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

Date: 26 March 2014

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 Response to the Gaddafi Defence's "Request for Leave to Reply to Responses to its "Request for leave to appeal the Pre-Trial Chamber's failure to issue a decision""

Source: The Government of Libya in the case of Mr Saif Al-Islam Gaddafi represented by:
Professor Ahmed El-Gehani
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:

The Office of the Prosecutor

Ms. Fatou Bensouda

Counsel for the Defence

Counsel for Saif Al-Islam Gaddafi

Mr. John R.W.D Jones QC

Ms. Sarah Bafadhel

Counsel for Abdullah Al-Senussi:

Mr. Ben Emmerson QC

Mr. Rodney Dixon

Ms. Amal Alamuddin

Mr. Anthony Kelly

Professor William Schabas

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

Ms. Paolina Massidda

Ms. Sarah Pellet

Mr. Mohamed Abdou

The Office of Public Counsel for the Defence

State's Representatives

Professor Ahmed El-Ghani

Professor Philippe Sands QC

Professor Payam Akhavan

Ms. Michelle Butler

Amicus Curiae

REGISTRY

Registrar

Mr. Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Section
Other**

I. INTRODUCTION

1. On 10th March 2014, the Gaddafi Defence filed its “Request for Leave to Appeal the Pre-Trial Chamber’s Failure to Issue a Decision”¹ (“Request for leave to appeal”). The Libyan Government and the Prosecution each submitted responses to this Request on 14th March 2014 (“the Responses”).² On 20th March 2014, the Gaddafi Defence filed its Defence Request for Leave to Reply with Annex A (“Request to reply”).³
2. The Government hereby submits that the Chamber should reject the Request on the following basis: (i) replies were not envisaged by the drafters of the ICC Rules and Regulations for requests for leave to appeal; (ii) even if replies were permissible in this context, the Defence have included the merits of the Reply within the Request thereby attempting to circumvent due process; and (ii) the Defence application for leave to reply does not demonstrate good cause to justify the filing of a reply.

II. SUBMISSIONS

A. *REPLIES NOT ENVISAGED FOR APPLICATIONS FOR LEAVE TO APPEAL*

3. It is clear from the relevant ICC Rules and Regulations that the drafters intended that requests for leave to appeal should be resolved in an expeditious manner. For example, the deadline for filing such requests is five days (Rule 155(1)), and responses must be filed within three days of notification (Regulation 65(3) of the Regulations of the Court).
4. It is also arguable that the fact that the drafters did not include a specific deadline for replies within either Rule 155(1) or Regulation 65(3) evidences their intention to exclude replies from the framework of the certification for appeal process. Indeed, the general deadline for filing replies is ten days, which is clearly excessive when compared to the time allocated for the application and response. Applying the

¹ ICC-01/11-01/11-522.

² ICC-01/11-01/11-526 and ICC-01/11-01/11-527.

³ ICC-01/11-01/11-531.

general regime of Regulations 24(5) and 34(c) to the *lex specialis* of Rule 155 and Regulation 65(3) would therefore frustrate the overriding objective of ensuring that interlocutory appeals can be disposed of in a timely manner.

5. In any case, the expeditiousness of the proceedings is a factor which should be taken into consideration by the Chamber in deciding whether it is appropriate to invoke Regulation 24(5) of the Regulations of the Court, and authorise a participant to file a reply to a Rule 155 request for leave to appeal.

B. MERITS OF REPLY IMPROPERLY INCLUDED IN APPLICATION FOR LEAVE TO REPLY

6. Despite the Appeals Chamber's express disapproval of the practice of filing a substantive reply prior to leave being granted and warning that this practice may, in and of itself, give rise to the rejection of an application for leave,⁴ the Request to reply includes the substantive reply arguments within it.⁵ The entirety of the Request to reply is made up of 15 pages of detailed submissions in effect bypassing the proper authorisation process by placing substantive arguments immediately before the Chamber, with a view to influencing the decision on the Request for leave to appeal.
7. The Defence is fully aware of the Appeal Chamber's express denunciation of this practice, which has been drawn to their attention by the Government on several occasions. Following previous attempts to circumvent due process, the *Lubanga* Decision has been expressly brought to the attention of the Defence in at least one previous filing.⁶ As such, the Chamber should take cognisance of this emerging pattern and summarily reject the Request to reply.

