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No.: **ICC-01/11-01/11 OA 8**
Date: **11 June 2019**

THE APPEALS CHAMBER

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

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

Public with Public Annex A and Confidential Annexes B and C

Prosecution Response to Mr Saif Al-Islam Gaddafi's Appeal against the "Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute'" (ICC-01/11-01/11-669)

Source: **Office of the Prosecutor**

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I. INTRODUCTION

1. On 5 April 2019, Pre-Trial Chamber I unanimously rejected Mr Gaddafi's admissibility challenge and found that his case was admissible before the ICC.[1] Mr Gaddafi appeals the Admissibility Decision.[2] However, he fails to show an error in the Majority's correct interpretation of the law, its reasonable and correct assessment of the facts, its reasoning or its exercise of discretion.

2. *First*, the Majority, with Judge Perrin de Brichambaut concurring, correctly interpreted that articles 17(1)(c) and 20(3) of the Rome Statute require a domestic judgment with *res judicata* effect. The Majority interpreted these provisions in accordance with the criteria of treaty interpretation considering, in good faith, its ordinary meaning in light of the relevant context, object and purpose. Where appropriate, it considered the drafting history and, notably, interpreted and applied these provisions consistently with internationally recognised human rights as required pursuant to article 21(3) of the Statute.

3. *Second*, the Majority, with Judge Perrin de Brichambaut concurring, correctly found that the judgment of 28 July 2015 of the Tripoli Court of Assize was not final according to Libyan law. The Majority considered the submissions of the Parties, participants and of the recognised Libyan representatives, and reviewed the material submitted. Similarly, the Majority, with Judge Perrin de Brichambaut concurring, correctly concluded that Law No. 6 did not apply to the crimes attributed to Mr Gaddafi and, therefore, he could not benefit from it. The Majority again reviewed the material submitted. Its assessment was corroborated by the interpretation of the Libyan law given by the recognised Libyan representatives. There was no compelling reason for the Majority to depart from that interpretation.

4. *Third*, the Majority, with Judge Perrin de Brichambaut concurring, reasonably exercised its discretion and did not decide on the factual questions raised by the Parties and participants when it was unnecessary to determine the admissibility of Mr Gaddafi's case. Accordingly, once the Majority found that Law No. 6 did not apply to the crimes attributed to Mr Gaddafi, it need not have enquired further. There is no error in this cautious and reasonable approach. To the contrary, the Appellant's manifold speculations only confirm the

[1] ICC-01/11-01/11-662 ("Admissibility Decision"). A Majority of two judges signed the Admissibility Decision and Judge Perrin de Brichambaut signed a separate concurring opinion. Although he agreed with the operative part of the Decision, he disagreed with "some of the legal underpinnings […] and about the way it is presented". *See* Judge Perrin de Brichambaut Separate Concurring Opinion, para. 1.
[2] ICC-01/11-01/11-669 ("Admissibility Appeal").

correctness of the Majority's position. However, the Majority did consider it appropriate to assess in *obiter* comments whether Law No. 6 was compatible with international law, to clarify the legal issues at stake. The Majority's approach was again correct. The Majority analysed consistent international human rights jurisprudence and, contrary to the Appellant's submissions, limited its findings to the facts of this case – and they are correct. The Appellant fails to show an error in the Majority's reasoning and findings, and there is none.[3] His appeal should be dismissed.[4]

II. GROUND 1: THE MAJORITY CORRECTLY INTERPRETED ARTICLES 17(1)(C) AND 20(3) AS REQUIRING A FINAL JUDGMENT

5. The Majority, with whom Judge Perrin de Brichambaut concurred, was correct in holding that articles 17(1)(c) and 20(3) require a final conviction or acquittal, in other words, a judgment with *res judicata* effect.[5] Mr Gaddafi's challenge to the Majority's interpretation in his first ground of appeal: (i) oversimplifies the interpretation of articles 17(1)(c) and 20(3) and disregards their relevant context, object and purpose; (ii) fails to adequately address the jurisprudence, commentary and the Statute's drafting history which supports the Majority's interpretation; and (iii) overstates the relevance of the *sui generis* nature of the Court's complementarity regime in order to distinguish it from the application of *ne bis in idem* in other international legal contexts. Mr Gaddafi's first ground of appeal should be rejected.

[3] *See* *Al-Bashir* Jordan Referral AD, paras. 33-35 (setting out the standard of review for errors of law and fact). *See in particular* para. 35 ("With regard to an exercise of discretion based upon an incorrect conclusion of fact, the Appeals Chamber applies a standard of reasonableness […], thereby according a margin of deference to the Chamber's findings"). *See also* *Bemba et al.* AJ, paras. 90-108.

[4] The Prosecution provides a brief factual and procedural background of this case in confidential Annex B. Pursuant to regulation 23*bis*(2) of the Regulations of the Court ("RoC"), Annex B is filed confidentially because it contains information with the same classification. If Annex B were considered argumentative, the Prosecution still complies with the page limit of regulation 38(2)(c) of the RoC.

[5] Admissibility Decision, paras. 36 ("The formulation 'a trial by the Court is not permitted under article 20, paragraph 3' suggests that the person has been the subject of a completed trial with a final conviction or acquittal and not merely a trial 'with a verdict on the merits' or a mere 'decision on conviction or acquittal by a trial court' as the Defence suggests. In other words, what is required, as the LRV correctly pointed out, is a judgment which acquires a *res judicata* effect"), 53 (stating that *res judicata* effect is required for the purposes of articles 17(1)(c) and 20(3)); *see also* Judge Perrin de Brichambaut Separate Concurring Opinion, para. 67; *contra* Admissibility Appeal, para. 7.

II.A. THE CORRECT INTERPRETATION OF ARTICLES 17(1)(C) AND 20(3) IMPLIES THE EXISTENCE OF A FINAL JUDGMENT

6. The Appellant's interpretation of articles 17(1)(c) and 20(3) is an oversimplification. The lack of explicit reference in those provisions to a "final judgment" or "final conviction/acquittal" is not of itself determinative of the drafters' intentions.[6] An examination of the ordinary meaning of the terms of those provisions, in their context and in light of their object and purpose[7] demonstrates that the requirement of finality is a necessary implication of those provisions. This meaning is further supported by the drafting history of these provisions.

II.A.1. The ordinary meaning of article 20(3) read in context and in light of its object and purpose requires a final judgment

7. The requirement of a final judgment is readily apparent in article 20(3) when that provision is read in good faith, in context and in light of its object and purpose. *Ne bis in idem* is a principle of criminal law that serves not only the interests of fairness to the accused, but also legal security resulting from the finality of prosecutions – it is thus intrinsically linked to the notion of *res judicata* given that it is the definitive character of the decision that terminates ordinary procedural action and disposes of a case, precluding it from being raised again.[8] Commentators have understood this to be the operation of *ne bis in idem* in article 20(3), namely, that it requires judgments to have the status of *res judicata*.[9]

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[6] *Contra* Admissibility Appeal, paras. 21, 25.

[7] VCLT, article 31(1).

[8] Carter, pp. 168, 176 (stating that *ne bis in idem* is a limitation based on fairness to the accused and finality of prosecutions, requiring "a conviction, an acquittal, or another *final determination* of the case") (emphasis added); Bernard, p. 865 (stating that *ne bis in idem*, *inter alia*, safeguards the rights of the accused, ensures respect for the authority of a national court's decision and protects legal security by holding that a court's decision is final); Lelieur, pp. 201, 203, 206 (stating it is the common understanding that *ne bis in idem* is based on the principle of *res judicata* and that it is the definitive character of the decision that matters – it must be a decision that terminates procedural action and triggers the *ne bis in idem* effect, it must be finally disposed of); Böse, pp. 50, 51, 71 (writing in the context of European criminal legal systems, notes that the traditional understanding of *ne bis in idem* is that it is limited to cases where a final decision has been rendered, equating final decisions with those having the authority of *res judicata*. The transnational effect of the *ne bis in idem* principle requires that the decision must have the effect of *res judicata* in the domestic criminal system).

[9] Bernard, pp. 876-877 ("Article 20(3) contributes to complementarity, offering an interpretative grid for judgment rendered at the national level, but Article 20 also provides for the application of *ne bis in idem* to actions where a judgment has already been rendered by the Court and, at that point, protects the accused […] The principle is not about a preventative action when the accused finds themselves 'in jeopardy' a number of times, since the principle restricts its applications to situations where the first proceedings have been completed. In inter-jurisdictional interactions, it only protects the accused from strictly defined jeopardy"—Bernard uses the terms "first proceedings", "first process" and "first judgment" throughout her article to mean the proceedings that were finalised in the first jurisdiction, as opposed to meaning a "first-instance" decision (*see e.g.* pp. 863, 869)); Tallgren and Coracini, pp. 909-910, mns. 15-16 ("Since only a final judgment on the merits of the case

8. This is also the only reasonable interpretation of article 20(3) of the Statute when read in conjunction with article 17. Article 17 is exhaustive and covers *all* procedural stages; there is no part of the ordinary legal proceedings missing from article 17.[10] The question of whether *ne bis in idem* may apply to render a case inadmissible under article 17(1)(c) will thus depend on whether ordinary legal remedies (such as appeals) have been exhausted, or where the time limits for such remedies have lapsed—*i.e.* the point at which judgments become *res judicata,* as the Majority rightly held.[11] The logical consequence of requiring a *res judicata* effect in article 17(1)(c), therefore, is that appeals proceedings form part of the ongoing prosecution, within article 17(1)(a), and are thus fully accommodated within article 17.

9. The Appellant, however, reads article 17(1)(c) together with article 19(10), and appears to suggest an interpretation that would allow a 'revision' of an inadmissibility decision if further domestic legal processes have taken place which may amount to 'new facts', by which he appears to include ordinary appeals.[12] The Appellant's submissions lack clarity and misconstrue the purpose of article 19(10). The suggestion that an appellate decision in the ordinary course of proceedings could constitute a new fact for the purposes of article 19(10)[13] cannot be reconciled with the Appellant's submission that article 17 is intended to cover the "full scope of the national process with respect to Rome Statute crimes",[14] unless the Appellant considers that ordinary appeals processes fall outside the full scope of a national process—an arbitrary and surely incorrect position to take.

10. Moreover, the Appellant's interpretation of articles 17 and 19(10) blurs the clear distinction between the procedural phases that the two provisions are intended to cover. Article 19(10) is an exceptional measure, designed to address new facts that became known after the initial admissibility decision.[15] The availability of appellate remedies in legal proceedings is neither exceptional nor unforeseeable at the time a first instance decision is rendered. It is therefore not the type of 'new fact' envisaged by article 19(10). The

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establishes *res iudicata*, decisions not to prosecute, termination of proceedings on procedural or formal grounds or interlocutory decisions do not bar further proceedings").
[10] Ambos (2016) Vol. III, p. 301.
[11] Admissibility Decision, fn. 49, citing *Zolotukhin v. Russia*, Grand Chamber Judgment; *see also* *Barayagwiza* Reconsideration AD, para. 49 (where the ICTR Appeals Chamber considered *res judicata* in the context of final decisions, finding that a final judgment is one that terminates the proceedings, in other words, where no other ordinary appeal remedies are available or have been exhausted); *see also* Judge Perrin de Brichambaut Separate Concurring Opinion, para. 67.
[12] Admissibility Appeal, paras. 28-30.
[13] Admissibility Appeal, para. 30.
[14] Admissibility Appeal, para. 28.
[15] Hall, Ntanda Nsereko & Ventura, p. 895, mn. 66.

Appellant's interpretation would require the Court to render article 20(3) admissibility decisions once a first-instance decision has been rendered domestically, and subsequently review that decision under article 19(10) depending on the outcome of any domestic appeal. This would be an inefficient and duplicative application of the Rome Statute's complementarity framework,[16] causing overlap between circumstances covered by articles 17(1)(c) and 19(10) and thus rendering one or the other ineffective—a reading that would not amount to a good faith interpretation of those provisions.[17] A correct reading instead requires the Court to assess a case that is under or capable of appeal (and even more so, re-trial) as an ongoing prosecution within the ordinary meaning of article 17(1)(a), with recourse to *ne bis in idem* under articles 17(1)(c) and 20(3) only occurring once a decision of conviction or acquittal in that case has obtained *res judicata* effect.

II.A.2 The drafting history of article 20 supports the Majority's interpretation

11. The first iterations of article 20 proposed by the ILC in its 1993 Draft Code and its 1994 Draft Code (the precursors to the Rome Statute), referred to "[a] person who has been tried by another court".[18] The words "final judgment" were not used. Nevertheless, the ILC understood *ne bis in idem* in the Draft Code as requiring a final judgment, as demonstrated in the following excerpts from the ILC commentary to the 1994 Draft Code:

- "[T]he phrase *non bis in idem* means that no person shall be tried for the same crime twice. It is an important principle of criminal law, recognised as such in article 14(7) of the ICCPR."[19] The latter provision provides "[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" (emphasis added), and by the time of the 1993 Draft Code, had been consistently interpreted as

[16] *Contra* Admissibility Appeal, para. 30.
[17] *Bemba* TJ, para. 77 ("[O]n the basis of the principle of good faith provided for in this provision, the general rule (of treaty interpretation) also comprises the principle of effectiveness […] requiring the Chamber to dismiss any interpretation of the applicable law that would result in disregarding or rendering any other of its provisions void […]").
[18] 1993 Draft Code, pp. 120-121, Article 45; 1994 Draft Code, p. 117, Article 42 ("A person who has been tried by another court for acts constituting a crime of the kind referred to in article 20 may be tried under this Statute only if: (a) the acts in question were characterised by that court as an ordinary crime and not as a crime which is within the jurisdiction of the court; or (b) the proceedings in the other court were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted").
[19] 1994 Draft Code, p. 117 (emphasis added).

requiring finality.[20] The ILC did not explain why, unlike the ICCPR, the Draft Code did not refer to a final conviction. Its lack of explanation indicates that the difference was not considered a meaningful one. The ILC's reference to article 14(7) of the ICCPR thus implies endorsement of that provision.

- The ILC stated that it drafted the provision "drawing heavily" from article 10 of the ICTY Statute on *ne bis in idem*.[21] The ICTY Statute, and ICTR Statute for that matter, is similar to the Draft Code in that it does not contain the term "final" conviction/acquittal or judgement;[22] and yet the jurisprudence of the *ad hoc* tribunals has interpreted the provision as requiring a final judgment, as discussed below.[23]

- The ILC also observed that "[where the] Court [had] reached a decision either convicting or acquitting the accused of the crime, *that decision should be final*, and the accused should not be subsequently tried by another court for that crime".[24]

12. Consistent with the above interpretation, the 1996 PrepCom Report noted that *ne bis in idem* "should only apply to *res judicata* and not to proceedings discontinued for technical reasons."[25] The Appellant's attempt to dilute the relevance of this comment must be rejected.[26] *First*, the Appellant's submission that the comment refers only to *res judicata* in connection with "proceedings discontinued for technical reasons"[27] selectively reads the text. It is clear from the comment that *res judicata* is not meant solely in relation to proceedings "discontinued for technical reasons" alone;[28] it is considered the primary requirement for *ne bis in idem*. *Second*, the commentator that the Appellant relies upon to suggest that this comment may only have been made in relation to articles 20(1) and (2),[29] states himself that

[20] *Machado de Cámpora & Cámpora Schweizer v. Uruguay*, para. 18.2 ("Article 14(7) […] is only violated if a person is tried again for an offence for which he has already been finally convicted or acquitted"); *Terán Jijón v. Ecuador*, para. 5.4 (finding that *ne bis in idem* is not violated if an indictment against a person is quashed and that person is re-indicted—in other words, there is no violation of *ne bis in idem* if there has not been a decision with a *res judicata* effect).
[21] 1994 Draft Code, p. 117.
[22] ICTY Statute, article 10(2) ("A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if: (a) the act for which he or she was tried was characterized as an ordinary crime; or (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted"); and *mutatis mutandis*, ICTR Statute, article 9(2).
[23] *See below*, paras. 19-20.
[24] 1994 Draft Code, p. 118 (emphasis added).
[25] 1996 PrepCom Report, para. 16.
[26] *See* Admissibility Appeal, paras. 25-26.
[27] Admissibility Appeal, paras. 26-27.
[28] Admissibility Appeal, para. 27.
[29] Admissibility Appeal, para. 27.

article 20(3) should be read as requiring finality, since this would be a guarantee in favour of the accused.[30]

13. The drafters of the Rome Statute were not drafting in a vacuum—they were influenced by international human rights law principles and the statutes of the *ad hoc* tribunals in formulating the *ne bis in idem* provision, as they explicitly acknowledge.[31] Those influences, the commentaries in the *travaux préparatoires*, and the lack of any explicit discussion as to whether a conviction or acquittal needs to result from a 'final judgment',[32] demonstrates that finality was considered a necessary element of *ne bis in idem* in drafting the Rome Statute. There is no indication that the drafters were creating a *sui generis* rule of criminal law that departed from established practice and established international human rights standards. That the jurisprudence of the ICC and the *ad hoc* tribunals, the Human Rights Committee, the ECtHR, and IACtHR has interpreted *ne bis in idem* in their respective statutes in that very way, as demonstrated below, provides further support for this implied meaning.

