that recognises the  
18 unity between international law and domestic Libyan law and not legal duality,  
19 which means that an international convention once ratified by the Libyan authorities  
20 becomes part of Libya's national law.

21 PRESIDING JUDGE EBOE-OSUJI: [11:49:47] But how do we -- how do you respond  
22 to the submissions we heard from the State of Libya as well as counsel for Redress  
23 and Lawyers for Justice in Libya, when they say this, because you talk about amnesty  
24 having been for purposes of reconciliation, but the submission we heard from these  
25 two lawyers who spoke say that there is some condition to it. Amnesty is not a free

1 lunch, so to speak. There is a quid pro quo, they're telling us. That means the  
2 person who claims or who wants to amnesty has to give something back and that  
3 something back is to confess and express remorse. And so that it's not about  
4 everybody getting amnesty without giving something back. How do you respond to  
5 that? They said Mr Gaddafi did not give that thing back in the way of a confession  
6 and remorse, how do you deal with that submission?

7 MR SAAD: [11:51:04] (Interpretation) This general amnesty opens the door for  
8 reconciliation, but all parties have refused to engage, all those that we -- that our  
9 council has approached, all those we have approached in the sense of achieving  
10 reconciliation, all of them have refused.

11 And I take this opportunity to call on them again to reconsider that and to become  
12 more open to this possibility. They are very stubborn in their approach and they are  
13 unwilling to sit down, but we continue to be committed to the idea of reconciliatory  
14 justice and bringing all parties to the table. This is what we believe in. However,  
15 our efforts have so far been to no avail from these parties.

16 I resume my remarks.

17 An international convention once ratified by the Libyan authorities becomes part of  
18 the national laws of Libya needless of enacting, needless of enacting a new domestic  
19 law. This is enshrined in the supreme court's decision of December 2013 which  
20 states that any international convention, once ratified by the Libyan State, has  
21 immediate effect once its ratification measures have been finalised by the legislative  
22 branch of government and that such convention supersedes domestic law. And in  
23 the case of an inconsistency with domestic law, then the international convention  
24 supersedes domestic law.

25 But these inconsistencies or contradictions, if any, can be remedied via reconciliation

1 and via other means as deemed right by the legislative branch entrusted to resolve  
2 any contradictions with international law.

3 In this situation, this law is in line with Article 6(5) of the second protocol of 1977  
4 attached to the Geneva Convention on domestic conflicts which calls on authorities  
5 that are in power following war, calls on such authorities to grant general amnesty to  
6 all those that were involved in the armed conflict or in combat action.

7 So again, this text, this text asks the new authority in power to grant amnesty, and  
8 should there be any other consequences, they shall be treated later.

9 Some may claim that there is a contradiction with Article 146(2) of the, of the fourth  
10 Geneva Convention of 1949 which calls on parties to wars to look for those deemed to  
11 have -- who allegedly committed or ordered the commission of serious crimes. But  
12 I think that that applies to international conflicts, not domestic conflicts. Domestic  
13 conflicts, however, are regulated by the second protocol mentioned above.

14 So it calls for general amnesty, as I said, and this has the status of *jus cogens* so why  
15 didn't we apply this? We actually should have applied this in the first days when  
16 the, when the war stopped. But having delayed taking such steps, it became more  
17 difficult for the parties to accept this rule. And as I said, this rule has the status of *jus*  
18 *cogens*. It cannot be bypassed.

19 As the legal team of the supreme council we do not see a contradiction between this  
20 law and international law. It is true that some crimes are not covered by amnesty  
21 but that are -- but that are also things mentioned in the Geneva protocol, so we must  
22 ensure that there is some consistency between that and between what was brought up  
23 yesterday.

24 Regarding the issue of whether it was validly issued, it was validly issued indeed  
25 because it was enacted by parliament and it was enforced by the government

1 recognised internationally. This government has authority over 70 per cent of  
2 Libyan territory, including the region where the detention facility of Mr Saif Al-Islam  
3 is located in the Zintan -- in the town of Zintan. Zintan was under the authority of  
4 the parliament that enacted this law.

5 And with regards to the Tripoli based government, although on -- although not  
6 appointed by parliament, it is internationally recognised and it has authority over  
7 Tripoli and over the western coast of Libya.

8 We call on your Honours to disregard any challenges to the legitimacy of these bodies  
9 because we must remember that there is a political conflict and international law does  
10 not require -- does not require recognition as a prerequisite.

11 PRESIDING JUDGE EBOE-OSUJI: [11:57:42] Counsel, you have five more minutes.

12 Five more minutes to finish your submissions.

13 MR SAAD: [11:57:49] (Interpretation) This law -- the Supreme Council of Libyan  
14 Cities and Tribes is a social body standing on equal footing from all parties and  
15 representing all factions of the Libyan people and is not biased with any party against  
16 any other party. All we seek to achieve is accord between Libyans. Our initiative  
17 in this case and in all cases that concern Libya is within the logic of reconciliatory  
18 justice which we seek to achieve.

19 Libya has entered a slippery slope since 2011 in every way, in every sense because all  
20 parties have suffered from catastrophic consequences, including Mr Saif Al-Islam  
21 Gaddafi. This man has lost his family members, including his father, his two  
22 brothers and has ended up detained -- his two brothers who were detained and who  
23 were seen alive and then were murdered, which is contradictory with the Geneva  
24 Convention for the protection of war prisoners.

25 The difficult situation that the Libyan people is going through requires all



1 international organisations to stand with the Libyan people, and as a social  
2 organisation, we look to the ICC as a protector and guardian of international justice to  
3 consider new ways of dealing with this situation and achieving justice.

4 It is strange that although ruled by the Libyan judiciary, it is strange for this Court to  
5 consider the case in question admissible. The object of this Court is not to interfere  
6 in the internal affairs of countries. Its object is instead to complement the role of  
7 national justice.

8 As I stand before you, I feel pain in my heart with the discord in Libyan society with  
9 the rise of organised crime and other negative developments. Your Honours,  
10 I would like to remind all the parties and participants appearing here that we need to  
11 go beyond our internal biases and commit seriously to cooperating with international  
12 bodies to end the crisis and the suffering of our people.

13 We call on you to accept the appeal and we thank you for allowing us this  
14 opportunity. Thank you.

15 PRESIDING JUDGE EBOE-OSUJI: [12:00:46] Thank you very much.

16 We will now turn over to the Office of the Prosecutor for their final submissions.

17 You have 45 minutes.

18 MS BRADY: [12:01:15] Good morning, your Honours. The Prosecution will  
19 structure its reply in the following way:

20 I'll first make a few brief submissions to respond to two points made yesterday by  
21 Mr Faal, and I will then also say something briefly on your Honours' question about  
22 whether, if there's been a case of what we might called egregious fair trial violations  
23 or violations of due process in the first national trial, whether that could be something  
24 to be considered under Article 20(3)(b) as showing a State's unwillingness to  
25 prosecute, that it was done in a manner inconsistent with the intent to bring the

1 person to justice.

2 \* Then Ms Whitford will address you, my colleague Ms Whitford, will address you on  
3 the validity of Law No. 6 under national law briefly, very briefly, addressing the  
4 constitutional validity of that law, but mostly addressing why it was not validly  
5 applied from the point of view of substantive law and from a procedural perspective.  
6 Then finally Ms Regué will address you on three points. The first one will be in  
7 relation to your Honours' question about how to determine if a penalty imposed by  
8 the national court was manifestly disproportionate to see if a pardon in the situation  
9 could be seen as shielding the person from criminal responsibility. And in doing  
10 that, she will also discuss an appropriate -- what might be an appropriate sentencing  
11 range in accordance with your Honour Judge Eboe-Osuji's question. Then she will  
12 also address just two points made by the Libyan tribes supreme council.

13 So firstly just on the matters that I'll be addressing, I'll first turn to respond to two  
14 points made by Mr Faal yesterday.

15 The first point is that, your Honours, yesterday in his submissions, Mr Faal sought to  
16 impugn the finding by the Tripoli court that Mr Gaddafi was tried *in absentia*, but in  
17 doing that he did make one factual premise which we need to correct because it's  
18 plainly incorrect.

19 He pointed to the attendance of defendants 4 and 6 before Tripoli court, saying that  
20 they were, and I quote from him, "almost in the same circumstance[s]", end of quote,  
21 as Mr Gaddafi at that national trial and yet they were convicted *in presentia* while  
22 Mr Gaddafi was convicted *in absentia*.

23 Now it may be the case that -- we don't quibble with the fact that they were convicted  
24 *in presentia*, that's not the point. But, your Honours, it's not the case that these  
25 defendants were almost in the same circumstances as Mr Gaddafi at the national trial.

1 The Tripoli Court of Assize judgment dated 28 July 2015, which is in the record,  
2 shows that Mr Gaddafi attended only four hearing sessions by CCTV, by the video  
3 link. And his counsel attended a total of eight. One was with Mr Gaddafi, one was  
4 when he wasn't there.

5 And so if we look, by contrast, defendant number 4, he attended 15 sessions and his  
6 counsel attended 21. I remind your Honours there were 25 sessions in total,  
7 including the 25th which was the rendering of the verdict. Defendant number 6  
8 attended 19 of the sessions and his counsel attended 20. So you can see already from  
9 these figures that the defendants 4 and 6 attended significantly more hearing dates  
10 than Mr Gaddafi, as did their counsel. So I think that it isn't the fundamental  
11 inconsistency, as the Defence submitted yesterday, for the Tripoli court to have found  
12 that defendants 4 and 6 were tried *in presentia* while Mr Gaddafi was tried *in absentia*.  
13 We simply ask your Honours to reject the Defence's attempt to impugn the *in absentia*  
14 finding against Mr Gaddafi, or that the trial was run on that basis, for that reason. I  
15 wanted to correct that point.

16 Turning to a second point, your Honours, because this is the Prosecution's last  
17 occasion to speak and then we'll hear the submissions made by Mr Gaddafi, of course  
18 bearing in mind there may be further questions from your Honours. But I wanted to  
19 make a point and it's about the unsigned statement that your Honour referred to in  
20 Mr Gaddafi's 2012 filing.

21 Your Honours, we note Mr Faal said yesterday, to -- he said that, well, quote: "That  
22 document he did not sign and we understand he was not in contact with the ICC  
23 lawyers that produced that document before this Court. He indicates it is possible  
24 that the document may have been prepared in consultation with members of his  
25 family ... but he did not put together that document. Not -- he did not work with the

1 ICC lawyers to put together that document. This is the first time his lawyers are  
2 speaking on his behalf in his name."

3 And, your Honours, yesterday you did read at the very beginning of the hearing  
4 paragraph 11 of the filing in which his lawyers then expressed that the statement, the  
5 unsigned statement, which was the first part of that filing, were, quote, "the  
6 sentiments, which Mr Gaddafi wished to convey to the honourable Pre-Trial Chamber,  
7 based on the views he had provided to the OPCD on 3 March 2012, and reconfirmed  
8 on 7 June 2012." And it goes on to then explain the attempt to sign it was sort of  
9 thwarted, one might say, by the guard who told the ICC delegation through the  
10 interpreter that he was illiterate, didn't understand English, and et cetera, confiscated  
11 the statement.

12 Now, your Honours, we're not sure how to reconcile these two points, but I merely  
13 note that they are contradictory. So that's all I'll say about that.

14 Finally, your Honours, I'll turn briefly to your question, interesting question, about  
15 when we might have a situation where there has not been proper due process or  
16 there's been fair trial violations in the national court and you may be thinking of this  
17 especially in the context of a case where the death penalty was imposed.

18 PRESIDING JUDGE EBOE-OSUJI: [12:08:45] Especially taking into account,  
19 assuming that what was read onto the record yesterday as expression of sentiments of  
20 Mr Gaddafi that OPCD filed before the Pre-Trial Chamber, assuming those facts are  
21 valid factually, we're not really then speaking in academic terms about whether or not  
22 a previous trial might have been done correctly. But keeping that in mind, generally  
23 speaking.

24 MS BRADY: [12:09:24] Well, if your Honour is making the point, which we agree  
25 with, that the Defence actually is not taking issue with the fairness of his trial.

1 Maybe I'm not understanding completely your Honour's point.

2 PRESIDING JUDGE EBOE-OSUJI: [12:09:35] Proceed. Go ahead.

3 MS BRADY: [12:09:35] Okay. So anyway, the question is I believe your Honours  
4 asked could that such a situation where there's been these egregious fair trial  
5 violations, could that render a case then admissible at this Court as showing a State's  
6 unwillingness under Article 20(3)(b) as an exception to *ne bis in idem* because then it's  
7 a manifest -- because it is manifestly inconsistent with bringing the person to justice in  
8 accordance with the terms of that provision.

9 Your Honours, we see this could be a potential way, it could be a potential way to  
10 assess a case's admissibility at the Court. On this point we agree with the  
11 submissions that have been made very eloquently by the counsel for the amici  
12 Redress. But in addition to the points she made, I also point your Honours, you will  
13 know it well, to what the Appeals Chamber said in the Senussi appeals judgment.  
14 You will recall that at paragraphs 229 and 230. If I could briefly just read at least  
15 portions of that.

16 At 229 the Appeals Chamber says, quote, I'm quoting: "... the Appeals Chamber  
17 considers that Article 17 was not designed to make principles of human rights per se  
18 determinative of admissibility. Yet, at the same time, the Appeals Chamber agrees  
19 with the Prosecutor that the fact that admissibility is not an enquiry into the fairness  
20 of the national proceedings per se does not mean 'that the Court must turn a blind eye  
21 to clear and conclusive evidence demonstrating that the national proceedings  
22 completely lack fairness.'"