⁴ Prosecutor v Lubanga, Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber entitled a Decision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyiloo, ICC01/04-01/06-824, 13 February 2007 ("The Lubanga Decision"), para 68.

⁵ Request to Reply, paragraphs 1-42.

⁶ ICC-01/11-01/11-416.

C. NO GOOD CAUSE SHOWN TO WARRANT A REPLY

8. In general, in order to obtain authorization to file a reply, participants also need to demonstrate good cause,⁷ or that there was an issue that arose from the response, which could not have been anticipated in their initial submissions.⁸ The Defence have included no such argumentation, and has not even attempted to explain how the filing of a reply would advance or assist the Chamber's ability to adjudicate on its Request for leave to appeal. This failure of reasoning is in itself grounds for dismissal of the Request to reply
9. Even if such argumentation had been included, allowing the applicant the opportunity to reply does not always enhance the fairness of the proceedings. As found by the Appeals Chamber, it is not appropriate or necessary to grant leave to file a reply in relation to issues that "are already before the Appeals Chamber or, in the view of the Appeals Chamber, appear to be mere disagreements with [another party's] arguments."⁹
10. Moreover, as the originator of the Request for leave to appeal, the Defence had a full opportunity to address these issues in its original pleading. If the Defence did not address a certain matter in its submissions, it was because it chose not to do so, presumably for strategic reasons. An applicant may not, for example, deliberately refrain from making an argument on a foreseeable issue.¹⁰ Recourse to a reply in respect of such arguments or information is not only a waste of judicial time, it "deprive[s] the [responding party] of its right to respond."¹¹ A request should not be written in a deliberately vague manner so as to gain a tactical advantage, by depriving the respondents of a proper and full opportunity to respond.

⁷ See for example, *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.

⁸ *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.

⁹ ICC-01/09-01/11-239 at para 10.

¹⁰ ICC-01/04-01/07-2792.

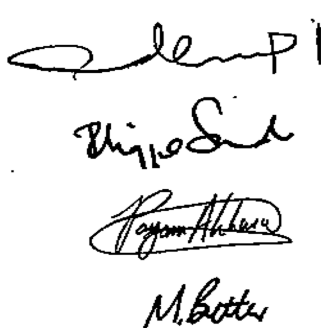
¹¹ *M. Nikolic v The Prosecutor* (IT-02-60/1-A), Decision on Prosecution's Motion to Strike, 20 January 2005, para 32.

11. The issues at stake in the request to reply have all been dealt with either in the Request for leave to appeal and the Responses or in the ongoing appeal proceedings in respect of the Admissibility Decision, of which the Appeals Chamber is already seized. In its Request to reply, the Defence improperly seeks to adduce further legal and factual submissions on these issues (as well as further purported evidence in support of them).¹² This appears to be an attempt to have the Pre-Trial Chamber express a view on the merits of an ongoing appeal after the pleadings for that appeal have closed and before a decision is issued by the Appeals Chamber. Such a practice is plainly undesirable and not at all conducive to the interests of justice.

III. RELIEF SOUGHT

12. For the reasons set out above, the Libyan Government requests the Honourable Pre-Trial Chamber to reject the Request to reply.

Respectfully submitted:



 Professor Ahmed El-Ghani
 Professor Philippe Sands QC
 Professor Payam Akhavan
 Ms Michelle Butler

ICC Focal Point and Counsel on behalf of the Government of Libya
 (in the proceedings relating to Saif Al-Islam Gaddafi)

Dated this 26th day of March 2014
 At London, United Kingdom

¹² See for example, Request to Reply, paragraphs 14-15, 37-41 and Annex A.