



Original: English

No. ICC-01/11-01/11
Date: 24 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

Public

Decision on the “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)”, and other related matters

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr Julian Nicholls

Counsel for the Defence

Ms Dató Shyamala Alagendra
Mr Essa Faal
Mr Khaled Al Zaidy

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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

States Representatives

Amicus Curiae

Lawyers for Justice in Libya
Redress Trust

REGISTRY

Registrar

Mr Peter Lewis

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

Other

PRE-TRIAL CHAMBER I (the “Chamber”) of the International Criminal Court (the “Court”) issues this decision on the “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 (filing 654)” (the “Defence’s Request” or “Application”),¹ and other related matters.

1. On 26 February 2011, the United Nations Security Council (the “Security Council”) referred the situation in Libya since 15 February 2011 to the Prosecutor of the Court by means of Resolution 1970 (2011).²

2. On 27 June 2011, Pre-Trial Chamber I issued a warrant of arrest for Saif Al-Islam Gaddafi (“Mr Gaddafi”).³ On 4 July 2011, the Registrar prepared a request to Libya to arrest Mr Gaddafi and surrender him to the Court.⁴

3. On 23 November 2011, a letter from the National Transitional Council of Libya was transmitted to Pre-Trial Chamber I.⁵ This letter confirmed the arrest of Mr Gaddafi on 19 November 2011 in Libya.

4. On 31 May 2013, Pre-Trial Chamber I rejected Libya’s challenge to the admissibility of the case against Mr Gaddafi before the Court and determined that the case against him was admissible.⁶ On 21 May 2014, the Appeals Chamber upheld the decision of Pre-Trial Chamber I.⁷

5. On 6 June 2018, the Chamber received the “Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute” (the

¹ ICC-01/11-01/11-655-Conf.

² S/RES/1970 (2011), para. 4.

³ ICC-01/11-01/11-3.

⁴ ICC-01/11-01/11-5.

⁵ ICC-01/11-01/11-34. The official English translation of this letter was filed in the case record on 28 November 2011.

⁶ ICC-01/11-01/11-344-Conf and public redacted version ICC-01/11-01/11-344-Red.

⁷ ICC-01/11-01/11-547-Red OA 4.

“Admissibility Challenge”).⁸ Mr Gaddafi asserts that, on 28 July 2015, he was convicted by the Tripoli Criminal Court for substantially the same conduct as alleged in the proceedings before the Court.⁹ Mr Gaddafi further alleges that, on or around 12 April 2016, he was released from prison pursuant to Law No. 6 of 2015.¹⁰ Thus, Mr Gaddafi submits that the case against him on charges of crimes falling within the jurisdiction of the Court is inadmissible.¹¹

6. On 14 June 2018, the Chamber issued the “Decision on the conduct of the proceedings following the ‘Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute’”,¹² in which, *inter alia*, it requested “the Prosecutor, the Security Council and victims who have communicated with the Court in relation to the present case, should they wish to do so, to submit written observations on the Admissibility Challenge no later than Friday, 28 September 2018, at 16.00 hours”.¹³

7. On 31 August 2018, the Chamber received the “Application by Lawyers for Justice in Libya and the Redress Trust for Leave to submit observations pursuant to Rule 103 of the Rules of Procedure and Evidence”¹⁴ (the “31 August 2018 Application”), and on 3 September 2018, the Chamber was notified of the “Defence Request for Leave to Respond the Application [...]” (the 3 September 2018 Defence Request”).¹⁵ In the 31 August 2018 Application, the Lawyers for Justice in Libya

⁸ ICC-01/11-01/11-640, with Confidential Annexes A, B, C, H and Public Annexes D, E, F and G. Document ICC-01/11-01/11-640-Conf and Annexes A, B and H were reclassified as public on 8 June 2018 pursuant to Pre-Trial Chamber I’s instructions.

⁹ Admissibility Challenge, para. 2.

¹⁰ Admissibility Challenge, para. 26. According to Mr Gaddafi, the Government of Libya promulgated Law No. 6 in September 2015, which provides, *inter alia*, that all Libyans who committed offences during the period 15 February 2011 until the issuance of this law should be eligible for a general amnesty and that received sentences and their subsequent criminal impact should be dropped. See Admissibility Challenge, para. 25.

¹¹ Admissibility Challenge, para. 1.

¹² Pre-Trial Chamber I, ICC-01/11-01/11-641.

¹³ Pre-Trial Chamber I, ICC-01/11-01/11-641, p. 6.

