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Date: **20 May 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 Balugi Bosa

SITUATION IN LIBYA

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

Public
with Confidential Annex 1 and Public Annex 2

Defence Appeal Brief in support of its appeal against Pre-Trial Chamber I's "Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute'"

Source: **Defence for Dr. Saif Al-Islam Gadafi**

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I. Introduction

1. The defence for Dr. Saif Al-Islam Gadafi ("Defence") hereby files its appeal brief in its appeal against Pre-Trial Chamber I's "Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute'", issued by majority (Presiding Judge Kovács and Judge Alapini-Gansou) on 5 April 2019.[1] The "Separate concurring opinion by Judge Marc Perrin de Brichambaut" was issued on 8 May 2019.[2]

2. The Defence notice of appeal[3] was registered in the record of the case on 11 April 2019. On 18 April 2019, the Appeals Chamber granted a Defence application[4] for an extension of time for the submission of the appeal brief in connection with the notification date of the Separate Opinion.[5]

3. The Defence files this appeal brief pursuant to articles 19(6) and 82(1)(a) of the Rome Statute ("Statute"), rules 154, 156 and 158 of the Rules of Procedure and Evidence ("Rules"), and Regulation 64 of the Regulations of the Court.

4. In the Impugned Decision, the majority of the Pre-Trial Chamber ("Majority") agreed[6] with the Defence that the ICC case against Dr. Gadafi should be declared inadmissible pursuant to the Defence's admissibility challenge under Articles 17(1)(c), 19 and 20(3) of the Statute[7] if the following four elements are met:

   i. that Dr. Gadafi has already been tried by the Libyan national courts […];

[1] ICC-01/11-01/11-662 ("Impugned Decision").
[2] ICC-01/11-01/11-662-Anx ("Separate Opinion").
[3] Defence Appeal against Pre-Trial Chamber I's "Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute'" and Application for extension of time to file the Appeal Brief, 10 April 2019, ICC-01/11-01/11-663 ("Notice of Appeal and Time Extension Application").
[4] *Ibid*.
[5] Decision on Mr Saif Al-Islam Gaddafi's 'Application for extension of time to file the Appeal Brief', 18 April 2019, ICC-01/11-01/11-668-Corr OA 8. The Appeals Chamber ordered that appeal brief be filed by 16h00 on 9 May 2019 if the minority opinion (as it was then referred to) is notified by 30 April 2019, and by 16h00 on the tenth day after the notification of the minority opinion if it is notified after 30 April 2019.
[6] Impugned Decision, paras. 26, 31.
[7] Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute, ICC-01/11-01/11-640 ("Admissibility Challenge").

ii. that the national trial was with respect "to the same conduct" as that alleged in this case […];

iii. national proceedings were not for the purpose of shielding within the meaning of Article 20(3)(a) […]; and

iv. national proceedings were not otherwise lacking in sufficient independence or impartiality, nor did they involve egregious due process violations, to the extent that the proceedings were incapable of providing genuine justice within the meaning of Article 20(3)(b) […].[8]

5. In respect of the first element, the Majority held that based on the material available "it is clear that Mr Gaddafi has been tried and convicted on 28 July 2015 by the Tripoli Criminal Court"[9] ("Libyan Judgment")[10], and acknowledged that Dr. Gadafi had been sentenced to death pursuant to this conviction.[11] However, the Chamber determined that the Libyan Judgment "was rendered *in absentia*" with respect to Dr. Gadafi,[12] and that Law No. 6 of 2015 on General Amnesty ("Law No. 6 of 2015")[13] does not, contrary to the Defence's submission, render Dr. Gadafi's conviction final as it: (i) "does not apply to Mr Gaddafi […] due to the nature of the crimes he is charged with domestically"; and (ii) in any event "should not apply […] when [he] is the subject of a warrant of arrest for conduct constituting crimes that fall within the jurisdiction of the Court".[14]

6. Further to these findings, and in view of the Majority having determined that "a judgment which acquired a *res judicata* effect"[15] is required for the *ne bis in idem* principle to attach for purposes of an admissibility challenge, the Chamber held

[8] Impugned Decision, para. 26, citing Admissibility Challenge, para. 34.
[9] Impugned Decision, para. 48.
[10] Annex A to the Admissibility Challenge contains a copy of the Arabic original of the Libyan Judgment. Annex B to the Admissibility Challenge contains the Prosecution's draft translation of the Libyan Judgment.
[11] Impugned Decision, para. 79.
[12] *Ibid*.
[13] The Official Court Translation of Law No. 6 of 2015 is registered as ICC-01/11-01/11-650-AnxIII-tENG.
[14] Impugned Decision, para. 56.
[15] Impugned Decision, para. 36.

that the Judgment did not constitute a "final decision on the merits" and was accordingly "[in]sufficient for satisfying articles 17(1)(c) and 20(3) of the Statute".[16] On this basis the Majority rejected the Admissibility Challenge, determined Dr. Gadafi's case was admissible before the Court, and held that "there is no need to delve into the remaining elements of article 20(3)".[17]

7. The Defence submits that the Majority erred in reaching its conclusion that Dr. Gadafi's case is not inadmissible before the ICC pursuant to articles 17(1)(c) and 20(3) of the Statute on the basis of the following two grounds of appeal:

- **Ground 1**: The Majority of the Pre-Trial Chamber erred in law in holding that articles 17(1)(c) and 20(3) of the Statute may only be satisfied where a judgment on the merits of a case has acquired *res judicata* effect (Impugned Decision, paragraphs 36-47);

- **Ground 2**: The Majority of the Pre-Trial Chamber erred in law and fact, and procedurally, by failing to determine that Law No. 6 of 2015 was applied to Dr. Gadafi and that such application rendered his conviction final (paragraphs 19, 56-78).

8. The errors identified in the above stated grounds of appeal, independently and cumulatively, materially affect the Impugned Decision in that, but for these errors, the Majority would have found that element (i) of the four-step *ne bis in idem* admissibility evaluation was satisfied.

9. In the Separate Opinion, Judge Perrin de Brichambaut concurred with the Majority's operative determinations that the Admissibility Challenge should be rejected and that Dr. Gadafi's case remains admissible before the Court.[18] Judge Perrin de Brichambaut however expressed "serious reservations about some of the legal underpinnings of the decision by the majority and about the way it is

[16] Impugned Decision, para. 79.
[17] *Ibid.*
[18] Separate Opinion, para. 1.

presented".[19] The Separate Opinion is accordingly drafted as an "alternate decision".[20] It is, of course, the Impugned Decision, not the Separate Opinion, that is before the Appeals Chamber. The Separate Opinion does not cure the Impugned Decision's failure to provide a reasoned decision (see Ground 2(i) below). References to the Separate Opinion in this appeal brief are therefore limited to circumstances where the Separate Opinion highlights the Impugned Decision's deficiencies in reasoning or where the issues in question are ones the Appeals Chamber could proceed to assess *de novo* and with respect to which it might then take cognizance of the Separate Opinion's 'alternate' position.

10. With respect to Ground 2, the Defence also requests the Appeals Chamber to admit into the record and consider on the merits the contents of 4 additional documents dated February 2019, which concern the issuance of identification records for Dr. Gadafi by the Libyan Civil Registry Authority in Tripoli.[21] The discrete nature of the documents, their high level of relevance to the Defence's submissions under Ground 2, and the fact that they fall within the category of submissions and evidence wholly discounted or ignored by the Majority (as set out in Ground 2) weigh heavily in favour of their admission and consideration.

11. On the basis of the above identified errors the Defence respectfully requests the Appeals Chamber: (i) reverse, in relevant part,[22] the Impugned Decision; (ii) determine that the four elements of the *ne bis in idem* evaluation[23] are satisfied further to the submissions and evidence contained in the Admissibility

[19] *Ibid*.
[20] *Id.* at para. 3.
[21] See Confidential **Annex 1**. These documents are classified as confidential as they contain personally identifying information related to Dr. Gadafi and members of his family.
[22] As submitted in the Notice of Appeal and Time Extension Application, the Defence does not appeal part (a) of the Impugned Decision's disposition holding that "Mr Gaddafi has a *locus standi* to lodge the Admissibility Challenge". The Separate Opinion concurs with this disposition of the Majority (Separate Opinion, para. 10).
[23] See paragraph 4 *supra*.

Challenge, the Defence's consolidated reply and response,[24] and this appeal brief; and (iii) hold that Dr. Gadafi's case before the ICC is inadmissible. In the alternative, if the Appeals Chamber declines to undertake the full four-step *ne bis in idem* evaluation, the Defence requests the Appeals Chamber reverse the Impugned Decision and remand this matter to the Pre-Trial Chamber to further consider and issue a new decision on the Admissibility Challenge in line with the Appeals Chamber's holdings and directions on the appeal *sub judice*.

II. Standard of review on appeal

12. Article 82(1)(a) of the Statute provides in relevant part that a decision with respect to admissibility may be appealed by either party "in accordance with the Rules of Procedure and Evidence".

13. The Appeals Chamber has clarified "that appeals under article 82 can include the grounds listed under article 81 (1) (a), namely procedural errors, errors of fact and errors of law".[25]

14. With respect to errors of law, the Appeals Chamber has held that it

> *[…] will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.*[26]

[24] Corrigendum of Defence Consolidated Reply to Prosecution "Response to 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3)of the Rome Statute" and Response to "Observations by Lawyers for Justice in Libya and the Redress Trust pursuant to Rule 103 of the Rules of Procedure and Evidence", 9 November 2018, ICC-01/11-01/11-660-Conf-Corr ("Consolidated Reply and Response"). A second redacted version was filed on 20 November 2018 (ICC-01/11-01/11-660-Corr-Red2).
[25] Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo", 27 May 2015, ICC-02/11-01/12-75-Red ("*Simone Gbagbo* Admissibility Judgment"), para. 37.
[26] Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi", ICC-01/11-01/11-547-Conf OA 4, 21 May 2014 ("*Gaddafi* Admissibility Judgment"), para. 49 (internal citation omitted). See also *Simone Gbagbo* Admissibility Judgment, para. 40 (citing to *Gaddafi* Admissibility Judgment), and Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09-397 OA 2 ("*Bashir* Judgment"), para. 33.

15. As regards factual errors in the context of an appeal of a decision with respect to admissibility, the Appeals Chamber has consistently

> *held that it will not interfere with the factual findings of a first-instance Chamber unless it is shown that the Pre-Trial or Trial Chamber "committed a clear error, namely: misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts". Regarding the "misappreciation of facts", the Appeals Chamber has also stated that it "will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the first-instance Chamber's conclusion could have reasonably been reached from the evidence before it".*[27]

16. In the *Simone Ggbagbo* Admissibility Judgment, the Appeals Chamber additionally held that "a standard of reasonableness in assessing an alleged error of fact in appeals pursuant to article 82 of the Statute [applies], thereby according a margin of deference to the Trial Chamber's findings".[28]

17. The Appeals Chamber has further held that "[w]here the appellant, while alleging an error of law, challenges the factual finding based on that law, the Appeals Chamber will consider such an alleged error as an error of fact".[29]

III. Submissions in support of Dr. Gadafi's Appeal of the Impugned Decision

Ground 1

The Majority erred in law in holding that articles 17(1)(c) and 20(3) of the Statute may only be satisfied where a judgment on the merits of a case has acquired *res judicata* effect (Impugned Decision, paragraphs 36-47)

[27] See *Simone Gbagbo* Admissibility Judgment, para. 38 (internal citations omitted). See also Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi", 24 July 2014, ICC-01/11-01/11-565 OA 6 ("*Al-Senussi* Admissibility Judgment"), para. 241 (internal citation omitted); *Gaddafi* Admissibility Judgment, para. 93 (internal citations omitted); *Bashir* Judgment, para. 35.

[28] *Simone Gbagbo* Admissibility Judgment, para. 39 (citing Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, ICC-01/04-01/06 A 5, paras. 22, 24, 27). See also *Bashir* Judgment, para. 35.

[29] *Simone Gbagbo* Admissibility Judgment, para. 46.

18. The Majority of the Pre-Trial Chamber erred in law in holding that articles 17(1)(c) and 20(3) of the Statute may only be satisfied where a judgment on the merits of a case has acquired *res judicata* effect.[30] The Defence requests the Appeals Chamber, for the reasons set out below, to reverse this error of law and determine that under the complementarity framework of the Rome Statute the language "tried by another court" in Article 20(3) of the Statute is satisfied where domestic trial proceedings have concluded with a verdict on the merits.[31]

19. Had the Majority correctly determined this legal issue, and had the Majority also found, as articulated under Ground 2 below, that the application of Law No. 6 of 2015 to the *in absentia*[32] conviction issued against Dr. Gadafi rendered the Libyan Judgment final (subject only to hypothetical re-opening),[33] any possible remaining doubt as to the 'absolute' finality of Dr. Gadafi's conviction is immaterial, and element (i) of the *ne bis in idem* evaluation[34] is satisfied. Put another way, had the Majority correctly determined this legal issue as well as held that Law No. 6 of 2015 was applied to Dr. Gadafi, then the Majority's determination that "it is clear [] Mr Gaddafi has been tried and convicted on 28 July 2015 by the Tripoli Criminal Court"[35] and acknowledgement he had been sentenced to death[36] would have unquestionably met the Article 20(3) requirement of Dr. Gadafi having been "tried by another court".

20. The Majority erred in interpreting articles 17(1)(c) and 20(3) by applying the statutory interpretation principle set out in Article 21(3) in a manner that

[30] Impugned Decision, para. 36.
[31] Admissibility Challenge, para. 44.
[32] The Defence does not agree with the Majority's determination that the Libyan Judgment can properly be considered as a verdict issued *in absentia* against Dr. Gadafi as opposed to a judgment *in presentia* (Impugned Decision, paras. 49-53). The Defence does not, however, challenge this finding for the purposes of this appeal.
[33] See Admissibility Challenge, para. 48.
[34] See paragraph 4 *supra*.
[35] Impugned Decision, para. 48.
[36] Impugned Decision, para. 79.

improperly overrode or minimized the principles of treaty interpretation codified in the Vienna Convention on the Law of Treaties ("VCLT").[37]

21. As submitted in the Admissibility Challenge, pursuant to Article 31(1) of the VCLT, the Statute must be construed, first, by reference to the ordinary meaning of the terms used in their context and in light of the object and purpose of the Statute.[38] The ordinary meaning of "has been tried by another court", in the context of the Rome Statute's complementarity framework, must include[39] the instigation by domestic authorities of trial proceedings in relation to the relevant person that have concluded with a verdict acquitting or convicting that person.

