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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

OPCV's response to the "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: Office of Public Counsel for Victims

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

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I. PROCEDURAL HISTORY

1. On 7 December 2012, the Pre-Trial Chamber (“the Chamber”) issued the “Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi”,¹ in which it requested the Government of Libya to submit additional information and evidence on several issues concerning the admissibility of this case by 23 January 2013, and authorised, *inter alia*, the Office of the Prosecution, the OPCD and the OPCV to respond to these submissions by 11 February 2013.²

2. On 23 January 2013 the Libyan Government filed further submissions (the “Libya’s Submissions”) together with 23 annexes.³

3. On 7 February 2013, the Chamber issued the “Decision on the ‘Libyan Government’s proposed redactions to ICC-01/01-01/11-258-Conf-Exp and Annexes 4, 5, 6, 7, 15, 16 and 17’”,⁴ granting the OPCV and the OPCD an extension of time to file their responses to Libya’s Submissions by 18 February 2013.

4. The responses to the Libya’s Submissions by the Prosecutor,⁵ the OPCV,⁶ and by the OPCD⁷ (collectively the “Responses”) were respectively filed on 12 February 2013, 18 February 2013 and 19 February 2013.

¹ See the “Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi”, No. ICC-01/11-01/11-239, 7 December 2012.

² *Idem*, p. 23.

³ See the “Libyan Government’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi”, No. ICC-01/11-01/11-258-Red2, 23 January 2013 (“Libya’s Submissions”).

⁴ See the “Decision on the ‘Libyan Government’s proposed redactions to ICC-01/01-01/11-258-Conf-Exp and Annexes 4, 5, 6, 7, 15, 16 and 17’”, No. ICC-01/11-01/11-271-Red, 7 February 2013.

⁵ See the “Prosecution’s Response to ‘Libyan Government’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi’”, No. ICC-01/11-01/11-276-Conf-Red, 12 February 2013.

⁶ See the “OPCV’s observations on ‘Libyan Government’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi’”, No. ICC-01/01-01/11-279, 18 February 2013.

5. On 20 February 2013, the Libyan Government filed a request seeking leave to reply to the Responses submitted by the OTP, OPCV and OPCD within 18 days of notification of the Responses (the “Request”).⁸

6. The Principal Counsel of the OPCV files her response on behalf of victim-applicants in this case and generally on behalf of victims who have communicated with the Court in the case in accordance with the Decision.

II. SUBMISSIONS

7. Leave to reply has been granted as a matter of discretion in previous cases where the moving party had shown “good cause”.⁹ The main reason for denying a request for reply is the case where the moving party does not “*avail itself of the opportunity to submit observations [...] despite having been invited to do so by the Chamber*”.¹⁰ Therefore, allowing a party to reply does not always enhance the fairness of the proceedings, contrary to the Government’s assertions.¹¹

8. According to Libya, the request for further submissions is necessitated by the “*extensive and complex nature of the Responses*” received.¹² The Government advances two main grounds for its Request. It asserts that the Request, if granted, will enable Libya to (i) respond to new arguments which are raised for the first

⁷ See the “Response to the “Libyan Government’s further submissions on issues related to admissibility of the case against Saif Al-Islam Gaddafi””, No. ICC-01/11-01/11-281-Red2, 19 February 2013, p. 72.

⁸ See the “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”, No. ICC-01/11-01/11-283, 20 February 2013. (the “Request”)

⁹ See *inter alia* the “Decision on the Defence’s Request for Leave to Reply on the Motion for Provisional Release dated 24 November 2008”, No. ICC-01/05-01/08-294, 27 November 2008, par. 3 and the “Redacted Order on the defence Application for Leave to Reply to the “Prosecution’s Response to the ‘Defence Request for a Temporary Stay of Proceedings’ and to the ‘Defence Request for an Oral Hearing’”, No. ICC-02/05-03/09-294-Red, 16 February 2012, par. 5

¹⁰ See the “Decision on Defence Request for Leave to Submit a Reply”, No. ICC-01/04-01/07-2792, 22 March 2011, par. 8.

¹¹ See the Request, *supra* note 8, paras. 3, 6 and 7.

