

1 International Criminal Court
2 Appeals Chamber
3 Situation: Libya
4 In the case of The Prosecutor v. Saif Al-Islam Gaddafi - ICC-01/11-01/11
5 Presiding Judge Chile Eboe-Osuji, Judge Howard Morrison, Judge Piotr Hofmański,
6 Judge Luz del Carmen Ibáñez Carranza and Judge Solomy Balungi Bossa
7 Appeals Hearing - Courtroom 1
8 Monday, 11 November 2019
9 (The hearing starts in open session at 9.46 a.m.)
10 THE COURT USHER: [9:46:19] All rise.
11 The International Criminal Court is now in session.
12 Please be seated.
13 PRESIDING JUDGE EBOE-OSUJI: [9:46:42] Thank you very much.
14 Court officer, please place the matter on the record.
15 THE COURT OFFICER: [9:46:55] Good morning, Mr President, your Honours.
16 The situation in Libya, in the case of The Prosecutor versus Saif Al-Islam Gaddafi,
17 case reference ICC-01/11-01/11.
18 And for the record, we are in open session.
19 PRESIDING JUDGE EBOE-OSUJI: [9:47:11] Thank you very much.
20 We will take appearances now, beginning with the appellants, counsel for the
21 appellants, Mr Gaddafi.
22 MR FAAL: [9:47:26] Good morning, Mr President. Good morning, Judges of the
23 Appeals Chamber. Good morning, my colleagues. Today, Dr Gaddafi is
24 represented by myself, Essa Faal, leading the team. And I am assisted by Aidan Ellis
25 of counsel, and Khaled Al-Zaidy, who is advisor on Libyan law, and Kamis, also an

1 advisor on Libyan law, and Doreen Kiggundu as our legal assistant.

2 Thank you, Mr President.

3 PRESIDING JUDGE EBOE-OSUJI: [9:48:09] Thank you, Mr Faal.

4 Counsel for the Prosecutor.

5 MS BRADY: [9:48:14] Good morning, your Honours, and everyone in the courtroom.

6 My name is Helen Brady. I'm the senior appeals counsel for the Prosecution. I'm
7 here today with Ms Meritxell Regué, appeals counsel; Ms Alison Whitford, associate
8 trial lawyer; Mr Julian Nicholls, senior trial attorney; Ms Nivedha Thiru, associate
9 appeals counsel; and our case manager today is Ms Biljana Popova.

10 Thank you.

11 PRESIDING JUDGE EBOE-OSUJI: Thank you very much, Ms Brady.

12 And the Office of Public Counsel for Victims.

13 MS MASSIDDA: [9:48:55] Good morning, Mr President, your Honours.

14 The Office of Public Counsel for Victims is appearing today with Ms Sarah Pellet,
15 counsel; Ms Anne Grabowski, legal officer; and I am Paolina Massidda, principal
16 counsel.

17 PRESIDING JUDGE EBOE-OSUJI: [9:49:07] Thank you very much.

18 And next we hear, if we may have appearances from Lawyers for Justice in Libya and
19 Redress.

20 MS MACDONALD: [9:49:22] Good morning, your Honours.

21 Alison MacDonald, QC, barrister at Matrix Chambers, London. I appear for the two
22 NGO *amici* today, assisted by Florence Iveson, who sits behind, a colleague barrister
23 in Matrix Chambers, London; Ms Elham Saudi, to my right, director of Lawyers for
24 Justice in Libya; Ms Nada Kiswanson, who sits behind, a further lawyer at Lawyers
25 for Justice in Libya; and Mr Rupert Skilbeck further to my right, a barrister and

1 director of Redress.

2 PRESIDING JUDGE EBOE-OSUJI: [9:49:55] Thank you very much.

3 Next, appearances from the Libyan Cities and Tribes Supreme Council.

4 MR SAAD: [9:50:17](Interpretation) My name is Abdussalam Ammara and I am
5 head of the Libyan Cities and Tribes Supreme Council. I am assisted by a colleague
6 who will join me later.

7 Thank you.

8 PRESIDING JUDGE EBOE-OSUJI: [9:50:37] Thank you very much.

9 Appearances, I believe, from the State of Libya, do we have representatives?

10 MR EL-GEHANI: [9:50:48] Good morning, Mr President, good morning,
11 distinguished Judges. I am Ahmed El-Gehani, the Libyan representative to the ICC.
12 I am here with the Minister of Justice, Mr Mohamed Abd Alwahed Lamloom to -- then
13 to address the Court. Thanks a lot.

14 PRESIDING JUDGE EBOE-OSUJI: [9:51:09] Thank you very much.

15 Have we left out anyone? No. Thank you.

16 Today we will be hearing oral submissions from parties and participants, the *amici*
17 *curiae*, and other intervenors, on the issues engaged in this appeal. I especially note
18 in that connection the presence of the representatives of the State of Libya as an
19 intervenor, as we have just heard in the appearance.

20 At the outset, I should note that in the specific circumstances of this case, or this
21 hearing, that Arabic interpretation has been made available in the courtroom for the
22 duration of the hearing, pursuant to the Court's legal framework.

23 Before inviting submissions from the parties, I shall set out the background to the
24 appeal.

25 The appellant is Saif Al-Islam Gaddafi. And his appeal concerns the question of

1 admissibility of his case at the ICC.

2 For those unfamiliar with that terminology, the question of admissibility of a case at
3 the ICC concerns a preliminary objection saying that the ICC may not exercise
4 jurisdiction in a particular case, because the defendant has already been tried, or is
5 being tried, by a national court; or because the case is being investigated by a national
6 jurisdiction; or because the case already been investigated by a national jurisdiction
7 but a decision was made in good faith to not proceed with the trial.

8 And in this appeal, the question of admissibility asks, to put it in the broadest of
9 terms, whether the Prosecution's case against Mr Gaddafi may proceed, given that he
10 was already tried, albeit in his absence, by a court in Tripoli and was convicted at the
11 end of that trial and was handed a death sentence, but was -- but there was
12 a subsequent grant of amnesty which Mr Gaddafi claims as extending to him.

13 Mr Gaddafi thus objects to the admissibility of his case at the ICC. The
14 Pre-Trial Chamber dismissed that objection. Now he appeals the judgment of the
15 Pre-Trial Chamber.

16 The parties and participants have since completed their written briefs. We are now
17 convened to hear their oral submissions.

18 Now the foregoing is enough of a general overview of the appeal. That may be
19 enough to assist the general public to follow the discussions in today's hearings. But
20 it may be that a better understanding of the appeal will be assisted by a little more
21 detail to the background. In that case, here now is the fuller background.

22 On 26 February 2011, the UN Security Council referred to the ICC Prosecutor the
23 situation in Libya since 15 February 2011. The Security Council made this referral by
24 way of Resolution 1970 of 2011.

25 Pre-Trial Chamber I issued a warrant of arrest for Mr Gaddafi four months later, on

1 27 June 2011. The charges are for the crimes of murder and persecution on political
2 grounds, as crimes against humanity within the meaning of Article 7(1)(a) and
3 clause (h) of the Rome Statute.

4 On 19 November 2011, Mr Gaddafi was arrested in Libya and was transferred to
5 a detention facility in Zintan, Libya, the next day.

6 On 1 May 2012, the government of Libya filed an objection or challenge to the
7 admissibility of the case against Mr Gaddafi at the ICC. Libya's objection was
8 premised on Libya's assertion that it was actively investigating the same case.

9 On that occasion, counsel acting on behalf of Mr Gaddafi opposed Libya's objection or
10 challenge to admissibility. Mr Gaddafi insisted then that the case shall remain
11 admissible before the ICC. On 31 May 2013, the Pre-Trial Chamber rejected Libya's
12 challenge to the admissibility of the case against Mr Gaddafi. The Appeals Chamber,
13 on 21 May 2014, confirmed that decision of the Pre-Trial Chamber.

14 But that notwithstanding, in 2014, Mr Gaddafi was tried together with 36 other
15 co-accused by a court in Tripoli. And on 28 July 2015, Mr Gaddafi was convicted
16 and sentenced to death.

17 In September 2015, according to the averment of Mr Gaddafi, a general amnesty law,
18 Law No. 6 of 2015, was passed in Libya, of which he claims to be amongst the
19 beneficiaries. And pursuant to that amnesty law, he was released from prison in
20 April 2016.

21 Subsequently, on 6 June 2018, Mr Gaddafi filed before the Pre-Trial Chamber an
22 objection or challenge of his own to the admissibility of his case at the ICC. He
23 submitted that he had been tried, convicted and sentenced by a Libyan court for
24 substantially the same conduct as alleged in the proceedings before the ICC, and that
25 a subsequent amnesty, which he asserts he was granted, pursuant to Law No. 6 of

1 2015, meant that any possibility of a retrial had been removed, thus bringing finality
2 to the case against him.

3 In those circumstances, he argued, based on either Article 17(1)(c) of the Rome Statute
4 or Article 20(3), the case against him should be found inadmissible at the ICC. He
5 further argued that the exceptions that are spelled out in Article 20(3) of the
6 Rome Statute did not apply, to the extent that those exceptions are meant to deny
7 validity to a previous trial.

8 On 5 April 2019, the Pre-Trial Chamber rejected Mr Gaddafi's challenge.

9 Pre-Trial Chamber determined that a person would be deemed to have been already
10 tried for purposes of Article 17(1)(c) and 20(3) of the Statute, only if the judgment of
11 the court of the national jurisdiction had become final or, as lawyers say, *res judicata*.

12 The Pre-Trial Chamber found that the Tripoli court's judgment had not acquired
13 that final or *res judicata* effect. This is because the Tripoli court's judgment was
14 ordinarily subject to appeal, and also, especially because the trial in Tripoli was
15 subject to retrial since Mr Gaddafi was tried and convicted in his absence, and in the
16 circumstances, the Libyan law required his retrial.

17 The Pre-Trial Chamber further found that Law No. 6 of 2015 could not apply to
18 Mr Gaddafi at any rate because the very terms of that law excluded the contemplated
19 amnesty from applying to certain categories of crimes, including those with which
20 Mr Gaddafi was charged.

21 The Pre-Trial Chamber also observed that there was a growing trend in international
22 law to the effect that grave crimes, such as crimes against humanity, could not be
23 subject to an amnesty. Hence, Law No. 6 would be incompatible with international
24 law to the extent that that law purports to apply to the crimes with which Mr Gaddafi
25 is charged at the ICC.

1 On 20 May 2019, Mr Gaddafi lodged the present appeal on two grounds. First, that
2 the Pre-Trial Chamber erred in law in holding that Article 17(1)(c) and 20(3)
3 of the Statute may only be satisfied where a judgment on the merits of a case has
4 acquired *res judicata* effect. And, second, that the Pre-Trial Chamber erred in failing
5 to determine that Law No. 6 applied to him and as such rendered his conviction final,
6 thus making his case inadmissible at the ICC. These are the main issues that we
7 have gathered here to discuss today.

8 Turning now to the conduct of these proceedings, I recall that on 1 November 2019,
9 the Appeals Chamber issued an order setting out questions on which it particularly
10 wishes to hear the parties and participants and other intervenors, as well as
11 a schedule for the present hearing.

12 Counsel are requested not to merely repeat arguments already made in their briefs.
13 It will be more helpful if counsels' submissions are guided mainly by the questions
14 posed in the Appeals Chamber's order of 1 November 2019, as well as questions
15 posed orally from the Bench.

16 May I also remind the parties and participants that they are expected to complete
17 their submissions or observations within the time frame set out by the
18 Appeals Chamber. The court officer will monitor the time and will indicate to the
19 party speaking when the time is about to run up.

20 I shall now read out on to the record the questions that the Appeals Chamber has
21 posed to the parties and participants as communicated in the order of
22 1 November 2019.

23 (a) If the object and purpose of the Rome Statute is to close the impunity gap, how
24 does the Court's complementarity regime serve to achieve this?

25 (b) In particular, how do the parties' and participants' respective interpretations of

1 Article 17(1)(c) and Article 20(3) of the Rome Statute accord with the object and
2 purpose of the Rome Statute and the complementarity regime envisaged in
3 the Statute?

4 (c) To what extent should jurisprudence and human rights instruments relating to *ne*
5 *bis in idem* principle inform the interpretation of Article 17(1)(c) of the Statute? Can
6 such sources be used to read a requirement of finality into Article 17 of the
7 Rome Statute? Do such sources of law sufficiently take into account the Court's
8 complementarity framework?

9 (d) Is it common ground that Mr Gaddafi's trial in Libya was held *in absentia*?

10 (e) Is a retrial automatic under Libyan law in the case of proceedings *in absentia*? Is it
11 confirmed by the appropriate Libyan authorities that Article 358 of the Libyan Code
12 of Criminal Procedure requires a retrial once Mr Gaddafi appears or is arrested? Is
13 a retrial a right to be asserted by the party tried *in absentia* or an obligation that must
14 be carried out by the State regardless of whether the person tried *in absentia* asserts
15 this right?

16 (f) How is Article 358 of the Libyan Code of Criminal Procedure applicable to
17 Mr Gaddafi given that he did not abscond, but rather was held in detention while his
18 trial was ongoing?

19 (g) Leaving aside the impact, if any, of Libyan Law No. 6 of 2015, in what
20 circumstances, if any, would Mr Gaddafi's conviction *in absentia* become final in
21 accordance with Libyan criminal law and procedure, for example, as a result of
22 a statute of limitation, or as the lapse of the penalty by prescription indicated in the
23 text of Article 358 of the Libyan Code of Criminal Procedure?

24 (h) In accordance with Libyan procedural law, where death penalty convictions are
25 concerned, is it confirmed by the appropriate Libyan authorities that a review by

1 the Court of Cassation is mandatory? Has such a review taken place? Leaving
2 aside, leaving aside the issue of finality with respect to trials *in absentia*, would review
3 by the Court of Cassation render final the judgment against Mr Gaddafi by the Tripoli
4 court?

5 (i) In reviewing an admissibility challenge, is a Chamber's scope of review limited to
6 the terms of the provisions under which the specific challenge was brought or does it
7 extend to a review of the admissibility of the case more generally under Article 17 and
8 in accordance with Article 19(1) of the Rome Statute?

9 (j) Are amnesties relevant to the admissibility of a case under Article 17 of the Statute
10 and, if so, under which limb of Article 17(1) of the Statute?

11 (k) In particular, can an amnesty be taken into account under Article 17(1)(c) and 20(3)
12 of the Statute? Could the amnesty be considered under Article 23(a) or (b)
13 of the Statute? In this regard, for purposes of Article 23(a) or (b) of the Statute, may
14 developments outside the judicial proceedings, such as the passing of an amnesty law,
15 be taken into account, also bearing in mind the overall purpose of the
16 complementarity regime? How would Article 20(3) of the Statute be applied to the
17 facts of this case?

18 (l) Was Libyan Law No. 6 of 2015 validly issued? Could the circumstances of this
19 case, in particular that an amnesty was allegedly passed after Mr Gaddafi's initial trial
20 but before a retrial, lead to a finding of inadmissibility under Article 17(1)(a) or (b)
21 of the Statute and should the Appeals Chamber address this?

22 Those are the questions the Appeals Chamber has posed to the parties.

23 I now turn to schedule of the hearing.

24 The following time will be allocated to the parties and participants:

25 Counsel for Mr Gaddafi would have one and a half hours to speak and counsel for

1 the Prosecutor would equally have one and a half hours to speak.
2 The Office of the Public Counsel for Victims would have 45 minutes and the State of
3 Libya would have 45 minutes.
4 Lawyers for Justice in Libya and Redress have 30 minutes and Libyan Cities and
5 Tribes Supreme Council has 30 minutes.
6 Further submissions may be made by the Office of the Prosecutor, and they would
7 have 45 minutes to do this. So too counsel for Mr Gaddafi, also 45 minutes.
8 Two hours have been accounted for -- or, rather, reserved to take into account
9 questions from the Bench. These may come at the end of the party speaking or
10 maybe questions may be asked while counsel is speaking, in which case from that
11 bank of two hours we will give counsel speaking more time to speak.
12 Additional questions again may be put, as I indicated earlier, from the Bench.
13 We have reserved two days for the hearing, but we should try, if we can, to finish as
14 early as possible. If we can do so today, that would be very helpful. This of course
15 means that counsel need not use up all the time they have been given. There is no
16 need to fill up the time if the point has been sufficiently made.
17 I will leave it at that for now and without further ado will invite counsel for the
18 appellant to make his submissions to the Court.
19 Mr Faal.
20 MR FAAL: [10:12:32] Thank you, Mr President, Honourable Judges of the
21 Appeals Chamber. And thank you for giving us the opportunity to address you on
22 behalf of Dr Gaddafi.
23 Mr President, in view of the directions you have just given, we would reorganise our
24 submissions in a way that we would focus more time answering the questions that
25 your Honours have asked instead of addressing the points that are contained in our

1 appeal brief. But in view of the approach we had previously taken, you would bear
2 with us as we try to reorganise our submissions as we move ahead.

3 Mr President, it's not --

4 PRESIDING JUDGE EBOE-OSUJI: [10:13:15] As long as you do all that within your
5 time, yes.

6 MR FAAL: [10:13:19] Thank you.

7 PRESIDING JUDGE EBOE-OSUJI: [10:13:19] Yes.

8 MR FAAL: [10:13:21] It's not lost on the Defence that this hearing takes place on
9 11 November, which in many countries is Armistice Day, a time to remember those
10 who have fallen in armed conflicts. In that vein --

11 PRESIDING JUDGE EBOE-OSUJI: [10:13:41] Let me stop you there, please. It
12 wasn't planned that way, when you say it was not lost. If you want to attach that
13 significance, you may do so, but just to reassure you that the planning of the hearing
14 did not have that in mind.

15 MR FAAL: [10:14:02] Indeed, indeed. Point well noted. Thank you, Mr President.
16 Your Honours, whilst we stand here in the safety of The Hague debating these issues,
17 the war still continues in Libya. That makes it all the more important, in our
18 respectful submission, that international law responds to the reality of the situation
19 on the ground in Libya.

20 Your Honours, the issues which come before you, it's mainly on the construction of
21 Article 17(1)(c) and Article 20(3) of the Statute, which are in fact novel issues before
22 these chambers. They have never been authoritatively determined by the
23 Appeals Chamber. You are of course not bound by the decisions of other chambers,
24 or the decisions of ad hoc tribunals or human rights courts.

25 This appeal may evoke interesting and intricate hypothetical questions which can

1 engage us in lots of discussions for hours on end, and some of them are very, very
2 fascinating, but we pause and ask whether all these issues are in fact central or
3 germane to the questions the Appeals Chamber is faced with.
4 We implore your Honours to limit yourselves to considering the issues which actually
5 arise on this appeal, and that is whether Dr Gaddafi has already been tried. We,
6 very respectfully, ask your Honours to adopt a restrained approach to this narrow
7 issue and, in so doing, to return to the foundational issues which are the cornerstone
8 of this Court. This case is premised on complementarity, it should be limited to just
9 that. Even if the genesis of this case is a Security Council referral, the basic
10 architecture of the Rome Statute, which guarantees the primacy of the States for the
11 investigations and prosecution of crimes committed within their territories, still
12 remain.

13 We ask the Court to go back to the founding principles of complementarity and to
14 fulfil its basic obligations to States, to allow them primacy over crimes arising in their
15 jurisdiction and not interfere with domestic processes for as long as the relevant State
16 is investigating, prosecuting or has tried the case. This Court must be concerned
17 with judicial -- must be very worried or wary of judicial and prosecutorial overreach
18 in a way that was not anticipated in the Rome Statute. The Rome Statute promises,
19 states in its preamble and throughout, that States will take primary responsibility to
20 fulfil their obligations to their people. And this is what Libya has done by
21 investigating, prosecuting, amending laws to facilitate attendance at trial, by
22 convicting and by issuing a verdict and reasoned judgment against Dr Gaddafi.
23 The ICC must not insert itself into domestic processes. It should be extremely
24 cautious about and veer away from adjudicating on the meaning or constitutionality
25 of national legal provisions.

1 This Court, as rightly ruled by the Appeals Chamber in the Senussi case, is not
2 a human rights court mandated to rule only compatibility of national laws with
3 international human rights principles.

4 Deferring to national systems will not lead to an impunity gap, which we
5 acknowledge is a purpose of the Statute, because the Statute itself allocates primary
6 responsibility for investigations and prosecutions to national systems, which may
7 more effectively prosecute crimes because they are closer to the evidence and the
8 suspects.

9 Since the Statute allocates primacy to national investigations and prosecutions, we
10 submit that the International Court must allow a degree of flexibility in its approach
11 to allow different legal systems, including transitional systems, to flourish and
12 coalesce around the ICC regime without micromanaging them. The International
13 Criminal Court must not be seen by States as shackling or obstructing their sovereign
14 legal systems. If the Court is seen as a meddlesome institution, intruding into
15 national systems, that can only be detrimental to the harmonious cooperation with
16 domestic systems and States, which the Court itself needs in order to flourish.

17 Your Honours, in order to deal with the questions that arise in this appeal, one issue
18 on which we say absolute clarity is required, and I repeat, we need absolute clarity on
19 this point: What is the Libyan government's actual position on this appeal? We
20 have struggled to determine what position they are taking from the papers they have
21 filed. And we ask this question directly: Is Libya suggesting that this case is
22 admissible and therefore Dr Gaddafi should be brought to The Hague for trial? Or is
23 Libya saying that this case is not admissible?

24 PRESIDING JUDGE EBOE-OSUJI: [10:20:14] Mr Faal, Mr Faal, direct your attention
25 to the Bench, not across to counsel. Thank you.

1 MR FAAL: [10:20:20] Thank you. Thank you, Mr President.

2 So we want to know what is the position of Libya on this, a clear, unambiguous

3 position: Is this case admissible according to Libyan law and therefore Dr Gaddafi

4 must be brought to The Hague for trial? Or is this case inadmissible?

5 Your Honours, in this appeal there are certain common grounds which can help

6 narrow the questions that we have to deal with, and I would try to list some of them:

7 It is common ground that Dr Gaddafi was detained on 19 November 2011. That he

8 was imprisoned upon the orders of the Libyan attorney general's office, that his case

9 was investigated by the government of Libya.

10 That the government of Libya authorised and facilitated visits by ICC lawyers to him

11 when he was in custody.

12 That he was tried in Libya before the Court of Assize in case 630 of 2012 and that he --

13 PRESIDING JUDGE EBOE-OSUJI: [10:21:40] You can -- go on, please, you can finish

14 that point and then wait for me to ask you one question for clarification.

15 MR FAAL: [10:21:48] Indeed. Thank you, Mr President.

16 He was tried before the Tripoli Court of Assize in case 630/2012, that he attended

17 some sessions by video link and he was represented by counsel in some sessions.

