

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

**Original: English**

**No. ICC-01/11-01/11**

**Date: 9 March 2020**

**THE APPEALS CHAMBER**

**Before:**

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

**SITUATION IN LIBYA**

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

**Public**

**Judgment**

**on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled ‘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”’ of 5 April 2019**

**Judgment to be notified in accordance with regulation 31 of the Regulations of the Court to:**

**The Office of the Prosecutor**  
Ms Fatou Bensouda, Prosecutor  
Mr James Stewart  
Ms Helen Brady

**Counsel for Mr Saif Al-Islam Gaddafi**  
Mr Essa Faal  
Mr Aidan Ellis

**The Office of Public Counsel for Victims**  
Ms Paolina Massidda

**States Representatives**  
The State of Libya

**Others**  
United Nations Security Council  
Lawyers for Justice in Libya  
Redress Trust  
Libyan Cities and Tribes Supreme Council

**REGISTRY**

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**Registrar**  
Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

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

After deliberation,

Unanimously,

*Delivers* the following

## JUDGMENT

1. The Prosecutor’s ‘Motion to Set Aside documents transmitted by the Libyan Cities and Tribes Supreme Council’ of 6 December 2019 (ICC-01/11-01/11-688-Conf) is granted in part. Annexes III to VI of ICC-01/11-01/11-685 are accepted, while confidential Annexes I and II of the same are rejected.
2. The ‘Decision on the “Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute”’, of 5 April 2019 (ICC-01/11-01/11-662), is confirmed.
3. The relevant party or participant shall file a public redacted version, request the reclassification as ‘public’, or alternatively, provide reasons as to why their confidential status should be maintained, of the following documents, by 16h00 on 30 March 2020:
  - a. ICC-01/11-01/11-676-Conf;
  - b. ICC-01/11-01/11-680-Conf;
  - c. ICC-01/11-01/11-683-Conf and annexes I to XIII;
  - d. ICC-01/11-01/11-685-Conf-AnxI and ICC-01/11-01/11-685-Conf-AnxII;
  - e. ICC-01/11-01/11-688-Conf; and
  - f. ICC-01/11-01/11-690-Conf.

## REASONS

### I. KEY FINDINGS

1. The Appeals Chamber considers that article 17(1)(c) of the Statute, read together with article 20(3) of the Statute, means that the decision issued by a national jurisdiction must be final before a case can be declared inadmissible on the basis of these provisions.

### II. INTRODUCTION

2. Counsel for Mr Saif Al-Islam Gaddafi has filed an appeal against a decision issued by Pre-Trial Chamber I, on 5 April 2019, dismissing his challenge to the admissibility of the case against him at the International Criminal Court ('ICC' or 'Court').

3. Mr Gaddafi's challenge, and the instant appeal, revolves around: a) the status of criminal proceedings in Libya, which resulted in his conviction, following a trial by a court in Tripoli ('Tripoli Court'), on 28 July 2015 (and the passing of a sentence of death), for crimes related to events in Libya around February 2011; and b) his claim that he was granted an amnesty in respect of the same crimes. Counsel for Mr Gaddafi argues that the Pre-Trial Chamber, in considering these two events, and in rejecting his challenge, erred in its interpretation of articles 17(1)(c) and 20(3) of the Statute when it found that the case against him remains admissible before the ICC.

4. Article 17(1)(c) of the Statute provides that the Court shall determine that a case is inadmissible where '[t]he person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3'. Article 20(3) of the Statute (the provision as a whole dealing with '*ne bis in idem*') provides that '[n]o person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct' unless the proceedings in the other court were 'for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court', or otherwise were not conducted 'independently or impartially' or 'were conducted in a manner which, in

the circumstances, was inconsistent with an intent to bring the person concerned to justice’.

5. Counsel for Mr Gaddafi raises two grounds of appeal:

Ground 1: 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; and

Ground 2: The Pre-Trial Chamber erred in law and fact, and procedurally, by failing to determine that Law No. 6 of 2015 (‘Law No. 6’) was applied to Mr Gaddafi and that such application rendered his conviction final.<sup>1</sup>

6. Counsel for Mr Gaddafi also requests, with respect to the second ground of appeal, that the Appeals Chamber admit into the record, and consider on the merits, the contents of four additional documents dated February 2019, which concern the issuance of identification records for Mr Gaddafi by the Libyan Civil Registry Authority in Tripoli.<sup>2</sup>

7. It is argued on behalf of Mr Gaddafi that the errors alleged on appeal, ‘independently and cumulatively, materially affect the Impugned Decision in that, but for these errors, the [Pre-Trial Chamber] would have found that [the first element] of the four-step *ne bis in idem* admissibility evaluation was satisfied’.<sup>3</sup>

Counsel for Mr Gaddafi requests that the Appeals Chamber:

(i) reverse, in relevant part, the Impugned Decision; (ii) determine that the four elements of the *ne bis in idem* evaluation are satisfied [...]; and (iii) hold that [Mr Gaddafi’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, [Mr Gaddafi] 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*.<sup>4</sup>

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<sup>1</sup> [Defence Appeal Brief in support of its appeal against Pre-Trial Chamber I’s “Decision on the Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17\(1\)\(c\), 19 and 20\(3\) of the Rome Statute”](#), 20 May 2019, ICC-01/11-01/11-669 (OA8) ( ‘Appeal Brief’), para. 7.

<sup>2</sup> [Appeal Brief](#), para. 10.

<sup>3</sup> [Appeal Brief](#), para. 8.

<sup>4</sup> [Appeal Brief](#), para. 11 (footnotes omitted).

8. The Appeals Chamber will address Mr Gaddafi's grounds of appeal in turn.

### III. PROCEDURAL HISTORY

#### A. Background and proceedings before the Pre-Trial Chamber

9. Following the United Nations Security Council's referral<sup>5</sup> of the situation in Libya since 15 February 2011 to the Prosecutor of the Court, on 27 June 2011, the Pre-Trial Chamber issued a warrant of arrest for Mr Gaddafi for the crimes of murder, and persecution of civilians, as crimes against humanity within the meaning of article 7(1)(a) and (h) of the Statute.<sup>6</sup> The allegations relate to an alleged attack, from 15 February 2011 to at least 28 February 2011, by Libyan Security Forces against the civilian population taking part in demonstrations against Muammar Gaddafi's regime or those perceived to be dissidents. Mr Gaddafi is alleged to be criminally responsible for the commission of these crimes as an indirect co-perpetrator in light of, among other factors, his senior leadership role in the Libyan State apparatus and being part of the inner circle.<sup>7</sup>

10. On 4 July 2011, the Registrar filed a request to the State of Libya ('Libya') to arrest Mr Gaddafi and surrender him to the Court.<sup>8</sup> By letter dated 23 November 2011, the National Transitional Council of Libya confirmed, to the Pre-Trial Chamber, the arrest of Mr Gaddafi on 19 November 2011 in Libya.<sup>9</sup>

11. The Pre-Trial Chamber, on 31 May 2013, dismissed a challenge by Libya to the admissibility of the case.<sup>10</sup> This decision was later confirmed by the Appeals Chamber, on 21 May 2014.<sup>11</sup>

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<sup>5</sup> United Nations Security Council, Resolution 1970, 26 February 2011, S/RES/1970 (2011).

<sup>6</sup> [Warrant of Arrest for Saif Al-Islam Gaddafi](#), 27 June 2011, ICC-01/11-01/11-3 (the 'Warrant of Arrest').

<sup>7</sup> [Warrant of Arrest](#), pp. 4-6.

<sup>8</sup> [Request to the Libyan Arab Jamahiriya for the arrest and surrender of Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi](#), ICC-01/11-01/11-5.

<sup>9</sup> [Annex to Implementation of the 'Decision to add document to case record' \(ICC-01/11-01/11-29-Conf-Exp\)](#), ICC-01/11-01/11-34-Anx.

<sup>10</sup> Pre-Trial Chamber I, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, [Decision on the admissibility of the case against Saif Al-Islam Gaddafi](#), ICC-01/11-01/11-344-Red (the 'Admissibility Decision of 31 May 2013').

<sup>11</sup> Appeals Chamber, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, [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-Red.

12. On 6 June 2018, counsel for Mr Gaddafi filed a challenge to the admissibility of the case,<sup>12</sup> on the grounds that he had already been tried, convicted and sentenced by a Libyan court for substantially the same conduct as alleged in the proceedings before the Court.<sup>13</sup> He also argued that he had subsequently been granted an amnesty by the Libyan authorities, based on Law No. 6, and had been released from prison on or around 12 April 2016.<sup>14</sup> That challenge was rejected by the Pre-Trial Chamber on 5 April 2019 (the ‘Impugned Decision’).<sup>15</sup>

## **B. Proceedings before the Appeals Chamber**

13. On 10 April 2019, counsel for Mr Gaddafi filed his notice of appeal.<sup>16</sup> On 20 May 2019, following a decision by the Appeals Chamber granting his request for an extension of time,<sup>17</sup> counsel for Mr Gaddafi filed his appeal brief (the ‘Appeal Brief’).<sup>18</sup>

14. On 11 June 2019, the Prosecutor<sup>19</sup> and victims represented by the Office of Public Counsel for Victims (‘OPCV’)<sup>20</sup> filed their respective responses to the Appeal Brief.

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<sup>12</sup> Pre-Trial Chamber I, *The Prosecutor v. Saif Al-Islam Gaddafi*, [Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17\(1\)\(c\), 19 and 20\(3\) of the Rome Statute](#), 5 June 2018 (notified on 6 June 2018 and reclassified as public on 8 June 2018), ICC-01/11-01/11-640 (the ‘Admissibility Challenge’).

<sup>13</sup> [Admissibility Challenge](#), paras 1-2.

<sup>14</sup> [Admissibility Challenge](#), para. 26.

<sup>15</sup> Pre-Trial Chamber I, *The Prosecutor v. Saif Al-Islam Gaddafi*, [Decision on the “Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17\(1\)\(c\), 19 and 20\(3\) of the Rome Statute”](#), ICC-01/11-01/11-662.

<sup>16</sup> [Defence Appeal against Pre-Trial Chamber I’s “Decision on the ‘Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17\(1\)\(c\), 19 and 20\(3\) of the Rome Statute’” and Application for extension of time to file the Appeal Brief](#), ICC-01/11-01/11-663 (OA8) (notified on 11 April 2019).

<sup>17</sup> 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 (OA8). A corrected version was filed on 23 April 2019 ([ICC-01/11-01/11-668-Corr](#)). The Appeals Chamber ordered that the 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.

<sup>18</sup> [Defence Appeal Brief in support of its appeal against Pre-Trial Chamber I’s “Decision on the ‘Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17\(1\)\(c\), 19 and 20\(3\) of the Rome Statute’”](#), ICC-01/11-01/11-669 (OA8).

<sup>19</sup> [Prosecution Response to Mr Saif Al-Islam Gaddafi’s Appeal against the “Decision on the ‘Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17\(1\)\(c\), 19 and 20\(3\) of the Rome Statute’”](#) (ICC-01/11-01/11-669), ICC-01/11-01/11-671 (OA8) (the ‘Prosecutor’s Response’).

<sup>20</sup> [Response on Behalf of Victims to the Defence Appeal Brief on the Decision on the Admissibility of the Case](#), ICC-01/11-01/11-670 (OA8) (the ‘OPCV Response’). It is noted that Mr Gaddafi’s appeal is an appeal against a decision with respect to admissibility, pursuant to article 82(1)(a) of the Statute. In previous appeals pursuant to this provision, the Appeals Chamber has issued orders on the conduct of

15. On 24 September 2019, the Appeals Chamber informed the parties and participants that a hearing would be held on 11-12 November 2019; it also invited the Security Council and Libya to submit observations and to attend the hearing and it set a deadline for the filing of any requests for leave to submit observations under rule 103 of the Rules of Procedure and Evidence ('Rules') on issues arising from the appeal.<sup>21</sup>

16. On 15 October 2019, the Appeals Chamber authorised the Libyan Cities and Tribes Supreme Council, and Lawyers for Justice in Libya and Redress (jointly), to submit observations pursuant to rule 103 of the Rules and to attend the hearing.<sup>22</sup> Although the Libyan representatives appeared to challenge the appearance of the Libyan Cities and Tribes Supreme Council,<sup>23</sup> the Appeals Chamber has taken the Libyan Cities and Tribes Supreme Council's submissions into account since it has granted them audience.