23 And then in paragraph 230 the Chamber notes: "At its most extreme, the Appeals  
24 Chamber would not envisage proceedings that are, in reality, little more than a  
25 predetermined prelude to an execution, and which are therefore contrary to even the

1 most basic understanding of justice, as ... sufficient to render a case inadmissible.  
2 Other less extreme instances may arise when the violations of the rights of the suspect  
3 are so egregious that it is clear that the international community would not accept  
4 that the accused was being brought to any genuine form of justice. In such  
5 circumstances, it is even arguable that a State" -- "it is even arguable that a State is not  
6 genuinely investigating or prosecuting at all. Whether a case will ultimately be  
7 admissible in such circumstances will necessarily depend" on the facts of the case.  
8 So, your Honours, we can see that this is a possibility, but in this case our view is that  
9 you do not need to go down this route. You don't need to go down this route  
10 because there are other --

11 PRESIDING JUDGE EBOE-OSUJI: [12:12:26] Can I pause you there. You may  
12 return to that.

13 When you say it is a possibility, just so we are very clear on what you're saying,  
14 possibility to what? Possibility to saying, well, we have to disregard what happened  
15 before in those circumstances, or possibility to say, well, someone has suffered  
16 enough of a jeopardy already by virtue of a previous trial that everyone would say,  
17 well, it was egregious, but that's not enough of a stress, and jeopardy maybe, as a  
18 practical matter, let's not subject the accused to a second jeopardy at the ICC. That's  
19 the point.

20 MS BRADY: [12:13:10] Yes, I think, I think both. Because I think you can look at  
21 both the fairness of the trial in general, especially when you're looking at a death  
22 penalty conviction, a conviction carrying death penalty to make sure it's not an  
23 arbitrary deprivation of life. I think that comes out clearly from human rights case  
24 law. You could. You could also consider it in relation to the accused's -- you  
25 balance it against the accused's right not to be tried again. You could. I mean your

1 question is basically if someone has had a very zealous trial, let's call it that, should  
2 we put him or her again to the jeopardy of a trial here to make, to make the point or to  
3 have a fair trial at the ICC?

4 PRESIDING JUDGE EBOE-OSUJI: [12:13:55] Purity of principle, isn't it?

5 MS BRADY: [12:13:58] Excuse me?

6 PRESIDING JUDGE EBOE-OSUJI: [12:13:59] Purity of principle. Let's do it again  
7 here, it wasn't done well (overlapping speakers) --

8 MS BRADY: [12:14:01] Exactly.

9 PRESIDING JUDGE EBOE-OSUJI: [12:14:02] -- the first time.

10 MS BRADY: [12:14:02] Exactly. You could consider it. I agree with what the  
11 amici has said, the Redress amici, because there are other -- but again, there are other  
12 concerns at issue here. It's not just about the accused's interest not to be tried again.  
13 There you have also to balance against the State's interest, the object and purpose of  
14 the Rome Statute, and importantly the victims' right to access to justice.

15 So it's not a simple equation that you just can kind of say, well, tick, he was tried. It  
16 was, you know, a bit horrible, or whatever your conclusion is, this wasn't fair. I'm  
17 talking very hypothetically now. I'm not talking about the present case. But you  
18 might come to that conclusion and yet still say for the other reasons it must be  
19 balanced again, the case should be admissible at the ICC.

20 PRESIDING JUDGE EBOE-OSUJI: [12:14:53] But you were beginning to say that  
21 that's not the case here.

22 \* MS BRADY: [12:14:56] Your Honour, this brings me to my last point on this  
23 question, and I think it's a really important point, because this point has not been  
24 argued, this route, this stream of reasoning has not been argued by the parties and  
25 participants save for the OPCV, and I think they have made submissions throughout

1 these proceedings, both at the Pre-Trial Chamber and Appeals Chamber, to that effect.  
2 However, what we have in the records, we have certain information about the trial,  
3 the fairness of the trial, how it was run. We have the UNSMIL report of  
4 February 2017 I believe it was. We have the IBA report of Mr Mark Ellis in  
5 November 2015. But the thing is if you were intending to take this course or go  
6 down that route, I believe you would have to ask the parties to make submissions on  
7 this new set of reasoning.

8 PRESIDING JUDGE EBOE-OSUJI: [12:15:54] But that question was asked yesterday  
9 and it continued today.

10 MS BRADY: [12:16:00] It does and we are giving an answer.

11 PRESIDING JUDGE EBOE-OSUJI: [12:16:04] Good.

12 MS BRADY: [12:16:04] Yes. But I think that it would be a chance I think for proper  
13 briefing on this because it's a pretty major point to declare whether a trial is fair or not.  
14 I think it has to be remembered that the proceedings -- the two reports that are on the  
15 record, the UNSMIL and the IBA report, they were about the proceedings in general.  
16 Let's not forget as well the conclusion of Mr Ellis was that ultimately it was fair.  
17 There were some issues that were identified, but I think his ultimate conclusion,  
18 going by memory now, is that it was a fair, a fair outcome. But he was making a  
19 report for all 37 defendants. So I think that we would have to provide proper  
20 briefing on the point to see whether in particular Mr Gaddafi in that trial had a fair  
21 trial. Because it's a bit general, the findings of the two reports in evidence.  
22 And I also do come back to the point I made before that, I mean, there's also  
23 something a bit counter-intuitive for your Honours to go down that particular path  
24 because Mr Gaddafi himself has not made any complaint after the trial about the  
25 fairness of his trial, so that's another reason why your Honours may not go down that



1 particular route.

2 JUDGE MORRISON: [12:17:34] May not or should not?

3 MS BRADY: [12:17:38] I would say should not. I would say should not.

4 PRESIDING JUDGE EBOE-OSUJI: [12:17:41] But can we really -- I'm not necessarily  
5 disagreeing with you, I just want to test the limits of the proposition there. If you  
6 looked at Article 20(3)(b), the last, the last phrase, so to speak, in that provision gives  
7 an orientation of the concern of the mischief in question and that orientation was  
8 inconsistent with an intent to bring the person concerned to justice. So it raises a  
9 question, where that overzealous trial was done, what does it say about the intent to  
10 bring the person to justice, which is what you see perhaps as a gravamen of Article  
11 20(3)(b)?

12 MS BRADY: [12:18:47] If I understand clearly your question, you would have to  
13 read that phrase that it was manifestly inconsistent with bringing the person to justice  
14 looking at justice in a very holistic way, in an objective way. Because on the one  
15 hand, you could say, well, if a national proceeding was so zealous and they absolutely  
16 wanted to have a conviction, let's say the conviction was the final outcome, is that  
17 justice? Is that true justice? It does raise very difficult questions because it starts to  
18 get into the whole subjective intent of the State in that situation.

19 I think, your Honours, at the end of the day, the purpose of Article 20(3) is essentially  
20 to avoid a sham, a sham acquittal or conviction.

21 And so that has to be taken into account when you consider what justice means --

22 PRESIDING JUDGE EBOE-OSUJI: [12:19:56] Also shielding if we also looking at it,  
23 perhaps the overarching - assuming that is the interpretation to be given to Article  
24 20(3) - if the overarching concern is to avoid shielding somebody from inquiries into  
25 accountability. It is a difficult question, one appreciates that, but I just thought to the

1 extent that that has anything to do with how we look at Article 20(3) *ne bis in idem*, it  
2 is something that submissions of counsel might help with, for what it is worth.

3 MS BRADY: [12:20:43] Yes, well, I mean, 20(3)(a) is the avoidance of shielding.  
4 That's clear. 20(3)(b) I would say is to more avoid a sham, a non-genuine trial, a  
5 sham acquittal, a non-genuine --

6 PRESIDING JUDGE EBOE-OSUJI: [12:21:08] Against concerns of double jeopardy,  
7 isn't it?

8 MS BRADY: [12:21:13] It is. It has to be balanced. They're both very important  
9 concerns. They have to be balanced. Where you draw that line, which one gives  
10 way to the other, I think because of the object and purpose of the Rome Statute, it  
11 would be in the side of finding the case was admissible.

12 PRESIDING JUDGE EBOE-OSUJI: [12:21:36] Proceed, please.

13 MS BRADY: [12:21:38] Thank you. That concludes my submissions in reply.  
14 I will now turn to Ms Whitford, who will be addressing you on Law No. 6.

15 MS WHITFORD: [12:21:59] Thank you, your Honours.

16 Your Honours, I will address you today in relation to the reasons why Law No. 6  
17 could not and has not been validly applied to Mr Gaddafi's case. These issues relate  
18 to sub-grounds (ii) and (iii) of ground 2 of this appeal.

19 To begin, I will briefly address the first sentence of question (1), was Law No. 6 of 2015  
20 validly issued?

21 My colleague Ms Regué has already addressed you in relation to whether Law No. 6  
22 was validly issued under international law. What remains to be addressed is  
23 whether Law No. 6 was validly issued under Libyan law.

24 The Libyan attorney general's office has submitted that Law No. 6 was not validly  
25 issued under its domestic law. Its legal reasoning is set out in its 18 September 2018

1 letter and its 8 November 2019 observations.

2 The legal issues identified as relevant by the attorney general's office concern the  
3 constitutional validity of certain laws issued by the Libyan House of Representatives,  
4 including Law No. 6. For your Honours' assistance, I will outline the facts relevant  
5 to these issues, as we understand them from the material that's before the Chamber.

6 The House of Representatives passed Law No. 6 on 7 September 2015. At that time  
7 the Al-Bayda Transitional Government was the internationally recognised executive  
8 authority.

9 However, according to the attorney general's office at the time that it passed  
10 Law No. 6, the House of Representatives could not validly issue laws and this was a  
11 result of a decision of the Libyan supreme court delivered on 11 June 2014. \* And this  
12 situation was not resolved until the Libyan Political Agreement was signed on  
13 17 December 2015. This agreement established the Government of National Accord  
14 as the internationally recognised government and the Al-Bayda Transitional  
15 Government ceased to be the internationally recognised government at that time.

16 The Libyan political agreement also established a process for remedying the invalidity  
17 of the laws passed by the Libyan House of Representatives during the intervening  
18 period, and this included Law No. 6.

19 According to the attorney general's office, this process was never implemented.

20 Therefore, it says, Law No. 6 was not valid. The attorney general's office maintains  
21 this position on the invalidity of Law No. 6 notwithstanding the six cases that have  
22 been put forward by the Defence for Mr Gaddafi in which it appears that Law No. 6  
23 has been applied.

24 It explains that the supreme court has not issued any judgment on the interpretation  
25 or application of Law No. 6. In the absence of such judgment, it says, it cannot be

1 concluded from the application of Law No. 6 in these six cases that it was a valid law.  
2 In our submission, your Honours, this Court is not the proper forum to resolve these  
3 complex issues of Libyan constitutional law.

4 Moreover, in this case it is not necessary for the Court to resolve whether Law No. 6  
5 was validly issued under Libyan law. This is because even if Law No. 6 was a valid  
6 law, as Ms Regué explained yesterday in response to your Honours' questions, it had  
7 no effect on Mr Gaddafi's case for two main reasons.

8 The first reason is substantive. Law No. 6 did not apply to the crimes with which  
9 Mr Gaddafi was charged and convicted.

10 The second reason is procedural. Law No. 6 was not validly applied to his case.

11 And each of these reasons taken alone is sufficient to conclude that Law No. 6 had no  
12 effect on his case.

13 PRESIDING JUDGE EBOE-OSUJI: [12:26:55] May I ask you a question, please.

14 Hold your thoughts there and return to it later.

15 When you said that this Court is not the place to resolve these complex matters of  
16 Libyan constitutional law, are you saying that because it is a very complex scenario,  
17 that if we followed it, we might get lost? To put it bluntly. Or that as a matter of  
18 principle, we should not go there? Which is it?

19 (Microphone not activated) practical matter the second is a matter of principle.

20 MS WHITFORD: [12:27:39] Your Honour, we say it's a matter of principle. It's  
21 (Overlapping speakers).

22 PRESIDING JUDGE EBOE-OSUJI: [12:27:44] If it is a matter of principle, what do we  
23 do with the concept of complementarity then? Ms MacDonald spoke earlier and, at  
24 the risk of misquoting her, she might have said that it's not so simple to say that the  
25 ICC may not inquire into what happened in the national jurisdiction in terms of law

1 and all that. Even if she didn't say that, the question is if we have the concept of  
2 complementarity that is supposed to complement national jurisdictions, are we really  
3 free to say we cannot look to see what the laws of the jurisdiction we're supposed to  
4 be complementing says?

5 MS WHITFORD: [12:28:45] Thank you, your Honour. I understand better your  
6 question.

7 I would refer your Honour to the Bemba admissibility decision on this point. The  
8 fact that the interpretation and application of domestic laws should ordinarily be  
9 given deference and that the Chamber should accept them unless there are  
10 compelling reasons not to do so. And moreover, in this case, the issue of whether  
11 Law No. 6 is valid or not doesn't require determination in order to reach a decision.

12 PRESIDING JUDGE EBOE-OSUJI: [12:29:13] Thank you very much. You may  
13 perhaps continue on that path.

14 MS WHITFORD: [12:29:17] Thank you, your Honour.

15 Your Honour, the Pre-Trial Chamber, having already found that the first of the two  
16 reasons applied, the substantive reason, did not need to determine that Law No. 6  
17 was validly issued, as I've just said, and therefore its approach was reasonable. And  
18 the fact that it did not make such a finding does not show any error in the exercise of  
19 its discretion, in our submission.

20 In my remaining submissions I will elaborate on these two reasons why Law No. 6,  
21 even if it was a valid law, had no effect on Mr Gaddafi's domestic case. And in  
22 doing so, I will develop on some of the points that were expressed by the Libyan  
23 representatives today and also touched upon by my learned colleague representing  
24 the amici Redress and Lawyers for Justice. I will also very briefly address why  
25 certain documents relied on by the Defence do not prove that Law No. 6 rendered his

1 case final.