II.B. THIS INTERPRETATION IS CONSISTENT WITH PREVIOUS DECISIONS OF THE COURT

14. The Majority correctly construed the *Bemba* Trial Chamber as "clearly calling for a *res judicata* effect" in article 20(3).[33] The Appellant unsuccessfully disputes the Majority's interpretation, and notes only that the *Bemba* Trial Chamber identifies "a decision on the merits" as being the relevant defining principle for the purposes of *ne bis in idem*.[34] This

[30] El-Zeidy, p. 939 ("[M]ust a national court's decision—either an acquittal or a conviction—be a final one? Although this seems vague according to Bassiouni's construction there are at least two answers based on two different legal arguments. First, it might be suggested that the outcome of the national court should be final. This argument looks at article 20(1) and (2), which anticipated final decisions. It presumes that the drafters had the same intent, evidenced in earlier proposals, about the entire article, notwithstanding the fact that the finality in paragraphs 1 and 2 refers to the ICC's outcomes. A second answer holds that in the case where a decision is the outcome of a national court, it is not necessary to reach a final judgment. There could be situations where the Court demands to intervene and waiting for a final decision prevents the Court from acting expeditiously. However, it could be argued that norms of due process require finality, since this would be a guarantee in favour of the accused").
[31] *See above*, para. 11 citing 1994 Draft Code, p. 117.
[32] Tallgren and Coracini, p. 912, mn. 19. The drafters instead focused their attention on debating the exceptions to *ne bis in idem*. *See e.g.* 1995 Ad Hoc Committee Report, p. 18 (comments by Switzerland regarding the need to afford the ICC the ability to review a case that has already been tried but where the proceedings were not proper); 1996 PrepCom Report, paras. 16-20 (discussing the scope of "ordinary crimes").
[33] Admissibility Decision, para. 38, citing *Bemba* Admissibility Decision, para. 248 ("The decision at first instance in the CAR was not in any sense a decision on the merits of the case—instead it involved, *inter alia*, a consideration of the sufficiency of the evidence before the investigating judge who was not empowered to try the case—and did not result in a final decision or acquittal of the accused, given the successful appellate proceedings").
[34] Admissibility Appeal, 31.

selectively reads the text and ignores the clear reference to the need for "a final decision or acquittal".

15. In *Simone Gbagbo*, Pre-Trial Chamber II sought information from Côte d'Ivoire regarding the details of judicial decisions rendered against Simone Gbagbo "including if the concerned judgments have become final according to national law" for the purposes of determining the admissibility of the case before the ICC.[35] The Appellant submits that nothing can be read into this quote regarding the requirement of finality for the purposes of *ne bis in idem*.[36] Indeed while this quote does not purport to set out the law of *ne bis in idem* in this Court, it nonetheless evinces a Chamber's view that the finality of a judgment is relevant to that principle. In any event, the Majority did not rely on this order.

II.C. THE MAJORITY'S INTERPRETATION IS CONSISTENT WITH HOW *NE BIS IN IDEM* HAS BEEN INTERPRETED IN THE *AD HOC* TRIBUNALS

16. The Majority rightly considered the jurisprudence of the *ad hoc* tribunals as instructive in determining that a final judgment is a requirement of *ne bis in idem* in the Statute.[37] The Appellant's attempt to minimise the relevance of that jurisprudence (i) misconstrues the Majority's views regarding the consistency of that jurisprudence with international human rights principles; (ii) fails to explain why the differences between the primary jurisdiction regime of the *ad hoc* tribunals renders its jurisprudence irrelevant in the context of the ICC's complementarity framework,[38] and (iii) relies on artificial distinctions to distinguish the jurisprudence from Mr Gaddafi's case.

17. *First*, the Appellant misreads the Decision; the Majority did not find the *ad hoc* tribunal jurisprudence on *ne bis in idem* determinative because that jurisprudence was consistent with international human rights principles.[39] Rather the Majority found the jurisprudence to be "instructive" given that the ICTY and ICTR Statutes contained similarly worded *ne bis in idem* provisions to the Rome Statute[40]—an approach which has been

[35] *Simone Gbagbo* Order to Request Information, para. 6 (emphasis added).
[36] Admissibility Appeal, para. 31; *see also* Defence Consolidated Reply, paras. 35-36.
[37] Admissibility Decision, para. 39.
[38] Admissibility Appeal, para. 32.
[39] *Contra* Admissibility Appeal, para. 32.
[40] Admissibility Decision, para. 39 ("[T]he drafting of the *ne bis in idem* provisions in the Statutes of the *ad hoc* tribunals is instructive").

confirmed by the Appeals Chamber.[41] It observed that the jurisprudence of the *ad hoc* tribunals was consistent with international human rights principles so as to demonstrate that the tribunals' interpretation of *ne bis in idem* did not develop arbitrarily, thus lending the jurisprudence greater weight.[42]

18. *Second*, the Appellant does not explain why the *sui generis* nature of the Court's complementarity framework should render the jurisprudence of the *ad hoc* tribunals irrelevant to the Majority's interpretation of *ne bis in idem*.[43] None of the Court's jurisprudence,[44] commentary[45] or drafting history[46] that has examined the notion of finality in *ne bis in idem* has distinguished the principle based on differences between the Court's complementarity framework and the *ad hoc* tribunals' primary jurisdiction framework.

19. *Third,* the Appellant's attempt to distinguish the *ad hoc* tribunal jurisprudence cited by the Majority from the circumstances of this case relies on artificial distinctions. While the cases cited by the Majority, namely *Semanza*, *Nzabirinda* and *Orić*,[47] considered *ne bis in idem* at stages of proceedings *prior* to a first-instance decision on the merits[48], it is significant that the relevant Chambers of the ICTR or MICT in those cases unequivocally interpreted *ne bis in idem* as requiring a final judgment.[49]

[41] *Lubanga* Oral Disclosure AD, para. 78 (confirming that, when a provision of the RPE is worded based on a similar provision in the Rules and Procedure and Evidence of the ICTY, "it is useful to consider the relevant jurisprudence of the ICTY and ICTR on the corresponding provisions in the ICTY and ICTR Rules of Procedure and Evidence").
[42] Admissibility Decision, para. 43.
[43] Admissibility Appeal, paras. 32, 34.
[44] *See above*, paras. 14-15
[45] *See above*, para. 7.
[46] *See above*, paras. 11-12.
[47] Admissibility Decision, paras. 40-43.
[48] Admissibility Appeal, para. 33.
[49] *Semanza* Arrest AD, para. 74 ("[T]he *non bis in idem* principle only applies where a person has effectively already been tried. The term 'tried' implies that proceedings in the national Court constituted a trial […] at the end of which a final judgement is rendered"); *Nzabirinda* SJ, para. 46 ("As the Appeals Chamber observed, the term 'tried' implies that the proceedings in the national court constituted a trial for the acts covered by the indictment brought against the Accused by the Tribunal and at the end of which trial a *final judgment* is rendered"); *Orić* ALA Decision, para. 13 ("[…] Article 7(1) of the Statute stipulates that a person cannot be tried in a national jurisdiction for acts for which he was already tried in the relevant international jurisdiction. It expressly refers to acts on the basis of which the person was tried, in the sense that a final judgment was rendered, not circumstances in which certain acts may have been investigated but upon which the person concerned was not tried").

20. *Semanza* was also cited with approval by the ICTR Appeals Chamber in *Muvunyi*, which the Appellant does not address, and which refers to the existence of a final judgment or final conviction or acquittal in order to trigger *ne bis in idem*.[50]

21. The consistent and unequivocal interpretation across the *ad hoc* tribunals regarding the need for a final judgment in *ne bis in idem* supports a similar interpretation for article 20(3), given that the drafters of the Rome Statute had modelled the provision on those of the *ad hoc* tribunals.[51] The Majority was correct to find this jurisprudence instructive and to find that it was supported by the interpretation of the principle in international human rights law.[52]

II.D. THE MAJORITY'S INTERPRETATION IS CONSISTENT WITH HOW *NE BIS IN IDEM* HAS BEEN INTERPRETED IN INTERNATIONAL HUMAN RIGHTS LAW

22. The Appellant's attempt to diminish the relevance of international human rights law and jurisprudence should be rejected.[53] *First,* the Appellant's argument misconstrues the purpose of the Majority's reference to international human rights law and article 21(3) of the Statute.[54] The Majority did not directly apply international human rights law to Mr Gaddafi's case, nor did it interpret *ne bis in idem* to be in "perfect harmony" with, or to "mirror" international human rights.[55] Rather it considered whether its interpretation of *ne bis in idem* was consistent (*i.e.*, "in harmony") with international human rights standards—and it is those human rights standards which the Majority noted were "mirrored in, *inter alia*, article 14(7) of the ICCPR".[56] That finding was also relevant in demonstrating that neither the *ad hoc* tribunals nor the ICC interpreted *ne bis in idem* in a vacuum,[57] nor did their interpretation

[50] *Muvunyi* Retrial Evidence AD, para. 16 (emphasis added).
[51] 1994 Draft Code, p. 117. The wording of the draft *ne bis in idem* provision, insofar as it related to a "person who has been tried", remained unchanged in subsequent drafts leading up to the Rome Statute as adopted in the Rome Conference 17 July 1998. *See e.g.* April 1998 Draft Statute, p. 36.
[52] Admissibility Decision, para. 43.
[53] Admissibility Appeal, paras. 20, 24.
[54] *See below,* paras. 109-110. Moreover, Chambers are required to interpret the Court's legal framework in accordance with internationally recognised human rights, including complementarity assessments. *See e.g. Al-Senussi* Admissibility AD, para. 220 ("The concept of independence and impartiality is one familiar in the area of human rights law. Rule 51 of the Rules of Procedure and Evidence specifically permits States to bring to the attention of the Court, in considering article 17(2), information "showing that its courts meet internationally recognised norms and standards for the independent and impartial prosecution of similar conduct". As such, 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)").
[55] Admissibility Appeal, paras. 22-23.
[56] Admissibility Decision, para. 47.
[57] Nor was it drafted in a vacuum, given the ILC's reference to article 14(7) of the ICCPR in the commentary to the *ne bis in idem* draft provision. *See* 1994 Draft Code, p. 117.

develop arbitrarily.[58] Moreover, the Majority's interpretation of *ne bis in idem* in light of article 21(3) was consonant with treaty interpretation principles.[59]

23. *Second*, the Majority correctly interpreted *ne bis in idem* in international human rights law as requiring *res judicata*. Article 4 to Protocol Number 7 of the ECHR defines *ne bis in idem* as applying once a person "has already been finally acquitted or convicted in accordance with the law and penal procedure of that State". The Explanatory Report to Protocol No. 7 and ECtHR case law confirms that this article requires a judgment of *res judicata*.[60] Article 8(4) of the ACHR applies *ne bis idem* to a person "acquitted by a non-appealable judgment".[61] In line with this principle, the jurisprudence of the IACtHR has determined that the principle of *ne bis in idem* prohibits "a new trial on the same facts that have been the subject of a sentence with the authority of *res judicata*".[62]

24. *Third*, although the Appellant does not challenge the Majority's interpretation of *ne bis in idem* and *res judicata* in international human rights law, it argues that the *sui generis* nature of the Court's complementarity framework requires an interpretation of the provision based on a horizontal application of *ne bis in idem*, and not a vertical one, which is the case in international human rights law.[63] But the Appellant does not explain how the horizontal application of *ne bis in idem* would differ from the vertical application found in international human rights law.

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[58] Admissibility Decision, para. 43.
[59] *Contra* Admissibility Appeal, para. 22. *See above*, paras. 7-10.
[60] Protocol No. 7 Explanatory Report, para. 22 (stating that article 4 requires a verdict that "has acquired the force of *res judicata*. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time limit to expire without availing themselves of them"); *Häkkä v. Finland*, Judgment, para. 44 ("Decisions against which an ordinary appeal lies are excluded from the scope of the guarantee contained in Article 4 of Protocol No. 7 as long as the time-limit for lodging such an appeal has not expired. On the other hand, extraordinary remedies such as a request for reopening of the proceedings or an application for extension of the expired time-limit are not taken into account for the purposes of determining whether the proceedings have reached a final conclusion […]"); *Bachmaier v. Austria*, Decision, The Law, para. 1 (finding no violation of *ne bis in idem* when a defendant was first tried for a crime and acquitted summarily. There had been no finding on guilt in the summary acquittal, or no judgment with *res judicata* effect, and therefore no violation of *ne bis in idem* in the subsequent indictment for the same crime).
[61] The original Spanish text of article 8(4) reads: "El inculpado absuelto por una *sentencia firme* no podrá ser sometido a nuevo juicio por los mismos hechos" and the English translation: "An accused person acquitted by a *non-appealable judgment* shall not be subjected to a new trial for the same cause." (emphasis added).
[62] *Mohamed v. Argentina*, Judgment, para. 125. Consistently, the IACtHR has indicated that there is a right to appeal before the judgment becomes *res judicata*. *See Herrera-Ulloa v. Costa Rica*, Judgment, para. 158. The IACtHR has suggested that the protection in article 8(4) of the ACHR is somewhat broader than the ICCPR which refers to "crime" instead of "cause": *Loayza-Tamayo v. Perú*, Judgment, para. 66.
[63] Admissibility Appeal, paras. 24, 28.

25. Moreover, although *ne bis in idem* is rarely applied horizontally between States, examples where they exist in the transnational prosecution of criminal cases point to an interpretation that requires a *res judicata* effect. For example, and while not a human rights treaty, article 54 of the Schengen Convention, which sets out the arrangements for freedom of movement for the nationals of all signatory states, provides that: "A person whose trial has been *finally disposed of* in one Contracting Party may not be prosecuted in another Contracting Party for the same acts […]".[64] Commentators writing in the context of *ne bis in idem* in transnational criminal prosecutions observe that a 'final judgment' is also required in the European Convention on the International Validity of Criminal Judgments and the European Convention on the Transfer of Proceedings in Criminal Matters, where the provisions restrict the operation of *non bis in idem* to final judgments.[65]

II.E. THE MAJORITY CORRECTLY CONSIDERED THAT, ON THE FACTS OF THIS CASE, THE JUDGMENT WAS NOT FINAL

26. Having held that *ne bis in idem* under the Statute requires a judgment of *res judicata*, the Majority, with Judge Perrin de Brichambaut concurring, correctly found that Mr Gaddafi's conviction and sentencing *in absentia* did not amount to a final judgment or conviction.[66] This is because Mr Gaddafi was convicted *in absentia*, as confirmed by the Government of Libya, and which the Appellant does not challenge.[67] Therefore, his conviction is not final and the death penalty cannot be enforced because he has an absolute right to a new trial in person pursuant to article 358 of the Libyan Code of Criminal Procedure once he is in the custody of the Libyan State.[68]

27. For the reasons stated above, the Appellant's first ground of appeal should be dismissed.

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[64] Schengen Agreement, article 54.
[65] Van den Wyngaert and Stessens, pp. 797-798.
[66] Admissibility Decision, paras. 48, 51; *see also* Judge Perrin de Brichambaut Separate Concurring Opinion, paras. 76, 78, 79.
[67] Admissibility Appeal, fn. 32.
[68] Prosecution Response, paras. 105, 107, citing Article 358 of the Libyan Code of Criminal Procedure ("If a person convicted in absentia appears or is arrested prior to the lapse of the penalty by prescription, the previously issued judgment shall be inevitably annulled either in respect of the penalty or the damages, and the case shall be retried by the Court"); *see also* Tripoli Court of Assize Judgment, p. 149; Libya's Response to Request for Order to Libya not to execute Mr Gaddafi, paras. 1-2, 5-6, 8; Annex 8, Prosecution Response, pp. 14-15.

III. GROUND 2: THE MAJORITY CORRECTLY ASSESSED LAW NO. 6

III.A. THE DECISION WAS REASONED

28. In its second ground of appeal, the Appellant argues that: (i) the Majority erred in finding that Law No. 6 did not apply to the crimes with which Mr Gaddafi was charged;[69] (ii) the Majority should have found that Law No. 6 had applied to Mr Gaddafi in light of several facts, including the acts and statements of two members of the Al-Bayda Transitional Government;[70] and (iii) the Majority erred in finding that all amnesty laws, including Law No. 6, are incompatible with international law.[71] The Appellant's claim that the Admissibility Decision lacks reasoning in these aspects is selective and unsupported. Nor does he accurately present the submissions leading up to the Decision, and the Decision itself.[72]

29. *First*, the Appellant disregards that the Majority's Decision was premised on two grounds: (i) that the judgment of the Tripoli Court of Assize was not final within the meaning of article 20(3) because once apprehended, under Libyan law Mr Gaddafi must be re-tried;[73] and (ii) that Law No. 6 did not "suspend" or "drop" the proceedings (thereby not rendering 'final' the Tripoli Court of Assize's judgment) because the Law did not apply to the crimes attributed to Mr Gaddafi.[74] Accordingly, the Majority considered it unnecessary to rule on the activation or implementation of Law No. 6[75] and, therefore, on the purported effect of the actions and statements of two members of the Al-Bayda Transitional Government. As such, the Majority considered these matters were not "determinative for the purpose of ruling on the present Admissibility Challenge".[76] It need not have gone further. This is not a lack of reasoning, but a reasonable and economic exercise of the Majority's discretion. The Appellant shows no error in the Majority's approach but rather simply ignores it.

