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

Date: 17 May 2012

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernandez de Gurmendi, Presiding Judge
Judge Hans-Peter Kaul
Judge Christine Van den Wyngaert

**SITUATION IN LIBYA
IN THE CASE OF**

***THE PROSECUTOR v.
SAIF AL-ISLAM GADDAFI and ABDULLAH AL-SENUSSI***

Public

**Libyan Government Application for leave to reply to any
Response/s to article 19 admissibility challenge**

Source: The Government of Libya, represented by:
Professor Philippe Sands QC
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Ms Michelle Butler

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

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Ms. Paolina Massida

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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Amicus Curiae

REGISTRY

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Detention Section

Victims Participation and Reparations Section Other

Introduction

1. The Government of Libya files this application for leave to reply to any Response/s to the “Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute” which have been ordered by Pre-Trial Chamber I (“the Chamber”) to be filed on or by 4 June 2012.

Procedural History

2. On 1 May 2012, the government of Libya filed the “Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute” (“Article 19 Application”), wherein it requested that the Chamber postpone execution of the surrender of Mr. Gaddafi to the ICC pursuant to article 95 of the Statute, and declare the case inadmissible.¹
3. On 2 May 2012, the government of Libya filed the “Motion on Behalf of the Government of Libya Requesting an Oral Hearing in Respect of its Admissibility Challenge Pursuant to Article 19 of the Statute”, requesting that the Chamber conduct an oral hearing concerning the Article 19 Application.²
4. On 4 May 2012, the Chamber issued the “Decision on the Conduct of the Proceedings Following the ‘Application on behalf of the Government of Libya pursuant to Article 19 of the Statute’” (“Decision of 4 May 2012”),³ in which it, *inter alia*, accepted that the Article 19 Application relate only to the case against Mr Gaddafi, not Abdullah Al-Senussi; invited the Prosecutor and the OPCD to submit their responses as to the issue of postponement, by 11 May 2012; appointed a legal representative for victims who have already communicated with the Court in relation to the case and instructed the Registrar to provide the OPCV with information and assistance in that regard; and invited the Prosecutor, the OPCD, the Security Council and the OPCV to

¹ Article 19 Application, paras. 107, 108.

² ICC-01/11-01/11-132.

³ ICC-01/11-01/11-134.

submit observations as to the issue of admissibility, no later than 4 June 2012.

Submissions

5. The government of Libya hereby requests leave to reply to any Response/s to the substance of the Article 19 Application, which may be filed by the Prosecutor, the OPCD, the Security Council and the OPCV on or by 4 June 2012. The Libyan government notes that, pursuant to Regulation 24(5), “[p]articipants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations”. The Libyan government also notes that the Chamber possesses discretion in relation to “the procedure to be followed [in an admissibility challenge] and may take appropriate measures for the proper conduct of the proceedings”.⁴ In this regard, the government of Libya is mindful of the need to maintain a balance between ensuring both the expeditious nature of proceedings and fairness to those involved, as required by, *inter alia*, Article 21(3) of the Statute.

6. The jurisprudence of the court provides guidance as to the requirements of procedural fairness in situations such as this. In *Prosecutor v. Ruto et al*, Pre-Trial Chamber II noted that “[i]t must ensure that proceedings are fair in the sense that, *inter alia*, the Government lodging the challenge enjoys the opportunity to respond to the parties' and participants' observations, but equally expeditious in order to avoid unnecessary delays of the entire proceedings”.⁵

7. It is submitted that, as the party bringing the Admissibility Challenge, the Libyan government should be permitted to address the arguments raised in the Response/s, as this would allow the matters raised therein to be addressed

⁴ Rule 58(2).

