Concurring Separate Opinion of Judge Eboe-Osuji and Judge Bossa

1. We wish to add the following thoughts, in order to underscore the complexities of the issues presented in this appeal.

2. We begin by noting that counsel for Mr Gaddafi urged the Court to 'go back to the founding principles of complementarity', and to allow States 'primacy over crimes arising in their jurisdiction and not interfere with domestic processes for as long as the relevant State is investigating, prosecuting or has tried the case'.[1] In that regard, they argued that it is not for the ICC to 'sit in judgment' over the national court – as the ICC is not the Supreme Court of Libya.[2] Continuing, they argued that 'any interpretation of the complementarity regime which requires this Court to delve too deeply into Libyan law could perhaps defeat the purpose'[3] – specifically because such an approach would be an undue encroachment upon 'national sovereignty'.[4]

3. We feel constrained to take a closer look at this sentiment, which is usually the last bulwark of most who wish the ICC to cease and desist interest in any particular case or situation.

4. As a philosophical target of the present exercise, the urge upon the Appeals Chamber to 'go back to the founding principles of complementarity' is salient indeed. However, the content of counsel's argument entirely missed the mark – anchored as it were upon a persistent understanding of inviolability of national sovereignty, underscored by the hackneyed witticism that the ICC does not 'sit in judgment' over a national legal system.

*

5. The real issue here is not about the ICC sitting in judgment over the Libyan national courts. But it is about complementarity – and what it means, as a practical or purposive idea of justice. As Ms McDonald aptly put it on behalf of the intervener Redress, '[w]hether the complementarity regime actually serves to help close the impunity gap depends entirely on

[1] Transcript of hearing, 11 November 2019, ICC-01/11-01/11-T-007-ENG, p 12, lines 13 to 16.
[2] *Ibid*, p 17, lines 21 to 22; p 54, lines 11 to 12.
[3] *Ibid*, p 17, lines 23 to 25.
[4] *Ibid*, p 23, lines 19 to 22.

how it is applied in practice'.[5] As she further argued (persuasively), '[i]f the Court applies it in a way which gives undue deference to national proceedings, which do not truly fulfil the aims of the Statute, then complementarity is actually on a path to serious tension with the objective of ending impunity'.[6]

6. It helps always to keep in mind that the doctrine of complementarity serves the affirmation of the international community – as expressed in the Rome Statute – 'that the most serious crimes of concern to the international community as a whole must not go *unpunished* and that their *effective* prosecution must be ensured'.[7] This is to be achieved by 'taking measures at the national level and by enhancing international cooperation'.[8] It is for those reasons and in that sense that the jurisdiction of the ICC is 'complementary to national criminal jurisdictions'.[9] The doctrine of complementarity is, thus, easy enough to state and attractive enough to embrace – as an abstract proposition. Difficulty rears its discordant head when the time comes to apply the idea in the concrete case. It is then that protestations are made in the name of national 'sovereignty' – even in the face of a regime of accountability that rests on the generally accepted affirmation that 'the most serious crimes of concern to the international community as a whole must not go *unpunished* and that their *effective* prosecution must be ensured'.

7. Indeed, the facts of the matter before the Appeals Chamber starkly engage that 'serious tension with the objective of ending impunity'.[10] One sees that tension in the following dilemma. It is recalled, once more, that the entire edifice of the Rome Statute is built on the affirmation that the 'the most serious crimes of concern to the international community as a whole must not go *unpunished*'. Can it truly be said that the crime has gone *unpunished* if its perpetrator is immediately granted amnesty or pardon soon after conviction – even assuming an effective prosecution and unassailable adjudication? That query retains its own value, unaffected by the question of acceptability of amnesties in international law.

8. The dilemma posed above also has implications for other values recognised in the Rome Statute. For instance, on its face, the question of proceedings continuing before this

[5] Transcript of hearing, 12 November 2019, ICC-01/11-01/11-T-008-ENG, p. 16, lines 19 to 20.
[6] *Ibid*, p. 16, lines 20 to 23.
[7] See Rome Statute, fourth preambular paragraph, emphasis added.
[8] *Ibid*.
[9] See Rome Statute, tenth preambular paragraph, articles 1 and 17.
[10] See paragraph 5 above.

Court in the aforementioned situation, would, as in the case at bar, raise issues of double jeopardy (or *ne bis in idem*) within the meaning of article 20 of the Statute, as the person in question would already have been tried and indeed convicted for the same conduct in accordance with article 17(c) of the Statute. Yet, it may be necessary to determine, for complementarity's sake, whether double jeopardy does truly attach to an individual brought before this Court who, after trial and conviction, was hastily granted an amnesty or pardon by the executive or the legislature at the national level, even where, as stated above, the judicial process was beyond reproach. It is not necessary to canvass now all the various scenarios in which such a speedy amnesty or pardon could be granted: perhaps political affiliates are in power or have regained it, etc. But, it is enough to ask whether the crime has truly gone 'unpunished' in those circumstances of a speedy grant of amnesty or pardon soon after even a credible criminal trial. If not, does the complementary role of the ICC forbid a new trial, if the purpose of the Court's complementary jurisdiction is to ensure that the crime 'must not go unpunished'?

9. The range of the concern outlined also captures the related question of proportionality of the punishment handed down or served in connection with the national proceedings – relative to the gravity of 'the most serious crimes of concern to the international community' such as are proscribed in the Rome Statute.

10. The foregoing brief discussion is enough to show the overly simplistic nature of the protestations of counsel for Mr Gaddafi, arguing that the imperatives of national sovereignty require the Court to accept whatever is done at the national level, lest the ICC be seen as 'sitting in judgment' over the Libyan judicial system.

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

Judge Chile Eboe-Osuji

Judge Solomy Balungi Bossa

Dated this 9th day of March 2020
At The Hague, The Netherlands