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No.: ICC-01/11-01/11
Date: 3 October 2013

APPEALS CHAMBER

Before: Judge Anita Ušacka, Presiding Judge
Judge Akua Kuenyehia
Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Sanji Mmasenono Monageng

**SITUATION IN LIBYA
IN THE CASE OF**

***THE PROSECUTOR v.
SAIF AL-ISLAM GADDAFI and ABDULLAH AL-SENUSSI***

Public

**Libyan Government's Request for leave to file Consolidated Reply to the
Observations (on the Libyan Government's further Submissions) filed by the
Defence for Saif Al-Islam Gaddafi, the Office of the Prosecutor and the Office of the
Public Counsel for Victims on 30 September 2013**

Source: The Government of Libya, represented by:
Professor Ahmed El-Gehani
Professor Philippe Sands QC
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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Mr. Anthony Kelly

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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Professor Ahmed El-Ghani

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REGISTRY

Registrar

Mr. Herman von Hebel

Counsel Support Section

Deputy Registrar

Mr. Didier Daniel Preira

Victims and Witnesses Unit

Detention Section

I. INTRODUCTION

1. On 23 September 2013, Libya filed “The Libyan Government’s further submissions in reply to the Prosecution and Gaddafi Responses to “Document in Support of Libya’s Appeal against the “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”¹ (“Further Submissions”). On 30 September 2013, the Defence, Prosecution and Office of Public Counsel for Victims filed their Responses to Libya’s Further Submissions² (“Defence Response”, “Prosecution Response” and “OPCV Response” respectively; “the Responses” collectively). Libya hereby respectfully requests leave to submit a single, consolidated reply to the Responses for the purpose of clarifying certain important matters arising from them.

II. APPLICABLE LAW

2. Libya notes that pursuant to Regulation 24(5) of the Regulations of the Court “participants may only reply to a response with the leave of the Chamber”.³ Further, the Appeals Chamber has discretion under Regulation 28 to order further submissions by parties or participants when it is “necessary for the proper disposal of the Appeal [...] bearing in mind the principle of equality of arms and the need for expeditious proceedings”.⁴
3. In exercising its discretion, the Appeals Chamber has previously ruled that further submissions will not be ordered where those submissions merely involve disagreement with arguments offered in the Responses by the parties and / or the development of arguments already before the Appeals Chamber.⁵

¹ ICC-01/11-01/11-350OA4; ICC-01/11-01/11-370-Conf-Exp OA5

² ICC-01/11-01/11-458-Conf-Red; ICC-01/11-01/11-459-Conf; ICC-01/11-01/11-460.

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

⁴ ICC-01/09-01/11 OA, para 9.

⁵ ICC-01/09-01/11 OA, para 10.

In the Gaddafi proceedings, the Pre-Trial Chamber has upheld the appropriateness of authorising Libya to file a reply to responses addressing admissibility issues, due to Libya's status as the "triggering force and main actor in [admissibility] proceedings".⁶

4. If leave is granted, the reply, according to Regulation 34(c) of the Regulations "shall be filed within ten days of notification [...] of the response". Under Regulation 29 and Rule 101 of the Rules of Procedure and Evidence, the Chamber has discretion to make orders in relation to time limits having "regard to the need to facilitate fair and expeditious proceedings" (Rule 101) and as "necessary in the interests of justice" (Regulation 29).

III. SUBMISSIONS

5. The need to correct inaccuracies or respond to new arguments raised in the participant submissions prior to a decision on the admissibility of the case constitutes good cause for the granting of leave to reply.⁷ The Responses raise issues concerning the admissibility appeal, which are incorrect and necessitate a reply from Libya in order to ensure that the Appeals Chamber has all the relevant information and submissions before it in respect of the appeal.
6. In the event that leave is granted to reply, Libya would not use any reply to repeat arguments already made in its previous submissions but rather would confine its submissions to addressing only matters raised by the Responses.
7. The Libyan Government submits that there is good cause to grant leave to reply in respect of the following new matters raised in the Responses:

⁶ ICC-01/11-01/11-191, para. 8.

⁷ *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; *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" , ICC-01/04-01/10, 24 February 2011.

