

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 28 October 2019

THE APPEALS CHAMBER

Before:

**Judge Chile Eboe-Osuji, Presiding
Judge Piotr Hofmański
Judge Howard Morrison
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa**

SITUATION IN LIBYA

**IN THE CASE OF
THE PROSECUTOR V. SAIF AL-ISLAM GADDAFI**

**Public
with Public Annexes I-VI**

**Lawyers for Justice in Libya and REDRESS' *amici curiae* observations pursuant to Rule 103
of the Rules of Procedure and Evidence**

Source:

Lawyers for Justice in Libya and REDRESS

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

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I. INTRODUCTION

1. Lawyers for Justice in Libya (the “LFJL”) and REDRESS (the “*Amici curiae*”) submit these observations pursuant to the Appeals Chamber’s “Decision on requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence.”¹ The *Amici curiae*’s observations may assist the Appeals Chamber in the proper determination of the Defence’s appeal against Pre-Trial Chamber I’s “Decision on the ‘Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute” (the “Pre-Trial Chamber Admissibility Decision”).² In that decision, the Pre-Trial Chamber determined that Articles 17(1)(c) and 20(3) of the Rome Statute (the “Statute”), read jointly, must be interpreted as requiring that a decision by a court must be final or else the *ne bis in idem* prohibition is not triggered.³

2. The *Amici curiae*’s observations are limited to issues that arise from the Defence’s second ground of appeal concerning the finality of the judgment issued by the Tripoli Court of Appeals (the “Tripoli Court Decision”) against Mr. Gaddafi in 2015. The main issue before the Appeals Chamber is whether or not the Tripoli Court Decision convicting Mr. Gaddafi for, *inter alia*, murder and sentencing him to death, precludes the International Criminal Court (the “Court”) from exercising jurisdiction on the basis of Articles 17(1)(c) and 20(3) of the Statute. Article 17(1)(c) holds that the Court shall determine that a case is inadmissible where “The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3.” Article 20(3) states that “No person who has been tried by another court for conduct also proscribed under 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct [...]”

3. As part of its second ground of appeal, the Defence submits that Pre-Trial Chamber I (a) erred in “law in failing to take account or to have sufficient regard to the *de facto* application of Law No. 6 of 2015 [on General Amnesty],”⁴ (b) erred in finding that Law

¹ Appeals Chamber, “Decision on requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence”, ICC-01/11-01/11 OA 8, 15 October 2019.

² Defence, “Defence Appeal Brief in support of its appeal against Pre-Trial Chamber I’s “Decision on the ‘Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute”, ICC-01/11-01/11, 20 May 2019.

³ Appeals Chamber, “Decision on requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence”, ICC-01/11-01/11 OA 8, 15 October 2019.

⁴ Defence Appeal Brief, para. 36.

No. 6 “was not capable of applying to the crimes for which Mr. Gadafi was charged,”⁵ (c) “erred in law in taking into consideration the validity of Law No. 6 of 2015 in international law in determining whether Mr. Gadafi’s conviction was final,”⁶ and (d) erred in finding that Law No. 6 “was incompatible with international law.”⁷

4. The *Amici curiae* submit (A) that the Tripoli Court Decision is not final, (B) that Law No. 6 was not lawfully applied to Mr. Gaddafi, and (C) that, in any case, the application of Law No. 6 to Mr. Gaddafi should not be recognized by the Court in its application and interpretation of Articles 17(1)(c) and 20(3) of the Statute.

II. PROCEDURAL HISTORY

5. On 5 April 2019, Pre-Trial Chamber I issued its “Decision on the ‘Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute’”.⁸ Judge de Brichambaut issued a separate and concurring opinion.⁹

6. On 20 May 2019, the Defence filed its “Defence Appeal Brief in support of its appeal against Pre-Trial I’s “Decision on the ‘Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute’” (“Defence Appeal Brief”) before the Appeals Chamber.

7. On 8 October 2019, the *Amici curiae* filed their request for leave to submit observations pursuant to Rule 103 of the Statute. The Appeals Chamber granted that request, as well as a request by the Libyan Cities and Tribes Supreme Council, on 15 October 2019.¹⁰

III. SUBMISSIONS

⁵ Defence Appeal Brief, para. 36.

⁶ Defence Appeal Brief, para. 36.

⁷ Defence Appeal Brief, para. 36.

