

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **2 April 2012**

**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***

**Confidential**

**Response to the "Application on behalf of the Government of Libya for leave to  
reply to any Response/s to be filed on 30 March 2012 to the "Notification and  
Request by the Government of Libya in response to 'Decision on Libya's  
Submissions regarding the arrest of Saif Al-Islam Gaddafi'"**

**Source:** The Office of Public Counsel for the Defence

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

**The Office of the Prosecutor**

Mr. Luis Moreno-Ocampo, Prosecutor  
Ms. Fatou Bensouda, Deputy Prosecutor

**Counsel for the Defence**

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

Mr. Xavier-Jean Keïta, Principal Counsel  
Ms. Melinda Taylor, Counsel

**States' Representatives**

Mr. Philippe Sands  
Mr. Payam Akhavan  
Ms. Michelle Butler

**Amicus Curiae**

**REGISTRY**

---

**Registrar**

Ms. Silvana Arbia, Registrar

**Deputy Registrar**

Mr. Didier Daniel Pereira, Deputy  
Registrar

**Victims and Witnesses Unit**

**Counsel Support Section**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## 1. Introduction

1. The request of the Libyan authorities for authorisation to file a reply arguably constitutes at best, a belated attempt to mask their lack of diligence in failing to either meet their burden of argumentation or to file their request for postponement contemporaneously with their admissibility challenge, and at worst, a stalling tactic designed to give a veneer of legitimacy to their refusal to surrender Mr. Saif Al Islam Gaddafi to the ICC.
2. In either case, the Pre-Trial Chamber should dismiss the request due to the lack of an objective basis for raising additional arguments at this point in time, the unfairness vis-à-vis the ability of the OPCD to have an effective right of response, and the impact it would have on the ability of the Chamber to dispose of this matter in an expeditious manner.

## 2. Procedural History

3. On 7 March 2012, the Pre-Trial Chamber issued its 'Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi', in which the Chamber found that Article 94 could not be invoked to postpone the surrender of Mr. Gaddafi in order to allow the domestic authorities to investigate Mr. Gaddafi for other crimes.<sup>1</sup> The Chamber therefore ordered the Libyan authorities to:
  - i. make their decision to grant the surrender request and inform the Chamber within seven days of notification of the Arabic translation of the decision;
  - ii. arrange with the Registry for the surrender of Mr. Gaddafi to the ICC; and
  - iii. inform the Court within fourteen days of the notification of the Arabic translation of the arrangements for surrender.

---

<sup>1</sup> ICC-01/11-01/11-72-Conf, 7 March 2012.

4. The Registrar sent the Arabic translation of the decision to the Libyan authorities on 13 March 2012, and the Libyan authorities acknowledged received on 15 March 2012.<sup>2</sup>
5. On 22 March 2012, the Libyan authorities notified the Pre-Trial Chamber of their intention to challenge admissibility, on the grounds that they were investigating Mr. Gaddafi for allegations of crimes against humanity falling under the scope of Article 7 of the Statute (the Notification).<sup>3</sup> The Libyan authorities indicated that they intended to file such a challenge by 30 April 2012, and further requested the Pre-Trial Chamber to suspend the surrender request pursuant to Article 95 of the Statute.
6. On 26 March 2012, the Pre-Trial Chamber noted the need to expedite the proceedings, and therefore ordered the Prosecution and the OPCD to file any responses to the Notification by 30 March 2012.<sup>4</sup>
7. On 27 March 2012, the OPCD requested the Pre-Trial Chamber to make a finding of non-compliance, in light of the fact that the Libyan authorities had failed to notify the Pre-Trial Chamber by 23 March 2012 of their decision, in principle, to surrender Mr. Gaddafi to the ICC.<sup>5</sup> The OPCD further requested the Pre-Trial Chamber to order the Libyan authorities to immediately inform the ICC as to whether they will surrender Mr. Gaddafi to the ICC, and to remind the Libyan authorities of their obligation to inform the Court by 30 March 2012 concerning the modalities of the surrender of Mr. Gaddafi to the ICC.
8. On 30 March 2012, the Libyan authorities filed a request to file a reply to any response filed by the parties.<sup>6</sup>
9. The current response is filed on a confidential basis because it refers to confidential filings. There is, however, nothing in its content which warrants the continuation of this confidentiality classification, if the filings to which it refers are subsequently reclassified as public.

---

<sup>2</sup> ICC-01/11-01/11-83-Conf-Corr-Anx1.

