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

Date: 20 February 2013

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's Request for leave to reply to Responses by OTP, OPCV and
OPCD to Libyan Government's further submissions on issues related to the
admissibility of the case against Saif Al-Islam Gaddafi**

Source: The Government of Libya, represented by:
Professor Ahmed El-Ghani
Professor Philippe Sands QC
Professor Payam Akhavan
Ms Michelle Butler

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

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Counsel for the Defence

Counsel for Abdullah Al-Senussi:

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Mr. Rodney Dixon

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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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Amicus Curiae

REGISTRY

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Mr. Didier Daniel Preira

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Detention Section

Victims Participation and Reparations Section Other

I. SUBMISSIONS

1. Libya files this request for leave to reply to the Responses filed by the Office of the Prosecutor (“OTP”),¹ the Office of Public Counsel for Victims (“OPCV”)² and the Office of Public Counsel for the Defence (“OPCD”)³ to the “Libyan Government’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi”⁴ which were publicly notified to the parties on 12 and 18 February 2013. Confidential versions of the OTP and OPCD Responses were notified to counsel for Libya on 13 and 20 February 2013 respectively.
2. Libya notes that pursuant to Regulation 24(5) of the Regulations of the Court “participants may only reply to a response with the leave of the Chamber”⁵ and that, if such leave is granted, the reply, according to Regulation 34(c) of the Regulations “shall be filed within ten days of notification [...] of the response”.
3. Libya also takes account of the Court’s jurisprudence in which it has acknowledged that in an admissibility challenge a Pre-Trial Chamber “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”.⁶ Indeed, the Pre-Trial Chamber in these very proceedings has previously upheld the appropriateness of authorising Libya to file a reply to responses dealing with admissibility

¹ ICC-01/11-01/11-276.

² ICC-01/11-01/11-279.

³ ICC-01/11-01/11-281.

⁴ ICC-01/11-01/11-258.

⁵ *Prosecutor v Lubanga*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Decision sur la demande de mise en liberte provisoire de Thomas Lubanga Dyilo”, ICC-01/04-01/06-824, 13 February 2007, para. 68.

⁶ *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.

submissions due to Libya's status as the "triggering force and main actor in [admissibility] proceedings".⁷

4. Each of the parties (ie. the OTP, the OPCV and the OPCD) have raised arguments and issues in their Responses which are either not correct or which are raised for the first time and thus necessitate a reply from Libya in order to ensure that the Chamber has all the relevant information and submissions before it prior to issuing a Decision on Libya's admissibility challenge of 1 May 2012. The need to correct inaccuracies or respond to new arguments in the submissions considered by the Pre-Trial Chamber prior to making a decision on admissibility of the case constitutes good cause for the granting of leave to reply.⁸ In the event that leave is granted to reply, Libya would not use any reply to repeat arguments already made in its 23 January 2013 Submissions but rather would confine its submissions to addressing only matters raised by the OTP, OPCV and OPCD Responses which are erroneous or in relation to which the Chamber is not apprised of the Libyan Government's submissions.
5. Examples of submissions to which a reply is warranted include submissions as to:
 - a. the application of procedural protections under Libyan law (OTP);
 - b. the burden and standard of proof in admissibility proceedings (OPCV);
 - c. the alleged premature filing of the admissibility challenge (OPCV);
 - d. the practical application of the same conduct test to the Libyan charges in Mr Gaddafi's case (OPCV);
 - e. the relevance of the role of victims in domestic proceedings when determining an admissibility challenge (OPCV);

⁷ ICC-01/11-01/11-191, para. 8.

⁸ *Prosecutor v. Bemba*, Decision on the Defence's Request for Leave to Reply on the Motion for Provisional Release dated 24 November 2008, 27 November 2008, ICC-01/05-01/08-294; *Prosecutor v. Mbarushimana* Decision on the Prosecution's request for leave to reply to the "Defence Response to Prosecution's Request for the Review of Potentially Privileged Material" 24 November 2011.

- f. the relationship between the Libyan judicial authorities and the authorities detaining Mr Gaddafi in Zintan (OPCV);
 - g. the protections available to witnesses during the trial phase of Libyan proceedings (OPCV);
 - h. the alleged lacunae in information or misleading submissions and evidenced provided by the Libyan Government on a plethora of admissibility related topics as recounted in a detailed 72 page Response (OPCD).
6. 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”.⁹ 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.
7. 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 due to the

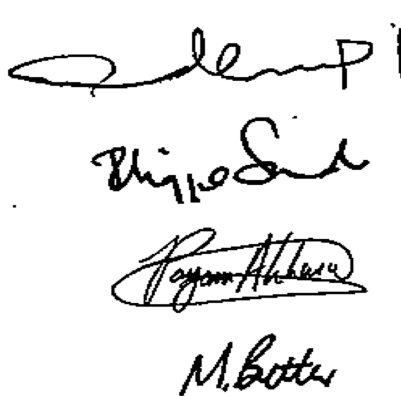
⁹ *Prosecutor v Ruto et al*, “Decision under Regulation 24(5) of the Regulations of the Court on the Motion submitted on behalf of the Government of Kenya”, Pre-Trial Chamber II, 2 May 2011, ICC-01/09-01/11-76, para. 15.

extensive and complex nature of the Responses [the public versions of which are 20 pages (OTP), 26 pages (OPCV) and 72 pages (OPCD) respectively], and the unavoidable delays caused by the need to translate significant parts of such Responses into Arabic in order to obtain instructions upon them, it would be appropriate for the Chamber to allow 18 days as an expeditious, but also fair, reply timeline.

8. Libya therefore respectfully requests that the Pre-Trial Chamber:

- a. Grant it leave to Reply to the OTP, OPCV and OPCD Responses pursuant to Regulation 24(5);
- b. Set a reply deadline of 18 days following notification of the Responses to counsel for the Libyan Government.

Respectfully submitted:



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 Professor Philippe Sands QC
 Professor Payam Akhavan
 Ms Michelle Butler
*Libyan ICC Coordinator and
 Counsel on behalf of the Government of Libya*

Dated this 20th day of February 2013
 At London, United Kingdom