

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 4 October 2018

PRE-TRIAL CHAMBER I

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

SITUATION IN LIBYA

IN THE CASE OF

THE PROSECUTOR V. SAIF AL-ISLAM GADDAFI

Confidential

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: Defence for Dr. Saif Al-Islam Gadafi

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

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**Unrepresented Applicants
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I. Introduction

1. The defence for Dr. Saif Al-Islam Gaddafi ("Defence"), as "the triggering force and the main actor"¹ in these admissibility proceedings, requests the Pre-Trial Chamber's leave, pursuant to Regulation 24(5) of the Regulations of the Court ("Regulations"), to reply to the issues raised in the "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'"² ("Prosecution Response") and the "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'"³ ("LRV Response").
2. Alternatively, should the Pre-Trial Chamber deem it unsuitable to grant a general right of reply to the issues raised in the Prosecution Response and LRV Response, the Defence seeks leave to reply to new issues – as further specified in this application – arising from these responsive documents that the Defence could not have reasonably anticipated.
3. Pursuant to Regulation 35, the Defence also applies to the Chamber for an extension of time beyond the normal time period set by Regulation 34 to submit a response to the "Observations by Lawyers for Justice in Libya and the Redress Trust pursuant to Rule 103 of the Rules of Procedure and Evidence"⁴ ("Amici Observations").

¹ Decision on the OPCD request for variation of time limit, 28 May 2012, ICC-01/11-01/11-159 (hereafter "Decision on OPCD Request"), para. 9. See also Decision on the "Libyan Government Application for leave to reply to any Responses to article 19 admissibility challenge", 26 July 2012, ICC-01/11-01/11-191 (hereafter "Decision on Libyan Government's Leave to Reply Application"), para. 8; Decision on the "Libyan Government's Request for Leave to reply to Responses by OTP, OPCV and OPCD to Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", 26 February 2013, ICC-01/11-01/11-288 (hereafter "Decision on Libyan Government's Second Leave to Reply Application"), para. 11; Decision on Libya's request for leave to file a consolidated reply, 16 July 2013, ICC-01/11-01/11-382 (hereafter "Decision on Libyan Government's Third Leave to Reply Application"), para. 11.

² 28 September 2018, ICC-01/11-01/11-653-Conf.

³ 28 September 2018, ICC-01/11-01/11-652.

⁴ 28 September 2018, ICC-01/11-01/11-654.

4. Lastly, the Defence requests permission, in the event its application for leave to reply to the Prosecution Response and LRV Response is granted, to submit a consolidated reply and response document addressing all three filings of no more than fifty pages by 9 November 2018.

II. Classification

5. Pursuant to Regulation 23*bis*(2), this application is classified as confidential because it refers to other documents in the case record that are likewise classified.

III. Procedural History

6. On 5 June 2018, the Defence submitted the “Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute”⁵ (“Admissibility Challenge”) before Pre-Trial Chamber I of the Court.
7. On 14 June 2018, the Pre-Trial 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’”, in which the Chamber, *inter alia*, invited the Prosecutor, the Security Council, and victims who have already communicated with the Court in relation to the present case to file any written observations they may have on the Admissibility Challenge by 28 September 2018.
8. On 26 July 2018, the Office of the Prosecutor “requested the assistance of the Government of Libya to provide information and documentation in relation to the factual and legal issues raised by the Admissibility Challenge”⁶ (“Request for Assistance”).

⁵ ICC-01/11-01/11-640.

⁶ See Prosecution Response, para. 25 and confidential Annex 7 thereto.

9. On 30 August 2018, the prospective *amici* Lawyers for Justice in Libya and the Redress Trust filed an application pursuant to Rule 103 of the Rules of Procedure and Evidence to submit observations on particular issues the prospective *amici* submitted may be relevant to the Admissibility Challenge (“Rule 103 Application”).⁷ On 2 September 2018, the Defence filed a request for leave to submit a response opposing the grant of the Rule 103 Application.⁸ On 5 September 2018, the Chamber issued its decision granting the Rule 103 Application, dismissing the Defence request for leave as premature, and ordering any Rule 103 submissions to be submitted by 28 September 2018.⁹
10. On 13 September 2018, the Defence submitted translations for two items annexed to the Admissibility Challenge as well as a better version of a previously submitted document.¹⁰
11. On 18 September 2018, the Prosecution received a substantive response from the Government of Libya to the Request for Assistance.¹¹
12. On 28 September 2018, the Prosecution Response, LRV Response and Amici Observations were registered in the record of the case.

