

Libyan Proceedings and the International Criminal Court: Assessment of Complementarity Challenges

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1. Introduction

In proceedings before the International Criminal Court (ICC or Court), greater attention and weight should be accorded to State obligations under international law to penalize, investigate, prosecute and provide remedy and reparation for crimes under international law, and to respect, protect and fulfill fair trial rights, when determining whether a case is admissible before the Court.¹ In order to ensure coherence between bodies of international law and to have regard to due process requirements and “international recognized human rights” when applying the Rome Statute,² and in light of the systemic and practical obstacles faced by Libya in meeting its obligations under international law, it is important: (i) that the definitions of “ordinary” or domestic crimes charged by a State include the elements of the crimes charged in the ICC warrant of arrest when assessing whether the State is investigating or prosecuting the “same case;” (ii) the threshold be lowered by which domestic fair trial violations are determinative of a finding of unwillingness or inability and therefore of the admissibility of a case; and (iii) in the adjudication of pending and future cases in the Libya situation, there is consideration of both the systemic deficiencies characterizing the Libyan legal system and the practical challenges that impede the effective functioning of domestic proceedings. This briefing paper advocates for such an approach by examining the standards applied by the ICC in determining the admissibility of the cases in the Libya situation against Saif al-Islam Gadhafi and Abdullah Al-Senussi in light of the International Commission of Jurists’ (ICJ) report, *Accountability for Serious Crimes under International Law in Libya: An Assessment of the Criminal Justice System*.³

On 26 February 2011, the UN Security Council referred the situation in Libya since 15 February 2011 to the Office of the Prosecutor (OTP) of the ICC.⁴ On 27 June 2011, Pre-Trial Chamber I (the PTC) issued warrants of arrest against Muammar Mohammed Abu Minyar Gadhafi, Saif al-Islam Gadhafi (Muammar Gadhafi’s son) and Abdullah Al-Senussi (former head of the Military Intelligence) for crimes against humanity committed during the 2011 uprising in Libya.⁵ Additional arrest warrants were issued against Al-Tuhamy Mohamed Khaled (former head of the Libyan Internal Security Agency) on 18 April 2013 (unsealed on 24 April 2017) for crimes against humanity and war crimes,⁶ and Mahmoud Mustafa Busayf Al-Werfalli (commander in the Al-Saiqa Brigade in the Libyan National Army, presently known as Libyan Arab Armed Forces) on 15 August 2017 and 4 July 2018 for war crimes.⁷ The case against Muammar Gadhafi was terminated on 22 November 2011 due to his death.⁸

In 2013, following admissibility challenges by the Libyan authorities in the *Gadhafi* and *Al-Senussi* cases,⁹ the PTC declared the case against Saif Al-Islam Gadhafi admissible and the case against Abdullah Al-Senussi inadmissible. These decisions, upheld by the Appeals Chamber in 2014, were based upon the Court’s interpretation of article 17 of the Rome Statute, which governs the circumstances in which the Court cannot defer to national investigations and prosecutions under the principle of complementarity. A key feature of the parties’ submissions and the Court’s findings was the extent to which the Court should have regard to the crimes charged domestically vis-à-vis the crimes alleged in the ICC warrant of arrest, and to international human rights norms, especially international fair trial standards, when determining admissibility. The Court’s main finding was that the domestic characterization of the crimes was irrelevant provided the underlying conduct was captured by the domestic investigation or prosecution,

¹ *Rome Statute of the International Criminal Court*, 2187 UNTS 3, 17 July 1998 (Rome Statute).

² Rome Statute, art. 21(3).

³ The report is available at <https://www.icj.org/wp-content/uploads/2019/07/Libya-Accountability-serious-crimes-Publications-Reports-Thematic-reports-2019-ENG.pdf>.

⁴ Security Council Resolution 1970, UN Doc. S/RES/1970, 26 February 2011, paras. 4-8.

⁵ *Warrant of Arrest for Muammar Mohammed Abu Minyar Gadhafi*, Doc. ICC-01/11-13, 27 June 2011; *Warrant of Arrest for Saif Al-Islam Gadhafi*, Doc. ICC-01/11-14, 27 June 2011; *Warrant of Arrest for Abdullah Al-Senussi*, Doc. ICC-01/11-15, 27 June 2011.

⁶ *Warrant of Arrest for Al-Tuhamy Mohamed Khaled (Under Seal, Ex Parte Prosecutor Only)*, Doc. ICC-01/11-01/13-1, 18 April 2013; *Decision on Reclassification of the Warrant of Arrest*, Doc. ICC-01/11-01/13-18, 24 April 2017.

⁷ *The Prosecutor v. Al-Werfalli*, Warrant of Arrest, Doc. ICC-01/11-01/17-2, 15 August 2017, para. 10; *The Prosecutor v. Al-Werfalli*, Second Warrant of Arrest, Doc. ICC-01/11-01/17-13, 4 July 2018.

⁸ *Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gadhafi*, Doc. ICC-01/11-01/11-28, 22 November 2011.

⁹ Admissibility challenges have not been filed in the *Khaled* or *Al-Werfalli* cases.

and that the violations of fair trial rights an accused may suffer at the domestic level do not *per se* render a case admissible before the ICC, unless they are so egregious that the conduct of national proceedings cannot be deemed consistent with an intent to bring the accused to justice. Gadhafi subsequently filed an admissibility challenge on 6 June 2018, which was rejected by the PTC on 5 April 2019, a decision which was confirmed by the Appeals Chamber on 9 March 2020. The *Gadhafi* and *Al-Senussi* cases have since been subject to considerable academic debate.¹⁰

The ICJ's report, *Accountability for Serious Crimes under International Law in Libya*, published in July 2019, sheds new light on the findings by the Court on Libya's capacity to ensure effective justice for crimes under international law. The report conducts an in-depth assessment of the legal framework governing the Libyan criminal justice system and its compliance with international law and standards. The report finds that, in the handful of cases investigated and/or prosecuted by Libyan authorities to date, including the case in which Abdullah Al-Senussi was prosecuted, the accused's rights to liberty and a fair trial were violated. The report also finds that the criminal justice framework is not compliant with international law and standards in four key areas: (i) the penalization of crimes under international law; (ii) the application of amnesties and immunities; (iii) the procedures governing the arrest and detention of an accused and the investigation and prosecution of crimes; and (iv) the provision of remedies and reparations to the victims. The report recommends substantial reforms to the legal framework to ensure fair and effective justice in future cases.

Section 2 of this paper provides an overview of the structure and interpretation of the principle of complementarity under article 17. Section 3 summarizes the findings and recommendations in the ICJ's report on the Libyan criminal justice system. Section 4 discusses the standards applied with respect to the "same case," unwillingness and inability tests that are central to a determination of admissibility, in particular in the context of the findings in the *Gadhafi* and *Al-Senussi* cases, and analyzes whether Libya was investigating the same case as that before the ICC (section 4.2), and whether it was unwilling or unable to genuinely carry out such investigations (sections 4.3 and 4.4, respectively). Section 5 remarks on the relevance of the briefing's analysis for future ICC cases on Libya.

2. Article 17 of the Rome Statute and the principle of complementarity

Complementarity is one of the core principles underpinning the Rome Statute. Both the Preamble and article 1 provide that the ICC "shall be complementary to national criminal jurisdictions." Complementarity means that States have primary jurisdiction over the investigation and prosecution of alleged crimes within the ICC's jurisdiction.¹¹ Article 17 of the Rome Statute encapsulates the principle of complementarity as follows:

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

¹⁰ Among others, see M. Tedeschini, "Complementarity in Practice: the ICCs Inconsistent Approach in the Gadhafi and Al-Senussi Admissibility Decisions" (2015) 7 *Amsterdam Law Forum*; H.M. Zawati, "Prosecuting International Core Crimes under Libya's Transitional Justice: the Case of Saif Al-Islam Gadhafi and Abdullah Al-Sennussi" in A. Diver and J. Miller, *Justiciability of Human Rights Law in Domestic Jurisdictions*, Springer, 2016; N.B. Jurdi, "The Complementarity Regime of the International Criminal Court in Practice: Is it Truly Serving the Purpose? Some Lessons from Libya" (2017) 30 *Leiden Journal of International Law*; M. Kersten, "Justice after the War: the International Criminal Court and post-Gadhafi Libya" in C. Bell, *Transitional Justice*, Routledge, 2017; J. Trahan, "The International Criminal Court's Libya Case(s) – The Need for Consistency with International Human Rights as to Due Process and the Death Penalty" (2017) 17 *International Criminal Law Review*.

¹¹ These crimes are listed in article 5 of the Rome Statute, and comprise genocide (article 6), crimes against humanity (article 7), war crimes (article 8) and the crime of aggression (article 8bis).

- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
- (d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Under article 17(1)(a) and (b), a case is inadmissible before the ICC if a State is investigating or prosecuting the case, or has investigated or prosecuted the case, unless it is "unwilling or unable genuinely to carry out the investigation or prosecution."¹² Article 17(2) and (3) define unwillingness and inability, respectively. Only when the concerned State shows inaction in exercising jurisdiction over the same crimes, or is unwilling or unable genuinely to investigate or prosecute them, will a case become admissible before the ICC.¹³ Consequently, while under article 17 a presumption exists in favour of national jurisdictions, such presumption "only applies where it has been shown that there are (or have been) investigations and/or prosecutions at the national level."¹⁴

Under article 17(1)(c), a case is also inadmissible if the State has already tried the accused, namely pursuant to the principle of *ne bis in idem* (double jeopardy)¹⁵ enshrined in article 20(3) of the Rome Statute:

No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

- (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
- (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a

¹² *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07 OA 8, Appeals Chamber, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, para. 78 (A failure by the State to investigate or prosecute the case at all renders the case inadmissible, and the second limb of the test becomes moot).

¹³ *Informal Expert Paper: The Principle of Complementarity in Practice*, Doc. ICC-01/04-01/07-1008-AnxA, 2003, p. 3.

¹⁴ *The Prosecutor v. Simone Gbagbo*, Case No. ICC-02/11-01/12OA, Appeals Chamber, Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo," 27 May 2015, paras. 58-59.

¹⁵ As set out in article 14(7) of the International Covenant on Civil and Political Rights, "[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

According to article 17(1)(c), a case is inadmissible if the accused has already been tried for the same conduct unless one of the exceptions in article 20(3)(a) or (b) – which mirror article 17(2)(a) and (c), respectively – applies. For the *ne bis in idem* principle to apply, the accused must have been “the subject of a completed trial with a *final* conviction or acquittal ... which acquired a *res judicata* effect.”¹⁶

A State or an accused that challenges the admissibility of a case bears the burden of demonstrating that the case is inadmissible, and “must provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case. It is not sufficient merely to assert that investigations are ongoing.”¹⁷

3. Libya’s criminal justice framework

Apart from a handful of investigations and prosecutions, accountability for crimes under international law committed by State and non-State actors in Libya has been elusive. The Libyan criminal justice system suffers from both capacity issues and serious shortcomings in its criminal justice framework, which make achieving effective justice compliant with international law and standards virtually impossible in the current context.

ICC decisions on the admissibility of the Libya cases seem premised on an assumption or assessment that the Libyan criminal justice system can and does function without hindrance, in accordance with its own domestic laws and procedures, and in compliance with international law and standards. The ICJ’s report on the criminal justice system in Libya challenges such assumptions, concluding that:

- Any investigation and prosecution of crimes under international law conducted by Libyan authorities is unlikely to meet the international standards of independence, impartiality and effectiveness;
- Any trial conducted by Libyan authorities of crimes under international law is unlikely to meet international fair trial standards, including the right to liberty, *habeas corpus*, defence rights, equality of arms and the right to appeal; and
- A web of amnesties, immunities, defences and offences that are insufficiently or inappropriately criminalized effectively prevent the Libyan legal system from genuinely carrying out proceedings.

Even if such deficiencies and inadequacies are addressed by the Libyan authorities through the adoption of legal reforms, such reforms would be of little effect if the security situation and ongoing armed conflicts continue to prevent the effective functioning of the criminal justice system, including, as documented in the ICJ’s report, the fact that:

- Libyan police and other law enforcement forces remain weak, ineffective and unable to exercise police powers all over the country;
- Armed groups continue to be empowered to arrest and detain individuals without proper judicial oversight or any form of accountability; and

¹⁶ *The Prosecutor v. Saif Al-Islam Gadhafi*, Case No. ICC-01/11-01/11, Pre-Trial Chamber I, Decision on the “Admissibility Challenge by Dr. Saif Al-Islam Gadhafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute,” 5 April 2019 (*Gadhafi*, Pre-Trial Chamber I, Admissibility Decision [2019]), para. 36 (emphasis in the original); *The Prosecutor v. Saif Al-Islam Gadhafi*, Case No. ICC-01/11-01/11, Appeals Chamber, Judgment on the appeal of Mr Saif Al-Islam Gadhafi against the decision of Pre-Trial Chamber I entitled “Decision on the ‘Admissibility Challenge by Dr. Saif Al-Islam Gadhafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute’” of 5 April 2019, 9 March 2020 (*Gadhafi*, Appeals Chamber, Admissibility Decision [2020]), para. 63

¹⁷ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11-307, Appeals Chamber, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute,” 30 August 2011, para. 62; *Gadhafi*, Pre-Trial Chamber I, Admissibility Decision (2019), para. 32.

- Judges, prosecutors, and courts continue to be subjected to attacks, including bombing, kidnapping and killings, further undermining the ability of the Libyan legal system to genuinely carry out proceedings.

3.1. Current context in Libya

Libya's political fragmentation and ongoing armed conflict has not undermined the unity of the Libyan judiciary, with judges and prosecutors operating under the authority of a single Supreme Judicial Council, and judges and prosecutors receiving remuneration by the internationally recognized Ministry of Justice, and applying the same Penal Code and Code of Criminal Procedure (CCP). Libyan police are also able to operate to a certain extent across the country; in some cases, armed groups are integrated into the police force, and in others law enforcement is carried out by armed groups which have pledged allegiance to executive authorities. However, the justice system is functioning at limited capacity in numerous places. While civil, administrative and family courts continue to operate in most parts of the country, criminal courts face greater challenges, as criminal justice actors are subject to continuing intimidation, threats and violence by armed groups.¹⁸ Despite State efforts to improve justice system capacity, few investigations involving crimes under international law committed after the post 2011 uprising have been opened and, based on the information available, no prosecutions have been conducted.¹⁹

3.2. Legal framework governing the criminal justice system

As discussed in more detail in the ICJ's report on the Libyan criminal justice system,²⁰ the legal framework does not meet international law standards governing the obligation to penalize, investigate and prosecute crimes under international law, and the rights to liberty and to a fair trial. Substantial reforms to the legal framework are required to ensure fair and effective justice in future cases.

The crimes over which the ICC has jurisdiction, and crimes under international law more broadly, are not penalized in Libyan law, or are defined inconsistently with international law. Crimes against humanity, genocide and war crimes are not penalized at all.²¹ Acts constituting crimes against humanity or underlying persecution – in particular murder, torture and inhumane treatment, enforced disappearance, unlawful arrest, rape and other acts of sexual violence and slavery – are either not penalized at all or are defined inconsistently with the definitions that apply under treaty or customary international law. For example, the definition of torture under article 2 of Law No. 10 of 2013²² includes an exhaustive rather

¹⁸ See e.g. *Report of the Secretary-General on the United Nations Support Mission in Libya*, UN Doc. S/2013/104, 21 February 2013, para. 26; *Report of the Secretary-General on the United Nations Support Mission in Libya*, UN Doc. S/2013/516, 5 September 2013, p. 7; *Report of the Secretary-General on the United Nations Support Mission in Libya*, UN Doc. S/2014/131, 26 February 2014, pp. 4, 9; *Report of the Secretary-General on the United Nations Support Mission in Libya*, UN Doc. S/2014/653, 5 September 2014, para. 53; *Report of the Secretary-General on the United Nations Support Mission in Libya*, UN Doc. S/2016/182, 25 February 2016, para. 54; *Report of the Secretary-General on the United Nations Support Mission in Libya*, UN Doc. S/2017/283, 4 April 2017, para. 50; *Report of the Secretary-General on the United Nations Support Mission in Libya*, UN Doc. A/HRC/43/75, 23 January 2020, paras. 52 ff. Although the information available is limited, the extent to which the criminal justice and tribunal systems operate for ordinary crimes seems limited. The UN Secretary-General reported in 2015 that *sharia* courts were established in Derna "outside the scope of the State authority;" *Report of the Secretary-General on the United Nations Support Mission in Libya*, UN Doc. S/2015/144, 26 February 2015, para. 57. See also OHCHR, *Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya: Detailed Findings*, UN Doc. A/HRC/31/CRP.3, 15 February 2016, p. 55 ("The Libyan judicial system has been the target of crippling, violent attacks with actors such as judges and prosecutors being subject to killings, assaults, abductions, and threats. Such attacks have caused the system to come to a halt in many areas of Libya, in particular the eastern and central regions, and have compromised the functioning of the courts that remain open"). See also HRW, *World Report 2020 – Libya: Events of 2019*, available at <https://www.hrw.org/world-report/2020/country-chapters/libya>.

