Cour
Pénale
Internationale

International
Criminal
Court

Original: English

No. **ICC-01/11-01/11**
Date: **5 April 2019**

PRE-TRIAL CHAMBER I

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

SITUATION IN LIBYA

IN THE CASE OF

THE PROSECUTOR v. SAIF AL-ISLAM GADDAFI

Public

Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute'

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

Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr Julian Nicholls

Counsel for the Defence
Ms Dató Shyamala Alagendra
Mr Essa Faal
Ms Venkateswari Alagendra
Mr Khaled Al Zaidy

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparations

Office of Public Counsel for Victims
Ms Paolina Massidda

Office of Public Counsel for the Defence

States Representatives

Amicus Curiae
Lawyers for Justice in Libya
Redress Trust

REGISTRY

Registrar
Mr Peter Lewis

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section
Mr Philipp Ambach

Other

PRE-TRIAL CHAMBER I of the International Criminal Court issues this decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute' (the 'Admissibility Challenge').[1]

The present decision is classified as public although it refers to the existence of documents and, as the case may be, to a limited extent to their content, which have been submitted and are currently treated as confidential. The Chamber considers that the references made in the present decision are required by the principle of publicity and judicial reasoning. Moreover, those references are not inconsistent with the nature of the documents referred to and have been kept to a minimum.

I. Procedural history

1. On 26 February 2011, the United Nations Security Council (the 'Security Council') referred the situation in Libya since 15 February 2011 to the Prosecutor of the Court by means of Resolution 1970 (2011).[2]

2. On 27 June 2011, the Chamber, in a different composition, issued a warrant of arrest for Mr Gaddafi (the '27 June 2011 Warrant of Arrest').[3] On 4 July 2011, the Registrar prepared a request to Libya to arrest Mr Gaddafi and surrender him to the Court.[4]

3. On 23 November 2011, a letter from the National Transitional Council of Libya was transmitted to the Chamber.[5] This letter confirmed the arrest of Mr Gaddafi on 19 November 2011 in Libya.

4. On 31 May 2013, the Chamber rejected Libya's challenge to the admissibility of the case against Mr Gaddafi before the Court and determined that the case against

[1] Admissibility Challenge, ICC-01/11-01/11-640, with confidential annexes A, B, C, H and public annexes D, E, F and G (reclassified as public on 8 June 2018, together with annexes A, B and H, pursuant to the Chamber's instructions).
[2] S/RES/1970 (2011), para. 4.
[3] Warrant of Arrest for Saif Al-Islam Gaddaf, ICC-01/11-01/11-3.
[4] Request to the Libyan Arab Jamahiriya for the arrest and surrender of Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ICC-01/11-01/11-5.
[5] Decision to Add Document to Case Record, 24 November 2011, ICC-01/11-01/11-29. The official English translation of this letter was filed in the case record on 28 November 2011; *see* Registry, Implementation of the "Decision to Add Document to Case Record"(ICC-01/11-01/11-29-Conf-Exp), ICC-01/11-01/11-34.

him was admissible.[6] On 21 May 2014, the Appeals Chamber upheld the decision of the Chamber.[7]

5. On 6 June 2018, the Chamber, in its current composition, received the Admissibility Challenge. Mr Gaddafi asserts that, on 28 July 2015, he was convicted by the Tripoli Criminal Court for substantially the same conduct as alleged in the proceedings before this Court.[8] Mr Gaddafi further alleges that, on or around 12 April 2016, he was released from prison pursuant to Law No. 6 of 2015.[9] Thus, Mr Gaddafi submits that the case against him on charges of crimes falling within the jurisdiction of the Court is inadmissible.[10]

6. On 14 June 2018, the Chamber issued the 'Decision on the conduct of the proceedings following the "Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute"', in which it, *inter alia*, requested 'the Prosecutor, the Security Council and victims who have communicated with the Court in relation to the present case, should they wish to do so, to submit written observations on the Admissibility Challenge no later than Friday, 28 September 2018, at 16.00 hours'.[11]

7. On 31 August 2018, the Chamber received 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'[12] and on 2 September 2018, the Defence sought leave to respond to this application (the '3 September 2018 Defence Request').[13]

---

[6] Decision on the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-344-Red.
[7] Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi", ICC-01/11-01/11-547-Red (OA 4).
[8] Admissibility Challenge, ICC-01/11-01/11-640, para. 2.
[9] Admissibility Challenge, ICC-01/11-01/11-640, para. 26. According to Mr Gaddafi, the Government of Libya promulgated Law No. 6 in September 2015, which provides, *inter alia*, that all Libyans who committed offences during the period 15 February 2011 until the issuance of this law should be eligible for a general amnesty and that received sentences and their subsequent criminal impact should be dropped; *see* Admissibility Challenge, ICC-01/11-01/11-640, para. 25.
[10] Admissibility Challenge, ICC-01/11-01/11-640, paras 1, 103.
[11] ICC-01/11-01/11-641, p. 6.
[12] 30 August 2018, ICC-01/11-01/11-647.
[13] Defence 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", ICC-01/11-01/11-648.

8. On 5 September 2018, the Chamber issued the '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"', in which it rejected the 3 September 2018 Defence Request as premature, and granted leave to the Lawyers for Justice in Libya ('LFJL') and the Redress Trust ('Redress') (collectively, the '*Amici Curiae*') to submit written observations no later than Friday, 28 September 2018, at 16.00hrs.[14]

9. On 28 September 2018, the Chamber received the 'Observations by Lawyers for Justice in Libya and the Redress Trust pursuant to Rule 103 of the Rules of Procedure and Evidence' (the 'Rule 103 Observations').[15] On the same date, the Chamber also received the Prosecutor's response (the '28 September 2018 Prosecutor's Response')[16] as well as observations on behalf of the victims (the '28 September 2018 Victims' Observations')[17] regarding the admissibility challenge.

10. On 4 October 2018, the Chamber received the 'Defence Application for 1) Leave to Reply to Legal Representative of Victims filing 652 and Prosecution filing 653-Conf, and 2) Extension of Time to Respond to Observations of *amici* Lawyers for Justice in Libya and Redress Trust (filing 654)' (the '4 October 2018 Defence Application'), in which it requested the Chamber to:

> i. [G]rant the Defence leave to reply to the issues raised in the Prosecution Response and [the Victims' Observations];
>
> ii. [I]n the alternative, grant the Defence leave to reply to the new and unanticipated issues arising from the Prosecution Response and [the Victims' Observations] identified at paragraph 23 [of the 4 October 2018 Defence Application];
>
> iii. [I]n the event, leave to reply is granted, authorise the Defence's submission of a consolidated document of no more than 50 pages addressing the Prosecution Response, [the Victims' Observations] and [the Rule 103 Observations], and set a deadline of 9 November 2018 for submission of the consolidated document; and

[14] 4 October 2018 Defence Application, ICC-01/11-01/11-649, p. 6.
[15] Rule 103 Observations, ICC-01/11-01/11-654.
[16] Prosecution response to 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1), 19 and 20(3) of the Rome Statute, ICC-01/11-01/11-653-Conf. A public redacted version was filed on 11 October 2018; *see* ICC-01/11-01/11-653-Red.
[17] Observations on behalf of victims on the "Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute", ICC-01/11-01/11-652.

iv. [I]n the event leave to reply is not granted, set a page limit of 30 pages and a deadline of 19 October 2018, for the Defence response to the [Rule 103 Observations].[18]

11. On 8 October 2018, the Chamber received the Prosecutor's response to the 4 October 2018 Defence Application.[19] On the same date, the Chamber also received the Victims' response to the 4 October 2018 Defence Application, in which the Office of Public Counsel for Victims ('OPCV') requested the Chamber to '[r]eject [said] Application; and [allow] the OPCV to respond to the Rule 103 Observations in the event the Defence is granted right to respond, and by the same deadline' (the '8 October 2018 OPCV Request').[20]

