Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/11-01/11**
Date: **5 June 2018**

PRE-TRIAL CHAMBER I

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

SITUATION IN LIBYA

IN THE CASE OF

THE PROSECUTOR V. SAIF AL-ISLAM GADDAFI

Confidential
with Confidential Annexes A, B, C, H and Public Annexes D, E, F and G

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

Source: **Defence for Dr. Saif Al-Islam Gadafi**

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

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"Whereas the Court found that the accused committed all these crimes as described in detail in the grounds of judgment, the accused shall be convicted as established by the Statement based on the above and pursuant to Article (277/2). Whereas regarding the penalty, the accused committed a large number of serious crimes, since he ordered and incited the killing of the protesters, mobilized armed groups to that end and supplied them with weapons, provided financial and material support to the armed groups that were fighting the people, brought African mercenaries to fight his compatriots, ordered that cities be besieged and arbitrarily bombed with heavy weapons and incited tribal dissension. He also ordered that sea ports be besieged, incited rape in the besieged cities and approved such policy, ordered that civilian facilities be struck by military aircraft in addition to other crimes, all of which aimed to undermine national security, wreak havoc and exact revenge on the Libyan people who defected from the regime, which the accused thought would be delegated to him after his father since he told Defendant No. 4 "This seat is mine". Whereas the crimes committed by the accused irrevocably prove the danger he represents given his serious propensity for crime and his willingness to kill people in order to preserve what he thinks belongs to him. Whereas the accused committed his crimes within an organized methodical framework, was aware of the seriousness and consequences of his acts and sought to achieve these consequences, i.e. sabotaging cities, performing arbitrary killings and wreaking havoc in the country. Therefore, the Court has no choice in this case and pursuant to the articles of indictment and Article (28) of the Penal Code but to punish the accused by the death penalty as worded in the dispositve portion of the ruling."

Judgement of the Tripoli Criminal Court against Dr. Saif Al-Islam Gadafi in Case 630/2012, 28 July 2015, LBY-OTP-0062-0280 at 0439-0440

I. Introduction

1. The defence for Dr. Saif Al-Islam Gadafi ("Defence") hereby challenge the admissibility of this case pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute ("Statute"). The Defence respectfully submits that this case is inadmissible because Dr. Saif Al-Islam Gadafi ("Dr. Gadafi") has already been tried in Libya for the same conduct as alleged by the Prosecutor of the International Criminal Court ("ICC" or "Court") in the present case. A second trial by the Court is not permitted pursuant to Article 20(3) of the Statute which provides 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:*

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 recognised 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.

2. Dr. Gadafi was captured on 19 November 2011, in southern Libya. Between 20 November 2011 and 12 April 2016, Dr. Gadafi was detained at the Zintan Reform and Rehabilitation Institution ("ZRRI") at the behest of the Government of Libya ("GOL"). In 2014, Dr. Gadafi was tried together with 36 other former regime officials, and, on 28 July 2015, he was convicted by the Tripoli Criminal Court[1] for substantially the same conduct as alleged in the proceedings before this Court.[2] The Tripoli Criminal Court imposed a sentence of capital punishment.[3]

3. Neither of the exceptions stated in Article 20(3) apply in the present case. The Libyan national proceedings were not for the purpose of shielding Dr. Gadafi from crimes within the jurisdiction of the Court; no allegation of shielding was made in earlier admissibility proceedings in this case and any such submission would now be unsustainable because Dr. Gadafi was convicted and sentenced by the Libyan court. Additionally, the national proceedings were not otherwise lacking in sufficient independence or impartiality, nor did they involve egregious due process violations, to the extent as to be inconsistent with an intent to bring Dr. Gadafi to justice. Furthermore, there is nothing to suggest that the proceedings were incapable of providing genuine justice (as the Pre-Trial

[1] See Judgment of the Tripoli Criminal Court, Case No. 630/2012, 28 July 2015. A copy of the original judgment in Arabic is provided in **Confidential Annex A** and registered as LBY-OTP-0051-0004. The Office of the Prosecutor's draft English translation of the judgment is provided in **Confidential Annex B** with registration **LBY-OTP-0062-0280**. References to the Judgment will hereinafter be to the draft translation.
[2] See Decision on the admissibility of the case against Abdullah Al-Senussi, 11 October 2013, ICC-01/11-01/11-466-Red ("*Al-Senussi* Admissibility Decision"), para. 167.
[3] LBY-OTP-0062-0280 at 0439-0440.

Chamber and Appeals Chamber previously found in the related *Al-Senussi* case).[4]

4. In light of all these matters, and as further argued below, the Defence submits that the present case is inadmissible before the Court.

II. Procedural History

5. On 16 May 2011, the Prosecutor submitted the "Prosecution's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi".[5]

6. On 27 June 2011, Pre-Trial Chamber I issued a decision on the Prosecution's Application[6] and a warrant of arrest for Dr. Gadafi.[7] The Chamber concluded that there were reasonable grounds to believe that:-

   i. The crime against humanity of murder was committed in Tripoli, Misrata, Benghazi and in cities near Benghazi including Al-Bayda, Derna, Tobruk and Ajdabiya, from 15 February 2011 until 25 February 2011, by security forces, as part of an attack against civilian demonstrators or alleged dissidents;[8]

   ii. Acts of persecution were committed by security forces, in particular in Benghazi, Tripoli, Misrata and neighbouring towns from 15 February 2011 until 28 February 2011 as part of the above attack;[9]

[4] *Al-Senussi* Admissibility Decision; Judgment on the appeal of Mr. Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi", 24 July 2017, ICC-01/11-01/11-565 OA 6 ("*Al-Senussi* Appeals Judgment").
[5] ICC-01/11-4-Conf-Exp.
[6] Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Sennusi", ICC-01/11-01/11-1.
[7] Warrant of Arrest for Saif Al-Islam Gaddafi, ICC-01/11-01/11-3 (and annexes thereto).
[8] ICC-01/11-01/11-1, para. 41.
[9] *Id.* at para. 65.

iii. Dr. Gadafi was criminally responsible for the above crimes as an indirect co-perpetrator.[10] Further, his contributions to the common plan were identified as supporting the design of the plan, ensuring the implementation of the plan, recruiting mercenaries and mobilising militias, ordering the imprisonment of dissidents, providing resources to the security forces, publicly threatening demonstrators and contributing to a subsequent cover up campaign.[11]

7. On 4 July 2011, Pre-Trial Chamber I issued a request to the Libyan Arab Jamahiriya to surrender Dr. Gadafi.[12]

8. In November 2011, Dr. Gadafi was captured and detained in Libya.[13] Throughout the relevant period, Dr. Gadafi was detained on the authority and was at all material times under the control of the Government of Libya, as evidenced by the witness statement of Colonel Alajmi Alatairi (attached, with exhibits, as confidential **Annex C**). Colonel Alatairi was appointed the Commander of the Abubakar Al Sadiq Brigade responsible for security at the Zintan Reform and Rehabilitation Institution which was, as identified by the Prosecutor, the battalion with custody over Dr. Gadafi.[14] The control of the Government of Libya over Dr. Gadafi and the ZRRI is evidenced by numerous factors in Colonel Alatairi's statement. These include, but are not limited to: (i) on 21 November 2011, the Libyan Prosecutor, Abdul Majid Saad, authorised Dr.

[10] *Id.* at para. 71.
[11] *Id.* at para. 80.
[12] Request to the Libyan Arab Jamahiriya for the arrest and surrender of Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Sennusi, ICC-01/11-01/11-5.
[13] See, for instance, ICC-01/11-01/11-44-Conf-Anx1.
[14] Request for an order directing the Registrar to transmit the request for arrest and surrender to Mr al-'Ajami AL-'ATIRI, Commander of the Abu-Bakr al-Siddiq Battalion in Zintan, Libya, 26 April 2016, ICC-01/11-01/11-624 para. 8.

Gadafi's detention;[15] (ii) the ZRRI was designated a place of detention by the Government of Libya;[16] (iii) subsequent orders authorising ongoing detention of Dr. Gadafi were issued by the Office of the General Prosecutor of Libya;[17] (iv) the Government of Libya controlled the medical treatment that Dr. Gadafi received at the ZRRI;[18] (v) the Government of Libya controlled the visitors that he was permitted to see;[19] (vi) the Government of Libya paid the salary of Colonel Alatairi whilst he was instructed to detain Dr. Gadaafi and perform his other functions designated by the Government of Libya;[20] (vii) the Government of Libya paid the salaries of the guards of the ZRRI who were detaining Dr. Gadafi and working at the ZRRI;[21] (viii) the Government of Libya supplied the uniform for Colonel Alatairi as well as all those for the guards working at the ZRRI.[22]

9. On 1 May 2012, Libya filed a challenge to the admissibility of the present case before the Court pursuant to Article 17(1)(a), on the basis that its national judicial system was *"actively investigating"* Dr. Gadafi for the same crimes.[23]

10. Since he was not before the Court and had not instructed lawyers, Pre-Trial Chamber I instructed the Office of Public Counsel for the Defence ("OPCD") to represent Dr. Gadafi's interests on the admissibility issue.[24] On 24 July 2012, on

[15] Witness Statement of Alajmi Ali Ahmed Alatairi ("Alatairi Statement") (Annex C), para. 8 and Exhibit 1 thereto.
[16] Alatairi Statement, para. 8, and Exhibits 1 to 5 thereto.
[17] Alatairi Statement, para. 13, and Exhibit 8 thereto.
[18] Alatairi Statement, para. 14, and Exhibits 9 to 12 thereto.
[19] Alatairi Statement, paras. 20 – 23, and Exhibits 18 to 21 thereto.
[20] Alatairi Statement, para. 33, and Exhibit 31 thereto.
[21] Alatairi Statement, para. 33.
[22] *Ibid*.
[23] Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-130-Conf (hereafter "Libya's Admissibility Challenge (Gadafi)"), para. 1.
[24] Public Redacted Version of Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi, 6 December 2011, ICC-01/11-01/11-39-Red, p. 6.

Dr. Gadafi's behalf, OPCD filed a response opposing Libya's application and arguing that the case should be tried before the Court.[25]

11. On 31 May 2013, the Pre-Trial Chamber found that the case was admissible.[26] The basis for this decision was that, although a number of progressive steps had been taken in the national investigation,[27] the evidence did not allow the Chamber to "*discern the actual contours of the national case against Mr. Gaddafi such that the scope of the domestic investigation could be said to cover the same case as that set out in the Warrant of Arrest*".[28]

12. In addition, considering Article 17(3), the Chamber also found that Libya was unable genuinely to carry out the investigation or prosecution because Libya's national system "*cannot yet be applied in full in areas or aspects relevant to the case*" and was therefore "*unavailable*".[29] In reaching that conclusion, the Chamber relied on three factors: Libya's ability to obtain Dr. Gadafi's transfer to state authority, Libya's capacity to obtain witness evidence and Libya's capacity to appoint a lawyer to represent Dr. Gadafi.[30]

13. On 7 June 2013, Libya filed an appeal against that admissibility decision.[31]

14. In the meantime, national proceedings in Libya progressed. On 19 September 2013, the Accusation Chamber in Libya held its initial hearing in the case against Dr. Gadafi, Abdullah Al-Senussi and others.[32]

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[25] Defence Response to the 'Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-190-Conf. A corrigendum was filed on 31 July 2012 (ICC-01/11-01/11-190-Conf-Corr).
[26] Decision on the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-344-Conf ("*Gaddafi* Admissibility Decision").
[27] *Id.* at para. 132.
[28] *Id.* at para. 135.
[29] *Id.* at para. 205.
[30] *Id.* at para. 215.
[31] The Government of Libya's Appeal against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi', ICC-01/11-01/11-350.
[32] See, for instance, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May

15. On 23 September 2013, Libya sought permission to adduce new evidence in the course of its appeal on admissibility in the case against Dr. Gadafi, in order to address both the initial hearing that had taken place in Libya after the Pre-Trial Chamber had rendered the impugned decision, as well as the substantial dossier passed by the Prosecutor-General's Office in Libya to the Accusation Chamber.[33] That evidence had not been presented to the PTC for consideration.

