

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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**Date: 28 September 2018**

**PRE-TRIAL CHAMBER II**

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

**SITUATION IN LIBYA**

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

**Public Document**

**Observations by Lawyers for Justice in Libya and the Redress Trust pursuant  
to Rule 103 of the Rules of Procedure and Evidence**

**Source: Lawyers for Justice in Libya and the Redress Trust**

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

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## I. INTRODUCTION

1. Lawyers for Justice in Libya (LFJL) and the Redress Trust (together, the “*amici curiae*”) submit their observations on the “Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute” (the “Admissibility Challenge”) in accordance with the parameters set out by Pre-Trial Chamber I (the “Chamber”) in its 5 September 2018 “Decision on the “Application by Lawyers for Justice in Libya and the Redress Trust for leave to submit observations pursuant to Rule 103 of the Rules of Procedure and evidence” and the “Defence Request for Leave to Respond to the Application”” (the “Decision on the Application”).<sup>1</sup>

## II. Procedural Background

2. On 26 February 2011, the United Nations Security Council (the “Security Council”) adopted Resolution 1970, referring the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court (the “Court”).<sup>2</sup>
3. On 27 June 2011, the Chamber issued an arrest warrant for Mr. Gaddafi.<sup>3</sup>
4. On 5 July 2011, the Registrar of the Court notified the Government of Libya of the request for cooperation, and sought their assistance in arresting and surrendering Mr. Gaddafi to the Court (the “Surrender Request”).<sup>4</sup>
5. On 23 November 2011, a letter from the National Transitional Council of Libya was transmitted to the Chamber, confirming the arrest and detention of Mr. Gaddafi on 19 November 2011 in Libya.<sup>5</sup>
6. On 1 May 2012, the Government of Libya filed an Article 19 Application requesting the postponement of the execution of the Surrender Request and sought to have the case declared inadmissible, pursuant to Article 17(1)(a), and the Surrender Request quashed.<sup>6</sup>
7. On 31 May 2013, the Chamber rejected the Government of Libya’s challenge to the admissibility of the case against Mr. Gaddafi and determined that the case against him was admissible.<sup>7</sup>

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<sup>1</sup> ICC-01/11-01/11-649.

<sup>2</sup> S/RES/1970 (2011), para 4.

<sup>3</sup> ICC-01/11-01/11-3.

<sup>4</sup> ICC-01/11-01/11-5.

<sup>5</sup> ICC-01/11-01/11-34 with annex.

<sup>6</sup> ICC-01/11- 01/11-130-Conf.

8. On 7 June 2013, the Government of Libya filed an appeal against the Chamber decision.<sup>8</sup> The Appeals Chamber of the Court upheld the decision of the Chamber on 21 May 2014.<sup>9</sup>
9. On 5 June 2018, Mr. Gaddafi filed the Admissibility Challenge. Mr. Gaddafi requested the Chamber find the case inadmissible on the basis that he was convicted domestically for substantially the same conduct alleged in the proceedings before the Court, and as such the case against him for the crimes as contained in the warrant of arrest, is inadmissible.<sup>10</sup>
10. On 14 June 2018, the Chamber issued its “Decision on the Conduct of the Proceedings following the ‘Admissibility Challenge by Mr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Statute’” (the “Decision on the Conduct of Proceedings”), in which it allowed the Prosecutor, the Security Council and victims who had already communicated with the Court in relation to this case to submit written observations.<sup>11</sup>
11. On 31 August 2018, in light of the Chamber’s decision on 14 June 2018, the *amici curiae* submitted their application to seek leave to submit joint observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence (the “Joint Request”).<sup>12</sup>
12. On 3 September 2018, the Defence filed a “Request for Leave to Respond to the ‘Application by Lawyers for Justice in Libya and the Redress Trust for leave to submit observations pursuant to Rule 103 of the Rules of Procedure and Evidence’” (the “Request for Leave to Respond”) opposing the *amici curiae*’s Joint Request.<sup>13</sup>
13. On 5 September 2018, the Chamber in its Decision on the Application granted the Joint Request, and rejected the Defence’s Request for Leave to Respond.<sup>14</sup>

### III. Summary of Observations

14. Article 20(3) of the Rome Statute of the Court (the "Statute") states that:

*No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:*

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<sup>7</sup> ICC-01/11-01/11-344-Conf.

<sup>8</sup> ICC-01/11-01/11-350.

<sup>9</sup> ICC-01/11-01/11-547-Red.

<sup>10</sup> Admissibility Challenge, para 34.

<sup>11</sup> ICC-01/11-01/11-641.

<sup>12</sup> ICC-01/11-01/11-647.

<sup>13</sup> ICC-01/11-01/11-648.

<sup>14</sup> Decision on Application, para 13.

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

15. Mr. Gaddafi submitted in his Admissibility Challenge that the *ne bis in idem* principle applies to his case because he was tried in domestic proceedings that are final and provided genuine justice. He stated that his case did not fall within Article 20(3)(a) or (b) and is therefore inadmissible before the Court.

16. In light of these submissions, and with the aim of assisting the Court "in the proper determination of the case" against Mr. Gaddafi,<sup>15</sup> the *amici curiae* wish to make the following observations:

- a) **The Libyan Appeals Process and the status of the domestic case:** There has been no final decision in the case against Mr. Gaddafi because the appeal process has not been exhausted and the Supreme Court has not yet verified the sentence. Given the pending domestic confirmation by the Supreme Court of Mr. Gaddafi's conviction, it is premature for the Chamber to decide on the issue of *ne bis in idem* due to the lack of finality of the domestic judgement.
- b) **The Nature of Law No.6 of 2015 and whether Mr. Gaddafi received a pardon or an amnesty:** The law permits a blanket amnesty for 'all Libyans' that does not exclude 'those most responsible'. It contains only limited conditions requiring no re-offending within 5 years, but which do not require full disclosure of the truth or a sufficient role for the victims. It has only been applied in this one case, and the amnesty was not ordered following a reasoned decision by the public prosecution, the Attorney General, or the Courts, as the law requires, but by the Battalion of Abu Bakr.
- c) **Amnesties and Pardons for International Crimes and Gross Violations of Human Rights:** Treaties ratified by Libya provide for an absolute prohibition of amnesties for grave breaches of the Geneva Conventions, for genocide, and for torture. There is an emerging international standard that prohibits amnesty and pardon in relation to other

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<sup>15</sup> Appeals Chamber, "Decision on 'Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence'", 22 April 2008, ICC-01/04-01/06-1289, para. 8.

serious international crimes. If the Court was to apply the principle of *ne bis in idem* to this case, it would arguably signify that individuals can evade justice before the Court by hiding behind amnesty laws. The purpose of Article 20(3)(a) and (b) of the Statute would arguably be undermined as amnesty laws are inherently contradictory to "the norms of due process recognized by international law".

#### IV. Submissions

##### **a. The Libyan appeals process and the status of the domestic case against Mr. Gaddafi in terms of its finality**

17. The criminal case against Mr. Gaddafi is still ongoing given that he still has avenues of appeal and the Court of Cassation has still not verified his conviction and sentence.