⁸ Pre-Trial Chamber, “Decision on the ‘Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute’” (“Pre-Trial Chamber Admissibility Decision”), ICC- 01/11-01/11-662, 5 April 2019.

⁹ “Separate concurring opinion by Judge Marc Perrin de Brichambaut”, ICC-01/11- 01/11-662-Anx, 8 May 2019.

¹⁰ Appeals Chamber, “Decision on requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence”, ICC-01/11-01/11 OA8, 15 October 2019.

A. The Tripoli Court Decision is not final

8. On 28 July 2015, the Tripoli Court of Appeals, sitting as a criminal court pursuant to Article 331 of the Libyan Criminal Procedures Code (the “Procedural Code”), issued a judgment in Case 630/2012 AD against Mr. Gaddafi *et al.* The Tripoli Court of Appeals convicted Mr. Gaddafi for, *inter alia*, looting, sabotage, murder, and the distribution of drugs, and sentenced him to death by firing squad.¹¹ The *Amici curiae* have previously raised their concerns about the absence of fair trial standards during this trial.¹²

9. A contentious issue between the parties at the Pre-Trial stage was whether or not the Tripoli Court Decision was issued *in absentia* or *in presentia* the Tripoli Court Decision expressly providing that it was issued *in absentia*.¹³ In either case, as is provided in the below paragraphs, the decisions would not be *ipso facto* final.

10. Libyan criminal procedural law differentiates between verdicts issued *in absentia* and verdicts issued *in presentia*. Chapter 3 of the Procedural Code regulates measures against an absent defendant accused of committing criminal acts. Article 348 of the Procedural Code explains that ‘If an accused transferred to the Criminal Court for a felony fails to appear on the day of the session after being duly summoned, the Court may issue its verdict in absentia.’¹⁴ A verdict issued *in absentia* is, however, not final until a) the penalty expires,¹⁵ or b) the person convicted *in absentia* makes himself available or is arrested.¹⁶ This is further supported by Article 353 of the Procedural Code that explains that should the individual convicted *in absentia* make him/herself available or be arrested, then the trial shall be held

¹¹ Judgment by the Tripoli Court of Appeals in 630/2012 AD of 28 July 2015 provided in English in Annex B of Defence, “Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c) and 20(3) of the Rome Statute”, ICC-01/11-01/11, 5 June 2018.

¹² LFJL, “[LFJL is concerned that the absence of fair trial standards during Gaddafi official trials will jeopardize the right of victims to justice](#)”, 29 July 2015; *see also* United Nations Support Mission in Libya and the United Nations Human Rights Office of the High Commissioner, “[Report on the trial of 37 former members of the Qadhafi regime \(Case 630/2012\)](#)”, 21 February 2017; *see also* LFJL and REDRESS, “Lawyers for Justice in Libya and REDRESS Trust’s observations pursuant to Rule 103 of the Rules of Procedure and Evidence”, ICC-01/11-01/11, 8 June 2012.

¹³ *See e.g.* Defence, “Second Redacted Version of Corrigendum of Defence Consolidated Reply to Prosecution “Response to ‘Admissibility Challenge by Dr. Said Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute’ and Response to “Observations by Lawyers for Justice in Libya and the Redress Trust pursuant to Rule 103 of the Rules of Procedure and Evidence””, ICC-01/11-01/11, 20 November 2018, para. 8.

¹⁴ Article 348 of the Procedural Code.

¹⁵ Article 357 of the Procedural Code.

¹⁶ Article 358 of the Procedural Code.

de novo and the verdict issued *in absentia* will be annulled.¹⁷ The rationale behind this legal construction is explained by the Libyan Supreme Court in case 1643/56 where it found that that a decision issued *in absentia* is temporary and intended to compel the accused to appear in court.¹⁸

11. Since Mr. Gaddafi was sentenced to death, his sentence cannot be considered to have expired. Mr. Gaddafi has also not made himself available or been arrested since the issuing of the Tripoli Court Decision. For these reasons, the Tripoli Court Decision against Mr. Gaddafi is not final if it was issued *in absentia*.

