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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

Response to "Public and Redacted Leave to reply to 'Libyan Government's Response to Saif Al-Islam Gaddafi 'Addendum to the Urgent Defence Request of 21 January 2013, and Request for Finding of Non-Compliance'"

**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. Counsel for Libya file this Response to Mr. Gaddafi's "Public and Redacted Leave to reply to 'Libyan Government's Response to Saif Al-Islam Gaddafi 'Addendum to the Urgent Defence Request of 21 January 2013, and Request for Finding of Non-Compliance'"¹ ("Application for leave to reply" or "the Application") filed on 3 June 2013.
2. The Government hereby requests that the Pre-Trial Chamber reject the Application for leave to reply on the basis that it does not demonstrate good cause as to why leave to reply is justified in the current circumstances.

II. SUBMISSIONS

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

3. It is noted at the outset that although the Application purportedly seeks leave to reply, it includes the substantive reply arguments within it. This is 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.² The inclusion of the merits in the Application for leave to reply creates the appearance of trying to bypass the proper authorisation process by placing substantive arguments immediately before the Chamber, with a view to influencing the ultimate decision. As such, the Application for leave to reply falls squarely outside accepted practice and should be rejected.

B. NO GOOD CAUSE SHOWN TO WARRANT A REPLY

4. In order to obtain authorization to file a reply, a party generally needs to

¹ ICC-01/11-01/11-345-Red.

² *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.

demonstrate good cause³ or that there was an issue that arose from the response which could not have been anticipated in their initial submission.⁴ Allowing the applicant the opportunity to reply does not always enhance the fairness of proceedings and indeed the opposite can be the case where an applicant has deliberately refrained from making a reasoned and evidenced argument on a foreseeable issue.⁵

5. The Application for leave to reply argues that the interests of justice merit the Defence being permitted to file a reply in order to dispel allegedly inaccurate submissions made by the Government in its Response.⁶ The Defence claims that a reply is also needed to respond to new factual matters raised in the Response, “such as the Government’s delays in notifying relevant domestic authorities of the Chamber’s decision”. No other examples of new arguments purportedly raised by the Government are cited. Despite this, the Application for leave to reply includes an additional 14 pages of legal and factual submissions. Rather than responding to new arguments, it is apparent that these additional arguments are merely an attempt to supplement the 19 pages of legal and factual submissions contained in its original ‘Addendum to the Urgent Defence Request of 21 January 2013’ (“Addendum”). These supplemental submissions relate to:
 - a. the purported procedural standing of the Defence to raise the issues set out in the Addendum;⁸
 - b. factual and legal matters relating to the 2 May 2013 hearing in Zintan (particularly in relation to the application of People’s Court procedures and due process issues);⁹ and

³ ICC-01/05-01/08-294.

⁴ ICC-01/04-01/07-2792.

⁵ ICTY, Prosecutor v M. Nikolic (IT-02-60/1-A), Decision on Prosecution’s Motion to Strike, 20 January 2005, para. 32.

⁶ Application, para. 4.

⁷ ICC-01/11-01/11-332.

⁸ Application, paras 32-38.

⁹ Application, paras 39-51.

- c. the temporal and legal parameters of the Government's obligation to execute the Chamber's Decision.¹⁰
6. A reply is designed to allow parties to address issues that could not reasonably be anticipated in the originating filing. It is not to be used by parties to merely supplement the original filing or otherwise ensure due diligence. Notably, the Defence has not explained in its Application for leave to reply the reasons for its belated attempt to rely upon or Regulations 29, 108 and 109 as the basis for the relief sought. As the party bringing the motion, the burden falls on the Defence to substantiate before the Chamber that it is legally entitled to the relief sought. The Defence nonetheless chose not to include any reference to these provisions in its original Addendum. Allowing these new submissions to be made by way of reply on these matters would not only create and condone procedural irregularity but also prejudice the Government and undermine the fairness of the process by preventing the Government from being able to respond to the erroneous interpretation of these legal provisions now put forward by the Defence.
7. Further, the Defence has not shown good cause to be permitted to advance further legal and factual submissions relating to the 2 May 2013 court hearing in Zintan. The Appeals Chamber has previously determined that it is not appropriate or necessary to grant leave to file a reply in relation to issues that “are already before the Appeals Chamber or, in the view of the Appeals Chamber, appear to be mere disagreements with [another party’s] arguments.”¹¹ However, the submissions made in respect of the 2 May 2013 court hearing and Libya’s obligation to execute the Chamber’s decision in the Application for leave to reply were / are:
- a. eminently foreseeable at the time of filing the Addendum; or
 - b. mere disagreements with factual / legal submissions made by the

¹⁰ Application, paras 7-31.

¹¹ ICC-01/09-01/11-239 at para. 10.