⁷ 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, ICC-01/11-01/11-647.

⁸ Defence Request for Leave to Respond to 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”, ICC-01/11-01/11-648.

⁹ 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”, ICC-01/11-01/11-649.

¹⁰ Defence Submission of i) translations of Annexes to “Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute” and ii) better version of document, ICC-01/11-01/11-650. An official Court translation (ICC-01/11-01/11-650-AnxIII-tENG) of the item contained in ICC-01/11-01/11-650-AnxIII was subsequently submitted.

¹¹ See Prosecution Response, para. 25 and confidential Annex 8 thereto (with six sub-annexes).

IV. Applicable Law

Applications for leave to reply

13. Regulation 24(5) of the Regulations provides that:

Participants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations. Unless 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.

14. Regulation 34(c) of the Regulation further states that:

A request for leave to reply shall be filed within three days of notification in accordance with regulation 31 of the response. The participants may respond to the request for leave to reply within two days. A Chamber may grant the request to file a reply within such time as it may specify in its order.

15. The Pre-Trial Chamber has previously held that “[t]he language of article 19(2) of the Statute and rule 58 of the Rules makes clear that in admissibility proceedings, the Prosecutor and the Defence are not the two parties to a dispute; rather the triggering force and the main actor in such proceedings is the entity challenging the admissibility of the case”.¹² The Pre-Trial Chamber has reiterated the validity and applicability of this principle in determining requests, by an entity challenging the admissibility of a case, for leave to reply to responses to the underlying admissibility challenge.¹³

Applications for extension of time

16. Regulation 34 of the Regulations establishes that a response shall be filed within ten days of notification of the document to which the participant is responding.

¹² Decision on OPCD Request, para. 9.

¹³ Decision on Libyan Government’s Leave to Reply Application, para. 8; Decision on Libyan Government’s Second Leave to Reply Application, para. 11; Decision on Libyan Government’s Third Leave to Reply Application, para. 11.

Regulation 35(1) provides that an application to alter a time limit established in the Regulations or as ordered by a Chamber must be made orally or in writing and set out the grounds on which the variation is sought.

V. Submissions

17. The Defence respectfully requests the Pre-Trial Chamber's leave to reply to the Prosecution Response and LRV Response, as well as an extension of time to respond to the Amici Observations.

18. Should leave to reply be granted, the Defence additionally requests permission to submit a consolidated document of no more than 50 pages addressing these three filings by 2 November 2018.

(i) Request for leave to reply to Prosecution Response and LRV Response

19. The Defence requests leave to submit a reply to the issues raised in the Prosecution Response and LRV Response. Pursuant to Regulation 24(5), a reply is normally "limited to new issues raised in the response which the replying participant could not reasonably have anticipated". However, in the context of an admissibility challenge, the Pre-Trial Chamber has held, in accordance with the guidance of the Appeals Chamber, that "the triggering force and the main actor in such proceedings is the entity challenging the admissibility of the case".¹⁴

20. In light of this underlying principle the Pre-Trial Chamber previously granted leave to the Government of Libya – when it was the 'triggering force and the main actor' in both the earlier challenge to the admissibility of this case as well

¹⁴ Decision on OPCD Request, para. 9 (citing with approval Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 30 August 2011, ICC-01/09-02/11-274, para. 61).

as the challenge to the admissibility of the ICC case against Abdallah Al-Senussi – to submit replies to responses filed by the Prosecution, Office of Public Counsel for the Defence, and the Office of Public Counsel for Victims to the Government of Libya's admissibility challenge.¹⁵ Significantly, the Chamber granted leave to reply to the issues raised in the responses to the original admissibility challenge¹⁶ – not simply to new issues in the responding documents that could not have been reasonably anticipated by the Government of Libya.

