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Date: **24 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 to D

Response to “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’”

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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I. Introduction

1. Libya's request to reply to the submissions of the Prosecutor, Gaddafi and Senussi Defence and the OPCV (the Reply)¹ should be dismissed *in limine*.
2. Libya has failed to provide any explanation or justification as to why there is good cause for the Single Judge to accept the Reply.
3. Moreover, not only has Libya included the merits of its arguments in its Reply, but it has used a 'reply' as a vehicle for introducing new evidence and substantive submissions.
4. Libya was granted several full opportunities to submit observations on several issues concerning its compliance or non-compliance with ICC orders. It did not submit a request for an extension of time in a timely manner, and thus had no legitimate expectation that it would be accorded any additional time to present its submissions on these points.²
5. Having waived its right to address these points in its initial observations, it is both procedurally improper and unfair to the other Court participants to include such matters in the Reply.
6. The substance of the Reply can only be taken into consideration insofar as the Reply demonstrates that Libya has wilfully failed to provide any explanation or justification for its failure to surrender Mr. Gaddafi to the ICC, and underscores the imperative of issuing an immediate finding of non-compliance in relation to this obligation.
7. Far from evidencing that Libya either lacks the material ability to comply with the Single Judge's order at the current time, or that Libya is acting in a manner that is consistent with its obligations to the ICC, the Reply demonstrates the precise opposite.
8. By submitting additional information from the Prosecutor-General, Libya has confirmed that it possesses the legal and practical means to take steps to implement ICC orders, if it chooses to do so.
9. It is, however, clear from both the Reply and recent statements of the ICC Focal Point and the Spokesperson for the Prosecutor-General that Libya has quite simply chosen not to surrender Mr. Gaddafi to the ICC.

¹ ICC-01/11-01/11-557-Red

² Cf ICC-01/11-01/11-547-Red, paras. 30-36.

10. Dr. Gehani and the Spokesperson for the Prosecutor-General have framed Libya's position in unequivocal terms, which negate the positions advanced in the Reply. Libya is focussing its efforts on firstly, securing Mr. Gaddafi's transfer from Zintan to Tripoli for the purpose of standing trial in Tripoli (in violation of the Surrender Order), and secondly, lobbying the ICC to convince the Court to enable Libya to try Mr. Gaddafi in Libya.³ The status of the implementation of the Surrender Order is clear, and requires no further submissions.
11. The Single Judge requested Libya to report in relation to the status of the implementation of Mr. Gaddafi's surrender and the return of Defence documents, as of 28 May 2014, not the steps that might be taken in the future. The scheduling of any future election thus has no relevance to Libya's duty to report to the ICC in relation to what it had done to implement the surrender obligation up until this point in time.
12. The only reason why Libya is unable to inform the Single Judge in relation to the specific steps that it has taken to implement the Surrender Order is because there are none to report.
13. To the contrary, Libya has evinced its ongoing intention to assert physical and legal jurisdiction over Mr Gaddafi, in violation of the outcome of the admissibility proceedings and the Surrender Order, which has been pending for over a year.
14. Notwithstanding Libya's attempts at verbal equivocation regarding the status of Mr. Gaddafi's trial, the fact is that, applying any reasonable meaning to the word, "trial", the domestic trial has started in Libya, the Prosecution has made evidential submissions,⁴ defendants have entered pleas, Defence disclosure obligations have been triggered,⁵ and, during the hearing on 22 June 2014, Mr. Gaddafi was ordered to address the charges against him.⁶
15. The fact that Libya scheduled a substantive trial hearing against Mr. Gaddafi – at the very time that it was claiming that it was unable to address the Single Judge's request to update the Court in relation to the implementation of the Surrender Order – shows a complete lack of respect by Libya for the binding nature of ICC orders.⁷

³ Article dated 23 June 2014, Annex D

⁴ Annex A.

⁵ ICC-01/11-01/11-553-AnxB, p. 24.

⁶ Annex A.

⁷ Cf ICC-01/04-580, p. 4. As observed by C. Kress and K. Prost, a 'request' attracts the same legal obligations as an order, and is legally binding on States: 'Article 87', Triffterer (ed.) Commentary on the Rome Statute of the International Criminal Court (Hart Publishers, 2nd ed. 2008) p. 1528.