2 Turning to the first reason, we say that the Chamber correctly found that Law No. 6  
3 did not apply to Mr Gaddafi's case due to the crimes with which he was charged.  
4 As we've heard today, Article 3 of Law No. 6 excludes certain crimes from its scope.  
5 The Chamber reviewed Article 3. \* It noted that certain crimes, and it listed  
6 identity-based murder, kidnapping, enforced disappearance and torture, were among  
7 those crimes which were excluded.

8 And then the Chamber considered the position of the attorney general's office and  
9 that was that Law No. 6 did not apply to Mr Gaddafi due to the crimes attributed to  
10 him. And the Chamber noted that its own reading of Article 3 was in line with the  
11 attorney general's position.

12 And we say the Chamber's approach was reasonable and there are three reasons.

13 First, there were no compelling reasons for the Chamber not to accept prima facie the  
14 correctness of the statement of the attorney general's office that Law No. 6 was not  
15 applicable to Mr Gaddafi's case. Its statement was clear, definitive and also  
16 consistent with other evidence in this case, including a prior statement made by the  
17 attorney general's office in 2017. And importantly, it was also in line with the  
18 Chamber's own reading of the plain text of Law No. 6.

19 Second, the Defence has not demonstrated that the attorney general's erred in stating  
20 that Law No. 6 excluded the crimes of murder attributed to Mr Gaddafi. The  
21 Defence has argued that Mr Gaddafi was not charged and convicted of identity-based  
22 murder. And this is the specific term used in Article 3. However, the Defence has  
23 not explained why the interpretation provided by the attorney general's office would  
24 be erroneous. And in fact, the record supports that its interpretation was correct.

25 There was a persecutory element to the crimes of murder for which Mr Gaddafi was

1 charged and convicted and this fact was acknowledged by the Defence in the context  
2 of its argument that the two cases cover substantially the same conduct. Therefore,  
3 these crimes of murder would be consistent with the definition of identity-based  
4 murders advanced by the Defence, albeit with no support.

5 Further, in its 8 November observations the attorney general's office has confirmed  
6 that the crimes attributed to Mr Gaddafi fit within this definition of identity-based  
7 murder and the Libyan representatives have confirmed that position today.

8 Third, your Honours, the Chamber did not err in referring to the crimes with which  
9 Mr Gaddafi was charged instead of those with which he was convicted. We say this  
10 difference in terminology is immaterial. The record shows that Mr Gaddafi was  
11 convicted of all of the crimes with which he was charged and, in any event, it was  
12 reasonable for the Chamber to refer to the crimes with which he was charged since his  
13 case was not final and he must be retried.

14 I will turn now, your Honours, to the second reason why Law No. 6 had no effect on  
15 Mr Gaddafi's case. And this reason relates to the procedure for applying Law No. 6.  
16 This procedure is set out in Article 6 of the law itself and it states, quote: "The  
17 competent judicial authority shall issue a reasoned decision to stay the criminal  
18 proceedings once it has ascertained that the conditions for the amnesty are met."  
19 End of quote.

20 The attorney general's office has confirmed Article 6 establishes Law No. 6 can only  
21 be applied by the competent judicial authority with jurisdiction over the case. It  
22 reiterated this point in its 8 November observations and also today.

23 The Chamber thus correctly noted that a reasoned decision by the competent judicial  
24 authority terminating the case is a prerequisite for Law No. 6 to be applied.

25 Lawyers for Justice in Libya and Redress Trust confirmed in their Rule 103

1 observations that the definition of judicial authority under Libyan law excludes the  
2 minister of justice.

3 Yet, the Defence argues that the Chamber should have relied on the acts of the  
4 minister of justice in the Al-Bayda government to find that Law No. 6 had been  
5 applied to his case. The Chamber was reasonable not to rely on these facts and I'll  
6 give two reasons.

7 First, the competent judicial authority with jurisdiction over Mr Gaddafi's case has  
8 not issued a reasoned decision to stay the criminal proceedings and apply Law No. 6.  
9 This has been clearly and consistently stated by the attorney general's office,  
10 including in its 8 November observations.

11 Second, the purported application by the minister of justice in the Al-Bayda  
12 Transitional Government of Law No. 6 to Mr Gaddafi's case was the act of an  
13 executive authority. An executive authority has no power to apply Law No. 6.

14 Accordingly, this attempt to apply Law No. 6 was invalid. That this act had no legal  
15 value and no impact whatsoever on Mr Gaddafi's case has been clearly and  
16 repeatedly stated by the attorney general's office.

17 Now, the Al-Bayda Transitional Government is said to have applied Law No. 6 to Mr  
18 Gaddafi's case in April 2016. At this time it had ceased to be the internationally  
19 recognised government. \* As I explained earlier, this resulted from the signing of the  
20 Libyan Political Agreement in December 2015.

21 However, it is not this fact that determines whether Law No. 6 was validly applied to  
22 Mr Gaddafi's case. Why? Because according to the terms of Law No. 6 itself, even  
23 if it was a valid law, no executive authority could apply it. It follows that even the  
24 minister of justice in the Government of National Accord, the internationally  
25 recognised government at that time, could not have applied it.



1 We say, your Honours, that for all of these reasons the Chamber was correct not to  
2 conclude that Law No. 6 had been validly applied to Mr Gaddafi's case based on these  
3 statements and acts of certain members of the Al-Bayda Transitional Government.  
4 Finally, your Honours, the Defence argues that the Chamber should have concluded  
5 from the fact of Mr Gaddafi's release that Law No. 6 had been validly applied to him.  
6 And I note that your Honour asked a question directly on this point yesterday. Your  
7 Honours, the Defence as the party bringing this admissibility challenge bears the  
8 burden of proof in establishing the relevant facts underpinning the challenge. The  
9 evidence before the Chamber on this point concerning Mr Gaddafi's release is  
10 contradictory and inconclusive. This issue is fleshed out in our Prosecution response  
11 to this appeal, paragraphs 56 to 61, and I won't repeat our submissions here.  
12 Nonetheless, one thing we know is that from the time of his arrest in November 2011  
13 until the time of his purported release in April 2016, Mr Gaddafi was detained by the  
14 Abu-Bakr al-Siddiq battalion headed by Mr Al-'Ajami Al-'Atiri. The precise nature  
15 of the relationship between this armed group and the recognised government remains  
16 unclear.

17 On 31 May 2013 in the first decision on the admissibility of this case, Pre-Trial  
18 Chamber I found that the Libyan authorities, quote, "[had] not yet been able to secure  
19 the transfer of Mr Gaddafi from his place of detention under the custody of the Zintan  
20 militia into State authority" end of the quote, in order to try him.

21 Nonetheless, a trial began and after a law was passed which provided for an accused  
22 to be tried via CCTV or video link, Mr Gaddafi did attend four sessions in total all by  
23 video link between April and June 2014.

24 The Libyan representative Mr Gehani addressed this issue this morning. And just  
25 for the sake of clarity, we understand what he said was that all the sessions were by

1 video link, but he did not attend all the sessions of the trial. In fact, our reading of  
2 the record is that he attended four of the total of 25 sessions.

3 What we also know is that in July 2014 Mr Al-'Atiri, the head of the armed group  
4 detaining Mr Gaddafi, stopped cooperating with the Tripoli court. \* Mr Al-'Atiri said  
5 as much in a conversation with a Prosecution investigator on 11 March 2016.

6 And, your Honour, the place where this is contained is an investigator's statement \*  
7 and this is cited at paragraph 40 to the Prosecution response to the original  
8 admissibility challenge.

9 Now this is consistent with the fact that Mr Gaddafi did not attend any further  
10 hearings after 22 June 2014. And this is also consistent with the 14 April 2016 letter  
11 sent by the head of the judicial police in Zintan to the attorney general's office, which  
12 stated, quote, "... since 15 July 2014, the prisons located in the town of Zintan are no  
13 longer under the Government's authority or legitimacy," end of quote.

14 And it was after receiving this letter that on 20 April 2015 the Tripoli court decided to  
15 proceed in the absence of Mr Gaddafi.

16 Therefore, your Honours, from the date of 15 July 2014 Mr Gaddafi was no longer  
17 being held on the charges that were before the Tripoli court and this is relevant to the  
18 question that your Honours asked yesterday. By that point in time Mr Gaddafi had  
19 been detained on those charges for a total of two years and eight months.

20 From 15 July 2014 until his purported release around 12 April 2016 - and this is a  
21 further one year, nine months - Mr Gaddafi was no longer being detained on the  
22 charges that were before the Tripoli court. And we say that this is a factor that your  
23 Honours need to take into account when considering the time that Mr Gaddafi served  
24 in custody on the charges before the Tripoli court and in considering whether this  
25 was an adequate punishment for his criminal conduct.

1 And we submit that two years and eight months would not be adequate. But even  
2 in the event that your Honours took into account the entire period of four and a half  
3 years, that this would also not be adequate. And my colleague Ms Regué will  
4 expand on that point.

5 Returning now to the question of Mr Gaddafi's release.

6 At the time of his purported release in April 2016, Mr Gaddafi was being held by an  
7 armed group which was not under the authority or following the instructions of the  
8 internationally recognised Government of National Accord.

9 And your Honour asked yesterday if Mr Gaddafi was not released pursuant to  
10 Law No. 6, then what is the alternative? We say, your Honours, if Mr Gaddafi was  
11 released, there was no legal basis at all for his release. In other words, it was an  
12 unlawful release. And this understanding was confirmed today by the Libyan  
13 minister of justice, Mr Lamlom. \* In fact, Mr Lamlom submitted that the act of  
14 releasing of Mr Gaddafi could even be characterised as a crime under Libyan law of  
15 aiding and abetting a fugitive to evade justice. And that's consistent with the  
16 position taken previously by the attorney general's office.

17 In its 18 September 2018 letter, when commenting on the purported release of Mr  
18 Gaddafi, it stated, quote, this was "nothing more than a factual action that has no legal  
19 value except to undermine the competent authorities," end quote. And further,  
20 quote, "It is unworthy of any consideration and has no legal impact whatsoever."  
21 End of quote.

22 In contrast, your Honours, there is overwhelming evidence, including clear  
23 statements from the attorney general's office that Law No. 6 was not validly applied  
24 to Mr Gaddafi's case. So, your Honours, we say, given all these reasons, the  
25 Chamber was correct and reasonable not to rely on the fact of Mr Gaddafi's purported

1 release to conclude that Law No. 6 had been applied to him.

2 (Microphone not activated) time and I won't go into any detail in relation to the

3 documents. Suffice to say that the interpretation of Article 353, which is the article

4 upon which the Defence arguments concerning those documents applies, the

5 interpretation has now been provided by the government of Libya in its observations

6 submitted last week, and we say that that interpretation only serves to strengthen the

7 arguments that we had put forward in our Prosecution response.

8 Your Honour, I'll stop there in order to leave sufficient time for my friend.

9 What we say ultimately is that nothing can alter the fact that Mr Gaddafi -- Law No. 6

10 had no effect on Mr Gaddafi's case for those two reasons that I outlined in my

11 submissions today. First, the crimes with which he was charged and convicted fall

12 outside the scope of Law No. 6. And second, Law No. 6 has not been validly applied

13 to him through the reasoned decision of the competent judicial authority with

14 jurisdiction over his case.

15 Unless your Honours have any questions, I will pass the floor to my colleague

16 Ms Regué.

17 PRESIDING JUDGE EBOE-OSUJI: [12:45:52] Thank you very much.

18 MS WHITFORD: [12:45:53] Thank you, your Honours.

19 MS BRADY: [12:45:55] Just before Ms Regué rises, your Honours, I do want to

20 correct one submission I made in my reply because I wouldn't want to mislead this

21 Court.

22 Mark Ellis's report in fact concluded that the trial was not fair, but rather, that the

23 Prosecutor and the Judges had made an effort to have a fair trial. But, your Honours,

24 he said although efforts were made to comply with international fair standards and

25 impartiality, there was much lacking in the conduct of the trial, and he concluded that

1 the trial was unduly compromised.  
2 But that doesn't take away from the point I was making, that you don't -- there's no  
3 need for you to actually analyse the case under that route. And also the parties  
4 themselves would have to have a chance to make written submissions on this point as  
5 it applies to Mr Gaddafi himself. And then even if you were to go down the path of  
6 concluding it was not fair, then this would have to be balanced against the -- my  
7 submission remains that you would balance it against the competing other  
8 compelling interests of the Rome Statute that it seeks to serve, including those of the  
9 victims and the international community, to have an effective prosecution, to have an  
10 effective trial and, as necessary, an appropriate and effective punishment.  
11 So that would come down still on the side of finding the case admissible. But I did  
12 want to make that point to clarify because I had said -- I had misremembered the  
13 ultimate conclusion of that report. Thank you.

14 MS REGUÉ: [12:47:45] Good afternoon, your Honours.

15 I would like to briefly go back to your question yesterday about how your Honours  
16 should determine the manifestly disproportionate nature of a penalty to conclude that  
17 a pardon or an amnesty render the proceedings with a purpose of shielding the  
18 person from criminal responsibility under Article 20(3)(a).

19 First, your Honour, as I already mentioned yesterday, we should consider the factors  
20 also relevant for unwillingness under Article 17(2)(a). For example, we should look  
21 at how and when was the law passed or the pardon awarded? Was it passed shortly  
22 after the conviction? Did the measure comply with the domestic procedure?  
23 The content of the measure is also relevant. Is it given to only one or a reduced  
24 number of persons? Does it regulate a transparent process to identify the  
25 beneficiaries? What are the conditions that the beneficiaries must comply with?

1 Does the law foresee any measure benefiting the victims such as reparations? Must  
2 the person acknowledge responsibility?

3 Second, your Honours, you should also consider the circumstances in which the  
4 measure was applied. Did it follow the procedures set out in the law? Was it  
5 applied by the competent authority?

