

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **18 May 2012**

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández 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
Defence Response to Libyan Application for Leave to Reply and Reply

Source: Defence

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

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Ms. Fatou Bensouda, Deputy Prosecutor

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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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Detention Section

**Victims Participation and Reparations
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Other

Introduction

1. The Libyan authorities have had ample opportunity to litigate the interpretation of Article 95 before the ICC. At the time that the Libyan authorities filed their request to postpone surrender pursuant to Article 95, they were familiar with both the Defence position on the interpretation of Article 95, and the issue as to the source of Libya's obligations to the ICC, which was canvassed in academic publications cited by Libya.
2. The Request of the Libyan authorities to file a reply to the Defence observations on Article 95 should therefore be rejected due to the fact that firstly, the Libyan authorities have failed to demonstrate good cause for filing a reply, and secondly, by including the merits of their reply in their request, they have sought to improperly influence the outcome of the request, which is itself, grounds for dismissal of such a request.

Procedural History

3. On 22 March 2012, the Libyan authorities notified the Pre-Trial Chamber of their intention to challenge admissibility, on the grounds that they were investigating Mr. Gaddafi for allegations of crimes against humanity falling under the scope of Article 7 of the Statute (the Notification).¹ The Libyan authorities indicated that they intended to file such a challenge by 30 April 2012, and further requested the Pre-Trial Chamber to suspend the surrender request pursuant to Article 95 of the Statute.
4. On 26 March 2012, the Pre-Trial Chamber ordered the Prosecution and the Office of Public Counsel for the Defence to file any responses to the Notification by 30 March 2012.²
5. The OPCD filed its observations on 30 March 2012.³

¹ 'Notification and Request by the Government of Libya in Response to 'Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi'', ICC-01/11-01/11-82-Conf.

² Order on the filing of responses to the "Notification and Request by the Government of Libya in response to 'Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi'", ICC-01/11-01/11-85-Conf.

³ Public Redacted Response to the "Notification and Request by the Government of Libya in response to "Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi", ICC-01/11-01/11-94-Red2

6. On 4 April 2012, the Pre-Trial Chamber rendered its ‘Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi’ (the Decision), in which the Chamber rejected the request for postponement on the grounds that, irrespective as to whether Article 95 extends to surrender requests, it cannot be invoked in connection with an admissibility challenge which had not yet been filed.⁴ The Pre-Trial Chamber therefore ordered the Libyan authorities to immediately surrender Mr. Gaddafi to the ICC.
7. On 10 April 2012, the Libyan authorities invoked Article 82(1)(a) of the Statute in order to appeal this decision directly before the Appeals Chamber,⁵ and subsequently filed their document in support of the appeal on 25 April 2012.⁶
8. The Appeals Chamber dismissed the appeal *in limine* on the same day.⁷
9. On 30 April 2012, the Libyan authorities challenged the admissibility of the case, and at the same time, requested to postpone the surrender of the defendant pursuant to Article 95 of the Statute (the Challenge to Admissibility).⁸
10. The Pre-Trial Chamber ordered the Defence and the Prosecution to file any responses to the discrete issue as to the postponement of Mr. Gaddafi’s surrender by 11 May 2012.⁹
11. The Defence filed its response on 11 May 2012.¹⁰

⁴ ICC-01/11-01/11-100 at para. 18.

⁵ Government of Libya’s Appeal against the “Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi”, ICC-01/11-01/11-103.

⁶ Document in Support the Government of Libya’s Appeal against the “Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi”, ICC-01/11-01/11-127.

⁷ Decision on "Government of Libya's Appeal Against the 'Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi'" of 10 April 2012, ICC-01/11-01/11-126.

⁸ Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-130.

⁹ Decision on the Conduct of the Proceedings Following the "Application on behalf of the Government of Libya pursuant to Article 19 of the Statute", ICC-01/11-01/11-134, 4 May 2012.

¹⁰ Public Redacted Version of the "Response to the Request to Postpone the Surrender of Mr. Saif Al Islam Gaddafi Pursuant to Article 95 of the Statute", ICC-01/11-01/11-141-Red.

12. On 16 May 2012, the Libyan authorities filed a request for leave to reply to this response, and at the same time, included the merits of their reply.¹¹

Submissions

13. As previously noted by the Defence, replies cannot be used by the parties to cover for their deficiencies in argumentation or lack of diligence. The ability to file a reply is designed to allow parties to address issues, which they were not able to anticipate in their initial filing,¹² or for which there is good cause to file a reply.¹³

14. Several of the issues raised by the Libyan authorities in the Reply, such as the interpretation of Article 89(2) and Article 19(8)(c), were previously addressed in the Challenge to Admissibility. The brevity of the Libyan authorities' initial submissions on Article 95 as compared to those of the Defence is of no relevance to the question as to whether there is good cause to file a reply. As the author of their own Challenge to Admissibility, which, in contrast to the Defence response, was not subject to any specific deadline, the Libyan authorities had *carte blanche* to utilize their 100 page limit as they deemed fit for this issue.

