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Date: **5 June 2014**

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Single Judge

SITUATION IN LIBYA

IN THE CASE OF

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

Public

With Public Annexes A and B

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’”

Source: Defence for Mr. Saif Al-Islam Gaddafi

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

The Office of the Prosecutor

Ms. Fatou Bensouda
Mr. James Stewart
Mr. Julian Nicholls

Counsel for the Defence

Counsel for Saif Al-Islam Gaddafi:
Mr. John R.W.D Jones QC
Ms. Sarah Bafadhel

Counsel for Abdullah Al-Senussi:
Mr. Ben Emmerson QC
Mr. Rodney Dixon QC
Ms. Amal Alamuddin
Mr. Anthony Kelly

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

Ms. Paolina Massidda
Ms. Sarah Pellet
Mr. Mohamed Abdou

The Office of Public Counsel for the Defence

States' Representatives

Professor Ahmed El---Ghani
Professor Philippe Sands QC
Professor James Crawford SC
Professor Payam Akhavan
Wayne Jordash QC
Ms. Michelle Butler

Amicus Curiae

REGISTRY

Registrar

Mr. Herman von Hebel, Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

I. Introduction

1. On 1 March 2013, the Pre-Trial Chamber confirmed Libya's obligation to surrender Defence documents, which were seized illegally in Zintan in June 2012.¹
2. On 31 May 2013, the Pre-Trial Chamber re-instigated Libya's obligation to surrender Mr. Saif Al-Islam Gaddafi to the ICC.²
3. Neither obligation has been suspended in the interim 12 months.
4. Despite being afforded multiple opportunities to engage with the ICC in order to resolve and eliminate any obstacles concerning the implementation of these requests, Libya has failed to do so, or to invoke any statutory provisions exempting it from immediate compliance.
5. In light of the indisputable fact that Libya had failed to implement these cooperation requests, contrary to the provisions of the Statute, the Single Judge requested Libya:

“to inform the Chamber, by Wednesday 28 May 2014, as to the status of the implementation of

- (i) its duty to immediately surrender Mr Gaddafi to the Court;
- (ii) its duty to return to the Defence of Mr Gaddafi the originals of o materials that were counsel for Mr Gaddafi by the Libyan authorities during her visit to Mr Gaddafi in Zintan, and destroy any copies thereof; and
- (iii) its duty to arrange a privileged legal visit to Mr Al-Senussi by his Defence.”³

6. On the very day that its submissions were due, Libya filed an application for extension of a further 12 weeks to respond, citing security concerns and an alleged need to obtain instruction from whichever Government might be elected after the elections in June.⁴

¹ ICC-01/11-01/11-291.

² ICC-01/11-01/11-344-Red.

³ ICC-01/11-01/11-545.

⁴ ICC-01/11-01/11-548 (“Application”).

7. The Application does not recognise Libya's legal obligations as concerns the cooperation requests nor does it affirm Libya's commitment to implement the cooperation requests at any point in time.
8. To the contrary, although framed as a request for an extension of time, the Application is in fact, a request to postpone the legal consequences as concerns Libya's past, ongoing, and future failure to surrender Mr. Gaddafi to the ICC.
9. Notwithstanding Libya's stated 'inability' to respond to the Single Judge's request, Libyan officials have made it abundantly clear that they intend to retain custody of Mr Gaddafi and continue their domestic prosecutions of him.
10. If Libya wished to postpone Mr. Gaddafi's surrender due to its desire to conduct its own trial, then it must file a second challenge, and abide by the procedural requirements.
11. If Libya was, contrary of the statements of its officials, genuinely concerned about the impact of security developments on its ability to implement the surrender request, then it would have invoked Article 97, and requested the assistance of the ICC (and the Security Council) to eliminate such security obstacles.
12. The Application thus does not evince *any* basis for exempting Libya from the consequences of its non-compliance or for adjourning the Single Judge's ruling on this matter any further.
13. Mr. Saif Al-Islam Gaddafi has not been surrendered to the ICC, and Libya has neither confirmed that it is willing to implement the surrender obligation, nor taken any steps in furtherance of the implementation of the surrender obligation or the obligation to return Defence documents.
14. Further delays would also be completely inimical to the interests of justice, and the protection of Mr. Gaddafi and his rights under the Statute.
15. Given that Libya has failed to engage with the ICC in order to resolve any impediments in relation to the execution of these cooperation requests, and there does not appear to be any other means under the Statute to ensure Libya's fulfilment of the

requests, the only solution at this juncture is for the Single Judge to issue a finding of non-compliance, and refer the matter to the Security Council for further action.