18. On 28 July 2015, Mr. Gaddafi – following his trial – was sentenced for the crimes levelled against him by Libyan authorities in the Tripoli Court of Appeal.<sup>16</sup> Mr Gaddafi was found guilty of committing or complicit in crimes, including:

**a. Pillage**

**b. Murder**

**c. Bombing of prisons**

**d. Use of aircrafts to throw internationally prohibited**

**e. Random shelling of residential areas**

**f. Killing peaceful demonstrators**

**g. Waging of civil war**

19. Mr. Gaddafi was sentenced to death for these crimes. As the resulting sentence was one of death, Article 385 *bis* of the Libyan Criminal Procedure Act<sup>17</sup> requires that the sentence be passed to the Court of Cassation to confirm validity of both the sentence and the conviction before it is deemed final and the sentence can be implemented. Mr. Gaddafi was sentenced in July 2015, but the Court of Cassation has yet to consider the case, or commence the process, more than three years later.

<sup>16</sup> Admissibility Challenge, Annex B, Pages 6-11.

<sup>17</sup> Article 385 *bis* Libyan Procedure Act, Admissibility Challenge, Annex G.

20. As referred to in Article 385 *bis* of the Libyan Code of Criminal Procedure, Article 381 of the Code of Procedure provides Mr. Gaddafi the possibility of appeal on several grounds. Namely, if:
- a) A violation of law or an error in its execution or interpretation
  - b) The verdict is null or the procedures involve a nullity that affected the verdict.
  - c) The procedures were neglected or violated, even if they are neither mentioned in the hearing minutes nor in the verdict.
21. The availability of such grounds of appeal, in combination with the fact that Mr. Gaddafi's case remains to be confirmed, indicates the ongoing nature of his case.
22. This delay in finalising Mr. Gaddafi's domestic proceedings is due to the continuing near collapse of the criminal justice system since 2014,<sup>18</sup> the weakness of Libya's judicial institutions and the general climate of lawlessness and insecurity.<sup>19</sup> The judiciary, prosecutors and lawyers continue to operate in a difficult security situation including direct attacks on courts,<sup>20</sup> and ongoing threats to their person, such as kidnapping and unlawful detention, including on the basis of perceived political affiliation or opinion.<sup>21</sup> The politically charged nature of the matter before the Court of Cassation, as well as the enduring militia power structure, continues to influence both the ability of the judiciary to undertake their work and the administration of justice across the country.
23. The fact that the sanction against Mr. Gaddafi remains unconfirmed and that further avenues of appeal exist indicates that the domestic case against Mr. Gaddafi is not final. It would therefore be pre-emptive for the Chamber to conclusively decide on the issue of *ne bis in idem* due to the lack of finality of the domestic judgement against Mr. Gaddafi and the ongoing nature of his case.

**b. The nature of Law No. 6 of 2015, whether Mr. Gaddafi received an amnesty or a pardon and the implications underlying Law No. 6 of 2015**

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<sup>18</sup> UNSC, 'Report of the Secretary General on the United Nations Support Mission in Libya' (7 May 2018) S/2018/429, para. 54.

<sup>19</sup> UNSC, 'Report of the Secretary General on the United Nations Support Mission in Libya' (12 February 2018) S/2018/140, para 38.

<sup>20</sup> *Ibid*, para 60.

<sup>21</sup> UNSC, 'Report of the Secretary General on the United Nations Support Mission in Libya' (7 May 2018) S/2018/429, paras. 36 and 52.

24. Mr. Gaddafi notes in his Admissibility Challenge that the effect of Law No 6 of 2015 was "not *stricto sensu* an 'amnesty' (since he had already been convicted)."<sup>22</sup> However, a close analysis of Law No. 6 of 2015, and the developing jurisprudence around the nature of amnesties versus pardons, demonstrates that Law No. 6 of 2015 is a blanket amnesty law, pursuant to which Mr. Gaddafi received amnesty.

### c. Overview of Law No. 6 of 2015

25. Law No. 6 of 2015 was adopted on 7 September 2015. It creates a general amnesty for all Libyans who committed offenses during the period of 15 February 2011 until 7 September 2015, the date the law was issued.

26. The provision on amnesty is contained in Article 1 of Law No. 6 of 2015. It reads as follows:

“Taking into consideration of the provisions of Article 2 and 3 of this law, shall be exempt general amnesty for all Libyans who have committed crimes during the period from the date of 15/02/2011 till the issuance of this law. The crime case is expired upon the criminal case, and fall adjudged criminal sanctions and their implications, And erased a criminal background record covered by this amnesty, when the availability of the conditions stipulated by this Law [sic]”<sup>23</sup>

27. In short, all Libyans who committed offences during the period from 15 February 2011 until the law was issued are eligible for a general amnesty. Any criminal sanctions received following a trial can be dropped, provided the conditions set out below are met.

28. Article 2 of Law No. 6 of 2015 creates the conditional requirements for the amnesty to take effect, requiring a written pledge of repentance, return of money or property obtained through crimes, reconciliation with victims and the surrender of weapons used in the commission of the crimes. Of particular importance is that the amnesty also applies to “those most responsible”, whereas they should be excluded from it.

29. Article 3 of Law No. 6 of 2015 outlines which crimes are excluded from the general amnesty, including terrorism, drug smuggling and trafficking, sexual crimes, enforced disappearances and torture, and corruption crimes. While certain crimes are correctly

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<sup>22</sup> Admissibility Challenge, para. 26.

<sup>23</sup> Annex E, Admissibility Challenge.



barred from amnesty, the exempted crimes do not reflect the totality of Libya's international legal obligations.

30. Article 7 of Law No. 6 of 2015 states that any amnesty provided under the Article 1 is conditional and will no longer apply if the relevant person commits a "wilful" felony within five years from the date when the amnesty was granted.

**d. Law No. 6 of 2015 within the context of previous Libyan amnesty provisions**

31. The expansive nature of Law No. 6 of 2015 represents a remarkable shift away from the previous amnesty provisions and transitional justice laws issued in the aftermath of the Libyan revolution. The line of legislation issued prior to Law No. 6 of 2015 solely provided exclusion from liability for acts carried out by revolutionaries.

32. Previous transitional laws include Law No. 38 of 2012 which granted selective self-amnesty for any "military, security or civil actions dictated by the February 17 Revolution that was performed by revolutionaries with the goal of promoting and protecting the revolution."<sup>24</sup> Similarly, Law No. 29 of 2013 conceptualised transitional justice as "addressing the systematic violations of the basic rights and liberties to which Libyans were subjected to by state affiliated apparatus under the former regime."<sup>25</sup> In contrast, this law provides a "general amnesty" to all Libyans who committed offences during the period between the 15 February 2011 and the date of its promulgation (7 September 2015), including to those who have committed serious crimes].<sup>26</sup> In contrast with previous laws, Law No. 6 of 2015 includes persons from all sides of the conflict.

33. It has been observed that the proclamation of Law No. 6 of 2015 was sudden and somewhat unexpected.<sup>27</sup> The Law was issued on 7 September 2015 within a short window from the handing down of Mr. Gaddafi's sentence on the 28 July 2015.<sup>28</sup> The further legal

<sup>24</sup> Article 4, Law No. 38 of 2012, Unofficial translation at: [https://security-legislation.ly/sites/default/files/lois/72-Law%20No.%20%2838%29%20of%202012%20on%20some%20of%20the%20procedures%20concerning%20the%20transitional%20phase\\_EN.pdf](https://security-legislation.ly/sites/default/files/lois/72-Law%20No.%20%2838%29%20of%202012%20on%20some%20of%20the%20procedures%20concerning%20the%20transitional%20phase_EN.pdf) (accessed 27 September 2018).

