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THE APPEALS CHAMBER

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

SITUATION IN LIBYA

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

Public

Response on Behalf of Victims to the Defence Appeal Brief on the Decision on the Admissibility of the Case

Source: **Office of Public Counsel for Victims**

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

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I. INTRODUCTION

1. On behalf of the Victims participating in the admissibility proceedings,[1] the Principal Counsel of the Office of Public Counsel for Victims (the "Legal Representative") hereby submits her response to the Defence Appeal Brief (the "Appeal Brief") on the Decision on the admissibility of the case filed on 20 May 2019.[2] The Legal Representative opposes in full all grounds and sub-grounds of appeal arguing that the Defence (i) fails to demonstrate that the Pre-Trial Chamber committed any error that materially affected the "Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute'" (the "Impugned Decision");[3] and (ii) largely reiterates arguments unsuccessfully advanced before the Pre-Trial Chamber.

2. The Legal Representative also opposes, for the reasons set out *infra*,[4] the Defence's request to have four additional documents admitted into the record of the case and considered in the present appeal,[5] said request being manifestly untimely.

[1] See the "Decision of the Conduct of the Proceedings following the 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute'" (Pre-Trial Chamber I), No. ICC-01/11-01/11-641, 14 June 2018, p. 6, appointing the Principal Counsel as legal representative of victims in the admissibility proceedings.
[2] See the "Defence Appeal Brief in support of its appeal against Pre-Trial Chamber I's 'Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute'", No. ICC-10/11-01/11-669, 20 May 2019 (the "Appeal Brief").
[3] See the "Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute'" (Pre-Trial Chamber I), No. 01/11-01/11-662, 5 April 2019 (the "Impugned Decision").
[4] See *infra*, para. 38.
[5] See the Appeal Brief, *supra* note 2, para. 10.

II. PROCEDURAL HISTORY

3. On 5 April 2019, Pre-Trial Chamber I (the "Chamber"), by majority, issued the Impugned Decision,[6] indicating that the Minority Opinion of Judge Perrin de Brichambaut would be filed in due course.[7]

4. On 11 April 2019, the Defence for Mr Gaddafi filed the "Defence Appeal against Pre-Trial Chamber I's 'Decision on the "Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute"' and Application for extension of time to file the Appeal Brief".[8]

5. On 12 April 2019, the Appeals Chamber issued the "Urgent Order on the filing of responses to Mr Saif Al-Islam Gaddafi's 'Application for extension of time to file the Appeal Brief' (ICC-01/11-01/11-663)",[9] ordering that any response to the Application be filed by 16 April 2019.[10]

6. On 16 April 2019, the Legal Representative and the Prosecution filed their respective responses to the request for an extension of time. Neither opposed the request on the basis that they would be granted a corresponding extension of time.[11]

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[6] See the Impugned Decision, *supra* note 3.
[7] *Idem*, p. 29.
[8] See the "Defence Appeal against Pre-Trial Chamber I's 'Decision on the "Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute"' and Application for extension of time to file the Appeal Brief", No. ICC-01/11-01/11-663, 11 April 2019.
[9] See the "Urgent Order on the filing of responses to Mr Saif Al-Islam Gaddafi's 'Application for extension of time to file the Appeal Brief' (ICC-01/11-01/11-663)" (Appeals Chamber), No. ICC-01/11-01/11-665, 12 April 2019.
[10] *Idem*, p. 3.
[11] See the "Response on Behalf of Victims to the Defence's Application for an Extension of time to file the Appeal Brief", No. ICC-01/11-01/11-666, 16 April 2019; and the "Prosecution's Response to Mr Saif Al-Islam Gaddafi's 'Application for extension of time to file the Appeal Brief' (ICC-01/11-01/11-663)", No. 01/11-01/11-667, 16 April 2019.

7. On 18 April 2019, the Appeals Chamber granted the Defence application for an extension of time, specifying that "*if the Minority Opinion of Judge Perrin de Brichambaut is notified by Tuesday, 30 April 2019*", the time limit for the filing of the appeal brief would be extended to 9 May 2019; if, however, the Minority Opinion was notified "*after Tuesday, 30 April 2019, the time limit for the filing of the appeal brief* [would be] *extended to 16h00 on the tenth day after the notification of the Minority Opinion*".[12] The requests for corresponding extension of time for the Prosecution and the Legal Representative were rejected therein.[13]

8. On 8 May 2019, Judge Perrin de Brichambaut filed a Separate Concurring Opinion to the Impugned Decision (the "Separate Opinion").[14]

9. The Defence filed its Appeal Brief on 20 May 2019.[15]

III. SUBMISSIONS

10. The Defence argues that the Chamber erred in law and failed to provide a reasoned opinion. It puts forward two main grounds of appeal.[16] Despite its contention that it submits one additional sub-ground of appeal,[17] the Defence puts forth five sub-grounds to ground two of its appeal, which are interrelated and – at times – pled in the alternative.[18] As regards the main grounds of appeal, the Defence seeks that the Appeals Chamber:

> "*(i) reverse, in the relevant part, the Impugned Decision; (ii) determine that the four elements of the* ne bis in idem *evaluation are satisfied further to the submissions and the evidence contained in the Admissibility Challenge, the Defence's consolidated reply and*

[12] See the "Decision on Mr Saif Al-Islam Gaddafi's Application for extension of time to file the Appeal Brief" (Appeal Chamber), No. 01/11-01/11-668-Corr, 18 April 2019, para. 1.
[13] *Idem*, para. 2.
[14] See the "Separate concurring opinion by Judge Marc Perrin de Brichambaut", No. ICC-01/11-01/11-662-Anx, 8 May 2019 (the "Separate Opinion").
[15] See *supra*, note 2.
[16] See the Appeal Brief, *supra* note 2, para. 7.
[17] *Idem*, para. 9.
[18] *Ibid*., pp. 18, 21, 33, 40 and 46.

> *response, and this appeal brief; and (iii) hold that Dr. Gadafi's case before the ICC is inadmissible. In the alternative, if the Appeals Chamber declines to undertake the full four-step* ne bis in idem *evaluation, the Defence requests the Appeals Chamber reverse the Impugned Decision and remand this matter to the Pre-Trial Chamber to further consider and issue a new decision on the Admissibility Challenge in line with the Appeals Chamber's holdings and directions on the appeal* sub judice".[19]

11. At the outset the Legal Representative recalls that, in order to succeed upon appeal, the Defence needs to satisfy the applicable standard of review for alleged errors of law, namely:

> "*An Impugned Decision is 'materially affected by an error of law' if the Trial Chamber 'would have rendered a decision that is substantially different from the decision that was affected by the error, if it had not made the error'*".[20]

The Appeals Chamber clarified that it "*will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision*". [21]

12. It is therefore for the appellant to demonstrate the Chamber's erroneous interpretation of the law and that the purported error materially affected the Impugned Decision.[22]

13. The Legal Representative submits that the Defence fails to demonstrate that the Chamber erred in law, or that it failed to provide a reasoned decision. The

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[19] *Ibid*., paras. 10 and 110.
[20] See the "*Judgment in the Jordan Referral re Al-Bashir Appeal*" (Appeals Chamber), No. ICC-02/05-01/09-397-Corr, 17 May 2019, para. 33 and the authorities cited therein.
[21] *Idem*.
[22] See the "Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 1 December 2014 entitled 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo" (Appeals Chamber), No. ICC-02/11-01/12-75-Red OA, 27 May 2015, paras. 40-41 (footnotes omitted).