16. The Pre-Trial Chamber has recently expressed the view that a finding of non-compliance is a measure of last resort. One has to question whether it is appropriate for ICC Judges to engage in calculations as to what will or will not be politically effective to bring about compliance; a task which is more properly confided to the UN Security Council, as a political body. But even assuming that the Court is not compromised by such political calculations, and even if it cannot be presumed that referral of the matter to the Security Council would necessarily result in Mr. Gaddafi's immediate surrender to the Court, the new information included in the Reply confirms that there is no viable alternative to this measure of last resort.
17. It is respectfully submitted, therefore, that the perils of inaction thus mandate that the Single Judge must resort to this measure in the face of clear evidence that all other measures for securing Libya's compliance with the Surrender Order have failed.

II. Submissions

The Reply should be dismissed in limine

18. Libya neither sought nor received authorisation from the Court for an extension of time before the expiration of its deadline to submit its observations concerning the implementation of the cooperation obligations. Apart from the fact that Libya did not obtain authorisation to file the Reply before it did so, it used the Reply as a vehicle for incorporating new substantive observations almost one month after the expiration of the initial deadline for the submission of such observations.
19. The OPCV has already suggested that, throughout these proceedings, Libya has evinced a consistent practice of submitting vague primary observations, with a view to gaining a tactical advantage by placing more concrete information and previously undisclosed information in its replies,⁸ which also has the effect of unduly prolonging the proceedings.

⁸ ICC-01/11-01/11-286, "It is submitted that a party should not be permitted to cure the defects related to the vagueness or omissions of its primary filings or oral submissions, through the filing of a reply." (para 11); "A reply may not serve as a mean to gain tactical advantages when it deliberately refrains from providing information or making arguments on foreseeable issues" (para. 15); "a filing should not be written in a deliberately vague manner so as to deprive the respondents of a proper and full opportunity to respond." (para. 16).

20. It is plainly unacceptable for a party to disregard or nullify the binding nature of Court deadlines in a regular and consistent manner,⁹ or to ignore the procedural requirements concerning the proper content of ‘replies’.
21. Rule 101 places a strict obligation on all Court participants to “endeavour to act as expeditiously as possible, within the time limit ordered by the Court”. Regulation 35(2) also specifies that after the lapse of a time limit, the Chamber may only grant the extension if the participant can demonstrate that they were unable to require the extension in due time for reasons outside their control.
22. Notwithstanding these strict requirements, Libya submitted its application for an extension of time on the day of its deadline at 15:56, i.e. at a time when it knew that it would be impossible for the Single Judge to hear the other participants and rule on the application before the expiration of the deadline.
23. At the same time, notwithstanding its clear obligations under Rule 101 and Regulation 35(2), Libya provided no explanation as to why it did not seek a modification of the deadline at an earlier time. Libya therefore forfeited its right to expect that it would be provided with any further opportunities to provide information to the Single Judge prior to the issuance of her decision.¹⁰
24. Libya has also failed to provide any justification in its Reply as to why there is good cause for the Single Judge to accept additional argument either in relation to the question as to whether additional time was warranted or as to the substance of the Single Judge’s Request. Apart from the fact that Libya has addressed the merits of its Reply without obtaining prior authorisation, it has failed to meet even the preliminary threshold of justifying why there is good cause to permit Libya to submit a Reply in the first place.
25. The right to adversarial proceedings does not translate into either a right or an expectation to be granted an opportunity to file a Reply.¹¹ It does, however, prevent parties from including substantive and new information in their replies.¹² The inclusion of new and more detailed information in its Reply has, unfairly, prevented the Gaddafi, and Al-Senussi Defences, the Prosecution and the OPCV from being able to address these issues in their respective Responses.

⁹ Libya has repeatedly submitted requests for extensions of time at the very point that its deadline was due to expire. See for example, ICC-01/11-01/11-41-Red, ICC-01/11-01/11-205, ICC-01/11-01/11-213.

¹⁰ ICC-01/04-01/07-1515-Corr, para. 30.

¹¹ ICC-01/04-01/06-424, Separate Opinion of Judge Pikis, para. 7.

