

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/18
Date: 22 February 2020

TRIAL CHAMBER I

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

SITUATION IN THE STATE OF PALESTINE

PUBLIC

Appeal to the “Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence”

Source: Ralph Wilde and Ata Hindi

Document 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 James Stewart, Deputy Prosecutor

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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States' Representatives

Amicus Curiae

Ralph Wilde
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REGISTRY

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach, Chief

Other

1. We respectfully appeal the decision of the Pre-Trial Chamber I (PTC I) on the “Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence,”¹ as far as our own application is concerned. We believe the decision was erroneous in terms of the date and time zone in which we made our application, the stipulations in the Order pursuant to which we made the application, the relevant Regulation of the Court, and the Court’s practice when it comes to other applications for leave. We respectfully request that PTC I reverse its decision in order to reflect when and where we made our submission, and to bring the decision in line with the terms of the Order, the meaning of the relevant Regulation, and the Court’s practice, in the interests of justice, fairness, and equal treatment.
2. Our application was submitted on 14 February at 11:30pm from Atlanta, GA, USA, by Ata Hindi, one of the two authors, who was in Atlanta at that time (he is currently based there). The application clearly indicates that it was submitted in Atlanta. However, our application was recorded by the PTC I as being ‘submitted’ at 5:30am, on 15 February 2020 (para. 51, fn 47), which is the time and date in the time zone of The Hague corresponding to when the application was submitted in Atlanta. As this time in The Hague was the day after the deadline, our application was rejected (para. 51). But the application was not submitted in the Hague; it was submitted in Atlanta. The PTC I does not mention this in its record of the submission.
3. In the PTC I’s “Order setting the procedure and the schedule for the submission of observations”² the Chamber stipulates simply that “other States, organizations and/or persons may submit applications for leave to file written observations by no later than 14 February 2020” (para. 17). Nowhere in the Order does it indicate a specific time and time zone. Crucially, the Order refers to when to ‘submit’ the

¹ ICC-CPI, *Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence*, ICC-01/18-63 (Feb. 20, 2020), https://www.icc-cpi.int/CourtRecords/CR2020_00610.PDF.

² ICC-CPI, *Order setting the procedure and the schedule for the submission of observations*, ICC/01/18-14 (Jan. 28, 2020), https://www.icc-cpi.int/CourtRecords/CR2020_00217.PDF.

applications for leave, thereby focusing on the date, time, and time zone of the submitter, rather than when the applications should be ‘received’, which would focus on the date, time, and time zone of the Court’s physical location. It is not unusual for application processes to stipulate when applications should be ‘received’, and in that context it is striking that such language was not used in the Order, with the word ‘submit’ being used instead.

4. Given this, it would be appropriate for the date adopted for the purposes of the Order to be that date in the time zone of the submitter at the time the application was submitted, in the absence of a stipulation on these matters being made by the Pre-Trial Chamber I.
5. We recognize that Regulation 33(2) of the Regulations of the Court stipulates that:

Documents shall be filed with the Registry between 9am and 4pm The Hague time or the time of such other place as designated by the Presidency, a Chamber or the Registrar, except where the urgent procedure foreseen in regulation 24, sub-regulation 3 of the Regulations of the Registry applies.

However, the relevant texts and the practice of the Court indicate that the relationship between this provision and the PTC I’s Order in the present case and other equivalent Orders is not straightforward. The Order uses the word ‘submit’, the Regulation concerns the procedure for documents to be ‘filed’. The Order is concerned with making submissions to the Court; the Regulation is concerned with how documents (such as submissions) are filed with the Registry. Nothing in the Regulation requires the Court only to accept as ‘submitted’ documents that are ‘filed with the Registry’ within the 9am–4pm time period in The Hague. All it stipulates is that document filing at and by the Registry will only take place, absent the urgent procedure indicated, during the prescribed time period in the prescribed time zone. Equally, nothing in the Regulation requires the Court necessarily to observe exclusively the time zone of The Hague when a date is fixed as the deadline for ‘submissions’, as far as the decision it makes about which ‘submissions’ to accept as validly made is concerned. Again, the Regulation is concerned more specifically with the question of what time zone

will be adopted for the purposes of the time period within which documents will be filed with the Registry. The Regulation serves a specific purpose relating to filing procedure in the Registry, which relates to, but is different from, the question of what time and what time zone operates as far as a deadline for 'submissions' is concerned. Given this, clearly the PTC I has a certain degree of discretion to determine the time and time zone question as it relates to valid submissions, the Regulation concerning the specific issue of 'filing' documentary submissions with the Registry notwithstanding.