22. The Defence agrees with the Majority[40] that Article 21(3) mandates the Court – where statutorily permissible[41] – to apply and interpret the Court's core legal texts in a manner that is "consistent with internationally recognized human rights". The Majority is incorrect, however, in reading the requirement of 'consistency' to require perfect "harmony" or 'mirroring' with international human rights,[42] particularly where the resulting interpretation of the Statute is not in accord with applicable VCLT interpretation principles.

23. Even accepting the Majority's finding that under internationally recognized human rights standards a state is obliged to respect the *ne bis in idem* principle

[37] 1155 United Nations Treaty Series 18232. See, *e.g.*, Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168 ("Extraordinary Review Judgment"), para. 33 ("*The interpretation of treaties, and the Rome Statute is no exception, is governed by the Vienna Convention on the Law of Treaties (23 May 1969), specifically the provisions of articles 31 and 32.*"). See also Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa to the *Bashir* Judgment, 6 May 2019, ICC-02/05-01/09-397-Anx1 ("*Bashir* Judgment Joint Concurring Opinion"), para. 391.
[38] Admissibility Challenge, para. 43.
[39] The Appeals Chamber need not consider for the purpose of this appeal whether Article 20(3) may also be satisfied by other domestic judicial action, such as a plea agreement accepted by a domestic court prior to the commencement or conclusion of trial proceedings.
[40] Impugned Decision, paras. 31, 45.
[41] See further the Defence's submissions at paragraph 81 *infra*, under Ground 2, on the meaning and proper application of Article 21(3) of the Statute.
[42] Impugned Decision, para. 47.

only where a "final" judgment of acquittal or conviction[43] acquiring a *res judicata* status[44] has been rendered, this does not mean that the Rome Statute's application of the *ne bis in idem* principle upon the issuance of a domestic judgment on the merits would be inconsistent (or unharmonious) with international human rights principles. It is not 'inconsistent' with international human rights principles for the Court to apply an internationally recognized human right to individuals at an earlier phase of proceedings than might be required by international human rights instruments.[45]

24. The "effective interpretation"[46] of Article 20(3) sought by the Majority is reached, consistent with internationally recognized human rights, through the VCLT interpretation process set out in the Admissibility Challenge.[47] The "core human rights instruments" relied upon by the Majority[48] address the application of the *ne bis in idem* principle in the context of a single domestic criminal justice system. The international jurisprudence and explanatory documentation relied upon by the Majority confirm this understanding.[49] These instruments do not address the application of horizontal *ne bis in idem* (application across two or more national systems) or the vertical application of the principle at issue here (between a domestic jurisdiction and an international criminal tribunal). The meaning and

[43] *Id.* at paras. 45-46.
[44] *Id.* at para. 36.
[45] For example, under Article 55(1)(a) of the Statute the right not to be compelled to incriminate oneself or confess guilt applies to all 'persons' at the investigation phase of ICC proceedings, whereas pursuant to Article 14(3) of the International Covenant on Civil and Political Rights ("ICCPR"), such protection attaches only to persons charged with a crime. The Rome Statute accordingly extends this universal human right to an earlier stage of the criminal process and to a wider category of persons than required under the ICCPR.
[46] Impugned Decision, para. 47.
[47] Admissibility Challenge, para. 46.
[48] Impugned Decision, para. 45 and accompanying footnotes (citing to the ICCPR, Protocol 7 of the European Convention on Human Rights ("ECHR Protocol No. 7"), and the American Convention on Human Rights, as well as certain jurisprudence interpreting and applying these instruments).
[49] The Explanatory Report to Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms ("Explanatory Report") states that Article 4 (Right not to be tried or punished twice) of ECHR Protocol No. 7 is limited "to the national level" (Explanatory Report, para. 27). The European Court of Human Rights cases of *A and B v. Norway* (Application no. 24130/11 & 29758/11, Judgment of 15 November 2016) and *Sergey Zolotukhin v. Russia* (Application no. 14939/03, Judgment of 10 February 2009) relied upon by the Majority, are limited to the application of the *ne bis in idem* principle within the Norwegian and Russian legal systems, respectively. The Inter-American Court of Human Rights case of *Garcia v. Peru* (Case 11.006 (Peru), IACHR Annual Report 1995, No. 1/95) cited by the Majority concerns a single national jurisdiction.

application of the *ne bis in idem* principle for the purposes of Article 20(3) is accordingly less susceptible to direct transposition of international human rights standards in comparison to principles such as the presumption of innocence or right to be tried without undue delay, which are meant to apply *within* a particular judicial system and not between / amongst different systems of justice.

25. In light of the relevant language in these instruments referring to a 'final' acquittal or conviction or "nonappealable judgment", it is surprising that the drafters of the Statute would have failed to include comparable language in articles 17(1)(c) and / or Article 20(3) unless, as the Defence submits, the language "tried by another court" simply means, at the very least, that the domestic trial proceedings in question have concluded with a verdict on the merits. In this regard, the Defence notes the Majority's agreement with the OPCV's position that what is required is a judgment which has acquired *res judicata* status.[50] While it does not appear the Impugned Decision specifically relied upon the record from the Rome Statute Preparatory Committee referenced in the OPCV Observations,[51] as this reference is included within the paragraphs cited by the Majority, the Defence address this citation for sake of completeness.

26. The excerpt in question states: "*As regards Article 42 [of the 1994 International Law Commission Draft Statute], the remark was made that, the principle of non bis in idem was closely linked with the issue of complementarity. This paragraph it was noted should apply only to res judicata and not to proceedings discontinued for technical reasons. In addition, non bis in idem should not be construed in such a way as to permit criminals to escape any procedure*."[52] As noted by Al Zeidy (who is cited in support in the

[50] Impugned Decision, para. 46, citing to Observations on behalf of victims on the "Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute", 28 September 2018, ICC-01/11-01/11-652 ("OPCV Observations"), paras. 61-70.
[51] OPCV Observations, para. 64, citing to Summary of the Proceedings of the Preparatory Committee on the Establishment of an International Criminal Court during the Period 25 March-12 April 1996, UN doc. A/AC.249/1, 7 May 1996 ("Summary of the Preparatory Committee Proceedings"), para. 124.
[52] Summary of the Preparatory Committee Proceedings, para. 124 (underline in original).

OPCV Observations),[53] reliance on this excerpt of the Preparatory Committee proceedings to interpret Article 20(3) "*presumes that the drafters had the same intent, evidenced in earlier proposals [citing to, inter alia, the excerpt in question] about the entire[ty of] article [20], notwithstanding the fact that the finality in paragraphs 1 and 2 [of Article 20] refers to the ICC's outcomes*".[54]

27. As discussed in the Triffterer and Ambos commentary on the Statute, it is unclear on the basis of the wording and drafting history of the Statute whether or not the *ne bis in idem* principle attaches pursuant to Article 20(1) and (2) once an ICC Trial Chamber judgment has been issued. It is suggested, however, that applying the principle at that stage "is more favourable to the individual, in particular in regard to its application under" Article 20(2), and further noted that appeal and revision proceedings before the Court would still be permissible under Article 20 "due to their exceptional character".[55] No indication is given that adopting such an interpretation of Article 20(1) and (2) of the Statute would be inconsistent or unharmonious with international human rights principles. Further, the reference to *res judicata* in the excerpt is made in connection with "proceedings discontinued for technical reasons", not the specific issue *sub judice* of a judgment on the merits following a completed trial. This limited and inconclusive reference to the *res judicata* principle in the Preparatory Committee proceedings underlines the validity of a systematic interpretation of articles 17(1)(c) and 20(3) of the Statute pursuant to VCLT interpretation principles.

28. Under the *sui generis* complementarity framework of the Statute – which is not the system envisioned or addressed by the human rights instruments relied on by the Majority – Article 17(1) is intended to cover the full scope of the national

[53] OPCV Observations, fn. 173.
[54] M.M. El Zeidy, "The Principle of Complementarity: A New Machinery to Implement International Criminal Law", 23 MJIL 869 (2002), p. 939 (underline added).
[55] I. Tallgren and A.R. Coracini, "Article 20: *Ne bis in idem*", in O. Triffterer and K. Ambos, eds., Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article (2016), p. 914, paras. 23-24. See also *id.* at p. 918, para. 29.

criminal process with respect to alleged Rome Statute crimes. The first three subsections of Article 17(1) each address a distinct phase of domestic proceedings. Article 17(1)(a) addresses domestic criminal processes prior to the conclusion of trial proceedings ('the case is being investigated or prosecuted'). Article 17(1)(b) addresses a State's decision not to proceed with the prosecution of an individual following an investigation conducted in accordance with Article 17(1)(a). Article 17(1)(c) addresses domestic proceedings *after* a decision on the merits of the case has been issued. These provisions do not overlap. Article 17(1)(a) cannot properly be said to apply after a domestic decision on the merits has been issued as the case is no longer 'being prosecuted'. Article 17(1)(c) is accordingly the only subsection reasonably capable of application after a domestic judgment on the merits has been rendered.

29. Interpreting articles 17(1) and 20(3) in this systematic manner protects individuals, in accordance with the *ne bis in idem* principle, from being prosecuted by the Court for the same conduct in regards to which a domestic trial has taken place and a judgment on the merits issued. This protection shall not apply, however, if the Court determines that the exceptions under Article 20(3)(a) or (b) apply. In the event the Court decides that a case is inadmissible pursuant to articles 17(1)(c) and 20(3), and subsequent domestic appeal proceedings raise questions as to whether the domestic trial, the trial judgment on the merits or the appellate process were for the purpose of shielding the person concerned or indicate an inconsistency with an intent to bring the person to justice, the Statute provides a mechanism to address such a circumstance.

30. As confirmed by the Appeals chamber,[56] Article 19(10) empowers the Prosecutor to submit a request for review of the Court's decision declaring a case inadmissible if the Prosecutor "is fully satisfied that new facts have arisen which

[56] *Al-Senussi* Admissibility Judgment, para. 61.

negate the basis on which the case had previously been found inadmissible". The Prosecutor has monitored the status of the domestic Libyan case and judgment against Dr. Gadafi's former co-defendant, Abdallah Al-Senussi, pursuant to Article 19(10).[57] No *lacunae* are present in the systematic, effective,[58] internationally human rights-compliant, and, the Defence submits, correct interpretation of articles 17(1) and 20(3) of the Statute it has proffered.[59]

31. In line with its above submissions, and *contra* the Majority's finding,[60] the Defence maintains[61] that Trial Chamber III's application of Article 17(1)(c) in the *Bemba* case[62] was not a considered and conclusive examination of whether *res judicata* was a necessary element to satisfy the *ne bis in idem* principle under Article 20(3) of the Statute. Instead, as is clear from the text of the Trial Chamber's decision, the focus of examination was on whether a decision on the merits of the case had been issued, and further, whether a "'trial' for the purposes of Article 17(1)(c) of the Statute" had even taken place.[63] The Defence similarly reiterates its submission that Pre-Trial Chamber II's 14 September 2018 decision in the *Simone Gbagbo* case[64] was simply an effort to obtain all pertinent

[57] See, *e.g.*, Office of the Prosecutor, Twelfth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011), 10 November 2016, para. 9 ("*At this stage, the Office remains of the view that no new facts have arisen which negate the basis on which Pre-Trial Chamber I found Mr Al-Senussi's case inadmissible before the ICC. […] In accordance with article 19(10) of the Rome Statute, the Office continues to collect information and review its assessment as and when new information becomes known.*"); Office of the Prosecutor, Seventeenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011), 8 May 2019, para. 20 ("*[T]he Office continues to monitor for any developments in Mr Al-Senussi's domestic case, which is still pending before the Supreme Court of Libya. There have been no significant developments during the reporting period.*").
[58] See *Bashir* Judgment, para. 124 (indicating that the Statute must not be read in a manner that is contrary to the principle of effectiveness).
[59] *Contra* the apparent suggestion of the OPCV (OPCV Observations, para. 78).
[60] Impugned Decision, paras. 37-38.
[61] Admissibility Challenge, para. 45.
[62] Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010, ICC-01/05-01/08-802 ("*Bemba* Admissibility Decision"), para. 248.
[63] *Ibid*.
[64] Order to the Registrar to Request Information from the Competent National Authorities of the Republic of Cote D'Ivoire, ICC-02/11-01/12-84.

domestic judicial decisions without, at that stage, making any considered determination on the parameters and meaning of articles 17(1)(c) and 20(3).[65]

32. The Majority's reliance on the jurisprudence of the *ad hoc* tribunals[66] to support its interpretation of Article 20(3) is likewise not determinative given its observation that said jurisprudence "is inspired by and follows internationally recognized human rights norms".[67] As submitted above, an interpretation of the Statute that attaches internationally recognized human rights protections at an earlier than required phase of the criminal process is not 'inconsistent' with internationally recognized human rights. Further, the *ad hoc* tribunals exercised (ICTY and ICTR) or continue to exercise (IRMCT) primary jurisdiction over the substantive crimes within their mandate. As submitted above, in the context of the ICC, the *ne bis in idem* principle must be interpreted in light of the *sui generis* complementarity framework that underpins the Rome Statute.[68]

33. Moreover, the particular judgments of the *ad hoc* tribunals relied upon by the Majority, just like the *Bemba* Admissibility Decision, do not confront the situation *sub judice*, namely, the issuance of a reasoned judgment on the merits of a case acquitting an individual or convicting and sentencing an individual. In *Semanza*,[69] the ICTR Appeals Chamber determined that the *ne bis in indem* principle did not apply as the domestic proceedings in question "concerned only admissibility of [][an] extradition request […] and was in no wise a trial for acts constituting serious violations of international humanitarian law".[70] In *Nzabirinda*,[71] the ICTR Trial Chamber held that the *ne bis in idem* principle did not attach in circumstances where the prosecutor had withdrawn certain charges

[65] Consolidated Reply and Response, paras. 6, 34-37.
[66] Impugned Decision, paras. 39-44.
[67] *Id.* at para. 43.
[68] Rome Statute, Preamble, paragraph 10 and Article 1.
[69] Relied on by the Majority at paragraphs 40 and 43 of the Impugned Decision.
[70] ICTR, *Prosecutor v. Semanza*, Decision, 31 May 2000, ICTR-97-20-A, paras 75-77.
[71] Impugned Decision, para. 41.

prior to the commencement of a trial.[72] Similarly, in *Orić*,[73] the IRMCT Appeals Chamber determined that the *ne bis in idem* principle contained in Article 7(1) of the IRMCT Statute does not apply in "circumstances in which certain acts may have been investigated but upon which the person concerned was not tried".[74]

34. While the Majority is correct that these decisions refer to 'a final judgment', the critical question was whether a trial on the merits had taken place.[75] As submitted above, in the context of the Statute's complementarity framework, once a trial on the merits has concluded in a judgment of acquittal or conviction, the *ne bis in diem* principle applies pursuant to articles 17(1)(c) and 20(3), even if the domestic judgment has not yet obtained (or fully obtained) *res judicata* effect. The monitoring mechanism established under Article 19(10) provides for the Court's review of a decision declaring a case inadmissible on the basis of the *ne bis in idem* principle in the event a subsequent domestic appellate process appears to have negated the basis for the Court's decision.