12. On 24 October 2018, the Chamber issued its decision on the 4 October 2018 Defence Application and other related matters, whereby the Chamber, *inter alia*, granted 'leave for the Defence to file a consolidated document of 50 pages maximum replying to new issues of facts or law arising from documents which were not available to the Defence at the time of the Admissibility Challenge, […] by no later than Friday, 9 November 2018, at 16.00hrs'.[21] The Chamber also granted the 8 October 2018 OPCV Request, and granted 'the Prosecutor until 9 November 2018, at 16.000hrs to respond to the Rule 103 Observations should she desire to do so'.[22]

13. On 9 November 2018, the Chamber received a confidential version of the 'Defence Consolidated Reply to Prosecution "Response to 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute" and Response to "Observations by Lawyers for Justice in Libya and the Redress Trust pursuant to Rule 103 of the Rules of Procedure and Evidence"'.[23]

---

[18] ICC-01/11-01/11-655, para. 28.
[19] Prosecution response to "Defence Application for 1) Leave to Reply to Legal Representative of Victims filing 652 and Prosecution filing 653-Conf, and 2) Extension of Time to Respond to Observations of amici Lawyers for Justice in Libya and Redress Trust (filing 654)", ICC-01/11-01/11-657.
[20] Victims' Response to the "Defence Application for 1) Leave to Reply to Legal Representative of Victims filing 652 and Prosecution filing 653-Conf, and 2) Extension of Time to Respond to Observations of amici Lawyers for Justice in Libya and Redress Trust (filing 654)" (No. ICC-01/11-01/11-655-Conf), ICC-01/11-01/11-656, p. 9.
[21] Decision on the "Defence Application for 1) Leave to Reply to Legal Representative of Victims filing 652 and Prosecution filing 653-Conf, and 2) Extension of Time to Respond to Observations of *amici* Lawyers for Justice in Libya and Redress (filing 654)", and other related matters, ICC-01/11-01/11-659 (the '24 October 2018 Decision'), p. 9.
[22] 24 October 2018 Decision, ICC-01/11-01/11-659, p. 9.
[23] ICC-01/11-01/11-660-Conf together with 7 public annexes.

14. On 12 November 2018, the Chamber was notified of a 'Corrigendum of Defence Consolidated Reply to Prosecution "Response to 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20 (3) of the Rome Statute" and Response to "Observations by Lawyers for Justice in Libya and the Redress Trust pursuant to Rule 103 of the Rules of Procedure and Evidence"'.[24]

15. On 15 November 2018, the Chamber received a public redacted version of 'Corrigendum of Defence Consolidated Reply to Prosecution "Response to 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20 (3) of the Rome Statute" and Response to "Observations by Lawyers for Justice in Libya and the Redress Trust pursuant to Rule 103 of the Rules of Procedure and Evidence"'.[25]

16. On 20 November 2018, the Chamber also received a second redacted version of 'Corrigendum of Defence Consolidated Reply to Prosecution "Response to 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20 (3) of the Rome Statute" and Response to "Observations by Lawyers for Justice in Libya and the Redress Trust pursuant to Rule 103 of the Rules of Procedure and Evidence"'(the '20 November 2018 Defence Consolidated Reply').[26]

17. On 14 January 2019, the Registry filed the 'Registration of the appointment of Ms Venkateswari Alagendra as Associate Counsel for Mr Saif Al-Islam Gaddafi'.[27]

II. Applicable law

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

III. The Chamber's determination

19. The Chamber has carefully studied the parties' different submissions and the annexes appended thereto, in particular, the Admissibility Challenge, the 28 September 2018 Prosecutor's Response, the 28 September 2018 Victims'

[24] ICC-01/11-01/11-660-Conf-Corr together with a public annex.
[25] ICC-01/11-01/11-660-Corr-Red.
[26] 20 November 2018 Defence Consolidated Reply, ICC-01/11-01/11-660-Corr-Red2.
[27] ICC-01/11-01/11-661 together with confidential annex I and public annex II.

Observations, the Rule 103 Observations, the 20 November 2018 Defence Consolidated Reply and all relevant material necessary for its determination. For the sake of judicial economy, the Chamber shall refer to these submissions only when relevant and to the extent necessary for its judicial reasoning.

20. In this respect, the Chamber observes that the Defence advances a number of arguments in the Admissibility Challenge, one of which is procedural and relates to Mr Gaddafi's standing to challenge the admissibility of the case before the Court. Thus, before delving into the merits and arguments in support of the Admissibility Challenge as presented by the Defence, the Chamber shall first rule on Mr Gaddafi's procedural standing, especially considering that the Prosecutor challenges this procedural aspect as an integral part of her overall request to reject the Admissibility Challenge.[28]

21. In the 28 September 2018 Prosecutor's Response, the Prosecutor argues that Mr Gaddafi lacks procedural standing to lodge the Admissibility Challenge.[29] In supporting her view, the Prosecutor asserts that Mr Gaddafi 'is subject to a public ICC arrest warrant that has been outstanding for seven years' and that by virtue of the judgment of 20 April 2015 rendered by the Tripoli Court of Assize, Mr Gaddafi is 'deemed […] "a fugitive from justice"'.[30] Referring to the Government of Libya's recent response to a Prosecutor's request for assistance dated 18 September 2018, and a letter from the Prosecutor General's Office dated 29 September 2016, as well as Libya's 'Response to Prosecution's "Request for an Order to Libya to refrain from Executing [Mr][…] Gaddafi […]"', the Prosecutor further argues that the 'Government of National Accord […] continues its efforts to secure the custody of Mr Gaddafi' for the purposes of either prosecuting him or surrendering him to the Court.[31] Despite the Defence's assertion that Mr Gaddafi was released from detention in Zintan 'on or around 12 April 2016', the suspect 'made no effort to surrender himself to either the Government of Libya or the ICC', the Prosecutor added.[32]

[28] *See* 28 September 2018 Prosecutor's Response, ICC-01/11-01/11-653-Red, para. 185.
[29] 28 September 2018 Prosecutor's Response, ICC-01/11-01/11-653-Red, paras 2-3, 83-96.
[30] 28 September 2018 Prosecutor's Response, ICC-01/11-01/11-653-Red, paras 2, 85.
[31] 28 September 2018 Prosecutor's Response, ICC-01/11-01/11-653-Red, paras 2, 85.
[32] 28 September 2018 Prosecutor's Response, ICC-01/11-01/11-653-Red, para. 3.

As such, there is no prospect that he 'will surrender himself' in case the Admissibility Challenge 'is unsuccessful'.[33]

22. The Chamber does not adhere to the Prosecutor's position, which suggests that lodging an admissibility challenge by the Defence is dependent on the person's arrest and surrender to the Court.[34] According to article 19(2)(a) of the Statute, '[a]n accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58', may challenge the admissibility of the case on the grounds referred to in article 17 of the Statute. Since Mr Gaddafi is subject to the 27 June 2011 Warrant of Arrest issued by the Chamber, he is entitled by virtue of article 19(4) of the Statute to challenge the admissibility of the case against him.

23. In this regard, the Chamber concurs with the position advanced by the Defence in this particular context that '[i]t is not a condition of making an admissibility challenge that [the suspect] must surrender himself to the Court' and that '[n]o such requirement is expressly or impliedly contained in Article 19'.[35]

24. This conclusion stands notwithstanding the Chamber's previous reminder set out in the 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi', which called for Libya to fulfil its 'obligation to surrender [Mr Gaddafi] to the Court'.[36] In this respect, the Chamber points out that the surrender of Mr Gaddafi to the Court and Libya's compliance with its obligation arising from Security Council Resolution 1970 (2011) pertains mainly to the issue of cooperation and, as such, is independent of challenges to the admissibility of cases before the Court. The former is not dependent on the latter especially when the admissibility of the case has been challenged by the suspect – rather than Libya – considering that it is the State that is under an obligation to surrender Mr Gaddafi to the Court. Accordingly, the Chamber considers that Mr Gaddafi has procedural standing to lodge the Admissibility Challenge pursuant to article 19(2)(a) of the Statute.