<sup>25</sup> Article 1, Law No. 29 of 2013. Unofficial translation at: [https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=E965634D2A728B0EC1257C60004D719B&action=openDocument&xp\\_countrySelected=LY&xp\\_topicSelected=GVAL-992BU6&from=topic&SessionID=DMTOPKMSFW](https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=E965634D2A728B0EC1257C60004D719B&action=openDocument&xp_countrySelected=LY&xp_topicSelected=GVAL-992BU6&from=topic&SessionID=DMTOPKMSFW) (Accessed 27 September 2018).

<sup>26</sup> Law No 6, 2015, para 1.

<sup>27</sup> M. Kerstan, Transitional Justice Without Peaceful Transition – The Case of Post-Gaddafi Libya, in Langer and Brown (eds) Building Sustainable Peace: Timing and Sequencing of Post –Conflict Reconstruction and Peacebuilding (Oxford University Press, 2016).

<sup>28</sup> Admissibility Challenge, para 25.

consequences of Law No. 6 of 2015 include the expunging of the criminal records of those found guilty of crimes. This element of the Law will result in perpetrators having limitations on travel lifted, the removal of certain fines and the lifting of bars from certain professions.<sup>29</sup>

**e. The distinction between amnesties and pardons**

34. There is no commonly accepted international definition of amnesty.<sup>30</sup> Commentators have noted that the term amnesty has been defined differently by states, and as such the scope and legal effects of amnesty vary.<sup>31</sup> In so far as the Chamber is required to differentiate between amnesty and pardon, key elements include:

- a) **the timing at which the pardon or amnesty occurs;**
- b) **the branch of government exercising the act granting pardon or amnesty;**
- c) **the exceptional and individualised nature of the act granting pardon or amnesty;**  
**and**
- d) **the ultimate effect of the pardon or amnesty.**

35. Much has been made of the timing of the act in differentiating between amnesties and pardons. Commentators have discerned between the two on the basis that amnesties take place prior to proceedings or conviction, while the latter takes place following conviction and punishment.<sup>32</sup> The European Court of Human Rights (the “ECtHR”) has stated that “amnesty overlooks the offence and prevents punishment, in contrast with pardon, which aims at either remitting such punishment or putting an end to the execution of a penalty.”<sup>33</sup> In contrast, the United Nations has defined amnesty as having the effect of “retroactively nullifying legal liability previously established”.<sup>34</sup>

<sup>29</sup> Article 17, Libyan Penal Code.

<sup>30</sup> L Mallinder and K McEvoy, 'Rethinking Amnesties: Atrocity, Accountability and Impunity in Post-Conflict Societies' (2011) 6(1) Contemporary Social Science 107, 115. See also L Mallinder, 'Investigation, Prosecutions and Amnesties under Articles 2 & 3 of the European Convention of Human Rights,' Transitional Justice Institute Research Paper N0.15-05, at 5.

<sup>31</sup> Ibid.

<sup>32</sup> F. Ntoubandi, *Amnesty for Crimes Against Humanity Under International Law*, (Martinus Nijhoff Publishers, 2007), at 10.

<sup>33</sup> International Committee of the Red Cross 'Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1969 (1987) para 1402.

<sup>34</sup> United Nations Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States, Amnesties*, HR/PUB/09/1 (2009), 5; See also: Third report on crimes against humanity presented by Sean D Murphy, Special Rapporteur, UN Doc. A/CN.4/074, 6 March 2017, para. 285.

36. The government branch that exercises its power in creating and implementing amnesties or pardons is potentially decisive in differentiating between the two concepts. While both amnesty and pardoning power grew out of the governing authority of the state, the origins and purposes of each are different.<sup>35</sup> The decision to grant amnesty is typically a legislative act while a pardon is usually an executive act granted by a head of state.<sup>36</sup> “Amnesty is a matter within the competence of the authorities. It is an act of legislative power... Legally, a distinction is made between amnesty and a free pardon. The latter is granted by the Head of State.”<sup>37</sup> The Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) has stated that “pardon traditionally applies to an enforceable sentence resulting from a final judicial decision... This results from the principle of separation of the executive and judicial powers, which prohibits a pardon while a judicial decision is still subject to review by a judicial body.”<sup>38</sup>
37. Further, the general nature of amnesty is in contrast with the specific or individualised nature of pardon. “Amnesty is usually general, addressed to classes or even communities... pardon applies only to the individual, releasing him from punishment fixed by law for his specific offence, but does not affect the criminality of the same or similar act when performed by other persons or repeated by the same person.”<sup>39</sup> The ECtHR has differentiated between pardons and amnesties on the basis that “amnesty is usually referred to as measure which is impersonal and applies to all persons or a class of person, while a pardon concerns a specific individual or a group of individuals.”<sup>40</sup>
38. The differentiating element that identifies that law as one of amnesty is its ultimate effect. “Amnesty .... eliminated the consequences of certain punishable offenses, stops prosecutions and quashes convictions. Legally, a distinction is made between amnesty and

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<sup>35</sup> A. O’Shea, *Amnesty in international Criminal Law and Practice* (Springer, 2002) 2.

<sup>36</sup> International Committee of the Red Cross ‘Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1969 (1987) para 1402.

<sup>37</sup> International Committee of the Red Cross ‘Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1969 (1987) para. 4617. See also: L. Olson, “Provoking the dragon on the patio – Matters of transitional justice: penal repression vs. amnesties”, (2006) 88 *International Review of the Red Cross*, 275–294.

<sup>38</sup> *Prosecutor v Ieng Sary*, Decision on Ieng Sary’s Rule 89 Preliminary Objections (Ne Bis In Idem, Amnesty and Pardon) ECCC Case File No. 002/19-09-2007-ECCC/TC (3 November 2011), para. 26 (*hereinafter Prosecutor v Ieng Sary*) ;See also: Report by Mr. Louis Joinet "Report by Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study on amnesty laws and their role in the safeguard and promotion of human rights", E/CN.4/Sub2/1985/16/Rev.1, para 5 ("pardon remits the penalty but does not expunge the conviction").

<sup>39</sup> H. Black, *Black’s Law Dictionary* (West Group, 1992),1113.

<sup>40</sup> *Lexa v Slovakia*, App no.5334/00, (ECtHR, 23 September Application) para. 89 (*hereinafter Lexa v Slovakia*).

a free pardon. The latter ..... puts an end to the execution of the penalty, though in other respects the effects of the conviction remains in being.”<sup>41</sup>

**f. The inappropriate application of Law No. 6 of 2015 to the case of Mr. Gaddafi**

39. Mr. Gaddafi was released from prison in April 2016. He had only been imprisoned for nine months following his conviction and, as noted above, his death penalty was never sanctioned by the Supreme Court.
40. The procedural requirements of Law No. 6 of 2015’s implementation are contained within Articles 2 and 6 to 9 of the law itself. Article 2 outlines the specific conditions that are required to be met for the amnesty law to be applicable. These include a written pledge of repentance, return of money or property obtained through crimes, reconciliation with victims and the surrender of weapons used in the commission of the crimes. There is no publically available record of the requirements of Article 2 being satisfied by Mr. Gaddafi.
41. As per Articles 6 and 9, Law No. 6 of 2015 is required to be applied on the basis of a reasoned decision by the Public Prosecution, the Attorney General or the Courts, depending on the timeline of the case. Mr. Gaddafi was released by the Battalion of Abu Bakr. However, the Battalion of Abu Bakr is not, nor does it function as, the Public Prosecution, the Attorney General nor the Courts, as required by Law No. 6 of 2015.
42. Once the conditions in Article 2 are met, Article 6 of the Law requires that where a case has reached the judges, as in the case of Mr. Gaddafi, a reasoned decision from a competent judicial authority is required for the amnesty to take effect. As Mr. Gaddafi’s case remains to be confirmed by the Supreme Court, it is that court which is seized as the competent judicial body. At time of writing, no information of such a decision implementing Law No. 6 of 2015 by the Supreme Court has been publically issued.
43. Article 3 of Law No. 6 of 2015 fails to differentiate between high-level and low-level perpetrators of war crimes, crimes against humanity and gross violations of human rights. The wording of Article 3 appears to exempt direct perpetrators from amnesty, but not architects of the crimes. This has resulted in a potential situation where persons who physically committed crimes exempt from amnesty in Article 2 are barred, but high-level

