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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

With Public Annexes A and B

**Request for Leave to Reply to the “Libyan Government’s Response to Urgent
Defence Request of 21 January 2013”**

Source: Defence of 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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1. Introduction

1. On 21 January 2013, the Defence for Mr. Saif Al-Islam Gaddafi seized the Honourable Pre-Trial Chamber of an application concerning the fact that Mr. Gaddafi is currently being prosecuted by Libyan authorities in connection with a privileged visit between Mr. Gaddafi and his ICC counsel, which fell squarely within the terms of a judicial order from the Pre-Trial Chamber.¹
2. The Defence submitted that the instigation of such proceedings constituted an abuse of the Government's physical custody over the defendant, which warranted his immediate surrender to the ICC.
3. The Defence also requested the immediate surrender of any Defence documents, which had been illegally seized from Counsel and Mr. Gaddafi, in clear violation of the Pre-Trial Chamber's order concerning the modalities for the visit.
4. On 11 February 2013, the Government of Libya filed its response, which is replete with a number of legal and factual inaccuracies.²
5. The Government confirmed that both Mr. Gaddafi and the ICC delegation are being prosecuted in domestic courts for matters concerning the visit with Mr. Gaddafi in Zintan. The Government also implicitly confirmed that Defence documents had been seized from Mr. Gaddafi's Counsel, and Mr. Gaddafi.³
6. The Government nonetheless claimed that the Pre-Trial Chamber has no competence over these matters, either because these matters should be determined by Libyan courts in accordance with Libyan law, or, because they should be the subject of diplomatic negotiations.
7. Essentially, the Government wishes to arrogate to itself the sole competence to determine whether it is obliged to comply with ICC judicial orders, and the terms of the Rome Statute, including the parameters of legal professional privilege under Articles 67(1) of the Statute. It would also appear that it wishes to benefit from its own illegal actions in order to obtain diplomatic leverage with the Court.
8. The Government also completely disregarded the fact that firstly, the ICC has not lifted any privileges and immunities, which might be relevant to the visit with Mr.

¹ ICC-01/11-01/11-255.

² ICC-01/11-01/11-274.

³ ICC-01/11-01/11-274 at paras. 10-11.

Gaddafi in Zintan; and secondly, the Government has not formally requested that the privileges and immunities of any persons related to the 7 June 2012 visit be waived.

9. The instigation or even continuation of domestic proceedings concerning the Zintan events is therefore *ipso facto* illegal and abusive.
10. The Government also failed to comply with the correct procedures for obtaining access to documents, within the custody of ICC officials, and as such, its continued retention of Defence documents is also *ipso facto* illegal.
11. In such circumstances, the Pre-Trial Chamber clearly has the competence to take measures to sanction the Government for its non-compliance with judicial orders, and to remedy the consequences of such non-compliance on the rights of the defendant, and the fairness of the proceedings.
12. The Defence for Mr. Saif Al-Islam Gaddafi therefore respectfully requests leave to reply in relation to the following issues:
 - a) the Government's incorrect assertion that the Pre-Trial Chamber lacks jurisdiction over matters, which are directly related to the rights of the defendant and the implementation of judicial orders, if they are not directly connected to the admissibility of the case;
 - b) the Government's incorrect subversion of the Part 9 cooperation regime under the Statute, and the relationship between domestic law and the Government's obligations under the Rome Statute;
 - c) The Government incorrect conflation of the regime for lifting the privileges and immunities of officials, and the Chamber's independent power to enforce judicial orders, and sanction non-compliance; and
 - d) the Government's fallacious position regarding the burden of proof in relation to the non-implementation of judicial orders, and information, which falls within the exclusive control of the Government.
13. The first two issues are intertwined insofar as the Government has suggested that any matters, which do not fall within the direct purview of the admissibility challenge, should be adjudicated by Libyan courts in accordance with Libyan law.