25. Turning to the following arguments, pertaining to the merits of the Admissibility Challenge, the Defence submits that Mr Gaddafi was detained 'at the

[33] 28 September 2018 Prosecutor's Response, ICC-01/11-01/11-653-Red, para. 3.
[34] *See* 28 September 2018 Prosecutor's Response, ICC-01/11-01/11-653-Red, paras 87-90.
[35] Admissibility Challenge, ICC-01/11-01/11-640, para. 36; *see further* pp. 17-18.
[36] ICC-01/11-01/11-344-Red, p. 91.

Zintan Reform and Rehabilitation Institution […] at the behest of the Government of Libya' between 20 November 2011 and 12 April 2016.[37] According to the Defence, Mr Gaddafi was tried together with other members of the former regime and sentenced to death by the Tripoli Criminal Court on 28 July 2015.[38]

26. Quoting a number of provisions from the Statute, including articles 17(1)(c) and 20(3), the Defence asserts that the Court should determine that the case against Mr Gaddafi is inadmissible if the following criteria have been met:

> i. that Dr. Gadafi has already been tried by the Libyan national courts […];
>
> ii. that the national trial was with respect "to the same conduct" as that alleged in this case […];
>
> iii. national proceedings were not for the purpose of shielding within the meaning of Article 20(3)(a) […]; and
>
> iv. national proceedings were not otherwise lacking in sufficient independence or impartiality, nor did they involve egregious due process violations, to the extent that the proceedings were incapable of providing genuine justice within the meaning of Article 20(3)(b) […].[39]

27. Having developed the foregoing four elements, the Defence 'submits that the present case against Dr. Saif Al-Islam Gaddafi before the ICC must be declared inadmissible'.[40]

28. The Chamber recalls article 17(1) of the Statute according to which, the Court shall determine that the case is inadmissible where:

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

[37] Admissibility Challenge, ICC-01/11-01/11-640, para. 2.
[38] Admissibility Challenge, ICC-01/11-01/11-640, paras 2, 24; Annex B to the Admissibility Challenge, ICC-01/11-01/11-640-AnxB.
[39] Admissibility Challenge, ICC-01/11-01/11-640, para. 34.
[40] Admissibility Challenge, ICC-01/11-01/11-640, para. 103.

29. Article 20(3) of the Statute further reads:

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

30. It is clear that articles 17(1)(c) and 20(3) of the Statute must be read together and they are the key provisions relevant to the Admissibility Challenge *sub judice*. This is so given that the Admissibility Challenge revolves around the question whether Mr Gaddafi has been previously tried by the Libyan national courts for the 'same conduct' set out in the 27 June 2011 Warrant of Arrest.

31. In this respect, the Chamber adheres to the methodology set out by the Defence as recalled above in paragraph 26 in responding to the Admissibility Challenge *sub judice*.[41] In particular, the Chamber agrees that the four elements elaborated by the Defence in its submission are, in principle, at the core of determining an admissibility challenge based on the principle of *ne bis in idem*/*non bis in idem*, in so far as the interpretation provided is consistent with internationally recognized human rights.[42] Thus, in order for the present Admissibility Challenge to be successful, the Chamber must ascertain, consistently with internationally recognized human rights, that these four elements elaborated by the Defence have been satisfied. However, failing to satisfy any of the above elements would be sufficient to reject the Admissibility Challenge.

32. In this context, the Chamber wishes to point out that the burden of proof lies on the challenging party, in this case the Defence. As the Appeals Chamber confirmed, albeit in a slightly different context, 'a State that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible [and in order] [t]o discharge that burden, the State must provide the Court with evidence of a sufficient

[41] *See* Admissibility Challenge, ICC-01/11-01/11-640, para. 34.
[42] Article 21(3) of the Statute.

degree of specificity and probative value'.[43] Although the Appeals Chamber made this pronouncement in the context of an admissibility challenge lodged by a State, the Chamber agrees with the Prosecutor that 'there is no reason why the standard of proof for an individual bringing an admissibility challenge should be different from that of a State'.[44]

33. Thus, in order to discharge the burden of proof in the Admissibility Challenge *sub judice*, the Defence must provide the Chamber with evidence meeting the required degree of specificity and probative value demonstrating that the four elements adopted by the Defence have been met.

34. In this regard, the Chamber recalls that article 17(1)(c) of the Statute refers to a person who 'has already been tried […] and a trial by the Court is not permitted under article 20, paragraph 3'. Article 20(3) of the Statute comes into play to impose a restriction for a second trial when the person 'has been tried by another court for conduct also proscribed under article[s] 6, 7, 8 or 8 *bis*'. A second trial for the 'same conduct' is not permitted unless 'the proceedings in the other court' were tainted with irregularities as reflected in article 20(3)(a) and (b) of the Statute.

35. A plain reading of these provisions suggests that only a trial on the merits by 'another court' – in this case a national court – is sufficient to trigger the *ne bis in idem* prohibition. This interpretation is at the heart of the Defence's line of argumentation with respect to the first element. According to the Defence, '[t]he ordinary meaning of "has been tried by another court" is that court proceedings in relation to the relevant person have been instigated by national authorities and have concluded with a verdict convicting or acquitting that person'.[45] Citing an earlier decision issued by Trial Chamber III, the Defence further argues that the Trial Chamber 'correctly identified that the defining characteristic of a concluded trial is the existence of a decision on the merits'.[46] Thus, in the Defence's opinion,

[43] Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 30 August 2011, ICC-01/09-02/11-274, paras 2, 61.
[44] 28 September 2018 Prosecutor's Response, ICC-01/11-01/11-653-Red, para. 97, fn. 168.
[45] Admissibility Challenge, ICC-01/11-01/11-640, para. 43.
[46] Admissibility Challenge, ICC-01/11-01/11-640, para. 45.

article 20(3) of the Statute is triggered once 'a decision on conviction or acquittal by a trial court' is rendered.[47]

36. The Chamber does not fully adhere to the broad interpretation endorsed by the Defence regarding the nature of the decision required in order to satisfy article 20(3) of the Statute. The formulation 'a trial by the Court is not permitted under article 20, paragraph 3' suggests that the person has been the subject of a completed trial with a *final* conviction or acquittal and not merely a trial 'with a verdict on the merits' or a mere 'decision on conviction or acquittal by a trial court' as the Defence suggests. In other words, what is required, as the OPCV correctly pointed out,[48] is a judgment which acquired a *res judicata* effect.[49]

37. This conclusion finds support in previous jurisprudence of the Court, the *ad hoc* Tribunals as well as decisions rendered by different human rights bodies. Trial Chamber III took a similar view when rejecting an argument advanced by the Defence of Mr Bemba that an order issued by the Senior Investigating Judge on 16 September 2004 'terminated finally the criminal proceedings against' him.[50] According to the Trial Chamber,

> [t]he decision at first instance in the [Central African Republic] was not in any sense a decision on the merits of the case – instead it involved, *inter alia*, a consideration of the sufficiency of the evidence before the investigating judge who was not empowered to try the case – and it did not result in a *final* decision or acquittal of [Mr Bemba].[51]

38. In this respect, although the Chamber agrees with the Defence that a decision on the merits of the case 'on conviction or acquittal' is required,[52] it still considers –

---

[47] Admissibility Challenge, ICC-01/11-01/11-640, para. 46.
[48] 28 September 2018 Victims' Observations, ICC-01/11-01/11-652, paras 61-70.
[49] This is the case 'when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them'; *see* European Court of Human Rights ('ECtHR'), *Sergey Zolotukhin v. Russia* (Application no. 14939/03), Judgment of 10 February 2009, para. 107; *Nikitin v. Russia* (Application no. 50178/99), Judgment of 20 July 2004, para. 37; *see also* International Court of Justice, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 17 March 2016, ICJ Reports 2016, p. 100, para. 58 (noting that 'the principle of *res judicata* […] is a general principle of law which protects, at the same time, the judicial function of a court or tribunal and the parties to a case which has led to a judgment that is final and without appeal […]. This principle establishes the finality of the decision adopted in a particular case').
[50] Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010, ICC-01/05-01/08-802, para. 88.
[51] Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010, ICC-01/05-01/08-802, para. 248 (emphasis added).
[52] Admissibility Challenge, ICC-01/11-01/11-640, para. 46.

contrary to the Defence's position[53] – that *finality* is equally required for such a decision or judgment on the merits. The Chamber construes the quoted paragraph from the Trial Chamber decision as clearly calling for a final judgment on the merits, where such judgment has acquired a *res judicata* effect. This is so notwithstanding the Defence's argument that if finality were required, the text of article 20(3) of the Statute would have expressly stated so.