35. For the reasons set out above, the Defence respectfully requests the Appeals Chamber to: (a) reverse the Majority's error of law and determine that articles 17(1)(c) and 20(3) of the Statute may be satisfied once trial proceedings in a domestic case have concluded with a verdict on the merits; and (b) in conjunction with the Defence's submissions under Ground 2, determine that element (i) of the four-step *ne bis in idem* evaluation[76] has been satisfied.

[72] ICTR, *Prosecutor v. Joseph Nzabirinda*, Sentencing Judgement, 23 February 2007, ICTR-2001-77-T, paras. 45-46.
[73] Relied on by the Majority at paragraph 42 of the Impugned Decision.
[74] IRMCT, *Prosecutor v. Orić*, Decision on an Application for Leave to Appeal the Single Judge's Decision of 10 December 2015, 17 February 2016, MICT-14-79, para. 13.
[75] See, for example, ICTY, *Prosecutor v. Karadžić*, Decision on the Accused's Motion for Finding of *Non-bis-in-idem*, 16 November 2009, IT-95-5/18-T, para. 13 *("[T]he principle of non-bis-in-idem applies only in cases where an accused has already been tried […]*.").
[76] See paragraph 4 *supra*.

Ground 2

The Majority erred in law and fact, and procedurally, by failing to determine that Law No. 6 of 2015 was applied to Dr. Gadafi and that such application rendered his conviction final (Impugned Decision, paragraphs 19, 56-78)

36. The Majority of the Pre-Trial Chamber found that Law No. 6 of 2015 could not apply to Dr. Gadafi on two grounds; the crimes charged were outside the scope of Law No. 6 of 2015[77] and Law No. 6 of 2015 was incompatible with international law.[78] In so doing, the Majority erred in the following ways:-

i. Erred in law, and procedurally, by failing to provide a reasoned decision;

ii. Erred in law in failing to take into account or to have sufficient regard to the *de facto* application of Law No. 6 of 2015 to Dr. Gadafi in Libya by the Al-Bayda transitional government;

iii. Erred in law and/or fact in finding that Law No. 6 of 2015 was not capable of applying to the crimes for which Dr. Gadafi was charged;

iv. Erred in law in taking into consideration the validity of Law No. 6 of 2015 in international law when determining whether Dr. Gadafi's conviction was final (as a matter of Libyan national law); and

v. Erred in law in finding that Law No. 6 of 2015 was incompatible with international law.

(i) The Majority erred in law, and procedurally, by failing to provide a reasoned decision

37. The Majority's errors identified under sub-grounds (ii) to (v) are permeated by a complete failure to consider Dr. Gadafi's submissions and evidence, evaluate

[77] Impugned Decision, paras. 56-59.
[78] *Id.* at 77-78.

them on the merits, and deliver a reasoned decision explaining why they were rejected. As demonstrated under sub-grounds (ii) to (v), extensive submissions on each of these matters were set out in the Admissibility Challenge and Consolidated Reply and Response. Despite deliberating for nearly five months, the Impugned Decision does not refer to these arguments. It does not cite to the authorities or evidence relied on by the Defence. Insofar as it might be interpreted as implicit that the relevant submissions of the Defence were rejected, the Impugned Decision does not explain why those arguments were rejected.

38. The Majority took no apparent cognizance of the serious questions raised by the Defence regarding the credibility, reliability and coherence of the submissions and evidence[79] put forward in the Libyan Attorney General's Office's response ("Attorney General's Response")[80] to the Prosecutor on behalf of the internationally recognized Government of Libya ("GoL"), or with respect to the impartiality[81] and credibility[82] of the observations of the *amici* granted leave to file observations in the case.[83] This is despite the fact that the Majority relies upon or otherwise utilizes the position of the GoL[84] and the Amici Observations.[85]

39. The Majority appears to anticipate these shortcomings by informing that: "*For the sake of judicial economy, the Chamber shall refer to the[] submissions [of the Defence, Prosecution, OPCV and amici] only when relevant and to the extent necessary for its*

[79] Consolidated Reply and Response, paras. 3-5, 7, 14-15, 26-33, 38-41.
[80] On 28 September 2018, the OTP submitted the Prosecution "Response to 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3)of the Rome Statute", ICC-01/01/11-653-Conf ("Prosecution Response"). A public redacted version of the Prosecution Response was filed on 11 October 2018. Annex 8 to the Prosecution Response contains the Attorney General's Response (ICC-01/11-01/11-653-Conf-Anx8 and ICC-01/11-01/11-653-Anx8-Red). References hereafter to the Attorney General's Response will be to the Prosecution's English translation (LBY-OTP-0065-0426) of the Arabic original.
[81] Consolidated Reply and Response, para. 14.
[82] *Id.* at para. 15.
[83] Observations by Lawyers for Justice in Libya and the Redress Trust pursuant to Rule 103 of the Rules of Procedure and Evidence, 28 September 2018, ICC-01/11-01/11-654 ("Amici Observations").
[84] Impugned Decision, paras. 48-50, 53, 57, 59, 79 (and fn. 114).
[85] *Id.* at paras. 57, 61 (fn. 88).

judicial reasoning."[86] This disclaimer does not inoculate the Impugned Decision from its failure to provide the bare minimum of clear and specific reasoning required to justify the relevant determinations reached by the Majority.

40. His Honour Judge Perrin de Brichambaut was compelled to issue the Separate Opinion, in part, due to his "serious reservations […] about the way [] [the Impugned Decision] is presented".[87] The Defence agrees with the Judge's pronouncements that "*decisions by the Court should be drafted in a way which makes their legal reasoning and the use of available evidence and sources easily accessible and understandable for all parties and for a broad public*", and that such a result may be achieved by "present[ing] clearly" at "*each step of the decision the applicable law, submissions by the parties and chamber's determination*".[88] The presentation and reasoning of the Impugned Decision falls well below this mark.

41. As summarized by the Appeals Chamber in the *Gaddafi* Admissibility Judgment:

> *The Appeals Chamber has found, in different contexts, that "[t]he extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the Pre-Trial Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion". It has also found that "[t]he reasons for a decision should be comprehensible from the decision itself". […]*[89]

42. The Defence submits, with respect to each of the sub-grounds below, and for the reasons set out therein, that the Chamber erred as a matter of law and procedure by not providing a sufficiently reasoned decision in respect of its failure to determine that Law No. 6 of 2015 was applied to Dr. Gadafi, and that such application rendered his conviction final. This overarching error, in combination

[86] Impugned Decision, para. 19.
[87] Separate Opinion, para. 1.
[88] *Id.* at 2.
[89] *Gaddafi* Admissibility Judgment, para. 89 (internal citations omitted) (underline added).

with the errors identified under sub-grounds (ii) to (v), impels the Appeals Chamber to reverse the Impugned Decision and find that element (i) of the four-step *ne bis in idem* evaluation is satisfied, or, in the alternative, to remand this matter to the Pre-Trial Chamber to further consider and issue a new determination on element (i) in line with the Appeals Chamber's directions.

(ii) *The Majority erred in law in failing to have regard to the de facto application of Law No. 6 of 2015 to Dr. Gadafi by the Al-Bayda transitional government*

43. The Majority found that "*it is quite clear based on the material available before the Chamber that Law No. 6 of 2015 does not apply to Mr Gaddafi*".[90] However, the question of whether Law No. 6 of 2015 applies (or had been applied) to Dr. Gadafi is a question of Libyan domestic law. As such, the Majority should have deferred to, or at least had regard to, the decision of the Al-Bayda transitional government in Libya to apply Law No. 6 of 2015 to Dr. Gadafi and to release him from detention. The Majority thus erred in:- failing to have any or any adequate regard to the fact of Dr. Gadafi's release; failing to defer to the national authorities in Libya; and failing to give due weight at the international level to the domestic acts of a *de facto* national authority.

44. The preponderance of evidence set out in and annexed to the Admissibility Challenge and Consolidated Reply and Response established that Dr. Gadafi has been released pursuant to Law No. 6 of 2015. Further, and regardless of the formal position it adopted in response to the Prosecution,[91] the GoL has through its actions in the domestic context recognized, accepted or acquiesced to the application of Law No. 6 of 2015 to Dr. Gadafi. In particular:-

i. On or around 12 April 2016, Dr. Gadafi was released from prison on the authority of Mr. Mabrouk Grira Omran, Minister of Justice of the Libyan

[90] Impugned Decision, para. 56.
[91] See Attorney General's Response.

Transitional Government in Al-Bayda. The fact of Dr. Gadafi's release is unequivocal evidence that Law No. 6 of 2015 has been applied to him;[92]

ii. In reaching that decision, the Minister expressly recorded that "*having considered the case file of the Accused, Saif al-Islam Mu'ammar Gaddafi, reviewed the aforementioned General Amnesty Law, and assessed the cases excluded from the application of this law, it has been established that these cases do not apply to the said Accused*".[93] The Minister thus expressly considered relevant matters including whether Dr. Gaddafi was excluded from the application of Law No. 6 of 2015. He determined that Law No. 6 of 2015 should apply to Dr. Gadafi;

iii. Although, according to the Prosecutor, the Al-Bayda transitional government had by that time ceased to be the internationally recognized government of Libya,[94] it remained the *de facto* authority over significant parts of Libya and remained recognized as the legitimate government by local officials in parts of Libya including Zintan;[95]

iv. Since his release, Dr. Gadafi has filed a criminal false accusation claim, which was subject to hearings before the Libyan judiciary in which the Libyan Public Prosecutor was a party, and that concluded in a reasoned judgment.[96] Dr. Gadafi submitted a further criminal false accusation claim to the Libyan Attorney General's Office that was acted upon by the same prosecutor in charge of Case 630/2012.[97] The acceptance of Dr. Gadafi's legal claims and action thereon by the Libyan judiciary and

[92] See Admissibility Challenge, paras. 25-26 and Annex C thereto; Consolidated Reply and Response, paras. 46, 48, 72.
[93] Exhibit 28 to Annex C to the Admissibility Challenge. The Prosecution has provided its own translation of this document at Annex 12 to the Prosecution Response (ICC-01/11-01/11-653-Conf-Anx12).
[94] Prosecution Response, para. 39.
[95] See Consolidated Reply and Response, para. 51; Prosecution Response, para. 40.
[96] See Annex 2 to the Consolidated Reply and Response, and Consolidated Reply and Response, paras. 26-31.
[97] See Annex 3 to the Consolidated Reply and Response, and Consolidated Reply and Response, paras. 32-33.

representatives of the Libyan Attorney General's Office (including the same senior prosecutor who secured Dr. Gadafi's conviction) provides additional, clear and uncontroverted evidence that Law No. 6 of 2015 was validly applied to Dr. Gadafi as a matter of Libyan law because – pursuant to Article 353 of the Amended Code of Libyan Criminal Procedure – a person convicted *in absentia* is deprived of the right to file any such case;[98]

v. Moreover, Article 8 of Law No. 6 of 2015 sets out a specific domestic mechanism for the resolution of any disputes regarding the operation of Law No. 6 of 2015. There was no evidence before the Pre-Trial Chamber that any such national dispute had been raised to challenge the application of Law No. 6 of 2015 to Dr. Gadafi.[99]

45. Additionally, on 24 February 2019, the Civil Registry Authority in Libya, at the behest of the Libyan Attorney General's Office, issued a Certificate of Family Status for Dr. Gadafi's mother, Mrs. Safia Farkash, as the head of household, per Libyan administrative practice. The certificate includes Mrs. Farkash's two unmarried children – Saif Al-Islam Gadafi and Hanaa Gadafi – and provides each member of the family, including Dr. Gadafi, with a unique national identity number.[100] On the same date, the Civil Registry Authority issued a birth certificate for Dr. Gadafi,[101] which likewise includes both his family and national identification numbers. As indicated in the letter dated 24 February 2019 from the Head of the Civil Registry Authority to the Head of the Investigation Department at the Attorney General's Office,[102] Mr. Sidieg Alsour, the Certificate of Family Status and Dr. Gadafi's birth certificate were issued further to Mr. Alsour's intervention, and based upon an application submitted by Dr. Gadafi's Libyan

[98] See Consolidated Reply and Response, paras. 3-4, 26, 29-33.
[99] See *id.* at paras. 8, 45, 55, 58, 61.
[100] See Confidential **Annex 1C**.
[101] See Confidential **Annex 1D**.
[102] See Confidential **Annex 1A**.