18 PRESIDING JUDGE EBOE-OSUJI: [10:22:03] Just for clarification, when you say it is

19 common ground that he was visited by ICC lawyers, can you be more specific? ICC

20 lawyers could be lawyers coming from the Office of the Prosecutor, it could also be

21 lawyers coming from Office of Public Counsel for the Defence --

22 MR FAAL: [10:22:30] Thank you very much, Mr Chair --

23 PRESIDING JUDGE EBOE-OSUJI: [10:22:33] -- on his behalf.

24 MR FAAL: [10:22:35] Mr President, excuse me. I would, I would say he was visited

25 by lawyers of the OPCD. That is the understanding I have. Thank you very much.

1 May I proceed, Mr President? Thank you.

2 It is also common ground that he was convicted and a reasoned judgment was issued
3 and he was sentenced on 28 July 2015; that Dr Gaddafi was imprisoned for a period
4 after the sentence.

5 And that the evidence shows that he was subsequently released on what we claim is
6 the application of Law No. 6 of 2015.

7 What is not common ground I will flag right away, is the question whether he was
8 convicted *in presentia* or *in absentia*. Our position, Mr President, is that he was
9 convicted *in presentia*. We had made that point, I believe, quite clearly in footnote 32
10 of our submissions in our appeals brief.

11 We merely discussed the effect of the, what was called the *in absentia* conviction
12 simply because we did not want to open a debate on the application of Libyan law.
13 But that has now become an issue in view of the questions asked by your Honours
14 and we will find time to deal with that adequately.

15 PRESIDING JUDGE EBOE-OSUJI: [10:24:05] So you will be discussing, you will be
16 giving the Court, to the best of your ability, the picture of how it was that he was tried
17 and convicted, or tried or convicted in his presence?

18 MR FAAL: [10:24:24] Yes, Mr President. We will address all those. But we would
19 also address Libyan law on the issue. What does Libyan law say when particular
20 facts exist?

21 PRESIDING JUDGE EBOE-OSUJI: [10:24:37] Thank you.

22 MR FAAL: [10:24:39] And the correct finding the trial judge should have entered.
23 Thank you. Thank you very much, Mr President.

24 Your Honours, however one looks at the facts or the rules of criminal procedure, we
25 say that one thing is clear, and that is, contrary to the Pre-Trial Chamber's decision,

1 Dr Gaddafi had already been tried within the meaning of the complementarity regime
2 of the ICC.

3 And for that, Mr President, we crave the Court's indulgence to play one short video.

4 It is just one minute. That would perhaps provide colour to what has happened. It
5 would give a better understanding of what Dr Gaddafi went through.

6 And with your permission, Mr President, we ask that we be allowed to play that
7 video.

8 PRESIDING JUDGE EBOE-OSUJI: [10:25:39] Counsel for the Prosecution, do you
9 have any ...

10 MS BRADY: [10:25:44] No, we have no objection.

11 PRESIDING JUDGE EBOE-OSUJI: [10:25:46] You have no objection.

12 Is this something -- what are we supposed to do with this, Mr Faal? Is this -- this is
13 an appeal court. This is something in the nature of evidence, is it not?

14 MR FAAL: [10:26:03] Yes, Mr President, it is. We are bringing this up simply
15 because we have received very late the submissions of the government of Libya, and
16 we believe that this video would help the Appeals Chamber have a better
17 understanding of what had happened in Libya. It's just one minute. It won't take
18 much of the Court's time, Mr President.

19 MS BRADY: [10:26:38] Yes, having heard the submissions, it may be best if he could
20 explain the relevance of what is this video to his grounds of appeal before a decision
21 is made. Because if indeed, if it is indeed fresh evidence on appeal, it should come in
22 in the proper way. If it's something more as a demonstration, demonstrative piece of
23 information, then perhaps we could treat it differently. But I think it would be
24 helpful to hear a little bit more on this issue.

25 PRESIDING JUDGE EBOE-OSUJI: [10:27:17] Why don't we see the material first --

1 MS BRADY: [10:27:21] That also works.

2 PRESIDING JUDGE EBOE-OSUJI: [10:27:23] -- without prejudice to the question of
3 law or of its admissibility. Thank you.

4 MR FAAL: [10:27:32] Thank you very much, Mr President.

5 Could you assist to have the video played, please.

6 THE COURT OFFICER: [10:27:37] The evidence will be displayed on evidence 1
7 channel.

8 (Pause in proceedings)

9 MR FAAL: [10:28:33] Mr President, it appears that we are experiencing a technical
10 difficulty.

11 PRESIDING JUDGE EBOE-OSUJI: [10:28:38] Then you may proceed with the rest of
12 your submission.

13 MR FAAL: [10:28:44] Thank you, thank you very much, Mr President.

14 Perhaps maybe at a later time, if possible, we may be allowed to play the video.

15 But what we were just trying to show is to demonstrate that Dr Gaddafi went through
16 a process that no one would dispute was a trial, which makes this case so blindingly
17 obvious that this is a simple case of double jeopardy.

18 The Defence appreciate that the views expressed and the positions taken by the
19 internationally recognised government of Libya are important and have been
20 adequately used by the Prosecution in support of its case, and also by the majority of
21 the Pre-Trial Chamber. But we ask that this Court be very careful with regards to
22 this, because this Court is not a supreme court for the court of -- for the State of Libya.
23 It cannot rule authoritatively on matters of Libyan law, and any interpretation of the
24 complementarity regime which requires this Court to delve too deeply into Libyan
25 law could perhaps defeat the purpose. We may be straying too far.

1 Equally, this is not a situation in which the Court should, as the Pre-Trial Chamber
2 did, accept the submissions of the recognised government of Libya blindly, without
3 necessary scrutiny. The government of Libya is not a neutral party in this matter; it
4 has an interest in the proceedings against Dr Gaddafi. Even the latest version of the
5 government of Libya's representations and the annexes notified to the Defence, albeit
6 out of time, are again authored and signed by the head of the investigation section at
7 the attorney general's office, the very person who was in charge of the prosecution of
8 Dr Gaddafi.

9 To the extent that the Court needs to resolve issues of Libyan law, which we say is
10 limited, we invite the Court to test the submissions against the evidence and prior
11 conduct of the government of Libya and the record of the case.

12 And, your Honours, I would now move on to --

13 (Counsel confers)

14 MR FAAL: [10:31:45] I know, Mr President, the directions you had given us suggest
15 that we practically reorganise our submissions to focus more on the answers provided.
16 I hoped, Mr President, that we'd be given the opportunity to also address the
17 submissions by the Libyan, Libyan government, because we received them late. Our
18 responses are still being prepared, but we hope that we would have an opportunity,
19 at least at a later stage to respond to them more directly if that becomes necessary.

20 PRESIDING JUDGE EBOE-OSUJI: [10:32:24] Indeed, the case. I thought I tried to
21 make it obvious that the questions we gave are a guide to you; you are not limited to
22 just those.

23 The significance of the questions are those questions that have occurred to the minds
24 of the Judges upon which we want to hear specific submissions. It doesn't stop you
25 making other submissions you feel will assist your case. If that includes responding

1 to materials you received late or some thought that occurred to you as you were
2 preparing your submissions last night, feel free to make them. Just keep in mind the
3 questions that are on the minds of the Judges.

4 MR FAAL: [10:33:17] I thank you very much, Mr President.

5 Actually, the point I was trying to make is that we would also probably require time
6 to address more directly the submissions made by the government of Libya.

7 PRESIDING JUDGE EBOE-OSUJI: [10:33:32] One and a half hours should be good
8 enough for you to do everything you need to do on this matter.

9 MR FAAL: [10:33:41] We will do our utmost. And if we require more time we will
10 come back and ask. Thank you, Mr President.

11 Your Honours will note that paragraph 35 of the majority decision in addressing the
12 issue of whether Dr Saif Gaddafi had been tried, relied or examined Article 17(1)(c)
13 and Article 20(3) of the Statute, and they suggest, and we suggest, that a judgment on
14 the merits by another court, in this case a national court, is sufficient to trigger the *ne*
15 *bis in idem* prohibition. But the majority in para 36 misinterpreted this provision by
16 finding that the words "a trial by the other court" suggests that the person had been
17 subject of a completed trial with a final conviction or acquittal; and went further, to
18 borrow the language used by the Legal Representatives for Victims, that the judgment
19 must have acquired *res judicata* effect.

20 The Prosecution and the Victims Representative submit that such an interpretation is
21 consistent with the *travaux préparatoires* of the Statute and the practice of the ad hoc
22 tribunals.

23 We submit that this interpretation of the words "has been tried" is simply wrong, and
24 we have addressed this at length in our appeals brief.

25 It's wrong for two important reasons:

1 The Pre-Trial Chamber erred in failing to apply the ordinary meaning of the words
2 "has been tried".

3 And the second issue is that it imported it required finality into judgments which
4 cannot be seen or cannot be contemplated in the Statute.

5 And, with your permission, I want to discuss each of those issues briefly.

6 At the heart of --

7 PRESIDING JUDGE EBOE-OSUJI: [10:35:54] Mr Faal, before you proceed, I have
8 been listening to your submissions, perhaps this might assist.

9 If you looked at question (a) we posed, it may well be that the source or the stream of
10 thought in this matter, question (a), may be the key. I'm not saying it is, but it asks
11 the question. Lawyers always say that when you interpret a statute, piece of
12 legislation -- and that's so with international treaties in particular. The
13 Vienna Convention on Law of Treaties, Article 31, I believe, says, when you are
14 reading a legal instrument, always keep an eye on the object and purpose of that
15 instrument. The question is: What is the object and purpose of the Rome Statute?
16 What is that instrument seeking to do in international law?

17 And you move on to that we also talk about complementarity. You have spoken
18 about it in general terms so far in your submission, even admitting or accepting that
19 the idea is to close impunity gap. But what does that all mean, closing impunity gap,
20 in view of the doctrine of complementarity? What is broader object of the
21 Rome Statute, which one may say ties into that idea of complementarity? If that is so,
22 how does your case or what you want the Court to do for you fit into all that
23 structure?

24 MR FAAL: [10:38:17] Thank you, Mr President.

25 We would address that point and we would address it directly.

1 But perhaps before I go in to all that, I would just want to draw your attention to the
2 submissions we have made in our appeals brief regarding the meanings of these
3 words and the kind of interpretation that should be adopted. And perhaps without
4 further ado, I will leave those issues and rely on the submissions we have made on
5 our appeals brief and go directly and address the questions that you have asked on
6 this issue.

7 The Defence acknowledges that the determination to end impunity is set out in the
8 preamble of the Statute, alongside the principle of complementarity itself, and that the
9 contents of the preamble form part of the context of the Statute which the Court is
10 entitled to take into account in interpreting the provisions of the Statute.

11 The complementarity regime, which is often described as a cornerstone of the Statute,
12 emphasises its importance and assists in the goal of ending impunity in the following
13 respects:

14 It acknowledges that not every case can be tried before the International Criminal
15 Court. There are not the resources or the institutional capacity to take every case
16 that might fall within the jurisdiction of the Court.

17 Moreover, national courts may be better placed to deal with cases given issues such as
18 access to evidence and witnesses. The complementarity framework addresses this
19 by recalling the duty on States to prosecute serious offences and giving primacy to
20 those national prosecutions, with the Court --

21 PRESIDING JUDGE EBOE-OSUJI: [10:40:12] I thought you were discussing the
22 object and purpose of the Rome Statute, which you say is in the preamble.

23 MR FAAL: [10:40:19] We are saying that, yes, the principle, the complementarity
24 issue is mentioned in the preamble and --

25 PRESIDING JUDGE EBOE-OSUJI: [10:40:29] All right. Can you go to the preamble,

1 please, so that we can speak in concrete terms.

2 Are you there?

3 MR FAAL: [10:40:48] Yes.

4 PRESIDING JUDGE EBOE-OSUJI: [10:40:53] If you look at the fourth preambular
5 paragraph.

6 MR FAAL: [10:40:58] Yes.

7 PRESIDING JUDGE EBOE-OSUJI: [10:41:06] Number four, what does that say,
8 please?

9 MR FAAL: [10:41:08] "Affirming that the most serious crimes of concern to the
10 international community as a whole must not go unpunished and that their effective
11 prosecution must be ensured by taking measures at the national level and by
12 enhancing international cooperation".

13 And I emphasise the words must be taking, "taking measures at the national level". I
14 think that is the key and operative phrase in that.

15 PRESIDING JUDGE EBOE-OSUJI: [10:41:38] Is that the operative phrase or is it that
16 the most serious crimes of concern to the international community as a whole must
17 not go unpunished?

18 MR FAAL: [10:41:50] Yes. And that's --

19 PRESIDING JUDGE EBOE-OSUJI: [10:41:50] And then, and then to that effect --

20 MR FAAL: [10:41:52] Yes, and that to that effect, must ensure that "by taking
21 measures at the national level". So the national level, actions taken at the national
22 level are given primacy.

23 PRESIDING JUDGE EBOE-OSUJI: [10:42:10] So how does the actions taken in Libya
24 in the context of this case assure or address that objective that the most
25 effective -- that the most serious crimes of concern to the international community as

1 a whole must not go unpunished?

2 MR FAAL: [10:42:31] Mr President, we say Dr Gaddafi was arrested, he was
3 investigated, he was taken before a court and tried, he was sentenced, he was in jail
4 for four and a half years or five years, depending on how you count it, and that
5 satisfies the objectives that are contained in the preamble here. That is our answer to
6 that question, Mr President.

7 PRESIDING JUDGE EBOE-OSUJI: [10:43:02] Please proceed.

8 MR FAAL: [10:43:04] Thank you very much.

9 And we say that the national courts, as just read out in the preamble, are better placed
10 to deal with cases given, given that access to the relevant evidence to prosecute a case
11 and access to the witnesses is easier if prosecutions are done at the national level. So
12 the complementarity framework addresses this by recalling the duty of States to
13 prosecute the offences, and the ICC should be very slow to interject itself in that
14 process, it should be slow to wrest or to remove the case from this national
15 jurisdiction.

16 Complementarity also acknowledges that the effectiveness of this Court, and
17 therefore the fight against impunity, depends on cooperations with States. At every
18 stage, from arrest and surrender of suspects to the gathering of evidence, the Court
19 relies on cooperation. So the complementarity regime is important to that
20 cooperation because respect for national sovereignty is important, and we must set
21 limits to ensure that the International Criminal Court does not interfere with this
22 process.

23 PRESIDING JUDGE EBOE-OSUJI: [10:44:31] Mr Faal, is your case this, that however
24 one looks at this whole thing, however we look at it, is that what you are saying, that
25 Mr Gaddafi was in jail for, did you say four years?

1 MR FAAL: [10:44:54] We say four and a half --

2 PRESIDING JUDGE EBOE-OSUJI: [10:44:55] Four and a half, yes.

3 MR FAAL: [10:44:55] -- and the Prosecution suggests five and a half.

4 PRESIDING JUDGE EBOE-OSUJI: [10:44:58] Yes. And you are saying that that's
5 enough for purposes of complementarity, and the punishment contemplated under
6 the Rome Statute? Is that what you are saying?

7 MR FAAL: [10:45:11] No, not exactly that, Mr President.

8 We are not saying that the punishment that he has served already satisfies what is
9 contemplated in the Rome Statute, no.

10 What we are saying is that the rules that have been established in the Rome Statute to
11 assess whether a case is admissible or inadmissible have been satisfied and his case
12 should be inadmissible because he has satisfied all those requirements. The issue of
13 the punishment he has been through so far would, if that is examined, would look
14 into certain executive actions which have happened afterwards, and that is a limit,
15 that is a point that this enquiry should not get into. We are saying that by going into
16 that enquiry we will be straying too far away from the issues that are germane to this
17 case, which is to enquire whether Dr Gaddafi had been tried in Libya. And if he's
18 been tried, he is entitled to the benefit of 20(3), he should not be tried again.

19 PRESIDING JUDGE EBOE-OSUJI: [10:46:28] Is that an academic argument? I am
20 not saying it is, I am asking questions so that I can wrap my own head around what
21 your case is about.

22 Would that all be academic if the point, assuming your case is that he has served
23 enough of a punishment, if that is the case, do we need to start looking into the other
24 issue you are talking about, about the framework and all that?

25 MR FAAL: [10:46:57] I am --

1 PRESIDING JUDGE EBOE-OSUJI: [10:46:58] I am just asking you, so.

2 MR FAAL: [10:46:59] My position is we should not even stray that far, because it
3 takes us away from the issues, it takes us away from the question: Has he been tried?
4 Because the question -- the issue ends once the Court is able to find that he has been
5 tried, so what happens subsequent to that is outside this consideration. Whether he
6 has served five years, 15, 20 years, it's neither here nor there. The issue is whether he
7 has been tried according to the terms of 17(1)(c). That is the question. And that is
8 why we want the Court to limit its consideration of the issues to just that: Has
9 Dr Gaddafi been tried? We say, yes, he has been tried and convicted. End of the
10 matter.

11 That is the position we are taking and that is, that is the disciplined approach we want
12 the Appeals Chamber to take to this issue of complementarity.

13 PRESIDING JUDGE EBOE-OSUJI: [10:48:03] If we had to focus on that as you say,
14 what are we to do with the previous position of your client when he maintained that
15 the case should be admissible before the ICC when he objected -- or, when he
16 opposed, when he opposed Libya's objection to admissibility the first time? I don't
17 know whether you -- let me see, one second.

18 If you look at the filing dated 31 July 2012, titled "Corrigendum to the 'Defence
19 Response to the 'Application on behalf of the Government of Libya pursuant to
20 Article 19 of the ICC Statute'" Source, the Defence. This is a Defence filing
21 dated 31 July to 12. Have you seen that document?

22 MR FAAL: [10:49:42] No, Mr President, my colleagues are digging it up. But I can
23 just --

24 PRESIDING JUDGE EBOE-OSUJI: [10:49:46] All right, while they dig it up, let me
25 look at what it says here. Do you -- if you don't, let me read it.

1 The very first averment in that document, in the first page it's titled -- it's
2 page number 3 it says, but actually it should be page 1. It doesn't matter. Under
3 the subsection "Introduction" says: "Unsigned statement ..." Quote now, quote:
4 "Unsigned statement/sentiments from Mr Saif Al Islam Gaddafi 7 June 2012, Zintan
5 1. I want to face justice.
6 2. I want to do so because I believe that Libya, the victims in Libya, internationally
7 community and myself - all have a right to the truth, and for the truth to be made
8 public.
9 3. I would have liked to have been tried in Libya by Libyan judges under Libyan law
10 in front of the Libyan people. But what has been happening in my case cannot be
11 called a trial.
12 4. The truth is only possible in a fair and impartial trial.
13 5. There will be no truth if I am kept locked up and silenced in a remote mountain
14 village, with no or very limited possibility to speak to my lawyers in order to convey
15 my defence.
16 6. There will also be no truth if witnesses are faced with possible life sentences for
17 simply testifying in my favour, there is no security or protection for them, nor any
18 consequences if these witnesses are threatened and killed.
19 7. There will certainly be no justice in this case, if the prosecution is based on
20 evidence extracted from torture and other inadmissible evidence, or persons who are
21 too scared to say the truth.
22 8. I am not afraid to die but if you execute me after such a trial you should just call it
23 murder and be done with it."
24 Paragraph 9, we can alight that and go to paragraph 10. Paragraph 10:
25 "Over a year ago, representatives of the NTC asked the international community to

1 intervene so that the Libyan people could have justice. I am asking for exactly the
2 same thing - the only way for Libya and the Libyan people to have justice is for the
3 ICC to try this case in a fair" -- "for the ICC to try this case in a fair, impartial and
4 independent manner, and, in so doing, set standards, which Libya can follow on its
5 future path to democracy and the rule of law."

6 That's paragraph 10. Paragraph 11 goes to say this:

7 "These were the sentiments, which Mr Gaddafi wished to convey to the honourable
8 Pre-Trial Chamber, based on the views he had provided to the OPCD on
9 3 March 2012, and reconfirmed on 7 June 2012. When Mr Gaddafi attempted to sign
10 this statement after reading it, the guard, who ... informed the ICC delegation through
11 the interpreter that he was illiterate, did not understand English and that his sole
12 purpose of being present was to ensure issues of physical security, confiscated the
13 statement and brought it to Dr Gehani to read." Unquote.

14 Now I will stop there, it has been a long text to read onto the record, but I just wanted
15 to put it there.

16 What are we supposed to do with that representation? Can you help us understand,
17 please.

18 MR FAAL: [10:54:50] Yes. One common thread runs through that representation is
19 that Dr Gaddafi wanted to face justice, and he wanted to face effective justice. But
20 all this happened during the pretrial stage and I believe that those documents were
21 filed by OPCD on the basis of their advice to the client, I would imagine. And he
22 wanted to face justice but things have been overtaken by events, he has faced his
23 justice. He would have wanted to face justice at the ICC but he has faced justice in
24 Libya, the Libyan courts have presided over the case against him and they have
25 convicted him and sentenced him to death.

1 He is alive today perhaps because the Libyans decided to grant a general amnesty,
2 but he could have been executed. He has paid the price, he has faced justice. And
3 that is what he has clamoured for in the documents that he sent to the ICC, he
4 wanted to face justice. And he believed that at the time the ICC would have
5 provided better justice. But nonetheless, few years later he has faced justice in Libya
6 under the most difficult conditions. So what we are now saying is this is double
7 jeopardy if he is now to be tried again before the ICC, and that is why we are here.
8 And another issue is positions have changed. Even the position of the Libyan
9 government that brought the admissibility challenge has somewhat changed, so
10 a changed position should not really be a reason to -- well, perhaps I should, I should
11 just withdraw that statement. But I would say that the parties are at liberty to
12 change their positions. The government of Libya has changed its position.
13 Previously they said that this case is not admissible. I don't know what they are
14 saying today and that is why I put that challenge to them, let them explain specifically
15 what they want. Are they saying that this case is inadmissible? Or they are saying
16 that this case is admissible and Dr Gaddafi must be brought to the ICC?
17 But we say that he has been through the process, that process that he clamoured for,
18 that process that he asked for, he has gone through it once and he suffered all the
19 perils. And law must protect him from going through that again, and that is why we
20 are here.

21 Mr President, may I proceed on the other submissions? Yes.

22 So, in summary, complementarity acknowledges that effectiveness of this Court, and
23 therefore the fight against impunity, depends on cooperation and collaboration with
24 States.

25 The ICC had indicted Dr Gaddafi, well, Libya also indicted him. Libya prosecuted

1 him. The ICC should now cooperate with Libya and yield all matters that
2 subsequently affect Dr Gaddafi to the Libyan State because he has already been tried.
3 And we refer your Honours to page 447 of the commentary of Schabas, which
4 suggests that without Article 17 of the Rome Statute it is doubtful whether the States
5 would have agreed to the architecture of the Rome Statute because Article 17 is quite
6 important, it ensures deference to national jurisdictions.

7 In summary, the complementarity framework is designed to end impunity by giving
8 primacy to national investigations, as mentioned in the preamble and, further, by
9 setting up a framework for an effective relationship between the States and the Court
10 and national sovereignty must be respected in this regard.