Impugned Decision should therefore be upheld and the Defence Appeal dismissed in its entirety.

A. First ground of appeal

The Majority of the Pre-Trial Chamber erred in law in holding that articles 17(1)(c) and 20(3) of the Statute may only be satisfied where a judgment on the merits of a case has acquired *res judicata* effect (Impugned Decision, paragraphs 36-47)[23]

14. The Defence avers that the Chamber erred in law in holding that articles 17(1)(c) and 20(3) of the Rome Statute (the "Statute") may only be satisfied where a judgment on the merits of a case has acquired *res judicata* effect.[24] It requests that the Appeals Chamber determine that the statutory requirements are satisfied "*where domestic trial proceedings have concluded with a verdict on the merits*".[25]

15. The Legal Representative opposes this ground of appeal and argues that the Defence fails to demonstrate that the Chamber erred in conducting its analysis underlying the interpretation of the relevant provision, and, in particular, the term '*has been tried*' contained within article 20(3) of the Statute. More so, it also offers an untenable interpretation of said term it seeks to justify by downplaying the significance of article 21(1) of the Statute.[26] The Appeals Chamber ought to the Defence's attempt to obtain said interpretation.

16. Indeed, the Defence simply reiterates previous submissions, including its claim that it finds it surprising that the drafters of the Statute would have failed to include language requiring finality into the text of articles 17(1)(c) and 20(3) as compared to internationally recognized human rights instruments. It repeats for the third time its stance that – because of such purported omission on the part of

[23] See the Appeal Brief, *supra* note 2, para. 7.
[24] *Idem*, para. 18.
[25] *Ibid.*
[26] *Ibid.*, para. 24: "[t]*he meaning and application of the* ne bis in idem *principle for the purposes of Article 20(3) is accordingly less susceptible to direct transposition of international human rights standards in comparison to principles such as the presumption of innocence or right to be tried without undue delay* […]".

the drafters – "*'tried by another court' simply means, at the very least, that the domestic trial proceedings in question have concluded with a verdict on the merits*".[27] The Legal Representative posits that it is neither the Appeals Chamber's task to engage in speculative academic discussions about the intentions of the drafters, nor to entertain arguments previously considered and rejected by the relevant Chamber. The Appeals Chamber is only entitled to consider matters such as the drafting history where the appellant has successfully demonstrated that the Chamber erred in misinterpreting the law. Only then can the Appeals Chamber be called upon stating the law. However, the Defence fails to demonstrate the existence of such error, merely expressing its disagreement with the interpretation of the Chamber.

17. As such, the Chamber conducted a complete examination of the drafting history; it reviewed applicable previous decisions of the Court and the *ad hoc* tribunals,[28] and considered the "*plain meaning of the terms*"[29] of articles 17(1)(c) and 20(3) of the Statute. It considered the position put forward by the Defence,[30] but preferred the interpretation suggested by the Legal Representative, finding that the latter was supported by the relevant authorities and internationally recognised human rights instruments.[31] Finally, it specifically noted its obligation to interpret and apply the law consistently with internationally recognised human rights standards, which – as found – envisaged the prohibition of a second trial when a *final* decision has been issued.[32] The Chamber thus concluded that the term "*has been tried by another court*" must be interpreted as to require finality.[33]

[27] *Ibid.*, para. 25. See also the "Admissibility Challenge by Dr. Saif-Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute", No. 01/11-01/11-640, 5 June 2018 (the "Admissibility Challenge"), para. 44.
[28] See the Impugned Decision, *supra* note 3, paras. 37-44.
[29] *Idem*, para. 35.
[30] *Ibid.*, paras. 36 and 46.
[31] *Ibid.*, para. 36.
[32] *Ibid.*, para. 45.
[33] *Ibid.*, para. 47.

18. In support of its disagreement and repeated argument that a 'trial on the merits' fulfils the requirement of article 20(3) of the Statute, the Defence further criticises the Chamber for purportedly failing to apply the Vienna Convention on the Law of Treaties 1969 (the "Vienna Convention") when interpreting the terms "*has been tried*".[34] Said Convention requires that terms be given their ordinary meaning.[35] While the Defence correctly points out that the provisions of the Statute must be interpreted in accordance with the Vienna Convention, it fails to demonstrate error on the Chamber's part. It merely claims that the Chamber misinterpreted the term "*has been tried by another court*" and instead offers its own interpretation. Moreover, said interpretation,[36] is anything but one in accordance with the ordinary meaning of the term in question. It is in fact a construct to meet the requirements of the Defence's argument.

19. The term "*has been tried*" in article 20(3) of the Statute, given its ordinary meaning – and, in particular, taking into account the grammatical tense used in the Statute, namely the perfect tense – describes an action *completed* in the present. Thus, a "*person who has been tried by another court*", indicates finality of that criminal process. It may of course be the case that a first instance judgment 'on the merits' acquires finality, and thus the status of *res judicata*,[37] but the key remains the *finality* of the process, as correctly pointed out by the Chamber in its ruling. Whether a case judged on the merits acquires the *res judicata* status is a highly fact-sensitive assessment and cannot be settled in the abstract.

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[34] See the Appeal Brief, *supra* note 2, paras. 20 and 21.
[35] See article 31(1) of the Vienna Convention on the Law of Treaties 1969.
[36] See the Appeal Brief, *supra* note 2, para. 21.
[37] The Legal Representative refers to her observations in response to the Admissibility Challenge, which were accepted by the Chamber, in which she argued that the circumstances were entirely distinguishable from the concrete case of Mr Gaddafi. See the "Observation's on behalf of victims on the 'Admissibility Challenge' by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute'", No. ICC-01/11-01/11-652, 28 September 2018 (the "Victims Observations"), paras. 61-70.

20. Should the Appeals Chamber nevertheless deem it appropriate to engage in a de *novo review* of the relevant law, the Legal Representative respectfully requests that her prior submissions on the matter be accepted as incorporated by reference into the present response.[38]

21. However, the Legal Representative maintains that, in her view, the Defence has not demonstrated that the Chamber erred in law and, therefore, a *de novo* determination is not warranted.

B. Second ground of appeal

The Majority erred in law and in fact, and procedurally, by failing to determine that Law No. 6 of 2015 was applied to Dr. Gaddafi and that such application rendered his conviction final (Impugned Decision, paragraphs 19, 56-78)[39].

22. The Defence submits that the Chamber's determination that Mr Gaddafi had been tried and convicted on 28 July 2015 by the Tripoli Criminal Court and sentenced to death,[40] failed to take account of the application of Law No. 6 of 2015 ("Law No. 6"). It avers that had the Chamber not erred by failing to acknowledge the application of said law, "*any possible remaining doubt as to the 'absolute' finality of Dr. Gadafi's conviction* [would have been] *immaterial*".[41]

23. The Legal Representative opposes this ground of appeal for the reasons that the Defence (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 – at times *verbatim*; and (iv) misrepresents the Impugned Decision. None of these factors is capable of satisfying the stringent requirements of the applicable standard of review.

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[38] *Idem*, paras. 61-70.
[39] See the Appeal Brief, *supra* note 2, para. 7.
[40] *Idem*, para. 19.
[41] *Ibid*., para. 19.

