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PRE-TRIAL CHAMBER I

**Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Hans-Peter Kaul
Judge Christine Van den Wyngaert**

**SITUATION IN LIBYA
IN THE CASE OF**

***THE PROSECUTOR v.
SAIF AL-ISLAM GADDAFI and ABDULLAH AL-SENUSSI***

Public & Redacted, with Public Annexes 1 & 2

Application for Leave to Reply & Consolidated Reply on Behalf of the Libyan Government to Responses to the “Libyan Application for Extension of Time Related to Pre-Trial Chamber I’s ‘Decision requesting Libya to provide submissions on the status of the implementation of its outstanding duties to cooperate with the Court’”

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I. INTRODUCTION

1. On 15 May 2014, Judge Silvia Fernández de Gurmendi, Single Judge responsible for carrying out the functions of Pre-Trial Chamber I (the 'Chamber') of the International Criminal Court (the 'Court'), issued a decision requesting Libya to provide submissions on the status of the implementation of its outstanding duties to cooperate with the Court.¹ The Decision relates, in particular, to the implementation of: (i) the surrender Mr. Gaddafi to the Court; (ii) the return to the current Gaddafi Defence team of the originals of the materials that were seized from the former Defence team for Mr. Gaddafi by the Libyan authorities during a visit to Mr Gaddafi in Zintan, and the destruction of any copies thereof; and (iii) the organisation of a privileged legal visit to Mr. Al-Senussi by his ICC Defence team.
2. On 27 May, the Libyan Government signed an Exchange of Letters with the Registrar, which addresses, *inter alia*, the provision to counsel representing Mr. Gaddafi and Mr. Al-Senussi of privileges and immunities; the application of legal privilege to all communications between counsel and their client; and the provision, to a wide variety of persons including counsel, staff, and experts associated with the Court, of visas allowing unimpeded entry into, exit from, and movement within the territory of Libya.
3. On 28 May 2014, the Libyan Government sought an extension of time for the purposes of providing this information.² [REDACTED].³ On 5th June 2014, responses to the Libyan Government's application were filed by the

¹ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Decision requesting Libya provide submissions on the status of the implementation of its outstanding duties to cooperate with the Court", 15 May 2014, ICC-01/11-01/11-545 ['Decision'].

² "Libyan Application for extension of time related to the Pre-Trial Chamber I's 'Decision requesting Libya to provide submissions on the status of the implementation of its outstanding duties to cooperate with the Court'" ICC-01/11-01/11-548 ['Request'].

³ REDACTED.

Prosecution,⁴ the Gaddafi Defence⁵ and the OPCV.⁶ On 6th June 2014 a response to the Libyan Government's application was filed by the Al-Senussi Defence.⁷

4. The Libyan Government hereby submits a request for leave to reply under Regulation 24(5) of the Regulations of the Court. The Libyan Government recognises that "participants may only reply to a response with the leave of the Chamber".⁸ Libya hereby takes the unusual step of filing herewith the details of its proposed reply, but emphasises that it recognises that the Chamber may, *if it were to deny leave to file a Reply*, disregard the submissions hereby provided. The reason for this approach is to help ensure the expeditious conduct of proceedings, bearing in mind that the nature of the Request under consideration is itself for an extension of a deadline.

II. SUBMISSIONS

A. *Remedies sought*

5. The Responses of the Prosecution, the Gaddafi Defence, and the OPCV refer specifically to the Request for an extension to the deadline imposed in the Decision for filing of the submissions sought by the Chamber. The Al-Senussi Defence, however, seeks a ruling by the Appeals Chamber on the Al-Senussi

⁴ "Prosecution Response to Libyan Application for extension of time related to the Pre-Trial Chamber I's "Decision requesting Libya to provide submissions on the status of the implementation of its outstanding duties to cooperate with the Court" ICC-01/11-01/11-551 ['Prosecution Response'].