12. The Tripoli Court Decision is also not final if it was issued in the presence of Mr. Gaddafi: Article 385*bis* of the Procedural Code provides that “the case shall be submitted to the Court of Cassation within 30 days from the date of the verdict [sentencing the defendant to death] and the Public Prosecution shall present a file with its opinion on the case within the next fifteen days.” The Court of Cassation then “has the right to challenge the verdict for the benefit of the accused.”¹⁹ The Libyan Supreme Court has clarified, in binding decisions,²⁰ that it *must* review the verdict sentencing a person to death.²¹ It is the understanding of the *Amici curiae* that the Supreme Court, sitting as a court of cassation, has not reviewed the Tripoli Court Decision. For these reasons, the Tripoli Court Decision, if considered to be an *in presentia* verdict would not be final. Absent the application of Law No. 6 to Mr. Gaddafi, as elaborated in the below sections, the Tripoli Court Decision has not in and of itself acquired *res judicata* effect.

B. Law No. 6 was not lawfully applied to Mr Gaddafi, and so cannot make the decision final

¹⁷ Article 358 of the Procedural Code. The requirement under Libyan law that a person convicted *in absentia* be tried *de novo* when present corresponds with the right to a fair trial. In *Colozzo v. Italy* the European Court of Human Rights (“ECtHR”) determined that ‘When domestic law permits a trial to be held notwithstanding the absence of a person “charged with a criminal offence” who is in Mr. Colozzo’s position, that person should, once he becomes aware of the proceedings, be able to obtain, from a court which has heard him, a fresh determination of the merits of the charge’. ECtHR, *Colozzo v. Italy*, 12 February 1984, para. 29. See also ECtHR, *Medenica v. Switzerland*, 14 June 2001.

¹⁸ Annex I to this filing.

¹⁹ Article 385*bis* of the Procedural Code.

²⁰ Article 31 of Law No. 6 of 1981 on the Reorganization of the Supreme Court holds that principles established by the Supreme Court are binding on other courts.

²¹ See Annex II and III to this filing.

13. The Defence asserts that Pre-Trial Chamber I “erred in law in failing to take account or to have sufficient regard to the *de facto* application of Law No. 6.”²² The information available to the *Amici curiae* holds that the Minister of Justice of the Al Bayda government sent a letter in 2016 to the Head of Prosecutions in Zintan, copying the Abu Bakr Battalion and the judicial police in Zintan, requesting that Law No. 6 be applied to Mr. Gaddafi and that he be released from prison.²³ On 9 June 2017, the Abu Bakr battalion, who controlled the prison in Zintan where Mr. Gaddafi was held, issued a written statement stipulating that Mr. Gaddafi was released from prison on the basis of the application of Law No. 6 to him by the Minister of Justice.²⁵

14. The *de facto* application of Law No. 6 to Mr. Gaddafi must not, however, be conflated with the *de jure* application of it or lack thereof. Law No. 6 cannot be considered to have been applied *de jure* to Mr. Gaddafi for the following reasons:

- a. Law No. 6 can only be applied to an individual by ‘a competent judicial authority’.²⁶ A Minister of Justice, be it of the internationally recognized government in Libya and the Al Bayda government,²⁷ is a member of the executive branch of government and does not fall within the meaning of ‘judicial authority’. This is supported in Law No 4 of 2011 amending the Law on the Judiciary which limits the definition of ‘judicial body’ to the Libyan Judicial

²² Defence Appeal Brief, para. 36.

²³ Annex IV to this filing.

²⁴ The Prosecution received a letter from the Head of Prosecutions in Zintan to the Minister of Justice informing the latter that the Minister of Justice, by virtue of his request to have Law No. 6 applied to Mr. Gaddafi, constituted interference by the executive authority in the jurisdiction of the judicial authority. See Prosecution, “Public redacted version of the “Prosecution response to ‘Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute’”, ICC-01/11-01/11-653-Conf, 28 September 2018, Annex 11, ICC-01/11-01/11, 11 October 2018.

²⁵ Annex V to this filing.

²⁶ Article 6 of Law No. 6.

²⁷ The Defence sets out in its appeal brief that Pre-Trial Chamber I ought to have deferred to Libyan domestic law and given regard to the *de facto* application of Law No. 6 to Mr. Gaddafi by the Al Bayda government as it “remained the *de facto* authority over significant parts of Libya and [...] legitimate government by local officials in parts of Libya including Zintan. See Defence Appeal Brief, para. 44.iii.