¹² *Prosecutor v. Stanislav Galic*, Decision On Prosecution's Motion to Strike New Argument Alleging Errors by Trial Chamber Raised for First Time in Appellant's Reply Brief, 28 January 2005

26. It would therefore violate the right of these participants to be heard on the issues at stake if the Single Judge were to base her decision on information included for the first time in the Reply.¹³

In the alternative, there is ‘good cause’ to accept the Reply only insofar as it constitutes evidence of Libya’s deliberate refusal to implement the Surrender Order, and its intentional failure to comply with the clear terms of the Single Judge’s Request

27. The Single Judge’s decision as to whether to issue a finding of non-compliance must be based on the information in the court record. The court record in this case is clear, and Libya has failed to demonstrate the existence of ‘good cause’ to supplement it either through an extension of time, or through the Court’s acceptance of the Reply.
28. The Single Judge found in her decision of 15 May 2014 that Libya had failed to implement the Surrender Order, and at the same time, had failed to invoke either the Article 97 consultation processes or Regulation 108 of the Regulations of the Court.¹⁴
29. Libya did not seek leave to appeal these findings, and the Reply in no way alters the Single Judge’s conclusion as concerns Libya’s obligation to surrender Mr. Gaddafi to the ICC, or the separate issue regarding the return of illegally seized Defence documents.
30. To the contrary, in its Reply, Libya has again failed to recognise the legal and practical consequences of the Surrender Order.
31. At paragraph 13 of its Reply, Libya’s Counsel confirm expressly that they have the capacity to inform the ICC as to whether Libya will surrender Mr. Gaddafi to the ICC, and that there are no practical or legal impediments to Counsel’s ability to receive instructions on this point.¹⁵
32. The Spokesperson for the Prosecutor-General has also confirmed that the ICC Focal Point – Dr. Gehani – has full authority and capacity to formulate Libya’s positions before the ICC at this juncture, on the basis of information provided by the Office of the Prosecutor-General.¹⁶ The elections thus have no bearing on these matters.

¹³ ICC-01/05-01/08-1937-Red2, para. 66.

¹⁴ ICC-01/11-01/11-545, para. 6.

¹⁵ ICC-01/11-01/11-557-Red, para .13,

¹⁶ “In this case, we are not represented by the Office of the Prosecutor General, but by Libya’s representative before the ICC. He has a team working on proving Libya’s right and ability to conduct this trial. We, as the Office of the Prosecutor General, provide him with all materials and investigations that prove the ability of the Libyan Judiciary.” Annex B.

33. It is therefore apparent that the media statements made by Dr. Gehani and the Spokesperson for the Prosecutor-General concerning Libya's continued intention to prosecute Mr. Gaddafi in Tripoli (and to retain custody of him for that purpose)¹⁷ reflect the official position of the Libyan Government as concerns the proceedings before the ICC.
34. When read in conjunction with the absence of any disavowal in the Reply concerning the statements of the ICC Focal Point affirming the non-surrender of Mr. Gaddafi to the ICC, there is only one possible conclusion: Libya has decided not to surrender Mr. Gaddafi to the ICC.
35. This conclusion is further supported by the fact that Libya confirmed in the Reply that Mr. Gaddafi would continue to be tried in Tripoli and would appear before the Court at the next hearing,¹⁸ which is what in fact occurred on 22 June 2014.¹⁹
36. In this regard, the question as to whether the proceedings are in the pre-trial or trial phase is irrelevant to the Single Judge's adjudication as to the question of compliance. The scheduling of any hearings in Mr. Gaddafi's domestic case constitutes a failure to recognise the legal consequences of the Appeals Judgment and the Surrender Order. Libya's stated intention to try Mr. Gaddafi on Libyan soil is *ipso facto* incompatible with the Appeals Judgment and the Surrender Order.
37. Accordingly, irrespective as to whether the trial has in fact commenced, or is in the process of commencing, any procedural or substantive steps taken by Libya which are directed towards Mr. Gaddafi's prosecution in Libya, are clear evidence of non-compliance with the Surrender Order.
38. Moreover, far from evidencing its respect for the ICC's authority, Libya's invitation for the Defence of Mr. Gaddafi to visit Mr Gaddafi in Libya and "according to the legal systems applied in Libya" demonstrates the contrary.²⁰
39. In the absence of a finding that the case is inadmissible before the ICC, the ICC retains jurisdiction over Mr. Gaddafi. In accordance with Article 93(10)(b)(ii)(b) of the Statute, any decisions concerning who should visit Mr. Gaddafi and the conditions of such visits should be determined by the ICC (the ICC Pre-Trial Chamber, in consultation with the ICC Defence).