⁵ "Gaddafi Defence Response to 'Libyan Application for extension of time related to the Pre-Trial Chamber I's 'Decision requesting Libya to provide submissions on the status of the implementation of its outstanding duties to cooperate with the Court'" ICC-01/11-01/11-553 ['Gaddafi Response'].

⁶ "Response to 'Libyan Application for extension of time related to the Pre-Trial Chamber I's 'Decision requesting Libya to provide submissions on the status of the implementation of its outstanding duties to cooperate with the Court'" ICC-01/11-01/11-552 ['OPCV Response'].

⁷ "Response on behalf of Abdullah Al-Senussi to the 'Libyan Application for extension of time related to the Pre-Trial Chamber I's 'Decision requesting Libya to provide submissions on the status of the implementation of its outstanding duties to cooperate with the Court'" ICC-01/11-01/11-554 ['Al-Senussi Response'].

⁸ *Prosecutor v Lubanga*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Decision sur la demande de mise en liberte provisoire de Thomas Lubanga Dyilo", ICC-01/04-01/06-824, 13 February 2007, para. 68.

Admissibility Decision, and suspension of the domestic proceedings.⁹ It is submitted that these requests cannot be raised through a response to the Request, and are not issues that are properly before the Pre-Trial Chamber. These aspects of the Al-Senussi Response, as well as the arguments made in support thereof, should be dismissed *in limine*.

B. Legal basis & nature of Request

6. It should be made clear at the outset that the nature of the Request was to seek variation of a time limit, which means that its legal basis was Regulation 35. It was repeatedly and specifically stated that the Request sought an extension of time.¹⁰ The arguments of the Gaddafi Defence and the OPCV that the Request lacks a legal basis,¹¹ therefore, must be rejected. Indeed, the Gaddafi Response is contradictory in this regard, as it – like the Prosecution Response – also recognizes that Regulation 35 *was* the basis of the Request.¹²
7. The Gaddafi Defence repeatedly seeks to characterize the Request either as an application under Article 95 of the Statute, or as attempt by Libya to circumvent, evade, or simply disregard international law. It must categorically be stated that each of these characterizations are unsubstantiated, misleading and self-serving.
8. The Request made clear that it was motivated by a desire to ensure that comprehensive and accurate instructions could be obtained in respect of the two remaining issues of which the Chamber sought submissions from the Libyan Government.¹³ There is a very clear distinction between the practical issue of ensuring that submissions reflect the reality of measures undertaken in compliance with co-operation requests, and the legal issue of postponing such

⁹ Al-Senussi Response, paras. 8-10.

¹⁰ Request, paras. 8, 9, 10.

¹¹ Gaddafi Response, para. 57; OPCV Response, para. 5.

¹² Gaddafi Response, para. 69; Prosecution Response, para. 1.

¹³ Request, paras. 5, 6, 8.

measures. Indeed, this is precisely the distinction between the contents of Regulation 35 and Article 95 of the Statute in the present circumstances.

9. The existence of a period of time needed in order to take instructions and prepare submissions does not amount to a suspension of proceedings. If this were the case, *every* period of time during which a filing is being prepared pending the passage of the applicable deadline – when the Court is effectively awaiting receipt of submissions – would amount to a ‘suspension’. Underpinning the totality of the arguments presented in the Gaddafi Defence is a conflation between *practical* barriers to the preparation of submissions and a *legal* barrier to the continuation of proceedings in the form of a desire on behalf of the Libyan Government, either to formally suspend proceedings, or to question the validity of the applicable international law, or to simply ignore it. Practical difficulties should be met with practical solutions, and the attempt by the Gaddafi Defence to undermine these aims must be rejected.
10. Indeed, the Decision demonstrates that this is precisely the approach taken by the Court, and rightfully so. Adopting a different approach so as to effectively deny the Libyan Government the possibility of making submissions that the Chamber itself recognized as required by Regulation 109.¹⁴
11. Only by attempting to assert bad faith on behalf of the Libyan Government can the Gaddafi Defence describe the Chamber’s treatment of the Request as “a test for situations referred by the Security Council, and the ability of the ICC to act as an independent and effective judicial institution in relation to such referrals”.¹⁵ Such misplaced hyperbole has no relevance to the Chamber’s task that rests on a practical consideration of the Request.
12. For this reason, there is no sense in which the Request falls under the auspices of Article 95. As noted above, the Request does not pertain to the validity of

¹⁴ Decision, para. 7.

