

**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 Pierre Perrin de Brichambaut  
Judge Reine Alapini-Gansou

**SITUATION IN LIBYA**

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

**Confidential**

**Victims' Response to 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)" (No. ICC-01/11-01/655-Conf)**

**Source:** Office of Public Counsel for Victims

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

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**Legal Representatives of the Applicants**

**Unrepresented Victim**

**Unrepresented Applicants  
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**The Office of Public Counsel for  
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Defence**

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**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. INTRODUCTION

1. On behalf of the Victims participating in the admissibility proceedings,<sup>1</sup> the Principal Counsel of the Office of Public Counsel for Victims (respectively the “Principal Counsel” and the “OPCV”) submits her Response to 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)” (the “Application”).<sup>2</sup>

2. The Principal Counsel contends that the Application should be dismissed. First, she opposes the Defence main request for leave to file a “general” Reply, in waiver of the statutory limitations that: (i) the issues be newly raised in the response; and (ii) could not have been reasonably anticipated. Second, she opposes the alternative request for leave to reply, because the Defence either (i) failed to specify an “issue” it intends to reply to; (ii) the identified issues were not raised for the first time in the Victims’ Admissibility Observations;<sup>3</sup> and/or (iii) said issues could have been reasonably anticipated. Lastly, should the Defence be granted the opportunity to respond to the Rule 103 Observations,<sup>4</sup> the Principal Counsel requests to be equally granted right to respond by the same deadline eventually set by the Chamber for the Defence.

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<sup>1</sup> See the “Decision of the Conduct of the Proceedings following the ‘Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute’” (Pre-Trial Chamber I), [No. ICC-01/11-01/11-641](#), 14 June 2018, p. 6, appointing the Principal Counsel as legal representative of victims in the admissibility proceedings.

<sup>2</sup> See 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)”, [No. ICC-01/11-01/11-655-Conf](#), 4 October 2018 (the “Application”).

<sup>3</sup> See the “Observations on behalf of victims on the ‘Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute’”, [No. ICC-01/11-01/11-652](#), 28 September 2018 (the “Victims’ Admissibility Observations”).

<sup>4</sup> See the “Observations by Lawyers for Justice in Libya and the Redress Trust pursuant to Rule 103 of the Rules of Procedure and Evidence”, [No. ICC-01/11-01/11-654](#), 28 September 2018 (the “Rule 103 Observations”).

## II. PROCEDURAL BACKGROUND

3. On 5 June 2018, Mr Gaddafi submitted its Admissibility Challenge.<sup>5</sup>

4. On 30 August 2018, the Lawyers for Justice in Libya and the Redress Trust filed a request pursuant to Rule 103 of the Rules of Procedure and Evidence to submit observations.<sup>6</sup> Said request was granted on 5 September 2018.<sup>7</sup>

5. On 28 September 2018, the Prosecution and the Victims filed their respective responses to Mr Gaddafi's Admissibility Challenge<sup>8</sup> and the Rule 103 Observations were filed.<sup>9</sup>

6. On 4 October 2018, the Defence filed the Application.<sup>10</sup>

## III. CONFIDENTIALITY

7. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this response is filed confidentially because it responds to submissions filed under the same classification. However, the Principal Counsel informs the Chamber that the present submissions do not contain confidential information and therefore can be reclassified as public. Incidentally, she also fails to understand the Defence original classification

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<sup>5</sup> See the "Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute", [No. ICC-01/11-01/11-640](#), 6 June 2018 (the "Admissibility Challenge"). The document was reclassified as "public" pursuant to the instruction of Pre-Trial Chamber I, dated 8 June 2018.

<sup>6</sup> See 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", [No. ICC-01/11-01/11-647](#), 30 August 2018.

<sup>7</sup> See 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'", [No. ICC-01/11-01/11-649](#), 4 October 2018.

<sup>8</sup> See the "Prosecution response to 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute'", [No. ICC-01/11-01/11-653-Conf](#), 28 September 2018; and the Victims' Admissibility Observations, *supra* note 3.

<sup>9</sup> See the Rule 103 Observations, *supra* note 4.