Government; or

- c. a mere repetition of submissions already made in these proceedings.
8. Indeed, as expressly conceded by the Defence in its Application, its submissions by way of reply pertaining to People's Court procedures have been set out in detail in previous filings.¹² Likewise, the submissions pertaining to Mr Gaddafi's legal representation at the Zintan hearing¹³ and the Government's efforts to comply with the Chamber's decision¹⁴ contain no new factual issues that might assist the Chamber. The submissions are limited to further comments on factual matters previously contained in the Annexes to the original Addendum.¹⁵
9. The Defence submissions are also, in several material respects, incorrect. As illustrations only, contrary to the statements in the Application that Libya has failed to respond to Registry correspondence and failed to notify the Registry of difficulties with compliance, the Libyan Focal Point to the ICC has been in regular contact with the Registrar on these issues. He has confirmed to Registry representatives that he is working - together with Mr Radwan (the newly appointed Prosecutor-General) - to try to overcome obstacles under Libyan law so that the documents can be handed back to the Court. The Defence submissions pertaining to the unavailability of judicial review of the Political Isolation Law are also made in error.¹⁶ While it would not be procedurally fair for such submissions to be received without the Government having a full opportunity to respond to them, the Government understands that several private individuals who are affected by the Political Isolation Law are currently in the process of applying to the Supreme Court to challenge the constitutionality of this contentious piece of legislation. It will be a matter for

¹² Application, para. 40.

¹³ Application, paras 44-46.

¹⁴ Application, paras 7-9.

¹⁵ Application, paras 43-51.

¹⁶ Application, para. 31.

the Supreme Court as to whether it has jurisdiction to entertain such challenges. Accordingly, it is plainly not in the interests of justice for a reply to seek to advance repetitive or erroneous submissions.

10. It is additionally suggested in the Application that the Government's position concerning the application of People's Court procedures is directly contradicted by evidence that is within the custody of the Libyan Government.¹⁷ This is a serious allegation which, like many in the Application,¹⁸ is made without evidential foundation. Allowing such submissions with respect to this topic to be made by way of reply would be procedurally irregular and prejudicial to the Government. The Government would wish to have the opportunity to respond to this allegation by clarifying the distinction under Libyan law between misdemeanours [such as offences pertaining to insulting the Libyan flag] (which are referred directly to trial courts) and felonies (which are referred to a trial court via the Accusation Chamber procedure).¹⁹ This distinction remains unaffected by the Supreme Court decision on 23 December 2012, which stated in terms that it applied to "felony" crimes.²⁰

11. Finally, Counsel for the Libyan Government note with concern the serious and personal allegations contained in the Application. These allegations range from accusations that Counsel have failed to: communicate the Court's decisions to

¹⁷ Application, paragraph 42.

¹⁸ Further unsubstantiated allegations made in the Application include: counsel for the Government drafting legal pleadings "which are predicated on misleading or incorrect legal or factual premises" (para. 4 and, again at para. 7); the Government's delay in notifying relevant domestic authorities of the chamber's decision (paras 5, 10 and 11); that there is "absolutely no indication that the Government has made any good faith efforts to comply with the Chamber's decision of 3 March 2013" (para.8); that "Libya's submissions lack internal or external coherence, and appear only designed to exempt Libya from its responsibility to implement the Court's orders" (para. 25); that "Counsel for Libya are unfamiliar with Libyan law, have not read Defence submissions, or are willing to make completely unfounded assertions" (para. 39); that the "Libyan authorities have actively impeded every attempt by Mr. Gaddafi to communicate his concerns regarding his well-being and detention conditions" (para. 49); "Mr Gaddafi's comment that he has 'no complaints' simply underscores the futility and hopelessness of his situation" (para. 50).

¹⁹ See articles 135, 136, 187, 187*bis* of Libyan Criminal Procedure Code.

²⁰ ICC-01/11-01/11-258, Annex 8. Cf. Application, para. 24. See Annexe 1.

the Government;²¹ take instructions on key factual issues;²² advise the Government of the binding nature of certain obligations under international law;²³ and ensure that their submissions made to the Court are accurate and based on proper evidence.²⁴ It is plainly unhelpful to the Court, to the parties, and to the proper determination of an admissibility challenge to advance such claims without any evidential or proper basis. Such claims do not advance the arguments or the administration of justice. For the avoidance of doubt, throughout this case Counsel for the Libyan Government have acted in full conformity with their professional conduct duties before both the ICC and their domestic jurisdictions. The Defence is respectfully urged to resist making unwarranted and unsubstantiated allegations against Counsel in future filings.

III. RELIEF REQUESTED

12. In conclusion, the Government submits that granting the Defence a right of reply would not advance or assist the Chamber's ability to adjudicate on the Addendum. As no good cause for a reply has been shown, the Libyan Government respectfully requests that the Pre-Trial Chamber reject the application for leave to reply.

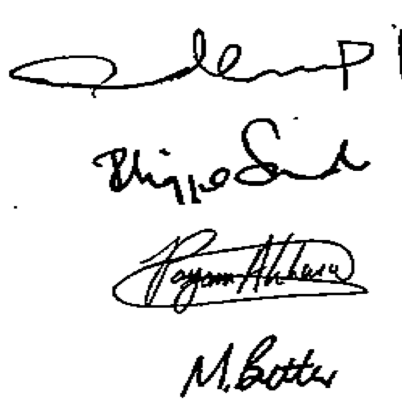
²¹ Application, paras 10 and 11.

²² Application, para. 41.

²³ Application, para. 11: the Defence speculates that Counsel for Libya might "deliberately refrain from communicating the Pre-Trial Chamber's order of 31 May 2013 requiring Libya to surrender Mr. Gaddafi to the ICC immediately, notwithstanding any potential appeal." See also paras 12 and 25.

²⁴ Application, paras 4, 7 and 39.

Respectfully submitted:



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Dated this 7th day of June 2013
At London, United Kingdom