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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

Libyan Government's Application for Leave to Reply and Reply to (i) the Defence's "Response to the 'Libyan Government Request for Status Conference and Extension of Time to file a Reply to the Responses to its Article 19 Admissibility Challenge'" and (ii) the "Registrar's Observations with respect to Libyan Government's Request"

Source: The Government of Libya, represented by:
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Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. The Government of Libya seeks leave to reply to (i) the "OPCD Response to the 'Libyan Government Request for Status Conference and Extension of Time to file a Reply to the Responses to its Article 19 Admissibility Challenge'",¹ ("OPCD Response") and (ii) the "Registrar's Observations with respect to Libyan Government's Request"² ("Registrar's Observations").
2. Regulation 34(c) states that "[s]ubject to leave being granted by a Chamber in accordance with regulation 24, sub-regulation 5, a reply shall be filed within ten days of notification in accordance with regulation 31 of the response". In case the Chamber should see fit to grant Libya's request to reply, the Libyan Government also hereby files its substantive submissions in reply to the OPCD Response, in order to ensure compliance with the deadline imposed by Regulation 34(c).

II. SUBMISSIONS

A. Leave to reply

3. The Government of Libya hereby requests leave to reply to the OPCD Response and the Registrar's Observations. Pursuant to Regulation 24(5), "[p]articipants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations". As is evident from the submissions below, the OPCD Response and the Registrar's Observations raises a number of matters which were not dealt with in the Libyan

¹ ICC-01/11-01/11-197.

² ICC-01/11-01/11-194-Conf.

Government's Request³. The Libyan Government submits that it should be given a fair opportunity to reply to these matters. It submits, further, that the nature of the submissions by the OPCD and the Registrar mean that the reason for the need for a Reply from the Libyan Government is inherently connected to the rationale underlying its request for a status conference. As a result, and because of the importance of the issue of admissibility more generally, the Government of Libya has good cause to reply in respect of the arguments in the OPCD Response and the Registrar's Observations.

B. Reply to Registrar's Observations

4. The Registrar submits that it has not received the investigation file concerning the detention of four OPCD staff.⁴ As of the present date, and due to the reasons outlined in its Request (ie. the change of Government and Ramadan), Counsel for the Libyan Government have not been able to take instructions on the Registrar's submission. Given the important role that this file would play in the ICC's investigation, and, in turn, the central importance of this investigation to the issue of admissibility, the temporary lack of instructions on this matter alone reaffirms the urgent need for a status conference and for an extension of time.

C. Reply to OPCD Response

5. Without prejudice to the right to provide a detailed response, the Libyan Government notes that several of the OPCD's arguments draw conclusions from the Libyan government's submissions which simply do not follow from the content thereof. For example, the OPCD claims that by noting that "the delegation was detained in Zintan because of the alleged misconduct of the OPCD counsel" Libya makes a "formal admission that there was absolutely no justification whatsoever for the detention of the three other ICC officials". It

³ ICC-01/11-01/11-192.

⁴ See Registrar's Observations, paras 5, 6.

asserts, further that this – as well as the very application for a status conference – is also evidence of an inability to genuinely investigate and prosecute Mr. Gaddafi.⁵ Such arguments are without foundation and wrong.

6. Similarly, several of the OPCD's submissions fail to consider significant aspects of the unique facts of the Libyan transitional period, and thereby draw deeply flawed conclusions. These include the OPCD's association of the availability of the Libyan Ministry of Justice Team with the wholesale determination of the admissibility issue;⁶ arguments about the nature of the link between the electoral process and the need for an extension;⁷ and the link drawn between prohibition of standing for public office with criminal responsibility.⁸ This last example is especially problematic as it seeks to punish Libya for the existence of laws which form part of its transition to democracy.
7. Another important *non sequitur* in the OPCD Response is that a Status Conference is not warranted because the statements of the ICC President, cited in the Libyan Government's Request, "do not contain any references or findings that there has been any misconduct by Counsel for the OPCD".⁹ Clearly, any such findings could only result from, rather than trigger, a proper investigation.
8. The OPCD makes a number of substantive allegations and arguments relating specifically to the nature of the Libyan authorities which would drive and administer future investigative steps against Mr. Gaddafi, as well as the ensuing prosecution. All such arguments merit a fuller response, which will be forthcoming as soon as a new government and prosecution team are in

⁵ OPCD Response, paras 24-27

⁶ OPCD Response, para. 38.

⁷ OPCD Response, para. 39.

⁸ OPCD Response, para. 40.

⁹ OPCD Response, para. 10.

place. These include numerous assertions that the government is unwilling and unable to pursue the case in an independent, impartial, or expeditious manner.¹⁰ It should be made clear at the outset that all of the OPCD's allegations are vigorously denied, and that Libya, and its transition to democracy, should not be prejudiced by an avoidable lack of opportunity to respond in full.