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<sup>41</sup> International Committee of the Red Cross ‘Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1969 (1987) para. 4617. See also: L. Olson, “Provoking the dragon on the patio – Matters of transitional justice: penal repression vs. amnesties”, (2006) 88 *International Review of the Red Cross*, 275.

perpetrators are not. The lack of a reasoned decision as required by Law No 6 of 2015 makes it difficult to establish how a court charged with such a situation would interpret the law.

44. Furthermore, Law No. 6 of 2015 has solely been applied to Mr. Gaddafi. Despite its wide applicability, it is yet to be applied to any other member of the former regime. While former regime members have been released from detention facilities, such releases have not been made on the purported basis or application of decisions made under Law No. 6 of 2015. The timing, nature and application of Law No. 6 of 2015, including the individual application to Mr. Gaddafi and the failure to follow its procedural requirements, raises questions about the motivation of Law No. 6 of 2015 as a genuine measure necessary for peace and reconciliation in Libya.
45. We respectfully submit that, based on a literal reading of the law in combination with the context in which the law was enacted, the fact that it is being applied prior to the finalisation of the criminal process in Mr. Gaddafi's case means that Law No. 6 of 2015 is correctly read as an amnesty law. Further, the failure to follow the procedural requirements contained in the law renders Mr. Gaddafi's release incorrect.

**g. The wider application of any ruling by the Chamber in relation to amnesties and pardons for international crimes and gross violations of human rights**

46. Amnesties and pardons for international crimes and gross human rights violations are prohibited in international humanitarian law, international human rights law, and in the decisions of international criminal tribunals. In summary, international treaties provide for an absolute prohibition of amnesties for grave breaches of the Geneva Conventions, genocide, and torture. There is an emerging international standard that prohibits amnesty and pardon in relation to other serious international crimes. "A State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember."<sup>42</sup>
47. This principle should be paramount as the Court considers whether the criminal proceedings against Mr. Gaddafi in Libya constituted an effective prosecution and punishment or whether the conduct of the trial and appeal (as well as the premature,

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<sup>42</sup> *The Prosecutor v Kallon and Kamara*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, SCSL-2004-15- AR72(E) and SCSL-2004-16-AR72(E), (13 March 2004), para. 67 (hereinafter *Prosecutor v Kallon and Kamara*)

summary, and solitary application of the amnesty process before the conviction was final) had the effect of absolving the accused of responsibility for an international crime, in breach of that principle.

#### **a. International Humanitarian Law**

48. International humanitarian law (IHL) is underpinned by a strong obligation to prosecute and punish. While amnesties are permitted in some circumstances, as outlined below they cannot be sought for international crimes. IHL also recognises the strong obligation in human rights law to prosecute offences such as torture.
49. Common Article 1 of the 1949 Geneva Conventions provides: “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances”.
50. States must criminalise serious violations of international humanitarian law such as war crimes and grave breaches of the Geneva Conventions. The Geneva Conventions (the “GCs”) oblige High Contracting Parties (the “HCPs”) to investigate grave breaches and prosecute or extradite offenders.<sup>43</sup> Rule 158 of the International Committee of the Red Cross (the “ICRC”) customary international humanitarian law study concludes that “States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects.”<sup>44</sup> The ICRC commentary confirms that “State practice establishes this as a norm of customary international law applicable in both international and non-international conflicts”,<sup>45</sup> and provides the basis for the rule.<sup>46</sup> The obligation on states to prosecute war crimes where appropriate is customary international law. Whilst the grave breaches regime under the GCs applies only to international armed conflicts, the customary international law rule is considered to apply to both international and non-international armed conflicts.<sup>47</sup>

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<sup>43</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 September 1950) 75 UNTS 31, Articles 49; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 September 1950), 75 UNTS 85, Articles 50; Convention (III) relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 September 1950) 75 UNTS 135, Articles 129; Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 September 1950), 75 UNTS 287, Articles 146.

<sup>44</sup> ICRC, Customary IHL Database, Rule 158, < [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule158](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158) > (last accessed 27 September 2018).

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

51. The ICRC Commentary to Article 51 of GC I confirms the obligation to prosecute grave breaches is absolute. The GCs prevent HCPs from absolving themselves or any other HCPs of any liability incurred in relation to grave breaches.<sup>48</sup> According to the ICRC Commentary to Article 51 GCI, “any liability” includes the responsibility contained in Article 49 to investigate and prosecute perpetrators of grave breaches. “Article 51 therefore aims to prevent a situation whereby States Parties, in future peace treaties or armistices, would absolve themselves or another State Party of this responsibility.”<sup>49</sup> The Commentary confirms that obligations under Article 49 are absolute and cannot be affected by agreements between HCPs. Article 51 was included as a means of ensuring the compulsory character of Article 49.<sup>50</sup>
52. Amnesties in the context of international armed conflicts are not explicitly mentioned in the GCs. However, the ICRC Commentary to Article 49 GCI makes it clear that “amnesties granted to persons who have participated in an armed conflict shall not extend to those who are suspected of having committed grave breaches or other serious violations of humanitarian law.”<sup>51</sup>
53. The power to grant amnesties in Article 6(5) of Additional Protocol II (“APII”) does not apply to war crimes or grave breaches. Article 6(5) requires authorities in power at the end of hostilities to grant the broadest possible amnesties to persons who have participated in a non-international armed conflict. This is reflected in Rule 159 of the ICRC customary international humanitarian law study, which also only applies to non-international armed conflicts. However, the ICRC’s commentary to Rule 159 refers to numerous examples of state practice and *opinion juris* to assert that the rule cannot be construed to enable war criminals or those guilty of crimes against humanity to evade punishment, as this would be incompatible with Rule 158.
54. Furthermore, the principle of *aut dedere aut judicare* for crimes under international law, articulated in Article 17 of the Rome Statute, requires states to either prosecute or

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<sup>48</sup> Articles 51 GCI, 52 GCII, 131 GCIII, 148 GCIV.

<sup>49</sup> International Committee of the Red Cross, *Updated Commentary on Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2016, at 3020. Available at; < <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=C87E4A3315767DE8C1257F7A005768A0>> (last accessed 27 September 2018)

<sup>50</sup> Ibid.

<sup>51</sup> International Committee of the Red Cross, *Updated Commentary on Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2016, at 2845. Available at; < <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=C87E4A3315767DE8C1257F7A005768A0>> (last accessed 27 September 2018)

extradite those suspected of committing such acts. An amnesty or pardon in the absence of proper punishment is in violation of that principle.