39. In this regard the drafting of the *ne bis in idem* provisions in the Statutes of the *ad hoc* tribunals is instructive. Article 10(2) of the Statute of the International Criminal Tribunal for the former Yugoslavia ('ICTY') only speak of a person 'who has been tried before a national court'.[54] Similarly, article 9(2) of the Statute of the International Criminal Tribunal for Rwanda ('ICTR') mentions a person 'who has been tried before a national court'.[55] The same holds true with respect to article 7(2) of the Statute of the International Residual Mechanism for Criminal Tribunals ('IRMCT'), which borrows the same language from the ICTY and ICTR Statutes.[56] These provisions, same as article 20(3) of the Statute, do not expressly refer to a final conviction or acquittal. Yet, the jurisprudence interpreting the *ne bis in idem* provisions follow the same interpretation adopted by the Chamber.

40. In the *Semanza* case, the ICTR Appeals Chamber stated:

> The *non bis in idem* principle applies only where a person has effectively already been tried. The term "tried" implies that proceedings in the national Court constituted a trial for the acts covered by the indictment brought against the Accused by the Tribunal and at the end of which trial a *final judgment* is rendered. […] The core question for the Appeals Chamber is whether in Cameroon the Appellant was the subject of a trial in the sense of Article 9(2) of the Statute, that is, whether the trial was for acts

[53] Admissibility Challenge, ICC-01/11-01/11-640, paras 43-44.
[54] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, 25 May 1993 (reprinted in 1993 ILM 1192). Article 10(2) reads: 'A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if: […]'.
[55] Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, 8 November 1994 (reprinted in 1994 ILM 1598). Article 9(2) reads: 'A person who has been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if: […]'.
[56] Statute of the International Residual Mechanism for Criminal Tribunals, 22 December 2010, annexed to Security Council Resolution 1966 (2010), UN Doc. S/RES/1966 (2010).

> constituting serious violations of international humanitarian law and whether a *final judgement* on those offences was delivered.[57]

41. Similarly, in the *Nzabirinda* case, the Trial Chamber, quoting the *Semanza* Appeals Chamber decision, concluded that, 'in the particular circumstances of this case where counts have been withdrawn without a *final judgement*, the principle of *non bis in idem* does not apply and cannot be invoked to bar potential subsequent trials of the accused before any jurisdiction'.[58]

42. Furthermore, in the *Orić* case, the IRMCT stated: 'Article 7(1) of the Statute stipulates that a person cannot be tried in a national jurisdiction for acts for which he was already tried in the relevant international jurisdiction. It expressly refers to acts on the basis of which the person was tried, in the sense that *a final judgment was rendered* […]'.[59] Although the IRMCT was referring to the reverse situation where the person should not be tried for a second time before national courts once he was tried before the IRMCT, the requirement for final judgment remains the same, even if the text is silent in this regard.

43. This interpretation provided by the Chamber and the *ad hoc* tribunals has not been developed arbitrarily. Rather it is inspired by and follows internationally recognized human rights norms. Again in the *Semanza* case, the ICTR Appeals Chamber confirmed this view when it stated:

> These provisions of the ICTY and ICTR Statutes are identical for all practical purposes. Moreover, the *non bis in idem* principle is set out in paragraph 7 of Article 14 of the International Covenant on Civil and Political Rights in the following terms: "No one shall be liable to be tried or punished again for an offence for which he has already been *finally convicted or acquitted* in accordance with the law and penal procedure of each country".[60]

44. Thus, although articles 7(2), 9(2) and 10(2) of the IRMCT, ICTR and ICTY Statutes respectively do no expressly refer to a final conviction or acquittal, practice

---

[57] *Laurent Semanza v. The Prosecutor*, Decision, 31 May 2000, ICTR-97-20-A, paras 74-75 (emphasis added, footnotes omitted).
[58] ICTR, *The Prosecutor v. Joseph Nzabirinda*, Sentencing Judgement, 23 February 2007, ICTR-2001-77-T, para. 46 (emphasis added).
[59] Appeals Chamber, *Prosecutor v. Naser Orić*, Decision on an Application for Leave to Appeal the Single Judge's Decision of 10 December 2015, 17 February 2016, MICT-14-79, para. 13 (emphasis added).
[60] *Laurent Semanza v. The Prosecutor*, Decision, 31 May 2000, ICTR-97-23-A, para. 74, fn. 95 (emphasis added).

consistent with international human rights standards support an interpretation of the *ne bis in idem* provisions to that effect.

45. This is not different with respect to the Statute of this Court, which even goes a step further than the Statutes of the *ad hoc* tribunals in explicitly requiring in article 21(3) that the 'application and interpretation of law […] must be consistent with internationally recognized human rights […]'. As such, article 20(3) must be applied and interpreted 'in light of internationally recognized human rights'.[61] The latter envisages a prohibition of a second trial when there is a *final* decision or judgment of acquittal or conviction. This is clear not only from the text of article 14(7) of the International Covenant on Civil and Political Rights ('ICCPR'),[62] quoted by the ICTR Appeals Chamber, but also from other core human rights instruments such as article 4(1) of Protocol 7 of the European Convention on Human Rights[63] and article 8(4) of the American Convention on Human Rights.[64]

46. In this respect, the Chamber cannot agree with the Defence that the 'language of Article 20(3) of the Statute should be contrasted, for instance, with Article 14(7) of the [ICCPR] which applies where a person "has already been *finally* convicted or acquitted"'.[65]

---

[61] Appeals Chamber, Judgment on the Prosecutor's appeal against the oral decision of Trial Chamber I pursuant to article 81(3)(c)(i) of the Statute, 1 February 2019, ICC-02/11-01/15-1251-Red2, para. 50 (date of public redacted version 21 February 2019); Judgment on the appeal of Mr Aimé Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled "Decision on the 'Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba'", 11 July 2014, ICC-01/05-01/13-558, para. 67; Judgment on the appeal of the Prosecutor against the decision of the Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, ICC-01/04-01/07-475, para. 57; Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, ICC-01/04-01/06-1486, para. 46.

[62] International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

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

[64] American Convention on Human Rights: 'Pact of San José, Costa Rica', 22 November 1969, 1144 UNTS 143; *see, inter alia*, Inter-American Court of Human Rights ('IACHR'), *Garcia v. Peru*, Case 11.006 (Peru), IACHR Annual Report 1995, No. 1/95, pp. 1-2.

[65] Admissibility Challenge, ICC-01/11-01/11-640, para. 44.

47. Although the text of article 20(3) does not expressly refer to a final judgment, as the Defence correctly points out, this does not mean that an effective interpretation consistent with human rights norms should not be endorsed. Therefore, the Chamber considers that the interpretation of article 20(3) of the Statute should be in harmony with universal human rights standards mirrored in, *inter alia*, article 14(7) of the ICCPR.

48. Based on a review of the material available before the Chamber, it is clear that Mr Gaddafi has been tried and convicted on 28 July 2015 by the Tripoli Criminal Court. This judgment has been passed by a first instance Tripoli Court of Assize, and in principle, should still be subject to appeal before the Court of Cassation.[66] Moreover, as indicated by the submission of the Libyan Government, this judgment has been rendered *in absentia*, which further demonstrates that it is not a final judgment of conviction. According to the Libyan national law, once the person is arrested, his trial should start anew.

