

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **21 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 Request and Response to the “Libyan Government Application for leave to reply to any Response/s to article 19 admissibility challenge”

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

Counsel for the Defence

Mr. Xavier-Jean Keïta, Principal Counsel
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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The potential deferral of the present case to Libya would significantly impact on the rights of the defendant, Mr. Saif Al Islam Gaddafi, in particular, because he is facing the prospect of the death penalty in domestic proceedings.
2. Once the ICC has made its final decision on admissibility, the defendant has no future recourse to request the ICC to reverse or reconsider a decision that the case is inadmissible, even if there are new facts or circumstances, which may invalidate the Chamber's initial decision.
3. In contrast, if a State is unsuccessful in challenging admissibility, it may, in exceptional circumstances, challenge the admissibility of the case more than once.
4. Similarly, the Prosecutor may invoke Article 19(10) of the Statute in order to request the Chamber to review a previous decision that a case is inadmissible, based on new facts.
5. In light of this Statutory lacuna as concerns the ability of the Defence to contest final decisions on admissibility, it is imperative that the decision of the Pre-Trial Chamber is reached after giving due regard to the ability of the Defence to bring all relevant issues to the attention of the Chamber, in an adversarial manner.
6. In the present case, the Prosecutor implicitly indicated at his briefing to the Security Council that he will endorse Libya's challenge to admissibility.¹
7. In indicating that there is "no doubt" concerning the legal principles that States have primacy, the Prosecutor was presaging that he will not raise any legal impediments to such a challenge. Moreover, by proclaiming that this challenge marked the "first time in the short history of the International Criminal Court that a State is requesting jurisdiction to conduct a national investigation against the same individual and for the

¹ ICC Prosecutor Statement to the United Nations Security Council on the situation in the Libyan Arab Jamahiriya, pursuant to UNSCR 1970 (2011)

same incidents under investigation by the International Criminal Court”, the Prosecutor was clearly stating his position that unlike the Kenya cases, Libya is actively investigating the defendant for the same conduct as the ICC case.

8. The Defence will therefore be facing at least two adverse positions as concerns the defendant’s objective of being tried before the ICC.
9. Whereas the current time frame for responses permits the Defence to respond to the observations of the Libyan government, the Defence currently does not have an explicit right to respond to either the observations of the Prosecution, or those of participating victims.
10. The right of the Defence to respond to such observations inheres from the Statutory presumption that the Defence should always have the last word, particularly on issues of fundamental importance to the rights of the Defence.
11. The Defence therefore respectfully requests the Honourable Pre-Trial Chamber to facilitate the above rights by permitting the Defence to file its observations after the deadline for the Prosecution, and the Victims.
12. As concerns the request by the Libyan authorities to file a reply to the Defence observations, the Defence therefore respectfully requests the Honourable Pre-Trial Chamber to reject the request as being unfounded, and contrary to the Statutory imperative of resolving admissibility challenges in an expeditious manner.
13. Alternatively, should the Chamber grant such a right, then in keeping with the right of the Defence to have the last word, the Defence should be authorized to respond to any additional allegations or evidential items contained in such a reply.
14. The Libyan authorities should also be required to file such a reply within the 10 day deadline.

Procedural History

15. On 1 May 2012, the Libyan authorities filed a challenge to the admissibility of the case.²
16. On 4 May 2012, the Honourable Pre-Trial Chamber issued its ‘Decision on the Conduct of the Proceedings Following the "Application on behalf of the Government of Libya pursuant to Article 19 of the Statute"’, in which the Chamber ordered the Prosecution, the Defence, the OPCV and the Security Council to submit any observations on the admissibility challenge by 4 June 2102.³
17. On 18 May 2012, the Libyan authorities filed an ‘Application for leave to reply to any Response/s to article 19 admissibility challenge’, in which the Libyan authorities requested authorisation to file a reply to any responses filed on the admissibility of the case, and further requested that it should be allocated a deadline of 18 days for doing so.⁴

Submissions

18. The jurisprudence and legislative regime of the ICC supports the presumption that the Defence should always have the last word, particularly on issues which affect the fundamental rights of the defendant.
19. Rule 140(2)(d) of the Rules of Procedure and Evidence provides that the Defence shall always have the last right to examine witnesses. For example, even if the Prosecution calls a witness, and is granted a right to re-examine the witnesses, the Defence is always accorded a right to ask final questions after the re-examination.⁵

² Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-130, 1 May 2012.

³ ICC-01/11-01/11-134.

⁴ ICC-01/11-01/11-150

⁵ See for example, Prosecutor v. Bemba, Decision on Directions for the Conduct of the Proceedings”; 19 November 2010; ICC-01/05-01/08-1023, para. 5, 8-9, 11; Prosecutor v. Katanga and Ngudjolo, Directions for the conduct of the proceedings and testimony in accordance with rule 140”, 20 November 2009; ICC-01/04-01/07-1665-Corr; para 73.