## **b. International Human Rights Law**

55. Human rights treaties contain a strong obligation on States to prosecute gross violations of human rights. Regional Human Rights courts and the United Nations Treaty Bodies have consistently affirmed that amnesties and pardons may not be granted for genocide, crimes against humanity, torture, and other gross violations of human rights.<sup>52</sup>

### **(1) Treaty Obligations for International Crimes**

56. Several treaties provide an explicit duty to prosecute and punish those who have committed gross human rights violations. The use of amnesties and pardons is in contradiction with these obligations.<sup>53</sup> The Convention on the Prevention and Punishment of the Crime of Genocide<sup>54</sup> requires States Parties to confirm that genocide is a crime under international law which they undertake to prevent and punish,<sup>55</sup> and undertake to enact the necessary legislation to the provisions of the convention and, in particular, “to provide effective penalties for persons guilty of genocide and other acts enumerated in Article 3”.<sup>56</sup> Similarly, Article 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the “Convention against Torture”) requires States Parties to prosecute or extradite persons alleged to have committed torture.<sup>57</sup>

57. The use of pardons or amnesties is also inconsistent with a state’s obligation to enforce effective<sup>58</sup> or appropriate penalties.<sup>59</sup>

### **(2) United Nations Treaty Mechanisms**

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<sup>52</sup> *Marguš v. Croatia*, App no 4455/10, (27 May 2014) para 195.

<sup>53</sup> Freeman, *Necessary Evils*, 39.

<sup>54</sup> *Convention on the Prevention and Punishment of the Crime of Genocide* (adopted 9 December 1948, entered into force 12 January 1951) United Nations, Treaty Series, vol. 78, p. 277. Libya acceded to the Genocide Convention on 16 May 1989.

<sup>55</sup> Article 1, Genocide Convention.

<sup>56</sup> Article 5, Genocide Convention.

<sup>57</sup> *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (adopted 10 December 1984, entered into force 26 June 1987), United Nations, Treaty Series, vol. 1465, p. 85. Libya acceded to the Convention on 16 May 1989.

<sup>58</sup> Jurdi, *The International Criminal Court and National Courts*, 104.

<sup>59</sup> The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, GA Res 39/46. UN DOC A/39/51, entered into force 26 June 1987. Libya acceded to the Convention on 16 May 1989.



58. The Treaty Body mechanisms have prohibited the use of amnesties and pardons for international crimes and gross human rights violations<sup>60</sup> as their use may prevent the appropriate investigation and punishment of perpetrators.<sup>61</sup>

59. The United Nations Human Rights Committee (the Human Rights Committee) has reaffirmed that amnesty laws in regard to serious human rights violations are incompatible with the International Covenant on Civil and Political Rights (ICCPR),<sup>62</sup> reiterating that they contribute to the creation of an atmosphere of impunity and bring about other serious human rights violations.<sup>63</sup> The Human Rights Committee has found that States Parties are required by the ICCPR to provide the victims of a gross human rights violation with a thorough and effective remedy including prosecuting, trying and punishing those responsible and providing effective reparation.<sup>64</sup>

60. In its General Comment 31 on the General Legal Obligation Imposed on States Parties to the Covenant, the Human Rights Committee went on to state:

“... a failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law... When committed as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity... Accordingly, where public officials or State agents have committed violations of the Covenant... the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties and prior legal immunities and indemnities.”<sup>65</sup>

61. Similarly, Treaty Body mechanisms have expressed concerns and made recommendations in relation to pardons for serious violations of human rights.

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<sup>60</sup> Note Libya ratified the *International Covenant on Civil and Political Rights* in 1976.

<sup>61</sup> United Nations Human Rights Committee, *Concluding Observations of the Human Rights Committee – Lebanon* (1 April 1997) UN Doc. CCPR/C/79/Add.78, para 12.

<sup>62</sup> United Nations Human Rights Committee, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, para.15.

<sup>63</sup> United Nations Human Rights Committee, *Rodriguez v. Uruguay*, Communication No. 322/1988, U.N. Doc. CCPR/C/51/D/322/1988 (1994).

<sup>64</sup> United Nations Human Rights Committee, *Purna Maya v Nepal*, Communication No. 2245/2013, U.N. Doc, CCPR/C/119/D/2245/2013 (2017), para. 13; *Yuba Kumari Katwal v. Nepal*, Communication No. 2000/2010, U.N. Doc. CCPR/C/113/D/2000/2010 (2015), para 15.

<sup>65</sup> United Nations Human Rights Committee, *CCPR General Comment No. 31: The General Legal Obligation Imposed on States Parties to the Covenant*, (26 May 2004) UN Doc. CCPR/C/21/Rev.1/Add.13, para.18.

62. The Human Rights Committee has expressed concern over the use of pardons stating that their use is inconsistent with the requirements of the ICCPR<sup>66</sup> and recommended that no pardon, commutation or remission of sentence or termination of public proceedings be granted in respect of any person who has committed or commits serious human rights violations.<sup>67</sup>
63. The United Nations Committee against Torture (“CAT”) has also expressed its concerns over domestic laws which impede the “investigation and punishment” of human rights violations in breach of the Convention against Torture,<sup>68</sup> recommending that states should ensure that that pardon and any other similar measures leading to impunity for acts of torture are prohibited both in law and in practice.<sup>69</sup>
64. The CAT has held, in relation to the pardoning of persons convicted of torture, that one of the purposes of the Convention against Torture is to avoid those who have committed acts of torture to escape punishment.<sup>70</sup> The granting of pardons has the practical effect of doing so.<sup>71</sup> The duty to impose appropriate penalties against perpetrators requires the grave nature of those acts to be taken into account, “the imposition of lighter penalties and the granting of pardons...are incompatible with the duty to impose appropriate punishment.”<sup>72</sup>

### **(3) Regional Human Rights System**

#### **a. African Commission on Human and Peoples’ Rights**

65. The African Commission on Human and Peoples’ Rights (the “African Commission”) jurisprudence is consistently critical of the use of amnesties and pardons. The African Commission considers that the granting of total and complete immunity from prosecution through the use of amnesty, “without access to remedy available for victims to vindicate their rights, and without putting in place adequate legislative or institutional mechanisms

<sup>66</sup> United Nations Human Rights Committee, *Comments on Argentina* (1995) UN Doc CCPR/C/79/Add/46, paras 3, 10 and 15.

<sup>67</sup> United Nations Human Rights Committee, *Concluding Observations on Algeria* (2007) UN Doc. CCPR/C/DZA/CO/3, para 7(c).

<sup>68</sup> United Nations Committee against Torture, *Concluding Observations on the Initial Report of Lebanon* (2017), UN Doc. CAT/C/LBN/CO/1, paras. 46 and 47; United Nations Committee against Torture, *Concluding Observations on Cabo Verde in the absence of a report* (2017) CAT/C/CPV/CO/1, para. 12. See also:

Committee against Torture, *Concluding Observations on Morocco* (2011), UN Doc. CAT/C/MAR/CO/4, para. 6.

<sup>69</sup> United Nations Committee against Torture, *Concluding Observations on the Initial Report of Armenia* (2017) UN Doc. CAT/C/ARM/CO/4, para. 8.

<sup>70</sup> United Nations Committee against Torture, *Kepa Urra Guridi v Spain*, Communication No. 212/2002, UN Doc. CAT/C/34/D/212/2002 (2005), para. 6(7).

<sup>71</sup> *Ibid*, para. 6(6).