¹⁷ ICC-01/11-01/11-553, paras. 32-33, Annex B.

¹⁸ ICC-01/11-01/11-557-Red, paras. 29 and 34

¹⁹ Annex A.

²⁰ ICC-01/11-01/11-557-Anx1.

40. It is disrespectful for Libya to attempt to demonstrate their “cooperation” with the ICC by ‘inviting’ the Defence to visit Mr. Gaddafi, when, if Libya were complying with the terms of the ICC Statute, it should in fact be the prerogative of the ICC to determine if and when any Libyan authorities (or any other non-ICC authorities for that matter) can have contact with Mr. Gaddafi, and the conditions of such contact (with a view to protecting Mr. Gaddafi’s privilege against self-incrimination, and rights under the Statute).
41. Even if the ICC does not have the competence to order Libya to stop the domestic proceedings against Mr. Gaddafi, the Statute does vest the Court with the competence to determine whether Mr. Gaddafi can be required to participate in any such proceedings.
42. In light of the above, it is apparent that the submissions in Libya’s Reply render Libya’s Application for an extension of time moot.
43. The Single Judge requested Libya to present observations “in relation to Libya’s non-compliance with its outstanding obligations”,²¹ and the “status of the implementation of its duty to: (i) immediately surrender Mr. Gaddafi to the Court”. The Reply confirms Libya’s present and continuing non-compliance with the Surrender Order, and thereby reinforces the need for the Court to make a finding of non-compliance in relation to Libya’s duty to surrender Mr. Gaddafi immediately to the ICC.
44. Contrary to Libya’s position, there is no meaningful difference between “the practical issue of ensuring that submissions reflect the reality of measures undertaken in compliance with the co-operation requests, and the legal issue of postponing such measures”,²² when the *effect* of Libya being granted more time in relation to “the practical issue” of making submissions is a *de facto* postponement of a finding of non-compliance. The distinction is also meaningless in circumstances where Libya does not intend to comply with the surrender request.
45. There are no “negotiations between the Libyan Government and the regional authorities in Zintan” as concerns the surrender of Mr. Gaddafi to the ICC, which is the point at issue.²³ The Zintani authorities, representatives of the Prosecutor-General, and the ICC focal point have repeatedly confirmed that the only negotiations between Zintan and the central Government concern the surrender of Mr. Gaddafi to Tripoli

²¹ ICC-01/11-01/11-545, para. 8.

²² ICC-01/11-01/11-557-Red, para.8.

²³ Cf ICC-01/11-01/11-557-Red, para.17.

for the purpose of him standing trial there, and not in order to effect his surrender to the ICC.²⁴

46. This illustrates the danger of the Single Judge relying on assertions of fact which are not substantiated by any evidence.²⁵ The Single Judge cannot and should not base her ruling on assertions of Counsel,²⁶ given that Counsel are not competent to give evidence about factual matters and given that experience has proved that such assertions may not reflect the reality on the ground.²⁷
47. There would only be good cause to grant Libya further time to receive instructions in relation to steps being taken to implement the Surrender Order if Libya had in fact taken a decision to implement the Surrender Order.
48. If Libya has decided not to surrender Mr. Gaddafi, then the provision of additional time serves no purpose, and only further delays the proceedings and extends Mr. Gaddafi's arbitrary incommunicado detention in Libya. The requested adjournment would thus only serve to further frustrate the ability of the ICC to engage with Libya on this issue, with a view to ensuring that the Court is in a position to exercise its powers and functions as concerns the commencement of Mr Gaddafi's case before the ICC.
49. For this reason, the Defence would lay down the following marker. It would withdraw its opposition to the Application for additional time if Libya submitted an undertaking that it intends to surrender Mr. Gaddafi to the ICC and that it has commenced negotiations with Zintan in relation to the surrender of Mr Gaddafi to the custody of the ICC (as opposed to Tripoli). Since such an undertaking can be submitted on a confidential basis, Libya's concerns at paragraph 16 of its Reply are otiose. If Libya is unwilling to give these undertakings, then the Single Judge can draw her own conclusions as to the reason why.
50. The Reply has also sought to distract the Court from the larger and graver issue of Libya's failure to surrender Mr. Gaddafi to the ICC by citing alleged developments concerning other cooperation issues. These developments cannot be taken into