counsel. A record dated 27 February 2019[103] records, pursuant to Mr. Alsour's instructions, the confirmation of receipt by the Investigation Department of copies of the identification documents. As noted in the Consolidated Reply and Response, the Head of the Investigation Department, Mr. Alsour: (i) was the main prosecutor in charge of Case 630/2012; (ii) issued a direction in January 2017 requiring action to be taken in response to a criminal false accusation claim filed by Dr. Gadafi; and (iii) signed the Attorney General's Response.[104]

46. The issuance of these national identification documents and the Attorney General's Office's involvement in this process is further, and uncontroverted evidence that the GoL accepts that Dr. Gadafi's *in absentia* conviction has been rendered final by the application of Law No. 6 of 2015. First, it is incongruous with the GoL's submission to the Prosecutor that Dr. Gadafi is a "wanted"[105] person following his conviction in Case 630/2012, for Mr. Alsour, acting on behalf of the Attorney General's Office, to approve of and assist with the issuance of national identification documents for Dr. Gadafi. Second, as with Dr. Gadafi's criminal false accusation claim submitted to the Attorney General's Office,[106] and the proceedings in a separate criminal false accusation suit before the Tobruk Sub-District Court,[107] the GoL, if it considered Dr. Gadafi to be a "wanted" person, should have dismissed Dr. Gadafi's application for the issuance of national identity documents. This is because, pursuant to Article 353 of the Amended Code of Libyan Criminal Procedure,[108] an *in absentia* conviction results in the 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".[109] Dr. Gadafi's application through his family to the Civil Registry Authority

[103] See Confidential **Annex 1B**.
[104] Consolidated Reply and Response, paras. 4, 32.
[105] Attorney General's Response, p. LBY-OTP-0065-0435.
[106] Consolidated Reply and Response, paras. 4, 32.
[107] *Id.* at 26, 29, 31.
[108] Amended Libyan Code of Criminal Procedure, Art. 353 (Annex G to Admissibility Challenge).
[109] See Consolidated Reply and Response, paras. 3, 4, 26, 29-32.

requesting the issuance of national identification documents constitutes a "case in the [allegedly] absent accused's name" or is otherwise an act undertaken by the person convicted *in absentia* that should be deemed void. The GoL and the Libyan judiciary, through their actions in the domestic legal context, have accordingly confirmed on three separate occasions that Dr. Gadafi's *in absentia* conviction in Case 630/2012 has been rendered final as a matter of Libyan law.

47. The Defence respectfully requests the Appeals Chamber to admit into the record of the case and consider on the merits the contents of these additional documents, which were issued more than three months after the submission of the Consolidated Reply and Response, but pre-dating the Impugned Decision. The Defence takes good note of the Appeals Chamber's previous holdings on the admission of additional evidence on appeal in admissibility proceedings.[110]

48. First, the documents in question do not post-date the Impugned Decision and accordingly do not "fall beyond the possible scope of the proceedings before the Pre-Trial Chamber and therefore beyond the scope of the proceedings on appeal".[111] Second, while the Pre-Trial Chamber did not review the documents in question,[112] they fall within the category of submissions and evidence wholly discounted or ignored by the Majority (namely, Dr. Gadafi's criminal false accusation claims and related submissions, and submissions regarding Article 8 of Law No. 6 of 2015). Given the Majority's erroneous approach, as set out in this sub-ground, the Majority would not have 'considered' these documents on the merits even if they had been available. The Appeals Chamber's corrective role is accordingly preserved in considering these additional documents in such circumstances, and the interests of justice weigh in favor of doing so. Third, the scope of the documents is limited; they address a discrete issue – the issuance of

[110] See, *e.g.*, *Al-Senussi* Admissibility Judgment, paras. 58-59.
[111] *Gaddafi* Admissibility Judgment, para. 43.
[112] See *id.* at para. 43; *Al-Senussi* Admissibility Judgment, para. 58.

identification documentation for Dr. Gadafi by the GoL. Fourth, the documents are highly relevant to the issue at hand – namely, the GoL's recognition of the finality of Dr. Gadafi's *in absentia* conviction in Case 630/2012 following the application of Law No. 6 of 2015. On the basis of the above submissions the Defence respectfully requests the Appeals Chamber to admit these additional documents into the record and to consider them on the merits for this appeal.

49. The Majority erred, first, in failing to have regard to the relevant (and decisive) fact that Dr. Gadafi has been released in Libya after close to four and a half years of incarceration, and following his conviction and sentencing in Case 630/2012, due to the application of Law No. 6 of 2015 to him. The Majority obliquely refers to the "issuing authority" for Law No. 6 of 2015 and the matter of the "validity of its legal action"[113] (presumably referring to the Libyan House of Representatives), but inexplicably fails to make any mention at all of the Al-Bayda transitional government's application of Law No. 6 of 2015 to Dr. Gadafi.[114]

50. In determining whether or not Dr. Gadafi's conviction had become final as a result of the issuance of Law No. 6 of 2015, the fact that the Law had actually been applied to him (as proved by the letter of Mr. Mabrouk Grira Omran and the undisputed fact of his release) was an obviously relevant consideration. It was expressly addressed at length in the Consolidated Reply and Response,[115] which the Impugned Decision takes no cognizance of at all. In the circumstances, and in order to provide the minimum requisite reasoning for its determination,[116] the Majority should have addressed this issue expressly. The Majority's failure to do so results in a decision that is erroneous. Its finding that Law No. 6 of 2015 "does not apply" to Dr. Gadafi is plainly contradicted by the fact that Law No. 6

[113] Impugned Decision, para. 56.
[114] The Separate Opinion also fails to consider the Al-Bayda transitional government's application of Law No. 6 of 2015 to Dr. Gadafi.
[115] Consolidated Reply and Response, paras. 43-55.
[116] See submissions at paragraphs 37 to 42 *supra*.

of 2015 has in fact been applied to him – as clearly demonstrated by his release, the GoL's acceptance of legal suits filed in his name concerning criminal false accusations by Dr. Gadafi, and the GoL's issuance to Dr. Gadafi of national identification documents.

51. Second, the Majority erred in law – acting akin to a national executive or court – in determining for itself the correct position as a matter of Libyan domestic law in circumstances where competent national authorities had already ruled on the matter.

52. In the specific context of an admissibility challenge, the Appeals Chamber has previously held 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.*[117]

53. The Majority should, likewise, have accepted the *prima facie* validity of the Al-Bayda transitional government's decision to apply Law No. 6 of 2015 to Dr. Gadafi. In *Bemba*, the Appeals Chamber was addressing the question whether national judicial proceedings in the Central African Republic had resulted in a decision not to prosecute Mr. Bemba in the terms of Article 17(1)(b). In this case, the Pre-Trial Chamber had to determine whether the national decision to apply Law No. 6 of 2015 to Dr. Gadafi and to release him had the effect of rendering the national proceedings against him final in the terms of Article 17(1)(c) of the Statute. In that determination, the Majority should have applied the same approach as the Appeals Chamber set out in *Bemba*. There is no reason for a

[117] Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges", 19 October 2010, ICC-01/05-01/08-962 OA3 ("*Bemba* Admissibility Judgment"), para. 66.

different approach to be applied between Article 17(1)(b) and Article 17(1)(c) on this issue. It is irrelevant that the source of the decision in this case was the national executive rather than a national judicial body.[118] The issue – whether the Court should accept the *prima facie* validity and effect of a national decision in the context of an admissibility challenge – is the same. The Majority should therefore have deferred to the decision of the Al-Bayda transitional government.

54. Earlier in the Impugned Decision, the Majority relied on that Appeals Chamber determination to hold that in the absence of compelling reasons it was not for the Court to challenge "the correctness, nature or qualification" of national judgments.[119] The Majority added that any such decision would be an "*unwarranted interference in the judicial domestic affairs of Libya*".[120] Consistent with those holdings, the Majority should simply have accepted that as a matter of fact and national law, Law No. 6 had been applied to Dr. Gadafi, thereby leading to the inevitable conclusion that Dr. Gadafi's conviction had become final.

55. Moreover, deference to the domestic application of Law No. 6 of 2015 is consistent with complementarity and with the approach taken by the Court to determining issues of national law in other contexts. Complementarity is integral to the architecture of the Statute and to admissibility in particular. Paragraph 10 of the Preamble states "emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions". Article 1 of the Statute repeats that the Court "shall be complementary to national criminal jurisdictions". Those provisions are particularly germane to issues of admissibility. The link between complementarity and admissibility is made express in the Statute itself; Article 17(1) begins by stating: "Having regard to paragraph 10 of the Preamble and

[118] As the Separate Opinion noted, albeit in different context (and therefore incorrectly – see submissions at paras. 70-71 *infra*), in relation to the internationally recognized GoL (Separate Opinion, para. 13).
[119] Impugned Decision, para. 51.
[120] *Id.* at para. 53.

article 1, the Court shall determine that a case is inadmissible where […].” In the *Al-Senussi* Admissibility Judgment the Appeals Chamber correctly reflected the importance of complementarity to admissibility proceedings when finding that “the Court was not established to be an international court of human rights, sitting in judgment over domestic legal systems […]”.[121]

56. Further, the Statute contains other provisions requiring the Court to defer to the competence of domestic authorities. In particular, Article 69(8) specifically prohibits the Court from ruling on “the application of the State’s national law” in deciding on the relevance or admissibility of evidence. Moreover, in defining the applicable law, Article 21(1) states that the Court shall apply (a) the Statute, Elements of Crimes and its Rules of Procedure and Evidence, (b) where appropriate applicable treaties and the principles and rules of international law and (c) general principles of law derived by the Court from national laws of legal systems of the world. Article 21 does not therefore allow the Court to apply Libyan national law directly, save insofar as it is able to extrapolate general principles of law from national legal systems of the world.

57. The Court was thus intended to be complementary to national legal systems and not to sit in judgment upon them. Here, the national law in question had been applied to persons in Libya from 2015 through at least 2018.[122] Where apparently competent national authorities have issued a *decision* applying the provisions of a valid national law (to be contrasted with a legal submission provided by a government at the behest of the OTP[123] in the context of contested litigation before the ICC),[124] it is contrary to complementarity and an unwarranted

[121] *Al-Senussi* Admissibility Judgment, para. 219.
[122] Consolidated Reply and Response, paras. 38-41, and Annex 4 and Annex 5 thereto
[123] For example, the Attorney General’s Response.
[124] See Consolidated Reply and Response, para. 28 (submitting, on the basis of the practice of Trial Chamber V(A), that the stated position of the Attorney General of a state on domestic law cannot be automatically accepted by the Court, but must be evaluated in light of the submissions and information put forward by the parties to the proceedings in order to reach the proper conclusion). The Majority also ignored this submission.

interference in national legal systems for the Court to ignore such a decision or determine it is invalid – at least in absence of compelling reasons. As a result, the Majority erred in failing to have any regard to the competent decision of the Al-Bayda transitional government applying Law No. 6 to Dr. Gadafi and releasing him. The Appeals Chamber must correct this error and find that, in the absence of compelling reasons to go behind this national determination of a national law issue, Law No. 6 was applied to Dr. Gadafi and rendered his conviction final.

58. Third, the validity of the application of Law No. 6 of 2015 to Dr. Gadafi is unaffected by the fact that the Al-Bayda transitional government may have ceased to be the internationally recognized Government of Libya before reaching the decision to release Dr. Gadafi. Given the bare reasoning of the Impugned Decision,[125] it is unclear the extent to or the manner in which the Chamber considered this issue and the Defence's relevant submissions,[126] if at all. The Defence accordingly reiterates its relevant position before the Appeals Chamber.

59. The non-recognition of a government at the international level does not mean the internal acts of that government should all be disregarded, at least in so far as they affect the rights of private individuals. Thus, in the *Namibia Advisory Opinion*, having determined that the continued presence of South Africa in Namibia was unlawful and that States should therefore not take any steps to recognise the South African administration in Namibia, the International Court of Justice added that:

> *[T]he non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births,*

[125] See submissions at paragraphs 37 to 42 *supra*.
[126] Consolidated Reply and Response, paras. 51-54.

deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.[127]

60. To the same effect, the European Court of Human Rights ("ECtHR") has held that: *"the obligation to disregard acts of de facto entities is far from absolute. Life goes on in the territory concerned for its inhabitants. That life must be made tolerable and be protected by the de facto authorities, including their courts; and, in the very interest of the inhabitants, the acts of these authorities related thereto cannot be simply ignored by third States or by international institutions, especially courts, including this one. To hold otherwise would amount to stripping the inhabitants of the territory of all their rights whenever they are discussed in an international context, which would amount to depriving them even of the minimum standard of rights to which they are entitled."*[128] As a result, in assessing whether the applicants had exhausted local remedies, the ECtHr had regard to the availability of local remedies through the judicial organs of the Turkish Republic of Northern Cyprus (a *de facto* government not recognised by the international community).[129]

61. The decision to apply Law No 6. of 2015 – a valid national law[130] – to Dr. Gaddafi was exclusively an internal act of a *de facto* government affecting the rights of a private individual (Dr. Gaddafi). Accordingly, the Chamber should not disregard the application of Law No 6. of 2015 to Dr. Gaddafi simply because it was applied by the Al-Bayda transitional government rather than by the internationally recognised GoL.