11 The Court, as recently mentioned by the Prosecutor, must be a court of last resort. It
12 must not be a meddlesome court. It must not be a court that interferes with national
13 proceedings. It must not be a court that would insert itself in national proceedings.

14 Nothing in the interpretations of "has been tried" proffered by the Defence is
15 inconsistent with the position just postulated. Nothing in that interpretation is
16 inconsistent with what we have just said. The end to impunity is protected where
17 a national trial has been conducted, concluded with a judgment on the merits, on the
18 facts of the case, where the accused is imprisoned for a period following his
19 conviction and prior to his release.

20 The Defence interpretation is consistent with the deference to national proceedings
21 which is at the heart of the complementarity framework, whereas reading words into
22 the Statute to restrict the circumstances in which a case will be is inadmissible is an
23 intrusion into national sovereignty and undermines the framework as a whole.

24 We have been asked to look into the interpretation of the ad hoc tribunals and the
25 *travaux préparatoires*. We say that is absolutely unnecessary. The words contained

1 in the Statute are very clear, it's not necessary to venture out.
2 But even if you are to look at the ad hoc tribunals, this is a completely different
3 animal. Its structure is completely different from the ICC. It is intended for the
4 ad hoc tribunals to have primacy over cases, whereas the ICC is just residual
5 jurisdiction. The ICC does not have primary jurisdiction over this case, so the
6 approach would obviously be different. And on that we refer your Honours to the
7 submissions that are contained in our, in our appeals brief.
8 By your question (c), your Honours, you ask this question: How could -- or, to what
9 extent would the jurisprudence of human rights instruments, or to what extent they
10 should be taken in interpreting 17(c). We say that question cuts also to the heart of
11 the issue: do the ad hoc tribunal cases and human rights cases sufficiently take into
12 account the Statute's complementarity framework?
13 We say no, they are not burdened or constrained by complementarity. The Statute's
14 complementarity framework was rightly described by Triffterer and Ambos in their
15 commentary at page 902 as "decisively different" jurisdictional model from anything
16 that has gone before.
17 So to import the approach of the ad hoc tribunals into the work of the ICC, especially
18 on a matter in which the structure is decisively different, would in fact be creating
19 a grave error. And that is why we are here, for your Honours to correct that grave
20 error that had been made at the Pre-Trial Chamber, so reliance on the jurisprudence
21 of the ad hoc tribunals is unhelpful and fruitless on this occasion. The context and
22 statutory regime applicable to those tribunals is different from that of the ICC.
23 It must be borne in mind that the Statute of the ICTY has no equivalent system to
24 complementarity. Indeed, its provisions as to the relationship with national
25 jurisdictions are diametrically opposite with what is to obtain at the ICC.

1 First, Article 9(2) of the ICTY Statute expressly states that "The International Tribunal
2 shall have primacy over national courts." This is the opposite of complementarity in
3 the Rome Statute by which the Court has a residual jurisdiction, if national
4 proceedings, of course, are flawed.

5 Article 9(2) of the ICTY Statute provides:

6 "At any stage of the procedure, the International Tribunal may formally request
7 national courts to defer to the competence of the International Tribunal".

8 Thus, where the complementarity framework work at the ICC defers to international
9 proceedings at each of the stages defined in 17(1)(a), (b) and (c), so, clearly, the two
10 are diametrically opposite.

11 Article 8(2) of the ICTR also provides a similar architecture very different from the
12 ICC.

13 While the Defence accept that the Pre-Trial Chamber, the Prosecution and the LRV are
14 correct that ad hoc tribunals have construed the terms "has been tried" in their own
15 statutes to require final judgment, that construction cannot be read across to the
16 decisively different complementarity regime at the ICC. The systems are different so,
17 of course, the reading of those words must necessarily be different.

18 In the context of the ad hoc tribunals, because they had primacy over national courts
19 and because they had no statutory provision deferring to an ongoing national
20 investigation or prosecution - in fact the reverse is the case - only a final judgment
21 with a *res judicata* effect from a national court could possibly displace those tribunal's
22 exercise of jurisdiction over the case.

23 And I digress a little bit. The ICC, we have the benefit of Article 19(10), which
24 enables the Prosecutor on the basis of new evidence to come back and say: well, this
25 case ought not to be admissible.

1 I cannot recollect seeing a similar provision in the statute of the ICTY or the statute of
2 the ICTR, and perhaps this could also explain the difference in the infrastructure or
3 the architecture. In this case, 19(10) is a good fallback position for the Prosecutor.
4 So for *ne bis in idem* to kick in you don't necessarily have to wait for finality, you can
5 say: Yes, at this stage, from what we have seen there has been a trial, so case
6 inadmissible. But the ICC Prosecutor can always come back if there is new evidence,
7 showing that, well, perhaps a different position should have been arrived at.
8 I do not believe, I cannot recall seeing such a similar position in the statutes of the
9 ad hoc tribunals. And this could account for the difference, because there is
10 a mechanism built into the Statute to avoid situations where matters falling under
11 20(3) would not be discovered as at that time the admissibility challenge or the *ne bis*
12 *in idem* issues are being dealt with. But 19(10) is a fallback position, in our view.
13 And just to move away from this particular point, we want to say that Article 19(10) is
14 an important safeguard which perhaps should be a basis for finding also that the
15 ad hoc tribunals' approach is completely different from the ICC, and the enquiry in
16 determining whether a person has been tried should be limited to what happens
17 during the trial process and not to unnecessarily incorporate things that happen
18 beyond the trial process, such as appeals and things like that.
19 And the position is the same in respect of human rights instruments and courts. We
20 say that the ICC can in several, lots of instances look into those. But in this particular
21 case, because the architecture is different, they may be looked into but they are not
22 necessarily instructive. They are not necessarily -- the ICC must not hang its mast on
23 the interpretation given by human rights bodies.
24 We acknowledge that Article 14(7) of ICCPR would require finality. We accept that.
25 But we are not required to adopt that interpretation, first, because the context is

1 different, they relate to successive cases within a national system, but here you have,
2 perhaps I may call it a horizontal or maybe even a vertical relationship, a national
3 court and an international court.

4 Secondly, they do not include consideration of the sophisticated complementarity
5 regime and, therefore, this Court should not rely on their approach to interpreting
6 those words.

7 In any event, and in relation to the role of Article 21(3) of the Statute, the Defence
8 submits that Article 17(1)(c) and 20(3) of the Statute exist to protect a legitimate right
9 of the accused. That is the right not to be put through a trial twice and punished
10 twice for the same conduct. That is what is at stake here. Dr Gaddafi has already
11 been imprisoned for four and a half or five and a half years, during and after his
12 national trial. If the ordinary meaning of the words of 17(1)(c) results in the Court
13 protecting the accused's rights accorded by the *ne bis in idem* at an early stage of the
14 proceedings, it must be understood that this provides a more extensive protection of
15 human rights, which is not, we say, inconsistent with human rights law.

16 The Defence therefore maintain that the Pre-Trial Chamber erred in relying on the
17 ad hoc tribunals and human rights instrument or cases to reach an interpretation
18 of the Statute which is at odds with the ordinary meaning of the words "has already
19 been tried".

20 Your Honours, I now allow my colleague, Aidan Ellis -- perhaps before I do that, I
21 just want to address point (d) in your, point (d), your questions, and then I will hand
22 over to him to deal with the other issues.

23 Point (d), the issue is: Is it common ground that Dr Gaddafi's -- no, Mr Gaddafi's
24 trial in Libya was held *in absentia*?

25 We do not accept that his trial was held *in absentia*. We do not accept that at all. We

1 say, in fact, that his trial was held *in presentia*. And the fundamental facts are this:
2 Dr Gaddafi attended hearings by video link, his counsel attended some hearings.
3 Where he did not attend it was through no fault or deliberate absconding by him,
4 which at the very least takes the case outside the classic ambit of trial *in absentia*.
5 And for that we refer your Honours to Article 348 of the Libyan Code of Procedure, it
6 sets the classic case of trial of an *in absentia* situation.
7 So the Defence submit that a concluded trial *in presentia* had taken place. And we
8 would refer your Honours to the relevant provisions of Libyan law which talk about
9 this. And perhaps let me just put down, my notes aside and speak off the cuff on
10 this. Article 211 of the Libyan statute creates a situation --
11 PRESIDING JUDGE EBOE-OSUJI: [11:14:29] Which Libyan statute?
12 MR FAAL: [11:14:31] The Criminal Procedure Code.
13 Allow me, Mr President, let me just fetch a copy.
14 It is annex G of the filings, it is Code of Criminal Procedure and supplementary laws.
15 We say that perhaps the judge in Libya made a fundamental error. The applicable
16 provision should have been 212, but the judge made a finding on 211. And let me
17 read out what 212 says, and it says where -- excuse me, excuse me, quote:
18 "The verdict shall be considered *in presentia* for all litigants appearing upon
19 [a] summons on the action, even if the litigant leaves the hearing afterwards or does
20 not appear in deferred hearings without an acceptable excuse."
21 So the mere fact that he had appeared, the mere fact that he was present during some
22 of these proceedings qualifies that case to *in presentia*. That is what 212 says, so it is
23 therefore surprising that the judge applied 211.
24 But even if one says 211 could be applicable, let's read it and see what it says. It says:
25 "In the event the subpoenaed litigant does not duly appear before the court at the date

1 mentioned in the subpoena and does not send an attorney in cases where he is
2 authorised to do so, an *in absentia* verdict shall be rendered after reviewing the
3 documents. However, if the subpoena was delivered to the litigant in person,
4 the court shall - if he did not submit an excuse justifying his absence - decide to
5 consider the verdict *in presentia* ..."

6 Even this provision, if applied correctly, would mean that Dr Gaddafi's trial was
7 *in presentia*. He attended the Court on the basis of the fact that he was served with
8 papers. The other instances in which he could not attend, well, he did not submit
9 any excuse.

10 And, and in addition to that, the judge found that: well, Dr Gaddafi was not here out
11 of his own volition. That is what the judge said. If that is accepted as true, then
12 under 211 the judge should have found that it is *in presentia*.

13 PRESIDING JUDGE EBOE-OSUJI: [11:17:37] Can you take that again. Did you say
14 the judge found that when he was absent his absence was not due to his own volition?
15 Was that what you're saying?

16 MR FAAL: [11:17:51] Said the absence was due to his own volition.

17 PRESIDING JUDGE EBOE-OSUJI: [11:17:55] The absence was due to Mr Gaddafi's
18 own volition. So Mr Gaddafi wanted to be absent and he was.

19 MR FAAL: [11:18:03] That is what the judge said. And he cited by way of example
20 the fact that: well, Dr Gaddafi initially wanted to be tried in Zintan. That's what the
21 judge said.

22 In addition to that, though, because I have to exercise with the greatest candour, I
23 have to say it as it is, the judge in addition to that also did say that he could not be
24 served by the judicial police.

25 But the premise of the decision was that Dr Gaddafi did not appear as a result of his

1 own volition - that is what the judge said - and on the basis of 211 that should have
2 given rise to an *in presentia* finding.

3 But there is also another issue that is perhaps -- in fact, Mr El-Gehani, who appeared
4 before, I think, believe it was the Pre-Trial Chamber, had this to say. He said:

5 "Under the Libyan law, as it is in other Latin law, those two types of trials unlike the
6 ICC. We know the trial with the presence of the accused and *in absentia* trials, but in
7 the case of Saif Al-Islam Gaddafi we cannot have *in absentia* trials as long as he is
8 present and the location of his presence is known on the Libyan territory, if this is
9 what you meant, madam?"

10 So by their own interpretation there could not have been a trial *in absentia*. He said
11 trial *in absentia* is not permitted in Libya if the location of the witness is known.

12 But there is another issue that is really interesting. We understand that Dr Gaddafi
13 was almost in the same circumstance as accused person 4 and 6. They attended
14 some of the trials and did not attend others. They were convicted *in presentia*,
15 Dr Gaddafi was convicted *in absentia*, a fundamental inconsistency in the approach
16 that was taken by the judge.

17 But, in any case, an interpretation of 212 would clearly suggest that the most
18 applicable provision under the circumstances would have been 212, and that meant
19 a sentence *in presentia*.

20 PRESIDING JUDGE EBOE-OSUJI: [11:20:59] Let's get some facts straight on the
21 record.

22 Now, can you help us: When precisely did Mr Gaddafi's trial in Tripoli start? And
23 when did it end? Within that span, how many days was he in court?

24 MR FAAL: [11:21:22] We would say -- I will get the exact dates as to when it started
25 and when it ended. But he appeared four times before the Court.

1 PRESIDING JUDGE EBOE-OSUJI: [11:21:31] He appeared four times.

2 MR FAAL: [11:21:33] Yes. And his lawyers appeared in other times.

3 PRESIDING JUDGE EBOE-OSUJI: [11:21:37] How many other times, do you know?

4 MR FAAL: [11:21:40] I don't know precisely, but I want to believe it's two times
5 more than Dr Gaddafi. That is the impression I have.

6 He said four times. Yes, four times. But we also understand that at least four,
7 appeared in Tripoli twice, and twice in Misrata by video conference.

8 PRESIDING JUDGE EBOE-OSUJI: [11:22:13] Right. On the occasions when
9 Mr Gaddafi was not in court, why was that? Was that because he chose to abstain or
10 was it because he was prevented from appearing?

11 MR FAAL: [11:22:33] Well, we say, the information we received, my instructions are,
12 that the video link broke down in Tripoli so they could not connect to Zintan or
13 Misrata, so therefore he could not have appeared by video link, and the trial
14 continued.

15 PRESIDING JUDGE EBOE-OSUJI: [11:22:58] And on those occasions when he, you
16 said he appeared, was that appearance only by video link or was it physically in the
17 courtroom in any of those?

18 MR FAAL: [11:23:15] Well, I would say he appeared by video link but appeared in
19 the courtroom constructively, because that can only be interpreted --

20 PRESIDING JUDGE EBOE-OSUJI: [11:23:25] Fair enough. But let's get the physical
21 fact first and then we can go to the constructive take on it.

22 Are you saying that, when you say he appeared, the appearance you are talking about
23 was appearance by video link?

24 MR FAAL: [11:23:45] Yes, Mr President.

25 PRESIDING JUDGE EBOE-OSUJI: [11:23:46] So at no time was he in the courtroom

1 physically.

2 MR FAAL: [11:23:49] No, Mr President.

3 PRESIDING JUDGE EBOE-OSUJI: [11:23:51] I am just trying to get the fact here,

4 I am not (Overlapping speakers)

5 MR FAAL: [11:23:54] Yes.

6 PRESIDING JUDGE EBOE-OSUJI: -- interpretation of them.

7 MR FAAL: [11:24:01] Indeed. But we bring this just to show that we cannot rely on

8 what happened in Libya. We cannot reopen Libyan law because it gets us into

9 a Pandora's box. We would have to question a lot of the actions that have been taken

10 by Libyan officials.

11 PRESIDING JUDGE EBOE-OSUJI: [11:24:27] You can make that submission.

12 One more question before you finish that: Was there any time that Mr Gaddafi was

13 prevented from appearing, either by video link or physically?

14 MR FAAL: [11:24:48] Well, I can say that because of the physical impossibility of

15 him appearing via video link, because the connection was down so he could not

16 appear, I do not have any information whether he was refused to go anywhere else.

17 I do not have that information.

18 PRESIDING JUDGE EBOE-OSUJI: [11:25:12] Whether, you mean whether somebody

19 else prevented him from going?

20 MR FAAL: [11:25:17] Yes, I do not have that information.

21 But what we do know, Mr President, is that at all times he was in the custody of the

22 government of Libya. And that is an important fact.

23 PRESIDING JUDGE EBOE-OSUJI: [11:25:29] Thank you. Please proceed.

24 MR FAAL: [11:25:30] Thank you very much.

25 So perhaps I should now hand over to my colleague to address the subsequent

1 questions.

2 Thank you. Thank you, Mr President.

3 MR ELLIS: [11:26:13] Sorry, your Honours, I am not sure the microphone is working
4 there.

5 Thank you, your Honours.

6 To complete that final point, your Honours, the breakdown of the hearings that were
7 attended by video link and by counsel is set out at footnote 72 and 73 of the Defence
8 admissibility challenge, if that would assist your Honours further.

9 Your Honours, I am left to deal with the remaining issues on Libyan law first. I see
10 that we have used a lot of our allotted time already, so if I may I will move through
11 those issues relatively quickly because of course the Defence position is, first, that this
12 Court --

13 PRESIDING JUDGE EBOE-OSUJI: [11:26:59] Can you hold on for a minute, please.
14 (Pause in proceedings)

15 PRESIDING JUDGE EBOE-OSUJI: [11:27:29] All right.

16 Counsel, just to let you know, we will be rising at 11.45 just for morning break. But,
17 for your anxiety, you will have noticed that I detained Mr Faal with some questions
18 and we will give you back some time to make up for time spent discussing my --

19 MR ELLIS: [11:27:59] I am very grateful, your Honour.

20 Will that be further time this morning or tomorrow as part of the bank of time?

21 PRESIDING JUDGE EBOE-OSUJI: [11:28:07] We will return to you on that, but
22 proceed.

23 MR FAAL: [11:28:09] I am very grateful, your Honour. Your Honours, in any
24 event, as to the questions on Libyan law, you've already heard the submissions made
25 by my learned colleague that, first, we say the Court should be slow to resolve

1 detailed questions of a national legal system.

2 And second, that, in any event, whichever route one follows through the Libyan
3 procedural rules, we say, leads to the same outcome: Mr Gaddafi has been tried.

4 And that any doubt about finality is removed, even if finality is a requirement - we
5 say it's not - is removed by the application of Law No. 6 of 2015 to him.

6 But to assist as best we can, your Honours, with your Honours' questions, firstly, at
7 question (e), your Honours ask whether retrial is automatic in the case of *in absentia*
8 proceedings.

9 We of course do not accept that this was an *in absentia* proceeding, as a preliminary
10 point. But we do accept that in ordinary circumstances, following a trial *in absentia*,
11 Article 358 of the Criminal Procedural Code appears to have an automatic right to
12 retrial. And that appears to be confirmed by paragraph 26 of the government of
13 Libya's very recent representations.

14 There is one complication in the circumstances of this case, your Honours, and that of
15 course --

16 PRESIDING JUDGE EBOE-OSUJI: [11:29:35] There are lots of complications in this
17 case, are there not?

18 MR ELLIS: [11:29:39] One complication on this issue, your Honours. I thought
19 I was going to have a straightforward answer to give you to at least one of the
20 questions, but alas, no.

21 The complication is this, your Honours: This case of course did not only concern
22 Mr Gaddafi, it concerned various other defendants, some of whom were convicted
23 *in presentia* and some of whom were convicted *in absentia*. We understand that there
24 is a proceeding ongoing in relation to some of those defendants who have brought an
25 appeal and whose file is still pending.

1 The potential significance of that, your Honours, is that pursuant to Article 396,
2 I believe it is, of the Code, where there are multiple defendants, some of whom appeal
3 and some don't, the ruling on that appeal may be applicable even to the defendants
4 who have not appealed. Of course, a standard provision in relation to multiple
5 accused cases.

6 But the question would arise in this case whether one first goes to a retrial or whether
7 one first waits for the appeal that is pending. But, in our submission, that's
8 a difficult question of Libyan law to which we do not know the direct answer and
9 that's why we prefer a straightforward -- one of the reasons why we put forward the
10 straightforward construction of Article 17(1)(c) which requires the Court to look at
11 these matters at an arm's length, as it were, and just look to see has he been tried.
12 We say yes, he has.

13 Your Honours, question (f) then asks how is Article 358 applicable to Dr Gaddafi
14 given that he did not abscond but was in detention throughout? And, your Honours,
15 we say this goes back to the earlier submissions made in response to question (d), it
16 highlights the fact that this is not an *in absentia* situation, it's not a classic *in absentia*
17 situation. The path through the Procedural Code beginnings at Article 348, which
18 provides a discretion to issue a verdict *in absentia* where the accused fails to appear.
19 And Article 358, we say, follows on from that by also presupposing a classic case. It
20 begins, "If a person who has been convicted *in absentia* makes himself available or if
21 he is arrested," well, that presupposes that he is not already arrested, as Mr Gaddafi
22 was.

23 And of course that's rather the point of a trial *in absentia*, your Honours, because the
24 point of going through that verdict, getting that result *in absentia* is that the loss of
25 legal status that results, in our submission, through for example, Article 353, is

1 a means of encouraging a person to make themselves available for trial. This is not
2 that situation. This is a person who was there in detention throughout and, in our
3 submission, it is not *an absentia* situation. The Libyan authorities knew exactly where
4 he was and he did attend four sessions by video link after the procedural law was
5 specifically amended to allow for that possibility.

6 Your Honours then ask at question (g) --

7 PRESIDING JUDGE EBOE-OSUJI: [11:33:09] Could it be here that there is perhaps
8 a fundamental difficulty with the definition of trials *in absentia*? Now without going
9 too much into Libyan law, could it be that the premise of their definition, or so to
10 speak, of trial *in absentia*, is this: If the accused person was given the opportunity to
11 appear, either through video link or physical presence, and the accused person chose
12 not to appear, then that was not trial *in absentia*. Could it be it?

13 MR ELLIS: [11:33:59] Your Honour, I think that goes back to one of the points that
14 my learned colleague was trying to make with reference to Articles 211 and 212. It
15 sets up a situation where *absentia* is for those who, having been served, choose not to
16 attend. Whereas the situation here, we would say, is *in presentia*, he has being served,
17 he has attended some sessions, and the fact that he does not attend certain other
18 sessions because of, apparently, technical difficulties with the video link doesn't
19 change that fact. It is fundamentally an *in presentia* situation, we would say.

20 PRESIDING JUDGE EBOE-OSUJI: [11:34:37] And whatever be the case you are
21 saying that the determination of that depends on Libyan law?

22 MR ELLIS: [11:34:45] It must, your Honours.

23 Your Honour then asked at question (g) in what circumstances an *in absentia*
24 conviction would become final. And again this is of course premised on it being
25 *in absentia*, which we do not accept. But if it helps the Chamber, our understanding

1 of Libyan procedural law would be that the lapse of penalty by prescription would
2 not ordinarily apply to a death penalty case, and on that issue we seem to agree with
3 the government of Libya's recent representations at paragraph 21, your Honours.
4 Finally as to question (h), which asks about the review by the Court of Cassation in
5 the event of a death penalty case, we note the government's representation at
6 paragraph 24 suggesting that review and approval by the supreme court judge is
7 required. We agree that review by the Court of Cassation would be mandatory in
8 a death penalty case, that being the clear effect of Article 385*bis*, but, your Honours,
9 this is no court higher than the Court of Cassation, review by that court would bring
10 finality. But of course we say that's a red herring because finality is not the test in
11 the Statute.