17. By filings dated 28 October 2019, the *amici curiae* filed their respective observations.<sup>24</sup> Libya, having been granted an extension of time,<sup>25</sup> submitted its

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proceedings regulating the participation of victims who have already communicated with the Court in relation to the case, or their legal representatives, pursuant to article 19(3) of the Statute and rule 59 of the Rules of Procedure and Evidence (*see, for example, The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al Senussi, Order in relation to the filing of victims' observations and the request pursuant to rule 103 of the Rules of Procedure and Evidence*, 16 July 2013, ICC-01/11-01/11-383 (OA4); *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Directions on the submission of observations pursuant to article 19 (3) of the Rome Statute and rule 59 (3) of the Rules of Procedure and Evidence*, 13 June 2011, ICC-01/09-02/11-116 (OA). In the instant appeal, however, the OPCV filed a response to the Appeal Brief without having been prompted by the Appeals Chamber. The Appeals Chamber notes that the OPCV had been appointed by the Pre-Trial Chamber 'to represent the victims who [had] already communicated with the Court in relation to the present case for the purposes of the proceedings arising from the Admissibility Challenge' (*see, Decision on the Conduct of the Proceedings following the 'Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute'*, 14 June 2018, ICC-01/11-01/11-641, para. 10). Given that the Appeals Chamber would have sought observations from the victims in this case in any event, this response was accepted as filed and the OPCV was also invited to attend the hearing on the appeal.

<sup>21</sup> *See Order scheduling a hearing before the Appeals Chamber and inviting participation in judicial proceedings*, ICC-01/11-01/11-672 (OA8).

<sup>22</sup> *Decision on requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence*, ICC-01/11-01/11-675 (OA8).

<sup>23</sup> The Libyan representatives stated that the Libyan Cities and Tribes Supreme Council was unknown to them and that they were 'not sure if this council is part of State institutions or if it is just an NGO'. *See Transcript, 12 November 2019*, p. 90, line 20 to p. 91, line 1.

<sup>24</sup> *Lawyers for Justice in Libya and REDRESS' amici curiae observations pursuant to Rule 103 of the Rules of Procedure and Evidence*, ICC-01/11-01/11-678 (OA8) (notified on 29 October 2019) ('*Lawyers for Justice in Libya and Redress Observations*'); *Written Observations of the Libyan Cities and Tribes Supreme Council pursuant to Rule 103 and the Decision on requests for leave to file*

observations to the Registry on 7 November 2019.<sup>26</sup> The Registry filed them on the record on 8 November 2019.<sup>27</sup>

18. On 1 November 2019, the Appeals Chamber issued a decision on the conduct of the hearing, including questions to be addressed by the parties and participants during the hearing.<sup>28</sup> Following a request by the Prosecutor,<sup>29</sup> on 6 November 2019, the Appeals Chamber directed the Registry to transmit certain confidential documents to Libya.<sup>30</sup>

19. On 11 and 12 November 2019, the Appeals Chamber held a hearing with the Prosecutor, counsel for Mr Gaddafi, Libya, the OPCV and the *amici curiae*.<sup>31</sup>

20. On 26 November 2019, the Registry transmitted, to the Appeals Chamber and parties, six documents submitted by the Libyan Cities and Tribes Supreme Council the day before, following an oral direction given by the Appeals Chamber during the hearing.<sup>32</sup>

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[observations pursuant to Rule 103 of the Rules of Procedure and Evidence](#), ICC-01/11-01/11-679 (OA8) (notified on 31 October 2019), ('Libyan Cities and Tribes Supreme Council Observations').

<sup>25</sup> The original deadline for the filing of observations by the Security Council and Libya was 24 October 2019. Libya was subsequently granted an extension of time until 7 November 2019. *See* [Decision on the 'Request for extension for submission of observations from the State of Libya in relation to the Appeals Chamber's Order ICC-01/11-01/11-672'](#), 23 October 2019, ICC-01/11-01/11-677 (OA8); *see also*, Request for extension for submission of observations from the State of Libya in relation to the Appeals Chamber's Order ICC-01/11-01/11-672, 23 October 2019, ICC-01/11-01/11-676-Conf (OA8).

<sup>26</sup> Transmission of the written observations submitted by the State of Libya, 8 November 2019, ICC-01/11-01/11-683-Conf (OA8), para. 3, wherein the Registry states that on 7 November it received 13 documents from Libya.

<sup>27</sup> Transmission of the written observations submitted by the State of Libya, 8 November 2019, ICC-01/11-01/11-683-Conf (OA8).

<sup>28</sup> Decision on the conduct of the hearing before the Appeals Chamber, ICC-01/11-01/11-681 (OA8) ('[Decision of 1 November 2019 on the conduct of the hearing](#)').

<sup>29</sup> Urgent request for an order directing the Registrar to transmit certain confidential documents to the State of Libya, 31 October 2019, ICC-01/11-01/11-680-Conf (OA8).

<sup>30</sup> Decision on urgent request for an order directing the Registrar to transmit certain confidential documents to the State of Libya, ICC-01/11-01/11-682 (OA8).

<sup>31</sup> [Transcript of hearing, 11 November 2019](#), ICC-01/11-01/11-T-007-ENG (OA8) ('Transcript, 11 November 2019'); [Transcript of hearing, 12 November 2019](#), ICC-01/11-01/11-T-008-ENG (OA8) ('Transcript, 12 November 2019').

<sup>32</sup> [Transmission of documents received by the Libyan Cities and Tribes Supreme Council](#), dated and registered on 25 November 2019, ICC-01/11-01/11-685 (OA8), with confidential annexes I and II, and public annexes III to VI. *See also* [Transcript, 12 November 2019](#), p. 36, lines 10-14.

21. On 6 December 2019, the Prosecutor filed a motion seeking to set aside certain of the documents filed by the Libyan Cities and Tribes Supreme Council,<sup>33</sup> to which the Libyan Cities and Tribes Supreme Council responded, on 13 December 2019, requesting that the Prosecutor's motion be rejected.<sup>34</sup>

## IV. MERITS

### A. Preliminary issues

#### *1. Prosecutor's Motion to Set Aside Documents*

22. During the hearing held on 11 and 12 November 2019, the Presiding Judge directed the Libyan Cities and Tribes Supreme Council to provide the Appeals Chamber with a copy of a Libyan Supreme Court judgment, in case 1518/53, concerning the distinction between proceedings in the presence or in the absence of the accused according to Libyan law, which the Libyan Cities and Tribes Supreme Council's representative had referred to during the hearing.<sup>35</sup>

23. On 26 November 2019, the Registry transmitted six documents submitted by the Libyan Cities and Tribes Supreme Council.<sup>36</sup> The documents filed included the judgment sought by the Appeals Chamber during the hearing in addition to three other Libyan Supreme Court judgments,<sup>37</sup> as well as additional submissions purportedly from Mr Gaddafi himself,<sup>38</sup> and from the Libyan Cities and Tribes Supreme Council.<sup>39</sup>

24. In the Prosecutor's Motion to Set Aside Documents, the Prosecutor requests that the additional submissions (contained in Annexes I and II) in the Libyan Cities and Tribes Supreme Council's filing of 25 November 2019 be set aside, as they fall

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<sup>33</sup> Motion to Set Aside documents transmitted by the Libyan Cities and Tribes Supreme Council, ICC-01/11-01/11-688-Conf (OA8) (the 'Prosecutor Motion to Set Aside Documents').

<sup>34</sup> Responses to the OTP's objection of 06 December 2019, ICC-01/11-01/11-690-Conf (OA8) (the 'Libyan Cities and Tribes Supreme Council's Response').

<sup>35</sup> See [Transcript, 12 November 2019](#), p. 36, lines 10-14.

<sup>36</sup> [Transmission of documents received by the Libyan Cities and Tribes Supreme Council](#), ICC-01/11-01/11-685 (OA8), with confidential annexes I and II, and public annexes III to VI.

<sup>37</sup> ICC-01/11-01/11-685-AnxIII; ICC-01/11-01/11-685-AnxIV; ICC-01/11-01/11-685-AnxV; ICC-01/11-01/11-685-AnxVI.

<sup>38</sup> ICC-01/11-01/11-685-Conf-AnxI.

<sup>39</sup> ICC-01/11-01/11-685-Conf-AnxII.

outside the scope of the Appeals Chamber's request.<sup>40</sup> As to the four Libyan judgments provided by the Libyan Cities and Tribes Supreme Council, the Prosecutor notes that only one was sought by the Appeals Chamber during the hearing (decision 1518/53). While the Prosecutor submits that the three additional judgments provided fall outside the scope of the oral direction, she does not object to those judgments, if relevant, 'remaining on the record'.<sup>41</sup> The Prosecutor notes, however, that all of the judgments were provided in Arabic, and requests that, pursuant to regulation 39(1) of the Regulations of the Court, the Appeals Chamber 'place English or French translations of those judgments on the record' if it deems them to be relevant to the determination of the present appeal.<sup>42</sup>

25. In its response, the Libyan Cities and Tribes Supreme Council requests that the Appeals Chamber reject the Prosecutor's motion, submitting that its further submissions, the statement made by Mr Gaddafi (which was 'available publicly on different websites [a] few years ago'<sup>43</sup>) and the additional judgments fall within the Appeals Chamber's request; in particular, with regard to the additional judgments, the Libyan Cities and Tribes Supreme Council argues that they were referred to during the hearing and/or they relate to the distinction between judgments rendered in the presence or in the absence of the accused.<sup>44</sup> The Libyan Cities and Tribes Supreme Council also requests that a translation of those judgments be placed on the record.<sup>45</sup>

26. The Appeals Chamber notes that, following a request for clarification by the Registry, on 14 November 2019 (the Registry having received various documents for filing from the Libyan Cities and Tribes Supreme Council), staff of the Appeals Chamber confirmed, to the Registry, the oral direction by the Presiding Judge 'for the Appeals Chamber to be provided with material being referred to in court by the Libyan Cities and Tribes Supreme Council (specifically Supreme Court decision

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<sup>40</sup> Prosecutor Motion to Set Aside Documents, ICC-01/11-01/11-688-Conf (OA8), paras 7-10 and 13.

<sup>41</sup> Prosecutor Motion to Set Aside Documents, ICC-01/11-01/11-688-Conf (OA8), paras 7, 11 and 13.

<sup>42</sup> Prosecutor Motion to Set Aside Documents, ICC-01/11-01/11-688-Conf (OA8), paras 12 and 13.

<sup>43</sup> Libyan Cities and Tribes Supreme Council's Response, ICC-01/11-01/11-690-Conf (OA8), para. 6.

<sup>44</sup> Libyan Cities and Tribes Supreme Council's Response, ICC-01/11-01/11-690-Conf (OA8), paras 1-11.

<sup>45</sup> Libyan Cities and Tribes Supreme Council's Response, ICC-01/11-01/11-690-Conf (OA8), para. 14.

1518/53, although it would also be useful to obtain any other material to which reference was made during the hearing, e.g. decision 717/52)<sup>46</sup>.

27. The Appeals Chamber notes that Annexes III to VI contain copies of judgments referred to by the Libyan Cities and Tribes Supreme Council during the hearing, or in any event relevant to the distinction between judgments rendered in the presence or in the absence of the accused. These decisions are, therefore, accepted. The remaining documents filed by the Libyan Cities and Tribes Supreme Council (Annexes I and II) fall outside the scope of the Appeals Chamber's direction and will, therefore, not be considered in the present appeal.

