

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: **English**

No.: ICC-01/11-01/11

Date: **03 June 2013**

**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**

**Public Redacted Version of the Leave to Reply to “Libyan Government’s  
Response to the Saif Al-Islam Gaddafi “Addendum to the “Urgent Defence  
Request” of 21 January 2013, and Request for Finding of Non-Compliance””**

**Source: Defence for Mr. Saif Al-Islam Gaddafi**

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

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**Deputy Registrar**

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**Victims Participation and  
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**Counsel Support Section**

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## I. Introduction

1. After exhausting their full allotment of 21 days, the Government of Libya has filed its Response to the Saif Al-Islam Gaddafi “Addendum to the “Urgent Defence Request” of 21 January 2013, and Request for Finding of Non-Compliance” (the Response).<sup>1</sup>
2. The Response fails to grapple with the actual (as opposed to misconstrued) submissions of the Defence, prior findings of the Pre-Trial Chamber, or the actual situation in the proceedings against Mr. Gaddafi or Libya in general.
3. In particular, the Government:
  - Ignores the binding jurisprudence of the Appeals Chamber concerning the obligation of Court participants to comply with decisions of the Court;
  - Incorrectly seeks to carve out an exemption for States concerning their obligation to comply with the Court’s decision, which is not supported by the Statute, Rules or jurisprudence of the Court;
  - In contesting the standing of the Defence, fails to take into consideration Regulation 109 of the Regulations of the Court, which expressly permits the Defence (as the party which initiated the Request in January) to submit a corollary application for a finding of non-compliance in the event that the State in question has failed to comply with the Decision of the Chamber and has not invoked Regulation 108 of the Regulations of the Court;
  - Incorrectly asserts that the Pre-Trial Chamber made findings on certain issues, which are in fact, still *sub judice*;
  - Ignores the actual submissions of the Defence in order to falsely accuse the Defence of making unsubstantiated allegations concerning the failure of the Libyan authorities to implement the

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<sup>1</sup> ICC-01/11-01/11-343.

December 2012 Libyan Supreme Court decision in relation to the national security proceedings in Zintan; and

- Confirms that its understanding of the right to legal representation bears absolutely no correspondence to the parameters of this right, as set out in either Libyan domestic law, or international conventions ratified by Libya.
4. The ability of the Pre-Trial Chamber to render a proper determination on the 'Addendum to the "Urgent Defence Request" of 21 January 2013, and Request for Finding of Non-Compliance' (the Addendum) is obstructed by pleadings, which are predicated on misleading or incorrect legal or factual premises. It would therefore be in the interests of justice to permit the Defence to reply in order to dispel these inaccuracies.<sup>2</sup>
  5. The Response also raises new factual matters, such as the Government's delay in notifying relevant domestic authorities of the Chamber's decision, which the Defence did not have the opportunity to address in its Addendum. Leave to reply is therefore necessary to allow the Defence to make submissions concerning the propriety of issuing a finding of non-compliance, in light of these new factual matters.
  6. The Defence for Mr. Saif Al-Islam Gaddafi therefore respectfully submits that there is good cause to grant the Defence leave to reply in order to address:
    - i. The temporal and legal parameters of the Government's obligation to execute the Chamber's Decision;
    - ii. The procedural standing of the Defence to raise the issues set out in the Addendum;
    - iii. The factual and legal bases underpinning the Defence's assertion that the Government has applied the procedures

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<sup>2</sup> ICC-02/05-03/09-147, para. 5.

from the People's Court to the national security proceedings against Mr. Gaddafi; and

- iv. The failure of the 2 May 2013 hearing in Zintan to satisfy Mr. Gaddafi's due process rights under domestic law, or human rights instruments ratified by Libya.