9. Moreover, the OPCD makes a number of serious and unsubstantiated allegations to the effect that the Libyan government's submissions entail a "thinly veiled attempt to deprive the defendant of any voice in the current proceedings".¹¹ This is wholly inaccurate and strongly denied: it is self-evident from the nature of such allegations that they should be addressed fully, in oral proceedings before the Chamber, but for the avoidance of doubt, the Libyan government has constantly supported the fullest respect for the rights of the defence.
10. Of similar gravity are the OPCD's allegations that the Libyan Government has engaged in, or has appeared to engage in, retaliatory actions against the OPCD by "engineering a break-down in communications, with the aim of justifying the replacement of Defence counsel",¹² and that Counsel for Libya has violated the Code of Professional Conduct by "seeking to effectively stave off any decision on the admissibility of the case".¹³ Once again, the Libyan Government can respond adequately to these assertions, which it vehemently denies, only in the context of a Status Conference.
11. The same applies in relation to the many and various allegations of violations of the rights of Mr. Gaddafi – in particular his right to participate in

¹⁰ OPCD Response, paras 2, 5, 6.

¹¹ OPCD Response, para. 3.

¹² OPCD Response, paras 11-16.

¹³ OPCD Response, para. 29.

proceedings,¹⁴ and his rights concerning the conditions of his detention.¹⁵ While it is clearly false to assert that violations thereof arise from the very making, *simpliciter*, of a request for an extension¹⁶ and of the original admissibility challenge,¹⁷ the severity of these allegations demand a full response, in which the Chamber can address questions to Counsel for the Libyan Government and receive a specific response thereto.

12. It should be noted, of course, that the occurrence of a thorough and proper investigation of the OPCD's actions does not necessarily involve the replacement of the current Defence counsel. However, conducting an investigation on the basis of all relevant information is vital in order to ensure that justice be both done and seen to be done in the case against Mr. Gaddafi, regardless of the jurisdiction in which it ultimately takes place. Thus, the provision of an extension of time and a Status Conference, rather than prejudicing Mr. Gaddafi as the OPCD asserts,¹⁸ would help to *ensure* the integrity of the proceedings against him.

13. The OPCD also appears to imply in its Response that Counsel for Libya have deliberately delayed in seeking instructions from the Libyan Government in order to engineer a delay based upon the change of government.¹⁹ This is a most unfortunate and unfair allegation which is wholly untrue – instructions could not be sought on the OPCD Response until it was notified to counsel for Libya. By that stage, the Libyan Government had entered its transitional mode and instructions could not be obtained. As soon as this situation became apparent to counsel for Libya the request for a status conference and an extension of time was drafted and lodged with the Court as expeditiously as possible. Both the Libyan Government and counsel for the Libyan

¹⁴ OPCD Response, para. 17-19.

¹⁵ OPCD Response, para. 31.

¹⁶ OPCD Response, paras 32, 33.

¹⁷ OPCD Response, para. 34.

¹⁸ OPCD Response, para. 22.

¹⁹ OPCD Response, para. 37.

Government have acted and continue to act in good faith in requesting the relief which is presently sought. The OPCD's apparent attempt to infer bad faith on behalf of both the Libyan Government and counsel for the Libyan Government is inappropriate and deeply regrettable.

14. Finally, the OPCD takes the time to point out in their Response that counsel for Libya have "failed" to avail themselves of the relevant and available procedures for receiving Confidential filings from the ICC.²⁰ Counsel wishes to clarify that they have liaised with Registry officials on several occasions with respect to this issue and understand from those conversations that courier delivery of confidential filings for external counsel to a State party (as opposed to external counsel for the Defence) is the correct and current ICC procedure because such counsel are not permitted to have access to the Court's electronic filing system.²¹ In any event, as counsel for Libya informed the Court of this procedure not to try to engineer any kind of delay but simply to notify the Court that they are acting as expeditiously as possible in the circumstances, a proper basis for the OPCD's criticism is difficult to ascertain.

III. CONCLUSION

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

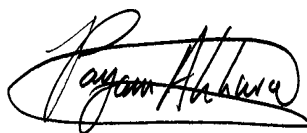
- i. Grant it leave to Reply to the OPCD Response;
- ii. Grant it leave to Reply to the Registrar's Observations;
- iii. Convene a Status Conference to clarify certain issues arising out of the admissibility proceedings; and
- iv. Grant it an extension of time until 18 days after the appointment of the new Libyan Ministry of Justice team to file its reply to the responses by the Prosecution, OPCV and OPCD to its article 19 admissibility

²⁰ OPCD Response, para. 45.

²¹ If there is now a changed procedure in place since these conversations (which took place in March and April 2012) Counsel for Libya would of course be delighted to adopt such a new procedure for future Confidential filings.

challenge.

Respectfully submitted:



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Dated this 9th day of August 2012

At London, United Kingdom