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**International
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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

**Prosecution's Motion to strike the "Defence Request for Leave to Reply to
Prosecution's Response to the Defence Request for an order for the
commencement of the pre-confirmation phase"**

Source: Office of the Prosecutor

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Introduction

1. On 5 September 2013, the Defence for Saif Al-Islam Gaddafi ("the Defence") filed its Reply to the Prosecution's Response opposing its request to start the pre-confirmation phase. The Defence Reply should be dismissed *in limine*. The Defence advances its arguments without seeking prior leave from the Chamber as required by Regulation 24(5) of the Regulations of the Court. Further, the Defence shows no good cause to warrant its Reply. The Defence develops arguments that should have been included in its original Request, it misrepresents the Prosecution Response and puts forward misleading submissions.

Background

2. On 7 August 2013, the Defence filed its "Request for an order for the commencement of the pre-confirmation phase" whereby it requested disclosure of information pursuant to Article 67(2) and Rules 76 and 77 ("Defence Request").¹
3. On 29 August 2013, the Prosecution filed its response ("Prosecution Response")² in which it opposed the Defence Request on the grounds that (1) the Chamber had already rejected full disclosure in relation to the substantive case against Mr. Gaddafi in light of the factual circumstances of this case;³ that (2) the Defence Request lacked specificity and constituted a full-fledged fishing expedition of any material potentially falling within the purview of Article 67(2) and Rules 76 and 77;⁴ that (3) full disclosure of information pursuant to Article 67(2) and Rules 76 and 77 is not necessary for the exercise

¹ ICC-01/11-01/11-397.

² ICC-01/11-01/11-425-Red.

³ Prosecution Response, paras.10-11 referring to ICC-01/11-01/11-392-Corr, paras.34-35.

⁴ Prosecution Response, paras.12-13.

of the rights of the Defence at this stage;⁵ that (4) the Statute and the Rules do not support the Defence arguments that the pre-confirmation phase may start in the current case,⁶ and that (5) a confirmation hearing *in absentia* is not possible in the instant case.⁷ The Prosecution also noted the consequences that disclosure would entail in terms of workload and security measures⁸ as well as the exceptionality of confirmation hearings *in absentia*.⁹

4. On 4 September 2013, the Defence filed its reply (“Defence Reply”).¹⁰

Submissions

5. The Defence Reply should be dismissed *in limine* because it already contains the merits of its submissions without having sought prior leave from the Chamber. Further, the Defence has failed to show good cause to merit the filing of a reply.

(i) *The Defence advances the merits of its Reply without prior leave from the Chamber*

6. The Defence advances without prior leave from the Chamber “its substantive arguments in order to assist the Chamber to issue an expeditious decision on the Defence Request”.¹¹ The Defence’s attitude shows a patent disregard of the mandatory provisions of the Court, in particular Regulation 24(5), which requires prior leave from the Chamber. Such practice runs contrary to the jurisprudence of the Appeals Chamber which stated that “[t]he Appeals chamber disapproves of a practice of the filing of a substantive reply prior to

⁵ Prosecution Response, paras.14-20.

⁶ Prosecution Response, paras.22-28.

⁷ Prosecution Response, paras.29-32.

⁸ Prosecution Response, para.21.

⁹ Prosecution Response, paras.33-34.

¹⁰ ICC-01/11-01/11-430.

¹¹ Defence Reply, para.12.

leave being granted [...], which in and of itself may also give rise to the rejection of an application for leave".¹² Only on these grounds, the Defence Reply should be rejected.

(ii) The Defence fails to show good cause to obtain leave to reply

7. Moreover, the Defence has not shown good cause to warrant the Chamber's leave to file a reply. First, the Defence rehashes arguments already put forward in its Request and in other filings¹³ and develops arguments that it should have included in its original Request.¹⁴ As noted by the Prosecution,¹⁵ it was striking that the Defence supported its Request on Rule 123 but it did not mention Article 61(2). Now, the Defence tries to amend its mistake and argues that the location of Mr. Gaddafi's detention is secret, that the ICRC and ICC delegations have not been able to visit his detention facility and that therefore he "cannot be found" within the terms of Article 61(2)(b).¹⁶ This is incorrect: it is uncontested throughout the proceedings that Mr. Gaddafi is detained in Zintan where he has received visits of delegations from the ICC, the ICRC and the HRW.¹⁷ In particular, and contrary to the Defence submissions,¹⁸ it has been publicly aired that the ICRC visited Mr. Gaddafi in the location where he is actually detained in Zintan.¹⁹ Thus, Mr. Gaddafi can be found.

8. Further, the Defence argues that "Rule 123(2) implies that holding such consultations is a condition precedent to a determination as to whether the

¹² ICC-01/04-01/06-824, para.68.

¹³ See for example, Defence Reply, paras.19,27-28.

¹⁴ See for example, Defence Reply, paras.22, 31-32, 35-38.

¹⁵ Prosecution Response, para.24.

¹⁶ Defence Reply, para.20.