## II. Submissions

### *i. The temporal and legal parameters of the Government's obligation to execute the Chamber's Decision.*

7. The Government's submission that it was neither fair nor reasonable for the Defence to request the Chamber to make a finding of non-compliance after two months had elapsed from the issuance of the Chamber's decision,<sup>3</sup> appears to have been drafted in a vacuum, which completely ignores legal and factual reality.
8. There is no absolutely no indication that the Government has made any good faith efforts to comply with the Chamber's decision of 3 March 2013. To the contrary, in the more than two months that had elapsed since the issuance of the Chamber's decision and the filing of the Defence request, the Libyan authorities have:
  - a. Failed to respond to the Registry's official correspondence concerning the implementation of the Chamber's decision;
  - b. Failed to notify the ICC concerning their intention to convene a hearing on 2 May 2013;<sup>4</sup>
  - c. Convened a hearing, which was predicated on accusations based on illegally seized documents, which were the subject of the 3 March 2013 decision;<sup>5</sup>
  - d. Confirmed their intention to convene further hearings;<sup>6</sup> and

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<sup>3</sup> Response at para. 18.

<sup>4</sup> ICC-01/11-01/11-332-Anx2 at p. 3.

<sup>5</sup> ICC-01/11-01/11-332-Anx3 at p. 2.

<sup>6</sup> ICC-01/11-01/11-332-Anx3 at p. 6;

- e. Failed to bring to the attention of either the Chamber or the Registry any practical issues that they might have faced in connection with the execution of the Chamber's decision.
9. Such actions can only be characterized as deliberate and flagrant non-compliance with the 3 March 2013 decision. Indeed, it is notable that notwithstanding the fact that both its request for leave to appeal and request for reconsideration were rejected by the Chamber, the Government has not confirmed to either the Chamber in its Response, or to the Registry that it will at any point return the documents and destroy any copies in its possession.
10. Of further concern is the fact that Counsel for the Government for Libya apparently failed to convey the Chamber's decision of 3 March 2013 to the relevant domestic authorities,<sup>7</sup> thereby arrogating to themselves the right to determine whether their request for leave to appeal and request for reconsideration had any suspensive effect.
11. The Libyan Government has been represented by the same Counsel since March 2012. It has been brought to their attention on numerous occasions that decisions of the Chamber are binding, and must be implemented unless and until the Appeals Chamber grants suspensive effect or reverses the decision on appeal.<sup>8</sup> A deliberate failure by Counsel to notify a binding order to the State to whom it is directed could constitute misconduct attracting sanctions within the meaning of article 71 of the Statute.<sup>9</sup> This would be so, if for example, Libya's Counsel were to deliberately refrain from communicating the Pre-Trial Chamber's order of 31 May 2013 requiring Libya to surrender Mr. Gaddafi to the ICC immediately, notwithstanding any potential appeal.

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<sup>7</sup> Response, at para.20.

<sup>8</sup> See for example ICC-01/11-01/11-87 at para. 10, and ICC-01/11-01/11-261-Red at para. 10.

<sup>9</sup> ICC-01/04-01/06-2582 at paras. 59-60.

12. This also affords a further example in a litany of failures by the Libyan Government to comply with orders and decisions of this Pre-Trial Chamber, notwithstanding the absence of suspensive effect or any justification for their non-compliance.<sup>10</sup> It would appear that the absence of any sanctions for such failures has given the Libyan Government the impression that orders of the ICC can be ignored or disregarded with impunity. As confirmed by the Appeals Chamber, “no criminal court can operate on the basis that whenever it makes an order in a particular area, [a party or participant] can elect whether or not to implement it, depending on [the party’s or participant’s] interpretation of his obligations”.<sup>11</sup>
13. It is also entirely erroneous for the Government to cite its domestic processes in order to excuse its failure to comply with the Chamber’s order.<sup>12</sup> As a general principle of international law, domestic law cannot be relied upon in order to justify the failure by a State to comply with its international obligations,<sup>13</sup> particularly obligations that originate from a Chapter VII Security Council Resolution.
14. The ICC Statute is also clear: the particularities of a State’s domestic system do not constitute grounds for failing to implement a decision of the Chamber. The Statute imposes a positive obligation on States to ensure that

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<sup>10</sup> For example, although the Pre-Trial Chamber ordered the Libyan Government to surrender Mr. Gaddafi to the ICC in its decisions of 7 March and 4 April 2012, the Government failed to do so, even though its obligation to surrender Mr. Gaddafi was not suspended until the Chamber issued its Article 95 decision on 1 June 2012. Similarly, the Government has not yet surrendered Mr. Al-Senussi to the ICC, notwithstanding the fact that it remains under a binding obligation to do so. See also ICC-01/11-01/11-261-Conf at paras. 10 and 11.