2. Submissions

The legal basis for granting leave to file a reply

14. Pursuant to Regulation 24 of the Regulations of the Court, participants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations.
15. In the present case, the Government's Response has revealed various policy and legal positions concerning the domestic proceedings against Mr. Gaddafi and the ICC delegation, which had not been previously communicated to the Defence or the ICC. Indeed, notwithstanding the fact that trial hearings against the ICC delegation commenced on 17 January 2013, and will apparently continue in May, at no point in time has the Defence ever been officially notified concerning the existence of such hearings, or their content.
16. It was therefore not possible for the Defence to anticipate these issues in its initial Request.
17. The issues concerning the Part 9 cooperation regime and the Pre-Trial Chamber's competence as concerns violations of the Defence and defendant's rights, which have been committed by national authorities, are also matters of fundamental importance to the operation of the Court. If, as is advanced by the Libyan Government, a State can determine *proprio motu* whether it is obliged to cooperate with the Court or respect judicial orders, then the Part 9 cooperation regime becomes meaningless.
18. It would therefore be in the interests of justice for the Pre-Trial Chamber to have the benefit of all relevant arguments, as concerns these issues.

The Pre-Trial Chamber's ongoing competence over matters concerning the rights of the Defence and defendant, notwithstanding the defendant's physical presence in Libya

19. Although the Pre-Trial Chamber previously authorised the Government to defer the surrender of Mr. Gaddafi to the ICC, the temporary deferral of Mr. Gaddafi's surrender does not give the Government *carte blanche* to initiate or continue domestic proceedings against the defendant, or to determine whether to comply with judicial orders or Libya's obligations under the Statute.

20. Notwithstanding Mr. Gaddafi's physical presence in Libya, the ICC Pre-Trial Chamber continues to exercise jurisdiction over him, unless and until the Government is successful in challenging the admissibility of the case.⁴
21. This jurisdiction is not confined to adjudicating matters concerning the admissibility of the case. Although the admissibility challenge had the effect of suspending the Prosecution's investigation of the case, it did not suspend the proceedings before the Court itself.⁵
22. When the Pre-Trial Chamber granted the Government's request to suspend the surrender of Mr. Gaddafi, the Chamber contemporaneously underlined "Libya's continuing obligation to cooperate with the Court, as decided by the Security Council and within the legal framework of Part IX of the Statute".⁶
23. The Chamber also emphasised that Libya must refrain from any actions which could impede, or delay the ability of Libya to comply with its obligations to the Court, including implementation of the surrender request.⁷
24. Although Mr. Gaddafi's physical presence in Libya may increase the Court's reliance on national authorities for the purpose of implementing some of Mr. Gaddafi's rights under the Statute, this does not vest national authorities with the competence for making legal determinations concerning Mr. Gaddafi's rights under the Statute, or to initiate proceedings, which could impede their eventually ability to surrender Mr. Gaddafi to the ICC.
25. In line with the fact that the Pre-Trial Chamber has the exclusive competence to determine the admissibility of the case,⁸ the Pre-Trial Chamber also has the exclusive competence to determine whether, and to what extent, a State has complied with the implementation of an order from the Court, and whether a State is entitled to deny or suspend such cooperation.⁹
26. This is consistent with the fact that in proceedings before the ICC, a participant cannot arrogate to itself the right to decide whether to comply with judicial orders: orders of the Chamber "are binding orders, to be implemented unless and until they are

⁴ ICC-02/11-01/12-2-Red at para. 41.

⁵ ICC-01/09-01/11-62, ICC-01/09-02/11-64, 20 April 2012 at paras. 8-9.

⁶ ICC-01/11-01/11-163 at para. 41. See also ICC-01/11-01/11-269 at para. 21 .

⁷ ICC-01/11-01/11-163 at para. 40.

⁸ ICC-02/04-01/05-377, at paras. 45-46.

⁹ ICC-01/11-01/11-163 at para. 37: See also C. Kress, K. Prost, P. Wilkitzki, ' International Cooperation and Judicial Assistance', in Triffterer (ed.) Commentary On the Rome Statute of the International Criminal Court (Hart Publishers 2008 2nd ed.) p. 1508.

suspended, reversed or amended by the Appeals Chamber or their legal effects are otherwise modified by an appropriate decision of a relevant Chamber.”¹⁰