¹⁹ ICJ, *Accountability for Serious Crimes under International Law in Libya: An Assessment of the Criminal Justice System*, July 2019, pp. 19-21.

²⁰ *Ibid.*, pp. 31 ff.

²¹ Although article 37 of the 2017 Consolidated Draft Constitution provides that "[a]ll forms of behavior that constitute crimes against humanity, war crimes, genocide, and terrorism shall be prohibited, shall not be subject to the statute of limitations, and shall not be pardoned, in so far as this does not contradict the provisions of the Constitution," the provision has not been approved by way of referendum, and thus has not been adopted or given effect in domestic legislation.

²² Law No. 10 of 2013 on the Criminalization of Torture, Forced Disappearance and Discrimination, 14 April 2013. Article 2 punishes "... anyone who inflicts or orders another person to inflict physical or mental pain on a detainee under his control in order to extract a

than inclusive list of purposes for which the harm is committed, and excludes some of the purposes included in definition in article 1 of the *Convention against Torture* (CAT),²³ which is reflective of customary international law.²⁴ Additionally, Libyan law does not criminalize other serious “acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture,” as required by article 16 of the CAT. Libyan law could also excuse killings that might constitute murder as the crime against humanity of persecution, in particular the use of lethal force by public officials in circumstances²⁵ other than as a measure of last resort in response to an imminent threat to life.²⁶ In addition, summary executions, in particular the application of the death penalty carried out without full compliance with fair trial guarantees, are not criminalized.²⁷ The definition of “forced disappearance” in Law No. 10 of 2013²⁸ does not, in fact, criminalize enforced disappearance as defined by the *International Convention for the Protection of all Persons from Enforced Disappearance* (ICPPED)²⁹ and customary international law, or acts which are constitutive of enforced disappearance and prohibited by the CAT and the International Covenant on Civil and Political Rights (ICCPR),³⁰ because it excludes two essential elements.³¹ Law No. 10 of 2013 consequently fails to recognize the special gravity of the crime, including its nature as a continuing act amounting to a composite and cumulative violation of several human rights. Rape and other acts of sexual violence and slavery are also not adequately defined in domestic law,³² including because rape and “indecent assault” are excused where the perpetrator marries the victim, and their definitions do not capture all situations in which a lack of consent can be inferred from the coercive

confession for any act that such detainee has or has not committed, or because of discrimination, regardless of its type, or revenge, regardless of its motive.” At the time the admissibility challenge was filed, Libya had charged torture under article 435 of the Penal Code, a provision which has subsequently been repealed and replaced by Law No. 10 of 2013.

²³ Namely: (a) obtaining information; (b) punishing the person for an act that has been or is suspected to have been committed; or (c) intimidating or coercing both or either the victim and/or a third person. See *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 UNTS 85, 10 December 1984 (CAT) (Libya acceded on 16 May 1989), art. 1. The requirements that the crime be committed by a public official and for specific purposes under article 1 of the CAT do not apply to crimes against humanity. See International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Kunarac et al.*, Case No. IT-96023 & IT-96-23/1-A, Appeals Chamber, Judgement, 12 June 2002, para. 148. See also CAT, arts. 2, 4; ICCPR, art. 7; CRC, art. 37(a); League of Arab States, *Arab Charter on Human Rights*, 22 May 2004 (Arab Charter) (Libya ratified on 7 August 2006), art. 8; *African Charter on Human and Peoples’ Rights*, 1520 UNTS 217, 27 June 1981 (ACHPR) (Libya ratified on 19 July 1986), art. 5; Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, UN Doc. HRI/GEN/1/Rev.9, 10 March 1992, paras. 8, 13.

²⁴ ICTY, *Prosecutor v. Brđanin et al.*, Case No. IT-99-36-A, Appeals Chamber, Judgement, 3 April 2007, para. 246.

²⁵ Article 71 of the Penal Code excuses public officials from punishment if they use or order the “use of arms or other means of coercion to repel force or to overcome resistance to public authorities,” as well as other parties assisting them. This applies “notwithstanding” limits on the use of self-defence contained in article 70, which states that “[t]here is no punishment if the act is committed during exercise of the right to lawful defence. This right exculpates a person for commission of any act that is necessary in order to avert a crime that would cause damage to himself or others. This right does not exist when it would have been possible to seek the protection of the public authorities in a timely manner.”

²⁶ *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, 27 August–7 September 1990, principles 9 and 13014. See also *Code of Conduct for Law Enforcement Officials*, UN Doc. A/RES/34/169, 17 December 1979, principle 3.

²⁷ ICJ, *Accountability for Serious Crimes under International Law in Libya*, pp. 39-40.

²⁸ Law No. 10 of 2013, art. 1. This provision replicates almost *verbatim* article 428 of the Penal Code, which was repealed pursuant to article 6 of Law No. 10 of 2013. See ICJ, *Accountability for Serious Crimes under International Law in Libya*, p. 35.

²⁹ *International Convention for the Protection of All Persons from Enforced Disappearance*, 2716 UNTS 3, 20 December 2006 (ICPPED), art. 2. See also Human Rights Committee, *Yurich v. Chile*, UN Doc. CCPR/C/85/D/1078/2002, 12 December 2005, para. 6.3.

³⁰ While Libya is not party to the ICPPED, it is party to conventions prohibiting acts which protect rights constitutive of enforced disappearance. See *International Covenant on Civil and Political Rights* (ICCPR), 999 UNTS 171, 16 December 1966 (Libya acceded on 15 May 1970); Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 18; *Boucherf v. Algeria*, UN Doc. CCPR/C/86/D/1196/2003, 27 April 2006, para. 9.2.

³¹ Namely the involvement of a public official and the refusal to disclose the fate or whereabouts of the person concerned or acknowledge the deprivation of liberty. See *Declaration on the Protection of All Persons from Enforced Disappearance*, UN Doc. A/RES/47/133, 18 December 1992 (DPED), arts. 2, 17; *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/16/48, 26 January 2001, paras. 1, 3. In any event, unlawful arrest and deprivation of liberty rather than enforced disappearance was charged or intended to be charged in the *Gadhafi* and *Al-Senussi* cases. See *Libyan Government’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gadhafi*, Doc. ICC-01/11-01/11-258-Red2, 23 January 2013, para. 82; *The Prosecutor v. Saifal-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11, Pre-Trial Chamber I, Decision on the admissibility of the case against Abdullah Al-Senussi, 11 October 2013 (*Al-Senussi*, Pre-Trial Chamber, Admissibility Decision), para. 166, note 414. See also UNSMIL & OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)*, February 2017, p. 19.

³² ICJ, *Accountability for Serious Crimes under International Law in Libya*, pp. 40-45.

circumstances in which they are committed. The prohibitions on indecent assault and slavery do not include all forms of sexual violence prohibited by the Rome Statute.³³

Other inadequacies also impact Libya's ability to hold perpetrators liable. In particular, superior responsibility as a mode of liability is not adequately provided for.³⁴ The defence of "superior orders" is recognized, irrespective of whether the order was manifestly unlawful.³⁵ Further, the expansive and overbroad application of amnesties and immunities prevent the investigation and prosecution of crimes under international law, in particular crimes committed during and after the 2011 conflict and crimes committed by public officials in the performance of their duties.³⁶

The provisions of the Libyan Code of Criminal Procedure (CCP) governing lawful arrest and detention are also not compliant with international law and standards governing the rights to liberty and to a fair trial.³⁷ The investigating judge and the prosecutor may provisionally detain a suspect, up to 15 and six days respectively, without prompt judicial oversight; afterwards, detention may be extended indefinitely for consecutive periods of time, subject to judicial approval.³⁸ The CCP is problematic insofar a person may be detained without judicial oversight and no maximum duration of pre-trial detention is set, much less one that is permissible; the CCP may also violate the right to be tried without undue delay under article 14(3)(c) of the ICCPR.³⁹ Furthermore, the CCP does not provide for the right to access a court to challenge the lawfulness of detention or raise any related issues (*habeas corpus*), as prescribed by international law.⁴⁰ Access to a court is dependent on the prison warden submitting the complaint to a judicial authority or the Public Prosecutor.⁴¹

With regard to the right to legal counsel, the investigating judge or the public prosecution may question an accused, as well as confront her or him with other accused or witnesses, only in the presence of a lawyer, except in cases of *flagrante delicto* or when there is a risk that evidence will be lost.⁴² The lawyer, however, may only speak when authorized by the judge. Accused persons have the right to choose their own lawyer and, in felony cases, the State may appoint a lawyer if the accused has not chosen one. A detained accused must always be guaranteed the right to contact her or his lawyer in private. Investigators are forbidden from seizing documents from the accused's lawyer.⁴³ The CCP is not in accordance with international law and standards⁴⁴ insofar as (i) it does not guarantee the right to legal counsel upon arrest or shortly thereafter; (ii) allows an accused to be questioned upon arrest and confronted with other accused or witnesses without the presence of her or his lawyer of choice in cases of *flagrante delicto* or where there is a risk that the evidence will be lost; and (iii) only permits the lawyer the right to speak upon the authorization of the judge. The fact that the CCP does not ensure that the accused's lawyer can actively and effectively participate in an interrogation, and subjects counsel

³³ *Ibid.*, pp. 42, 45. For example, the prohibition on forced prostitution excludes men and the prohibition on human trafficking only applies where it committed for the purposes of prostitution

³⁴ *Ibid.*, pp. 47-49.

³⁵ *Ibid.*, pp. 49-50.

³⁶ *Ibid.*, pp. 54-59.

³⁷ ICCPR, art. 9; Arab Charter, art. 14; ACHPR, art. 6; African Commission on Human and Peoples' Rights (AComHPR), *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Doc. OS(XXX)247, 2003, principle M(1).

³⁸ Code of Criminal Procedure (CCP), arts. 107, 111, 115-116, 122-123, 175-177.

³⁹ Human Rights Committee, *General Comment No. 32: Right to Equality before Courts and Tribunals and to a Fair Trial (Article 14)*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 35.

⁴⁰ ICCPR, art. 9(4); Arab Charter, art. 14(6); Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of Person)*, UN Doc. CCPR/C/GC/35, 16 December 2014, paras. 41-42, 45.

⁴¹ The CCP provides the prisoners with the right to "submit a written or verbal complaint to the prison warden at any time and ask him to notify it to the Public Prosecution or to the competent judge ...;" the public prosecution or competent judge is then obliged to "immediately proceed to the location of the detainee in question, conduct an investigation, order the release of the inmate detained illegally, and draw up a detailed report on all such facts." See CCP, art. 33.

⁴² CCP, art. 106.

⁴³ CCP, arts. 80, 106, 121, 162(1), 187 *bis* (C), 321.

⁴⁴ ICCPR, art. 14(3)(d); Arab Charter, art. 16(4); ACHPR, arts. 3, 7; *Basic Principles on the Role of Lawyers*, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August-7 September 1990, principles 1, 3, 5, 8, 22; Human Rights Committee, *General Comment No. 35*, paras. 35, 46.

questions to prior authorization by the investigative judge, is contrary to the accused's rights to an effective legal counsel.⁴⁵

Libyan law also does not expressly exclude the use of information obtained or extracted through torture or ill-treatment as evidence at trial, as required by international law and standards; under the CAT, information so obtained can only be used as proof that an act of torture or ill-treatment has occurred.⁴⁶ Torture and ill-treatment inflicted irrespective of the purpose for which it was inflicted also constitute a violation of a person's fair trial rights, specifically of the right to humane treatment and conditions of detention, which persons deprived of their liberty enjoy at all times;⁴⁷ such acts may also impinge upon one's ability to prepare a proper defence by subjecting them to undue physical and psychological pressure. Practice shows that torture and other ill-treatment are used in a widespread manner during interrogations in Libya.⁴⁸

Libyan law is also non-compliant in relation to other fair trial rights, including the right to be promptly informed of the charges; the right to be brought promptly before a judge; the right to adequate time and facilities to prepare a defence; the right not to be compelled to incriminate oneself; the right to family visits and medical assistance; the right to trial before a competent, independent and impartial tribunal; the right to a public hearing; the right to call and examine witnesses; the right to be tried in one's presence; and the right to appeal.⁴⁹

3.3. Ongoing violations of detainees and accused's rights in Libya

The inadequacies of the Libyan legal framework have continued to provide fertile ground for human rights violations and abuses. Although there is little information about practice in relation to the investigation and prosecution of crimes domestically, since the 2011 uprising, arbitrary detention has been practiced on a continuous and widespread basis, with thousands of people including migrants, refugees and asylum seekers being detained without charge, without being brought before a judicial authority and without access to counsel or family. In the *37 Gadhafi-regime members* case before the Tripoli Court of Assize, and as discussed in more detail in section 4, the accused had limited access to counsel, to the evidence against them and to trial hearings, and their rights to examine and cross-examine witnesses were severely curtailed. Public access to the trial was restricted, and the prosecution case, supporting evidence and judgment were not made public. The Court also repeatedly dismissed the accused's allegations that witness statements were obtained through torture or ill-treatment without conducting an investigation, placing the burden of proof on the defence to verify them.⁵⁰

4. Complementarity and the Libya cases

4.1. Overview of the *Gadhafi* and *Al-Senussi* cases

On 27 June 2011, the PTC issued warrants of arrest against Saif al-Islam Gadhafi and Abdullah Al-Senussi. The PTC found there were reasonable grounds to believe Gadhafi and Al-Senussi were

⁴⁵ ICJ, *Accountability for Serious Crimes under International Law in Libya*, p. 69.

⁴⁶ CAT, art. 15; Human Rights Committee, *General Comment No. 20*, para. 12.

⁴⁷ ICCPR, art. 10(1); AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle M(7)(b); *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, UN Doc. A/RES/70/175, 17 December 2015, rule 1.

⁴⁸ Among others, see UN Working Group on Arbitrary Detention, *Opinion No. 4/2016 concerning Abdul Majed al-Gaoud and Others (Libya)*, UN Doc. A/HRC/WGAD/2016/4, 15 June 2016, paras. 16, 18-19, 2-22, 24; *Opinion No. 6/2017 concerning Yousif Abdul Salam Faraj Ahbara and Others (Libya)*, UN Doc. A/HRC/WGAD/2017/6, 9 June 2017, paras. 14-28; UNSMIL & OHCHR, *Abuse Behind Bars: Arbitrary and Unlawful Detention in Libya*, April 2018, pp. 44-45, 49-50; *Torture and Deaths in Detention in Libya*, October 2013.

⁴⁹ ICJ, *Accountability for Serious Crimes under International Law in Libya*, pp. 60-92.

⁵⁰ See UNSMIL & OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)*, February 2017; ICJ, *Accountability for Serious Crimes under International Law in Libya*. The 37 alleged members of the Gadhafi regime, including Gadhafi and al-Senussi, were tried on charges of war crimes and other offences before the Tripoli Court of Assize, which sentenced nine defendants to death; eight defendants to life in prison; and the rest to prison sentences ranging from 12 to 15 years.

responsible as an indirect co-perpetrator and indirect perpetrator, respectively, under article 25(3)(a) of the Rome Statute for the crimes against humanity of murder and persecution (namely murder, abductions, arbitrary arrest and detention, beatings, torture and enforced disappearances) under article 7(1)(a) and (h).⁵¹

On 31 May 2013, the PTC rejected the Government of Libya's challenge to the admissibility of the case against Saif al-Islam Gadhafi (the *Gadhafi* case) under article 17 of the Rome Statute⁵² on the basis that Libya: (i) was not investigating the same case as that before the ICC; and (ii) was unable to carry out a genuine investigation or prosecution.⁵³ The finding was upheld by the Appeals Chamber on 21 May 2014.⁵⁴ Conversely, the PTC granted the Government of Libya's challenge to the admissibility of the case against Abdullah Al-Senussi (the *Al-Senussi* case)⁵⁵ because Libya: (i) was investigating the same case as that before the ICC; and (ii) was neither unwilling nor unable genuinely to conduct an investigation or prosecution.⁵⁶ The Appeals Chamber again upheld the decision.⁵⁷ The constitution of the PTC and Appeals Chamber in the *Gadhafi* and *Al-Senussi* cases was the same.

On 28 July 2015, in a case against 37 former officials of the Gadhafi regime, the Tripoli Court of Assize convicted Gadhafi and Al-Senussi of multiple charges, including indiscriminate killings, sexual violence and unlawful detention, and sentenced both to death.⁵⁸ An appeal against the conviction is currently

⁵¹ *Warrant of Arrest for Saif Al-Islam Gadhafi*, Doc. ICC-01/11-14, 27 June 2011, p. 6 (such crimes against humanity were allegedly committed by Security Forces under his control in various locations in Libya (in particular in Benghazi, Misrata, Tripoli and other neighboring cities) from 15 February 2011 until at least 28 February 2011 for Gadhafi); *Warrant of Arrest for Abdullah Al-Senussi*, Doc. ICC-01/11-15, 27 June 2011, p. 6 (such crimes were allegedly committed in Benghazi from 15 February 2011 until at least 20 February 2011 by the members of the armed forces under his control); *Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gadhafi, Saif Al-Islam Gadhafi and Abdullah Al-Senussi,"* Case No. ICC-01/11, Pre-Trial Chamber I, 27 June 2011, paras. 42-65. See also *Lawyers for Justice in Libya and Redress Trust's Observations pursuant to Rule 103 of the Rules of Procedure and Evidence*, Doc. ICC-01/11-01/11-172, 8 June 2012.