49. This conclusion stands despite the Defence's argument that Mr Gaddafi's trial should have been deemed *in presentia*,[67] given that he attended a number of hearings via video-link 'for security reasons', according to the new 'Law No. 7 of 2014, amending Article 234 of the Code of Criminal Procedure of Libya'.[68] The Libyan Government confirmed the Chamber's position when it stated:

> The fact that [Mr Gaddafi] participated in some proceedings by video-conference from Zintan does not affect his categorical entitlement under Article 358 of the Libyan Code of Criminal Procedure to a trial in-person before there would be any possibility of a sentence being carried out.[69]

50. The Libyan Government also stated:

> It must be underlined at this juncture that the sentence is rendered *in absentia* if the sentenced person is absent from all hearing sessions or has been present in some,

[66] The Principal Counsel of the OPCV also noted this point; *see* 28 September 2018 Victims' Observations, ICC-01/11-01/11-652, paras 51-53; *see also* ICC-01/11-01/11-T-2-Red-ENG, 9 October 2012, p. 27 (where the Libyan Government representative explained this procedure).
[67] Admissibility Challenge, ICC-01/11-01/11-640, para. 47; 20 November 2018 Defence Consolidated Reply, ICC-01/11-01/11-660-Corr-Red2, para. 21.
[68] Admissibility Challenge, ICC-01/11-01/11-640, para. 41; 20 November 2018 Defence Consolidated Reply, ICC-01/11-01/11-660-Corr-Red2, paras 21-23.
[69] Government of Libya, Response to Prosecution's 'Request for an Order to Libya to Refrain from Executing Saif Al-Islam Gaddafi, Immediately Surrender Him to the Court, and Report His Death Sentence to the United Nations Security Council', 20 August 2015, ICC-01/11-01/11-612, para. 7; 28 September 2018 Prosecutor's Response, ICC-01/11-01/11-653-Red, para. 108.

> without giving him the opportunity to defend himself. Accordingly, the trial of an Accused who is absent is subject to a number of procedural rules which should be observed and exercised by the court that has pronounced the sentence. That is effectively what the court did, precisely after it had established that the facility where the convict was detained was outside the control of the Judicial Police, the judiciary and the Public Prosecution. It had to move ahead with the proceedings in a bid not to affect those amongst the Accused who were present and also to avoid inflicting on them a situation worse than the one encountered by the Accused – who is either absent or kept away – by delaying their proceedings. […] In the case of the Convict Saif […] Gaddafi, the sentence is either nullified when the period of time he is to serve as part of his punishment lapses – this does not apply to the case concerned under the general rules governing this process – or that the person convicted *in absentia* appears, voluntarily or coercively, before the court that has handed down the judgment *in absentia*. Thereupon, the previously delivered judgment shall irrevocably be null and void, whether in relation to the sentence or damages. The case, brought up again, shall then be reheard before the Court.[70]

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

52. In the *Bemba* case, the Appeals Chamber stated, in similar terms, in a ruling on an admissibility question that:

> It was *not* the role of the Trial Chamber to review the decisions of the [Central African Republic ('CAR')] courts to decide whether those courts applied CAR law correctly. In the view of the Appeals Chamber, when a Trial Chamber must determine the status of domestic judicial proceedings, it should accept *prima facie* the validity and effect of the decisions of domestic courts, *unless presented with compelling evidence indicating* otherwise.[71]

53. But this is not the case, as it is clear from the submissions of the Libyan Government that the judgment of conviction rendered against Mr Gaddafi is considered according to Libyan law a judgment *in absentia*, which by its very nature is far from being final. Moreover, the text of the judgment provided in the material submitted to the Chamber demonstrates that the national judges decided that the trial

[70] Annex 8 to the 28 September 2018 Prosecutor's Response, ICC-01/11-01/11-653-Anx8-Red, pp. 14-15 (LBY-OTP-0065-0426, at 0428-0429).
[71] *Corrigendum to* Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges", 19 October 2010, ICC-01/05-01/08-962-Corr, para. 66 (emphasis added).

judgment was rendered *in absentia*.[72] Thus, the Chamber agrees with the Prosecutor that 'it is not for this Chamber to review the decision of the Tripoli Court of Assize to convict Mr Gaddafi *in absentia*',[73] especially that there 'is no compelling evidence in this case which would impel the Chamber to examine the *in absentia* nature of the judgment against Mr Gaddafi by the Tripoli Court of Assize'.[74] In the view of this Chamber, to do so in the case *sub judice* would amount to an unwarranted interference in the judicial domestic affairs of Libya. Nevertheless, even assuming *arguendo* that the judgment passed against Mr Gaddafi was *in presentia*, this does not mean that it is a final judgment acquiring a *res judicata* effect as required for the purpose of articles 17(1)(c) and 20(3) of the Statute.

54. The Defence of Mr Gaddafi develops a further argument, apart from the nature of the judgment passed, to the effect that by passing Law No. 6 of 2015 'any further criminal proceedings against Dr. Gadafi are conditionally "dropped" and sentence effectively suspended'.[75]

55. According to the Defence:

> [E]ven if Dr. Gadafi had a hypothetical right to ask for a re-trial because the judgment was pronounced *in absentia*, Law No. 6 of 2015 takes away that possibility and so renders the existing Judgment final (subject only to the possible re-opening of proceedings should Dr. Gadafi commit a further offence within the relevant five year period).[76]

Thus, the Defence believes that '[i]t cannot be right that this case remains admissible at this Court because there remains a hypothetical possibility of the re-opening of proceedings in Libya in the event of future re-offending'.[77] For the Defence, the Admissibility Challenge 'should be judged on the current position; the current position is that national proceedings against Dr. Gadafi have been concluded with judgment on the merits'.[78]

---

[72] Annex A to the Admissibility Challenge, ICC-01/11-01/11-640-AnxA, p. 352 (LBY-OTP-0051-0004, at. 0354); Annex B to the Admissibility Challenge, ICC-01/11-01/11-640-AnxB, p. 353 (LBY-OTP-0062-0282, at 0631).
[73] 28 September 2018 Prosecutor's Response, ICC-01/11-01/11-653-Red, para. 122.
[74] 28 September 2018 Prosecutor's Response, ICC-01/11-01/11-653-Red, para. 126.
[75] Admissibility Challenge, ICC-01/11-01/11-640, para. 48.
[76] Admissibility Challenge, ICC-01/11-01/11-640, para. 48; 20 November 2018 Defence Consolidated Reply, ICC-01/11-01/11-660-Corr-Red2, paras 3, 19.
[77] Admissibility Challenge, ICC-01/11-01/11-640, para. 48.
[78] Admissibility Challenge, ICC-01/11-01/11-640, para. 48.

56. The Chamber agrees that the Admissibility Challenge 'must be determined on the basis of the facts at the time of the proceedings on the [Admissibility Challenge]'.[79] Nonetheless, the Chamber does not adhere to the Defence's argument that Law No. 6 of 2015 'renders the existing Judgment final'.[80] Irrespective of the issuing authority and the validity of its legal action, it is quite clear based on the material available before the Chamber that Law No. 6 of 2015 does not apply to Mr Gaddafi at least due to the nature of the crimes he is charged with domestically. Law No. 6 of 2015 should not apply also when the person (Mr Gaddafi) is the subject of a warrant of arrest for conduct constituting crimes that fall within the jurisdiction of the Court as those reflected in the 27 June 2011 Warrant of Arrest. The Chamber will entertain these two elements in sequence.

57. Regarding the application of Law No. 6 of 2015 with respect to the domestic charges, the Libyan Government confirmed that '[p]ursuant to the provisions of Article 3 of Law No. 6 of 2015 in respect of amnesty, the crimes involving murders and corruption attributed to the Accused Saif al-Islam Gaddafi are excluded from the application of law provisions'.[81] Moreover, according to article 6 of Law No. 6 of 2015, a reasoned decision by the competent judicial authority terminating the criminal case is a prerequisite.[82] The *Amici Curiae* observed that '[a]t [the] time of writing, no information of such a decision implementing Law No. 6 of 2015 by the Supreme Court has been publically issued'.[83] The Defence claims the contrary by referring to two letters issued by the Tobruk Court of appeal and Al Bayda Court of Appeal regarding the implementation of said law.[84] Be that as it may, and regardless of the accuracy of the information related to the implementation or activation of Law No. 6 of 2015, the Chamber does not deem this point determinative for the purpose of ruling on the present Admissibility Challenge.