28. The Appeals Chamber noted that the judgments provided by the Libyan Cities and Tribes Supreme Council were only in Arabic. It further recalls regulation 39(1) of the Regulations of the Court, pursuant to which '[a]ll documents and materials filed with the Registry shall be in English or French, unless otherwise [...] authorised by the Chamber [...]. If the original document or material is not in English or French, it is for the participant to attach a translation thereof.' In the circumstances of this case, as the judgments provided by the Libyan Cities and Tribes Supreme Council (Annexes III to VI) were filed upon the express direction of the Appeals Chamber, the Appeals Chamber, exceptionally, directed the Registry to provide English translations thereof and to place them on the record. This was done and the translations were placed on the record on 23 January 2020.<sup>47</sup>

## 2. *Classification of certain documents*

29. The Appeals Chamber notes that certain documents filed in this appeal are confidential. An order is made, in this judgment, for the relevant parties and participants to file public redacted versions of their respective filings or seek their reclassification as 'public'. The Appeals Chamber considers, however, there is no reason why the information in those documents, which is referred to in this judgment, may not already be made public.

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<sup>46</sup> Email sent by Legal Officer of the Appeals Chamber to the Registry, 14 November 2019, at 17:01.

<sup>47</sup> ICC-01/11-01/11-685-AnxIII-tENG; ICC-01/11-01/11-685-AnxIV-tENG; ICC-01/11-01/11-685-AnxV-tENG; ICC-01/11-01/11-685-AnxVI-tENG.

## **B. Relevant legal framework**

30. Article 17 of the Statute pertains to issues of admissibility and provides as follows:

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
  - (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
  - (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
  - (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
  - (d) The case is not of sufficient gravity to justify further action by the Court.
  
2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
  - (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
  - (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
  - (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
  
3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

31. Article 20 of the Statute concerns the principle of *ne bis in idem* and provides, in relevant part, as follows:

[...]

3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
  - (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
  - (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

### C. First ground of appeal

32. In his first ground of appeal, it is argued on behalf of Mr Gaddafi that 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.<sup>48</sup> The question before the Appeals Chamber is whether the Pre-Trial Chamber was correct in finding that those aforementioned provisions are only satisfied when a judgment on the merits of a case has acquired *res judicata* effect<sup>49</sup> or whether they are satisfied when domestic trial proceedings have concluded with a first instance verdict on the merits, as argued by counsel for Mr Gaddafi.<sup>50</sup>

#### 1. Relevant part of the Impugned Decision

33. The Pre-Trial Chamber held that ‘it is clear that articles 17(1)(c) and 20(3) must be read together and they are the key provisions relevant to the Admissibility Challenge *sub judice*’; it found that this is so, given that the latter revolves around the question whether Mr Gaddafi has been previously tried by the Libyan national courts for the ‘same conduct’ set out in the Warrant of Arrest.<sup>51</sup>

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<sup>48</sup> [Appeal Brief](#), p. 8, and paras 18-35.

<sup>49</sup> [Impugned Decision](#), paras 36, 48. *See also* para. 79.

<sup>50</sup> [Appeal Brief](#), paras 18-35.

<sup>51</sup> [Impugned Decision](#), para. 30.

34. In this respect, the Pre-Trial Chamber accepted Mr Gaddafi’s contention that the case against him should be declared inadmissible under articles 17(1)(c) and 20(3) of the Statute if the following four elements are met: (i) he has already been tried by the Libyan national courts; (ii) the national trial was with respect ‘to the same conduct’ as that alleged in this case; (iii) the national proceedings were not for the purpose of shielding within the meaning of article 20(3)(a); and (iv) the 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) of the Statute.<sup>52</sup> The Pre-Trial Chamber added that failing to satisfy any of the above elements would be sufficient to reject the Admissibility Challenge.<sup>53</sup>

35. With respect to the first element, the Pre-Trial Chamber, referring to article 20(3) of the Statute, stated that its wording ‘suggests that the person has been the subject of a completed trial with a *final* conviction or acquittal and not merely a trial “with a verdict on the merits” or a mere “decision on conviction or acquittal by a trial court”’, as counsel for Mr Gaddafi suggested.<sup>54</sup> The Pre-Trial Chamber stated that, ‘[i]n other words, what is required, [...], is a judgment which acquired *res judicata* effect’.<sup>55</sup> According to the Pre-Trial Chamber, ‘[t]his conclusion finds support in previous jurisprudence of the Court, the *ad hoc* tribunals, as well as decisions rendered by different human rights bodies’.<sup>56</sup> On the basis of the material available before it, the Pre-Trial Chamber held that, although Mr Gaddafi had been tried and convicted by the Tripoli Court,<sup>57</sup> the judgment of the court in Tripoli (the ‘Tripoli Court Judgment’) was not a final judgment of conviction.<sup>58</sup> This was so because the judgment was passed by a first instance court and, ‘in principle, should still be subject to appeal before the Court of Cassation’; moreover, since this

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<sup>52</sup> [Impugned Decision](#), paras 26 and 31, referring to [Admissibility Challenge](#), para. 34.

<sup>53</sup> [Impugned Decision](#), para. 31.

<sup>54</sup> [Impugned Decision](#), para. 36.

<sup>55</sup> [Impugned Decision](#), para. 36.

<sup>56</sup> [Impugned Decision](#), para. 37; see also paras 37-47 for what it found to support this.

<sup>57</sup> [Tripoli Court Judgment](#), case 630/2012 AD of 28 July 2015, provided in English in Annex B to the [Admissibility Challenge](#), ICC-01/11-01/11-640-AnxB.

<sup>58</sup> [Impugned Decision](#), para. 48.

judgment was rendered *in absentia*, according to Libyan law, Mr Gaddafi would be entitled to a retrial.<sup>59</sup>

## 2. *Submissions before the Appeals Chamber*

### (a) **Submissions on behalf of Mr Gaddafi**

36. Counsel for Mr Gaddafi argues that, under the Statute’s complementarity framework, ‘once a trial on the merits has concluded in a judgment of acquittal or conviction, the *ne bis in idem* 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’.<sup>60</sup> He argues that the Pre-Trial Chamber ‘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 improperly overrode or minimized the principles of treaty interpretation codified in the Vienna Convention on the Law of Treaties (‘VCLT’)’.<sup>61</sup> He refers to the ordinary meaning, effective interpretation, systematic interpretation and the drafting history of the relevant phrase, to argue that all that is necessary for these provisions to be triggered is for a trial on the merits to have concluded.<sup>62</sup> Counsel for Mr Gaddafi also challenges the Pre-Trial Chamber’s reliance on jurisprudence from the Court and other international tribunals to support his interpretation of article 20(3) of the Statute.<sup>63</sup>

37. During the hearing, counsel for Mr Gaddafi submitted that this Court should not accept the submissions of the Government of Libya ‘blindly, without necessary scrutiny’,<sup>64</sup> that Mr Gaddafi should be considered to have been tried in his presence,

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<sup>59</sup> [Impugned Decision](#), para. 48. *See also* [Impugned Decision](#), para. 79: ‘[...] considering that the judgment of the Tripoli Court issued on 28 July 2015 was rendered *in absentia*, with the possibility of reinstating judicial proceedings due also to the nature of the sentence passed (death penalty), and no final decision on the merits was rendered, the Chamber cannot consider said judgment sufficient for satisfying articles 17(1)(c) and 20(3) of the Statute’ (footnote omitted).

<sup>60</sup> [Appeal Brief](#), para. 34. *See also* [Transcript, 11 November 2019](#), p. 12, line 8 to p. 13, line 16; p. 21, lines 7-20; p. 23 lines 9-22; p. 28, line 22 to p. 29, line 23.

<sup>61</sup> [Appeal Brief](#), para. 20.

<sup>62</sup> [Appeal Brief](#), paras 21-31. *See also* [Transcript, 11 November 2019](#), p. 19, line 23 to p. 23 line 6; p. 43, line 23 to p. 46, line 14.

<sup>63</sup> [Appeal Brief](#), paras 31-34. *See also* [Transcript, 11 November 2019](#), p. 30, line 2 to p. 33, line 19.

<sup>64</sup> [Transcript, 11 November 2019](#), p. 17, line 18 to p. 18, line 11.

rather than *in absentia*, and that, in any event, Mr Gaddafi has already been tried on the merits.<sup>65</sup>

38. Counsel for Mr Gaddafi requests that the Appeals Chamber: (i) reverse the Pre-Trial Chamber's error of law and determine that, under the Statute's complementarity framework, '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';<sup>66</sup> and (ii) as further articulated under the second ground of appeal, determine that the application of Law No. 6 to Mr Gaddafi rendered the Libyan judgment final, thereby removing any doubt as to the finality of his conviction, and thus satisfying the first element of the four-step *ne bis in idem* evaluation.<sup>67</sup>

**(b) Prosecutor's submissions**

39. The Prosecutor argues that the Pre-Trial Chamber correctly interpreted articles 17(1)(c) and 20(3) of the Statute as requiring a final judgment such that Mr Gaddafi's first ground of appeal should be rejected. She argues that Mr Gaddafi's challenge to the Pre-Trial Chamber's interpretation '(i) oversimplifies the interpretation of articles 17(1)(c) and 20(3) and disregards their relevant context, object and purpose, (ii) fails to adequately address the jurisprudence, commentary and the Statute's drafting history which supports the [Pre-Trial Chamber's] interpretation, and (iii) overstates the relevance of the *sui generis* nature of the Court's complementarity regime in order to distinguish it from the application of *ne bis in idem* in other international legal contexts'.<sup>68</sup>

40. In particular, the Prosecutor submits that the correct interpretation of articles 17(1)(c) and 20(3) of the Statute implies the existence of a final judgment.<sup>69</sup> Such an interpretation, in the Prosecutor's view, stems from an examination of the ordinary meaning of the terms of these provisions, read in context and in light of their object

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<sup>65</sup> [Transcript, 11 November 2019](#), p. 15, lines 2-14; p. 33, line 25 to p. 46, line 14. See also [Transcript, 12 November 2019](#), p. 66, line 9 to p. 68, line 2; p. 71, lines 4-24.

<sup>66</sup> [Appeal Brief](#), para. 18.

<sup>67</sup> [Appeal Brief](#), paras 19, 35.

<sup>68</sup> [Prosecutor's Response](#), para. 5.

<sup>69</sup> [Prosecutor's Response](#), paras 6-10.

and purpose;<sup>70</sup> it is further supported by the drafting history<sup>71</sup> and is consistent with previous decisions of the Court<sup>72</sup> and with how *ne bis in idem* has been interpreted in the *ad hoc* tribunals,<sup>73</sup> as well as in international human rights law.<sup>74</sup>

41. During the hearing, the Prosecutor elaborated further on the interpretation of articles 17(1)(a) and 20(3) of the Statute and, in the factual context of this case, submitted that Mr Gaddafi should be considered to have been tried *in absentia*.<sup>75</sup>

**(c) OPCV's submissions**

42. The OPCV argues that counsel for Mr Gaddafi fails to demonstrate that the Pre-Trial Chamber erred in its interpretation of the relevant provisions and, in particular, the term 'has been tried' in article 20(3) of the Statute.<sup>76</sup> It states that counsel for Mr Gaddafi 'offers an untenable interpretation of said term it seeks to justify by downplaying the significance of article 21(1) of the Statute'.<sup>77</sup> It argues that counsel for Mr Gaddafi 'has not demonstrated that the [Pre-Trial] Chamber erred in law and, therefore, a *de novo* determination is not warranted'.<sup>78</sup>

43. During the hearing, the OPCV submitted that Mr Gaddafi should be considered to have been tried *in absentia*.<sup>79</sup> The OPCV also submitted that the 'Libyan proceedings were conducted in flagrant disregard of universally recognised fair trial rights' and that the process did not adhere to what is required under article 17 of the Statute.<sup>80</sup>

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<sup>70</sup> [Prosecutor's Response](#), paras 6-10. *See also* [Transcript, 11 November 2019](#), p. 66, line 24 to p. 72, line 1.

<sup>71</sup> [Prosecutor's Response](#), paras 11-13.

<sup>72</sup> [Prosecutor's Response](#), paras 14-15. *See also* [Transcript, 11 November 2019](#), p. 80, lines 11-15.