Sub-ground 2(i): The Majority erred in law, and procedurally, by failing to provide a reasoned decision

24. The Defence avers that the Chamber erred in law in failing to render a reasoned decision. It finds support for this contention in the fact that Judge Perrin de Brichambaut expressed, in its view, serious reservations about some of the legal underpinnings of the Impugned Decision and about the way in which it is presented.[42] The Defence also relies on the fact that Judge Perrin de Brichambaut chose to render his Separate Opinion in the form of an 'alternate decision'[43] as indicative of the "*Impugned Decision's failure to provide a reasoned decision*".[44] In particular, the Defence argues that the various sub-grounds of its second ground of appeal are "*permeated by a complete failure to consider Dr. Gadafi's submissions on evidence, evaluate them on the merits and deliver a reasoned decision explaining why they were rejected*".[45]

25. In this regard, the Legal Representative notes that the Appeals Chamber previously held that a decision must be "*so lacking in reasoning that it can be said that the* [Chamber] *failed to comply with the obligation to provide a reasoned decision and therefore made an error of law*."[46] It is insufficient to demonstrate that the reasoning was "*relatively sparse*".[47] More recently, the Appeals Chamber ruled that:

> "*The extent of the reasoning will depend on the circumstances of the case, but it is essential that* [the Chamber] *indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the Chamber to*

[42] *Ibid.*, para. 9 referring to the Separate Opinion, *supra* note 14, para. 1.
[43] See the Separate Opinion, *idem*, para. 3.
[44] See the Appeal Brief, *supra* note 2, para. 9.
[45] *Idem*, para. 37.
[46] See the "Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled 'Decision on the 'Requête de la Défence demandant la mise en liberté provisoire du president Gbagbo'" (Appeals Chamber), No. ICC-02/11-01/11-278-Red OA, 26 October 2012, para. 48.
[47] See the "Judgment on the appeal of Mr Laurent Gbagbo against the decision of Pre-Trial Chamber I of 11 July 2013 entitled 'Third decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute'", No. ICC-02/11-01/11-548-Red OA 4, 29 October 2013, para. 23.

> *be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion*".[48]

26. Thus, to fulfil its obligation to provide a reasoned opinion, a chamber needs not address all arguments raised by the parties, or every item of evidence relevant to a particular finding, provided that it indicated with sufficient clarity the basis for its decision.[49] Indeed, the Appeals Chamber clarified that: "[w]*hile the provision of sufficient reasoning is important* […], *this does not mean that failure to address in the reasoning of a decision one of the arguments of a party automatically results in an error*".[50]

27. Relying on jurisprudence of the *ad hoc* tribunals, the Legal Representative further submits that it is necessary for any appellant claiming an error of law on the basis of a lack of a reasoned decision to identify the specific issues, factual findings, or arguments which the appellant submits the relevant chamber omitted to address and to explain why this omission invalidated the decision.[51] Notably, the examples provided by the Defence in the present appeal are largely inaccurate as a review of

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[48] See the "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute'", No. ICC-01/05-01/08-3636-Red A, 8 June 2018 (the "*Bemba* Final Appeal Judgement"), para. 51, referring to the "Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Tre-Trial Chamber I entitled 'First Decision on the Prosecution's Requests and Amended Requests for Redactions under Rule 81'" (Appeals Chamber), No. ICC-01/04-01/06-773 OA 5, 14 December 2006, para. 20.

[49] See the *Bemba* Final Appeal Judgement, *idem*, para. 53. The settled jurisprudence of the *ad hoc* Tribunals likewise sets out that "*while a trial chamber must provide reasoning in support of its findings on the substantive considerations relevant for a decision, it is not required to articulate every step of its reasoning and to discuss each submission*". See ICTY, *The Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.6, Decision on Interlocutory Appeal against Decision on Defence Motion for a Fair Trial and the Presumption of Innocence", 27 February 2017, para. 25, referring to ICTR, *The Prosecutor v. Pauline Nyiramasuhuko* et al. Case No. ICTR-98-42-A, Appeal Judgement, para. 105 (the "*Nyiramasuhuko* et al. Appeal Judgment") and references cited therein. See also ICTY, *The Prosecutor v. Radovan Karadžić*, Cases Nos. IT-95-5/18-AR72.1, IT-95-5/18-AR72.2, IT-95-5/18-AR72.3, Decision on Radovan Karadžić's Motions Challenging Jurisdiction (Omission Liability, JCE-III – Special Intent Crimes, Superior Responsibility), 25 June 2009, para. 30.

[50] See the "Judgment on the appeal of Mr Jean-Jacques Mangenda Kabongo against the decision of Pre-Trial Chamber II of 17 March 2014 entitled 'Decision on the 'Requête de mise en liberté' submitted by the Defence for jean-Jacques Mangenda'" (Appeals Chamber), No. ICC-01/05-01/13-560 OA 4, 11 July 2014, para. 116.

[51] See ICTY, *The Prosecutor v. Ante Gotovina and Mladen Markač*, Case No. IT-01-06-90-A, Judgement, 16 November 2012, para. 12.

the Impugned Decision reveals that the arguments were considered and – more often than not – explicitly discussed.[52]

28. The Defence further submits that the Majority "*took no apparent cognizance*" of the serious questions it raised regarding the credibility, reliability and coherence of the submissions and evidence put forward in the Libyan Attorney General's Office's response on behalf of the internationally recognised Government of Libya.[53]

29. As noted *supra*, the Chamber was not obliged to articulate every step of its reasoning for each finding that it made.[54] Its general indication that "*there is no compelling evidence in this case that would impel the Chamber to examine the* in absentia *nature of the judgement*",[55] and reference to the Defence claims about the implementation of Law No. 6 by the Al-Bayda Court of Appeal,[56] clearly demonstrates that it indeed considered and rejected the credibility and reliability-related submissions that were before it, or did not deem them to be determinative for the purposes of the decision.[57]

30. The Defence takes particular issue with the Chamber's indication it would only refer to the parties' and participants' submissions where relevant and to the extent necessary,[58] and contends that it is an illustration of the Chamber's disregard of arguments before it. The Legal Representative opposes the Defence's characterisation of the Chamber's reasoning as a judicial "*disclaimer*".[59] This view is squarely based on the Defence's discontentment with the substance of the

[52] See *e.g.*, *infra*, para. 31.
[53] See the Appeal Brief, *supra* note 2, para. 38.
[54] See the *Nyiramasuhuko* et al. Appeal Judgement, *supra* note 49, para. 45.
[55] See the Impugned Decision, *supra* note 3, para. 53 (emphasis added).
[56] *Idem*, para. 57.
[57] *Ibid.*, paras. 53, 57 and 59.
[58] See the Appeal Brief, *supra* note 2, para. 39 referring to the Impugned Decision, *supra* note 3, para. 19.
[59] See the Appeal Brief, *idem*, para. 39.

Impugned Decision and its claim that it was insufficiently reasoned and such shortcomings were sought to be remedied by the insertion of said statement. The Chamber was under no obligation to articulate every step of its reasoning or to address every argument put forth by the parties and participants.

31. The Defence further alleges that the Chamber largely ignored relevant submissions and "*does not cite to the authorities or evidence relied on by the Defence*".[60] This claim is entirely baseless, as a review of the Impugned Decision reveals that the Chamber discussed the authorities relied on by the Defence in extensive detail, or at the very least, referred to them in its discussion.[61]

32. As will be demonstrated in relation to the following sub-grounds of appeal, the Defence's contention that all of these sub-grounds are affected by the overarching error of failing to provide a reasoned opinion[62] is entirely baseless and, ought to be rejected accordingly.