<sup>72</sup> *Ibid*, para. 6(7).

to ensure that perpetrators of alleged atrocities were punished” not only prevented the victims from seeking effective remedy, but also promoted impunity.<sup>73</sup> The African Commission has noted that amnesty laws adopted by a State do not shield a country from its international obligations.<sup>74</sup>

66. In relation to pardons, the African Commission has stated that the use of a clemency order that granted pardon to persons liable to criminal prosecution and granted remission of the whole or remainder of the sentence of those convicted<sup>75</sup> removed not only the right to effective remedy for victims from seeking redress, but also encouraged impunity.<sup>76</sup>

### **b. European Court of Human Rights**

67. The ECtHR has stated that “[g]ranted amnesty in respect of ‘international crimes’ – which include crimes against humanity, war crimes and genocide – is increasingly considered to be prohibited by international law” on the basis of their incompatibility with the unanimously recognised obligations of States to prosecute and punish grave breaches of fundamental human rights.<sup>77</sup> It drew this understanding from customary rules of international humanitarian law, human rights treaties, as well as the decisions of international and regional courts and developing State practice, as there has been a growing tendency for international, regional and national courts to overturn general amnesties enacted by governments.<sup>78</sup> The ECtHR has noted that “even if it were to be to be accepted that amnesties are possible” in particular circumstances, such as a reconciliation process and/or as a form of compensation to victims, such actions had not occurred in the case before it.<sup>79</sup>

68. In relation to pardons the ECtHR has indicated that in “in the event of widespread use of lethal force against the civilian population ...an amnesty is generally incompatible with the duty to investigate acts of torture and to combat impunity for international crimes. This is also true in respect for pardon.”<sup>80</sup> Further, the ECtHR has noted that where a state agent has been charged with *jus cogens* crimes, such as torture, it is of the utmost

<sup>73</sup> *Mouvement Ivoirien des Droits Humains (MIDH) v Cote d’Ivoire*, Comm. No. 246/02, Decision (ACHPR, 29 July 2009) para 98.

<sup>74</sup> *Case of Malawi African Association and Others v. Mauritania*, Comm. Nos. 54/91, 61/91,98/93, 164/97-196/97 and 210/98, Decision (ACHPR, 11 May 2000) paras 82-83.

<sup>75</sup> *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Comm. No. 245/02, Decision (ACHPR, 15 May 2006) para. 192.

<sup>76</sup> *Ibid*, 215.

<sup>77</sup> *Marguš v Croatia*, App no. 4455/10 (27 May 2014,) para 139 (hereinafter *Marguš v. Croatia*)

<sup>78</sup> *Ibid*, para 130.

<sup>79</sup> *Ibid*, para.139.

<sup>80</sup> *Case of Association ‘21 Decembre 1989’ and Others v. Romania*, App no. 33810/07 (25 May 2011) para. 106.

importance for the purposes of an effective remedy that criminal proceedings and sentencing are not time-barred and that the granting of a pardon should not be permissible.<sup>81</sup> In such a situation, the granting of a pardon can “scarcely serve the purpose of an adequate punishment.”<sup>82</sup> Further, the ECtHR considered that, as a matter of principle, “it would be wholly inappropriate and would send a wrong signal to the public if the perpetrators of the very serious crime in question maintained eligibility for holding public office in the future.”<sup>83</sup>

### c. Inter-American Commission of Human Rights

69. The Inter-American Commission on Human Rights (the “Inter-American Commission”) has taken a strong stance against the use of amnesties in instances of gross violations of human rights, stating that the “obligation to investigate and prosecute crimes against humanity is a norm of *jus cogens*.”<sup>84</sup> The Inter-American Commission has recalled that it has crystallised its doctrine establishing that amnesty laws and that “[t]hese decisions which coincide with the standards of other international bodies on human rights regarding amnesties, have declared in a uniform manner that both the amnesty laws as well as other comparable legislative measures that impede or finalize the investigation and judgment of agents of [a] State ... violate multiple provisions of said instruments.”<sup>85</sup>

### d. Inter-American Court of Human Rights

70. The Inter-American Court of Human Rights (the “IACtHR”) jurisprudence has held that where unconditional amnesties, provisions on prescription and the establishment of measures designed to eliminate responsibility, extend to international crimes and gross violations of human rights they are incompatible with a States Parties obligation<sup>86</sup>

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<sup>81</sup> *Yeter v Turkey*, App no. 33750/03 (13 January 2009) para 70; *Abdülsamet Yaman v Turkey*, App no. 32446/96 (2 November 2004), para. 55. See also: *Tuna v Turkey*, App no. 22339/03 (19 January 2010), para. 71; *Eski v Turkey*, App no. 8354/04 (5 June 2012), para. 34; *Taylan Vs. Turkey*, App no. 32051/09 (3 July 2012) para. 45.

<sup>82</sup> *Ibid*, para. 274.

<sup>83</sup> *Ibid*.

<sup>84</sup> *Case 11.552, (Brazil)*, March 26 2009, para. 186.

<sup>85</sup> *Case 10.820 (Perú)*, Report (13 April 2000), para. 68; *Case 10.908 (Perú)*, Report (13 April 2000) para. 76.

<sup>86</sup> L Mallinder, ‘The end of Amnesty or Regional Overreach? Interpreting the Erosion of South America’s Amnesty Laws (2016) 65(3) International and Comparative Law Quarterly 645, 660. *Gomes Lund et al. (‘Guerrilha do Araguaia’) v Brazil*, Judgement (Preliminary Objections, Merits, Reparations, and Costs) (24 November 2010) paras 174–175; *Gelman v Uruguay*, Judgement (Merits and Reparations) (24 February 2011) para. 232; *Case of the Massacres of El Mozote and nearby places v El Salvador*, Judgement (Merits, Reparations and Costs) (October 2012) para. 296.

“because “they violate non-derogable rights recognized by international human rights law.”<sup>87</sup>

71. The IACtHR has emphasised that amnesties and pardons are in contradiction with the international obligation to prosecute, and where criminal responsibility is determined, to punish perpetrators of human rights violations. “Amnesties or similar forms have been one of the obstacles alleged by some States in the investigation, and where applicable, punishment of those responsible for serious human rights violations.”<sup>88</sup> The IACtHR noted that itself, the Inter-American Commission, the organs of the United Nations, and other universal and regional organs for the protection of human rights have ruled on the non-compatibility of amnesty laws related to serious human rights violations with international law and the international obligations of States.”<sup>89</sup>

72. In relation to pardon, the IACtHR has opined that states shall refrain from resorting to pardon, statute of limitations and from enacting provisions to exclude liability, as well as measures aimed at preventing criminal prosecution or at voiding the effects of a conviction”.<sup>90</sup> The IACtHR has referred in a general state duty to refrain from resorting to actions “that intend [...] to suppress the effects of the conviction”<sup>91</sup> and make an “undue granting of benefits in the execution of the penalty”,<sup>92</sup> as well as the importance of the sentence being fulfilled “in the terms in which it is decreed”.<sup>93</sup>

73. Most recently, the IACtHR recognised “there is a growing tendency in the International Law of Human Rights and International Criminal Law regarding limiting that the sentences imposed by criminal courts for serious violations of human rights be pardoned or extinguished by discretionary decisions of the executive or legislative powers.”<sup>94</sup> Further, the IACtHR has emphasized that the punishment of a perpetrator should be proportional to the rights recognized by law and the culpability with which the perpetrator

<sup>87</sup> *Barrios Altos Case Chumbipuma Aguirre et al v Peru*, Judgment (Merits, (14 March 2001) para 41; See also: *La Cantuta v Peru*, Judgement (Merits, Reparations and Costs) (29 November 2006); *Almonacid Arellano et al v Chile*, Judgement (Preliminary Objections, Merits, Reparations and Costs) (26 September 2006); *Gomes Lund et al (“Guerrilha do Araguaia”) v Brazil*, Judgment (Preliminary Objects, Merits, Reparations and Costs) (24 November 2010), paras. 171-176; *The Massacres of El Mozote and Nearby Places v El Salvador*, Judgment (Merits, Reparations and Costs) (25 October 2012) paras. 283-286.