¹⁴ ICC-01/11-01/11-647.

¹⁵ ICC-01/11-01/11-648.

("LFJL") and the Redress Trust ("Redress") (collectively the "Applicants") sought leave to submit joint observations pursuant to rule 103(1) of the Rules of Procedure and Evidence (the "Rules").

8. On 5 September 2018, the Chamber issued the "Decision on the 'Application by Lawyers for Justice in Libya and the Redress Trust for leave to submit observations pursuant to Rule 103 of the Rules of Procedure and Evidence' and the 'Defence Request for Leave to Respond to the Application'",¹⁶ in which it rejected the 3 September 2018 Defence Request as premature, and granted "leave to the Applicants to submit written observations [...], no later than Friday, 28 September 2018, at 16.00hrs".¹⁷

9. On 28 September 2018, the Chamber received the "Observations by Lawyers for Justice in Libya and the Redress Trust pursuant to Rule 103 of the Rules of Procedure and Evidence" (the "Rule 103 Observations").¹⁸ On the same date, the Chamber also received the Prosecutor's response¹⁹ (the "Prosecutor's Response") as well as observations on behalf of the victims²⁰ (the "Victims' Observations") regarding the admissibility challenge.

10. On 4 October 2018, the Defence filed the Application,²¹ in which it requests the Chamber to:

- i. [G]rant the Defence leave to reply to the issues raised in the Prosecution Response and [the Victims' Observations];
- ii. [I]n the alternative, grant the Defence leave to reply to the new and unanticipated issues arising from the Prosecution Response and [the Victims' Observations] identified at paragraph 23 [of the Application];

¹⁶ Pre-Trial Chamber I, ICC-01/11-01/11-649.

¹⁷ Pre-Trial Chamber I, ICC-01/11-01/11-649, p. 6.

¹⁸ ICC-01/11-01/11-654.

¹⁹ "Prosecution response to 'Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1), 19 and 20(3) of the Rome Statute", ICC-01/11-01/11-653-Conf. A public redacted version of the response was filed in the record on 11 October 2018 (ICC-01/11-01/11-653-Red).

²⁰ "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'", ICC-01/11-01/11-652.

²¹ ICC-01/11-01/11-655-Conf.

- iii. [I]n the event, leave to reply is granted, authorise the Defence's submission of a consolidated document of no more than 50 pages addressing the Prosecution Response, [Victims' Observations] and [the Rule 103 Observations], and set a deadline of 9 November 2018 for submission of the consolidated document; and
- iv. [I]n the event leave to reply is not granted, set a page limit of 30 pages and a deadline of 19 October 2018, for the Defence response to the [Rule 103 Observations].²²

11. On 8 October 2018, the Chamber received the "Prosecution's response to 'Defence Application [...]' (the "8 October 2018 Prosecutor's Response").²³ On the same date, the Chamber also received the "Victims' Response to the 'Defence Application' [...]",²⁴ in which the Office of Public Counsel for Victims ("OPCV") requests the Chamber to "[r]eject the Application; and [allow] the OPCV to respond to the Rule 103 Observations in the event the Defence is granted right to respond, and by the same deadline" (the "8 October 2018 OPCV's Response" or the "OPCV's Request").²⁵

12. The Chamber notes article 21(1)(a) and 19 of the Rome Statute, rules 59(1)(b) and 103(2) of the Rules and regulations 23*bis*, 24(5), 34(c), 35 and 37(2) of the Regulations of the Court (the "Regulations").

13. The Chamber has carefully examined the Application including the alternative requests put forward by the Defence. The Chamber has also considered the 8 October 2018 Prosecutor's Response and as well as the 8 October 2018 OPCV's Response both of which call for rejecting the Defence's Request to file a general reply or a reply on specific issues, as a reply "should not be used as a mean to complement original submissions",²⁶ namely the Admissibility Challenge.

14. In this respect, the Chamber agrees with the common position argued by both the Prosecutor and the OPCV that the purpose of granting leave to reply to a

²² ICC-01/11-01/11-655-Conf, para. 28.

²³ ICC-01/11-01/11-657-Conf.

²⁴ ICC-01/11-01/11-656-Conf.

²⁵ ICC-01/11-01/11-656-Conf, p. 9.

²⁶ ICC-01/11-01/11-656-Conf, paras 12-13; ICC-01/11-01/11-657-Conf, paras 1, 5, 8, 9, 11-13.

participant's response per regulation 24(5) of the Regulations is not to strengthen the arguments presented in the Defence original submission. Rather the plain text of regulation 24(5) of the Regulations aims at permitting "a reply [...] limited to new issues raised in the response which the replying participant [Defence in this case] could not reasonably have anticipated".