¹⁵ Gaddafi Response, para. 95.

obligations, and there is no desire to postpone or suspend the proceedings, other than to the extent that the period pending any filing entails the passage of time. The Gaddafi Defence's arguments in this regard¹⁶ must be rejected.

13. The Gaddafi Response also attempts to frame the Libyan Government's Request as indicative of a desire to deploy legal argument in respect of the co-operation requests, rather than making the factual submissions as to the steps taken to comply with them.¹⁷ If the Libyan Government understood the Decision as an inquiry as to "whether Libya would surrender Mr. Gaddafi" as opposed to "inform[ing] the Court of the steps taken",¹⁸ or as an opportunity to make legal argument in that regard, no extension would have been required. However, in order to provide accurate, detailed submissions on the *factual* question of what steps have been taken, up to date instructions on developments in Libya are needed – and it is precisely such instructions that necessitate the extension sought.

C. Good cause & good faith

14. The Responses assert, on a number of bases, that the Libyan Government's Request lacks good cause for the purposes of Regulation 35.¹⁹ The Responses – and particular that of the Gaddafi Defence – also assert yet again that the Libyan Government is acting in bad faith.²⁰ To a large extent, the arguments present in the context of the assertion of the lack of good faith are repetitious of arguments made in support of the contention that the Request lacks good cause for the purposes of Regulation 35. They will, therefore, be addressed together.

¹⁶ Gaddafi Response, paras. 16, 17; 57-69.

¹⁷ Gaddafi Response, paras. 20, 21, 44, 58, 59.

¹⁸ Gaddafi Response, para. 58.

¹⁹ Gaddafi Response, paras. 16-56.

²⁰ Gaddafi Response, paras. 70-84.

1. *Effect of security difficulties and the imminent election*

15. The Gaddafi Defence contends that neither the security situation in Libya nor the imminent election have any impact on the ability of Libya to comply with the deadline of which it seeks an extension.²¹ The Al-Senussi Defence, on the other hand, adopts a position at the opposite extreme, referring to “catastrophic circumstances”, and “deep political instability” such that Libya is totally unable to administer a legal visit.²² The real position is between both sets of inflated rhetoric: that there are security concerns in Libya, and that addressing these has been, and remains, the government’s priority. Although full instructions are not yet available for the reasons set out in the Request, it is instructive to note that, in contrast to the descriptions of Libyan politics advanced by the Al-Senussi Defence, there is credible evidence that, despite the security difficulties faced by the Libyan Government in recent months, the rule of law is prevailing.²³ Indeed, the head of the UN Support Mission in Libya, Tarek Mitri, described rule of law developments just this week in Libya as a “sign of hope”.²⁴

16. The Gaddafi Defence and the OPCV also refer to the fact that the Libyan Government has previously made submissions at times when there were security difficulties in Libya.²⁵ It is obviously over-simplistic to suggest that merely because submissions had been made at previous times of social upheaval or related difficulties, they can be made in the present circumstances. No reference is made either to the particularities of the requisite submissions, or to the particularities of the circumstances in Libya at the present time.²⁶ As to the former, as already noted, the submissions sought by the Chamber will necessarily address complex facts which involve sensitive and confidential

²¹ Gaddafi Response, paras. 19, 22-41; 72.

²² Al-Senussi Response, paras. 27, 31; see generally, paras. 24-31.