<sup>3</sup> 'Notification and Request by the Government of Libya in Response to 'Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi'', ICC-01/11-01/11-82-Conf.

<sup>4</sup> Order on the filing of responses to the "Notification and Request by the Government of Libya in response to 'Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi'", ICC-01/11-01/11-85-Conf.

<sup>5</sup> ICC-01/11-01/11-87-Conf.

<sup>6</sup> 'Application on behalf of the Government of Libya for leave to reply to any Response/s to be filed on 30 March 2012 to the "Notification and Request by the Government of Libya in response to 'Decision on Libya's Submissions regarding the arrest of Saif Al-Islam Gaddafi'", ICC-01/11-01/11-93-Conf.

### 3. Submissions

10. Replies cannot be used by the parties to cover for their deficiencies in argumentation or lack of diligence. The ability to file a reply is designed to allow parties to address issues, which they were not able to anticipate in their initial filing. The Libyan authorities have failed to put forth any argument as to why they were not in a position to advance a full and detailed exposition concerning the legitimacy of their invocation of Article 95 in their Notification.
11. As the participant bringing the motion, the burden of argumentation fell on the Libyan authorities. The Libyan authorities were also aware from the Pre-Trial Chamber's decision of 7 March 2012 that there were legal issues concerning the interpretation of cooperation clauses such as Article 94 and 95.<sup>7</sup> The Libyan authorities nonetheless chose not to include any elaboration concerning the scope and interpretation of article 95 in their Notification.
12. The lack of any such elaboration was prejudicial to the OPCD as it prevented the OPCD from being able to ascertain and respond to the possible interpretations and arguments, which could be relied upon by the Libyan authorities. If the Libyan authorities are granted a right of reply, then they will have effectively reversed the burden of argumentation by forcing the OPCD to put forward a positive interpretation of Article 95, and then using their reply to controvert this interpretation. Since the OPCD will have no opportunity to respond to these arguments, the OPCD will also have been deprived of an effective opportunity of responding to and challenging any of the substantive legal and procedural arguments adhered to by the Libyan authorities.
13. Finally, given that the parties were only accorded four days in effect to file their responses,<sup>8</sup> the requested period of four days for a reply would have a disproportionate impact on the fairness and expeditiousness of the proceedings. The Chamber's duty to ensure the expeditiousness of the proceedings is heightened when a defendant's key detention rights are at stake. In light of the upcoming Easter recess, affording the Libyan authorities a right of reply would significantly delay the ability of

---

<sup>7</sup> ICC-01/11-01/11-72-Conf.

<sup>8</sup> The Notification was filed on a Friday, and as such, the deadline for responding did not commence to run until the next Monday. The day of filing is also not included in the deadline.

the Chamber to dispose of their initial Notification, and thereby prolong Mr. Saif Al Islam's sufferance of the violations of his rights.

14. As argued in the OPCD Request for an Order of Non-Compliance,<sup>9</sup> the scope of Article 95 is clearly limited to the period during which the admissibility challenge is under consideration by the Court. The OPCD is concerned that the Libyan authorities are attempting to use such a delay to bridge the gap between the date of the filing of their Notification, and the date of the filing of their future admissibility challenge, and thereby render such an argument obsolete. It would be unfair, and have a disproportionate impact on the rights of the Mr. Saif Al Islam Gaddafi, for the Libyan authorities to be given an opportunity to exploit the time lags in responses and replies in order to mask their lack of diligence in filing the request for postponement contemporaneously with their challenge to admissibility.
15. The Libyan authorities have also indicated that if granted authorisation to file a reply, they would respond to the OPCD Request for an Order of Non-Compliance in the same filing. Under Regulation 24(3) of the Regulations of the Court, States do not have a right to respond to the filings of the parties; it falls to the discretion of the Chamber to regulate. The objective of the OPCD Request – to obtain a finding of non-compliance in advance of the Chamber's decision on Article 95 or to expedite the filing schedule for the Article 95 decision – has been rendered largely moot by the absence of a decision on this Request. It is therefore unnecessary and contrary to the expeditiousness of the proceedings to accord the Libyan authorities a right to respond to this Request.

#### **4. Relief Sought**

16. The OPCD respectfully requests the Honourable Pre-Trial Chamber to reject the request of the Libyan authorities to file a reply.

---

<sup>9</sup> ICC-01/11-01/11-87-Conf.



---

Xavier-Jean Keïta, Principal Counsel of the OPCD

Dated this, 2<sup>nd</sup> Day of April 2012

At The Hague, The Netherlands