According to the Office of Public Counsel for Victims (“OPCV”), the Al Bayda government, to which the Minister of Justice belonged, was not the legitimate government in Libya at the time. As a result, OPCV, found that the “Chamber was under no obligation to accept it as a valid domestic judicial decision.” See OPCV, “Response on Behalf of Victims to the Defence Appeal Brief on the Decision on the Admissibility of the Case”, ICC-01/11-01/11, 11 January 2019, para. 44.

The Prosecution explains that the legitimacy of the government is immaterial to the case at hand. See Prosecution, “Public redacted version of the “Prosecution response to ‘Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute’”, ICC-01/11-01/11-653-Conf, 28 September 2018, paras. 51-53.

Inspection Department, Courts, the Public Prosecution, the Lawsuit Authority, the Law Department, and the Public Attorney Department.²⁸ This law further confirms that the Supreme Judicial Council, that handles Libyan judicial affairs, excludes the Minister of Justice.²⁹

- b. Law No. 6 requires that the judicial authority applying the law issues a ‘reasoned decision’.³⁰ The letter from the Minister of Justice simply states that the exceptions of Law No. 6 do not apply to Mr. Gaddafi, and therefore that it should be applied to him.
- c. Law No. 6 requires that the person benefiting from it served the judicial sentence.³¹ As far as the *Amici curiae* are aware, Mr Gaddafi’s death sentence has not been implemented.
- d. According to Law No. 6, the person on which the law is applied must issue a written pledge promising to repent and not to re-offend and the person shall reconcile with the victims.³² The *Amici curiae* are not aware of Mr. Gaddafi having issued a written pledge or having reconciled with the victims of his crimes, as required by Law No. 6:
- e. Finally, Law No. 6 cannot have been applied to Mr. Gaddafi *de jure* due to the exclusion of certain crimes – that include the crimes of which Mr. Gaddafi was charged and convicted for³³ – from its scope of application. The law provides that it shall not be applied to individuals that committed drug trafficking and importing, sexual and indecent assault, identity-based murder, abduction, forced disappearance and torture, corruption, *huddud* offences, and crimes of terrorism stipulated in domestic law.³⁴ Mr. Gaddafi was charged and convicted for *inter alia* “homicide across the country in order to undermine the State security,” “enlisted and equipped mercenaries and granted some of them Libyan citizenship,” “established armed tribal groups, equipped them with various weapons and materials and provided them with logistic support” and “rigged a number of vehicles with explosives in order to detonate them remotely.”³⁵

²⁸ Annex VI to this filing.

²⁹ Annex VI to this filing.

³⁰ Article 6 of Law No. 6.

³¹ Article 4 of Law No. 6

³² Article 2 of Law No. 6

³³ See Tripoli Court Decision.

³⁴ Article 3 of Law No. 6

³⁵ See Tripoli Court Decision.

C. In any case, any application of Law No. 6 to Mr. Gaddafi should not be recognized by the Court as it is inconsistent with international law

15. While taking the position that a court decision does not have to be final to bar the Court from exercising jurisdiction, the Defence argues that “the application of Law No. 6 of 2015 to the *in absentia* conviction issued against Dr. Gaddafi rendered the Libyan Judgment final (subject only to hypothetical re-opening).”³⁶ As explained above, Law No. 6 was not applied to Mr. Gaddafi lawfully. As will be presented below, any application of Law No. 6 to Mr. Gaddafi should not be recognized by the Court as it is inconsistent with international law.

16. While it is correct that “it is not for the Chamber to challenge the correctness, nature or qualification of judgments passed by national courts, unless there are compelling reasons to do so,”³⁷ the Court is required to determine the application of Law No. 6 to Mr. Gaddafi with international law with a view to establish whether Articles 17(1)(c) and 20(3) of the Statute apply.³⁸ Article 21 stipulates that the “principles and rules of international law” apply, and that the application and interpretation of such international law “must be consistent with internationally recognized human rights.”³⁹ Whereas the Court is not bound by the jurisprudence of other tribunals,⁴⁰ it may refer to relevant jurisprudence from *ad hoc* tribunals and other courts, when there is a *lacuna* in its core instruments, and when it is identifying rules of customary international law.⁴¹

17. The *Amici curiae* submit that a domestic amnesty law such as Law No. 6 cannot bar the Court from exercising jurisdiction because (1) amnesties are prohibited by international law in relation to international crimes and gross human rights violations, including for crimes against humanity, and (2) such an amnesty would violate the rights of the victims to truth, justice, and reparation, which are considerations for the Court in its quest for international justice.⁴²

³⁶ Defence Appeal Brief, para. 19.