30. *Second*, the Majority adequately reasoned its finding that Law No. 6 did not apply to Mr Gaddafi.[77] As demonstrated below, the Majority considered the arguments of the Parties and participants, the interpretation of the law by the recognised Libyan representative and

[69] Admissibility Appeal, second ground of appeal, issue (iii), paras. 65-74.
[70] Admissibility Appeal, second ground of appeal, issue (ii), paras. 43-64.
[71] Admissibility Appeal, second ground of appeal, issues (iv) and (v), paras. 75-109.
[72] *Contra* Admissibility Appeal, second ground of appeal, issue (i), paras. 37-42.
[73] Admissibility Decision, paras. 34-53.
[74] Admissibility Decision, paras. 57-59.
[75] Admissibility Decision, para. 57.
[76] Admissibility Decision, para. 57. *See also* Judge Perrin de Brichambaut Separate Concurring Opinion, paras. 100-101.
[77] Admissibility Decision, paras. 56-59.

conducted its own independent review. That it reached a different conclusion from the Appellant does not show a lack of reasoning. The Appellant fails to show an error in the Majority's reasoning.

31. *Finally*, the Majority adequately reasoned its finding *obiter dicta* that Law No. 6, if applied to Mr Gaddafi, would be incompatible with international law.[78] The Appellant misunderstands the Admissibility Decision: the Majority did not find that all amnesty laws are contrary to international law. It only found that Law No. 6, if applied to Mr Gaddafi, was incompatible with international law. The Majority's approach was reasonable and correct. Considering that the Defence had argued before the Pre-Trial Chamber the "limited relevance of the national amnesty law to [the] admissibility challenge",[79] and disputed the *Amici's* submissions on amnesties because they "are not strictly relevant to the resolution of this admissibility challenge",[80] it is surprising that the Appellant now argues that the Majority's finding *obiter* on this matter has vast "ramifications".[81] The only ramification is that this is a further reason why Mr Gaddafi's case remains admissible before the Court.

32. The Prosecution addresses the Appellant's arguments with respect to this second ground of appeal in the following order: *first*, the Majority correctly found that the crimes with which Mr Gaddafi was charged were excluded from the scope of Law No. 6;[82] *second*, the Majority considered the actions and statements of two persons of the Al-Bayda Transitional Government, but reasonably considered it unnecessary to rule on the application of Law No. 6;[83] and *third*, the Majority correctly assessed the effects of Law No. 6 for the exercise of the Court's jurisdiction.[84] The Appellant's second ground of appeal should be dismissed.

[78] Admissibility Decision, paras. 60-78.
[79] Defence Consolidated Reply, para. 64.
[80] Defence Consolidated Reply, para. 64.
[81] Admissibility Challenge, para. 88.
[82] *Contra* Admissibility Appeal, Second Ground, issue (iii).
[83] *Contra* Admissibility Appeal, Second Ground, issue (ii).
[84] *Contra* Admissibility Appeal, Second Ground, issues (iv) and (v).

III.B. THE MAJORITY CORRECTLY FOUND THAT LAW NO. 6 DID NOT APPLY TO THE CRIMES WITH WHICH MR GADDAFI WAS CHARGED

33. The Majority correctly found that Law No. 6 did not apply to the crimes with which Mr Gaddafi was charged.[85] The Appellant confuses the record and misunderstands the Decision.

34. *First*, the Majority reasonably referred to the crimes with which Mr Gaddafi was domestically "charged" instead of those of which he was "convicted" since the Majority did not consider the judgment of the Tripoli Court of Assize 'final'.[86] Mr Gaddafi must be re-tried once he surrenders to the Libyan authorities.[87] Judge Perrin de Brichambaut similarly found that Law No. 6 "does not apply to Mr Gaddafi due to the nature of the crimes for which he was charged domestically".[88] In any event, the different terminology is immaterial, since Mr Gaddafi, as acknowledged by the Appellant, was convicted of the acts of murder with which he was charged and prosecuted.[89]

35. *Second*, the Appellant does not substantiate its allegation that Mr Gaddafi was not charged and convicted of 'identity-based murder'.[90] The record shows the opposite. The judgment of the Tripoli Court of Assize (as presented by the Appellant) confirms this, since Mr Gaddafi's acts led to the killing of 'protesters', 'rebels in Bani Walid' and 'the supporters of the 17 February Revolution'.[91] The 'persecutory' element of the crimes of murder for which Mr Gaddafi was convicted (as acknowledged by the Appellant)[92] would be consistent

[85] Admissibility Appeal, para. 65 referring to Admissibility Decision, para. 58. *See more generally* Admissibility Appeal, paras. 65-74.
[86] Admissibility Decision, paras. 53, 59. *Contra* Admissibility Appeal, paras. 66-67.
[87] Admissibility Decision, para. 50.
[88] Judge Perrin de Brichambaut Separate Concurring Opinion, para. 99.
[89] *See* Annex H, Admissibility Challenge, pp. 3, 35-45 (in particular pp. 43-45). *See also* Admissibility Challenge, para. 63 ("Dr Gaddafi was tried and convicted for offences including the murder or killing of demonstrators and/or persons opposed to the regime of Muammar Gaddafi"). *See also* Tripoli Court of Assize Judgment, pp. 152-159. The Prosecution refers to the page numbers of Annex B (which includes the Judgment) and Annex H, as opposed to the page numbers of the judgment and chart, respectively.
[90] Admissibility Appeal, paras. 68-69; Defence Consolidated Reply, para. 60.
[91] Annex H, Admissibility Challenge, pp. 43-44.
[92] Admissibility Challenge, para. 63 ("the substance of the charge of persecution, specifically the directing of violent attacks against civilian demonstrators resulting in killings and the kidnapping of individuals, formed part of the Libyan national proceedings.").

with the definition of 'identity-based murder' advanced by the Appellant (although with no support).[93]

36. *Third*, the Majority's approach was correct. The Majority reviewed the text of Law No. 6 and considered the interpretation of the Libyan law and procedure provided by the Libyan Prosecutor General's Office.[94] The Prosecutor General's Office confirmed that "[p]ursuant to the provisions of Article 3 of Law No. 6 in respect of amnesty, the crimes involving murders and corruption attributed to the Accused Saif al-Islam Gaddafi are excluded from the application of law provisions".[95] The Majority thus noted that its finding was "in line with the Libyan Government position towards the application of Law No. 6 to the case of Mr Gaddafi."[96] The Prosecutor General's Office forms part of the Government of National Accord ("GNA"), which are the competent national authorities recognised by the international community to represent the State and the only official channel of communication between Libya and the Court.[97] Despite the existence of competing executive authorities in Libya, the Prosecution authorities remain unified, headed by the Prosecutor General's Office in Tripoli.[98] Moreover, as Judge Perrin de Brichambaut noted, the Defence made no attempt to explain why the statement of the Prosecutor General's Office about the exclusion of murders (and not just 'identity-based murders') would be erroneous.[99] Nor does the Appellant demonstrate that the Prosecutor General's Office was incorrect in its Appeal.[100]

37. Further, the Majority's (and Judge Perrin de Brichambaut's) approach is consistent with the approach taken by other Chambers of this Court when faced with similar issues

[93] Admissibility Appeal, para. 68 ("the natural meaning of 'identity-based murder' is a murder in which there is an additional element, namely that the victim is selected because of their identity within a particular ethnic, religious or other group (which are called hate crimes in some jurisdictions)".
[94] Admissibility Decision, para. 57, 59, citing to Annex 8, Prosecution Response, p. 20. The translations "Prosecutor General's Office", "Attorney General's Office" and "Chief Prosecutor's Office" are all references to the same entity, which is written in Arabic as بـتكم ابـئانل المعلم and can be transliterated as "Maktab Al-Na'ib Alam". For the purpose of this response, the Prosecution has used "Prosecutor General's Office" and "Prosecutor General".
[95] Admissibility Decision, para. 57; Annex 8, Prosecution Response, p. 20.
[96] Admissibility Decision, para. 59.
[97] Judge Perrin de Brichambaut Separate Concurring Opinion, para. 11, citing to Al-'Atiri Decision, paras. 15-16 ("[…] [T]he Chamber notes that the official channel of communication between Libya and the Court are the competent national authorities, namely the GNA, which is recognised by the international community to represent the State.").
[98] Annex 8, Prosecution Response, p. 13 ("The [Prosecutor General's Office], being the central authority designated to deal with requests for judicial assistance on criminal matters"); Libya's Response to Request for Order to Libya not to execute Mr Gaddafi, para. 13 ("[T]he Libyan prosecution authorities and the Libyan judiciary remain unified bodies headed in Tripoli, which, in accordance with the separation of powers principle, work independently from both of the two governments and legislatures.").
[99] *See* Judge Perrin de Brichambaut Separate Concurring Opinion, para. 98.
[100] Admissibility Appeal, para. 71.

relating to the interpretation of domestic laws and procedures. In the admissibility proceedings in the *Bemba* case, Trial Chamber III similarly relied on the statements of the Central African Republic ("CAR") representatives with respect to the interpretation of the CAR law and adequacy of the domestic proceedings to the law. The Trial Chamber stated that "these conclusions are based on the submissions relied on and developed during the course of this application. The Chamber has not attempted, nor should it attempt, to provide a definitive interpretation of the criminal law of the CAR".[101] It further found that "only in exceptional circumstances should this Chamber seek to go behind a national judicial decision", noting in that case the "lack of evidence of material impropriety or irregularity in those proceedings".[102]

38. In the subsequent appeal proceedings, the Appeals Chamber also relied on statements of the CAR representatives[103] and confirmed the Trial Chamber's decision, stating that:

> "It was *not* the role of the Trial Chamber to review the decisions of the CAR courts to decide whether those courts applied CAR law correctly. In the view of the Appeals Chamber, when a Trial Chamber must determine the status of domestic judicial proceedings, it should accept *prima facie* the validity and effect of the decisions of domestic courts, unless presented with compelling evidence indicating otherwise."[104]

39. This same consideration should apply to the submissions of the Libyan Prosecutor General's Office regarding the interpretation of Libyan law.[105]

40. This approach is also consistent with other statutory provisions, such as article 69(8), which contains a categorical prohibition against the Court ruling on the application of the State's national law when deciding on the relevance or admissibility of evidence.[106] Article 69(8) was "designed to make sure that the Court would not interfere with State sovereignty and 'get involved in intricate inquiries about domestic laws and procedures'".[107]

41. There was no compelling evidence before the Pre-Trial Chamber indicating that it should not accept *prima facie* the correctness of the statements of the Libyan Prosecutor General's Office in relation to Mr Gaddafi's case. To the contrary, the submissions of the Prosecutor General's Office were consistent with previous submissions from Libyan

[101] *Bemba* Admissibility Decision, para. 233.
[102] *Bemba* Admissibility Decision, para. 235.
[103] *Bemba* Admissibility AD, para. 71.
[104] *Bemba* Admissibility AD, para. 66.
[105] Judge Perrin de Brichambaut Separate Concurring Opinion, paras. 12-13.
[106] *Bemba et al.* AJ, para. 287. The Appellant cites this provision to similarly argue that the Court should defer to the competence of domestic authorities in the application of national law. *See* Admissibility Appeal, para. 56.
[107] *Bemba et al.* Western Union Documents Decision, para. 37. *See also* *Bemba et al.* AJ, para. 287 and fn. 653-654.

representatives received by the Court since 2016.[108] It was also consistent with a public statement released by the Prosecutor General's Office in 2017,[109] and supported by public statements made by other Libyan authorities, such as the Presidency Council of the GNA,[110] the House of Representatives' National Defence and Security Committee,[111] and the Municipal Council and the Military Council of Zintan.[112]

42. Contrary to the Appellant's submission,[113] the Majority's approach was not inconsistent with Trial Chamber V(A) in the *Ruto and Sang* case.[114] In that case, the domestic authorities repeatedly avoided answering a question from the Court about its domestic law. Given that the domestic authorities did not advance a position, the Court relied on the one submitted by the LRV, which it found was consistent with its review of the relevant domestic provisions.[115] By contrast, in the present case, the Prosecutor General's Office provided a clear and definitive answer on the issue, which the Majority nevertheless did not automatically accept, but found was in line with its own review of Law No. 6.[116]

43. Lastly, as the Appellant concedes, the Majority did not conclude that Mr Gaddafi was convicted of corruption, another crime excluded from Law No. 6 pursuant to article 3(6).[117] It did not have to, since it had already concluded that Mr Gaddafi had been charged with other crimes excluded under article 3(4).[118] In any event, and contrary to the Appellant's submissions, the evidence appears to indicate that Mr Gaddafi was also convicted of acts which could be qualified as corruption,[119] kidnapping, forced disappearance and torture.[120]

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[108] Judge Perrin de Brichambaut Separate Concurring Opinion, para. 14. *See also* Libya's Response to Request for Order to Libya not to execute Mr Gaddafi; Annex 5, Registry Update.
[109] Annex 4, Prosecution Response, p. 4.
[110] Annex 3, Prosecution Response, p. 4.
[111] Annex 6, Prosecution Response, p. 4.
[112] Annex 5, Prosecution Response, p. 4.
[113] Admissibility Appeal, paras. 57, 71; Defence Consolidated Reply, para. 28.
[114] *Ruto and Sang* Witness Summonses Decision, paras. 158-164.
[115] *Ruto and Sang* Witness Summonses Decision, paras. 158-164.
[116] Admissibility Decision, paras. 57, 59.
[117] *Contra* Admissibility Appeal, para. 72 (citing Admissibility Decision, para. 59 and noting that "the Majority did not mention corruption in its operative findings and did not cite to Article 3(6) which provides that 'all crimes of corruption' are excluded from application of the Law").
[118] Admissibility Decision, para. 59.
[119] The Indictment reproduced within the Tripoli Court of Assize Judgment appears to indicate that Mr Gaddafi was charged with acts constitutive of corruption: *see* Tripoli Court of Assize Judgment, p. 13 ("Caused serious damage to public funds by conducting financial transactions that contravene the customary procedures followed in the State's Financial System, since the supplier companies did not provide detailed invoices and the concluded contracts violated the Administrative Regulation and the Oversight and Expenditure Law in contravention of the Law of the Financial System of the State, and Budget, Public Accounting and Storehouses Regulation and the Current Budget Law. The serious damage caused by each accused person to public funds as a result, is assessed in the attached Financial Expertise Report, as shown in detail in the papers."). It also appears that Mr Gaddafi

44. In conclusion, the Majority correctly found that the crimes with which Mr Gaddafi was charged were excluded from Law No. 6.

III.C. THE MAJORITY SUFFICIENTLY CONSIDERED THE ATTEMPTS BY THE AL-BAYDA TRANSITIONAL GOVERNMENT TO APPLY LAW NO. 6 TO MR GADDAFI'S CASE

45. Having found that Law No. 6 did not apply to the crimes for which Mr Gaddafi was charged,[121] and after considering the Defence's submissions with respect to the activation or application of Law No. 6, the Majority concluded that "this point [was not] determinative for the purpose of ruling on the present Admissibility Challenge".[122] The Appellant's arguments that the Majority should have ruled on this issue do not show an error in the exercise of the Majority's discretion.[123] There was none. The Majority reasonably did not infer from Mr Gaddafi's purported release that Law No. 6 was validly applied to his case. In addition, the Majority reasonably did not rely on the acts of certain members of the Al-Bayda Transitional Government to infer that Law No. 6 was validly applied to Mr Gaddafi. These issues will be addressed in reverse order.

III.C.1. The Majority reasonably did not rely on the acts of certain members of the Al-Bayda Transitional Government

46. The evidence before the Majority, as set out below, demonstrated unequivocally that Law No. 6 must be applied by the competent judicial authority. The Majority thus correctly noted that "according to article 6 of Law No. 6 of 2015, a reasoned decision by the *competent judicial authority* terminating the criminal case is a prerequisite".[124] The Appellant's

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was convicted of those charges: *see* Tripoli Court of Assize Judgment, p. 161 (Having convicted Mr Gaddafi of a list of crimes, the Tripoli Court of Assize then stated: "*Whereas upon inspection of the rest of the charges brought against the accused by the Public Prosecution*, which were not discussed by the Court in the grounds of judgment, the Court found that some were described with the previous charges and others were committed along with the crimes discussed by the Court in one criminal impulse and in execution of the same criminal tendency. Therefore, based on the aforementioned and pursuant to Article (211/76) of the Penal Code, *the Court deemed these crimes an integral part of the discussed crimes and decided to impose the penalty for the most serious crime as punishment for all the crimes committed by the accused*. Whereas the Court found that the accused committed all these crimes as described in detail in the grounds of judgment, the accused shall be convicted as established by the Statement based on the above and pursuant to Article (277/2)") (emphasis added).

[120] Admissibility Challenge, para. 63 (stating that the core findings of the Tripoli Court of Assize Judgment include kidnapping of individuals). *See* Annex H, Admissibility Challenge, pp. 44-45 (arrest and detention of political opponents) and pp. 49-50 (use of torture).

[121] Admissibility Decision, paras. 56-59.

[122] Admissibility Decision, para. 57.

[123] Admissibility Appeal, para. 43.