¹⁷ See for instance, ICC-01/11-01/11-130-Red, para.27, ICC-01/11-01/11-70-Red2, ICC-01/11-01/11-128-Red, para. 7(iv) and para. 7(v).

¹⁸ Defence Reply, para.20.

¹⁹ <http://www.reuters.com/article/2011/11/22/us-libya-saif-redcross-idUSTRE7AL1VK20111122> .

conditions set forth in Article 61(2) are fulfilled”.²⁰ Similarly, this submission should have been included in the original Request. In any event, this argument lacks merit: the consultations under Rule 123(2) are not abstract discussions unrelated to the possibility of convening a confirmation hearing; to the contrary, the consultations seek precisely to determine whether a confirmation hearing can be held because the conditions under Article 61(2)(b) are met.²¹

9. Second, the Defence oversimplifies²² and misrepresents the Prosecution’s arguments.²³ As noted above, while the Prosecution noted the serious consequences that full disclosure would entail in terms of workload and security issues,²⁴ it requested dismissal of the Defence Request on other grounds than a mere increase of work. In particular, the Prosecution argued that the Chamber had already rejected full disclosure in relation to the substantive case against Mr. Gaddafi in light of the factual circumstances of the case.²⁵ The Prosecution then listed the facts upon which the Chamber grounded its ruling, namely that, “Mr Gaddafi's initial appearance [...] has not yet taken place; that the decision determining that the case is admissible, although in full force, is currently under review of the Appeals Chamber; that Libya has long refused to comply with its obligation to afford Mr Gaddafi with the procedure described in article 59 of the Statute; and that the prospect of surrender of the suspect to the Court appears uncertain, also in light of the Chamber's finding that the Libyan authorities lack custody of Mr Gaddafi”.²⁶

²⁰ Defence Reply, para.22.

²¹ Prosecution Response, para.25.

²² Defence Reply, para.9.

²³ For example, the Defence summarises the Prosecution’s arguments as if it had requested dismissal of the Defence Request only on the grounds that there is “no real prospect of having a confirmation hearing, let alone a trial, and it is even unclear whether Mr. Gaddafi would choose Mr. Jones as counsel should he appear before the Court” (Reply, para.13) or “the Prosecution’s reliance on unspecified security concerns and the workload associated with implementing redactions”(Reply, paras.23-25). See also, para.16.

²⁴ Prosecution Response, para.21.

²⁵ Prosecution Response, paras.10-11 referring to ICC-01/11-01/11-392-Corr, paras.34-35.

²⁶ Prosecution Response, para.11 referring to ICC-01/11-01/11-392-Corr, para.35.

The Defence now appears to challenge these findings²⁷ and indicates that they are contrary to the Appeals Chamber jurisprudence.²⁸

10. Moreover, the Prosecution also opposed the Defence Request on the grounds that it lacked specificity and constituted a full-fledged fishing expedition of any material potentially falling within the purview of Article 67(2) and Rules 76 and 77,²⁹ and that full disclosure of information pursuant to Article 67(2) and Rules 76 and 77 is not necessary for the exercise of the rights of the Defence at this stage.³⁰ The Defence fails to acknowledge and rebut these arguments in its Reply.
11. Third, the Defence advances new arguments which are incorrect. For example and contrary to the Defence submissions, the Prosecution did not acknowledge in its Response that “the public convocation of [...] a [confirmation] hearing could enhance the likelihood of the accused’s arrest”.³¹ The Prosecution precisely noted that Rule 61 hearings at the ICTY sought publicity of the arrest warrants but that such a need does not arise at the ICC because the arrest warrants, if unsealed as in the instant case, are already publicly known.
12. Further, the Defence submission that the Prosecution’s opposition to its request for disclosure has the effect of prolonging the detention of Mr. Gaddafi is unsustainable and hardly compatible with Articles 7, 24 and 27 of the Code of Professional Conduct³² which obligates counsel to “act fairly, in good faith and courteously” and to “not deceive or knowingly mislead the Court”. Mr. Gaddafi is not held in Zintan at the behest of the Court. Thus,

²⁷ Defence Reply, para.16.

²⁸ Defence Reply, para.17.

²⁹ Prosecution Response, paras.12-13.

³⁰ Prosecution Response, paras.14-20.

³¹ Defence Reply, para.18 referring to Prosecution Response, para.34.

³² ICC-ASP/4/Res.1.

any parallelism that the Defence tries to draw from the *Barayagwiza* case is wrong and misleading.³³

Relief Sought

13. For the foregoing, the Prosecution requests that the Chamber dismisses the Defence Reply without entertaining its merits.



Fatou Bensouda, Prosecutor

Dated 6th of September 2013
At The Hague, the Netherlands

³³ *Barayagwiza v. The Prosecutor*, Appeals Chamber Decision, 3 November 1999, paras. 43-44. See <http://www.unict.org/Portals/0/Case/English/Barayagwiza/decisions/dcs991103.pdf>