⁵² *Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute*, Doc. ICC-01/11-01/11-130-Red, 1 May 2012. The OTP supported Libya's application (*Prosecution response to Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute*, Doc. ICC-01/11-01/11-167-Red, 5 June 2012) and the Office of Public Counsel for Victims (OPCV) and Saif al-Islam Gadhafi opposed it (See, e.g. *Observations on behalf of victims on the Government of Libya's Application pursuant to Article 19 of the Rome Statute*, Doc. ICC-01/11-01/11-166-Red, 4 June 2012; *Public Redacted Version of the Corrigendum to the "Defence Response to the 'Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute,'"* Doc. ICC-01/11-01/11-190-Corr-Red, 31 July 2012).

⁵³ *The Prosecutor v. Saif Al-Islam Gadhafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11, Pre-Trial Chamber I, Decision on the admissibility of the case against Saif Al-Islam Gadhafi, 31 May 2013, (*Gadhafi*, Pre-Trial Chamber I, Admissibility Decision [2013]) para. 219.

⁵⁴ *The Prosecutor v. Saif Al-Islam Gadhafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11 OA 4, Appeals Chamber, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gadhafi," 21 May 2014 (*Gadhafi*, Appeals Chamber, Admissibility Decision [2014]), p. 3. See also *The Government of Libya's Appeal against Pre-Trial Chamber I's "Decision on the admissibility of the case against Saif Al-Islam Gadhafi,"* Doc. ICC-01/11-01/11-350, 7 June 2013.

⁵⁵ *Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute*, Doc. ICC-01/11-01/11-307-Red2, 2 April 2013 (public redacted version). The OTP again supported Libya's application (*Prosecution's Response to "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute,"* Doc. ICC-01/11-01/11-321-Red, 3 May 2013 (public redacted version); *Defence Response on behalf of Mr. Abdullah Al-Senussi to "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute,"* Doc. ICC-01/11-01/11-356, 14 June 2013) while the Defence and the OPCV opposed it (*Observations on behalf of victims on the "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute,"* Doc. ICC-01/11-01/11-353-Red, 14 June 2013 (public redacted version).

⁵⁶ *The Prosecutor v. Saif Al-Islam Gadhafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11, Pre-Trial Chamber I, Decision on the admissibility of the case against Abdullah Al-Senussi, 11 October 2013 (*Al-Senussi*, Pre-Trial Chamber I, Admissibility Decision), para. 311.

⁵⁷ *The Prosecutor v. Saif Al-Islam Gadhafi and Abdullah Al-Senussi*, Case No. ICC-OI/II-OI/IIOA6, Appeals Chamber, Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi," 24 July 2014, p. 3. See also Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's "Decision on the admissibility of the case against Abdullah Al-Senussi," and Request for Suspensive Effect, Doc. ICC-01/11-01/11-468-Red, 17 October 2013.

⁵⁸ *The State of Libya v. Saif al-Gadhafi, Abdullah al-Senussi & Others*, Case No. 630/2012, July 2015.

pending before the Libyan Supreme Court. The trial and conviction have been the subject of reports, including by the ICJ, alleging that the accused's fair trial rights were violated.⁵⁹

Following his domestic trial, on 6 June 2018, Gadhafi filed a second admissibility challenge,⁶⁰ arguing that the case against him was inadmissible under articles 17(1)(c) and 20(3) of the Rome Statute because (i) he had already been tried by the Tripoli Court of Assize⁶¹ and (ii) he benefitted from the amnesty adopted under Law No. 6 of 2015.⁶² On 9 March 2020, the Appeals Chamber upheld the PTC's rejection of Gadhafi's application, finding that "the Pre-Trial Chamber did not err in finding a lack of finality of the Tripoli Court Judgment, and that Law No. 6 is not applicable to the crimes for which Mr Gaddafi was convicted."⁶³

4.2. The "same case" test

When determining whether a State is investigating or prosecuting the same case, the Court only requires that national proceedings cover the same conduct alleged before the ICC irrespective of how the crimes are characterized.⁶⁴ This reasoning was applied in the *Gadhafi* and *Al-Senussi* cases, where the Court stated that Libyan law was capable of capturing the conduct underlying the crimes against humanity of murder and persecution charged, notwithstanding the lack of domestic provisions penalizing crimes against humanity in general, and the crime of persecution in particular.⁶⁵ In proceedings before the Court, consideration ought to be given to Libya's obligation to penalize crimes under international law in line with definitions found in relevant treaties and customary international law, and article 21(3) of the Rome Statute, which requires the Court to apply the Rome Statute, the Elements of Crimes, treaties and principles and rules of international law "consistent with internationally recognized human rights." To ensure consistency with international law, cases should be considered inadmissible if the "ordinary crimes" charged by the States fail to meet the essential elements of the crimes charged before the ICC.

4.2.1. Meaning of "same case"

In order to conclude that domestic authorities are investigating or prosecuting the "same case" as that before the ICC,⁶⁶ "the national investigation [or prosecution] must cover the same individual and

⁵⁹ UNSMIL & OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)*, February 2017; ICJ, *Accountability for Serious Crimes under International Law in Libya*, pp. 73 ff.

⁶⁰ *Admissibility Challenge by Dr. Saif Al-Islam Gadhafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute*, Doc. ICC-01/11-01/11-640, 6 June 2018.

⁶¹ *The State of Libya v. Saif al-Gadhafi, Abdullah al-Senussi & Others*, Case No. 630/2012, July 2015; UNSMIL & OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)*, February 2017.

⁶² Law No. 6 of 2015 on General Amnesty, 7 September 2015. The OPCV (*Observations on behalf of victims on the "Admissibility Challenge by Dr. Saif Al-Islam Gadhafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute"*, Doc. ICC-01/11-01/11-652, 28 September 2018) and the OTP (*Public redacted version of "Prosecution response to 'Admissibility Challenge by Dr. Saif Al-Islam Gadhafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute'" filed on 28 September 2018*, Doc. ICC-01/11-01/11-653-Red, 11 October 2018) filed responses opposing the application. Lawyers for Justice in Libya and the Redress Trust filed another *amicus curiae* submission arguing *inter alia* that there was no final decision in the domestic case and that, even if an amnesty was granted, it could not apply to international crimes (*Observations by Lawyers for Justice in Libya and the Redress Trust pursuant to Rule 103 of the Rules of Procedure and Evidence*, Doc. ICC-01/11-01/11-654, 28 September 2018).

⁶³ *Gadhafi*, Appeals Chamber, Admissibility Decision (2020), para. 96. See also *Gadhafi*, Pre-Trial Chamber I, Admissibility Decision (2019), p. 29; *Defence Appeal against Pre-Trial Chamber I's "Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gadhafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute'" and Application for extension of time to file the Appeal Brief*, Doc. ICC-01/11-01/11-663, 10 April 2019.

⁶⁴ *Al-Senussi*, Appeals Chamber, Admissibility Decision, paras. 118-119.

⁶⁵ See section 3.2.3 below.

⁶⁶ Article 17 applies not only to concrete cases in which an alleged perpetrator has been identified, but also to preliminary admissibility rulings under article 18 or the initiation of an investigation under articles 15 and 53, i.e. instances in which the contours of an investigation are still vague, no individual suspect has been identified or the conduct or its legal characterization are not yet clear. See *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11-307, Appeals Chamber, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute," 30 August 2011, paras. 38-39.

substantially the same conduct as alleged in the proceedings before the Court.”⁶⁷ The Appeals Chamber stated that:

... the “conduct” that defines the “case” is both that of the suspect ... *and* that described in the incidents under investigation which is imputed to the suspect. “Incident” is understood as referring to a historical event, defined in time and place, in the course of which crimes within the jurisdiction of the Court were allegedly committed by one or more direct perpetrators. The exact scope of an incident cannot be determined in the abstract. What is required is an analysis of all the circumstances of a case, including the context of the crimes and the overall allegations against the suspect.⁶⁸

The Appeals Chamber also determined that a State does not need to characterize the offences an accused is charged with as “crimes under international law” in order to show that it is investigating or prosecuting the same case. An investigation or prosecution for “ordinary crimes” is sufficient as long as it covers the same conduct.⁶⁹

4.2.2. The “same case” test in the *Gadhafi* and *Al-Senussi* cases

The PTC found that Libya was not investigating the same case against Gadhafi, but was investigating the same case against Al-Senussi. The decisions turned on the scope of the Libyan authorities’ investigations, not on the characterization of the crimes that might ultimately be charged. In the *Gadhafi* case, the PTC could not determine Libya was investigating the same case because it could not “discern the actual contours of the national case.”⁷⁰ The PTC in the *Al-Senussi* case, however, ruled that Libya was investigating the same case as alleged in the warrant of arrest based on the investigative steps taken by Libya.⁷¹ The Appeals Chamber disagreed that the divergent approach between the cases was consequential despite their overlap,⁷² finding they could be distinguished based on their geographic and temporal scope and the role of the suspects, as well as the evidence submitted by Libya.⁷³

In both cases, the Court affirmed that Libya’s characterization of the crimes under investigation at the domestic level did not matter for the purposes of evaluating whether Libya was investigating the same case. In the *Gadhafi* case, the PTC stated that “the assessment of domestic proceedings should focus on the alleged conduct and not its legal characterization,” and that the “question of whether domestic investigations are carried out with a view to prosecuting ‘international crimes’ is not determinative of an admissibility challenge.”⁷⁴ It noted that article 20(3) of the ICC Statute refers to “conduct” and does not distinguish between ordinary and international crimes, and that the drafters of the ICC Statute made a

⁶⁷ *Ibid.*, para. 40. See also *Gadhafi*, Appeals Chamber, Admissibility Decision (2014), paras. 60-61 (emphasis added). See also *ibid.*, paras. 72-73.

⁶⁸ *Ibid.*, para. 62 (emphasis in the original). See also *ibid.*, para. 73 (To make such an assessment, it is “necessary to use, as a comparator, the underlying incidents under investigation both by the Prosecutor and the State, alongside the conduct of the suspect under investigation that gives rise to his or her criminal responsibility for the conduct described in those incidents”). See also para. 83.

⁶⁹ *Al-Senussi*, Appeals Chamber, Admissibility Decision, para. 119.

⁷⁰ *Gadhafi*, Pre-Trial Chamber I, Admissibility Decision (2013), paras. 134-135. See also *ibid.*, paras. 116-117, 123. For a description of the conduct compared by the PTC, see para. 133. On 21 October 2014, the Appeals Chamber upheld the PTC’s decision. See *Gadhafi*, Appeals Chamber, Admissibility Decision (2014), paras. 86, 143-144.

⁷¹ *Al-Senussi*, Pre-Trial Chamber I, Admissibility Decision, paras. 163, 168. For a description of the conduct, see *ibid.*, para. 163. The PTC found that the reference to specific incidents alleged in the warrant of arrest was not necessary to define the criminal conduct (*ibid.*, paras. 77, 79). The Appeals Chamber dismissed the appeal against this finding on the basis that, although the PTC contradicted their earlier statement in the *Gadhafi* case that it was required “... to use, as a comparator, the underlying incidents under investigation both by the Prosecutor and the State” as well as the “conduct of the suspect” (*Gadhafi*, Appeals Chamber, Admissibility Decision (2014), para. 73), the PTC “relied, at least in part, on the underlying incidents to assess the sameness of the cases being investigated.” See *ibid.*, para. 103. See also *ibid.*, para. 105.

⁷² *Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I’s ‘Decision on the admissibility of the case against Abdullah Al-Senussi,’* Doc. ICC-01/11-01/11-474, 4 November 2013 (*Al-Senussi* Document in support of appeal against admissibility), para. 175 (they were allegedly “jointly involved in the same plan at the highest level” to “commit crimes in order to quell the demonstrations in Libya in February 2011”). See also paras. 174 and 176.

⁷³ *Al-Senussi*, Appeals Chamber, Admissibility Decision, paras. 94-97.

⁷⁴ *Gadhafi*, Pre-Trial Chamber I, Admissibility Decision (2013), paras. 85, 89.

deliberate decision to depart from the approach of the ICTY and ICTR, in which the principle of *ne bis in idem* did not apply where the accused was being or had been prosecuted for ordinary crimes.⁷⁵ Although the domestic crimes being considered in the investigation against Gadhafi did not cover all aspects of the crimes he was charged with under the Rome Statute, the PTC found the domestic case overall captured the relevant criminal conduct. With specific reference to persecution, the PTC accepted Libya's submission that, "although persecutory intent is not an element of any of the crimes against Mr Gadhafi, it is an aggravating factor which is taken into account in sentencing under articles 27 and 28 of the Libyan Criminal Code"⁷⁶ and that, combined, the domestic charges "may sufficiently capture Mr Gadhafi's use of his control over the Libyan State apparatus and Security Forces to kill and persecute hundreds of civilian demonstrators or alleged dissidents."⁷⁷ Only one of the crimes in the list provided by Libyan authorities included a political component, namely "attacks upon the political rights of a Libyan through violence, threats or deceit" under article 217 of the Penal Code,⁷⁸ which was not analysed by the Chamber.

The PTC applied the same reasoning in the *Al-Senussi* case without analyzing the crimes that Libya envisaged charging Al-Senussi with, which also included article 217 of the Penal Code.⁷⁹ On appeal, Al-Senussi argued that domestic charges were insufficient because "a central 'factual aspect' of the ICC's case will not be reflected."⁸⁰ With respect to persecution in particular, he argued that taking into account the discriminatory component of persecution as an aggravating factor during sentencing is inadequate and that, in any event, articles 27 and 28 of the Penal Code do not make reference to the prohibited grounds of discrimination constituting the crime of persecution in article 7(1)(h) of the Rome Statute.⁸¹ He stated that "it must be established that the facts underlying these [domestic] charges would rise to the level of crimes against humanity if these same facts were applied to the case before the Court."⁸² The OTP supported Libya's submissions in this regard, stating that "there may be discrepancies in the way a particular act is criminalized under the Rome Statute and under national law."⁸³ The Appeals Chamber disagreed, upholding the PTC's reasoning.⁸⁴

4.2.3. Should the domestic characterization of crimes under international law matter?

Domestic definitions of crimes should accord with those charged in ICC proceedings for purposes of assessing whether a State is investigating or prosecuting "substantially the same conduct." In this

⁷⁵ *Ibid.*, paras. 86-87.

⁷⁶ *Ibid.*, para. 111.

⁷⁷ *Ibid.*, para. 113.

⁷⁸ The Chamber's finding was based on a submission made by Libyan authorities with respect to the crimes for which Gadhafi may be charged, which included "both 'ordinary crimes' under the Libyan criminal code and an offence under Law No 7 of 1988 (crimes under Sharia law)," namely "articles 368 (intentional murder), 435 (torture), 293 (incitement to civil war), 296 (indiscriminate or 'random' killings), 431 (misuse of authority against individuals), 433 (arresting people without just cause) and 434 (unjustified deprivation of personal liberty) of the Libyan Criminal Code – are contained in articles 195 (insulting constitutional authorities), 202 (devastation, rapine and carnage), 203 (civil war), 211 (conspiracy), 217 (attacks upon the political rights of a Libyan subject), 297 (arson), 362 (spreading disease among plants and livestock), 294 (concealment of a corpse), 322 (aiding members of a criminal association), 429 (use of force to compel another) and 432 (search of persons) of the Criminal Code as well as in the Sharia law governing retaliation and Diya compensation for killings pursuant to Law No 7 of 1988." See *Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gadhafi*, Doc. ICC-01/11-01/11-258-Red2, 23 January 2013, para. 82. See also *Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute*, UN Doc. ICC-01/11-01/11-130-Red, 1 May 2012, para. 75 ("Under Libyan domestic law, ... murders and persecutions as well as other criminal acts not included in the ICC Article 58 Decision, are likely to be charged as: intentional murder; torture; incitement to civil war; indiscriminate killings; misuse of authority against individuals; arresting people without just cause; and the unjustified deprivation of personal liberty pursuant to Articles 368, 435, 293, 296, 431, 433, 434 of the Libyan Criminal Code 1953").

⁷⁹ *Al-Senussi*, Pre-Trial Chamber I, Admissibility Decision, para. 166 (footnote omitted). For the crimes the Libyan Government submitted it envisaged charging, which are the same or similar to those in the *Gadhafi* case, see *Al-Senussi*, Pre-Trial Chamber, Admissibility Decision, para. 166, note 414.

⁸⁰ *Al-Senussi* Document in support of appeal against admissibility, paras. 178, 180.

⁸¹ *Ibid.*, para. 184.

⁸² *Ibid.*, para. 182.

⁸³ *Prosecution's Response to the "Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's 'Decision on the Admissibility of the case against Abdullah Al-Senussi,'" Doc. ICC-01/11-01/11-483*, 26 November 2013, para. 146.