<sup>10</sup> See the Application, *supra* note 2.

as, although referring to confidential documents, does not contain confidential information justifying the level of classification chosen.<sup>11</sup>

#### IV. SUBMISSIONS

##### A. *In the main: the Defence is not entitled to a “general” right to reply*

8. The Defence refers to a number of decisions of Pre-Trial Chamber I, issued in its previous composition, according to which it construes a principle that the triggering force of an Admissibility Challenge should be authorised to file a “general reply”, one that need not be limited to issues that were raised for the first time in the responses and could not reasonably be anticipated.<sup>12</sup>

9. The Principal Counsel submits that the Defence misconstrues the jurisprudence of the Chamber taking it out of context. The Defence quotes a Decision according to which:

*“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”*.<sup>13</sup>

10. In said jurisprudence, the issue under scrutiny was whether the OPCD, acting in the interests of the Defence, should have had the “last word” when setting out the timeline for written submissions in admissibility proceedings.<sup>14</sup> The Pre-Trial Chamber barely rejected the request setting out the principle that, where the triggering force of the admissibility proceedings is a State, the main actors are not the otherwise usual parties: Prosecutor and Defence.

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<sup>11</sup> *Idem*, para. 5.

<sup>12</sup> *Ibidem*, paras. 15, 19, 21 and 22.

<sup>13</sup> See the “Decision on the OPCD request for variation of time limit”, [No. ICC-01/11-01/11-159](#), 28 May 2012, para. 9.

<sup>14</sup> *Idem*, para. 7.

11. The Defence of Mr Gaddafi then argues that the Pre-Trial Chamber invoked said 'principle' when deciding on requests for leave to reply.<sup>15</sup> However, the Principal Counsel posits that the quoted decisions of the Pre-Trial Chamber were merely analysing the legal framework governing applications for leave to reply pursuant to previous regulation 24(5) of the Regulations of the Court, according to which: "[p]articipants may only reply to a response with the leave of the Chamber".<sup>16</sup> Usual participants in the proceedings are the Victims, the Prosecution and the Defence and the issue at stake was to enable a State to qualify as "participant" in the sense of regulation 24(5); the Chamber clarifying that the State was the triggering force and main actor in admissibility proceedings. To infer from this that the triggering force of proceedings should have an unfettered right to reply would misconstrue the legal framework of the Court. It would entail, for instance, that the Prosecution as the triggering force of criminal investigations should always have an unrestricted and general right to reply. This interpretation cannot be persuasive.

12. The Defence has not offered any other reasons to substantiate why the Chamber should allow a reply that is not limited to new issues raised in the response(s) which the replying participant(s) could not reasonably have anticipated. Such reasons are not self-evident either.

13. Accordingly, not only the Defence is misconstruing the jurisprudence of the Court but is also misleading the Chamber. The Principal Counsel therefore respectfully requests the Chamber to apply the letter of regulation 24(5) of the Regulations of the Court and reject the Application to be authorised to file a "*general reply*". Indeed, replies should not be used as a mean to complement original submissions.

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<sup>15</sup> See the Application, *supra* note 2, para. 15.

<sup>16</sup> Decision on the "Libyan Government Application for leave to reply to any Response/s to article 19 admissibility challenge", [No. ICC-01/11-01/11-191](#), 26 July 2012, para. 7.

**B. *In the alternative: the Defence wishes to reply to matters that are not 'issues' arising from the response, are not new or should have been reasonably anticipated***

14. The Defence lists a number of 'issues' arising from the Victims' Admissibility Observations that, in its submission, are "*new*" and "*could not have reasonably anticipated in preparing the Admissibility Challenge*". The Principal Counsel posits that none of the purported 'issues' are new, and in any event, said 'issues' could have been reasonably anticipated by the Defence.