Sub-ground 2(ii): The Majority erred in law in failing to have regard to the *de facto* application of Law No. 6 of 2015 to Dr. Gaddafi by the Al-Bayda transitional government

33. The Defence avers that the application of Law No. 6 of 2015 to Mr Gaddafi was a question pertaining to Libyan domestic law and, accordingly, the Majority should have deferred to the decision of the Al-Bayda transitional government.[63]

34. The Legal Representative, in her previous submissions – albeit in cautious terms – expressed scepticism in relation to the source of Law No. 6 of 2015, questioning the legitimacy of the government that passed said law.[64] Since, the main thrust of her overall submissions in response to the admissibility challenge

[60] See the Appeal Brief, *supra* note 2, para. 37.
[61] See *infra*, para. 68.
[62] See the Appeal Brief, *supra* note 2, para. 42.
[63] *Idem*, para. 43.
[64] See the Victims Observations, *supra* note 37, para. 7.

did not rely on the validity of Law No. 6, she deemed a passing reference to a potential issue regarding its validity to be sufficient. However, in the present appeal proceedings, the Defence heavily relies on what it refers to as a matter of Libyan "*national law*" when it mentions Law No. 6 and its purported application to Mr Gaddafi by the 'Al-Bayda government'.[65] The Legal Representative opposes the Defence's position. As will be discussed *infra*,[66] the 'Al-Bayda government' was not the legitimate government of Libya, and Law No. 6, if at all, was 'applied' by an illegitimate minister and not by a competent court.

35. As previously pointed out by the Prosecution,[67] according to the UN Support Mission in Libya Report, the then Interim Government of incumbent Prime Minister Abdullah al-Thinni relocated to Al-Bayda. Said government was subsequently sworn in by the House of Representatives, elected in June 2014, and remained the internationally recognised Government only until the signing of the Libyan Political Agreement in December 2015.[68] Thus, the release of Mr Gaddafi on or around 12 April 2016 by a "*Minister of Justice of the Libyan Transitional Government in Al-Bayda*"[69] cannot be said to have been executed by an agent of the legitimate government of Libya.[70] It follows that the application of the law can be considered at best 'irregular'. These facts have been before the Chamber when it deliberated

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[65] See the Appeal Brief, *supra* note 2, paras. 54-57, 61, 64 and 71.
[66] See *infra* paras. 37 and 45-51.
[67] See the "Public redacted version of 'Prosecution response to 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute'' filed on 28 September 2018 (ICC-01/11-01/11-653-Conf", No. ICC-01/11-01/11-653-Red, 11 October 2018, para. 39.
[68] See "Annex D to the Admissibility Challenge", No. ICC-01/11-01/11-640-AnxD, Report of the United Nations Support Mission in Libya and the Office of the United Nations High Commissioner for Human Rights on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012), 6 June 2018, p. 8. See also UNSC Res 2323(2016) of 13 December 2016 which "*Recall*[s] *resolution 2259(2015) which endorses the Rome Communiqué of 13 December 2015 to support the Government of National Accord (GNA) as the sole legitimate government of Libya, and welcoming the arrival in Tripoli on 30 March 2016 of members of the Presidency Council of the GNA* […]", p. 1. See also UNSC Res 2238(2015) of 10 September 2015, UNSC Res 2259 (2015) of 23 December 2015, p.
[69] See the Appeal Brief, *supra* note 2, para. 44(ii).
[70] See the UNSC Res 2278(2016) "Further recall[ed] *resolution 2259(2015) which called on Member States to cease support to and official contact with parallel institutions claiming to be the legitimate authority, but which were outside the Libyan Political Agreements, as specified by it.*", of 31 March 2016, p. 2.

the Impugned Decision. Indeed, the Chamber indicated that it considered the validity of Law No. 6 to be of secondary relevance; it was convinced that "*it is quite clear based on the material before* [it] *that Law No. 6 of 2015 does not apply to Mr Gaddafi at least due to the nature of the crimes*".[71] It therefore found that it was not necessary to engage in a review of the validity of said Law.

36. Rather than demonstrating an error in the Chamber's reasoning, the Defence is now attempting to supplement previous submissions and to re-litigate a question the Chamber legitimately considered to be less than crucial to its deliberations on the issues at stake.

37. In any event, the Defence's argument that the 'Al-Bayda government' was a *de facto* government and that, therefore, the matter was one of Libyan domestic law to which the Chamber should have accorded deference is based on an entirely erroneous premise. The Defence indeed justifies the alleged legitimacy of the 'Al-Bayda government' by arguing that it remained the *de facto* government recognised by local officials.[72] At the relevant time, the Government of National Accord was the only legitimate and internationally recognised government of Libya. The so-called 'Al-Bayda government' was a rival government the international community was called upon to cease engaging with by the United Nations Security Council. Thus, according to the practical implications of the principle of non-recognition, it was also incumbent upon the Court - as an international organisation - to refrain from engaging with the non-recognised 'Al-Bayda government'.[73]

38. The Defence further argues that, since his release, Mr Gaddafi has filed two false accusation claims and that this, in itself, demonstrated that Law No. 6 had been validly applied to him.[74] First, the Defence simply repeats its earlier

[71] See the Impugned Decision, *supra* note 3, para. 56.
[72] See the Appeal Brief, *supra* note 2, para. 44(iii) (emphasis added).
[73] See *infra*, para. 49.
[74] See the Appeal Brief, *supra* note 2, para. 44(iv).

submissions.[75] Second, the Defence seeks to rely on new materials not previously before the Chamber. As the Appeals Chamber ruled in the *Ruto* case, "[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*".[76] The same must apply, *mutatis mutandis*, to Mr Gaddafi. The Defence has not put forth any arguments justifying why the documents were not adduced before the Pre-Trial Chamber at the time it presented its admissibility challenge. It simply submits that they "*were issued*" more than three months after their Consolidated Response was filed. The Defence does not demonstrate that the documents were not available in any form at the relevant time, or discoverable through the exercise of due diligence.[77] The attempted justification is entirely insufficient to satisfy the requirements of regulation 62 of the Regulations of the Court. The exercise of due diligence, *i.e.* requesting said documents earlier on, was an available avenue for the Defence. Notwithstanding, the Defence should have explained the nature of difficulties, if any, that prevented it from requesting the documents from the Libyan Registry Office earlier. The additional documents should thus be excluded from the present appeal.

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[75] See the "Second Redacted Version of Corrigendum of Defence Consolidated Reply to Prosecution 'Response to 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute' and Response to 'Observations by Lawyers for Justice in Libya and the Redress Trust pursuant to Rule 103 of the Rules of Procedure and Evidence'", No. ICC-01/11-01/11-660-Corr-Red2, 20 November 2018, (the "Defence Consolidated Response"), paras. 32 and 33.

[76] See the "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.

[77] The Legal Representative refers to the jurisprudence of the *ad hoc* Tribunals with regard to requests for additional evidence upon appeal: See *e.g.* ICTY, *The Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A, Decision on a Motion to Admit Additional Evidence on Appeal, 2 March 2018, para. 7, referring to ICTR, *The Prosecutor v. Augustin Ngirabatware*, Case No. MICT-12-29-A, Decision on Ngirabatware's Motions for Relief for Rule 73 Violations and Admission of Additional Evidence on Appeal, 21 November 2014, para. 24; ICTR, *The Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-24-AR14.1, Decision on Requests for Admission of Additional Evidence on Appeal, 22 September 2016, para. 5.