20. If the witness is called by a participant rather than a party, the Defence right to have the last word is of even more importance.⁶
21. This right has been extended to oral submissions on important procedural issues, and written filings on substantive issues concerning the case, at both the trial and pre-confirmation phase.⁷ For example, in the Lubanga case, although the Trial Chamber initially requested the Prosecution and the Defence to file their final submissions at the same time, the Trial Chamber subsequently amended the order in express recognition that the principle that the Defence should always have the last word also extends to written submissions.⁸ In confirmation proceedings, the Defence are consistently authorised to file their confirmation briefs after the deadline for the Prosecution and any participating Victims.⁹
22. In light of the consequences for the Defendant if the case is referred back to Libya, it would be consistent with these above jurisprudence to amend the deadline for the Defence so that it can file its observations after those of the Prosecution, OPCV, and Security Council.
23. In terms of the request by the Libyan authorities to file a reply, Rule 58(3) of the Rules of Procedure and Evidence only requires the Chamber to permit the Prosecution and the Defence to file observations on the challenge – no provision is made for the filing of replies.
24. Regulation 24(5) of the Regulations of the Court can only be invoked if the participant can demonstrate a concrete basis for filing a reply; it cannot be invoked in the abstract prior to the filing of any responses.

⁶ Prosecutor v. Katanga and Ngudjolo, Oral decision, 13 January 2010, Transcript pp. 64-65, ICC-01/04-01/06-T-226-Red-ENG.

⁷ For example, in connection with the Lubanga confirmation hearing, the Presiding Judge repeatedly emphasized the principle that the 'Defence should have the last word' Transcript of 3 November 2006, at p. 29. <http://212.159.242.181/iccdocs/doc/doc216085.pdf> The Chamber also amended the deadline for filing final briefs to permit the Defence brief to be filed after the Prosecution and the Victims. 'Decision on the schedule and conduct of the confirmation hearing', ICC-01/04-01/06-678, 7 November 2006.

⁸ 'Order on the timetable for closing submissions', ICC-01/04-01/06-2722, 12 April 2011

⁹ Prosecutor v. Muthaura, Kenyatta and Ali, 5 October 2011, Transcript no. ICC-01/09-02/11-T-15-Red-ENG WT 05-10-2011 ; page 87-89 ; Prosecutor v. Ruto, Kosgey and Sang, 8 September 2011, Transcript number ICC-01/09-01/11-T-12-ENG ET WT 08-09-2011, page 76-77 ; Prosecutor v. Mbarushimana, 21 September 2011, Transcript number ICC-01/04-01/10-T-9-ENG ET WT 21-09-2011, page 29; Prosecutor v. Katanga and Ngudjolo, Oral decision of 16 July 2008, Transcript number ICC-01/04-01/07-T-50-ENG ET WT, page 8-9.

25. In the absence of any concrete arguments as to why a reply is justified, the Libyan authorities have simply cited ‘State sovereignty’ and attempted to draw an analogy with the Kenya cases.
26. In respect of the first justification, the triumph of international criminal law is that it recognizes that State sovereignty should not trump the fundamental rights of individuals.¹⁰ In the present case, the fact that the challenge concerns issues linked to the sovereignty of Libya should not be used to trample on the ability of the defendant to have the last word as to whether he should have to face the death penalty in a domestic trial lacking in due process protections.
27. International Courts have also made clear that deference to State sovereignty should not be invoked to prevent the Defence from being able to bring relevant information concerning the credibility of an issue to the attention of the Chamber.¹¹ If the Libyan authorities are granted a right to reply, it is entirely possible that in responding to Defence arguments that they may raise new factual issues or assertions, which the Chamber does not have an independent capacity to verify. In such circumstances, the right to adversarial proceedings requires that the Defence should have the right to respond to any such allegations or documentation relied upon by the Libyan authorities.¹² Since this would, in turn, impact on the ability of the Chamber to expeditiously resolve the admissibility challenge, the Chamber should exercise its discretion to reject the request for leave to file a reply.
28. In this connection, Trial Chamber II has underscored that the Statutory and regulatory regime for admissibility challenges is reflective of the desire of the drafters that they should be resolved as expeditiously as possible, and that the making of such a challenge should not frustrate the defendant’s right to expeditious proceedings before the ICC:

¹⁰ A Cassese, Reflections on International Criminal Justice, *Journal of International Criminal Justice* 9 (2011), 271-275 at p. 272;

¹¹ *Prosecutor v. Milutinovic*, Decision on Interlocutory Appeal against Second Decision Precluding the Prosecution from Adding General Wesley Clark to its 65th Witness List, 20 April 2007, at para. 18.