---

[79] Appeals Chamber, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, ICC-01/04-01/07-1497, para. 56.
[80] Admissibility Challenge, ICC-01/11-01/11-640, para. 48; 20 November 2018 Defence Consolidated Reply, ICC-01/11-01/11-660-Corr-Red2, paras 3, 19.
[81] Annex 8 to the 28 September 2018 Prosecutor's Response, ICC-01/11-01/11-653-Anx8-Red, p. 20 (LBY-OTP-0065-0426, at 0434).
[82] Annex 8.3 to the 28 September 2018 Prosecutor's Response, ICC-01/11-01/11-653-Conf-Anx8.3, p. 3 (LBY-OTP-0065-0089, at 0091).
[83] Rule 103 Observations, ICC-01/11-01/11-654, paras 41-42.
[84] 20 November 2018 Defence Consolidated Reply, ICC-01/11-01/11-660-Corr-Red2, p. 6; and Annex 5 to the 20 November 2018 Defence Consolidated Reply, ICC-01/11-01/11-660-Anx5 (Annex 5A and 5B).

58. So even if assuming *arguendo* that the effect of Law No. 6 of 2015 is to put an end to the judicial process, this is not the case, as this law does not apply to Mr Gaddafi at a minimum due to the nature of the crime(s) he is domestically charged with as mentioned above, which are automatically excluded by virtue of said law.

59. Indeed, upon review of Law No. 6 of 2015, particularly article 3(4), it becomes clear that the crimes of identity-based murder, kidnapping, enforced disappearance and torture are excluded from the amnesty and/or pardon provided by virtue of this law.[85] This finding is in line with the Libyan Government position towards the application of Law No. 6 of 2015 to the case of Mr Gaddafi. It follows that Law No. 6 of 2015 does not 'render[] the existing Judgment [against Mr Gaddafi] final', as the Defence asserts.[86]

60. Turning to the second element regarding the nature of the crimes set out in the 27 June 2011 Warrant of Arrest, the Chamber, in a different composition, found reasonable grounds to believe that Mr Gaddafi is 'criminally responsible as an indirect co-perpetrator, under article 25(3)(a) of the Statute' for the crimes of 'murder as a crime against humanity' (article 7(1)(a) of the Statute) and 'persecution as a crime against humanity' (article 7(1)(h) of the Statute).[87]

61. The Chamber believes that there is a strong, growing, universal tendency that grave and systematic human rights violations – which may amount to crimes against humanity by their very nature – are not subject to amnesties or pardons under international law. Regardless of the technical differences between amnesties and pardons (both of which may result in impunity),[88] the Chamber shall treat Law No. 6 of 2015 as defined by the Libyan Government and presented by the Defence – as a general amnesty law.[89] As previously stated, the Chamber shall apply and interpret the Statute consistently with internationally recognized human rights. The latter, as mirrored in the jurisprudence of the different human rights bodies, supports the

[85] Annex 8.3 to the 28 September 2018 Prosecutor's Response, ICC-01/11-01/11-653-Conf-Anx8.3, p. 3 (LBY-OTP-0065-0089, at 0090); for an English translation *see* Annex III to the Defence Submission of i) translations ofAnnexes to "Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute" and ii) better version of document, 13 September 2018, ICC-01/11-01/11-650-AnxIII-tENG, p. 3.
[86] Admissibility Challenge, ICC-01/11-01/11-640, para. 48.
[87] Warrant of Arrest for Saif Al-Islam Gaddaf, ICC-01/11-01/11-3, p. 6.
[88] This distinction has been developed by the *Amici Curiae*; *see* Rule 103 Observations, ICC-01/11-01/11-654, paras 35-38.
[89] Annex E to the Admissibility Challenge, ICC-01/11-01/11-640-AnxE, p. 6.

Chamber's position in this respect. International criminal tribunals have also revealed their position with respect to the prohibition of amnesties for international crimes.

62. In the *Massacres of El Mozote* case, the Inter-American Court of Human Rights ('IACHR') expressed its disapproval of amnesty laws in general, when it stated:

> [In other] cases […] decided by this Court within the sphere of its jurisdictional competence, the Court has already described and developed at length how this Court, the Inter-American Commission on Human Rights, the organs of the United Nations, other regional organizations for the protection of human rights, and other courts of international criminal law have ruled on the incompatibility of amnesty laws in relation to grave human rights violations with international law and the international obligations of States. This is because amnesties or similar mechanisms have been one of the obstacles cited by States in order to comply with their obligation to investigate, prosecute and punish, as appropriate, those responsible for grave human rights violations.[90]

63. In examining the compatibility of the 'Law of General Amnesty for the Consolidation of Peace' approved in El Salvador, which applied to the case under consideration, the IACHR reiterated

> the inadmissibility of "amnesty provisions, provisions on prescription, and the establishment of exclusions of responsibility that seek to prevent the investigation and punishment of those responsible for grave human rights violations such as torture, summary extrajudicial or arbitrary execution, and forced disappearance, all of which are prohibited because they violate non-derogable rights recognized by international human rights law".[91] On the other hand, the Law of general Amnesty for the Consolidation of Peace has resulted in the installation and perpetuation of a situation of impunity owning the absence of investigation (*sic*), pursuit, capture, prosecution and punishment of those responsible for the facts […]. Given their evident incompatibility with the American Convention, the provisions of the Law of General Amnesty for the Consolidation of Peace that prevent the investigation and punishment of the grave human rights violations that were perpetrated in this case lack legal effects […].[92]

64. Similarly, in the *Gomes Lund* case, the IACHR stated that it 'has ruled on the non-compatibility of amnesties […] in cases of serious human rights violations […]'.[93] The IACHR stated further that in the 'Inter-American system of Human Rights, the rulings on the non-compatibility of amnesty laws with conventional

---

[90] *Case of the Massacres of El Mozote and Nearby Places v. El Salvador* (Merits, reparations and costs), Judgment of 25 October 2012, para. 283 (footnotes omitted).
[91] *Case of the Massacres of El Mozote and Nearby Places v. El Salvador* (Merits, reparations and costs), Judgment of 25 October 2012, para. 283.
[92] *Case of the Massacres of El Mozote and Nearby Places v. El Salvador* (Merits, reparations and costs), Judgment of 25 October 2012, para. 296.
[93] *Gomes Lund et al. ("Guerrilha Do Araguaia") v. Brazil* (Preliminary Objections, Merits, Reparations, and Costs), Judgment of 24 November 2010, para. 148.

obligations of States when dealing with serious human rights violations are many. In addition to the decisions noted by this Court, the Inter-American Commission has concluded, in the present case and in other related […] [cases], its contradiction with international law'.[94]

65. Furthermore, in the *Almonacid Arellano et al*. case, the IACHR revealed the direct link between crimes against humanity and serious human rights violations. The Court said that '[a]ccording to the international law *corpus juris*, a crime against humanity is in itself a serious violation of human rights and affects mankind as a whole […]. The adoption and enforcement of laws that grant amnesty for crimes against humanity prevents the compliance of [States with their] obligations'[95] to investigate and punish those persons accused of certain international crimes such as crimes against humanity.[96]

66. Also, in the case of *Barrios Altos*, the IACHR stated in broad terms that 'all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible'.[97] In a more recent case, the IACHR went a step further and expressly denounced the passing of sentences which are not subsequently enforced by the State due to the application of illegitimate pardons. Thus, in the case of *Caso Barrios Altos*, the IACHR stated that 'States must assure […] that sentences issued do not amount to impunity'. In paragraph 38 of the judgment, it stated further that it has highlighted 'the duty of the state to abstain from recurring to structures "that pretend to […] cancel the effects of a sentence" and "illegitimately grant benefits in the execution of a sentence"'.[98] This consistent view of the non-compatibility of amnesty laws with international law including human rights law has been followed in many other cases.[99]

