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

Date: 7 February 2012

APPEALS CHAMBER

Before: Judge Sang-Hyun Song
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Usacka
Judge Daniel David Ntanda Nsereko

SITUATION IN LIBYA

IN THE CASE OF

**THE PROSECUTOR v.
SAIF AL-ISLAM GADDAFI and ABDULLAH AL-SENUSSI**

Public Document

Appeal Against Decision on Application Under Rule 103

Source: Mishana Hosseinioun, represented by Sir Geoffrey Nice QC and
Rodney Dixon

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

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**Victims Participation and Reparations
Section**

Other

A. Introduction

1. The Appellant, being the Applicant in the “Application on behalf of Mishana Hosseinioun for Leave to Submit Amicus Curiae Observations to the Chamber” (hereinafter “the Application”), files this appeal against the Pre-Trial Chamber’s “Decision on the Applications of Mishana Hosseinioun and Aisha Gaddafi to submit Amicus Curiae observations to the Chamber” (hereinafter “the Decision”), dated 2 February 2012, the parties being notified of the Decision on that day.
2. This Appeal is submitted pursuant to Article 82(1)(a) of the Statute, Rule 154, and Regulations 33 and 64.

B. Standing to Appeal the Decision

3. Article 82(1)(a) states that: “Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: A decision with respect to jurisdiction or admissibility”.
4. To bring this appeal, the Appellant must therefore satisfy the Appeals Chamber of two matters in respect of her standing: (i) that she is a party to the proceedings and (ii) that the Decision is one “with respect to jurisdiction or admissibility”.
5. In respect of the first matter, the Appellant would urge the Appeals Chamber to adopt the logical and common sense meaning of “party” - that it refers to the applicant in a Rule 103 application that has been rejected. Any other interpretation would mean that Rule 103 applicants have *no* right of appeal whatsoever and that determinations under Rule 103 fall solely within the competence of the Pre-Trial Chamber. Rule 103 does not provide as much, nor does any other provision in the Statute, Rules or Regulations. The drafters of the Statute could not have intended such a procedurally odd and unfair outcome, namely to remove the exercise of the discretion to allow *amicus curiae* and other observations entirely from the jurisdiction of the Appeals Chamber.
6. A Pre-Trial Chamber in another case rejected an application for leave to appeal a decision under Rule 103 (without considering the merits of the appeal) on the basis that the applicant lacked standing to appeal the refusal of their application because

they could not be regarded as parties¹. The Appellant submits that the Appeals Chamber should not endorse this decision for the reasons above. It eliminated the Rule 103 Applicant's right of appeal for no proper reason, and in effect permitted the Pre-Trial Chamber to avoid engaging with the merits of the case.

7. The Appeals Chamber should take into account that Article 82(1) states that it is to be applied in accordance with the Rules of Procedure and Evidence. Rule 155(1) provides that: "When a party wishes to appeal a decision under article 82, paragraph 1 (d) ...". Rule 155(2) stipulates that the Chamber "shall notify all parties who participated in the proceedings that gave rise to the decision referred to in sub-rule 1". The clear implication of Rule 155 is that in the context of Article 82, a "party" means one of the parties who participated in the proceedings that gave rise to the decision which is subject to the appeal.
8. Article 82 should not be read restrictively or in an overly technical way, which would leave the court open to criticism of failing to confront the important legal issues raised by the appeal. In the present case the Appellant has sought to file submissions to assist the court in guaranteeing the human rights and safety of a man who is at risk of torture and the death penalty². The Pre-Trial Chamber, with respect, has simply ignored this request, whether deliberately or not. The error is so unjust and perverse that the Appeals Chamber should not in the performance of its obligations and duties under the Statute refuse to consider the vital issues raised on account of a purported procedural bar (which, in the Appellant's submission, does not exist).
9. With regard to the second issue as to standing, the Appellant submits that the Decision is one "*with respect to jurisdiction or admissibility*". The Appellant specifically asked the Pre-Trial Chamber to receive her observations under Rule 103 in order that Saif Gaddafi could obtain legal representation to be heard by the ICC on the question of admissibility before any decision is taken by the ICC on where his trial should be held, and it was this application concerning admissibility that was refused by the Chamber. The point of the Application was that the Pre-Trial Chamber should consider

¹ Decision on the Application for Leave to Appeal the Decision on Application under Rule 103, ICC-02/05-192, 19 February 2009.