<sup>88</sup> *Gelman v. Uruguay*, Judgement (24 February 2011) para 195.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Gutiérrez Soler v Colombia*, Judgment (12 September 2005), para. 97.

<sup>91</sup> *19 Merchants v Colombia*, Judgement (Merits, Reparations and Costs) (5 July 2004) para. 263.

<sup>92</sup> *Barrios Altos v Peru*, Decision on monitoring compliance with the judgment (September 7, 2012), paras. 54-45.

<sup>93</sup> *Rodríguez Vera et al (The Disappeared from the Palace of Justice) v Colombia*, Judgement (Preliminary Objections, Merits, Reparations and Costs) (14 November 2014), para. 460.

<sup>94</sup> *Barrios Altos and La Cantuta v Peru*, Decision on monitoring compliance with Judgement (May 30 2018), para.45.

acted, which in turn should be established as a function of the nature and gravity of the events.<sup>95</sup> It has also indicated that States must ensure that the sentences imposed and their execution do not constitute factors that contribute to impunity, taking into account aspects such as the characteristics of the crime, and the participation and guilt of the accused.<sup>96</sup>

### c. International Criminal Tribunals

### d. Relationship between International Human Rights and International Criminal Law

74. International criminal tribunals have consistently held that there can be no blanket amnesties or pardons at the international level for international crimes and gross violations of human rights. There is a limited power to release those convicted of such offences before the end of their sentences, but any early release must respect the human rights standards set out above that ensure that there has been justice for the victims through adequate punishment of the perpetrator.

75. As a preliminary matter, an amnesty under domestic law cannot include crimes under international law that give rise to universal jurisdiction, as other states are still free to prosecute. As was established by the International Court of Justice in *Yerodia*,<sup>97</sup> international tribunals have jurisdiction over crimes under international law and there are no procedural bars, such as sovereign immunity, that can prevent such international prosecutions. Although the applicability of sovereign immunity for prosecution in third-country domestic courts is still uncertain, the *Pinochet* decision of the Spanish Audiencia Nacional,<sup>98</sup> the *Ely Ould Dah* decision in France<sup>99</sup> and the *Cavallo*

<sup>95</sup> *La Rochela v Colombia*, Judgement (Merits, Reparations and Costs) (11 May 2007) para. 196. *Vargas-Areco v Paraguay*, Judgement (Merits, Reparations and Costs) (26 September 2006), para. 108; *Caso Raxcacó Reyes v Guatemala*, Judgement (Merits, Reparations and Costs), (15 September 2005), paras. 70 and 133; *Heliodoro Portugal v Panamá*, Judgement (Preliminary Objections, Merits, Reparations and Costs) (12 August 2008), para. 203.

<sup>96</sup> *Manuel Cepeda Vargas v Colombia*. Judgement (Preliminary Objections, Merits, Reparations and Costs) (26 May 2010) para.150; *Hilaire, Constantine and Benjamin and others v Trinidad and Tobago*, Judgement (Merits, Reparations and Costs) (June 21 2002) paras. 103, 106 and 108 *González and others ("Cotton Fields") v México*, Judgement (Preliminary Objections, Merits, Reparations and Costs) (16 November 2009) para. 377.

<sup>97</sup> Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) Judgment, Preliminary Objections and Merits, 14 February 2002, para 53. The decision established that acting heads of state and foreign ministries still benefit from serving immunity in third-county courts, however the judgment was not unanimous and there are still unresolved questions regarding this principle The Court has left the category open as to which other officials will be afforded such immunity.

<sup>98</sup> National Court of Spain, *Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer de los crímenes de genocidio y terrorismo cometidos durante la dictadura chilena*, Madrid, (5 November 1998). Available at: <http://www.universaljurisdiction.info/index/95083>;

<sup>99</sup> Case of Ely Ould Dah *Cour de Cassation, Chambre Criminelle, crim n° 195*, (23 October 2002). Available at: <http://www.universaljurisdiction.info/index/110287>.

decision of the Supreme Court of Mexico<sup>100</sup> have confirmed that domestic amnesties covering crimes under international law cannot prevent the investigation and prosecution of these crimes in other states.

#### e. Amnesties

76. In *Prosecutor v Furundzija*, the ICTY Trial Chamber stated that amnesty laws should not be recognised by international tribunals.<sup>101</sup> While the issue of amnesty was under the Trial Chamber's immediate consideration, the Chamber was of the view that the *jus cogens* status of the prohibition against torture meant that any treaty or law that purported to authorise torture would be rendered null and void *ab initio*. Consequently, "taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law" would also be null and void and "would not be accorded international legal recognition."<sup>102</sup> The Trial Chamber affirmed that "What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime."<sup>103</sup>

77. In *Prosecutor v Erdemovic*, the ICTY Trial Chamber recognised that crimes against humanity are inhumane acts that, by their extent and gravity, cannot be tolerated by the international community, which "must perforce demand their punishment."<sup>104</sup>

78. The Special Court for Sierra Leone (the "SCSL") considered in detail the question of an amnesty granted to the RUF under the Lomé Peace Agreement.<sup>105</sup> In *Kallon and Kamara*, the Appeals Chamber held that the amnesty did not present a bar to prosecution of international crimes before the SCSL. The Appeals Chamber determined that an amnesty granted by one State cannot deprive another State of jurisdiction where that jurisdiction is universal as, "a State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember."<sup>106</sup> The Appeals Chamber extended this reasoning to conclude that amnesties cannot bar prosecution before an international court or tribunal where the crimes within its

<sup>100</sup> Case of Ricardo Miguel Cavallo, *Suprema Corte de Justicia de la Nación* ( 12 Jun 2003) Available at: [http://www.universaljurisdiction.info/index/Cases/Cases/Spain\\_-\\_Cavallo\\_case\\_/Case\\_Doc\\_Summaries/117738,0](http://www.universaljurisdiction.info/index/Cases/Cases/Spain_-_Cavallo_case_/Case_Doc_Summaries/117738,0).

<sup>101</sup> *Prosecutor v Furundzija*, Judgment, IT-95-17/1-T (10 December 1998)

<sup>102</sup> *Prosecutor v Furundzija*, Judgment, IT-95-17/1-T (10 December 1998) para. 155.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Prosecutor v Erdemovic*, Sentencing Judgment, IT-96-22-T (29 November 1996) para. 28.

<sup>105</sup> *Prosecutor v Kallon and Kamara*, paras. 66-80.