39. If the Appeals Chamber were, however, minded to accept the new documents as additional evidence on appeal, it still ought to dismiss the Defence argument that these documents constitute "*further and uncontroverted evidence*" that the legitimate Libyan government accepts that Mr Gaddafi's *in absentia* conviction is final.[78] First, the identification documentation[79] was *requested* and issued to Mr Gaddafi's mother and his Libyan counsel, respectively,[80] as opposed to Mr Gaddafi in person. Thus, there is absolutely no contradiction with the proposition that Mr Gaddafi is still a wanted individual. Second, *issuing* identification documentation *to his mother and counsel*[81] is in no way inconsistent with Mr Gaddafi being a wanted individual. Furthermore, the Defence's argumentation that the government of Libya "*should have*" rejected Mr Gaddafi's application for the issuance of national identification documents, had it considered him to be fugitive, must be dismissed as speculative and irrelevant. In any event, the Defence itself concedes that the requests were made "*through his family*" and accordingly contradicts its very own reasoning in this regard. Contrary to the Defence's argument, the issuance of said documents does not offer any prove for the court having accepted that Mr Gaddafi's conviction *in absentia* has been rendered final.[82] This argument should be rejected as speculative and unfounded and the admission of additional documentation should be rejected as untimely.

40. Thus, the Defence contention that Mr Gaddafi's false accusation claims *prove* that Law No. 6 was indeed applied and accepted to have been applied to him is not convincing. Moreover, the Defence is merely re-submitted previous arguments[83]

[78] See the Appeal Brief, *supra* note 2, para. 46.
[79] See "Annex 1 to the Defence Appeal Brief in support of its appeal against Pre-Trial Chamber I's 'Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute'"', No. ICC-11/11-01/11-669-Anx1, 20 Mai 2019 ("Confidential Anx1 to the Appeal Brief").
[80] See the Appeal Brief, *supra* note 2, para. 46.
[81] See Confidential Anx1 to the Appeal Brief, *supra* note 79.
[82] See the Appeal Brief, *supra* note 2, para. 46.
[83] See the Defence Consolidated Response, *supra* note 75, paras. 43 *et seq*.

without demonstrating an error in the Impugned Decision. This constitutes a pure reflection of mere disagreement and must be rejected as such.

41. The Defence further submits that the Chamber erred in law "*in determining for itself the correct position as a matter of Libyan domestic law in circumstances where competent national authorities had already ruled on the matter*."[84] The Defence provides no reference to the Impugned Decision and it remains unclear which part of said Decision it refers to when discussing a matter of Libyan domestic law already having been ruled upon by the competent national authorities. If this argument is still related to the 'application' of Law No. 6, said argument is entirely flawed, as (i) the 'Al-Bayda government' was no longer the competent authority; and (ii) even if, *arguendo*, that would have been the case, there is no court 'ruling' involved, even if one were to accept the Defence narrative, *i.e.* that the 'Al-Bayda minister' *applied* the law to Mr Gaddafi by releasing him.[85] In any event, this argument should be summarily dismissed based on the Defence's failure to properly identify the impugned finding.

42. If, however, the Defence submissions are to be understood as challenging the Chamber's assessment that Law No. 6 did not apply to Mr Gaddafi because of the nature of the crimes for which he was convicted, it must still fail for the following reasons.

43. First, the Chamber clearly indicated that, already the fact that Mr Gaddafi was convicted *in absentia* and thus automatically entitled to a re-trial, coupled with the circumstance that under Libyan law, no death sentence verdict acquires the force of *res judicata* by virtue of the need to be confirmed by the Court of

[84] See the Appeal Brief, *supra* note 2, para. 51.
[85] *Idem*, para. 44.

Cassation,[86] was sufficient for a finding that he had not *been tried* within the meaning of article 20(3) of the Statute.[87]

44. Second, the matter remains that the 'Al-Bayda government', at the time of the purported application, was not the legitimate government of Libya. Accordingly, the Chamber was under no obligation to accept it as a valid domestic judicial decision; notwithstanding that, according to the Defence's own contradictory submission, it was an executive decision to begin with.[88]

45. Third, it should be noted that by putting great emphasis on the fact that *if* the amnesty *were* accepted, the Libyan proceedings would "*have been rendered final*",[89] the Defence admits that, indeed, in order to satisfy the criterion established in article 20(3) of the Statute, the proceedings must have acquired the status being finally concluded, in other words, *res judicata*. It thus contradicts its own stance that all that is required for the principle of *ne bis in idem* to be triggered is a decision on the merits. Indeed, the Defence repeatedly argues that the application of Law No. 6 would have rendered the decision final and "*any possible remaining doubt as to the 'absolute' finality of Dr. Gadafi's conviction* […] *immaterial*".[90] If its proffered interpretation of article 20(3) of the Statute were indeed correct, this would be unnecessary. Significantly, however, the Defence's attempts to construe the amnesty and the latter's purported application as legitimate and valid, only demonstrate that without the intervening factor of the amnesty, it is obvious that

[86] See the Victims Observations, *supra* note 37, para. 58, which discusses article 429 of the Libyan Code of Criminal procedure that sets out that in case of a death penalty sentence, the case must be considered by the Court of Cassation carrying out a full review.
[87] See the Impugned Decision, *supra* note 3, para. 48.
[88] See the Appeal Brief, *supra* note 2, para. 44. The Defence previously characterised it as such in its Consolidated Response, *supra* note 75, para. 47.
[89] See the Appeal Brief, *idem*, para. 46.
[90] *Ibid.*, para. 19. See also paras. 53-54 where the Defence submits that: "[i]*n this case, the Pre-Trial Chamber had to determine whether the national decision to apply Law No. 6 of 2015 to Dr. Gadafi and to release him had the effect of rendering the national proceedings against him final in the terms of Article 17(1)(c) of the Statute*"; and "*the Majority should simply have accepted as a matter of fact and national law, Law No. 6 had been applied to Dr. Gadafi, thereby leading to the inevitable conclusion that Dr. Gadafi's conviction had become final*".

the Libyan proceedings have not attained the required status of finality and accordingly fall short of the requirements set out in article 20(3) and 17(1)(c) of the Statute.

46. To remedy its flawed argument about the status of the 'Al-Bayda government', the Defence seeks to rely on jurisprudence of the European Court of Human Rights (the "ECtHR") in the case of *Cyprus v. Turkey*. However, it misleadingly quotes this case in the context. The Defence argues, relying on this case, that the ECtHR accepts cases involving the self-proclaimed Turkish Republic of Northern Cyprus (the "TRNC") as a *de facto* entity because citizens should not suffer for they are subject to the law of non-recognised entities.[91] This is only part of the relevant findings and completely mischaracterises the status of the *de facto* entity to serve the Defence's argument.

47. However, the case at hand involves two governments, namely the Republic of Cyprus and the Republic of Turkey – States which do not have formal diplomatic relations,[92] mutually alleging that the other does not guarantee Convention rights to Greek Cypriot and Turkish Cypriots, respectively.