³⁷ Pre-Trial Chamber Admissibility Decision, para. 51.

³⁸ The examination of the Pre-Trial Chamber on the compatibility of Law No. 6 and international law was *obiter dicta*. See Pre-Trial Chamber [Admissibility Decision](#), para. 58.

³⁹ Article 21(3) of the Rome Statute.

⁴⁰ See e.g. ICTY, *Prosecutor v. Dorđević*, Judgement, [IT-05-87/1-A](#), Appeals Chamber, 27 January 2014, para. 83; *Prosecutor v. Delalić et al.*, Judgement, [IT-96-21-A](#), Appeals Chamber, 20 February 2001, para. 24.

⁴¹ ICC, *Prosecutor v. Katanga*, Judgement, [ICC-01/04-01/07](#), Trial Chamber, 7 March 2014, para. 47. See Article 38(1)(d) of the [Statute of the International Court of Justice](#);

⁴² See e.g. Rome Statute preambular paragraphs 4 and 5, Article 68 (rights of victims), and Article 75 (reparations).

(1) The Prohibition of Amnesties Under International Law

18. The application of an amnesty to Mr. Gaddafi for serious international crimes violates international law, and so cannot make his case inadmissible before the Court. Pre-Trial Chamber I accepted that Law No. 6 can be considered a general amnesty.⁴³ Such amnesties are prohibited by international law for genocide, crimes against humanity, and grave breaches of the 1949 Geneva Conventions (“international crimes”) under the jurisdiction of the Court, as well as for gross human rights violations.

19. The bar on amnesties for international crimes and gross human rights violations is set out in international treaties ratified by Libya⁴⁴ that provide for an absolute prohibition of amnesties for grave breaches of the Geneva Conventions, genocide and torture, the jurisprudence of other international criminal and hybrid tribunals, and other sources of international law. The *Amici curiae* refer to their more detailed submissions on international law to Pre-Trial Chamber II.⁴⁵

20. In 2011, the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) considered a pardon and amnesty granted to former Khmer Rouge minister Ieng Sary for his earlier conviction *in absentia* for genocide and crimes against humanity. The ECCC held that an “emerging consensus prohibits amnesties in relation to serious international crimes, based on a duty to investigate and prosecute these crimes and to punish their perpetrators.”⁴⁶ A few years earlier, in 2004, the appeals chamber of the Special Court for Sierra Leone in the *Kallon et al.*

⁴³ Pre-Trial Chamber Admissibility Decision, para. 61.

⁴⁴ International Covenant on Civil and Political Rights, 999 UNTS 171 (acceded 15 May 1970); Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (acceded 16 May 1989); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (acceded 16 May 1989); Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention (III) relative to the Treatment of Prisoners of War; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (acceded 22 May 1956); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (acceded 7 June 1978); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (acceded 7 June 1978).

⁴⁵ Observations by Lawyers for Justice in Libya and the Redress Trust pursuant to Rule 103 of the Rules of Procedure and Evidence, [ICC-01/11-01/11](#), 28 September 2018, paras 16, 48-85, 88.

⁴⁶ ECCC, *Co-Prosecutors v. Nuon et al.*, Decision on Ieng Sary’s Rule 89 Preliminary Objections (*Ne bis in idem* and amnesty and pardon) (“Ieng Sary Decision”), [002/19-09-2007/ECCC/TC](#), Trial Chamber, 3 November 2011, para. 53.

and *Gbao* cases had held that there is a "crystallising international norm that a government cannot grant amnesty for serious crimes under international law."⁴⁷

21. In its 2018 decision in *Kwoyelo v. Uganda*, the African Commission on Human and Peoples' Rights ("African Commission") considered whether the application of a Ugandan amnesty law to Thomas Kwoyelo had been discriminatory.⁴⁸ The African Commission provided a detailed analysis of the compatibility of amnesties for serious international crimes with the international and regional human rights obligations of States Parties to the African Charter,⁴⁹ concluding that "blanket or unconditional amnesties that prevent investigations (particularly of those acts amounting to [war crimes, genocide, and crimes against humanity]) are not consistent with the provisions of the African Charter".⁵⁰ While their decision on this point was *obiter dicta*, the African Commission felt the need to give a judgment on this issue "given the lack of clear guidance on ensuring compliance with the requirements of the African Charter when states resort to the use of amnesty as necessary means for pursuing the objectives of achieving peace and justice in times of transition from violence to peace."⁵¹