II. Submissions

Libya has failed to demonstrate justifiable and compelling reasons for the requested adjournment

16. Any postponement of Libya's response to the Single Judge necessarily implies a further postponement of the surrender of Mr. Gaddafi to the ICC. Although Libya has requested 8 weeks following the election (i.e. three months from the initial deadline),⁵ it also appears to suggest that matters concerning Libya's obligation to implement the cooperation requests concerning Mr. Gaddafi will remain in hiatus pending the formation of a new Government.⁶
17. The Application is not just an application to suspend a particular deadline, therefore, but to suspend, effectively, the proceedings against Mr. Gaddafi before the ICC for an unspecified time period.
18. For this reason, Trial Chamber V has emphasised that in determining whether to adjourn the proceedings pending the resolution of cooperation issues, the Trial Chamber must consider the following:

“In particular, the Chamber is mindful of its obligation pursuant to Article 64(2) of the Statute to ensure that the proceedings are conducted in a manner which is fair and expeditious and fully respects the rights of the accused, as well as its obligation to interpret and apply the law in a manner consistent with internationally recognised human rights. The Chamber adverts, in particular, to the right of every accused to be tried without undue delay. It is noted that proceedings in this case have been ongoing for approximately three years, and that the start of trial has already been adjourned on a number of occasions. The Chamber considers that any further adjournment without justifiable and compelling reasons could constitute undue delay contrary to the rights of the accused.”⁷

⁵ ICC-01/11-01/11-548, para. 4.

⁶ “It is expected that this proposed new timeframe of providing submissions within 8 weeks following the upcoming election will allow time for the formation of a successor Government following the elections and for the new office holders to provide instructions regarding its cooperation duties.”, ICC-01/11-01/11-548, para. 8.

⁷ ICC-01/09-02/11-908, para. 80.

19. In order to have demonstrated the existence of a compelling cause to adjourn its response, or at the very least, the *de minimis* ‘good cause’ standard of Regulation 35, Libya should have demonstrated the existence of a causal link between the factors upon which it relies in support of the Application, and its ability to submit its response to the Single Judge. It has not done so.
20. The request of the Single Judge was clear that Libya was required to inform the Court as to the status of the implementation of the cooperation requests. The submissions requested of Libya were descriptive in nature, and do not require legal argument, consideration or debate.
21. Either Libya has submitted a request to the authorities in Zintan to take steps to implement these obligations or it has not.
22. The security situation in Libya has absolutely no impact on the ability of Libya to report to the ICC as to what has occurred to date.
23. The security situation in Libya did not prevent Libya from filing more detailed and complex submissions on the 2, 9, 13, 20, 27 January 2014, 24 February 2014, 14 and 26 March 2014, and as recently as 1 and 8 May 2014.
24. In the latter filing, Libya expressly stated that,

“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.”⁸
25. Having claimed on 8 May 2014 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, it is self-contradictory, and thus irrational, to claim the complete opposite two weeks later.
26. The mandate of the General National Congress (GNC) also expired in February 2014.⁹ Neither the questionable mandate of the GNC, nor the constitutional ambiguity as to

⁸ ICC-01/11-01/11-542, para. 48.

⁹ M. Eljarh, ‘February is a Make or Break Month for Libya’, *Foreign Policy* 6 February 2014, http://transitions.foreignpolicy.com/posts/2014/02/06/february_is_a_make_or_break_month_for_libya

who is Libya's actual Prime Minister following the legally questionable dismissal of Ali Zeidan, prevented Libya from filing the aforementioned submissions.

27. The flawed logic underpinning the Application is further evidenced by the fact that on the one hand, Libya attempts to rely on a legal document signed by Salah Marghani, as Minister of Justice, (who is not part of the Government proposed by Prime Minister Maitig), whilst at the same time, claiming that it cannot receive instructions from the current Libyan authorities in relation to the surrender of Mr. Gaddafi to the ICC, or the return of illegally seized Defence documents.
28. This 'selective' inability is neither logical nor credible.
29. The fact that Libya was able to submit the Application and address the cooperation issues concerning the Senussi case indicates that there are no physical or logistical impediment as concerns Libya's ability to submit a response.
30. The hypothesis that either the security situation or the impending elections have had any impact on the ability of the Government to inform the ICC as to its position concerning the surrender of Mr. Gaddafi and the return of these documents is directly contradicted by the following statements and developments.¹⁰
31. On 21 May 2014, the ICC focal point, who has the status of Counsel within Libya's team before the ICC, was interviewed in relation to the Appeals Judgment on the admissibility challenge, and the surrender of Mr. Gaddafi.
32. In response to the question, "So are we to understand that the judgment issued today from the ICC which demanded the transfer of the accused to it, there is a right for Libya to appeal?", Dr. Gehani stated, "Yes and this is what we'll do, we will appeal it and this is not a final decision" (emphasis added).¹¹
33. Later in the interview, Dr. Gehani claimed as follows:

"The court said in today's decision that if Libya was to cooperate with the Court in all its demands than there is room for another challenge from

¹⁰ As set out in the Informal Expert Paper on Complementarity, in order to assess the position of a State, the Court should refer to multiple sources of information, and should not restrict itself to the 'official position' submitted by a State: ICC-01/04-01/07-1008-AnxA, para. 39.

¹¹ Annex A, Libya TV Broadcast 21 May 2014.

anew/request for Libya to try him in Libya – the important thing is that this is not a final decision”.

34. Dr. Gehani could not have been more unequivocal in stating that Libya does not consider the Appeals Chamber’s Judgment, or the related surrender obligation, to constitute final decisions. This is obviously incorrect. The Judgment is, of course, final and not subject to appeal. The Single Judge will note the serious issue of professional legal ethics that it raises in relation to Dr. Gehani as Counsel appearing before the Court that he is wilfully and knowingly broadcasting an interpretation of the Appeals Chamber’s Judgment which he must know to be false and/or misleading.

35. A contemporaneous New York Times article stated that,

“A lawyer familiar with the Libyan position called the ruling inadequate and outdated. “It was based on the case as it stood 18 months ago,” the lawyer said. “It has not taken into account all the investigations Libya has done since. This will not be the end of the road.””¹²

36. Given that Libya was able to communicate its position regarding Mr. Gaddafi to media outlets and anonymous lawyers immediately after the Appeals Judgment was issued, there cannot be any compelling reason or even “good cause” as to why it was unable to comply with the Single Judge’s order to communicate its position.

37. Libya’s recent actions have also unambiguously reflected its position towards the surrender of Mr. Gaddafi to the ICC.

38. On 25 May 2014 (that is, a mere three days before Libya submitted its Application), Libya convened a further trial hearing against Mr. Gaddafi.¹³ Although Mr. Gaddafi was shown by video link, the Chamber did not give Mr. Gaddafi an opportunity to address the Court, nor was he represented by Counsel.

39. Notably, the charges read out against Mr. Gaddafi include allegations that he ‘insulted’ the Libyan State to the international community,¹⁴ which, in the absence of

¹² M. Simons, ‘Appeals Court Orders Qaddafi Son Tried in Hague, Not Libya’, *New York Times* 21 May 2014 at http://www.nytimes.com/2014/05/22/world/africa/appeals-court-orders-qaddafi-son-tried-in-hague-not-libya.html?_r=0

¹³ Annex B.

¹⁴ Annex B, p.5, “The first [Mr. Gaddafi] and the fifth are accomplices in insulting the Libyan Arab People worldwide.”

any other factual particulars, appears to be based on the illegal seizure of Defence documents in Zintan in June 2012.

40. The Trial Chamber scheduled a further hearing for the proceedings against Mr. Gaddafi for 22 June 2014.¹⁵
41. The continuation of the proceedings against Mr. Gaddafi – notwithstanding the Appeals Chamber’s Judgment – is clear evidence of Libya’s intention to disregard the ICC rulings concerning Mr. Gaddafi.
42. In the Application, Libya has requested further time to “provide submissions on these aspects”.¹⁶ This vague language does not indicate that Libya either accepts its obligation to implement the cooperation requests at this juncture or that it will employ the requested time to advance the implementation of the cooperation requests.
43. To the contrary, Libya’s explicit acknowledgement at paragraph 8 of its response that Counsel are waiting for “the new office holders to provide instructions regarding its cooperation duties” clearly indicates that Libya’s duty to cooperate with the ICC as concerns these cooperation requests will remain in abeyance in the interim.
44. Apart from the fact that Article 86 of the Rome Statute and Article 27 of the Vienna Convention on the Law of Treaties do not permit Libya to rely on internal political issues to justify its failure to immediately execute the ICC co-operation requests, Article 30 of the Interim Constitutional Declaration vests the Government with full power and authorities until there has been a handover of power.
45. In the same way that States have an obligation to ensure the existence of domestic procedures to facilitate the execution of cooperation requests, Libya has a positive obligation to ensure that any political transition and handover do not affect the timely execution of outstanding cooperation requests.¹⁷ Libya must therefore apply Article

¹⁵ Annex B.