12 And that is the submission at heart that we stand by, your Honours, "has been tried",
13 "has already been tried" means, we say, no more and no less than that a trial on the
14 merits has concluded with a judgment. And whether this was *in absentia* or
15 *in presentia*, it was a trial on the merits. A reasoned judgment convicting Mr Gaddafi
16 was rendered and he remained in prison for a period of months following that
17 reasoned verdict. In those circumstances, whatever the view of the procedural laws
18 that is taken, we say the trial process was -- there was a trial process, he was tried.
19 Your Honours, I am glancing at the time. I see I have 10 minutes. May I make
20 a start on your Honours' questions (i), (j), (k) and (l)?

21 PRESIDING JUDGE EBOE-OSUJI: [11:36:59] Before you make that start, can you
22 explain again why the finality question is a red herring for purposes of Article 20(3)?

23 MR ELLIS: [11:37:11] Your Honours, yes. It goes back to the submissions that my
24 learned colleague made earlier, that we say when the Court is construing the wording
25 used in Article 17 and Article 20(3) that the choice of words is simply "has been tried",

1 "has already been tried".

2 We say that the ordinary meaning of those words is simply that a trial process has
3 been followed and has ended with a reasoned judgment on the merits, and that choice
4 of words could be contrasted with other words such as finally convicted or acquitted
5 or some other words that would have imported a requirement of finality.

6 We say that the requirement of finality is only read in by the Pre-Trial Chamber
7 because it does so relying on the ad hoc tribunal jurisprudence, the human rights
8 jurisprudence which we say does not take into account this Court's complementarity
9 framework. It's about where this Court draws the line between a case being
10 admissible by this Court and deferring to the primary role of States, and we say that
11 conscious decision is to draw the line at the end of a trial process.

12 PRESIDING JUDGE EBOE-OSUJI: [11:38:29] Is there something you have -- as you
13 said at some point, that this case has its own peculiarities that possibly -- well, not
14 possibly, that must try the determination of the case in itself. It's a different
15 proposition to hang it all on innovative views of Article 20(3) in that way when the
16 question remains if we are going to say the case has been tried and we must leave it at
17 that and ask no further question and move on. If that is a submission, what does
18 that do then to the object and purpose of the Rome Statute?

19 This is what I mean. If we are to leave it as the case has been tried, we need not
20 worry about finality - the concern of the Rome Statute is that those who commit
21 certain crimes or certain violations must not go unpunished - are we free to simply
22 leave it at: Well, yes, there has been a trial and that's the end of it, forget about
23 whether or not the crime has gone unpunished? Is it possible that following a trial
24 the difficulties or the concerns of the Rome Statute may engage on appeal? Let us
25 say that a trial was done in good faith but on appeal, the appeals court may say:

1 Well, sorry, we are reversing that and setting an accused person free, assuming there
2 had been a conviction. If that is the case, if there is a concern there, can we then
3 safely say all that the Chamber here must do is focus on the enquiry whether there
4 had been a trial and not worry about anything else that comes off of that?

5 MR ELLIS: [11:41:02] Your Honours, there is a number of questions there, some of
6 which I may need to go on to in answer to the further questions about the relevance of
7 amnesties to the Statute. But if I may in summary, what we say is that the first
8 question, the first and primary question before you is a question of construction of the
9 Rome Statute.

10 The Statute is --

11 PRESIDING JUDGE EBOE-OSUJI: [11:41:22] Keeping in mind object and purpose, of
12 course.

13 MR ELLIS: [11:41:25] Keeping in mind object and purpose, of course, but also
14 keeping in mind complementarity, which is also mentioned in the preamble to
15 the Statute itself, also mentioned in Article 1 of the Statute, and also a fundamental
16 feature of the regime, the framework, I should say, that your Honours must apply.

17 And so fundamentally, your Honours, what we say is that by stopping the enquiry at
18 the trial what the Court would be doing is respecting the framework that has been
19 placed in Article 17 and 19 of the Statute, which reflects drawing a balancing line
20 between the residual role of the Court as an international institution, but the primary
21 role of States to investigate and try cases within their own sovereignty.

22 And, your Honours, there is a danger that in -- or two dangers, your Honour: Firstly,
23 a purpose of interpretation of the Statute can only take one so far. The starting point
24 still in the Vienna Convention, we would say, is the ordinary meaning of terms. One
25 can interpret those terms in the light of the purpose of the Statute but one always has

1 to come back to the words, one can't change the meaning by that route.

2 But the other point, your Honours, is that of course that wouldn't be, in any event, the
3 end of the enquiry, because what the Chamber, the Pre-Trial Chamber in this case,
4 was dealing with the very first limb of the admissibility enquiry. It was answering
5 the question: Has Dr Gaddafi been tried? And had it reached a conclusion in our
6 favour on that issue it would have needed to go on to consider all of the other issues
7 which were engaged by Article 20(3)(a) and 20(3)(b).

8 And we say, within the proper parameters of the Statute - and I will have further
9 submissions on that on our return - that was the juncture at which this discussion
10 might have become relevant. It wasn't relevant to the first question: Has there
11 been a trial? Because we say the answer to that question is clear, because of the
12 process that Dr Gaddafi went through, the investigation, the trial proceeding, the
13 judgment on the merits, the time in prison after the judgment was imposed, he was
14 tried.

15 PRESIDING JUDGE EBOE-OSUJI: [11:43:53] And tried and served some
16 punishment, according to you?

17 MR ELLIS: [11:44:00] Well, yes, your Honours.

18 PRESIDING JUDGE EBOE-OSUJI: [11:44:02] Why don't we leave it there for now.
19 This will be a convenient time for us to take the morning break and when we come
20 back you can continue with your submission.

21 MR ELLIS: [11:44:11] Thank you, your Honour.

22 PRESIDING JUDGE EBOE-OSUJI: [11:44:14] Court will rise.

23 THE COURT USHER: [11:44:19] All rise.

24 (Recess taken at 11.44 a.m.)

25 (Upon resuming in open session at 12.18 p.m.)

1 THE COURT USHER: [12:18:56] All rise.

2 Please be seated.

3 PRESIDING JUDGE EBOE-OSUJI: [12:19:23] Thank you very much and welcome
4 back everyone.

5 Counsel, you have a further 20 minutes to make your submissions. We will be rising
6 at 12.30 today for lunch break, so that gives enough time for you to finish, and the
7 OTP will begin their submissions. And then we will resume at 2.30. OTP will
8 continue and finish their submissions and then counsel for victims will go after that.
9 We will adjourning today at 10 minutes past four for today. Thank you. Please
10 proceed.

11 MR ELLIS: [12:20:13] Thank you, your Honours.

12 So I had finished dealing with the Libyan law issues and I was moving on to
13 your Honours' final four questions, which go to the relevance of the amnesty issues in
14 this case.

15 Your Honours, before I turn to the first question, we would say that to some extent
16 the question should be framed in a slightly different way. What we would say the
17 key point is, is what the Statute actually says. And it's not a question, in my
18 submission, of looking through the Statute for a role for amnesties, it's a question of
19 looking what the Statute, what this detailed sophisticated complementarity
20 framework actually says, and applying that, of course, as your Honours say, in the
21 light of the object and purpose of the Statute. And that's the theme to which we will
22 return as we go through these questions.

23 We say on the circumstances of this case, Law No. 6 of 2015 has been applied to
24 Dr Gaddafi. It has been applied in a way that brings finality to proceedings - if that's
25 even a requirement under the Rome Statute - and it is not part of the proceedings in

1 the other court to which the exceptions in Article 20(3)(a) relate, so falling outside the
2 scope of matters that are before your Honours for consideration. But I'll return to
3 that in answer to the later questions.

4 Your Honours' first question at question (i) was whether the Chamber's scope of
5 review is limited to terms of the provisions under which the specific challenge was
6 brought or whether it extends to a review of complementarity more generally.

7 Your Honours, a Chamber, your Honours, you can't be bound only by the provisions
8 of the challenge that was brought. The explanation for that, your Honours, is that
9 Article 19(1) of the Statute itself provides that the Court may, on its own motion,
10 determine the admissibility of a case in accordance with Article 17.

11 And the effect of that, your Honours, we say, must be that a Chamber of this Court
12 may decide to consider issues of admissibility but under different limbs of Article
13 17(1).

14 And we would say moreover that that would accord, in general terms, with the object
15 of doing justice because the outcome of the case should not depend on whether
16 a State or whether a party has identified the correct pleading in the Statute, but on the
17 substance of whether the case is admissible or inadmissible.

18 So the Chamber, any Chamber, is entitled of its own motion to determine the
19 admissibility of a case in accordance with any limb of Article 17, subject, perhaps, to
20 two qualifications, your Honours.

21 The first is obviously, as a matter of procedural fairness, the parties and participants
22 should have the opportunity to make submissions on any finding that hadn't
23 previously been canvassed in the specific challenge and response. And secondly, of
24 course, there may be a slight difference to the role of the Appeals Chamber in that
25 your Honours are faced with a Pre-Trial Chamber decision which considered Article

1 17(1)(c), because that is fairly and squarely the ground on which we, the Defence,
2 have made the admissibility challenge. We say he has been tried and that is the
3 issue that the Pre-Trial Chamber ruled on.

4 So if, of course, your Honours conclude that the Pre-Trial Chamber was wrong, that
5 Article 17(1)(c) is not the operative provision, you do have the discretion of your own
6 motion to consider admissibility under a different limb. But at that point
7 your Honours would need to consider, as appeals chambers often have to consider,
8 whether it's appropriate for your Honours to make your own findings under the
9 different limbs for reasons of judicial economy, or whether it would be more
10 appropriate, given the factual findings that may be involved, to remand particular
11 issues back to the Pre-Trial Chamber in order to preserve the parties' and participants'
12 right to appeal any issue that arises.

13 PRESIDING JUDGE EBOE-OSUJI: [12:24:38] Let me -- on that note, if we then look
14 at Article 17(1)(a) -- no, sorry, 17(1)(b). 17(1)(b) says, beginning with the general
15 provision, chapeau:

16 "Having regard to paragraph 10 of the Preamble and Article 1, the Court shall
17 determine that a case is inadmissible where:" And then we go to (b):

18 "The case has been investigated by a State which has jurisdiction over it and the State
19 has decided not to prosecute the person concerned, unless the decision resulted from
20 the unwillingness or inability of the State genuinely to prosecute ..."

21 So here let's concentrate on, "The case has been investigated by a State which has
22 jurisdiction over it and the State has decided not to prosecute". Since you are urging
23 us to give a definitive interpretation of this provision, according to Mr Faal when he
24 spoke, taking into account a certain facet of this case, a certain facet of it, let's look at
25 the amnesty that was granted. Let's also look at trial in the absence of an accused

1 person - need not be in this case - trial in the absence of an accused person, and let's
2 also keep in mind a provision that may say any person who has been tried in his or
3 her absence either has a right to be retried or must be retried subsequently.
4 Giving all those, if a trial has concluded in the absence of an accused person and that
5 accused person is entitled to retrial, but in the meantime there is a nervous actor, so to
6 speak, that intervenes, and that is an amnesty comes and intervenes, because of that
7 there is now a decision not to do the retrial, are we now in the zone of Article 17(1)(b)?
8 Can we now speak of a decision not to prosecute because retrial was not done?

9 MR ELLIS: [12:28:22] Your Honour, in our submission, no.

10 In our submission, the question contains its own answer when the court -- and this is I
11 think related in particular to question (l). Your Honours, as soon as one asks -- as
12 soon as one asks: Could the circumstances of this case, in particular that an amnesty
13 was allegedly passed after Mr Gaddafi's initial trial, there it is, we say, there is your
14 answer. There has been a trial, your Honours. And that means that the operative
15 provision is 17(1)(c) and 20(3)(a) and (b) rather than 17(1)(b).

16 Your Honours, we say that is the applicable provision here. This is not a decision
17 not to prosecute; he has been prosecuted, he has been through that trial process, so we
18 say that doesn't arise on these facts. But, your Honours, even if it did, the
19 consequence of course of each of the provisions of 17(1)(a), (b) and (c) being
20 applicable, we say, is the same, it ends in inadmissibility before this Court.

21 Your Honours, if I go back a step to question (j), by which your Honours ask about
22 the relevance of amnesties to the admissibility of cases under Article 17 and under
23 which limb. Your Honours, we're conscious of the danger of answering questions in
24 the abstract, since much in these cases depend on the facts and circumstances. I
25 don't need to say that to your Honours, of course, but there are many different types

1 of amnesties, blanket, conditional, general, pardons, they may happen at different
2 stages in the proceedings, so we can't give a comprehensive answer to that question.
3 We can say that there is a detailed and sophisticated framework here which the Court
4 should apply. And whilst the word "amnesty" does not appear in the text, there are
5 exceptions to the complementarity regime, in the case, for example, of unwillingness
6 and inability, which the Court can apply within the limits of the statutory definitions
7 and the statutory framework provided. So, for example, it is probably worth saying
8 at the outset that in very many cases these issues won't arise because if there is a
9 blanket amnesty before a State has investigated then there's no investigation, there's
10 no prosecution and Article 17 doesn't get engaged at all.
11 If then during a national investigation an amnesty were to be granted, we would be in
12 the territory -- but before a trial has concluded, we would be in the territory of
13 Article 17(2)(a) and the Court would not be considering amnesty per se, but the Court
14 would be answering the question whether the proceedings were or are being
15 undertaken or the national decision was made for the purpose of shielding the person
16 concerned from criminal responsibility.
17 And we say that's not synonymous with amnesty. The focus for the Court would be
18 on the words of the Statute and on whether the purpose of shielding a person from
19 criminal responsibility was made out on the facts and circumstances.
20 There is, in our submission, your Honours, a difference between a State which,
21 knowing that one particular person is wanted for crimes before this Court, passes a
22 law that only applies to that one particular person. Then your Honours might say
23 that that could be an example of shielding.
24 But it's different, in our submission, if there is a conditional amnesty capable of
25 applying to any individual, which was in fact applied to other individuals other than

1 someone who was wanted before this Court. And if that measure appears on its face
2 to be part of a national reconciliation project, we would say that would be unlikely to
3 amount to the purpose of shielding a person concerned within the meaning of the
4 Statute.

5 PRESIDING JUDGE EBOE-OSUJI: [12:32:59] What if the scenario we have would be
6 where there would be political authorities - be it executive or parliament - waits until
7 the trial is completed and immediately grant pardon or amnesty?

8 MR ELLIS: [12:33:25] well, your Honour, if I may, I see a concern in that submission
9 because, so far as I am aware, there is no evidence in the record of this case suggestive
10 of a causal link between this trial and Law No. 6 of 2015.

11 PRESIDING JUDGE EBOE-OSUJI: [12:33:40] No, no, I'm not saying in the facts of
12 this case. We're discussing the purport of and the reaches of some of the
13 submissions. See, if the submissions you made had been focused strictly in saying:
14 Look, these are the facts of this case and we're going to craft our submissions just on
15 those facts and nothing more, that's something else. But when you make
16 submissions generally as you make in the written material and also in oral
17 submissions about how to interpret article of the Rome Statute more broadly, these
18 questions do arise, don't they?

19 MR ELLIS: [12:34:18] Your Honours, they arise to an extent, but we say they always
20 have to be brought back to this case which is before your Honours for consideration.
21 And where there is a provision of national law before the Court, in my submission, it
22 would be rather a jump to say that that provision was passed in response to this
23 particular case when that doesn't seem to be on the evidence of any party or
24 participant.

25 And moreover, your Honours will of course be aware of the cases that we've attached

1 at annex 4, to I think the consolidated reply, which show that this law was being
2 applied by courts from four different locations within Libya to a range of defendants.
3 Nothing to do with this case, your Honours. So I -- with all respect, we are
4 concerned about the premise of that question. In my submission, it's not made out
5 on the facts of this case.

6 Your Honours, I see that I have five minutes left in order to address you.

7 Your Honours, I do need to deal briefly with the position under Article 20(3)(a) and (b)
8 of the Statute because your Honours ask particularly at question (k) whether an
9 amnesty may take into account -- whether, sorry, whether the Court's consideration
10 may take into account developments outside the judicial proceedings such as the
11 passing of an amnesty law.

12 And, your Honour, here again, we say it comes back to the language of the Statute,
13 Article 20(3) provides, before turning to the exceptions:

14 "... unless the proceedings in the other court:

15 (a) Were for the purpose of shielding ...

16 (b) Otherwise were not conducted independently ... "

17 And I haven't read out the full provisions for reasons of time, your Honours, but

18 going back to the submission that my learned friend made at the outset about

19 applying those provisions with a measure of discipline, and conscious of the balance

20 that the Rome Statute strikes, your Honours, between the residual role for the Court

21 but also the primary role of States in investigating and carrying out trials given

22 matters of national sovereignty, what we say is that those words have meaning.

23 The Court's consideration is limited to the proceedings in the other court and it would

24 be quite considerable overreach for the Court to step beyond that. Every step that

25 the Court took in the analysis of national executive measures after the end of a trial

1 would be a step outside the line drawn by the drafters of the Statute and a step into
2 the sovereignty of States Parties and States not party.

3 And, your Honours, that is to an extent also an answer to the questions about
4 punishment that your Honours were addressing earlier in the submission. The
5 question of adequacy of punishment, in my submission, is not before your Honours.
6 The question is: Has he been tried? And do the exceptions in Article 20(3)(a) or (b)
7 apply?

8 So, your Honours, I'm conscious I need to leave a little time for my learned friend
9 Mr Faal to conclude, but I do need to deal finally with one matter in question (1),
10 whether Libyan Law No. 6 of 2015 was validly issued.

11 And, your Honours, we do feel a sense of strangeness in addressing that issue
12 because we're not before the Libyan Supreme Court, we're here before the
13 International Criminal Court, and the question of the validity of a provision of
14 national law must be a question for the Libyan courts and the Libyan judiciary.

15 And we say the answer to that is provided by the jurisprudence that we've provided
16 at annex 4 that show that different national courts within Libya are applying this law.
17 That, in my submission, removes any doubt as to its efficacy.

18 Your Honours, the government of Libya of course maintain that the law was not
19 properly issued, and this is one of those submissions that we do ask the Court to
20 scrutinise carefully for the credibility of the submissions put forward.

21 Your Honours will have well in mind in particular paragraph 33 of the Libyan
22 government's submission which, rather than engaging with the issue, reflects simply
23 any judgment may be a bad one in spite of conformity with the provisions of the law
24 and the judgment may be originally contrary to the law.

25 Well, that's no answer at all, your Honours, to the proposition that this law is being

1 enforced, and that's the best explanation that the Libyan attorney general's office can
2 come up with for why a law that they say is invalid is in fact being applied by their
3 courts in proceedings to which the public prosecutor is a party and without the public
4 prosecutor apparently appealing or taking any step as required under Article 8 of
5 Law No. 6 of 2015 to challenge the application nationally.

6 Having not challenged it nationally, the government cannot come to your Honours to
7 assert that this provision of national law is not valid. Your Honours, it is ostensibly
8 valid, it is being applied by the courts in Libya, and this Court should not, in our
9 submission, go beyond that.

10 And with that, I yield the floor.

11 PRESIDING JUDGE EBOE-OSUJI: [12:40:12] Thank you very much.

12 MR FAAL: [12:40:15] Thank you, Mr President. We wrap up our submissions, first
13 of all, by asking if we can --

14 THE COURT OFFICER: [12:40:28] Excuse me, Counsel.

15 MR FAAL: [12:40:31] May I proceed? Thank you.

16 PRESIDING JUDGE EBOE-OSUJI: [12:40:35] Proceed.

17 MR FAAL: [12:40:36] Thank you. Thank you. Can you hear me? Yes? My
18 microphone is on? Can you hear me? Thank you.

19 Just to wrap up, Mr President, we would wish at this stage to have our video played,
20 if your Honours would allow us. It's a one-minute video. Thank you.

21 (Viewing of the video excerpt)

22 MR FAAL: [12:42:50] Thank you. Thank you very much. Mr President, we say
23 that this clearly says -- shows what happened in Libya, that Dr Gaddafi was taken to
24 court, he appeared by video link and he was tried.

25 We say that a reasoned decision was given -- was handed down, he was convicted

1 and sentenced. That should be the end of the matter. He should no longer be
2 brought before any court to be tried for the same charges.

3 We say this Court must not overreach. It must not go back to Libya to take this, this
4 case and bring it back to the ICC. But in that, in that issue, we put the Libyan
5 government on the spot to state - and don't be vague - and to state clearly for the
6 record whether they say that this case is admissible and that Dr Gaddafi must be
7 brought and tried at the ICC, or that the case is inadmissible. They should address
8 this without fail.

9 And before I conclude, Mr President, there are a few issues that we would like to
10 address arising out of the questions you had posed. You did indicate -- you did ask
11 the question whether Dr Gaddafi was prevented from attending the trial. I have just
12 received instructions clearly indicating that the reason why Dr Gaddafi could not
13 attend the hearing was because of the technical difficulties. At no point was he
14 prevented from attending any of the sessions. So it was the problems of the CCTV,
15 that's why he could not attend.

16 Another point I would wish to clarify is the issue of the video -- the document
17 your Honour read out at the beginning, this unsigned statement allegedly from
18 Dr Gaddafi. We understand that Dr Gaddafi never said he wanted to be tried before
19 the ICC. He had always maintained that he would wish to be tried in Libya, in front
20 of the Libyan people. That document he did not sign and we understand he was not
21 in contact with the ICC lawyers that produced that document before this Court. He
22 indicates it is possible that that document may have been prepared in consultation
23 with members of his family who may have interest as to what happened to him, but
24 he did not put together that document. Not -- he did not work with the ICC lawyers
25 to put together that document. This is the first time his lawyers are speaking on his

1 behalf in his name. So he distances himself with that document.
2 Your Honour had asked certain other questions about the dates, like the
3 commencement of the trial, we say it was 27 April 2014, and the court decided that
4 they would proceed without him on 16 April 2015. And on 28 April -- 28 May 2015
5 they made a decision sentencing him.

6 So to finally wrap up, we encourage this Court to find that the Pre-Trial Chamber
7 made fundamental errors in reading the requirement of finality in Article 17(c) and
8 that this Court should overturn the findings, should overturn the findings of the
9 Pre-Trial Chamber and declare this case inadmissible.

10 Now we say that is the prudent way to proceed, it would signal a disciplined
11 approach by the ICC to the issue of complementarity, it would reinforce the spirit of
12 the Statute, and it would ensure that the promise that the Rome Statute gave to the
13 States would -- is being honoured.

14 PRESIDING JUDGE EBOE-OSUJI: [12:47:37] Mr Faal, I see you are wrapping up.
15 Before you do, I know I have asked you a lot of questions because they are the ones,
16 the things troubling the mind. I asked your colleague a question and he protested
17 about the premise of the question, and the question was: What if at the end of a case,
18 immediately upon that, a political act was done granting amnesty or pardon, you say
19 there is no premise for that.

