

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 27 February 2013

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 and Redacted

Libyan Government's Response to OPCD Request for Leave to Reply to the "Libyan Government's Response to Urgent Defence Request of 21 January 2013"

Source: The Government of Libya, represented by:
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Professor Payam Akhavan
Ms Michelle Butler

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

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Legal Representatives of the Applicants

Unrepresented Victims

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I. SUBMISSIONS

1. Libya files this Response to the OPCD's "Request for Leave to Reply to the 'Libyan Government's Response to Urgent Defence Request of 21 January 2013'" (the "Request for Leave to Reply") submitted on 22 February 2013.¹
2. The Libyan Government opposes the request on the basis that the OPCD has improperly used its Request for Leave to Reply to effectively make its Reply without waiting for a grant of leave by the Pre-Trial Chamber. Its nineteen page submission contains detailed factual assertions and legal arguments constituting a full reply and thus breaches Regulation 24(5).
3. The OPCD has also failed to demonstrate in paragraphs 1 to 18 of its Request for Leave to Reply good cause for such a reply. Its Request for Leave to Reply appears to be an attempt to compensate for an inadequately reasoned and unsubstantiated Urgent Request. There is no issue that arose from Libya's Response² that could not have been anticipated in the OPCD's Urgent Request.³ Affording an opportunity to reply does not enhance the fairness of proceedings when an applicant has failed to make a reasoned and evidenced argument on foreseeable issues.⁴
4. Specifically, paragraphs 19 to 53 of the Request for Leave to Reply either recycle prior arguments on Part 9 of the Statute, or advance new arguments that were entirely foreseeable. The Urgent Request made no mention whatsoever of Article 89(4) of the Statute.⁵ The recent Request for Leave to Reply however dedicates several paragraphs to this provision, in an attempt to argue that

¹ ICC-01/05-01/08-284.

² ICC-01/04-01/07-274.

³ ICC-01/11-01/11-255.

⁴ ICTY, Prosecutor v M. Nikolic (IT-02-60/1-A), Decision on Prosecution's Motion to Strike, 20 January 2005, para. 32.

⁵ ICC-01/11-01/11-255.

pursuant to article 89(4) Libya is prohibited from initiating national proceedings unrelated to the admissibility challenge.⁶ This is an apparent reply to the submission in Libya's Response that the "OPCD has been unable to identify any provision of the Rome Statute in support of that contention, which is erroneous."⁷ This new argument was entirely foreseeable at the outset.

5. Paragraphs 54 to 61 of the Request for Leave to Reply argue that the question of the scope of privileges and immunities is a matter for the Pre-Trial Chamber. These paragraphs mostly repeat prior assertions. The new reference to Article 64(2) of the Statute⁸ is not mentioned anywhere in the Urgent Request despite being entirely foreseeable. Furthermore, the use of diplomatic channels to resolve disputes between the ICC and States concerning interpretation and application of the Agreement on the Privileges and Immunities of the ICC was expressly contemplated by Article 32 of that Agreement, which calls for "consultation, negotiation or other mode of settlement" and, as a last resort, establishment of an "arbitral tribunal". This "mode of settlement" has been agreed upon by the ICC President and Libya as set forth in Libya's Response.⁹ Again, the OPCD's Urgent Request failed to overlooks this foreseeable argument from the outset.
6. Paragraphs 62 to 80 and 84 to 87 of the Request for Leave to Reply primarily recycle previous assertions relating to the June 2012 Zintan incident made in the Urgent Request, and in several other prior filings and oral submissions by the OPCD.¹⁰ The OPCD appears to raise this issue again before the Pre-Trial Chamber in order to prejudice Libya's admissibility challenge. Such arguments do not assist the Pre-Trial Chamber in its remit to determine the admissibility of the present case.

⁶ ICC-01/11-01/11-284, paras. 39-44.

⁷ ICC-01/11-01/11-274, para. 6.

⁸ ICC-01/11-01/11-284, para. 60.

⁹ ICC-01/04-01/07-274, para. 12.

¹⁰ See for example, ICC-01/11-01/11-190-Conf and Transcripts of hearing of 9-10 October 2012.