6. Indeed, the Court has a consistent practice of accepting, as valid 'submissions', documents sent in after the 9am-4pm time period in The Hague on the due date for submissions. In the present case, it accepted as valid the submissions of the League of Arab States (with a corrigendum on 17 February), Me Yael Vias Gvirsman, the Popular Conference for Palestinians Abroad, the Israel Forever Foundation, Dr. Frank Romano, and Dr. Uri Weiss. Each of these requests, like our application, is reported as having been 'received' on 17 February or later (indeed, Uganda's submission was actually not a submission per se, but a *note verbale*). These applications were submitted after the 9am-4pm 'filing' period stipulated by the Regulation, on the due date and, presumably for this reason, were recorded as being 'received' by the Court on the next working day, 17 February, not on the day of the deadline. Nonetheless, they were accepted by the Court as being 'submitted' within the deadline.
7. The only difference between our submission and these submissions is that they were sent in (although not recorded as received, because they were outside the filing period) before midnight The Hague time on the due date, whereas our submission was sent in after that time, five and a half hours into the following day in The Hague, but within the due date as far as time zone (Atlanta, GA, USA) operating where the submission was sent.
8. As mentioned, the Order did not stipulate a particular time and time zone for submissions. There is no Regulation that provides such a stipulation. The only basis in the Regulations for adopting The Hague as the time zone for submission

would be Regulation 33. But, as mentioned, Regulation 33 is concerned with the more specific matter of when documentary submissions will be filed. If Regulation 33 somehow applied as a binding requirement for submissions to be regarded as valid, then all the aforementioned submissions would be invalid, since they were submitted after the 9am-4pm filing period had ended. Yet the PTC I accepted them as valid. Given this, it would be perverse and unfair were the Court to selectively transpose one element of the Regulation (the reference to The Hague time zone) to disadvantage our application whilst at the same time choosing not to transpose another element of the Regulation (the reference to the 9am-4pm period) that would disadvantage the other applications.

9. More broadly, there is no good reason why our submission should be rejected yet the other submissions accepted, given that in both cases the 'receiving' date is considered by the Court to be the following working day, the 17th February, and not the date of the deadline. In the end, our submission was the only one singled out for rejection. Accepting this submission would have resulted in little to no additional burden on the Court. This is especially the case given that, as mentioned, the submission was made before midnight US Eastern Standard Time, the time in the location of the sender, Ata Hindi. Ultimately, the only potentially valid reason for making such a distinction would be if the Court had somehow overlooked the location from which our submission was sent and the implications this had for the difference in time zone and date, and instead simply adopted the Hague time and time zone as a default. We trust that now this critical information (indicated in the submission, with reference to it being adopted in Atlanta) has been foregrounded, the Court will correct its earlier decision.
10. Moreover, and more fundamentally, the Court has a global jurisdiction, so the default approach on the question of what time zone to apply should be one favorable to the submitter, at least in the absence of a specified time and time zone and the absence of a consistent practice when it comes to the transposition of the provisions of Regulation 33 to the question of valid submissions. The principles of universality, fairness, and natural justice require that unless there is

a stipulation to the contrary, a specified date should be understood to operate at a time that is applicable to all those affected by the issues before the Court, wherever they are in the world. Indeed, Ata Hindi is a Palestinian who has been profoundly affected by the Israeli occupation of Palestine. The reason he is outside of Palestine, in Atlanta, is to be able to pursue educational opportunities in international law that are not available in Palestine because of the very situation before the Court. Obviously, that is the situation for many Palestinians generally – they are displaced around the world – due to the occupation. The interests of justice should require that the Court respect where Palestinians are located when determining what time zone to apply when it comes to this deadline, given that the situation before the court is one affecting them and the Court has not stipulated a time and time zone.

11. In any case, beyond the specific issue of the time zone, the Court has previously been willing to depart entirely from applying deadlines in applications for leave. With respect to the Situation in the Islamic Republic of Afghanistan, the Appeals Chamber, in its “Corrigendum of order scheduling a hearing before the Appeals Chamber and other related matters”,³ invited interested parties to submit written observations and indicate whether or not they wished to appear. The deadline for states was ‘16h00 on Friday, 15 November 2019’ (para. 4), while the deadline for *amici curiae* was “16h00 on Tuesday, 15 October 2019” (para. 5).
12. Despite the 15 November deadline, the Islamic Republic of Afghanistan neither requested to appear and/or submit written observations nor asked for an extension to do these things by the deadline. Ten days later, on November 25, the State indicated that it would appear, and requested an extension of time to submit written observations. The Appeals Chamber accepted this.⁴
13. Moreover, an application for leave to from the European Centre for Law and Justice (ECLJ), backdated to 15 October 2019, was reported by the Court as having

³ ICC-CPI, *Corrigendum of order scheduling a hearing before the Appeals Chamber and other related matters*, ICC-02/17-72-Corr (Sep. 27, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_05785.PDF.