20 Now let's look at paragraph 70 of your admissibility document dated 5 June 2018.

21 Paragraph 70. Are you there? Paragraph 70 says here, quote:

22 "First, the ordinary and natural meaning of the text of Article 20(3) itself shows that
23 the term 'proceedings' is limited to judicial proceedings. Article 20(3) refers
24 specifically to 'proceedings in the other court' again, within quotes:

25 "A pardon, commutation of sentence or even an amnesty pronounced by a State, does

1 not form part of proceedings in court because they are not judicial acts. Moreover,
2 the use of the words 'in the other court' as opposed to a more expansive phrase such
3 as 'the national process as a whole' suggests that the section only applies to
4 proceedings in court and does not apply to any subsequent executive action in
5 relation to a case." Unquote.

6 This is a general submission about how Article 20(3) must be construed by the Court
7 when there is an amnesty, pardon or commutation, is it not? Not necessarily
8 something you are tying strictly to the facts of your case, is that the case?

9 MR FAAL: [12:50:06] Well, I cannot see the difference.

10 PRESIDING JUDGE EBOE-OSUJI: [12:50:08] Fair enough.

11 Now here is the point, and I return to the question: If political authorities in a
12 case -- in a national jurisdiction wait until the completion of a trial and they
13 immediately grant amnesty or pardon, are you saying that that must be disregarded
14 by the Court? As long as the trial has completed, that's all that counts?

15 MR FAAL: [12:50:39] No. No. Not at all.

16 We are saying, if that was part of a process of ensuring that the proceedings itself
17 would shield this person from responsibility, go through the motions, just convict the
18 person with a view to granting an amnesty, you see? But that would show, one, bad
19 faith. It would also show that --

20 PRESIDING JUDGE EBOE-OSUJI: [12:51:07] What if it wasn't with a view -- what if
21 the process, the trial proceeding was not done with a view to granting an amnesty or
22 shielding a person? Let's assume that there is a change in political parties, or
23 something like that, and the court does its work in good faith, a trial, concludes it, but
24 the executive comes immediately and says we are pardoning this person. Are you
25 saying we should ignore that for purposes of interpreting Article 20(3)?

1 MR FAAL: [12:51:42] The Court has to be very careful before it interjects itself in
2 these processes because, Mr President, the States must be allowed to take such steps
3 for the purposes of peace, for the purposes of ensuring there is reconciliation in the
4 society. So if the ICC would want to step in to prevent these necessary State actions
5 that would enable peace to be restored in the society, then we would hold -- lose the
6 whole essence of this international infrastructure of ensuring justice because -- I mean,
7 it's not just important to have justice and not have peace at all. So States would have
8 to do what it takes to also ensure that there is peace. Whilst we clamour for justice,
9 we also have to ensure that there is that space that would enable peace to happen.
10 I would, I would agree with your Honour that if it can be shown that this particular
11 amnesty was designed solely, was designed purposely to shield a particular person
12 from justice, I would say yes, but in this particular instance there is not so -- there is
13 no such evidence.

14 PRESIDING JUDGE EBOE-OSUJI: [12:53:10] That's a different submission altogether.
15 If you are saying that that is not what the facts of your case implicates, that's
16 a separate proposition from the general submission you make in paragraph 70.
17 That's the point, isn't it?

18 MR FAAL: [12:53:26] Yes, it is.

19 PRESIDING JUDGE EBOE-OSUJI: [12:53:27] Thank you.

20 MR FAAL: [12:53:28] Thank you.

21 As we wrap up, your Honours, we say -- I just want to be sure that I have answered
22 all these questions, these lingering questions that have been asked.

23 You asked this question as to whether Dr Gaddafi was prevented from attending.

24 Perhaps another question that could be asked is: What efforts had the government of
25 Libya taken to reach him? We say nothing, they did nothing. They pretty much

1 acquiesced to everything that had happened, including the application of the amnesty
2 law. And even the very conduct of officials of the government of Libya, we say, here
3 present, suggest that they also acquiesced to the application of the amnesty law.
4 And one action is allowing Dr Gaddafi to bring actions in his name in order to
5 address defamations that have been made against him. We do -- we have seen the
6 statements of the Libyan government, but that is far from the position of the law in
7 Libya. Article 37 of the Criminal Code clearly states that if you are sentenced to
8 death you lose your legal status. It's like you are in a state of legal interdiction.
9 Those are the words that have been used in -- by the Libyans in their submissions.
10 Also, 353 suggests that if you are sentenced to death, or *in absentia*, you lose certain
11 legal status and there are certain activities you cannot carry out.
12 The government of Libya, the same participants in these proceedings, assisted him as
13 if this is the person who had not lost status or this is the person who is not suffering
14 under Article 37 of legal interdiction. If they were to be allowed to turn around now
15 and say: Well, the amnesty law should not have been applied, it's sending mixed
16 signals. It's huffing and puffing. It's inconsistent behaviour.
17 So we wish to say, that is one of the reasons why we say that the Libyan government
18 should be put in a position where they would state clearly without any vagueness
19 what is their position in this case.
20 And without further ado, Mr President, we leave it at that. We ask that the appeal
21 be upheld and the findings of the Pre-Trial Chamber be overturned. Thank you.
22 PRESIDING JUDGE EBOE-OSUJI: [12:56:29] Thank you very much, Mr Faal.
23 Prosecution?
24 MS BRADY: [12:56:50] Good afternoon, your Honours.
25 I will first give you a brief outline of the Prosecution's position in this appeal, and also

1 a roadmap on how we intend to proceed, including answering the questions in your
2 Honours' scheduling order.

3 Your Honours, in brief, we see that there are five main issues in this appeal. Ah, but
4 if it could only be that *easy. Each of those have several sub-issues.

5 The first issue, your Honours, is: Was the Pre-Trial Chamber correct that for a case
6 to be inadmissible at the Court under Article 17(1)(c) and Article 20(3) of the Statute,
7 the prior national judgment or decision must be final, in the sense of having
8 *res judicata* effect? The answer to that is yes, and I'll be addressing this in just
9 a moment, and in doing so I'll answer your Honours' questions in questions (a)
10 through (c) of the order.

11 The second issue is: Was the Pre-Trial Chamber correct that the judgment rendered
12 against Mr Gaddafi by the Tripoli court on 28 July 2015 was not final under Libyan
13 law? And again we say it was correct, the Pre-Trial Chamber was correct. I'll also
14 be addressing this issue, and at that time I'll deal with your questions (d) through (h)
15 of the order. In brief, under Libyan law, a person convicted of crimes *in absentia*
16 must be retried if he appears before the national court. And, further, if he is
17 convicted and sentenced to the death penalty, he must have that judgment, that
18 sentence reviewed on appeal by the Court of Cassation, the Supreme Court sitting as
19 the Court of Cassation.

20 The third issue, your Honours: Was the Pre-Trial Chamber correct that any purported
21 application of Law No. 6 to Mr Gaddafi by the Al-Bayda Transitional Government
22 also did not make his judgment final by expunging his conviction sentence. Again
23 yes, the Pre-Trial Chamber was correct. Firstly, because the crimes he was convicted
24 of in Tripoli, such as murder, are excluded from the application from Law No. 6's
25 scope, by virtue of Article 3 of that law. And second, by virtue of Article 6 of that

1 law, there must be a reasoned decision by a competent judicial authority, and this has
2 not happened. A decision to give Mr Gaddafi amnesty under Law No. 6 by the
3 minister of justice, an executive member of the Al-Bayda government, is not sufficient.
4 My colleague, Ms Whitford, will briefly address these issues and will also be
5 answering question -- or, at least part of question (l) on whether or not Law No. 6 was
6 validly issued. But since we would like to hear the submissions of all the
7 participants in this room before we do so, she will actually make her submissions in
8 the time allotted for our, as it were, reply, or our further submissions.

9 The fourth issue, your Honours, this relates to the documents that the Defence relies
10 on, the national ID, identification papers, and those about his criminal accusation
11 complaints. Mr Faal only just briefly addressed this just now. In brief, our position
12 is, and leaving aside any issue about the admissibility in this appeal as of the national
13 identification papers, in our submission, none of the documents prove that Law No. 6
14 was validly applied to Mr Gaddafi because of some loss of certain rights he may have
15 under Libyan law. And there it's -- the relevant section is 353 of the Code. And it
16 doesn't prove that the government of Libya has accepted - by these actions - that it has
17 accepted it was. And, in fact, throughout the submissions that have been filed, the
18 representations that have been filed, the government of Libya has stressed several
19 times they do not consider that the Law No. 6 was validly applied to him or that he
20 has been or was lawfully released.

21 And then the fifth and final issue that we will address in our submissions this
22 afternoon: Assuming for argument's sake that Law No. 6 could be and was applied
23 to Mr Gaddafi's crimes, was the Pre-Trial Chamber correct to find that any such
24 amnesty was incompatible with international law? In brief, it was correct. And my
25 colleague Ms Regué, who will speak directly after me, will answer your final four

1 questions, questions (i) through (l), which address these matters and consider
2 potential ways to examine the admissibility of this case, and indeed the amnesty,
3 including under 17(1)(a), (b) or (c) and Article 20(3)(a) and (b).

4 So with that brief introduction I'll now turn to respond to the issues, they arose
5 actually in Mr Gaddafi's first ground, and I'll at the same time answer the first eight
6 questions in the order.

7 The question is this: Was Mr Gaddafi tried for conduct the subject of the ICC case by a
8 Libyan court, such that the *ne bis in idem* principle in Article 20(3) renders his case
9 inadmissible before the Court?

10 Now, your Honours, this requires us to answer both a legal question and a factual one.

11 The legal question is of course whether the domestic judgment must be final, in the
12 sense of *res judicata*, in the national system in order for the case to be inadmissible at
13 the Court under 17(1)(c) and Article 20(3), and we agree with the Pre-Trial Chamber
14 in the sense that it does. And the factual question is: Was his judgment, was his
15 trial in fact final? And again we agree with the Pre-Trial Chamber that it was not.

16 And I'll turn firstly to the legal question. As you'll know, your Honours should see
17 on the screen in just a moment, but as you'll know, the word "final" doesn't appear
18 expressly in either Article 17(1)(c) or in Article 20(3).

19 I think it should be on your screen. You probably know it anyway. It should be on
20 the evidence channel, I think. Is it up?

21 Okay, so Article 17(1)(c) says: "The person concerned has already been tried for
22 conduct which is the subject of the complaint, and a trial by the Court is not permitted
23 under Article 20(3)..."

24 And similarly, Article 20(3) says: "No person who has been tried by another court ...
25 shall be tried ..." at the Court for the same conduct. So we acknowledge, it says

1 "tried", not "finally tried".

2 But, in our submission, the Chamber below was correct that the *ne bis in idem*
3 principle in Article 20(3) requires the person to have been subjected to a completed
4 trial with a final verdict in order to render the case inadmissible at the Court. And
5 this means a decision on the merits which has got or required *res judicata* effect, which
6 means that no further ordinary remedies are available, the parties have exhausted
7 their remedies or their time limits have expired.

8 Now, of course your Honours will know from your own national practices that
9 whether a decision is *res judicata* will be based on the national decision at issue, taking
10 into account the national law on finality of decisions. And you'll know that what is
11 final or *res judicata* in one jurisdiction might not be in another. So, for example, in
12 many, many common law countries, it's not possible, the Prosecution cannot appeal
13 an acquittal at the first instance level and so that means a verdict will be final, it will
14 be *res judicata* once the trial court has issued that acquittal. But in most civil law
15 countries, and indeed even some common law ones such as Canada, prosecution
16 appeals against acquittals are allowed, meaning that the decision is not considered
17 final until the last appeal has been decided or their time limits for appeal, appealing,
18 have expired.

19 So this directly brings me to the cluster of questions in (a) through (c) of your
20 scheduling other.

21 The first one, question (a), you have asked: If the object and purpose of the Rome
22 Statute is to close the impunity gap, how does the Court's complementarity regime
23 serve to achieve this?

24 PRESIDING JUDGE EBOE-OSUJI: [13:07:03] While you answer that question,
25 counsel, please keep in mind one question that I was asking on the other side, and

1 that is whether, in a sense, one could say that all this might be academic - I'm not
2 saying it is - if one considered that no one -- I believe it could be common grounds
3 that the trial of Mr Gaddafi in Tripoli could not be said to happen for purposes of
4 shielding him, after all, he was convicted and sentenced to death. Right?

5 Now the question then becomes this: If he has already been in prison for four and a
6 half years as Defence counsel have said is the case, after such a trial, whether or not
7 one agreed with it, the question is can one really say that the concerns of the Rome
8 Statute are still engaged, that someone who has committed certain crimes has gone
9 unpunished in those circumstances? Keep that in mind, please.

10 MS BRADY: [13:08:28] I will indeed, your Honour, and I will definitely touch on
11 that issue.

12 Your Honour, the object and purpose of the Statute to close the impunity gap is
13 reflected clearly in paragraph 5 of the preamble. It will be now appearing on your
14 screens and you'll see that this expresses the determination of State Parties to, quote,
15 "put an end to impunity for the perpetrators of these crimes and thus to contribute to
16 the prevention of such crimes."

17 And the previous paragraph of that preamble, in paragraph 4 sheds light on what it
18 means to end impunity. And it, and I'm quoting:

19 "Affirming that the most serious crimes of concern to the international community ...
20 must not go unpunished and that their effective prosecution must be ensured by
21 taking measures at the national level and by enhancing international cooperation."

22 So ending impunity thus means not leaving such crimes unpunished, without
23 criminal sanction. And this also accords with the ordinary usage of the term
24 impunity, meaning exemption from punishment. And how this is to be achieved,
25 this is to be pursued by ensuring their effective prosecution.

1 Now, the Rome Statute seeks to further this goal of ending impunity by the
2 establishment of an international criminal court with jurisdiction over these crimes,
3 but whose jurisdiction is complementary to national jurisdictions. And in this
4 respect we agree with the Defence's submission, that the principle of complementarity
5 ensures that the primary responsibility for bringing perpetrators of these crimes to
6 account is on States, and the ICC's jurisdiction is only engaged if States are *inactive
7 or otherwise unwilling or unable to exercise that duty genuinely.

8 Your Honours, we know from the Statute's premise, the Statute's Preamble, excuse
9 me, that it is replete with references to the State's primary responsibility in that
10 respect. So if you again look at the slide on your screens, there are comments,
11 paragraphs in the preamble saying, "affirming that the effective prosecution [of such
12 crimes] must be ensured by taking measures at the national level and by enhancing
13 international cooperation," and "recalling that it is the duty of every State to exercise
14 its criminal jurisdiction over those responsible for international crimes," and
15 "emphasising that the ICC established under this Statute shall be complementary to
16 national criminal jurisdictions". So it's, the ICC's jurisdiction is to complement, not
17 to replace, the existing system of domestic criminal jurisdictions and national
18 enforcement.

19 And it's a principle so fundamental that it appears again in the first article of the
20 Statute, which emphasises again this complementary nature of the ICC. So, in brief,
21 the ICC serves the goal of closing the impunity gap by enabling the Court to, as it
22 were, step in and assert its jurisdiction when there is a risk that the most serious
23 crimes of concern to the international community will go unpunished.

24 And I will come back to that word means in a moment, because I would like to turn
25 directly to your question (b), which asks: how can our interpretation of the Statute, of

1 Article 17(1)(c) and 20(3) - which actually is also the Pre-Trial Chamber's
2 interpretation - which requires finality of the national jurisdiction, how does that then
3 accord with this object and purpose, in particular paying attention to the
4 complementarity regime of the Court?

5 Well, Article 17 of the Statute, on admissibility, gives effect to this key principle of
6 complementarity. It enables the Court to determine whether the case should be
7 heard at the domestic level or at the ICC. According to its very provisions, the ICC
8 basically defers to the national criminal process at all stages of the national process.

9 This means - and they have been briefly outlined, but to remind again - if the national
10 proceedings are in the process of criminal investigation or prosecution, that's the
11 situation in little (a) of 17(1); if investigations have occurred and a decision made not
12 to prosecute, that's under 17(1)(b); or if the person has been tried in the national
13 forum, that's the situation in 17(1)(c).

14 So, all stages are covered. It could also, and this goes to your Honour's question and
15 my colleague will get back in more detail to this, because I don't necessarily want to
16 jump right now to the amnesty question, but this could also occur in the phase of
17 enforcement of sentences, and so in that respect we disagree with the submission
18 made this morning.

19 Now, of course what I've said about deferring is only if the national proceedings or
20 the national decision was carried out genuinely, that means the State is not found to
21 be unwilling or unable as per 17, Article 17(2) or (3).

22 And I heard this morning in the Defence's submissions a sort of putting an aside of
23 those Articles 17(2) and (3), but they're vital to ensure that the ICC can perform
24 its -- try and achieve its goal of ending impunity, because through these Article 17
25 enables the Court to assess whether the case is being or has been genuinely

1 investigated and prosecuted at the domestic level, and this may occur at any stage.
2 The Court won't -- will not assert its jurisdiction if the State is pursuing or has
3 pursued genuine criminal investigative, prosecutorial or adjudicative measures
4 against the person for the same conduct. The need for Article 17 to cover all stages
5 of the national process - national criminal process, I should stress - is fundamental to
6 its operation. If we think about complementarity as being the means to try and
7 attain this object and purpose of the Statute, that is, to close the impunity gap by
8 ensuring the effective prosecution and, as appropriate, punishment of perpetrators of
9 these serious international crimes, then it requires that all stages of the national
10 proceedings - the investigative, the prosecutorial and the criminal adjudicative
11 stage - and there may also be room in the enforcement stage, I'll get to that - must be
12 conducted genuinely.

13 What does this mean? It's stage dependent. When a national investigation or
14 prosecution is ongoing, in the situation of 17(1)(a), those proceedings must have a real
15 or genuine possibility of leading to the proper adjudication of criminal responsibility
16 for the alleged perpetrator.

17 When a national investigation has occurred and a decision taken not to prosecute,
18 what is required is that the decision was taken after a genuine investigation and for
19 proper reasons. Lastly, when the person has been tried in national criminal
20 proceedings, the situation in 17(1)(c), there must have been a genuine adjudication of
21 criminal responsibility which is final. And I don't mean that the outcome, you know,
22 depends on the conviction, whether there's a conviction or an acquittal. It's that there
23 has to be a genuine adjudication which is final. So why this need then for finality in
24 Article 17(1)(c)?

25 Well, firstly, it avoids overlap with the other two prongs of Article 17(1). If

1 Article -- subparagraph little (a) of 17(1) already covers an ongoing or what we might
2 call a non-final prosecution, why would subparagraph (c) of that provision need to do
3 the same? And I'll get back to how this fits into Article 17(1)(a) in just a moment.
4 But the second reason why you need to have finality of the below, the national
5 decision or judgment, because if finality of that judgment was not required under (c)
6 of Article 17(1), one of the -- well, ordinary, one of the usual phases of criminal
7 proceedings, namely, the appeal - or, where it's allowed, the retrial - would be, as it
8 were, left out. And this would be illogical, if we recall that the goal of the Statute is
9 to close the impunity gap for these serious crimes. Article 17(1)(c) is thus meant to
10 capture scenarios which are not already covered by subparagraphs (a) and (b). In
11 other words, where national criminal proceedings are maybe in some certain
12 exceptional circumstances, where they're not possible or no longer possible, if
13 domestic criminal proceedings were still possible after a first instance decision, we'd
14 either need to revert back to 17(1)(a) and thereby break the sequence of scenarios
15 envisaged by Article 17.
16 It's not impossible. I'll get to that. But we would either be doing that or we must
17 accept that Article 17(1)(c) only applies after the national decision has become final.
18 And, your Honours, to make this point, I want to give two opposing examples.
19 Imagine we have a State where you have a first instance national trial against
20 a perpetrator and it's finished. It appears to have been conducted genuinely and
21 there's no evidence of that State's unwillingness or that it was unable to prosecute.
22 But let's assume the judgment is not final because there can or there must still be
23 a retrial or an appeal. What would happen if in those second proceedings the State
24 then conducts a sham proceeding or it becomes unable to genuinely proceed?
25 Or, for example, as your Honour asked this morning, say it was now thwarted, it was

1 stopped by way of a *novus actus interveniens* in the form of the amnesty -- an amnesty.
2 If the Article 17 assessment stops at the first instance verdict, or when that's been
3 issued, complementarity could not fulfil its function, the Court wouldn't be able to
4 properly determine as per Article 17(2) or Article 20(3)(a) and (b). They could
5 not -- the Court couldn't properly determine if the State was genuinely willing and
6 able. It would be like: Well, that's done. You know, there's nothing more for us to
7 look at. And that couldn't be right because that would defeat the Statute's aim for
8 ending impunity.

9 And at the same time, if that first instance national judgment were able to render the
10 trial at the ICC inadmissible, then there would be no accountability at the
11 international level either, and this would hardly serve to close the impunity gap.

12 Now imagine the reverse situation. A national first instance trial has occurred, but
13 the trial appears to be a sham trial held in the State to shield the person from justice.
14 It's a hypothetical. But if then there's a mandatory retrial or an appeal phase in the
15 State, those second proceedings could still lead to what might colloquially be called
16 a course correction, through a genuine proceeding in the State.

17 So once again, if the Article 17 assessment were to stop, as the Defence has suggested,
18 at the first instance verdict, the Court would not be able to properly determine if the
19 State was genuinely willing and able to do this, and it might even lead it to jump in
20 prematurely. And again, that would undermine the goal of the Statute and be
21 counter to the complementarity regime.

22 I want to address one point the Defence has made today, and that is that, well, any
23 criminal proceedings occurring after the first instance trial, well, we can just address
24 that by way of Article 19(10). But that's not what the article is meant for. Article
25 19(10) allows the Court to review its prior determination that a case is inadmissible.

1 It's a procedural vehicle, which it then conducts again in relation to the three
2 scenarios set out in Article 17(1)(a) through (c). So, in this sense, Article 19 doesn't
3 provide for a new and a sort of further fourth stage for substantive review. It
4 redirects the Court back to its Article 17, its original Article 17 assessment, and it's
5 engaged when something exceptional has meanwhile happened in the State's national
6 proceedings to affect the Court's prior assessment under Article 17.

7 This brings me to one set of questions that were asked in the morning's proceedings:
8 Could that situation of a national first instance trial decision which is not then yet
9 final, could that be covered then by a different stream, as it were, a different prong of
10 Article 17(1)(a) as being seen as, well, we're in the realm of an ongoing prosecution
11 against the perpetrator and thus that would make the case inadmissible before the
12 Court? Is that possible?

13 Well, definitely yes. That is definitely possible. If a first instance verdict is not final,
14 then it necessarily falls to be considered under one of the other subparagraphs,
15 whether that's Article 17(1)(a) or (b) and, in that context, then the Court will need to
16 consider whether the State is then willing and able to proceed genuinely. If in the
17 meantime, meanwhile, the States become unwilling to prosecute in the sense of
18 Article 17(2), the case would be admissible at the Court and if - and this may well be
19 applicable to the facts of this case - if the State has meanwhile become unable to
20 prosecute the case under Article 17(3), and there, due to a total or substantial collapse
21 or unavailability of the national judicial system making it, quote, "unable to obtain the
22 accused ... or otherwise ... carry out" -- yeah, "carry out its proceedings." Then, in
23 that case, the case would still be admissible at the Court and your Honours may view
24 this case as falling into that present situation anymore -- as well. I won't say any
25 more about that because my colleague, Ms Regué, will address this further in the

1 question on amnesties.