16. The Appeals Chamber rejected Libya's request to file additional evidence, emphasising that admissibility "*must be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge*".[34] The Appeals Chamber noted that if Libya wished the Court to consider new material, it could apply pursuant to Article 19(4) for permission to make a second admissibility challenge.[35] Libya did not file a second admissibility challenge and accordingly the evidence it wished to present was never considered by any Chamber of the ICC.

17. On 21 May 2014, more than a year after the Pre-Trial Chamber decision, the Appeals Chamber issued its judgement rejecting Libya's Appeal. In so doing, the Appeals Chamber upheld the decision of the Pre-Trial Chamber that "although certain investigative activity was taking place in Libya, 'the evidence, "*taken as a whole,* does not allow the Chamber to discern the actual contours of the national case against Mr. Gaddafi such as the scope of the domestic investigation could be said to cover the same case as that set out in the Warrant of Arrest issued by

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2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi", 21 May 2014, ICC-01/11-01/11-547-Red OA 4 ("*Gaddafi* Admissibility Judgment"), para 37 (summarising the Government of Libya's submissions).

[33] The Libyan Government's further submissions in reply to the Prosecution and Gaddafi Responses to 'Document in support of Libya's Appeal against the 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi', ICC-01/11-01/11-454-Conf, paras. 4-11.

[34] *Gaddafi* Admissibility Judgment, paras. 41, 44. See further, ICC-01/09-01/11-234 OA, para. 10.

[35] *Gaddafi* Admissibility Judgment, para. 44.

the Court'".[36] Since that conclusion was sufficient to dismiss the Appeal, the Appeals Chamber did not proceed to review the Pre-Trial Chamber's conclusions in relation to Libya's inability to prosecute Dr. Gadafi.[37]

18. On 11 October 2013, Pre-Trial Chamber I found that the case against Mr. Al-Senussi was inadmissible.[38] It held that the evidence submitted in support of that application (in contrast to the more limited evidence submitted a year earlier, in support of Libya's admissibility challenge in the *Gaddafi* case)[39] established that "*concrete and progressive steps*" had been taken in the national investigation in relation to substantially the same conduct as alleged in the proceedings before the Court.[40]

19. It further held that Libya was not unwilling to genuinely carry out the investigation or prosecution.[41] It concluded that (i) there was no indication that national proceedings were being conducted for the purpose of shielding Mr. Al-Senussi;[42] (ii) proceedings were not tainted by unjustified delay;[43] and (iii) the investigations were not being conducted in a manner inconsistent with the intent to bring Mr. Al-Senussi to justice.[44] Further, it held that (iv) Libya was not unable to prosecute the case.[45]

20. In relation to the considerations which had led to the opposite conclusion in Libya's admissibility challenge (*Gadafi*), the Pre-Trial Chamber held that: Mr. Al-Senussi was in State custody;[46] the progression of national proceedings showed

[36] *Id.* at para. 143 (emphasis added by Appeals Chamber).
[37] *Id.* at paras. 213-214.
[38] *Al-Senussi* Admissibility Decision.
[39] *Id.* at para. 297.
[40] *Id.* at para. 167.
[41] *Id.* at para. 293.
[42] *Id.* at para. 290.
[43] *Id.* at para. 291.
[44] *Id.* at para. 292.
[45] *Id.* at para. 310.
[46] *Id.* at para. 308.

that Libya was not unable to obtain testimony or evidence;[47] and considered that "*Libya is not unable to otherwise carry out the proceedings against Mr Al-Senussi due to a total or substantial collapse or unavailability of its national judicial system*".[48]

21. The Pre-Trial Chamber in the *Al-Senussi* case was of the view that "the fact that certain detention facilities are yet to be transferred under the authority of the Ministry of Justice […] have a direct bearing on the investigation against Mr. Gaddafi as they prevent Libya from obtaining the 'necessary evidence and testimony' within the meaning of article 17(3) of the Statute".[49] If the available evidence held by Libya[50] had been put to the Pre-Trial Chamber in the *Gaddafi* case, it would have found that the ZRRI had also been formally placed under the control of the Government of Libya and that, in any event, it did not prevent Libya from obtaining "necessary evidence and testimony" concerning Dr. Gadafi.

22. Because all necessary and relevant information was not presented to the Pre-Trial Chamber by the parties or by Libya, it seems, with respect, that the Pre-Trial Chamber misapprehended the situation pertaining in Libya to the extent of wrongly drawing a distinction between the cases of *Al Senussi* and *Gaddafi* as far as the issue of "control over the accused" is concerned. The main trial took place within the Al Hadhba detention facility,[51] where Mr. Al-Senussi and most of the accused in Case 630/2012 were detained. In the same way that the Libyan

[47] *Id.* at paras. 298-301.
[48] *Id.* at para. 309.
[49] *Id.* at para. 297.
[50] See, e.g., Alatairi Statement (Annex C), and as outlined at *supra* para. 8.
[51] See United Nations Support Mission in Libya and United Nations High Commissioner for Human Rights, "Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012), 21 February 2017, available at: http://www.ohchr.org/Documents/Countries/LY/Trial37FormerMembersQadhafiRegime_EN.pdf ("UNSMIL Report"), p. 2 ("*The trial took place inside the Al-Hadhba compound. The compound is controlled by an armed group that was opposed to the Qadhafi regime, creating an intimidating environment for defendants and their families, as well as their lawyers. Access to the Court was controlled by prison staff who, on a number of occasions, hindered entry for observers, media, and defendants' relatives.*") A copy of the report is provided in **Annex D** hereto.

Government mandated Col. Ajami to be in charge of the security at ZRRI, it mandated Mr. Khaled Sherif to oversee security at Al Hadhba. Mr. Khaled Sherif was a former leader of the "Libyan Islamic Fighting Group" and he remained in charge of Al Hadhba detention facility during the trial although "*no longer undertaking* [other] *official government functions*".[52] There was thus no material distinction between the GOL's control over Dr. Gadafi and Mr. Al-Senussi.

23. On 17 October 2013, the Defence for Abdullah Al-Senussi filed an appeal against that decision.[53] On 24 July 2014, the Appeals Chamber upheld the Pre-Trial Chamber's conclusion that the case against Abdullah Al-Senussi was inadmissible.[54] It upheld both the finding that Libya was prosecuting the same case[55] and the conclusions that Libya was not unable or unwilling to prosecute the case.[56]

24. On 28 July 2015, Dr. Gadafi was convicted and sentenced by the Tripoli Court. The Prosecutor has disclosed to the Defence a translation of the Judgment of the Tripoli Court of Appeal which records that court's verdict and reasoning (attached to this application as confidential **Annex B**). Dr. Gadafi remained imprisoned in Libya following that verdict.

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[52] *Id.* at p. 21 ("*In terms of the location, the trial was held at the Al-Hadhba compound in Tripoli, which had been formerly the place of a police academy. The compound includes the Al-Hadhba prison, a high security prison where the majority of defendants in Case 630/2012 were held. While the Al- Hadhba prison has nominally been under the control of the Judicial Police under the Ministry of Justice since 2012, prison guards and administration do not answer to the head of the Judicial Police but to Khaled Sherif, a Deputy Minister of Defence until 2014 and a former leader of the Libyan Islamic Fighting Group. Members of this group opposed, at times with the use of force, the Qadhafi regime in years prior to the 2011 uprising as well as during the conflict, and are currently mostly members of an armed group called "National Guard", which physically controls the Al-Hadhba compound. During a meeting with UNSMIL in May 2014, Khaled Sherif confirmed that he had a special role in overseeing the Al-Hadhba prison. He is still in control of the prison although no longer undertaking official government functions.*").
[53] Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Abdullah Al-Senussi', and request for suspensive effect, ICC-01/11-01/11-468-Red.
[54] *Al-Senussi* Appeals Judgment.
[55] *Id.* at para. 123.
[56] *Id.* at paras. 262, 297.

25. In exercise of its sovereign authority as a State, in September 2015, the Government of Libya promulgated Law No. 6 of 2015 (attached with draft translation as **Annex E**). Article 1 of that Law provided that all Libyans who committed offences during the period 15/02/2011 until the issuance of the law should be eligible for a general amnesty and that received sentences and their subsequent criminal impact should be dropped. Articles 2 and 3 placed certain conditions on the application of Article 1. Article 7 provided that any amnesty on the basis of that law was conditional and would no longer apply if the person included in the general amnesty committed a 'wilful' felony within 5 years from the date of when the proceedings of the relevant criminal case were discontinued.

26. On or around 12 April 2016, having been imprisoned for a further nine months after his conviction, Dr. Gadafi was released from prison in Zintan on the authority and upon the instruction of the Government of Libya, pursuant to Law 6 of 2015.[57] The effect of Law 6 of 2015, as it applied to Dr. Gadafi, was thus not *stricto sensu* an "amnesty" (since he had already been convicted), but instead that any further criminal proceedings against him in Libya were "dropped", save that, as provided by the law, they could be re-opened and the sentence imposed in full if he committed any new offences within a five-year period.

27. On 5 May 2017, the power of attorney personally signed by Dr. Saif Al-Islam Gadafi in favour of lead counsel in the present case was finally accepted by the Registry of the Court.[58] Since that time, the Defence sought and was eventually granted access to the confidential case files in the case. After reviewing the same and conducting certain additional investigations, the Defence hereby submits that the present case should be declared inadmissible before the Court.

[57] See Alatairi Statement (Annex C), paras. 30-31 and Exhibits 25 to 29 thereto.
[58] Registration of the appointment of Mr. Karim Khan as Counsel and Ms Shyamala Alagendra as Associate Counsel for Mr. Saif Al-Islam Gaddafi, ICC-01/11-01/11-635, paras. 1 and 5.

III. Relevant Provisions of the Statute and Rules

28. The Preamble to the Statute provides (in part) that:-

> *the States Parties to this Statute,*
>
> *[…]*
>
> ***Determined*** *to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,*
>
> *[…]*
>
> ***Emphasizing*** *in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,*
>
> *[…]*
>
> ***Emphasizing*** *that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,*
>
> *[…]*
>
> *Have agreed as follows: […]*

29. Article 1 of the Statute also confirms that the Court "*shall be complementary to national criminal jurisdictions*".

30. Article 17(1) of the Statute provides that:-

> *Issues of Admissibility*
>
> *(1) Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:*
>
> *a. The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;*
>
> *b. […]*

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. *[…].*

31. Article 19 of the Statute provides in part that:-

(1) […]

(2) Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:

a. An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;

b. A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated and prosecuted; or

c. A State from which acceptance of jurisdiction is required under article 12.

(3) […]

(4) The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1(c).

(5) A State referred to in paragraph 2(b) and (c) shall make a challenge at the earliest opportunity.

(6) Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. […]

32. Article 20(3) of the Statute provides that:

> ***Ne bis in idem***
>
> *1. […]*
>
> *2. […]*
>
> *3. 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:*
>
> *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 recognised 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.*

33. Rule 58 (Proceedings under article 19) provides in relevant part that:-

> *1. A request or application made under article 19 shall be in writing and contain the basis for it."*

34. The effect of Article 20(3), read together with Article 17(1)(c), is that the Court must ("*shall*") determine that this case is inadmissible if it is satisfied of the following matters:-

i. that Dr. Gadafi has already been tried by the Libyan national courts (see paragraphs 40 – 49 below);

ii. that the national trial was with respect "to the same conduct" as that alleged in this case (see paragraphs 50 – 66 below);

iii. national proceedings were not for the purpose of shielding within the meaning of Article 20(3)(a) (see paragraphs 67 – 90 below); 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) (see paragraphs 91 – 101 below).