7. As a general observation, some of the OPCD's arguments in its Request for Leave to Reply misrepresent Libya's position as set forth in its Response. Libya does not dispute that the scope of privilege is regulated by both international law as well as domestic law. It has simply noted that the international law aspects should be determined by ICC organs other than the Pre-Trial Chamber, in accordance with the ICC President's statement of 22 June 2012.¹¹ To the extent that there are discrepancies between international and domestic law, or simply ambiguities requiring resolution, Libya's Response has clarified that it is in the process of "agreeing a protocol for future visits with the ICC Registry so that the applicable regulations are clear."¹²

8. Libya also notes that counsel for the OPCD has included in footnote 30 of its Request for Leave to Reply factual assertions concerning the June 2012 incident. Libya queries whether it is appropriate for counsel for the OPCD in the admissibility proceedings to also act as a witness of fact in the same case. This highlights one of the reasons why Libya submits that such matters are properly regulated by ICC organs other than the same Pre-Trial Chamber which is considering issues of admissibility.

9. In paragraphs 81 to 83 of its Request for Leave to Reply, the OPCD intimates that it is considering submitting a complaint against counsel for Libya for professional misconduct due to counsel's reference in the Response to the allegations which form the subject matter of the Libyan national security proceedings.¹³ This is notwithstanding the reality that these allegations are also referred to in the OPCD's own submissions in its Urgent Request,¹⁴ in its Request for Leave to Reply,¹⁵ in its other filings,¹⁶ during its oral submissions on

¹¹ ICC-01/04-01/07-274, para. 12.

¹² ICC-01/04-01/07-274, para. 14.

¹³ ICC-01/11-01/11-284, para. 83.

¹⁴ ICC-01/11-01/11-255, paras. 34, 54, 56-58.

¹⁵ ICC-01/11-01/11-284, paras. 79, 81.

¹⁶ See for example: ICC-01/11-01/11-190-Conf.

9-10 October 2012, as well as in the OPCD's press statements.¹⁷ It is therefore difficult to understand on what basis counsel are alleged to have acted improperly. Counsel for Libya wish to clarify that they have absolutely no wish to "publicly impugn the reputation and credibility of the Defence" as alleged by the OPCD.¹⁸ Avoiding such difficulties is again one of the reasons for Libya's submission that any allegations regarding counsel and the events in June 2012 in Zintan are properly dealt with outside of the conduct of the admissibility proceedings.

10. The OPCD also appears to suggest in its Response that the Government unsuccessfully litigated issues arising from the conduct of the OPCD in June 2012 in Zintan in confidential proceedings before the Pre-Trial Chamber.¹⁹ As the Chamber will be aware, this is not the case – [REDACTED]:
 - (a) [REDACTED];²⁰ and
 - (b) [REDACTED].²¹

11. The Government of Libya submits that it is not appropriate for the OPCD to continue to use the admissibility proceedings as a vehicle to make allegations regarding the events of June 2012 in Zintan when the issues arising out of such events are properly regulated by organs other than the Pre-trial Chamber which is presently considering Libya's admissibility challenge. Accordingly, it is submitted that the Urgent Request is without merit and should be dismissed.

12. Furthermore, since the OPCD has not shown good cause as to why its arguments by way of reply were not foreseeable the OPCD's Request for Leave to Reply should also be refused.

¹⁷ See for example: <http://www.theaustralian.com.au/news/nation/libyan-claims-a-farce-australian-lawyer-melinda-taylor-says/story-e6frg6nf-1226419432389>

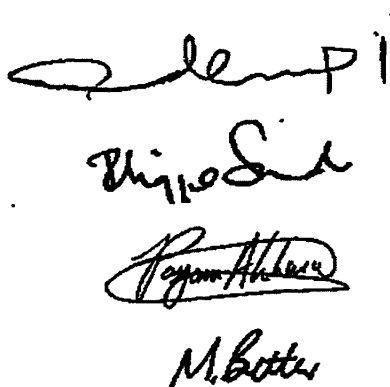
¹⁸ Reply, para 83.

¹⁹ Reply, para. 81.

²⁰ ICC-01/11-01/11-233-Conf, para. 41.

²¹ ICC-01/11-01/11-233-Conf, paras. 35-37.

Respectfully submitted:



Handwritten signatures of the four individuals listed below: Professor Ahmed El-Ghani, Professor Philippe Sands QC, Professor Payam Akhavan, and Ms Michelle Butler.

Professor Ahmed El-Ghani
Professor Philippe Sands QC
Professor Payam Akhavan
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*Libyan ICC Coordinator and
Counsel on behalf of the Government of Libya*

Dated this 27th day of February 2013
At London, United Kingdom