[124] Admissibility Decision, para. 57, citing Law No. 6, p. 3 (emphasis added).

suggestion that the Minister of Justice and his Undersecretary in the Al-Bayda Transitional Government validly authorised Mr Gaddafi's release pursuant to Law No. 6 must fail.[125]

47. Article 6 of Law No. 6 states: "The *competent judicial authority* shall issue a reasoned decision to stay the criminal proceedings once it has ascertained that the conditions for the amnesty are met."[126] As confirmed by the Prosecutor General's Office, this article establishes that "the jurisdiction to apply provisions of this law lies with the competent judicial authority legally mandated to look into the case."[127] This is consistent with the prior public statement of the Prosecutor General's Office that Law No. 6 "can only take effect through procedures and the fulfilment of legal requirements which can only be executed by the judicial authority, which has the sole and exclusive competence".[128]

48. This interpretation is also consistent with statements of other Libyan authorities. For example, the Zintan Prosecutor's Office, on 17 May 2016, in response to the request from the Minister of Justice in the Al-Bayda Transitional Government that Mr Gaddafi be released in implementation of Law No. 6, replied:

> "For you to apply to the Prosecutor's Office to release the Accused in the manner set out in the letter constitutes interference by the executive authority in the jurisdiction of the judicial authority and an absolute bypassing of the entire judicial apparatus and its institutions."[129]

49. Notably, in all six examples provided by the Defence relating to the application of Law No. 6 to other cases, the decision was made by the competent judicial authority, not by an executive authority.[130] This includes one case in which judgment had been rendered against the accused *in absentia* and to which article 358 of the Libyan Code of Criminal Procedure applied, as with Mr Gaddafi.[131]

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[125] Admissibility Appeal, paras. 43, 53, 54, 61, 64.
[126] Law No. 6, p. 3 (emphasis added).
[127] Annex 8, Prosecution Response, pp. 19-20.
[128] Annex 4, Prosecution Response, p. 4.
[129] Annex 11, Prosecution Response, p. 6.
[130] Admissibility Appeal, para. 62; Annex 4, Defence Consolidated Reply.
[131] Annex 4, Defence Consolidated Reply, Annex 4E, p. 48. In the three cases that involved victims, each judgment noted that there had been reconciliation with the victim or next of kin, in accordance with Article 2 of Law No. 6. *See* Annex 4A, pp. 9-10; Annex 4D, p. 39; Annex 4E, p. 48. In addition, in five of the six cases, there was reference to the accused having pledged repentance, in accordance with Article 2 of Law No. 6. *See* Annex 4A, p. 10; Annex 4B, p. 19; Annex 4C, p. 27; Annex 4E, p. 48; Annex 4F, p. 56. There is no evidence before the Court that either of these requirements was fulfilled in Mr Gaddafi's case.

50. However, in Mr Gaddafi's case, there was no evidence of a reasoned decision from the competent judicial authority pursuant to article 6 of Law No. 6. To the contrary, the evidence before the Majority shows that no such decision had been issued.[132]

51. The efforts by the Minister of Justice and his Undersecretary in the Al-Bayda Transitional Government to apply Law No. 6 to Mr Gaddafi were attempted acts of an executive authority that, consistent with the text of Law No. 6 and as confirmed by the Prosecutor General's Office, could not validly authorise Mr Gaddafi's release pursuant to Law No. 6. As such, these acts were invalid and could have no legal effect on Mr Gaddafi's case.[133] The Appellant's efforts to give legal effect to these attempts are artificial and should be rejected. The Prosecutor General's Office has stated unequivocally that these acts would be invalid under Libyan law.[134] There are no compelling reasons to reject the Prosecutor General's Office interpretation and application of its domestic law.[135]

52. Moreover, it is immaterial that the Al-Bayda Transitional Government was not the internationally recognised government of Libya at the time that these acts occurred,[136] since not even the Minister of Justice in the GNA could have validly applied Law No. 6 to Mr Gaddafi's case.

53. Further, the authorities cited by the Appellant in relation to the recognition of certain acts of *de facto* governments are inapposite.[137] These authorities provide support for the general principle that not all acts of *de facto* authorities should be disregarded by third States or international courts solely on the basis that the government that performed them was not internationally recognised.[138] It does not follow from this principle that all acts of a *de facto* authority in violation of the domestic law of the relevant State can or should be given legal effect simply because they were carried out by an entity exercising *de facto* authority.

54. Finally, the Appellant's argument that the Government of Libya does not genuinely dispute the application of Law No. 6 to Mr Gaddafi's case because it has not brought a

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[132] Annex 8, Prosecution Response, pp. 18-20; Annex 4, Prosecution Response, p. 4. *See also* *Amici* Observations, paras. 41-42.
[133] According to the Libyan Prosecutor General's Office, these were "issued by an executive authority lacking legal jurisdiction over the case" and "nothing more than a factual action that has no legal value except to undermine the competent authorities […]. It is unworthy of any consideration and has no legal impact whatsoever." *See* Annex 8, Prosecution Response, pp. 19, 20.
[134] Annex 8, Prosecution Response, pp. 18-20.
[135] *See above*, paras. 37-40.
[136] *Contra* Admissibility Appeal, paras. 43, 58-61.
[137] *Namibia* Advisory Opinion; *Cyprus v. Turkey*, Grand Chamber Judgment.
[138] *Namibia* Advisory Opinion, para. 125; *Cyprus v. Turkey*, Grand Chamber Judgment, paras. 90-98.

dispute before the competent prosecutorial authority[139] lacks logic and clarity since the competent prosecutorial authority in relation to Mr Gaddafi's case is the Prosecutor General's Office,[140] which is a branch of the Government of Libya itself.[141] Notably, the Libyan Prosecutor General's Office has consistently stated that Law No. 6 does not apply to Mr Gaddafi, and that the attempts by certain members of the Al-Bayda Transitional Government to apply Law No. 6 to Mr Gaddafi's case have no legal effect.[142] Therefore, no logical inference can be drawn from the fact that the Government of Libya has not brought a dispute before the Prosecutor General's Office. This argument should be dismissed.

55. In conclusion, the Appellant's arguments that the Majority did not have sufficient regard to the attempts by the Al-Bayda Transitional Government to apply Law No. 6 to Mr Gaddafi's case should be dismissed.

III.C.2. Mr Gaddafi's purported release does not mean that Law No. 6 was validly applied to him

56. The Appellant's argument that Mr Gaddafi's release is unequivocal proof that Law No. 6 has been applied to his case is circular and unsupported by the evidence.[143] The Majority was reasonable, and correct, not to infer that Law No. 6 had been validly applied to Mr Gaddafi on the basis of his purported release.

57. *First*, the evidence in relation to Mr Gaddafi's purported release is contradictory and inconclusive. According to the Appellant, he was released on or around 12 April 2016.[144] However, the Appellant has failed to explain how the Undersecretary of the Minister of Justice in the Al-Bayda Transitional Government apparently visited Mr Gaddafi in the custody of the Abu-Bakr al-Siddiq Battalion on or around 27 May 2017,[145] nor why the Abu-

[139] Admissibility Appeal, paras. 44(v), 62.
[140] Annex 8, Prosecution Response, p. 18; Annex 11, Prosecution Response, p. 5.
[141] Judge Perrin de Brichambaut Separate Concurring Opinion, para. 11, citing to Al-'Atiri Decision, paras. 15-16.
[142] Annex 8, Prosecution Response, pp. 18-20; Annex 4, Prosecution Response, p. 4.
[143] *Contra* Admissibility Appeal, paras. 44, 44(i), 49-50.
[144] Admissibility Challenge, para. 26.
[145] On 27 May 2017, the Undersecretary of the Ministry of Justice of the Al-Bayda Transitional Government gave a television interview in which he stated that he had recently visited Mr Gaddafi in the custody of the Abu-Bakr al-Siddiq Battalion, headed by Mr Al-'Atiri, and that Mr Gaddafi should be released pursuant to Law No. 6 and given free movement across Libya. *See* Annex 14, Prosecution Response (Translation at Annex 14, Prosecution Response (Translation), p. 5, l. 49-63).

Bakr al-Siddiq Battalion issued a statement declaring it had released Mr Gaddafi on 10 June 2017.[146]

58. In relation to the issue of Mr Gaddafi's purported release, the Government of Libya has stated:

> "The [Abu-Bakr al-Siddiq Battalion] allegedly issued many statements recently, all addressing the location of [Mr Gaddafi] and the matter of his release. This news item is controversial and not supported by any facts on the ground. The Public Prosecution cannot rely on these claims when handling the case of [Mr Gaddafi] who is, at times, said to have full freedom to leave the facility and, at other times, said to be released. All these claims remain unsubstantiated."[147]

59. The Prosecution has also been unable to confirm Mr Gaddafi's current whereabouts or custodial status.

60. *Second*, even if Mr Gaddafi had been released, the Majority could not reasonably have inferred that this resulted from the valid application of Law No. 6 to his case given all of the evidence to the contrary.[148] Such evidence includes:

- The statement of the Prosecutor General's Office that "no decision has been issued by the competent judicial authority on the release of [Mr Gaddafi] pursuant to judicial action or an authoritative legal situation that allows for such release."[149]

- The Libyan House of Representatives' National Defence and Security Committee's statement on 11 June 2017, the day after Mr Gaddafi's second purported release:

> "[W]ith a view to preserving the security of the nation and averting any sedition or chaos that aims to create confusion and obfuscation, we would like to draw your attention, given that you are agencies in charge of the prisoners who were members of the previous regime, that you are not authorised to

[146] Annex 13, Prosecution Response, p. 4.
[147] Annex 8, Prosecution Response, p. 20. The Prosecutor General's Office also states: "The [Abu-Bakr al-Siddiq Battalion] is assumed to seek the continued detention of [Mr Gaddafi], particularly given the lack of evidence, amongst the latest information assessed by the [Prosecutor General's Office] and available to the general public, to substantiate anything to the contrary." Further, "if what is meant here is inquiring about the continued arbitrary detention of [Mr Gaddafi] by his prison keepers, this matter stands and nothing to the contrary appears to refute it. The Public Prosecution is unable to provide a categorical answer to this question given that the location of his detention falls outside the control of the Judicial Police." *See* Annex 8, Prosecution Response, p. 21.
[148] *See above*, paras. 34-44 and 46-55.
[149] Annex 8, Prosecution Response, p. 21.

> release any such prisoners so long as no clear judgments have been issued acquitting them of the charges against them."[150]

- The joint statement of the Municipal Council of Zintan and the Military Council of Zintan, also on 11 June 2017:

> "We strongly condemn and denounce the statement issued by the Abu-Bakr al Siddiq Battalion's Outreach Office confirming the release of the detainee, [Mr Gaddafi], under the pretext of implementing [Law No. 6]. This has nothing to do with legal procedures and is indeed a collusive behaviour, a betrayal of our fallen fighters and a stab in the back to the military establishment, to which they allegedly belong."[151]

- The statement of the Presidency Council of the GNA, on 10 July 2017, commending the statement made by the Municipal Council of Zintan and the Military Council of Zintan, and endorsing all of the points raised therein.[152]

61. Given that the evidence does not clearly establish the circumstances of Mr Gaddafi's release, and in light of the overwhelming evidence that any such release did not result from the valid application of Law No. 6 to his case, the Majority reasonably did not conclude from Mr Gaddafi's purported release that Law No. 6 had been validly applied to him. The Appellant's arguments should be dismissed.

III.C.3. The Documents do not establish that Law No. 6 was validly applied to Mr Gaddafi

62. The Appellant relies on two sets of documents to argue that the Government of Libya has implicitly accepted the application of Law No. 6 to his case ("the Documents").[153] The Documents relate to: (i) the issuance of national identification papers–which the Appellant seeks to admit as additional evidence in this appeal; and (ii) Mr Gaddafi's false accusation complaints–which the Appellant submitted before the Pre-Trial Chamber.

63. The crux of the Appellant's arguments is that Mr Gaddafi would not have been authorised, pursuant to article 353 of the Libyan Code of Criminal Procedure, to lodge such

[150] Annex 6, Prosecution Response, p. 4.
[151] Annex 5, Prosecution Response, p. 4.
[152] Annex 3, Prosecution Response, p. 4.
[153] The issuance of national identification papers: Annex 1, Admissibility Appeal (Prosecution translations of Annexes 1A and 1B at Annex C to this Response). Mr Gaddafi's false accusation complaints: Annex 1, Defence Consolidated Reply; Annex 2, Defence Consolidated Reply; Annex 3, Defence Consolidated Reply.

proceedings if he were still considered a person convicted *in absentia*.[154] However, the Appellant's arguments are unsupported and speculative, and must be rejected. The Appellant gives his own interpretation of article 353 of the Libyan Code of Criminal Procedure without any evidence as to how the article operates. The Appellant then speculates, based on this paucity of evidence, that the Government of Libya accepts that Law No. 6 has been applied to Mr Gaddafi's case, despite its clear statement to the contrary.[155]

The issuance of national identification papers

64. The Appellant's request to admit these four documents should be rejected.[156] *First*, the request does not comply with regulation 62(1)(b) of the RoC.[157] The documents pre-date the Admissibility Decision by over five weeks.[158] Yet the Appellant does not explain why he did not seek the admission of these documents before the Pre-Trial Chamber, especially when Mr Gaddafi's own Libyan counsel was involved in obtaining them.[159] *Second*, the Appeals Chamber should not consider these new documents when the Majority did not do so,[160] especially when the Appellant could have sought to admit them before the Pre-Trial Chamber but it did not. *Third*, the Appellant's obscure argument that the Pre-Trial Chamber would not have considered these documents even if they had been made available to it[161] is speculative and does not justify withholding the evidence from the Pre-Trial Chamber. *Finally*, the Appellant fails to make any convincing argument as to why the admission of these documents by the Appeals Chamber would be in the interests of justice.[162]

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[154] Libyan Code of Criminal Procedure, article 353, p. 75 ("Article (353) Effect of Convictions in Absentia: A conviction in absentia shall entail a deprivation of the right to dispose of and manage money and deprivation of the right to file any case in the absent accused's name, and any act or engagements undertaken by the convicted party shall be void. […]").
[155] Annex 8, Prosecution Response, pp. 18-20.
[156] Admissibility Appeal, paras. 47-48.
[157] Regulation 62(1)(b) of the RoC states: "1. A participant seeking to present additional evidence shall file an application setting out: […] (b) The ground of appeal to which the evidence relates and the reasons, if relevant, why the evidence was not adduced before the Trial Chamber."
[158] Annexes 1A, 1C and 1D are dated 24 February 2019; Annex 1B is dated 27 February 2019.
[159] Admissibility Appeal, para. 45.
[160] *Al-Senussi* Admissibility AD, paras. 58 ("None of the documents that are sought to be admitted as additional evidence have been considered by the Pre-Trial Chamber. In addition, some of the information contained within the documents post-dates the Impugned Decision. As in the *Gaddafi* Admissibility Judgment, the Appeals Chamber considers that in the circumstances of this case, it would not be appropriate for the Appeals Chamber to consider this information when the Pre-Trial Chamber has not done so"), 59 ("[T]he Appeals Chamber will also not take into account, in the circumstances of the present case, any other factual matters that post-date the Impugned Decision or were not before the Pre-Trial Chamber").
[161] Admissibility Appeal, para. 48.
[162] *Contra* Admissibility Appeal, para. 48.

65. In any event, even if the Documents are considered, they do not support the Appellant's proposition since they do not establish that the Government of Libya acknowledged that Law No. 6 had been validly applied to Mr Gaddafi's case. *First*, the application for national identification papers (comprising a certificate of family status for Mr Gaddafi's mother, and birth certificates for herself and two of her children, including Mr Gaddafi)[163] appears to have been made by Mr Gaddafi's mother, not by Mr Gaddafi as the Appellant suggested.[164] There is no evidence that article 353 of the Libyan Code of Criminal Procedure would prevent Mr Gaddafi's mother from obtaining national identification papers for herself and her children. Therefore, the fact that the head of the Investigation Department at the Libyan Prosecutor General's Office appears to have facilitated her application[165] has little significance.

66. *Second*, even assuming that the papers were issued to Mr Gaddafi, it is unclear that the issuance of national identification papers to a person for whom a judgment has been rendered *in absentia* would infringe article 353 of the Libyan Code of Criminal Procedure. And even if this provision had been infringed, this does not establish that the Government of Libya recognised, accepted or acquiesced in the application of Law No. 6 to Mr Gaddafi's case. Such a conclusion would be unreasonable given the totality of the evidence, including the limited probative value of the Documents, and the consistent and unambiguous statements of the Libyan Prosecutor General's Office,[166] and other Libyan authorities,[167] to the contrary.

[163] Annex 1, Admissibility Appeal, Annex 1B.
[164] The Appellant submits that the national identification papers were issued "based upon an application submitted by Dr. Gadafi's Libyan counsel" and that the Government of Libya "should have dismissed Dr. Gadafi's application for the issuance of national identity documents." However, the Appellant also appears to acknowledge that the application was not made directly by Mr Gaddafi in the same paragraph, describing it as "Dr. Gadafi's application through his family to the Civil Registry Authority". *See* Admissibility Appeal, paras. 45-46 (emphasis added). The use of the feminine form of the Arabic word for "client" in the 24 February 2019 letter indicates that the application was made on behalf of a female client. *Compare* Annex 1A of Annex 1, Admissibility Appeal (where the gender of the applicant is unclear) and Prosecution's translation at Annex C to this Response (clarifying that it is a female applicant). It would appear that the application was made on behalf of Mr Gaddafi's mother on the basis that the Certificate of Family Status was issued to her. *See* Admissibility Appeal, Annex 1C.
[165] Annex 1, Admissibility Appeal, Annexes 1A and 1B (*See* Prosecution translation at Annex C to this Response). The Prosecution's translation of Annex 1B shows that the documents were received from the Prosecutor General's Office, not on behalf of it. *Contra* Admissibility Appeal, para. 45.
[166] Annex 8, Prosecution Response, pp. 18-20; Annex 4, Prosecution Response, p. 4. *See also* Annex 5, Registry Update, pp. 5-6.
[167] Annex 3, Prosecution Response, p. 4; Annex 6, Prosecution Response, p. 4; Annex 5, Prosecution Response, p. 4.