IV. Dr. Gadafi has standing to challenge admissibility at this time

35. Dr. Gadafi has standing to challenge the admissibility of the case against him pursuant to Article 19(2)(a) and brings this challenge within the procedural conditions defined by Article 19(4). Article 19(2)(a) specifies that "*an accused or a person for whom a warrant of arrest or a summons to appear has been issued under Article 58*" are among the parties who may challenge the admissibility of a case. Dr. Gadafi is a person for whom a warrant of arrest has been issued under Article 58 of the Statute.[59] He therefore has personal standing to challenge admissibility. Further, Dr. Gadafi submits this admissibility challenge prior to the commencement of trial, in accordance with Article 19(4). He has not previously filed an admissibility challenge. This challenge is thus submitted within the time limit and procedural requirements specified by Article 19(4).

36. It is not a condition of making an admissibility challenge that Dr. Gadafi must surrender himself to the Court. No such requirement is expressly or impliedly contained in Article 19, and commentators have taken the view that "the person sought for surrender has a right to challenge the admissibility before the Court under article 19(2)(a) as soon as a warrant for arrest has been issued".[60] Moreover, imposing any such requirement would infringe the very right that Article 20(3) is intended to protect. The Defence submit that:-

[59] Warrant of Arrest for Saif Al-Islam Gaddafi, 27 June 2011, ICC-01/11-01/11-3.
[60] Claus Kreß and Kimberley Prost, "Article 89: surrender of persons to the Court", the Rome Statute of the International Criminal Court: a commentary (3rd edition 2016) eds O. Triffterer, K. Ambos, p. 2054.

i. The parties who can bring an admissibility challenge and the circumstances in which they can bring such a challenge are exhaustively set out in Article 19. There is no requirement that a person challenging admissibility must first surrender themselves to the custody of the Court or national authorities. Indeed, pursuant to Article 19(2)(a), the trigger allowing a person to challenge admissibility is simply that a warrant of arrest "has been issued" under Article 58, not that the person has surrendered or has been surrendered in response to the issue of an arrest warrant;

ii. Any attempt to read words into Article 19, in order to require a relevant person to surrender to the Court or national authorities before making an admissibility challenge, would undermine the very right that Article 20(3) is designed to protect. The Court must interpret and apply the Statute, including Articles 17, 19 and 20, in a manner which is consistent with internationally recognised human rights.[61] The right not to be tried twice for the same conduct is an internationally recognised human right. Article 14(7) of the International Convention on Civil and Political Rights provides that "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 […]". The right not to be tried twice is also protected, in similar terms, by every major regional human rights treaty.[62] Each of these instruments makes it clear that, provided that there is sufficient identity of subject matter between the two proceedings, it is a

[61] Article 21(3) of the Statute. See further ICC-01/04-01/06-772 (OA4), 14 December 2006, para. 37.
[62] Article 4 of Protocol 7 to the European Convention on Human Rights; Article 50 of the Charter of Fundamental Rights of the European Union; Article 8(4) of the American Convention on Human Rights; Article N(8) of the Principles and Guidelines on the right to a Fair Trial and Legal Assistance in Africa; Article 16 of the Arab Charter on Human Rights; and the Fifth Amendment to the Constitution of the United States of America.

fundamental right that no-one should be tried a second time. Dr. Gadafi has already been tried, convicted and punished by imprisonment in Libya for the same conduct alleged in the present case before the Court. To require him to surrender to custody before exercising his right to argue that he has already been tried for the same conduct, would necessarily require him to be deprived of his liberty a second time in relation to the same conduct. That would infringe his right not to be punished twice for the same conduct, which is exactly the right which Article 20(3) was designed to protect. No requirement that a person must surrender to the Court before submitting an admissibility challenge should therefore be read into Article 19.

V. The Burden of Proof on this Application

37. The Appeals Chamber has not directly addressed the burden of proof applicable to an accused or person bringing an admissibility challenge pursuant to Article 19(2)(a). The Defence submits that the proper standard is that identified by Trial Chamber III, namely, on the balance of probabilities. This is based upon the "overwhelming preponderance of national and international legal systems" that apply this standard "when the burden lies upon the defence in criminal proceedings".[63] The Defence respectfully agrees with Trial Chamber III's holding that this burden is limited to the Defence establishing the relevant facts underpinning the application, whereas the overall duty falls on the Chamber to "weigh the merits of the competing submissions in arriving" at its decision.[64]

38. In applying this burden of proof to an accused or person's application pursuant to Articles 17(1)(c) and 20, the Defence submit that the following approach

[63] *Prosecutor v. Bemba*, Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010, ICC-01/05-01/08-802, para. 203.
[64] *Id.* at para. 204.

applies. First, the accused or person must adduce relevant facts demonstrating that he or she "has been tried by another court". In this regard, and pursuant to the holding of the Appeals Chamber that the ICC was not established as a human rights court,[65] the accused or person need only adduce facts demonstrating that "something that can recognizably be described as a trial has occurred".[66] Second, the accused or person must adduce relevant facts demonstrating that the case involved substantially the same conduct as the case before the Court.

39. Once the accused or person has met this evidential burden with respect to these two primary elements under the chapeau of Article 20(3), the Defence submits that the accused or person need only establish on a *prima facie* basis that the exceptions under Article 20(3)(a) and (b) do not apply. As regards the exception under Article 20(3)(a), it should be sufficient for the accused or person to show that there is no reasonable indication that the purpose of the trial was to shield the accused or person from criminal responsibility, rather than a positive burden to 'disprove' this possibility. With respect to the exception under Article 20(3)(b), and as submitted above, the main consideration for the Chamber is "whether something that can recognizably be described as a trial has occurred". Once this evidential burden is met by the Defence, the burden of proof shifts to any other party or participant that submits that the exception under Article 20(3)(b) does apply. This is in line with the Pre-Trial Chamber's finding in the *Al-Senussi* Admissibility Decision, upheld by the Appeals Chamber,[67] that "any factual allegation raised by any party or participant must be sufficiently substantiated in order to be considered properly raised".[68]

[65] *Al-Senussi* Appeals Judgment, para. 219.
[66] F. Mégret & M.G. Samson, "Holding the Line on Complementarity in Libya: the Case for Tolerating Flawed Domestic Trials" 11(3) Journal of International Criminal Law (2013), p. 586, quoted with approval in *Al-Senussi* Appeals Judgment, fn. 458.
[67] *Al-Senussi* Admissibility Judgment, para. 167.
[68] *Al-Senussi* Admissibility Decision, para. 208.

VI. This Case is inadmissible pursuant to Article 20(3)

a. Dr. Gadafi has already been tried by the Libyan national Courts

40. This case is inadmissible because Dr. Gadafi has already been tried in Libya. After the presentation of evidence by the prosecution and submission of "*a lengthy murafa'a*" on behalf of Mr. Gadaffi,[69] a reasoned judgment on the merits of the case against Dr. Gadafi has been entered by a competent Court.

41. Following national investigations, an Indictment decision was issued committing the case against Dr. Gadafi and others to the trial court.[70] The Government of Libya passed Law No. 7 of 2014, amending Article 243 of the Code of Criminal Procedure of Libya, thereby permitting Dr. Gadafi, held in the Reform and Rehabilitation Institution in Zintan, and the eight accused held in Al-Jawiya Reform and Rehabilitation Institution in Misrata, to attend trial by video-link "for security reasons".[71] On the instructions of the General Prosecutor of Libya, Dr. Gadafi was duly taken to the Zintan Court by officials of the Zintan Reform & Rehabilitation Institution to attend his hearing by video-link on several occasions.[72] On other occasions, when the video-link was not operational

[69] Dr. Mark S. Ellis, "Trial of the Libyan regime: An investigation into international fair trial standards", International Bar Association, November 2015, p. 31 (available at: https://www.ibanet.org/Document/Default.aspx?DocumentUid=abcf9bed-7a28-4b66-a923-a6c1c487c845) A copy of the report is provided in public **Annex F** hereto.

[70] This was received in Zintan and seen by Dr. Gadafi in June 2014. See Alatairi Statement (Annex C), para. 15.

[71] See Alatairi Statement (Annex C), para. 16; Application for Leave to Reply & Consolidated Reply on Behalf of the Libyan Government to Responses to the "Libyan Application for Extension of Time Related to Pre-Trial Chamber I's 'Decision requesting Libya to provide submissions on the status of the implementation of its outstanding duties to cooperate with the Court'", 13 June 2014, ICC-01/11-01/11-557-Red, para. 29; Amended Libyan Code of Criminal Procedure (attached as **Annex G** hereto), Article 243; UNSMIL Report (Annex D), p. 4 ("*Despite attempts to facilitate attendance at the trial for some defendants through video-link, the right to be tried in one's presence was undermined with at least nine defendants, held in Misrata and Mitiga, missing hearings of the trial, and Saif al-Islam Qadhafi, held in Zintan, being connected by video-link for only four out of 25 trial sessions.*").

[72] See LBY-OTP-0062-0280, p. 0293 ("The Public Prosecutor requested the trial be postponed in order to link Tripoli's courtroom to Zintan's courtroom so that Defendant No. 1 [Dr. Gadafi] may be prosecuted via CCTV […]."); p. 0294-0295 ("The Public Prosecution requested the Court to enforce Article 1 of Law No. 7 of 2014 AD, which provides that the accused may be tried via CCTV if he cannot be brought before the Court. The Public Prosecutor also requested that the Article be enforced in the case of Defendant No. 1, who is detained at the Reform and Rehabilitation Institute in Zintan, and Defendants Nos. 4, 23, 24, 25, 26, 27, 28 and 29, who are detained at the Reform and Rehabilitation Institute in Misratah. He said that the courtroom in Zintan was linked to the one in Misratah and submitted a copy of Law No. 7 of 2014 AD on the amendment of the Code of

or Dr. Gadafi did not otherwise appear by video-link, the record discloses that hearings were attended by lawyers on his behalf or substantive issues were not discussed.[73] The Defence observes that several sessions not attended by Dr. Gadafi or his lawyer, Mr. Hanashi, did not directly concern him. During those sessions the lawyers for the other accused persons presented evidence and made submissions relating to their defence.[74]

42. As set out above, the Judgment convicting Dr. Gadafi on the merits was pronounced by the Tripoli Court of Appeal on 28 July 2015. It is, therefore, clear that he has been "tried".

43. Article 20(3) applies where the relevant person "has been tried by another court". The language of the Statute must be construed, first, by reference to the ordinary meaning of the terms used in their context and in the light of the object and purpose of the Statute.[75] The 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. As set out above, that is the position here.

Criminal Procedure."); p. 0296 ("[T]he Court decided to postpone the hearing of the case until the session of 27/4/2014 AD so that Defendants Nos. 1, 4, 6, 26, 27 28 and 29 accused may be tried via CCTV in execution of Article 2 of Law No. 7 of 2014 AD regarding the amendment of certain provisions of the Code of Criminal Procedure."); p. 0296 ("At the above-mentioned session [27 April 2014], Defendant No. 1 was tried via CCTV without counsel and said that God is his defender."); p. 0298 ("Defendant No. 1 attended the above-mentioned session [11 May 2014] via CCTV without counsel."); p. 299 ("Defendant No. 1 attended the above-mentioned session [25 May 2014] via CCTV without counsel."); p. 300 ("Defendant No. 1 attended the above-mentioned session [22 June 2014] via CCTV along with Attorney Abd al-Salam al-Hanashi, member of the Public Attorney Department.").

[73] See LBY-OTP-0062-0280, pp. 0302 (2 October 2014 hearing – video link not functioning and no evidence presented or substantive issues discussed); 0316 (14 December 2014 hearing – Dr. Gadafi represented by counsel); 0309 (11 January 2015 hearing – Dr. Gadafi represented by counsel); 0312 (25 January 2015 hearing – Dr. Gadafi represented by counsel); 0323 (8 March 2015 hearing – Dr. Gadafi represented by counsel); 0334 (12 April 2015 hearing – Dr. Gadafi represented by counsel); 0353 (3 May 2015 hearing – Dr. Gadafi represented by counsel).