15. In this regard, the Chamber takes note of paragraph 15 of the 8 October 2018 Prosecution's Response in which the Prosecutor convincingly illustrates that the issues raised in the Defence Application in support of a request for a general reply could have been anticipated and most of them "were directly addressed in the Admissibility Challenge".²⁷ Accordingly, the Chamber cannot but reject point (i) and (ii) of the Defence's Request.

16. Nevertheless, the Chamber agrees with the Prosecutor's alternative proposal that the Defence may be permitted to reply to new issues of facts or law arising from documents which were not available to the Defence at the time of the Admissibility Challenge. The relevant documents, as they are referred to in detail in paragraph 20 of the 8 October 2018 Prosecutor's Response²⁸, are:

- J Response of the Government of Libya dated 18 September 2018²⁹ to the Prosecution's Request for Assistance dated 26 July 2018³⁰;
- J Letter from the Zintan Prosecutor's Office to the Minister of Justice in the Al-Bayda Transitional Government dated 17 May 2016³¹; Letter from the Libyan

²⁷ ICC-01/11-01/11-657-Conf, para. 15.

²⁸ ICC-01/11-01/11-657-Conf., para. 20.

²⁹ 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.

³⁰ 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.

³¹ 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 in paragraph 20 of the

Prosecutor General's Office to the ICC Prosecutor dated 13 July 2017³²; and Letter from the Libyan Prosecutor General's Office to United Nations Support Mission in Libya ("UNSMIL") dated 19 April 2016³³; and

- J) Decision of Pre-Trial Chamber II in relation to Simone Gbagbo dated 14 September 2018³⁴ and report of the United Nations Panel of Experts dated 5 September 2018³⁵.

Accordingly, leave to reply is granted consistently with this paragraph.

17. With respect, to point (iii) concerning filing a consolidated document of 50 pages addressing also the Rule 103 Observations, within a deadline of 9 November 2018, the Chamber considers appropriate granting the Defence the requested extension of time and page limit, pursuant to regulations 34(c), 35 and 37(2) of the Regulations.

18. As to the Rule 103 Observations, according to rule 103(2) of the Rules, "[t]he Prosecutor and the defence *shall* have the opportunity to respond to the observations submitted under sub-rule 1". This means that the Defence is entitled as a matter of right to respond to the Rule 103 Observations received by the Chamber. Having granted the Defence a modified leave to reply as well as its Request set out in point (iii) to the extent specified in paragraphs 16-17 of the present decision, the Chamber considers that the alternative Request in point (iv) becomes moot.

8 October 2018 Response that "in paragraph 23(c) of the Defence Request, Defence identify this letter as Annex 8 to the Prosecution Response".

³² 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.

³³ 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.

³⁴ *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.

³⁵ 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.


19. Finally, the Chamber takes note of the OPCV's Request to be allowed to respond to the Rule 103 Observations "should the Defence be granted the right to respond to the Rule 103 Observations".³⁶ Since the Chamber grants the Defence's Request to the extent specified above, both the OPCV and the Prosecutor may respond to the Rule 103 Observations should they desire to do so.

FOR THESE REASONS, THE CHAMBER HEREBY

- a) **GRANTS** leave for the Defence to file a consolidated document of 50 pages maximum replying to new issues of facts or law arising from documents which were not available to the Defence at the time of the Admissibility Challenge, in accordance with paragraphs 16 and 17 of the present decision, by no later than Friday, 9 November 2018, at 16.00hrs;
- b) **GRANTS** the OPCV's Request;
- c) **GRANTS** the Prosecutor until 9 November 2018, at 16.00hrs to respond to the Rule 103 Observations should she desire to do so;
- d) **REJECTS** points (i), (ii) and (iv) of the Defence's Request; and
- e) **ORDERS** the Prosecutor, the Defence and the OPCV to file public redacted versions of their respective submissions or to indicate to the Registrar, within 3 days of notification of this decision, whether their submissions may be reclassified as public.

³⁶ ICC-01/11-01/11-656-Conf., p. 9.

Done in both English and French, the English version being authoritative.



Judge Péter Kovács
Presiding Judge



Judge Marc Perrin de Brichambaut



Judge Reine Adélaïde Sophie
Alapini-Gansou

Dated this Wednesday, 24 October 2018

At The Hague, The Netherlands