15. The Libyan authorities have also addressed this issue of Article 95 on multiple occasions before this Chamber, and in their appellate submissions, which were cross-referenced in their Challenge to Admissibility,¹⁴ and such, no issue of procedural fairness arises.

16. The fact that the Libyan authorities chose not to address some of the issues raised by the Defence is also irrelevant to the question as to whether the Libyan authorities have demonstrated good cause to file a reply, or whether these issues in question could not be anticipated.

¹¹ Libyan Government Application for leave to reply and reply to OPCD Response to the request to postpone the surrender of Mr Saif Al-Islam Gaddafi pursuant to article 95 of the Statute, ICC-01/11-01/11-149, 16 May 2012.

¹² 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" 24 November 2011.

¹³ See for example, 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.

¹⁴ Challenge to Admissibility at footnote 130, citing ICC-01/11-01/11-127, paras 45-50.

17. Most of the arguments invoked by the Defence were derived from the OPCD observations of 30 March 2012.¹⁵ The public redacted version was notified to the Libyan authorities on 5 April 2012.
18. Since the composition of the Defence had not altered from this date, the Libyan authorities could have clearly anticipated that the Defence would once again, raise arguments concerning the wording and placement of Article 95 of the Statute. The Libyan authorities cannot rest on their rights, for the sole purpose of seeking the strategic advantage of having the last word on these issues. Such an approach would contravene the general Statutory presumption that the Defence should have the last word, particularly on fundamental issues such as the surrender and custody of the Defendant.
19. Similarly, the issue of the source and legal character of Libya's obligation to cooperate with the ICC was addressed in an article, which formed the principal basis for the submissions of the Libyan authorities.¹⁶ Again, the fact that the Libyan authorities deliberately chose to skirt around this issue does not warrant the granting of a right to reply.
20. The curtailment of the time period for the Defence and the Prosecution to respond to this postponement issues is also consonant with the fact that Libya's has sought to postpone an obligation, which has two distinct components: an obligation to surrender Mr. Gaddafi to the ICC, and an obligation to do so immediately. Granting authorisation to file a lengthy reply would potentially frustrate the ability of the Chamber to dispose of this issue in an expeditious manner, which would in turn, predetermine the outcome of the immediacy of the surrender. Indeed, whilst it may be theoretically possible to postpone a surrender, it is a contradiction in words to postpone the immediacy of surrender; any delays vitiate the order itself.
21. Finally, although the Libyan authorities formally sought authorisation to file a reply, they have submitted the merits of the reply in the same filing. As found by the ICC

¹⁵ ICC-01/11-01/11-94-Red2

¹⁶ Akande, D., 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC', *Journal of International Criminal Justice*, 2012, Vol 10, Issue 2 (May), cited at footnote 133 of the Challenge to Admissibility.

Appeals Chamber, the practice of including the merits of a reply can result in the Chamber rejecting the request itself.¹⁷ The Defence has explicitly drawn the attention of the Libyan authorities to this appellate jurisprudence, in past filings.¹⁸

22. The Libyan authorities' decision to include the merits in the current application creates the appearance that they are trying to bypass the authorisation process by placing substantive arguments immediately before the Chamber, with a view to influencing the ultimate decision. As such, the request falls squarely within the practice deprecated by the Appeals Chamber.

Relief Sought

23. For the reasons set out above, the Defence for Mr. Saif Al Islam Gaddafi requests the Honourable Pre-Trial Chamber to reject the application for leave to reply.



Xavier-Jean Keïta, Counsel for Mr. Saif Al Islam Gaddafi

Dated this, 18th Day of May 2012

At The Hague, The Netherlands

¹⁷ The Appeals Chamber has warned that it “disapproves of a practice of the filing of a substantive reply prior to leave being granted by the Appeals Chamber, which in and of itself may also give rise to the rejection of an application for leave. If a participant anticipates that the Appeals Chamber might not be in a position to dispose of such an application prior to the expiration of the time limit for the filing of a reply, the proper procedural avenue is to file, together with the application for leave to reply, an application for the extension of the time limit.” Prosecutor v. Lubanga, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”, ICC-01/04-01/06-824, 13 February 2007, para. 68.

¹⁸ Response to the “Application on behalf of the Government of Libya for leave to reply to the ‘Response to the “Government of Libya’s application for leave to appeal the Decision regarding the second request by the Government of Libya for postponement of the surrender of Saif Al-Islam Gaddafi””, ICC-01/11-01/11-123, 24 April 2012.