---

[94] *Gomes Lund et al. ("Guerrilha Do Araguaia") v. Brazil* (Preliminary Objections, Merits, Reparations, and Costs), Judgment of 24 November 2010, para. 149.
[95] *Case of Almonacid-Arellano et al v. Chile* (Preliminary Objections, Merits, Reparations and Costs), Judgment of 26 September 2006, para. 108.
[96] *Case of Almonacid-Arellano et al v. Chile* (Preliminary Objections, Merits, Reparations and Costs), Judgment of 26 September 2006, paras 110,111.
[97] *Case of Barrios Altos* (Merits), Judgment of 14 March 2001, para. 41.
[98] *Caso Barrios Altos y Caso La Cantuta vs. Perú*, Supervisión de cumplimiento de sentencia, Obligación de investigar, juzgar y, de ser el caso, sancionar, Resolución del 30 de mayo de 2018, paras 31, 38.
[99] *See, inter alia*, IACHR, *Gelman v. Uruguay* (Merits and Reparations), Judgment of 24 February 2011, paras 195-196.

67. The European Court of Human Rights ('ECtHR') has gone in a similar direction. In the *Marguš* case, the ECtHR, stated:

> Granting amnesty in respect of "international crimes" – which include crimes against humanity, war crimes and genocide – is increasingly considered to be prohibited by international law. This understanding is drawn 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.[100]

68. Moreover, referring to the jurisprudence of the IACHR (which in turn refers to organs of the United Nations and other universal and regional organs for the protection of human rights), the ECtHR Grand Chamber subsequently acknowledged the growing tendency in international law in support of the prohibition of amnesties and pardons for serious human rights violations and core crimes such as crimes against humanity.[101] The Grand Chamber stated that when the right to life or the right not to be subjected to ill-treatment under articles 2 and 3 of the European Convention on Human Rights – 'the most fundamental provisions' – are at stake 'it is of the utmost importance that […] the granting of an amnesty or pardon should not be permissible'.[102]

69. The African Commission on Human and Peoples' Rights ('ACHPR') also expressed its dissatisfaction for the granting of amnesties for human rights violations on several occasions. In the case of *Mouvement Ivoirien des Droits Humains*, the ACHPR stated:

> [T]his commission reiterated its position on amnesty laws by holding that "by passing the Clemency Order No. 1 of 2000, prohibiting prosecution and setting free perpetrators of 'politically motivated crimes', the State did not only encourage impunity but effectively foreclosed any available avenue for the alleged abuses to be invested, and prevented victims of crimes and alleged human rights violations from seeking effective remedy and compensation. This act of the State constituted a violation of the victims' right to judicial protection and to have their cause heard. […]

[100] *Marguš v. Croatia* (Application no. 4455/10), Judgment of 13 November 2012, para. 74.
[101] *Marguš v. Croatia* (Application no. 4455/10), Judgment of 27 May 2014, paras 129-135, 138.
[102] *Marguš v. Croatia* (Application no. 4455/10), Judgment of 27 May 2014, paras 124-127. See also, ECtHR, *Abdülsamet Yaman v. Turkey*, (Application no. 32446/96), Judgment of 2 November 2004, para. 55; *Okkalı v. Turkey*, (Application no 52067/99), Judgment of 17 October 2006, para. 76; and *Yeşil and Sevim v. Turkey*, (Application no. 34738/04), Judgment of 5 June 2007, para. 38.

> The granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy.[103]

70. In the same vein, the ACHPR in the case of *Malawi African Association et al.*, opposed general amnesty laws when they concern serious human rights violations such as the right to life set out in article 4 of the African Charter of Human and Peoples Rights.[104] In this respect, the ACHPR stated:

> The Mauritanian State was informed of the worrying human rights situation prevailing in the country. Particular attention, both within the national and international communities, was paid to the events of 1989 and succeeding years. Even if it were to be assumed that the victims had instituted no internal judicial action, the government was sufficiently informed of the situation and its representative, on various occasions, stressed before the Commission that a law known as the "general amnesty" law, dealing with the facts arraigned was adopted by his country's parliament in 1993. The Mauritanian government justified the said law with the argument that "the civilians had benefited from an amnesty law in 1991, and consequently the military wanted to obtain the same benefits; especially as they had given up power after allowing the holding of presidential (1992) and legislative (1993) elections". The Commission notes that the amnesty law adopted by the Mauritanian legislature had the effect of annulling the penal nature of the precise facts and violations of which the plaintiffs are complaining; and that the said law also had the effect of leading to the foreclosure of any judicial actions that may be brought before local jurisdictions by the victims of the alleged violations. The Commission recalls that its role consists precisely in pronouncing on allegations of violations of the human rights protected by the Charter of which it is seized in conformity with the relevant provisions of that instrument. It is of the view that an amnesty law adopted with the aim of nullifying suits or other actions seeking redress that may be filed by the victims or their beneficiaries, while having force within Mauritanian national territory, cannot shield that country from fulfilling its international obligations under the Charter.[105]

71. Similarly, in the case of *Zimbabwe Human Rights NGO Forum*, the ACHPR stated in a similar context that:

> Clemency embraces the constitutional authority of the President to remit punishment using the distinct vehicles of pardons, amnesties, commutations, reprieves, and remissions of fines. An amnesty is granted to a group of people who commit political offences, e.g. during a civil war, during armed conflicts or during a domestic insurrection. A pardon may lessen a defendant's sentence or set it altogether. One may be pardoned even before being formally accused or convicted […]. Over the years however, this strict interpretation of Clemency powers have been the subject of

---

[103] *Mouvement Ivoirien des Droits Humains (MIDH) v Cote d'Ivoire*, Communication No. 246/02, Decision, 29 July 2009, paras 96-98. The ACHPR's pronouncement is explicitly reflected in the 'Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa, 2003'. Under the right to an effective remedy, sub-principle (d) reads: 'The granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy'.

[104] African Charter on Human and Peoples' Rights (Banjul), 27 June 1981, OAU Doc. CAB/LEG/67/3rev. 5, 21 ILM 58 (1982).

[105] *Malawi African Association et al. v. Mauritania*, Communication No. 54/91, 61/91, 98/93, 164/97, 196/97, 210/98, Decision, 11 May 2000, paras 81-83.

> considerable scrutiny by international human rights bodies and legal scholars. It is generally believed that the single most important factor in the proliferation and continuation of human rights violations is the persistence of impunity, be it of a de jure or de facto nature. Clemency, it is believed, encourages de jure as well as de facto impunity and leaves the victims without just compensation and effective remedy. De jure impunity generally arises where legislation provides indemnity from legal process in respect of acts to be committed in a particular context or exemption from legal responsibility in respect of acts that have in the past been committed, for example, as in the present case, by way of clemency (amnesty or pardon). De facto impunity occurs where those committing the acts in question are in practice insulated from the normal operation of the legal system. That seems to be the situation with the present case.[106]

72. At the universal level, the Human Rights Committee ('HRC') followed a similar path. In the *Hugo Rodriguez* case, the HRC stated that:

> [I]t reaffirms its position that amnesties for gross violations of human rights and legislation such as the Law No. 15,848, […] are incompatible with the obligations of the State party under the Covenant. The Committee notes with deep concern that the adoption of this law […] prevents the State party from discharging its responsibility to provide effective remedies to the victims of those abuses. Moreover, the Committee is concerned that, in adopting this law, the State party has contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further grave human rights violations.[107]

73. On the other hand, the jurisprudence of the *ad hoc* tribunals is also instructive in this regard. In the *Erdemovic* case, the ICTY stated:

> Crimes against humanity are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health, and

[106] *Zimbabwe Human rights NGO Forum*, Communication No. 245/2002, Decision, 15 May 2006, paras 196, 200. Although the Clemency Order No. 1 of 2000 exempted crimes such as murder, the ACHPR still found that providing clemency in the form of amnesty or pardon for other serious human rights violations 'not only encourage impunity but effectively […] prevented victims of crimes and alleged human rights violations from seeking effective remedy and compensation'; *Zimbabwe Human rights NGO Forum*, Communication No. 245/2002, Decision, 15 May 2006, para. 211; *see also* para. 208, where the ACHPR quoted Guideline No.16 of the Robben Island Guidelines adopted by the ACHPR during its 32nd session in October 2002, which states: 'in order to combat impunity States should: a) ensure that those responsible for acts of torture or ill-treatment are subject to legal process; and b) ensure that there is no immunity from prosecution for nationals suspected of torture, and that the scope of immunities for foreign nationals who are entitled to such immunities be as restrictive as is possible under international law'.