[74] See LBY-OTP-0062-0280, pp. 0303-0306 (2 November 2014 hearing); 0306-0309 (28 November 2014 hearing); 0319-0321 (8 February 2015 hearing); 0331-0334 (30 March 2015 hearing).

[75] See Vienna Convention on the Law of Treaties (1969), Article 31(1).

44. There is no basis in the Statute, or in the facts of this case, for any artificial attempt to displace the obvious conclusion that Dr. Gadafi has been tried. Dr. Gadafi does not have to show that he has exhausted all appellate proceedings or other remedies under Libyan law. The term "has been tried" means simply that the trial proceedings have concluded with a verdict on the merits. First, the language of Article 20(3) of the Statute should be contrasted, for instance, with Article 14(7) of the International Covenant on Civil and Political Rights which applies where a person "has already been *finally* convicted or acquitted" (emphasis added). If the drafters of the Statute intended to limit the application of Article 20 to the situation where all appeals have been exhausted and the verdict is final, they would have done so expressly.

45. Second, consistent with this interpretation of Article 20(3), Trial Chamber III has held that Article 17(1)(c) was inapplicable where the national decision relied on was "not in any sense a decision on the merits of the case".[76] Trial Chamber III thus correctly identified that the defining characteristic of a concluded trial is the existence of a decision on the merits. The same conclusion was reached by a trial chamber of the International Criminal Tribunal for the former Yugoslavia.[77] Though Trial Chamber III added, in the same paragraph, that the national decision "did not result in a final decision or acquittal", that is not inconsistent with the interpretation advanced by the Defence. The primary reason that Article 17(1)(c) did not apply in that case was that the relevant national decision was only a consideration of the sufficiency of the evidence and not a determination on the merits.[78] The additional reason that there was no final

[76] ICC-01/05-01/08-802, para. 248.
[77] *Prosecutor v Tadić*, IT-94-1-T, Decision on the Defence Motion on the principle of non bis in idem, 14 November 1995, para. 24 (determining that the application of the principle of ne bis in idem requires a "judgment on the merits").
[78] ICC-01/05-01/08-802, para. 248.

decision or acquittal only arose on the unusual facts of that case because the relevant national decision had already been successfully appealed.[79]

46. Third, the Defence submits that the structure of Article 17 suggests that all that is required to trigger Article 20(3) is a decision on conviction or acquittal by a trial court. Article 17(1)(a) applies where a case "is being investigated or prosecuted by a State". Article 17(1)(b) applies where a case "has been investigated by a State […] which has decided not to prosecute". Article 17(1)(c) applies where "the person concerned has already been tried". The three subsections thus each address a distinct phase of national proceedings. In this scheme, the distinction between Article 17(1)(a) and Article 17(1)(c) is that Article 17(1)(a) addresses national trial proceedings prior to the conclusion of trial, while Article 17(1)(c) addresses national proceedings after the conclusion of trial. There is no overlap between these subsections; it could not be argued that Article 17(1)(a) continues to apply in this case because no investigation or prosecution is ongoing. Construed in the light of this chronological progression, Article 17(1)(c) is concerned with the situation where a national trial has taken place and is the only subsection which is capable of applying after a judgment on the merits has been entered.

47. Finally, the Defence note that the Judgment (Annexes A and B) appears on its face to suggest that "a judgment in absentia shall be issued" in relation to Dr. Gadafi.[80] The Government of Libya has previously submitted that any person tried in absentia benefits from an automatic re-trial if apprehended.[81] The Government of Libya also submitted, in response to a question from the Presiding Judge of the Pre-Trial Chamber, that under Libyan law in absentia trials are not permitted in circumstances where the defendant is

[79] *Id.* at paras. 222 and 228.
[80] LBY-OTP-0062-0280, p. 0625.
[81] ICC-01/11-01/11-612, paras. 6-8 (relying on Article 358 of the Libyan Code of Criminal Procedure).

present on the territory of Libya and his location is known to the authorities.[82] The Pre-Trial Chamber noted this submission from Libya in the Admissibility Decision (*Gaddafi*) and found that "*[a]s a result, without the transfer of Mr Gaddafi into the control of the central authorities, the trial cannot take place.*"[83] In view of the above submissions from the Libyan government and the Pre-Trial Chamber's finding, it is not at all clear to the Defence that the Libyan Court was correct to regard the trial of Dr. Gadafi as a trial in absentia. First, per the Libyan government's submission, a trial in absentia cannot take place when the location of the accused is known, as was the case with Mr. Gadafi. Second, treating it as a trial in absentia overlooks the amendments to Libyan criminal procedure which were made specifically to allow Dr. Gadafi to attend the trial by video-link.[84] As explained by Colonel Alatairi, the provision for Dr. Gadafi to attend trial by video-link was wholly initiated and coordinated by the Libyan central government.[85] He did in fact attend four hearings by video-link. Further hearings when Dr. Gadafi did not attend were attended by lawyers on his behalf.[86] Third, the Judgment suggests that the reason a Judgment in absentia was entered was that Dr. Gadafi's "non-appearance before the Court was the result of his own free will and his belief that his jailors do not have jurisdiction […] therefore, he is deemed a fugitive from justice".[87] That reasoning is bizarre. Dr. Gadafi was imprisoned in Zintan throughout. Moreover, his imprisonment was under the control of the Government of Libya, who could have produced

[82] Hearing of 10 October 2012, ICC-01/11-01/11-T-3-Red-ENG, p. 62, lines 10-14.
[83] *Gaddafi* Admissibility Decision, para. 208.
[84] See, e.g., LBY-OTP-0062-0280, pp. 0294-0295 ("The Public Prosecution requested the Court to enforce Article 1 of Law No. 7 of 2014 AD, which provides that the accused may be tried via CCTV if he cannot be brought before the Court. The Public Prosecutor also requested that the Article be enforced in the case of Defendant No. 1, who is detained at the Reform and Rehabilitation Institute in Zintan […]").
[85] Alatairi Statement (Annex C), paras. 16-18.
[86] See LBY-OTP-0062-0280, pp. 0316 (14 December 2014 hearing); 0309 (11 January 2015 hearing); 0312 (25 January 2015 hearing); 0323 (8 March 2015 hearing); 0334 (12 April 2015 hearing); 0353 (3 May 2015 hearing).
[87] LBY-OTP-0062-0280, p. 0427.

him for trial either in person or by video-link.[88] It is difficult to understand how a person in the custody of the Government could properly be termed a "fugitive from justice". There appears therefore to be no proper foundation for the finding that Judgment in absentia should be issued. The correct position is therefore that this was not a trial in absentia; it was a trial which Dr. Gadafi attended by video-link in accordance with the requirements of national law at the time. The Defence respectfully submits that "compelling evidence"[89] accordingly exists pursuant to which the Pre-Trial Chamber is entitled to and should reject the Libyan Trial Judgment's apparent qualification of Mr. Gadafi's conviction as issued "in absentia", and instead accept that the verdict against him was "in presentia" pursuant to Libyan law.

48. In any event, the question whether the trial was in absentia or not has become academic. The effect of Law No. 6 of 2015 is that any further criminal proceedings against Dr. Gadafi are conditionally "dropped" and sentence effectively suspended. The result is that even 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). It 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. This admissibility challenge should be judged on the current

[88] See Amended Libyan Code of Criminal Procedure (Annex G), Article 243.
[89] Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges", 23 October 2010, ICC-01/05-01/08-962 OA 3, para. 66 ("*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.*")

position; the current position is that the national proceedings against Dr. Gadafi have concluded with a judgment on the merits.

49. The inescapable truth at the heart of this application is that in accordance with national criminal procedures over a period of at least 3 years the case against Dr. Gadafi was investigated by the national authorities in Libya, a trial was conducted over more than one year, in which evidence was introduced and a verdict of conviction was delivered by the Libyan judges adjudicating the case. After that verdict, Dr. Gadafi remained imprisoned. He has therefore unquestionably been through a national trial procedure. He has, in short, been tried.

b. The trial in Libya related to the "same conduct"

50. The Appeals Chambers in the *Gadafi* and *Al-Senussi* Admissibility Decisions have laid out the legal framework applicable to Article 17 admissibility challenges. Although those decisions relate to admissibility challenges brought under Article 17(1)(a) – and the present challenge is brought under Article 17(1)(c) – the Defence submits that same test should apply here. First, both Articles 17(1)(a) and 17(1)(c) relate to situations where the Court shall determine that a case is inadmissible. As a result, they serve a similar purpose in the architecture of the Statute. The Appeals Chamber itself has used Articles 17(1)(c) and 20(3) as an aid to the interpretation of Article 17(1)(a), precisely because "it is reasonable to assume that they were intended to have the same meaning".[90] Second, applying different tests to Article 17(1)(c) and Article 17(1)(a), would potentially lead to inconsistent results depending only on the stage of national proceedings. If a national case concerned substantially the same conduct as a case before the Court, it cannot be right that the case would be inadmissible during the national prosecution pursuant to Article 17(1)(a) but become admissible after the national

[90] *Al-Senussi* Appeals Judgment, para 222. See further ICC-01/09-01/11-307 OA, paras. 37, 40.

trial has concluded because Article 17(1)(c) imposes a more stringent test. Third, the test in relation to the "same conduct" defined by the Appeals Chamber in relation to Article 17(1)(a) and set out in paragraphs 51 – 53 below is entirely consistent with the test propounded by the Grand Chamber of the European Court of Human Rights ("ECtHR") in *Zolotukhin v Russia* in determining whether the right not to be tried twice for the same offence has been infringed.[91] To impose a more stringent test on application pursuant to Article 17(1)(c) would thus be inconsistent with internationally recognised human rights.

51. The Defence submits that the case tried in Libya against Dr. Gadafi related to the same conduct. The Appeals Chamber has consistently defined the parameters of a 'case' for the purpose of admissibility by reference to the 'same individual' and 'substantially the same conduct'. The test of substantially the same conduct requires the Chamber to consider both the alleged mode of liability and the underlying incidents and to make a judicial assessment of whether the national proceedings sufficiently mirror the case before the Court. The assessment of the subject matter of domestic proceedings must focus on the alleged conduct and not on its legal characterisation. A "domestic investigation or prosecution for 'ordinary crimes', to the extent that the case covers the same conduct, shall be considered sufficient." [92]

52. The Appeals Chamber confirmed that the parameters of a case are defined by "the suspect under investigation and the conduct that gives rise to criminal liability".[93] The Appeals Chamber went on to explain that in this context *"conduct" means both "that of the suspect, Mr. Gaddafi, and that described in the*

[91] *Zolotukhin v Russia*, App No. 14939/03, Grand Chamber Judgment, 10 February 2009.
[92] *Gaddafi* Admissibility Decision, para. 77; *Al-Senussi* Admissibility Decision, para. 66(iv).
[93] *Gaddafi* Admissibility Judgment, para. 61.

incidents under investigation".[94] As a result, both the mode of liability and the historical events in the course of which crimes were allegedly committed are relevant.

53. In the course of assessing the evidence on that occasion, the Appeals Chamber emphasised that "*the exact scope of an incident cannot be determined in the abstract. What is required is an analysis of all the circumstances of a case, including the context of the crimes and the overall allegations against the suspect*".[95] There is no "*hard and fast rule*" regulating the amount of "*overlap, or sameness*" between the national investigation and the case before the Court.[96] Rather, what is required is a "*judicial assessment of whether the case that the State is investigating sufficiently mirrors the one that the Prosecutor is investigating*".[97] That assessment must compare "*the underlying incidents under investigation both by the Prosecutor and the State, alongside the conduct of the suspect*".[98] Those legal findings were subsequently also applied by the Appeals Chamber in the Al-Senussi case.[99]

54. The stated position of the ICC Prosecutor, from its 5 June 2012 Response to the Article 19 Challenge submitted by Libya (and not varied to date), has been that the investigations Libya was conducting at the time of Libya's admissibility challenge in *Gadafi* were "almost identical"[100] to the case in this Court.