<sup>73</sup> [Prosecutor's Response](#), paras 16-21.

<sup>74</sup> [Prosecutor's Response](#), paras 22-25. *See also* [Transcript, 11 November 2019](#), p. 72, line 2 to p. 75, line 21.

<sup>75</sup> [Transcript, 11 November 2019](#), p. 75, line 22 to p. 82, line 1; [Transcript, 12 November 2019](#), p. 42, line 15 to p. 43, line 15.

<sup>76</sup> [OPCV's Response](#), para. 15. *See also* [Transcript, 11 November 2019](#), p. 104, line 20 to p. 106, line 6.

<sup>77</sup> [OPCV's Response](#), para. 15.

<sup>78</sup> [OPCV's Response](#), para. 21.

<sup>79</sup> [Transcript, 11 November 2019](#), p. 106, line 7 to p. 108, line 13.

<sup>80</sup> [Transcript, 11 November 2019](#), p. 103, line 12 to p. 104, line 16.

**(d) Libya's submissions**

44. The Libyan government's representatives submit that the Impugned Decision is correct and that the case is admissible before the Court.<sup>81</sup> According to them, the trial was *in absentia* due both to Mr Gaddafi's wish not to attend, and the fact that the detention facilities were outside the control of the relevant Libyan authorities.<sup>82</sup> They confirm that a sentence of death is only considered final once reviewed and confirmed by the judges of the Court of Cassation.<sup>83</sup>

**(e) *Amici curiae's* submissions**

45. Lawyers for Justice in Libya and Redress mainly submit that the Tripoli Court Judgment is not final because Mr Gaddafi was tried *in absentia* and that, in any event, it would not be final even if he was convicted in his presence, given the mandatory review, according to Libyan law, of death penalty convictions by the Court of Cassation.<sup>84</sup>

46. The Libyan Cities and Tribes Supreme Council submits, *inter alia*, that considering the Tripoli Court Judgment as lacking finality because of it being issued *in absentia* is in contradiction with the position this Court took in the *Al-Senussi* case, where the case was declared inadmissible before the ICC, noting that the Libyan judiciary was considered able to prosecute the case.<sup>85</sup> It further submits that the Pre-Trial Chamber gave a broad interpretation of article 20 of the Statute and that the trial of Mr Gaddafi before the Tripoli Court 'meets the conditions stipulated in this Article'.<sup>86</sup> During the hearing, the Libyan Cities and Tribes Supreme Council submitted that the Tripoli Court was wrong in considering that the Tripoli Court Judgment against Mr Gaddafi was rendered *in absentia*, and that there is compelling evidence indicating that the ruling was in fact rendered in Mr Gaddafi's presence, notably the fact that Mr Gaddafi attended hearings by video-link, and that some of

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<sup>81</sup> [Transcript, 12 November 2019](#), p. 92, line 4 to line 12; p. 99, line 5 to p. 100, line 4.

<sup>82</sup> Annex XIII to the Transmission of the written observations submitted by the State of Libya, 8 November 2019, ICC-01/11-01/11-683-Conf-AnxXIII (OA8) ('Libya's Submissions'), paras 7-9; [Transcript, 12 November 2019](#), p. 12, lines 3-22; p. 88, line 22 to p. 89, line 16; p. 91, line 17 to p. 92, line 2.

<sup>83</sup> Libya's Submissions, ICC-01/11-01/11-683-Conf-AnxXIII (OA8), paras 24-27.

<sup>84</sup> [Lawyers for Justice in Libya and Redress Observations](#), paras 8-12. *See also* [Transcript, 12 November 2019](#), p. 13, line 19 to p. 14, line 7.

<sup>85</sup> [Libyan Cities and Tribes Supreme Council Observations](#), para 34.

<sup>86</sup> [Libyan Cities and Tribes Supreme Council Observations](#), para 34.

Mr Gaddafi's co-accused who also attended hearings by video-link received sentences rendered in their presence, rather than *in absentia*.<sup>87</sup> It also submitted that 'the judicial authorities in Libya have carried out their full duties in prosecuting [Mr Gaddafi], which fulfils Article 17(c) of the Rome Statute and which fulfils the complementarity principle enshrined in the Rome Statute'.<sup>88</sup>

### 3. *Determination by the Appeals Chamber*

47. In this first ground of appeal, counsel for Mr Gaddafi argues that the Pre-Trial Chamber's interpretation gave undue weight to article 21(3) of the Statute (according to which '[t]he application and interpretation of law pursuant to [that provision] must be consistent with internationally recognized human rights'), at the expense of the principles of treaty interpretation of the VCLT, and that the Pre-Trial Chamber also wrongly interpreted the jurisprudence on which it relied.

48. As recalled above, the Pre-Trial Chamber held that, in order for a case to be inadmissible before this Court, under articles 17(1)(c) and 20(3) of the Statute, a person must have been the subject of a completed trial, resulting in a final conviction or acquittal, which has acquired *res judicata* effect.<sup>89</sup> The Pre-Trial Chamber reached this conclusion on the basis of its analysis of, in particular, a decision of Trial Chamber III in the *Bemba* case, jurisprudence of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda regarding the *ne bis in idem* principle, and the text of article 14(7) of the International Covenant on Civil and Political Rights (the 'ICCPR') and of provisions of other human rights instruments, also related to the issue of *ne bis in idem* which, according to the Pre-Trial Chamber, had to be taken into account when interpreting article 20(3) of the Statute, in accordance with article 21(3) of the Statute.<sup>90</sup>

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<sup>87</sup> [Transcript, 12 November 2019](#), p. 35, line 4 to p. 36, line 23.

<sup>88</sup> [Transcript, 12 November 2019](#), p. 36, line 24 to p. 37, line 1.

<sup>89</sup> [Impugned Decision](#), *see* in particular, paras 36 and 79.

<sup>90</sup> [Impugned Decision](#), paras 37-47. Article 14(7) of the ICCPR reads as follows: 'No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country'.

**(a) Tripoli Court Judgment of 28 July 2015**

49. Before turning to the question of the interpretation of articles 17(1)(c) and 20(3) of the Statute, the Appeals Chamber notes that it is not in dispute that Mr Gaddafi was tried, convicted and sentenced to death, by the Tripoli Court, in a judgment dated 28 July 2015.<sup>91</sup> Counsel for Mr Gaddafi argued, before the Pre-Trial Chamber, that, although the Tripoli Court concluded that its findings were made *in absentia*, the Pre-Trial Chamber should find that the trial was conducted in his presence;<sup>92</sup> as noted above, in the Impugned Decision, the Pre-Trial Chamber concluded that the judgment was rendered *in absentia*.<sup>93</sup> It found that ‘it [was] not for [it] to challenge the correctness, nature or qualification of judgments passed by national courts of States, unless there are compelling reasons to do so’,<sup>94</sup> and concluded that there were no such compelling reasons in this case.

50. The Appeals Chamber notes that, although counsel for Mr Gaddafi stated, in his Appeal Brief, that he did not challenge this finding on appeal,<sup>95</sup> at the appeal hearing, following a question by the Appeals Chamber as to whether it was common ground that the proceedings against Mr Gaddafi were conducted *in absentia*,<sup>96</sup> counsel for Mr Gaddafi stated that his position was that Mr Gaddafi had been tried in his presence.<sup>97</sup> The parties and participants made extensive submissions on this question at the hearing, as well as on related questions of Libyan law. As seen above, the Libyan Cities and Tribes Supreme Council also submitted four judgments

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<sup>91</sup> See for example, [Admissibility Challenge](#), paras 17-24; Prosecution response to ‘Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute’, 28 September 2018, ICC-01/11-01/11-653-Conf, paras 32-50, (a public redacted version was filed on 11 October 2018, [ICC-01/11-01/11-653-Red](#)); [Prosecutor’s Response](#), para. 26; [Transcript, 11 November 2019](#), p.14, line 5 to p.15, line 4.

<sup>92</sup> See for example, [Admissibility Challenge](#), para. 47 and Corrigendum of Defence Consolidated Reply to Prosecution “Response to ‘Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute’ 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’), paras 20 *et seq*; a second redacted version was filed on 20 November 2018 ([ICC-01/11-01/11-660-Corr-Red2](#)).

<sup>93</sup> [Impugned Decision](#), para. 48.

<sup>94</sup> [Impugned Decision](#), para. 51.

<sup>95</sup> Counsel for Mr Gaddafi stated that he disagreed with the Pre-Trial Chamber’s finding that the Tripoli Court Judgment could properly be considered as a verdict issued *in absentia*, he stated that he did not, however, challenge this finding on appeal. See [Appeal Brief](#), footnote 32.

<sup>96</sup> [Decision of 1 November 2019 on the conduct of the hearing](#), p. 4, question (d).

<sup>97</sup> [Transcript, 11 November 2019](#), p. 33, line 15 to p. 36, line 19.

of the Libyan Supreme Court, related to the issue, after the hearing. Therefore, as this matter has arisen on appeal, the Appeals Chamber shall address it at the outset.

51. The Appeals Chamber notes the arguments made by counsel for Mr Gaddafi in support of the fact that the trial was held in Mr Gaddafi's presence, including that he attended a number of hearings via video-link, that his counsel attended some hearings, and that, 'where he did not attend it was through no fault or deliberate absconding by him'.<sup>98</sup> He also challenges the approach taken by the Tripoli Court and presents what he states is the correct interpretation of the relevant provisions of the Libyan criminal code based on what he states are the facts.

52. Counsel for Mr Gaddafi is challenging the way in which Libyan law should be interpreted on the facts of Mr Gaddafi's case. As noted by the Pre-Trial Chamber, the Appeals Chamber has stated that it is not the role of a chamber 'to review the decisions of [national] courts to decide whether those courts applied [national] law correctly'; a chamber 'should accept *prima facie* the validity and effect of the decisions of domestic courts, unless presented with compelling evidence indicating otherwise.'<sup>99</sup> In this regard, as noted by the Pre-Trial Chamber, the Tripoli Court itself indicates that it passed the judgment *in absentia*, and the fact that the trial was conducted *in absentia* was further supported by statements from the Libyan government that were before the Pre-Trial Chamber.<sup>100</sup> Whereas there are conflicting submissions on the record on this issue, in circumstances such as the present, the Appeals Chamber is of the view that counsel for Mr Gaddafi has not demonstrated that the Pre-Trial Chamber erred in finding that there were no compelling reasons not to accept the nature of the Tripoli Court Judgment as one taken *in absentia*.

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<sup>98</sup> See for example [Transcript, 11 November 2019](#), p. 34, lines 2-3; see more in general, p. 33, line 25 to p. 42, line 19.

<sup>99</sup> [Impugned Decision](#), para 52, referring to *Corrigendum to 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-Corr, para. 66.

<sup>100</sup> [Impugned Decision](#), paras 49-53, referring *inter alia*, to Annex 8 to the 28 September 2018 Prosecutor's Response, ICC-01/11-01/11-653-Conf-Anx8 ('Annex 8 to the Prosecutor's PTC Response'), pp. 14-15, (a public redacted version was filed on 11 October 2018, [ICC-01/11-01/11-653-Anx8-Red](#)).

53. The Appeals Chamber notes that the *in absentia* nature of the trial of Mr Gaddafi in Libya means that the judgment of 28 July 2015 cannot be considered final. Pursuant to article 358 of the Libyan Code of Criminal Procedure, a retrial shall take place if a person appears or is apprehended following a trial *in absentia*.<sup>101</sup> This is not disputed by the parties,<sup>102</sup> and it is confirmed by the submissions of the Government of Libya.<sup>103</sup> Therefore, it is the case that, as a result of the *in absentia* nature of Mr Gaddafi's trial (and leaving aside the potential impact of Law No. 6), should Mr Gaddafi appear, or be apprehended, the Tripoli Court Judgment would be 'nullified', and Mr Gaddafi would be retried.

