

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 8 October 2018

PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Reine Adélaïde Sophie Alapini-Gansou

**SITUATION IN LIBYA
IN THE CASE OF *THE PROSECUTOR v. SAIF AL-ISLAM GADDAFI***

Confidential

Prosecution response to "Defence Application for 1) Leave to Reply to Legal Representative of Victims filing 652 and Prosecution filing 653-Conf, and 2) Extension of Time to Respond to Observations of *amici* Lawyers for Justice in Libya and Redress Trust (filing 654)"

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Julian Nicholls

Counsel for the Defence

Ms Shyamala Alagendra
Mr Essa Faal
Mr Aidan Ellis
Mr Khaled Al Zaidy

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Other

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

A. INTRODUCTION

1. Pre-Trial Chamber I ("PTC I" or "Chamber") should reject the Defence request¹ ("Defence Request") to make either a general reply, or in the alternative, a reply to specific issues raised in the responses to Mr Gaddafi's challenge to the admissibility of the case against him at the International Criminal Court ("ICC" or "Court")² ("Admissibility Challenge") by the Office of the Prosecutor³ (the "Prosecution Response") and the Office of Public Counsel for Victims⁴ ("the OPCV Response"). A reply should not be used to attempt to strengthen the arguments put forward in the Admissibility Challenge and the Defence does not identify any new issues raised in the Prosecution Response or the OPCV Response which it could not reasonably have anticipated.

2. The Prosecution does not object to the Chamber exercising its discretion to grant leave to the Defence to reply to any new facts or law that may arise from the documents listed in paragraph 20 below (the "Documents"). While any new facts or law that arise from the Documents do not raise any new issues, the Prosecution accepts that they may impact issues already raised in the Admissibility Challenge. On this basis, the reply should be limited to addressing how any new facts or law that arise from the Documents relate to the issues raised in the Admissibility Challenge.

3. The Prosecution also does not object to the Defence filing a consolidated document that addresses new facts or law that arise from the Documents and

¹ Defence Application for 1) Leave to Reply to Legal Representative of Victims filing 652 and Prosecution filing 653-Conf, and 2) Extension of Time to Respond to Observations of *amici* Lawyers for Justice in Libya and Redress Trust (filing 654), 4 October 2018, ICC-01/11-01/11-655-Conf ("Defence Request").

² Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute, 5 June 2018, ICC-01/11-01/11-640 ("Admissibility Challenge").

³ Prosecution response to "Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute", 28 September 2018, ICC-01/11-01/11-653-Conf ("Prosecution Response").

⁴ Observations on behalf of victims on the "Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute", 28 September 2018, ICC-01/11-01/11-652 ("OPCV Response").

responds to the observations filed by Lawyers for Justice in Libya and Redress Trust (“Amici Observations”).⁵ The Prosecution requests that the page limit for this consolidated document reflect that no issues that the Defence could not reasonably have anticipated are raised in the Prosecution Response, the OPCV Response or the Amici Observations.

B. CLASSIFICATION

4. Pursuant to regulation 23bis(2) of the Regulations of the Court (the “Regulations”), this response is classified as confidential because it refers to other documents marked with the same classification. The Prosecution will file a public redacted version as soon as practicable.

C. SUBMISSIONS

5. The Defence does not justify why the Chamber should exercise its discretion to grant leave to reply to any issues in the Prosecution Response or the OPCV Response, either in a general reply or in a reply to any specific issues.

6. Regulation 24(5) of the Regulations states, in relevant part that: “[u]nless otherwise permitted by the Chamber, a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated.”

7. The Appeals Chamber has previously found that it “would consider granting a request for leave to reply if these conditions are met, unless it considers that a reply would otherwise be necessary for the adjudication of the appeal”⁶ and that the

⁵ Observations by Lawyers for Justice in Libya and the Redress Trust pursuant to Rule 103 of the Rules of Procedure and Evidence, 28 September 2018, ICC-01/11-01/11-654 (“Amici Observations”).