- (i) Libya's compliance with and the proper interpretation of Regulation 36(3). At paragraphs 2 to 6 of the Defence Response, it is argued that Libya's Further Submissions should be dismissed *in limine* for allegedly breaching a word count regulation. Libya's reply would address the errors in this submission.
- (ii) The proper interpretation of Rule 149 of the Rules of Procedure and Evidence. At paragraph 15 of the OPCV Observations, the OPCV argues that this does not provide the requisite authority for admission of the additional evidence relied upon by Libya. Libya's reply would address the OPCV's interpretation of this provision.
- (iii) Compliance with and relevance of Regulation 62 (which regulates the presentation of evidence in appeal): A reply would set out how, contrary to paragraph 12 of the Prosecution Response, the Libyan Government's Further Submissions complies with Regulation 62 to the extent that it is applicable. It would also clarify the (different) procedural regimes applicable to the Libyan Government's two requests, in respect of the Accusation Dossier and the Annex A to the Further Submissions.
- (iv) The issue of whether Annex A is within the scope of the appeal and relevant thereto: A reply would correct the legally and factually erroneous view, held by the Prosecution at paragraphs 30-31 of its Response, the OPCV at paragraph 17 of its Response, and the Defence at paragraphs 8-18 of its Response that the contents of Annex A go beyond the scope of the appellate proceedings. Libya's reply would address the circumstances in which new evidence may be admitted on appeal.
- (v) The limits of the corrective appellate jurisdiction and the relevance of this to the Libyan Government's request in respect of the Accusation Dossier:

A reply would describe the legal errors in the Prosecution's submissions at paragraphs 14-29, and in the Defence submissions at paragraphs 19-25, 30-33 and 37 that the request for time to translate and apply for admission of the Accusation Dossier is outside of appellate jurisdiction. It would also demonstrate that the Prosecution and Defence arguments misinterpret the material element of the test for admission of new evidence on appeal.

- (vi) The parties' erroneous interpretations of Libyan law: The Prosecution at paragraphs 24-25 of its Response and the Defence at paragraphs 26-29 and 58 of its Response makes several arguments on the basis of Libyan law. A reply would provide the requisite information, *inter alia* correcting the legally wrong notions that: (1) the ICC could be viewed as "part of [Libya's] own judiciary"; (2) the defence could be provided with a copy of the investigative file (without witnesses' names being redacted or hidden from view (as would have to have been arranged during the proposed site visit to Tripoli) prior to the case progressing to the Accusation Chamber; and (3) the future reliance on Article 59 of the Libyan Criminal Procedure Code by the Libyan Government.
- (vii) The parties' erroneous interpretations of international law: A reply would correct the erroneous argument by the OPCV at paragraph 20 of its Response that Libya's failure to amend its national laws to allow disclosure of the evidence during the investigation stage of its domestic proceedings "constitutes a clear violation of Libya's obligations by virtue of the Security Council Resolution 1970 (2011)" and that Libya ought to have made a national security claim pursuant to article 72 of the Rome Statute. Libya's reply would address this unfounded allegation and the proper application of article 72. A reply would also explain the legal errors in the Prosecution's reliance, at paragraph 21 of its Response, upon

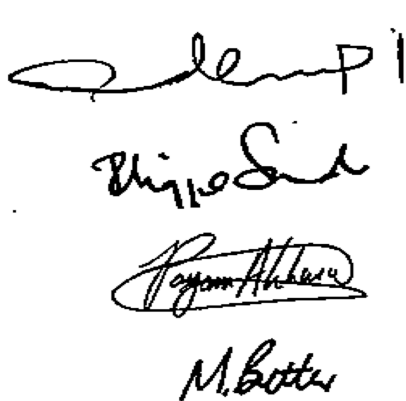
the international law principle that provisions of domestic law do not justify violations of international obligations in the present circumstances, and demonstrate that it does not militate against the Libyan Government's Further Submissions.

- (viii) The parties' irrelevant and / or incorrect arguments pertaining to the Libyan Government's submissions concerning admissibility: A reply would correct the inaccuracies at paragraphs 33-45 of the Prosecution Response and paragraphs 41-43, 59-61 of the Defence Response by briefly indicating how and why the arguments advanced by the Prosecution and the Defence are in error and / or fail to address the Libyan Government's legal submissions.

IV. RELIEF SOUGHT

8. Libya therefore respectfully requests that the Appeals Chamber grant Libya leave to reply to the Responses within 7 days of notification of its decision regarding this application.

Respectfully submitted:



The block contains four handwritten signatures stacked vertically. The first signature is a cursive 'A' followed by 'hmed'. The second is 'Phillipe Sands'. The third is 'Payam Akhavan'. The fourth is 'M. Butler'.

Professor Ahmed El-Gehani
Professor Phillipe Sands QC
Professor Payam Akhavan
Ms Michelle Butler

*Libyan ICC Coordinator and
Counsel on behalf of the Government of Libya*

Dated this 3rd day of October 2013
At London, United Kingdom