55. The ICC Prosecutor further conceded in the 5 June 2012 Response that:

    i. "the Libyan authorities are investigating Saif Al-Islam for his involvement in the planning, financing and supervision of widespread and systematic

[94] *Id.* at para. 62.
[95] *Ibid.*
[96] *Id.* at para. 71.
[97] *Id.* at para. 73.
[98] *Ibid.*
[99] *Al-Senussi* Appeals Judgment, paras. 99-110.
[100] Prosecution response to Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, 5 June 2012, ICC-01/11-01/11-167-Red, para. 2.

attacks against civilians in Libya, and for specific incidents that occurred as a consequence of Saif Al Islam's actions."[101]

ii. "This is the first time that a State has submitted an admissibility challenge providing concrete information that it is prosecuting the same case as that pending before the International Criminal Court".[102]

iii. "There is no question that the national authorities are investigating the same person before the court, namely Saif Al-Islam Gaddafi. Likewise, the summary of evidence provided by the Applicant shows that it has taken concrete steps to investigate Saif Al Islam for substantially the same conduct at issue in the case before the ICC."[103]

(i) The Evidence Demonstrates that Dr. Gadafi was tried for the same conduct

56. The Trial Judgment in the Libyan proceedings makes it clear that, as set out below and in confidential **Annex H**, Dr. Gadafi was tried and convicted, *inter alia*, for his role in planning, instigating, inciting, funding or otherwise facilitating the commission of crimes including the murder and killing of civilian demonstrators opposed to Muammar Gaddafi's regime by the Libyan armed forces and security forces. The Libyan proceedings thus mirror the case investigated by the ICC Prosecutor.

57. In assessing whether Dr. Gadafi was tried for the same conduct, the Defence submits that the various concessions by the ICC Prosecutor that Dr. Gadafi was being investigated by the Libyan national authorities for the same conduct as

[101] *Ibid.*
[102] *Id.* at para. 4.
[103] *Id.* at para. 35 (emphasis added).

alleged in the Article 58 decision[104] constitutes cogent evidence relevant to this application.

58. As to mode of liability, the Defence notes that in its Article 58 Decision, the Pre-Trial Chamber defined the relevant mode of liability as indirect co-perpetration.[105] Dr. Gadafi's contributions to the common plan were identified as supporting the design of the plan, ensuring the implementation of the plan, recruiting mercenaries and mobilising militias, ordering the imprisonment of dissidents, providing resources to the security forces, publicly threatening demonstrators and contributing to a subsequent cover up campaign.[106]

59. The Defence notes that, in assessing Libya's admissibility challenge (*Gaddafi*), the Pre-Trial Chamber previously assessed that the incidents identified in its decision were not intended as an exhaustive list but as "samples of a course of conduct".[107] It therefore concluded that "*it would not be appropriate to expect Libya's investigation to cover exactly the same acts of murder and persecution*" but instead that the issue is whether the domestic investigation "*addresses the same conduct […] namely that: Mr. Gaddafi used his control over relevant parts of the Libyan State apparatus and Security Forces to deter and quell, by any means, including the use of lethal force, the demonstrations of civilians, which started in February 2011 against Muammar Gaddafi's regime in particular, that Mr Gaddafi activated the Security Forces under his control to kill and persecute hundreds of civilian demonstrators or alleged dissidents to Muammar Gaddafi's regime, across Libya, in particular in Benghazi, Misrata, Tripoli and other neighbouring cities, from 15 February 2011 to at least 28 February 2011*".[108]

[104] *Al-Senussi* Admissibility Decision, para. 68.
[105] ICC-01/11-01/11-1, para. 71.
[106] *Id.* at para. 80.
[107] *Al-Senussi* Admissibility Decision, para. 82.
[108] *Id.* at para. 83.

60. A review of the evidence led at trial, and as detailed in the Trial Judgement, establishes that the Libyan proceedings addressed the same conduct as alleged in the Article 58 warrant. In Case No. 630/12, the Libyan Prosecutor, *inter alia*, charged Dr. Gadafi for his alleged role in killings and other criminal acts against those "rebelling against the regime" and "whoever was opposed to [Dr. Gadafi's] father" starting from 15 February 2011.[109] He was charged for his involvement in deliberate killings of protestors in various locations including in Bengahzi,[110] Tripoli[111] and Misrata.[112] Dr. Gadafi was also charged for his role in seizing others' movable property and for unlawfully "detaining thousands of Libyans from from the opposition and cities rebelling against the regime"[113]. The Libyan Prosecutor alleged that Dr. Gadafi provided financial support and equipment to public forces to commit the crimes charged. He was charged for recruiting and equipping mercenaries[114] to fight alongside his father's battalions.[115] It was further alleged that Dr. Gadafi established armed tribal groups, equipped them with various weapons and materials and provided them with logistic support.[116] The Libyan Prosecutor also charged Dr. Gadafi for instigating "the arbitrary bombing of cities rebelling against the regime"[117] and for inciting hatred and civil war through his speeches which were aired on Libyan satellites.[118] The Libyan proceedings thus mirrored the case investigated by the ICC Prosecutor.

61. The Libyan Prosecutor presented evidence concerning the killing and injuring of

[109] LBY-OTP-0062-0280, p. 0284.
[110] LBY-OTP-0062-0280, pp. 0287-0288.
[111] LBY-OTP-0062-0280, p. 0287.
[112] LBY-OTP-0062-0280, p. 0286.
[113] LBY-OTP-0062-0280, p. 0290.
[114] LBY-OTP-0062-0280, p. 0284.
[115] LBY-OTP-0062-0280, pp. 0365-0366.
[116] LBY-OTP-0062-0280, p. 0284.
[117] LBY-OTP-0062-0280, p. 0285.
[118] *Ibid*.

those who were against the Gadafi regime in several locations including in Al Bayda[119], Benghazi[120], Ajdabiya[121] and Misrata[122]. The Libyan Prosecutor also presented evidence of civilians who were tortured whilst in detention. The Libyan proceedings thus covered the same geographic locations as the case investigated by the ICC Prosecutor.

62. In convicting Dr. Gadafi, the Tripoli Court found *inter alia* that:

i. *"he provided financial support to Gaddafi's battalions that killed the Libyan people"*;[123]

ii. he *"brought in [and] equipped […] mercenaries and dispatched them to the battle fronts in Misratah and the Western Mountains in order to fight the Libyan people opposing his father's regime"*;[124]

iii. *"testimonies of the witnesses and the confessions of the accused prove that he was involved in funding soldiers, security services and mercenaries and bringing in weapons, ammunition, vehicles and other military equipment in order to suppress the Libyan people rebelling against his father's regime"*;[125]

iv. *"the accused knew that providing financial support to the armed groups and African mercenaries allows these forces to pursue their brutal war against the Libyans, which happened in fact, as many cities were ruined and people were killed because of these forces that were supplied with funds and ammunition by the accused"*;[126]

v. *"it was indisputably established by the aforementioned testimonies that the mercenaries entered the battle fronts in Misratah and the Western Mountains and fought the residents of these areas, committing wide-spread killings and wreaking*

[119] LBY-OTP-0062-0280, pp. 0362, 0381, 0402.
[120] LBY-OTP-0062-0280, pp. 0284-0285, 0287-0288.
[121] LBY-OTP-0062-0280, pp. 0403, 0406, 0392-0393.
[122] LBY-OTP-0062-0280, pp. 0386.
[123] LBY-OTP-0062-0280, p. 0427.
[124] LBY-OTP-0062-0280, pp. 0428-0429.
[125] LBY-OTP-0062-0280, p. 0428.
[126] LBY-OTP-0062-0280, p. 0428.

havoc";[127]

vi. *"the [] evidence prove that the accused committed crimes of sabotage, killing, instigating civil war and dismantling national unity. Whereas the accused knows full well that inciting the residents of the regions supporting his father's regime to attack anti-regime regions and inciting and arming a category of pro-regime citizens to attack anti-regime citizens are legally prohibited and criminalized because such acts undermine civil peace, wreak havoc in the country and lead to killings. Whereas the accused has undisputedly revived old conflicts and grudges between the people and created new rivalries between the residents of the Libyan cities and regions, given the atrocities committed by the volunteers under his command as a result of his incitement, such as killings, rape, kidnapping, looting funds, sabotage and house torching, all of which targeted the residents of rebel cities*.[128]

vii. *"Whereas the fact that the accused issued instructions to dispatch boats and speedboats after supplying them with weapons in order to intercept aid vessels heading towards the besieged cities, such as Misratah and Benghazi, during the Libyan Revolution is deemed a criminal act because the accused thereby deliberately cut off food and medication to the residents of these cities as a way of revenge and punishment. Whereas the accused knew that his acts would necessarily entail arbitrary killings and havoc in the besieged cities. Therefore, this crime is established against the accused with all its elements"*;[129]

viii. *"he incited the arbitrary shelling of rebel cities, is proven against the accused based on the testimony of (al-Hadi Ambirish) who said before the Public Prosecution that Sayf al-Islam used to come to the Security Room and instruct them to control the country; he also instructed his brother Khamis to control al-Zawiyah and was monitoring the operations. The charge is proven against the*

[127] LBY-OTP-0062-0280, p. 0429.
[128] LBY-OTP-0062-0280, p. 0430.
[129] LBY-OTP-0062-0280, p. 0431.

accused based on the statements of Defendant No. 4, Mansur Daw Ibrahim, who said that the accused Sayf al-Islam used to attend the meetings of the Higher Security Committee and issue instructions to combat units. The charge is also proven against the accused based on the testimony of the witness Nasir al-Hassuni, who told the Public Prosecution that the accused Sayf al-Islam was responsible for managing all types of operations";[130]

ix. *"that he played an inciting role and gave instructions and orders to the military units and armed groups that were fighting the Libyan people in al-Brigah, the Western Mountains, Misratah and al-Zawiyah. Whereas all these regions were indisputably besieged and bombed with all types of heavy weapons, such as tanks, Grad rocket launchers, rocket launchers and mortar shells, which destroyed the infrastructure of the cities and killed and displaced its civilian unarmed residents. Whereas the accused knows that besieging inhabited cities and inciting their bombing will lead to the arbitrary killing of people and the sabotage of cities. Whereas the accused committed this act for political reasons in order to take revenge on the residents of these cities because they defected from the regime. This charge is proven against the accused";*[131]

x. *"the charge of conspiracy by agreement, incitement and contribution to the deliberate killing of protesters in Tripoli and Benghazi brought against Defendant No. 1, was proven with all its elements and evidence";*[132]

xi. *"the accused, despite knowing all these facts, incited others and gave them explicit instructions to counter, crush and open fire on the protesters. Whereas such incitement and orders led to killing hundreds of unarmed protesters who took to the streets demanding freedom and good governance, which are legitimate and rightful demands. Therefore, the crimes of sabotage, arbitrary killing and deliberate killing are established against the accused with all their evidence and*

[130] LBY-OTP-0062-0280, p. 0431.
[131] LBY-OTP-0062-0280, pp. 0431-0432.
[132] LBY-OTP-0062-0280, p. 0433.

legal elements, which requires him to be convicted";[133]

xii. *"the charge of incitement, contribution and agreement to kill the protesters was brought against the accused since he mobilized armed groups from Tarhunah, Bani Walid, Abu Salim and Sirte, supplied them with weapons and ordered them to kill whoever opposes his father's regime. This charge is proven against the accused;*[134]

xiii. *"all these testimonies prove that the accused mobilized groups of young men belonging to certain regions and tribes, armed and incited them to kill the people who oppose his father's regime. He also instructed his aides to kill the detained persons and leave their corpses strewn by the side of the road";*[135]

xiv. *"due to the incitement of the accused and his orders, the groups that he had mobilized killed regime opponents";*[136]

xv. *"the accused committed a large number of serious crimes, since he ordered and incited the killing of the protesters, mobilized armed groups to that end and supplied them with weapons, provided financial and material support to the armed groups that were fighting the people, brought African mercenaries to fight his compatriots, ordered that cities be besieged and arbitrarily bombed with heavy weapons and incited tribal dissension. He also ordered that sea ports be besieged, incited rape in the besieged cities and approved such policy, ordered that civilian facilities be struck by military aircraft in addition to other crimes, all of which aimed to undermine national security, wreak havoc and exact revenge on the Libyan people who defected from the regime, which the accused thought would be delegated to him after his father since he told Defendant No. 4 'This seat is mine'";*
[137]

xvi. *"Whereas it is an undisputable fact that the volunteers' legions, since they are*

[133] LBY-OTP-0062-0280, pp. 0435-0436.
[134] LBY-OTP-0062-0280, p. 0436.
[135] LBY-OTP-0062-0280, p. 0437.
[136] LBY-OTP-0062-0280, p. 0437.
[137] LBY-OTP-0062-0280, pp. 0439-0440.