²⁴ Annex D, Annex C.

²⁵ For example, as concerns the existence of 'inquiries' into the security incident concerning Mr. Al-Senussi's lawyer or other incidents affecting the security of lawyers, and its intention to confirm the cessation of the national security proceedings at the 22 June 2014 hearing. The transcripts of the hearing demonstrate that the latter did not occur (Annex A), and there is no evidence that any investigations (which is the proper course of action) have been instigated in relation to attacks on lawyers.

²⁶ ICC-01/09-01/11-1312; ICC-02/04-179, at para. 36.

²⁷ The Defence refers to Libya's submissions in ICC-01/11-01/11-160 as a case in point.

consideration for the purposes of the Single Judge's findings concerning Libya's implementation of the Surrender Order.

51. It is thus necessary for the Single Judge to sever her determination as to whether to accept either the Application or the Reply insofar as they relate to the Surrender Order, from her determination in relation to matters concerning the Senussi case.
52. Apart from the fact that the Pre-Trial Chamber severed the admissibility proceedings concerning Mr. Gaddafi from those pertaining to Mr. Al-Senussi, the reference to 'request' in its singular tense in Article 87(7) also underscores that the Chamber is not required to consider the State's cumulative record on cooperation, but whether its failure to implement a specific cooperation request has prevented the ICC from "exercising its powers and functions under the Statute".
53. To hold otherwise would allow a State to avoid a finding of non-compliance by cooperating with the Prosecution, whilst refusing to cooperate with the Defence, or *vice versa*, or by co-operating only on certain issues, and not others.
54. According to the drafting history of the Statute, Part 9 was intentionally framed to impose a more stringent regime regarding the prompt implementation of surrender orders, as compared to other cooperation requests.²⁸ Given the hierarchically superior nature of this obligation, the Court should not defer or condition a ruling concerning non-surrender according to the status of other cooperation requests.
55. The jurisprudence of the ICTY on non-compliance indicates that that the Court should consider whether to issue a finding of non-compliance by assessing whether the State has complied with specific cooperation obligations, as opposed to assessing the State's record of cooperation as a whole.
56. For example, in July 1999, the ICTY Prosecutor requested President McDonald to make a finding of non-compliance against Croatia in relation to three separate cooperation requests (a request for access to evidence, a request for Mr. Martinovic and Mr. Naletilic to be surrendered to the ICTY, and a request to exercise jurisdiction over Operations Storm and Flash).²⁹
57. President McDonald declined to issue a finding of non-compliance in relation to the first request due to the fact that the Prosecutor had failed to first request the Chamber to issue a binding order in relation to the requested evidence.

²⁸ P. Mochochoko, 'International Cooperation and Judicial Assistance', (Lee ed.) The International Criminal Court: The Making of the Rome Statute (Kluwer 1999), p. 314.

²⁹ 'Letter dated 25 August 1999 from the President of the ICTY addressed to the Prosecutor of the ICTY, S/1999/912, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/1999/912