2 I'd like to turn then, at least before the lunch break, to question (c). Our
3 interpretation, which requires that the final, that the domestic judgment be final, is
4 consistent with *ne bis in idem* in international human rights law. And you've asked in
5 question (c), well, to what extent do those international human rights instruments
6 inform or should they inform Article 17(1)(c)? And should they be used to read
7 a requirement of finality into the article? And do they sufficiently take into account
8 the Court's complementarity regime?

9 The Pre-Trial Chamber applied it. They felt that they were also required to under
10 Article 20(3), that the interpretation of the Statute should be in harmony with
11 universal human rights standards mirrored in, *inter alia*, Article 14(7) of the ICCPR.
12 And I think there's no difference of opinion on this between Prosecution and the
13 Defence that these sources basically confirm that under international human rights
14 law the second trial of a person for the same conduct is prohibited when there's
15 already been a final decision or judgment of acquittal or conviction. I don't think
16 there's any issue there.

17 But the question is, and essentially boils down to whether there's any reason that we
18 should not interpret Article 17(1)(c) and Article 20(3) in accordance with that
19 international human rights law because of the special nature, some special nature of
20 the ICC regime, in particular its complementarity regime. So this gets me back to
21 sort of the basics of what the principle is about and how that principle then can be
22 considered with complementarity.

23 Generally speaking, those standards under international human rights law, they
24 apply to States. It protects a person, *ne bis in idem* protects a person who has been
25 subject to final national criminal proceedings from being tried again by that State and

1 thereby twice put in jeopardy of trial. And national systems vary on that front,
2 where they will draw the line on prosecution - further prosecution, I should say. But,
3 generally speaking, the principle usually doesn't prevent a State from pursuing
4 further criminal procedures such as appeals and retrials following appeals. But at
5 that point, once they're completed, *res judicata* kicks in and the person cannot be tried
6 again. And I put to one side that in some systems there may be -- they may allow for
7 further exceptional proceedings such as revision based on discovery of new facts or
8 judicial fraud.

9 So, in the purely domestic scenario, the principle of *ne bis in idem* strikes a balance
10 between these competing interests. On the one hand, the accused's interest not to be
11 continuously pursued for the same offence - at some point life must begin again for
12 the accused - and the public interest in the certainty of criminal litigation. That's on
13 one side. This is the State level. On the other side you have the States' and the
14 victims' interest in seeking to bring perpetrators of crimes to justice. So in this
15 context we can see it makes sense that only when proceedings are final, *res judicata*,
16 that the accused cannot be tried again for the same conduct or offence.

17 Now bringing that to the context of the ICC, does this balance between the various
18 competing interests, and in light of the complementarity regime, lead us to the same
19 result of requiring finality of the national judgment in the context of Article 17(1)(c)?

20 Yes, and even more so because of the complementarity nature of the Court and its
21 goal to seek an end to impunity for serious international crimes. Allow me to
22 explain.

23 For an accused alleged to have committed serious international crimes, if he has
24 already faced a domestic criminal trial, then like any other accused, his interest is not
25 to be prosecuted again for the same criminal conduct, whether in the national system

1 or at the ICC. Mr Faal mentioned that interest this morning, but he -- I don't think he
2 sufficiently mentioned the other interest which is playing against the accused's
3 interest, and that is what is most pertinent in the ICC situation because that interest of
4 the accused has to be balanced against the other compelling interests. By agreeing to
5 the Rome Statute, States Parties have essentially committed to their shared goal to
6 ensure that the perpetrators of serious international crimes are effectively prosecuted
7 and, as appropriate, punished. And victims also share that interest. And indeed,
8 under international human rights law, have the right to truth, to seek access to justice
9 and an effective remedy.

10 PRESIDING JUDGE EBOE-OSUJI: [13:31:19] Can we leave at that for now?

11 MS BRADY: [13:31:26] Okay.

12 PRESIDING JUDGE EBOE-OSUJI: [13:31:28] Then we come at -- we will have
13 a shortened lunch break. We will come back at 2.30. The Court will rise.

14 THE COURT USHER: [13:31:39] All rise.

15 (Recess taken at 1.31 p.m.)

16 (Upon resuming in open session at 2.32 p.m.)

17 THE COURT USHER: [14:32:10] All rise.

18 Please be seated.

19 PRESIDING JUDGE EBOE-OSUJI: [14:32:37] Thank you very much.

20 Ms Brady, please proceed.

21 MS BRADY: [14:32:42] Thank you. Thank you, your Honours.

22 Before the break I was addressing question (c) and I was making the point that the
23 human rights standard on finality should also apply -- there's no reason not to apply
24 it in the context of the ICC. And I was making the point that in fact it may even be
25 more reason to apply in the context of the ICC because of the complementary nature

1 of the Court and its goal to end impunity.

2 Now, on the one hand, as I said, you have the accused's interests not to be tried again
3 after finality, but this has to be balanced against a very important compelling other
4 interest, and that is that when the Rome Statute was agreed to, State Parties
5 committed to their shared goal to ensure that the perpetrators of these crimes would
6 be effectively prosecuted and, as appropriate, punished.

7 And I was making the point that victims too have this right indeed under
8 international human rights law to the truth, to seek justice and to an effective remedy.

9 Now in the Rome Statute the chosen model for doing so is complementarity, as
10 opposed to a primacy, a jurisdiction which has primacy over national jurisdictions
11 and this preferences the national proceedings. But very importantly, if they don't
12 occur, there's just no proceedings or the State has been shown to be unable or
13 unwilling to investigate and prosecute genuinely, then the case may take place, case
14 may take place at the ICC.

15 So in short, your Honours, finality of the national decision or the judgment under
16 Article 17(1)(c) and Article 20(3) is needed. If it's not final but yet could render the
17 case at the ICC inadmissible, this would undermine the Statute's goal of closing the
18 impunity gap by ensuring that serious crimes are effectively prosecuted and punished.
19 And it serves the complementarity regime of the Court by ensuring that all stages of
20 the national proceedings are captured with no gaps, and at the same time it gives
21 effect to the rights of the accused under the *ne bis in idem* principle.

22 Now I want to turn to the question of whether the Chamber, the Pre-Trial Chamber
23 was correct that the judgment in this case, the Tripoli court judgment was indeed not
24 final, meaning that his case remained admissible at the ICC. In our submission, it
25 was correct. Our position is that the conviction was rendered *in absentia* and under

1 Libyan law then he has this automatic or mandatory retrial; and secondly, that
2 because he received the death penalty, under Libyan law this requires mandatory
3 review on appeal by the court of cassation. And such a process has not yet occurred
4 for him, and indeed it cannot occur until he appears.

5 I'll first turn to the questions (d) and (f).

6 Now in (d) you've asked the question whether it's common ground about his trial
7 having been *in absentia* and in (f) you have asked whether -- effectively, you've asked,
8 well, if it was indeed *in absentia* -- sorry, you've asked whether it was indeed
9 *in absentia*, thus triggering Article 358 of the Libyan code, given -- and your reason is
10 that given he didn't abscond, but was rather held in detention while his trial was
11 ongoing.

12 We note the Gaddafi Defence made the point in its appeal brief it didn't consider the
13 verdict against him was *in absentia* rather than *in presentia*. It said it wasn't going to
14 challenge this finding in the appeal. However, the question has been raised and
15 indeed today he has clarified their position that it was an *in presentia* situation, trial
16 situation, not *in absentia*.

17 So let's go into this issue. The government of Libya has addressed it in their
18 submissions and in their earlier correspondence which was attached to the Pre-Trial
19 Chamber -- the submissions by the Prosecutor before the Pre-Trial Chamber. And I
20 point your Honours to the letter which the Libyan attorney general's office wrote to
21 the OTP, the Office of the Prosecutor, 18 September 2018, this is annex 8 to the
22 Prosecution's submissions.

23 And at page 2, the first bullet point, the observation was made by the Libyan attorney
24 general that his trial was *in absentia* because it was held in his absence while he was in
25 detention in Zintan, outside the control of the judicial police, the judiciary and the

1 public prosecution.

2 However, I note that there has been an expansion on this point in the recent

3 submissions or the recent representations which the government of Libya has filed

4 last Friday on 8 November, and that expand that they said, well, it was *in absentia* due

5 both to his wish not to attend before the court and because his detention facility had

6 become outside the control of the relevant authorities, the judicial police, et cetera.

7 That's at page 3, paras 7 to 9. And if you look at the record of proceedings and the

8 judgment of the Tripoli court, this is, this is supported.

9 Your Honour asked a few questions about how the trial -- you know, the sort of

10 process of the trial. Essentially it began against Mr Gaddafi and 36 other defendants

11 in March 2014, and indeed we agree with my, with my colleague over for the Defence,

12 that he went to -- by video link from the Zintan court he attended four sessions of the

13 trial proceedings in Tripoli.

14 I do point out, your Honours, that -- well, in July of 2014 the Zintan prison authorities

15 stopped cooperating with the Libyan authorities and you can see that, there's a whole

16 pile of correspondence about that attached to the Prosecution submissions, I think

17 especially in annex 8.2, I believe, to the Prosecution submissions in the Pre-Trial

18 Chamber.

19 Now, we heard Mr Faal say that he had instructions that the reason was because of a

20 technicality about the video link not working, not sort of connecting, or whatever.

21 And your Honours, we would be interested in knowing what the basis for that, it

22 sounds almost like it's a piece of evidence now. It's not supported by the record

23 because the record shows that it was a stoppage of cooperation with the Libyan

24 authorities. And after that point, once they had ceased, as this sort of exchange of

25 letters had ceased, he didn't attend any further sessions by video link or any other

1 means. And despite the court -- sorry, the Libyan attorney general's request that he
2 appear, the Tripoli court ordered him to appear, they made requests, but they went
3 nowhere, as it were. And yes, true, a lawyer did attend for him in -- it
4 wasn't -- I believe Mr Faal said two, I actually believe that there were about seven
5 more sessions where this lawyer was also there.

6 Now, on 20 April 2015, the Tripoli court had received the report from the judicial
7 police, the report dated 14 April 2015, it was a report, it was a letter about what was
8 going on. And at that point, once they received the letter, they formally decided to
9 continue his trial in his absence.

10 And, your Honours, I should point out, you asked about when the -- how long was
11 the trial. It was -- I think you asked that. It was about 16 months and there were 25
12 sessions. So you see, the trial went on in his -- while he was not there.

13 Now on 28 July 2015 the court delivered its verdict and, your Honours, on the screen
14 is its grounds for judgment and it set out why it was proceeding *in absentia* against
15 Mr Gaddafi. It's on your screen. And I'll quote from it what it says.

16 Your Honours it says: "Whereas it has come to the knowledge of the Court through
17 briefings on public affairs that [Mr Gaddafi] said during one of his trial sessions
18 before the Court of Appeal in ... Zintan ... that he wishes to be prosecuted in that city.
19 Therefore, his non-appearance before the Court was the result of his own free will
20 and his belief that his jailers do not have jurisdiction, as was mentioned by the
21 Director of Judicial Police in his letter ... dated" 14 April 2015 "... attached to the case
22 file. Therefore, he is deemed a fugitive from justice... Therefore, based on the
23 above and in conformity with Article (211) of the Code of Criminal Procedure, a
24 judgment *in absentia* shall be issued regarding the accused ..."

25 Now the Tripoli court, we can see from that reasons for grounds for judgment and

1 that decision about the *in absentia*, their decision to proceed, they said, was in
2 accordance with Article 211 of the Code of Criminal Procedure. If you go to that and
3 you take a look at that provision, and it's our understanding as well from reading that
4 provision and together with, there's another relevant one, Article 348 of the code, that
5 according to this, a Libyan court may conduct a trial and convict an accused
6 *in absentia* so long as certain things have happened, he's been duly summonsed or
7 subpoenaed and he's given a reason for not attending. If he doesn't give an excuse,
8 the matter proceeds as if *in presentia*. So no excuse, *in presentia*. That's in 211.
9 So just coming briefly back to the question (f), we understand that under the Libyan
10 procedure in Article 211 for the trial to proceed *in absentia*, the person must have been
11 duly served and given a reason for not attending. If you take the text of 211 of the
12 code together with what the Tripoli court did, their approach and what they said, it
13 appears that the trial court need not have found that the person had absconded, so
14 long as they were satisfied he gave a reason for attending and moreover showing it
15 was his own free will. In other words, voluntary.
16 That's an important point, your Honours, because, because of that, at least in the way
17 we read the provision and the grounds, it does appear to accord with international
18 human rights law on this issue of *in absentia* trials, especially given the mandatory
19 retrial provision in Article 358. I don't want to say a lot about that, but there
20 are -- you know, *in absentia* trials under international human rights law there are -- are
21 generally not favoured, but there are some exceptions and they are that where
22 the -- firstly you have to show that the court is satisfied the accused was duly notified
23 of the charges and the proceedings and either he voluntarily decided not to attend or
24 he fled or he absconded and also that he's entitled to a new -- a mandatory -- to a new
25 retrial if he appears.

1 Your Honours, in that respect I point you to the trial chamber of the Special Tribunal
2 for Lebanon in their *in absentia* decision which came out in November 2011 and it goes
3 into these points very well.

4 So, your Honours, what we can deduce is that -- and I'm putting it a bit colloquially
5 here, but it appears there's a bit of a meeting of the minds here, it appears
6 that -- about his detention situation. So yes, he was detained, but from what we
7 understand from the judgment, at least the way it's phrased, it appears that it may
8 also -- matched or paralleled his wish not to be there as well. So in that respect it
9 appears to have been a voluntary decision, even though it seems strange to say that
10 because he was in detention. I hope I've been clear on that point.

11 So, your Honours, in short, in line with the Bemba admissibility appeal judgment,
12 you and this Chamber, you need not, you should not go behind the national decision
13 which treated his trial and conviction as an *in absentia* one, and nor the qualification
14 which the Libyan attorney general's office has put on that. So this means that Article
15 358 is triggered, it's the one that's applicable.

16 And that brings me to question (e). You've asked essentially if he were to appear or
17 he was arrested, is a retrial required, is it mandatory under 358 of the Code of
18 Criminal Procedure or is it a right which the person asserts, the person who is tried
19 *in absentia* asserts?

20 Again the answers have been already outlined or given by the Libyan government,
21 both in their letter dated 18 September and their observations filed last Friday, and
22 they state it's a mandatory requirement. And I think we're in agreement here
23 because Mr Gaddafi also agrees that it's a mandatory one if it were to apply. He
24 doesn't think it applies.

25 Your Honours, I point you to paragraphs 19 and 21 to 22 of their written submissions

1 and I also point you to the actual terms, you'll see it on the screen now, the actual
2 terms of 358 which essentially, I'll quote from it, they say that "If a person who has
3 been convicted *in absentia* makes himself available or ... is arrested ... the prior verdict
4 shall automatically be annulled, either with regards to penalty or compensation, and
5 the case shall be heard again before the court."

6 Before I go to question (g) I will just make one more point on this. Based on what we
7 know from what's been said from the Libyan attorney general's office, both in their
8 letter on 18 September 2018 and their observations last Friday at paragraphs 11 to 15,
9 it appears that Mr Gaddafi is still outside of the control of the recognised national
10 government. If he appears or if he's apprehended, then in accordance with Article
11 358 his conviction and sentence would become automatically annulled and a new trial
12 ordered. And until that point, the decision is not final.

13 So I'll turn now to question (g) where you've asked, if you leave aside Law No. 6, are
14 there any circumstances where his *in absentia* conviction would become final under
15 Libyan law, for example, the lapse of the penalty by prescription, which is mentioned
16 in Article 358 of the Libyan code? Again, this and all these questions, really, it's very
17 much a matter as well for the Libyan lawyers here today and we look forward to
18 hearing from them on all these questions, but we can see that Articles 357 and 358 of
19 the code, of the Libyan code, that it says that a verdict and penalty issued *in absentia*
20 will be considered when the penalty expires.

21 The attorney general's office has explained in both its -- in both the representations
22 recently and the letter that these provisions don't apply. They are inapplicable.
23 And it hasn't been expressly said why, but it seems only logical that these provisions
24 would be applicable to a sentence of imprisonment and not when the person has been
25 sentenced to a death penalty. Although I guess it could apply if the person dies in

1 the meantime from other causes, then that could be a situation.

2 Finally, your Honours, I'll turn to question (h) and that is about the death penalty
3 that's been imposed. When the death penalty has been imposed, your question is
4 whether the authorities, Libyan authorities have confirmed that under Libyan law a
5 review by the court of cassation is mandatory and whether such a review has taken
6 place. And then leaving aside the issue of finality for *in absentia* trials, would a
7 review by the court of cassation render the judgment against him at the Tripoli court
8 final?

9 Again these questions have already been given by the Libyan representatives and I
10 point you to their letter on 18 September attached as annex 8, page 3, paragraphs 3 to
11 5, and page 4, paragraph 1, and their recent representations at paragraphs 24 to 27,
12 which basically confirm that the death penalty sentence is only final once reviewed
13 and ratified by the judges of the supreme court.

14 We can see from Article 385*bis* of the Libyan code that there is a mandatory procedure
15 for appeal when the death penalty has been imposed in the person's presence. But
16 that's not the case here. In that case it says that the case shall be sent to the court of
17 cassation. But that article doesn't apply to a person who has been sentenced to death
18 *in absentia* and the government of Libya has confirmed that neither the accused nor
19 his legal representative has a right to bring, participate or bring such an appeal, and
20 indeed it would be inadmissible.

21 Since the judgment was rendered *in absentia* and Mr Gaddafi is still outside their
22 control, as they have observed, these mandatory appeal provisions for the death
23 penalty would be presently inapplicable. As such, Mr Gaddafi, we understand,
24 currently has no right to appeal that verdict, that death penalty verdict because it was
25 given *in absentia*, and he can't appoint counsel to do so on his behalf. And indeed

1 I think the Defence in their submissions appear to also accept that he has no right to
2 appeal at this point and has not done so.

3 So this explains why the court of cassation has not yet reviewed the Tripoli court
4 decision for him or even commenced the process.

5 But, your Honours, even if, let's say for argument's sake, the decision of conviction
6 and sentence were to be considered as an *in presentia* verdict and not an *in absentia* one,
7 because of Article 385*bis*, we understand that the court of cassation would still need to
8 review it before it were considered final under Libyan law.

9 In conclusion on my part, your Honours, because I will hand the floor over to
10 Ms Regué for the last four questions, but in conclusion, the Pre-Trial Chamber was
11 correct that the decision was not final under Libyan law. Mr Gaddafi is presently
12 outside the control of the Libyan authorities. If he were to appear again, whether
13 voluntarily or under arrest, the judgment would have to be annulled, must be
14 annulled and a retrial held. And if he was again -- well, it's a hypothetical, but if he
15 was again convicted and sentenced to the same penalty, then this decision would only
16 be final if it had gone through the mandatory appeal to the court of cassation.

17 Your Honours, this concludes my submissions and I'm in your hands. I can move on
18 or --

19 PRESIDING JUDGE EBOE-OSUJI: [14:53:38] Your point being that the review of a
20 death penalty conviction in the circumstances of a case like this is held in abeyance
21 until the matter about retrial for trial *in absentia* has been settled and then there is an
22 activation of the review, cassation review, is that --

23 MS BRADY: [14:54:11] Yes, that's the Prosecution's understanding, your Honour.
24 Yes.

25 PRESIDING JUDGE EBOE-OSUJI: [14:54:15] Thank you.

1 MS BRADY: [14:54:17] So I will hand over to Ms Regué and she will answer the last
2 four questions.

3 PRESIDING JUDGE EBOE-OSUJI: [14:54:26] Who will deal with the question I
4 posed earlier --

5 MS BRADY: [14:54:29] Yes, I'll give --

6 PRESIDING JUDGE EBOE-OSUJI: [14:54:30] After all of this --

7 MS BRADY: [14:54:30] Yes, she will be dealing --

8 PRESIDING JUDGE EBOE-OSUJI: [14:54:31] -- is said and done, she will deal with
9 that?

10 MS BRADY: [14:54:32] She will definitely be dealing with that question as part of
11 question (k) I understand.

12 PRESIDING JUDGE EBOE-OSUJI: [14:54:37] Part of question (k).

13 MS BRADY: [14:54:38] Yes.

14 PRESIDING JUDGE EBOE-OSUJI: [14:54:39] Whether or not, after all is said and
15 done, one can still say that Mr Gaddafi, as it were, has escaped unpunished?

16 MS BRADY: [14:54:47] Exactly.

17 PRESIDING JUDGE EBOE-OSUJI: [14:54:49] Thank you.

18 MS BRADY: [14:54:50] Thank you.

19 MS REGUÉ: [14:54:52] Good afternoon, your Honours.
20 Good afternoon, your Honours. As Ms Brady has said earlier, I'm going to respond
21 to questions (i) through (l), which largely relate to the issue of amnesties and whether
22 and how are amnesties relevant to the Court's admissibility determinations.
23 In question (i), your Honours ask whether a Chamber, in deciding on an admissibility
24 challenge, is limited to the provisions under which the challenge was brought or does
25 it extend to a review of the admissibility of the case more generally in accordance

1 with Article 19(1).

2 Your Honours, the Chamber has the discretion to review the admissibility of a case
3 beyond the provisions under which the challenge is brought.

4 This is particularly pertinent if the Chamber has all the relevant information, all the
5 relevant contemporaneous information before it and identifies a fact or a changed
6 circumstance which is relevant to a prong of Article 17 different from the prong upon
7 which the admissibility challenge was brought.

8 PRESIDING JUDGE EBOE-OSUJI: [14:56:05] So you agree with the Defence on that?

9 MS REGUÉ: [14:56:09] Yes.

10 However --

11 PRESIDING JUDGE EBOE-OSUJI: [14:56:09] You do?

12 MS REGUÉ: [14:56:10] Yes, yes.

13 However, considering that the party or the State challenging the admissibility have
14 the burden to provide specific and probative evidence, it may be that they only
15 provide evidence regarding the prong upon which they base their challenge. So
16 your Honours may face a situation where you don't have before it relevant
17 information regarding the other prongs. Then the question is whether your Honours
18 should ask for that information or not. And whether your Honours should ask for
19 that information really depends on the circumstances of each case.

20 In this case, Mr Gaddafi relied on Article 17(1)(c) and the Chamber did not ask for
21 more information to Libya and did not exercise its discretion to review other prongs
22 of Article 17. And we thought, and we submit, your Honours, that they correctly
23 did that. Judge Perrin de Brichambaut in his separate opinion very aptly explained
24 why the Chamber decided not to do so. In paragraph 164 he explained that the
25 circumstances of the case had not changed because Mr Gaddafi was not detained

1 under the authority of the, of the State of Libya, of the recognised *government of
2 Libya, and therefore Libya was unable to prosecute him. Under these circumstances,
3 the Chamber's decision not to engage with other aspects of Article 17 was reasonable
4 and correct.