¹⁶ Application, para. 8.

¹⁷ “[B]oth Articles 93(1) and 99(1) of the Statute explicitly provide that compliance with such requests is to be facilitated under procedures of national law [...]. Further, these provisions envisage that national law will facilitate rather than impede the execution of cooperation requests emanating from the Court.” ICC-01/09-02/11-908, para. 31. The Chamber further noted “the obligation, pursuant to Article 88 of the Statute, to ensure there are procedures for cooperation available under national law. These procedures should facilitate timely compliance with requests for assistance.” ICC-01/09-02/11-908, para. 47.

30 of the Interim Constitutional Declaration in order to ensure continuity of instructions and expeditious cooperation with the ICC.

46. The announcement of an upcoming election on 25 June 2014 thus has no legal or practical import as concerns the ability of Libya to either submit the requested observations or to execute the cooperation requests.

47. The execution of ICC cooperation requests cannot be made contingent on the particular identity or composition of the Government, or whether or not elections are pending. There is nothing in the Rome Statute or Rules which allows a State to defer an obligation to a future government: this government is obliged to cooperate, and the future government is obliged to cooperate. The composition of the government is thus irrelevant. As found by Trial Chamber V,

“any purported deficiency in domestic legal procedures (or interpretation thereof), cannot be raised as a shield to protect a State Party from its obligation to cooperate with the Court, or to undermine any application for non-compliance under Article 87(7) of the Statute that may result.”¹⁸

48. Finally, it must be stressed that Libya has been accorded ten opportunities to submit its observations in relation to the execution of these particular cooperation requests.¹⁹

49. The Registrar has also submitted multiple *note verbales* requesting Libya’s position on these cooperation requests, and raised the issue of their implementation during formal meetings with Libya’s representatives.²⁰

50. The ICC Prosecutor also called on Libya to surrender Mr. Gaddafi at both the November 2013 and May 2014 Security Council briefings. Unlike the Defence for Mr. Gaddafi, Libya’s Representative to the Security Council was afforded a full opportunity to address the Security Council on this point.

51. During the November briefing, Libya’s Representative to the United Nations exercised this right by stating unequivocally that, “No Government, regardless of its

¹⁸ ICC-01/09-02/11-908, para. 47.

¹⁹ ICC-01/11-01/11-343, ICC-01/11-01/11-348, ICC-01/11-01/11-374, ICC-01/11-01/11-377, ICC-01/11-01/11-402, ICC-01/11-01/11-450, ICC-01/11-01/11-496, ICC-01/11-01/11-527, ICC-01/11-01/11-532, ICC-01/11-01/11-542.

²⁰ ICC-01/11-01/11-545, para. 6.

popularity, can accept a trial [of Mr. Saif Al-Islam Gaddafi] taking place outside Libya”.²¹

52. During the May briefing, the same representative updated the Council on Libya’s amendment to the criminal procedure code, which was adopted for the purpose of prosecuting Mr. Gaddafi in Zintan.²²

53. Libyan officials have confirmed repeatedly and consistently their unwillingness to surrender Mr. Gaddafi to the ICC, and their actions and ICC submissions are fully consonant with this position.

54. As advocated by the ICC Prosecution Paper on Preliminary Examinations, Libya’s recalcitrance and the implied difficulty of enforcing the cooperation requests against its will should not dissuade the ICC from taking all necessary measures to attempt to do so:

“Weighing feasibility as a separate self-standing factor, moreover, could prejudice the consistent application of the Statute and might encourage obstructionism to dissuade ICC intervention.”²³

55. In light of the above procedural history, and the tardiness of Libya’s Application (which was submitted on the very day of the deadline), Libya had no legitimate expectation that it would be afforded any further opportunity to address these specific cooperation requests.²⁴

56. It is therefore indisputable that Libya has been ‘heard’ for the purposes of Article 87(7) and Regulation 109(3), and the Single Judge both can and should issue a finding of non-compliance, and refer the matter to the Security Council.