> *undisciplined, oblivious to the laws of war and driven by fierce tribal grudges and blind hatred, committed serious atrocities in rebel areas such as killing, kidnapping, rape, looting, house torching and money theft as was the case in al-Zawiyah, Zuwarah and Misratah. Whereas these acts and crimes were the direct result of the behavior of the accused and his contribution to the formation of these legions. Therefore, the accused committed the crimes of sabotage, arbitrary killing, dismantling national unity and inciting civil war attributed to him, which requires him to be convicted. Whereas the sabotage and arbitrary killing charge brought against the accused since he provided financial support to the armed groups and mercenaries is established against him […]".*[138]

63. These core findings show unequivocally that Dr. Gadafi was tried and convicted for offences including the murder or killing of demonstrators and/or persons opposed to the regime of Muammar Gadafi. Although the term 'persecution' is not used in the Libyan Trial Judgement, the Defence recalls that the legal characterisation of the charges is not determinative.[139] The substance of the case of persecution investigated by the ICC Prosecutor related to the attacks against and the killing of civilian demonstrators[140] and the arrest, detention and torture of demonstrators / persons opposed to the regime of Muammar Gaddafi.[141] The above core findings demonstrate that the substance of the charge of persecution, specifically the directing of violent attacks against civilian demonstrators resulting in killings and the kidnapping of individuals, formed part of the Libyan national proceedings.

[138] LBY-OTP-0062-0280, pp. 0444-0445.
[139] *Gaddafi* Admissibility Decision, para. 77; *Al-Senussi* Admissibility Decision, para. 66(iv).
[140] Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Sennusi", ICC-01/11-01/11-1, paras. 49-64.
[141] *Id.* at paras. 42-48.

64. The Defence hereby submits confidential **Annex H** representing a comparative chart showing the substantial correlation and material overlap between the case against Dr. Gadafi before this Court and in Case No. 630/2012 before the Tripoli court, as detailed in its judgement delivered on 28 July 2015. For all these reasons, the Defence submits that it has been established that Libya prosecuted 'substantially' the same case as that alleged before the ICC.

(ii) The Pre-Trial Chamber is not bound by its conclusion on Libya's Challenge to Admissibility

65. This is a new challenge to admissibility. Like any challenge to admissibility, it must be determined based on the facts as they exist at the time of the admissibility challenge.[142] The Appeals Chamber has specifically recognised that "*a case that was originally admissible may be rendered inadmissible by a change of circumstances in the concerned States*".[143]

66. The evidence relied upon in this application is fundamentally different from that relied upon by the Government of Libya when it filed its admissibility challenge in 2012. Since that time, the Libyan investigation of the case against Dr. Gadafi has concluded, the domestic trial of Dr. Gadafi has opened and closed, and a verdict has been rendered. Accordingly, the Pre-Trial Chamber's rejection of Libya's admissibility challenge in its decision of 31 May 2013, has no bearing as to the merits of the present application submitted by the Defence.

c. Libyan National Proceedings were not "for the purpose of shielding Dr. Gadafi from criminal responsibility for crimes"

[142] ICC-01/04-01/07-1497, para. 56; ICC-01/11-01/11-347, paras. 41 and 44; ICC-01/09-01/11-234, para 10.
[143] ICC-01/04-01/07-1497, para. 56.

67. Article 20(3)(a) provides a limited exception from the general rule of *ne bis in idem*, where the national proceedings "were for the purpose of shielding the person concerned from criminal responsibility". This exception does not apply to this case. First, the Statute expressly limits the Court's consideration to "the proceedings in the other Court" with the result that the Court is not permitted to extend the scope of this exception to embrace any subsequent pardon or commutation of sentence issued by a State, in exercise of its sovereign authority. Second, the exception only applies when the national proceedings, viewed as a whole, were "for the purpose" of shielding. That high threshold cannot be crossed on these facts. Even if the Court considers that Law No. 6 of 2015 is somehow relevant to this assessment, the limited commutation of sentence which arose from that national provision is on its own insufficient to justify the conclusion that the proceedings were for the purpose of shielding.

68. No informed observer looking at the pre-trial and trial proceedings in Libya from 2011 – 2015 could possibly conclude that those proceedings were for the purpose of shielding Dr. Gadafi. After a substantial period of pre-trial detention, Dr. Gadafi was tried. At the end of that trial, he was convicted. A sentence was imposed. He served a further period in prison. Against that factual background, any contention that this trial process leading to conviction and sentence was "for the purpose of shielding" Dr. Gadafi is unsustainable.

(i) The Court's consideration is limited to whether national court proceedings were for the purpose of shielding

69. Any executive decision made by Libya, as a sovereign State, after the trial verdict was pronounced, is immaterial to this application. The consideration of shielding is expressly limited by Article 20(3) to "proceedings in the other court". Court proceedings begin with an investigation and end with a verdict.

For the reasons set out below, the language and drafting of the Statute itself, legal dictionaries and other analogous ICC decisions all suggest that the word "proceedings" is not capable of applying to any subsequent executive action after the end of the judicial proceedings. The Pre-Trial Chamber should therefore determine whether the proceedings were for the purpose of shielding without taking into account Law No. 6 of 2015.

70. First, the ordinary and natural meaning of the text of Article 20(3) itself shows that the term "proceedings" is limited to judicial proceedings. Article 20(3) refers specifically to "*proceedings in the other court*" (emphasis added). A pardon, commutation of sentence or even an amnesty pronounced by a State, does not form part of proceedings in court because they are not judicial acts. Moreover, the use of the words "*in the other court*" as opposed to a more expansive phrase such as 'the national process as a whole' suggests that the section only applies to proceedings in court and does not apply to any subsequent executive action in relation to a case.

71. Second, that interpretation is confirmed by the commentaries on the Statute. The Triffterer commentary notes that "court procedures usually end with a judgment and the determination of the sentence in cases of conviction".[144] Similarly, both Holmes and Van den Wyngaert note that the drafting of Article 20(3)(a) appears to exclude consideration of any subsequent pardon because any such pardon would fall outside the meaning of court proceedings.[145]

[144] Immi Tallgren and Reisinger Coacini, "Article 20: Ne bis in idem", the Rome Statute of the International Criminal Court: a commentary (3rd edition 2016), eds. O. Triffterer, K. Ambos, p. 925, para. 44.
[145] The Rome Statute of the International Criminal Court: A Commentary (2002), eds. Cassese, Gaeta and Jones, pp. 678, 726.

72. Third, that interpretation of Article 20(3) is confirmed by the drafting history of the Statute.[146] At various times, proposals were submitted to alter the provision which became Article 20(3) so that any subsequent amnesty or pardon would be taken into account. All were rejected. The deliberate rejection of those amendments confirms that Article 20(3)(a) is not intended to embrace executive action after the end of court proceedings.

73. The original Draft Statute for an International Criminal Court provided at Article 42(2)(b) for an exception to *ne bis in idem* where "*the proceedings in the other court were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not prosecuted diligently*".[147] The alternative Siracusa Draft proposed amending that subsection to add the words in bold: "*the proceedings – **including clemency, parole, pardon, amnesty and other similar relief** – were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted*".[148] The notes to the amendment proposed in the Siracusa Draft clearly explain that the inclusion of additional words was proposed as being considered "*necessary to clarify that the exception to the ne bis in idem principle for sham proceedings extended beyond trial […]*".[149] That the amendment proposed in the Siracusa draft was not accepted, and that its proposed formulation did not find its way into the Final draft, despite its rationale being clearly identified, demonstrates that the focus of sham proceedings and shielding does not extend beyond trial.

[146] The Chamber is entitled to consider the preparatory work as a supplementary means of interpreting the Statute pursuant to Article 32 of the Vienna Convention on the Law of Treaties. See *Situation in the Democratic Republic of the Congo*, Judgment on Extraordinary Review, ICC-01/04-168 OA3, 13 July 2006, para. 40.
[147] Draft Statute for an International Criminal Court, adopted by the International Law Commission at its 46th Session, 14 July 1994.
[148] Draft Statute for an International Criminal Court, Alternative to the ILC Draft (Siracusa Draft), July 1995, Article 42(2)(b), p. 65, available at: https://www.legal-tools.org/doc/39a534/pdf/.
[149] *Ibid*.

74. The inclusion of a draft article which would have created a further exception to *ne bis in idem* where national authorities had suspended or terminated a sentence was also considered in detail and rejected during the 11th and 12th meetings of the Committee of the Whole. In particular, the 11th meeting of the Committee of the Whole, considered a proposed draft article 19 which would have provided an exception to *ne bis in idem* where "*a manifestly unfounded decision on the suspension of the enforcement of a sentence or on a pardon, a parole or a commutation of the sentence excludes the application of any appropriate form of penalty*".[150] At both the 11th and 12th meetings, a significant number of States suggested or supported the deletion of draft article 19.[151] As a result, draft article 19 was not included in the final version of the Statute.

75. The drafting history of Article 20(3) thus confirms that amendments or drafts that would have expressly extended the definition of 'proceedings' in Article 20(3) to subsequent executive decisions including pardons and reductions of sentence were considered and deliberately rejected. The natural conclusion must be that "proceedings" retains its normal meaning and the supposed "lacuna" that Article 20(3)(a) does not cover a subsequent executive decree was a deliberate choice made by the draftsmen.

76. Fourth, legal dictionaries confirm that "proceedings" means matters that occur in a court case – not after the court case has concluded.[152] Thus, Blacks Legal Dictionary defines "proceeding" as "(1) the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and

[150] Summary records of the Meetings of the Committee of the Whole, 11th Meeting, 22 June 1998, A/CONF.183/C.1/SR.11, as introduced by Canada at page 214.
[151] See, e.g., at the 11th meeting Afghanistan (*id.* at p. 215), Australia, Philippines, Colombia, Israel, Venezuela (*id.* at p. 216), Poland, France (*id.* at p. 217) and at the 12th meeting Iraq (*Ibid.*), Japan, Indonesia, China, India (*id.* at p. 218), Algeria, Switzerland, Jordan, Singapore, Brazil, Peru, Norway, Nigeria, Egypt (*id.* at p. 219), Sudan, Italy, Morocco, Botswana, Austria (*id.* at p. 220), New Zealand, Vietnam, Uruguay, Oman, Iran (*id.* at p. 221).
[152] The Appeals Chamber has on occasion relied on dictionary definitions to interpret provisions. See for instance ICC-01/09-02/11-365, para. 53.

the entry of judgment […]."[153] It further defines "criminal proceeding" as "a judicial hearing, session or prosecution in which a court adjudicates whether a person has committed a crime or, having already fixed guilt, decides on the offender's punishment".[154] These definitions confirm that the word "proceedings" covers only matters which occur within a court case and ends with the court's adjudication of guilt or punishment.