⁸⁴ *Al-Senussi*, Appeals Chamber, Admissibility Decision, paras. 118-119, 122.

respect, the lack of legislation penalizing crimes under international law should be one of the factors to be taken into account by the Court and parties pleading the case.

Under international law, including international human rights law and international humanitarian law, States have an obligation to penalize crimes under international law, including war crimes and crimes against humanity, which entails an obligation to define them consistently with the elements provided for in treaty and customary international law.⁸⁵ Although there is no express obligation in the Rome Statute to penalize such crimes domestically, article 21(1)(b) requires the Court to apply, in addition to the Rome Statute, “applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.” Article 21(3) requires the Court to apply and interpret every article of the Rome Statute, including article 17, “consistent[ly] with internationally recognized human rights.”⁸⁶ The sources that can be employed for this purpose are varied, and include – but are not limited to – treaties,⁸⁷ soft law,⁸⁸ and human rights bodies’ case law.⁸⁹ Accordingly, article 17 must be applied consistently with States’ obligations to penalize crimes under international law consistently with the definitions applicable under treaty and customary international law.

Article 17 read in light of article 21(3) suggests that, in assessing whether or not a State is investigating or prosecuting “substantially the same conduct,” consideration ought to be given to whether the domestic characterization of crimes complies with international human rights law. In fact, if international human rights law requires certain crimes to be defined in a specific way, and if the ICC is to interpret each provision of the Statute consistently with such body of law, then the concept of “same case” under article 17 should encapsulate considerations regarding the correct definition and penalization of crimes in accordance with international human rights law.

As discussed above, the crimes over which the ICC has jurisdiction, and crimes under international law more broadly, are not penalized in Libyan law or are defined inconsistently with international law. Crimes against humanity, genocide and war crimes are not penalized in domestic law at all.⁹⁰ Acts constituting crimes against humanity or underlying persecution – in particular murder, torture and inhumane treatment, enforced disappearance, unlawful arrest, rape and other acts of sexual violence and slavery – are either not penalized at all or are defined inconsistently with the definitions that apply under treaty or customary international law. Superior responsibility is also not penalized and the defence of superior orders maintained, further limiting opportunities for holding perpetrators of crimes liable. Moreover, amnesties and immunities may prevent the investigation and prosecution of crimes domestically, or extinguish penalties for them.

⁸⁵ For torture, see Committee against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, UN Doc. CAT/C/GC/2, 24 January 2008, paras. 8-9; for enforced disappearance, see ICPPED, art. 4; DPED, art. 4; *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. E/CN.4/1996/38, 15 January 1996, paras. 54-55; for war crimes, see *Convention relative to the Protection of Civilian Persons in Time of War*, 75 UNTS 287, 12 August 1949, arts. 146-147; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, 1125 UNTS 3, 8 June 1977, art. 85; ICRC Customary IHL Database, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul, rules 156, 158; for crimes against humanity, see Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, paras. 15, 18; Inter-American Court of Human Rights, *Gómez-Palomino v. Peru*, Series C No. 136, 22 November 2005, para. 103.

⁸⁶ *Situation in the Democratic Republic of the Congo*, Case No. ICC-01/04, Appeals Chamber, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, para. 38; *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06 (OA4), Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, para. 37.

⁸⁷ *Gadhafi*, Pre-Trial Chamber I, Admissibility Decision (2019), para. 45.

⁸⁸ *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Trial Chamber I, Decision on Victims’ Participation, 18 January 2008, para. 35.

⁸⁹ *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06 OA 13, Appeals Chamber, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled “Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, together with Certain other Issues Raised at the Status Conference on 10 June 2008,” 21 October 2008, paras. 46-47.

⁹⁰ Although article 37 of the 2017 Consolidated Draft Constitution provides that “[a]ll forms of behavior that constitute crimes against humanity, war crimes, genocide, and terrorism shall be prohibited, shall not be subject to the statute of limitations, and shall not be pardoned, in so far as this does not contradict the provisions of the Constitution,” the provision has not been approved by way of referendum, and thus has not been adopted or given effect in domestic legislation.

Absent penalization of crimes against humanity, Libyan law fails to capture their particular gravity, which is reflected in the *chapeau* of article 7 of the Rome Statute: the commission of the underlying acts “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” Charging a suspect with “ordinary” offences such as murder without considering whether it rises to the level of a crime against humanity does not ensure national proceedings include the conduct covered by the *chapeau*, including not only the widespread and systematic attack against a civilian population but also the accused’s intent in relation to it.

With specific regard to persecution, Al-Senussi’s argument that he would not be held liable for the conduct underlying the charges – namely the targeting of a particular group of individuals by reason of the identity of the group⁹¹ – has merit. Even if discriminatory intent could constitute an aggravating factor in sentencing – Al-Senussi correctly argued the Penal Code makes no specific reference to the prohibited grounds of discrimination listed in article 7(1)(h) of the Rome Statute⁹² – this does not equate to charging the accused with the same conduct. Relying on the domestic charge of murder and a provision in the Penal Code which punishes “attacks on the political rights of citizens through violence, threats or deceit”⁹³ also does not equate to ensuring that murder, unlawful detention, torture, enforced disappearances and any ill-treatment constitutes a persecutory act, and nevertheless does not incorporate the *chapeau* elements of crimes against humanity which are necessary for persecution to be proven.

The discrepancy between the Court’s jurisprudence and what is required under international law is significant in relation to the underlying acts of enforced disappearance and torture. Under international law, including the Rome Statute, the definition of enforced disappearance rests upon three elements, two of which are not included in the domestic definition, namely the involvement of a public official and the refusal to disclose the fate or whereabouts of the person concerned or acknowledge the deprivation of liberty.⁹⁴ Essential characteristics of this crime are its continuing nature⁹⁵ and the fact that it entails a violation of multiple rights.⁹⁶ Under international human rights law, States are required to criminalize enforced disappearance as a discrete crime and establish a penalty that reflects its special gravity, particularly as a continuing act and violation of multiple rights for as long as the person remains disappeared.⁹⁷ As observed by the UN Working Group on Enforced Disappearance, “States are, of course, not bound to follow strictly this definition in their criminal codes. They shall, however, ensure that the act of enforced disappearance is defined in a way which clearly distinguishes it from related offences such as enforced deprivation of liberty, abduction, kidnapping, incommunicado detention, etc.,”⁹⁸ which is precisely what the domestic offence is limited to.⁹⁹ Further, the domestic definition does not include the fourth element contained in the Rome Statute, namely the requirement that the perpetrator intended to remove them from the protection of the law for a prolonged period of time.¹⁰⁰

With respect to torture, as affirmed by the UN Committee against Torture, “States parties must make the offence of torture punishable as an offence under its criminal law, in accordance, at a minimum, with the

⁹¹ Rome Statute, art. 7(2)(h).

⁹² Article 26 of the Penal Code makes reference to applicable fines, and article 27 states: “The judge shall inflict the penalty that he deems fit within the limits stipulated by the law. He shall set forth the grounds supporting his assessment, and he shall not transgress the limits stipulated by the law either by increase or reduction, except in the cases provided for by the law.”

⁹³ Although this provision was not explicitly discussed in the PTC’s admissibility decision, it was listed as an offence in the current list of charges against Gadhafi by the Libyan authorities. See *Libyan Government’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gadhafi*, Doc. ICC-01/11-01/11-258-Red2, 23 January 2013, para. 82.

⁹⁴ See section 3.3 above.

⁹⁵ *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/16/48, 26 January 2001, paras. 1, 3. See also ICPPED, art. 24(6).

⁹⁶ DPED, art. 1(2); Human Rights Committee, *Boucherf v. Algeria*, UN Doc. CCPR/C/86/D/1196/2003, 27 April 2006, para. 9.2.

⁹⁷ DPED, art. 4; Inter-American Court of Human Rights, *Gómez-Palomino v. Peru*, Series C No. 136, 22 November 2005, para. 103.

⁹⁸ *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. E/CN.4/1996/38, 15 January 1996, para. 55.

⁹⁹ See section 3.3 above.

¹⁰⁰ Rome Statute, art. 7(2)(i).

elements of torture as defined in article 1 of the Convention, and the requirements of article 4.”¹⁰¹ The domestic definition’s non-compliance with the CAT because it fails to include a non-exhaustive list of all purposive requirements is not significant for the purposes of ICC jurisdiction because the definition of torture as a crime against humanity under the Rome Statute does not include a purposive requirement.¹⁰² However, the inclusion of a purposive requirement in the domestic definition of torture means that torture committed without purpose or for a purpose not included in the domestic definition would not be punishable in Libya, despite that it could be a crime against humanity under the Rome Statute.

In respect of charges, the State should demonstrate that its domestic legislation reproduces the elements of the crimes as defined in the Rome Statute. If a State charged an accused for a different crime, e.g. kidnapping rather than enforced disappearance, it would not be investigating or prosecuting “substantially the same conduct” as required under article 17(1)(a) and (b). To accept otherwise would contravene article 21(3) of the Rome Statute and, indirectly, international human rights law. In this sense, the Court’s statement, according to which “it is the alleged *conduct*, as opposed to its legal characterization, that matters,”¹⁰³ fails to adequately appreciate the extent to which the legal characterization is key to the investigation and prosecution of a crime under international law.

By allowing domestic authorities to prosecute crimes under international law without requiring them to respect the definitional elements prescribed by international human rights law, a discrepancy arises between what States are required to do in terms of investigation and prosecution of the same crime under different bodies of international law, i.e. international human rights law and international humanitarian law, and under the Rome Statute. That discrepancy would result in perpetrators of conduct criminalized under international law evading responsibility under domestic law. States should only be allowed to charge an accused with “ordinary crimes,” instead of crimes under international law, to the extent the essential elements of the latter are reproduced in the former: that is to say, the relevant domestic offences should actually reflect all the elements (and thereby conduct) that, under the Rome Statute, international human rights law or international humanitarian law, characterize the specific crimes charged in the ICC warrant of arrest.

When assessing the admissibility of a case, due consideration should be provided to the characterization of crimes at domestic level. Whenever domestic legislation does not ensure national investigations cover all the definitional elements of the relevant crime, the conclusion should be drawn that a State is not investigating “substantially the same conduct,” and thus that the “same case” test is not met, which would make the case admissible before the ICC.

4.3. Unwillingness

The required threshold for determining whether a State is unwilling to investigate or prosecute is too high. The requirement, in particular, that due process rights violations must be “so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice,”¹⁰⁴ as interpreted, effectively permits States to investigate and prosecute accused persons in violation of fundamental fair trial rights. Such a threshold does not accord with: (i) article 21(3), which requires the ICC to interpret the Rome Statute “consistent[ly] with internationally recognized human rights,” including international fair trial standards; and (ii) the relevance that fundamental principles of fair trial have within the ICC’s framework and international criminal law more generally. In the ICJ’s view, the threshold established in the *Al-Senussi* case should be lowered in adjudicating pending and future cases.

¹⁰¹ Committee against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, UN Doc. CAT/C/GC/2, 24 January 2008, paras. 8-9.

¹⁰² Rome Statute, art. 7(2)(e).

¹⁰³ *Al-Senussi*, Appeals Chamber, Admissibility Decision, paras. 118-119 (emphasis in the original).

¹⁰⁴ *Ibid.*, para. 230.

4.3.1. Meaning of “unwillingness”

Once the Court ascertains that the national investigation or prosecution concerns the “same case” as that before the ICC, article 17 of the Rome Statute requires an examination of whether the State is unwilling or unable genuinely to investigate or prosecute it.¹⁰⁵ The concept of unwillingness under article 17(2) is “primarily concerned with a situation in which proceedings are conducted in a manner which would lead to a suspect evading justice as a result of a State not being willing genuinely to investigate or prosecute.”¹⁰⁶ This is specifically reflected in sub-paragraph (a), which focuses on whether “proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility.” Under sub-paragraph (b), this may occur where there is “an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice,” the determination of which must be made “against the specific circumstances surrounding the investigation concerned,” taking into account “the chronology of the domestic proceedings and the complexity of the domestic case.”¹⁰⁷ Under sub-paragraph (c), an evasion of justice may only be found “when the manner in which the proceedings are being conducted, together with indicating a lack of independence and impartiality, is to be considered, in the circumstances, inconsistent with the intent to bring the person to justice.”¹⁰⁸

Despite the requirement to have “regard to the principles of due process recognized by international law” in the *chapeau* of article 17(2), and the prescription under article 21(3) that the application and interpretation of the Statute “be consistent with internationally recognized human rights,” in the *Al-Senussi* case the Appeals Chamber found that domestic violations of due process rights are not *per se* grounds for considering a case admissible.¹⁰⁹ Only where such violations are “so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the suspect [can they] be deemed, in those circumstances, to be ‘inconsistent with an intent to bring that person to justice.’”¹¹⁰ Specifically, the Appeals Chamber found that while “human rights standards may assist the Court in its assessment of whether the proceedings are or were conducted ‘independently or impartially’ within the meaning of article 17(2)(c),¹¹¹ ... the notions of independence and impartiality ... are included within a provision which is primarily concerned with whether the national proceedings are being conducted in a manner that would enable the suspect to evade justice and must be seen in that light.”¹¹²

4.3.2. Unwillingness in the *Al-Senussi* case

The Court found that Libya was not unwilling to carry out genuine proceedings against Al-Senussi. Al-Senussi opposed Libya’s application, arguing that “(i) the domestic proceedings against Mr Al-Senussi are tainted by ‘unjustified delay’ [and the risk of further delays]; (ii) Mr Al-Senussi has not benefited from legal assistance to date in the proceedings; (iii) other of Mr Al-Senussi’s fundamental rights have been violated or, at a minimum, there is no indication that they have been respected; and (iv) Mr Al-Senussi may be further prejudiced by a systemic lack of independence and impartiality of the Libyan judicial system.”¹¹³ Al-Senussi argued that “considerations of due process are inherent in the assessment of a State’s ability and willingness to conduct ‘genuine’ proceedings and ‘must [...] be even more stringent in

¹⁰⁵ The two elements are alternative and not cumulative: if the Court makes a finding of unwillingness, it does not need to examine inability, and vice versa. See *Gadhafi*, Pre-Trial Chamber I, Admissibility Decision (2013), para. 138.

¹⁰⁶ *Al-Senussi*, Appeals Chamber, Admissibility Decision, para. 218.

¹⁰⁷ *Al-Senussi*, Pre-Trial Chamber I, Admissibility Decision, para. 223

¹⁰⁸ *Ibid.*, para. 235. Article 17(2)(c) mirrors article 20(3)(b), which prevents the Court from exercising jurisdiction pursuant to the principle of *ne bis in idem* (double jeopardy) unless the prior trial was not “conducted independently or impartially with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person to justice.” See section 2 above.

¹⁰⁹ *Al-Senussi*, Appeals Chamber, Admissibility Decision, paras. 224-226.

¹¹⁰ *Ibid.*, para. 230.

¹¹¹ *Al-Senussi*, Pre-Trial Chamber I, Admissibility Decision, para. 220.

¹¹² *Ibid.*, para. 221. See also *ibid.*, para. 228 (“the focus of article 17(2)(c) [is] upon ensuring that an accused does not evade justice”).

¹¹³ *Ibid.*, para. 220 (citations omitted). See also *ibid.*, para. 224.

a case, such as this, where a conviction in a national court would very likely result in the suspect being sentenced to death."¹¹⁴ The PTC and, on appeal, the Appeals Chamber found that due process and fair trial rights violations, including significant delays in access to legal counsel and systemic shortcomings in the independence and impartiality of judicial authorities, were only relevant insofar as they could show the proceedings were being conducted in which would lead the suspect to evade justice.

After finding that Libya was not unwilling under articles 17(2)(a) and 17(2)(b),¹¹⁵ with respect to article 17(2)(c) the PTC found that the Al-Senussi investigation "is not being conducted in a manner that is inconsistent with the intent to bring Mr Al-Senussi to justice," and that the investigation against Al-Senussi "appears to have been adequately conducted."¹¹⁶ The PTC considered Al-Senussi's arguments that he had not had access to legal counsel of his choosing throughout the nine months of his detention, that he had not benefitted from legal representation during interrogations and confrontations with witnesses in violation of the Libyan Code of Criminal Procedure, and that he was not able to contact the ICC-appointed legal counsel in person or over the phone.¹¹⁷ It nevertheless found that "the fact that Mr Al-Senussi's right to benefit from legal assistance at the investigation stage is yet to be implemented" did not justify a finding of unwillingness "in the absence of any indication that this is inconsistent with Libya's intent to bring Mr Al-Senussi to justice." It noted that Al-Senussi's right to legal representation had "been primarily prejudiced so far by the security situation in the country."¹¹⁸

The Appeals Chamber upheld this finding,¹¹⁹ observing that "denying a suspect access to a lawyer may, depending on the specific circumstances, be relevant to a finding" of unwillingness under article 17(2)(c),¹²⁰ but that the Court is not called upon to determine whether national proceedings have violated international or domestic law. The relevant question is "whether the failure to provide a lawyer constitutes a violation of Mr Al-Senussi's rights which is 'so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the accused so that they should be deemed ... to be inconsistent with an intent to bring [Mr Al-Senussi] to justice.'"¹²¹ The Appeals Chamber found no contradiction between the PTC's findings that the security conditions did not adversely impact Libya's investigations and that, on the other hand, they were the main reason for Al-Senussi's lack of access to legal counsel.¹²²

More generally, the PTC found "that alleged violations of the accused's procedural rights are not *per se* grounds for a finding of unwillingness or inability under article 17 of the Statute."¹²³ With particular reference to article 17(2)(c), the PTC stated that "certain violations of the procedural rights of the accused may be relevant to the assessment of the independence and impartiality of the national proceedings ... having regard to the principles of due process recognized under international law," but

¹¹⁴ Ibid., para. 220 (citations omitted).

