



Original: **English**

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

Date: **24 April 2012**

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

**Response to the "Application on behalf of the Government of Libya for leave to
reply to the 'Response to the "Government of Libya's application for leave to
appeal the Decision regarding the second request by the Government of Libya for
postponement of the surrender of Saif Al-Islam Gaddafi'"**

Source: The Office of Public Counsel for the Defence

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

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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Victims and Witnesses Unit

Counsel Support Section

Detention Section

**Victims Participation and Reparations
Section**

Other

Procedural History

1. On 4 April 2012, the Pre-Trial Chamber rendered its ‘Decision Regarding the Second Request b y the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi’ (the Decision), in which the Chamber rejected the request for postponement on the grounds that, irrespective as to whether Article 95 extends to surrender requests, it cannot be invoked in connection with an admissibility challenge which had not yet been filed.¹
2. On 10 April 2012, the Libyan authorities filed their request for leave to appeal the Decision pursuant to Article 82(1)(d) of the Statute (the Request).² At the same time, the Libyan authorities also directly seized the Appeals Chamber of an appeal against the decision pursuant to Article 82(1)(a) of the Statute.³
3. On 12 April 2012, the Office of Public Counsel for the Defence filed its ‘Response to the “Government of Libya’s Application for Leave to Appeal the “Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi”’’.⁴
4. On 16 April 2012, the Libyan authorities submitted an application for leave to reply.⁵
5. The Defence hereby requests the Honourable Pre-Trial Chamber to reject the request on the basis that firstly, the Libyan authorities have not included any argumentation or justification as to why leave to reply is justified in the current circumstances, and secondly, by including the merits of their reply in their request, they have sought to

¹ ICC-01/11-01/11-100 at para. 18.

² ‘Government of Libya’s Application for Leave to Appeal the “Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi”’, ICC-01/11-01/11-102.

³ ‘Government of Libya’s Appeal Against the “Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi”’, ICC-01/11-01/11-103, 10 April 2012.

⁴ ICC-01/11-01/11-106.

⁵ ‘Application on behalf of the Government of Libya for leave to reply to the ‘Response to the “Government of Libya’s application for leave to appeal the Decision regarding the second request by the Government of Libya for postponement of the surrender of Saif Al-Islam Gaddafi”’, ICC-01/11-01/11-111. This application was later reclassified as confidential ex parte, and a redacted version was filed on 24 April 2012, ICC-01/11-01/11-111–Red.

improperly influence the outcome of the request, which is itself, grounds for dismissal of such a request.

Submissions

6. 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).
7. 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 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.
8. 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.
9. In general, in order to obtain authorization to file a reply, participants also need to demonstrate good cause,⁶ or that there was an issue that arose from the response, which could not have been anticipated in their initial submissions.⁷
10. The Libyan authorities have included no such argumentation, which in itself, is grounds for dismissal of the request.

⁶ 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.

⁷ 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.

11. In terms of the foreseeability of the issues raised in the response, the standing of non-parties to invoke the provisions of Article 82 had been raised by Judge Nsereko in a recent separate opinion issued in this case.⁸ It is clear that the Libyan authorities were aware of this decision because the appellate jurisprudence on this topic is referred to in the Article 82(1)(a) appeal that the Libyan authorities filed on the same day.⁹ The possibility for a finding of non-compliance to be invoked was also explicitly contemplated in the decision, for which leave to appeal was sought.
12. Moreover, although the Libyan authorities formally sought authorisation to file a reply, they have submitted the merits of the reply in the same filing. As found by the ICC Appeals Chamber, the practice of including the merits of a reply can result in the Chamber rejecting the request itself.¹⁰
13. The fact that the Libyan authorities were aware of this distinction is evidenced from their earlier request to file a reply, in which they did not include any merits in the request.¹¹ The Libyan authorities' decision to include the merits in the current application creates the appearance that they are trying to bypass the authorisation process by placing substantive arguments immediately before the Chamber, with a view to influencing the ultimate decision. As such, the request falls squarely within the practice deprecated by the Appeals Chamber.
14. Finally, the Libyan authorities have included substantive arguments, which fall outside of the scope of either the initial application for leave to appeal, or the OPCD or

⁸ Decision on the admissibility of the "Appeal Against Decision on Application Under Rule 103" of Ms Mishana Hosseinioun of 7 February 2012, ICC-01/11-01/11-74, 9 March 2012.

⁹ ICC-01/11-01/11-103 at para. 15. Although the Libyan authorities do not explicitly cite this decision, their reference to a plurality of appellate rulings on this topic necessarily encompasses this decision, as there are only two Appeals Chamber decisions on this topic.

¹⁰ The Appeals Chamber has warned that it "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. If a participant anticipates that the Appeals Chamber might not be in a position to dispose of such an application prior to the expiration of the time limit for the filing of a reply, the proper procedural avenue is to file, together with the application for leave to reply, an application for the extension of the time limit." *Prosecutor v. Lubanga, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo"*, ICC-01/04-01/06-824, 13 February 2007, para. 68.

¹¹ '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'", ICC-01/11-01/11-93.

Prosecution responses.¹² It is inappropriate to include new matters in a reply, as it deprives the parties of an opportunity to respond, and to address any factual inaccuracies contained therein.

Relief Sought

15. For the reasons set out above, the Defence for Mr. Saif Al Islam Gaddafi requests the Honourable Pre-Trial Chamber to reject the application for leave to reply.



Xavier-Jean Keïta, Principal Counsel of the OPCD

Dated this, 24th Day of April 2012

At The Hague, The Netherlands

¹² ICC-01/11-01/11-111-Red at paras. 15-18.