<sup>11</sup> ICC-01/04-01/06-2582 at para. 48.

<sup>12</sup> Response at paras. 20-22.

<sup>13</sup> See for example, Article 3 of the ILC Articles on State Responsibility for Internationally Wrongful Acts, 2001, [http://untreaty.un.org/ilc/texts/9\\_6.htm](http://untreaty.un.org/ilc/texts/9_6.htm); Article 27 of the Vienna Convention on the Law of Treaties.

it has procedures available under national law, in order to enable it to implement cooperation requests from the Court.<sup>14</sup>

15. Moreover, if a State faces any practical difficulties in implementing a decision of the Chamber, it must follow the procedures set out in article 97, namely, it is obliged to consult with the Court without delay. Article 97 also anticipates that the purpose of such consultation is to facilitate the ability of the State to execute the request in an expeditious manner; it does not provide a mechanism for a State to employ stalling tactics, nor does it permit a State to suspend execution of a request, in the absence of explicit approval from the Court to do so (i.e. *via* an appellate decision granting suspensive effect).
16. The Government of Libya evidently has made no effort to either create domestic procedures, which would enable it to implement ICC requests, or to invoke the provisions of article 97 in a timely manner.
17. The timing of Libya's non-compliance must also be viewed against the backdrop that the Libyan authorities have retained illegal possession of the Defence documents since June 2012, and at no point requested the ICC to either lift the immunities of the Defence or those of the documents in question.
18. The release of the four ICC officials in July 2012 also did not occur because the Libyan authorities (belatedly) recognized their obligations under the Rome Statute – it was secured through a negotiation in which the Prosecutor-General attempted to put pressure on the Court by stipulating that he would release the officials if the ICC agreed to proffer an apology, provide information about defence witnesses (which the Prosecutors assigned to Mr. Gaddafi's case had previously attempted to extract during a 7 hour interrogation with Mr. Gaddafi's Counsel), assist the Libyan authorities to prosecute Mr. Gaddafi and such Defence witnesses in

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<sup>14</sup> Article 88 of the Statute.

connection with the allegations pertaining to the illegally seized Defence documents, and question the potentially protected status of Defence witnesses.<sup>15</sup>

19. Given that the Government of Libya has accepted that it is bound by the provisions of the Statute in their entirety,<sup>16</sup> there is absolutely no basis for this Chamber to apply a more lenient approach to Libya as compared to that which has been applied to other States or in other cases.
20. For example, in the case against Omar Al-Bashir, Pre-Trial Chamber I recently issued a finding of non-compliance in relation to Chad after the Government submitted observations concerning their failure to execute the arrest warrant against President Al-Bashir six days after the deadline set by the Chamber, without any justification for the delay.<sup>17</sup> In reaching its determination, the Chamber underscored that apart from failing to execute the arrest warrant, the Government of Chad had failed to consult with the Court in connection with any difficulties it may have faced in executing the request, and this was part of a consistent pattern of disregarding the Court's orders to arrest President Al-Bashir.<sup>18</sup>
21. These findings are equally applicable to the current non-compliance of the Libyan Government, which as noted above, is part of a consistent pattern of non-compliance of Court orders and failure to consult with the Court in connection with such non-compliance.
22. In any case, the likelihood that the domestic processes cited by the Government in its current Response have impeded the Government's ability to implement the Decision is undermined by previous submissions from the Government on this subject. For example, whereas the Government has now claimed that due to 'separation of powers', the

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<sup>15</sup> ICC-01/11-01/11-323-Conf-Exp-Anx1.

