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PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Ekatarina Trendafilova
Judge Christine Van den Wyngaert

SITUATION IN LIBYA

**IN THE CASE OF
*THE PROSECUTOR v. SAIF AL-ISLAM GADDAFI***

**Public
With Public Annexes A and B**

Defence Response to “Libyan Government’s application for extension of time for the purposes of compliance with Pre-Trial Chamber I’s ‘Decision on matters related to Libya’s 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. “I really failed. This is the reality. I could not deliver justice to Libya”.¹ These are the words spoken yesterday by former Minister of Justice, Saleh Marghani, as he tendered his resignation. The Court has previously relied on the assurance of Mr. Marghani but now even he has recognized that these assurances do not reflect the reality in Libya. In his own words, Libya is a failing state, there is no justice and no respect for the rule of law and the related authority of the ICC. The Court can either silently watch Libya descend further into lawlessness or act as a beacon showing the need for all persons in Libya - regardless of their status - to adhere to Libya’s legal obligations.

2. On 7 June 2012, privileged Defence documents were illegally seized from former Counsel for Mr. Gaddafi by the Libyan authorities during her visit to Mr. Gaddafi in Zintan. In its “Decision on the ‘Urgent Defence Requests’”, the Chamber requested Libya to return to the Defence the originals of the materials seized in Zintan and destroy any copies thereof.² This cooperation request has been outstanding since 1 March 2013.

3. Thirteen weeks ago, on 15 May 2014, the Chamber noted that Libya had failed to discharge both the surrender obligation, which has been outstanding since 31 May 2013, and the return of the privileged documents to the Defence.³ In the absence of any information as to the steps taken by Libya to implement the outstanding cooperation requests, the Chamber requested Libya to:

¹ BBC World News Interview with Minister of Justice, Saleh Marghani dated 24 August 2014 (“BBC Marghani Interview”) at 08:04 min to 08:11 min. Full interview from 01:50 min to 08:13 min at http://downloads.bbc.co.uk/podcasts/worldservice/newshour/newshour_20140824-2204c.mp3?utm_source=twitterfeed&utm_medium=twitter

² ICC-01/11-01/11-291 (“Decision of 1 March 2013”).

³ ICC-01/11-01/11-545 (“Decision of 15 May 2014”).

“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 the materials that were seized from the former Defence counsel for Mr Gaddafi by the Libyan authorities during her visit to Mr Gaddafi in Zintan, and destroy any copies thereof...”⁴

4. Upon the expiry of the previous deadline, Libya sought an extension of time of twelve weeks to respond to the first two aspects of the Decision of 15 May 2014, i.e. both outstanding obligations that concerned Mr. Gaddafi. Libya stated that it required the extension on the grounds that: (i) the Libyan authorities were unable to provide up-to-date instruction on the salient issues due to a “surge in attacks against the Government” in May 2014 and (ii) that the Government “will be better placed to update the Court” following the scheduled election on 25 June 2014.⁵
5. On 11 July 2014, the Chamber issued its “Decision on matters related to Libya’s duties to cooperate with the Court” in which it, *inter alia*:
 - (i) rejected Libya’s request for an extension of time to provide submissions on the status of implementation of its duty to surrender Mr. Gaddafi to the Court; and
 - (ii) granted Libya an extension of time until 20 August 2014 to provide submissions on the status of implementation of its duty to return to the Defence of Mr. Gaddafi the originals of the materials that were seized from the former Defence counsel for Mr. Gaddafi by the Libyan authorities during her visit to Mr. Gaddafi in Zintan, and destroy any copies thereof.⁶

⁴ Decision of 15 May 2014, para. 8.

⁵ ICC-01/11-01/11- 548, paras. 4-7.

⁶ ICC-01/11-01/11-563, para. 34 (“Decision of 11 July 2014”).

6. Despite being granted an extension of time to provide submissions on the implementation of its duty to return privileged Defence documents, Libya has failed to do so. Instead, Libya notified the Chamber on 21 August 2014 i.e. one day after the deadline had expired, that it would require a further extension until 29 October 2014 in order to provide submissions on a cooperation request that has been outstanding since 1 March 2013.⁷
7. The untimely filing of the Application is yet another example of Libya's failure genuinely to engage with the Chamber in order to resolve any impediments in relation to the execution of its outstanding cooperation requests.
8. As previously noted,⁸ Libya's Application still does not recognise Libya's legal obligations regarding the cooperation requests nor has Libya affirmed at any point its commitment to implement the cooperation requests at any point in time.
9. In these circumstances, the Court should not condone Libya's practice of requesting extensions of time on the eve of, or even after, the expiry of, the Court's deadlines, paying lip service to compliance with the Court's judicial orders whilst delaying proceedings concerning Mr. Gaddafi before the ICC. This in turn allows Libya to continue its own domestic proceedings against Mr. Gaddafi, contrary to the Appeal Chamber's final judgment, whilst escaping any censure or sanction.
10. Whilst Libya plays for more time, Mr. Gaddafi remains detained outside the Court's reach, facing serious charges of crimes against humanity before the ICC which he is unable to answer or defend himself against as a direct result