77. Finally, some guidance as to the meaning of "proceedings" may be obtained from the scope of the right to a fair hearing in international human rights law. The right to a fair hearing under Article 6 of the European Convention on Human Rights only applies to the determination of civil rights and criminal charges. It does not apply to events subsequent to a final conviction; it does not apply to the execution of a sentence, conditional release or to an application for clemency.[155] The right to a fair hearing (criminal limb) does not apply to issues about the existence or scope of amnesty legislation.[156] If the right to a fair hearing does not apply to matters which occur after a conviction, that must be because international human rights law recognises that the proceedings have concluded at that point.

78. The language and drafting history of Article 20(3), together with the ordinary meaning of the word 'proceedings' taken from legal dictionaries, all suggest that the exception provided for in Article 20(3)(a) is limited to shielding which occurs within the national court proceedings. It does not allow the court to consider a subsequent executive pardon or commutation of sentence.

(ii) *The National Court Proceedings were not for the Purpose of Shielding*

[153] Blacks Law Dictionary (10 ed., 2014), p. 1398.
[154] *Id.* at p. 456.
[155] *Dybeku v Albania*, Application No. 41153/06, Judgment, 18 December 2007, para. 55; *Aldrian v Austria* (1990) 65 DR 337 (European Commission).
[156] *Montcornet de Caumont v France*, App No. 59290/00, Chamber Decision, 13 May 2003.

79. In the event that the Court accepts the primary submission that any executive action after trial is outside the scope of Article 20(3)(a), it is obvious that proceedings were not for the purpose of shielding. Dr. Gadafi was tried, convicted and sentenced. Far from shielding Dr. Gadafi from responsibility, the national proceedings condemned and convicted him.

80. In any event, even if the Court determines that the word "proceedings" is broad enough to encompass Law No. 6 of 2015, the Defence submits that it could not still be said that these national proceedings "were for the purpose of shielding". Article 20(3)(a) requires the Court to consider the proceedings in the other court as a whole. Considered in the round, it is unsustainable to regard national proceedings as a whole as an exercise in shielding.

81. First, the concept of "shielding" applies where national authorities have manifestly failed to investigate an individual or carried out only a sham investigation. Whilst there is no definition of "shielding" in the Statute, the meaning of "shielding" or 'sham double jeopardy' has been discussed by international human rights courts. These courts only infer that shielding has taken place, in the face of evidence of a national investigation, where there are obvious and unexplained deficiencies in the national investigation and no action has been taken against the apparent perpetrator.

82. Thus, in considering whether a national investigation violated the positive obligation to investigate deaths which arises under Article 2 of the European Convention on Human Rights,[157] in *Nachova v Bulgaria*, the Grand Chamber of the ECtHR expressly concluded that a national investigation into a shooting had 'shielded' the perpetrator. The basis for this finding was that "*the authorities ignored those significant facts [referring to the location of the fatal wound, the location of*

[157] See generally, *Jordan v U.K.*, App No. 24746/94, Judgment, 4 May 2001, paras. 105-109.

the spent cartridges and that the officer fired 'in automatic mode'] and, without seeking any proper explanation, merely accepted [the perpetrator's] statements and terminated the investigation".[158]

83. The ECtHR has also determined allegations of shielding in a series of cases concerning Croatia's national investigation of war crimes. The ECtHR has clearly established that, like the ICC, it is not required to "micro-manage" national proceedings.[159] A high threshold is required before a finding of shielding can be made; on one occasion, the ECtHR concluded that the evidence did not amount to shielding, despite allegations that arrest warrants were not issued and there was a delay in investigations.[160] The ECtHR, however, held that the procedural obligation in Article 2 had been violated in a case where the State failed to follow all available leads or to take steps to prosecute an accused who had been identified as the perpetrator by three witnesses.[161]

84. Though it does not use the term "shielding", the Inter-American Court of Human Rights ("IACtHR") has also considered analogous issues in determining that national proceedings were not capable of supporting a plea of *ne bis in idem*. In *Carpio-Nicolle et al v Guatemala*,[162] where the national court had disqualified the evidence of the victims, failed to investigate the disappearance of critical evidence and the military's refusal to summon soldiers to give evidence, the IACtHR held that the dismissal of national proceedings led only to a "fraudulent res judicata" which could not satisfy the State's obligation to investigate. Similarly in *Gutierrez-Solar v Colombia*, where a complaint of torture was summarily dismissed as the product of the victims "sick mind", there was only a

[158] *Nachova v Bulgaria*, Application Numbers 43577/98 and 43579/98, Grand Chamber, 6 July 2005, para. 116.
[159] *Trivkanovic v Croatia*, Application No. 12986/13, Chamber, 6 July 2017, para. 85.
[160] *Njezic and Stimac v Croatia*, Application No. 29823/13, 9 April 2015, paras. 68, 72-74.
[161] *Jelic v Croatia*, Application No. 57856/11, 13 October 2014, paras. 86, 89, 95.
[162] *Carpio-Nicole et al. v Guatemala*, 22 November 2004, paras. 76(53)-76(54) and 132-135.

sham double jeopardy which the State could not rely upon to preclude proper investigation.[163]

85. The Libyan national proceedings against Dr. Gadafi are not remotely comparable with the definition of shielding crafted by the above cases. The criminal charges against Dr. Gadafi were not dismissed without investigation and did not result in obvious loss of evidence to the detriment of the victims. Instead, an investigatory process was followed, evidence was gathered and then presented at trial. At the conclusion of trial, a reasoned decision was given on the merits of the case (so satisfying the victims' legitimate interest in uncovering the truth). Dr. Gadafi was convicted and sentenced. He even continued to serve time in prison after the sentence was passed. As a result, the national proceedings could not fall within any reasonable definition of shielding.

86. Second, pursuant to Article 20(3)(a) the exception to the fundamental human rights principle of *ne bis in idem* only arises where national proceedings "were for the purpose of shielding". In that sentence, the "purpose of shielding" applies to the "proceedings in the other court" as a whole, not to any distinct part of those proceedings. Commentators have noted that this "requirement of purpose in the provision is a very high standard".[164]

87. There is no evidence whatsoever that the national criminal proceedings were designed or intended to shield Dr. Gadafi. No suggestion of shielding was raised by any party during Libya's admissibility challenge (*Gaddafi*) in 2012 – 2013. Indeed, the Prosecutor went so far as to submit that there was "no suggestion that [Libya's] efforts lack genuineness".[165] Similarly, in relation to the

[163] *Gutierrez-Solar v Colombia*,12 September 2006, para. 48(7), 96-98.
[164] William Schabas, The International Criminal Court: A Commentary on the Rome Statute (2nd ed., 2016), p. 467.
[165] Prosecution response to Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, 5 June 2012, ICC-01/11-01/11-167-Red, para. 40. See further para. 46.

admissibility proceedings in *Al-Senussi*, the Prosecutor expressly submitted that Libya did not appear to be shielding Mr. Al-Senussi.[166] Although the issue of "willingness" was not addressed in determining Libya's admissibility challenge (*Gaddafi*),[167] the Pre-Trial Chamber expressly held in Libya's admissibility challenge (*Al-Senussi*) that there was no indication that proceedings were for the purpose of shielding Mr. Al-Senussi.[168] The conclusion of the Pre-Trial Chamber and the above concessions by the Prosecutor were and remain plainly correct. There is no indication that the court proceedings in Libya were anything other than a genuine prosecution of Dr. Gadafi. Indeed, the very fact that Dr. Gadafi was convicted and sentenced to death decisively undermines any attempt to suggest that the proceedings were for the purpose of shielding him.

88. Third, Law No. 6 of 2015, to the extent that the Court can take it into account, does not amount to a blanket amnesty. It must be considered not in the abstract, but instead as it applies specifically to Dr. Gadafi himself. Law No. 6 of 2015 was passed after the verdict against Dr. Gadafi was pronounced. The Law was limited in its applicability to Dr. Gadafi and had wider application. It is not a law which shielded Dr. Gadafi from prosecution or prevented his trial from taking place. Moreover, the effect of Law No. 6 of 2015 is that the "received sentences" should be "dropped". Importantly, that does not annul the trial verdict, which remains a lengthy written judgment setting out findings against Dr. Gadafi and so meets the victims' legitimate interest in this regard. Law No. 6 of 2015 was also only applied to Dr. Gadafi when he was released in April 2016, by which time he had been imprisoned for 4 years and six months in total (including nine months of custody after the verdict was announced). Nor has Dr. Gadafi been released unconditionally; he is released under condition that if he

[166] ICC-01/11-01/11-321, para. 79.
[167] *Gaddafi* Admissibility Decision, para. 138.
[168] *Al-Senussi* Admissibility Decision, para. 290.

commits a felony within five years, the sentence against him could be reactivated. Properly understood, in relation to Dr. Gadafi, Law No. 6 of 2015 is not an amnesty at all; it is no more than a commutation of sentence. Such a commutation of sentence does not undermine the facts that a trial took place, that a judgment on the merits was entered, or that Dr. Gadafi was deprived of his liberty in prison for several years and punished.

89. In the light of the limited application of Law No. 6 of 2015 to Dr. Gadafi, in assessing the issues in this application, the Pre-Trial Chamber does not need to determine the validity as a matter of international law of any amnesties introduced by sovereign States in relation to crimes against humanity. The only issue which arises on this application is whether a subsequent commutation of sentence following the conclusion of trial proceedings can sustain the conclusion that the proceedings as a whole were for the purpose of shielding Dr. Gadafi. For the reasons set out above, it cannot.

90. Nevertheless, to the extent that consideration of these issues requires the Pre-Trial Chamber to consider broader questions of international law and policy, the Defence submits that the Chamber should adopt a cautious and case-by-case approach to the issues which may arise. Following international and internal armed conflicts in diverse situations, sovereign States must balance the demand for criminal accountability against the need to restore the peace and rebuild society. Not every situation will call for the same resolution: some will be appropriate for international criminal justice, others may be more suited to a truth commission or another system of reconciliation. By one estimate, in the period from 1979 – 2011, a total of 398 amnesty laws were passed by 115 States.[169] The Defence submits that the Court should be slow to impose a red-line which

[169] Louise Mallinder, Amnesties' Challenge to the Global Accountability Norm?', in Amnesty in the Age of Human Rights Accountability (2012), eds. F. Lessa and L. Payne, p. 79.

would prevent States adopting these alternative solutions in all future conflicts. The Government of Libya is not and will not be the only State conditionally to release prisoners as part of peace-building and reconciliation efforts. Two examples may be cited. First, in 1998, the British and Irish Governments signed the Belfast Agreement (also known as the Good Friday Agreement), which sought to end the troubles in Northern Ireland and included a provision at section 10 that "both governments will put in place mechanisms to provide for an accelerated programme for the release of prisoners […]".[170] Pursuant to that Agreement, releases of paramilitary prisoners (who had been convicted following trials) did take place.[171] The peace holds. Second, the Truth and Reconciliation Commission in South Africa, which was established by the Promotion of National Unity and Reconciliation Act 34 of 1995,[172] allowed amnesties to be granted pursuant to section 20(1) to individual perpetrators of crimes provided that they met certain conditions, including that they had "made a full disclosure of all relevant facts". In that way, the sovereign State balanced legitimate interest of the victims in establishing the truth with the need for national reconciliation and peace-building. The Defence submits that, in appropriate cases subject to appropriate conditions, such measures are a valuable way of sovereign States promoting reconciliation and ending conflict, and respectfully urges the Pre-Trial Chamber to avoid any conclusion that would prevent their adoption following any future conflict.

