

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **29 June 2015**

PRE-TRIAL CHAMBER I

Before: Judge Joyce Aluoch, Presiding Judge
Judge Cuno Tarfusser
Judge Péter Kovács

SITUATION IN LIBYA

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

Confidential *Ex Parte*, Defence and Registry Only

**Defence Request for Leave to Reply to “Observations on the ‘Request for review
of Registrar’s Decision’ (ICC-01/11-01/11-595-Conf-Exp)”**

Source: Defence for Mr. Saif Al-Islam Gaddafi

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

The Office of the Prosecutor

Counsel for the Defence

Mr. John R.W.D Jones QC

Ms. Sarah Bafadhel

Legal Representatives of the Victims

**Legal Representatives of the
Applicants**

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr. Herman von Hebel, Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

1. The Gaddafi Defence respectfully seeks the leave of the Pre-Trial Chamber to file a reply to the "Observations on the 'Request for the review of the Registrar's Decision' (ICC-01/11-01/11-595-Conf-Exp)"¹ (hereinafter "Registrar's Observations"), pursuant to Regulation 24 of the Regulations of the Court.
2. Leave is sought in relation to two discrete issues which arise from the Registrar's Observations, namely:
 - a. The summarised equation of the hourly rate applied for legal services; and
 - b. The rate of €34.31 as "the average of monthly hourly rates based on the above calculation over the period running from January until December 2014."
3. The Registrar made new submissions on both these issues, which could not have been reasonably anticipated in the "Request for the review of the Registrar's Decision" ("Request").² That this additional information arose for the first time in the Registrar's Observations constitutes good cause for allowing the Defence to reply to them.
4. As to the summarised equation, the Registrar states that he has calculated the hourly rate for legal research services conducted by Ms. Bafadhel on the following basis: "[**monthly cap**] / 21.75 – (**days worked as language assistant**)] / [working hours per day] (emphasis added)."³
5. In doing so, the Registrar incorrectly assumes that €2,500.00 was the maximum monthly fee applied. Rather, €2,500.00 is the *capped* amount to be

¹ ICC-01/11-01/11-608-Conf-Exp.

² ICC-01/11-01/11-595-Conf-Exp.

³ Registrar's Observations, par. 13.

provided to Ms. Bafadhel, as stipulated by Mr. Mbaye in his email dated 21 February 2014.⁴

6. The monthly cap was reached as part of a considered agreement to ensure the efficient management of the budget and to avoid overrunning the funds allocated to the Defence. At the time of the agreement, CSS confirmed that this was a reasonable request.⁵
7. In turn, the question as to the amount of the monthly cap is logically distinct from the hourly rate to be provided for legal research services conducted by Ms. Bafadhel. As an example, if the hourly rate was fixed at €250.00 per hour, Ms. Bafadhel could only work ten hours a month before reaching the monthly capped rate. By comparison, if the hourly rate was fixed at €25.00 per hour, Ms. Bafadhel could work 100 hours before reaching the monthly capped rate. Therefore, the question as to what a reasonable hourly rate must be determined independently of the question of the monthly-capped amount.
8. At the time of the agreement with CSS, it was known and understood by all concerned that Ms. Bafadhel was: (i) assisting with legal research services on a part-time basis; and (ii) capped at providing only twenty hours of language services per month.⁶ A reasonable hourly rate would take into account both considerations.
9. However, the Registrar's newly derived equation ignores both of these factors and proceeds to use the monthly-capped amount as divided by the hours worked by full time staff.

⁴ ICC-01/11-01/11-608-Conf-Exp-Anx8. Also available at ICC-01/11-01/11-595-Conf-Exp-Anx5.

⁵ *Ibid.*

⁶ Request, par. 8.

10. Given these limitations, it is not possible for the equation provided by the Registrar to amount to the €34.31 “average” rate it provides.⁷ That the new equation provided cannot equal the Registrar’s calculations only further emphasises the arbitrary approach adopted by the Registrar when manufacturing a variable rate. This new equation is baseless, unreasonable and should be disregarded entirely.
11. The Registrar also asserts that €34.31, is not a fixed rate but rather “the average of monthly hourly rates based on the above calculation.”⁸ Despite numerous requests for a monthly breakdown of payments, this is the first time that the Registrar has provided some sort of explanation as to the applicability of the hourly rate on a monthly basis.
12. However, notably, the Registrar still omits to provide any actual breakdown of monthly payments for the period between January to December 2014 in order to be able to accurately deduce and verify whether €34.31 is in fact “the average of monthly hourly rates.”
13. As a result, the Registrar also fails to address why, using his own method of calculation and “average monthly rate” of €34.31, he has calculated that Ms. Bafadhel’s remuneration over the total period was underestimated by €3,5066.33. This point is further emphasised by the breakdown provided for in the Request and the fact that when applying the Registrar’s average monthly

⁷ With the 20-hour language assistance cap and rounding up, this means that the most Ms.. Bafadhel could have worked is three days per month on language assistance. Using the equation provided, this means that Ms. Bafadhel’s maximum legal research services rate could only have been $2500/(21.75-3)/7.5$, a number far lower than the €34.31 “monthly average” rate.