Mr Gaddafi's criminal false accusation complaints

67. The Appellant argues that Mr Gaddafi would have been prevented from filing his two false accusation complaints pursuant to article 353 of the Libyan Code of Criminal Procedure if he had been convicted *in absentia*, but he was not.[168] The Appellant argues that the Majority erred by not relying on this fact to conclude that Law No. 6 had been applied to Mr Gaddafi. Yet, the Appellant's argument is unreasonable and ignores the evidence.

68. *First*, there is no evidence that the correct interpretation and application of article 353 of the Libyan Code of Criminal Procedure would prevent either: (i) the Prosecutor General's Office from taking an investigative step in relation to a criminal complaint made by a person against whom a judgment has been rendered *in absentia*; or (ii) the filing of a criminal claim by such a person.

69. *Second*, even if article 353 of the Libyan Code of Criminal Procedure would prevent Mr Gaddafi from filing such complaints, this does not mean that the head of the Investigation Department of the Prosecutor General's Office, the Tobruk Public Prosecutor, or the judge of the Tobruk Sub-District court, respectively, recognised, accepted or acquiesced that Law No. 6 was applied to Mr Gaddafi's case. Further, to impute this view to the Government of Libya, would require inferences that are not reasonable to draw given all of the evidence in this case, especially the clear statements from the Government of Libya itself.

70. Most significantly, the Appellant's submissions about the Documents do not alter the fact that Law No. 6 cannot apply to Mr Gaddafi's case given the nature of the crimes with which he was charged,[169] and the absence of a reasoned decision from the competent judicial authority applying it to his case.[170]

71. In conclusion, the Majority was reasonable not to rely on the Documents to infer that the Government of Libya had implicitly accepted that Law No. 6 had been applied to Mr Gaddafi. The Appellant's arguments and his request to admit additional evidence before the Appeals Chamber should be rejected. Further, the Appellant's arguments regarding the application of Law No. 6 to Mr Gaddafi's crimes, and the *de facto* application of the Law should be dismissed.

[168] Annex 2, Defence Consolidated Reply; Annex 3, Defence Consolidated Reply.
[169] *See above*, paras. 34-44.
[170] *See above*, paras. 46-55.

III.D. LAW NO. 6 DID NOT RENDER THE TRIPOLI COURT OF ASSIZE'S JUDGMENT FINAL

72. The Appellant's submissions in sections (iv) and (v) of its second ground of appeal misapprehend the facts and inaccurately read the Admissibility Decision. *First*, the Majority did not find that *all* amnesties are incompatible with international law; it only found, correctly, that Law No. 6, if applied to Mr Gaddafi, was incompatible with international law. *Second*, the Majority correctly applied article 21(3) and did not "strike down" a domestic law; instead, the Majority found that, contrary to the Appellant's submissions, Law No. 6 did not render the judgment of the Tripoli Court of Assize 'final'.

73. In any event, the Majority's findings regarding the effects of Law No. 6 were *obiter dicta* since the Majority had already correctly found that Law No. 6 was inapplicable to Mr Gaddafi.

III.D.1. The Majority correctly found that Law No. 6, if applied to Mr Gaddafi, was incompatible with international law

74. The crux of the Appellant's argument is that: (i) the Majority erroneously found that *all amnesties*, including conditional amnesties, are incompatible with international law,[171] and (ii) that Law No. 6 is a conditional amnesty.[172] Yet, the Appellant confuses the Majority's assessment of the relevant human rights jurisprudence with the concrete question that the Majority ruled upon—namely, that Law No. 6, if applied to Mr Gaddafi's case, was incompatible with international law.[173] It also disregards the Majority's approach which abstained from applying abstract legal labels and instead looked at the facts of the case. Judge Perrin de Brichambaut followed the same approach and reached the same conclusion.[174]

75. Therefore, the general lawfulness of conditional amnesties was not "[t]he specific issue at hand".[175] The Majority did not "side-step[] any debate about conditional amnesties" because, on the facts of this case, it did not have to rule on conditional amnesties.[176] Consequently, the Majority did not issue any "sweeping conclusion […] inconsistent with the

[171] *See e.g.* Admissibility Appeal, paras. 87, 88, 89, 91, 96, 98, 101, 102, 103, 104.
[172] Admissibility Appeal, paras. 87, 106.
[173] Admissibility Decision, para. 78.
[174] Judge Perrin de Brichambaut Separate Concurring Opinion, paras. 103-149.
[175] *Contra* Admissibility Appeal, para. 91.
[176] *Contra* Admissibility Appeal, para. 88.

assessment of other eminent experts".[177] To the contrary, the Majority considered and endorsed consistent human rights jurisprudence,[178] and the Decision accords with the view of other international criminal courts and tribunals which have addressed similar questions.[179]

76. The Appellant submits that Law No. 6 is not a "blanket amnesty in respect of him" but a conditional amnesty "passed as part of a national reconciliation process",[180] or a commutation (or conditional commutation) of sentence.[181] Yet, he does not explain what those terms mean. In its Challenge before the Pre-Trial Chamber, the Appellant had ambiguously argued that Law No. 6 was a 'commutation of sentence'.[182]

77. Jurisprudence and academic sources reveal diverging opinions with respect to the precise meaning and scope of terminology relevant to this appeal, including terms such as 'amnesty', 'conditional amnesty' and 'blanket amnesty'. The Office of the United Nations High Commissioner for Human Rights ("OHCHR") has defined 'amnesty' as legal measures that have the effect of: (a) prospectively barring criminal prosecution and, in some cases, civil actions against certain individuals or categories of individuals in respect of specified criminal conduct committed before the amnesty's adoption; or (b) retroactively nullifying legal liability previously established.[183] The OHCHR further indicates that, "[i]n practice, states have used a broad range of terms - including pardon and clemency - to denote laws that fall within [their] definition of amnesties[]".[184]

78. The OHCHR also notes that the phrase 'blanket amnesties' is rarely defined and has not always been consistently used. However, such amnesties generally "exempt broad categories of serious human rights offenders from prosecution and/or civil liability without the beneficiaries having to satisfy preconditions, including those aimed at ensuring full disclosure of what they know about crimes covered by the amnesty, on an individual basis".[185] 'Blanket amnesties' have also been defined as "amnesties that apply 'across the

[177] *Contra* Admissibility Appeal, para. 87.
[178] Admissibility Decision, paras. 62-66.
[179] Admissibility Decision, paras. 73-76.
[180] Admissibility Appeal, para. 106.
[181] Admissibility Appeal, para. 87 (conditional commutation of sentence), 91 (conditional amnesties and commutations of sentence), 103 (iii) (commutation of sentence).
[182] Admissibility Challenge, paras. 67, 88, 89; Defence Consolidated Reply, para. 73.
[183] OHCHR, Amnesties, pp. 5, 43. *See* Judge Perrin de Brichambaut Separate Concurring Opinion, para. 116.
[184] OHCHR, Amnesties, p. 5 (defining pardon as an "official act that exempts a convicted criminal or criminals from serving his, her or their sentence(s), in whole or in part, without expunging the underlying conviction").
[185] OHCHR, Amnesties, pp. 8, 43.

board without requiring any application on the part of the beneficiary or even an initial inquiry into the facts to determine if they fit the law's scope of application'".[186]

79. 'Conditional amnesties' generally require the beneficiary to individually apply for the benefit of the amnesty and to fulfil certain pre-requisites such as full disclosure of the facts about the violations committed, acknowledgement of crimes, non-repetition of crimes or further violence, assisting in a truth-seeking process, return of stolen assets, or participation in reparations for victims.[187]

80. The Majority did not use either of these terms and instead noted that "[r]egardless of the technical differences between amnesties and pardons (both of which may result in impunity), the Chamber shall treat Law No. 6 of 2015 as defined by the Libyan Government and presented by the Defence – as a *general amnesty law*."[188] Like the Majority, the Prosecution will also abstain from artificially labelling Law No. 6 and will assess the consequences that the application of Law No. 6 had for Mr Gaddafi's case.

81. In its Decision, the Majority provided an overview of relevant human rights jurisprudence on amnesties, and correctly agreed with those courts and tribunals that amnesty laws for certain serious acts such as murder constituting crimes against humanity conflict with States' duties under international law to investigate, prosecute and punish perpetrators of core crimes.[189] In addition, it correctly found that Law No. 6, if applied to Mr Gaddafi, was contrary to international law.[190] Judge Perrin de Brichambaut agreed in his Separate Concurring Opinion.[191]

82. In this regard, it bears noting that complementarity assessments are made on a case-by-case basis and are fact-specific. The Majority's findings were made solely to determine the admissibility of Mr Gaddafi's case before the Court. The Appellant's attempt to challenge the

[186] OHCHR, Amnesties, fn. 22, referring to Meintjes and Méndez, p. 76. *See also* Ambos (2009), paras. 24-29. *See also* Siatitsa and Wierda, p. 259 (noting that some authors also refer to 'pseudo-amnesties' or '*de facto*' amnesties which have the same effect as amnesties by effectively preventing the investigation and prosecution of serious human rights violations).
[187] Siatitsa and Wierda, p. 259; OHCHR, Amnesties, p. 43. *See also* p. 7 (noting that certain amnesties are conditional in the sense that, for example, an amnesty aimed at inducing rebel forces to cease their rebellion may provide that the benefits bestowed will be forfeited by a beneficiary who once again takes up arms). *See also* Ambos (2009), paras. 30-33.
[188] Admissibility Decision, para. 61 (emphasis added).
[189] Admissibility Decision, paras. 61-77.
[190] Admissibility Decision, para. 78.
[191] Judge Perrin de Brichambaut Separate Concurring Opinion, paras. 103-149.

Majority's finding by extending the effects of this Decision to other situations apart from Mr Gaddafi's case is thus unhelpful and incorrect.[192]

III.D.1.a Human rights jurisprudence holds that amnesties for international crimes are generally incompatible with internationally recognised human rights

83. Since the Appellant argued before the Pre-Trial Chamber that the judgment of the Tripoli Court of Assize "became final by virtue of the application of Law No. 6",[193] the Majority had to determine the impact (if any) of Law No. 6 in the domestic proceedings against Mr Gaddafi.[194] However, the Court's legal framework does not refer to amnesties.[195] Nor is there a general textual prohibition against amnesties in the main international treaties regarding crimes which fall within the Court's jurisdiction.[196] Therefore, and consistently with article 21(3), the Majority and Judge Perrin de Brichambaut noted that regional human rights courts and tribunals have found that amnesties with respect to serious human rights violations are generally incompatible with rights encompassed in those treaties.[197] The relevant treaties are the International Covenant on Civil and Political Rights ("ICCPR"), the African Charter on Human and Peoples Rights ("African Charter"), the American Convention on Human Rights ("ACHR") and the European Convention on Human Rights ("ECHR").[198] The courts and tribunals are the Inter-American Court on Human Rights ("IACtHR"), the European Court on Human Rights ("ECtHR") and the African Commission on Human and Peoples Rights ("ACHPR").[199] In particular, these treaties recognise an individual's right to

[192] *Contra* Admissibility Appeal, para. 88.
[193] Defence Consolidated Reply, para. 3. *See also* para. 19. *See also* Admissibility Challenge, paras. 48, 88.
[194] *See* Admissibility Decision, paras. 54-55; Judge Perrin de Brichambaut Separate Concurring Opinion, paras. 83-84.
[195] Unlike article 2(5) of Control Council Law No. 10; article 6 of the STL Statute; article 40 of the Law on the Establishment of the ECCC and article 10 of the SCSL Statute. *See* Judge Perrin de Brichambaut Separate Concurring Opinion, para. 118. This only means that the drafters did not agree and decided to leave to the Chambers the determination regarding the impact of a given amnesty. As Darryl Robinson, who assisted with the coordination of the relevant negotiations and the drafting of article 17, noted: the drafters "wisely chose not to delve into these difficult questions" because agreement would have likely been impossible and it would have been "unwise to attempt to codify a comprehensive test to distinguish between acceptable and unacceptable reconciliation measures […]." *See* Robinson, p. 483. *Contra* Admissibility Appeal, para. 85.
[196] *See* Judge Perrin de Brichambaut Separate Concurring Opinion, para. 119; Stahn (2019), p. 261 (noting that there is no international treaty that explicitly prohibits the granting of amnesties).
[197] Admissibility Decision, paras. 62-71, 77; Judge Perrin de Brichambaut Separate Concurring Opinion, paras. 130-136.
[198] Libya is party to the ICCPR and the African Charter, as well as to the four Geneva Conventions, Genocide Convention, Convention against Torture and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.
[199] The ACHR is considered a quasi-judicial body. Article 45 of the African Charter describes its mandate.

an effective remedy and to access the justice system,[200] and also require States to respect and ensure the rights contained therein.[201] These regional courts and tribunals have relied on these rights and obligations to identify a duty of States to investigate, prosecute and punish serious human rights violations and have found that amnesties for serious human rights violations are generally incompatible with these duties and consequently null or ineffective.[202]

84. In addition, the Majority and Judge Perrin de Brichambaut considered the practice of the Human Rights Committee (which monitors the implementation of the ICCPR).[203] The Majority also considered the jurisprudence of other international criminal courts and tribunals, which have ruled on the effects of amnesties on the exercise of their jurisdiction.[204] Judge Perrin de Brichambaut analysed humanitarian law and resolutions of the UN Commission on Human Rights,[205] and noted that the four Geneva Conventions of 1949[206] and Additional Protocol I[207] expressly provide that States have a duty to prosecute or extradite the perpetrators of grave breaches of international humanitarian law (also known as the principle of *aut dedere aut judicare).*[208] This obligation is also enshrined, although with different

[200] ICCPR, article 2(3) (effective remedy) and article 14(1) (right to a fair trial); African Charter, article 7 (right to fair trial); ACHR, article 8 (right to a fair trial) and article 25 (right to judicial protection); ECHR, article 6 (right to a fair trial) and article 13 (right to an effective remedy).
[201] ICCPR, article 2(1) (duty to respect and ensure), article 6 (right to life); African Charter, article 4 (right to life) and article 25 (duty to promote rights); ACHR, article 1 (duty to respect and ensure rights) and article 4 (right to life); ECHR, article 1 (duty to secure), article 2 (right to life), article 41 (just satisfaction).
[202] *See e.g. Barrios Altos v. Perú*, Judgment, para. 41 (stating that amnesties and other measures designed to eliminate responsibility are inadmissible because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations); *Almonacid Arellano et al. v. Chile*, Judgment, paras. 111 ("The obligation that arises pursuant to international law to try, and, if found guilty, to punish the perpetrators of certain international crimes, among which are crimes against humanity, is derived from the duty of protection embodied in Article 1(1) of the American Convention") and 114 ("the States cannot neglect their duty to investigate, identify, and punish those persons responsible for crimes against humanity by enforcing amnesty laws or any other similar domestic provisions. Consequently, crimes against humanity are crimes which cannot be susceptible of amnesty"); *Gelman v. Uruguay*, Judgment, paras. 188-191, 195, 227, 229, 232; *Mouvement Ivoirien des Droits Humains*, Decision, paras. 91, 98; *Zimbabwe Human Rights NGO Forum*, Decision, paras. 211, 215; *Malawi African Association v. Mauritania*, Decision, paras. 82-83; *Marguš v. Croatia*, Judgment, paras. 74, 76; *Marguš v. Croatia*, Grand Chamber Judgment, paras. 139-140; *Okkali v. Turkey*, Judgment, para. 76; *Yaman v. Turkey*, Judgment, para. 55. *See* Admissibility Decision, paras. 62-72, 77; Judge Perrin de Brichambaut Separate Concurring Opinion, paras. 125-136, 148.
[203] Admissibility Decision, para. 72; Judge Perrin de Brichambaut Separate Concurring Opinion, paras. 128-129.
[204] Admissibility Decision, paras. 73-76.
[205] Judge Perrin de Brichambaut Separate Concurring Opinion, paras. 119-120, 126-127.
[206] The system of repression of "grave breaches" common to the four Geneva Conventions explicitly includes three different obligations upon States Parties: (1) the enactment of a specific national criminal legislation to provide effective penal sanctions for those responsible for committing, or ordering to be committed any of the grave breaches; (2) obligation to search; (3) obligation to bring before their domestic courts or to extradite to another contracting party alleged perpetrators (*aut dedere aut judicare*). *See* Geneva Convention I, article 49; Geneva Convention II, article 50; Geneva Convention III, article 129; Geneva Convention IV, article 146.
[207] API, article 85(1) ("The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol").
[208] Judge Perrin de Brichambaut Separate Concurring Opinion, paras. 120-122.

wording, in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment concerning the crime of torture ("Convention against Torture")[209] and in the Convention on the Prevention and Punishment of the Crime of Genocide concerning the crime of genocide ("Genocide Convention").[210] As with the human rights treaties, the passing of amnesty laws by States appear incompatible with these obligations as amnesties would impede any potential prosecution and result in impunity for those who have committed serious crimes.[211]

85. Based on their assessment of international human rights law, the Majority and Judge Perrin de Brichambaut concluded that amnesties for serious acts such as murder as a crime against humanity (or international crimes more generally) are generally or *ab initio* incompatible with States' positive obligations to investigate, prosecute and punish, and deny victims of such crimes the right to truth, access to justice, and to request reparations where appropriate.[212]

86. Their conclusion was correct. In addition to the above conventions and jurisprudence, the preamble of the Rome Statute recalls the duty of States to exercise their criminal jurisdiction over those responsible for international crimes.[213] Most commentators also recognise a duty of States to investigate, prosecute and punish international crimes.[214] The