⁷ ICC-01/11-01/11-568-Corr ("Application")

⁸ ICC-01/11-01/11-553, para. 7.

of Libya's unwillingness and inability to comply with judicial orders in over eighteen months.

11. Libya's latest filing must be read in the context of the numerous opportunities, reminders and requests for Libya to return the privileged Defence documents. Libya's continued possession of these documents, which were illegally seized in the first place, is fundamentally incompatible with its duties under the Statute and with the rights of the Defence.

12. This violation is compounded by Libya's refusal to take any steps to proceed to the immediate surrender of Mr. Gaddafi to the Court.

13. The Chamber has now exhausted all other measures for securing Libya's compliance and as such, the only appropriate response in these circumstances is to issue a formal finding of non-compliance and refer the matter to the United Nations Security Council and Assembly of States Parties.

II. Submissions

a) Libya's Application is filed out of time and, even if it were filed timeously, there is no good cause for a further extension of time

14. Libya's Application should be dismissed *in limine*.

15. In accordance with regulation 33(2) of the Regulations of the Court, "documents shall be filed with the Registry between 9am and 4pm The Hague time or the time of such other place as designated by the Presidency, a Chamber or the Registrar, except where the urgent procedure foreseen in regulation 24, sub-regulation 3 of the Regulations of the Registry applies."

16. Libya's submissions in compliance with the Chamber's Decision of 15 May 2014 had to be filed with the Registry before 16:00 The Hague time on 20 August 2014.
17. Libya not only failed to provide any submissions as requested by the Chamber, but filed its Application for an extension of time at 23:03 The Hague time on 20 August 2014, some seven hours after the deadline for filing had expired.
18. Libya has provided no explanation as to why it was unable to file its Application in accordance with regulation 33(2) of the Regulations of the Court. The Presidency, Chamber or Registrar had not designated any other time and there was no applicable urgent procedure as stipulated in Regulation 24(3) of the Regulations of the Registry.⁹
19. Moreover, although Libya seeks to aver that its Application arises "from recent events in Libya", the articles it seeks to rely upon in support are dated 22 July and 12 August 2014,¹⁰ and concern matters that have been on-going for several months.¹¹ Libya's representatives would therefore have been able to anticipate for some time that they would be unable to provide the submissions as requested by the Chamber by 20 August 2014.

⁹ "The Presidency, a Chamber or a participant filing documents, material, orders or decisions which require urgent measures to be taken shall inform the relevant courtroom officer as soon as possible and insert the word "URGENT" on the cover page in capital letters. Outside the filing hours described in regulation 33, sub-regulation 2 of the Regulations of the Court, the Presidency, the Chamber or the participant requesting urgent measures shall contact the duty officer provided for in regulation 39."

¹⁰ Notwithstanding that the web links for five of the seven media articles do not open. See Application, footnotes 5 to 7.

¹¹ As relied upon by Libya on 28 May 2014 *see* ICC-01/11-01/11-548, paras. 6-8.

20. The Registrar had also provided Libya with a further reminder of its pending cooperation requests on 18 August 2014.¹² Libya's untimely submissions suggest that until it received this reminder, it simply had not turned its attention to this issue. From this it is open to reasonable inference that Libya had had no intention of implementing the cooperating request, had not taken any steps to comply with the Decision of 15 May 2014 and accordingly, the matter had not been on its agenda.

21. There is, therefore, no reasonable explanation for Libya's failure to file a request, which in any case, simply reiterates its submissions from May 2014, in a timely manner. The request should, therefore, be rejected *in limine*.

b) *The consequence of a failure to submit should be a finding of non-compliance*

22. In support of its Application, Libya relies on the "challenging security situation in Libya", stating that bomb attacks in Tripoli have allegedly "disrupted both travel and effective communication between Zintan and Tripoli [and] prevented discussions with the local authorities in Zintan directed at obtaining the material that the Libyan Government is seeking to return to the Court".¹³ Libya also states that following the 25 June parliamentary election, Libya's representatives have been unable to take "effective instructions from the Libyan Government, as it is fully occupied with dealing appropriately and effectively with the circumstances on the ground."¹⁴

23. Libya is seeking a further twelve weeks extension on the same grounds it relied upon its request for an extension of time in May 2014. In that instance,

¹² Annex A.