54. However, the Appeals Chamber also notes that, even disregarding the *in absentia* nature of Mr Gaddafi's trial and assuming it was a trial in his presence, other procedural avenues under Libyan law would not have been completed in this case, as correctly found by the Pre-Trial Chamber;<sup>104</sup> notably, a mandatory review by the Court of Cassation, which is required in the case of death penalty convictions.<sup>105</sup>

**(b) Whether a judgment must be final to render a case inadmissible under articles 17(1)(c) and 20(3) of the Statute**

55. The Appeals Chamber now turns to the legal question raised by counsel for Mr Gaddafi under this ground of appeal, namely, whether a judgment must be final, in the sense of having acquired *res judicata* effect in the national system, for the case to be inadmissible before the ICC under articles 17(1)(c) and 20(3) of the Statute.

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<sup>101</sup> Article 358 of the Libyan Code of Criminal Procedure provides that 'If a person convicted in absentia appears or is arrested prior to the lapse of the penalty by prescription, the previously issued judgment shall be inevitably annulled either in respect of the penalty or the damages, and the case shall be retried before the Court'. See [Prosecutor's Response](#), footnote 68.

<sup>102</sup> See for example, [Transcript, 11 November 2019](#), p. 40, lines 6-13; p. 80, line 16 to p. 81, line 12.

<sup>103</sup> See for example, Government of Libya, [Response to Prosecution's 'Request for an Order to Libya to Refrain from Executing Saif Al-Islam Gaddafi, Immediately Surrender Him to the Court, and Report His Death Sentence to the United Nations Security Council'](#), 20 August 2015, ICC-01/11-01/11-612 paras 2 and 8; Libya's Submissions, ICC-01/11-01/11-683-Conf-AnxXIII (OA8), paras 19-27; [Transcript, 12 November 2019](#), p. 3, line 23 to p. 4, line 6.

<sup>104</sup> [Impugned Decision](#), paras 48, 53.

<sup>105</sup> See for example, Libya's Submissions, ICC-01/11-01/11-683-Conf-AnxXIII (OA8), para. 24; [Transcript, 11 November 2019](#), p. 43, lines 4-10.

56. Although counsel for Mr Gaddafi frames this ground of appeal in terms of whether a first-instance judgment must have become *res judicata* – a notion which was used by the Pre-Trial Chamber in the Impugned Decision<sup>106</sup> – for the purposes of this appeal, the Appeals Chamber will confine itself to focusing on the meaning and scope of the phrases ‘has already been tried’, and ‘has been tried’, as expressly set out in articles 17(1)(c) and 20(3) of the Statute, respectively. The question, therefore, is whether the Pre-Trial Chamber erred when it found that a person ‘has been tried’, in terms of these provisions, only if the decision resulting from such trial is no longer subject to appeal and, as a result, is final. For the reasons that follow, the Appeals Chamber considers that counsel for Mr Gaddafi’s arguments are unpersuasive in showing that the Pre-Trial Chamber erred.

57. Article 17(1)(c) of the Statute provides that the Court shall determine that a case is inadmissible when a person ‘has already been tried [...], and a trial by the Court is not permitted under article 20, paragraph 3’ of the Statute. Article 20(3) of the Statute provides that ‘[n]o person who has been tried by another court’ for crimes under the jurisdiction of the Court shall be tried by the Court with respect to the same conduct unless the proceedings in the other court were tainted for any of the reasons set out in article 20(3)(a) and (b) of the Statute.<sup>107</sup>

58. The Appeals Chamber recalls that article 17(1)(a) to (c) of the Statute sets out the circumstances in which the Court shall determine that a case is inadmissible because of the actions of a State which has jurisdiction over that case. In making such determination, consideration must be given to the fact that the Court is ‘complementary to national criminal jurisdictions’.<sup>108</sup> In light of the overall function

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<sup>106</sup> [Impugned Decision](#), paras 36, 38, 53.

<sup>107</sup> Article 20 of the Statute provides, in relevant part, as follows: ‘[...] 3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice’.

<sup>108</sup> Appeals Chamber, *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, [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 (OA6) (*‘Al-Senussi Admissibility Judgment’*), para. 215, referring to the tenth paragraph of the Preamble of the Statute and article 1 of the Statute, as referred to in article 17 of the Statute.

of the complementarity principle, and, for the following reasons, the Appeals Chamber considers that article 17(1)(c) of the Statute must be read to require finality. The Appeals Chamber has stated that “[t]he aim of the Rome Statute is “to put an end to impunity” and to ensure that “the most serious crimes of concern to the international community as a whole must not go unpunished””.<sup>109</sup> Under the complementarity principle, States have the primary responsibility to investigate and prosecute crimes falling within the jurisdiction of the Court, and the Court may only exercise its jurisdiction where the relevant national jurisdiction is either not doing so or is unwilling or unable to do so genuinely. In terms of articles 17(1)(c) and 20(3) of the Statute, the latter requires the Court to consider: (i) if the domestic proceedings were for the purpose of shielding the person from criminal responsibility for crimes within the jurisdiction of the Court (article 20(3)(a) of the Statute), or (ii) if domestic proceedings were not conducted in an independent or impartial manner (article 20(3)(b) of the Statute).

59. Whether domestic proceedings were for the purpose of shielding, or not conducted independently or impartially, cannot be meaningfully determined if only the domestic first-instance proceedings are taken into account, disregarding potential appeals proceedings. This is because it is conceivable that a domestic trial is carried out genuinely at the first-instance level, but that the appellate phase is used to shield the person concerned from criminal responsibility. In such a scenario, the Court would prematurely declare a case inadmissible relying on proceedings which may later be overruled in a way that would make the case admissible. Conversely, it is also conceivable that any shortcomings of a domestic first-instance trial will be corrected on appeal. The Appeals Chamber considers that, before the Court is called to determine the admissibility of a case on the basis that a person has been tried, a State’s judicial system should be given the opportunity to remedy deficiencies in proceedings if, and to the extent that, such means to do so are available.<sup>110</sup> This is

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<sup>109</sup> Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case](#), 25 September 2009, ICC-01/04-01/07-1497 (OAS), para. 79 (footnotes omitted).

<sup>110</sup> See Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, pp 124-125; see also [Transcript, 11 November 2019](#), p. 69, line 16 to p. 70, line 21.

ensured by an interpretation of articles 17(1)(c) and 20(3) of the Statute that requires finality of the domestic trial.

60. The suggestion of counsel for Mr Gaddafi that an appellate decision could constitute a ‘new fact’ for the purposes of article 19(10) of the Statute, and that therefore a first-instance judgment should be sufficient for the purposes of articles 17(1)(c) and 20(3) of the Statute, is unpersuasive. Article 19(10) of the Statute, which enables the Prosecutor to request a review of any inadmissibility decision if ‘new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17’, is designed to address any ‘new facts’ that become known after the initial admissibility decision. However, the existence of article 19(10) of the Statute – which is primarily a procedural rule – does not inform the interpretation of article 17(1)(c) of the Statute. Rather, that provision must be interpreted in its context – in particular, the preceding sub-paragraphs of the provision – and the object and purpose of the Rome Statute.

61. In sum, requiring finality of domestic proceedings, pursuant to article 17(1)(c) of the Statute, is in line with the Court’s complementarity framework as a whole, as set out in the Rome Statute. It recognises the primary role of States to investigate and try cases within their own jurisdictions, thereby allowing domestic courts to conduct effective prosecutions. The Court will exercise its jurisdiction only in cases where domestic jurisdiction is not being exercised, or where there is unwillingness or inability to do so genuinely.

62. As noted above, the Pre-Trial Chamber concluded that finality is required for the purposes of articles 17(1)(c) and 20(3) of the Statute relying, in particular, on jurisprudence of the Court and the *ad hoc* tribunals as well as decisions rendered by different human rights bodies. In light of its finding above, the Appeals Chamber can identify no error in the Pre-Trial Chamber’s conclusion and, in particular, in the fact that it interpreted the relevant provisions in light of jurisprudence, including from other courts, in relation to the *ne bis in idem* principle, and that it did so in view of article 21(3) of the Statute.<sup>111</sup> The Appeals Chamber notes that the submissions of counsel for Mr Gaddafi that some of that jurisprudence relates to the

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<sup>111</sup> [Impugned Decision](#), paras 31, 45.

*ne bis in idem* principle as applicable within the same jurisdiction, and not to the application of the principle across jurisdictions, and that where the jurisprudence does apply across national and international jurisdictions, such as at the *ad hoc* tribunals, this was in a context in which they had primacy over national courts,<sup>112</sup> as opposed to the contingency jurisdiction conferred on the Court within the complementarity framework. While noting the *sui generis* nature of the complementarity regime in which the Court operates, there is no error in the Pre-Trial Chamber finding the *ad hoc* tribunal's jurisprudence instructive and finding that that jurisprudence was supported by the interpretation of the *ne bis in idem* principle in international human rights law.

63. In light of the above, the Appeals Chamber considers that article 17(1)(c) of the Statute, read together with article 20(3) of the Statute, means that the decision issued by a national jurisdiction must be final before a case can be declared inadmissible on the basis of these provisions. The Appeals Chamber, therefore, confirms the Impugned Decision on this point and finds that the Pre-Trial Chamber was correct in holding that a final judgment is required to render a case inadmissible under articles 17(1)(c) and 20(3) of the Statute. Accordingly, the Appeals Chamber rejects Mr Gaddafi's first ground of appeal.

#### **D. Second ground of appeal**

64. As his second ground of appeal, counsel for Mr Gaddafi submits that the Pre-Trial Chamber erred in law and fact, and procedurally, by failing to determine that Law No. 6 was applied to Mr Gaddafi, and that such application rendered his conviction final.<sup>113</sup>

##### *1. Relevant part of the Impugned Decision*

65. The Pre-Trial Chamber found that Law No. 6 could not apply to Mr Gaddafi for two reasons. First, because the crimes charged fell outside the scope of the law and second, because the law was incompatible with international law.<sup>114</sup>

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<sup>112</sup> See, for example, ICTY, Article 9(2) of the Statute: 'The International Tribunal shall have primacy over national courts'. See similarly, ICTR, Article 8(2) of the Statute.

<sup>113</sup> [Appeal Brief](#), paras 36-109.

<sup>114</sup> [Impugned Decision](#), paras 56-78.

66. Regarding the application of Law No. 6 with respect to the domestic charges, the Pre-Trial Chamber recalled that the Government of Libya ‘confirmed that “[p]ursuant to Article 3 of Law No. 6 of 2015 in respect of amnesty, the crimes involving murders and corruption attributed to the Accused Saif al-Islam Gaddafi are excluded from the application of law provisions”’.<sup>115</sup> It also noted that, pursuant to article 6 of Law No. 6, ‘a reasoned decision by the competent judicial authority terminating the criminal case is a prerequisite’.<sup>116</sup> Having noted the differing submissions as to whether the law had been implemented, the Pre-Trial Chamber stated that ‘[b]e that as it may, and regardless of the accuracy of the information related to the implementation or activation of Law No. 6 of 2015, the Chamber does not deem this point determinative for the purpose of ruling on the present Admissibility Challenge’.<sup>117</sup> It added that, ‘even if assuming *arguendo* that the effect of Law No. 6 [...] is to put an end to the judicial process, this is not the case, as this law does not apply to Mr Gaddafi at a minimum due to the nature of the crime(s) he is domestically charged with [...] which are automatically excluded by virtue of said law’.<sup>118</sup> Specifically, the Pre-Trial Chamber found ‘that the crimes of identity-based murder, kidnapping, enforced disappearance and torture are excluded from the amnesty and/or pardon provided by virtue of this law’.<sup>119</sup>

67. As to its second reason, the Pre-Trial Chamber ‘believe[d] that there is a strong, growing, universal tendency that grave and systematic human rights violations – which may amount to crimes against humanity by their very nature – are not subject to amnesties or pardons under international law.’<sup>120</sup> After having reviewed case law from the Inter-American Court of Human Rights, the European Court of Human Rights, the African Commission on Human and Peoples’ Rights, the *ad hoc* and other international tribunals,<sup>121</sup> the Pre-Trial Chamber concluded

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<sup>115</sup> [Impugned Decision](#), para. 57.