21. The Defence submits that the same conditions that led the Chamber to grant leave to the Government of Libya to submit a general reply in the previous admissibility proceedings in the Libya Situation exists with respect to the present proceedings. In the present admissibility challenge the Defence is the triggering force and main actor. Further, the Prosecution Response and LRV Response contain (in light of the Admissibility Challenge) 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 ("Law No. 6 of 2015"). These issues include, but are not limited to: Dr. Gaddafi's standing to submit the Admissibility Challenge;¹⁷ whether the 'same case' test has been met for the purposes of an admissibility challenge;¹⁸ whether Dr. Gaddafi's trial before the Tripoli Court of Assize is a 'trial' for the purposes of articles 17(1)(c) and 20(3) of the Rome Statute ("Statute");¹⁹ the *in absentia* judgment issued by the Tripoli Court of Assize and its implications for the matter of the finality of Dr.

¹⁵ Decision on Libyan Government's Leave to Reply Application, para. 8; Decision on Libyan Government's Second Leave to Reply Application, para. 11; Decision on Libyan Government's Third Leave to Reply Application, para. 11.

¹⁶ Decision on Libyan Government's Leave to Reply Application, para. 8; Decision on Libyan Government's Third Leave to Reply Application, para. 11.

¹⁷ See, e.g., Prosecution Response, paras. 2-3.

¹⁸ See, e.g., Prosecution Response, para. 7; LRV Response, paras. 15-18.

¹⁹ See, e.g., Prosecution Response, para. 5.

Gadafi's conviction by the same court;²⁰ the relevancy (if any) of the *res judicata* principle to admissibility challenges pursuant to articles 17(1)(c) and 20(3) of the Statute;²¹ the application (or not) of Law No. 6 of 2015 to Dr. Gadafi and its implications;²² the permissibility of amnesties under the Rome Statute framework and the alleged shielding of Dr. Gadafi for the purposes of Article 20(3) of the Statute.²³

22. The Defence accordingly submits that it is fair and appropriate for the Pre-Trial Chamber, in light of its aforementioned jurisprudence and practice, as well as the factors outlined above, to grant the Defence's application to reply "to the arguments raised in the [r]esponses".²⁴ Such a reply would assist the Pre-Trial Chamber in properly determining the Admissibility Challenge.

(ii) Alternative request for leave to reply

23. In the event the Pre-Trial Chamber determines that the Defence should not be granted leave to file a general reply to the arguments raised in the Prosecution Response and LRV Response, the Defence requests leave to submit a reply to the following new issues arising from the Prosecution Response and / or LRV Response that the Defence could not have reasonably anticipated in preparing the Admissibility Challenge:

- (a) The Prosecution and Legal Representative of Victims ("LRV") divergent assessments as to whether the 'same case' test has been met for purposes of articles 17 and 19 of the Statute.²⁵ The Defence could not have reasonably anticipated whether or not the Prosecution and LRV would reach the same or

²⁰ See, e.g., Prosecution Response, para. 5.

²¹ See, e.g., LRV Response, paras. 48-80.

²² See, e.g., Prosecution Response, paras. 8-10.

²³ See, e.g., Prosecution Response, paras. 164-174; LRV Response, paras. 92-101.

²⁴ Decision on Libyan Government's Leave to Reply Application, para. 8.