² Libyan officials will seek death penalty for Saif al-Islam Gaddafi, Telegraph, 21 November 2011 (<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8905151/Libyan-officials-will-seek-death-penalty-for-Saif-al-Islam-Gaddafi.html>); Saif Gaddafi could face death penalty in Libya – minister, Reuters, 20 November 2011 (<http://in.reuters.com/article/2011/11/20/idINIndia-60619320111120>).

observations on this issue so that no decision is taken about admissibility in the absence of submissions from the very person who is the subject of the admissibility proceedings³. In other words, the ICC should not determine this critical issue purely on basis of the submissions from the NTC, ICC Prosecutor and OPCD (who have no instructions from Mr. Gaddafi), that directly affects Mr. Gaddafi's health, safety, and life without hearing *his* submissions on admissibility.

10. Ms. Hosseinioun's application included the following submissions, all of which concerned the admissibility of the case:

- (i) "the proper determination of the case before the ICC requires he [Mr. Gaddafi] have access to a lawyer. Having no lawyer to represent him, he is unable to make submissions to this Chamber on admissibility and other crucial issues which would enable the case to be properly and fairly determined. The case is at a critical stage in which the ICC, as it should, will determine whether the case should be tried before the ICC or not. It cannot be right that the ICC is not in a position to hear directly from Saif Gaddafi on these vital issues, especially given the security situation in Libya and that he could face the death penalty if tried in Libya, or worse, meet the same grim fate as his late father and brother even before he reaches trial".
- (ii) "the Prosecutor is not raising any of these matters before the ICC. Although the OPCD has been requested to make observations on behalf of Saif Gaddafi, it has obviously not been able to meet with him or to take any instructions from him. Saif Gaddafi is plainly entitled to have access to a lawyer of his choosing, whom he can instruct to make submissions directly on his behalf, especially in light of the very important issues pertaining to admissibility and his fair trial rights, issues that *are* effectively before the ICC".
- (iii) "Under the Statute the admissibility of the case raised by the custodial State cannot be determined without the opportunity for Saif Gaddafi to make submissions before the ICC if he so chooses. It would be incompatible with the ICC Statute for the Court to allow Libya to challenge the admissibility of

³ In His First Interview, Saif al-Islam Says He Has Not Been Given Access to a Lawyer, Human Rights Watch, 30 December 2011 (<http://www.hrw.org/print/news/2011/12/30/his-first-interview-saif-al-islam-says-he-has-not-been-given-access-lawyer>); Libya: Ensure Gaddafi Son's Access to Lawyer, Human Rights Watch, 21 December 2011 (<http://www.hrw.org/news/2011/12/21/libya-ensure-gaddafi-son-s-access-lawyer>).

the case without hearing from Saif Gaddafi or the counsel of his choice, especially when Libya has itself put him in the position in which he is unable to participate or to instruct counsel. Libya should not benefit from its own denial to a detainee of his basic rights”.

(iv) “Such fairness is especially significant in a case such as this where the very venue and judicial forum of the trial will be determined in the current stage, being themselves issues which directly impact on the interests of the suspect”.

(v) “No decisions concerning the admissibility of the case should be made until Saif Gaddafi has been given the opportunity to instruct a lawyer of his choosing and to make submissions before the ICC if he so wishes”.

(vi) “Under the provisions of the ICC Statute, Libya should be required in the present case either to make an admissibility challenge or comply with its obligations to surrender Saif Gaddafi pursuant to the ICC arrest warrant”.

11. The Application was refused on the ground that the Applicant was seeking permission in effect to have access to Mr. Gaddafi to provide him with the advice that the Applicant deemed appropriate, which did fall within the scope of Rule 103. As set out below, the Appellant submits that this reasoning unfairly distorts and completely misconceives the Application. It is, in any event, a decision that is concerned with admissibility in that it has refused the admission of observations on this precise subject.

12. The Appeals Chamber is urged to take into consideration, should there be any doubt about whether the Decision fits squarely within Article 82(1)(a), the current circumstances facing Mr. Gaddafi in which the risks to his life are escalating, making the admissibility of the case the most pertinent issue:

- It is reported on 30 January 2012 that Dr. Omar Brebesh, who was held by militia from the town of Zintan (where Saif Gaddafi is held), has died in custody. His body turned up in a hospital in Zintan less than 24 hours after

being detained in Tripoli on 19 January 2012. Human Rights Watch has stated that it has seen evidence that he died as a result of torture⁴.