¹³ Application, para. 4.

¹⁴ Application, para. 6.

Libya had said that it required a “temporary postponement” of twelve weeks to provide submissions on the outstanding cooperation requests as concerns Mr. Gaddafi due to:

- i. a surge in attacks against the Government which have prevented the Libyan authorities from providing up-to-date instructions on the salient issues;¹⁵ and
- ii. the parliamentary election scheduled on 25 June 2014 following which the Government would be better placed to update the Court on these matters.¹⁶

24. In its Decision of 11 July 2014, the Chamber had already dismissed both factual aspects and found that the security situation and the scheduled election were not justifiable grounds for an extension of time.¹⁷

25. The Chamber had found that Libya’s failure to comply with the outstanding cooperation request were not contingent on the current situation of the country in particular when taking into account: (i) the duration of the outstanding request; and (ii) Libya’s failure to provide any information on its failure to comply with the outstanding request despite numerous opportunities to do so.¹⁸

26. It was on this basis that the Chamber dismissed Libya’s request for an extension of time to provide submissions concerning the immediate surrender of Mr. Gaddafi. Instead, it rightly considered that the consultation period under regulation 109(3) of the Regulations of the Court had concluded and the Chamber could now decide “at any time what further action is appropriate,

¹⁵ ICC-01/11-01/11=548, para. 6.

¹⁶ *Ibid.*, paras 6-7.

¹⁷ Decision of 11 July 2014, paras. 10-13.

¹⁸ Decision of 11 July 2014, paras. 12-13 and Decision of 15 May 2014, para. 6

including making a formal finding of no-cooperation and transmitting it to the Security Council”.¹⁹

27. Libya never sought reconsideration or leave to appeal the Decision of 11 July 2014 and yet it now seeks to re-litigate arguments that have already been ruled upon by the Chamber, without any justification as to why it considers the decision to be erroneous.

28. The same circumstances apply in relation to the outstanding request to return privileged material to the Defence. This is a cooperation request that has been outstanding *since 1 March 2013*. Despite numerous requests and reminders, Libya has shown no willingness in this time to comply with this request. Nor has it provided any submissions in over thirteen weeks in compliance with the Decision of 15 May 2014. Nor does it make any efforts to reconcile its request with the fact that it has never accepted its obligation to implement either outstanding cooperation request. Nor does it put forward any argument that it will employ the requested ten weeks to advance the implementation of the cooperation requests.

29. The Chamber had only granted Libya an extension of twelve weeks to provide submissions on the return of privileged Defence materials following “Libya’s submissions that confirmation that the national proceedings against Mr. Gaddafi arising out of the events in Zintan in summer 2012 will no longer be pursued is expected to take place ‘in an upcoming procedural hearing taking place in Tripoli in the main criminal proceedings relating to crimes committed

¹⁹ Decision of 11 July 2014, para. 13.

during the 2011 revolution'''²⁰ To date, there has been no confirmation of the termination of the national security proceedings against Mr. Gaddafi.²¹

30. Although Libya may reiterate that it is committed to cooperating with the Court and honouring the rule of law, there is nothing on record to suggest that this is true. Libya states that it has made "considerable progress"²² since its last request for an extension of time on 28 May 2014 and yet it is unable to provide *any example* of progress in relation to complying with its obligations to the Court. Its reference to the "signing of the Memorandum of Understanding with the Registry"²³ had already been submitted in its request for an extension of time back in May 2014.²⁴

31. In these circumstances, the consultation period under regulation 109(3) of the Regulations of the Court should also be considered to have concluded in relation to Libya's outstanding obligation to return privileged materials to the Defence and destroy any copies thereof.

32. The Chamber should also take into consideration Libya's prolonged unwillingness and inability to enforce a simple judicial order in both the exercise of its functions and powers in accordance with article 87(7) of the Statute and any determination of a request under article 19(4) of the Statute. A State cannot rely on the argument of inability for the purpose of avoiding its duty to comply with judicial orders, only to then assert that it suddenly possesses full capacity for the purposes of article 19(4) of the Statute. Such an

²⁰ Decision 1 July 2014, para. 16.

²¹ There was no announcement of this termination in the hearing scheduled on 22 June 2014 see ICC-01/11-01/11-560-AnxA. The scheduled hearing on 18 August 2014 was subsequently postponed *see* Annex B.

²² Application, para. 3.