6 Third, and as I said yesterday, the concrete circumstances of the case should also be  
7 considered, the nature of the crimes and the degree of culpability of the person.

8 Fourth, and together with the object and purpose of the Rome Statute, we should  
9 consider the purpose of sentencing, which is retribution, deterrence and rehabilitation.

10 We should consider the circumstances of the convicted person but also the rights and  
11 the interests of the victims.

12 If now we look at Mr Gaddafi's case, and assuming that Law No. 6 was applied to  
13 him and after a final decision was taken, which we both dispute, we can conclude that  
14 this application was with a purpose of shielding him from criminal responsibility for  
15 the reasons that we have explained these two days and those are, your Honours, there  
16 are some questions about the constitutional validity of the law.

17 Also the law does not regulate a transparent procedure to identify the beneficiaries.  
18 It does not require the beneficiary to acknowledge responsibility. We submit that  
19 the requirements, the conditions in Article 2 are insufficient. No benefit for the  
20 victims is acknowledged in the law. No reparations.

21 Also the circumstances upon which Law No. 6 was applied to Mr Gaddafi do not  
22 follow the procedure of the law. My colleague Ms Whitford has explained and we  
23 have set out a very detailed procedural background, which is quite complex, in our  
24 response to the admissibility challenge and also in annex B of our response to the  
25 appeal.

1 But in this case it was the minister of justice and the deputy minister of justice of the  
2 Al-Bayda government, which is not the GNA, who requested the release of  
3 Mr Gaddafi to the Zintan prosecutor's office. The request was not granted.

4 Next thing we have is a telephone interview of Mr Al-'Atiri, the head of the battalion  
5 which detained Mr Gaddafi, in July 2016 saying that he had applied Law No. 6 to  
6 release Mr Gaddafi. However, the presidency council of the GNA, the recognised  
7 Libyan government, repudiated the release.

8 And now going back to the circumstances of Mr Gaddafi, your Honours, \* he was de  
9 facto prime minister of Libya who had effective control over the State apparatus  
10 during the period where the crimes were committed. He allegedly planned, funded,  
11 incited, instructed and contributed to the murder of civilian population in particular  
12 through violent attacks against civilian demonstrators.

13 There is no evidence that Mr Gaddafi has acknowledged his responsibility or  
14 contributed in any way towards the victims. There is no evidence that Mr Gaddafi  
15 has rehabilitated.

16 Moreover, the circumstances of Mr Gaddafi's detention in general are unclear. He  
17 was not under the custody of the Libyan authorities from July 2014 and we do not  
18 have much information about the concrete circumstances of his detention during the  
19 two years and eight months before. We do know that now he has not surrendered to  
20 the Libyan authorities. But in short, your Honours, we cannot say that the time that  
21 Mr Gaddafi has spent with the Abu-Bakr al-Siddiq battalion constitutes punishment  
22 for the purposes of the Rome Statute and much less that it served the sentencing  
23 purposes of deterrence, retribution and rehabilitation.

24 And in response to your Honour's question yesterday on page 117 and today about  
25 the range of appropriate sentences, your Honours yesterday raised the question about

1 the difficulty on how to assess the proportionality of the sentence and against which  
2 legal framework such analysis should be conducted.

3 This is not a straightforward answer, your Honour.

4 First, we do agree that you should consider the domestic legal framework, indeed,  
5 you should look at that. However, you should go beyond and look at the facts, the  
6 inherent gravity of the facts, and you should consider whether the penalties foreseen  
7 in the domestic legal framework and awarded in the concrete case, whether they  
8 really reflect the gravity and the culpability. In doing so, your Honours should also  
9 consider the discretion of the domestic authorities as the Appeals Chamber also  
10 awards \* some discretion to the Trial Chamber in determining the sentence, because  
11 at the end of the day the sentencing regime is a discretionary matter.

12 The practices of the international tribunals may be of guidance, but we cannot  
13 extrapolate the sentencing ranges that they have applied to the domestic framework.

14 There are very good publications from Professor Barbora Hola from Vrije Universiteit  
15 in Amsterdam, also Silvia D'Ascoli. They compare, they note that the sentencing  
16 regime in the two tribunals actually differs. ICTR they are quite higher than ICTY.  
17 For high-level perpetrators ICTY around 20, 25 maximum -- sorry between 20, 25,  
18 ICTR 55.

19 But, your Honours, the figure is not the figure that the sentence -- the figure of the  
20 sentence that has been given domestically should not be the only factor. You should  
21 look, as I mentioned, holistically at other factors, other criteria also before the moment  
22 that the sentence was imposed in order to determine whether there was indeed lack  
23 of genuineness or unwillingness.

24 And I think, your Honours, that I've probably run out of the time of the time allocated  
25 to the Prosecutor, right, so I will -- I think that I will stop there.



1 And just to conclude, your Honours, it's the Prosecution's position that the Pre-Trial  
2 Chamber's decision was correct and you should uphold it and in doing that, confirm  
3 that the case against Mr Saif Gaddafi remains admissible before the Court.

4 PRESIDING JUDGE EBOE-OSUJI: [12:56:46] Thank you very much.

5 (Appeals Chamber confers)

6 PRESIDING JUDGE EBOE-OSUJI: [12:57:33] We will adjourn now. In order to see  
7 if we can finish earlier, let's return at 2.15 instead of 2.30. At that time counsel for  
8 Mr Gaddafi will have the floor.

9 The Court rises.

10 THE COURT USHER: [12:58:00] All rise.

11 (Recess taken at 12.58 p.m.)

12 (Upon resuming in open session at 2.18 p.m.)

13 THE COURT USHER: [14:18:24] All rise.

14 Please be seated.

15 PRESIDING JUDGE EBOE-OSUJI: [14:18:47] Thank you very much.

16 Counsel for Mr Gaddafi.

17 MR FAAL: [14:18:55] (Microphone not activated)

18 THE INTERPRETER: [14:19:24] Microphone, please.

19 MR FAAL: [14:19:39] Yes, now it's on. Thank you. I'm sorry about that.

20 As I said, your Honours, we will take this opportunity to respond to some of the  
21 issues that we have heard over the last two days. I would endeavour to provide  
22 a roadmap about the issues that we would address.

23 First of all, Mr President, you had asked that we clarify our position regarding the  
24 statement that was filed with the Court by OPCD attributed to Dr Gaddafi. That  
25 aside, I intend to address six issues, and then we conclude.

1 The first issue would be issues that were raised concerning the Tripoli judgment.  
2 The second is matters pertaining to the release of Dr Gaddafi. I will also respond to  
3 some of the submissions by the Libya government, in particular, about the application  
4 of Article 212. We will then address the issues of amnesty, the issues of shielding,  
5 and punishment, whether they should be proposing it or not. And then we would  
6 conclude.  
7 I will address the first three issues and my colleague Aidan Ellis would address the  
8 following three issues, and then I will come back and conclude.  
9 Your Honours, on the issue of the Tripoli judgment, your Honours, two issues were  
10 raised in the submission of the Prosecution. And the first was whether the authority  
11 for the -- what was our authority for the proposition that Dr Gaddafi did not attend  
12 sessions by video link due to technical issues? We just wish to draw the attention of  
13 the Chamber to paragraph 21 in this document LBY-OTP-0062-0302. And the  
14 essence of it is that the Libyan prosecution submitted a technical report confirming  
15 that due to the damage to the transmitter stations and post offices the video link was  
16 unavailable. They did not only affect Dr Gaddafi's trial, they also affected the trial  
17 for those who were based in Misrata, including person 4 and person 6. So we submit  
18 that our proposition that he did not attend because of these problems, the problems  
19 with the video link, was correct and accurate.  
20 Second, the reasons, what were the reasons given by the Tripoli court for their finding  
21 that the trial was *in absentia*? Again, we refer to the judgment itself and the reference  
22 is LBY-OTP-0062-0427.  
23 Perhaps I could ask that this be put on the screen, please, if that is possible. Excuse  
24 me, I think we need assistance. Someone to yield to the ...  
25 Thank you.

1 Perhaps, Mr President, in order to save time, I will just read out what it says. Under  
2 the heading "Grounds of Judgement" it says:

3 "Whereas it has come to the knowledge of the Court through briefings on public  
4 affairs that Defendant No. 1, Sayd al-Islam Muammar Gaddafi said during one of his  
5 trial sessions before the Court of Appeal in al-Zawiyah, Zintan Criminal Circuit, that  
6 he wishes to be prosecuted in that city. Therefore, his non-appearance before  
7 the Court was the result of his own free will and his belief that his jailers do not have  
8 jurisdiction, as was mentioned by the Director of the Judicial Police ..."

9 PRESIDING JUDGE EBOE-OSUJI: [14:24:44] I think we are following you, keep  
10 reading.

11 MR FAAL: [14:24:47] "... as was mentioned by the Director of the Judicial Police in  
12 his Letter No. 8-9-1648 dated 14/4/2015 attached to the case file. Therefore, he is  
13 deemed a fugitive from justice."

14 So those were the only two elements that formed the basis of the decision that he was  
15 a fugitive. One, that he had said in another trial, a trial separate from the one that  
16 was going on in Tripoli, that he wished in that trial to be tried in Zintan. Not in the  
17 Tripoli case.

18 So it was on that basis and on the basis of the letter submitted by the judicial police,  
19 and the issue that was flagged therein was that he had claimed that his jailers did not  
20 have jurisdiction. On the basis of those two elements they found him a fugitive, so  
21 the submissions by the Defence on those issues were correct.

22 The judgment went on to say that because Dr Gaddafi had said that he wished to be  
23 tried in Zintan for the other case, because there were two ongoing cases at the time,  
24 that signalled an indication that in his own free will and his own belief he did not  
25 wish to appear before the Court, and that is the reason why the Court declared him

1 a fugitive. And we say that the failure to attend such as to justify the protection of  
2 the court in declaring the trial *in absentia* was erroneous and wrong.

3 PRESIDING JUDGE EBOE-OSUJI: [14:26:57] Mr Faal, are you able to shed any more  
4 light on, if you know, or if you are able to, on why he might have wanted to be tried  
5 in the trial, in the proceedings in Zintan but not the one in Tripoli?

6 MR FAAL: [14:27:17] This was, this was a separate trial that was being done in  
7 Zintan. It did not have a direct relationship with the trial that was ongoing in Tripoli.  
8 But because in the trial in Zintan he had indicated there that he would wish to be  
9 tried in Zintan, that statement was taken by the judge in the Tripoli case and used  
10 against him.

11 PRESIDING JUDGE EBOE-OSUJI: [14:27:48] So the point was that he was denying  
12 that the court in Tripoli had jurisdiction?

13 MR FAAL: [14:27:58] My understanding from this paragraph is that his jailers  
14 lacked jurisdiction. I cannot give it any other interpretation other than the words  
15 that are used there, because I do not know of the other underlying facts.

16 PRESIDING JUDGE EBOE-OSUJI: [14:28:15] All right. Please proceed.

17 MR FAAL: [14:28:16] Thank you very much, Mr President.

18 Another issue that we would wish to deal with is the issue of the release of  
19 Dr Gaddafi.

20 We are asked to look at the basis of his release and we say the record in fact contains  
21 a document which explains the basis of his release. It is the letter by the minister in  
22 the Al-Bayda government, which is actually contained in annex 12 of  
23 the Prosecution's response, which stated the reasons why Dr Gaddafi was released.  
24 We have heard from the representative of the Libya government that that release was  
25 unlawful and it was in fact criminal. That that was his submission. We also heard

1 from the Prosecution suggesting that that release was in fact unauthorised.

2 But, Mr President, we argue that the amnesty law which the minister in Al-Bayda  
3 used as his basis for the release has provided a mechanism in order to adjudicate  
4 disputes that would arise as a result of the application of the law. And that,  
5 your Honours, is Article 8 of the amnesty law, and with your permission I read  
6 Article 8.

7 And this is what it says:

8 "The competent prosecutorial authority shall be responsible for adjudicating disputes  
9 arising from the application of the provisions of this Law. Its decision shall be  
10 subject to appeal in accordance with the general rules."

11 Effectively, the office of the minister of justice and the attorney general had  
12 a responsibility to address all unlawful applications of this law. It was their  
13 responsibility to do so in Libya. It is quite convenient, Mr President, to come to  
14 The Hague and argue that the law is invalid, the law should not have been used, but  
15 when they sat in their offices in Libya they acted to the contrary. It was their  
16 responsibility under Article 8 to challenge the application of the law. They did not.  
17 It was their responsibility to ensure that nobody who did not qualify under the law  
18 benefits from it. They did not. They knew that the law was applied or purportedly  
19 applied to Dr Gaddafi. They did not do anything about it.

20 It is our submission that the position of the government of Libya should not be judged  
21 on the basis of what they say in The Hague, but also for their action or inactions in  
22 Libya. Their conduct in Libya is important in determining this particular issue.

23 We also submit, Mr President, that this law had been applied several times. We  
24 have submitted evidence of that fact. The government of Libya did nothing in order  
25 to prevent the application of the law to those people, they never challenged it. Even

1 the validity of the law they have come to the Hague to challenge, but doesn't the  
2 minister of justice in Libya have the responsibility to challenge the unconstitutionality  
3 or otherwise of a law in Libya? Did they challenge it in Libya, in Libyan courts?

4 No.

5 In fact, what has happened is, according to Libyan law, a person who is sentenced to  
6 death would, under Article 37 of the Criminal Code, lose his legal status. In fact, the  
7 law in Libya is called legal interdiction. It has a similar effect to Article 353 of the  
8 Criminal Procedure Code, which means under that law that if a person is convicted  
9 *in absentia* the person would be unable to file cases in that person's own name.

10 But what has happened in this instance, it meant that Dr Gaddafi could not do  
11 anything on his own. He could not -- he has lost legal status, he cannot get an  
12 identity card, he cannot bring action on his behalf, except by a person appointed by  
13 a court.