<sup>16</sup> ICC-01/11-01/11-339, at para. 23.

<sup>17</sup> ICC-02/05-01/09-151 at para. 17; ICC-02/05-01/09-154 at para. 7.

<sup>18</sup> ICC-02/05-01/09-151 at para. 21.

executive cannot enforce the Chamber's decision vis-à-vis the Prosecutor-General or the Judiciary,<sup>19</sup> in its February response, the Government expressly proposed that the subject should be resolved through diplomatic negotiation between the Libyan Embassy and the ICC,<sup>20</sup> thereby conveying the impression that the executive did indeed have the power to reach a binding resolution on this issue.

23. In the press conference following the 2 May 2013 hearing, it was also announced that the prosecutor acting in the case had requested the Prosecutor-General to notify the ICC of the scheduled hearing through the Ministry of Foreign Affairs, but that the Prosecutor-General failed to do so.<sup>21</sup> The Prosecutor-General was thus aware of the 2 May 2013 hearing, and had, at the same time, been notified on 24 April 2013 of the decision of the Pre-Trial Chamber, but failed to take any steps to either notify the ICC as to the 2 May 2013 hearing, or to notify the Zintan Court in connection with the decision of the Pre-Trial Chamber.
24. The charges against Mr. Gaddafi *et alia* have also not been confirmed by an Accusation Chamber – they were referred by the prosecuting authorities directly to the Trial Chamber (in violation of the December 2012 Supreme Court decision).<sup>22</sup> The independence of the judiciary is therefore completely irrelevant, as the discretion for destroying the copies and returning the documents remained with the Prosecutor-General, prior to the commencement of the trial.
25. The factual record therefore does not support the Government's contention that it was unable to implement the Chamber's decision due to domestic legal processes. Rather, there appears to have been a deliberate decision by domestic prosecuting authorities to ignore the Chamber's decision. Once

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<sup>19</sup> Response at para. 21.

<sup>20</sup> ICC-01/11-01/11-274 at para. 10.

<sup>21</sup> ICC-01/11-01/11-332-Anx3 at p. 2.

<sup>22</sup> ICC-01/11-01/11-308 at para. 10 fn. 16.

again, Libya's submissions lack internal or external coherence, and appear only designed to exempt Libya from its responsibility to implement the Court's orders.

26. The Government has also completely undermined its March 2013 Notification, in which the Government averred that the appointment of a new Prosecutor-General "will have significant implications on further cooperation with the Court",<sup>23</sup> by which it clearly implied that Libya's cooperation with the Court would improve with that appointment.
27. Moreover, in seeking to rely upon the alleged objective difficulties that it faces in implementing its obligations towards the ICC, the Government in fact confirms the Defence submissions in its Addendum, in particular, the Defence arguments that the Chamber cannot place any weight on the Government's submissions before the ICC as concerns the future course of the proceedings against Mr. Gaddafi, as the Government either lacks the will or the capacity to enforce these submissions vis-a-vis domestic prosecution authorities and courts.<sup>24</sup>
28. In terms of the relevance of the Political Isolation Law to the Chamber's assessment, the *status quo* is that the Libyan authorities have failed to comply with the Chamber's order to return the privileged documents in a timely manner, and this failure should be sufficient to dispose of the matter. The Chamber should base its decision as to whether Libya is fulfilling its cooperation obligations to the Court on the concrete actions undertaken by Libya thus far, rather than the Government's empty assurances that the situation will improve. However, if for any reason the Chamber is minded to give any credence or weight to Libya's hypothetical

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<sup>23</sup> ICC-01/11-01/11-306 at para. 4.

<sup>24</sup> Addendum at paras. 71-84. It should be noted that in a press-conference convened on 29 May 2013, Prime Minister Zeidan conceded that "'the state is weak...the whole nation is weak". S. Zaptia, 'The state is weak and public must be patient- Zeidan', Libya Herald 29 May 2013 <http://www.libyaherald.com/2013/05/29/the-state-is-weak-and-public-must-be-patient-zeidan/>

assurances of improvement on the issue of the return of documents, then at the same time, it cannot ignore other factors, which clearly militate against the prospects of any such improvement.