15. In relation to the "same case" requirement,<sup>17</sup> the Defence does not need to explain why the Prosecution and the Victims may have come to different conclusions. The purported 'issue' is whether the Libyan authorities have investigated and prosecuted the "*same case*" as before the ICC and the existing submissions are more than sufficient for the adjudication of the matter. The existence of "*divergent assessments*"<sup>18</sup> from the Victims and the Prosecution is inessential "*for the determination of the matters arising in the judicial cause under examination*".<sup>19</sup>

16. In relation to the Defence's omission to refer to the Judgment of the African Court of Human Rights in the very case against Mr Gaddafi,<sup>20</sup> the Defence admits that: "*the LRV's reliance on existing and prima facie relevant jurisprudence of another international body does not, by itself, constitute a new issue [but still] the Defence could not have reasonably anticipated that [...]*".<sup>21</sup> However, leave to reply can only be granted where the applicant demonstrates that the issues in the response are "*new*" and "*could not reasonably be anticipated*". Hence, the availability of a reply is precluded. Incidentally, the Principal Counsel again contends that a reply should not be used as

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<sup>17</sup> See the Application, *supra* note 2, para. 23(a).

<sup>18</sup> *Idem*, para. 23(a).

<sup>19</sup> See the "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" (Appeals Chamber), [No. ICC 01/04-168](#), 13 July 2006, para 9.

<sup>20</sup> See the Application, *supra* note 2, para. 23(g).

<sup>21</sup> *Idem*, para. 23(g) (emphasis added).

a mean to substantiate original submissions and clearly fails to see how the Defence can reasonably argue that reliance on relevant jurisprudence, be it of the Court or of other international jurisdictions, in the Victims' Admissibility Observations could not have reasonably anticipated.<sup>22</sup>

17. In relation to whether Mr Gaddafi "*waived*" his fair trial rights,<sup>23</sup> the Principal Counsel submits that given the manifest contradiction between the position of the Defence in the previous Admissibility Challenge made by Libya<sup>24</sup> and its convenient current position<sup>25</sup>, it should have been reasonably anticipated that the Victims would raise concerns. Hence leave to reply should not be granted.

18. Last but not least, in relation to the "*finality*" issue,<sup>26</sup> the Principal Counsel submits that the Defence failed to substantiate why it could not have anticipated that the Victims would invoke the jurisprudence of the Appeals Chamber concerning the definition of the *res judicata* principle. The Defence discusses in its Admissibility Challenge the need for "*finality*" in relation to Article 17(1)(c) of the Rome Statute and it would have been reasonable to verify the jurisprudence of the Appeals Chamber on the concept to anticipate potential objections. Hence leave to reply should not be granted and the Principal Counsel therefore reiterates that a reply cannot be used as a mean to substantiate original submissions.<sup>27</sup>

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<sup>22</sup> See also *supra* para. 13.

<sup>23</sup> See the Application, *supra* note 2, para. 23(h).

<sup>24</sup> See the transcript of the hearing held on 10 October 2012, [No. ICC-01/11-01/11-T-3-Red-ENG](#), p. 12 line 23 to p. 13 line 1: "[i]t is abundantly clear that the proceedings [...] are not being conducted in a manner which is consistent with an attempt to ensure [Mr Gaddafi's] fair trial rights".

<sup>25</sup> See Mr Gaddafi's Admissibility Challenge, *supra* note 5, para. 101.

<sup>26</sup> See the Application, *supra* note 2, para. 23(i).

<sup>27</sup> See also *supra* paras. 13 and 16.



**C. Leave to respond to the Rule 103 Observations**

19. The Principal Counsel respectfully requests the Chamber that, should the Defence be granted the right to respond to the Rule 103 Observations,<sup>28</sup> she be equally invited to respond and by the same deadline eventually set by the Chamber for the Defence, as the case may be.

20. The Principal Counsel however underlines that any such opportunity should not be used by the Defence to circumvent the Chamber's decision in relation to the application for leave to reply, if denied.

**FOR THE FOREGOING REASONS** the Principal Counsel respectfully requests the Pre-Trial Chamber to:

- **REJECT** 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



**Paolina Massidda**

**Principal Counsel**

Dated this 8<sup>th</sup> day of October 2018

At The Hague, The Netherlands

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<sup>28</sup> See the Rule 103 Observations, *supra* note 4.