14 But what has happened in Libya, the same attorney general's office participated in  
15 a suit brought in the name of Dr Gaddafi when, if the amnesty law was not applied,  
16 he would not have been able to do so. If the government considered him to have  
17 been under legal interdiction, he would not have been able to file those two suits.

18 But the office of the attorney general participated in both suits as if Dr Gaddafi still  
19 retained full legal status. That is, that is endorsement of the application of the  
20 amnesty law. It is acquiescence. We say in Libya they accepted it. They come to  
21 The Hague and deny it. There is inconsistency in their conduct and the Court  
22 should call them out for that.

23 So, in essence, what we have is an application of a law in Libya which the attorney  
24 general considered to be unconstitutional. He has a responsibility to challenge it  
25 before the courts in Libya, but he did not do so, he came to The Hague and wants this

1 Court to pronounce on the validity or the unconstitutionality of that court. That  
2 should not be allowed. This Court must not serve or should not serve as the  
3 supreme court of Libya.

4 I will move on to the other issue, which deals with the issue of *presentia* and *absentia*.  
5 On this particular issue also it is quite interesting, the response we have received from  
6 the Libya government. I would have thought that at least we would have a very  
7 good, detailed explanation of what Libyan law says on this issue.

8 What do we have is one statement from Mr El-Gehani saying that for a trial to be  
9 *in presentia* one must be present in all sessions. And I underline all sessions. But is  
10 that the case? That is not in accord with Libyan law. I have read out Article 212,  
11 which said that even -- all that needs to happen is for one to attend once, but even if  
12 one does not attend the other sessions without any lawful excuse. So that is so  
13 completely at odds with the interpretation we have received from the Libyan  
14 government.

15 Equally, we were told that in civil law in Libya only one attendance is enough for  
16 *in presentia*, but that the law is different for a criminal matter; one needs to be present  
17 in all sessions. But that also is not the case, because the law I cited is the  
18 Criminal Procedure Code. I did not cite the Civil Procedure Code, and the  
19 Criminal Procedure Code said in 212 that after the first attendance, even if you are  
20 absent in the others, you are still deemed to have been *in presentia*. So the  
21 explanation we received from the Libyan government is erroneous.

22 What we have heard from the council for the tribes in fact supports our position, and  
23 that is a correct statement of the law and it's in accord with what is contained in 212 as  
24 opposed to what is contained in 348.

25 I leave it at that for the moment, my colleague Aidan Ellis -- perhaps, before I do that,

1 I will touch upon two issues. I had promised to address the issue of this statement, I  
2 will do that. And, at the outset today, yesterday, we said we wanted to hear the  
3 position of the Libyan government on the admissibility of this case. And again  
4 today their position is even vaguer than it was before this hearing commenced. We  
5 have not heard from them anything which suggests whether they want this case to be  
6 deemed admissible and therefore Dr Gaddafi be brought to The Hague, or that this  
7 case is inadmissible. The only thing we have heard from them that helps this Court  
8 is that Libya is willing, able and capable to prosecute these cases. That much we  
9 have heard from the minister of justice, so I leave it at that.

10 Before I yield the floor to my colleague to deal with these three other issues, I would  
11 respond to the issue of the statement. We confirm that, yes, Dr Gaddafi did indeed  
12 meet with lawyers from the OPCD. Those were lawyers appointed by the Court, he  
13 did not appoint them. But the statement that your Honour read out contains words  
14 that were not his. The only lawyers he had directly instructed to speak on his behalf  
15 is this legal team presently here; his lawyer in Libya, Mr Khaled Al-Zaidy, and this  
16 legal team. Those are the instructions I have received on this matter.

17 PRESIDING JUDGE EBOE-OSUJI: [14:40:11] What do you mean that the statement  
18 contains words that were not his?

19 MR FAAL: [14:40:18] That is precisely what I was told by the client. The statement,  
20 what you have read out, those 10 or 11 paragraphs, were not his words. He also  
21 acknowledged that OPCD lawyers indeed consulted with members of his family. It  
22 is also possible that the statement contains views of members of his family who were  
23 acting in what they believe was his best interest at the time.

24 PRESIDING JUDGE EBOE-OSUJI: [14:40:51] What the statement said, if you recall,  
25 was that they were reflecting the sentiments, at least that much is there, of



1 Mr Gaddafi, a minimum of sentiments. It might have also said statements of

2 Mr Gaddafi, I cannot find the document now, but it doesn't matter if I find it or not.

3 Is he saying that those did not reflect his sentiments?

4 MR FAAL: [14:41:33] Those were not his words. He did not say to anybody that he  
5 wanted to be tried in The Hague. He never said that.

6 PRESIDING JUDGE EBOE-OSUJI: [14:41:44] Thank you.

7 MR FAAL: [14:41:44] Thank you.

8 PRESIDING JUDGE EBOE-OSUJI: [14:42:07] Mr Ellis, does that mean that -- either  
9 of you can answer this question -- that had there not been the amnesty that was  
10 granted eventually, that Mr Gaddafi would have accepted the trial that he had and  
11 the death sentence that was given to him?

12 MR FAAL: [14:42:38] I cannot speculate on that. All I can say is that Mr Gaddafi  
13 did suffer as a result of the death sentence that was imposed on him.

14 PRESIDING JUDGE EBOE-OSUJI: [14:42:54] Proceed.

15 MR ELLIS: [14:42:57] Thank you, your Honour.

16 The outstanding issues first in relation to amnesties more broadly.

17 Your Honours, we note the positions taken by the Prosecution, the victims and the  
18 first amicus in support broadly of the Pre-Trial Chamber's conclusion at paragraph 77  
19 of the majority decision that both amnesties and pardons in relation to crimes against  
20 humanity are internationally unlawful.

21 Your Honours, we do not deny that strong statements on that suggest have been  
22 made in international human rights courts, nor that there is a general trend  
23 discernible away from amnesties. But what we stand on is that the issue is whether  
24 that general trend had crystallised into a rule of customary international law by  
25 April 2016 when the law was applied to Dr Gaddafi. We note that neither the Belfast

1 Guidelines of 2013 nor the International Law Commission Special Rapporteur's report  
2 of 2017 concluded that any such rule had yet crystallised.

3 Moreover, as the Prosecution submitted, with perhaps a measure of understatement  
4 in the response to this appeal brief at paragraph 88, state practice is still not fully  
5 consistent on this point. And that, in our submission, carries with it the necessary  
6 conclusion that without consistent state practice no rule of customary international  
7 law can yet be said to have crystallised.

8 Your Honours, the issue of amnesties was debated between States when they agreed  
9 the terms and drafted this Statute. They reached no agreement and, as a result, no  
10 such provisions were inserted into the Statute. And they have still not reached  
11 agreement, your Honours, in my submission.

12 As we left court yesterday I turned on my newsfeed to find that in the UK, in the  
13 United Kingdom in the current general election which is going on, one party was  
14 reported to be making a manifesto pledge to limit the prosecutions of soldiers for  
15 crimes connected with the troubles in Northern Ireland. That's not to call out my  
16 own government, there are many cases, many situations that could be cited, but it is  
17 to show that there is a debate here which is genuinely ongoing and it's ongoing  
18 amongst States even as we sit here debating the points in The Hague.

19 This case has implications beyond the nest of issues directly before you today,  
20 your Honours. It has implications beyond Dr Gaddafi, beyond Libya, and we invite  
21 the Court in those circumstances to stay close to the carefully crafted  
22 complementarity framework before you in the Statute and to avoid what we say are  
23 the overly broad conclusions adopted by the Pre-Trial Chamber.

24 Your Honours, I want to move to try to address the issue that your Honour the  
25 Presiding Judge asked me about yesterday, the issue of whether this case should be

1 declared admissible on an Article 17(1)(b) basis, on the basis that the decision to apply  
2 Law 6 of 2015 to Dr Gaddafi was a decision not to prosecute him, which was made for  
3 the purpose of shielding him from criminal responsibility.

4 That issue, of course, was inherent in your Honours' written questions, though it  
5 hadn't been canvassed by the parties in their written filings before that.

6 We say the application of Law No. 6 should not be characterised as a decision not to  
7 prosecute, for the simple reason that we say Dr Gaddafi had already been prosecuted.

8 But, in any event, your Honours, we say the evidence before you does not justify  
9 a finding that the decision to release him in application of Law 6 of 2015 was for the  
10 purpose of shielding him from criminal responsibility.

11 Shielding, in my submission, is not a light allegation to make. It's not, in my  
12 submission, something that should be assumed in the absence of evidence. And the  
13 statutory test does not focus on the effect of a decision, it doesn't say did this decision  
14 have the effect of shielding, it says it must be made for the purpose of shielding.

15 And we repeat that we ask the Court to be faithful to the terms of the statutory test  
16 without overreaching that ambit. And in the full context of this case, we say there  
17 was no purpose of shielding from criminal responsibility that can properly be  
18 inferred from the evidence.

19 PRESIDING JUDGE EBOE-OSUJI: [14:47:49] What would be the purpose of an  
20 amnesty law then?

21 MR ELLIS: [14:47:55] Your Honour heard submissions, very eloquently in my  
22 submission, this morning, perhaps this afternoon, from the second amicus, the Libyan  
23 Cities and Tribes, who described with integrity, in my submission, the reasons why  
24 people in the territory may be interested in a reconciliation measure, a genuine  
25 attempt to try and move on from an internal armed conflict and to try and find

1 solutions that enable people to move forwards. In my submission, such a purpose  
2 would be outside the scope of shielding. And in --

3 PRESIDING JUDGE EBOE-OSUJI: [14:48:32] Does shielding necessarily have to  
4 connote bad faith?

5 MR ELLIS: [14:48:41] Yes, in my submission, it is inherent in the notion of shielding.  
6 I would say that. And if one were to look in the human rights cases that there are in  
7 which the concept of shielding has been discussed, some of which I think is cited in  
8 Triffterer, others are in our original admissibility challenge, they very much focus on  
9 cases where there has been bad faith in the investigation of a crime. So my answer to  
10 that is yes.

11 But, your Honours, in my submission, going back to Law No. 6 of 2015, it is not a law  
12 for the purpose of shielding Dr Gaddafi. It is capable of applying to any individual.  
13 And we have supplied your Honours with decisions applying the law to other  
14 individuals, so this is not about shielding him. There is no link between the passage  
15 of the law and his case.

16 Moreover, your Honours, Law No. 6 of 2015 was passed on 7 September 2015.

17 Dr Gaddafi was released, we say on the evidence, in April 2016, seven months later.

18 If there was a connection in timing between the two such that this was designed  
19 deliberately to shield him, we would say he would have been released much earlier.

20 Those seven months break the connection between one and the other.

21 And, your Honours, in my submission, it comes to this: The only evidence you have  
22 of the intentions of the decision maker, the minister of justice in the Al-Bayda

23 Transitional Government, are the contents of his release letter that my learned friend

24 Mr Faal also cited. In our submission, the first amicus, Redress, was right to say

25 earlier this morning, at transcript page 17, that we don't know the underlying

1 motivation. The evidence is not there to infer that the underlying motivation was  
2 the purpose of shielding, and for that reason we say 17(1)(b) should not apply.  
3 We say the context is not consistent with shielding. Dr Gaddafi had been tried, he  
4 had been convicted, he had been sentenced to death. He remained in prison for  
5 a period following sentence. He was not shielded from criminal responsibility, in  
6 our submission. Considering also Article 6(4) of the International Covenant on Civil  
7 and Political Rights which provides that a person sentenced to death has the right to  
8 seek amnesty, pardon or commutation of sentence, we say it should not be concluded  
9 that this was an exercise in shielding.

10 And, your Honours, the final point entrusted to me is the question that's been the  
11 focus of much discussion today and yesterday, whether the period of time that  
12 Mr Gaddafi has spent in prison - on our pleading four and a half years - is  
13 a proportionate punish and whether there is --

14 PRESIDING JUDGE EBOE-OSUJI: [14:51:43] Before you go there, one more question  
15 for you about the amnesty. The submissions of the intervenors from Libya, and also  
16 Redress, make that point about the conditions of amnesty or for amnesty, and one of  
17 them being confession and expression of remorse, which they say have not happened,  
18 or Mr Gaddafi hasn't done. The second intervener from Libya, counsel for Libyan  
19 Cities and Tribes Supreme Council say that none of the parties have complied for the  
20 conditions for amnesty and called upon them to do so. What's your response to  
21 that?

22 MR ELLIS: [14:52:54] Your Honour, my response to that, and it's a refrain that you  
23 have heard from me before, your Honours, is that this is not a court of Libyan law, it's  
24 not a Libyan supreme court. You have before you a Libyan law, Law No. 6 of 2015.  
25 You have before you a letter from the minister of justice in the Al-Bayda government

1 saying that he is applying that law to Dr Gaddafi.

2 Further than that, in my submission, the Court does not need to go. It's not  
3 a decision for this Court whether that decision was correct, particularly in  
4 circumstances where there is a national dispute resolution proceeding inherent in  
5 Article 8 of Law No. 6 of 2015 and there is no evidence that any party has tried to  
6 activate it in Libya to dispute the application of this law to Dr Gaddafi.

7 PRESIDING JUDGE EBOE-OSUJI: [14:53:49] I want to understand what your  
8 submission is. You are standing on the premise of that law to say that Mr Gaddafi's  
9 case has acquired finality. But you don't want us to examine whether indeed  
10 provisions of that law are indeed applicable. Is that what it boils down to?

11 MR ELLIS: [14:54:12] It does, your Honours, because -- and the reason for that is that  
12 we say that takes the Court beyond applying the Statute, applying international law,  
13 into applying Libyan law in circumstances where, firstly, the matter is settled by the  
14 minister applying the law to Mr Gaddafi and, secondly, there is no evidence before  
15 you of any national challenge in Libya where such a challenge, in my submission,  
16 belongs. So yes, that is the Defence submission.