29. In this connection, the promulgation of the Political Isolation Law is directly relevant to the Chamber's assessment of the likelihood that domestic authorities – who will now be vetted in accordance with their anti-Gaddafi credentials or lack of experience under the Gaddafi regime - will be either willing or able to cooperate with the ICC in the future in connection with issues which are germane to the rights of the Defence, or to uphold the rights of the Defence in connection with domestic proceedings.

30. For example, during the October 2012 admissibility hearing, Professor Gehani touted the appointment of Mr. el-Magariaf as President of the General National Congress as ushering in “a legal and political culture, which is based on the rule of law and tolerance.”<sup>25</sup> However, notwithstanding the fact that he dedicated 20 years to opposing the former Gaddafi regime, President El Magariaf has been forced to resign from his post due to the fact that he was once an Ambassador under the Gaddafi regime.<sup>26</sup>

31. In contradistinction to the assertion of the Libyan government that the Political Isolation Law is amenable to judicial review, the GNC has explicitly proscribed judicial review of the constitutionality of the law, as set out in the Defence Addendum.<sup>27</sup> It would appear that Counsel for the Government are unaware of the Addendum.

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<sup>25</sup> ICC-01/11-01/11-T-2-Red-ENG at p. 9 lines 3-7.

<sup>26</sup> S. Zaptia, 'Magarief resigns as GNC head – in anticipation of being forced out by Isolation law', Libya Herald 28 May 2013, <http://www.libyaherald.com/2013/05/28/magarief-resigns-as-gnc-head-in-anticipation-of-being-forced-out-by-isolation-law-2/>.

<sup>27</sup> Addendum at para. 70. See also 'Law 'Provisions for Exclusion Too Vague, Sweeping' Human Rights Watch 4 May 2013, <http://www.hrw.org/news/2013/05/04/libya-reject-political-isolation-law>

ii. The procedural standing of the Defence to raise the issues set out in the Addendum

32. If the Pre-Trial Chamber possesses a power, it follows that the parties possess the corollary ability to move the Chamber to exercise that power. Given that the Pre-Trial Chamber possesses the power to make findings of non-compliance and pursuant to Regulation 29 of the Regulations of the Court, may “issue any order that is deemed necessary in the interests of justice”, the Defence must possess the corollary power to request the Chamber to issue a finding of non-compliance and to make submissions concerning the type of remedy that might be appropriate for the Chamber to order.
33. As concerns the Chamber’s power to make a finding of non-compliance, Regulation 109 of the Regulations of the Court expressly permits the Defence, as the party which initiated the Request in January, to submit a corollary application for a finding of non-compliance in the event that the State in question has failed to comply with the Decision of the Chamber and has not invoked Regulation 108 of the Regulations of the Court.
34. In light of the fact that any finding of non-compliance would need to be predicated on the factual circumstances in existence at the time of the application, it also follows that the Defence must have the power to raise any factual matters, which evidence Libya’s failure to implement the decision of the Chamber.
35. In the present case, the hearing of 2 May 2013 illustrated Libya’s contumacy by confirming that the domestic authorities had maintained criminal proceedings against certain individuals, whose connection with the 7 June 2012 Zintan meeting only came to the attention of the prosecuting authorities through the contents of illegally seized Defence documents. The authorities’ announcement that they intended to
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reconvene the trial in September 2013<sup>28</sup> further demonstrated that the authorities had no intention of complying with the Chamber's decision in the future.