¹¹⁵ In relation to 17(2)(a), the PTC affirmed that the Libyan national proceedings had not been conducted for the purpose of shielding the accused. See *ibid.*, para. 290. In relation to article 17(2)(b), the PTC acknowledged that the investigation into the alleged crimes imputed to Al-Senussi was broad in scope and therefore "understandably challenging." Accordingly, it considered that in the specific circumstances, "a period of less than 18 months between the commencement of the investigation in relation to Mr Al-Senussi and the referral of the case against him to the Accusation Chamber cannot be considered to constitute an unjustified delay inconsistent with an intent to bring Mr Al-Senussi to justice." See *ibid.*, paras. 228-229. See also *ibid.*, para. 291.

¹¹⁶ Ibid., para. 292.

¹¹⁷ *Defence Response on behalf of Mr. Abdullah Al-Senussi to "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute,"* Doc. ICC-01/11-01/11-356, 14 June 2013, paras. 120-130.

¹¹⁸ *Al-Senussi*, Pre-Trial Chamber I, Admissibility Decision, para. 292.

¹¹⁹ Ibid., paras. 196.

¹²⁰ Ibid., para. 190.

¹²¹ Ibid., para. 190. This specific dictum of the Appeals Chamber is developed in a different part of the judgement, which will be analyzed more in detail in sections 4.3.3.1-4.3.3.2. See also *Al-Senussi*, Appeals Chamber, Admissibility Decision, paras. 191 and 193. The Appeals Chamber refused to consider additional evidence that had not been already considered by the PTC. See also *Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Abdullah Al-Senussi,'* Doc. ICC-01/11-01/11-474, 4 November 2013, para. 84.

¹²² *Al-Senussi*, Appeals Chamber, Admissibility Decision, paras. 195. See also *Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Abdullah Al-Senussi,'* Doc. ICC-01/11-01/11-474, 4 November 2013, para. 85.

¹²³ *Al-Senussi*, Pre-Trial Chamber I, Admissibility Decision, para. 235.

that the manner in which the proceedings are being conducted “together with indicating a lack of independence and impartially” must be “inconsistent with the intent to bring the person to justice.”¹²⁴ The Chamber more generally rejected Al-Senussi’s submissions that Libya had not verified that violations of some of Al-Senussi’s fundamental rights – including the right to be brought promptly before a judge, to silence, and to an adequate defence¹²⁵ – had not occurred during national proceedings on the basis that they amounted to “generic assertions without any tangible proof,”¹²⁶ and “uncertainties” that Libya was not obligated to disprove.¹²⁷ Finally, in response to Al-Senussi’s allegation that there is a systemic lack of independence and impartiality in the Libyan judicial system, the PTC said such information was only relevant as “contextual information” unless it could be shown it had a bearing on the particular case,¹²⁸ which was not made out based on the evidence before them.¹²⁹ The PTC rejected other alleged fair trial rights violations on the basis that they did not undermine the integrity or impartiality of the proceedings.¹³⁰

The ICJ is concerned that due consideration was not given to the due process requirements that must be had in cases involving the death penalty. Without any discussion of its relevance, the PTC only noted that “[a] more stringent procedure is followed when the death penalty has been imposed following conviction,” which requires the Libyan Supreme Court to review the decision and an opportunity to appeal legal, factual and procedural errors,¹³¹ and that the Defence asked the PTC to take into account an Amnesty International report apparently indicating the likelihood that Al-Senussi would be sentenced to death.

The Appeals Chamber agreed with the PTC, rejecting Al-Senussi’s appeal argument “that a State is unwilling genuinely to carry out the investigation or prosecution if it does not respect the fair trial rights of the suspect”¹³² on the basis that the concept of unwillingness is “primarily concerned with a situation in which proceedings are conducted in a manner which would lead to a suspect evading justice as a result of a State not being willing genuinely to investigate or prosecute.”¹³³ The proceedings must be “the equivalent of sham proceedings that are concerned with that person’s protection.”¹³⁴

The Appeals Chamber supported its interpretation by making two points. First, the same criteria defining unwillingness under article 17(2)(c) are found in article 20(3)(b), which sets an exception to the principle of *ne bis in idem*, and should be given the same meaning. Article 20(3)(b)’s reference to proceedings

¹²⁴ Ibid., para. 235.

¹²⁵ Al-Senussi’s defence argued that it was unclear how soon and how often he had been brought whether he had been brought before a judge upon arrest and whether the judge was independent and able to issue a reasoned decision in compliance with the presumption of liberty or international law, whether Al-Senussi had been tortured to subject to other ill-treatment, whether he was informed of his right to silence and whether this right had been respected, whether he could access the evidence in the case and whether such evidence had been “appropriately recorded,” and whether his health problems had been monitored and recorded. See *ibid.*, para. 238.

¹²⁶ Ibid., para. 239.

¹²⁷ Ibid., para. 239. The PTC noted however that the Libyan authorities had made submissions which verified Al-Senussi had been brought before a judge once a month and had regular medical check-ups, and that the confrontation with witnesses had been conducted in writing as is judicial practice in Libya. They also relied on a Human Rights Watch report stating that Al-Senussi did not complain of physical abuse. See *ibid.*, para. 240.

¹²⁸ Ibid., para. 245.

¹²⁹ Ibid., para. 258.

¹³⁰ The PTC rejected Al-Senussi’s argument that his transfer to Libya from Mauritania constituted an “unlawful rendition [that] undermined the integrity of Libya’s proceedings” on the facts and relevance, stating that “irrespective of whether [such an allegation was] true, [it] do[es] not demonstrate the existence of one of the scenarios under article 17(2) or (3) of the Statute.” See *ibid.*, para. 236. Al-Senussi’s it also rejected his argument that he could not be afforded a fair trial because members of the former and current Libyan government had made statements assuming his guilt, in violation of the presumption of innocence, on the basis that statements could not be linked to any actual or perceived bias on the behalf of the Libyan judicial authorities involved. See *ibid.*, para. 241.

¹³¹ Ibid., para. 205.

¹³² *Al-Senussi*, Appeals Chamber, Admissibility Decision, para. 213. See also *Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I’s ‘Decision on the admissibility of the case against Abdullah Al-Senussi,’* Doc. ICC-01/11-01/11-474, 4 November 2013, para. 97 (“[t]he requirement that the proceedings must be impartial and independent and be consistent with an intention on the part of Libya to bring Mr. Al-Senussi to justice must be assessed having regard to international standards of due process”).

¹³³ *Al-Senussi*, Appeals Chamber, Admissibility Decision, para. 218. See also *ibid.*, paras. 220-221, 230.

¹³⁴ Ibid., para. 230.

conducted in a manner which is “inconsistent with an intent to bring the person concerned to justice” should be interpreted as “primarily concern[ing] proceedings that are not genuine in that they are akin to sham or other proceedings that unjustly benefit the accused,”¹³⁵ and which would permit the re-trial of an accused before the ICC. Accordingly, article 20(3)(b), and by extension article 17(2)(c), are not concerned with proceedings in which the accused’s fair trial rights are violated.¹³⁶ Second, the drafting history of the Statute confirms that the ICC should not be allowed “to pass judgment on the operation of national courts in general”¹³⁷ or on “the penal system of a state.”¹³⁸ A proposal submitted by Italy, which openly contemplated the lack of “full respect for the fundamental rights of the accused” as a ground for admissibility,¹³⁹ was rejected during the Rome Statute negotiations and an “express requirement for the Court to consider whether the domestic proceedings fully respect the due process rights of a suspect” was not included.¹⁴⁰

The Appeals Chamber nevertheless acknowledged that, in specific instances, due process violations may become relevant to determining the admissibility of a case:

[T]he Appeals Chamber ... observes that, while article 17 is *lex specialis* on questions of admissibility, the Statute as a whole is underpinned by the requirement in article 21(3) that the application and interpretation of law under the Statute “must be consistent with internationally recognized human rights” ... At its most extreme, the Appeals Chamber would not envisage proceedings that are, in reality, little more than a predetermined prelude to an execution, and which are therefore contrary to even the most basic understanding of justice, as being sufficient to render a case inadmissible. Other less extreme instances may arise when the violations of the rights of the suspect are so egregious that it is clear that the international community would not accept that the accused was being brought to any genuine form of justice. In such circumstances, it is even arguable that a State is not genuinely investigating or prosecuting at all. Whether a case will ultimately be admissible in such circumstances will necessarily depend upon its precise facts.¹⁴¹

According to the Appeals Chamber, the facts reasonably found by the PTC did not demonstrate that violations of the accused’s rights met such a threshold. With respect to the possible imposition of the death penalty, in particular, they did not agree with Al-Senussi that the PTC failed to address his argument that a higher level of scrutiny was required,¹⁴² finding that the PTC’s setting out of the “more stringent procedure” that must be applied under domestic law demonstrated it was aware that it “formed part of the factual context” and “took its decision against that background.”¹⁴³

Based on the Court’s reasoning, violations of due process rights are relevant when they benefit the accused, assisting her or him to evade justice; such violations would instead not be relevant when they prejudice the accused by subjecting her or him to an unfair trial, unless they are so egregious that the “international community would not accept [them].” By construing article 17(2) as only being concerned

¹³⁵ Ibid., paras. 222.

¹³⁶ Ibid., para. 222.

¹³⁷ *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, UN Doc. A/50/22, 6 September 1995, para. 43.

¹³⁸ *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Vol. I, UN Doc. A/51/22, 13 September 1996, para. 161.

¹³⁹ *Draft Proposal by Italy on Article 35 (Issues of Admissibility)*, Non-Paper/WG.3/No.4, 5 August 1997 (“In deciding on issues of admissibility under this article, the Court shall consider whether: [...] (ii) the said investigations or proceedings have been, or are impartial or independent, or were or are designed to shield the accused from international criminal responsibility, or were or are conducted with full respect for the fundamental rights of the accused”). The proposal was originally submitted as an inability criterion; it was rejected and re-assigned for discussion as an unwillingness criterion, where it has eventually been rejected again. See K.J. Heller, “The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process” *Criminal Law Forum*, Vol. 17, 2006, pp. 18-19.

¹⁴⁰ *Al-Senussi*, Appeals Chamber, Admissibility Decision, para. 226. See also para. 228.

¹⁴¹ Ibid., paras. 229-230.

¹⁴² Ibid., para. 253.

¹⁴³ Ibid., para. 254.

with the evasion of justice rather than guaranteeing their fair trial rights, the Appeals Chamber set a high threshold for the determining that fair trial rights violations justify a finding of unwillingness under article 17(2)(c).

4.3.3. Should the standard established in the *Al-Senussi* case be re-interpreted or lowered?

Article 21(3), as well as the central role of fair trial principles within the Rome Statute, require that the threshold set in the *Al-Senussi* case to be lowered. The necessity for the standard to be re-interpreted and lowered is apparent in both a reading of the text of the Rome Statute, as well as an assessment of the facts in the *Al-Senussi* case, particularly when coupled with the systemic shortcomings in the Libyan criminal justice system set out in section 3 above.

4.3.3.1. The Rome Statute's intersection with international human rights law

The Appeals Chamber's contention that the ICC is not a human rights court whose role is to review the violations of an accused's fair trial rights in the course of domestic proceedings arguably reflects the logic underpinning its creation.¹⁴⁴ This point was highlighted in an informal expert paper commissioned by the Director of Common Services of the ICC in 2003,¹⁴⁵ as well as by the drafting history of the Rome Statute.¹⁴⁶ At the same time, the informal expert paper made clear that "human rights standards may still be of relevance and utility in assessing whether the proceedings are carried out genuinely."¹⁴⁷ This aspect clearly emerges from the text of article 17 itself, which requires the ICC to give relevance to "principles of due process recognized by international law," and to the independence and impartiality of domestic proceedings. In turn, article 21(3) requires the Court to interpret and apply article 17 consistently with international human rights law.

The ICC is competent to take due account of whether domestic proceedings respect "the fundamental principles of fair trial"¹⁴⁸ recognized by international law, including article 14 of the ICCPR, without acting as a human rights body which determines State responsibility for them. Basic fair trial guarantees and principles are recognized as fundamental even in situations of armed conflict, which the Court has jurisdiction to adjudicate.¹⁴⁹ The Rome Statute lists "depriving a prisoner of war or other protected person of the rights of fair and regular trial" and "[t]he passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable" as war crimes.¹⁵⁰ Furthermore, articles 55 and 67 of the Rome Statute enumerate the fundamental rights, equivalent to those found in article 14 of the ICCPR, an accused enjoys during ICC proceedings, which the Court is competent to ensure are met. Fair trial rights include the right to be judged by an independent and impartial court established by law, the right to legal counsel, the right to adequate time and facilities to prepare a defence, the right to be tried without undue delay, the right to call and examine witnesses, as well as the right to a public trial, the presumption of innocence, the right to be informed of the charges, the right to be tried in one's presence, the right to remain silent, the prohibition of *ne bis in idem*, and the right to appeal.¹⁵¹

¹⁴⁴ As set out in the Preamble to the Rome Statute, the purpose of the Court is to "put an end to impunity for the perpetrators" of "the most serious crimes of concern to the international community as a whole."

¹⁴⁵ *Informal Expert Paper: The Principle of Complementarity in Practice*, Doc. ICC-01/04-01/07-1008-AnxA, 2003, pp. 8, 15-16.

¹⁴⁶ See section 4.3.2 above.

¹⁴⁷ *Informal Expert Paper: The Principle of Complementarity in Practice*, Doc. ICC-01/04-01/07-1008-AnxA, 2003, pp. 8-9.

¹⁴⁸ Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11; *General Comment No. 32: Right to Equality before Courts and Tribunals and to a Fair Trial (Article 14)*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 6: "[w]hile article 14 is not included in the list of non-derogable rights of article 4, paragraph 2 of the Covenant, ... [t]he guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights ... Deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times."

¹⁴⁹ GC IV, arts. 3, 5, 66-75; AP I, art. 75(4); AP II, art. 6(2); ICRC Customary IHL Database, rule 100.

¹⁵⁰ Rome Statute, art. 8(2)(a)(vi) and (c)(iv).

¹⁵¹ ICCPR, art. 14(3); Arab Charter, art. 16; African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*. The Human Rights Committee considers some of these rights to have attained the status

In the ICJ's view, article 17 should not be interpreted narrowly when international fair trial standards are taken into account for admissibility purposes. The high threshold applied to the relevance of human rights standards, in particular fair trial standards, does not accord with: (i) article 21(3)'s requirement to interpret the Rome Statute "consistent[ly] with internationally recognized human rights;" and (ii) the *chapeau* of article 17(2), which requires the Court to have "regard to the principles of due process recognized by international law" in determining unwillingness, and in light of which the requirement of "bringing a person to justice" under article 17(2)(c) must be read. In further decisions, the standard according to which only "egregious" violations of fair trial rights or violations which would lead to a suspect evading justice render the conduct of national proceedings "inconsistent with an intent to bring the person concerned to justice" should be reconsidered.

The concept of "bringing a person to justice" under articles 17(2)(c) and 20(3)(b), on which the determination of the "genuineness" of domestic proceedings is based, should be more closely related to the fundamental principles of fair trial, such that the meaning of the term "justice" should also hinge on the respect of the fair trial rights of the accused. The pursuit of justice under the Rome Statute should not mean that all prosecutions for the most serious crimes under international law are acceptable, including unfair ones: investigations and prosecutions should in fact comport with the basic principles governing fair trials and be respectful of the accused's due process rights.¹⁵² This point has expressly been affirmed by the Court in relation to the proceedings before it:

[A]rticle 21(3) ... requires the exercise of the jurisdiction of the Court in accordance with internationally recognized human rights norms ... first and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety ... Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped ... Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed ... Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial.¹⁵³

In the above passage, the Appeals Chamber clarified that respect for the accused's rights, warranted by article 21(3), is determinative of the fairness of the proceedings before the ICC. While the Appeals Chamber was specifically referring to the inadmissibility of evidence obtained in breach of international human rights law, as per article 69(7) of the Rome Statute, the same reasoning may be applied to fair trial rights more generally.

of peremptory norms of international law (*jus cogens*); *General Comment No. 29: States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11.