17 PRESIDING JUDGE EBOE-OSUJI: [14:54:42] Please proceed.

18 MR ELLIS: [14:54:44] I'm grateful, your Honour.

19 Your Honour, I was turning to deal with the question of proportionality of  
20 punishment, and it may be there's a common theme here with the submission that  
21 you have just heard, your Honours, because, in my submission, we opened  
22 proceedings with a warning about the dangers of prosecutorial overreach and, in our  
23 submission, there is no more clear example of an invitation to this Court to step  
24 beyond the bounds of the complementarity framework than what your Honours are  
25 being invited to do in relation to sentence.

1 Your Honours, we say quite simply it should not be for the International Criminal  
2 Court to specify a tariff of sentences that it might be acceptable for a State to apply to  
3 someone within its jurisdiction.

4 We recall, in any event, that this was not a case in which the sentence passed was one  
5 of four and a half years imprisonment. It was a death sentence case. It happens  
6 that by the time of release we say Dr Gaddafi had been imprisoned for four and a half  
7 years, but that, in our submission, is a different thing from a defined sentence being  
8 imposed at the outset.

9 And we have to say we do not understand the position of the Prosecution that  
10 the Court ought not to count the final period of that detention. Dr Gaddafi was  
11 imprisoned in Zintan throughout and he was imprisoned there on the orders of the  
12 government of Libya and he remained there in detention until the point when we say  
13 he was released in April 2016. I don't suppose that any technicality about which  
14 government had ordered his detention was of particular concern to him as he sat  
15 there wondering if the death sentence was going to be implemented, your Honours.  
16 In our submission, the full period must be counted. And, in any event, we do invite  
17 the Court's attention to annex C of the admissibility challenge containing a statement  
18 from the commander of the battalion holding Dr Gaddafi explaining how he  
19 remained on instructions throughout, and we invite the Court's attention to that.  
20 But, your Honours, the fundamental question is whether this Court should go on to  
21 consider questions of proportionality of punishment imposed by a sovereign national  
22 system. The problem isn't simply that sentencing practices of national courts and  
23 international tribunals is divergent. In our submission, that is a step beyond what  
24 the Statute envisages the Court doing on a complementarity framework.

25 PRESIDING JUDGE EBOE-OSUJI: [14:57:30] Is it the case then that go again to see if

1 they can distill your submissions to its essential elements? You are saying that  
2 consideration of manifest disproportionality is out of the question here, it is not  
3 something that this Court needs to trouble itself with.

4 MR ELLIS: [14:57:59] In essence, your Honour, yes. Your Honour cuts through  
5 matters to the heart. I am grateful.

6 But, in my submission, there are a number of elements to that.

7 The first is, and I was glancing around to see if I could locate my Statute, but it's  
8 Article 20(3) itself, your Honours.

9 Of course, if the Court finds that there has been a trial, Article 20(3), before turning to  
10 the exceptions, refers the Court "to the same conduct unless the proceedings in the  
11 other court", and goes on, "Were for the purpose of shielding". And, in our  
12 submission, the Statute is effectively a treaty agreed between States. Interpreting  
13 that treaty faithfully to the meaning of the words, the ordinary meaning of the words  
14 in the Statute, one can't simply ignore the words "proceedings in the other court".  
15 That is a line drawn by the drafters of the Statute, we say deliberately, and it draws  
16 the line at the end of the trial proceedings. It does not allow the Court to examine  
17 any subsequent pardon or reduction in sentence. No other reading of those words,  
18 in our submission, is possible.

19 Your Honours, we do also say that there may be some relevance in this context to  
20 Article 80 of the Statute, which in relation to sentencing makes it clear that nothing in  
21 Part 7 of the Statute "affects the application by States of penalties prescribed by their  
22 national law, nor the law of States which do not provide for penalties prescribed in  
23 this Part." And, in our submission, that shows that the drafters were alive to the  
24 possibility that this Court's Statute and practices could impact on national sentencing  
25 laws and sought to avoid that possibility.



1 And we also draw your Honours' attention, respectfully, to the Colombian Special  
2 Jurisdiction for Peace which in its draft provisions provides for restriction in  
3 sentences for those who acknowledge their responsibility to a period of five to eight  
4 years effective restriction of freedom and rights. And we note the provisional view  
5 expressed by the Deputy Prosecutor in May 2018 that such reduced sentences are  
6 conceivable in certain circumstances. The references are at paragraph 882 of our  
7 appeal brief. We wonder is it then the position that five years is conceivable, but  
8 four and a half years in fear of the death penalty is not.

9 Your Honours, we bring it back to the Statute, to our underlying submission that this  
10 is a complementarity framework which is designed to aid in the fight against  
11 impunity but which is also designed to respect State sovereignty. It's  
12 a complementarity framework that gives the primary role to sovereign States and  
13 allocates this as a court of last resort, a residual jurisdiction. And, in our submission,  
14 many of the points made today which tend to broaden out the scope of the exceptions  
15 to allow more cases in which the Court may declare matters admissible and so take  
16 them away from the national system which would otherwise have jurisdiction, are  
17 simply stepping beyond what the Statute intended, what the drafters intended, what  
18 States intended when they agreed those terms and what they intend to be bound by  
19 when they agree to ratify the Statute.

20 We do not retreat from the submission, your Honours, that this is not a human rights  
21 court. It was not created to sit in judgment over national courts and national  
22 systems. I note my use of those words was picked up by the first amicus in her  
23 excellent submissions this morning. But they aren't my words, your Honour, they're  
24 the words of the Appeals Chamber in the Al-Senussi appeal at paragraph 219 and, in  
25 our submission, in our submission, they are important. They reflect the balance

1 between a residual role for this court of last resort and a sovereign role for States.

2 Dr Gaddafi was arrested, imprisoned, investigated and tried. A reasoned judgment

3 was rendered. In our submission, on an ordinary application of the

4 complementarity framework, we say the case is inadmissible.

5 And I hand back to my colleague for the final submissions.

6 MR FAAL: [15:02:55] To conclude, Mr President, we reiterate that the Rome Statute

7 is based upon a contract between States and that it will be interpreted according to

8 the intent of the drafters and not according to the normative principles that may

9 inspire - or it be a judge in office -- at any moment in time. Ultimately, in the

10 international plane where you are dealing with state sovereignty, not simply

11 a domestic court, that obligation to interpret with fidelity to the intent of the drafters

12 is essential, because if that trust is lost and States see that the judges are creating law

13 in their own image, that they are dealing not with the *lex lata* but with *lex ferenda*,

14 States will flee international agreements even more so than they are doing at this

15 imperial moment.

16 PRESIDING JUDGE EBOE-OSUJI: [15:03:55] Mr Faal, can you limit yourself to the

17 legal questions we have to deal with it and not the political statements about States

18 fleeing the Court.

19 MR FAAL: [15:04:09] Much obliged.

20 PRESIDING JUDGE EBOE-OSUJI: [15:04:10] Thank you.

21 MR FAAL: [15:04:11] Much obliged. But, Mr President, I do wish to say that the

22 two are so interlinked, because this is dealing with complementarity, it is dealing with

23 the relationship between the Court and States. How States would react to

24 approaches to interpretation -- (Overlapping speakers)

25 PRESIDING JUDGE EBOE-OSUJI: [15:04:27] It's a matter of speculation, isn't it?

1 MR FAAL: [15:04:32] Well, this is a legitimate situation in which one can in fact  
2 speculate. We see already what is happening. Some States are losing confidence in  
3 the ICC. That is a fact. Other States are gaining confidence. That is also a fact. I  
4 want to believe that all of us here would want to encourage universality in -- I mean,  
5 universal membership to the Rome Statute. But that objective cannot be attained if  
6 States do not have confidence in the Court.

7 So my submissions, I believe, are really germane to the issue that this Court is going  
8 to -- the issues that this Court is going to consider. Because if judicial adventurism is  
9 encouraged, instead of fidelity to the rules, then there would be problems outside  
10 this Court far beyond this case, and that's why we believe it is important that we  
11 make these submissions.

12 And with your permission, Mr President, I will continue along those lines. Thank  
13 you very much.

14 We say if there is no discipline, a disciplined approach to the interpretation of the  
15 rules, and where the Court seeks every ingenuous argument to find a way to wrestle  
16 a case from the arms of the mother jurisdiction into the fist of a supranational court,  
17 there would continue to be problems.

18 We must note that in Dr Gaddafi's case there has been a detention, there has been  
19 a trial, there have been witnesses. The right of the victims to the truth has been  
20 respected. There has been confrontation. There has been a conviction and  
21 a sentence. As His Honour Justice Morrison pointed out, there has been a death  
22 sentence and Dr Gaddafi has lived under the peril of that sentence for a while.

23 The fact that subsequent to all that States have decided in their sovereign will to  
24 pardon is simply not a matter for the ICC, it's not the Court's business. And  
25 however compelling the personal normative values are to each of your Honours,

1 however much you may wish that there be a different solution, your primary  
2 responsibility to act with fidelity to your own office and to interpret the Statute  
3 according to the intent of the drafters, that is the -- that intent is manifest by the terms  
4 of the provisions of the article, but also by the principles of complementarity that this  
5 is a court of last resort. And therefore, when you have a question mark, you are not  
6 left unguided. You have clear signposts in the Rome Statute. We beg you to heed  
7 those signs --

8 PRESIDING JUDGE EBOE-OSUJI: [15:07:58] Mr Faal, you see, the thing is this:  
9 One dilemma, to stray perhaps too far from the facts of a specific case and making  
10 general submissions might be to attract certain attention to the submissions more  
11 closely. Here you are making general submissions about what States have agreed to  
12 do, which it is not the business of the Court to enquire, and you make that submission  
13 in the context of amnesty. And here we have been having this discussion since  
14 yesterday whether categorical statements could be made about a trend in  
15 international law that stands against amnesty. Is it the case that one of the reasons  
16 why those who view amnesty with suspicion, why they do so might be because you  
17 may have a scenario where military might might be used to compel amnesty, so to  
18 speak, and impose it upon an unwilling population? Is the Court supposed to  
19 ignore ties to that possibility?

20 MR FAAL: [15:09:48] Well, Mr President, if that is the law of that State, I would  
21 imagine that the International Criminal Court should back off and stay away from it  
22 because --

23 PRESIDING JUDGE EBOE-OSUJI: [15:09:57] The law of the State, you are an  
24 international lawyer, did we have in international law a trial of a whole legal system  
25 after the end of the Second World War, justice case --

1 MR FAAL: [15:10:15] Yes.

2 PRESIDING JUDGE EBOE-OSUJI: [15:10:15] -- where the law of the case effectively  
3 would say to have been perverted for purposes of fostering an oppressive regime?

4 MR FAAL: [15:10:26] But, Mr President (Overlapping speakers)

5 PRESIDING JUDGE EBOE-OSUJI: [15:10:27] Are we supposed, if we have that kind  
6 of scenario, we are supposed to say no, that's the law on this State, move on?

7 MR FAAL: [15:10:33] But, Mr President, the example you have given is in fact the  
8 direct opposite. Amnesties are not given for the purposes of carrying out a genocide  
9 against a particular people. Amnesties are given mainly to help peace, bring about  
10 national cohesion.

11 PRESIDING JUDGE EBOE-OSUJI: [15:10:55] We may have a scenario, do we not, is  
12 that beyond the realms of a possibility, that a genocide might have happened, but  
13 then the powers that may have committed it emerged on top at the end of it and  
14 impose an amnesty law on the population, so the ICC is supposed to accept that and  
15 say, because it is a national law of that country, we must not enquire?

16 MR FAAL: [15:11:21] Again, Mr President, this example you are giving is very  
17 different from the circumstances we are faced with.

18 PRESIDING JUDGE EBOE-OSUJI: [15:11:30] And that's why I was saying that  
19 perhaps we might look closer to the facts of your case than general statements of  
20 international law the way you have made them.

21 MR FAAL: [15:11:41] I am not making these general statements in a vacuum, I am  
22 making them in the context of the case that we have here.

23 And with your permission, Mr President, I'll finish, I'll have a few things more to say.

24 PRESIDING JUDGE EBOE-OSUJI: [15:11:52] Proceed.

25 MR FAAL: [15:11:53] Thank you very much.

1 And the ICC is a court of last resort. If you get to a point where you have a question  
2 mark, we beg you to heed those signs. And if you heed those signs, there's  
3 a flashing red light which says "stop". In such instances, clearly the case is  
4 inadmissible, just like this case we have here.

5 Mr President, you and your fellow judges have individually, and as a Bench,  
6 a responsibility to uphold the trust that States have placed in this Rome Statute. To  
7 uphold the trust requires acting with fidelity to the intention of the drafters.  
8 However, seductive are the arguments in your own mind, please resist the temptation  
9 to create laws according to your individual normative principles and instead interpret  
10 according to the intent of the drafters. Only if we do that will international law be  
11 able to survive these very turbulent times when international institutions,  
12 international structures, and indeed the very rule of law itself, is under siege in many  
13 quarters.

14 With that, I thank you.

15 PRESIDING JUDGE EBOE-OSUJI: [15:13:20] Thank you.

16 JUDGE MORRISON: [15:13:25] Mr Faal, I am just obliged to applaud your optimism  
17 that the provisions of the Rome Statute are so clear and unambiguous that they need  
18 not cause the judges to engage ever in any interpretive measures. There is a whole  
19 army out there of academic bloggers who will be rather disappointed if that optimism  
20 was founded.

21 MR FAAL: [15:13:52] I would very much agree with that.

22 But also we would encourage that there won't be much judicial adventurism on the  
23 part of the Court and they will stick faithfully to the words that are expressed in this  
24 Statute. Where it is not necessary to go beyond the ordinary meaning of the words  
25 in the Statute, please stick to them. Thank you.