5 In question (j), your Honours asked whether amnesties are relevant to the
6 admissibility of a case under Article 17 and, if so, under which prong of Article 17(1).
7 Amnesties were considered during the negotiations of the Rome Statute, but they
8 were finally not included because they were found to be too controversial so they
9 were left to your Honours' decision. You can find the reference to authority number
10 1 of the list of references that we have circulated this morning.

11 Amnesties, however, may be relevant to the admissibility of a case if they have an
12 effect on a domestic case which is also before the Court. For example, a State or a
13 suspect or an accused person challenges the admissibility of the case under Article
14 19(2) relying on the effect of an amnesty on a domestic proceeding, or a State might
15 request the Prosecution to defer an investigation of potential cases under Article 18(2)
16 because the amnesty prevents or terminates the domestic proceedings or suspends
17 the execution of the sentence. Or a Chamber may also consider the relevance of an
18 amnesty if it decides to determine the admissibility of a case on its own motion under
19 Article 19(1).

20 And for the sake of clarity and common understanding, we are using the definition of
21 amnesty and pardon that the Office of the UN High Commissioner for Human Rights
22 put forward and that Judge Perrin de Brichambaut also endorsed in his separate
23 opinion, that's paragraph 16. I won't repeat them, but you can find them in
24 authority number 2 of our list of references.

25 The application of an amnesty or a pardon domestically could occur at any stage of

1 the proceedings: Before an investigation has commenced, during an investigation or
2 prosecution, but also after a final decision. This is why, we submit, amnesties and
3 pardons with respect to cases before the Court may be relevant to the different prongs
4 of Article 17. Let me explain.

5 For the purposes of the Court's complementarity assessment, an amnesty or pardon
6 could lead to the following three scenarios:

7 First, an investigation may be precluded by the application of an amnesty. This
8 could be a case of inaction and could render the case admissible before the Court.

9 A second situation could be where some investigative steps have been undertaken or
10 even a prosecution has started but the domestic authorities decide not to continue
11 with the proceedings in application of the amnesty. In that case, we might start in
12 the realm of Article 17(1)(a), which we display in the screen, and the decision not to
13 continue could be akin to a decision not to prosecute under Article 17(1)(b). In such
14 cases, the admissibility of a case would depend on the unwillingness and inability
15 tests under Article 17(2) and (3).

16 A third scenario could happen when the person concerned has already been
17 domestically tried for substantially the same conduct and there is a final decision with
18 *res judicata* effect. In such cases the application of a pardon could prevent or
19 discontinue the execution of the sentence. This scenario could fall under Article
20 17(1)(c) and 20(3), and the admissibility of the case would depend on the
21 unwillingness test under Article 20(3)(a) and (b), which largely mirrors 17(2)(a) and
22 (c).

23 And I will develop this point in question (k), answering your Honours' question, but
24 with your leave, I would like to invert the order of the last two questions and I will
25 start with question (l) and then I will move to question (k). Tomorrow my colleague

1 Ms Whitford will briefly address the constitutional validity of Law No. 6 and I
2 imagine that the Libyan representatives will also do that.

3 In question (1), your Honours ask whether the circumstances of this case, that is an
4 amnesty which has been allegedly passed after a trial but before a retrial, could lead
5 to a finding of inadmissibility under Article 17(1)(a) or (b).

6 Your Honours, if Article 17(1)(a) or (b) were to apply, the case will be similarly
7 admissible. We reach this conclusion following the two-step process inherent to any
8 admissibility assessment. Let me develop.

9 First, assuming *ad arguendo* that Law No. 6 was applicable and was applied to
10 Mr Gaddafi, the proceedings against him would have been terminated. This would
11 mean that he could not be subject to a retrial nor his case could be brought before the
12 court of cassation if he was arrested or if he surrendered. This could be considered a
13 decision not to prosecute under Article 17(1)(b).

14 Second, and I will explain more in detail, considering the facts of this case, the
15 application of Law No. 6 to Mr Gaddafi would have the effect of shielding him from
16 criminal responsibility under Article 17(2)(a), which we display in the screen. In
17 other words, Libya could be considered to be unwilling to prosecute Mr Gaddafi and
18 the case admissible before the Court.

19 But whether a domestic authority is unwilling is always a case-specific and
20 fact-specific determination. The Office of the Prosecutor has issued a policy paper
21 where we develop the principles that we rely upon which are drawn from principles
22 and standards set out mostly in various international human rights instruments and
23 jurisprudence. That's number 3 of our list of authorities.

24 But before explaining the factors that we consider relevant in this case, I want to take
25 a moment to clarify how we interpret the notion for the purpose of shielding which

1 appears in Articles 17(2)(a) and 20(3)(a). We do not understand this notion as a
2 purely subjective test that requires establishing bad faith on the part of the person or
3 body granting the amnesty. Generally, there will be multiple actors involved and
4 not all of them will act with the purpose of shielding the person from criminal
5 responsibility. Instead, the Chamber should infer the lack of genuineness of the
6 State from objective factors or as objective as possible generally related to the quality,
7 seriousness and effectiveness of the proceedings and the decision, among others.
8 The question is whether there is a defect or a series of defects in the approach taken
9 by the State which will demonstrate a lack of genuineness. And the threshold to
10 determine unwillingness, lack of genuineness is high, is a high threshold according to
11 the Appeals Chamber in the Al-Senussi case. You have the authority number 4 of
12 our list of references.

13 But now going back to Mr Gaddafi's case: We consider there are at least four factors
14 that show that the purported application of Law No. 6 to him would have the
15 purpose of shielding him from criminal responsibility.

16 First, Law No. 6 was a general law which does not exclude any category of
17 perpetrators and therefore applies to anyone who committed a crime between
18 15 February 2011 until 7 September 2015 when the law was passed, including people
19 who are considered to be the most responsible, like Mr Gaddafi.

20 But also, and that brings me to my second point, the law does not exclude
21 international crimes whose *prohibition is *jus cogens*. Mr Gaddafi is charged both at
22 the ICC but also in Libya for conduct constituting murder as crimes against humanity.
23 As this Appeals Chamber has found in another case there is an obligation *erga omnes*
24 to prevent, investigate and punish international crimes. That's authority number 5
25 of our list of references.

1 And third, your Honours, Law No. 6 does not require any form of accountability. It
2 is contrary to Libya's international obligations. As Pre-Trial Chamber I found in
3 previous admissibility decisions in this case, but also in Mr Al-Senussi's case, the
4 assessment of Libya's willingness to carry out the proceedings should be made with
5 reference to its national legal system, including its international obligations. That's
6 authority number 6. Libya is party to the Geneva Conventions, to the Additional
7 Protocols, to the Convention against Torture, and major human rights treaties, such as
8 the Universal Declaration of Human Rights, the International Covenant on Civil and
9 Political Rights, the African and the Arab Charters.

10 For example, as a result of the Geneva Conventions, Libya has an obligation to bring
11 before its courts or to extradite persons responsible for grave breaches. This
12 obligation is also known as *aut dedere aut judicare* and the ICRC has considered it as a
13 rule of customary international law applicable to both international and
14 non-international armed conflicts when crimes are committed by nationals of a State
15 or on their territory. That's rule 158.

16 And contrary to what the Libyan Cities and Tribes Supreme Council has said in their
17 submissions, this obligation has not been diluted by Article 6(5) of Additional
18 Protocol II. The drafting history of this provision, ICRC commentary and reports,
19 the Inter-American Court, and the Commission on Human Rights, and even the
20 Security Council have said that Article 6(5) does not apply to persons responsible for
21 war crimes and crimes against humanity. This provision governs the
22 non-criminalisation of mere participation in a non-international armed conflict and
23 applies to persons who have complied with international humanitarian law. It has
24 been applied, for example, to release political prisoners of a former regime or to
25 facilitate the return of refugees. The supreme council's interpretation of the

1 provision is contrary to the object of Additional Protocol II, which is to provide more
2 protection to victims of a non-international armed conflict, supplementing common
3 Article 3.

4 Likewise, the Convention against Torture, Article 7, to which Libya is party, and the
5 final version of the draft articles on the prevention and punishment of crimes against
6 humanity, which was finalised in August and submitted before the General Assembly,
7 Article 10 of the draft articles, require the State where the person is present to
8 extradite the person or to submit the case to its competent authorities for the purpose
9 of prosecution. The draft articles introduce a third alternative, which is to surrender
10 the person to a competent international criminal court or tribunal.

11 In addition, the human rights treaties to which Libya is party, the Arab and the
12 African charter of human rights recognise the right to an effective remedy and also
13 require States to respect and ensure the rights contained therein. The European
14 Convention on Human Rights and the American Convention on Human Rights
15 contain similar provisions. Regional courts and tribunals and UN bodies
16 interpreting and applying these conventions have relied on these provisions to
17 identify a duty on States to investigate, prosecute and punish serious human rights
18 violations and accordingly have found that amnesties for these crimes are generally
19 incompatible with these duties. I will refer to authority number 8 of our list of
20 reference.

21 And finally, your Honours, we note that Law No. 6 does not regulate a transparent
22 procedure to determine the eligibility of the person. In fact, the substantive and
23 procedural requirements of Law No. 6 were not applied and were not followed in
24 Mr Gaddafi's case. My colleague Ms Whitford will develop -- will develop this
25 point.

1 In conclusion, and considering these criteria, if Law No. 6 was applicable here, your
2 Honours could conclude that the Libyan authorities are unwilling to prosecute
3 Mr Gaddafi under Article 17(2)(a) and on this basis Mr Gaddafi's case is admissible
4 before the Court.

5 I have not elaborated on how the amnesty could be considered under Article 17(2)(c).
6 We consider that this provision could also apply on the basis of the same factors, but
7 we think that Article 17(2)(a) better captures the facts of this case, considering the
8 information available.

9 Now moving on to the last question: In (1) your Honours ask whether the Appeals
10 Chamber should address Law No. 6 under Article 17(1)(a) or (b).

11 Your Honours, you could certainly address the effects of an amnesty law under these
12 provisions, as I have just explained, but we submit that this is not necessary in this
13 case and this is for two reasons.

14 First, the Chamber's findings with respect to Law No. 6 were obiter. Law No. 6 does
15 not apply to Mr Gaddafi because his crimes are excluded from the law's scope of
16 application. If your Honours wish to address Law No. 6 under Article 17(1)(a) or (b),
17 you would first need to conclude that the law applies to Mr Gaddafi and was applied
18 to him, but we submit that this could not be the case.

19 But second, and more importantly, the Pre-Trial Chamber's assessment of Law No. 6
20 was correct and your Honours should uphold it. Law No. 6 cannot preclude the
21 exercise of the Court's jurisdiction. We see the Chamber's decision as comprehensive
22 in the sense that its reasoning could be relevant to other scenarios where amnesties
23 may become relevant. For example, it could also apply to the hypothetical scenario
24 where Libya refuses to surrender Mr Gaddafi on the basis of Law No. 6.

25 In such a hypothetical scenario the Court would surely reaffirm Libya's obligation to

1 cooperate from the UN Security Council Resolution 1970 referring the situation to the
2 Court. It would also note that Libya cannot rely on domestic law, including Law No.
3 6, to evade its international obligations. You can find authorities in item number 9.
4 However, the Chamber's reasoning in the decision under appeal would be an
5 additional pillar on which the conclusion that Libya should surrender Mr Gaddafi
6 would rest.

7 And now I will move to the last question, your Honour.

8 PRESIDING JUDGE EBOE-OSUJI: [15:14:32] Before you move to the last question,
9 you say Law No. 6 could not have applied to -- does not and could not have applied
10 to Mr Gaddafi.

11 MS REGUÉ: [15:14:46] Yes.

12 PRESIDING JUDGE EBOE-OSUJI: [15:14:47] On what basis was he then released
13 from prison?

14 MS REGUÉ: [15:14:51] We don't know, your Honour. We don't have the
15 information before us.

16 PRESIDING JUDGE EBOE-OSUJI: [15:14:58] Proceed.

17 They have said that --

18 MS REGUÉ: [15:15:01] Yes, I --

19 PRESIDING JUDGE EBOE-OSUJI: [15:15:03] -- he was released on the basis of
20 Law No. 6. Isn't that the submission of the Defence?

21 MS REGUÉ: [15:15:13] Sorry, this is the submission of the Defence, but this is not the
22 submission of the Libyan authorities.

23 PRESIDING JUDGE EBOE-OSUJI: [15:15:21] Have the Libyan authorities then given
24 an alternative explanation for his release? He was sentenced to death.

25 MS REGUÉ: [15:15:24] Yes.

1 PRESIDING JUDGE EBOE-OSUJI: [15:15:26] And then released.

2 MS REGUÉ: [15:15:28] Yes.

3 PRESIDING JUDGE EBOE-OSUJI: [15:15:30] Why?

4 MS REGUÉ: [15:15:31] Well, as Ms Brady has explained throughout the proceedings,
5 in the middle of the proceedings, the authorities under which Mr Gaddafi was being
6 held ceased cooperation with the court. And I understand that there were two
7 public statements, one, I believe it was in June 2016, another in July 2017 from the
8 Al-Bayda authorities where they announced that they had released Mr Gaddafi in
9 application of the law. Sorry. But the Libyan authorities have said that this is not
10 correct.

11 As Ms Whitford will develop, they have explained that the law was not validly
12 passed, we understand, and also they have explained that the law does not apply to
13 Mr Gaddafi because of the nature of the crimes for which he was charged and
14 convicted, like murder, which is expressly excluded from the law, and also the
15 procedural requirements of the law have not been followed, right, because they
16 required a reasoned decision.

17 So we understand from the Libya -- from the submissions from the Libyan
18 representatives and the authorities from -- the authorities from the executive
19 government of Al-Bayda have released Mr Gaddafi, but according to the Libyan
20 authorities, not under the application of the law.

21 With your Honours' leave I will now move to the last question.

22 In question (k), your Honours ask whether an amnesty can be taken into account
23 under Articles 17(1)(c) and 20(3) of the Statute and whether it could be considered
24 under Article 20(3)(a) or (b). You also ask whether developments outside the judicial
25 proceedings, including an amnesty law, could be considered in light of the purpose of

1 the complementarity regime. Finally, you ask how Article 20(3) will apply to the
2 facts of this case.

3 Your Honours, we believe that developments outside the judicial proceedings, such
4 as an amnesty or a pardon, could be considered under Article 17(1)(c) and
5 Article 20(3). And in fact they could render a case admissible before the Court as an
6 exception to the principle *ne bis in idem* under Article 20(3)(a) or (b). We bring up
7 now the provision in the screens.

8 Your Honour, a pardon which exempts a convicted person from serving a sentence or
9 results on an illusory sentence which is manifestly disproportionate to the gravity of
10 the crimes and to the culpability of the person may lead to a situation of
11 unwillingness under Article 20(3)(a) or (b).

12 In these circumstances, these measures, even if they take place outside the judicial
13 proceedings, have an impact on them. They undermine the very purpose of the
14 proceedings. They suppress the effects of the sentence, which would become
15 meaningless. They void the sentence of its retributive and deterrent effect. The
16 crimes will be left unpunished. They would constitute a form of impunity.

17 These measures would be inconsistent with the purpose of the complementarity
18 regime which seeks to avoid that fraud from happening. They are also contrary to
19 the object and purpose of the Rome Statute, in particular paragraphs 4 to 6 of the
20 preamble which seek to aim -- to end impunity for the most serious crimes of
21 international concern. The complementarity provisions must be interpreted in a
22 manner that give effect to this object and purpose, as Ms Brady has stressed earlier.
23 Our interpret --

24 PRESIDING JUDGE EBOE-OSUJI: [15:19:19] So that submission then, I see you
25 beginning to answer the question as I was asking.

1 MS REGUÉ: [15:19:25] Yes.

2 PRESIDING JUDGE EBOE-OSUJI: [15:19:26] Does it mean then that it all depends
3 on the facts and circumstances --

4 MS REGUÉ: [15:19:34] Yes.

5 PRESIDING JUDGE EBOE-OSUJI: [15:19:35] -- of particular cases --

6 MS REGUÉ: [15:19:37] Yes.

7 PRESIDING JUDGE EBOE-OSUJI: [15:19:38] -- when you say when the punishment
8 is manifestly disproportionate to the gravity of the offence, that that would not serve
9 the purpose of impunity required by the Rome Statute?

10 MS REGUÉ: [15:19:53] That's correct, your Honours. It depends on the
11 circumstances of each case.

12 PRESIDING JUDGE EBOE-OSUJI: [15:19:57] So then that will require, for example,
13 to compare the kinds of sentences one would get in international law verses what
14 sentence or what punishment, so to speak, one actually served, first. That's what we
15 are now reduced to doing, not that it may not be done, but is that, is that the point of
16 it?

17 MS REGUÉ: [15:20:36] Well, not necessarily, your Honours, because we can consider,
18 as we have explained before in the context of Article 17(2)(a), for the purposes of
19 unwillingness, we are trying to rely on criteria factors as objective as possible to
20 determine the lack of genuineness, right? So the same principle, the same rationale
21 will apply in this case. *We'll try to consider those factors.

22 I see your Honour's concern and indeed that was the concern of the drafters, right,
23 because the inclusion of the possibility of considering pardons in the context of the
24 enforcement of the sentences, it was discussed during the, during the drafting history.
25 And you can see that in authority number 12 of our list of authorities.

1 And in fact the International Law Commission consider that the failure to impose a
2 proportionate sentence and the failure to take steps to enforce a sentence could
3 indicate an element of fraud in the administration of justice. In fact, the draft, the
4 draft text which was sent to Rome by the preparatory committee for negotiation
5 contained the following proposal that we are uploading now in the screen, in brackets,
6 as an exception to the principle of *ne bis in idem*.

7 And I read: "Without prejudice to article 18, a person who has been tried by another
8 court for conduct also prescribed *under article 5 may be tried by the Court if a
9 manifestly unfounded decision on the suspension of the enforcement of a sentence or
10 on a pardon, a parole or a commutation of the sentence excludes the application of
11 any appropriate form of penalty."

12 However, in Rome, after much discussion, the negotiators did not include it. They
13 thought that it was too controversial due to the different sentencing practices among
14 the States. But what's important for our *discussion, your Honours, today is that the
15 drafters, they consider that the provisions of the Statute gave enough latitude for us
16 to address the lack of genuineness of the application of these type of measures during
17 the enforcement of sentences.

18 And indeed, your Honour, it's a case-specific determination where we will consider
19 factors but also the type of crimes, the contribution to the person, to the crimes. And
20 as your Honours say, when they determine the sentences in this Court, you always
21 say that there are no cases alike, right, every case is specific. So the same applies
22 when we need to assess the adequateness or the proportionality of a sentence.

23 And this is fully consistent as well with the jurisprudence of the human rights courts
24 and tribunals. In fact the Inter-American Court of Human Rights, for example, has
25 found that the enforcement of --

1 PRESIDING JUDGE EBOE-OSUJI: [15:23:37] Counsel, the interpreters and court
2 reporters would like you to slow down.

3 MS REGUÉ: [15:23:45] Sorry.

4 THE COURT OFFICER: [15:23:47] Counsel, you have five minutes left.

5 MS REGUÉ: [15:23:49] Thanks.

6 I was saying that the interpretation of the Statute is consistent with the jurisprudence
7 of regional human rights courts and tribunals.

8 PRESIDING JUDGE EBOE-OSUJI: [15:24:02] The concern here really is how do we
9 determine when a sentence is manifestly disproportionate to the gravity?

10 MS REGUÉ: [15:24:11] In the particular case of Mr Gaddafi or in general?

11 PRESIDING JUDGE EBOE-OSUJI: [15:24:14] Both.

12 MS REGUÉ: [15:24:16] In general, as I mentioned, we will consider objective criteria.

13 For example, in this particular case, if the Law No. 6 was to apply, we will consider

14 the same criteria that I mentioned before, the content and the form of the law,

15 whether it was complied or not. We will also consider the type of crimes that

16 Mr Gaddafi has committed and his contributions. And then we will assess that the

17 sentence that he served was proportionate or not.

18 PRESIDING JUDGE EBOE-OSUJI: [15:24:42] Now, we are looking here, the Defence

19 have registered the observation, and I have not heard you dispute it, that he was in

20 detention for four and a half years. As we understand these things, how they work

21 here, it would be upon conviction that would be necessarily -- not necessarily, but

22 that we're looking at deducting that from jail term if sentence of imprisonment is

23 imposed. Are we then to say is that your submission, that four and a half years

24 would be manifestly disproportionate to the gravity of the charges that you're looking

25 at at the ICC?

1 MS REGUÉ: [15:25:31] Yes. That would be manifestly disproportionate
2 considering that he has been charged with crimes against humanity of murder,
3 persecution. But in addition to that, your Honours, we understand from the
4 judgment of the court -- of the tribunal of Tripoli that back in April 2014 he -- the
5 authorities from Al-Bayda ceased collaboration with the Libyan authorities.
6 Therefore, we have no guarantee or we are not certain whether those two extra years
7 that the Defence is counting as *theoretically sentence served they were effectively
8 served, and then we will be talking about two years and a half. But regardless, if we
9 consider four years and a half, our submission is this is manifestly disproportionate,
10 your Honours.

11 JUDGE MORRISON: [15:26:28] What effect, if any, is the fact that he was sentenced
12 to death and lived under the threat of that penalty?

13 MS REGUÉ: [15:26:37] To determine the, to determine the sentence, the
14 punishment?

15 Well, in the particular circumstances of his case, he is not under the control of the
16 Libyan authorities so he's not -- I was going to say he's not facing the -- that penalty,
17 but obviously if he surrenders, there is the possibility, but he will be entitled to a new
18 retrial, your Honour, right? So in that particular case the Libyan domestic legislation
19 *as other domestic legislations foresees death penalty and it's been regulated, the
20 provisions, they afford due process rights, they afford a right to appeal.

21 So in that context, I understand your Honour's concern, but if all the procedures are
22 followed, we don't see how the fact that he faces the possibility of a death sentence
23 should be taken into account to consider the punishment that he has satisfied, that he
24 has complied.

25 And I believe, your Honours, that I have concluded my submissions. I just wanted

1 to make the last point which was about the consistency of our approach with the
2 jurisprudence of Inter-American Court of Human Rights which have considered the
3 enforcement of sentences as an integral part of the victims' right to access to justice.
4 The Inter-American Court has emphasised that the punishment must be
5 proportionate to the gravity of the crimes and to the culpability of the person and that
6 this principle applies to the determination of the sentence, but also to its enforcement.
7 In other words, a sentence cannot be rendered illusory during enforcement. And we
8 do consider that a sentence of four years and a half will be illusory in the case of
9 Mr Gaddafi.