27. Regulation 108 of the Regulations of the Court further specifies that if a State contests the legality of a request for cooperation, the State must seize the Chamber of the matter. It cannot simply take matters into its own hands.
28. It therefore follows that the temporary deferral of Mr. Gaddafi’s surrender to the Court did not in any way displace the Chamber’s authority to adjudicate whether Libya has complied with its obligations under the Statute, or the Chamber’s power to issue such orders as may be necessary to ensure respect for Mr. Gaddafi’s rights, or compliance with judicial orders.
29. In an earlier decision, the Pre-Trial Chamber had also expressly recognized that

its power to issue such orders or seek such cooperation as may be necessary to protect Mr Gaddafi or assist in the preparation of his defence pursuant to articles 57(3) (b) and (c) of the Statute cannot be made contingent on Libya's compliance with the request for arrest and surrender issued by the Court.¹¹
30. ICC jurisprudence also affirms that a defendant’s entitlement to invoke their rights under the Statute, including Article 67(1), is not contingent on whether the defendant has physically appeared before the Court.¹²
31. Article 57(3)(b) of the Statute vests the Pre-Trial Chamber with a broad power to “seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence”. The preparation of Mr. Gaddafi’s defence necessarily encompasses his right pursuant to Article 67(1)(b) to communicate freely with his Counsel on defence issues, in confidence, without fear of retaliation or reprisals.
32. A corollary of the Pre-Trial Chamber’s powers under Article 57(3)(b) is that the Chamber also has the power to issues such orders or decisions, as may be relevant to a State’s failure to execute orders issued pursuant to Article 57(3)(b).
33. For example, Article 87(7) specifies that as concerns Article 13(b) Security Council referrals, the Court may make a finding of non-cooperation and refer the matter to the Security Council. The Pre-Trial Chamber has already explicitly confirmed that it has

¹⁰ ICC-01/04-01/06-2582 at para. 48.

¹¹ ICC-01/11-01/11-129 at para. 11.

¹² ICC-01/09-02/11-38 at para. 11.

the power to do so in connection with any failure by the Government of Libya to comply with orders of the Chamber.¹³

34. Article 93(1)(l) of the Statute also vests the Chamber with a broad residual power to request any such cooperation or assistance that might be necessary to ensure a State's compliance with an initial request for cooperation or assistance. This would include the power to order Libya to return privileged documents, which had been seized from the Defence in violation of a court order and article 67(1)(b) of the Statute.¹⁴ Such a power would also inhere in Articles 93(1)(d), (h) and (i) of the Statute.
35. The provisions of Part 9 also clearly set out the ICC's competence over domestic proceedings, which are not related to the ICC arrest warrant or an admissibility challenge, but which nonetheless affect the investigations and prosecutions before the ICC.
36. For example, Article 94 of the Statute, provides that:

If the immediate execution of a request would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates, the requested State may postpone the execution of the request for a period of time agreed upon by the Court(emphases added).

37. It is apparent from this article that firstly, the Court can issue orders that may impact on the investigation and prosecution of cases, which do not concern the same subject matter as the Court, and secondly, that the ICC retains the competence for determining if a State can invoke this provision to defer cooperation with the Court, and the duration of the suspension.¹⁵
38. The Government's argument that the Pre-Trial Chamber should reject the Defence request to return privilege documents on the grounds that such matters fall within the competence of Libyan courts to determine, and do not fall within the admissibility proceedings before the ICC,¹⁶ are thus clearly specious and lacking in any legal foundation.

¹³ ICC-01/11-01/11-100 at para. 19, citing ICC-02/05-01/07-57.

¹⁴ Although Article 93(4) permits a State to invoke Article 72 in order to deny a request for cooperation if it concerns the production of documents, the ambit of Article 72 is strictly limited to "documents of a State": i.e. documents authored or originated by a State.

¹⁵ See also ICC-01/11-01/11-72.

¹⁶ ICC-0111-01/11-271 at para. 11.

