

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 30 March 2012

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***

Confidential

**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 Government of Libya, represented by:
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

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 Keita, Principal Counsel
Ms. Melinda Taylor, Counsel

States' Representatives

Professor Philippe Sands QC
Professor Payam Akhavan
Ms. Michelle Butler

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Counsel Support Section

Deputy Registrar

Mr. Didier Daniel Pereira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Government of Libya files this application for leave to reply to any Response/s 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'" ("the Libyan Government's Notification and Request"), which have been ordered by Pre-Trial Chamber I ("the Chamber") to be filed on 30 March 2012.
2. The Government is mindful of the expedited timetable for Responses which the Chamber has set down in relation to the Libyan Government's Notification and Request, and accordingly applies for leave to file a reply to any Response/s within 4 days of notification of such Response/s.
3. In the event that leave is granted to Reply, the Government of Libya, in the interests of expedition, intends to respond to the issues raised by the "OPCD Request for the Pre-Trial Chamber to make a finding of non-compliance" filed on 27 March 2012 ("the OPCD Request") within its Reply.

Procedural History

4. On 27 June 2011, the Chamber issued a warrant of arrest against, among others, Saif Al-Islam Gaddafi ("Mr Gaddafi").¹ On 5 July 2011 the Registrar notified the Libyan authorities of a request for cooperation asking for their assistance in arresting Mr Gaddafi and surrendering him to the Court.²
5. On 23 January 2012 the Libyan Authorities sought postponement of the surrender of Mr Gaddafi to the Court pending the completion of national proceedings in relation to other crimes against Mr Gaddafi.³

¹ ICC-01/11-01/11-3.

² ICC-01/11-01/11-5; ICC-01/11-01/11-25-Conf.

³ ICC-01/11-01/11-44, with confidential Annex 1.

6. On 7 March 2012 the Chamber issued the "Decision on Libya's Submissions regarding the arrest of Saif Al-Islam Gaddafi" ("the 7 March 2012 Decision") dismissing the request for postponement and requesting that the Libyan Government make their decision to surrender Mr Gaddafi to the Court and inform the Chamber accordingly within seven days of notification of the Arabic translation of the decision.⁴
7. On 22 March 2012, in the Libyan Government's Notification and Request, the Government notified the Chamber of its intention to challenge the admissibility of the case concerning Mr Gaddafi pursuant to articles 19(2)(b), (5) and (6) of the Rome Statute ("Statute") by 30 April 2012 and requested that, pending a decision on this challenge, the Pre-Trial Chamber suspend its surrender request in relation to Mr Gaddafi in accordance with, *inter alia*, Article 95 of the Statute and Rule 58 of the Rules of Procedure and Evidence.⁵
8. On 26 March 2012 the Chamber issued the "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'''"⁶ ("the Order"). This Order, which was notified to counsel for the Libyan Government on 28 March 2012, provided that "in order to ensure the expeditious conduct of the proceedings, the Chamber considers it appropriate to shorten the deadline for the submission of responses, if any, to the Request of the Government of Libya" and accordingly, ordered "the Prosecutor and the OPCD to file their responses ... by 30 March 2012".
9. On 27 March 2012 the Office of Public Counsel for the Defence ("the OPCD") filed the "OPCD Request for the Pre-Trial Chamber to make a finding of non-

⁴ ICC-01/11-01/11-72-Conf.

⁵ ICC-01/11-01/11-82-Conf.

⁶ ICC-01/11-01/11-85-Conf

compliance”⁷ (“the OPCD Request”), which was notified to counsel for the Government of Libya on 28 March 2012. In the OPCD Request, the OPCD intimated that it intends to file a response to the Libyan Government’s Notification and Request by stating in paragraph 10 that “as will be elaborated in the OPCD’s response on this issue”. The OPCD Request also asks the Chamber to:

“a. Find that the Libyan authorities have failed to comply with the deadline of 23 March 2012 for informing the Court of their decision as to the surrender of Mr Gaddafi to the ICC;

b. Order the Libyan authorities to immediately inform the ICC as to whether they will surrender Mr Gaddafi to the ICC; and

c. 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.