⁶ *Prosecutor v. Ntaganda*, Decision on Mr Ntaganda’s request for leave to reply, 3 March 2017, ICC-01/04-02/06-1813 (“*Ntaganda* Decision”), para. 8.

question of whether the Chamber should grant the Defence leave to reply “lies within its discretionary powers and must be considered on a case-by-case basis.”⁷

8. The Pre-Trial Chamber has also found that a reply “may not be used to strengthen the arguments [already put forward].”⁸

9. In the present case, the Defence have not demonstrated that the conditions of regulation 24(5) have been met. A general reply is not necessary for the adjudication of the Admissibility Challenge and there are no new issues raised in the Prosecution Response or the OPCV Response which the Defence could not reasonably have anticipated.

10. Nevertheless, the Prosecution accepts that submissions by the Defence on new facts or law arising from the Documents may assist the Chamber in its adjudication of the issues. Therefore, while any new facts or law arising from the Documents do not raise any new issues, the Prosecution does not object to a reply that addresses how any new facts or law arising from the Documents relate to the issues raised in the Admissibility Challenge.

1) The Chamber should reject the Defence request for leave to file a general reply to issues raised in the Prosecution Response and the OPCV Response

11. The Defence requests leave to submit a general reply to issues raised in the Prosecution Response and the OPCV Response.⁹ The Prosecution opposes this request on the basis that the Defence had the opportunity to present its arguments on these issues in the Admissibility Challenge and does not demonstrate how further general submissions on previously raised issues would assist the Chamber in its determination of the Admissibility Challenge.

⁷ *Prosecutor v. Bemba, Kilolo, Mangenda, Babala & Arido*, Decision on requests for leave to reply to the Prosecutor’s consolidated response to the documents in support of the appeal, 18 August 2017, ICC-01/05-01/13-2197 (“*Bemba et al* Decision”), para. 17. *See also*, *Ntaganda* Decision, para. 8.

⁸ *Prosecutor v. Ngudjolo*, Decision on the request by Counsel for Mathieu Ngudjolo for leave to reply, 8 October 2015, ICC-01/04-02/12-296-tENG, para. 7.

⁹ Defence Request, paras. 19 to 22.

12. The Prosecution does not dispute that, like the Government of Libya in its admissibility challenges in relation to Mr Gaddafi and Abdullah Al-Senussi,¹⁰ the Defence is the “triggering force and the main actor” in these admissibility proceedings.¹¹ However, the Defence does not adequately explain how this would justify an exercise of the Chamber’s discretion to grant leave to the Defence to submit a general reply to issues raised in the Prosecution Response and the OPCV Response.

13. The Defence also does not explain why the fact that the Government of Libya was granted leave to file replies to responses in relation to its admissibility challenges in relation to Mr Gaddafi and Abdullah Al-Senussi, should require this Chamber to exercise its discretion to grant leave to the Defence to submit a general reply.¹²

14. The Chamber’s discretion on whether to grant leave to reply must be considered on a case-by-case basis¹³ and in this case, the Defence have not offered sufficient justification for the Chamber to permit leave to file a general reply.

15. In support of the request for a general reply, the Defence further argues that the Prosecution Response and the OPCV Response contain “myriad important, complex and often times novel issues of Libyan and international law, as well as crucial matters of fact regarding the Libyan national proceedings against Dr. Gaddafi and the application of Law No. 6 of 2015 on general amnesty”.¹⁴ The issues referred to by the Defence in paragraph 21 of the Defence Request in support of this argument for a general reply could each reasonably be anticipated, and many were directly addressed in the Admissibility Challenge, as follows:

¹⁰ See e.g. Decision on the OPCD request for variation of time limit, 28 May 2012, ICC-01/11-01/11-159, para. 9; Decision on Libya’s request for leave to file a consolidated reply, 16 July 2013, ICC-01/11-01/11-382, para. 11.

¹¹ Defence Request, paras. 1, 15 and 19-21.

¹² See e.g. Decision on the “Libyan Government Application for leave to reply to any Response/s to article 19 admissibility challenge”, 26 July 2012, ICC-01/11-01/11-191; Decision on Libya’s request for leave to file a consolidated reply, 16 July 2013, ICC-01/11-01/11-382.