39. Part 9 of the Statute also sets out a very specific regime, which must be followed in the event that national authorities wish to pursue the defendant for crimes falling outside of the ICC arrest warrant.
40. Article 89(4) of the Statute requires the State to firstly, consent to the surrender of the defendant to the ICC, and secondly, consult with the Court concerning the modalities of pursuing such domestic proceedings.
41. At no point in time has the Government ever indicated to the ICC that it would be willing to implement the Court's surrender request. The Government also clearly failed to consult with the Court, even going so far as to mislead the Court in relation to its intention to instigate proceedings against Mr. Gaddafi for the events in Zintan.¹⁷
42. By failing to comply with these requirements, the initiation of domestic proceedings against Mr. Gaddafi are *ipso facto* a violation of the Government's obligations to the Court, and should therefore be immediately terminated.
43. Since Article 89(4) vests the ICC with the ultimate authority for determining the length of any deferral of the defendant's surrender, it also gives the Pre-Trial Chamber the corollary power to order the immediate surrender of the defendant to the Court. Such a measure is particularly apt as concerns abusive prosecutions, which could potentially frustrate the ability of the Court to exercise its jurisdiction over the case.
44. Article 89(4) also regulates the situation of domestic proceedings, which were initiated prior to the receipt of the Court's surrender request. Neither Article 89(4) nor any other provisions of Part 9 permit a State to initiate proceedings against a defendant in relation to events, which postdate the issuance of a surrender request. The only possibility for such prosecutions would be pursuant to Article 70 of the Statute (offences against the administration of justice), in conjunction with Rule 162 of the Rules of Procedure and Evidence. Critically, Rule 162 specifies that it is for the ICC Chamber to determine whether it should exercise jurisdiction, or defer the matter to national courts.
45. Further protection is accorded to the defendant by virtue of Article 48(4) of the Statute, which provides that "any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on privileges and immunities of the Court."

¹⁷ ICC-01/11-01/11-251 at para. 3.

46. As the defendant, who has a right to effectively participate in his case, Mr. Gaddafi is clearly a person who is required to be present at the seat of the Court.¹⁸ Critically, the operation of Article 48(4) is not contingent on the person in question actually being present at the seat of the Court; its protection extends to any person who is ‘required to be present’.¹⁹
47. The ICTY Appeals Chambers has clarified firstly, that the phrase ‘other persons required to be present at the Court’ should be interpreted in conjunction with the phrase “necessary for the proper functioning”, and as such, should encompass persons, who play a key role in the judicial proceedings before the Court, and secondly, that in order for such protection to be effective, it cannot be limited to the time period when the person is physically present at the seat of the Court.²⁰
48. Moreover, as noted above, ICC jurisprudence has emphasized that the rights of the defendant must be interpreted in an effective manner, and that as such, the implementation of key Statutory rights cannot be made contingent on whether a defendant, who is the subject of an arrest warrant or summons, has first appeared before the Court.²¹
49. Clearly, the proper functioning of the Court requires that a defendant should be able to communicate freely with his counsel on Defence matters, without fear of retaliation or prosecution by domestic authorities.²² This is particularly the case as concerns communications, which occurred within the context of an official ICC mission, which was ordered by the Chamber.
50. In this connection, Article 70(1) of the Statute expressly provides that the following constitutes an offence against the administration of justice: “retaliating against a witness for giving testimony”.²³ The Defence directly relied on Mr. Gaddafi’s observations in order to formulate its submissions and reports to the Court, and

¹⁸ The equivalent Statutory provisions of the ICTR and ICTY concerning privileges and immunities (Article 28(4) and Article 30(4) respectively) expressly cite the accused as an example of a person, who is required to be present at the seat of the Court.

¹⁹ This interpretation is supported by the terms of Article 22(1) of the Agreement on the Privileges and Immunities of the Court, which explicitly extends protection to scenarios, in which persons are not physically present at the court, for example, time spent on journeys in connection with a person’s appearance before the Court.

²⁰ 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, at paras. 27 -33. See also paragraph 7 of Annex A.

²¹ ICC-01/11-01/11-129 at para. 11; ICC-01/09-02/11-38 at para. 11.

²² This is consistent with the findings of the ICTY Appeals Chamber in the above-cited Gotovina decision, at para. 31.

²³ Article 70(1)(c) of the Statute.

attempted to obtain a statement from Mr. Gaddafi, which was illegally seized during the course of a privileged meeting. Mr. Gaddafi can thus be considered as a witness, who is now the subject of retaliatory measures.

51. It can be extrapolated from the express inclusion of such actions as an offence against the administration of the Court that it is necessary for the functioning of the Court that such actions should not occur. It therefore follows that in determining the specific parameters of the treatment, which should be accorded to Mr. Gaddafi, in order to ensure the “proper functioning of the Court”, the Chamber must ensure at a minimum, that he is protected from any retaliation, which concerns his attempt to provide instructions or a statement to his Counsel.
52. Further guidance concerning the appropriate scope of Mr. Gaddafi’s functional immunity can be gleaned from Articles 20 and 22(1) of the Agreement on Privileges and Immunities, which are incorporated by reference into Article 48(4) through the phrase “in accordance with the agreement on the privileges and immunities of the Court.” Article 20(1)(c) specifically entitles Mr. Gaddafi to:

Immunity from legal process of every kind in respect of words spoken or written and all acts performed by them in the course of their appearance before the Court, which immunity shall continue to be accorded even after their appearance before the Court.

