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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 Defence for Mr. Saif Al-Islam Gaddafi "Request for Leave to Reply to the Government of Libya's "Response to the Gaddafi Defence's Request for Finding of Non-Compliance and Referral to United Nations Security Council""

**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 the “Defence for Mr. Saif Al-Islam Gaddafi “Request for Leave to Reply to the Government of Libya’s “Response to the Gaddafi Defence’s Request for Finding of Non-Compliance and Referral to United Nations Security Council”” (“the Request”).¹
2. The Government hereby submits that the Chamber should reject the Request on the following basis: (i) that the Defence have included the merits of the Reply within the Request thereby attempting to circumvent due process and (ii) that it does not demonstrate good cause to justify the filing of a reply.

II. SUBMISSIONS

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

3. 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 Defence Application for a reply includes the substantive reply arguments within it.³ Having outlined in Section I the reasons underlying the Request, the Defence for Mr. Gaddafi in Section II advance detailed submissions under the heading “Submissions” bypassing the proper authorisation process by placing substantive arguments immediately before the Chamber, with a view to influencing the decision on their “Request for finding of Non-Compliance and Referral to United Nations Security Council” (“the Original Request”).⁴
4. The Defence is fully aware of the Appeal Chamber’s express denunciation of this

¹ ICC-01/11-01/11-410, 20 August 2013.

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 (“The *Lubanga* Decision”), para 68.

³ The Request, paras. 5-27.

⁴ ICC-01/11-01/11-388, 23 July 2013.

practice, as stated in the *Lubanga* proceedings.⁵ Following a previous attempt to circumvent due process, the *Lubanga* Decision was brought to the attention of the Defence on the 7 June 2013.⁶ As such, the Chamber should take cognisance of this emerging pattern and summarily reject the Request.

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 cause⁷ or that there was an issue that arose from the response which could not have been anticipated in their initial submission.⁸ 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.⁹
6. The Gaddafi Defence argues that a reply is required to address issues that purportedly “strike at the heart as to whether the Chamber should issue a finding of non-compliance”.¹⁰ In particular, the Defence argue that Libya has: (a) “[e]mployed an inaccurate time frame for calculating the duration of its obligation to surrender Mr. Gaddafi to the ICC”; (b) confirmed that Libya intends to prosecute, convict and sentence Mr. Gaddafi in Libya; (c) invoked Article 97 on the basis of vague and contradictory references to the Zintan issue; and (d) attempted to bypass the authority of the Appeals Chamber by relitigating the issue of suspensive effect before the Pre-Trial Chamber.¹¹ Further the Defence argues that, “it is also in the interests of justice that the

⁵ The *Lubanga* Decision.

⁶ Libyan Government “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’”, ICC-01/11-01/11-348, 7 June 2013.

⁷ ICC-01/05-01/08-294

⁸ ICC-01/04-01/07-2792.

⁹ ICTY, *Prosecutor v. Nikolic* (IT-02-60/1-A), Decision on Prosecution’s Motion to Strike, 20 January 2005, para. 32.

¹⁰ The Request, para. 3.

¹¹ *Ibid*, para. 2.

record should not be tainted by Libya's selective quoting of decisions and ambiguous pleadings".¹² Finally, that "given that Libya has asserted that its prior pleadings should be construed as 'consultations' for the purposes of Article 97, the principles of adversarial proceedings requires that the Defence should be accorded an opportunity to respond to such 'consultations'".¹³

7. In all instances, the Defence Request is misconceived and ought to be dismissed.
8. First, with regard to (a) to (d) above and the claim that the record should not be tainted by selective quoting of decisions and ambiguous pleadings, there is nothing in these alleged submissions that requires further argument. The Chamber is fully able to ascertain whether submissions are ambiguous and decisions have been taken out of context. There is nothing contained in the Defence's premature arguments that begin to warrant this characterisation. Additionally, the Chamber is fully cognisant of the history of the proceedings, the domestic proceedings that concern Mr. Gaddafi and Article 97 and the associated 'Zintan issue'. The points raised by the Defence with regard to these fully debated issues are plain on their face, require no further elucidation and are wholly without merit.
9. Similarly with regard to (d), the Chamber is fully able to assess on the face of the Response whether the Government is attempting to "bypass the authority of the Appeals Chamber". Plainly, the Government's submissions concerning the good faith efforts for the "negotiated transfer of Mr. Gaddafi from Zintan to Tripoli" and the "disproportionate" nature of the Defence request to report Libya to the Security Council"¹⁴ cannot be reasonably construed in this manner.
10. Finally, the suggestion that the Defence should be "accorded an opportunity to

¹² *Ibid*, para. 3.

¹³ *Ibid*, para. 3.

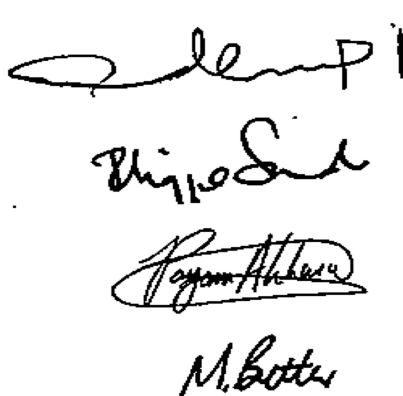
¹⁴ The Response, para.

respond to such “consultations” [as required by Article 97],¹⁵ disregards the fact that on each an every occasion that Libya has consulted through its pleadings, the Defence has responded. The “principle of adversarial proceedings” has been fully respected. Repeating this litigation does not provide any greater equality or otherwise enhance the interests of justice. Accordingly, there is no discernible benefit or basis for requiring the grant of any relief.

III. RELIEF REQUESTED

11. 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 Original Request. As the Request is filed improperly and 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 Phillippe Sands QC
 Professor Payam Akhavan
 Ms Michelle Butler

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

Dated this 26th day of August 2013
 At London, United Kingdom

¹⁵ The Request, para. 3.