¹² *Idem*, par. 7.

time¹³ and, (ii) correct alleged inaccuracies contained in the Responses filed by the parties and participants.¹⁴

9. The Principal Counsel submit that, at this advanced stage of the admissibility proceedings, the Request is not warranted and Libya has had ample opportunities to “*avail itself of the opportunity to submit observations*”¹⁵ be it in its initial challenge,¹⁶ during court’s hearings¹⁷ or in its further submissions.¹⁸

10. As far as the Response of the OPCV is concerned, the Principal Counsel contends that the issues developed therein were addressing directly the actual content of Libya’s Submissions, be it in the submissions themselves or in the documents annexed as evidenced by abundant references to Libya’s Submissions throughout its observations. But generally speaking, the issues identified in the Request have been dealt with extensively, through oral and written submissions. In particular the following issues: (i) the burden and standard of proof in admissibility proceedings;¹⁹ (ii) the application of the same conduct test to the Libyan charges in Mr Gaddafi’s case;²⁰ (iii) the relationship between the Libyan

¹³ *Ibid.*, par. 4.

¹⁴ *Ibid.*

¹⁵ See the “Decision on Defence Request for Leave to Submit a Reply”, *supra* note 10, par. 8.

¹⁶ See the “Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute”, No. ICC-01/11-01/11-130-Red, 1 May 2012 (dated 30 April 2012).

¹⁷ See the transcripts of the hearing held on 9 and 10 October 2012, No. ICC-01/11-01/11-T-2-Red-ENG WT and No. ICC-01/11-01/11-T-3-Red-ENG WT.

¹⁸ See Libya’s Submissions, *supra* note 3.

¹⁹ See *inter alia* the “Application on behalf of the Government of Libya pursuant to Article 19 of the Statute”, *supra* note 16, paras. 88 to 91; the “Observations on behalf of victims on the Government of Libya’s Application pursuant to Article 19 of the Rome Statute”, No. ICC-01/11-01/11-166-Red, 4 June 2012, paras. 15 *et seq.*; Libya’s submissions, *supra* note 3, paras. 11 to 26 and the “OPCV’s observations on ‘Libyan Government’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi’”, *supra* note 6, paras. 21-38.

²⁰ See *inter alia* the “Application on behalf of the Government of Libya pursuant to Article 19 of the Statute”, *supra* note 16, paras. 82 to 87; the “Observations on behalf of victims on the Government of Libya’s Application pursuant to Article 19 of the Rome Statute”, *supra* note 19, paras. 17 to 26; Libya’s submissions, *supra* note 3, par. 27 and the “OPCV’s observations on ‘Libyan Government’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi’”, *supra* note 6, paras. 39 *et seq.*

judicial authorities and the authorities detaining Mr Gaddafi in Zintan;²¹ (iv) the allegations concerning the lacunae in information or misleading submissions and evidence provided by the Libyan Government²² and (v) the premature filing of the admissibility challenge.²³ With regard to the issues dealing with victims and witnesses, the observations of the OPCV were only warranted by the content of the some annexes submitted by Libya who did not deem it necessary to comment on in their Submissions.

11. Accordingly, it cannot be reasonably argued that some observations made by the Office *“were raised for the first time and thus necessitate a reply from Lybia in order to ensure that the Chamber has all relevant information before it prior to issuing a Decision on Libya’s admissibility Challenge of 1 May 2012”*²⁴. It is submitted that a party should not be permitted to cure the defects related to the vagueness or omissions of its primary filings or oral submissions, through the filing of a reply.

12. Furthermore, the Principal Counsel contends that the Government’s Request merely seeks to exceed the proper scope of reply. Indeed, the Government seek to address *“arguments and issues contained in the Responses which in its opinion are either not correct or [...] necessitate a reply from Lybia in order to ensure that the Chamber has all the relevant information”* prior to deciding on the Admissibility

²¹ See *inter alia* the “Application on behalf of the Government of Libya pursuant to Article 19 of the Statute”, *supra* note 16, paras. 35 *et seq.*; the “Observations on behalf of victims on the Government of Libya’s Application pursuant to Article 19 of the Rome Statute”, *supra* note 19, paras. 46 to 49; Lybia’s submissions, *supra* note 3, paras. 98 to 102 and the “OPCV’s observations on ‘Libyan Government’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi’”, *supra* note 6, paras. 62 to 64.