¹⁵² F. Gioia, "State Sovereignty, Jurisdiction, and Modern International Law: The Principle of Complementarity in the International Criminal Court" *Leiden Journal of International Law*, Vol. 19, 2006, pp. 1112-1113: "... the Statute as a whole seems to foster the objective and fair assessment of the truth, as opposed to a one-sided approach necessarily leading to the conviction of the accused ... In the area of the investigation and prosecution of international crimes, the most relevant basic principle appears to be the right to a fair trial, sanctioned as fundamental by human rights treaties on a worldwide basis. By requiring that a state be able and willing to proceed in compliance with internationally recognized human rights standards, the Statute precisely aims at clarifying that not just *any* kind of investigation or prosecution may be regarded as proper implementation of the obligations at stake, but exclusively those which abide by the highest standards of fair trial; accordingly, failure to comply with such standards should be construed as tantamount to failing to perform the obligation and result in the Court legitimately stepping in" (footnotes omitted; emphasis in the original).

¹⁵³ *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06 (OA4), Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, paras. 36-37, 39 (footnotes omitted).

As highlighted by human rights bodies, fair trial rights are also crucial to the principle of *ne bis in idem*. For such a principle to apply, a final judgement must be issued by a competent, independent and impartial court, and the proceedings must be carried out with strict adherence to the right to a fair trial, as well as to the rights of the victims and family members that have taken part in the proceedings.¹⁵⁴ The UN Human Rights Committee has stated that, where an accused person has been tried in proceedings that do not meet these guarantees, the right to an effective remedy and to reparation requires that they be released and/or that their conviction reviewed in accordance with the requirements of a fair trial, including by reopening the case and holding a new trial, and awarding compensation where appropriate.¹⁵⁵ For instance, similar measures have been ordered in the case of persons tried and condemned in proceedings lacking the basic guarantees of a fair trial, including when the principle of presumption of innocence, the right to a public hearing (without reasonable and objective motives for restricting this right), the right to be tried without undue delay, the right to examine and counter-examine witnesses or to challenge the evidence submitted, have been violated.¹⁵⁶

While States have an obligation to protect and respect international fair trial standards, international criminal law gives effect to international human rights law and standards. This is evident from the inclusion, in articles 55 and 67 of the Rome Statute, of the fair trial rights an accused must be afforded during investigation and trial, in accordance with what is prescribed by article 14 of the ICCPR. Against this background, holding States to different – yet unclear – standards under the principle of complementarity would create a divergence in long-established international law principles underpinning both international criminal law and international human rights law. Given the ICC's objective of upholding international justice,¹⁵⁷ consistency between the Rome Statute and other bodies of international law and with their established principles should be safeguarded. It would be a perverse outcome if the ICC found a case inadmissible despite evidence of fair trial rights violations in domestic proceedings, when those same fair trial rights violations could or would give rise to the reopening and re-trial of that case under international human rights law.

In light of the above, where the Court affirmed that the fairness of ICC proceedings is to be evaluated against the respect for the accused's rights, domestic proceedings should be evaluated against the same standard in the context of admissibility decisions. Accordingly, a case would become admissible whenever domestic proceedings gave rise to such breaches of fair trial rights that, if committed in the context of ICC proceedings, would render them unfair.

By adopting the proposed approach, the ICC would not transform into a human rights court that reviews each and every fair trial violation suffered by an accused and determines responsibility for them. The quality and seriousness of due process rights violations should be assessed on a case-by-case basis, and take into account that "bringing a person to justice" means prosecuting her or him in full respect of fair trial principles. By lowering the high threshold set in the *Al-Senussi* case, the appropriate weight would be given to those fair trial rights that determine whether or not criminal proceedings can be considered fair and equitable, be it at the domestic or ICC level.

4.3.3.2. *The Al-Senussi case and systemic shortcomings in the Libyan criminal justice system*

¹⁵⁴ Human Rights Committee, *Polay Campos v. Peru*, UN Doc. CCPR/C/61/D/577/1994, 6 November 1997, paras. 8.8, 10. See also section 2 above.

¹⁵⁵ Human Rights Committee, *Violeta Setelich v. Uruguay*, UN Doc. CCPR/C/OP/1, 28 October 1981, para. 21.

¹⁵⁶ Human Rights Committee, *Vazgen Arutyuniantz v. Uzbekistan*, UN Doc. CCPR/C/83/D/971/2001, 30 March 2005; *Gridin v. The Russian Federation*, UN Doc. CCPR/C/69/D/770/1997, 20 July 2000; *Manuel Francisco Becerra Barney v. Colombia*, UN Doc. CCPR/C/87/D/1298/2004, 11 July 2006; Inter-American Court of Human rights, *Ricardo Canese v. Paraguay*, Series C No. 111, 31 August 2004.

¹⁵⁷ As set out in the Preamble of the Rome Statute, States Parties intend to "guarantee lasting respect for and the enforcement of international justice."

The fair trial rights violations suffered by Al-Senussi, coupled with the legal deficiencies characterizing the protection of an accused's rights in Libya, discussed in section 3 above, show that a different outcome could have been reached in respect of the inadmissibility of the case before the ICC.

As argued in the Defence's submissions, and as emerged during the trial before the Tripoli Court of Assize, the shortcomings in the Libyan criminal justice system, including those discussed in section 3 above, impacted the domestic proceedings against Al-Senussi. In its response to Libya's admissibility challenge, the Defence noted that "Mr. Al-Senussi has had no access to a lawyer of his choosing throughout the nine months he has been detained in Libya," notwithstanding he had asked for one when he was brought before a judge to review his detention, and that the lack of legal counsel impeded him from challenging the legal basis for his detention.¹⁵⁸ The Defence further submitted that Al-Senussi had been interrogated and confronted with witness statements in the absence of a lawyer,¹⁵⁹ and was subject to other fair trial rights violations including solitary confinement, incommunicado detention, and lack of access to family visits and medical care.¹⁶⁰ It further argued that it remained unclear whether he had been promptly informed of the charges against him, promptly brought before a judge, subjected to torture or ill-treatment, informed of his right to remain silent, and allowed to examine the evidence against him.¹⁶¹

These and other violations occurred during the investigation and accusation phases, and at trial following the PTC's admissibility determination. At the first trial hearing before the Tripoli Court of Assize on 24 March 2014, Al-Senussi stated that he had been impeded from accessing legal counsel during interrogations.¹⁶² The Tripoli Court of Assize assured the defendant that it would appoint counsel from the public bar association for those defendants who were still unrepresented, but the extent to which defendants were permitted to choose their own counsel, as is their right under international law, remains unclear. For example, at the 14 April 2014 hearing, seven defendants, including Abdullah Al-Senussi, had no legal representation.¹⁶³ The political sensitivity of the case made it difficult to find Libyan lawyers willing to represent certain defendants, including Al-Senussi, who consequently expressed their desire to be represented by foreign lawyers. According to UNSMIL, "[a] number of foreign lawyers were willing to join Libyan defence teams, but none were able to do so although Libyan law allows and regulates the appearance of foreign lawyers."¹⁶⁴ Al-Senussi's multiple allegations that he was tortured and subjected to other ill-treatment, including beatings, appear to have been ignored by the Tripoli Court of Assize, which did not open an investigation.¹⁶⁵ Al-Senussi also complained about the use of solitary confinement for prolonged periods of time by detaining authorities, as well as about having experienced discriminatory treatment.¹⁶⁶

The domestic fair trial rights violations suffered by Al-Senussi before the Court's admissibility decisions could have led to a finding of admissibility. The information available to the Court at the time showed that the significant number of due process violations had an impact on the Al-Senussi, in particular on his ability to defend himself, and are "contrary to even the most basic understanding of justice." It appears

¹⁵⁸ *Defence Response on behalf of Mr. Abdullah Al-Senussi to "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute,"* Doc. ICC-01/11-01/11-356, 14 June 2013, paras. 121, 124, 125.

¹⁵⁹ *Ibid.*, para. 125.

¹⁶⁰ *Ibid.*, para. 132.

¹⁶¹ *Ibid.*, para. 139.

¹⁶² *The State of Libya v. Saif al-Gadhafi, Abdullah al-Senussi & Others*, Case No. 630/2012, July 2015, p. 14.

¹⁶³ *Ibid.*, p. 13.

¹⁶⁴ UNSMIL & OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)*, February 2017, p. 38.

¹⁶⁵ *Ibid.*, pp. 27-31. See also *The State of Libya v. Saif al-Gadhafi, Abdullah al-Senussi & Others*, Case No. 630/2012, July 2015, p. 340;

¹⁶⁶ UNSMIL & OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)*, February 2017, p. 29. It is also worth highlighting that, in its appeals submission before the ICC, Al-Senussi's Defence made allegations that he was mistreated "in order to induce confessions from him to shorten the proceedings;" *Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's "Decision on the admissibility of the case against Abdullah Al-Senussi,"* Doc. ICC-01/11-01/11-474, 4 November 2013, para. 153. This allegation, however, was part of the Defence's request to admit new evidence not previously considered by the PTC, which was rejected by the Appeals Chamber; *Al-Senussi, Appeals Chamber, Admissibility Decision*, paras. 55-59.

that the absence of legal counsel for Al-Senussi was initially imputable to security reasons, given the difficulty of finding local lawyers willing to represent him. Yet, Al-Senussi was not permitted to be represented by foreign lawyers at a later stage, even where it was recognized under Libyan law.¹⁶⁷ From this viewpoint, the lack of legal representation can therefore only partly be attributed to the security situation:¹⁶⁸ in part, it owes to the unwillingness of Libyan authorities to facilitate the appointment of foreign lawyers. Such unwillingness is further demonstrated by the fact that, during certain trial hearings, some of which took place while the appeal before the ICC was pending, Al-Senussi still did not have a lawyer.¹⁶⁹ This circumstance directly challenges the Court's assumption, solely based on Libya's assurances,¹⁷⁰ that the lack of legal representation was a temporary problem confined to the investigation phase. In fact, the absence of a lawyer was a constitutive, not an incidental, shortcoming of the domestic proceedings, which characterized their conduct from the commencement of Al-Senussi's detention until and during trial. In respect of other allegations raised by the Defence, including violations of the rights to liberty, to family visits and medical care, and to freedom from torture, similar findings should have been made, also in light of the diminished protection accorded to such rights within the Libyan legal system. These elements should have led to the conclusion that the due process rights violations suffered by Al-Senussi were "so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the suspect so that they should be deemed, in those circumstances, to be 'inconsistent with an intent to bring that person to justice.'"¹⁷¹

Even if one argued that the fair trial violations suffered by Al-Senussi had not met the high threshold at the time of the Court's decisions, an *ex post facto* analysis demonstrates that such a threshold has subsequently been met. Beside the infringement upon Al-Senussi's right to legal counsel illustrated above, other violations of his due process rights occurred during the trial before the Tripoli Court of Assize, which culminated in his conviction and death sentence. In addition to the findings made by UNSMIL and OHCHR following the observation of trial hearings,¹⁷² the ICJ has examined the Tripoli Court of Assize's judgement, finding that in addition to a violation of the right to legal counsel, the rights to call and examine witnesses and to be tried in one's presence, and the prohibition on the exclusion of evidence and confessions obtained through torture and ill-treatment, were violated.¹⁷³ For example, the prosecution did not call any witnesses to testify during the hearings but relied upon written statements only,¹⁷⁴ raising serious concerns regarding the credibility of the written testimonies, which could not be tested through cross-examination.¹⁷⁵ The Tripoli Court of Assize also did not open any investigation into allegations that statements relied upon by the Prosecution was obtained through torture or other coercive means.¹⁷⁶ If analyzed against the lower threshold argued for in section 4.3.3.1 above, the violations suffered by Al-Senussi during the domestic proceedings, both at the time of the Court's decisions and afterwards, would by implication lead to a finding of the admissibility of Al-Senussi's case.

As discussed in section 3 above, the Libyan criminal justice framework is non-compliant with international law and standards governing the right to a fair trial, as well as the right to liberty and the prohibition on torture and cruel, inhuman and degrading treatment or punishment. The areas in which the framework is non-compliant are extensive, covering all aspects of the investigative and prosecution process, from arrest, to investigation, to trial and to appeal. The Court found that systemic shortcomings in the criminal

¹⁶⁷ UNSMIL & OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)*, February 2017, p. 38.

¹⁶⁸ *Al-Senussi*, Pre-Trial Chamber I, Admissibility Decision, para. 292.

¹⁶⁹ *The State of Libya v. Saif al-Gadhafi, Abdullah al-Senussi & Others*, Case No. 630/2012, July 2015, p. 13.

¹⁷⁰ *Libyan Government's consolidated Reply to the Responses by the Prosecution, Defence and OPCV to the Libyan Government's Application relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute*, Doc. ICC-01/11-01/11-403-Red2, 14 August 2013, para. 146.

¹⁷¹ *Al-Senussi*, Appeals Chamber, Admissibility Decision, para. 230.

¹⁷² UNSMIL & OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)*, February 2017.

¹⁷³ ICJ Libya Report, pp. 80-88.

¹⁷⁴ UNSMIL & OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)*, February 2017, p. 43.

¹⁷⁵ See ICJ Libya Report, pp. 83-84. According to observers, some defence lawyers challenged the prosecution's reliance on written testimony, submitting that the witnesses, many of whom were detained at the time, were subject to coercion or even torture or ill-treatment to extract testimony, and calling for the witnesses to testify; their requests were refused. UNSMIL & OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)*, February 2017, p. 43.

¹⁷⁶ ICJ, *Accountability for Serious Crimes under International Law in Libya*, pp.87-88.

justice framework were not determinative unless it could be shown that they had an impact on the accused in the situation before the Court, having particular regard in this instance to the independence and impartiality of the justice system.¹⁷⁷ While not without reasonable basis, some systemic issues could be held to always have an impact on a criminal case in the domestic system. For example, if the process by which judges are appointed is not intrinsically independent, under international law the judges sitting within the criminal justice system are not, effectively, independent in all cases;¹⁷⁸ although reforms to the procedures by which the judiciary is appointed have been made, some of which were raised by the Libyan authorities in the proceedings,¹⁷⁹ procedural shortcomings continue to affect the independence of the judiciary.¹⁸⁰ If an accused does not have the right to appeal a conviction upon an error of fact, as in the case in Libya,¹⁸¹ every accused's right to appeal is violated. Additionally, given the wide-ranging nature of the areas of non-compliance with due process rights in the domestic system, and the consequent likelihood that an accused's rights will be violated, particular attention should be paid in future cases to allegations by an accused that the domestic proceedings do not meet admissibility standards.

The Court's reluctance to do so is particularly stark in the context of its discussion with respect to the death penalty, where it impliedly determined that the "more stringent [appeal] procedure" which applies upon imposition of the death penalty ensured due process concerns were assuaged. That "more stringent procedure" – a right to appeal the decision upon legal, factual and procedural bases to the Supreme Court (and necessity on the part of the Prosecutor where the accused does not exercise their right) – is the minimum that is required under international law.¹⁸² The decision assumes that systemic shortcomings in the criminal justice framework with respect to compliance with international law and standards could be rectified by the Supreme Court on appeal. Moreover, by requiring that a violation of fair trial standards demonstrate that the case could not be said to have been "little more than a predetermined prelude to an execution,"¹⁸³ the Court gave little regard to the basic and indisputable standards that must apply in criminal proceedings to ensure fair and effective justice, in particular in death penalty cases, where people charged with crimes punishable by death are entitled to the strictest observance of all fair trial guarantees and to certain additional safeguards.¹⁸⁴ When applied against the higher threshold – namely "when the violations of the rights of the suspect are so egregious that it is clear that the international community would not accept that the accused was being brought to any genuine form of justice" – international standards already demonstrate that imposition of the death penalty following fair trial rights violations is contrary to international law, such that the international community has already indicated it would not accept it as a genuine form of justice. The threshold should therefore be lowered so as not to impose too high a burden on an accused to demonstrate that their fair trial rights are or would be infringed, thus enhancing the complementary role of international criminal justice in ensuring accountability and combatting impunity for crimes under international law.

4.4. Inability

The threshold for determining whether a State is "otherwise unable to investigate or prosecute" is also too high. The standards governing the right to a fair trial under international law should be applied when

¹⁷⁷ *Al-Senussi*, Appeals Chamber, Admissibility Decision, para. 245.

¹⁷⁸ The Court on the other hand found, based on the evidence submitted by Libya with respect to the conduct of other cases in Libya, that it was "not unreasonable to assume that if their proceedings can be conducted independently and impartially, the same is true for the proceedings in relation to Mr Al-Senussi." See *Al-Senussi*, Appeals Chamber, Admissibility Decision, para. 258. See also *ibid.*, para. 259.

¹⁷⁹ *Al-Senussi*, Pre-Trial Chamber I, Admissibility Decision, paras. 246-252.

¹⁸⁰ ICJ, *Accountability for Serious Crimes under International Law in Libya*, pp. 76-78.

¹⁸¹ *Ibid.*, pp. 89-90.

¹⁸² ICCPR, art. 14(5); Arab Charter, art. 16(7); ACHPR, art. 7(1); AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle N(1)(a)(i), (b); Human Right Committee, *General Comment No. 32: Right to Equality before Courts and Tribunals and to a Fair Trial (Article 14)*, UN Doc. CCPR/C/GC/32, 23 August 2007, paras. 48, 51.

¹⁸³ *Al-Senussi*, Appeals Chamber, Admissibility Decision, paras. 229-230. See discussion at section 4.3.2 above.