1 JUDGE IBÁÑEZ CARRANZA: [15:14:17] Thank you.

2 This question is for the Defence.

3 The Rome Statute framework is designed to end impunity and to promote  
4 prosecution and, if pertinent, the punishment for the most serious international  
5 crimes such as crimes against humanity or war crimes, and so forth, that deeply shock  
6 the conscience of humanity. Rome Statute also centres the right of victims so that  
7 they may obtain meaningful reparations and redress for harm suffered. In light of  
8 this, my question is:

9 In the proceedings or trial that you affirm Mr Gaddafi went through in Libya, there  
10 had been any reparations for victims? That accordingly, the submissions of the State  
11 of Libya, paragraph 29(A), (B), (C), (D), are about 343 identified victims. Again, the  
12 question is: In those proceedings, has there been any form of reparations to these  
13 victims?

14 MR FAAL: [15:15:38] Your Honour, I do not know of any reparation that has taken  
15 place. We are definitely not aware of that. And I do not believe that the trial was  
16 intended for the purposes of giving reparations, perhaps reparations would have  
17 been part of some other process.

18 And I just wish to bring to your attention Article 10 of the, of the amnesty law, which  
19 states that the provisions of this law shall be without prejudice to the right of an  
20 affected person to restitution and compensation, so under the Libyan law the need for  
21 reparation, compensation and restitution is recognised. I would imagine that a full  
22 implementation of this law would have also respected the rights of the victims to  
23 reparation.

24 I hope I have answered your question. Thank you.

25 PRESIDING JUDGE EBOE-OSUJI: [15:16:44] Thank you very much.

1 To the representatives of the State of Libya.  
2 If you -- we would have closed now, but considering that during the submissions of  
3 counsel for the Defence, some of their submissions, whether some of their  
4 submissions might have provoked something you want to speak to or reply to. If  
5 you recall, amongst them was the submission that you effectively did not challenge  
6 the amnesty or supposed amnesty that Mr Gaddafi was given, you say illegally, by  
7 somebody and they say you did nothing to challenge that. As a matter of fact, you  
8 may have acquiesced in people thinking that you accepted that state of affairs. They  
9 also submit that they don't quite know where you stand on whether or not the case  
10 should be admissible before this Court.

11 If you care to react to any of those, or any other thing arising from counsels'  
12 submission, you may do so briefly in five minutes or so.

13 MR EL-GEHANI: [15:18:21] (Microphone not activated)

14 PRESIDING JUDGE EBOE-OSUJI: [15:18:25] Your microphone is not working.  
15 Can you try again.

16 MR EL-GEHANI: [15:18:37] Okay.

17 PRESIDING JUDGE EBOE-OSUJI: [15:18:37] Good, yes.

18 MR EL-GEHANI: [15:18:37] Thanks, your Honours, for this time and we will share  
19 this some few minutes between us.

20 Yes, many points, we have to make observation on many points arising from the -- all  
21 the teams here, especially from the Defence team.

22 This concept of *presentia* and *absentia*, it looks that need more explanation from our  
23 side. It is a practical and academical issue.

24 I am Ahmed El-Gehani. I am teaching criminal procedure law from 1980 in two  
25 universities, in Benghazi and in Rome in Italy, so I know very well what means



1 *absentia* and what means *presentia*. And according to the penal law, Libyan penal  
2 law or criminal law, which has been taken from the old called Shirocco (phon) -- the  
3 Code Rocco in Italy of 1933, the offences divided in three categories; fines, which the  
4 punishment only amount of money. This is no problem for that. That's fine.  
5 The other two categories of the offences, the minor offence and major offence, *juna o*  
6 *jinayat* (phon) as we call it.  
7 What concerned of the Article 2000 -- sorry, 211, 212, it concerned to the minor crimes,  
8 which Mr Gaddafi has nothing to do with it.  
9 But if we go to major crimes, *jinayat* -- and some of the presence here, I taught them  
10 this argument in Benghazi and I am proud that they are here with me. The major  
11 crimes, so -- or, or *in absentia* or in absence. To be *in presentia* I challenge anybody  
12 can tell argument, else *in presentia*, it should be presented and attended all the session,  
13 all the session. This is clear and nobody can argue of that.  
14 When I mention it this morning, the civil code, just to make it clear between the two  
15 system, the civil and penal law, but I am not confused that I am speaking on the civil  
16 law.  
17 Why the Libyan government haven't challenged this law under No. 6, because there  
18 is -- there haven't arised any or seen any problem to challenge that, and in  
19 some -- before some authorities it considered as nil. So, according to me, this law  
20 haven't been challenged by the ministry of justice or other authorities.  
21 I hope that I make things clear and this, especially this *presentia* and *absentia* principle  
22 or concept. Okay.  
23 If there is two minutes for my colleague, please.  
24 PRESIDING JUDGE EBOE-OSUJI: [15:23:12] You can turn off the other microphone.  
25 MR LAMLOM: (Microphone not activated)

1 PRESIDING JUDGE EBOE-OSUJI: [15:23:29] All right, I think -- hold on. Okay, we  
2 are having technical issues as well, we do have them at the ICC, you know. Your  
3 microphone is not on.

4 MR LAMLOM: [15:23:52] (Interpretation) Thank you, your Honour.

5 I wish to clarify a few points, although already addressed in an official  
6 correspondence from the attorney general's office, as mentioned, as the OTP  
7 mentioned.

8 With regards to the amnesty law, we did not speak about the validity or the  
9 legitimacy of this law, nor did we deny its existence. This law is one of the laws  
10 enacted during the period of political division in Libya in July 2015 precisely. This  
11 and other laws is, is subject of consideration by many courts. We have not spoken  
12 about that aspect yet. Mr Gaddafi's defence claim that we are denying the existence  
13 of this law. That's not true. We did not deny existence of this law. This law was  
14 enacted by parliament, but its applicability in general and to Mr Gaddafi's case in  
15 particular is another story.

16 What we always said is that the charges to Mr Saif Al-Islam Gaddafi are not subject to  
17 the provisions of the amnesty law, in addition to the fact that he did not fulfil the  
18 prerequisites including expressing remorse and reconciling with the victims. That's  
19 on one end.

20 On the other end, and with regards to the Libyan Supreme Council of Tribes and  
21 Cities, I am from eastern Libya, as I said, a region known for its tribes, very prominent.  
22 This council, this supreme council I haven't heard of before, and I haven't heard of  
23 any legal initiative that they have launched in the past. And I am not sure if this  
24 council is, in a way, part of State institutions or if it is just an NGO, because today  
25 they talked about the legitimacy of the GNA government and the eastern region

1 government.

2 With regards to the legitimacy of the GNA government, that's not a subject I wish to  
3 address here, your Honour. But, as you know, the United Nations has supported an  
4 agreement reached in the Morocco city of Skhirat. On December 15, 2015, an  
5 agreement was reached and out of which were created three bodies of the state, the  
6 government, the parliament, and the supreme council of state which is only a -- which  
7 acts only in an advisory capacity. This is the government recognised by the  
8 international community and dealt with by the international community.

9 As to the parallel government, the interim government located in Al-Bayda, it is  
10 a parallel government that has not, that has not complied with international  
11 directions. And a statement, referring to a statement from an official of that  
12 government is -- does not stand as a legitimate, as legitimate ground, because the  
13 body required to apply such, to take such measures is the Libyan judiciary and that  
14 means the court and prosecution offices under the supervision of the attorney  
15 general's office. So such statement cannot serve as basis for anything, and certainly  
16 not for the issue of the release of Mr Saif Al-Islam Gaddafi.

17 Also, the representatives of the Supreme Council of Libyan Tribes and Cities spoke  
18 about the ruling by the Libyan Supreme Court called the -- a ruling *in presentia* on the  
19 merits of a person deemed present. And as my colleague said, this concerns  
20 misdemeanours only. We have a system where we have offences, misdemeanours  
21 and felonies. In felonies, there isn't such thing as *in presentia* on the merits of the  
22 person deemed present, it's either *in presentia* or *in absentia*. There isn't a third  
23 category when it comes to felonies.

24 We also uphold that the Defence team qualified the ruling against their client as an  
25 *in presentia* ruling contrary to the findings of the Tripoli court. The Tripoli court has

1 found that the ruling is *in absentia*, totally -- in total consistency with the law. This is  
2 what we wished to clarify to the Court.

3 We thank you for your attention.

4 PRESIDING JUDGE EBOE-OSUJI: [15:29:54] Are you in a position to speak to  
5 the -- where the government stands on admissibility? The Defence counsel  
6 repeatedly said that your submissions in that regard are not very clear on whether or  
7 not you are for or against admissibility. If you are able to speak to that, just in one  
8 brief sentence, that would be appreciated.

9 MR EL-GEHANI: [15:30:32] The Libyan State was the first part who challenged the  
10 argument of the admissibility, and now for the -- this submits -- submission of  
11 Mr Gaddafi, if we will be asked what our stand or what our position, we will say  
12 inadmissibility, that we -- that the judgment of the Pre-Trial Chamber is correct.

13 PRESIDING JUDGE EBOE-OSUJI: [15:31:12] Thank you.

14 JUDGE MORRISON: [15:31:22] Ms MacDonald --

15 MR ELLIS: [15:31:25] Your Honours.

16 JUDGE MORRISON: [15:31:26] I'm sorry.

17 MR ELLIS: [15:31:28] Your Honours, might the Defence have one minute to respond  
18 to the government of Libya?

19 (Appeals Chamber confer)

20 PRESIDING JUDGE EBOE-OSUJI: [15:31:45] Right, what we will do, we will just  
21 take a round and then end with you finally.

22 So if we go next to the counsel for Supreme Council Libyan Cities and Tribes. If you  
23 have anything to respond to, sir, this is the opportunity to do so, and if you can please  
24 limit yourself to five minutes. If you see no need to respond to anything please do  
25 not feel compelled to speak. Thank you.

1 MR SAAD: [15:32:28] Thank you, your Honour, for the opportunity for us to speak  
2 before you. I just would like to make a couple of points that are not  
3 a hundred per cent within the legal language, if you like. I am not legal expert, but  
4 they are within the general framework of the Court, as well as the situation of -- in my  
5 country.

6 I will start by saying the Libyan Tribes and City Council is actually -- there was an  
7 issue with that, just before. It is actually an open nongovernmental organisation,  
8 working on volunteer basis to try to come up with the proposals and mechanisms to  
9 implement those proposals for general, across the board reconciliation process in the  
10 country that could help healing the wounds we have been suffering from since 2011  
11 up until this moment.

12 Given the fact that I do not comment on the legal issues, if you permit me, there are a  
13 couple of points which have some kind of legal relations I would like to mention,  
14 probably it would be good reminders for the different sides of the Court,  
15 your Honour.

16 One is that I went through the sheet of accusations against the defendant Dr Saif  
17 Al-Islam Gaddafi on the website of the ICC, and one of the things that I note and  
18 actually struck me is that the Court states in, under a subheading -- I will use -- I am  
19 trying to use the legal coding of my statement to make it easier, under subheading  
20 called "non-compliance". This Court, in the briefest time, says it still requires the  
21 Libyan authorities - Libyan authorities, not the Libyan government, I have my  
22 reservations about the word government in this case - to do two things: One is allow  
23 Mr Saif some kind of facility with the Defence or something, and the other important  
24 thing is, demands that the authorities in this case return the original documents that  
25 were confiscated from the Defence team appointed for Mr Gaddafi, of which

1 Mr Gehani was here with us, was a member when they visited Zintan, him, when  
2 they visited him for the first time in Zintan at that time, and there was some kind of  
3 trouble and some documents were taken from them. This is what the ICC is saying,  
4 not me.

5 So, in that statement, this Court, ICC, recognises completely and fully that  
6 Mr Gaddafi in Zintan, despite the fact he is in Zintan, not in Tripoli, is actually within  
7 the jurisdiction of the government in Tripoli and he is under their control, otherwise  
8 why would ICC ask the authorities to do 1 and 2? That's one thing.

9 The other thing is I feel a little bit disturbed today and upset, because I heard so much,  
10 so many attacks, whether intended or not, against the Libyan State's history itself, and  
11 the Libyan legal system, like if the judiciary of Libya is something was created  
12 yesterday and has no, no, if you like, reputation, or roots, or expertise. And things  
13 like this. I am honest with you, my Judges, I feel very bad. Because the issue here,  
14 if I am to interpret it in a certain way, has nothing to do with the Libyan legal system,  
15 as the Defence repeated that in different ways. It centres on the question whether  
16 Mr Gaddafi should be brought before this Court or not --

17 PRESIDING JUDGE EBOE-OSUJI: [15:37:37] I can assure you that we know that that  
18 is the focus of enquiry. So don't take offence that anything you might have  
19 perceived as attacking the State of Libya or its institutions, we are focused on that  
20 question whether that case can still continue to be tried, or retain a live file at the ICC.  
21 So if you may move on to your next point, please. Thank you.

22 MR SAAD: [15:38:11] Thank you. My next point is there was a lot of discussions  
23 and controversy around the question of legitimacy, whether this authority in eastern  
24 Libya, western Libya is legitimate or not. The Libyan political agreement, which is  
25 LBC, short for the agreement, which was signed in Skhirat in December 2015, the

1 States -- two very important things, you know, they had been overlooked in the  
2 question of legitimacy, that the presidency council, which is now by default called the  
3 government, recognised, international recognised government or UN recognised  
4 government in Tripoli, that that council itself, plus the government that it will set up  
5 in the future, should be voted on in a vote of confidence in the Libyan parliament in  
6 eastern Libya, in Bayda -- in Tobruk. That that's a clear article in the LPA, Libya  
7 Political Agreement, or Libyan political accord, as it is called. Which means since  
8 this -- this never happened, the vote of confidence never happened, never took place.  
9 That's one thing.

