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PRE-TRIAL CHAMBER I

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Sylvia Steiner
Judge Cuno Tarfusser

SITUATION IN THE LIBYAN ARAB JAMAHIRIYA

Public

**Prosecution's motion to strike OPCD's "Request for Leave to Reply to
Prosecution's Response to OPCD's 'Requête relative aux propos publics de
Monsieur le Procureur et au respect de la présomption d'innocence'"**

Source: Office of the Prosecutor

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Submissions

1. On 16 May 2011, the Prosecution filed its Application pursuant to Article 58 for the issuance of warrants of arrest for Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI (the “Application”).¹
2. On 25 May 2011, the Office of Public Counsel for the Defence (“OPCD”) filed its request “Requête relative aux propos publics de Monsieur le Procureur et au respect de la présomption d’innocence” (“OPCD’s Request”).² The Prosecution responded to OPCD’s Request on 16 June 2011 (“Prosecution’s Response”).³
3. On 17 June 2011, OPCD sought leave to reply to the Prosecution’s Response in order to address the issue whether, pursuant to its authority under Regulation 77(4), “OPCD may request the Pre-Trial Chamber to take specific measures, which fall under the competence of the Chamber, in order to protect the rights of the Defence during the initial stages of the proceedings”.⁴
4. The Prosecution notes that although OPCD supposedly seeks prior leave from the Chamber, in fact its filing advances arguments on the merits and addresses at length the above-mentioned issue.⁵ In effect, the application is the Reply; if the application is denied, the arguments nonetheless have been put before the Chamber. This tactic contravenes Regulation 24(5) of the Regulations of the Court and has been repeatedly censured by the Appeals Chamber, which has expressly refused to entertain substantive replies when the requisite prior leave of the Court was not sought or given.⁶

¹ ICC-01/11-4-Conf-Exp. The Prosecution filed a public redacted version on the same day: ICC-01/11-4-Red.

² ICC-01/11-5.

³ ICC-01/11-7.

⁴ ICC-01/11-9 (“OPCD’s Application for Leave to Reply”), para.3.

⁵ The Prosecution notes that OPCD improperly provides substantive submissions with respect to the applicability and scope of Regulation 77(4) to the instant scenario in paras.4 to 11.

⁶ “The Appeals Chamber disapproves of a practice of the filing of a substantive reply prior to leave being granted by the Appeals Chamber, which in and of itself may also give rise to the rejection of an application for leave.” See ICC-01/04-01/06-824 OA7, para.68. Also ICC-01/05-01/08-602 OA2, para.9: “In accordance with rule 103 [...], the submission of substantive observations is only permissible after a Chamber has decided to invite or grant leave to do so. In the present circumstances, Aprocdec submitted substantive observations on the appeal in

5. In addition, the Prosecution submits that the issue for which leave to reply is sought is not a new argument that would justify further submissions under Regulation 24(5).⁷ In fact, OPCD relied on Regulation 77(4) when it filed its Request.⁸ Its failure to consider fully the fundamental issue of its standing to raise its complaints, the issue that it now seeks to advance, cannot be amended with the filing of a reply.⁹ Also, OPCD's Application does not accurately presents the jurisprudence cited. In particular, OPCD asserts that this Chamber has implicitly accepted its standing and entertained the merits of its submissions in the past without requiring that it first obtain leave. This is incorrect. In the decision cited to support this argument the Single Judge of this Chamber clearly stated that "[he] refrain[ed] from addressing the merits of the Request".¹⁰

6. For the above reasons, the Prosecution requests that the Chamber deny and strike OPCD's Application for Leave to Reply and disregard its submissions.



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Prosecutor

Dated this 20th Day of June 2011

At The Hague, the Netherlands

paragraphs 35 through 74 of the application without leave. For that reason, the Appeals Chamber shall disregard the substantive submissions contained in the Amicus Application." Although the latter ruling was made in the context of Rule 103 observations, its rationale equally applies to Regulation 24(5) which also requires leave.

⁷ ICC-01/04-01/06-424 OA3, paras.5-7.

⁸ OPCD's Request, para.3.

⁹ ICC-01/04-01/06-424 OA3, Separate Concurrent Opinion of Judge Pikis, para.1. Judge Pikis stated that failure by a party to deal with an argument in its filing does not qualify it as new subject meriting leave to reply being granted. Note that OPCD's omission to properly ground its standing under Regulation 77(4) is patent in paragraph 12 of its Application for Leave to Reply, whereby OPCD improperly requests that the Chamber consider *proprio motu* the Prosecution's public statements and its submissions even in the case that the Chamber finds that OPCD lacks standing.

¹⁰ OPCD's Application for Leave to Reply, footnote 13, which refers to ICC-02/05-01/09-112.