²⁵ See, e.g., Prosecution Response, para. 7; LRV Response, paras. 15-18.

similar conclusions on this issue. If granted leave the Defence shall file limited submissions addressing how the Chamber should assess the divergent submissions of the Prosecution and LRV on this issue;

(b) Submissions in the Prosecution Response that are based in whole or in part on the 18 September 2018 response received from the Government of Libya to the Prosecution's Request for Assistance.²⁶ The Defence could not have reasonably anticipated the exact content of any request for assistance the Prosecution might seek from the Government of Libya further to the Admissibility Challenge, or the exact content of the information, claims and documentation that the Prosecution might receive in response to such a request. The Prosecution Response relies heavily on the information, claims and documents received through the Government of Libya's 18 September 2018 response.²⁷ It would accordingly be fair and proper to grant the Defence leave to submit a reply to these new issues arising from the Prosecution Response;

(c) Submissions in the Prosecution response to the extent that they rely upon documents that the Defence understand are not generally publicly available and that the Defence did not previously have access to – in particular: (i) Letter from the Zintan Prosecutor's Office to the Minister of Justice in the Al-Bayda Transitional Government dated 17 May 2016 (provided in confidential Annex 8 to the Prosecution Response);²⁸ (ii) Letter from the Libyan Prosecutor General's Office to the ICC Prosecutor, dated 13 July 2017 (Annex 16 to the Prosecution Response);²⁹ and (iii) Letter from the Libyan Prosecutor General's Office to UNSMIL, dated 19 April 2016 (Annex 17 to the

²⁶ See Prosecution Response, paras. 2, 3, 5, 8, 9, 43, 47, 80-82, 85, 86, 105, 106, 108-110, 126, 127, 128, 146, 156, 161, 162, 165.

²⁷ *Ibid.*

²⁸ See Prosecution Response, paras. 66, 151.

²⁹ See Prosecution Response, para. 179, fn. 276.

Prosecution Response).³⁰ The Defence could not have reasonably anticipated the Prosecution's reliance on documentation that was not generally publicly available or otherwise in the possession of the Defence;

(d) Submissions in the Prosecution response to the extent that they rely upon documents issued subsequent to the filing of the Admissibility Challenge – in particular Pre-Trial Chamber II's Order of 14 September 2018 in *Prosecutor v. Gbagbo*³¹ and the 5 September 2018 report issued by the United Nations Panel of Experts on Libya.³² Self-evidently, the documents in question were not issued until after the submission of the Admissibility Challenge; the Defence should be permitted to reply to Prosecution submissions to the extent that they rely upon these documents;

(e) The Prosecution's argument by implication (*modus ponendo ponens*) 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.³³ This is a new issue that the Defence could not have reasonably anticipated – namely, that the Prosecution would apply the limited finding of the Chamber regarding the Court's official channel of communication with governmental authorities in Libya to the core substantive issue of the validity or not of official acts in the context of a state that is experiencing severe instability and is in the midst of an ongoing peace process;

(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

³⁰ See Prosecution Response, para. 179, fn. 276.

³¹ See Prosecution Response, para. 115.

³² See Prosecution Response, para. 86.

³³ See, e.g., Prosecution Response, paras. 157, 165.

proceedings were undertaken for the purpose of shielding Mr Gadafi from criminal responsibility".³⁴ The Defence should be permitted to respond to this new issue, which it could not have reasonably anticipated – namely the Prosecution advancing a claim that the application of Law No. 6 of 2015 to Dr. Gadafi was for the purpose of shielding Dr. Gadafi without providing any clear factual basis to support this alleged purpose.

- (g) The LRV's claim that the Defence's "failure" to reference a default judgment by the African Court of Human and Peoples' Rights against the government of Libya (in which the government did not participate) constituted a wilful omission on the part of the Defence.³⁵ While the LRV's reliance on existing and *prima facie* relevant jurisprudence of another international body does not, by itself, constitute a new issue, the Defence could not have reasonably anticipated that the LRV would ascribe improper motives to the Defence arising from such non-citation. The Defence should accordingly be permitted to reply to this argument;
- (h) The LRV's claim that Dr. Gadafi cannot 'waive' his fair trial rights.³⁶ The Defence disputes that Dr. Gadafi made such a waiver in the Admissibility Challenge.³⁷ However, as this new issue that could not have been reasonably anticipated has now been raised by the LRV, the Defence should be permitted to make submissions in reply;
- (i) The LRV's reliance on principles of *res judicata* as part of its submissions on the meaning and application of the phrase "has been tried" under Article

³⁴ Prosecution Response, para. 174.