36. There is therefore absolutely no procedural bar as concerns the ability of the Defence to update the Chamber in relation to Government's failure to implement the Decision, request a finding of non-compliance in light of these factual circumstances, and make submissions concerning any other appropriate remedies that might be warranted in light of such non-compliance.
37. The Government also cannot claim that it has been prejudiced in any way by the Defence Addendum, as it has exercised its right to respond, and exhausted the full time period for doing so.
38. It is also completely spurious for the Government to claim that the Defence is attempting to re-litigate issues, which have been disposed of by the Chamber. As expressly conceded by the Government,<sup>29</sup> the Chamber did not issue any findings in relation to a range of issues set out in the January Defence request, including the scope of article 95. As these matters are not *res judicata*, there is absolutely no legal impediment to the Defence making further submissions on these matters, insofar as they directly relate to the nature of the remedies, which might be warranted in light of Libya's failure to comply with the Chamber's decision.

iii. The factual and legal bases underpinning the Defence's assertion that the Government has applied the procedures from the People's Court to the national security proceedings against Mr. Gaddafi

39. By accusing the Defence of failing to substantiate its assertion that the Libyan authorities are still applying the People's Court procedures to the

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<sup>28</sup> ICC-01/11-01/11-332-Anx3 at p. 6.

<sup>29</sup> Response at para. 8.

case of Mr. Gaddafi, Counsel for Libya are once more demonstrating that they are either unfamiliar with Libyan law, have not read Defence submissions, or are willing to make completely unfounded assertions.

40. As demonstrated by the video and accompanying transcript annexed to the Defence Addendum, on 2 May 2013, Mr. Gaddafi was brought before a panel of three Judges, who appointed Counsel.<sup>30</sup> Similarly, on 18 January 2013, Mr. Gaddafi was also brought before the same three Judges, and the Presiding Judge utilised the terminology, which refers to a Trial Chamber under Libyan law. These matters were set in detail in previous filings.<sup>31</sup> It is also clear from the statements of the judges annexed to the Addendum that no prior review of the case file was undertaken by an Accusation Chamber.<sup>32</sup> Mr. Gaddafi was therefore brought straight before the Trial Chamber in violation of the December 2012 Supreme Court decision, which prohibited the use of Peoples Court procedures in any criminal proceeding.

41. Finally, it is notable that Counsel for the Libyan Government have the possibility of seeking instructions from the domestic prosecuting authorities, who are in possession of the case file against Mr. Gaddafi. As set out in the Defence Request for Leave to Reply of 22 February 2013,<sup>33</sup> the case file would directly corroborate Defence submissions, in particular, as concerns the fact that Mr. Gaddafi was not advised of his right to legal representation before his interrogation, and the nature of the allegations against Mr. Gaddafi, which appear to have been based on the proscriptions set out in the now defunct NTC law 38.

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<sup>30</sup> ICC-01/11-01/11-332-Anx2 at p. 2.

<sup>31</sup> See for example, ICC-01/11-01/11-308 at footnote 16; ICC-01/11-01/11-281 at para. 142.

<sup>32</sup> The Presiding Judge refers to the fact that the swatch watch belonging to the ICC interpreter was not subjected to an expert analysis. Addendum, ICC-01/11-01/11-332-Anx2 at p. 3.

<sup>33</sup> ICC-01/11-01/11-284 at paras. 77-79.

42. It is patently unfair and improper for the Government to make accusations against the Defence, which are directly contradicted by evidence which is within the custody of the Libyan Government, and which the Defence is not in a position to put before the Pre-Trial Chamber.

iv. The failure of the 2 May hearing to satisfy Mr. Gaddafi's due process rights under domestic law, or human rights instruments ratified by Libya

43. Although the Government has attempted to utilise the 2 May hearing in order to assert that the Libyan authorities are treating Mr. Gaddafi well, and respecting his fair trial rights, the opposite conclusion is warranted.

44. Under Libyan law, Mr. Gaddafi has a right to effective legal representation. This encompasses the right to be represented during interrogations and witness confrontations during the investigation phase, for his counsel to have access to the case file, and to have privileged meetings with his Counsel. The superficial presence of an uninstructed Counsel at the hearing does not satisfy the right to effective representation, nor does it remedy the failure of the Libyan authorities to comply with these rights during earlier stages of the proceedings.