²³ See, for example, Libya Herald, ‘Opinion: 9th June – A historic day in democratic Libya?’ <http://www.libyaherald.com/2014/06/10/opinion-9th-june-a-historic-day-in-democratic-libya/#axzz34F4GOssH>

²⁴ <http://www.libyaherald.com/2014/06/11/the-un-and-italy-react-to-libyan-supreme-court-ruling/>

²⁵ Gaddafi Response, para. 23; OPCV Response, para. 10.

²⁶ Gaddafi Response, paras. 22-30.

information as to the negotiations between the Libyan Government and the regional authorities in Zintan. The disclosure of this information at the present time would not be conducive to the improvement of national security or to the attainment of political stability in Libya. In light of the unique political and security situation existing in Libya at this time, the two weeks allowed by the Decision to provide submissions on these sensitive and important matters proved demonstrably too short. Given the matters under consideration, the ongoing and rapid changes in Libya and the need for greater political and security stability, a reasonable extension of time is needed to provide detailed submissions. As to the need for stability, the difficulties currently faced by the Libyan Government are both of a greater intensity than in previous instances of violence, and are exacerbated by the unavoidable uncertainties arising from an imminent election in the post-revolutionary environment in which Libyan politics is conducted.

17. The Gaddafi, the Prosecution, and the OPCV Responses refer to the continuity of statehood as a means of denying that the imminent elections support the Libyan Government's Request.²⁷ This reflects, once again, the erroneous conflation of *practical* barriers to the preparation of submissions with a desire to alter in some way the *legal* nature of the relationship between the Court and Libya. It is eminently clear that the practical barriers to obtaining full, detailed instructions on the highly sensitive matters (both from a political and a national security perspective) to which the Request refers, can exist in circumstances which come nowhere near the high threshold required to demonstrate a rupture of statehood at international law.²⁸ Of course, in the present circumstances, there is no suggestion whatsoever that the current security difficulties impinge upon Libya's statehood, or its obligations at international law, and Libya makes no attempt to make these claims. Libya is simply seeking a modest extension of

²⁷ Gaddafi Response, paras. 44-47; Prosecution Response, para. 4; OPCV Response, para. 11.

²⁸ Indeed a presumption of continuity applies to existing States even if the criteria of statehood appear to be met in a limited fashion only. See James Crawford, *The Creation of States in International Law* (2nd ed., Oxford: OUP, 2006) at 89.

time following the upcoming election - for purely practical purposes - for the new Government to be able to provide its legal team with instructions, including those that pertain to the sensitive negotiations with the local authorities in Zintan authorities.

2. *Alleged inconsistencies in Libya's submissions*

18. The Gaddafi Defence refers to the previous submissions of the Libyan Government, which it seems to have misunderstood, and alleges hypocrisy where there is none. The passage quoted from the Libyan Government's filing of 8 May is as follows

*the practical difficulties encountered in the transfer of Mr. Gaddafi from Zintan to Tripoli have not impeded the Libyan Government's engagement with the Court and its utmost effort to comply with its international obligations in these proceedings.*²⁹

19. The Gaddafi Defence describes the Libyan Government's argument, in this regard, as asserting that, "the security situation and issues related to the control of the Government over militia had no negative impact on Libya's interaction with the ICC and ability to cooperate".³⁰ Clearly, there is no assertion of this kind in the extracted submission. To the contrary, the point made in the extract quoted is that despite the considerable difficulties that the Libya has faced, it has remained engaged with the Court and had continued to apply its utmost effort to comply with its international obligations in these proceedings.

20. This is clearly correct, as was already apparent at the time of the submission quoted above. It is indicated not only by the signing of the Exchange of Letters, but also by the letters, dated 9 June 2014, from the Prosecutor-General of Libya: (a) to the ICC Registrar concerning the planning of visits by the ICC Defence

²⁹ ICC-01/11-01/11-542, para. 48, cited in Gaddafi Response, para. 24.