53. Mr. Gaddafi’s meeting with the ICC delegation, within the parameters of a mission ordered by the Pre-Trial Chamber, constitutes an ‘appearance before the Court’. This immunity also applies in connection with any “time spent in connection with time spent on journeys in connection with their appearance before the Court”, which would include the time when Mr. Gaddafi is in detention in Libya pending his transfer to the ICC. Article 20(1)(c) therefore protects Mr. Gaddafi from any prosecution for any words spoken or communicated to his Counsel or the ICC delegation.

The Government incorrect conflation of the regime for lifting the privileges and immunities of officials, and the Chamber’s independent power to enforce judicial orders, and sanction non-compliance

54. The proper functioning of the Court requires that it should be the ICC, and not domestic authorities, which should determine whether the actions of the defendant or

counsel were consistent with their duties and entitlements under the Statute, or whether there are grounds for waiving functional immunity.

55. To hold otherwise would completely frustrate the ability of the Court to exercise effective jurisdiction over defendants, who are either waiting surrender to the Court, or who are at liberty, or on conditional release. It would also undermine the Chamber's express stipulation, as recently formulated in the case of Mr. Al-Senussi, that pending the execution of a surrender request, Libya "is also under the corollary obligation not to put in place any action which would frustrate or otherwise hinder or delay the possibility of compliance with its obligations vis-à-vis the Court, including with its duty to surrender Mr Al- Senussi to the Court."²⁴
56. At this point in time, the Court has not waived the privileges and immunities of any persons involved or concerned by the mission to Zintan. The Government has also failed to comply with the procedures for seeking the lifting of such privileges and immunities. The Government cannot simply assert that the privileges and immunities do not apply in public statements or through its actions - it must submit a formal request to the ICC Presidency or Registrar (depending on the object of the request). Unless and until the ICC reaches a determination on such a request, the Court's privileges and immunities continue to apply.
57. It is therefore a complete contravention of Libya's obligations to the Court for the Libyan authorities to initiate and continue domestic proceedings, in connection with the events regarding the mission to Zintan, in full knowledge that the persons involved in the proceedings are currently protected from such domestic processes.²⁵ As will be further elaborated below, the burden does not rest on the Defence to establish that such proceedings are illegal or abusive: the very existence of such proceedings is illegal and abusive.
58. By suggesting that the Defence incorrectly seized the Chamber of its request for the return of privileged documents,²⁶ the Government has also completely conflated the procedures for asserting and waiving privileges and immunities, which are vested in the Presidency and the Registry, and the Chamber's exclusive competence over the execution of judicial orders, and the consequences for non-compliance.

²⁴ ICC-01/11-01/11-269 at para. 36.

²⁵ In June 2012, the current Minister of Justice, Mr. Saleh Marghani, explicitly recognized that the ICC delegation was protected by functional immunity, and should therefore be released. Annex B.

²⁶ ICC-01/11-01/11-274 at para. 10.

59. The potential lifting of the privileges and immunities of the Defence could, in theory, subject Counsel to domestic sanctions or proceedings. It would not, however, exempt the Libyan authorities from their independent duty to comply with judicial orders, nor would it protect Libya from any sanctions or measures that the Chamber might order in connection with Libya's failure to comply with such orders.
60. It is thus entirely misconceived for the Government to aver that matters, which are the subject of binding judicial orders and Statutory obligations, should be farmed out to diplomatic negotiations. Part 9 of the Statute provides that cooperation requests shall be transmitted through diplomatic channels, not that they should be formulated or debated *via* diplomatic channels.²⁷ The Rome Statute further dictates that “[t]he ultimate responsibility for securing justice and ensuring fairness has been given to the Chamber (Article 64(2) of the Statute) and these responsibilities cannot be delegated by, or removed from, the judges”.²⁸
61. Indeed, the Government's suggestion that “the only proper channel for such a request [i.e. the return of illegally seized defence documents] would be the diplomatic one”,²⁹ simply supports the conclusion that the Government may have launched abusive, and entirely unsubstantiated domestic prosecutions in order to obtain diplomatic leverage in connection with its non-compliance regarding the surrender of Mr. Al-Senussi, and the possibility that it will not surrender Mr. Gaddafi, if its admissibility challenged is dismissed.