45. With respect to the issue of effective representation, although it is indisputable that Counsel attended the hearing of 2 May 2013, the video of the hearing illustrates the superficial nature of their representation. For example, when the Defence Counsel attempted to converse with Mr. Gaddafi, Counsel is interrupted and prevented from doing so by Mr. Al-Alagi, the head of the Human Rights Council.<sup>34</sup>

46. In terms of the absence of legal representation during the investigation phase, the Libyan authorities have repeatedly attempted to excuse their failure to fulfil Mr. Gaddafi's right to effective representation by making the ludicrous claim that Mr. Gaddafi refused representation, or wished to

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<sup>34</sup> ICC-01/11-01/11-332-Anx2 at p. 2.

represent himself like Mr. Milosevic, or even that he wished to be represented by Dr. Gehani. However, the 2 May 2013 hearing confirmed that Mr. Gaddafi has no wish to represent himself and is not refusing representation. To the contrary, Mr. Gaddafi expressly confirmed that he wished to be represented by a counsel selected by his family.<sup>35</sup> There is absolutely no basis for inferring that Mr. Gaddafi would wish to be represented at trial, but not during the investigation phase. The only reasonable inference, which is supported by their practices in other cases and statements of Libyan officials, is that the Libyan authorities utilised the procedures from the Peoples Court in order to deny Mr. Gaddafi the right to counsel during interrogations and witness confrontations.

47. It is also very disturbing that the Government asserts that Mr. Gaddafi is being treated well because of his comment to journalists, which was made in the presence of Libyan officials, that he had “no complaints to make”.<sup>36</sup> The Government clearly does not comprehend the traumatising impact of being detained in circumstances in which the detainee’s communications have been covertly monitored, and the detainee has been subjected to reprisals for attempting to make complaints on past occasions.<sup>37</sup>
48. As first observed in connection with Jeremy Bentham’s Panopticon and later developed by Michel Foucault,<sup>38</sup> a prisoner who believes that his actions can be monitored will start to self-regulate his behaviour, irrespective as to whether he is being actively monitored or not.
49. The Libyan authorities have actively impeded every attempt by Mr. Gaddafi to communicate his concerns regarding his well-being and detention conditions. Mr. Gaddafi is now on trial for violating national security for attempting to convey his concerns to his Counsel in what was

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<sup>35</sup> ICC-01/11-01/11-332-Anx2 at p. 3.

<sup>36</sup> Response at para. 14.

<sup>37</sup> ICC-01/11-01/11-216-Conf-Anx8.3; ICC-01/11-01/11-255 at para. 57.

<sup>38</sup> Foucault, M 1977, *Discipline and punish: the birth of the prison*, trans. A Sheridan, Penguin, London.

supposed to be a privileged context. Given this context, no sensible person would expect Mr. Gaddafi to communicate any complaints to journalists in the very courtroom where he is being prosecuted for past attempts to do so.<sup>39</sup>

50. Mr. Gaddafi's comment that he has 'no complaints' simply underscores the futility and hopelessness of his situation, in that after having been held in isolation and incommunicado detention for 18 ½ months, Mr. Gaddafi still does not have any effective mechanism for communicating his concerns and complaints to a lawyer, in a privileged setting.
51. Moreover, although Mr. Gaddafi has finally been brought before a Court –given that the Chamber is seised of allegations that Mr. Gaddafi violated national security for communicating legitimate detention and due process concerns to his lawyer – Mr. Gaddafi cannot challenge either the conditions of his detention or raise due process violations before this Chamber without taking the risk that in doing so, he might incriminate himself in connection with the very charges that he is now facing.

### **III. Relief Sought**

52. For the reasons set out above, the Defence for Mr. Saif Al-Islam Gaddafi respectfully requests the Honourable Pre-Trial Chamber to grant the Defence leave to reply to the Response.

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<sup>39</sup>[Redacted].

A handwritten signature in black ink, appearing to read 'John Jones', written in a cursive style.

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

Dated this, 3<sup>rd</sup> Day of June 2013

At London, United Kingdom