48. Nevertheless, a study of the ECtHR jurisprudence involving litigation concerned with the TRNC is instructive in this regard. The ECtHR considered cases of citizens whose rights were affected because of the non-recognised and illegal nature of the TRNC government.[93] Indeed, the very fact that cases arising from conduct committed in, or linked with, the TRNC are brought against *Turkey* is the essence of the legal *vacuum* that characterises the TRNC – though it, for its own

[91] See the Appeal Brief, *supra* note 2, para. 60.
[92] See ECtHR, *Güzelyurtlu and Others v. Cyprus and Turkey*, Application No. 36925/07, Judgment (Grand Chamber), 29 January 2019, para. 237.
[93] See, *inter alia*, UNSC, Resolution 541 (1983), 23 November 1983 and UNSC Resolution 550(1984), 11 May 1984. See also ECtHR, *Loizidou v. Turkey*, Application No. 15318/89, Judgment (Grand Chamber), 18 December 1996, paras. 21 and 42; and *Güzelyurtlu and Others v. Cyprus and Turkey*, *supra* note 92, paras. 194-197.

purposes, has courts, laws, and law enforcement agencies and even claims jurisdiction over acts committed on the island of Cyprus.[94] Turkey, as the controlling State, is, however, responsible for securing the entire range of substantive rights set out in the European Convention on Human Rights in the area under its control, that is, the TRNC. Turkey is thus liable for any violations of those rights within the *de facto* entity of the TRNC.[95] The ECtHR held:

> "[i]*t is not necessary to determine whether* […] *Turkey actually exercises detailed control over the policies and actions of the authorities of the 'TRNC'. It is obvious from the large number of troops engaged in active duties in Northern Cyprus* […] *that her army exercises effective overall control over that part of the island. Such control* […] *entails her responsibility for the policies and actions of the 'TRNC'* […]. *Those affected by the policies or actions therefore come within the 'jurisdiction' of Turkey for the purposes of Article 1 of the Convention (art. 1). Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus*".[96]

49. The Libyan scenario is entirely different. Indeed, the legitimate and internationally recognised Libyan government, does neither recognise the 'Al-Bayda government' (contrary to Turkey being the only State recognising the TRNC), nor does it exercise control over the Al-Bayda controlled area (unlike Turkey over the TRNC). Therefore, and contrary to the Defence's argumentation, the Libyan government could therefore not have engaged in adjudicating disputes over Law No. 6, just as the Republic of Cyprus does not engage with the so-called judicial and law enforcement agencies of the TRNC.

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[94] See *Güzelyurtlu and Others v. Cyprus and Turkey*, *idem*, para. 1.

[95] *Ibid*, paras. 179 and 237. See also ECtHR, *Xenides-Aretsis v. Turkey*, Application No. 46347/99, Judgment, 22 December 2005, paras. 22, 28 and 32; and *Demades v. Turkey*, Application No. 16219/90, Judgment, 31 October 2003, paras. 29-30.

[96] See ECtHR, *Loizidou v. Turkey*, *supra* note 93, para. 56. See also *Güzelyurtlu and others v. Cyprus and Turkey*, *supra* note 92, para. 179 where the ECtHR held that: "[o]*ne exception to the principle that jurisdiction under Article 1 is limited to a State's own territory occurs when, as a consequent of lawful or unlawful military action, a Contracting State exercised effective control of an area outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration*".

50. The Libyan situation is thus a reverse TRNC scenario, where there is a part of the Libyan territory controlled by the 'Al-Bayda government', which purportedly applies laws to persons within the territory under its control. The legitimate and internationally recognised Libyan government is more akin to the Republic of Cyprus within this scenario, namely, officially opposing and not recognising the self-proclaimed entity. Internationally, acts of both the TRNC and the 'Al-Bayda government' are not internationally recognised as they emanate from non-recognised entities.[97]

51. Accordingly, the Chamber was under no obligation to question the stance of the internationally recognised Libyan government in relation to Law No. 6. In fact, the practice of non-recognition extends not only to States but also to international organisations and specialised agencies. It requires, *inter alia*, that they refrain from any action or dealing that might be interpreted as recognition of said entity, whether direct or indirect.[98] Thus, by recognising executive acts performed by the 'Al-Bayda government', such as the 'Al-Bayda minister' purportedly applying Law No. 6 to Mr Gaddafi, the Chamber, and ultimately the Court, would have impliedly recognised the 'Al-Bayda government' as legitimate. However, the Court is bound by Security Council Resolution 1970 (2011), which recognises the territorial integrity of Libya,[99] and the terms of Security Council Resolution 2259 (2015), in which the Security Council recalled Resolution 1970 (2011) and recognised the Government of National Accord as the sole legitimate government of Libya.[100]

52. It thus follows that, having had before it communications from the legitimate government, the Chamber was under no obligation – contrary to the

[97] With the exception of acts performed within the framework of peace negotiations.
[98] See UNSC, Resolution 2259 (2015), UN Doc. S/RES/2259(2015), 23 December 2015.
[99] See UNSC, Resolution 1970 (2011), UN Doc. S/RES/1970(2011), 26 February 2011, p. 2.
[100] See S/RES/2259(2015), *supra* note 98, p. 1.

Defence's argument –[101] to accord deference to the Al-Bayda minister's purported application of Law No. 6.

Sub-ground 2(iii): The Majority erred in law and/or fact in finding that Law No. 6 of 2015 was not capable of applying to Dr. Gadafi

53. The Defence submits that the Majority erred in law and/or fact in determining that Law No. 6 does not apply to Mr Gaddafi at a minimum due to the nature of the crime(s) he was domestically charged with.[102] The Defence takes issue with the Chamber's interpretation of the law and thus contends that the latter focused on crimes Mr Gaddafi was domestically charged with rather than those he was convicted for.[103] It avers that the Chamber "*failed specifically to identify which of the crimes for which Dr. Gadafi was convicted fall within the exception*".[104] The Defence's challenges not only misstate the facts but also constitute nothing but a mere disagreement with the Chamber's determination.

54. According to the Defence, the Chamber erroneously focused on the charges against Mr Gaddafi, rather than on his conviction. It then largely repeats its previous submissions on its stance regarding 'murder' and 'identity-based murder' it put forth in the Consolidated Response.[105] Yet, the Libyan court convicted Mr Gaddafi on all charges. The judgment states:

> "*The court ruled* in absentia *of Defendants Nos. 1* […], *and in presence of the remaining accused: 1. Convict Defendant No. 1 Sayf al-Islam Muammar Gaddafi,* […] *for the charges against them and their execution by firing squad;* […]".[106]

55. Accordingly, both the charges against Mr Gaddafi as well as the charges for which he was convicted are identical and the Chamber did not err in this regard.

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[101] See the Appeal Brief, *supra* note 2, para. 55.
[102] *Idem*, para. 65, referring to the Impugned Decision, para. 56.
[103] *Ibid.*
[104] *Ibid.*
[105] *Ibid.*, referring to the Defence Consolidated Response, *supra* note 75, para. 60.
[106] See "Annex B to the Admissibility Challenge", No. ICC-01/11-01/11-640-AnxB, p. 350.