In the alternative, should the Chamber deem it necessary to receive the observations of the parties on the Article 95 postponement before making any decisions on this issue of non-compliance, the OPCD would be willing to file its observations at an earlier date (for example by 28 March 2012) in order to minimise the unnecessary protraction of Mr Gaddafi’s detention in Libya”.

Submissions

10. The Government of Libya hereby applies for leave to Reply to any Responses by the Prosecutor and the OPCD to the Libyan Government’s Notification and Request which are due to be filed on 30 March 2012. Although the Government of Libya does not presently have confirmation as to whether the Prosecutor will be filing a Response, it is clear from the procedural history outlined above that the OPCD does intend to file such a Response.

11. The Government of Libya is taking the somewhat unusual step of filing this

⁷ ICC-01/11-01/11-87-Conf

application for leave to reply in advance of seeing the Response/s to which a Reply is sought to be filed because it is mindful of the expedited timetable which the Chamber has set out in relation to the Libyan Government's Notification and Request. The Government notes the delays which are necessitated by the need for personal service by courier of all confidential filings in this case which results from the Libyan Government not being a formal party to these proceedings and therefore not being granted access to the Court's TRIM record management system. These delays have meant that the Libyan Government was only notified, for the purposes of regulations 31 and 32 of the ICC Regulations of Court, of the Chamber's Order and the OPCD Request two days and one day respectively after their official filing dates.

12. The Libyan Government is therefore concerned that if it were to wait until notification by courier of any Response/s filed by the Prosecutor and OPCD that there would be a real risk that the Chamber may render a decision before the Libyan Government has had the opportunity to file an application for leave to reply and reply. Given the importance of the subject matters under consideration (ie. the anticipated filing of an admissibility challenge by the Libyan Government and the requested surrender of Saif Al-Islam to the Court) - both of which go to the heart of the Libyan Government's sovereign rights under the ICC Statute - such an occurrence would amount to a gross procedural unfairness.

13. The Libyan Government is well versed in the Chamber's duties to balance the competing interests at stake – namely the need to ensure that the proceedings are fair in the sense that, *inter alia*, the parties enjoy the opportunity to respond to other parties' submissions (and the Chamber is assisted by having all the relevant information and arguments before it), and that the proceedings are expeditious and avoid unnecessary delays. Pursuant to regulations 24(5) and

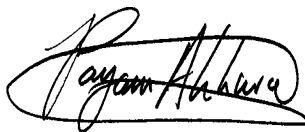
34(c), the usual time limit for the filing of a reply (subject to the Court's leave) is within 10 days of notification of the response. Bearing in mind the Chamber's desire for expedition in relation to the Libyan Government's Notification and Request, the Government hereby applies for leave to Reply to any Response/s filed by the Prosecutor and the OPCD within 4 days of notification of such Response/s.

14. In the event that leave is granted to Reply to any Response/s, the Libyan Government, again in the interests of expedition, intends to respond to the issues raised by the OPCD Request within its Reply, rather than seeking to rely upon the usual 21 day deadline (subject to any other order made by the Chamber) provided for Responses by regulations 24(3) and 34(b). Indeed, the Libyan Government observes that the OPCD Request raises, in summary form, the same issues which are likely to be dealt with in detail in any Response/s – that is, the proper interpretation of article 95 and its potential application to postponement of a surrender request in advance of a future admissibility challenge. For this reason, it is anticipated that a Reply by the Libyan Government which also responds in a consolidated fashion to the matters raised in the OPCD Request will assist the Court's deliberations on the Libyan Government's Notification and Request.

Conclusion

15. For these reasons, the Government of Libya respectfully requests the Chamber to:

- i. Grant it leave to Reply to any Response/s which may be filed by the Prosecutor and the OPCD on 30 March 2012; and
- ii. Set a deadline for this Reply of 4 days following notification of the Response/s to counsel for the Libyan Government.



Professor Philippe Sands QC
Professor Payam Akhavan
Michelle Butler

Counsel on behalf of the Government of Libya

Dated this 30th day of March 2012

At London, United Kingdom