22. Article 29 of the Rome Statute explicitly states that "[t]he crimes within the jurisdiction of the Court shall not be subject to any statute of limitations". While the Statute is silent on amnesties, they have the same impact as limitation periods in upholding impunity. The Appeals Chamber may consider whether recognising the application of an amnesty for a serious international crime would defeat the object and purpose of the Statute – the fight against impunity and ensuring accountability for the most egregious crimes. International law also prohibits other measures which practically exempt perpetrators from prosecution and accountability for international crimes or gross human rights violations, including clemency, reduction of sentence, and pardons, as well as the application of limitation periods.⁵²

⁴⁷ SCSL, *Prosecutor v. Kallon et al.*, Decision on Challenge to jurisdiction: Lomé Accord Amnesty, [SCSL-04-15-AR72\(E\)](#), [SCSL-04-16-AR72\(E\)](#), Appeals Chamber, 13 March 2004, para. 82; SCSL, *Prosecutor v. Gbao*, Decision on Preliminary Motion on the Invalidity of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, [SCSL-04-15-PT, Appeals Chamber](#), 25 May 2004, para. 9.

⁴⁸ ACommHPR, *Thomas Kwoyelo v. Uganda*, *Comm. No. 431/12*, Decision on Merits, 17 October 2018.

⁴⁹ *Ibid*, paras 283-293.

⁵⁰ *Ibid*, para 293.

⁵¹ *Ibid*, para 284.

⁵² See *Kwoyelo v. Uganda*, above, at para. 293: States should "desist from taking policy, legal or executive/administrative measures *that in fact or in effect* grant blanket amnesties, as that would be a flagrant violation of international law" (emphasis added); See also IACtHR, [Gelman v. Uruguay](#), Merits and Reparations,

23. For the avoidance of doubt, the prohibition on the application of amnesty laws to serious international crimes also includes amnesties for crimes against humanity. As noted above in paragraph 20, the ECCC rejected the application of an amnesty to Ieng Sary's convictions, including for crimes against humanity. The IACtHR has also concluded that there was sufficient evidence to conclude that the "prohibition to commit crimes against humanity is a *ius cogens* rule, and the punishment of such crimes is obligatory pursuant to the general principles of international law."⁵³ The fact that the prohibition of crimes against humanity is founded in customary law rather than treaty law makes no difference: "since the Nuremberg Charter, the customary status of the prohibition against crimes against humanity and the attribution of individual criminal responsibility for their commission have not been seriously questioned."⁵⁴ Furthermore, a number of States have also introduced into their law or constitutions specific prohibitions on amnesties or pardons for crimes against humanity. This is the case in Suriname, Nicaragua, Guatemala, Federation of Bosnia and Herzegovina, Venezuela, Cote d'Ivoire, Colombia, the Philippines, the Democratic Republic of the Congo, Tunisia and Poland.⁵⁵

(2) The Right of Victims to Truth, Justice, and Reparation

24. Amnesties or *de facto* measures having a similar effect also violate the right to truth,⁵⁶ justice,⁵⁷ and reparation⁵⁸ of victims.

Judgement of 24 February 2011, *Series C No. 221*, at para. 225). The UN Human Rights Committee has repeatedly held that whether *de jure* or *de facto*, impunity for human rights violations is incompatible with States' obligations under the ICCPR: Concluding observations of the Human Rights Committee to: Lesotho, [CCPR/C/79/Add.106](#) 8 April 1999, para 17; and Brazil, [CCPR/C/79/Add.66](#), 24 July 1996, para. 8.

⁵³ IACtHR, [Almonacid Arellano et al. v. Chile](#), Preliminary Objections, Merits, Reparations and Costs, Judgement of 26 September 2006, *Series C No. 154*, paras. 99 and 152. IACtHR, [Barrios Altos v. Peru](#) and [La Cantuta v. Peru](#), Monitoring Compliance with Judgement, Order of 30 May 2018, paras 5-9.

⁵⁴ ICTY, *Prosecutor v. Tadić*, [IT-94-1-T](#), Opinion and Judgment, Trial Chamber, 7 May 1997, para. 623.