The Government's fallacious position regarding the burden of proof in relation to the non-implementation of judicial orders, and information, which falls within the exclusive control of the Government

62. The Government's arguments on the legal regime, which should have applied to the 7 June 2012 visit, are confusing, contradictory, and incorrect.
63. On the one hand, the Government claims that such matters should be regulated by national law, although it fails to refer to any specific domestic law provisions, which were violated, or any provisions of domestic law, which would permit the prosecuting authorities and the ICC focal point, Dr. Gehani, to monitor privileged communications and seize Defence documents, in the absence of an order from a competent judicial authority.

²⁷ Article 87(1)(a) of the Statute.

²⁸ ICC-01/04-01/06-2582 at para. 47.

²⁹ ICC-01/1-01/11-271 at para. 7.

64. On the other hand, the Government completely randomly cites the ICTY provisions on detention, and for incomprehensible and illogical reasons, suggests that this legal regime – and not the ICC legal regime - should have been applicable. It is, however, worth noting that even if this regime had been applicable, the actions of the Libyan authorities completely failed to comport to its requirements, and there would have been no basis for seizing the Defence documents in question.³⁰
65. In any case, the Government can not forum shop in a desperate attempt to try to retrospectively create a legal regime, which penalises the conduct of the delegation.
66. When the Government invoked Article 95 of the Statute in order to defer the surrender of Mr. Gaddafi, the Government expressly recognized that Part 9 of the Statute regulated its obligation to cooperate with the Court.
67. This part sets out very specific provisions, which regulate the manner in which States must implement judicial orders. The Statute’s reference to national law in Part 9 was intended to ensure that there was an appropriate vehicle for the implementation of ICC requests, as required by Article 88 of the Statute;³¹ it was not intended to give States an excuse to defeat their cooperation obligations under Part 9.³²
68. For that reason, Part 9 of the cooperation regime imposes a positive obligation on States to draw to the attention of the Court any issues of national law or impediments, which might be relevant to their execution of a request for cooperation.³³ It is not permissible for a State to retrospectively formulate unknown and unspecified domestic procedures, in order to excuse the fact that they failed to comply with judicial requests.

³⁰ Contrary to the Government’s insinuations, it is worth noting that the ICC delegation was subjected to a security screening before the meeting with Mr. Gaddafi. Everything, which went into the meeting with Mr. Gaddafi, had been visually surveyed and approved. The Defence did not take in any concealed devices or concealed documents. The ICTY detention regime does not permit the detention authorities to scrutinise the contents of Defence communications, nor does it permit the authorities to aurally monitor privileged visits. The ability of the detention authorities to potentially regulate privileged communications is strictly circumscribed: there must be prior incidents of abuse, and notice must be given to the defendant and Counsel as concerns the possibility of monitoring. The Libyan authorities have also failed to establish that the contents of monitored communications or seized documents related in any way to attempts to “(i) arrange escape; (ii) interfere with or intimidate a witness; (iii) interfere with the administration of justice or (iv) otherwise disturb the maintenance of security and good order in the detention unit”. Any such monitoring is also conducted by neutral detention authorities, and not by the persons assigned to prosecute the detainees. See Rule 65(B) and (E) of the ICTY Rules of Detention.

³¹ Article 88 provides that “State Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part”.

³² C. Kress, K. Prost, ‘ Article 89’, and ‘ Article 93’, Triffterer (ed.), Commentary On the Rome Statute of the International Criminal Court (Hart Publishers 2008 2nd ed.)at pp. 1541, 1573.

³³ See for example, Article 97.

69. At no point in time prior to, during or subsequent to the mission to Zintan did the Government:

- i. inform the Court of any provisions of national law, which would be relevant to the implementation of the privileged visit.
- ii. request the Chamber to alter the privileged status of the visit in advance, and provide justification for doing so;
- iii. seek the authorization of the Chamber to lift the privileged status of defence documents, and obtain access to them; or
- iv. formally deny the requested assistance of the Court to implement a privileged visit, in accordance with the procedures set out in Part 9 of the Statute.