The Application is an improper attempt to circumvent the procedural requirements of Article 95

57. Libya has cited no legal basis or authority in relation to its request to postpone its response to the Single Judge.

²¹ S/PV.7059, p. 16, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.7059

²² S/PV.7173, p. 15, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.7173

²³ ICC Prosecution Policy Paper on Preliminary Investigations, November 2013, para. 70, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf

²⁴ ICC-02/05-01/09-151, para. 19.

58. The Single Judge did not request Libya to inform the Court as to whether Libya would surrender Mr. Gaddafi; Libya was requested to inform the Court of the steps taken to implement the surrender request (and other cooperation requests).
59. As clarified by the Single Judge, Libya was obliged to implement the surrender and cooperation requests immediately, or either consult with the Court pursuant to Article 97, or invoke Regulation 108 of the Regulations of the Court.²⁵
60. In fact, the Application runs completely counter to Article 97 and Regulation 108. Whereas Article 97 and Regulation 108 impose a stringent onus on State to consult with the Court without delay in relation to any issues concerning the implementation of the cooperation requests, Libya is seeking at least a further two months before it will even decide whether to consult with the Court.
61. In the *Kenyatta* case, the Trial Chamber suspended temporarily its decision on a finding of non-compliance due to the fact that Kenya and the Prosecution agreed to engage in a consultation process to ensure the fulfilment of the cooperation requests in the interim.²⁶ Libya has never indicated its willingness to implement the cooperation requests or to consult with the Court in relation to their implementation.
62. The only possible inference that can be drawn from the Application, when read in conjunction with Libya's statements and actions towards Mr. Gaddafi, is that Libya is not unable to report on the status of the implementation of the cooperation requests, it is simply unwilling to confirm Libya's official position at this juncture as Libya does not wish to trigger a finding of non-compliance.
63. In this regard, the only reasonable conclusion from Dr. Gehani's clear statement that they will 'appeal' the Appeals Judgment is that Libya intends to file a second challenge to the admissibility challenge, and that the underlying purpose of the Application is stave off a potential referral to the Security Council in the interim.
64. The Application is thus – to all extents and purposes – a request to postpone the surrender of Mr. Gaddafi.

²⁵ ICC-01/11-01/11-545, para. 6.

²⁶ ICC-01/09-02/11-908, para. 100.

65. Having failed in its previous attempts to invoke Article 95 in connection with a putative admissibility challenge in order to postpone the surrender of Mr. Gaddafi and Mr. Al-Senussi, it would appear that Libya is seeking to circumvent the Pre-Trial Chamber's rulings on this point, by attempting to postpone the consequences of non-surrender.
66. To put it in other words, rather than obtaining the ICC's approval to postpone Mr. Gaddafi's surrender, Libya is attempting to postpone the Court's disapproval of its failure to surrender Mr. Gaddafi.
67. The rationale underlining the Pre-Trial Chamber's decisions is, however, equally applicable to the Application: "article 95 of the Statute cannot constitute a legal basis to postpone a request for surrender following a mere announcement that an admissibility challenge is forthcoming and, therefore, in the absence of any such challenge before the Chamber."²⁷
68. Similarly, the mere announcement that an official position concerning the surrender obligation is 'forthcoming' cannot and should not suffice to postpone the surrender obligation.
69. The absence of any pending condemnation of Libya's failure to implement the cooperation requests creates the same result as a postponement of Libya's legal obligation to implement the surrender requests, without requiring Libya to fulfil the preconditions in Article 95. Accordingly, if the Single Judge were to grant the Application, the Court would create an extra-Statutory precedent allowing States to utilise Regulation 35 in order to avoid the *lex specialis* requirements of Article 95.

The Application is inconsistent with Libya's obligation to fulfil its cooperation duties to the ICC in good faith

70. The Single Judge cannot condone a strategy, the objective or effect of which is to extend the period of Libya's non-cooperation with the Court.
71. Libya is obliged to execute its duties and powers under the Rome Statute "in accordance with the principle of good faith".²⁸ The existence of good or bad faith can

²⁷ ICC-01/11-01/11-269, para. 30.

²⁸ ICC-01/11-01/11-480, para. 18.

be inferred from circumstantial evidence, such as statements of public officials, or the specific conduct of Libyan officials, and members of the prosecution and judiciary.²⁹

72. As noted above, the existence of ‘good cause’ to grant the Application is undermined by Libya’s failure to explain the causal nexus between the political and security situation and in its inability to submit observations on what steps have been taken to date, and its attempt to invoke these factors in relation to the cooperation requests pertaining to Mr. Gaddafi, but not as concerns the MoU.