¹⁸⁴ ICCPR, art. 6(2-5); *General Comment No. 36: Article 6 (The Right to Life)*, UN Doc. CCPR/C/GC/36, 30 October 2018, para. 38, 41-43; African Commission on Human and Peoples' Rights, *General Comment No. 3: The Right to Life (Article 4)*, 57th Ordinary Session, 4-18 November 2015, para. 24.

assessing whether the State is unable to proceed with an investigation or prosecution. In particular, greater importance should be attached to the impact an inability to conduct effective investigations and to obtain evidence, whether by virtue of an inability to access or effectively control territory or the absence of a witness protection programme, could have on the accused's right to defend themselves. The right to counsel should also be assessed through the lens of international human rights law at the time the decision is made, such that significant delays in the appointment of counsel should lead to a finding of inability to proceed, even where assurances are made by the State (and particularly where such assurances are repeatedly made but not met). More broadly, when assessing whether, "due to a substantial collapse or unavailability of its national justice system," the State is "otherwise unable to carry out domestic proceedings," a broader lens should be adopted which considers whether violations of an accused's rights or other shortcomings in the domestic investigation or prosecution of criminal cases would require suspension of the proceedings under international law and standards.

4.4.1. Meaning of "inability"

Under article 17(3), an inability to investigate or prosecute a case is determined by State authorities being unable to (i) obtain the accused, (ii) obtain the necessary evidence and testimony, or (iii) otherwise carry out domestic proceedings, as a result of the total or substantial collapse or unavailability of the national judicial system.¹⁸⁵ Inability "must be assessed in the context of the relevant national system and procedures," meaning that national authorities must demonstrate they are able to investigate or prosecute an accused "in accordance with the substantive and procedural law" applicable in the country.¹⁸⁶ The unavailability of the national judicial system must be assessed in relation to the concrete case at hand.¹⁸⁷

4.4.2. Inability in the *Gadhafi* and *Al-Senussi* cases

The PTC reached different conclusions about Libya's ability to investigate and prosecute Gadhafi and Al-Senussi. In the *Gadhafi* case, the PTC found that Libya was unable to investigate the case, stating that:

Libya continues to face substantial difficulties in exercising its judicial powers fully across the entire territory ... [D]ue to these difficulties ... its national system cannot yet be applied in full in areas or aspects relevant to the case, being thus "unavailable" within the terms of article 17(3) of the Statute. As a consequence, Libya is "unable to obtain the accused" and the necessary testimony and is also "otherwise unable to carry out [the] proceedings."¹⁸⁸

In relation to inability to obtain the accused, the PTC noted that Libyan authorities had been unable to secure the custody of Gadhafi from the militia detaining him in the city of Zintan, and it was not persuaded that the transfer of Gadhafi to State authorities could happen in the near future.¹⁸⁹ With respect to inability to obtain evidence and testimony, the PTC pointed to "the lack of capacity to obtain the necessary testimony due to the inability of judicial and governmental authorities to ascertain control and provide adequate witness protection," highlighting numerous reports concerning torture, mistreatment and deaths in custody of detainees in Libya.¹⁹⁰ The State authorities' lack of control over certain detention centres resulted in Libyan prosecuting authorities' inability to interview two witnesses, whose testimonies were relevant to the case.¹⁹¹ The absence of a witness protection programme in Libya

¹⁸⁵ *Al-Senussi*, Pre-Trial Chamber I, Admissibility Decision, para. 261 ("in relation to 'inability' under article 17(3) of the Statute, the Chamber is of the view that not simply any 'security challenge' would amount to the unavailability or a total or substantial collapse of the national judicial system rendering a State unable to obtain the necessary evidence or testimony in relation to a specific case or otherwise unable to carry out genuine proceedings").

¹⁸⁶ *Gadhafi*, Pre-Trial Chamber I, Admissibility Decision (2013), para. 200.

¹⁸⁷ *Ibid.*, para. 215.

¹⁸⁸ *Ibid.*, para. 205.

¹⁸⁹ *Ibid.*, paras. 206-208.

¹⁹⁰ *Ibid.*, para. 209.

¹⁹¹ *Ibid.*, para. 210.

meant Libya could not demonstrate the existence of “protective measures for witnesses who agree to testify in the case against Mr Gadhafi.”¹⁹²

The PTC also found that Libya was “otherwise unable to carry out its proceedings” due to the Libyan authorities’ failure to appoint Gadhafi a lawyer. The Libyan authorities had failed to explain in a sufficiently clear way “whether and how the difficulties in securing a lawyer for the suspect may be overcome in the future.”¹⁹³ The lack of legal counsel was “an impediment to the progress of proceedings against Mr Gadhafi,” which meant the trial could not “be conducted in accordance with the rights and protections of the Libyan national justice system.”¹⁹⁴ Accordingly, Libya was unable genuinely to carry out an investigation against Gadhafi.¹⁹⁵

In the *Al-Senussi* case, the PTC found that Libya was not unable to investigate the case.¹⁹⁶ The PTC noted that – unlike Gadhafi – Al-Senussi was in the custody of the Libyan authorities, meaning that the first ground of article 17(3) was not met.¹⁹⁷ In relation to inability to obtain the “necessary evidence and testimony,” the PTC recalled its findings in *Gadhafi* case in relation to the security challenges faced by Libya and the resultant absence of an effective witness protection programme and control over detention facilities,¹⁹⁸ but found to the contrary that they did not affect the proceedings against Al-Senussi.¹⁹⁹ Libya had “provided a considerable amount of evidence collected as part of its investigation against Mr Al-Senussi,” and there was “no indication that collection of evidence and testimony” had or would cease.²⁰⁰

The PTC then addressed Al-Senussi’s lack of access to counsel and more generally the ongoing security difficulties in the context of its assessment of whether Libya was “otherwise unable to carry out its proceedings” under article 17(3). Having found Libya appeared to be in a position to address the ongoing security difficulties such that the proceedings would not generally be hindered,²⁰¹ the PTC found that it could not conclude that Libya would “be unable to adequately address the current security concerns and ensure the provision of adequate legal representation for Mr Al-Senussi as necessary” to ensure further proceedings would not be impeded.²⁰² The PTC observed (i) that Al-Senussi, unlike Gadhafi, was under the control of Libyan authorities; and (ii) that Libya had assured the Court that several local lawyers had expressed their willingness to represent Al-Senussi, and that the current lack of power of attorney would have been solved in the near future.²⁰³ Although it acknowledged that the “problem of legal representation ... holds the potential to become a fatal obstacle to the progress of the case,” it was not a compelling problem at the given time.²⁰⁴

The Appeals Chamber upheld the PTC’s decision regarding the inadmissibility of the *Al-Senussi* case.²⁰⁵ With regard to access to evidence and witness protection, the Appeals Chamber rejected Al-Senussi’s argument that the PTC was only concerned with whether the State could collect evidence, something which he argued clearly contradicted the most basic notion of a ‘genuine’ judicial proceeding as required

¹⁹² *Ibid.*, para. 211.

¹⁹³ *Ibid.*, para. 213.

¹⁹⁴ *Ibid.*, para. 214.

¹⁹⁵ *Ibid.*, para. 219. The Appeals Chamber refrained from enquiring into Libya’s inability because it had already found that Libya could not demonstrate it was investigating the same case. See *Gadhafi*, Appeals Chamber, Admissibility Decision (2014), paras. 213-214.

¹⁹⁶ *Al-Senussi*, Pre-Trial Chamber I, Admissibility Decision, paras. 309-11.

¹⁹⁷ *Ibid.*, para. 294.

¹⁹⁸ *Ibid.*, para. 297.

¹⁹⁹ *Ibid.*, para. 301.

²⁰⁰ *Ibid.*, para. 298. The evidence “included several relevant witness and victims’ statements as well as pieces of documentary evidence, such as written orders, medical records and flight documents.”

²⁰¹ *Ibid.*, para. 303.

²⁰² *Ibid.*, para. 308.

²⁰³ *Ibid.*, para. 308. See also *Libyan Government’s consolidated Reply to the Responses by the Prosecution, Defence and OPCV to the Libyan Government’s Application relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute*, Doc. ICC-01/11-01/11-403-Red2, 14 August 2013, para. 146 (such challenges are “far from insurmountable and do not amount to inability or unwillingness on the part of the Government to carry out genuine proceedings”)

²⁰⁴ *Al-Senussi*, Pre-Trial Chamber I, Admissibility Decision, para. 307.

²⁰⁵ *Al-Senussi*, Appeals Chamber, Admissibility Decision, para. 298.

under Article 17,²⁰⁶ and that his case would be prejudiced due to the lack of effective witness protection as defence witnesses will not be prepared to come forward due to considerable security concerns.²⁰⁷ The Appeals Chamber found that Al-Senussi's argument was "speculative" because there was no evidence that specific Defence witnesses were not prepared to testify, the State's investigative material "included exculpatory evidence," and the reference to "former regime officials ... imprisoned with Mr Al-Senussi who may have evidence of particular importance to his case could ... be important for either the prosecution or the Defence."²⁰⁸

It dismissed Al-Senussi's argument that the lack of legal counsel meant domestic proceedings could not proceed further, stating:

[T]hese questions do not have to be determined in the context of this appeal. This is because even if the Libyan courts, in the further conduct of the proceedings, were to conclude that the proceedings in respect of Mr Al-Senussi must be terminated because of the lack of a lawyer during the early stages of the proceedings, this would not render Libya unable genuinely to prosecute him. This is because, even though it is one of the objectives of the Statute and indeed of the complementarity principle to end impunity, this does not mean that this objective is only attained if trials for the most serious crimes end with a conviction. Indeed, it is intrinsic to the notion of criminal justice that trials may end with an acquittal or have to be terminated because a fair trial is no longer possible. Should this occur, it cannot be said that the jurisdiction in question was unable genuinely to try the suspect; to the contrary, subject to the specific circumstances of the case, a genuine prosecution could have taken place.²⁰⁹

The Defence further argued that the PTC's finding on the Libya's ability to rectify his lack of representation was speculative, highlighting that Libya had not appointed him a lawyer despite their repeated assurances they would do so.²¹⁰ The Appeals Chamber noted that the PTC's conclusion was primarily based on the control exercised by Libyan authorities over Al-Senussi, and found that "it was not unreasonable for the Pre-Trial Chamber to conclude that, although in the past it had not been possible to appoint counsel for Mr Al-Senussi because of the security situation, there was a prospect of this happening in the future." The "element of prediction" was not unreasonable.²¹¹

The Appeals Chamber also rejected the Defence's alternate argument that the PTC's findings contradicted the *Gadhafi* case ruling, stating that the different findings do "not *per se* illustrate that the findings in [the *Al-Senussi* case] were unreasonable."²¹² The Appeals Chamber pointed out that the distinguishing factor was the exercise of control over the accused by Libyan authorities, and that the failure to access Gadhafi was central to the conclusion that appointing him a lawyer was significantly more difficult.²¹³

4.4.3. Was Libya unable to carry out national proceedings against Al-Senussi?

The threshold determining whether a State is "otherwise unable to carry out its proceedings" should be lowered, in particular by taking into account whether, under international law and standards governing the right to a fair trial and administration of the criminal justice system, an investigation or prosecution may lawfully proceed. The findings in the *Al-Senussi* case, as a result of which the domestic trial commenced despite the absence of legal representation or a witness protection programme, and despite

²⁰⁶ Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's "Decision on the admissibility of the case against Abdullah Al-Senussi," Doc. ICC-01/11-01/11-474, 4 November 2013, para. 134 (emphasis added).

²⁰⁷ Ibid., para. 135.

²⁰⁸ *Al-Senussi*, Appeals Chamber, Admissibility Decision, paras. 295-296.

²⁰⁹ Ibid., para. 200. See Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Abdullah Al-Senussi,' Doc. ICC-01/11-01/11-474, 4 November 2013, paras. 64-69.

²¹⁰ Ibid., paras. 50, 56, 80, 86-90.

²¹¹ *Al-Senussi*, Appeals Chamber, Admissibility Decision, para. 201.

²¹² Ibid., para. 203. See Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Abdullah Al-Senussi,' Doc. ICC-01/11-01/11-474, 4 November 2013, paras. 86-90.

²¹³ *Al-Senussi*, Appeals Chamber, Admissibility Decision, para. 203.

indications that other rights of the accused could be violated, has resulted in a discrepancy between complementarity as applied by the ICC and international human rights law as it applies to criminal justice systems.

Although article 17(3) initially addresses whether a substantial collapse or unavailability of the national justice system means the "State" is unable to obtain the accused or the necessary evidence and testimony, it also requires the Court to ask whether such State is "otherwise unable to carry out its proceedings." This should include an assessment of whether carrying out proceedings would be unlawful under international law, including international human rights law and international humanitarian law under which States are obligated to ensure an accused is afforded a fair trial, during which victims and witnesses are protected from any reprisals. In the event a State cannot do so, they are obligated to make the necessary reforms to their laws and practices to meet their obligations before carrying out an investigation or prosecution. This not only has implications for the Court's assessment of whether Al-Senussi was able to access evidence and witnesses and was represented by counsel, but requires the Court to expand the scope of its assessment to other shortcomings in the domestic proceedings and their impact on the State's ability to investigate and prosecute the case.

Due weight should be given to the State authorities' ability to collect and present evidence of crimes over the accused's ability to do so. In the *Al-Senussi* case, the Court dismissed the argument that the same security situation, including a lack of State control over detention facilities and absence of a witness protection programme,²¹⁴ as well as the general hostility against Gadhafi sympathizers, may hamper his ability to collect evidence and deter potential defence witnesses as speculative.²¹⁵ It also relied on the fact that the Prosecution had collected exculpatory evidence and the possibility that Prosecution witnesses detained with the accused might also have information useful for the defence.²¹⁶ Relying on the Prosecution to collect exculpatory evidence to support the accused's case is not sufficient to discharge the State's obligation to ensure an accused has equal treatment before a domestic court, including adequate time and facilities to defend themselves and the right to call and examine witnesses.²¹⁷ Proceedings in which an accused is unable to access evidence and witnesses, and is therefore unable to call and examine witnesses, as required under international law, should be considered as evidence of the State inability to effectively investigate and prosecute.

Additionally, the Court appears to have applied a low threshold for determining whether the State can obtain the "necessary evidence and testimony," which has insufficient regard for a State's obligation to

²¹⁴ Their assessment underlies the finding that such factors directly impacted the proceedings against Gadhafi (*Gadhafi*, Pre-Trial Chamber I, Admissibility Decision (2013), paras. 210-211) but not against the Al-Senussi (*Al-Senussi*, Pre-Trial Chamber I, Admissibility Decision, para. 298); in the latter case, Libya had demonstrated that it had already collected a variety of evidence and there was "no indication that the collection of evidence and testimony has ceased or will cease" (*Al-Senussi*, Pre-Trial Chamber I, Admissibility Decision, para. 298).

²¹⁵ *Al-Senussi*, Appeals Chamber, Admissibility Decision, paras. 295-296.

²¹⁶ The focus on the authorities' access is apparent in the divergence between the *Gadhafi* and *Al-Senussi* cases. Similar factors led the Court to conclude that the Libyan authorities were unable to access evidence and witnesses in the *Gadhafi* case in the absence of actual proof that they were able to do so; a similar absence of defence-related evidence in the *Al-Senussi's* case was not determinative. The difference between the Court's findings in the *Al-Senussi* and *Gadhafi* cases was rooted in the Libyan authorities' (lack of) territorial control. The authorities had custody of Al-Senussi but not of Gadhafi, were able to access evidence against Al-Senussi but not Gadhafi despite that limitations on access to some detention facilities and the absence of a witness protection programme applied equally and, in the context of whether the authorities were otherwise unable to carry out proceedings, and were able to appoint Al-Senussi a lawyer but not Gadhafi. Al-Senussi also argued that the Chamber's reasoning was contradictory, stating on appeal that "the Chamber never took into consideration the amount of evidence gathered in Mr. Gadhafi's case as a justification for its decision that the lack of witness protection rendered Libya unable to try Mr. Gadhafi" and that "[the PTC] found his case admissible as there was no evidence of any effective witness protection programme which could prejudice the proceedings." In Al-Senussi's view, these factors applied in his case as well, to the effect that the PTC should have come to the same conclusion. See *Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's "Decision on the admissibility of the case against Abdullah Al-Senussi"*, Doc. ICC-01/11-01/11-474, 4 November 2013, para. 134.

²¹⁷ ICCPR, art. 14(3); Arab Charter, art. 16(5); African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle N(6)(f); CEDAW, arts. 2(c), 15(1); CERD, arts. 2, 5(a); Human Rights Committee, *General Comment No. 32: Right to Equality before Courts and Tribunals and to a Fair Trial (Article 14)*, UN Doc. CCPR/C/GC/32, 23 August 2007, paras. 32, 39.

ensure victims and witnesses are protected.²¹⁸ This conclusion is more apparent in the conflict between the *Gadhafi* and *Al-Senussi* cases, the former based on the general lack of “protective measures for witnesses who agree to testify in the case against Mr Gadhafi,”²¹⁹ and the latter based on the fact that, even “in the context of a potentially precarious security situation across the country [in which] witnesses may be afraid of coming forward or may be eliminated,”²²⁰ the evidence collected up to that point proved that the absence of witness protection measures did not have an impact on the *Al-Senussi* case. The fact that Libyan authorities were able to collect some witness statements does not entail that those witnesses would be able to, or in fact would, testify in court in the absence of protective measures or that, if they did so, they would not be subject to reprisals.