¹² This would be consistent with the fact that Trial Chamber II has found that if the Prosecution were to be granted a right to submit rebuttal evidence, then the Defence should also be accorded an additional opportunity to conduct further investigations and call further evidence. *Prosecutor v. Katanga and Ngudjolo*, Oral Decision, 18 April 2011, pp. 20-21, ICC-01/04-01/06-T-352-Red-ENG.

the Chamber notes that the provisions of paragraphs 5 to 8 of this article [Article 19] are clearly aimed at avoiding challenges to admissibility needlessly hindering or delaying the proceedings, which means that they must be brought as soon as possible, preferably during the pre-trial phase. Such is the case in paragraph 4 of article 19, as well as for paragraph 5 thereof, which requires States to make their challenges “at the earliest opportunity”. The same is also true of rule 58 of the Rules, which lays down the procedure to be followed for the purposes of article 19 and provides that a challenge may be considered in the context of a confirmation of charges hearing or a trial proceeding, “as long as this does not cause undue delay”, with the determination of the time limits for submitting observations being in the discretion of the Chamber. This same concern is indirectly expressed in rule 122(2) of the Rules, which requires the Pre-Trial Chamber, when called upon to rule on a challenge made during the confirmation hearing, to ensure adherence to the diligence expressly prescribed by rule 58 of the Rule.¹³

29. It is also incorrect for the Libyan authorities to assert that they had “no prior opportunity to make arguments as to the Court’s jurisdiction over acts alleged to have taken place on its sovereign territory”.¹⁴ Dating from November 2011, the Libyan authorities have made multiple submissions to the ICC concerning the status of domestic proceedings and the jurisdiction of the ICC both at their own initiative (as was the case with the letter of the President of the NTC to the Pre-Trial Chamber, and their applications under Articles 94 and 95), and at the invitation of the Pre-Trial Chamber (as was the case with their observations of 23 January 2012). Notwithstanding the absence of any clear legal basis for doing so, they have also submitted a detailed response to information contained in an OPCD report. Unlike the Defence, the Libyan authorities have also had the direct opportunity of directly addressing the Security Council, in advance of the deadline for the Security Council to submit its observations before the ICC. The Libyan authorities have therefore had a plethora of opportunities to advance their position before the ICC.

¹³ Prosecutor v. Katanga and Ngudjolo, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute) ICC-01/04-01/07-1213-tENG at para. 44.

¹⁴ At para. 8.

30. A right to reply can not be derived from past precedent in the Kenya cases. The current case is not analogous to the Kenya cases, in which the State challenge to admissibility was either explicitly supported by the Defence, or the Defence took no position. Indeed, rather than using its right to reply to respond to Defence arguments, the Kenyan government actually incorporated Defence arguments into their reply.¹⁵
31. As noted in the Introduction, the Prosecution was also not unduly prejudiced by the fact that the Kenyan government was granted a right to reply, due to the fact that the Prosecution had the possibility of invoking Article 19(10) in the future. The Prosecution also did not oppose the request of the Kenyan government to be granted a right to reply.¹⁶
32. The time requested by the Libyan government is, in any case, excessive. The Libyan government is represented by three English speaking counsel, who are proficient in international criminal procedure. Unlike a regular participant in the proceedings, the Libyan authorities have the resources of the State at their disposal, which necessarily expedites their ability to both access information in a timely manner, and to have sufficient resources to respond to Court deadlines. There is thus no objective basis for according a State with a greater time for filing a reply than which is normally accorded to participants.
33. It is incorrect for the Libyan authorities to assert that the Kenyan government was given 15 days to reply to observations in the Ruto et al., and Muthaura et al. cases: the decision was issued on Monday 2 May 2012 and the Government was requested to file on Friday 13 May – that equates to a time period of 10 days (as the date of notification and the date of filing are not included in deadlines).¹⁷ The observations of the Prosecution and the Defence were submitted on Thursday 28 April 2012, which was the day before an ICC holiday. As the ten day time period would only have run from the next working day, which was 2 May 2012, the Kenyan government was only accorded ten days in total from the actual filing of the observations.

¹⁵ Reply on behalf of the Government of Kenya to the Responses of the Prosecutor, Defence, and OPCV to the Government's Application pursuant to Article 19 of the Rome Statute, ICC-01/09-01/11-89.

¹⁶ Decision under Regulation 24(5) of the Regulations of the Court on Submitted on Behalf of the Government of Kenya the Motion of Kenya, 2 May 2011, ICC-01/09-01/11-76 at para. 6.

¹⁷ ICC-01/09-01/11-76.

34. The difference between the amount of time accorded to the parties in the present case to respond to the challenge as compared to the Kenya cases is also minimal, and presumably, took into consideration the fact that the Defence should have been entitled to travel to Libya to visit the defendant, and that such a mission would have understandably, impacted on the time necessary for Defence preparation.
35. The time allocated to the parties must also be viewed through the lens that Libya filed many documents in Arabic, which were directly relevant to the admissibility of the case, but for which English translations were either not provided at the time of filing, or where provided in an incomplete form.¹⁸ The parties were therefore only in a proper position to respond to the challenge as of 15 May 2012, which means that the Defence only had an effective time period of 17 days from the filing of the complete version of the application to complete its response.

Relief Sought

36. For the reasons set out above, the Defence for Mr. Saif Al Islam Gaddafi respectfully requests the Honourable Pre-Trial Chamber to:
- i. authorise the Defence to file its observations on admissibility after the deadline for the Prosecution, OPCV, and Security Council; and
 - ii. reject the request for the Libyan authorities to file a reply to any observations filed by the Defence, Prosecution, OPCV and Security Council.

¹⁸ ICC-01/11-01/11-144 and ICC-01/11-01/11-146-Conf.



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

Dated this, 21st Day of May 2012

At The Hague, The Netherlands