70. To the contrary, the Government:

- i. failed to respond to an April 2012 Defence inquiry as to whether any particular security regime governed visits to Mr. Gaddafi or the composition of the OPCD delegation;³⁴
- ii. expressed their full willingness to implement the privileged visit and to permit any communications on Defence matters;³⁵
- iii. informed the Chamber and the parties that under Libyan law, Defence counsel have the right to exchange documents with their client on a privileged basis.³⁶
- iv. despite a previous agreement, failed to meet with the ICC Registry Representative in Tripoli for the purposes of explaining the procedures, which should regulate the visit;³⁷ and
- v. seized the mobile phones of the delegation at the very point when the ICC delegation was attempting to communicate with the Presiding Judge for the purpose of discussing the legal regime, which should apply to such situations.³⁸

³⁴ ICC-01/11-01/11-152-AnxB.

³⁵ ICC-01/11-01/11-160.

³⁶ ICC-01/11-01/11-146, Annex A, para 25.

³⁷ ICC-01/11-01/11-190-Red-Corr at p. 262.

³⁸ ICC-01/11-01/11-190-Red-Corr at para. 274.

71. The Government of Libya has never disputed the fact that the visit between the Defence and Mr. Gaddafi was recorded by a hidden video camera, nor have they disputed that they deliberately misled the delegation concerning the linguistic abilities of the guards, who were planted in the meeting between the Defence and Mr. Gaddafi. It is therefore not in dispute that without prior authorisation from the Chamber or even notice to the Chamber, the Government completely failed to implement the Chamber's order to permit the Defence to meet with Mr. Gaddafi on a privileged basis.
72. The Government has also not disputed that it seized documents from Counsel and Mr. Gaddafi, which were either authored by the Defence, or Mr. Gaddafi (such as his signatures), and that it did so, again, without seeking the prior authorisation of the ICC Pre-Trial Chamber.
73. In terms of the latter aspect, if the Libyan authorities were of the view that it required access to Defence documents in order to conduct an investigation or trial, then it should have followed the express procedure set out in Article 93(10) of the Statute, and at the same time, provided justification as to why the privileged nature of the documents should be lifted. The Government completely failed to do so.
74. The burden fell on the Government of Libya to displace the presumption that such documents were covered by legal professional privilege, and to justify why it required access to such information.³⁹ Since the Government has not seized the Chamber with a request to lift the privilege or to obtain access to the documents, it is not necessary for the Defence to establish the illegality or abusive nature of the Government's actions; the mere fact that the Government has failed to comply with ICC procedures renders their actions and possession of these documents, illegal.
75. The Government has also not disputed that the current subject matter of the proceedings against Mr. Gaddafi derive from the 'fruits of the poisonous tree'; i.e. the allegations are based on information obtained from illegally monitoring the visit between the Defence and Mr. Gaddafi, and from illegally seized Defence documents.
76. Apart from the fact that Article 93(10) of the Statute places the burden of seeking access to Defence documentation on the Government, the ability of the Defence to establish the illegality of the actions of the Libyan authorities, and to defend its own actions and those of Mr. Gaddafi, is also completely circumscribed by the fact that the relevant documentation is within the control of the Libyan authorities.

³⁹ ICC-01/09-63 at para. 33.

77. If the Defence had the ability to access and refer to the records concerning the current proceedings against Mr. Gaddafi and the ICC delegation, then it would be able to establish that the domestic prosecution against Mr. Gaddafi for the events in Zintan is completely abusive, and without legal foundation.
78. In particular, the Defence would be able to establish that Mr. Gaddafi is being prosecuted for firstly, the ridiculous charge of playing with a Libyan flag during a privileged (and therefore private) meeting, and secondly, the charge of communicating his concerns regarding the violations of his rights to the ICC *via* his Defence. In terms of the latter aspect, the fact that Mr. Gaddafi referenced information provided to him by Dr. Gehani might be awkward for Dr. Gehani, and it may have impacted on the Government's admissibility challenge, but it certainly did not constitute a violation of national security, or in any way, justify the seizure of Defence documents, and the current vexatious prosecution of Mr. Gaddafi.
79. The Defence would also be able to establish that notwithstanding various public lurid references to escape plans, codes, and violations of national security by a 'notorious Gaddafi regime fugitive', the documents seized from the Defence and defendant were considered to be 'dangerous' because they concerned Mr. Gaddafi's wish to be tried before the ICC, and supported him in this wish.
80. In circumstances in which a State exercises control over information, which is necessary to establish the existence of violations, it is appropriate for the Court to draw adverse inferences against the State.⁴⁰ This is consistent with Article 72 of the Statute, which permits the Court to draw inferences of fact in favour of the defendant in circumstances in which national security prevents the disclosure of relevant information to the Defence, and the jurisprudence of the ICC as concerns the consequences of Article 54(3)(e) non-disclosure.⁴¹
81. Moreover, as the Chamber is aware, although the Government has bandied about references to a 'notorious fugitive' in public documents and media statements in order to undermine the credibility of the Defence, the Government unsuccessfully litigated this issue before the Court in confidential proceedings. The confidentiality of those proceedings had been expressly requested by the Government. It is highly inappropriate for the Government to attempt to impugn publicly the ethical standing of the Defence in relation to such matters, when it is aware that it was unable to sustain a