73. In terms of the latter aspect, ‘selective cooperation’ does not excuse a State from a finding of non-compliance,³⁰ and if condoned, would open the door to a fundamental inequality of arms between the parties to the proceedings.

74. Moreover, in the current case:

- i. Libya has never confirmed that it would implement the two cooperation requests concerning Mr. Gaddafi;
- ii. At the same time that Libya was obliged to surrender Mr. Gaddafi to the ICC, Libya’s Representatives before the ICC reportedly advised Libyan authorities to amend Libyan law to enable them to commence trial hearings against Mr. Gaddafi *via* video link in Zintan;³¹
- iii. Dr. Gehani – who is instructed to represent Libya before the ICC – stated explicitly that Libya does not consider the Appeals Chamber’s Judgment (and related surrender obligation) to be final, and that Libya would ‘appeal’ it;
- iv. During the same period that Libya claimed that the security and political situation prevented it from addressing the ICC in relation to the cooperation requests, Libya continued the trial hearings against Mr. Gaddafi and evinced a clear intention to continue such hearings;³²
- v. Libya has never demonstrated that it has informed its judiciary or prosecuting authorities of the privileges and immunities of the ICC.

²⁹ Articles 4 and 5 of the ILC Draft Articles on State Responsibility, http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf

³⁰ ICC-01/09-02/11-733-Red, paras 25-26.

³¹ ICC-01/11-01/11-543, para. 34.

³² Annex B.

75. Libya's omission to refer to the ongoing proceedings against Mr. Gaddafi or to draw the attention of the Single Judge to the legal issues concerning the contested status of Mr. Marghani also impacts on the overall credibility of its position. A State's failure to submit relevant information that was known to it can also give rise to adverse inferences concerning the State's good faith interaction with the ICC.³³
76. In the case of Mr. Al-Senussi, Libya's failure to apprise the Court of such matters is especially troubling. As a result of the Admissibility Decision in Mr. Al-Senussi's case, the ICC Prosecution cannot conduct investigations concerning him. The Prosecution is therefore, to a large extent, dependent on the veracity of information provided by Libya in order to decide whether to invoke Article 19(10).
77. Similarly, Libya's 'good faith' must be viewed in light of its stated intention to advance the trial proceedings against Mr. Gaddafi whilst failing to specify what measures it will take to ensure that any postponement does not frustrate its ability to implement the surrender obligation or affect Mr Gaddafi's rights under the Rome Statute.
78. There is no indication that the Court participants in Libya were informed of Libya's immediate obligation to surrender Mr. Gaddafi to the ICC or, instructed to ensure that the continuation of the trial proceedings would not prejudice the execution of the surrender request.
79. Moreover, apart from the fact that the MoU is potentially legally and politically unenforceable,³⁴ it does no more than recognise Libya's pre-existing obligations under Article 48 of the Statute.
80. Contrary to Libya's submissions,³⁵ in the absence of any indication that Libya is actually willing to apply its provisions to concrete situations and requests (for example, in relation to the return of the Defence documents, or the cessation of the

³³ ICC Informal Expert Paper on Complementarity, para. 57.

³⁴ The MoU was signed by Mr. Marghani as 'Justice Minister' two days after the GNC reportedly approved Mr. Maitig's Government. 'Libya's Maiteeq wins congress confidence vote after militia threats', Reuters 25 May 2014, <http://www.theguardian.com/world/2014/may/25/libya-maiteeq-prime-minister-congress-parliament-confidence>

The Justice Minister in Mr. Maitig's Government is Omar Abdul Al-Khaliq: 'GNC Approved Maetig Cabinet Revealed', Libya Herald 29 May 2014, <http://www.libyaherald.com/2014/05/29/gnc-approved-maetig-cabinet-revealed/>

³⁵ ICC-01/11-01/11-548, para. 9.

ongoing national security proceedings in Zintan), the MoU in itself has no bearing on the Single Judge's determination as to whether Libya has complied with the Court's cooperation requests pertaining to Mr. Gaddafi.