³⁰ Gaddafi Response, para. 25.

teams to Mr. Gaddafi and Mr. Al-Senussi (Annex 1); and to the Chief Prosecutor of Zintan regarding the discontinuance of proceedings against the four ICC staff members (Annex 2). These letters, which are discussed in more detail further below, confirm – yet again – that contrary to the Gaddafi Defence submissions, Libya intends to continue to cooperate fully with the Court and has made clear to its own authorities its agreement regarding the privileges and immunities of the ICC.³¹

21. As regards the Exchange of Letters in particular, the Gaddafi Defence and the OPCV assert that this indicates that the Libyan Government can make submissions at present, and that it is acting in bad faith.³² To the contrary, the Exchange of Letters, as well as subsequent developments (such as, for example Annex 1 and Annex 2), are indicative of the good faith efforts of the Libyan Government to co-operate fully with the Court.
22. The Gaddafi Defence makes further objections to the validity and relevance of the Exchange of Letters. As to the latter, the Gaddafi Defence asserts that the Exchange of Letters merely refers to already extant legal obligations – once again conflating the factual nature of the issues at stake with legal arguments that are not in issue. This, however, entirely misses the point, namely that the Exchange of Letters is a very important step in the domestic implementation of measures directed at ensuring compliance with Libya's international obligations.
23. A further legal argument is raised by the Gaddafi and Al-Senussi Defence teams as to the validity of the Exchange of Letters, whereby the question is raised as to whether Salah Bashir Al-Marghani was, in fact, the Minister of Justice on the date that the Exchange of Letters was signed in view of the fact that he was not part of the Government proposed by Ahmed Maetig.³³ The Gaddafi Defence also refers to this issue in its assertions as to bad faith on behalf of the Libyan

³¹ Cf. Gaddafi Response, paras 61 and 74.

³² Gaddafi Response, paras. 27, 28, 29; 73.

³³ Gaddafi Response, para. 27; Al-Senussi Response, para 16.

Government.³⁴ However, the validity of the putative Maetig government, that purported to appoint a new Minister of Justice, has been clarified by the Supreme Court. Maetig has accepted the Supreme Court's decision.³⁵ It is, therefore, undeniable that Mr Salah Margani remains the validly appointed Minister of Justice at the present time and it is he who was legitimately holding this post at the time of signing the Exchange of Letters.

3. *Public and media statements about further recourse*

24. The Gaddafi Defence seeks to mount further objections to the extension sought by Libya on the basis of a media interview with Professor El-Gehani and a newspaper article.³⁶ The Gaddafi Defence seems to assert that because the Libyan Focal Point to the ICC has made statements to the press relating to the recent Appeals Chamber decision in the Gaddafi case that there is no barrier to providing the submissions to which the Decision of 15 May relates.³⁷ This is an obvious, and absurd, *non sequitur*.

25. The Gaddafi Defence also relies upon these media extracts to assert bad faith by the Libyan Government in respect of co-operation with the Court. As regards Professor El-Gehani's comments during the interview, which have been translated as referring to the finality of the Appeals Chamber's decision in respect of the admissibility challenge, and a possible 'appeal',³⁸ it should be noted, first, that Professor El-Gehani clearly made his understanding of the position very clear later in the interview when he commented, on the same topic, that "there is room for *another challenge*" (emphasis added). This is no

³⁴ Gaddafi Response, para. 75.

³⁵ <http://www.libyaherald.com/2014/06/10/opinion-9th-june-a-historic-day-in-democratic-libya/#axzz34F4GOssH> ; <http://www.businessweek.com/news/2014-06-09/libyan-court-rules-appointment-of-prime-minister-maetig-unlawful>; <http://www.libyaherald.com/2014/06/09/breaking-news-maetigs-gnc-election-unconstitutional-supreme-court/>; <http://www.libyaherald.com/2014/06/09/maetig-accepts-supreme-court-ruling/>;

³⁶ Gaddafi Response, paras. 31-36.