58. In relation to the surrender issue, Croatia surrendered Mr Martinovic to the ICTY after the request for a finding of non-compliance had been filed. Nonetheless, President McDonald still deemed it appropriate and necessary to issue a finding of non-compliance in relation to Croatia's failure to surrender Mr. Naletilic because, notwithstanding the fact that he was detained in their custody, Croatia had failed to surrender him for 8 months, which constituted a failure to surrender him "without undue delay".³⁰
59. In the present case, the fact that Libya has entered into a MoU with the Court on privileges and immunities, and confirmed the illegality of the national proceedings against four ICC staff has no relevance to the rights of Mr. Gaddafi and the specific question of his non-surrender to the ICC.
60. These developments cannot be taken in consideration for the purposes of determining whether Libya has failed to implement the Surrender Order, contrary to the provisions of the Statute, and whether this failure has prevented the Court from exercising its functions and powers under the Statute.
61. These belated actions cannot in any way ameliorate the prejudice caused to Mr. Gaddafi as concerns his simultaneous prosecution before different Courts nor do they remove the legal obstruction as concerns the inability of the ICC to commence the confirmation proceedings against Mr. Gaddafi in his absence.
62. It would also be completely unacceptable to allow a State to eke out the performance of different cooperation obligations, with a view to parlaying compliance with more minor obligations against a finding of non-compliance as concerns an obligation of extreme importance, such as the surrender of Mr. Gaddafi.
63. This is particularly the case where the other obligations are of a negative rather than positive nature. Libya's prosecution of the four ICC staff constituted a fundamental violation of the Statute, and the rights of Mr. Gaddafi. After two years of persistent efforts by Libyan officials to use these proceedings to extract concessions from the Court, it appears that Libya has now recognised the illegality of its actions in order to avoid sanctions.
64. This belated attempt to protect itself from negative consequences does not, however, remedy the legal and psychological prejudice occasioned to Mr. Gaddafi as a result of his very public prosecution for illegal charges. It does not remedy the harm occasioned to persons rightly or wrongly associated with the Defence, on the basis of

³⁰ S/1999/912, p.5.

information that was illegally extracted from privileged documents. Given Libya's failure to return the Defence documents, it also does not eliminate the possibility that the privileged Defence information could be used to the detriment of Mr. Gaddafi or potential Defence witnesses.

65. Apart from the fact that the Chamber has a positive duty to take all necessary measures to ensure the confidentiality of Defence documents,³¹ it would be grossly unjust if Libya were to succeed in once more, using the national security proceedings to its advantage, in this instance, if Libya were to succeed in using its belated recognition of the obvious illegality of these proceedings (and its Statutory obligations under Article 48 of the Statute) in order to escape a finding of non-compliance in relation to its protracted failure to surrender Mr. Gaddafi to the ICC.
66. To the contrary, if the national security proceedings failed to comport with domestic law, in that the Minister of Justice had not authorised their inception, the ICC has a right to demand an explanation as to why the Minister of Justice waited almost two years before informing the ICC of this fact, and why, if the Libyan authorities were aware that the proceedings were not approved by the Ministry of Justice, various Libyan representatives attempted to exploit the existence of these proceedings to extract concessions from the ICC?³²

Libya should not be permitted to use its Reply in order to stall the ICC's adjudication of matters pertaining to Mr. Gaddafi's case, whilst simultaneously using this time to advance the prosecution of Mr. Gaddafi in Libya. The only available remedy is to issue an immediate finding of non-compliance.

67. In the absence of any recognition in any of Libya's filings that Libya has agreed, in principle, to implement the Surrender Order, it is futile to defer the issuance of a finding of non-compliance.
68. The Pre-Trial Chamber has recognised that Libya's failure to surrender Mr. Gaddafi has "prejudic[ed] certain rights to which Mr. Gaddafi is entitled before the Court, notably his "right to challenge the legality of his detention and seek provisional release", his "right to silence under Article 55 or Article 67(1)", "his right to be tried

³¹ The ICTY Appeals Chamber has recognised that the Chamber's duty to ensure the fairness of the proceedings encompasses a duty to take all necessary measures to protect the confidentiality of Defence documents: *Prosecutor v. Gotovina*, 'Decision on Gotovina Defence Appeal Against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia', 14 February 2011, para. 68.