81. In particular, Libya's duty to give effect to the privileges and immunities of the ICC imposed a positive obligation on it to instruct the national judicial authorities to cease any proceedings which are contrary to these privileges and immunities.³⁶ Failing to perform such an obligation constitutes, in itself, a violation of privileges and immunities, which attracts State responsibility.³⁷
82. The Application fails to provide any explanation or justification as to why Libya is not in a position to inform the ICC as to whether it has taken such a fundamentally important step.
83. In the absence of a clear understanding between Libya and the ICC that Mr. Gaddafi and Mr. Al-Senussi are included within the legal protection of the MoU as concerns their participation in any ICC sanctioned meetings or activities in Libya, the MoU also fails to provide any protection to either Mr. Gaddafi or Mr. Al-Senussi in relation to retaliatory measures which might be initiated against them in connection with information provided by them to their ICC Counsel. This is of particular concern in light of Libya's practice of invoking Article 195 to initiate prosecutions against anyone who criticises the Government or the Judiciary.³⁸
84. The Single Judge cannot, therefore, prioritise the conclusion of the MoU over the Court's duty towards Mr. Gaddafi, whose rights continue to be jeopardised by Libya's continued scheduling of the national security proceedings, its failure to return

³⁶ As found by the ICJ in its Advisory Opinion Concerning the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 29 April 1999, "When national courts are seised of a case in which the immunity of a United Nations agent is in issue, they should immediately (*emphasis added*) be notified of any finding by the Secretary-General concerning that immunity. That finding, and its documentary expression, creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts. The governmental authorities of a party to the General Convention are therefore under an obligation to convey such information to the national courts concerned, since a proper application of the Convention by them is dependent on such information. Failure to comply with this obligation, among others, could give rise to the institution of proceedings under Article VIII, Section 30, of the General Convention", para. 61, <http://www.icj-cij.org/docket/files/100/7619.pdf>

³⁷ Advisory Opinion Concerning the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, paras. 61 and 62.

³⁸ 'Libya: Three years on, Gaddafi-era laws used to clamp down on free expression', Amnesty International 12 February 2014, <https://www.amnesty.org/en/news/libya-three-years-gaddafi-era-laws-used-clamp-down-free-expression-2014-02-13>

the illegally seized Defence documents, and Libya's inclusion of Article 195 national security charges in the ongoing trial proceedings.

Granting the Application would be contrary to the interests of justice, and unduly prejudicial to the rights of Mr. Gaddafi

85. The interests of justice dictate the immediate referral of the issue to the Security Council.
86. A failure to act in good faith may, in itself, constitute an independent failure to comply with Libya's obligations under the Rome Statute (in particular, the obligation to implement Libya's obligations under the Rome Statute in good faith), or at the very least, militate in favour of immediate or specific responses from the Security Council.
87. A finding of bad faith is not, however, a pre-requisite as concerns a finding that Libya has failed to surrender Mr Gaddafi immediately to the ICC, or to return the illegally seized Defence documents.
88. Article 87(7) is value-neutral: the Court can refer the matter to the Security Council if the State has failed to implement a cooperation request, and its failure has prevented the Court from exercising its powers and functions. The Article does not limit or specify the reasons underlying the State's failure to cooperate.
89. An objective interpretation of Article 87(7) is consistent with Article 12 of the ILC Draft Articles on State Responsibility:

“There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character. (emphasis added)”³⁹
90. Moreover, although the Security Council can seek to ensure compliance through such measures as sanctions, it can also consider the employment of other non-punitive measures, which aim to eliminate the impediments to non-cooperation.
91. For example, if security issues were impacting on Libya's ability to implement the requests, immediate referral to the Security Council would ensure that the Council

³⁹ http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf

could consider providing Libya with the means and assistance to eliminate these issues.

92. The objective of Article 87(7) is to eliminate the impediments to cooperation, not to judge or punish Libya. In circumstances, such as the present, where it is manifestly clear that Libya has not implemented the cooperation requests, and, irrespective of its underlying reasons, will not do so in the near future, referral to the Security Council is the only solution to ensure that the cooperation requests are executed, and that the ICC can (finally) fulfil its mandate in this case.
93. The Security Council has scheduled a session in June this year to address the situation in Libya.⁴⁰ Immediate referral would therefore ensure that the Security Council could factor the role of the ICC within any proposed measures. A finding of non-compliance regarding Libya's failure to recognise Defence privileges and immunities in relation to the events in Zintan (as evidenced by its failure to return Defence documents or terminate the national security proceedings) will also serve as a strong deterrent to any future breach of privileges and immunities.⁴¹
94. The ICC Statute is predicated on the belief that certain laws and fundamental rights must be respected at all times, including in times of war, political instability and civil-strife. The ICC was conceived as an instrument for promoting peace and stability within the framework of the rule of law. The current situation in Libya reinforces the need for the ICC and the international community at large to hold all actors in Libya to account for their actions and willingness to respect all legal obligations, including their obligations to international entities such as the ICC, and the United Nations.⁴²
95. Either the Court believes in itself as a positive instrument, which encourages adherence to fundamental legal norms and obligations at all times, or it does not. In