³⁵ See, e.g., LRV Response, paras. 3, 8.

³⁶ LRV Response, para. 25.

³⁷ Dr. Gadafi submitted that his fair trial rights were not egregiously violated for the purposes of Article 20(3)(b) of the Statute and that it would be an usual situation where a third party could advance claims that a person whose rights were infringed by national proceedings should, due to these infringements, face a second trial (Admissibility Challenge, para. 99).

20(3) of the Rome Statute.³⁸ The Defence could not have reasonably anticipated that the LRV would transpose Appeals Chamber exposition on the principle of *res judicata* in the context of interlocutory appeals at the ICC on the one hand,³⁹ and appeals of the decision under Article 74 of the Statute on the other,⁴⁰ to the very specific context of whether a suspect or accused person “has been tried by another court” for purposes of Article 20(3) of the Statute. The Defence notes that the Prosecution Response has not sought to rely upon the *res judicata* principle in this manner. The Defence should be permitted to address this new issue.

24. The Defence submits that the above identified matters are new issues that arise from the Prosecution Response and/or LRV Response that the Defence could not have reasonably anticipated, and with respect to which the Defence should be permitted a reply. Such a reply would assist the Pre-Trial Chamber in properly determining the Admissibility Challenge.

(iii) Application for extension of time and to submit a consolidated filing

25. As a preliminary matter, the Defence notes that the Prosecution Response, LRV Response and Amici Observations – not unexpectedly – overlap in important respects in terms of the issues they seek to address arising from the Defence Admissibility Challenge. The Defence accordingly submits that it would be in the interests of efficiency and judicial economy to permit the Defence to submit – should leave to reply be granted – a consolidated document addressing the Prosecution Response, LRV Response and Amici Observations.

³⁸ See, e.g., LRV Response, paras. 61-70.

³⁹ LRV Response, para. 61, citing to Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence”, 13 October 2006, ICC-01/04-01/06-568 OA3.

⁴⁰ LRV Response, para. 61, citing to Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled “Judgment pursuant to article 74 of the Statute”, 7 April 2015, ICC-01/04-02/12-271-Corr A.

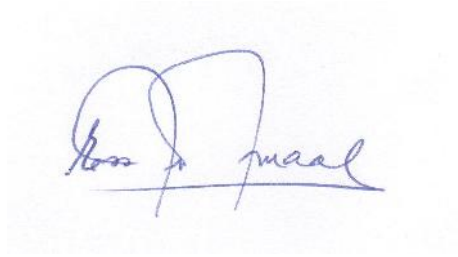
26. The Defence additionally requests, pursuant to Regulation 35, and in the event the Chamber authorises the submission of a consolidated document, that a filing deadline of 9 November 2018, and page limit of no more than 50 pages be set for the consolidated filing. The Defence notes that the Prosecution and LRV were provided 16 weeks to prepare their responses to the Admissibility Challenge. Further, in view of the length of the documents in question (totalling 132 substantive pages plus numerous annexes) and the variety and complexity of the issues contained therein, the Defence submits that the proposed page limit and a filing deadline of 6 weeks from the date of notification of the three filings is fair and reasonable.
27. In the event leave to reply is not granted, and pursuant to Regulation 35, the Defence requests that the Chamber set a page limit of 30 pages and a deadline of 19 October 2018, for the Defence response to the Amicus Observations.

Relief Requested

28. For the reasons detailed above, the Defence respectfully requests the Pre-Trial Chamber to:
- i. grant the Defence leave to reply to the issues raised in the Prosecution Response and LRV Response;
 - ii. in the alternative, grant the Defence leave to reply to the new and unanticipated issues arising from the Prosecution Response and LRV Response identified at paragraph 23 above;
 - iii. in 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, LRV Response and Amicus Observations, and set a deadline of 9 November 2018 for submission of the consolidated document; and

- iv. in 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 Amicus Observations.

Respectfully submitted,



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on behalf of
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Lead Counsel for Dr. Saif Al-Islam Gadafi

Dated this 4th Day of October 2018
At Banjul, The Gambia