³² ICC-01/11-01/11-543, para.44 ; ICC-01/11-01/11-506-Conf-Exp, para.19.

in an expeditious manner”, and “his right not to be detained for an unreasonable length of time during the pre-trial proceedings””.³³

69. To the extent that the Rely confirms Libya’s intention to maintain Mr. Gaddafi in Libyan custody and to continue the domestic proceedings against Mr. Gaddafi, the Reply compounds rather than cures the above prejudices.
70. The Spokesperson for the Prosecutor-General has announced his expectation that the judgment against Mr. Gaddafi and other might be issued after only five more hearings.³⁴
71. Irrespective as to whether this prediction will be realised or not, it is highly improper for the Libyan Government to assert in its Reply that the commencement of the domestic trial against Mr Gaddafi is not “imminent”,³⁵ when the Prosecutor-General – who instructs Libya’s Counsel in relation to the status of domestic proceedings³⁶ – has claimed the opposite.
72. Having recognised that Mr. Gaddafi’s rights under the Statute are being prejudiced through his non-surrender to the Court, the Chamber has a duty to take such measures as are within its power to remedy this prejudice.
73. Although the Defence cannot impose a particular remedy or course of action on the Chamber, the Chamber is, nonetheless, duty bound to adopt the course of action, which on the basis of the information in the court record, is most likely to secure the rights of Mr. Gaddafi under the Statute, in an effective manner.
74. It is manifestly clear that neither diplomatic overtures nor the normal course of litigation will suffice to bring Libya into compliance with the Surrender Order.³⁷
75. At same time, Libya has not availed itself of the provisions of the Statute, which address delays in the implementation of a cooperation obligation.³⁸

³³ ICC-01/11-01/11-556, para. 25 read in conjunction with para. 26: “it is not the lack of a ruling on whether a finding of non-cooperation by Libya should be made that significantly affects the fair and expeditious conduct of the proceedings, but it is the non-surrender of Mr Gaddafi to the Court and his continued detention in Libya that produces the results that the Defence alleges”.

³⁴ “Then the investigations were deferred to the Indictment Chamber, then following two hearings in which the Indictment Judge reviewed this case, he deferred the case to the Criminal Court, precisely the 15th Criminal Circuit in Tripoli Appeals Court. And it has reviewed the case over nearly five hearing. And I expect that a judgment will be issued in this big case in five hearings or maybe the number will reach [interrupted by interviewer]”, Annex B.

³⁵ ICC-01/11-01/11-557-Red, para28.

³⁶ Annex B.

³⁷ ICC-01/11-01/11-556, paras. 6-7.

³⁸ ICC-01/11-01/11-5tue the 45, para.6.

76. Libya has therefore, once again and without any justification, declined to either surrender Mr. Gaddafi or avail itself of the appropriate provisions of the Statute, such as Article 97 or Regulation 108 of the Regulations of the Court.
77. The Spokesperson for the Prosecutor-General has also announced that unless the issue is referred to the Security Council, Libya will not even consider surrendering Mr. Gaddafi to the ICC:

“Interviewer: Is Libya obliged to surrender Saif Al-Islam Gaddafi to the International Criminal Court?

Al-Sur: If the ICC refers to the Security Council that; the issue is related to the Security Council. It is a different level, not a judicial one, but a political one. If the ICC concludes the proceedings and reaches a final judgment that Libya must surrender Saif Gaddafi to the ICC and refers this issue to the Security Council, it will then be the role of the Libyan Government and the extent of its capacity to deal with the issue before the Security Council, concerning the fact that a national trial for those individual is a popular demand”.³⁹

78. In these circumstances, even if a referral of the matter to the Security Council is not guaranteed to result in Mr. Gaddafi’s surrender to the ICC, it is plainly impossible to identify a legal avenue that is more likely to produce this result.
79. Although it is possible that the Security Council might fail to reach the necessary degree of consensus as concerns potential follow up actions by the Security Council, a judicial finding that Libya has failed to comply with its obligation to surrender Mr. Gaddafi (which arises out of Security Council 1970), triggers a legal interest and right for every Member State of the United Nations to take measures to secure Libya’s compliance with this obligation.⁴⁰ It also paves the way for collective responses by international governmental organisations, under the auspices of the United Nations Charter.⁴¹
80. As set out in an expert legal opinion prepared by Professor Crawford Q.C., Professor Sands Q.C., and Professor Wilde, if a State fails to consult with the Court concerning the implementation of an arrest warrant, then the next procedural step is to consider

³⁹ Annex B.

⁴⁰ *Prosecutor v. Blaskic*, ‘Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997’, 29 October 1997, para. 36.

