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PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernandez 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

**Response to "Defence Request to invite Government of Libya to
submit unequivocal and binding undertakings concerning the
national security proceedings against Mr Gaddafi"**

Source: The Government of Libya, represented by:
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Professor Payam Akhavan
Ms Michelle Butler

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

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I. INTRODUCTION

1. The Libyan Government files this Response to Mr. Gaddafi's "Request to invite Government of Libya to submit unequivocal and binding undertakings concerning the national security proceedings against Mr Gaddafi"¹ ("Request") filed on 12 June 2013. The Government hereby requests that the Pre-Trial Chamber reject the Request on the basis that it: is without legal basis, relates to matters on which the Chamber has already issued a determination, runs counter to the complementarity regime and impinges on the separation between executive and judicial authority.

II. SUBMISSIONS

2. In its Request the Defence requests the Chamber to:

“invite the Government of Libya to submit, by Monday 17 June 2013, unequivocal and binding undertakings to the effect that:

- a. All seven defendants charged in the Zintan trial of Mr Gaddafi et alia are only charged with misdemeanours and not felonies; and*
- b. As of the date of the Defence submissions, there are no legislative impediments or political directives, which purport to bar challenges to the constitutionality of the Political Isolation Law before Libyan courts.”*

3. It is notable at the outset that the Defence Request does not purport to rely upon any provision in the ICC Statute, Rules of Procedure and Evidence or Regulations of Court as a basis for the relief sought. It is submitted that this is because there is no legal basis for this kind of a request within the ICC's statutory and regulatory scheme. Requesting a Government to provide binding undertakings for matters which were the subject of argument in earlier filings runs counter to the purpose of the complementarity regime which was designed to protect State sovereignty and to uphold the primacy of national jurisdictions.

¹ ICC-01/11-01/11-352.

4. The absence of legal basis for the Request may also be discerned from the fact that it asks the Pre-Trial Chamber to order the Government to provide undertakings within five days of the filing. This is despite the fact that the Regulations 24 and 34 grant a party 21 days to respond to any request filed by another party. No reason is given by the Defence to justify a departure from this long-established right. As the party bringing the motion, the burden falls on the Defence to substantiate before the Chamber that it is legally entitled to the relief sought. As the Defence has made no attempt to provide legal justification for its request for relief or the shortened timeframe, the Request should be dismissed *in limine*.
5. Even if there were a legal basis for such a Request it ought to be rejected by the Pre-Trial Chamber as another misconceived attempt to reopen earlier findings by the Chamber which the Defence did not seek to appeal at the time.
6. It will be recalled that the Request arises from a protracted set of filings by the Defence commencing on 21 January 2013,² seeking a finding of non-compliance against the Government, which were ultimately rejected by the Pre-Trial Chamber on 1 March 2013.³ Since the Pre-Trial Chamber's Decision, the Defence has sought to reopen the Chamber's rejection of its request for a finding of non-compliance on several occasions. It has done this through the filing of an "Addendum to its Urgent Request" on 7 May 2013,⁴ an "Application for Leave to Reply to the Libyan Government's Response to its Addendum" on 3 June 2013⁵ and now through the present Request.⁶ Despite the fact that each of these filings are mere attempts to re-litigate matters already determined by the Chamber by circumventing the ICC's appellate regime, they have required the Government's resources and time to refute the arguments contained therein.

² "21 January 2013 Urgent Defence Request", ICC-01/11-01/11-255.

³ "Decision on the "Urgent Defence Request"", 1 March 2013, ICC-01/11-01/11-291.

⁴ ICC-01/11-01/11-332.

⁵ ICC-01/11-01/11-345-Red.

⁶ ICC-01/11-01/11-352.

The Defence's latest Request is no exception. It wastes the time and resources of the Government, as well those of the Court.

7. It is also difficult to understand the legitimacy or relevance of a request for undertakings relating to matters that formed no part of the Pre-Trial Chamber's assessment of admissibility in relation to the case of Saif Al-Islam Gaddafi, particularly when the Chamber has already made an admissibility determination that is now the subject of an appeal. Indeed, the Chamber made no findings in its Admissibility Decision with respect to either the nature of the national security proceedings in Zintan or the Political Isolation Law. Such matters are, therefore, of no direct relevance to the ongoing appeal proceedings nor, given that the Chamber has already ruled on the "Urgent Defence Request for a finding of non-compliance", are they not matters of which the Pre-Trial Chamber is presently seized.

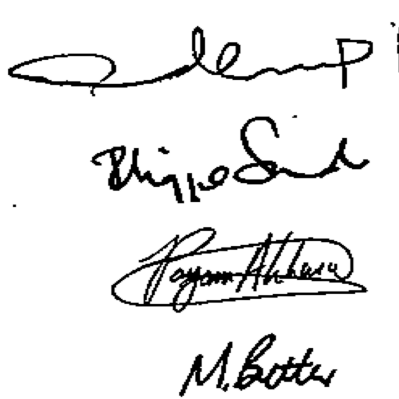
8. Finally, the matters on which the Defence seeks binding undertakings are matters that are entirely within the remit of the independent Libyan judiciary. This is because it is a matter for the judiciary to make a final determination on the exact charges which will proceed to trial (and therefore whether their categorization as misdemeanours rather than felonies will remain) and as to the proper interpretation to be given to a piece of legislation. The Defence suggestion that the Government should issue undertakings purporting to bind the judiciary on such matters indicates a wholesale misunderstanding of the rationale for the separation of powers between executive and judiciary and the importance of this principle for the rule of law. The fact that the Request is expressed as for "*binding* undertakings" but "*as of the date of the Defence submissions*"⁷ is patently a *non sequitur* which betrays the Defence's awareness of this fundamental flaw in its own Request.

⁷ Request, para. 20.

III. RELIEF REQUESTED

9. For all the reasons outlined above, the Libyan Government respectfully requests that the Pre-Trial Chamber reject the Request.

Respectfully submitted:



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 Ms Michelle Butler
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 Counsel on behalf of the Government of Libya
 in the case of Saif Al-Islam Gaddafi*

Dated this 4th day of July 2013
 At London, United Kingdom