³⁷ Gaddafi Response, para. 36

³⁸ Gaddafi Response, paras. 31-34; 74.

more than a reflection upon that explicitly stated at paragraph 44 of the Appeals Chamber's decision:

"Should Libya wish the above information relating to events to be considered by the Court [i.e., the additional evidence sought to be adduced on appeal in the form of the Accusation Chamber dossier consisting of 1000 pages of witness statements, interviews and other documentary evidence relating to the case], the correct avenue would rather be for it to make an application under article 19 (4) of the Statute, in which circumstances the Pre-Trial Chamber could decide whether to grant leave to Libya to bring a second challenge to the admissibility of the case ("In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial.").

26. Second, it was the interviewer who first used the terminology of an 'appeal'.

While the difference between an appeal and a new admissibility challenge is of legal significance in making submissions before the Court, Professor El-Gehani was speaking in the domestic political context, where his comments were directed towards laypersons. In that context, the primary message – that of the possibility of making further arguments on admissibility in future proceedings – however such arguments arise in procedural terms – is the overriding issue.

27. In respect of an article in the New York Times, the Gaddafi Defence asserts that because "Libya was able to communicate its position regarding Mr. Gaddafi to media outlets and anonymous lawyers immediately after the Appeals Judgment was issued", Libya is able to comply with the deadline imposed in the Decision of 15 May 2014.³⁹ Clearly, the content of the article – including, in particular, the paragraph extracted in the Gaddafi Response⁴⁰ – relates to the substance of the Appeals Chamber's decision, including the extract quoted above. Given the

³⁹ Gaddafi Response, para. 35, referring to <http://www.nytimes.com/2014/05/22/world/africa/appeals-court-orders-qaddafi-son-tried-in-hague-not-libya.html>

⁴⁰ Gaddafi Response, para. 35.

baseless assertion that this article is the result of Libya's communication with 'media outlets' and 'anonymous lawyers', this curious *non sequitur* should also be disregarded

4. *Existence of domestic proceedings*

28. The Gaddafi Defence refers to the status of domestic proceedings against Mr. Gaddafi, as well as associated law reform, as an indication that there is no good cause for extension of the deadline, as well as of bad faith.⁴¹ The Libyan Government has already addressed this argument on several occasions, and reiterates that the commencement of any domestic trial involving either Mr. Gaddafi or Mr. Al-Senussi is not imminent.

29. The proceedings to date in which Mr Gaddafi has appeared by video link have been procedural hearings that are a pre-cursor to the commencement of any trial and have related primarily to the appointment of lawyers for the defendant and the access of such lawyers to the investigative files. Furthermore, the changes to the Libyan Criminal Procedure Code have been designed as one of the witness protection measures permissible under Libyan law to assist victims and other witnesses who may be concerned for their safety.⁴² The use of video link hearings for Mr Gaddafi at this pre-trial procedural stage of proceedings is simply a means of protecting his safety during a period of instability in which it is not safe to move him from Zintan without risking his personal security.

5. *Arrangement of privileged visit*

30. The Al-Senussi Defence raises a number of arguments concerning the arrangement of privileged visits. It should be noted, in this regard, that the

⁴¹ Gaddafi Response, paras. 37-41; 74.

⁴² See Libyan UN Security Council Briefing, May 2014, S/PV/7173, p. 15.

Request for extension to the deadline imposed by the Chamber did not relate to submissions in respect of the organisation of a privileged legal visit to Mr. Al-Senussi by his ICC Defence team.