⁴¹ *Prosecutor v. Blaskic*, ‘Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997’, 29 October 1997, para. 36.

whether the threshold for issuing a finding of non-compliance has been met, as *per* Article 87(7).⁴²

81. The underlying rationale of Article 87(7) is thus to provide a mechanism for enforcing cooperation orders in circumstances in which a State's failure to implement a cooperation order has prevented the Court from exercising its functions and powers. That threshold has been reached.
82. Article 87(7) also embodies the appropriate separation of powers between judicial and executive. Where all judicial remedies have failed to produce a result, a political remedy may be required, but such a remedy must be determined by the executive and not by judges.⁴³ Article 87(7) thus recognises that judges cannot and should not descend into the political realm, and that as such, the independence and impartiality of the Court is best served by referring such political matters to an independent entity.
83. The inclusion of the word 'may' in Article 87(7) must also be construed in accordance with the principle of effective interpretation. The Court has an obligation to interpret and apply the Statute in a manner which ensures its effective operation. The use of the word 'may' in Article 87(7) thus "attracts the standard jurisprudence which says that enabling words are construed as compulsory whenever the object of the power which they confer is to effectuate a legal right".⁴⁴
84. To give an analogy, Article 57(3) delineates a series of powers that the Pre-Trial Chamber 'may' exercise. Although the Pre-Trial Chamber retains the ultimate competence for determining whether to exercise these powers, if the requisite criteria in the respective provisions are met, the Chamber's discretion to decline to exercise its powers is arguably, limited. For example, if it is necessary for the Chamber to take measures to provide for the protection and privacy of victims and witnesses, the use of the word 'may' in the chapeau of Article 57(3) does not excuse or qualify the Chamber's duty to take such measures.

⁴²Joint Opinion in the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States under Article 98(2)', p. 25, <http://www.amicc.org/docs/Art98-14une03FINAL.pdf>

⁴³ "The International Tribunal (i.e., a Trial Chamber, a Judge or the President) engages in a judicial activity proper: acting upon all the principles and rules of judicial propriety, it scrutinises the behaviour of a certain State in order to establish formally whether or not that State has breached its international obligation to cooperate with the International Tribunal. Furthermore, the finding by the International Tribunal must not include any recommendations or suggestions as to the course of action the Security Council may wish to take as a consequence of that finding." *Prosecutor v. Blaskic*, 'Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997', 29 October 1997, paras. 35-36.

⁴⁴ *Prosecutor v. Milutinovic et al.*, 'Decision on Interlocutory Appeal on Motion for Additional Funds', 13 November 2003, Separate Opinion of Judge Shahabuddeen, para. 6.

85. Similarly, the drafters clearly did not envisage that the Judges should have unlimited discretion to consider whether and when to issue a finding of non-compliance in relation to circumstances in which all other options had failed, and the State's continued non-compliance had prevented the Court from exercising its functions and powers for over a year. The very fact that the Court has been prevented from exercising its functions and powers impels the Court to take all necessary measures to secure the State's cooperation.
86. Thus, where a finding of non-compliance is the only option which has not been explored, and where the consequences of non-compliance are likely to have significant repercussions on fundamental legal rights, 'may' becomes 'must'.
87. As explained by Judge McDonald in her report to the Security Council concerning Serbia's non-compliance, referral to the Security Council is a fundamental tool for ensuring the effective discharge of the Tribunal's mandate. If the Tribunal or the Security Council were to remain inactive in relation to instances where the Tribunal's orders were disregarded, it would reward the State's transgressions and undermine the international legal order.⁴⁵

III. Relief Sought

88. For the reasons set out above, the Defence for Mr. Saif Al-Islam Gaddafi respectfully requests the Honourable Single Judge to:
- i. Dismiss the Reply *in limine*; or
 - ii. In the alternative, there is good cause to accept the Reply only insofar as it constitutes evidence of Libya's non-compliance with the Surrender Order, and underscores the necessity of issuing an immediate finding on non-compliance.

⁴⁵ Address to the Security Council by President Gabrielle Kirk McDonald, 2 October 1998, <http://www.icty.org/sid/7633>



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

Dated this, 24th Day of June 2014

At London, United Kingdom