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

Date: **21 May 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**

Public

**Response to the Libyan Government Application for leave to reply to any
Response/s to article 19 admissibility challenge**

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 background

1. On 1 May 2012, the Government of Libya filed an Application pursuant to article 19 of the Rome Statute (the “Admissibility Challenge”), whereby it requested the Chamber to: (i) postpone execution of the Surrender Request pursuant to article 95 of the Rome Statute and (ii) declare the case inadmissible and quash the Surrender Request.¹

2. On 4 May 2012, the Chamber issued the “Decision on the Conduct of the Proceedings Following the ‘Application on behalf of the Government of Libya pursuant to Article 19 of the Statute’” (the “Decision”) appointing, *inter alia*, for the purpose of the admissibility proceedings, Paolina Massidda from the Office of Public Counsel for Victims (the “OPCV” or the “Office”) as legal representative of victims who have already communicated with the Court in relation to the case.²

3. On 7 May 2012, the Principal Counsel of the OPCV filed a “Request to access documents in relation to the Challenge to the Jurisdiction of the Court by the Government of Libya” requesting access to certain confidential documents concerning the Admissibility Challenge³. On 15 May 2012, the Chamber granted the OPCV’s request.⁴

4. On 17 May 2012, the Libyan Government filed an Application for leave to reply to any response to article 19 admissibility challenge.⁵

¹ See the “Application on behalf of the Government of Libya pursuant to Article 19 of the Statute”, No. ICC-01/11-01/11-130-Red, 1 May 2012, paras. 107 and 108.

² See the “Decision on the Conduct of the Proceedings Following the ‘Application on behalf of the Government of Libya pursuant to Article 19 of the Statute’” (Pre-Trial Chamber I), No. ICC-01/11-01/11-134, 4 May 2012, par. 13.

³ See the “Request to access documents in relation to the Challenge to the Jurisdiction of the Court by the Government of Libya”, No. ICC-01/11-01/11-138, 8 May 2012.

⁴ See the “Decision on the OPCV ‘Request to access documents in relation to the Challenge to the Jurisdiction of the Court by the Government of Libya’”, No. ICC-01/11-01/11-147, 15 May 2012.

⁵ See the “Libyan Government Application for leave to reply to any Response/s to article 19 admissibility challenge”, No. ICC-01/11-01/11-150, 17 May 2012.

5. 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

6. The Principal Counsel submits that the Application is premature in the absence of responses and that the Government of Libya has not shown “good cause” for being authorized to reply.

7. Indeed, leave to reply has been granted as a matter of discretion in previous cases where the applicant has “shown good cause”.⁶ The need for such submissions depends on the nature of the responses received; the Chamber having therefore to determine whether it would be assisted by supplemental submissions.⁷ Allowing the applicant to reply does not always enhance the fairness of the proceedings; indeed, the opposite can also be the case. An applicant may not, for example, deliberately refrain from making an argument on a foreseeable issue.⁸ Recourse to a reply in respect of such arguments or information is not only a waste of judicial time, it

⁶ See the “Decision on the Defence’s Request for Leave to Reply on the Motion for Provisional Release dated 24 November 2008” (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-294, 27 November 2008, para. 3.

⁷ See the “Decision on the Application of the Defence for Germain Katanga to file a reply (regulation 24 of the *Regulations of the Court*)”, No. ICC-01/04-01/07-1004-tENG, 27 March 2009, para. 3 (sic. para. 4): “*given the importance of the issue raised by the Challenge to Admissibility and in light of the Prosecutor’s arguments set forth in his Response [...]*” (we underline); see also the “Decision on the Prosecution’s Request for Leave to Reply to the ‘Defence Response to the Prosecution’s Request for the Review of Potentially Privileged Material’” (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/10-61, 24 February 2011, p. 4 (referring to the “*important and potential effect of the issues raised in the Prosecution request and the Defence Response on the ongoing process of disclosure*” (we underline) and the “Decision on the Request for Leave to Reply”, No. ICC-01/04-01/07-600 (Pre-Trial Chamber I, Single Judge), 17 June 2008, p. 4 (granting leave after the filing of the Prosecution response).

⁸ See the “Decision on Defence Request for Leave to Submit a Reply” (Trial Chamber II), No. ICC-01/04-01/07-2792, 22 March 2011 (denying leave on the basis that the Chamber considered itself “*sufficiently informed*” on the issues concerned and that no “*new issue*” had been raised in the responses).

“deprive[s] the [responding party] of its right to respond.”⁹ A motion 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. The appropriateness for granting leave to reply depends, therefore, on a substantive examination of the content of the response, and the specific purpose of the proposed reply.

8. No good cause can be shown until possible responses have been received, when the applicant can describe precisely the purpose of a proposed reply. Only then can the Chamber properly assess whether a reply enhances or diminishes the fairness of proceedings. Therefore, the Principal Counsel contends that, since the actual need to address matters eventually related to the responses by the other participants in article 19 proceedings can only be determined by the Chamber once said responses have been filed, the Application should be rejected on the basis that the Libyan Government’s need to reply is speculative and good cause has not been shown.

FOR THE FOREGOING REASONS the Principal Counsel respectfully requests the Pre-Trial Chamber to reject, from the time being, the Libyan Government’s Application for leave to reply to any responses submitted on article 19 admissibility challenge.



Paolina Massidda
Principal Counsel

Dated this 21st day of May 2012
At The Hague, The Netherlands

⁹ See ICTY, *M. Nikolic v. The Prosecutor* (IT-02-60/1-A), Decision on Prosecution’s Motion to Strike, 20 January 2005, para. 32.