62. Nor is the position altered by the position taken by the Libyan Attorney General's Office on behalf of the internationally recognized GoL, as

[127] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970), International Court of Justice, 21 June 1971, para. 125.
[128] *Cyprus v Turkey*, App No. 25781/94, Judgment (merits), Grand Chamber, 10 May 2001, para. 96.
[129] *Id.* at para. 98.
[130] Consolidated Reply and Response, paras. 38-41, and Annex 4 and Annex 5 thereto.

communicated to the Prosecutor.[131] Dr. Gadafi submits that this stance of the Libyan Attorney General's Office[132] is wholly undermined by the GoL's actions in (1) not opposing or dismissing *in limine* Dr. Gadafi's criminal defamation claims on the grounds that he had an outstanding *in absentia* conviction;[133] and (2) the Head of the Civil Registry Authority granting Dr. Gadafi's application for the issuance of national identification papers further to the intervention of the Libyan Attorney General's Office.[134] Moreover, the Defence notes again, and as submitted in the Consolidated Reply and Response,[135] that Law No. 6 of 2015 contains its own dispute resolution procedure, which the Impugned Decision (once again) makes no mention of.[136] Article 8 of Law No. 6 of 2015 provides that: "The competent prosecutorial authority shall be responsible for adjudicating disputes arising from the application of the provisions of this Law." Had the GoL genuinely disputed the application of Law No. 6 of 2015 to Dr. Gadafi, it would have submitted that dispute to the competent prosecutorial authorities for resolution. There is no evidence that it has done so.[137] In this regard, the Defence also refers to its relevant submissions refuting the GoL's claims as to the lack of legal validity of Law No. 6 of 2015,[138] which has been applied before various Libyan courts[139] – a rare Defence submission and related evidence that the Impugned Decision does reference, though even then only in part.[140]

[131] Attorney General's Response.
[132] Attorney General's Response, p. LBY-OTP-0065-0434.
[133] See Consolidated Reply and Response, paras. 26-33.
[134] See submissions at paras. 45-46 *supra*.
[135] Consolidated Reply and Response, paras. 8, 45, 55, 58, 61.
[136] See submissions at paragraphs 37 to 42 *supra*.
[137] See Consolidated Reply and Response, paras. 8, 45, 55, 58, 61.
[138] Attorney General's Response, pp. LBY-OTP-0065-0430 to 0432.
[139] Consolidated Reply and Response, paras. 38-41.
[140] Impugned Decision, para. 57 (referencing the letters issued by the Tobruk Court of Appeal and Al Bayda Court of Appeal (Annex 5 to Consolidated Reply and Response), but not the annexed judgments from the Tobruk Court of Appeal, Jebel Akhdar Court of Appeal, Benghazi Court of Appeal, and Al Bayda Court of Appeal, dating from 2015 to 2018, applying Law No. 6 of 2015 to criminal defendants (Annex 4 to the Consolidated Reply and Response)).

63. In this context the Defence additionally notes the Appeals Chamber's finding in the *Al-Senussi* Admissibility Judgment that it is reasonable to place an evidential burden on a party opposing an admissibility challenge to sufficiently substantiate factual allegations before a need arises to rebut such allegations.[141] Here, presuming the Prosecutor raised a sufficiently substantiated claim that Law No. 6 of 2015 was not applied to Dr. Gadafi,[142] it was a legal and procedural error[143] for the Impugned Decision to fail to acknowledge and engage on the merits Dr. Gadafi's submissions and evidence answering and rebutting the Prosecution's claim.[144] The Pre-Trial Chamber would have been within its discretion[145] to request additional submissions from the Prosecutor in respect of the Defence's submissions and evidence in reply, including requesting the Prosecution to obtain additional answers or information from the GoL. It was an error if not an abuse of discretion,[146] however, for the Impugned Decision to have simply ignored the Defence's relevant and responsive submissions and evidence.

64. The Impugned Decision thus erred in finding that Law No. 6 of 2015 was not capable of applying to Dr. Gadafi as a matter of Libyan national law, in circumstances where Law No. 6 had in fact already been applied in Libya commencing in 2015,[147] including to Dr. Gadafi in 2016 by the Al-Bayda transitional government. In the light of the statutory provisions relating to complementarity, the Pre-Trial Chamber should have deferred to that national determination rather than disregarding it altogether.

(iii) *The Majority erred in law and/or fact in finding that Law No. 6 of 2015 was not capable of applying to Dr. Gadafi*

[141] *Al-Senussi* Admissibility Judgment, para. 167.
[142] See, e.g., Prosecution Response, paras. 155-158.
[143] See submissions at paragraphs 37 to 42 *supra*.
[144] See Consolidated Reply and Response, paras. 8, 26-33, 45, 55, 58, 61 and annexes thereto.
[145] See Rule 58(2).
[146] See submissions at paragraphs 37 to 42 *supra*.
[147] Consolidated Reply and Response, paras. 38-41, and Annex 4 and Annex 5 thereto.

65. In the event the Appeals Chamber determines, contrary to sub-ground (ii), that it was no error for the Majority to itself consider the applicability of Law No. 6 of 2015 to Dr. Gadafi, the Defence submits the Majority committed errors in applying Law No. 6. In particular, the Majority erred in law and/or fact in determining that Law No. 6 "does not apply to Mr Gaddafi at a minimum due to the nature of the crime(s) he is domestically charged with".[148] Relying on Article 3 of Law No 6. of 2015, the Majority found that "the crimes of identity-based murder, kidnapping, enforced disappearance and torture are excluded from the amnesty".[149] However, erroneously, the Majority focused on the crimes Dr. Gadafi was "domestically charged with" rather than those for which he was convicted. Moreover, the Majority failed specifically to identify which of the crimes for which Dr. Gadafi was convicted fall within this exception. The Defence assumes that the Majority adopted the position of the GoL that Dr. Gadafi's convictions for murder and corruption are excluded from the amnesty[150] (as the Separate Opinion did).[151] That was wrong as a matter of law or fact, because the exception contained in Article 3 only applies to "identity-based murders" and Dr. Gadafi was not convicted of "identity-based murders". Moreover, Dr. Gadafi was not convicted of corruption offences. Once again, the Majority appears to take no cognizance at all[152] of relevant Defence submissions on this important issue.[153]

66. First, the Majority erred in focusing on the domestic offences that Dr. Gadafi was *charged* with, rather than those for which he was *convicted*.[154] Article 1 of Law No. 6 of 2015 states that a general amnesty shall apply and continues "Criminal proceedings related to such crimes shall be terminated, and sentences handed

[148] Impugned Decision, para. 58.
[149] *Id.* at para. 59.
[150] *Id.* at para. 57, citing to Attorney General's Response, p. LBY-OTP-0065-0432.
[151] Separate Opinion, para. 99.
[152] See submissions at paragraphs 37 to 42 *supra*.
[153] Consolidated Reply and Response, para. 60.
[154] Impugned Decision, para. 58.

down shall be revoked".[155] Article 7, in relation to the invalidation of the amnesty in case of future re-offending, provides that the relevant proceedings "shall then resume from the point at which they had been discontinued". Law No. 6 of 2015 is thus capable of applying at any stage of domestic criminal proceedings, but its effect on a specific case – and the effect of any voiding of its application due to re-offending – depends on the stage of domestic proceedings at which Law No. 6 of 2015 was applied. Law No. 6 of 2015 was applied to Dr. Gadafi after he had been convicted by the Tripoli Criminal Court. Pursuant to Articles 1 and 7, it therefore applied to the crimes for which he was convicted rather than the crimes for which he was charged. No other interpretation of Law No. 6 of 2015 would make sense; Dr. Gadafi would have no need to make use of Law No. 6 of 2015 in relation to crimes for which he was not convicted. As confirmed by the GoL,[156] Dr. Gadafi had no right to appeal his *in absentia* conviction, nor did the GoL submit or provide any evidence that the other parties or participants in Case 630/2012, including the Attorney General's Office, appealed any aspect of Dr. Gadafi's *in absentia* conviction within the deadline proscribed under Libyan Law for such appeal.[157] In the event the Appeals Chamber determines, contrary to the Defence's submission under sub-ground (ii), that the Court is permitted to consider the validity of the application of Law No. 6 of 2015 to Dr. Gadafi, then the Appeals Chamber should correct this error of law and/or fact and apply the exceptions in Article 3 *de novo* to the crimes for which Dr. Gadafi was convicted.

67. Second, the Majority erred in law and/or fact in finding that Law No 6. of 2015 does not apply to Dr. Gaddafi since Article 3(4) excludes the crimes of identity-based murder, kidnapping, enforced disappearance and torture from the amnesty / pardon.[158] The Majority, once again, failed to explain its finding.[159] At a

[155] See ICC-01/11-01/11-650-AnxIII-tENG (Official Court Translation of Law No. 6 of 2015).
[156] Attorney General's Response, pp. LBY-OTP-0065-0429 to 0430.
[157] Amended Libyan Code of Criminal Procedure, articles 384, 385 (Annex G to Admissibility Challenge).
[158] Impugned Decision, para. 59.

minimum, it should have compared the crimes excluded from Law No. 6 of 2015 to the crimes for which Dr. Gadafi was convicted by the Tripoli Criminal Court. In the absence of any such analysis, it is not even clear which crime(s) the Majority believed was/were excluded, though the Defence proceed on the basis that the Majority accepted the position of the GoL that "murder" was excluded.

68. Article 3(4) did not exclude Dr. Gadafi's convictions from the application of Law No. 6 of 2015. Article 3(4) reads "Provisions of this Law shall not apply to the following crimes: […] Identity-based murder, abduction, forced disappearance and torture". As a matter of construction, it is clear that Article 3(4) does not exclude all crimes of murder from the application of Law No. 6 of 2015. The inclusion of the words "identity-based" qualifies the meaning of the word "murder", with the result that only those murders which are proved to be "identity-based" are excluded. In the absence of any definition of "identity-based murder" within Law No. 6 of 2015 itself, 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). The Majority erred in law or fact in failing to consider whether Dr. Gadafi's convictions fell within this narrow sub-set of murders (despite this point being specifically pleaded in the Consolidated Reply and Response).[160]

69. The Appeals Chamber, if it determines that the Court is permitted to consider the validity of the application of Law No. 6 of 2015 to Dr. Gadafi (*contra* sub-ground (ii) above), should correct this error and apply the correct test to Dr. Gadafi's convictions. The Defence set out the convictions entered against Dr. Gadafi in his Admissibility Challenge.[161] Although Dr. Gadafi's conviction does relate to the

[159] See submissions at paragraphs 37 to 42 *supra*.
[160] Consolidated Reply and Response, para. 60.
[161] Admissibility Challenge, para. 62.

offence of "killing" or "arbitrary killing", there is nothing in the Libyan Judgment to indicate that the necessary additional element that the killing must be "identity-based" was alleged, adjudicated or established against Dr. Gadafi. No specific submissions or evidence – let alone sufficiently substantiated[162] – are put forward in the Prosecution Response (including the annexed Attorney General's Response), OPCV Observations or Amici Observations that could reasonably justify or support the Majority ignoring or reading out of Law No. 6 of 2015 the clear wording "identity based". Accordingly, Dr. Gadafi was not convicted of "identity-based murder" and Law No. 6 of 2015 did apply to his convictions.

70. As the Appeals Chamber may, depending on its approach, deem it appropriate to consider this issue *de novo*, it is relevant here to address the alternate approach taken in the Separate Opinion. In the view of the Separate Opinion, the Appeals Chamber's holding in the *Bemba* Admissibility Judgment that the Court "should accept *prima facie* the validity and effect of the decisions of domestic courts" (unless compelling contrary evidence exists)[163] should "apply *mutatis mutandis* to submissions from national governments regarding the interpretation of their domestic law".[164] On this basis, the Separate Opinion rejected the Defence position on the proper definition of "identity-based murder" because in its view "*the Defence does not substantiate its claim and makes no attempt to explain why the statement from the Libyan Attorney General regarding the exclusion of murders […] from the scope of Law No. 6 of 2015 would be erroneous*".[165]

71. First, the Defence disagrees with the legal position taken in the Separate Opinion. A decision of a domestic court or domestic executive (whether *de jure* or *de facto*) in the context of a wholly domestic matter is deserving of the deference required

[162] *Al-Senussi* Admissibility Judgment. para. 167.
[163] *Bemba* Admissibility Judgment, para. 66. See fuller discussion of the Judgment at paras. 52-54 *supra*.
[164] Separate Opinion, para. 13.
[165] *Id.* at para. 98.

by the rule set out in the *Bemba* Admissibility Judgment.[166] As submitted in the Consolidated Reply and Response,[167] and in line with the approach taken by Trial Chamber V(A),[168] the same deference should not apply in the context of admissibility proceedings before the ICC to an opinion on the interpretation of national law from the national government in circumstances where the opinion provided has been obtained by one party to the proceedings for purposes of contested litigation. Second, as submitted in the Consolidated Reply and Response, there are fundamental issues of credibility, reliability and coherence in respect of the submissions and evidence put forward in the Libyan Attorney General's Response.[169] Third, as outlined above, the Defence did substantiate its position on the basis of the clear wording of Law No. 6 of 2015. It would be unreasonable for the Court to accept, in this context, and without substantiation,[170] the GoL's apparent position that the wording "identity-based" is superfluous or devoid of meaning. This is particularly so when the GoL simultaneously claims that the legislative body that enacted the law was without legal authority[171] whilst taking action that affirms its approval of or acquiescence to the application of Law No. 6 of 2015 to Dr. Gadafi.[172] Accordingly, for the reasons set out above, the Defence submits that the position articulated in the Separate Opinion is incorrect as a matter of law and fact.

72. Third, insofar as the Majority concluded that Dr. Gadafi was convicted of corruption offences, which are excluded from the operation of Law No. 6 of 2015, that too was an error. Despite citing to the GoL's position that crimes involving

[166] See submissions at paras. 52-61 *supra*.
[167] Consolidated Reply and Response, para. 28.
[168] See fn. 124 *supra* (citing to *Prosecutor v. Ruto and Sang*, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014, ICC-01/09-01/11-1274-Corr2, paras. 158-164.
[169] Consolidated Reply and Response, paras. 3-5, 7, 14-15, 26-33, 38-41.
[170] *Al-Senussi* Admissibility Judgment, para. 167.
[171] A position refuted with evidence in the Consolidated Reply and Response (paras. 38-41).
[172] See, *e.g.*, submissions at paras. 44-46 *supra*.

corruption are excluded from the application of Law No. 6 of 2015,[173] 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.[174] To the extent this formed part of the Majority's reasoning, it was clearly incorrect: Dr. Gadafi was not convicted of crimes of corruption. "Crimes of corruption" are not defined in Law No. 6 of 2015. The natural meaning of corruption refers to dishonesty or a wrongful use of public money.[175] Although Dr. Gadafi was convicted of supplying weapons and providing financial and material support,[176] no conviction was entered for corruption. Unlike convicted persons 2, 3, 4, 8, 11, 15, 18, 20, 31, 35, 36 and 37 in Case 630/2012 – who were ordered to "compensate the public treasury for the money" each "squandered", determined on the basis of an expert report[177] – no finding of dishonesty or misuse of public funds was made against Dr. Gadafi; he was not ordered to "compensate" the public treasury. As a result, this exclusion did not apply to the crimes for which he was convicted.