[107] *Hugo Rodríguez v. Uruguay*, Communication No. 322/1988, 9 August 1994, UN Doc. CCPR/C/51/D/322/1988, para. 12.4. *See also* HRC, General Comment No. 31[80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, UN Doc. CCPR/C/21/Rev.1/Add. 13, para. 18 (where the HRC emphasised once more the obligation for states to comply with the duty to investigate and bring to justice the perpetrators of human rights violations, especially those 'recognized as criminal under either domestic or international law'); HRC, General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, para. 15 (referring to the incompatibility of amnesties with the duty of States to investigate and prevent acts of torture). Although the reference is to torture, such acts could amount to crimes against humanity, for which there is a general prohibition of amnesties for all of the enumerated acts forming it as an international crime.

> or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must *perforce demand their punishment*.[108]

74. In the *Furundzija* case, the ICTY speaking of torture as an international crime constituting, *inter alia*, crimes against humanity, stated:

> It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law.[109]

Although the ICTY made the following statement with respect to torture, the fact that the tribunal considered it in the context of an international crime makes the analogy equally valid for acts of murder also constituting crimes against humanity.

75. Similarly, in the *Kallon et al.* case, the Special Court for Sierra Leone, speaking of the legitimacy of granting both amnesties and pardons for international crimes, stated:

> The grant of amnesty or pardon is undoubtedly an exercise of sovereign power which, essentially, is closely linked, as far as crime is concerned, to the criminal jurisdiction of the State exercising such sovereign power. Where jurisdiction is universal, a State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty. It is for this reason *unrealistic to regard as universally effective the grant of amnesty by a State in regard to grave international crimes* in which there exists universal jurisdiction. 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.[110]

76. The Extraordinary Chambers in the Courts of Cambodia ('ECCC') also addressed the inconsistency of passing amnesty laws with respect to core crimes including crimes against humanity.[111] In the *Ieng Sary* case, the ECCC argued that:

> The interpretation of the Decree proposed by the Co-Lawyers for Ieng Sary, which would grant Ieng Sary an amnesty for all crimes committed during the Khmer Rouge era, including all crimes charged in the Closing Order, […] is also inconsistent with the international obligations of Cambodia. Insofar as genocide, torture and grave breaches of the Geneva Conventions are concerned, the grant of an amnesty, without any

[108] *Prosecutor v. Erdemovic*, Sentencing Judgment, 29 November 1996, IT-96-22-T, para. 28 (emphasis added).
[109] *Prosecutor v. Furundžija*, Judgment. 10 December 1998, IT-95-17/1-T, paras 141, 155-156.
[110] *Prosecutor v. Morris Kallon et al.*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), para. 67 (emphasis added, footnotes omitted).
[111] Decision on Ieng Sary's Rule 89 Preliminary Objections (*Ne bis in idem* and Amnesty and Pardon), 3 November 2011, Case No. 002/19-09-2007/ECCC/TC, paras 40-51.

> prosecution and punishment, would infringe upon Cambodia's treaty obligations to prosecute and punish the authors of such crimes, as set out in the Genocide Convention, the Convention Against Torture and the Geneva Conventions. Cambodia, which has ratified the ICCPR, also had and continues to have an obligation to ensure that victims of crimes against humanity which, by definition, cause serious violations of human rights, were and are afforded an effective remedy. This obligation would generally require the State to prosecute and punish the authors of violations. The grant of an amnesty, which implies abolition and forgetfulness of the offence for crimes against humanity, would not have conformed with Cambodia's obligation under the ICCPR to prosecute and punish authors of serious violations of human rights or otherwise provide an effective remedy to the victims.[112]

77. It follows that granting amnesties and pardons for serious acts such as murder constituting crimes against humanity is incompatible with internationally recognized human rights. Amnesties and pardons intervene with States' positive obligations to investigate, prosecute and punish perpetrators of core crimes. In addition, they deny victims the right to truth, access to justice, and to request reparations where appropriate.[113]

78. Thus, applying the same rationale to Law No. 6 of 2015 assuming its applicability to Mr Gaddafi leads to the conclusion that it is equally incompatible with international law, including internationally recognized human rights. This is so, in the context of the case *sub judice*, due to the fact that applying Law No. 6 of 2015 would lead to the inevitable negative conclusion of blocking the continuation of the judicial process against Mr Gaddafi once arrested, and the prevention of punishment if found guilty by virtue of a final judgment on the merits, as well as denying victims their rights where applicable.

79. Having said the above and considering that the judgment of the Tripoli Court issued on 28 July 2015 was rendered *in absentia*, with the possibility of reinstituting judicial proceedings due also to the nature of the sentence passed (death penalty),[114] and no final decision on the merits was rendered, the Chamber cannot consider said judgment sufficient for satisfying articles 17(1)(c) and 20(3) of the Statute. Since the elements or criteria set out in article 20(3) of the Statute are cumulative, and given

---

[112] Decision on Ieng Sary's Appeal against the Closing Order, 11 April 2011, Case No. 002/19-09-2007/ECCC/OCIJ (PTC75), para. 201.
[113] Pre-Trial Chamber I, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", 6 September 2018, ICC-RoC46(3)-01/18-37, para. 88.
[114] The OPCV correctly summarizes the judicial process in the context of passing a death penalty conviction; *see also* Admissibility Challenge, ICC-01/11-01/11-640, paras 58-59; Transcript of hearing, 9 October 2012, ICC-01/11-01/11-T-2-Red-ENG, pp. 27-28 (where the Libyan Government representative explained the particularity of the procedure in cases of death sentence).

that the Defence failed to satisfy the first element of said provision, the Chamber cannot but reject the Admissibility Challenge. Accordingly, there is no need to delve into the remaining elements of article 20(3) of the Statute.[115]

FOR THESE REASONS, THE CHAMBER, BY MAJORITY, HEREBY

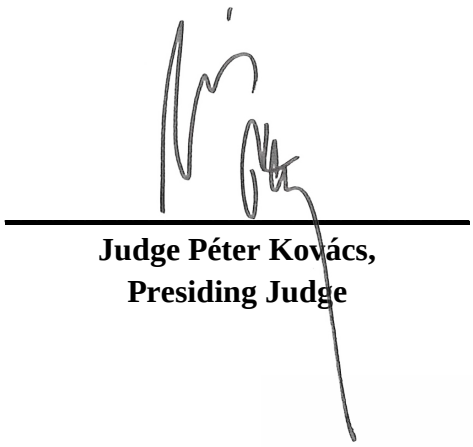
a) **DECIDES** that Mr Gaddafi has a *locus standi* to lodge the Admissibility Challenge;

b) **REJECTS** the Admissibility Challenge; and

c) **DECIDES** that the case against Mr Gaddafi is admissible.

Judge Marc Perrin de Brichambaut will file a minority opinion in due course.

Done in both English and French, the English version being authoritative.



Judge Péter Kovács,
Presiding Judge

Judge Marc Perrin de Brichambaut **Judge Reine Adélaïde Sophie Alapini-Gansou**

Dated this Friday, 5 April 2019
At The Hague, The Netherlands

[115] *See* para. 31 of the present decision.