¹³ See, *Bemba et al* Decision, para. 17. See also, *Ntaganda* Decision, para. 8.

¹⁴ Defence Request, para. 21.

- a. "Dr. Gadafi's standing to submit the Admissibility Challenge".¹⁵ This issue was addressed in paragraphs 35 and 36 of the Admissibility Challenge;
- b. "whether the 'same case' test has been met for the purposes of an admissibility challenge".¹⁶ This issue was addressed in paragraphs 50 to 64 of the Admissibility Challenge;
- c. "whether Dr. Gadafi's trial before the Tripoli Court of Assize is a 'trial' for the purposes of article 17(1)(c) and 20(3) of the Rome Statute".¹⁷ This issue was addressed in paragraphs 40 to 49 of the Admissibility Challenge;
- d. "the *in absentia* judgment issued by the Tripoli Court of Assize and its implications for the matter of the finality of Dr. Gadafi's conviction by the same court".¹⁸ This issue was addressed in paragraphs 47 and 48 of the Admissibility Challenge;
- e. "the relevancy (if any) of the *res judicata* principle to admissibility challenges pursuant to articles 17(1)(c) and 20(3) of the Statute".¹⁹ This issue could have been anticipated by the Defence and is addressed, at least in part, in paragraphs 44 and 45 of the Admissibility Challenge;
- f. "the application (or not) of Law No. 6 of 2015 to Dr. Gadafi and its implications".²⁰ This issue was addressed in paragraphs 25, 26, 48, 67, 88 and 89 of the Admissibility Challenge; and
- g. "the permissibility of amnesties under the Rome Statute framework and the alleged shielding of Dr. Gadafi for the purpose of Article 20(3) of the

¹⁵ Defence Request, para. 21.

¹⁶ Defence Request, para. 21.

¹⁷ Defence Request, para. 21.

¹⁸ Defence Request, para. 21.

¹⁹ Defence Request, para. 21.

²⁰ Defence Request, para. 21.

Statute.”²¹ This issue was addressed in paragraphs 67 to 90 of the Admissibility Challenge.

16. Since each of these issues could reasonably be anticipated, and were each addressed, at least in part, by the Defence in the Admissibility Challenge, the Chamber should not permit the Defence to provide a general reply based on these issues. The Prosecution does not dispute that many of these issues are important, complex and novel, but they have already been addressed by the Defence in the Admissibility Challenge and a general reply on these issues would solely serve the impermissible purpose of allowing a party to strengthen its arguments.

2) The Chamber should reject the alternative Defence request for leave to reply to specific purported “new issues” raised in the Prosecution Response and the OPCV Response

17. In the alternative, the Defence requests leave to submit a reply to a number of “new issues”, outlined in paragraph 23 of the Defence Request, that it suggests arise from the Prosecution Response and the OPCV Response. The Prosecution opposes this request on the basis set out below.

18. The following paragraphs in the Defence Request, which are relied on by the Defence in support of the alternative request to file a reply, refer to issues that are not “new”, but rather core issues that could be reasonably anticipated by the Defence and in most cases, were addressed in the Admissibility Challenge, as follows:

- a. Paragraph 23(a): “The Prosecution and Legal Representative of Victims [...] divergent assessments as to whether the ‘same case’ test has been met for purposes of articles 17 and 19 of the Statute.”²² The issue of the ‘same case’ test was addressed in paragraphs 56 to 64 of the

²¹ Defence Request, para. 21.

²² Defence Request, para. 23(a).

Admissibility Challenge. Divergent assessments of this issue by the Prosecution and the OPCV have no bearing on the fact that the Defence addressed this issue in detail;