<sup>106</sup> *Ibid.*, para.67.

competence are susceptible to universal jurisdiction. Further, the Chamber expressly recognised that a norm was developing under international law that governments cannot grant amnesties for serious violations of international crimes.<sup>107</sup>

79. The Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) considered the intersection of *ne bis in idem*, amnesty, and pardon, in the *Prosecutor v Ieng Sary*, who was previously convicted of genocide by a revolutionary tribunal, given a royal pardon by King Sihanouk (the “Royal Decree”), and sought to rely on an amnesty law.<sup>108</sup>

80. The defence argued that the Court lacked jurisdiction due to the Royal Decree and because the principle of *ne bis in idem* debarred a new trial. In relation to the amnesty, the Trial Chamber found that Cambodia’s treaty obligations to ensure the prosecution and punishment of grave breaches of the GCs, genocide, and torture imposed an absolute prohibition on amnesties.<sup>109</sup> The Royal Decree could not relieve it of these duties. It further concluded that an emerging consensus prohibits amnesty in relation to other serious international crimes. Although State practice was insufficiently uniform to establish an absolute prohibition, “this practice demonstrates at a minimum a retroactive right for third States, internationalised and domestic courts to evaluate amnesties and to set them aside or limit their scope should they be deemed incompatible with international norms”, such as norms which oblige States to hold perpetrators of serious international crimes to account.<sup>110</sup> No weight was to be attributed to the granting of amnesty, which is “contrary to the direction in which customary international law is developing and to Cambodia’s international obligations.”<sup>111</sup>

### c. Pardons

81. In *Prosecutor v Ieng Sary*, the ECCC Trial Chamber rejected the argument that the Royal Decree prevented a further trial as Ieng Sary had already been tried and convicted. The ECCC concluded that the original trial “was not conducted by an impartial and independent tribunal, in accordance with the requirements of due process”, and that “the deficiencies affecting these proceedings were so significant that the decision resulting from this trial cannot be characterised as a genuine judicial decision. It is therefore

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<sup>107</sup> Ibid, para.82.

<sup>108</sup> *Prosecutor v Ieng Sary*, para.

<sup>109</sup> Ibid, para 39.

<sup>110</sup> Ibid, para.53.

<sup>111</sup> Ibid, para.54.



incapable of producing valid legal effects”.<sup>112</sup> Consequently, the decision could not be the basis for the application of the principle of *res judicata* and the sentence could not be subject to pardon. Ultimately, the pardon and the principle of *res judicata* did not debar the ECCC’s jurisdiction under Cambodian law.<sup>113</sup>

82. The Court also reviewed the relevant international standards, and noted that “[w]here an international tribunal has jurisdiction over offences previously tried by domestic proceedings with manifest shortcomings, the *ne bis in idem* principle has been balanced against the interest of the international community and victims in ensuring that those responsible for the prosecution of international crimes are properly prosecuted.”<sup>114</sup> It concluded that “the protection against double jeopardy does not negate states’ international obligations to promote accountability in relation to perpetrators of genocide, crimes against humanity and war crimes. The *ne bis in idem* principle therefore does not debar the Chamber’s exercise of jurisdiction as to do so “would amount to a *de facto* amnesty for the facts prosecuted.”<sup>115</sup>

#### **d. Transitional Justice and Amnesties**

83. While a transitional justice approach might allow for alternative mechanisms to formal prosecution in the pursuit of justice, this does not permit blanket amnesties or procedures that do not offer a serious alternatives to dealing with the past or which do not take into account the interest of victims.<sup>116</sup> “While it is clear that respect for the justice interest is indispensable to achieve a lasting peace, the hard question is how much justice can be sacrificed on the altar of peace negotiations without unduly restricting a state’s duty *vis-à-vis* international crimes”.<sup>117</sup>

84. However, international practice is clear that any limitation of responsibility will not be permitted where it is based on excluding specific crimes, or excluding those most responsible, or where there has been no fact-finding, confrontation, or admission of responsibility.<sup>118</sup> In practice, this means that blanket amnesties are not acceptable, as their

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<sup>112</sup> Ibid, para.30.

<sup>113</sup> Ibid, para.31.

<sup>114</sup> Ibid, para.33.

<sup>115</sup> Ibid, para.35.

<sup>116</sup> Kai Ambos, ‘The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC’, in K. Ambos et al. (eds), *Building a Future on Peace and Justice*, (Springer, 2009).

<sup>117</sup> Ibid, at para.23.

<sup>118</sup> Ibid, para. 21; his sentiment is mirrored in the UN position on the use of amnesties for international crimes in endorsed peace agreements which is that agreements cannot utilise “amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights: Report of the Secretary-General, ‘The Rule of law and

goal is to conceal past crimes by preventing any investigation: “International law quite unequivocally prohibits this type of amnesty.<sup>119</sup>” Amnesties that are conditional, or which provide for some form of accountability, may be permissible in limited circumstances, where there has been full disclosure of the facts, acknowledgment of responsibility, and repentance.<sup>120</sup>

85. The expert-developed Belfast Guidelines on Amnesty and Accountability make a distinction between illegitimate amnesties, which ensure impunity for persons responsible for serious crimes, and legitimate amnesties, which “create institutional and security conditions for the sustainable protection of human rights, and require individual offenders to engage with measures to ensure truth, accountability, and reparations”.<sup>121</sup> The Guidelines set out in detail the conditions that must be fulfilled before an amnesty can be granted.

## V. Summary of Observations

86. **The Libyan Appeals Process and the status of the domestic case:** There has been no final decision in the case against Mr. Gaddafi because the appeal process has not been exhausted and the Supreme Court has not yet verified the sentence. Given the pending domestic confirmation by the Supreme Court of Mr. Gaddafi’s conviction, it is premature for the Chamber to decide on the issue of *ne bis in idem* due to the lack of finality of the domestic judgement.

87. **The Nature of Law No.6 of 2015 and whether Mr. Gaddafi received a pardon or an amnesty:** The law permits a amnesty for ‘all Libyans’ that does not exclude ‘those most responsible’. It contains only limited conditions requiring no re-offending within 5 years, but which do not require full disclosure of the truth or a sufficient role for the victims. It has only been applied in this one case, and the amnesty was not ordered following a reasoned decision by the public prosecution, the Attorney General, or the Courts, as the law requires, but by the Battalion of Abu Bakr.

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transitional justice in conflict and post-conflict societies’ (2004) S/2004/616, para 10; See also: Report of the Secretary-General, ‘The rule of law and transitional justice in conflict and post-conflict societies’ (2011) S/2011/634, paras. 12 and 32.

<sup>119</sup> Ibid, para. 55.

<sup>120</sup> Ibid, para 30.

<sup>121</sup> The Belfast Guidelines on Amnesty and Accountability, Transitional Justice Institute, University of Ulster, 2013. Available at

[https://www.ulster.ac.uk/\\_data/assets/pdf\\_file/0005/57839/TheBelfastGuidelinesFINAL\\_000.pdf](https://www.ulster.ac.uk/_data/assets/pdf_file/0005/57839/TheBelfastGuidelinesFINAL_000.pdf), at page 9.

**88. Amnesties and Pardons for International Crimes and Gross Violations of Human**

**Rights:** Treaties ratified by Libya provide for an absolute prohibition of amnesties for grave breaches of the Geneva Conventions, for genocide, and for torture. There is an emerging international standard that prohibits amnesty and pardon in relation to other serious international crimes. If the Court was to apply the principle of *ne bis in idem* to this case, it would arguably signify that individuals can evade justice before the Court by hiding behind amnesty laws. The purpose of Article 20(3)(a) and (b) of the Statute would arguably be undermined as amnesty laws are inherently contradictory to "the norms of due process recognized by international law".



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Dated this 28 September 2018

At London, United Kingdom