31. Notwithstanding this, the Al-Senussi Response asserts that the Exchange of Letters is inadequate, because it does not contain certain details that the Al-Senussi Defence would wish it to.⁴³ It is submitted that the practical modalities for the visit, specified by the Chamber to be agreed to in its decision of 26 September 2013, are in fact incorporated in the Exchange of Letters. The Pre-Trial Chamber specified that these practical modalities were to cover: (a) immunity from arrest and detention; (b) immunity from search of baggage for the individuals participating in the visit; (c) inviolability of defence documents;; and (d) non-interference with and guarantee of the privileged nature and communication between Mr Al-Senussi and his defence during the meeting.⁴⁴ Contrary to the Al-Senussi submissions,⁴⁵ each of these practical modalities is in fact addressed in the Exchange of Letters at paragraphs 4-5, 9 and 12.
32. Contrary to the Al-Senussi Defence criticisms that insufficient provision has been made in terms of security, the Government has in fact taken steps to formalise arrangements to alleviate such concerns in paragraphs 11 and 15 of the Exchange of Letters. Unfortunately, it is impossible for Libya to properly address the concerns raised by the Al-Senussi Response in this regard as the source of the incident relied upon in which a lawyer for Mr Al-Senussi was purportedly injured while leaving the hearing on 27 April 2014 has not been identified. The Libyan Government has made inquiries and is not aware of any evidence suggesting this alleged incident occurred. The Government has also made inquiries in respect of the other purported attack on a lawyer cited by the Al-Senussi defence – a kidnapping lasting several hours of the nephew of a lawyer appointed to defend Mr Gaddafi. To the Government's knowledge this

⁴³ Al-Senussi Response, paras. 4-6; 12; 17-20.

⁴⁴ ICC-01/11-01/11456, paras 14-16.

⁴⁵ Al-Senussi Response, paras 18-20.

was an entirely unrelated incident that took place in September 2013. The Government adopts a cautious approach to the security of the legal team and although the evidence cited by Mr Al-Senussi does not substantiate the defence's claims, the Government has taken steps in any event to ensure the safety of lawyers involved in the cases of Mr Gaddafi and Mr Al-Senussi. In particular, for recent pre-trial hearings the Government has arranged for all the lawyers who wish to do so to travel to and from the hearings under armed guard. Such arrangements will continue for as long as the individual lawyers involved request them.

33. In the absence of a specifically arranged appointment, it is plainly unreasonable for the Defence to expect *at this time* further practical detail than these already detailed, especially in a diplomatic agreement between the Court and a State. Any such further arrangements which may become necessary would be made only when a particular visit is in the process of being organised – something which is now possible in view of the terms of the Exchange of Letters. Furthermore, there is clear evidence of further progress in this regard in terms of the modalities of the visit, visa application process and the immunity of ICC personnel from criminal prosecution in Libya. This includes the following clear evidence:

- a. **Annex 1** is a letter, dated 9th June 2014, from the Attorney General of Libya to the Registrar of the International Criminal Court. The letter makes clear the role of the office of the Attorney General in effecting practical measures necessary for the implementation of the privileged visits, through the provision of visas. The effect of this letter is to make clear that the next step in facilitating such a visit is for the Al-Senussi defence team to apply through the normal official channels, that is through their local embassy, for a visit visa. In this respect, Libya extends its express invitation to the Al-Senussi defence team to apply to the

Libyan embassy in London for a visit visa.

- b. **Annex 2** is a letter, also dated 9th June 2014, from the Attorney General of Libya to the Chief Prosecutor of Zintan, which notes that it is impossible for charges against the ICC staff to proceed without the permission of the Minister of Justice, and that the Minister has provided no such permission. The letter also confirms that, in any event, “the accused are from the staff of the International Criminal Court who enjoy immunities and privileges which should be considered and applied according to the international agreements acceded and respected by Libya”. Accordingly, the effect of this letter is to clarify the position as to the Libyan Government’s position on the privileges and immunities of the ICC staff members who visited Libya in the summer of 2012 as requested by the Registrar. It places beyond doubt the fact that the four ICC staff members who were detained in Zintan in 2012 are no longer subject to any domestic criminal proceedings in Libya.⁴⁶

34. As regards the assertion that the Exchange of Letters fails to provide for protection from prosecution in respect of information conveyed during privileged conversations between counsel and Mr. Al-Senussi,⁴⁷ the Libyan Government notes that this is incorporated within the very definition of legal privilege. To specify this in the Exchange of Letters would be superfluous. The Libyan Government is also able to confirm that - in conformity with the spirit of the recently signed Exchange of Letters - the national security proceedings against Mr. Gaddafi arising out of events in Zintan in the summer of 2012 will no longer be pursued. It is expected that will be confirmed in an upcoming procedural hearing taking place in Tripoli in the main criminal proceedings

⁴⁶ [REDACTED].