[170] A copy of the Good Friday Agreement is available at the following United Kingdom government address: https://www.gov.uk/government/publications/the-belfast-agreement (last accessed 5 June 2018).
[171] The Good Friday Agreement has the status of an international treaty. Between 1998 and 2012, 506 prisoners classed as "paramilitaries" or "terrorists" were released pursuant to the Agreement. The Good Friday Agreement also included provisions that all remaining prisoners incarcerated by 2000 would be released. See generally: http://www.democraticprogress.org/wp-content/uploads/2013/09/The-Good-Friday-Agreement-Prisoner-Release-Processes.pdf (last accessed 5 June 2018).
[172] A copy of the Act is available on the following Government of South Africa website: http://www.justice.gov.za/legislation/acts/1995-034.pdf (last accessed 5 June 2018).

d. It is not the case that the Libyan National Proceedings were "not conducted independently or impartially", nor did they involve egregious due process violations such that they were inconsistent with an intent to bring Dr. Gadafi to justice

91. Article 20(3)(b) creates a second exception to the principle of *ne bis in idem*, which applies when national proceedings "were not conducted independently or impartially in accordance with the norms of due process recognised by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice". The Appeals Chamber has set a high threshold in construing the similar exception in Article 17(2)(c), holding that it is only satisfied where violations of due process were "so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the accused".[173] In accordance with that test, the Defence does not argue that the Libyan national proceedings were flawless or that they were conducted without infringing on some of Dr. Gadafi's rights. Nevertheless, a recognisable trial did occur; *prima facie* the violation were not so egregious that the national proceedings could be said to provide "no genuine form of justice" within the meaning of the Appeals Chamber judgment.

(i) The Test to be applied is whether the violations of fair trial rights are "so egregious" that national proceedings provided no "genuine form of justice"

92. In Libya's admissibility challenge (*Al-Senussi*), the Appeals Chamber held in relation to Article 17(2)(c) that the Court is not primarily called upon to determine whether certain provisions of human rights law are being violated by

[173] *Al-Senussi* Appeals Judgment, paras. 190 and 230.

the national proceedings,[174] but that the question is whether any violations of fair trial rights are "so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the accused".[175] The Appeals Chamber concluded that the fact that Mr. Al-Senussi had not been legally represented up to that point did not meet this high threshold.[176] Indeed, the only example the Appeals Chamber gave of a situation meeting this threshold arises where the national proceedings were "little more than a predetermined prelude to an execution".[177]

93. In defining that test, the Appeals Chamber set a deliberately high threshold by requiring that any violations of fair hearing rights must be so "egregious" that the proceedings no longer amount to "any genuine form of justice". A high threshold is necessary for the following reasons:-

i. In determining questions of admissibility, regard must be had to the fact that the Court is complementary to national criminal jurisdictions.[178] Article 20(3)(b) is an exception to the general rule that a person cannot be tried by the Court for the same conduct that he has been tried for nationally. In order to respect the principle of complementarity, that exception should be construed narrowly;

ii. As the Appeals Chamber held, the Court was not established to be an international human rights court sitting in judgment over the fair trial standards of national proceedings.[179] The Defence notes that this position was expressly supported by the Prosecutor's submissions on that occasion.[180]

[174] *Id.* at paras. 134-232.
[175] *Id.* at paras. 190 and 230.
[176] *Id.* at paras. 191, 200-202.
[177] *Id.* at para 230.
[178] Paragraph 10 of the Preamble and Article 1 of the Statute; *Al-Senussi* Appeals Judgment, para. 215.
[179] *Al-Senussi* Appeals Judgment, para. 219; see further para. 225.
[180] ICC-01/11-01/11-483, paras. 20-11.

iii. Further, the exceptions to Article 20(3) are, like the concept of unwillingness to prosecute in Article 17, "primarily" concerned with a "suspect evading justice".[181] The intention of these provisions is to put an end to impunity by refusing to recognise proceedings which unjustly benefit the accused.[182] The logical corollary is that Article 20(3)(b) is not primarily concerned with protecting an individual's right to a fair hearing.

94. Although the decision in *Al-Senussi* related to Article 17(2), the principles set out apply equally to the similar test in Article 20(3). The Appeals Chamber itself described the criteria set out in the two provisions as being "the same or very similar" and concluded that it was "reasonable to assume that they were intended to have the same meaning".[183] The same point has been made by commentators.[184] If anything, the only difference between the provisions is that the threshold in Article 20(3)(b) should be ever higher because Article 20(3)(b) protects an accused person's fundamental right not to be tried twice for the same offence. As the Appeals Chamber observed, "*it is less easy to imagine that there was an intention for an accused to be tried again at this Court for the same conduct that had already been tried nationally on the basis that the domestic trial did not fully comply with international standards of due process*".[185]

(ii) *The Libyan proceedings were not so egregiously unfair that they are not capable of amounting to justice at all*

95. The Appeals Chamber has confirmed the Pre-Trial Chamber's finding that "*alleged violations of the accused's procedural rights are not per se grounds for a finding*

[181] *Al-Senussi* Appeals Judgment, para. 218.
[182] *Id.* at paras. 221-222.
[183] *Id.* at para. 222.
[184] William Schabas, The International Criminal Court: A Commentary on the Rome Statute (2nd ed., 2016), p. 509 (noting that Article 20(3)(b) is "broadly similar in scope" to Article 17(2)(c)).
[185] *Al-Senussi* Appeals Judgment, para 222.

of unwillingness or inability under article 17".[186] Further, the Pre-Trial Chamber held that "*depending on the specific circumstances, certain violations of the procedural rights of the accused may be relevant to the assessment of the independence and impartiality of the national proceedings that the Chamber is required to make, having regard to the principles of due process recognized under international law, under article 17(2)(c) of the Statute. However, this latter provision, identifying two cumulative requirements, provides for a finding of only when the manner in which the proceedings are being conducted, together with indicating a lack of independence and impartiality, is to be considered, in the circumstances, inconsistent with the intent to bring the person to justice.*"[187] The Pre-Trial Chamber, based on factual observations[188] that are equally relevant to the present Application, did not find that there was "*a systemic lack of independence and impartiality of the judiciary such that would demonstrate, alone or in combination with other relevant circumstances, that the proceedings against Mr Al-Senussi 'are not being conducted independently or impartially and they [...] are being conducted in a manner which, in the circumstances is inconsistent with an intent to bring [Mr Al-Senussi] to justice', within the meaning of article 17(2)(c) of the Statute.*"[189]

96. In the present case, no reasonable observer would argue that the Libyan prosecution and trial process was conducted in a manner which, in the circumstances, was inconsistent with an intent to bring Dr. Gadafi to justice within the meaning of Article 17(2)(c) of the Statute. Rather, the steps taken by Libya, including the arrest of Dr. Gadafi, the establishment of detention facilities in Zintan in which he was incarcerated on the orders of the Libyan prosecutor, the content of the evidence presented by the Libyan prosecutor to support the

[186] *Al-Senussi* Admissibility Judgment, para. 231 (citing Al-Senussi Admissibility Decision, para. 235).
[187] *Al-Senussi* Admissibility Decision, para. 235.
[188] *Al-Senussi* Admissibility Judgment, paras. 242 to 258.
[189] *Al-Senussi* Admissibility Decision, para. 258.

indictment as detailed in the Judgment of the Tripoli Court, the amendment of laws to allow trial via video link and Dr. Gadafi's attendance via the same, makes it abundantly clear that Libya was determined to bring him to justice within the meaning of Article 17(2)(c) of the Rome Statute.

97. The Defence submits that, although criticisms can be levied at various aspects of the national proceedings, they cannot be said to have been so egregiously unfair that they were not capable of amounting to justice at all.

98. As to the correct application of this test, the natural meaning of the word "egregious" demonstrates the high threshold imposed. "Egregious" means "conspicuously bad" or "flagrant".[190] In determining whether violations of fair trial rights are egregious, the Court may be assisted by the jurisprudence of the European Court of Human Rights,[191] which distinguishes between ordinary violations of fair trial rights and a "flagrant denial of justice", in determining whether a State would breach Article 6 of the European Convention on Human Rights by extraditing an accused to face an unfair trial in a third country.[192] The ECtHR has held that a flagrant denial of justice "goes beyond mere irregularities or lack of safeguards in the trial procedures […] what is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or a destruction of the very essence, of the right".[193] Clearly a high standard is set.

99. It is noteworthy that in these admissibility proceedings, Dr. Gadafi does not argue that his fair trial rights were egregiously violated. His instructions in this

[190] Merriam-Webster Online Dictionary.
[191] Which the Court may take into account pursuant to Article 21(1)(c).
[192] *Soering v UK*, App no. 14038/88, Judgment, 7 July 2989, para. 113.
[193] *Ahorugeze v Sweden*, App no. 27075/09, Judgment, 27 October 2011, para. 115.

regard are specific and he signs this filing along with counsel. The right to a fair hearing is invested in him. It would be unusual to find a situation in which another party or participant could challenge the fairness of a trial, in circumstances where the victim of that alleged unfairness has made an informed choice not to do so. Indeed, that would create the very situation which the Appeals Chamber previously dismissed as "less easy to imagine" because the drafters of the Statute cannot have intended that the person whose rights were infringed by an unfair national trial would as a result of those infringements be exposed to a second trial.[194] That would result in Dr. Gadafi's rights being breached twice: once by national proceedings being unfair and a second time by being tried twice for the same conduct.

100. Moreover, the Defence notes that in determining Libya's admissibility challenge (*Al-Senussi*) the Appeals Chamber concluded that, at that time, proceedings could not be said to be so egregiously unfair that they were incapable of amounting to justice.[195] Article 19(10) of the Statute grants the Prosecutor the discretion to request a review of that decision if "fully satisfied that new facts have arisen which negate the basis" of the admissibility decision. The trial of Dr. Gadafi and Mr. Al-Senussi concluded in July 2015 – two and a half years ago. In that time, the Prosecutor has not requested the Court to review the admissibility of the case against Mr. Al-Senussi.[196] The Prosecutor must be presumed therefore to have accepted that there is nothing in the subsequent conduct of national proceedings to negate the conclusion that any violations of due process rights were not so egregiously unfair that the national proceedings were incapable of providing justice.

[194] *Al-Senussi* Admissibility Judgment, para. 222.
[195] *Id.* at paras. 262, 297.
[196] See for instance, Statement of the ICC Prosecutor to the UN Security Council on the situation in Libya, 8 May 2017, paras. 20-22.

101. The evidence suggests that something that can recognisably be described as a trial has occurred. The trial was opened after the conclusion of the investigation phase. Dr. Gadafi attended certain hearings by video-link, pursuant to the criminal procedures in force at the time. He was represented by lawyers, who were permitted to consult with him in private in Zintan.[197] A reasoned Judgment was delivered at the conclusion of proceedings, which explains the basis for the verdict against Dr. Gadafi.[198] Accordingly, the exception set out in Article 20(3)(b) does not apply.

VII. Classification

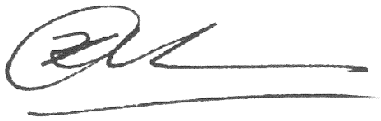
102. This filing, as well as Annexes C and H hereto, are classified as confidential as they contain or refer to information that is likewise classified confidential. With respect to Annexes A and B, while the Defence does not believe there is any reason that the documents and information therein should not be made publicly available, as the two items were provided by the Prosecution by courtesy disclosure, and the second item (LBY-OTP-0062-0280 (Annex B)) is stamped "ICC Restricted", the Defence classifies the two annexes as confidential at this time until clarification can be sought from the Prosecution on their classification.

Conclusion

103. Accordingly, and for the reasons detailed in this Application and its accompanying annexures, the Defence respectfully submits that the present case against Dr. Saif Al-Islam Gadafi before the ICC must be declared inadmissible.

[197] Alatairi Statement) (Annex C), paras. 21-23.
[198] LBY-OTP-0062-0280.

Respectfully submitted,



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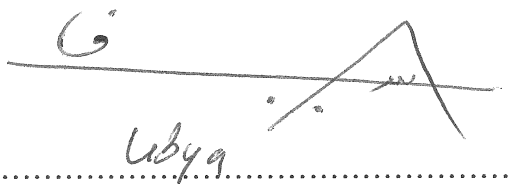
This filing has been read and approved by:



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Dr. Saif Al-Islam Gadafi

Dated this 5th day of June 2018