[209] Convention against Torture, articles 5(2) ("Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him […]") and 7(1) ("The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.").
[210] Genocide Convention, article 1 ("The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish").
[211] *See* ICRC Commentary to article 49, GCI, paras. 2859, 2861, 2862 (noting that if there is evidence, "[competent authorities] cannot rely, for example, on national rules of prosecutorial discretion and decide not to press charges. In those circumstances, they must prosecute the case. Any other conclusion would be at odds with the obligations contained in Article 49(2), as well as those contained in common Article 1 to respect and ensure respect for the Convention"). *See similarly* 2877 ("Immunities under national law, such as constitutional immunities, are not a bar to the prosecution by domestic courts of heads of State or heads of government. As the obligation to prosecute alleged perpetrators of grave breaches flows from an unequivocal international obligation, it would amount to a breach of this international treaty obligation if domestic courts were to allow constitutional immunities prevail"). *See* Judge Perrin de Brichambaut Separate Concurring Opinion, paras. 122, 148.
[212] Admissibility Decision, para. 77; Judge Perrin de Brichambaut Separate Concurring Opinion, paras. 136 (also noting that "there is an ongoing political debate about the conditions in which amnesties may interfere with the duty to prosecute") and 148.
[213] Rome Statute, Preamble, paras. 4-6. *See* Ambos (2009), para. 8 (noting that "the Statute has reinforced the customary law duty in that it expresses – as a kind of "Verbalpraxis" – the general acceptance of such a duty with regard to the ICC crimes (genocide, crimes against humanity and war crimes)").
[214] *See e.g.* Robinson, pp. 490-491 (distinguishing between genocide, torture and grave breaches, where the obligation to prosecute derives from treaties and it is reinforced by international customary law) and pp. 491-492 (noting that "there are convincing reasons to suggest that under current or emerging customary international law,

current ILC Draft Articles on Crimes Against Humanity expressly regulate the *principle aut dedere aut judicare* and impose a series of obligations to ensure the exercise of criminal jurisdiction by national authorities.[215]

87. Even States which do not always comply with this duty acknowledge its existence, but advance countervailing considerations to explain its violations.[216] As the International Court of Justice ("ICJ") held in the *Nicaragua Case*, such infringements could in fact acknowledge the existence of the rule itself:

> "[I]nstances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule […] If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then […] the significance of that attitude is to confirm rather than to weaken the rule".[217]

88. Although State practice is still not fully consistent with respect to the exercise of this duty, it appears settled that there is an obligation *erga omnes* to prevent, investigate and punish crimes within the jurisdiction of the Court. The Appeals Chamber has confirmed

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there is a duty to bring to justice perpetrators of genocide, crimes against humanity and war crimes, at least with respect to crimes committed on the state's territory by its nationals"); Edelenbos, pp. 15-16 ("In the light of the existing treaties, declarations and the practice with regard to war crimes and crimes against humanity committed during the Second World War, one can conclude that the international community of states has accepted the obligation to prosecute those suspected of having committed war crimes and crimes against humanity […], even though in practice prosecution does not always occur. A norm extending such obligation to other human rights violations is developing"); Jackson, p. 117 (arguing that there is a duty to prosecute crimes against humanity under customary international law which is subject to emergency derogations). *See also* Ambos (2016) Vol. I, pp. 394-395 (distinguishing between genocide, torture and grave breaches, where the obligation to prosecute derives from treaties for state parties; noting that the 'dominant opinion of the doctrine' infers this duty from human rights treaties and confirming the existence of a duty to prosecute the most serious crimes but on the basis of paras. 4-6 of the ICC Preamble for States Parties), and Ambos (2009), paras. 8-9 (noting that the duty to prosecute is generally considered a "rule or principle" which permits strictly defined exceptions). *See also* Impunity Principles, Principle 19, Duties of States with regard to the Administration of Justice.

[215] ILC 71st Session, Draft Articles: article 10 (*Aut dedere aut judicare*: "The State in the territory under whose jurisdiction the alleged offender is present shall, if it does not extradite or surrender the person to another State or competent international criminal court or tribunal, submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State"). *See also* preamble, para. 8 (Recalling that it is the duty of every State to exercise its criminal jurisdiction with respect to crimes against humanity), article 6 (Criminalization under national law), article 7 (Establishment of national jurisdiction), article 8 (Investigation), article 9 (Preliminary measures when an alleged offender is present). *See* Kreß and Garibian, pp. 927 (noting that the "adoption of this set of proposals in the form of an international treaty would at the same time strengthen the case for maintaining that the obligation of the state of the *iudex deprehensionis* to exercise universal jurisdiction over a crime against humanity (in the form of *aut dedere aut iudicare*) reflects customary international law") and 949 (noting that the draft makes extremely difficult for a national prosecutor (and a judge) to accept a negotiated settlement of a violent conflict which provides for an amnesty for crimes under international law committed in the course of that conflict).

[216] Edelenbos, pp. 20-21 (explaining that "even those states which have adopted amnesty laws and thereby allowed impunity do not deny the existence, in principle, of an obligation to prosecute, but invoke countervailing considerations, such as national reconciliation or the instability of the democratic process").

[217] *Nicaragua v. United States*, Judgment, para. 186.

this.[218] The Appellant himself does not dispute the existence of such a rule, but distinguishes this duty from the existence, in international law, of a prohibition of amnesties for *crimes against humanity*.[219] Although the two are not the same, the Majority (and Judge Perrin de Brichambaut) rightly considered them intrinsically linked since amnesties and pardons intervene with States' positive obligations to investigate, prosecute and punish perpetrators of core crimes.[220] In deciding on acts of torture, the *Furundžija* Trial Chamber aptly noted that it was 'senseless' to recognise a *jus cogens* prohibition of this international crime but then absolve the perpetrators of those crimes through an amnesty law.[221] Similarly, the IACtHR has considered as *jus cogens* norms the obligations to investigate, prosecute and punish those responsible for crimes against humanity.[222]

89. The Appellant disregards human rights treaties and argues that while amnesties for grave breaches, torture and genocide may be unlawful because they breach treaty obligations to prosecute or extradite, there is no such treaty obligation forbidding amnesties for crimes against humanity.[223] This argument overlooks that neither the Geneva Conventions, nor the Conventions against Torture and Genocide Convention expressly forbid amnesties, yet the prohibition has been inferred from the rights and obligations envisaged in those treaties, as has been the case with the human rights treaties. Although the Appellant does not appear to dispute how those human rights courts and tribunals have interpreted the conventions, he

[218] *Al-Bashir* Jordan Referral AD, para. 123. *See also* Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, para. 207 ("It has now been authoritatively settled that the proscriptions of genocide, crimes against humanity and war crimes enjoy the status of *jus cogens* norms").
[219] Admissibility Appeal, para. 91.
[220] Admissibility Decision, para. 77; Judge Perrin de Brichambaut Separate Concurring Opinion, para. 148. *See* Ambos (2016) Vol. I, p. 365 (referring to the "*rule-of-law* argument: if the law provides for a duty to prosecute, then the rule of law entails a prohibition of amnesty and other procedural defences, and as such constitutes a limit to politics; otherwise the very legal and social order to be protected by the rule of law would be undermined and, instead, a culture of impunity created or promoted").
[221] *Furundžija* TJ, para. 155, quoted in Admissibility Decision, para. 74. *Contra* Admissibility Appeal, para. 103(ii).
[222] *Goiburú v. Paraguay*, Judgment, paras. 84, 131 ("Access to justice is a peremptory norm of international law and, as such, gives rise to obligations *erga omnes* for the States to adopt all necessary measures to ensure that such violations do not remain unpunished, either by exercising their jurisdiction to apply their domestic law and international law to prosecute and, when applicable, punish those responsible, or by collaborating with other States that do so or attempt to do so"); *La Cantuta v. Perú*, Judgment, para. 157 ("the duty to investigate and eventually conduct trials and impose sanctions, becomes particularly compelling and important in view of the seriousness of the crimes [against humanity] committed and the nature of the rights wronged; all the more since the prohibition against the forced disappearance of people and the corresponding duty to investigate and punish those responsible has become *jus cogens*. The impunity of these events will not be eradicated without ascertaining general liability of the State and individual criminal liability of its agents or other individuals, both of which complement each other."). These findings were made in the context of torture and forced disappearances.
[223] Admissibility Appeal, para. 91.

overlooks that "a crime against humanity is in itself a serious violation of human rights and affects mankind as a whole".[224]

90. That the Special Rapporteur for Crimes against Humanity suggested in his Third Report not including an explicit prohibition of amnesties in the ILC Draft Articles on Crimes against Humanity does not mean that there is none.[225] To the contrary, the ILC Commentary to the 69th session and the Third Report of the Special Rapporteur explain that, even if a prohibition is not expressly included, this does not mean that it cannot be determined in certain cases as a result of the States' duties to submit the matter to the competent authorities.[226] In any event, the matter is not yet settled. In the February 2019 Fourth Report of the Special Rapporteur, several States and the OHCHR called for the inclusion of a prohibition on amnesties in the Draft Articles. Another State suggested a modification in the commentary to clarify that the prohibition is included within the State's obligation to submit the case to the competent authorities.[227]

91. These discussions among States during the drafting of the Draft Articles reflect that State practice on the prohibition and use of amnesties for international crimes more generally is still divergent.[228] But that States give amnesties or pardons to perpetrators of international crimes does not make their conduct compatible with international law, in particular when they are bound by conventions not to do it.[229] Commentators generally agree that 'blanket

[224] *Almonacid Arellano et al. v. Chile*, Judgment, para. 105. *Contra* Admissibility Appeal, para. 101 (implying that serious human rights abuses are "not necessarily synonymous with crimes against humanity" and not covered by the regional human rights jurisprudence). *See also* *Tadić* AJ, para. 69 ("After full consideration, the Appeals Chamber takes the view that there is in law no distinction between the seriousness of a crime against humanity and that of a war crime").
[225] *Contra* Admissibility Appeal, para. 91.
[226] *See* ILC 69th Session Report, para. 46, commentary to draft article 10, para. (11) (noting the Commission's commentary that "[w]ithin the State that has adopted the amnesty, its permissibility would need to be evaluated, inter alia, in the light of that State's obligations under the present draft articles to criminalize crimes against humanity, to comply with its *aut dedere aut judicare* obligation, and to fulfil its obligations in relation to victims and others"); ILC Special Rapporteur Third Report Draft Articles Crimes Against Humanity, para. 297 ("Any amnesty granted by a State would have to be evaluated in light of that State's obligations under, *inter alia*, draft articles 9 and 14, and under customary international law as it currently exists or as it evolves in the future").
[227] ILC Special Rapporteur Fourth Report Draft Articles Crimes Against Humanity, paras. 302-303 (while four States and OHCHR expressly asked for the inclusion of a prohibition of amnesties for crimes against humanity, either in the article or commentary, two States preferred not to include it).
[228] *See similarly* Ieng Sary Rule 89 Decision, paras. 50 (noting that third States and international tribunals have found amnesties covering serious international crimes to be incompatible with international standards) and 51 (noting that although State practice of granting amnesties remains commonplace, there is a trend toward the limitation of their scope and excluding their application to certain serious international crimes). *See also* ILC Special Rapporteur Third Report Draft Articles Crimes Against Humanity, paras. 290-291.
[229] *See* Ieng Sary Rule 89 Decision, para. 54 (noting that the Chamber is entitled to attribute no weight to a grant of amnesty which it considers "contrary to the direction in which customary international law is developing and to Cambodia's international obligations"). *See also* Ieng Sary Closing Order Appeal Decision, para. 201 (noting that the grant of an amnesty for genocide, torture and grave breaches would infringe upon Cambodia's treaty

amnesties'[230] and amnesties for the core crimes of the Court[231] are incompatible with international law.

92. Contrary to the Appellant's submissions, the Majority did not erroneously or selectively quote the jurisprudence that it assessed. In particular:

- The Majority's omission of article 6(4) of the ICCPR (recognising a right to pardon or commutation of those sentenced to death) and article 6(5) of Additional Protocol II (encouraging amnesties for persons who have participated in the conflict at the end of hostilities) is inapposite.[232] These provisions do not apply to Mr Gaddafi. Article 6(4) of the ICCPR does not apply because, as noted above, the sentence of the Tripoli Court of Assize is not final and Mr Gaddafi must be retried once he surrenders. Moreover, the ICRC has explained that article 6(5) of Additional Protocol II excludes persons suspected or accused of war crimes and other crimes specifically listed under international law.[233]

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obligations to prosecute and punish the authors of the crimes under the Geneva Conventions, Genocide Convention and Convention against Torture); *Kallon* Amnesty AD, para. 84 (also noting that the Chamber can attribute little or no weight to the grant of an amnesty which is contrary to the direction in which customary international law is developing and to the obligations in certain treaties and conventions to protect humanity). *See also* O'Keefe, p. 474, 11.28 ("when it comes to amnesty, its grant will tend to be incompatible with this framing of the [conventional] obligation *aut dedere aut judicare*, […] when an amnesty is in place, the state will simply not submit cases for the relevant offence to its authorities for prosecution, in clear breach of its treaty obligation to do so. In the event that it does go through the motions of submitting a case, things are more nuanced, although ultimately no less unlawful in most conceivable instances.").

[230] Robinson, p. 481 ("blanket amnesties could never warrant deference, as they are the antithesis of the ICC; even in situations of extreme political necessity, to accept a blanket amnesty would be for the ICC to succumb to blackmail"); Ambos (2016) Vol. I, p. 422 ("International law quite unequivocally prohibits blanket amnesties"); Stahn (2019), p. 262 ("Blanket amnesties which absolve individuals of criminal responsibility for genocide, war crimes and crimes against humanity are not permissible under international law"); Ambos (2009), para. 25 ("International law quite unequivocally prohibits this type of amnesty").

[231] Stahn (2005) p. 701 ("there is growing support for the position that amnesties for the core crimes of the Court are generally incompatible with international law"); Ambos (2009), para. 29 ("Often it is argued, from a *ratione materiae* perspective, that amnesties for international core crimes are inadmissible" and noting that the ICC Statute's clear commitment against impunity (paras. 4-6 of the preamble) is considered an expression of *opinio iuris* that amnesties for the ICC crimes are prohibited). *But see* para. 33 (and authors cited therein). *See also* OHCHR, Amnesties, p. 11 (noting that "[u]nder various sources of international law and under United Nations policy, amnesties are impermissible if they: (a) Prevent prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity or gross violations of human rights […] (c) Restrict victims' and societies' right to know the truth about violations of human rights and humanitarian law."); Impunity Principles, Principle 24(a) (Restrictions and other measures relating to Amnesty).

[232] *Contra* Admissibility Appeal, paras. 92-93.

[233] *See* ICRC Rules, Rule 159 ("At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes") and pp. 611-614 (explaining that article 6(5) cannot be used by war criminals or those accused of war crimes to evade punishment. That would be incompatible with rule 158, which obliges States to investigate and prosecute persons suspected of having committed war crimes in non-international armed conflicts). *See also* Judge Perrin de Brichambaut Separate Concurring Opinion, fn. 137

- The Appellant cites the Ieng Sary Rule 89 Decision in the Extraordinary Chambers in the Courts of Cambodia ("ECCC") and the Belfast Guidelines to argue that there is no customary prohibition of amnesties due to diverging State practice.[234] But the ECCC decision does not assist the Appellant. There, the ECCC Trial Chamber—as the ICC Pre-Trial Chamber did with respect to Law No. 6—disregarded the 1996 Decree at issue because it was "contrary to the direction in which customary international law is developing *and* to Cambodia's international obligations".[235] International custom and international conventions are sources of international law.[236] The ECCC Trial Chamber's decision is fully consistent with a previous appeals decision at that Court. In that decision, the Appeals Chamber noted the incompatibility of the 1996 Decree with Cambodia's treaty obligations if the Decree had afforded amnesties for international crimes (which, at that time, the Appeals Chamber considered the Decree did not cover).[237] The Appellant's effort to explain away the Belfast Guidelines' omission of this decision is unconvincing.[238] Moreover, Libya, like Cambodia, is a party to the same conventions cited in that appeals decision (Geneva Conventions, Genocide Convention, Convention against Torture and ICCPR). The Appellant also fails to note that the Belfast Guidelines did refer to ICTY decisions which found that amnesties for international crimes were prohibited under customary law.[239] In any event, the Belfast Guidelines are not *per se* incompatible with the approach adopted by the Majority.[240]

(citing the 1995, Letter from the Legal Division to the ICTY Prosecutor, explaining that this provision only encourages States to grant amnesties to members of armed groups who have participated in the internal armed conflict for that sole fact or for committing minor crimes associated to it, and is not intended to protect perpetrators of grave IHL violations).

[234] Admissibility Appeal, para. 103 (iv).

[235] Ieng Sary Rule 89 Decision, para. 54 (emphasis added).

[236] *See* ICJ Statute, article 38(1) (listing as sources of international law: "a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law").

[237] In this decision, the Appeals Chamber considered that the 1996 Decree read together with the 1994 Law excluded international crimes. *See* Ieng Sary Closing Order Appeal Decision, paras. 200-201.

[238] Admissibility Appeal, para. 103 (v).