<sup>116</sup> [Impugned Decision](#), para. 57.

<sup>117</sup> [Impugned Decision](#), para. 57.

<sup>118</sup> [Impugned Decision](#), para. 58.

<sup>119</sup> [Impugned Decision](#), para. 59, referring to Annex 8.3 to the 28 September 2018 Prosecutor’s Response, ICC-01/11-01/11-653-Conf-Anx8.3, p. 3; for an English translation *see* Annex III to the Defence Submission of i) translations of Annexes to “Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute” and ii) better version of document, 13 September 2018, ICC-01/11-01/11-650-AnxIII-tENG (‘Law No. 6’), p. 3.

<sup>120</sup> [Impugned Decision](#), para. 61.

<sup>121</sup> [Impugned Decision](#), paras 62-76.

‘that granting amnesties and pardons for serious acts such as murder constituting crimes against humanity is incompatible with internationally recognized human rights’.<sup>122</sup>

## 2. *Submissions before the Appeals Chamber*

### (a) **Submissions on behalf of Mr Gaddafi**

68. Counsel for Mr Gaddafi first argues that the Pre-Trial Chamber erred in law, and procedurally, by failing to provide a reasoned decision.<sup>123</sup> He alleges that the Pre-Trial Chamber’s errors, as identified in this ground of appeal, ‘are permeated by a complete failure to consider [his] submissions and evidence, evaluate them on the merits, and deliver a reasoned decision explaining why they were rejected’.<sup>124</sup>

69. Second, counsel for Mr Gaddafi argues that the Pre-Trial Chamber erred in law in failing to have regard to the *de facto* application of Law No. 6 to him by the Al-Bayda transitional government.<sup>125</sup> In support of the fact that Law No. 6 had in fact already been applied to him, counsel for Mr Gaddafi refers in particular to his release from custody, as well as to the fact that he was able to file law suits in Libya and was issued national identification documents by the Libyan authorities, both of which, he argues, could not have occurred if there were an outstanding *in absentia* criminal conviction against him.<sup>126</sup> In this respect, counsel for Mr Gaddafi requests the Appeals Chamber to admit into the record, and consider on the merits, the contents of four additional documents dated February 2019, concerning the issuance of identification records for Mr Gaddafi by the Libyan Civil Registry Authority in Tripoli (the ‘Request for Admission of Documents’).<sup>127</sup> Counsel for Mr Gaddafi argues that the limited scope of the documents (‘they address a discrete issue’), their high level of relevance to his submissions under the second ground of appeal, and the fact that ‘they fall within the category of submissions and evidence wholly discounted or ignored by the [Pre-Trial Chamber]’ weigh in favour of their

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<sup>122</sup> [Impugned Decision](#), para. 77.

<sup>123</sup> [Appeal Brief](#), paras 36(i), 37-42.

<sup>124</sup> [Appeal Brief](#), para. 37.

<sup>125</sup> [Appeal Brief](#), paras 36(ii), 43-64. *See also* [Transcript, 12 November 2019](#), p. 68, line 18 to p. 71, line 3; p. 77, line 14 to p. 78, line 16.

<sup>126</sup> [Appeal Brief](#), paras 44-46. *See also* [Transcript, 12 November 2019](#), p. 68, line 18 to p. 71, line 3.

<sup>127</sup> [Appeal Brief](#), paras 47-48. *See also* Confidential Annex 1.

admission and consideration on the merits.<sup>128</sup> It is further argued on behalf of Mr Gaddafi that these documents were issued more than three months after the filing of his Consolidated Reply and Response of 9 November 2018 before the Pre-Trial Chamber, but pre-date the Impugned Decision.<sup>129</sup>

70. Third, counsel for Mr Gaddafi submits that the Pre-Trial Chamber erred in law and/or fact in finding that Law No. 6 was not capable of applying to the crimes for which he was charged.<sup>130</sup> It is argued that the Pre-Trial Chamber focused erroneously, ‘on the crimes [he] was “domestically charged with” rather than those for which he was convicted’.<sup>131</sup> As Law No. 6 was applied to Mr Gaddafi after he had been convicted, he argues that ‘it therefore applied to the crimes for which he was convicted rather than the crimes for which he was charged’.<sup>132</sup> Thus, it is submitted that the Appeals Chamber should apply article 3 of Law No. 6, which provides for exceptions to the applicability of the law, to the crimes for which Mr Gaddafi was convicted.<sup>133</sup>

71. Fourth, counsel for Mr Gaddafi argues that the Pre-Trial Chamber erred in law in taking into consideration the validity of Law No. 6 in international law, when determining whether his conviction was final, as a matter of Libyan law.<sup>134</sup> He argues that, ‘[i]n effectively striking down a provision of national law, the [Pre-Trial Chamber] exceeded its powers’.<sup>135</sup> Counsel for Mr Gaddafi argues that ‘[t]he issue should have been determined as a matter of national law’, and the Pre-Trial Chamber erred in relying ‘on international law considerations in relation to amnesties’.<sup>136</sup> He further argues that article 21(3) of the Statute ‘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’.<sup>137</sup>

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<sup>128</sup> [Appeal Brief](#), para. 48.

<sup>129</sup> [Appeal Brief](#), para. 47, referring also to the [Al-Senussi Admissibility Judgment](#), paras 58-59 as to the admissibility of additional evidence in appeals related to admissibility.

<sup>130</sup> [Appeal Brief](#), paras 36 (iii), 65-74.

<sup>131</sup> [Appeal Brief](#), para. 65.

<sup>132</sup> [Appeal Brief](#), para. 66.

<sup>133</sup> [Appeal Brief](#), para. 73.

<sup>134</sup> [Appeal Brief](#), paras 36 (iv), 75-86.

<sup>135</sup> [Appeal Brief](#), para. 76.

<sup>136</sup> [Appeal Brief](#), para. 76; *see also* paras 77-86.

<sup>137</sup> [Appeal Brief](#), para. 76.

72. Finally, as his fifth argument, counsel for Mr Gaddafi submits that the Pre-Trial Chamber erred in law in finding that Law No. 6 was incompatible with international law.<sup>138</sup> Even if the Appeals Chamber were to find that the Pre-Trial Chamber ‘did not err in considering the validity of Law No. 6 [...] as a matter of international law’, counsel for Mr Gaddafi submits that the Pre-Trial Chamber ‘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”’.<sup>139</sup> He argues that the Appeals Chamber should ‘find that at the time of [Mr] Gaddafi’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’.<sup>140</sup> He submits that ‘[t]he 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 international human rights law’.<sup>141</sup> He reviews international law on the issue<sup>142</sup> and states that the Pre-Trial Chamber’s ‘rule [...] takes no account of [the] nuances [in the jurisprudence] and is not therefore consistent with internationally recognized human rights’.<sup>143</sup> Counsel for Mr Gaddafi asserts that Law No. 6 ‘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’.<sup>144</sup> He also argues that ‘the crimes alleged against [him] were fully investigated, he was tried, and he was convicted and sentenced in Libya’.<sup>145</sup> Counsel for Mr Gaddafi therefore argues that the Appeals Chamber should conclude that the application of Law No. 6 to him ‘is not inconsistent with internationally recognized human rights’.<sup>146</sup>

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<sup>138</sup> [Appeal Brief](#), paras 36 (v), 87-109.

<sup>139</sup> [Appeal Brief](#), para. 87.

<sup>140</sup> [Appeal Brief](#), para. 87 (emphasis in original). *See also* [Transcript, 12 November 2019](#), p. 73, line 16 to p. 74, line 23.

<sup>141</sup> [Appeal Brief](#), para. 89. *See also* paras 104-105.

<sup>142</sup> [Appeal Brief](#), paras 91-104.

<sup>143</sup> [Appeal Brief](#), para. 101.

<sup>144</sup> [Appeal Brief](#), para. 106.

<sup>145</sup> [Appeal Brief](#), para. 107.

<sup>146</sup> [Appeal Brief](#), para. 109.

73. On the validity of Law No. 6, during the hearing it was submitted on behalf of Mr Gaddafi that Libyan national courts have applied this law, that the Libyan Attorney General's Office has acquiesced in its application, and that this Chamber should adopt a 'measure of discipline' in inquiring into the validity of this law.<sup>147</sup> With respect to the issue of whether the Court should consider questions of proportionality of punishment imposed by a national jurisdiction, which was raised during the hearing, counsel for Mr Gaddafi submitted that 'that is a step beyond what the Statute envisages the Court doing [under its] complementarity framework', given the divergent national and international sentencing practices of courts.<sup>148</sup>

**(b) Prosecutor's submissions**

74. The Prosecutor argues that: (i) the Impugned Decision was reasoned;<sup>149</sup> (ii) the Pre-Trial Chamber correctly found that Law No. 6 did not apply to the crimes with which Mr Gaddafi was charged;<sup>150</sup> (iii) the Pre-Trial Chamber sufficiently considered the attempts by the Al-Bayda transitional government to apply Law No. 6 to Mr Gaddafi's case; in particular, she argues that the Pre-Trial Chamber reasonably did not rely on the acts of certain members of the Al-Bayda transitional government,<sup>151</sup> that Mr Gaddafi's purported release does not mean that Law No. 6 was validly applied to him,<sup>152</sup> and that the documents do not establish that Law No. 6 was validly applied to him;<sup>153</sup> (iv) Law No. 6 did not render the Tripoli Court Judgment final; that the Pre-Trial Chamber correctly found that Law No. 6, if applied to Mr Gaddafi, was incompatible with international law,<sup>154</sup> and that the Pre-Trial Chamber correctly applied article 21 of the Statute and reasonably exercised its discretion.<sup>155</sup>

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<sup>147</sup> [Transcript, 11 November 2019](#), p. 52, line 25 to p. 55, line 9. *See also* [Transcript, 12 November 2019](#), p. 68, line 18 to p. 71, line 3.

<sup>148</sup> [Transcript, 12 November 2019](#), p. 78, line 19 to p. 82, line 4, see in particular, p. 79, lines 20-24.

<sup>149</sup> [Prosecutor's Response](#), paras 28-32.

<sup>150</sup> [Prosecutor's Response](#), paras 33-44. *See also* [Transcript, 11 November 2019](#), p. 91, lines 21-25; p. 92, lines 14-18; p. 94, lines 11-20.

<sup>151</sup> [Prosecutor's Response](#), paras 45-55.

<sup>152</sup> [Prosecutor's Response](#), paras 45, 56-61.

<sup>153</sup> [Prosecutor's Response](#), paras 45, 62-71.

<sup>154</sup> [Prosecutor's Response](#), paras 72-107. *See also* [Transcript, 11 November 2019](#), p. 89, line 20 to p. 91, line 20; p. 100, lines 1 to 9.

<sup>155</sup> [Prosecutor's Response](#), paras 72, 108-115.

75. The Prosecutor argues that the Request for Admission of Documents should be rejected. The Prosecutor mainly submits that the request does not comply with regulation 62(1)(b) of the Regulations of the Court (dealing with additional evidence presented before the Appeals Chamber),<sup>156</sup> that the documents ‘pre-date the Impugned Decision by over five weeks’,<sup>157</sup> that counsel for Mr Gaddafi does not explain why he did not seek their admission before the Pre-Trial Chamber, ‘especially when [his] own Libyan counsel was involved in obtaining them’,<sup>158</sup> and that the Appeals Chamber should not consider them when the Pre-Trial Chamber did not do so.<sup>159</sup> She argues that counsel for Mr Gaddafi ‘fails to make any convincing argument as to why the admission of these documents by the Appeals Chamber would be in the interests of justice’.<sup>160</sup>

76. Lastly, the Prosecutor argues that the Pre-Trial Chamber’s findings on Law No. 6, although correct, were *obiter dicta*, and that, if the Appeals Chamber upholds the Pre-Trial Chamber’s findings on the basis of the lack of finality of the Tripoli Court Judgment and the inapplicability of Law No. 6 to Mr Gaddafi, the Appeals Chamber need not address Mr Gaddafi’s arguments as to the lack of compatibility of the law with international law.<sup>161</sup>

77. During the hearing, the Prosecutor submitted that the period of four and a half years, which Mr Gaddafi has served in prison, is manifestly disproportionate to the gravity of his alleged crimes, even if an inquiry into ‘shielding’ is engaged.<sup>162</sup> The Prosecutor also submitted that Law No. 6 was not validly issued under Libyan domestic law<sup>163</sup> and, even if it was, it could not be applied to Mr Gaddafi both substantively and procedurally.<sup>164</sup>

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<sup>156</sup> [Prosecutor’s Response](#), para. 64.