10 The other thing --

11 PRESIDING JUDGE EBOE-OSUJI: [15:39:28] You know, your time is up, but I will  
12 give you another minute to finish the point.

13 MR SAAD: [15:39:33] Another minute is, you know, is very -- I would, I would  
14 rather use it for something different, not for that point.

15 I also, I also heard the representative of the victims of Mr Gaddafi, if I understand  
16 correctly, because I was late yesterday, and I wondered how many are they. I heard  
17 the figure just some time ago, 343. I don't know if that's the total number of the  
18 victims, according to whoever accusing him, that he personally killed? Did he  
19 personally order the murder of those people or cancellation of those people, or what  
20 is it?

21 The last point I would like to make is about Law No. 6, which is the amnesty,  
22 general amnesty law. The representative of the Libyan authority, not the  
23 government, actually, they consider the law like it doesn't exist, but at the same time  
24 they refer to it, and at the same time they also say, stated just before me, that the  
25 legislative authorities, which is the elected parliament in Tobruk, passed a law and it's

1 acceptable, as it was passed.

2 Thank you, sir.

3 PRESIDING JUDGE EBOE-OSUJI: Thank you very, very much.

4 We are still moving in a clockwise direction and we will now call on Lawyers for  
5 Justice in Libya and Redress, whether you have any point to (Overlapping speakers)

6 MS MACDONALD: [15:41:11] Mr President, members of --

7 PRESIDING JUDGE EBOE-OSUJI: [15:41:13] -- Five minutes.

8 MS MACDONALD: [15:41:14] -- members of the Court. There is nothing further  
9 that we would seek to add, subject to answering any further questions that the  
10 members of the Court may have for us.

11 PRESIDING JUDGE EBOE-OSUJI: [15:41:21] Thank you very much. Yes.

12 JUDGE MORRISON: [15:41:27] Ms MacDonald, would it be over-simplistic to  
13 conclude that your submissions are predicted not so much upon issues of *presentia* or  
14 *absentia* but rather more on the application of utmost good faith?

15 MS MACDONALD: [15:41:49] In -- may I clarify in what sense?

16 JUDGE MORRISON: [15:41:54] Well, in sense that your main concern - and I may  
17 have misread this, which is why I ask it - is really that the Court should be much more  
18 concerned with the application of utmost good faith in terms of procedure, rather  
19 than whether one classifies it as *absentia* or *presentia*. It's the conclusion and the, as it  
20 were, the characteristic behind that that matters.

21 MS MACDONALD: [15:42:24] Well the structure of our submission, just briefly, was  
22 twofold: Firstly that, as we said, adopting the submissions of others as to the  
23 requirement of finality in this concept -- in this context, one can look, one can deal  
24 with that issue purely on Libyan law, and there are two strands to that.

25 Firstly, the fact that due to the *in absentia* nature of the conviction the proceedings are



1 not final under Libyan law, irrespective of the application of Law No. 6.  
2 And secondly, insofar as the proceedings were, or the possibility of proceedings  
3 against the accused were terminated, has been terminated, that has been done by the  
4 purported application of Law No. 6 in a manner which it is plain Law No. 6 does not  
5 in fact support.  
6 So, in our submission, Libyan law provides a complete answer to why there are not  
7 proceedings which are final so as to trigger double jeopardy.  
8 Then moving on to the international law issues which the Pre-Trial Chamber went on  
9 to address, the question then arose of how the Court ought to respond, under which  
10 provisions of the Statute the Court ought to respond to an amnesty in international  
11 law. And in that context -- and we, we and the Office of the Prosecutor indicated  
12 different situations which might arise because we are obviously, in part in that  
13 discussion we are in hypothetical territory to answer some of the Court's and in part  
14 we're in real territory because we are also trying to apply the principles that are  
15 drawn out to the facts of this case. Insofar as one is in hypothetical territory you can  
16 see where the good faith, the *bona fides* of the State, where one might draw an  
17 inference that that was lacking, and there were perhaps an intent to shield where, for  
18 example, an investigation was never carried out at all or was terminated by reason of  
19 an amnesty. One would have to look at all the facts of the particular case. And  
20 applying that here, we indicated that the application of the amnesty as it was done  
21 here led to a situation which international law would abhor, and a situation of  
22 impunity under the Statute in that it has led to manifestly inappropriate and  
23 disproportionate punishment.  
24 So there is not specific allegations of bad faith in this case, but certainly in the analysis  
25 that we tried to, I hoped in a structured way, tried to trace through how this issue

1 could play out in the Statute in different scenarios under 17 and 20. The *bona fides* of  
2 a State would be highly relevant in a number of situations, but as the Prosecutor's  
3 counsel have made clear in this hearing as well, that doesn't necessarily mean that  
4 tests like unable and willing require any subjective finding of bad faith, so one  
5 may -- and the Prosecutor has been very structured in their analysis of this, one may  
6 draw inferences from the circumstances, one does not lead to level an acquisition of  
7 bad faith at a State in order to find that domestic proceedings do not render the case  
8 inadmissible before this court, if I use an inelegant double negative. And I  
9 hope -- that was potentially slightly long, but I hope that that addressed the concern  
10 that, or the question that was being asked, but I am very happy to try again if it  
11 didn't.

12 JUDGE MORRISON: [15:46:16] It answered, it answered it very well, and you could  
13 have simply answered when I said was it over-simplistic, you could simply have said  
14 yes, but you were far too polite to say so.

15 MS MACDONALD: [15:46:30] Unless there are any further questions from the Court,  
16 the *amici* --

17 PRESIDING JUDGE EBOE-OSUJI: [15:46:36] Thank you, but you can turn off your  
18 microphone, please. Thank you very much.

19 And we move over then to the OPCV if you have any point to reply to.

20 MS MASSIDDA: [15:46:46] Thank you, Mr President. I would like first to apologise,  
21 I was a little bit late for an urgent family matter I had to take care of. My apologies  
22 for that.

23 We do not have any further submissions. We simply recall our written submission  
24 before the Pre-Trial Chamber and the Appeal Chamber. Thank you for listening to  
25 the victims' concern.

1 PRESIDING JUDGE EBOE-OSUJI: [15:47:06] That is music to our ear so late in the  
2 day.

3 And then we move over then to the Prosecutor, any point to respond to? Five  
4 minutes, if you do.

5 MS BRADY: [15:47:19] We don't have any further submissions to make, as such, but  
6 we do think it's important to clarify one matter which came out in the English  
7 transcript to be sure that we can understand exactly what the position was when  
8 Dr Gehani answered about whether the government of Libya considers the case is  
9 admissible at the ICC. Because if you look at the transcript at page 1530 -- 32, he  
10 says, "If we be asked what is our position, we will say inadmissibility -- that the  
11 judgment of the Pre-Trial Chamber is correct."

12 And, your Honours, if it's correct, then the answer is it's admissible. And I just  
13 wonder if something has happened in the translation that -- I mean, it's confusing  
14 when it's inadmissible or inadmissible.

15 PRESIDING JUDGE EBOE-OSUJI: [15:48:13] I picked up on that point, but we might  
16 as well have Professor now come -- so he is here with us, so.

17 MS BRADY: [15:48:22] I think for clarity that would be --

18 PRESIDING JUDGE EBOE-OSUJI: Yes, let's do that.

19 MR EL-GEHANI: [15:48:26] Yes. I mean it's admissible and the Pre-Trial Chamber  
20 decision is correct.

21 PRESIDING JUDGE EBOE-OSUJI: [15:48:34] I thought I heard you say on  
22 admissibility of the case --

23 MR EL-GEHANI: [15:48:39] Yeah, yeah, yeah.

24 PRESIDING JUDGE EBOE-OSUJI: [15:48:39] But it might have come out differently.  
25 But now you are clear, you are saying that the case is admissible before the ICC --

1 MR EL-GEHANI: [15:48:47] Yes.

2 PRESIDING JUDGE EBOE-OSUJI: [15:48:47] -- and that the Pre-Trial Chamber is  
3 correct.

4 MR EL-GEHANI: [15:48:52] Yes.

5 PRESIDING JUDGE EBOE-OSUJI: [15:48:53] Thank you.

6 Then we will move on back to the Prosecutor, five minutes for whatever you want to  
7 say and then you have -- sorry, my apologies, Mr Faal used to work for the Prosecutor  
8 but now he is for the Defence.

9 So let's have submissions from the Defence, and finally, you get last word, five  
10 minutes.

11 MR ELLIS: [15:49:21] Your Honour, I'm grateful. I don't think I will need five  
12 minutes, but very briefly.

13 Firstly, your Honours, we were surprised to hear the Libyan representative say in the  
14 transcript, I think it was at page 109, lines 12 to 13, that they didn't speak about the  
15 validity or the legitimacy of Law No. 6 of 2015, nor did they deny its existence. We  
16 had rather got the impression from paragraph 28 of their filing on Friday that that  
17 was exactly what they were doing, and you will recall the Prosecution submissions  
18 this afternoon building on what had appeared to be the government of Libya's case.  
19 Rather an inconsistency there.

20 Secondly, in terms of the *absentia/presentia* issue, it was a surprise to learn that Article  
21 211 doesn't apply to this sort of case, because that's exactly the provision that the  
22 Tripoli court relied on. If I can find it a moment, it was the page that my colleague,  
23 learned colleague referred to earlier. It's page 146 of the internal pages in the  
24 judgment:

25 "... in conformity with Article (211) of the Code of Criminal Procedure, a judgement

1 in absentia shall be issued ..."

2 Secondly, your Honours, we had some discussion earlier about defendants 4 and 6 in  
3 the Tripoli case, amongst the 37 defendants. You will recall the Prosecution saying  
4 that their cases weren't truly comparable to Dr Gaddafi's because they attended more  
5 sessions, but even on that count not all sessions, and they were convicted *in presentia*.  
6 Finally, your Honours, we are told that if your Honours were to look at Article 345 of  
7 the Code of Criminal Procedure in its original Arabic rather than the translated  
8 version, which we understand is not quite right, that would clarify that the same  
9 procedural rules apply to this case as those set out in Articles 211 and 212,  
10 your Honours.

11 PRESIDING JUDGE EBOE-OSUJI: [15:51:38] Thank you very, very much. And the  
12 proceedings have been very helpful in helping to clarify in the mind of the judges  
13 some of the issues in this matter, and we thank you.

14 And those of you travelling distances, we wish you happy landings, and the Court is  
15 adjourned.

16 THE COURT USHER: [15:51:58] All rise.

17 (The hearing ends in open session at 3.52 p.m.)

#### 18 CORRECTIONS REPORT

19 The corrections marked with an asterisk (\*) in the transcript are implemented as  
20 follows:

21 Page 63 line 8 :« it was»

22 is corrected to page 63 line 8 :« he was »

23 Page 64 line 10: "awards discretion" is corrected to Page 64 line 10: "awards some  
24 discretion"

#### 25 SECOND CORRECTIONS REPORT

1 The following corrections, marked with an asterisk \* and included in the  
2 audio-visual recording of the hearing, are brought into the transcript.

3 Page 42 lines 2-4:

4 "Then Ms Whitford will address you, my colleague Ms Whitford, will address you  
5 on the validity of Law No. 6 under national law briefly, very briefly, addressing the  
6 constitutional validity of that law."

7 is corrected to:

8 "Then Ms Whitford will address you, my colleague Ms Whitford, will address you  
9 on the validity of Law No. 6 under national law briefly, very briefly addressing the  
10 constitutional validity of that law."

11 Page 47 lines 22-23:

12 "MS BRADY: [12:14:56] Your Honour, this brings me to my last point on this  
13 question, and I think it's a really important point, because this point has not be  
14 argued"

15 is corrected to:

16 "MS BRADY: [12:14:56] Your Honour, this brings me to my last point on this  
17 question, and I think it's a really important point, because this point has not been  
18 argued"

19 Page 51 lines 11-13:

20 "And this situation was not resolved until the Libyan political agreement was signed  
21 on 17 December 2015."

22 is corrected to:

23 "And this situation was not resolved until the Libyan Political Agreement was  
24 signed on 17 December 2015."

25 Page 54 lines 5-7:

1 "It noted that certain crimes, and it listed identity-based murder, kidnapping,  
2 enforced disappearance and torture were among those crimes which were  
3 excluded."

4 is corrected to

5 "It noted that certain crimes, and it listed identity-based murder, kidnapping,  
6 enforced disappearance and torture, were among those crimes which were  
7 excluded."

8 Page 56 lines 19-20:

9 "As I explained earlier, this resulted from the signing of the Libyan political  
10 agreement in December 2015."

11 is corrected to:

12 "As I explained earlier, this resulted from the signing of the Libyan Political  
13 Agreement in December 2015."

14 Page 58 lines 4-5:

15 "Mr Al-'Atiri said as much in a conversation with a prosecution investigator on  
16 11 March 2016."

17 is corrected to:

18 "Mr Al-'Atiri said as much in a conversation with a Prosecution investigator on  
19 11 March 2016"

20 Page 58 lines 7-8:

21 "and this is sited at paragraph 40 to the Prosecution response to the original  
22 admissibility challenge"

23 is corrected to:

24 "and this is cited at paragraph 40 to the Prosecution response to the original  
25 admissibility challenge"

1 Page 59 lines 13-15:

2 "In fact, Mr Lamlom submitted that the active release of Mr Gaddafi could even be  
3 characterised as a crime under Libyan law of aiding and abetting a fugitive to evade  
4 justice."

5 is corrected to:

6 "In fact, Mr Lamlom submitted that the act of releasing of Mr Gaddafi could even be  
7 characterised as a crime under Libyan law of aiding and abetting a fugitive to evade  
8 justice."