⁸ Registrar’s Observations, par. 14.

rate of €34.31 to calculate remuneration for legal research services completed for the period January to December 2014 amounts to at least €17,562.11.⁹

14. This figure is ascertained on the basis of the hours approved by CSS for legal research tasks undertaken by Ms. Bafadhel. In this regard, the Defence notes that contrary to the Registrar's submissions; the relevance of activity undertaken by Ms. Bafadhel is not currently in issue.

15. In particular, it is noted that Ms. Bafadhel did not claim payment for case management activities as part of her language assistant timesheets as submitted by the Registrar.¹⁰ This error was initially included and subsequently removed from Ms. Bafadhel's legal assistant timesheets as early as July 2014.¹¹ Furthermore, the figures provided for and relied upon in the Request relate to the hours as approved by CSS and therefore exclude case management activities or activities considered by CSS to "supplant activities that should be properly conducted by counsel."¹²

16. In the continued absence of any monthly breakdown of calculation and remuneration for language and legal research services provided, the Registrar's approach remains unreasonable and non-transparent.

17. The Defence also regretfully notes that Registrar's Observations contains several assertions, which are both inaccurate and misleading.

18. First, the Registrar repeatedly asserts that Ms. Bafadhel is not registered on the list of legal assistants. He further asserts that the only predetermined hourly rate that could have been considered for the remuneration of Ms. Bafadhel's

⁹ Request, par. 42. The Defence notes that the figure provided for at paragraph 42 of the Request is for legal research services provided between **January to October 2014**. However, the Registrar has asserted that his method is based on the period **January to December 2014**.

¹⁰ Registrar's Observations, par. 5.

¹¹ ICC-01/11-01/11-608-Conf-Exp-Anx7.

¹² Request, par. 40 and fn. 25.

legal research services is the hourly rate provided for legal assistants in the Legal Aid Policy.¹³

19. The Defence were not told that Ms. Bafadhel had to be appointed or registered on the list of legal assistants as part of the agreement with CSS wherein they agreed that the request to remunerate Ms. Bafadhel was a reasonable one.¹⁴ The fact that Ms. Bafadhel is not on the approved ICC list of legal assistants cannot now be retroactively applied. To do so, would be to unfairly shift the goal posts once again.

20. Moreover, even in the event that the Registrar does not wish to apply his own calculated rate of €34.31 as a pre-determined hourly rate for legal research services, his adopted position fails to coherently explain why Ms. Bafadhel is not entitled to a predetermined rate. Not all positions on a Defence team require a qualified registration process, including for example, case manager positions. Using the Registrar's logic, the hourly rate for case manager is yet another example of a reasonable hourly rate which could be applied and subsequently capped at €2,500.00 per month.

21. Second, the Registrar concludes that his proposed calculation is a practical response "which was not foreseen in the Legal Aid Policy."¹⁵ This is a misleading conclusion. From the outset, it was agreed that Ms. Bafadhel would be reimbursed from the €3,000.00 monthly allotment to each Defence team as per the Legal Aid Policy.¹⁶ Ms. Bafadhel's remuneration is therefore a foreseeable expense to be taken from funds already allotted to the Gaddafi Defence team.

¹³ Registrar's Observations, par. 16.

¹⁴ ICC-01/11-01/11-60-Conf-Exp-Anx8.

¹⁵ Registrar's Observations, par. 17.

¹⁶ ICC-ASP/12/3, Registry's single policy document on Court's legal aid system, 4 June 2013, par. 139. See also ICC-01/11-01/11-608-Conf-Exp-Anx8.

22. It is clear from the Registrar's Observations that he is approaching this matter in an unreasonable manner. The Gaddafi Defence team would have conducted and organised itself in an entirely different manner had it known that: (i) the €2,500.00 was not to be considered a monthly cap in the true meaning of the word; (ii) Ms. Bafadhel was expected to provide legal research services on a full-time basis; (iii) work completed as a language assistant would be used to limit the hourly rate applied for legal research services; (iv) Ms. Bafadhel had to be registered as legal assistant to be entitled to a predetermined rate; and (v) CSS and Registrar would fail to provide any monthly breakdown of remuneration for language and legal research services.

23. Finally, the Gaddafi Defence objects to the classification of filings pertaining to the original Request. Given the nature of the Request and the information it pertains to, its public availability strongly runs the risk of revealing confidential defence strategy and also relates to issues concerning personal employment.

Relief sought

24. For the reasons set out above, the Defence for Mr. Saif Al-Islam Gaddafi respectfully requests the Honourable Pre-Trial Chamber to: (i) grant leave for the Defence to file a reply and (ii) accept the present submission as this reply.



John R.W.D. Jones QC, Counsel for Mr. Saif Al-Islam Gaddafi

Dated this, 29th Day of June 2015

At The Hague, The Netherlands