73. The Appeals Chamber, if it determines the Court is permitted to consider the validity of the application of Law No. 6 of 2015 to Dr. Gadafi (*contra* sub-ground (ii) above), should correct this error by applying Article 3 of the Law to the crimes for which Dr. Gadafi was convicted.

74. The Prosecution, OPCV and *Amici* submitted that there were various other reasons why Law No. 6 of 2015 should not apply to Dr. Gadafi. In relation to those matters, Dr. Gadafi maintains his submissions in the Consolidated Reply and Response. Nevertheless, even if those matters formed no part of the

[173] Impugned Decision, para. 57.
[174] Impugned Decision, para. 59.
[175] Black's Law Dictionary (10th ed., 2014) defines corruption as: "*A fiduciary's or official's use of a station or office to procure some benefit either personally or for someone else, contrary to the rights of others; an act carried out with the intent of giving some advantage inconsistent with official duty or the rights of others.*"
[176] Libyan Judgment, p. LBY-OTP-0062-0439.
[177] *Id.* at p. LBY-OTP-0062-0631 to 0633.

Majority's determinative reasoning in dismissing his admissibility challenge,[178] Dr. Gadafi submits the proper course is to correct the Majority's error in relation to Article 3 of Law No. 6 of 2015 and remit the matter to the Pre-Trial Chamber. The Appeals Chamber should not find for the first time that Law No. 6 does not apply to Dr. Gadafi for any reason outside the scope of the Impugned Decision, since that would be to determine a matter for the first time in circumstances where Dr. Gadafi would have no further avenue to appeal such determination.

(iv) *Erred in law in taking into consideration the validity of Law No. 6 of 2015 in international law when determining whether Dr. Gadafi's conviction was final (as a matter of Libyan law)*

75. If the Appeals Chamber agrees with the Defence that the Majority erred in the manner submitted under sub-grounds (ii) or (iii) above, the Majority's finding that Law No. 6 of 2015 cannot apply to Dr. Gadafi as a matter of international law does not salvage the Majority's ultimate determination. The Majority erred in law when it concluded that "Law No. 6 of 2015 should not apply also when the person (Mr Gaddafi) is the subject of a warrant of arrest for conduct constituting crimes that fall within the jurisdiction of the Court".[179] The Majority explained that it would "apply and interpret the Statute consistently with internationally recognized human rights".[180] Its discussion of international human rights led to the Majority's conclusion that "Law No. 6 of 2015 […] is equally incompatible with international law, including internationally recognized human rights".[181] The Majority thus used its interpretation of international human rights law to

[178] In this regard, the Defence notes that the Majority, at paragraph 57 of the Impugned Decision, states: "Moreover, 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" (citing to the Arabic original of Law No. 6 of 2015 provided in Annex 8.3 to the Attorney General's Response). The Majority makes no further findings in this regard, and, once again, ignores relevant Defence submissions (see Consolidated Reply and Response, paras. 58-59).
[179] Impugned Decision, para. 56.
[180] *Id.* at para. 61.
[181] *Id.* at para. 78.

determine that a provision of Libyan national law (Law No. 6 of 2015) should not have been applied to Dr. Gadafi in Libya.

76. In effectively striking down a provision of national law, the Majority exceeded its powers. At this stage of the admissibility enquiry, the Majority was called upon simply to determine whether Dr. Gadafi's conviction was final (in accordance with its construction of Article 20(3)). The issue should have been determined as a matter of national law. The Majority erred in law in relying, as a second reason for finding Law No. 6 of 2015 could not apply to Dr. Gadafi, on international law considerations in relation to amnesties. Further, Article 21(3), which appears to be the only jurisdictional basis relied on by the Majority for this exercise, does not permit the Court to find that a rule of national law is incompatible with internationally recognized human rights, still less to strike it down.

77. First, the question of whether the application of Law No. 6 of 2015 to Dr. Gadafi rendered his conviction final is a question of Libyan national law. The Appeals Chamber implicitly recognized that a similar issue in the *Bemba* admissibility appeal was one of national law. In determining whether national judicial proceedings had resulted in a final decision not to prosecute pursuant to Article 17(1)(b), the Appeals Chamber held 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*".[182] The Appeals Chamber added that the Chamber "should accept prima facie the validity and effect of the decisions of domestic courts, unless presented with compelling evidence indicating otherwise".[183] The Appeals Chamber thus acknowledged that the question of whether a final decision not to prosecute had been taken pursuant to Article 17(1)(b) was a question of national law. The same must apply to Article 17(1)(c); just as the assessment of a decision

[182] *Bemba* Admissibility Judgment, para. 66 (underline added).
[183] *Ibid*.

not to prosecute is a matter of national law, so too is the assessment of whether a criminal conviction has been rendered final.

78. Accordingly, the Majority erred in undertaking an analysis of the status of amnesties in international law at this stage of the test under Article 20(3); it should simply have determined as a factual matter that Law No. 6 of 2015 had been applied to Dr. Gadafi as a matter of Libyan domestic law.

79. Second, the only basis offered by the Majority for importing considerations of international law was that "*the Chamber shall apply and interpret the Statute consistently with internationally recognized human rights*".[184] That recalls its earlier reliance on Rome Statute Article 21(3).[185] However, the Majority used Article 21(3) not to apply or interpret the Statute but to apply and interpret Law No. 6 of 2015. Article 21(3) does not permit the Court to interpret or assess the application of domestic law through the prism of consistency with internationally recognized human rights. That is not consistent with the text of Article 21(3) and represents a significant and unwarranted intrusion by the Court in national sovereignty.

80. First, the Majority's interpretation is inconsistent with the text of Article 21(3). Article 21 is headed "Applicable Law". It begins by setting out in subsection (1) the laws that the Court "shall apply", those being in summary (a) the Statute, Elements of Crimes and Rules of Procedure and Evidence; (b) applicable treaties and rules of international law, including the law of armed conflict; and (c) general principles of law derived by the Court from national laws of legal systems of the world. Subsection 2 then provides that the Court may apply its previous decisions. Finally Article 21(3) provides in relevant part that: "The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights […]".

[184] Impugned Decision, para. 61.
[185] See *id.* at para. 45.

81. Nothing in Article 21(1) or (2) of the Statute mandates the Court to apply or determine questions of national law, save insofar as it may consider the national law of various States and legal systems in order to derive general principles of law. The "application and interpretation" provision in Article 21(3), relied on by the Majority, expressly only applies to "law pursuant to this article". Thus it only permits the Court to consider consistency with internationally recognized human rights when applying or interpreting the sources of law enumerated in Article 21(1) and (2). Previous cases have acknowledged this limitation on the scope of Article 21(3). Thus Trial Chamber II recognized: "*Article 21(3) of the Statute does not place an obligation on the Court to ensure that States Parties properly apply internationally recognised human rights in their domestic proceedings. It only requires the Chambers to ensure that the Statute and the other sources of law set forth at article 21(1) and 21(2) are applied in a manner which is not inconsistent with or in violation of internationally recognised human rights.*"[186] Since specific domestic / national laws are not one of the sources of law set out in Articles 21(1) or (2), it follows that Article 21(3) cannot be used by the Court as a tool when interpreting or applying specific domestic / national laws, such as Law No. 6 of 2015.

82. Second, that approach is consistent with complementarity and the Court's proper role. In a different context, the Appeals Chamber held that "*the Court was not established to be an international court of human rights, sitting in judgment over domestic legal systems […]*".[187] The Defence submits that the Appeals Chamber's *dicta* is correct. The Court was not created as a new human rights court. It does not have the jurisdiction to determine that national laws are incompatible with international human rights. Yet that is exactly what the Majority determined in finding that "*Law No. 6 of 2015 […] is equally incompatible with international law,*

[186] *Prosecutor v. Katanga*, Decision on an Amicus Curiae application and on the "Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d'asile" (articles 68 and 93(7) of the Statute), 9 June 2011, ICC-01/04-01/07-3003-tENG, para. 62.
[187] *Al-Senussi* Admissibility Judgment, para. 219.

including international human rights law."[188] This finding is an unwarranted extension of the Court's powers and an infringement of national sovereignty.

83. In any event, in requiring that the interpretation and application of law must be consistent with internationally recognized human rights, Article 21(3) was not incorporating the whole *corpus* of jurisprudence of regional human rights bodies into the applicable law of the Court. The intent of Article 21(3) is to ensure the protection of those human rights which are internationally recognized. The identification of 'internationally recognized human rights' has thus, correctly, been used in defining the extent of the fair trial rights of the accused[189] and in protecting the internationally recognized right to privacy of persons affected by the activities of the Court.[190] But the rule defined by the Majority, that "granting amnesties and pardons for serious acts such as murder constituting crimes against humanity is incompatible with internationally recognized human rights"[191] is not itself an "internationally recognized human right" within the meaning of Article 21(3). The rule defined by the Majority is, at most, an inference derived by certain human rights bodies *vis a vis* the positive obligation on States to investigate, prosecute and punish perpetrators of certain crimes (with no mention by the Majority of actual state practice). It is not itself an internationally recognized human right that the Majority should have imported into its assessment of national law under Article 21(3).

84. The Majority's error is encapsulated in its finding that "Law No. 6 of 2015 should not apply also when the person (Mr Gaddafi) is the subject of a warrant of arrest for conduct constituting crimes that fall within the jurisdiction of the Court".[192] The Majority clearly determined for itself when Law No. 6 of 2015 – a provision

[188] Impugned Decision, para. 78.
[189] Extraordinary Review Judgment, para. 11.
[190] ICC-01/05-01/13-1284, paras. 17-18.
[191] Impugned Decision, para. 77.
[192] *Id.* at para. 56.

of Libyan domestic law – *should* apply. It did not have jurisdiction to do that. It should simply have considered whether as a matter of fact Law No. 6 of 2015 had been applied to Dr. Gadafi in Libya. As set out above, the only reasonable conclusion on the evidence is that it had.

85. Nor is the Separate Opinion's approach to this issue any more persuasive. The Separate Opinion relied on the supposed internationally recognized prohibition of amnesties to conclude, not that Law No. 6 of 2015 should not apply as a matter of Libyan law, but that "where there are proceedings before this Court following or concurrent 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".[193] The Separate Opinion thus effectively read an additional exception in to the text of Article 20; this is impermissible and unwarranted. First, the Statute defines two exceptions to Article 20 in subsection (a) in relation to shielding and subsection (b) in relation to proceedings not conducted independently or impartially in accordance with due process. Where the Statute clearly states a limited number of exceptions to *ne bis in idem* (which in the architecture of the Statute are equivalent to the exceptions identified in Article 17(2) to a different aspect of admissibility), as a matter of statutory interpretation there can be no justification for reading in a third exception. Second, this approach disregards the drafting history of the Statute (and the relevant Defence submissions) which clearly showed that a draft provision expressly excluding amnesties from the application of Article 20 was considered and rejected by the drafters of the Statute.[194]

86. Finally, the Defence notes that this conclusion does not necessarily mean that there is no role for internationally recognized human rights in the context of Article 20(3). Had the Majority resolved this first issue in Dr. Gadafi's favour, it would have had to go on to consider the remaining requirements of Article 20(3)

[193] Separate Opinion, para. 148.
[194] Admissibility Challenge, paras. 72-75.

as set out at paragraph 26 of the Impugned Decision. In considering those requirements, the Chamber would have had to consider whether the national proceedings were for the purpose of shielding within the meaning of Article 20(3)(a) and whether the national proceedings were conducted independently and impartially in accordance with the norms of due process recognized by international law (per Article 20(3)(b)). In addressing those matters, the Chamber would have had to consider, *inter alia*, the submission of the Prosecution that the application of Law No. 6 of 2015 amounted to shielding[195] and the Defence position that the Statute does not permit consideration of post-conviction executive actions.[196] At that stage, and if the Defence position that the Statute does not permit consideration of post-conviction executive action is rejected, it might be appropriate to consider the broader issue of amnesties (to the extent that the Statute permits such a broader issue to be considered at all in applying Article 20(3)), rather than inappropriately relying on controversial issues of international human rights law to strike down provisions of national law.

(v) Erred in law in finding that Law No. 6 of 2015 was incompatible with international law

87. In the event the Appeals Chamber determines, contrary to the submissions under sub-ground (iv), that the Majority did not err in considering the validity of Law No. 6 of 2015 as a matter of international law, the Defence submits the Majority still erred in law in concluding that "granting amnesties and pardons for serious acts such as murder constituting crimes against humanity is incompatible with internationally recognized human rights".[197] The Majority's sweeping conclusion is inconsistent with the assessment of other eminent experts, was reached without addressing relevant international instruments which are inconsistent

[195] Prosecution Response, paras. 164-174.
[196] Admissibility Challenge, paras. 67-78.
[197] Impugned Decision, para. 77.

with this conclusion, and is based on a partial and inadequate review of the relevant jurisprudence. The Appeals Chamber should correct this error and find that at the time of Dr. Gadafi's release in April 2016, no rule of international human rights law had crystallized that prohibited, *at the very least*, all conditional amnesties and pardons for crimes against humanity. Law No. 6 of 2015 in its application to Dr. Gadafi was not an unconditional amnesty but a conditional commutation of sentence not inconsistent with international human rights law.