- b. Paragraph 23(e): “The Prosecution’s argument by implication [...] that because the Chamber has recognized the Government of National Accord as the official channel of communication with the Court, therefore action taken and statements made by officials of the Al-Bayda Transitional Government with respect to Mr. Gaddafi lack legal authority or are otherwise improper.”²³ The Prosecution does not accept the Defence’s characterisation of the Prosecution’s arguments on this issue and notes that the Chamber has previously publicly referred to the Government of National Accord (“GNA”) as the “*de jure*” government in Libya.²⁴ As such, this issue could reasonably have been anticipated by the Defence, which chose to draw no distinction in the Admissibility Challenge between the GNA, the transitional government based in Al-Bayda and the House of Representatives based in Tobruk;²⁵
- c. Paragraph 23(f): “The Prosecution’s submission that should the Chamber find that Law No. 6 of 2015 was validly applied to Mr. Gaddafi, that it should then ‘find that these proceedings were undertaken for the purpose of shielding Mr Gaddafi from criminal responsibility’.”²⁶ As referred to above, the issue of shielding was addressed in paragraphs 67 to 90 of the Admissibility Challenge;

²³ Defence Request, para. 23(e).

²⁴ Decision on the Prosecutor’s “Request for an order directing the Registrar to transmit the request for arrest and surrender to Mr al-‘Ajami AL-‘ATIRI, Commander of the *Abu-Bakr Al Siddiq* Battalion in Zintan, Libya, 21 November 2016, ICC-01/11-01/11-634-Red (“Decision on Al-‘Atiri Request”), para. 15.

²⁵ The Prosecution also notes that the issue of the legitimacy of the different authorities in Libya was raised in the Witness Statement of Alajmi Alatairi, Annex C to the Admissibility Challenge, ICC-01/11-01/11-640-Conf-AnxC, para. 26 and Exhibits 22-24 to that witness statement.

²⁶ Defence Request, para. 23(f).

- d. Paragraph 23(h): "The LRV's claim that Dr. Gaddafi cannot 'waive' his fair trial rights."²⁷ The issue of Mr Gaddafi's fair trial rights was raised in paragraphs 92 to 101 of the Admissibility Challenge;²⁸ and
- e. Paragraph 23(i) "The LRV's reliance on the principle of *res judicata* as part of its submissions on the meaning and application of the phrase 'has been tried' under Article 20(3) of the Rome Statute."²⁹ This issue could have been anticipated by the Defence and is addressed, at least in part, in paragraphs 44 and 45 of the Admissibility Challenge.

19. The issues referred to in paragraph 18 are therefore not "new" and the Defence do not justify how further submissions on these issues would assist the Chamber in determining the Admissibility Challenge.

3) The Chamber should grant the Defence leave to reply in relation to new facts or law arising from the Documents

20. The Defence should be granted leave to reply to the Documents, which are referenced in this paragraph, which were not available to the Defence at the time of the Admissibility Challenge, either because they came into existence after the date on which the Admissibility Challenge was filed, or because they were not generally publicly available and not previously accessible to the Defence, as follows:

- a. Paragraph 23(b): Response of the Government of Libya dated 18 September 2018³⁰ to the Prosecution's Request for Assistance dated 26 July 2018;³¹

²⁷ Defence Request, para. 23(h).

²⁸ See, in particular, para. 99 of the Admissibility Challenge which states in relevant part: "The right to a fair hearing is invested in [Mr Gaddafi]. It would be unusual to find a situation in which another party or participant could challenge the fairness of a trial, in circumstances where the victim of that alleged unfairness has made an informed choice not to do so."

²⁹ Defence Request, para. 23(i).

³⁰ Annex 8 to the Prosecution Response, Response of the Government of Libya to the Office of the Prosecutor's Request for Assistance, 18 September 2018, LBY-OTP-0065-0077 (Translation at LBY-OTP-0065-0426 at 0435-0436), ICC-01/11-01/11-653-Conf-Anx8.

- b. Paragraph 23(c): Letter from the Zintan Prosecutor's Office to the Minister of Justice in the Al-Bayda Transitional Government dated 17 May 2016;³² Letter from the Libyan Prosecutor General's Office to the ICC Prosecutor dated 13 July 2017;³³ and Letter from the Libyan Prosecutor General's Office to United Nations Support Mission in Libya ("UNSMIL") dated 19 April 2016;³⁴ and
- c. Paragraph 23(d): Decision of Pre-Trial Chamber II in relation to Simone Gbagbo dated 14 September 2018³⁵ and report of the United Nations Panel of Experts dated 5 September 2018.³⁶

21. The Prosecution does not object to the Chamber exercising its discretion to grant leave to the Defence to reply to any new facts or law that may arise from the Documents, as referred to in paragraph 20. The Prosecution notes that any such new facts or law do not relate to "new" issues, however the Prosecution accepts that they may impact issues already raised in the Admissibility Challenge. The Prosecution therefore does not object to a reply that addresses how any new facts or law arising from the Documents relate to issues previously raised in the Admissibility Challenge.