10 To conclude, your Honours, we submit that the Chamber's decision was correct.

11 Your Honours should dismiss Mr Gaddafi's challenge and uphold the Pre-Trial
12 Chamber's decision. Thank you.

13 PRESIDING JUDGE EBOE-OSUJI: [15:29:11] Thank you very much.

14 Ms Massidda.

15 MS MASSIDDA: [15:29:24] Thank you, your Honour. I have the luxury of
16 speaking last and I having made extensive written submissions, I think I can spare
17 some time of the Court. Let's see how I can reshuffle my submissions after the
18 Prosecution's submissions, which actually contains some of the points that I intended
19 to make.

20 Mr President, your Honours, having submitted written extensive submissions both
21 before the Pre-Trial Chamber and the Appeals Chamber, I will address today mainly
22 the main arguments in relation to the questions posed by the Chamber. And for
23 clarity, I will follow the order of the question as identified by the Chamber in its
24 order.

25 I may refer during my submission to some arguments already included in our

1 submission before the Pre-Trial Chamber for the simple reason that some of the
2 questions posed by your Honours contained arguments which were already raised by
3 us before the Pre-Trial Chamber.

4 And for easy reference, what I will do, I will state now the document number for the
5 case record which is ICC-01/11-01/11-652 dated 28 September 2018 and this will allow
6 me to only refer to the relevant paragraphs later on in my oral submissions.

7 Now, your Honour, my first point is that differently from other participants in this
8 hearing, the position of the victims have our own position so far in all the
9 admissibility challenges brought so far before the Court has remained unchanged in
10 the sense that we consider that there has been no genuine and effective prosecution
11 and -- investigation and prosecution of Mr Gaddafi for the same conduct for which he
12 is sought by the Court and the fact that victims have not been granted the right to
13 truth and justice.

14 I'm turning now to the questions of the Chamber starting with question (a).

15 As far as question (a) is concerned, it is our submission that the ICC is not meant to
16 close all conceivable impunity gaps. The ICC is part of a system of regional and
17 international organisations that works towards justice and peace. In this context, the
18 complementarity principle means that the ICC should only address impunity gaps
19 where the conditions set out in the statutory framework for a case to be admissible are
20 met.

21 In other words, the Court steps in when national investigation and prosecution are
22 not effective in responding to impunity, as it is the case at hand, in our submission.

23 And we join here the Prosecution arguments in relation to the different interest in a
24 criminal proceedings, including the one of victims to obtain justice.

25 Now, the conditions for the admissibility of a case have been the subject of legal

1 interpretation before this Court.

2 The requirement that the case is being investigated or prosecuted by a State which has
3 jurisdiction over it, according to Article 17(1)(a), contemplates a two-step test:

4 Whether there is an ongoing investigation or prosecution of the case at the national
5 level, what is normally called the first limb; and whether the State is unwilling or
6 unable genuinely to carry out investigation or prosecution, secondly.

7 The main issues relevant to this assessment has also been developed in the
8 jurisprudence of the Court and I would like for the purposes of my submission today
9 to underline only few of them.

10 The parameters of the case are defined by the suspect under investigation and the
11 conduct that gives rise to criminal liability under the Statute. Same case means same
12 person and substantially the same conduct.

13 Second, the expression "the case is being investigated" must be understood as
14 requiring the taking of concrete and progressive investigative steps to ascertain
15 whether the persons had responsibility.

16 Three, if there is no investigation or prosecution at the national level, there is a
17 situation of inaction.

18 Four, the ICC is not a human rights court. However, where domestic proceedings
19 incur serious violations of rights of a suspect such that they no longer provide a
20 genuine form of justice, they are deemed inconsistent with an intent to bring the
21 person to justice, as also stated by the Pre-Trial Chamber I on its judgment of
22 7 December 2012 in the Gaddafi case, the previous admissibility challenge, paragraph
23 14 and the document is ICC-01/11-01/11-239.

24 In conclusion for question (a), your Honour, it's our submission that when these
25 conditions are met, then the complementarity principle allows the Court to close the

1 impunity gap.

2 Question (b). To summarise, your Honour, before I give the answer, our position in
3 relation to the interpretation of the relevant provisions.

4 First of all, contrary to the repeated contention of the Defence this morning,
5 Mr Gaddafi cannot in our submission invoke the *ne bis in idem* principle under Article
6 20(3) of the Statute for at least four reasons.

7 One, the Libyan proceedings did not cover the same conduct as the one for which
8 Mr Gaddafi is sought by the Court, mainly because of three shortcomings: They do
9 not properly include crimes of torture; the incidents under investigation by the
10 Libyans fall beyond the temporal parameters of the charges before the Court; and
11 they do not concern principal liability under indirect co-perpetration.

12 Second, Libyan proceedings were conducted in flagrant disregard of universally
13 recognised fair trial rights, rendering the domestic proceedings inconsistent with an
14 intent to bring Mr Gaddafi to justice. In this regard, in the case record we have
15 several indicia of different failure, including the fact that Mr Gaddafi was detained in
16 an irregular, secret detention facility, he spent 90 days without ever having been
17 brought before a judge, was held in solitary confinement, denied medical treatment,
18 held incommunicado, repeatedly interrogated by Libyan prosecutors, and the Africa
19 Court on Human and Peoples' Rights decided the detention of Mr Gaddafi did not
20 respect any of the rights set forth in Article 7 of the Charter.

21 PRESIDING JUDGE EBOE-OSUJI: [15:38:49] But it looks like from the submissions
22 of Defence counsel they are not complaining.

23 MS MASSIDDA: [15:38:57] Your Honour, I'm simply using these examples to arrive
24 at my point of saying that the way in which we interpret the relevant provisions of
25 the Statute under Article 17 are in line with the purpose and the object of the Statute

1 in the sense that the way in which we have interpreted the Rome Statute pleads for
2 lack of proceedings at the national level which justifies the intervention of the Court.

3 PRESIDING JUDGE EBOE-OSUJI: [15:39:38] We have something of a dissonance
4 there then that we may have to resolve in terms of how we view the objects and
5 purpose of the Rome Statute. On the one hand, it is persons who commit certain,
6 allegedly certain offences shall not go unpunished. Do we have a complaint if we
7 then say, well, the process we are looking at might have been a little highhanded in
8 the way it goes about punishing the person to bring about -- to close the impunity gap,
9 maybe they overdid it. Do we have a dissonance there here?

10 MS MASSIDDA: [15:40:28] No, I don't think so, your Honour. It was just for the
11 simple purpose of showing how the process before the national jurisdiction was not
12 adherent to what Article 17 will require. And I'm saying Article 17 in general at this
13 point in time, not identifying a specific letter of the article. So I want simply to show
14 how the criteria used before the national jurisdictions are not in adherence with what
15 provides Article 17, and this is the reason why the complementarity principle justifies
16 the step-in of the Court in this specific case at hand.

17 But I think that I've made my point, so I can easily skip to question (c). And
18 question (c) relates to the impact, if any, of human rights instruments and practice on
19 the interpretation of Article 17(1)(c).

20 And in this regard I think that it's important first of all to stress that there is a term
21 specific in Article 20(3) of the Statute and the term is "has been tried".

22 Now, we disagree with the observation made by the Defence on this point that a first
23 instance judgment on the merits will suffice to comply with interpretation of the
24 terms "has been tried".

25 And why we disagree because actually the Appeals Chamber has already addressed

1 the issue. In a judgment issued in 2006 in the Lubanga case, the Appeals Chamber
2 set out that the *res judicata* principle leads to the finality of judicial determinations and
3 this occurs unless, and I quote, "jurisdiction is specifically conferred upon the Court to
4 revisit an issue under given circumstances".

5 And the reference, your Honour, is the judgment of 13 October 2006,
6 ICC-01/04-01/06-568-OA3 at paragraph 19.

7 Now, in our submission there is no reason from the Appeals Chamber to deviate from
8 that interpretation because that interpretation not only accords with the drafting
9 history of the Rome Statute, and I refer to the drafting history analysis in paragraph
10 64 of our submission before the Pre-Trial Chamber, but also because this
11 interpretation is in line with the jurisprudence of European Court of Human Rights,
12 the Inter-American Court of Human Rights, the ad hoc tribunals, the Court of Justice.
13 In the case of *Fäkkä versus Finland*, the European Court of Human Rights indicated,
14 and I quote: "[a] decision is final 'if, according to the traditional expression, it has
15 acquired the force of *res judicata*. This is the case when it is irrevocable, that is to say
16 when no further ordinary remedies are available or when the parties have exhausted
17 such remedies or have permitted the time limit to expire without availing themselves
18 of them". And the quote is application number 758/11, judgment of 20 May 2014,
19 paragraph 14 -- 43 and 44.

20 This principle has also been interpreted in that way by the ICTR and ICTY, and I refer
21 to our submissions at paragraph 63; to the ICJ, it's paragraph 65; by the
22 Inter-American Court of Human Rights, it's paragraph 66; by the European Court of
23 Justice, it's paragraph 67.

24 Accordingly, there is nothing specific in the ICC complementary framework that
25 makes such practice inapplicable before the Appeals Chamber.

1 Contrary to the development made by the Defence this morning, such jurisprudence
2 is applicable where it states principle of law consistent with the founding text of the
3 Court in conformity with Article 21 of the Rome Statute.

4 And for the sake of brevity, I will refer the Chamber to our submissions before the
5 Pre-Trial Chamber, paragraph 62 to 67 for a full overview of the practice of the
6 human rights and ad hoc tribunals in this respect.

7 Now turning to question (d), if it is common ground that Mr Gaddafi was held
8 *in absentia*.

9 I tend to share the Prosecution arguments in this respect. In fact, I meant to do
10 exactly the same arguments in relation to Article 211 as it was done by the
11 Prosecution. The only thing that I will add to that is that for us the answer can only
12 be in the affirmative.

13 The Defence alleges that the only Court sessions Mr Gaddafi did not attend were the
14 ones that did not directly concern him. Now, there are indicia of the contrary in the
15 case record. If we look, for instance, at the draft judgment which was also shown by
16 the Prosecution on the screen, the Libyan judgment reveals that Mr Gaddafi did not
17 attend the trial hearings in Libya. And I will not repeat the issue brought by the
18 Prosecution.

19 The Africa Court on Human and Peoples' Rights also investigated this issue and
20 concluded, I quote, "The detainee was arrested over two years ago and has been
21 sentenced to death *in absentia*". It's application 002/2013, 3 June 2016, the judgment,
22 paragraph 96.

23 In any case, your Honour, in relation to the issue of was Mr Gaddafi tried *in absentia*,
24 the recent submission filed by the State of Libya on 8 November last Friday confirm
25 that Gaddafi is, and I quote -- I think the submission of the State of Libya are still

1 classified confidential. Okay.

2 The State of Libya has confirmed in its submission that Mr Gaddafi is still wanted by
3 the national jurisdiction and I will simply refer, without quoting, to annex XIII of
4 submission 01/11-01/11-683, confidential, paragraph 4, 6 and 27.

5 On question (e), your Honour, again I had exactly the same arguments that the
6 Prosecution already put forward and therefore I will simply join that submission,
7 stating that indeed the use of terms in Article 358 of the Libyan Code of Criminal
8 Procedure shall automatically be annulled and the case shall be heard again is
9 determinative that there is no option under Libyan law but to conduct a new trial if
10 the person reappear. There is no exception recognised in the law and therefore a
11 retrial is automatic under Libyan law.

12 And again it is our understanding that this has been confirmed in the submission by
13 the State of Libya of 8 October. It's again annex XIII, paragraph 26.

14 And by the way, the Defence has accepted this morning, if I'm not incorrect, the fact
15 that a retrial is necessary.

16 Question (f), your Honour.

17 An investigation into fair trial standards in the trial of the Libyan regime has been
18 conducted by Mr Ellis in November 2015. This investigation concluded that trials
19 *in absentia* may be permitted in Libya in exceptional circumstances, and I quote, "for
20 example when the accused, despite having been informed of the charges, the date and
21 place of hearing, nevertheless chooses not to attend". And I refer to what the
22 Prosecution showed on the screen, the grounds of the judgment in which the Judges
23 explained why they applied Article 211 of the code of procedural -- of the Code of
24 Criminal Procedure.

25 In situations where the accused fails to attend due to circumstances beyond his or her

1 control, the exception does not apply. And this is actually annex F to the
2 admissibility challenge, document ICC-01/11-01/11-640 at page 30.

3 In our submission there is no requirement in Libyan law that the person absconds as a
4 prerequisite for a trial *in absentia*. In particular, Articles 211, 215 and 348 of the
5 Libyan Code of Criminal Procedure only referred to the accused failing to appear.
6 No distinction is made upon the reason for the failure to appear, either absconding or
7 detention, for instance.

8 This is confirmed by the provision in Libyan law of other scenarios where trials
9 *in absentia* are admitted within the accused absconding. And I made only one
10 example, Article 350 concerning an accused residing abroad. If the accused is
11 residing abroad, the transfer order and the subpoena shall be sent to his place of
12 residence, if known. If the accused fails to appear after being summoned, the ruling
13 may be issued *in absentia*.

14 Now, question (g) was a sort of dilemma, if I can put it that way, for us because, your
15 Honours, I am uncertain on whether we are best placed to comment on the question
16 related to when exactly a conviction becomes final under Libyan law.

17 PRESIDING JUDGE EBOE-OSUJI: [15:54:11] Before you, before you go to that one,
18 here is one that possibly flows from your submissions so far: If we have the criminal
19 procedure code of Libya laying down when what happens in the event of a trial
20 *in absentia* there has to be a retrial, you say, but then we have Law No. 6 of 2015 which,
21 as I understand it, is not necessarily an executive statement or proclamation, it's also a
22 law, assuming that that Law No. 6 of 2015 applies to this case, how do you reconcile
23 that law on the one hand versus the other law?

24 MS MASSIDDA: [15:55:20] Your Honour, for us --

25 PRESIDING JUDGE EBOE-OSUJI: [15:55:22] That's one of the dilemmas in this case,

1 amongst many.

2 MS MASSIDDA: [15:55:25] Yes, but for us, Law No. 6 does not apply. This is
3 our -- this is one of our arguments and we concur actually with the Office of the
4 Prosecutor. For us, Law No. 6 cannot apply and I will touch upon briefly in question
5 (j), (k) and (l) on that.

6 PRESIDING JUDGE EBOE-OSUJI: [15:55:45] But except that we still have that
7 matter, I'm not disagreeing with you necessarily, but there is the question how come
8 he was released? Someone who was sentenced to death and then released, we need
9 to account for that, if we can, in circumstances where the Defence say he was released
10 because of application of Law No. 6, and you're saying that's not the case but you
11 haven't given us an alternative explanation for the release.

12 MS MASSIDDA: [15:56:16] I understand that and I wanted actually to touch upon
13 this question that you already posed to the Prosecution in responding to the last three
14 questions because I wanted to refer the Appeals Chamber to paragraph 17 which
15 I cannot read because the document is classified confidential.

16 PRESIDING JUDGE EBOE-OSUJI: [15:56:34] Then you can just mention it and we
17 can (Overlapping speakers).

18 MS MASSIDDA: [15:56:37] I mean if you look at paragraph 17 of the submission of
19 the State of Libya of 8 November, the State of Libya is making an assertion about the
20 decision to release Mr Gaddafi. If you want, we can go to closed session, I can read
21 it. I think it can be read in public, but I don't want to undermine the classification of
22 the document.

23 PRESIDING JUDGE EBOE-OSUJI: [15:57:11] We can proceed. Let's not read it in
24 public.

25 MS MASSIDDA: [15:57:14] Okay. I guess I can turn to question (g).

1 And I was saying it was for us, yes, a little bit of dilemma on if we wanted to answer
2 that question because it looks to us that it's difficult for us to say exactly when a
3 conviction will become final under Libyan law.

4 However, our position remains the same that the proceedings in Libya are not final in
5 this case, and in any case, the crimes for which Mr Gaddafi would eventually be tried
6 in Libya are imprescriptible. And in our submission, now that we have read the
7 observation by the State of Libya, it seems to us that Libya confirms in the submission
8 of 8 November this understanding because they confirm that prescription does not
9 apply to the national criminal case. And this is annex XIII, paragraph 21. And the
10 State of Libya also confirms that a trial before the national court will be necessary if
11 Mr Gaddafi will appear and that that procedure will be a new trial. And these are
12 paragraphs 21 and 26 of annex 14.

13 Question (h). Now, your Honour, for question (h) I will skip the arguments already
14 brought forward by the Prosecution and what could be maybe interesting for the
15 Chamber is to know in relation to this question what the Libya representative said
16 during the hearing held on 9 October 2012 during the first admissibility challenge on
17 the interpretation of the relevant law.

18 And I'm referring to the transcript of the hearings of 9 October 2012,
19 ICC-01/11-01/11-T-2-Red, English, page 28, lines 1 to 3.

20 Now what the Libya representative said at that time already was:

21 One, where death penalty convictions are concerned pursuant to Article 429 of the
22 Code of Criminal Procedure, the execution cannot be carried out until the case has
23 been considered by the court of cassation.

24 Two, the file must be sent to the court of cassation and the prosecutor is obliged to file
25 his or her opinion related to the case. The convicted person, the defence counsel and

1 the prosecutor can appeal the verdict before the sentence is implemented. Even the
2 court can trigger the cassation review.

3 Three, in appeals involving the death penalty, the court of cassation does not only
4 consider errors of law, but reviews all factual, legal and procedural matters that led to
5 the verdict and the sentence.

6 Four, when an error is detected, the court of cassation has the power to nullify the
7 verdict, amend the sentence or remit the case for retrial by different judges.

8 Lastly, the sentence cannot be carried out until all potential avenues of appeal have
9 been exhausted.

10 This is to confirm, your Honour, that already in 2012 the representative of Libya made
11 clear which is the procedure under Libyan law in the case of death penalties and that
12 a full review by the cassation court is mandatory in that case.

13 And we join again the submission by the Prosecution that such review has not taken
14 place in the case at hand.

15 Now, question (i), which I would personally consider the most interesting one, if I
16 may, and on which unfortunately I cannot expand as I wish because the Prosecution
17 already did that.

18 PRESIDING JUDGE EBOE-OSUJI: [16:02:13] Also we don't have much time. We
19 have to be leaving very soon. So if you can agree with submissions already made,
20 I think it may help you and everyone else.

21 MS MASSIDDA: [16:02:24] Yes. Absolutely, your Honour. I think I still have
22 10 minutes. Is that correct? I will be done by then.

23 So question (i), the scope or review of the Appeals Chamber in review of the
24 admissibility challenge.

25 Now our submission is that the Chamber's scope of review need not be limited to the

1 terms of the provisions under which the specific challenge was brought. In other
2 words, the Chamber has full discretion and it may extend to a review of the
3 admissibility of a case more generally under Article 17 in accordance with Article 19(1)
4 on its own motion, which was, by the way, also accepted this morning by the Defence
5 just after the break.

6 Now, we also agree with the Prosecution that a question may arise and the question is:
7 Does the Chamber have enough information to eventually review the challenge under
8 another prong of Article 17?

9 In our submission, your Honour, in this specific case, we can consider it's our
10 submission that the Chamber may have enough information for eventually review the
11 challenge under other prongs of Article 17.

12 And finally I will treat questions (j), (k) and (l) in relation to amnesties together for the
13 last few minutes.

14 Our first point, as stated already several times, your Honour, is that in our submission,
15 according to international law, international law does not recognise as valid amnesty
16 for the gravest crimes. We have put forward several times that amnesty deprives
17 victims of the right to seek redress before a court of law, which is an essential right for
18 victims.

19 The Libyan Cities and Tribes Supreme Council submitted in their amicus curiae that
20 amnesty for serious crime leads to impunity, lack of deterrence and violation of
21 victims' rights. We agree with this submission, but our agreement ends here because
22 the council went on proposing as a sufficient mechanism to counter these effects a
23 form of criminal reconciliation which normally applies to contravention and
24 misdemeanours. And it's perhaps 20 and 22 of the council's submission. They
25 suggest, therefore, that a criminal sentence can be avoided and replaced by a fine

1 agreed between the accused and the victims. The council also request the Court to
2 endorse the general amnesty law passed by Libyan parliament and adopt restorative
3 justice as an alternative to punitive justice.

4 Now, your Honours, for us, this is an important point for victims. Reparations for
5 victims are not an alternative to punitive justice, but rather they complement punitive
6 justice. Moreover, in our submission, the way proposed by the Libyan Cities and
7 Tribes Supreme Council could be antithetical to the mission and mandate of the ICC
8 which has been to set up to put an end to impunity and contribute to the prevention
9 of the most serious crimes.

10 In relation to the amnesty Law No. 6, you may recall, your Honours, that we
11 expressed several times our scepticism in relation to the legitimacy of a government
12 that pass the amnesty law. Now this concern seems now echoed by the State of
13 Libya in its submission of 8 November, it's again annex XIII, paragraph 28.

14 However, it's our submission that this is an issue that need not to be addressed by the
15 Appeals Chamber for reasons obviously different from the one stated by the Defence
16 this morning. Indeed, as the Pre-Trial Chamber rightly consider, the amnesty could
17 not have been validly applied to Mr Gaddafi because amnesties for the most serious
18 crimes are not compatible with international law. Accordingly, your Honours need
19 not, as put forward by the Defence this morning, study the specificity of said amnesty
20 law in order to assess its validity.

21 And finally, your Honour, the Defence argument that Article 21 of the Statue does not
22 confer upon the judges of this Court the power to apply internationally recognised
23 human rights other than in order to interpret the provision of the Statute is in our
24 submission misleading.

25 An interpretation of the ICC admissible regime acknowledging an amnesty law

1 would be incompatible with internationally recognised human rights and as such, we
2 submit in breach of Article 21(3) of the Rome Statute.

3 This concludes, your Honours, our submissions on behalf of the general interest of
4 victims in these proceedings. Thank you.

5 PRESIDING JUDGE EBOE-OSUJI: [16:08:14] Thank you very much. That's right on
6 time.

7 We will adjourn now and reconvene tomorrow at 9.30, 9.30 tomorrow. Thank you.

8 THE COURT USHER: [16:08:26] All rise.

9 (The hearing ends in open session at 4.08 p.m.)

10 CORRECTIONS REPORT

11 The following corrections, marked with an asterisk and included in the audio-visual
12 recording of the hearing, are brought into the transcript.

13 Page 61 line 4

14 "easy, each of those have several sub-issues." Is corrected to "easy. Each of those
15 have several sub-issues."

16 Page 66 line 6

17 "enactive" Is corrected to "inactive"

18 Page 86 line 1

19 "governments" Is corrected to "government"

20 Page 89 line 21

21 "provision" Is corrected to "prohibition"

22 Page 96 line 21

23 "we tried" Is corrected to "We'll try"

24 Page 97 line 8

25 "understood" Is corrected to "under"

- 1 Page 97 line 14
- 2 "discussions" Is corrected to "discussion"
- 3 Page 99 line 7
- 4 "directly" Is corrected to "theoretically"
- 5 Page 99 line 19
- 6 "ordered domestic legislations forces the penalty" Is corrected to "as other domestic
- 7 legislations foresees death penalty"