⁵ *Prosecutor v. Ruto et al.*, “Decision under Regulation 24(5) of the Regulations of the Court on the Motion Submitted on Behalf of the Government of Kenya”, Pre-Trial Chamber II, 2 May 2011 ICC-01/09-01/11-76, para. 15.

by the requesting party, thereby assuring completeness of argumentation. In this regard, the government of Libya notes that it would not use such a Reply to repeat arguments already specifically made in the Admissibility Challenge itself, but rather would confine its submissions to addressing only matters raised by the parties' or participants' Response/s in relation to which the Chamber is not apprised of the Libyan government's submissions. This would ensure that the Chamber will be informed of all of the relevant arguments before it decides on the Admissibility Challenge.

8. As recognised by Pre-Trial Chamber II, an admissibility challenge is a matter of "delicacy [...] which goes to the heart of the States' sovereign rights".⁶ As a result, the fairness of proceedings is especially dependent upon the submission of a Reply from the government of Libya – not only because this would ensure that the Pre-Trial Chamber is apprised of all material arguments, but also because, in relation to matters of such sensitivity, the appearance of fairness requires that every opportunity be made available to the government of the state, whose sovereign rights may be so deeply affected, to make its case known to the Chamber. This argument is amplified even further in the situation where the state concerned is not a party to the Rome Statute, and has an entirely new government. Such a state had no prior opportunity to make arguments as to the Court's jurisdiction over acts alleged to have taken place on its sovereign territory.

9. The Libyan government notes that, pursuant to Regulation 34(c), "[u]nless otherwise provided in the Statute, Rules or these Regulations, or unless otherwise ordered [...] [s]ubject to leave being granted by a Chamber in accordance with regulation 24, sub-regulation 5, a reply shall be filed within 10 days of notification". The government of Libya submits that the present circumstance require the Chamber to order otherwise, in line with Regulation

⁶ *Ibid.*

34(c). Given the need to maintain the expeditious nature of proceedings, the Libyan government submits that it would be appropriate to impose a deadline for this Reply of 18 days following notification of the Response/s to counsel for the Libyan Government.

10. In *Prosecutor v. Ruto et al.*, Pre-Trial Chamber II allowed the government of Kenya ten days to reply, on the basis of Regulation 34(c). However, as the decision was rendered four days after the filing of the Responses, the government was in fact given 15 days between the filing of the Response and the deadline for the filing of its Reply. Moreover, there are several significant reasons why the circumstances in *Prosecutor v. Ruto et al.* must be distinguished from the present situation. In *Prosecutor v. Ruto et al.*, the parties and participants were given 28 days to file Responses, which contrasts with the present case, in which the parties and participants were allowed 34 days.⁷ In such circumstances, the principle of equality of arms militates in favour of a longer deadline than 10 days. Even more importantly, the Libyan Government has a pressing need for additional time in order to carry out translations of: (1) any Response/s filed on or before 4 June 2012; (2) any documents which may be provided by the Libyan Government which relate to matters raised in any Response/s filed on 4 June 2012; and (3) the draft Reply before it is filed with the Court in order to ensure that it is in full conformity with the Libyan Government's instructions. All of these matters are of profound importance to the government of Libya's challenge to the admissibility of the case against Mr. Gaddafi and it is for this reason that 18 days is sought an expeditious, but also fair, timeframe for filing of a reply.

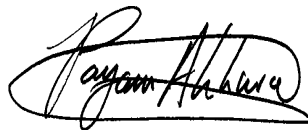
⁷ Decision of 4 May 2012; *Prosecutor v. Ruto et al.*, "Decision under Regulation 24(5) of the Regulations of the Court on the Motion Submitted on Behalf of the Government of Kenya", Pre-Trial Chamber II, 2 May 2011 ICC-01/09-01/11-76.

Conclusion

11. For these reasons, the Government of Libya respectfully requests the Chamber to:

- i. Grant it leave to Reply to any Response/s which may be filed by the Prosecutor, the OPCD, the Security Council and the OPCV on or by 4 June 2012; and
- ii. Set a deadline for this Reply of 18 days following notification of the Response/s to counsel for the Libyan Government.

Respectfully submitted:



Professor Philippe Sands QC

Professor Payam Akhavan

Michelle Butler

Counsel on behalf of the Government of Libya

Dated this 17th day of May 2012

At London, United Kingdom