- A recent battle between heavily armed Misurata and Zintan militias in Tripoli, in which a person may have been killed, underscores the volatility of the security situation in Libya and the NTC's inability to establish authority over the country, in particular over the militia who hold Saif Gaddafi, even in the capital itself. It is reported that the NTC admits that "We do not know why they are fighting"⁵.
- Amnesty International has stated that torture is occurring in both NTC controlled custody and without, that it is getting worse, and that extra-judicial processes are occurring outside the authority of the state⁶.
- Saif Gaddafi is still held without access to any lawyer, family or friends in Libya and the authorities have indicated that the death penalty will be applicable to his case⁷.
- The new Libyan Interior Minister, Mr. Fawzi Abdelali, has now stated that "should Saif demand a lawyer, then a lawyer would be provided", but it should be noted that Human Rights Watch recorded that Mr. Gaddafi had demanded a lawyer late last year but was denied access.⁸

⁴ Libya: Diplomat Dies in Militia Custody: Investigate Death of Former Envoy to France, Human Rights Watch, 3rd February 2012 (<http://www.hrw.org/node/104964>); Gaddafi-era Libyan diplomat tortured to death after detainment: rights group, National Post (Reuters), 3 February 2012, (<http://news.nationalpost.com/2012/02/03/gaddafi-era-libyan-diplomat-tortured-to-death-after-detainment-rights-group/>); Gaddafi-era envoy 'killed' by Libyan militia, Al-Jazeera, 4 February 2012, (<http://www.aljazeera.com/news/africa/2012/02/2012249959312137.html>).

⁵ Militias battle in heart of Tripoli, Financial Times, 1 February 2012 (http://www.ft.com/cms/s/5675e6b8-4d05-11e1-bdd1-00144feabdc0,Authorised=false.html?_i_location=http%3A%2F%2Fwww.ft.com%2Fcms%2Fs%2F0%2F5675e6b8-4d05-11e1-bdd1-00144feabdc0.html&_i_referer=); Rival Libya militias battle in Tripoli, BBC, 1 February 2012, (<http://www.bbc.co.uk/news/world-africa-16841848>).

⁶ Torture in Libya: la même chose, Amnesty, 27th January 2012 (<http://www2.amnesty.org.uk/blogs/press-release-me-let-me-go/torture-libya-la-m%C3%Aame-chose>); Libya: fresh reports of deaths of detainees amid widespread torture, Amnesty, 26 January 2012 (http://www.amnesty.org.uk/news_details.asp?NewsID=19917); MSF Suspends Work in Misrata Amid Torture Claims, Channel 4, 26 January 2012, (<http://www.channel4.com/news/msf-suspends-work-in-misrata-amid-torture-claims>).

⁷ See above.

⁸ <http://www.independent.co.uk/news/world/africa/saif-gaddafis-trial-could-begin-within-weeks-says-ntc-6579559.html>

- It has also recently been reported if the ICC fails to act, Mr. Gaddafi could be tried “within weeks” in Libya.⁹
- Only yesterday the trials of Libyans accused by the NTC were halted due to allegations of the trials being unfair and detainees not being able to hire their own lawyers.¹⁰

13. The Appeals Chamber should be mindful of the fact that the Prosecutor has raised no concern over these events. The Pre-Trial Chamber has not addressed them in any way. There should be no reason for the Pre-Trial Chamber not to receive all relevant observations on these matters in the course of considering the admissibility issue and the venue for holding trial.

C. Errors in the Decision under appeal

14. The Pre-Trial Chamber refused leave to the Applicant pursuant to Rule 103 solely on the basis that it found that there was an implicit motivation to “seek the Chamber's permission to contact Saif Gaddafi and give him access to what they deem to be appropriate legal advice”. This is the only reason given for rejecting the Application as set out in one paragraph of the Decision.

15. In the Appellant's submission this is an astonishing finding. It is as if the Application had not been considered at all by the Pre-Trial Chamber. A reading of the Application should have made it clear that the Applicant was asking to make observations on Mr. Gaddafi's right to legal representation so that he could have a lawyer of his choosing in order to make *his* submissions before the ICC. The Applicant in her observations, if permitted, would have asked that the ICC not make any decision on the admissibility issue and the venue of the trial until it had heard from Mr. Gaddafi to make whatever submissions *he* thought appropriate *himself or through lawyers of his choosing*.