88. The breadth of the Majority's conclusion will not be lost on the Appeals Chamber. At a stroke, and without (once again) analyzing any of the countervailing submissions or authorities,[198] the Majority converted what it had earlier described as a "strong, growing, universal tendency"[199] into a hard-edged rule of law. Moreover, it side-stepped any debate about conditional amnesties by prohibiting all amnesties and pardons in relation to serious acts including crimes against humanity. The ramifications of this conclusion are vast. It has been estimated by one scholar on the subject that 398 different amnesty laws were passed by 115 States in the period 1979 – 2011.[200] The same scholar reported in September 2017, that her database of national amnesty laws contained 630 unique entries, though she qualified even this number by stating she did not deem her database to be comprehensive.[201] According to the Majority all of those amnesty laws would now be regarded as incompatible with international human rights law. The sweeping nature of this finding means that it would entail, for example, the following consequences:-

[198] See submissions at paragraphs 37 to 42 *supra*.
[199] Impugned Decision, para. 61 (underline added).
[200] Louise Mallinder, Amnesties' Challenge to the Global Accountability Norm?', in Amnesty in the Age of Human Rights Accountability (2012), eds. F. Lessa and L. Payne, p. 79.
[201] Louise Mallinder, Atrocity, Accountability, and Amnesty in a 'Post-Human Rights World'?, Research Paper No. 18-01, Transitional Justice Institute – Ulster University, September 2017, available at: https://blogs.sps.ed.ac.uk/politicalsettlements/files/2017/10/201709_WP_Mallinder_Inaugural-Lecture_FINAL.pdf.

i. the Good Friday Agreement between the United Kingdom and the Republic of Ireland was incompatible with international law (or at least would be incompatible if entered into today) because Section 10 of the Agreement provided for the "accelerated release" of prisoners, including those convicted of crimes such as murder;[202]

ii. the sentencing provisions contained in the legislation establishing the Colombian Special Jurisdiction for Peace may be incompatible with international human rights law, because whilst they do not permit amnesty for crimes against humanity they do restrict the sentence for those who acknowledge their responsibility and commit to non-repetition to a period of 5 – 8 years effective restriction of freedom and rights.[203] Despite the Deputy-Prosecutor's provisional view that "[r]educed sentences are conceivable, however, as long as the convicted person must fulfil certain conditions that would justify an attenuated sentence",[204] the Majority's absolute formulation that amnesties and pardons are incompatible with internationally recognised human rights would appear also to invalidate attenuated sentences of this nature.

89. The Majority erred in law in deducing from the authorities and regional human rights tribunals cited in the Impugned Decision that there was a rule of international human rights law which prohibits *all* amnesties and pardons for *all* serious acts such as murder constituting crimes against humanity. The true position on the authorities is simply that there is a trend towards regarding blanket or unconditional amnesties – but not qualified amnesties or post-conviction commutations of sentence – for certain crimes as incompatible with

[202] A copy of the Good Friday Agreement is available at the following United Kingdom government address: https://www.gov.uk/government/publications/the-belfast-agreement (last accessed 1 May 2019).
[203] See Deputy Prosecutor James Stewart, "The Role of the ICC in the Transitional Justice Process in Colombia", conference in Bogota and Medellin, Columbia, 30-31 May 2018, para. 133.
[204] *Id*. at para. 146.

international human rights law. The application of Law No. 6 of 2015 to Dr. Gadafi was not inconsistent with this more nuanced position.

90. The Defence notes at the outset that Law No. 6 of 2015 was applied to Dr. Gadafi in April 2016, at which point he was released from prison. In accordance with the general principle against retroactivity (as enshrined in Article 22 of the Statute), the critical question is whether the rule of international human rights law apparently identified by the Majority had crystallised prior to that date. The Majority made no finding at all as to the date at which the suggested rule of international human rights law crystallised, though it is inherent in its characterization of the suggested rule as a "strong, growing, universal tendency" that it has not always existed. The Defence notes that in holding that "in a more recent case, the IACHR went a step further and expressly denounced the passing of sentences which are not subsequently enforced by the State due to the application of illegitimate pardons" the Majority relied on a case from May 2018 – two years after Dr. Gadafi's release.[205] The date of that case means it cannot be relied upon in support of any suggestion that both amnesties and pardons were prohibited by international human rights law prior to Dr. Gadafi's release.

91. The Defence takes good note of the Appeals Chamber's recent finding, in the 6 May 2019 *Bashir* Judgment, that an *erga omnes* obligation exists "to prevent, investigate and punish crimes that shock the conscience of humanity, including in particular those under the jurisdiction of the Court […]".[206] The specific issue at hand, as underlined above, is the application of amnesties and pardons including, importantly, conditional amnesties and commutations of sentence in the context of crimes against humanity. In this regard it is crucial to recognize that the crimes of genocide, torture and grave breaches of the Geneva

[205] Impugned Decision, para. 66 and fn. 98 (citing to *Caso Barrios Altos y Caso La Cantuta vs. Perú*, Supervisión de cumplimiento de sentencia, Obligación de investigar, juzgar y, de ser el caso, sancionar, Resolución del 30 de mayo de 2018).
[206] *Bashir* Judgment, para. 123. See also *Bashir* Judgment Joint Concurring Opinion, paras. 207, 211.

Conventions are all addressed by specific treaty provisions which require States to investigate those crimes and either to prosecute or extradite persons suspected of committing them.[207] Amnesties in relation to those crimes may be unlawful to the extent that the amnesty would contravene the treaty obligation to prosecute or extradite. But that provides tenuous basis to extend absolute prohibitions on the use of amnesties for crimes against humanity, in relation to which no specific treaty obligation forbidding amnesties exists, as noted in the January 2017 Report of the International Law Commission's ("ILC") Special Rapporteur for Crimes Against Humanity,[208] including no such prohibition in the ILC Draft Articles on Crimes Against Humanity.[209] There is no basis for jumping, as the Separate Opinion does, to deduce a more general prohibition from the specific treaty rules governing war crimes, torture and genocide.[210]

92. Moreover, in reaching its conclusions, the Majority disregarded Article 6(5) of Additional Protocol II to the Geneva Conventions or Article 6(4) of the ICCPR, which each support the use of amnesties in certain circumstances. In relation to non-international armed conflicts, Article 6(5) of Additional Protocol II to the Geneva Conventions expressly provides that: "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict […]". That provision was relied upon by the Constitutional Court of South Africa to justify the use of amnesties in relation to non-international armed conflicts.[211] In this context, the difference between an international and a non-international armed conflict is

[207] Convention on the Prevention and Punishment of the Crime of Genocide, Articles 1, 5-7; Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Article 7(1); First Geneva Convention, Article 49; Second Geneva Convention, Article 50; Third Geneva Convention, Article 129; Fourth Geneva Convention, Article 146.
[208] Sean D. Murphy, Third report on crimes against humanity, 23 January 2017, A/CN.4/704 ("ILC Special Rapporteur's Report"), paras. 286-289.
[209] *Id.* at para. 297.
[210] Separate Opinion, para. 122.
[211] *Azanian Peoples Organisation and Others v President of the Republic of South Africa*, Constitutional Court, 27 July 1996, paras. 30-31.

significant and resides in the need for national reconciliation in the latter case. As the South African Constitutional Court explained: "*The erstwhile adversaries of such a conflict inhabit the same sovereign territory. They have to live with each other and work with each other and the state concerned is best equipped to determine what measures may be most conducive for the facilitation of such reconciliation and reconstruction.*"[212] Thus, in relation to Non-International Armed Conflicts such as the one in Libya,[213] the use of amnesties is not expressly prohibited in any treaty and their use, at least in certain circumstances, is acknowledged to be legitimate.

93. Further, Article 6(4) of the ICCPR provides that "*anyone sentenced to death shall have the right to seek pardon or commutation of sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases*". Dr. Gadafi was sentenced to death. Pursuant to Article 6(4) – itself an internationally recognized human right – amnesties, pardons and commutations of sentence must be available in such cases. The Majority's conclusion is undermined by its failure to consider these relevant instruments, which cannot be consistent with a general prohibition on amnesties.

94. In relation to the Majority's reliance on the jurisprudence of regional human rights courts, it should be noted that Article 21(3) requires the Court to apply and interpret "internationally recognized human rights". The Defence notes that the Court is a genuinely international institution with States Parties and situations from all regions, including those which do not benefit from any regional human rights apparatus (such as the Asia-Pacific region) and those with a human rights Charter but no regional court (such as the Arab Charter on Human Rights). Principles embraced by one regional human rights apparatus should not

[212] *Id.* at para. 31.
[213] Pre-Trial Chamber I previously accepted that "there are reasonable grounds for believing that an armed conflict not of an international character has been ongoing on the territory of Libya, from at least early March 2011" (*Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, Warrant of Arrest, 15 August 2017, ICC-01/11-01/17-2, para. 25).

automatically be assumed to have achieved the broader recognition necessary to qualify as an "internationally recognized human right". This is particularly so when, as recognized in the 2013 Belfast Guidelines on Amnesty and Accountability,[214] as well as in the 2017 ILC Special Rapporteur's Report (citing favorably to the Belfast Guidelines' analysis),[215] state practice together with "opino juris from domestic and hybrid courts", at least with respect to crimes against humanity, "*does not reflect an established, explicit and categorical customary prohibition of amnesties for international crimes*".[216]

95. In relation to the specific jurisdictions cited by the Majority, while citing three decisions of the African Commission on Human Rights, the Majority did not address, or even acknowledge[217] (despite it being discussed in the Consolidated Reply and Response),[218] the more recent decision of the African Commission in the case of *Kwoyelo v Uganda*.[219] In that case, the ACHPR upheld a complaint that the State's decision not to apply its national amnesty law to the petitioner violated his right to equal treatment before the law.[220] Having reached that decision on the facts of the case, in view of the "lack of clear guidance on ensuring compliance with the requirements of the African Charter when states resort to the use of amnesties", the ACHPR went on to assess the legality of amnesties more broadly.[221] In so doing, the ACHPR reviewed its previous decisions – including those cited by the Majority. From that comprehensive analysis, it concluded:-

> *It is, therefore, the considered view of the Commission that blanket or unconditional amnesties that prevent investigations (particularly of those acts amounting to most serious*

[214] The Belfast Guidelines on Amnesty and Accountability, University of Ulster and Transitional Justice Initiative, 2013 ("Belfast Guidelines").
[215] ILC Special Rapporteur's Report, paras. 295-297.
[216] Belfast Guidelines, p. 12, General Principle 6(d).
[217] See submissions at paragraphs 37 to 42 *supra*.
[218] Consolidated Reply and Response, para. 67(ii).
[219] *Thomas Kwoyelo v Uganda*, Comm. No. 431/12, Decision, 17 October 2018.
[220] *Id.* at para. 195.
[221] *Id.* at para. 284.

> *crimes referred to in Article 4(h) of the AU Constitutive Act) are not consistent with the provisions of the African Charter. African states in transition from conflict to peace should at all times and under any circumstances desist from taking policy, legal or executive/administrative measures that in fact or in effect grant blanket amnesties, as that would be a flagrant violation of international law. When they resort to amnesties as necessary measures for ending violence and continuing violations and achieving peace and justice, they should respect and honor their international and regional obligations. Most particularly, they should ensure that such amnesties comply with both procedural and substantive conditions. In procedural terms, conditional amnesties should be formulated with the participation of affected communities including victim groups. Substantively speaking, amnesties should not totally exclude the right of victims for remedy, particularly remedies taking the form of getting the truth and reparations. They should also facilitate a measure of reconciliation with perpetrators acknowledging responsibility and victims getting a hearing about and receiving acknowledgment for the violations they suffered.*[222]

96. Contrary to the Majority's finding that the ACHPR has "expressed its dissatisfaction for the granting of amnesties for human rights violations",[223] in this authoritative statement of its position, the ACHPR accepted that a conditional amnesty will be lawful, provided that it does not totally exclude the victims' right to a remedy (including getting to the truth) and facilitates a measure of reconciliation. That conclusion was re-affirmed in a further in-depth study issued in April 2019, where the ACHPR again confirmed that conditional amnesties may be lawful if certain requirements are met.[224] The Majority's conclusion that all amnesties and pardons are inconsistent with internationally recognised human rights is therefore not consistent with ACHPR jurisprudence.

[222] *Id.* at para. 293.
[223] Impugned Decision, para. 69.
[224] ACHPR, Study on Transitional Justice and Human and Peoples' Rights in Africa, 28 April 2019 (available at: http://www.achpr.org/news/2019/04/d373/), paras. 288, 291, 293.

97. In relation to the European Court of Human Rights ("ECtHR"), the Majority cites from the discussion of the Grand Chamber in *Margus v. Croatia*,[225] but omits to refer[226] to the Grand Chamber's actual conclusion in that case (which had been set out in the Consolidated Reply and Response).[227] That conclusion was:

> *In the present case the applicant was granted amnesty for acts which amounted to grave breaches of fundamental human rights such as the intentional killing of civilians and inflicting grave bodily injury on a child, and the County Court's reasoning referred to the applicant's merits as a military officer. A growing tendency in international law is to see such amnesties as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights. Even if it were to be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims, the amnesty granted to the applicant in the instant case would still not be acceptable since there is nothing to indicate that there were any such circumstances.*[228]

98. By only considering the 'discussion' section of the Judgment, but omitting the Grand Chamber's actual conclusion, the Majority overlooked a critical point. Setting out that concluding paragraph in full, it is clear that in 2014 – only two years before Dr. Gadafi's release – the ECtHR considered that the rule posited by the Majority was a "growing tendency" rather than a fully crystallized rule. Moreover, consistent with the position adopted by the ACHPR in *Kwoyelo*, the Grand Chamber expressly reserved the possibility that conditional amnesties remain lawful; a conclusion clearly ignored by the over-broad rule extrapolated by the Majority from the earlier discussion in that decision.[229]

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[225] *Marguš v. Croatia*, App. no. 4455/10, Judgment, 27 May 2014.
[226] See submissions at paragraphs 37 to 42 *supra*.
[227] Consolidated Reply and Response, para. 67(i).
[228] *Marguš v. Croatia*, App. no. 4455/10, Judgment, 27 May 2014, para. 139.
[229] This analysis is unaffected by the Separate Opinion citation of *Ould Dah v France*, App. No. 13113/03, which concerned the specific offence of torture and in which, distinct from the facts *sub judice*, the purported amnesty was enacted with a view to preventing prosecution, not after the applicant had been tried and convicted.