56. Moreover, the Chamber clearly indicated that it had conducted a "*review of Law No. 6 of 2015, particularly article 3(4)*"[107] and concluded that upon such review it became clear that the crimes of identity-based murder, kidnapping, enforced disappearance and torture, were excluded from the amnesty.[108] The Defence argues that the Chamber erred in law and/or fact when applying the exceptions to Mr Gaddafi and requests that the Appeals Chamber conduct a *de novo* review, if it determines that the Court is permitted to consider the validity of the application of Law No. 6.[109]

57. The Legal Representative submits that, since the application of Law No. 6 lacked validity in the first place,[110] the Chamber was, in any event, under no obligation to consider this point any further. It is clear from the reasoning of the Chamber, that this was the approach it took when it stated: "[s]*o even if* arguendo [sic] *that the effect of Law Np. 6 of 2015 is to put an end to the judicial process* […]".[111] The review it thus provided was premised on a mere hypothesis. It did not, as such, *apply* the exceptions, as it was not obliged to do so. The Defence fails to demonstrate an error in this approach.

58. It therefore follows that the Chamber did not have to provide a detailed analysis of the crimes excluded from the application of Law No. 6 in general or in Gaddafi's case in particular. Accordingly, the Appeals Chamber should reject, without further consideration, the Defence's view on the interpretation of article 3(4) of Law No. 6 and the elements of the crimes concerned as irrelevant.

59. The Defence argues that "*even if those matters formed no part of the Majority's determinative reasoning in dismissing his admissibility challenge, Dr. Gadafi submits the proper course is to correct the Majority's error in relation to Article 3 of Law No. 6 of*

[107] See the Impugned Decision, *supra* note 3, para. 59.
[108] *Idem*.
[109] See the Appeal Brief, *supra* note 2, para. 66.
[110] See the present submissions in relation to sub-ground 2(i), *supra* paras. 24-32.
[111] See the Impugned Decision, *supra* note 3, para. 58 (emphasis added).

2015".[112] The appellate standard prescribes that the appellant must identify a concrete error of law and that this erroneous interpretation of the law materially affected the Impugned Decision.[113] The Appeals Chamber has previously ruled that if it were to entertain requests without proper legal basis, "*it would assume the role of an advisory body, which it considers to be beyond and outside the scope of its authority*".[114] The Appeals Chamber should therefore decline to entertain the submissions on the applicability of article 3 of Law No. 6 to corruption charges.

60. The fact that the Defence merely vents is disagreement with the Chamber's findings, is further amplified by its lengthy development on corruption charges which the Chamber did neither discuss nor make findings on – which is further underscored by the fact that the Defence has no reference to the Impugned Decision to provide in this regard. The Defence then discusses the Separate Opinion, which is not the object of the present appeal, and then self-servingly concludes with a discussion on the crime of corruption, the interpretation of which it bases on that taken from Black's Law Dictionary.[115] The entire discussion is both flawed and extraneous to the Impugned Decision and should, accordingly, be dismissed without further consideration.

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[112] See the Appeal Brief, *supra* note 2, para. 74.
[113] See *supra*, para. 12.
[114] See the "Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 24 December 2007" (Appeals Chamber), No. ICC-01/04-503 OA4 OA5 OA6, 30 June 2008, para. 30.
[115] See footnote 175 of the Appeal Brief, *supra* note 2. A more instructive and universally accepted definition is contained in article 8(1) of the United Nations Convention against Transnational Organized Crime, which was ratified by Libya on 18 June 2004. See article 8(1)(a) and (b) of the United Nations Convention against Transnational Organized Crime, UN Doc. A/RES/55/25, 8 January 2001.

Sub-ground 2(iv): The Chamber erred in law in taking into consideration the validity of Law No. 6 of 2015 in international law when determining whether Dr. Gadafi's conviction was final (as a matter of Libyan law)

61. The Legal Representative submits that the Defence's assertion according to which the Chamber "*effectively* [struck] *down a provision of national law*" using its interpretation of international human rights law and thereby exceeded its powers is flawed and misconstrues the Impugned Decision.[116]

62. Although the Chamber's reasoning on this aspect is indeed relatively sparse, it is not erroneous as a matter of law. It is also clear that the Chamber did not "*strike down a provision of national law*". As set out *supra*, Law No. 6 did not have the force or character of a national law to begin with.[117] Second, and as the Legal Representative already submitted in her Observations in response to the Admissibility Challenge, *even if* Law No. 6 could have been said to qualify as a 'national law', Libya could not have validly applied it to Mr Gaddafi because of the nature of the crimes for which he was convicted *in absentia*.[118] Libya was and is under the continuing obligation, as a matter of international law, to surrender Mr Gaddafi to the Court following the dismissal of its Admissibility Challenge in 2014.[119] Mr Gaddafi remained – and still remains – wanted pursuant to the ICC arrest warrant for murder as a crime against humanity and persecution as a crime against humanity.[120] The Chamber rightly considered that the amnesty could not have been validly applied – had it been a valid Libyan law – because amnesties for the most serious crimes are incompatible with international law.[121]

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[116] See the Appeal Brief, *supra* note 2, paras. 75-76.
[117] See *supra*, para. 51.
[118] See the Victims Observations, *supra* note 37, paras. 92-100.
[119] See the "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'", No. ICC-01/11-01/11-547-Red OA 4, 21 May 2014.
[120] See the "Warrant of Arrest for Saif Al-Islam Gaddafi" (Pre-Trial Chamber I), No. 01/11-14, 27 June 2011, p. 6.
[121] See the Impugned Decision, *supra* note 3, para. 77-78.

63. The Defence's main argument seems to rely on the fact that the Chamber is not entitled to apply internationally recognised human rights other than in order to interpret the provisions of the Statute. According to the Defence, "[t]*he Majority used Article 21(3) not to apply or interpret the Statute but to apply and interpret Law No. 6 of 2015. Article 21(3) does not permit the Court to interpret or assess the application of domestic law through the prism of consistency with internationally recognized human rights*".[122] This argument is a startlingly absurd interpretation of both article 21 of the Statute and of the Impugned Decision. In the relevant part, article 21 provides :

> "1. *The Court shall apply:*
> *(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;*
> *(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;*
> *(c) Failing that, general principles of law* […]
> […]
> *2. The application and interpretation of law pursuant to this article* ***must be*** *consistent with internationally recognized human rights,* […]".

64. It is clear from the plain language of the provision, that the Chamber was entitled to consider the legal status of the purported amnesty law and to further assess whether its interpretation accorded with internationally recognised human rights. The Defence distinctly fails to demonstrate any error in the Chamber's assessment. It merely advances its disagreement with the latter's findings.

65. The Defence's second line of argumentation regarding the Chamber's review of the validity of the purported amnesty law, namely that, as a matter of complementarity, the Chamber was not entitled to "*determine that national laws are incompatible with international human rights*",[123] is equally flawed. Again, Law No. 6 was not a 'national law' [124] to begin with and, therefore, the question of complementarity does not come into play here. Second, the Chamber did not make

[122] See the Appeal Brief, *supra* note 2, para. 79.
[123] *Idem*, para. 82.
[124] See *supra*, paras. 37 and 46-51.

a determination of the amnesty's compatibility with international human rights law in the abstract. Rather, the Chamber – in addition to its determination that Mr Gaddafi's case was still admissible before the Court because the Libyan case had not acquired the status of *res judicata* – determined that *even assuming* that Law No. 6 *was* valid and applicable to the Defendant "*it* [was] *equally incompatible with international law, including internationally recognized human rights*".[125] The Defence, on the other hand, misrepresents the Chamber's finding in that it places undue weight on this additional step of the reasoning. Moreover, the Defence's submissions in this regard are both repetitive of its previous arguments and demonstrate nothing more than a disagreement with the Chamber's findings.