16. Furthermore, the Applicant does not need the Chamber's permission to contact Saif Gaddafi – she was not asking for any permission.

⁹ <http://edition.cnn.com/2012/02/05/world/africa/libya-gadhafi/>

¹⁰ Libya court postpones trial of Gaddafi loyalists, Reuters, 6 February 2012 (<http://uk.reuters.com/article/2012/02/05/uk-libya-trial-idUKTRE8140ME20120205>).

17. It is his *rights* that were at the centre of the Application. These are important and fundamental questions which should not have been trivialised by the Pre-Trial Chamber. Article 21(3) of the ICC Statute requires the court to interpret the provisions of Statute consistent with “internationally recognised human rights”. It is precisely on this topic that the Applicant would have submitted observations to the court to seek to assist the Chamber in determining the admissibility issue. As emphasised in the Application, she did not apply to make submissions on behalf of Mr. Gaddafi. Your Appellant applied under Rule 103 to ensure that Mr. Gaddafi had access to *his* choice of appropriate legal representation and to the ICC to make his own submissions about his situation and where he should be tried, and not, as the Chamber incorrectly concludes, to what the Applicant “deem[s] to be appropriate legal advice”.
18. Deciding an application on the basis of the Pre-Trial Chamber’s conjecture as to the *motivations* of the Applicant rather than the *content* of the Application places the Pre-Trial Chamber fundamentally in error as to the attitude of a court of law towards determining an application.
19. As the Appeals Chamber has repeatedly stated, “courts do not base their decisions on impulse, intuition and conjecture or on mere sympathy or emotion” as to do so “would lead to arbitrariness and would be antithetical to the rule of law”¹¹.
20. It should be plain to the Appeals Chamber that a reading of the Application under Rule 103 shows that the Pre-Trial Chamber did not have regard to the actual grounds of the Application. The Pre-Trial Chamber did not address any of the grounds in the Decision, and appears to have been prepared to refuse the Application at any cost.
21. It was explained in the Application that the proposed observations would be “in respect of legal representation”, stressing the importance of “proper and fair procedures [to] be followed by the ICC being seised of the present case” (para. 37). There appears to be no reason for refusing, at the very least, to hear observations on

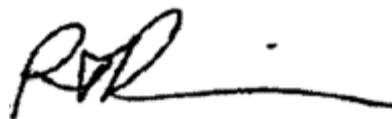
¹¹ Judgment on the appeals of the Defence against the decisions entitled "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06" of Pre-Trial Chamber II, ICC-02/04 OA and ICC-02/04-01/05 OA2, 23 February 2009, para. 36; 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", ICC-01/09-01/11 OA, 30 August 2011, para. 62.

these matters, especially since the Prosecutor has not raised them before the Chamber.¹² As made clear in the Application, the observations would have addressed the ways in which Mr. Gaddafi's rights could be protected by the Chamber. Admissibility proceedings *cannot* take place with any semblance of fairness while Saif Gaddafi cannot make submissions through counsel *of his own choosing*, or in person.

22. While the Appellant recognises that Rule 103 affords the Pre-Trial Chamber a discretion, it is not an unfettered discretion. Exercise of the discretion must be reasonable, based on the provisions of the Rule, and made in good faith. Where, as is the case here, the Pre-Trial Chamber has completely ignored the Applicant's grounds, and is thus unlikely to grant leave to appeal their own decision (which the Appellant has today applied for without prejudice to the present appeal), the Appeals Chamber is urged to consider the present appeal. If not, the Appellant will be effectively without any remedy, and Mr. Gaddafi without any person highlighting his plight and without any court safeguarding his rights.

D. Conclusion

23. For all of the above reasons, the Appellant submits that the requirements of Article 82(1)(a) are satisfied, that the Pre-Trial Chamber has committed serious errors in the Decision, and that the Appeals Chamber should reverse the Decision and permit the observations to be filed under Rule 103.



Sir Geoffrey Nice QC
Rodney Dixon
Counsel on behalf of Mishana Hosseinioun

¹² "In May, we requested a warrant because Libyans couldn't do justice in Libya," the ICC chief prosecutor said. "Now, as soon as Libyans decide to do justice they could do justice and we'll help them to do it."; Saif al-Islam Gaddafi can face trial in Libya - ICC, BBC, 22 November 2011 (<http://www.bbc.co.uk/news/world-africa-15831241>).

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London, United Kingdom