⁴⁷ Al-Senussi Response, para. 15.

relating to crimes committed during the 2011 revolution. For this reason, the concerns of the Gaddafi and Al-Senussi defence teams⁴⁸ as to the confidentiality of their meetings with their clients are entirely without merit.

35. In addition, the Government wishes to clarify – contrary to the Al-Senussi criticisms on this issue⁴⁹ - that the requirement for there to be a Libyan lawyer present at any meetings that the ICC Al-Senussi defence team wish to have with their client in Libya only applies if the ICC Al-Senussi defence team wish to be appointed to represent Mr Al-Senussi in the proceedings currently taking place in Tripoli. This is because it is a requirement of Libyan law that there must be at least one Libyan qualified lawyer on the record when representing clients before the Libyan courts. If, however, the ICC Al-Senussi defence team simply wish to meet with their client to discuss the ICC proceedings, there is no need to have a Libyan qualified lawyer present at that meeting.

36. Finally, as to the arguments alleging that the Exchange of Letters was finalised in order to avoid a finding of non-compliance, and referral to the Security Council,⁵⁰ the Libyan Government emphasises that this speculative assertion is entirely baseless. It is only one aspect of a long-term period of dialogue between the Court and the Libyan Government, the speed of which must be understood in the context of very considerable political upheaval in Libya. The arguments of the Al-Senussi Defence that the Exchange of Letters should have been finalised earlier⁵¹ clearly relate only to previous applications made by the Defence for findings of non-compliance and referral to the Security Council. They cannot be understood as relevant in response to the Libyan Government's request.

⁴⁸ Gaddafi Response, paras 39, 83; Al-Senussi Response, para 15.

⁴⁹ Al-Senussi Response, para 15.

⁵⁰ Al-Senussi Response, para. 11.

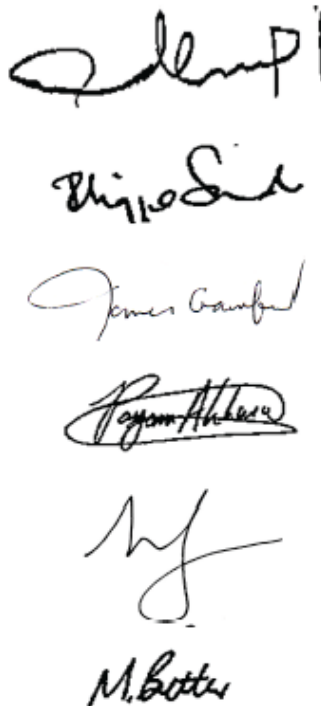
⁵¹ Al-Senussi Response, paras. 6, 7, 11.

III. CONCLUSION

37. For all the reasons outlined above, Libya continues to affirm its wish to fully cooperate with the Court and accordingly submits that the Chamber should:

- a. Grant Libya permission to reply; and
- b. Grant the extension of the deadline sought in the Request.

Respectfully submitted:



The block contains six handwritten signatures stacked vertically. From top to bottom, they appear to be: a stylized signature, 'Philippe', 'James Crawford', 'Payam Akhavan', a signature that looks like 'WJ', and 'M. Butler'.

Professor Ahmed El-Gehani
 Professor Philippe Sands QC
 Professor James Crawford SC
 Professor Payam Akhavan
 Mr Wayne Jordash QC
 Ms Michelle Butler
*Libyan ICC Coordinator and
 Counsel on behalf of the Government of Libya*

Dated this 13th day of June 2014
 At London, United Kingdom