²³ Application, para. 5

²⁴ ICC-01/11-01/11-548-Anx1.

obvious *volte face* is evidence of conduct amounting to bad faith, which should warrant the automatic rejection of any attempt to benefit from the fruits of Libya's current non-compliance.

c) Further undue delay seriously comprises Mr. Gaddafi's rights

33. Libya's non-compliance has a direct impact on Mr. Gaddafi's dignity and well-being. There is no legitimate explanation as concerns Libya's continued possession of privileged Defence documents. As long as Libya retains possession, the Court cannot exclude the possibility that Libya may continue or resurrect national security proceedings against Mr. Gaddafi, or otherwise use the privileged documents against him in the main proceedings in Tripoli. Libya's failure to return the documents is not only a failure of omission but an intentional and continuing violation of fundamental defence rights.

34. Similarly, as Libya refuses to surrender Mr. Gaddafi to the Court, it deliberately forces him to engage in the domestic proceedings held in Tripoli whilst preventing Mr. Gaddafi from any access to proceedings before the ICC.

35. The Application also reveals the grave situation in which Mr. Gaddafi finds himself. Libya submits that the security issues have prevented the Government from engaging with Zintan authorities on key issues concerning Mr. Gaddafi. This argument appears to suggest that no member of the Government has possessed the means to communicate a simple judicial order to Mr. Gaddafi's custodians from at least 29 May 2013.²⁵

²⁵ This was the last time Libya stated on record that it had transmitted the Decision of 1 March 2013 to Ministry of Foreign Affairs, the Ministry of Justice, the Prosecutor-General's Office and the Zintan Court *see* ICC-01/11-01/11-343, para. 20.

36. This is a matter which demands clarification. Libya should be requested to confirm the timing and nature of communications between the Prosecutor-General's office and the Zintan authorities as concerns the surrender of Mr. Gaddafi and the return of privileged Defence documents. It is not acceptable for Libya to imply, for the purpose of obtaining more time, that it does not possess the means to communicate with Zintan regarding Mr. Gaddafi and then later, for the purposes of admissibility, assert the contrary.

37. Libya seeks to rely on the on-going militia attacks in order to excuse itself from compliance with the Court. However, such instability and violence only heightens the need for Libya to immediately comply with all extant obligations prior to any further deterioration of the situation. At present, there is already a great risk to both the integrity of Defence documents, and the security of information contained therein, and the physical integrity of Mr. Gaddafi himself.

38. Under article 57(3)(b) and (c) of the Statute, the Pre-Trial Chamber has a duty to ensure the safety and security of defendants. If the attacks in Libya are such that the Government cannot supposedly communicate with authorities in Zintan, then in turn they also have no means of knowing or ensuring that Mr. Gaddafi is safe. The fact that Zintan militia have been the subject of sustained attacks creates a real possibility that either Mr. Gaddafi himself, or his custodians could be similarly targeted.²⁶

39. A Government which does not have the power to return privileged Defence documents and destroy copies thereof, palpably does not have the means to guarantee the safety and security of a high profile defendant such as Mr.

²⁶ BBC News, Libya crisis: Tensions rise as Tripoli airport seized, 24 August 2014, <http://www.bbc.com/news/world-africa-28916417>

Gaddafi from militia attacks. As acknowledged by Mr. Marghani “fearing for life is the norm now, everyone fears for his life or her life in Libya”.²⁷ Mr. Gaddafi’s life remains in peril as long as he remains on Libyan territory. He must therefore be immediately evacuated to a neighbouring safe territory such as Tunisia, a State Party to the ICC, and from there surrendered to the ICC.

d) *There are no justifiable grounds to protract the adjudication of this matter*

40. Concerns regarding Libya’s non-compliance have now been exhaustively, and repetitively, litigated. Libya’s latest Application adds no new issue or factor for consideration. It is a repeat request for an extension of time on grounds that have already been dismissed. For these reasons, together with the passage of time, the Defence submits that any application for leave to reply to this Response should not be granted and if filed, should be summarily dismissed.

41. If the Chamber is inclined to hear any further submissions before dismissing the Application, and given the aforementioned impact on Mr. Gaddafi’s rights stemming from further delays, the Defence respectfully requests the Chamber to order that any response from the Prosecution to Libya’s Application be filed on an expedited basis.

III. Relief

42. For these reasons, the Defence for Mr. Saif Al-Islam Gaddafi respectfully requests the Pre-Trial Chamber to:

- a. Order any response from the Prosecution to be filed on an expedited basis;
- b. Dismiss Libya’s Application *in limine*;

²⁷ BBC Marghani Interview at 06:50 min to 06:58 min.

- c. 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
- d. Refer the matter to the Security Council and Assembly of States Parties.



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

Dated this, 25th Day of August 2014

At London, United Kingdom