²² See *inter alia* the “Application on behalf of the Government of Libya pursuant to Article 19 of the Statute”, *supra* note 16, paras. 38 and 94; Lybia’s submissions, *supra* note 3, paras. 58 *et seq.*; the “Libyan Government’s Response to Urgent Defence Request of 21 January 2013”, No. ICC-01/11-01/11-274, 11 February 2013 and “Libyan Government Response to Defence Request”, No. ICC-01/11-01/11-160, 30 May 2012.

²³ This issue was previously raised during the hearing held on 9 and 10 October 2012. See No. ICC-01/11-01/11-T-2-red-ENG WT, 9 October 2012, p. 66, lines 17 *et seq.* and No. ICC-01/11-01/11-T-3-Red-ENG WT, 10 October 2012, p. 44 line 6 to p. 45 line 2.

²⁴ See the Request, *supra* note 8, par. 4.

Challenge,²⁵ and in doing so present new factual information. The Government's intention to proffer new factual information is made even clearer if one considers the list of issues likely to be addressed in the proposed reply.²⁶

13. For instance, Libya proposes to reply to submissions pertaining to "*the relationship between the Libyan judicial authorities and the authorities detaining Mr Gaddafi in Zintan*".²⁷ It also proposes to respond to allegations concerning "*lacunae in information*" and "*misleading submissions*".²⁸ This, no doubt, implies that the Government wishes to be granted wide latitude to proffer new facts and evidence, or even to be permitted to alter the factual basis of the Admissibility Challenge in violation of rule 58(1) of the Rules of Procedure and Evidence.

14. Moreover, the Principal Counsel notes that, on 7 December 2012, the Chamber requested Libya to present an update on: "(i) *who has custody of Mr. Gaddafi at present*; (ii) *whether any agreement has been reached as to the transfer of Mr Gaddafi to Tripoli and, if so, when this transfer is expected to take place*".²⁹ Despite the clear and detailed instructions by the Chamber, Libya's Submissions failed to address any of these issues, which were deemed, by the Chamber, essential for the determination of the admissibility of this case.

15. In the circumstances, the Government assertion that it did not have "*prior opportunity to make arguments*"³⁰ on these issues is wholly unfounded. A reply may not serve as a mean to gain tactical advantages when it deliberately refrains from providing information or making arguments on foreseeable issues.³¹

²⁵ See the Request, *supra* note 8, par. 4.

²⁶ *Idem*, par. 5.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ See the "Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", *supra* note 1, par. 45.

³⁰ See the Request, *supra* note 8, par. 6.

³¹ See the "Decision on Defence Request for Leave to Submit a Reply", No. ICC-01/04-01/07-2792, 22 March 2011, paras. 6 and 8 in which Trial Chamber II denied leave considering itself "*sufficiently*

16. Incidentally the Principal Counsel notes that Libya is merely providing “[e]xample of submissions to which a reply is warranted”.³² In this regard she contends that a filing should not be written in a deliberately vague manner so as to deprive the respondents of a proper and full opportunity to respond.

17. The Principal Counsel therefore submits that the Government’s Request should be denied since no “good cause” has been shown.

FOR THE FOREGOING REASONS the Principal Counsel of the OPCV, acting as Legal Representative of victims for the purpose of Article 19 proceedings, respectfully requests the Pre-Trial Chamber to reject the Government’s Request since no good cause has been shown.

In the event that the Chamber is minded to grant the Request, the Principal Counsel respectfully requests that the Libyan Government be precluded from presenting new factual information or evidence and to confine its reply to the specific issues raised in the Responses.³³



Paolina Massidda
Principal Counsel

Dated this 22th day of February 2013

At The Hague, The Netherlands

informed” of the issues based on the pleading and that no “*new issue*” had been raised in the responses.

³² See the Request, *supra* note 8, par. 5.

³³ See the “Decision on the ‘Libyan Government Application for leave to reply to any Response/s to article 19 admissibility challenge’”, No. ICC-01/11-01/11-191, 26 July 2012, par. 8.