22. Lastly, paragraph 23(g) of the Defence Request refers to "[t]he LRV's claim that the Defence's 'failure' to reference a default judgment by the African Court of

³¹ Annex 7 to the Prosecution Response, Office of the Prosecutor's Request for Assistance to the Government of Libya, 26 July 2018, OTP/LBY/LBY-27/TL/JCCD-afpt, ICC-01/11-01/11-653-Conf-Anx7.

³² Annex 11 to the Prosecution Response, Letter from the Zintan Prosecutor's Office to the Minister of Justice in the Al-Bayda Transitional Government, 17 May 2016, LBY-OTP-0064-0983 (Translation at LBY-OTP-0064-3168), ICC-01/11-01/11-653-Conf-Anx11. The Prosecution notes that in paragraph 23(c) of the Defence Request, Defence identify this letter as Annex 8 to the Prosecution Response.

³³ Annex 16 to the Prosecution Response, Letter from Libyan Prosecutor General's Office to the ICC Prosecutor, 13 July 2017, LBY-OTP-0053-0259 (Translation at LBY-OTP-0064-0940), ICC-01/11-01/11-653-Conf-Anx16.

³⁴ Annex 17 to the Prosecution Response, Letter from the Libyan Prosecutor General's Office to UNSMIL, 19 April 2016, LBY-OTP-0064-0887 (Translation at LBY-OTP-0064-0967), ICC-01/11-01/11-653-Conf-Anx17.

³⁵ *Prosecutor v. Simone Gbagbo*, Order to the Registrar to Request Information from the Competent National Authorities of the Republic of Côte d'Ivoire, 14 September 2018, ICC-02/11-01/12-84.

³⁶ Annex 18 to the Prosecution Response, United Nations, Final report of the Panel of Experts on Libya established pursuant to resolution 1973(2011), S/2018/812, 5 September 2018, Annex 59, LBY-OTP-0065-0126, ICC-01/11-01/11-653-Conf-Anx18.

Human and People's Rights against the government of Libya (in which the government did not participate) constituted a wilful omission on the part of the Defence."³⁷ The Prosecution takes no position on this issue.

4) Consolidated Filing, Page Limit and Extension of Time

23. On the basis of the above, the Prosecution does not object to the Defence filing a consolidated document that addresses new facts or law that arise from the Documents and responds to the Amici Observations.³⁸

24. As regards the Defence's submissions in relation to page count, a limit of 50 pages for the consolidated document proposed by the Defence is excessive.³⁹ The Defence presented detailed submissions in the Admissibility Challenge on the relevant issues and no new issues have been raised in the Prosecution Response, the OPCV Response or the Amici Observations which the Defence could not reasonably have anticipated. The page limit for any consolidated document should reflect this.

25. The Prosecution takes no position in relation to the deadline requested by the Defence.⁴⁰

D. CONCLUSION

26. For the reasons set out above, the Prosecution requests that the Chamber: i) reject the Defence's request to make either a general reply, or in the alternative, a reply to specific issues raised in the Prosecution Response and the OPCV Response; ii) exercise its discretion to permit the Defence to reply to any new facts or law that may arise from the Documents; and iii) limit the number of pages for any consolidated document of the Defence to an amount that reflects the fact that no new

³⁷ Defence Request, para. 23(g).

³⁸ Defence Request, para. 25.

³⁹ Defence Request, para. 26.

⁴⁰ Defence Request, para. 27.

issues have been raised in the Prosecution Response, the OPCV Response or the Amici Observations which the Defence could not reasonably have anticipated.



Fatou Bensouda
Prosecutor

Dated this 8th day of October 2018

At The Hague, The Netherlands