<sup>157</sup> [Prosecutor’s Response](#), para. 64, where it is noted that Annexes 1A, 1C and 1D are dated 24 February 2019; Annex 1B is dated 27 February 2019.

<sup>158</sup> [Prosecutor’s Response](#), para. 64, referring to [Appeal Brief](#), para. 45.

<sup>159</sup> [Prosecutor’s Response](#), para. 64, referring to [Al-Senussi Admissibility Judgment](#), paras 58-59.

<sup>160</sup> [Prosecutor’s Response](#), para. 64.

<sup>161</sup> [Prosecutor’s Response](#), paras 73, 116-119.

<sup>162</sup> [Transcript, 11 November 2019](#), p. 95, line 8 to p. 99, line 24; [Transcript, 12 November 2019](#), p. 61, line 15 to p. 64, line 23.

<sup>163</sup> [Transcript, 12 November 2019](#), p. 50, line 19 to p. 52, line 3.

<sup>164</sup> [Transcript, 12 November 2019](#), p. 52, lines 4-12; p. 53, line 20 to p. 57, line 3; p. 59, line 5 to p. 60, line 1.

**(c) OPCV's submissions**

78. The OPCV opposes this ground of appeal on the basis that counsel for Mr Gaddafi: ‘(i) fails to demonstrate a material error, (ii) puts forward nothing but a general disagreement with the Chamber’s factual findings, (iii) impermissibly reiterates previous arguments [...]; and (iv) misrepresents the Impugned Decision’.<sup>165</sup>

79. With regard to the Request for Admission of Documents, the OPCV refers to the Appeals Chamber’s ruling in the *Ruto* case that: ‘[t]he State cannot expect to be allowed to amend an admissibility challenge or to submit additional supporting evidence just because the State made the challenge prematurely’,<sup>166</sup> and they contend that ‘[t]he same must apply, *mutatis mutandis*, to Mr Gaddafi’.<sup>167</sup> In the OPCV’s view, counsel for Mr Gaddafi ‘has not put forward any arguments justifying why the documents were not adduced before the Pre-Trial Chamber at the time it presented its admissibility challenge’,<sup>168</sup> instead simply submitting ‘that they “were issued” more than three months after’ the filing of his Consolidated Reply and Response before the Pre-Trial Chamber.<sup>169</sup> Moreover, they submit that counsel for Mr Gaddafi ‘does not demonstrate that the documents were not available in any form at the relevant time, or discoverable through the exercise of due diligence’.<sup>170</sup>

80. During the hearing, the OPCV submitted that the Pre-Trial Chamber correctly decided that amnesties for the most serious crimes are incompatible with international law.<sup>171</sup>

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<sup>165</sup> [OPCV's Response](#), para. 23; *see also* paras 23-71.

<sup>166</sup> [OPCV's Response](#), para. 38, referring to ‘Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute”’, No. [ICC-01/09-01/11-307 OA](#), 30 August 2011, para. 100.

<sup>167</sup> [OPCV's Response](#), para. 38.

<sup>168</sup> [OPCV's Response](#), para. 38.

<sup>169</sup> [OPCV's Response](#), para. 38.

<sup>170</sup> [OPCV's Response](#), para. 38, referring to the jurisprudence of the *ad hoc* Tribunals with regard to requests for additional evidence upon appeal.

<sup>171</sup> [OPCV's Response](#), para. 62; *see also* [Transcript, 11 November 2019](#), p. 112, line 14 to p. 113, line 20.

81. The OPCV submits that, since counsel for Mr Gaddafi fails to demonstrate that the Pre-Trial Chamber erred in law, the Appeals Chamber should dismiss his appeal in its entirety.<sup>172</sup>

**(d) Libya's submissions**

82. Libya essentially states that Law No. 6 was not applied to Mr Gaddafi and that he can therefore not benefit from it.<sup>173</sup> During the hearing, Libya's representatives submitted that the Impugned Decision is correct.<sup>174</sup> While they did not deny the existence of Law No. 6,<sup>175</sup> they submitted that it had been 'misinterpreted to achieve impunity'.<sup>176</sup> Libya argued that, as a matter of both substance and procedure, Mr Gaddafi's alleged crimes were not covered by the law.<sup>177</sup> Libya further argued that, even if they were covered, Mr Gaddafi had not expressed remorse, and the Libyan judicial authorities had not issued any decision to grant Mr Gaddafi amnesty, both of which are preconditions for Law No. 6 to apply.<sup>178</sup>

**(e) *Amici curiae's* submissions**

83. Lawyers for Justice in Libya and Redress, who filed joint submissions, argue that Law No. 6 was not lawfully applied to Mr Gaddafi and could not render final the Tripoli Court Judgment.<sup>179</sup> They also submit that, in any event, any application of this law to Mr Gaddafi should not be recognised by the Court as it is inconsistent with international law.<sup>180</sup> During the hearing, they submitted that in considering article 20(3), despite the word 'court' therein, developments outside court proceedings, e.g. amnesties which are 'most often applied by legislative or executive act',<sup>181</sup> should be taken into account by the Court.<sup>182</sup> On the issue of effective

<sup>172</sup> [OPCV's Response](#), para. 72.

<sup>173</sup> Libya's Submissions, ICC-01/11-01/11-683-Conf-AnxXIII (OA8), paras 29-30.

<sup>174</sup> [Transcript, 12 November 2019](#), p. 92, lines 4-12; p. 99, line 5 to p. 100, line 4.

<sup>175</sup> [Transcript, 12 November 2019](#), p. 90, lines 8-19.

<sup>176</sup> [Transcript, 12 November 2019](#), p. 6, lines 14-20.

<sup>177</sup> See in particular, Libya's Submissions, para. 29, and [Transcript, 12 November 2019](#), p. 6, lines 15-19.

<sup>178</sup> Libya's Submissions, ICC-01/11-01/11-683-Conf-AnxXIII (OA8), paras 29-30, 33; [Transcript, 12 November 2019](#), p. 6, line 14 to p. 10, line 14.

<sup>179</sup> [Lawyers for Justice in Libya and Redress Observations](#), paras 13-14. See also [Transcript, 12 November 2019](#), p. 14, line 8 to p. 15, line 22.

<sup>180</sup> [Lawyers for Justice in Libya and Redress Observations](#), paras 15-25. See also [Transcript, 12 November 2019](#), p. 18, line 2 to p. 23, line 1.

<sup>181</sup> [Transcript, 12 November 2019](#), p. 23, lines 10-11.

<sup>182</sup> [Transcript, 12 November 2019](#), p. 23, line 2 to p. 29, line 8.

punishment, and specifically in relation to Mr Gaddafi, they submit that ‘the facts of this case do not come anywhere close to effective punishment for the crimes against humanity’ and that ‘to hold otherwise [...] would be to undermine the very object and purpose of the Statute’.<sup>183</sup>

84. The Libyan Cities and Tribes Supreme Council submits that Law No. 6 was promulgated for social reconciliation in Libya, in line with international law, and validly issued.<sup>184</sup> In particular, the Libyan Cities and Tribes Supreme Council submits that one of the reasons that the Libyan Parliament passed Law No. 6, and subsequently applied it to Mr Gaddafi, ‘was the delivery of unjust judgments against him [...] that are disproportionate to the accusations levelled at [him]’.<sup>185</sup> Although the Libyan Cities and Tribes Supreme Council avers it is ‘fully confident of the integrity and independence of the Libyan judiciary and do[es] not have the least of doubt concerning the due process adopted in [Mr Gaddafi’s case]’, it nonetheless notes that the trial ‘has been in such an environment that was infested by militias practices in Tripoli that tend to afflict retaliation and revenge’.<sup>186</sup> The Libyan Cities and Tribes Supreme Council further notes that a number of those executed or sentenced alongside Mr Gaddafi in case 630/2012 have been amnestied and discharged for the same crimes for which Mr Gaddafi was charged, and that victims’ rights were not affected by the amnesty.<sup>187</sup> With regard to the submissions made to the effect that the conditions required for the application of the law – as set out in article 2 of Law No. 6 – including the expression of remorse, have not been satisfied in the present case, the Libyan Cities and Tribes Supreme Council noted that, although ‘this general amnesty opens the door for reconciliation, [...] all parties have refused to engage’,<sup>188</sup> despite the Libyan Cities and Tribes Supreme Council’s efforts to call upon them to do so.<sup>189</sup>

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<sup>183</sup> [Transcript, 12 November 2019](#), p. 31, lines 1-5.

<sup>184</sup> [Libyan Cities and Tribes Supreme Council Observations](#), paras 9-17. *See also* [Transcript, 12 November 2019](#), p. 37, line 9 to p. 40, line 10.

<sup>185</sup> [Libyan Cities and Tribes Supreme Council Observations](#), para. 15.

<sup>186</sup> [Libyan Cities and Tribes Supreme Council Observations](#), para. 15.

<sup>187</sup> [Libyan Cities and Tribes Supreme Council Observations](#), para. 28.

<sup>188</sup> [Transcript, 12 November 2019](#), p. 38, lines 7-8.

<sup>189</sup> [Transcript, 12 November 2019](#), p. 38, lines 11-15.

### 3. *Determination by the Appeals Chamber*

85. Before the Pre-Trial Chamber, Mr Gaddafi's counsel argued that, even if finality of the domestic proceedings were required for a case to be inadmissible under articles 17(1)(c) and 20(3) of the Statute, Law No. 6 granted him amnesty, thereby rendering, in practical terms, the Libyan proceedings against him final. The Pre-Trial Chamber rejected Mr Gaddafi's arguments. On appeal, Mr Gaddafi's counsel raises several arguments to challenge the Pre-Trial Chamber's findings.

#### (a) **The impact of Law No. 6**

86. With his first set of arguments, counsel for Mr Gaddafi submits that the Pre-Trial Chamber failed to provide a reasoned opinion.<sup>190</sup> In essence, he submits that the Pre-Trial Chamber failed to address many of the arguments that he had raised – and which he now repeats in his Appeal Brief.

87. The Appeals Chamber is not persuaded by the argument made by counsel for Mr Gaddafi as to the purported failure to provide a reasoned opinion. In the Impugned Decision, the Pre-Trial Chamber explained that it reached its conclusion as to the inapplicability of Law No. 6 on the basis of its determination that, irrespective of the validity and the implementation of Law No. 6, article 3(4) of that law excluded from the amnesty crimes with which Mr Gaddafi had been charged.<sup>191</sup> The Pre-Trial Chamber based this conclusion on its own review of the law and on the Libyan Government's position with respect to the application of Law No. 6 to the case of Mr Gaddafi.<sup>192</sup> In particular, the Pre-Trial Chamber accepted submissions from the Prosecutor General's Office, stating that '[p]ursuant to the provisions of Article 3 of Law No. 6 of 2015 in respect of amnesty, the crimes involving murders [...] attributed to [Mr Gaddafi] are excluded from the application of law provisions'.<sup>193</sup> The Appeals Chamber therefore finds that the Pre-Trial Chamber's approach was clear and it rejects the argument that it failed to provide a reasoned decision. It remains to be determined whether the Pre-Trial Chamber's decision was correct.

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<sup>190</sup> [Appeal Brief](#), paras 37-42.

<sup>191</sup> [Impugned Decision](#), para. 59. *See also* [Law No. 6](#), article 3(4).

<sup>192</sup> [Impugned Decision](#), para. 59.