⁴⁰ Iskandarov v. Russia ECtHR Application no. 17185/05, 23 September 2010, at para. 108.

⁴¹ ICC-01/04-01/06-1980-Anx2, at paras. 47, 51 and 54.

finding of ‘professional misjudgment’, let alone ‘professional misconduct’, when it attempted to litigate the issue before the Court.⁴²

82. Indeed, notwithstanding their lofty protestations that the Government is opposed to litigation by media, that is exactly what the Government has done and continues to do through its defamatory statements in the media over the past 8 months. The Government has been directed on several occasions that if they wish to pursue any allegations concerning the alleged misconduct of Counsel, then the appropriate avenue for doing so is to file a complaint in accordance with the procedures set out in the Code of Professional Conduct for Counsel. Although over eight months has elapsed since the visit to Mr. Gaddafi, the Government has not done so.
83. If the Government persists in its conduct of publicly impugning the reputation and credibility of the Defence in filings before the Court, the Defence may submit a complaint against Counsel for the Government, on the grounds that their actions violate Article 24(4) of the Code of Conduct, namely, that they are directed solely towards harming one or more of the participants in the proceedings.
84. In any case, any wrongdoing on the part of Counsel – real or fabricated – cannot justify the instigation of penal measures against Mr. Gaddafi. The Government has not requested the Court to lift the functional immunity of Mr. Gaddafi as concerns any words and statements made in the course of an official ICC mission, nor has it sought authorisation to conduct such proceedings in accordance with the requirements of Article 89(4) of the Statute.
85. Essentially, in June 2012, the Libyan authorities resorted to the rule of force over the rule of law: they seized Defence documents and detained the ICC delegation because they could, not because they were legally entitled to do so. It is also arguable that they are now continuing with their prosecution of Mr. Gaddafi (and the ICC delegation) because at no point, has the ICC ever condemned their actions - the fact that the Libyan authorities were able to violate Mr. Gaddafi’s and the Defence’s rights with impunity has seemingly given them further impetus to continue with such violations.
86. If the Pre-Trial Chamber were to acquiesce to such actions, or allow the Government’s right to possess such documents to become a *fait accompli*, then it would establish an extremely deleterious precedent for the ICC. On the one hand, it would create a powerful disincentive for governments, such as Kenya, who complied with the correct legal avenues but failed to meet the legal criteria for access, to do so again. On the

⁴² ICC-01/11-01/11-233-Red at paras. 31-32.

other hand, it would send the signal that if States wish to obtain access to sensitive ICC materials concerning the strategies of the parties or the names of their witnesses, then the most effective way to do so is to simply detain ICC officials and take such information by force.

87. As the guarantor of the fairness of the proceedings and the rights of the Defence, it is essential that the Chamber takes measures to ensure that as a participant to the proceedings, the Libyan government adheres to its obligations under the Statute and the correct procedures, and is not rewarded for taking matters into its own hands.

3. Relief sought

88. For the reasons set out above, the Defence for Mr. Saif Al-Islam Gaddafi respectfully requests the Honourable Pre-Trial Chamber to authorise the Defence to submit the present reply.



Xavier-Jean Keïta, Counsel for Mr. Saif Al-Islam Gaddafi

Dated this, 22nd Day of February 2013

At The Hague, The Netherlands