⁴⁰ 'Press Conference by Security Council President on Work Programme for June', 3 June 2014, http://www.un.org/News/briefings/docs/2014/140603_SC.doc.htm

⁴¹ The importance of such deterrence is underscored by recent reports that four UN workers were temporarily arrested, and roughly treated by Libyan airport officials yesterday: Hanan Salah, HRW, <https://twitter.com/hananHRW/status/474484051617652737>

⁴² The Defence reiterates the principle that "human rights also apply in periods of transition. Previous opinions adopted by the Group have emphasized that not only do human rights apply in periods of transition but so do the international system of supervision and international law based on State responsibility" (emphasis added), Opinion no. 60/2012, A/HRC/WGAD/2012/60, para. 12, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/164/17/PDF/G1316417.pdf?OpenElement> cited in ICC-01/11-01/11-543, para. 45.

this sense, Libya's Application is not a test for Libya, it is 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.

96. Immediate referral to the Security Council is also the only response which is consistent with the Pre-Trial Chamber's duty to ensure fair and expeditious proceedings before the ICC, the rights of Mr. Gaddafi, and its obligation to apply the law in a manner which is consistent with internationally recognised human rights.
97. Mr. Gaddafi was arrested over two and half years ago. His conditions of detention during this time have been found by the United Nations Working Group on Arbitrary Detention (UNWGAD) to be "arbitrary and illegal".⁴³ Mr. Gaddafi's case before the ICC has stagnated, and he has had no opportunity to effectively participate in the proceedings, to receive privileged legal advice, or to appear before an ICC judge.
98. For this reason, UNWGAD determined in December 2013 that 'internationally recognised human rights' required Mr. Gaddafi to be either released or surrendered immediately to the custody of the ICC.⁴⁴
99. The security issues and lawlessness in Libya also heighten rather than diminish the imperative of ensuring Mr. Gaddafi's immediate transfer to the ICC. The Libyan authorities have repeatedly demonstrated their inability to ensure the security and protection of persons involved in the judicial proceedings concerning Mr. Gaddafi, including the former Prosecutor-General, Defence counsel, and detainees such as Mr. Saadi Gaddafi.⁴⁵
100. If Mr. Gaddafi is forced to continue to participate (albeit in a remote, ineffective and unfair sense) in his domestic trial, he will be compelled to provide the names of potential Defence witnesses,⁴⁶ who are also likely to be witnesses for his case before the ICC. In the absence of an effective witness protection programme, the disclosure of any information concerning possible witnesses could cause irreversible harm to these persons, and to Mr. Gaddafi's ability to defend himself before the ICC.

⁴³ICC-01/11-01/11-491.

⁴⁴ICC-01/11-01/11-491.

⁴⁵ ICC-01/11-01/11-537, paras. 62-67.

⁴⁶ Annex B, p 24.

101. Given that the ICC Appeals Chamber has rejected Libya's admissibility challenge, Mr. Gaddafi's continued prosecution in Libya also engenders unnecessary risk to anyone who attempts to represent him or assist him in these proceedings.

102. In such circumstances and taking into consideration the scheduling of the next hearing against Mr Gaddafi on 22 June 2014, the Single Judge's discretion as to whether to refer a situation of non-compliance to the Security Council must bow to the Single Judge's duty to ensure, as a matter of urgency, Mr. Gaddafi's protection and fundamental rights.

III. Relief Sought

103. For the reasons set out above, the Defence for Mr. Saif Al-Islam Gaddafi respectfully requests the Single Judge, as a matter of urgency, to

- i. Issue a finding of non-compliance as concerns Libya's obligations to surrender Mr. Gaddafi to the ICC and to return the illegally seized Defence documents; and
- ii. Refer the matter to the Security Council.



John R.W.D. Jones QC, Counsel for Mr. Saif Al-Islam Gaddafi

Dated this, 5th Day of June 2014

At London, United Kingdom