<sup>193</sup> [Impugned Decision](#), para. 57, referring, *inter alia*, Annex 8 to the Prosecutor's PTC Response, ICC-01/11-01/11-653-Conf-Anx8.

88. Without prejudice to the question as to whether an amnesty may have any impact on decisions on the admissibility of a case under article 17(1)(c) of the Statute, in particular on whether it can change the fact that a person has or has not been tried for the purposes of article 17(1)(c) of the Statute, the Appeals Chamber finds that, for the reasons that follow, the Pre-Trial Chamber did not err when it found that Law No. 6 did not render the case against Mr Gaddafi inadmissible before this Court.

89. Counsel for Mr Gaddafi raises several arguments to challenge the Pre-Trial Chamber's finding that Law No. 6 did not apply to the types of crimes with which he had been charged. Notably, he argues that the Pre-Trial Chamber erred in (i) focusing on the domestic offences with which he was charged, rather than those for which he was convicted;<sup>194</sup> and (ii) finding that Law No. 6 does not apply to him since article 3(4) of said law excludes the crimes of identity-based murder, kidnapping, enforced disappearance and torture from the amnesty and/or pardon.<sup>195</sup> In this regard, counsel for Mr Gaddafi submits that '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)',<sup>196</sup> and that, although Mr Gaddafi's conviction relates to the offence of "killing" or "arbitrary killing", there is nothing in the Libyan Judgment indicating that this necessary additional element 'was alleged, adjudicated or established'.<sup>197</sup>

90. As to Mr Gaddafi's first argument – that the Pre-Trial Chamber incorrectly focused on the crimes charged, as opposed to the crimes for which he was convicted in the domestic proceedings – the Appeals Chamber notes that the Impugned Decision refers indeed to the 'crime(s) [Mr Gaddafi] is domestically charged with'.<sup>198</sup> However, there is no indication that, in assessing the effect of Law No. 6, the Pre-Trial Chamber considered specifically the charges brought against Mr Gaddafi, as opposed to the crimes of which he was convicted. The Appeals Chamber

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<sup>194</sup> [Appeal Brief](#), paras 65-66.

<sup>195</sup> [Appeal Brief](#), paras 65-67.

<sup>196</sup> [Appeal Brief](#), para. 68.

<sup>197</sup> [Appeal Brief](#), para. 69.

<sup>198</sup> [Impugned Decision](#), para. 58.

also notes that counsel for Mr Gaddafi does not argue that there was any difference between the charges and his eventual conviction in the domestic proceedings that would be relevant to the determination of the admissibility of his case. The Appeals Chamber therefore rejects Mr Gaddafi's argument.

91. As to the argument that the Pre-Trial Chamber erred when it found that Mr Gaddafi had been charged with crimes amounting to 'identity-based murder', which were excluded from the amnesty, the Appeals Chamber notes that the Pre-Trial Chamber did not engage in any interpretation of the crime of 'identity-based murder'. Counsel for Mr Gaddafi advances an interpretation according to which 'identity-based murder' is murder where 'the victim is selected because of their identity within a particular ethnic, religious or other group (which are called hate crimes in some jurisdictions)'.<sup>199</sup> The Appeals Chamber notes, however, that counsel for Mr Gaddafi did not provide any authority in Libyan law to support his interpretation and which would contradict the Pre-Trial Chamber's own understanding of the crime in question. The Appeals Chamber also notes that the Pre-Trial Chamber stated that its 'finding [was] in line with the Libyan Government's position towards the application of Law No. 6 of 2015 to the case of Mr Gaddafi'.<sup>200</sup>

92. Counsel for Mr Gaddafi argues that the Pre-Trial Chamber failed to have regard to the *de facto* application of the law to him, including highlighting the fact that he was actually released from prison, that since his release he has filed false accusation claims to the Libyan Attorney General's Office that were acted upon by the same prosecutor in charge of his criminal case (in relation to which he would not have standing if he were still subject to the criminal proceedings), and that Law No. 6 provides for a specific domestic mechanism for the resolution of any disputes regarding the operation of the law and that there is no evidence that any such national dispute had been raised to challenge the application of the law to him.<sup>201</sup> He also seeks the submission into evidence of four documents which concern the

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<sup>199</sup> [Appeal Brief](#), para. 68.

<sup>200</sup> [Impugned Decision](#), para. 59. *See also* Annex 8 to the Prosecutor's PTC Response, ICC-01/11-01/11-653-Conf-Anx8, p. 20.

<sup>201</sup> [Appeal Brief](#), paras 43-44.

issuance of identification records for Mr Gaddafi by the Libyan Civil Registry Authority in Tripoli<sup>202</sup> and which he argues also indicate acceptance of Law No. 6 by the Libyan authorities.

93. The Appeals Chamber considers that the Pre-Trial Chamber did not err by relying on the Libyan Government's position in support of its conclusion that Law No. 6 did not apply to Mr Gaddafi. In this regard, the Appeals Chamber notes that there is no information as to whether certain formal requirements for the law's application were satisfied; namely, there is no information as to whether Mr Gaddafi made any pledge of repentance and not to re-offend, nor as to any effort on Mr Gaddafi's part to reconcile with the victims, all conditions that appear necessary according to article 2 of the law. There is also no clarity, from the information and submissions before the Appeals Chamber, as to the basis on which Mr Gaddafi was released from prison; in particular there seems to be no evidence of a reasoned decision from 'the competent judicial authority' pursuant to article 6 of Law No. 6,<sup>203</sup> which also appears to be required by the terms of the law. It may be noted, in this respect, that Libya was at all material times a country going through a difficult transition phase, in which different armed factions controlled different parts of the country. Some confusion must be assumed in certain respects.

94. In contrast, the Libyan authorities have confirmed several times that Law No. 6 does not apply to Mr Gaddafi, including more recently before the Appeals Chamber. Both in its written and oral submissions, before both the Pre-Trial Chamber and the Appeals Chamber, Libya's position is that (i) the law does not apply to Mr Gaddafi, that 'the jurisdiction to apply provisions of this law lies with the competent judicial authority legally mandated to look into the case' but no such decision has been made in relation to Mr Gaddafi;<sup>204</sup> (ii) this law has therefore 'no impact on the judgment handed down against [Mr Gaddafi]';<sup>205</sup> (iii) 'the crimes

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<sup>202</sup> Annex 1 to the [Appeal Brief](#).

<sup>203</sup> [Appeal Brief](#), para. 44; [Admissibility Challenge](#), paras 25-26, and Annex C thereto. [Prosecutor's Response](#), paras 46-55. *See also* Prosecutor's oral submissions, [Transcript, 11 November 2019](#), p. 93, line 12 to p. 94, line 20; Libya's Submissions, ICC-01/11-01/11-683-Conf-AnxXIII (OA8), paras 17, 30, pp. 5, 12-14; [Lawyers for Justice in Libya and Redress Observations](#), paras 13-14.

<sup>204</sup> Annex 8 to the Prosecutor's PTC Response, ICC-01/11-01/11-653-Conf-Anx8, pp. 18-20.

<sup>205</sup> Annex 8 to the Prosecutor's PTC Response, ICC-01/11-01/11-653-Conf-Anx8, p. 20; *See also* Libya's Submissions, ICC-01/11-01/11-683-Conf-AnxXIII (OA8), para. 30, pp. 12-14.

involving murders [...], attributed to Mr Gaddafi were excluded from the application of the amnesty, pursuant to article 3 of the Law No. 6 of 2015’,<sup>206</sup> and (iv) ‘[a]ssuming that some of the crimes that Mr Gaddafi is charged with are covered by the [a]mnesty, the prerequisites for applying such law do not exist in his case’, pursuant to article 2 of the said law.<sup>207</sup> In relation to Mr Gaddafi’s release, Libya stated, *inter alia*, that ‘no decision has been issued by the competent judicial authority on the release of [Mr Gaddafi] pursuant to a judicial action or an authoritative legal situation that allows for such release’.<sup>208</sup> In sum, Libya’s position is that Law No. 6 ‘is one of these laws that has been misinterpreted to achieve impunity’.<sup>209</sup> The Appeals Chamber does not consider that it was erroneous for the Pre-Trial Chamber to take into account the unambiguous statements by the Libyan government made before it at the time, noting also that such statements have been further confirmed and reinforced on appeal.

95. As to the admission of additional documents sought by counsel for Mr Gaddafi, the Appeals Chamber first notes that these documents pre-date the Impugned Decision and that counsel for Mr Gaddafi, except for submitting that they ‘were issued’ more than three months after the filing of his Consolidated Reply and Response, has not put forward any arguments justifying why the documents were not adduced before the Pre-Trial Chamber. It further finds that, in any event, and even if the additional documents were admitted into evidence, this would not have an impact on the factual conclusion reached in the Impugned Decision. The arguments, and potential new material sought to be admitted by counsel for Mr Gaddafi do not suffice to counter the Libyan government’s position, particularly bearing in mind the submissions the Libyan authorities made, both in writing and orally, before the Appeals Chamber.<sup>210</sup>

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<sup>206</sup> Annex 8 to the Prosecutor’s PTC Response, ICC-01/11-01/11-653-Conf-Anx8, p. 20. *See also* Libya’s Submissions, ICC-01/11-01/11-683-Conf-AnxXIII (OA8), para. 29, pp. 10-12; [Transcript, 12 November 2019](#), p. 6, lines 15-19 and p. 7, lines 2-7.

<sup>207</sup> [Transcript, 12 November 2019](#), p. 9, lines 6-14.

<sup>208</sup> Annex 8 to the Prosecutor’s PTC Response, ICC-01/11-01/11-653-Conf-Anx8, p. 21. *See also* [Transcript, 12 November 2019](#), p. 9, line 15 to p. 10, line 14; *see also* Libya’s Submissions, ICC-01/11-01/11-683-Conf-AnxXIII (OA8), para. 30, pp. 12-14.

<sup>209</sup> [Transcript, 12 November 2019](#), p. 6, lines 14-15 and 25 to p. 6, line 2.

<sup>210</sup> *See for example*, Libya’s Submissions, ICC-01/11-01/11-683-Conf-AnxXIII (OA8), paras 28-33; [Transcript, 12 November 2019](#), p. 6, line 14 to p. 10, line 14.

96. Lastly, the Appeals Chamber finds that the Pre-Trial Chamber's holdings on Law No. 6's compatibility with international law were *obiter dicta*.<sup>211</sup> In light of the Appeals Chamber's conclusions above, that the Pre-Trial Chamber did not err in finding a lack of finality of the Tripoli Court Judgment, and that Law No. 6 is not applicable to the crimes for which Mr Gaddafi was convicted, the Appeals Chamber does not find it necessary to address the remaining arguments in the second ground of appeal. For present purposes, it suffices to say only that international law is still in the developmental stage on the question of acceptability of amnesties. The Pre-Trial Chamber appears to have accepted this: rather than determining that this question was settled, it found 'a strong, growing, universal tendency that grave and systematic human rights violations – which may amount to crimes against humanity by their very nature – are not subject to amnesties or pardons under international law'.<sup>212</sup> In these circumstances, the Appeals Chamber will not dwell on the matter further.

97. Accordingly, the Pre-Trial Chamber did not err when it found that the case against Mr Gaddafi is not inadmissible before the Court under article 17(1)(c) of the Statute as a result of Law No. 6.

## V. APPROPRIATE RELIEF

98. In an appeal pursuant to article 82(1)(a) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158(1) of the Rules). In the present case it is appropriate to confirm the Impugned Decision.

99. Judge Eboe-Osuji and Judge Bossa jointly append a concurring separate opinion to this judgment. Judge Ibáñez Carranza will, in due course, file a separate opinion to this judgment, related to the question of amnesties and international law, referred to at paragraph 96 above.

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<sup>211</sup> See [Impugned Decision](#), paras 61-78.

<sup>212</sup> [Impugned Decision](#), para. 61.

100. Done in both English and French, the English version being authoritative.



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**Judge Chile Eboe-Osuji**  
**Presiding**

Dated this 9<sup>th</sup> day of March 2020

At The Hague, The Netherlands