⁴ ICC-CPI, *Decision on request for extension of time*, ICC-02/17-121 (Nov. 26, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_07200.PDF

been ‘requested’ and ‘filed’ on 22 October 2019 (para. 29 & fn 32 respectively)⁵. This indicates that the application was submitted seven days after the date indicated on it, which was the deadline—thereby missing the deadline entirely, whatever time zone is adopted, by an entire week. Despite this, the Court accepted the application without question (para. 31).⁶

14. Given the circumstances of these earlier accepted submissions, the rejection of our submission constitutes a clear breach of fairness and equal treatment. Moreover, when it comes to the acceptance of the late submission by the ECLJ in particular, given the political character of this entity as a far-right pro-Israel organization, on the one hand, and the identity of one of the present applicants, Ata Hindi, as a Palestinian, on the other hand, the Court risks opening itself to accusations of applying double standards rooted in political bias, a situation that has already presented itself with commentary that has been made on social media following the decision by the Court to reject our application.⁷ This is especially significant bearing in mind the political positions concerning Israel and Palestine held by many of the individuals, groups, and governments whose applications were accepted by the Court in this case.

15. A further matter of practicality is also significant to the present appeal. The Registry of the Court did not make the document template necessary for submissions for leave easily accessible to potential applicants. It was only found by the authors through third-party sources well into the evening of 14 February. The authors attempted to recreate the template on their own. The authors had no information on where to send the document and requested the email address from colleagues. After receiving this, the authors emailed judoc@icc-cpi.int on 14 February to request the template. To date there has still been no response.

⁵ ICC-CPI, *Request for Leave to Submit Observations on behalf of the European Centre for Law and Justice*, ICC-02/17-95 (Oct. 22, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_06242.PDF.

⁶ ICC-CPI, *Decision on the participation of amici curiae, the Office of Public Counsel for the Defence and the cross-border victims*, ICC-02/17-97 (Oct. 24, 2019), <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/17-97>.

⁷ See, e.g., <https://opiniojuris.org/2020/02/22/the-icc-takes-time-limits-seriously-if-youre-palestinian/> and <https://twitter.com/nicolascas/status/1230977541852278784?s=11>.

Further, according to a letter from the Registry of the ICC to the Coalition for the ICC (Ref: NV/2020/EOSS/27/JCA-aps), which was shared with the authors afterwards, there was a document template circulated and no particular time was indicated on the template. Those who are not members of the Coalition, such as the authors, would have not had access to the document template.

16. If the Court adopts the position that it has appropriately addressed matters of time and date in its decision regarding our submission, we would respectfully request the Court to exercise its discretion to accept the submission as validly filed. No other submission will assist the Court on the matter we propose to address in the manner we propose to address it. Moreover, the inclusion of a further Palestinian voice, in Ata Hindi, in the proceedings would be significant in terms of balance and even-handedness, bearing in mind the aforementioned political position of many of the other applicants who have been granted leave. Ultimately, if it is necessary in order for our submission to be potentially considered, we would respectfully request that the Court grant an extension under Regulation 35 in order for us to make it again or for the Court to re-consider the submission already made.

17. In sum, we respectfully request that the Pre-Trial Chamber should consider the following:

- a. That the application was submitted within the deadline of February 14, as far as the time zone in which the submission was made by Ata Hindi is concerned;
- b. That the provisions of Regulation 33, which are the only stipulations that include reference to The Hague time zone, relate to the separate, more specific matter of the filing process at the Registry, and in any case cannot be invoked to apply this time zone as a requirement for our submission, bearing in mind that they were not applied to bar other submissions that were made after the 9am-4pm filing period on the due date;

- c. That the required time of submission, including the time zone, was not stipulated by the Court in its Order, and in the absence of this the authors' application should not be rejected;
- d. That several submissions were submitted contrary to Regulation 33 and nonetheless accepted, having been received on the next working day, and this flexibility should have been applied to our submission;
- e. That the Court previously allowed for at least two submissions to be filed well after its deadline, and it would be unfair and discriminatory to allow those applications and yet reject ours for seemingly having missed the deadline (and by a much smaller margin);
- f. That our submission was made at the last minute, although still on February 14 in the time zone of the person sending in the submission, due to the failure of the Court to properly circulate the template or communicate by email or include it anywhere reasonably visible on the website;
- g. That the interests of universality, justice, and fairness require that submission within the date in any time zone in the world should be acceptable.

18. Regardless of your decision about our submission, we respectfully request that the Court clarify the matter of the time and time zone for submissions to be regarded as valid, stipulate the standards to be applied if late submissions are to be accepted, and then apply the foregoing consistently and fairly in the future.



Ralph Wilde



Ata Hindi

Dated this 22nd day of February, 2020

At Atlanta, GA, USA