99. The Defence also acknowledges that in some cases the ECtHR has considered whether national sentencing decisions by the national judicial or executive may be incompatible with the positive obligation on States to protect convention rights. It has held that it will grant *substantial deference* to national sentencing practice, but that there will be a breach of the Convention where there is a *manifest disproportion* between the crimes and the effective sentence.[230] That is significant because, contrary to the rule formulated by the Majority, the ECtHR indicates that a pardon or commutation of sentence will only violate internationally recognized human rights if the high threshold of a "manifest disproportion" between the crime and the sentence is crossed.

100. Whilst the Inter-American Court of Human Rights ("IACHR") has been an outspoken critic of amnesties, even its jurisprudence is less unequivocal than the Majority acknowledged. In the case of *La Rochela v Colombia*, concerning a partial amnesty which restricted sentences to five to eight years in consideration of a contribution to reconciliation, the IACHR did not find that such an arrangement was necessarily incompatible with human rights but instead set out the "principles, guarantees and duties" that should accompany a sentence reduction.[231] The same principles informed the IACHR's assessment of the humanitarian pardon granted to former President Fujimori in *Caso Barios Altos y Caso La Cantuta v Peru*[232] (a case considered by the Majority).[233] In that case, the IACHR held that there was an "emerging trend" to restrict pardons in relation to serious human rights violations and that relevant considerations include whether the pardon would "*unnecessarily and disproportionately affect[] the right of access to justice of the victims of such violations and their family members, in terms of*

[230] *Yeter v Turkey*, App. No 33750/03, Judgment, 13 January 2009, para. 67.
[231] *Case of the Rochela Massacre v Colombia*, Judgment (merits), 11 May 2007, paras. 182, 192-198.
[232] *Caso Barrios Altos y Caso La Cantuta vs. Perú*, Supervisión de cumplimiento de sentencia, Obligación de investigar, juzgar y, de ser el caso, sancionar, Resolución del 30 de mayo de 2018 ("2018 *Caso Barrios* Decision"). The Defence attaches as Public **Annex 2** a Revised English translation of Sections C.2 to C.4 of the Decision. The Defence extends its thanks and appreciation to the Registry's LSS for undertaking this translation.
[233] Impugned Decision, para. 66.

the proportional relationship between the sentence imposed in the judicial proceedings and its execution".[234] It further noted that in considering the legality of a pardon, relevant factors included whether a significant proportion of the sentence had been served, the prisoner's conduct in the establishment of the truth and the potential effect of early release on society and on the victims.[235] That shows again that a partial amnesty or reduced sentence is not, without more, contrary to international human rights law. It depends on all the facts and circumstances.

101. The effect of the regional human rights jurisprudence is thus to reveal a potential "growing tendency" against blanket amnesties for serious human rights abuses (which are not necessarily synonymous with crimes against humanity) but, crucially, not to invalidate conditional amnesties or pardons in all circumstances. The rule formulated by the Majority takes no account of those nuances and is not therefore consistent with internationally recognized human rights.

102. In relation to the Human Rights Committee, the Defence notes both the *Hugo Rodriguez* case[236] and General Comment No. 20[237] relied on by the Majority relate specifically to torture. As explained above, States have particular obligations in relation to victims of torture pursuant to provisions of the Convention against Torture (many of which are now recognized as part of customary international law), which do not necessarily extend to crimes against humanity more broadly. Further, neither this material nor the General Comments and Resolutions cited by the Separate Opinion,[238] gives any or any detailed consideration to the issues of pardons, commutations of sentence or conditional amnesties. These sources of soft law pre-date both the 2013 Belfast Guidelines and 2017 ILC Special

[234] 2018 *Caso Barrios* Decision, para. 45.
[235] *Id.* at para. 57.
[236] *Hugo Rodríguez v. Uruguay*, Communication No. 322/1988, 9 August 1994, UN Doc. CCPR/C/51/D/322/1988.
[237] HRC, General Comment No. 31[80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, UN Doc. CCPR/C/21/Rev.1/Add. 13.
[238] Separate Opinion, paras. 126-129.

Rapporteur's Report, neither of which concluded that international law unequivocally prohibits all amnesties for crimes against humanity offences.

103. In relation to the Majority's reliance on the decisions of the *ad hoc* tribunals, the Defence submits – as they did (again ignored by the Majority)[239] in the consolidated Reply and Response[240] – that on their proper construction these add no support to the Majority's conclusions:-

i. the *Erdemovic* sentencing decision is wholly unrelated to the issue of amnesties.[241] The passage cited by the Majority is taken out of context. It simply expresses the severity of crimes against humanity from a sentencing standpoint.

ii. In the *Furundžija* case, the Trial Chamber of the ICTY set out some of the legal consequences of the *jus cogens* nature of the prohibition against torture,[242] but did not address the specific issues of conditional amnesties or pardons, or crimes against humanity more broadly.

iii. In relation to the SCSL, the Majority cite the decision that "where jurisdiction is universal, a State cannot deprive another State of its jurisdiction by the grant of amnesty".[243] Regardless of the accuracy of that conclusion, it has no application to Dr. Gadafi's case, in which the issue is not whether the commutation of sentence arising from the application of Law No. 6 of 2015 in Libya would bind another state or tribunal of jurisdiction; the issue which was before the Pre-Trial Chamber was

[239] See submissions at paragraphs 37 to 42 *supra*.
[240] Consolidated Reply and Response, para. 67(v.).
[241] *Prosecutor v. Erdemovic*, Sentencing Judgment, IT-96-22-T, 29 November 1996, para. 28.
[242] *Prosecutor v Furunžija,* Judgment, IT-95-17/1-T, 10 December 1998, paras. 151-157. Four Judges of the Appeals Chamber have recently confirmed this specific focus of the Judgment (*Bashir* Judgment Joint Concurring Opinion, para. 199).
[243] *Prosecutor v. Kallon and Kamara*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004 ("*Kallon* Decision"), paras. 72-74.

whether as a matter of Libyan law Dr. Gadafi's conviction had become final. In any event, and despite it being highlighted in the Consolidated Reply and Response,[244] the Majority ignored the SCSL Appeals Chamber's grateful adoption of the extra-judicial opinion of Judge Cassese that there is "not yet any general obligation" to refrain from granting amnesty in relation to crimes against humanity.[245] That omission is typical of the Impugned Decision; the Majority's conclusion only appears sustainable because the Majority cherry-picked supportive paragraphs from the authorities without engaging with, or even acknowledging, other passages in the same cases which undermine its conclusion.[246]

iv. In *Ieng Sary*, the ECCC Trial Chamber – in passages cited by the Consolidated Reply and Response[247] but (yet again) ignored[248] by the Majority[249] – held that conditional amnesties "have generally not been invalidated, but rather, applied on a case-by-case basis, depending on a number of factors […]".[250] It added later that whilst blanket amnesties were prohibited for genocide, torture and grave breaches of the Geneva Conventions, "*state practice in relation to other serious international crimes is arguably insufficiently uniform to establish an absolute prohibition of amnesties in relation to them, [though] this practice demonstrates at a minimum a retroactive right for third States, internationalised and domestic courts to evaluate amnesties and to set them aside or limit their scope should they be deemed incompatible with international norms*".[251] As noted in the 2013 Belfast Guidelines, in reaching this conclusion, the ECCC Trial Chamber

[244] Consolidated Reply and Response, para. 67(vi.).
[245] *Kallon* Decision, para. 71.
[246] See submissions at paragraphs 37 to 42 *supra*.
[247] Consolidated Reply and Response, para. 67(iv.).
[248] See submissions at paragraphs 37 to 42 *supra*.
[249] Impugned Decision, para. 76.
[250] Decision on Ieng Sary's Rule 89 Preliminary Objections, No. 002/19-09-2007/ECCC/TC, 3 November 2011, para. 52.
[251] *Id.* at para. 54.

"conducted the most extensive review of state practice of any international(ised) criminal court" on this issue.[252] Thus this decision too is inconsistent with the rule deduced by the Majority.

v. Lastly, the paragraph from the *Decision on Ieng Sary's Appeal against the Closing Order* relied upon by the Majority[253] does not purport a general prohibition of amnesties for crimes against humanity as a matter of international law, but rather determined that Cambodia was bound by a specific treaty obligation as a party to the ICCPR to "prosecute and punish the authors of serious violations of human rights". In the view of the ECCC Appeals Chamber this obligation – arising from the rights of victims to an effective remedy – impliedly required Cambodia to abstain from implementing amnesties for crimes against humanity offences. The issue of conditional amnesties or pardons – where prosecution and punishment has occurred – is not addressed by the ECCC Appeals Chamber. Further, as noted above, the ILC Special Rapporteur's Report, which has considered the wide body of relevant domestic and international jurisprudence (including this ECCC decision)[254] as well as state practice through January 2017, does not find that a rule of international law prohibiting amnesties for crimes against humanity, and certainly for conditional amnesties, can safely be asserted.[255] Further, the ECCC's finding is arguably no more than *obiter dictum*, given the final sentence of the relevant paragraph (omitted by the Majority): "*As there is no indication that the King (and others involved) intended not to respect the international obligations of Cambodia when adopting the Decree, the interpretation of this*

[252] Belfast Guidelines, p. 39.
[253] Impugned Decision, para. 76.
[254] ILC Special Rapporteur's Report, para. 289 and fn. 497.
[255] *Id.* at paras. 295-297.

document proposed by the Co-Lawyers is found to be without merit."[256] In other words, the ECCC provided its understanding of an aspect of human rights law as an additional, but not determinative, interpretative tool in understanding the intent of a provision of national law. The Defence posits that this context as well as the limited scope of this decision (ICCPR treaty obligation basis) is perhaps the reason the Belfast Guidelines, issued in 2013, discuss only the later 3 November 2011 Decision of the ECCC Trial Chamber (addressed in the preceding paragraph),[257] and not the 11 April 2011 Decision of the ECCC Appeals Chamber.

104. In summary, the various sources relied upon by the Majority do not establish the unequivocal rule that "granting amnesties and pardons for serious acts such as murder constituting crimes against humanity is incompatible with internationally recognized human rights". They may, at best, point to a growing "trend". They may suggest that blanket amnesties are impermissible. But the Majority's blunt finding goes further than even the IACHR in apparently invalidating all amnesties, pardons and commutations of sentence regardless of the circumstances. As such the decision is wrong in law.

105. If the Appeals Chamber is satisfied that considerations of international human rights law are apposite at this juncture at all, the Appeals Chamber should correct the Majority's error and apply the correct international standard to the facts. At its highest, "internationally recognized human rights" would prohibit blanket amnesties, but not conditional amnesties or post-conviction / sentence pardons, where supplementary measures are in place to protect victims' rights.

[256] Decision on Ieng Sary's Appeal against the Closing Order, 11 April 2011, Case No. 002/19-09-2007/ECCC/OCIJ (PTC75), para. 201.
[257] Belfast Guidelines, pp. 35, 38.

106. As it applied to Dr. Gadafi, Law No. 6 of 2015 complies with these conditions. It is not a general or blanket amnesty in respect of him. It was passed as part of a national reconciliation process. It expressly preserves the rights of victims to reparations where applicable; article 10 provides that Law No. 6 of 2015 will not "*prejudice the right of an affected person to restitution and compensation*". Moreover, the victims (unlike the situation of the presidential pardon granted to former President Fujimori)[258] retain the option of disputing the application of Law No. 6 of 2015 to Dr. Gadafi through the procedure set out in Article 8 of that law.[259]

107. Furthermore, the crimes alleged against Dr. Gadafi were fully investigated, he was tried, and he was convicted and sentenced in Libya. The reasoned judgment pronounced by the Tripoli Criminal Court meets the right of victims to uncover the truth.

108. Additionally, Dr. Gadafi was punished. From his detention on 19 November 2011 upon the orders and authority of the GoL[260] until his release, Dr. Gadafi was imprisoned for a total of 4 years and 5 months. He remains subject to the potential reactivation of his case in the event of further offending. In the circumstances, it cannot be said that he was not punished for the crimes for which he was convicted.

109. The Appeals Chamber should therefore find that the application of Law No. 6 of 2015 to Dr. Gadafi is not inconsistent with internationally recognized human rights.

Relief Requested

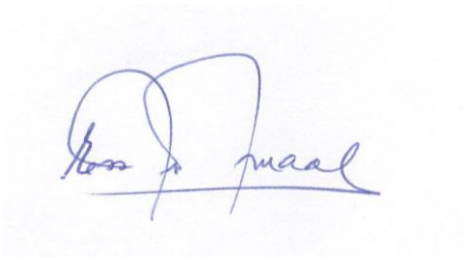
110. On the basis of the above submissions, Dr. Gadafi respectfully requests the Appeals Chamber:

[258] See submissions at para. 100 *supra*.
[259] See submissions at paras. 44.v, 48, 62 *supra*.
[260] See Admissibility Challenge, paras. 8, 96.

i. (a) reverse, in relevant part,[261] the Impugned Decision; (b) determine that the four elements of the *ne bis in idem* evaluation[262] are satisfied further to the submissions and evidence contained in the Admissibility Challenge, the Consolidated Reply and Response, and this appeal brief; and (c) hold that Dr. Gadafi's case before the ICC is inadmissible on the basis of articles 17(1)(c) and 20(3) of the Rome Statute; or

ii. in the alternative, should the Appeals Chamber decline to undertake itself the full four-step *ne bis in idem* evaluation under Article 20(3), to reverse the Impugned Decision in relevant part and remand this matter to the Pre-Trial Chamber to further consider and issue a new decision on the Admissibility Challenge in line with the Appeals Chamber's holdings on the appeal *sub judice*.

Respectfully submitted,[263]



Essa M. Faal
Counsel for Dr. Saif Al-Islam Gadafi

Dated this 20th Day of May 2019
At Banjul, The Gambia

[261] As submitted in the Notice of Appeal and Time Extension Application, the Defence does not appeal part (a) of the Impugned Decision's disposition holding that "Mr Gaddafi has a *locus standi* to lodge the Admissibility Challenge".
[262] See paragraph 4 *supra*.
[263] This filing complies with Regulation 36 of the Regulations of the Court (see the Appeals Chamber's direction in the *Al-Senussi* Admissibility Judgment, para. 32).