[239] Belfast Guidelines, p. 38 at fn. 54 (citing *Karadžić* Disclosure Decision, paras. 17 and 25; *Karadžić* Holbrooke Agreement AD, para. 52 and *Furundžija* TJ, para. 155). Although the *Karadžić* decisions refer to 'immunity', the Chamber also relied on SCSL jurisprudence on amnesties (*see e.g.* *Karadžić* Holbrooke Agreement Decision, para. 87) and Karadžić never invoked an official capacity or immunity based on that fact and he relied on examples drawn from situations where amnesties had been granted (*see* *Karadžić* Holbrooke Agreement Decision, paras. 12-13).

[240] *See below*, paras. 98-104. The Guidelines set out a range of considerations to assist those seeking to make or evaluate decisions on amnesties and accountability in the midst or in the wake of conflict or repression and

- The Appellant's attempt to undermine the Human Rights Committee *Hugo Rodríguez* case and General Comment No. 20 because they relate to the crime of torture and pre-date the 2013 Belfast Guidelines and the 2017 ILC Special Rapporteur Report is unhelpful.[241] General Comment No. 6 (regarding article 6: right to life) similarly indicates that "States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces".[242] Moreover, the Human Rights Committee has issued similar pronouncements with respect to the inherent right to life (article 6),[243] which postdate these documents. For example, in 2015 the Human Rights Committee recommended to Spain that "[the 1977] Amnesty Act should be repealed or amended to bring it fully into line with the provisions of the Covenant" and reiterated that Spain "should actively encourage investigations into all past human rights violations" and "should also ensure that, as a result of these investigations, the perpetrators are identified, prosecuted and punished in a manner commensurate with the gravity of the crimes committed".[244] In 2017, the Human Rights Committee found Belarus had violated its obligations under the ICCPR "for failure to properly investigate and take appropriate remedial action regarding the [enforced] disappearance" of the identified victim.[245] Belarus was deemed to have breached its obligations under article 6. The Committee reiterated its prior determination that States bear obligations to investigate, "prosecute, try and punish", and "provide adequate compensation [] for the violations suffered."[246] In 2018, the Committee again reiterated the state's obligations to investigate, prosecute, punish and afford victims redress for extrajudicial executions, enforced disappearances and torture in its Concluding Observations to El Salvador.[247] Notably, the Committee also welcomed a determination by El Salvador's Constitutional

present ways that amnesties or associated processes or institutions can be designed to complement accountability. *See* Belfast Guidelines, p. 1. *See also* Guideline 13 emphasising that for an amnesty to be valid under domestic law, *at a minimum* its enactment must adhere to all relevant formal domestic rules and that where these rules are not respected, national courts should have the independence and authority to declare the amnesty unconstitutional or require amendment of the legislation.

[241] *Contra* Admissibility Appeal, para. 102, citing Admissibility Decision, para. 72. The Majority reasoned that acts of torture could also amount to crimes against humanity, for which there is a general prohibition of amnesties for all of the enumerated acts underlying it as an international crime.

[242] HRC General Comment No. 6 (Right to Life), para. 3.

[243] *See e.g. Baboeram v. Suriname* (concerning extra-legal executions, the HRC urged the State "to take effective steps (i) to investigate the killings […]; (ii) to bring to justice any persons found to be responsible for the death of the victims; (iii) to pay compensation to the surviving families; and (iv) to ensure that the right to life is duly protected in Suriname").

[244] HRC Concluding Observations Spain.

[245] *Zakharenko v. Belarus*, para. 7.3.

[246] *Zakharenko v. Belarus*, para. 9.

[247] HRC Concluding Observations El Salvador, para. 24(a).

Chamber of the Supreme Court that the State's general amnesty law was unconstitutional.[248]

93. Lastly, the Majority's position is consistent with other international criminal courts and tribunals which have addressed this issue. For example, the ECCC Trial Chamber observed in November 2011 that "an emerging consensus prohibits amnesties in relation to serious international crimes, based on a duty to investigate and prosecute these crimes and to punish their perpetrators".[249] The Trial Chamber considered both, "the direction in which customary law is developing" and also "Cambodia's international obligations".[250] The SCSL Appeals Chamber likewise concluded in March 2004 that the Lomé Agreement was "contrary to the direction in which customary international law is developing and […] contrary to the obligations in certain treaties and conventions".[251]

94. In conclusion, the Majority's assessment of the relevant law and jurisprudence was relevant and correct. The Appellant shows no error in the Majority's reasoning.

III.D.1.b. Law No. 6, if applied to Mr Gaddafi, was incompatible with international law

95. The Majority correctly found that Law No. 6, if applied to Mr Gaddafi, was incompatible with international law, including internationally recognised human rights.[252] Judge Perrin de Brichambaut reached a similar conclusion.[253] The Appellant disagrees. However, he ignores and inaccurately presents the facts of this case and misunderstands the Admissibility Decision.[254]

96. Law No. 6 was adopted on 7 September 2015 by the House of Representatives in Tobruk, shortly after Mr Gaddafi's sentence was handed down *in absentia* on 28 July 2015. Article 1 provides that "all Libyans who committed crimes during the period from 15 February 2011 until the promulgation of the Present Law [7 September 2015] shall be covered by a general amnesty". In addition to requiring the competent authority to issue a reasoned decision to stay the criminal proceedings,[255] the Law has the following characteristics:

[248] HRC Concluding Observations El Salvador, para. 3(a).
[249] Ieng Sary Rule 89 Decision, para. 53.
[250] Ieng Sary Rule 89 Decision, para. 54.
[251] *Kallon* Amnesty AD, para. 84.
[252] Admissibility Decision, para. 78.
[253] Judge Perrin de Brichambaut Separate Concurring Opinion, para. 148.
[254] Admissibility Appeal, paras. 87-109.
[255] Law No. 6, article 6.

- Article 1 indicates that "criminal proceedings related to such crimes shall be terminated, and sentences handed down shall be revoked. Such crimes shall have no subsequent penal effects and shall be struck from the criminal record […] provided that the conditions stipulated herein are met". Article 4 further confirms that the law applies to persons against whom judicial sentences were handed down, and subsequently served.

- Article 3 excludes from the application of the law, among others, identity-based murder, abduction, forced disappearance and torture.

- Article 2 sets out the requirements for the amnesty to take effect, requiring a written pledge of repentance, reimbursement of funds for financial crimes, reconciliation with victims and the surrender of weapons used in the commission of the crimes.

- Article 7 indicates that that any amnesty provided will no longer apply if the relevant person commits a "wilful" felony within five years from the date when the amnesty was granted.

97. Contrary to the Appellant's submissions, the "critical question" before the Appeals Chamber is not whether there is a rule of international human rights law which prohibits *all* amnesties and pardons for all serious acts,[256] but whether the Majority correctly found that Law No. 6, if applied to Mr Gaddafi, was incompatible with international law. The Majority correctly found that it was.[257]

98. The Majority correctly noted that, assuming that Law No. 6 was applied to Mr Gaddafi, his proceedings would be terminated without a final decision on the merits.[258] His crimes would have no subsequent penal effect and would be struck from the criminal record.[259] Indeed, unless he commits a "felony within the five years following the date of the decision staying his criminal proceedings",[260] any future proceeding (required by article 358 of the Libyan Code of Criminal Procedure)[261] would be barred. As the Majority indicated:

[256] *Contra* Admissibility Appeal, paras. 89-90.
[257] Admissibility Decision, para. 78.
[258] Admissibility Decision, para. 78.
[259] Law No. 6, articles 1 and 4.
[260] Law No. 6, article 7.
[261] Admissibility Decision, paras. 49-50 quoting Annex 8, Prosecution Response, pp. 14-15.

> "in the context of the case *sub judice*, due to the fact that applying Law No. 6 of 2015 would lead to the inevitable negative conclusion of blocking the continuation of the judicial process against Mr Gaddafi once arrested, and the prevention of punishment if found guilty by virtue of a final judgment on the merits, as well as denying victims their rights where applicable."[262]

99. The Appellant's arguments disputing this finding are irrelevant and inaccurate.[263] Although he attempts to present Mr Gaddafi's release as a compromise measure in the context of a reconciliation process, he does not substantiate his assertions.[264]

100. *First*, Law No. 6 is a general law which does not exclude any category of perpetrators. Therefore, anyone who committed a crime between 15 February 2011 and 7 September 2015 (when Law No. 6 was issued) could benefit from the amnesty regardless of their degree of participation and responsibility.[265] Mr Gaddafi is allegedly one of the persons who bears the greatest responsibility for the crimes against humanity of murder and persecution, for which the Court has issued an arrest warrant. The Libyan case substantially mirrors the case before the Court. Mr Gaddafi is alleged to have, *inter alia*, planned, funded, incited, instructed and otherwise contributed to the murder of the civilian population, in particular through violent attacks against civilian demonstrators resulting in killings and kidnapping of individuals.[266] In this respect, the ACHPR has noted that "[a]mnesties that preclude accountability measures for gross violations of human rights and serious violations of humanitarian law, particularly for individuals with senior command responsibility, [] violate customary international law".[267]

101. *Second*, Law No. 6 has been purportedly applied to a person charged with international crimes. Mr Gaddafi should not benefit from the Law because of the nature of the crimes he was domestically charged with, which are excluded pursuant to article 3 of Law No.

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[262] Admissibility Decision, para. 78.
[263] Admissibility Challenge, paras. 87-109.
[264] Admissibility Challenge, para. 106.
[265] *See* Belfast Guidelines (providing recommendations to design amnesties to complement accountability), Guideline 8(b) (Eligible beneficiaries: An amnesty should set forth clearly the criteria for determining which offenders may be eligible for amnesty, which categories of offenders are excluded from the amnesty, or both. Distinctions can be made on the basis of […] ii. rank within the institution or body, or perceived level of responsibility therein). *See also* Ambos (2009), para. 21 ("*Limitation ratione personae with regard to the most responsible*": listing some criteria to consider in assessing the proportionality of conditional amnesties and noting that the most responsible (in particular political and military leaders) must not benefit from amnesties).
[266] *See* Admissibility Challenge, paras. 62-64 and Annex H, Admissibility Challenge (where the Defence submitted a comparative chart showing the substantial correlation and material overlap between the case against Mr Gaddafi before the ICC, and Case No. 630/2012 before the Tripoli Court of Assize. The Defence and the Prosecution agreed that Libya prosecuted substantially the same case as that alleged before the ICC. *See* Article 58 Decision, paras. 76-78, 80-83. *See also* Prosecution Response, paras. 134-145.
[267] *Kwoyelo v. Uganda*, para. 289.

6.[268] Instead, the Appellant argues that he did benefit. This erroneous application of the law[269] would permit alleged perpetrators of international crimes (such as crimes against humanity) to benefit from an amnesty.[270] The IACtHR, the ECtHR and the UN Commission on Human Rights, among others, have stated that international crimes, including crimes against humanity, should not be susceptible to amnesties.[271]

102. *Third*, Law No. 6 does not provide for specific and effective measures of accountability.[272] For example, although the Law generally requires a "written pledge of repentance" and "reconciliation with the victims",[273] it does not explain whether this entails, for example, a public confrontation with the victims or an acknowledgement of the beneficiary's criminal responsibility. Notably, articles 1 and 4 of the Law indicate that the crimes of an amnesty beneficiary "shall have no subsequent penal effects and shall be struck from the criminal record". Similarly, Law No. 6 does not appear to require fully disclosing the beneficiary's personal involvement in the crimes or contribution to reparations for victims.[274] In any event, there is no evidence that Mr Gaddafi satisfied any of these measures.

103. Moreover, although the Law requires a reasoned decision by the competent judicial authority (which is in any event lacking in Mr Gaddafi's case),[275] it does not regulate a transparent application procedure to determine an individual's eligibility for amnesty.[276] Nor

[268] Admissibility Decision, para. 58.
[269] *See* Belfast Guidelines, Guideline 13 ("Adherence to Domestic Law: […] For an amnesty to be valid under domestic law, at a minimum its enactment must adhere to all relevant domestic rules. Where these rules are not respected, national courts should have the independence and authority to declare the amnesty unconstitutional or require amendment of the legislation").
[270] *See* Belfast Guidelines, Guideline 7 (Eligible Offences: (c) noting that the exclusion of serious international crimes may serve to increase the legitimacy and legality of an amnesty); Ambos (2009), para. 21 ("*Limitation ratione materiae* with regard to international core crimes: given the general duty to prosecute ICC crimes [] it is, in principle, inadmissible to exempt these crimes from criminal prosecution and punishment").
[271] *See above*, fn. 202. *See also* Resolution 2005/81 (21 April 2005), preamble, para. 3.
[272] *See* Belfast Guidelines, Guideline 2 (Accountability: listing as key elements of an effective accountability process: (b) holding these individuals or institutions to account through a process in which they are to disclose and explain their actions (c) subjecting such individuals or institutions to a process through which sanctions can be imposed on individuals and reforms imposed on relevant institutions. Appropriate sanctions may include imprisonment, exclusion from public office, limitations of civil and political rights, requirements to apologise, and requirements to contribute to material or symbolic reparations for victims); Ambos (2009), para. 21 ("Some form of *accountability*": citing a public procedure where victims can confront the suspected perpetrators which results in the disclosure of the facts, cooperation).
[273] Law No. 6, article 2. No information has been provided with respect to legislation or regulations regulating the application of Law No. 6.
[274] *See* Belfast Guidelines, Guideline 11, pp. 17-18 (also noting that "the inclusion of such conditions may serve to increase an amnesty's legitimacy and legality and further compliance with a state's international obligations to investigate and provide remedies" and "[w]here individuals fail to comply full with applicable conditions, amnesty should be withheld"). *See also* Ambos (2009), para. 21; Ambos (2016) Vol. I, p. 42; and *Amici* Observations, para. 84.
[275] Law No. 6, article 6.
[276] Belfast Guidelines, guideline 16 ("Administering the Amnesty").

does article 8 of the Law regulate how the "competent prosecutorial authority [would] adjudicat[e] disputes arising from the application" of the Law nor the procedure to lodge such a dispute.[277] Even the Appellant confusingly argues that both the victims[278] and also "the Libyan Attorney's Office or any 'competent prosecutorial authority'"[279] can challenge the validity of the application of the Law to Mr Gaddafi. Moreover, although the Appellant claims that article 10 of the Law expressly preserves the right of victims to reparations where applicable, the provision simply states that "[t]he provisions of this Law shall be without prejudice to the right of an affected person to restitution and compensation". The Law does not regulate the process and it is unclear whether victims can claim compensation on the basis of the judgment of the Tripoli Court of Assize. In addition, the method of enactment of Law No. 6 is obscure and there is no indication that there was public consultation or referenda.[280]

104. *Fourth*, the Appellant does not explain why the amnesty applied to Mr Gaddafi is appropriate and necessary to achieve the alleged reconciliation and peace-building process, or any other legitimate goal.[281] The Appellant has not submitted any evidence to demonstrate the existence and implementation of a broader and genuine reconciliation and peace plan. Nor did the Appellant submit any evidence in his Admissibility Challenge before the Pre-Trial Chamber.[282]

105. Lastly, the Appellant's suggestion that the Majority omitted or selectively relied on certain case law is unfounded. In particular:

- The Appellant criticises the Majority because it did not cite the *obiter dictum* of the *Kwoyelo v. Uganda* Decision of 17 October 2018.[283] It did not have to. Law No. 6 does not meet the procedural and substantive conditions that the ACHPR suggested that conditional amnesties must satisfy: there is no indication that Law No. 6 was elaborated with the participation of the affected communities or that Mr Gaddafi

[277] Law No. 6, article 8.
[278] Admissibility Appeal, para. 106.
[279] Defence Consolidated Reply, para. 58; Admissibility Appeal, para. 62.
[280] Belfast Guidelines, Guideline 14 (Method of Enactment and Public Consultation: noting that public consultation in the design of an amnesty, public participation and national referenda may help to increase the legitimacy of an amnesty).
[281] *See* Ambos (2009), paras. 19-21 and Ambos (2016) Vol. 1, pp. 420-421 (providing guidance with respect to factors to consider and balance in assessing limitations to criminal prosecutions). *Compare* Admissibility Appeal, para. 106.
[282] Admissibility Challenge, paras. 88-90.
[283] *Contra* Admissibility Appeal, para. 95.

publicly acknowledged his violations.[284] The ACHPR also highlighted that States "should respect and honor their international and regional obligations."[285] Moreover, the ACHPR Study on Transitional Justice referred to by the Appellant confirms that the exceptional derogation of a norm reaffirms its existence. Indeed, although the Study refers to "qualified amnesties as an unavoidable compromise" to end violence, it also recognises that "rules of international law barring the use of amnesties have emerged".[286]

- The Majority did not overlook a critical point by not citing a particular extract of a Judgment of the ECtHR Grand Chamber. Like in *Marguš v. Croatia*, there is no indication that Mr Gaddafi participated in a reconciliation process or provided any form of compensation to the victims.[287] In addition, the Grand Chamber did not "expressly reserve[] the possibility that conditional amnesties remain lawful" and instead it confirmed "the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental rights".[288]

- The Appellant's reference to the IACtHR cases of *La Rochela v. Colombia* and *Barrios Altos y La Cantuta v. Perú* is also unhelpful.[289] The facts of those cases are inapposite to Mr Gaddafi's case: the former relates to Colombian legislation (to be applied at that time) regarding the reduction of sentences depending on the level of contribution to national peace, collaboration and other factors; the latter case related to a humanitarian pardon, which was eventually invalidated by the Peruvian Supreme Court following the parameters set out by the IACtHR.[290] Both decisions stand for the proposition that any reduced sentence must nevertheless be proportionate to the crime and the person's culpability, and not cause a disproportionate impact on the victims' right to access to justice.[291] Mr Gaddafi's punishment, even if the total period that he

[284] *Kwoyelo v. Uganda*, Decision, para. 293.
[285] *Kwoyelo v. Uganda*, Decision, para. 293.
[286] ACHPR Transitional Justice Study, para. 78, cited in Admissibility Appeal para. 96.
[287] Admissibility Appeal, para. 97 quoting *Marguš v. Croatia*, Grand Chamber Judgment, para. 139.
[288] *Contra* Admissibility Appeal, paras. 97, 98.
[289] Admissibility Appeal, para. 100.
[290] The IACtHR ordered Peru to review the presidential pardon granted to former president and dictator Alberto Fujimori, who had been convicted and imprisoned for his role in serious human rights violations. *See Barrios Altos y La Cantuta v. Perú*, Monitoring Decision, para. 64 (ordering Perú to conduct a judicial review of the pardon considering the criteria set out in paras. 45-57). The Peruvian Supreme Court invalidated the pardon.
[291] *Barrios Altos y La Cantuta v. Perú*, Monitoring Decision, para. 45. *See also* para. 49 (noting that penalties cannot be rendered illusory during the execution of the sentence) and para. 56 (concluding that a presidential pardon entails a greater affectation to the victims' rights of access to justice). *See also* *Rochela Massacre v.*

spent in alleged detention is computed, is manifestly disproportionate to his crimes and his culpability.[292]

106. In conclusion, the Majority correctly found that Law No. 6, if applied to Mr Gaddafi, is incompatible with international law (including internationally recognised human rights).[293] The application of Law No. 6 to Mr Gaddafi would block any judicial proceeding against him, including the imposition of punishment, and would deny victims of his crimes their rights, if applicable.[294] In addition, Law No. 6 generally applies to any suspect, accused and convicted person for crimes committed across Libya over a four year period, without distinguishing among their responsibility and level of participation. Moreover, Law No. 6 has been applied (as the Appellant suggests) to terminate proceedings with respect to international crimes.

