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

Date: 9 September 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

Response to Defence "Application for Leave to Reply to the "Response to 'Defence Application on behalf of Mr. Abdullah Al-Senussi to refer Libya to the Security Council with Confidential Ex Parte (Chamber only) Annex 1'"

Source: The Government of Libya, represented by:
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Mr. Wayne Jordash
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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. Counsel for Libya file this Response to “Application for Leave to Reply to the “Response to ‘Defence Application on behalf of Mr. Abdullah Al-Senussi to refer Libya to the Security Council with Confidential Ex Parte (Chamber only) Annex 1’”, filed on 3 September 2013 (“Application for Leave to Reply”).¹
2. The Defence originally filed its Application on 9 August 2013 requesting that the Pre-Trial Chamber (i) find Libya in non-compliance with the Chamber’s Order of 6 February 2013 to arrange for appointed Counsel to be allowed a privileged and confidential legal visit to Mr. Al-Senussi as soon as practicable; and (ii) refer Libya to the United Nations Security Council.²
3. The Government hereby submits that the Chamber should reject the application for leave to reply on the basis that it is improperly made and/or fails to demonstrate good cause to justify the filing of a reply.

II. SUBMISSIONS

A. MERITS OF REPLY IMPROPERLY INCLUDED IN APPLICATION FOR LEAVE TO REPLY

4. Despite the Appeals Chamber’s express disapproval of the practice of filing a substantive reply prior to leave being granted and warning that this practice may, in and of itself, give rise to the rejection of an application for leave,³ the Defence Application for a reply includes the substantive reply arguments within it. Having claimed that a Reply is necessary “to update the Chamber with its submissions on these developments which have taken place after the Defence filed its Application, but which are relevant to the determination of the Application”,⁴ the Defence then includes these purportedly relevant developments in the body of Application. In doing so, the Defence deliberately

¹ ICC-01/011-01/11-429

² Defence Application on behalf of Mr. Abdullah Al-Senussi to refer Libya to the Security Council with Confidential Ex Parte (Chamber only) Annex 1, ICC-01/11-01/11-399, 9 August 2013 (“Defence Application of 9 August 2013”).

³ *Prosecutor v Lubanga*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber entitled “Decision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”, ICC-01/04-01/06-824, 13 February 2007, para 68.

⁴ Application for Leave to Reply, para. 8.

attempts to bypass the proper authorisation process by placing substantive arguments immediately before the Chamber, with a view to influencing the Chamber's decision on the application and/or the eventual admissibility decision. As such, the Application for leave to Reply should be rejected and the Defence prevented from undermining due process.

B. NO GOOD CAUSE SHOWN TO WARRANT A REPLY

5. In order to obtain authorisation to file a reply, a party generally needs to demonstrate good cause⁵ or that there was an issue that arose from the response which could not have been anticipated in their initial submission.⁶
6. The Defence for Al-Senussi argues that the information it intends to include in its reply (and which is improperly contained in the body of its Application for Leave to Reply) is "relevant to the Defence's Application and should be received by the Chamber in the Defence's Reply for three reasons.⁷ First, the purported announcement of a hearing on 19 September is said to contradict Libya's submission in its Response of 26 August that "[a]s his case is yet to progress to the Accusation Chamber for review of the evidence, there is no imminent prospect of trial." The Defence submits further "that it is misleading for Libya to inform the Court that domestic proceedings are not imminent and that 'there is plainly no need for urgency' when on the following day Libya announced that the case will be heard on 19 September."⁸
7. Counsel for Libya are fully aware of their duties to the court and continue to inform the court promptly as soon as they become aware of pertinent developments in the case. The Chamber is not assisted by the defence's submissions in this regard, which are purely speculative and made without proper foundation. Obviously, having a pre-trial hearing on the 19th September 2013 is not tantamount to the commencement of an imminent trial when the case

⁵ ICC-01/05-01/08-294.

⁶ ICC-01/04-01/07-2792.

⁷ Application for Leave to Reply, para. 10.

⁸ Application for Leave to Reply, para. 12.

still needs to progress through the Accusation Chamber stage of proceedings. Therefore, the Defence allegation that Libya is misleading the court is entirely speculative.

8. Even without such speculation, the Defence has failed to establish how this information has any bearing upon the matters to be considered by the Chamber when considering the application to refer Libya to the UN Security Council for non-compliance with a court order. In these circumstances, the Defence have failed to show good cause as to why it should be granted leave to reply.
9. The second reason advanced by the Defence for leave to be granted to reply is that “Prosecutor Al-Seddik al-Sur”’s announcement that Mr. Al-Senussi had apparently made confessions should be taken into account by the Chamber” and that this shows that the Libyan Government have acted in breach of its domestic law and the ICC Statute.⁹ The bald assertion that this information is relevant, without any argument concerning how it bears upon the Chamber’s consideration of the relevant issues underpinning the application to refer Libya to the Security Council for non-compliance with a court order is patently insufficient to form any basis for the grant of leave to reply.
10. Finally, the Defence submits that an interview with Professor El-Gehani, the ICC focal point for Libya, demonstrates an absence of intention to comply with the Court order.¹⁰ However, again, the purported relevance of this interview to the Chamber’s consideration of the Defence Application is not made out. The purported remarks relied upon do not concern the facilitation or non-facilitation of a legal visit by the current Defence team. Accordingly, they do not bear upon the critical question before the Court in its consideration of the Defence Application to Refer Libya to the Security Council, namely, Libya’s compliance with the Court order regarding the facilitation of a legal visit.

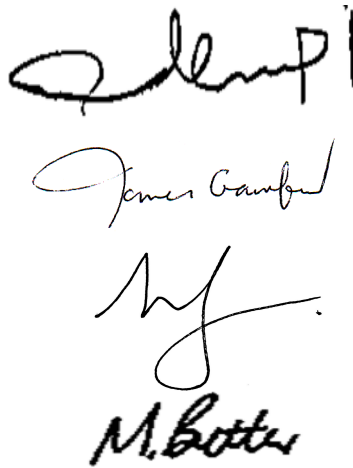
⁹ Application for Leave to Reply, para. 13

¹⁰ Application for Leave to Reply, para. 15.

III. RELIEF REQUESTED

11. The Government submits that granting the Defence a right of reply would not advance or assist the Chamber's ability to adjudicate on the Defence Application of 10 July 2013. As no good cause for a reply has been shown, the Libyan Government respectfully requests that the Chamber reject the application for leave to reply.

Respectfully submitted:



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 Professor James Crawford SC
 Mr Wayne Jordash
 Ms Michelle Butler

*Libyan ICC Coordinator and
 Counsel on behalf of the Government of Libya
 in the case of Abdullah Al-Senussi*

Dated this 9th day of September 2013
 At London, United Kingdom