66. Said disagreement is further evidenced by the fact that the Defence simply reiterates arguments previously put before the Chamber. In its Consolidated Response, the Defence already disputed – as it now does – that there is an emerging international standard prohibiting amnesties for the most serious crimes.[126] Indeed, the Defence, to a large extend, simply repeats its previous submission, including reliance on the same case law, such as *Marguš v. Croatia*, the South African case,[127] and *Kwoyelo v. Uganda*.[128] Some of its arguments are even a *verbatim* replication of its earlier submissions.[129] A party cannot merely repeat on appeal arguments that did not succeed previously before another chamber, unless it can demonstrate that the previous chamber's rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber.[130] The Defence fails to demonstrate such error and the Appeals Chamber should therefore reject this sub-ground of appeal.

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[125] See the Impugned Decision, *supra* note 3, para. 78 (emphasis added).
[126] See the Defence Consolidated Response, *supra* note 75, paras. 64-65.
[127] See the Appeal Brief, *supra* note 2, para. 92 and the Defence Consolidated Response, *idem*, para. 66.
[128] See the Appeal Brief, *idem*, para. 95 and Defence Consolidated Response, *ibid.*, para. 67.
[129] See *e.g.* the Appeal Brief, *ibid.*, para. 92 and the Defence Consolidated Response, *ibid.*, para. 66.
[130] See the *Nyiramasuhuko* et al. Appeal Judgment, para. 34. See also "Judgment on the appeal of Laurent Gbagbo against the decision of Trial Chamber I of 8 July 2015 entitled 'Ninth decision on the review of Mr. Gbagbo's detention pursuant to Article 60(3) of the Statute" (Appeals Chamber), No. ICC-02/11-01/15-208, 8 September 2015, para. 53.

Sub-ground 2(v): The Chamber erred in law in finding that Law No. 6 of 2015 was incompatible with international law

67. Under this purported sub-ground of appeal the Defence submits the same argument it raised under sub-ground four, namely, that the Chamber "*still erred in law in concluding that 'granting amnesties is incompatible with internationally recognized human rights'*".[131] This time, it criticises the "*Majority's sweeping conclusion*" and avers that it was "*inconsistent with the assessment of other imminent experts, was reached without addressing relevant international instruments which are inconsistent with this conclusion, and is based on a partial and adequate review of the relevant jurisprudence*".[132]

68. The finding contained in paragraph 77 of the Impugned Decision follows a detailed review of international human rights law and relevant jurisprudence. It is in fact mainly based on the discussion of those authorities cited by the Defence in its Consolidated Response, such as *Marguš*,[133] *Zimbabwe Human Rights NGO Forum*,[134] *Massacre of El Mozote*,[135] *Furundžija*,[136] *Ieng Sary*,[137] *Kallon* et al.,[138] and *Erdemović*.[139] Moreover, the re-submission of the same arguments in relation to the same authorities[140] only magnifies the fact that what the Defence is seeking to do is to re-litigate the issue anew before the Appeals Chamber in the hope of securing a different ruling. It is not for the Appeals Chamber to substitute its interpretation

[131] See the Appeal Brief, *supra* note 2, para. 87, referring to the Impugned Decision, *supra* note 3, para. 77.
[132] See the Appeal Brief, *supra* note 2, para. 87 *et seq*.
[133] See the Impugned Decision, *supra* note 3, para. 67 and the Defence Consolidated Response, *supra* note 75, para. 67i.
[134] See the Impugned Decision, *idem*, para. 71 and the Defence Consolidated Response, *idem*, para. 67ii.
[135] See the Impugned Decision, *ibid.*, para. 62 and Defence Consolidated Response, *ibid.*, para. 67iii.
[136] See the Impugned Decision, *ibid.*, para. 74 and Defence Consolidated Response, *ibid.*, para. 67v.
[137] See the Impugned Decision, *ibid.*, para. 76 and Defence Consolidated Response, *ibid.*, para. 67iv.
[138] See the Impugned Decision, *ibid.*, para. 75 and Defence Consolidated Response, *ibid.*, para. 67vi.
[139] See the Impugned Decision, *ibid.*, para. 73 and Defence Consolidated Response, *ibid.*, para. 67v.
[140] See *e.g.* renewed submissions on *Marguš* (Defence Appeal Brief, *supra* note 2, para. 97); *Kwoyelo* (*ibid.*, para. 98); *Furundžija (ibid.*, para. 103ii); *Erdemović* (*ibid.*, para. 103i); *Kallon* et al. (*ibid.*, para. 103iii); and *Ieng Sary* (*ibid.*, para. 103iv).

for that of the Pre-Trial Chamber in the absence of any demonstrated error committed by the latter. However, the Defence fails to demonstrate such error.

69. Finally, the Defence seeks to rescue its argument according to which the Chamber erred by ruling that even if the latter was right to find that internationally recognised human rights would prohibit blanket immunities[141] – the precise term was never used in the Impugned Decision – this would not apply to "*conditional immunities or post-conviction / sentence pardons, where supplementary measures are in place to protect victims' rights*".[142] It then argues that Law No. 6 "*as it applied to Dr. Gadafi* […] *complied with these conditions*" and that it was passed as part of a "*national reconciliation process*".[143] It is an entirely self-serving, circular argument to justify the validity of a law purportedly applied by a non-recognised entity to a person who still remains fugitive by stating that it provides for measures that protect victims' rights and that victims are free to dispute its application through the procedure set out in said law. The Defence further claims that under Law No. 6, victims have a right to restitution and compensation; however, it fails to mention that a Libyan "*victims' compensation fund has not been established*".[144] In this regard, it should be recalled – since the Defence raised the issue of comparison with the TRNC, that precisely because victims have absolutely no access to redress *vis-à-vis* the *de facto* entity, that jurisdiction of the controlling entity has to be constructed to give them access to redress. There exists no such possibility in the Libyan context. Victims cannot and will not be able enjoy their rights if Mr Gaddafi benefits from the purported amnesty.

70. Finally, the Legal Representative opposes the Defence's statement that Law No. 6 ostensibly contributes to the reconciliation process. She recalls that according

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[141] See the Appeal Brief, *supra* note 2, para. 105.
[142] *Idem*.
[143] *Ibid.*, para. 106.
[144] See the Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Libya, including on the effectiveness of technical assistance and capacity-building measures received by the Government of Libya, UN Doc. A/HRC/34/42, 13 January 2017, para. 74.

to the Libyan National Conference, facilitated by the United Nations, "[e]*vents since 2011 have led to different local approaches to reconciliation, which should be accommodated. However, participants insisted that reconciliation must not mean impunity for those who have committed crimes against humanity*".[145]

71. The victims' right to justice does not fade over time. To the contrary, they are entitled to Mr Gaddafi being surrendered pursuant to the outstanding warrant of arrest and being tried before this Court. The lengthy and repeated admissibility proceedings have already negatively impacted their right to the expeditious establishment of the truth and any reparation expectations they legitimately have.

IV. CONCLUSION

72. For the foregoing reasons, the Legal Representative respectfully requests the Appeals Chamber to dismiss the Defence's Appeal in its entirety since the Defence fails to demonstrate that the Pre-Trial Chamber erred in law.

Paolina Massidda
Principal Counsel

Dated this 11th day of June 2019
At The Hague, The Netherlands

[145] See the LYBIAN NATIONAL CONFERENCE PROCESS, *Final Report*, November 2018, p. 48 (emphasis added).