107. Lastly, even if Law No. 6 is considered a 'commutation of sentence', the punishment received already by Mr Gaddafi would be manifestly inadequate. Even factoring in the total time that Mr Gaddafi spent in detention (largely outside the control of the Libyan authorities)[295] and during the trial *in absentia*,[296] this would be a disproportionate punishment for the crimes and Mr Gaddafi's culpability. Notably, Mr Gaddafi, allegedly one of those most responsible for the crimes against humanity attributed to him, exercised control over crucial parts of the State apparatus, including finances and logistics and had the powers of a *de facto* Prime Minister.[297] If the criteria in the IACtHR *Barrios Altos y La Cantuta v. Perú* Monitoring Decision were applied to Mr Gaddafi,[298] it is apparent that the sentencing objectives of retribution, rehabilitation, and deterrence would be far from met.

III.D.2.The Majority correctly applied article 21 of the Rome Statute and reasonably exercised its discretion

108. The Appellant further adds that the Majority misapplied article 21(3) of the Statute and had no authority to assess Law No. 6. This is not correct. As shown above, the Majority

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Colombia, Judgment, para. 196 (noting that the punishment must be proportional to the rights recognised by law, the person's culpability and gravity of the crime so that criminal justice does not become illusory).
[292] *See below*, para. 107.
[293] Admissibility Decision, para. 78.
[294] Admissibility Decision, para. 78.
[295] Prosecution Response, para. 40.
[296] Gaddafi attended four sessions via video-link (27 April 2014, 11 and 25 May 2014, and 22 June 2014). *See* Tripoli Court of Assize Judgment, pp. 18, 20-21, 22-23; Prosecution Response, para. 127.
[297] Article 58 Decision, para. 72.
[298] *Barrios Altos y La Cantuta v. Perú*, Monitoring Decision, para. 57 (significant portion of the prison sentence served, civil reparations paid, prisoner's conduct in the establishment of the truth, recognition of gravity of the crimes perpetrated, prisoner's rehabilitation, potential effects that the prisoner's early release would have on the society, victims and families). *See* Admissibility Appeal, para. 100.

correctly applied and interpreted article 20(3) of the Rome Statute consistently with internationally recognised human rights, as expressed in the consistent jurisprudence of different human rights bodies, pursuant to article 21(3).[299] Further, the Majority reasonably exercised its discretion when it decided to disregard Law No. 6 in its admissibility determination.

III.D.2.a. The Majority correctly applied article 21(3)

109. Contrary to the Appellant's assertion, the Majority did not "incorporat[e] the whole *corpus* of jurisprudence of regional human rights bodies into the applicable law of the Court",[300] nor did it consider only "one regional human rights apparatus".[301] Instead, it applied the complementarity provisions in accordance with internationally recognised human rights as expressed by the consistent jurisprudence of three regional human rights courts and tribunals and one UN monitoring body.[302]

110. The Majority was not only entitled to consider these human rights treaties and jurisprudence, but was required to do so.[303] The application of article 21(3) is not limited to defining the fair trial rights of an accused or their rights of privacy.[304] This Court has consistently interpreted and applied different provisions in accordance with article 21(3).[305] Complementarity provisions are no exception.[306] As the Appeals Chamber has explained: "[h]uman rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court."[307]

[299] Admissibility Decision, paras. 61, 77-78. *See also* fn. 42 and para. 45. *Contra* Admissiblity Appeal, paras. 75, 78-83, 94.
[300] *Contra* Admissibility Appeal, para. 83.
[301] *Contra* Admissiblity Appeal, para. 94.
[302] *Contra* Admissibility Appeal (second ground of appeal, issue (iv)), paras. 75, 78-83.
[303] *See e.g. Katanga* Regulation 55 AD, para. 86; *Lubanga* Jurisdiction AD, paras. 36-37.
[304] *Contra* Admissibility Appeal, para. 83.
[305] *See e.g. Lubanga* Jurisdiction AD, paras. 37, 39 (where the Appeals Chamber recognised the possibility of ordering a stay of proceedings in the event of breaches of fundamental rights of the suspect or the accused, although this is not contemplated by the Statute or the Rules); *Harun* Article 58 Decision, para. 28 (relying on human rights sources to interpret "reasonable grounds to believe" under article 58). *See also* DRC Victims Participation Decision, para. 81; *Bemba* Fourth Victims Participation Decision, paras. 16, 40; *Lubanga* Victims Participation Decision, paras. 35-37 (all relying on human rights sources to develop issues relating to victims participation and protection).
[306] *Al-Senussi* Admissibility AD, para. 229 ("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'").
[307] *Lubanga* Jurisdiction AD, para. 37.

III.D.2.b. The Majority correctly found Law No. 6 inoperative for the Court's admissibility determination

111. Finally, in finding that Law No. 6, if applied to Mr Gaddafi, was incompatible with international law, the Majority did not "strike down a provision of national law" nor did it exceed its powers in assessing the compatibility of Law No. 6 with international law.[308] As noted, the Majority found Law No. 6 incapable of rendering the judgment of the Tripoli Court of Assize of 28 July 2015 'final' within the terms of article 20(3). Put simply, and as Judge Perrin de Brichambaut noted in his Separate Concurring Opinion, Law No. 6 was incapable of preventing the Court from exercising its jurisdiction.[309] However, the Majority's finding is independent of (and unrelated to) the validity and application of Law No. 6 in Libya, which falls squarely within the discretion of the competent Libyan authorities.[310]

112. The Majority's approach is not surprising nor is it new. Notwithstanding their different legal frameworks, other international criminal courts and tribunals have followed a similar approach and found, in the exercise of their discretion, that domestic amnesties would not bar the exercise of jurisdiction. On 13 March 2004, the SCSL Appeals Chamber found, in determining whether the Lomé Agreement could deprive the SCSL of jurisdiction,[311] that:

> "Even if the opinion is held that Sierra Leone may not have breached customary law in granting an amnesty, *this court is entitled in the exercise of its discretionary power*, to attribute little or no weight to the grant of such amnesty which is contrary to the direction in which customary international law is developing and which is contrary to the obligations in certain treaties and conventions the purpose of which is to protect humanity".[312]

113. On 3 November 2011, the ECCC Trial Chamber similarly found that it was "entitled *in the exercise of its discretion to attribute no weight to a grant of such amnesty* which it

[308] *Contra* Admissibility Appeal, paras. 76-77, 79, 81, 84-85.
[309] Judge Perrin de Brichambaut Separate Concurring Opinion, para. 148 ("It follows that where there are proceedings before this Court following or current with a State's use of an amnesty law, these proceedings do not necessarily give rise to a violation of the *ne bis in idem* principle"). *Contra* Admissibility Appeal, para. 103 (iii) (stating that "the issue which was before the Pre-Trial Chamber was whether as a matter of Libyan law Dr Gaddafi's conviction had become final").
[310] *See e.g. Malawi African Association et al. v. Mauritania*, Decision, para. 83 (finding that an "amnesty law adopted with the aim of nullifying suits or other actions seeking redress that may be filed by the victims or their beneficiaries, while having force within Mauritanian national territory, cannot shield that country from fulfilling its international obligations under the Charter"); Belfast Guidelines, Guideline 18(c) ("even where such [international and hybrid criminal tribunals] declare an amnesty to be inoperative at the international level in an individual case, it may continue to have effect at the domestic level"). *Contra* Admissibility Appeal, para. 84.
[311] *Kallon* Amnesty AD, para. 64.
[312] *Kallon* Amnesty AD, para. 84 (emphasis added). *See also* para. 88. The Majority relied on this decision in Admissibility Decision, para. 74 quoting *Kallon* Amnesty AD, para. 67.

considers contrary to the direction in which customary international law is developing and to Cambodia's international obligations".[313]

114. The ECtHR has likewise found that a person benefiting from a domestic amnesty can be prosecuted by another State without infringing the *ne bis in idem* principle.[314] In the Third ILC Report of the Draft Articles of Crimes against Humanity, cited by the Appellant, the Special Rapporteur confirmed this approach, stating that: "it should be recalled that a national amnesty would not bar prosecution of a crime against humanity by a competent international criminal tribunal or a foreign State with concurrent prescriptive jurisdiction over that crime".[315] The Belfast Guidelines, on which the Appellant consistently relies, likewise indicate that: "[a]lthough amnesties bar criminal proceedings within the states that enacted the amnesty, they cannot bar international, hybrid or foreign courts from exercising jurisdiction. Such courts may decide under their own jurisdiction whether to recognise an amnesty".[316] Commentators have also recognised the Court's discretion to disregard certain amnesties in the exercise of its functions.[317]

115. In conclusion, the Majority correctly exercised its discretion and found that Law No. 6 was incapable of blocking the exercise of the Court's jurisdiction. Although the Majority, and Judge Perrin de Brichambaut, conducted this assessment when they analysed the finality of the Tripoli Court of Assize's judgment within the terms of article 20(3), they could also have done it within article 20(3)(a), which contains an exception to the principle *ne bis in idem*.

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[313] Ieng Sary Rule 89 Decision, para. 54 (emphasis added).
[314] *Ould Dah v France*, Admissibility Decision; *Marguš v. Croatia*, Judgment, para. 76; *Marguš v. Croatia*, Grand Chamber Judgment, para. 140.
[315] ILC Special Rapporteur Third Report Draft Articles Crimes Against Humanity, para. 297. *See also* para. 291 ("In considering the effect of an amnesty, a distinction might be drawn between the ability of an amnesty to affect a prosecution in the State where the amnesty was issued, and its ability to affect a prosecution before the courts of other States or a prosecution before an international or 'hybrid' court").
[316] *See* Belfast Guidelines, Guideline 18(a) at p. 23 and 62 ("These cases indicate that with respect to unconditional amnesties for international crimes, foreign courts do not consider themselves bound to recognise amnesties enacted elsewhere. The ICTY, the Special Court for Sierra Leone and the Extraordinary Chambers of the Courts of Cambodia have adopted similar positions. Guideline 18(a) concurs with this approach by stating that amnesties cannot bar international, hybrid or foreign courts from exercising jurisdiction").
[317] Ambos (2016) Vol. I, pp. 425-426 (noting that "given the judicial autonomy of international tribunals, they are in principle free whether to accept or reject amnesties as a procedural defence"); Cryer *et al.*, p. 572 ("A domestic amnesty does not bind the ICC nor its Prosecutor"); Stahn (2005), p. 700 (noting that "the Court may use its own autonomous criteria and standards to assess whether an amnesty or other alternative forms of justice are compatible with the Statute, taking into account the particular context of the Statute, international treaty law and general principles of law derived from national legal systems (Article 21)" and "the Court may therefore declare national amnesties or pardons or resort to truth and reconciliation mechanisms irrelevant for decision-making by the ICC"). *See also* Robinson, p. 490, fn. 35 (noting that even if a State was not under a duty to prosecute particular crimes, the ICC would not necessarily defer to an amnesty and would be mandated under its Statute to investigate and prosecute those crimes unless of the Statute's conditions for non-action are met).

Had they done so, and in light of the above factors,[318] they would in any event have concluded that applying Law No. 6 to Mr Gaddafi would be tantamount to proceedings undertaken for the purpose of shielding him from criminal responsibility for crimes within the jurisdiction of the Court.[319] As a consequence, the first exception to the principle of *ne bis in idem* in article 20(3)(a) would have applied and Mr Gaddafi's case would have remained admissible before the Court.

III.D.3. The Majority's findings were *obiter dicta*

116. Lastly, although the Majority's findings on Law No. 6 were correct, they were issued *obiter dicta*. If the Appeals Chamber agrees with the Pre-Trial Chamber that the judgment of the Tripoli Court of Assize was not final and that Law No. 6 did not apply to Mr Gaddafi, it need not address the Appellant's arguments in issues (iv) and (v) of the second ground of appeal.

117. The Majority did not find the case against Mr Gaddafi inadmissible because Law No. 6 was not compatible with international law.[320] Its finding was *obiter*. The Majority had already found the case admissible since there was not a final domestic decision[321] and Law No. 6 did not 'drop' any further proceedings or 'suspend' his sentence since it was inapplicable to Mr Gaddafi.[322] Although the Majority need not have gone further in its reasoning, it decided to also rule on the effect of Law No. 6 in the Rome Statute "assuming" its applicability to Mr Gaddafi:

> "[…] applying the same rationale to Law No. 6 of 2015 *assuming its applicability to Mr Gaddafi* leads to the conclusion that it is equally incompatible with international law, including internationally recognized human rights".[323]

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[318] *See above*, paras. 98-104. *See* Ambos (2016) Vol. III, pp. 309-310 (citing, *inter alia*, as *indicia* of unwillingness "the decision to grant blanket amnesties and immunities, or a considerable mitigation of punishment"). *See also Barrios Altos y La Cantuta v. Perú*, Monitoring Decision, paras. 30-31 (noting that the obligation to investigate, prosecute and punish and the victims' right of access to justice also affects the execution of the sentence, that undue benefits could lead to a form of impunity and that the principle of proportionality still applies during the execution of the sentence).

[319] *See Al-Senussi* Admissibility AD, para. 224, fn. 451-452 (noting early discussions in PrepCom on whether the Court should intervene "where an operating national judicial system was being used as a shield or to safeguard against sham trials" or against "the risk of perpetrators of serious crimes being protected by national judiciaries or authorities") (internal quotations omitted). Article 17(2)(a) and article 20(3)(i) reflect this. *See also* Prosecution Response, paras. 164-174.

[320] *Contra* Admissibility Appeal, paras. 36, 76. The Appellant inaccurately submits that the Majority found that Law No. 6 could not apply to Gaddafi "on two grounds", namely, its inapplicability to the crimes for which Gaddafi was charged and, "as a second reason", its incompatibility with international law.

[321] Admissibility Decision, paras. 48-53.

[322] Admissibility Decision, paras. 58-59.

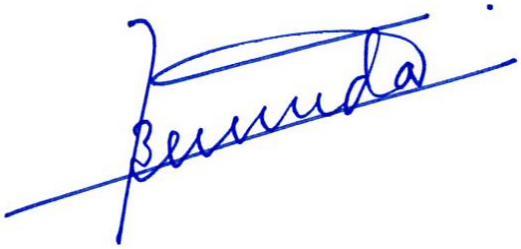
[323] Admissibility Decision, para. 78 (emphasis added).

118. Judge Perrin de Brichambaut further explained in his Separate Concurring Opinion that the Majority ruled on these matters "although the present case does not strictly require it" and "in order to contribute to the clarification of legal issues at stake".[324] Thus, if the Appeals Chamber upholds the Majority's findings on the basis of the lack of finality of the 28 July 2015 judgment and the inapplicability of Law No. 6 to Mr Gaddafi, the Appeals Chamber need not address the remaining arguments in the Appellant's second ground of appeal. However, if it does, and as demonstrated above, the Appellant's arguments with respect to the Majority's assessment of Law No. 6 should be rejected[325] and the Decision confirmed.

119. The Appellant's second ground of appeal should be dismissed.

IV. CONCLUSION AND RELIEF

120. The Prosecution respectfully requests the Appeals Chamber to dismiss the Appellant's Admissibility Appeal and to find that the case against Mr Gaddafi remains admissible before the Court.



Fatou Bensouda, Prosecutor

Dated this 11th day of June 2019

At The Hague, The Netherlands[326]

[324] Judge Perrin de Brichambaut Separate Concurring Opinion, para. 102.
[325] Admissibility Appeal, paras. 75-109.
[326] The Prosecution hereby makes the required certification: *Al-Senussi* Admissibility AD, para. 32.