More weight should also be attached to whether an accused has been afforded representation by legal counsel. Under international law, the right to legal counsel applies to an accused from the moment of their arrest until the conclusion of proceedings against them.²²¹ At the time of Al-Senussi’s submissions before the PTC, he had not had access to a lawyer for the duration of his nine months of detention,²²² and still lacked a lawyer at the time the Defence filed its appeal against the PTC’s decision,²²³ namely when the domestic Accusation Chamber confirmed the charges and the trial was due to commence.²²⁴ The Appeals Chamber’s conclusion that the “element of prediction” in the PTC’s finding was “not unreasonable”²²⁵ is problematic insofar as it implicitly accepted that restrictions on the accused’s rights did not hinder the State’s ability to prosecute the case against him, on the assumption that the State would remedy the absence of a lawyer during Al-Senussi’s interrogation and the investigation of the case, which the Court did not explicitly address. The Appeals Chamber’s conclusion was also based on factual circumstances as they pertained at the time of the PTC’s decision, having rejected Al-Senussi’s request to submit new evidence about the absence of representation on the basis that the appropriate procedure was for the Prosecution to seek review of the PTC’s decision.²²⁶ Had it considered the facts applying at the time of the appeal, it is difficult to reach a conclusion other than that the Libyan authorities would be unable to prosecute the case, given under both international law and, according to the PTC, domestic law²²⁷ a trial cannot be conducted in the absence of legal representation when the accused requests it. Further, based on the information now available, the domestic trial continued despite that some of the accused were periodically unrepresented, including because of threats to lawyers and the difficulty in securing them.²²⁸ The ICJ is unaware of any appropriate measures taken by the authorities to ensure the safety of lawyers, nor of any investigation into an attack on one lawyer reported by UNSMIL.²²⁹

A wider view should also be adopted when assessing whether a State, including Libya, is “otherwise unable to carry out proceedings.” The Court focused its examination on whether Al-Senussi had access to

²¹⁸ See e.g. CAT, art. 3; ICCPED, art. 12; DPED, art. 13(3); *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016), Office of the High Commissioner for Human Rights, New York/Geneva, 2017, paras. 27, 35, 71, 76; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, 16 December 2005, para. 12(b); Inter-American Court of Human Rights, *Myrna Mack-Chang v. Guatemala*, Series C No. 101, 25 November 2003, para. 199.

²¹⁹ *Gadhafi*, Pre-Trial Chamber I, Admissibility Decision (2013), para. 211.

²²⁰ *Al-Senussi*, Pre-Trial Chamber I, Admissibility Decision, paras. 283, 287.

²²¹ ICCPR, arts. 9, 14(3)(d); Arab Charter, art. 16(4); ACHPR, arts. 3, 7; ICCPED, art. 17(2)(d). See also Human Rights Committee, *General Comment No. 32: Right to Equality before Courts and Tribunals and to a Fair Trial (Article 14)*, UN Doc. CCPR/C/GC/32, 23 August 2007, paras. 35, 46; *Concluding Observations: Netherlands*, UN Doc. CCPR/C/NLD/CO/4, 25 August 2009, para. 11; African Commission on Human and Peoples’ Rights, *Liesbeth Zegveld and Mussie Ephrem v. Eritrea*, Communication No. 250/02, 20 November 2003, para. 55.

²²² *Defence Response on behalf of Mr. Abdullah Al-Senussi to “Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute,”* Doc. ICC-01/11-01/11-356, 14 June 2013, paras. 121, 124.

²²³ *Ibid.*, paras. 50, 56, 80.

²²⁴ *Ibid.*, para. 80. Al-Senussi did not yet have a lawyer during the hearings before the Tripoli Court of Assize on 24 March and 14 April 2014. It is worth noting that such hearings took place before the Appeals Chamber’s judgment, which dates 24 July 2014.

²²⁵ *Al-Senussi*, Appeals Chamber, Admissibility Decision, para. 201.

²²⁶ *Ibid.*, paras. 58-61, 193. See also *Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I’s “Decision on the admissibility of the case against Abdullah Al-Senussi,”* Doc. ICC-01/11-01/11-474, 4 November 2013, para. 84.

²²⁷ *Al-Senussi*, Pre-Trial Chamber I, Admissibility Decision, paras. 206, 231.

²²⁸ ICJ, *Accountability for Serious Crimes under International Law in Libya*, p. 81.

²²⁹ *Ibid.*, pp. 81-82.

legal representation, dismissing several questions raised by the accused with respect to whether other violations of his rights might have occurred.²³⁰ The Court also dismissed submissions made by Al-Senussi and the Office of Public Counsel for Victims regarding the security situation, which related to the adverse impact attacks on judges had on their ability to conduct domestic proceedings,²³¹ and militia control over the Al-Hadhba prison where the accused were detained and where the trial was held would have on the security and independence of the proceedings.²³² The Court expressly stated that the information available to it did “not indicate that the domestic proceedings against Mr Al-Senussi are tainted by departures from, or violations of, the Libyan national law such that they would support ... a finding of unwillingness or inability.”²³³ The Court appears to have examined each issue in isolation without examining the totality of the issues raised by parties to the proceedings and the overall impact they might have on the proceedings. Further, the Court had undue reference to whether the proceedings could be carried out in compliance with domestic law, rather than additionally whether domestic law was compliant with international law and standards governing the accused and victims’ rights.

As discussed in sections 3 and 4.3.3.2 above, and in more detail in the ICJ’s report on the Libyan criminal justice system, the criminal justice framework suffers from serious shortcomings which make achieving effective justice compliant with international law and standards virtually impossible in the current context, which is not altogether different from that which applied at the time of the admissibility proceedings. Unless Libyan authorities could demonstrate that they could and would apply the framework in compliance with international law and standards, they should be deemed “unable to carry out their proceedings.” As also discussed, serious procedural violations plagued the trial against Al-Senussi (and Gadhafi). The information now available also shows that the Libyan criminal justice system has effectively become inaccessible for crimes under international law, and as such subject to a “substantial collapse or unavailability.” Such factors should be taken into account when determining admissibility in future Libya cases.

In this respect, it is necessary to reconsider the low burden imposed on the State and comparably high burden imposed on the accused during admissibility challenges to demonstrate that the State is unable to investigate or prosecute the case. The Court dismissed issues raised by the accused as, for example, “speculative”²³⁴ or “generic assertions without any tangible proof.”²³⁵ With respect to allegations of mistreatment in detention in particular, the Court required Al-Senussi to “properly raise” the issue before requiring Libya to “disprove it.”²³⁶ Where such allegations include coercion to provide information or evidence, under international law the burden of proof lies on the State authorities to investigate such allegations and to demonstrate that evidence was not obtained through torture or other coercive means.²³⁷ The Appeals Chamber found that the PTC’s statement that the burden “that lies with Libya cannot be interpreted as an obligation to disprove any possible ‘doubts’ raised by the opposing participants in the admissibility proceedings”²³⁸ did not reverse the burden of proof.²³⁹ However, where an accused challenges the State’s ability to investigate or prosecute a case, the State should be required to demonstrate it has in fact rectified the issue at hand instead of only be required to provide assurances it will do so.²⁴⁰

²³⁰ *Al-Senussi*, Pre-Trial Chamber I, Admissibility Decision, paras. 238-243.

²³¹ *Ibid.*, paras. 259-261, 272-281, 299, 303; *Al-Senussi*, Appeals Chamber, Admissibility Decision, para. 244(c).

²³² *Al-Senussi*, Pre-Trial Chamber I, Admissibility Decision, paras. 263-265; *Al-Senussi*, Appeals Chamber, Admissibility Decision, para. 244(d).

²³³ *Al-Senussi*, Pre-Trial Chamber I, Admissibility Decision, para. 243.

²³⁴ *Ibid.*, paras. para. 244(e), (i), 288, 295

²³⁵ *Ibid.*, paras. para. 239.

²³⁶ *Ibid.*, paras. para. 239.

²³⁷ Committee against Torture, *G.K. v. Switzerland*, UN Doc. CAT/C/30/D/219/2002, 12 May 2003, para. 6.10; Human Rights Committee, *Nallaratnam v. Sri Lanka*, UN Doc. CCPR/C/81/D/1033/2001, 23 August 2004, para. 7.4.

²³⁸ *Al-Senussi*, Pre-Trial Chamber I, Admissibility Decision, para. 208.

²³⁹ *Al-Senussi*, Appeals Chamber, Admissibility Decision, para. 249. See also *ibid.*, paras. 166 et seq, 244(f).

²⁴⁰ For example, the PTC’s decision in the *Al-Senussi* case was based in part on the prospect that the Libyan authorities *could* appoint counsel given they had custody of the accused and had made assurances they would do so. See *Al-Senussi*, Pre-Trial Chamber I, Admissibility Decision, para. 214. This was also reiterated in the Appeals Chamber’s conclusion that the failure to secure custody of

The Appeals Chamber stated that the termination of national proceedings due to the absence of legal counsel for the accused should be accepted as an outcome of criminal proceedings which does not result in an inability to prosecute the accused. On this specific point, the Court's role of complementing national jurisdictions when they are unable to genuinely investigate or prosecute a suspect is undermined. The Appeals Chamber's reasoning flows from the idea that the Court should step in only when the State concerned is attempting to shield an accused. The consequence of this, however, is to tolerate the termination of national proceedings, even when these do not purposely aim to shield the accused, a stance which contradicts the Rome Statute's goal of combating impunity. In the ICJ's view, impunity should be addressed in respect of a case before the Court, including when the violation of the fair trial rights of an accused results in domestic proceedings being terminated.

5. Conclusion and recommendations

Complementarity and coherence between the different bodies of international law and domestic law require to give due regard to the intersection of the Rome Statute with other treaties and customary international law and their application in domestic systems. The obligation to do so is expressly set out in articles 17(2), 20(3)(b) and 21(3) of the Rome Statute, and is implicit in the Statute's objective to combat impunity for international crimes and the obligations to comply with an accused's fair trial rights and protect victims and witnesses under articles 67 and 43(6), respectively. In pending and future cases, greater emphasis should be placed on a State's obligations under international law when determining whether it is unwilling or unable to prosecute the same case.

In particular, it is necessary to: (i) ensure that domestic definitions of crimes accord with those charged in ICC warrants of arrest when assessing whether a State is investigating or prosecuting "substantially the same conduct;" (ii) lower the threshold for determining whether a State is unwilling to investigate or prosecute, taking into account "due process" obligations when determining whether the State can "bring a person to justice;" and (iii) when assessing whether, "due to a substantial collapse or unavailability of its national justice system," a State is "otherwise unable to carry out domestic proceedings," adopt a broader lens which considers whether violations of an accused's rights or other shortcomings in the domestic investigation or prosecution of criminal cases would require suspension of the proceedings under international law and standards.

Greater regard for Libya's ability to meet international law and standards governing criminal justice is especially important in future ICC proceedings, including in the *Khaled* and *Al-Werfalli* cases. At present, Al-Tuhamy Mohamed Khaled (former head of the Libyan Internal Security Agency) is at large, allegedly residing in Cairo.²⁴¹ Mahmoud Mustafa Busayf Al-Werfalli (commander in the Al-Saiqa Brigade in the Libyan Arab Armed Forces, formerly Libyan National Army) also remains at large in the Benghazi area.²⁴² In July 2019, the OTP reported that Al-Werfalli had been promoted to the rank of Lieutenant Colonel by the General Command of the Libyan Arab Armed Forces.²⁴³

Gadhafi made it considerably more difficult to appoint him a lawyer than Al-Senussi. See *Al-Senussi*, Appeals Chamber, Admissibility Decision, para. 203.

²⁴¹ *Eighteenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011)*, 6 November 2019, para. 16. The arrest warrant against charges Khaled with *inter alia* crimes against humanity of imprisonment, torture, other inhumane acts and persecution, and the war crimes of torture and cruel treatment, and outrages upon personal dignity perpetrated on Libyan territory from at least early March 2011 until 24 August 2011. See *Warrant of Arrest for Al-Tuhamy Mohamed Khaled (Under Seal, Ex Parte Prosecutor Only)*, Doc. ICC-01/11-01/13-1, 18 April 2013, p. 6.

²⁴² *Eighteenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011)*, 6 November 2019, paras. 12-13. Al-Werfalli is accused of perpetrating eight extrajudicial executions of 43 people, videos of some of which were posted on Facebook. See *The Prosecutor v. Al-Werfalli*, Warrant of Arrest, Doc. ICC-01/11-01/17-2, 15 August 2017, para. 10; *The Prosecutor v. Al-Werfalli*, Second Warrant of Arrest, Doc. ICC-01/11-01/17-13, 4 July 2018, para. 35.

²⁴³ *Eighteenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011)*, 6 November 2019, para. 12.

If Libyan authorities gain custody of the suspects, they would be investigated and prosecuted in a criminal justice system which is largely non-compliant with international law and standards governing the penalization of crimes and the rights of the accused. They would also be investigated and prosecuted without a witness protection system, and subject to serious security concerns including ongoing attacks on judges, prosecutors, and lawyers and limited access to, and control over, a majority of the territory and detention facilities by Libyan authorities, issues which are exacerbated by the armed conflict that is ongoing at the time of publication. Greater regard should therefore be given to these issues if an admissibility challenge is filed by the Libyan authorities.

In light of the above, in future cases and in any review of admissibility decisions in the Libya situation, the ICJ recommends the following for consideration by all involved in addressing these issues at the ICC:

With respect to the "same case" test:

- **Consider the domestic characterization of crimes under international law as an essential component in the assessment of whether a State is investigating or prosecuting "substantially the same conduct;"**
- **Require States to ensure that the offences a suspect is charged with at domestic level reflect all the definitional elements prescribed under international law;**
- **Determine that a State is not investigating the "same case" whenever relevant domestic offences fail to reflect the definitional elements of crimes under international law.**

With respect to whether a State is "unwilling:"

- **Lower the threshold by which the Court determines whether fair trial rights violations are determinative of State's willingness to investigate or prosecute a case, recognizing that "bringing a person to justice" also hinges on ensuring the accused is accorded justice;**
- **Deem serious violations of fair trial rights suffered by an accused at domestic level, which if committed in the context of ICC proceedings would render them unfair, as determinative of a finding of unwillingness under article 17(2)(c), unless such violations have been remedied so as to ensure the accused has a fair trial;**

With respect to whether a State is "unable:"

- **Determine a case admissible where violations of an accused's rights or other procedural shortcomings would render domestic authorities unable to investigate or prosecute the case under domestic or international law, including where the accused may be sentenced to death in violation of international law;**
- **Determine admissibility decisions consistently with its findings in the *Gadhafi* case, according to which the lack of a witness protection programme can demonstrate an inability to "obtain the necessary evidence and testimony" under article 17(3) of the Rome Statute, irrespective of whether the State has been able to gather some evidence;**
- **Determine whether a State is "otherwise unable to carry out its proceedings" under article 17(3) of the Rome Statute based on circumstances existing at the time of submission, including whether an accused has in fact been appointed a lawyer at domestic level and was able to exercise their rights including to call and examine**

witnesses and defend themselves, not on the possibility that such matters could be rectified;

- If violations of an accused's rights have occurred at the time of submission, when determining whether a state is "unable to carry out proceedings," assess whether such violations have been remedied so that the accused can be afforded a fair trial.

As set out in more detail in the ICJ's report on the Libyan criminal justice system, and in light of the above, the ICJ also urges the Libyan authorities to:

- Enact new legal provisions or amend existing ones to criminalize war crimes, crimes against humanity, torture and cruel, inhuman or degrading treatment or punishment, enforced disappearance, arbitrary deprivation of life, rape and other forms of sexual and gender-based violence, and slavery in line with international law and standards, to codify superior responsibility in respect of all crimes under international law, and to remove the defence of superior orders;²⁴⁴
- Amend or repeal laws on amnesties and immunities to ensure full compliance with international law and standards, and ensure they are not a barrier to the investigation and prosecution of crimes under international law or the provision of reparations;
- With respect to investigations and prosecutions, ensure that an accused's rights to liberty and a fair trial are guaranteed in law and in practice, including by ensuring the independence, impartiality and competence of the judiciary; ensuring accused persons have the right to *habeas corpus* and to be brought promptly before an independent judicial authority, the right to legal counsel from the moment of arrest, throughout pre-trial proceedings and during trial, and the right to be informed of the charges and to access the evidence against them; prohibit reliance on statements or information obtained through torture or other coercive means as evidence at trial; preserve the accused's right to re-trial following trials in *absentia*; and ensure the right to appeal questions of fact and the right to review upon discovery of new facts; and
- Establish an immediate moratorium on the death penalty, with a view to its abolition.

²⁴⁴ For detailed recommendations on these points, see ICJ, *Accountability for Serious Crimes under International Law in Libya*, pp. 98-102.

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March 2020 (for an updated list, please visit www.icj.org/commission)

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