⁵⁵ See *Ieng Sary* Decision, para. 49 (on the results of the study carried out by the trial chamber).

⁵⁶ IACommHR [Report No. 37/00](#), Case 11.481 (*Monsignor Oscar Arnulfo Romero y Galdámez v El Salvador*), 13 April 2000, paras 123-151.

⁵⁷ [Kwoyelo v. Uganda](#), para 293; ACommHPR, [General Comment No. 4](#) on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture (Article 5), 2017, para. 28; IACommHR [Report No. 37/00](#), Case 11.481 (*Monsignor Oscar Arnulfo Romero y Galdámez v El Salvador*), paras 123-141.

⁵⁸ ACommHPR, [Mouvement Ivoirien des Droits Humains \(MIDH\) v. Cote d'Ivoire](#), *Comm. No. 246/2002*, Decision on Merits, 29 July 2008, paras 97-98; See also ACommHPR, [Zimbabwe Human Rights NGO Forum v. Zimbabwe](#), *Comm. No. 245/02*, Decision on Merits, 21 May 2006, paras 211 and 215.

25. Amnesty laws are expressly incompatible with human rights law in that they impede the investigation and punishment of those responsible for gross human rights violations. In so doing, they adversely affect the victims' access to the truth of what happened and to the corresponding reparations.⁵⁹ In turn, this hinders victims' full, timely, and effective access to justice.⁶⁰ Similarly the Court has recognized that victims have a right to a declaration of truth by a competent body, a right to have those who victimized them identified and prosecuted, and a right to reparation.⁶¹

IV. CONCLUSION

26. The *Amici curiae* note that Mr. Gaddafi is accused of committing murder and persecution as crimes against humanity⁶² and that the evidence submitted to the Court "leads to the inference that [he] as part of Muammar Gaddafi's inner circle and in coordination with him, conceived and orchestrated a plan to deter and quell, by all means, the civilian demonstrations."⁶³ While bearing in mind that Law No. 6 excludes from its remit *inter alia* the crime of murder, the application of Law No. 6 to Mr. Gaddafi would not be compatible with international law and should therefore not be recognized by the Court. A recognition by the Court of the Defence's assertion that Law No. 6 should be regarded as making, and made, the Tripoli Court Decision final would infringe on the rights of the victims, in particular as Mr. Gaddafi has not attempted to reconcile with his victims as required by Law No. 6, and contradict the current status of international law around amnesties.

⁵⁹ IACtHR, *Gelman v. Uruguay*, Merits and Reparations, Judgement of 24 February 2011, *Series C No. 221*, para. 226; IACtHR, *Massacres of El Mozote and Nearby Places v. El Salvador*, Merits, Reparations and Costs, Judgment of 25 October 2012, *Series C, No. 252*, paras 297-299. See also ACommHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2003, Principle C(d)).

⁶⁰ IACtHR, *Almonacid Arellano et al v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgement of 26 September 2006, *Series C No. 154*, paras 110-114; IACtHR, *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Preliminary Objections, Merits, Reparations and Costs, Judgement of 24 November 2010, *Series C No. 219*, paras 172-173. See also ACommHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2003, Principle C(d)).

⁶¹ Pre-Trial Chamber, "Decision on the 34 Applications for Participation at the Pre-Trial Stage", ICC-02/05-02/09-121, 25 September 2009, para. 3; *see also* Pre-Trial Chamber, "Decision on the Set of Procedural Rights attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ICC-01/04-01/07-474, 15 May 2008, paras. 31-44.

⁶² Pre-Trial Chamber I, "Warrant of Arrest for Saif Al-Islam Gaddafi", ICC-01/11, 27 June 2011.

⁶³ Pre-Trial Chamber I, "Warrant of Arrest for Saif Al-Islam Gaddafi", ICC-01/11, 27 June 2011.

27. For these reasons, the *Amici curiae* conclude that Articles 17(1)(c) and 20(3) do not bar the Court from exercising jurisdiction over Mr. Gaddafi for murder and persecution as crimes against humanity.⁶⁴



Rupert Skilbeck
Director REDRESS



Ms. Elham Saudi
Director LFJL

Signed this 28th of October 2019
At London, United Kingdom

⁶⁴ Pre-Trial Chamber, “Warrant of Arrest for Saif Al-Islam Gaddafi”, ICC-01/11, 27 June 2011.