

1 International Criminal Court
2 Appeals Chamber
3 Situation: Libya
4 In the case of The Prosecutor v. Saif Al-Islam Gaddafi - ICC-01/11-01/11
5 Presiding Judge Chile Eboe-Osuji
6 Appeals Judgment - Courtroom 1
7 Monday, 9 March 2020
8 (The hearing starts in open session at 2.34 p.m.)
9 THE COURT USHER: [14:34:52] All rise.
10 The International Criminal Court is now session.
11 Please be seated.
12 PRESIDING JUDGE EBOE-OSUJI: [14:35:14] Thank you very much.
13 Court officer, please place the matter on the record.
14 THE COURT OFFICER: [14:35:22] Good afternoon, Mr President.
15 Situation in Libya, in the case of The Prosecutor versus Saif Al-Islam Gaddafi,
16 case reference ICC-01/11-01/11.
17 And for the record, we are in open session.
18 PRESIDING JUDGE EBOE-OSUJI: [14:35:38] Thank you very much.
19 Appearances, please, from the Defence side.
20 MR ELLIS: [14:35:44] Good afternoon your Honour, Mr President.
21 Lead counsel Essa Faal asked me to convey his apologies and regrets that he cannot
22 attend this afternoon. Your Honour, Mr Gaddafi is represented by Khaled Al-Zaidy,
23 Kamis Al Zanati, Libyan law advisers. And I'm Aidan Ellis, counsel.
24 PRESIDING JUDGE EBOE-OSUJI: [14:36:08] Thank you very much.
25 MS BRADY: [14:36:10] Good afternoon, your Honour.

1 Appearing for the Prosecution is myself Helen Brady, senior appeals counsel. I'm
2 here today with Ms Meritxell Regue, appeals counsel; Ms Alison Whitford, associate
3 trial lawyer; behind me Mr Julian Nicholls, senior trial lawyer; next to him
4 Ms Nivedha Thiru, associate appeals counsel; and our case manager,
5 Ms Biljana Popova. Thank you.

6 PRESIDING JUDGE EBOE-OSUJI: [14:36:38] Thank you very much.

7 MS MASSIDDA: [14:36:41] Good afternoon, Mr President.

8 Victims in these proceedings are represented by the Office of Public Counsel for
9 Victims. Appearing with me today, Ms Sarah Pellet, counsel; Ms Anne Grabowski,
10 legal officer; and I am Paolina Massidda, principal counsel.

11 PRESIDING JUDGE EBOE-OSUJI: [14:36:59] Thank you.

12 MS KISWANSON VAN HOOYDONK: [14:37:05] Thank you, Mr President.

13 Nada Kiswanson van Hooydonk on behalf of Lawyers for Justice in Libya. Next to
14 me is Ms Alejandra Vicente on behalf of Redress.

15 PRESIDING JUDGE EBOE-OSUJI: [14:37:18] Thank you very much.

16 And for the record, the representatives of the government of Libya are not in
17 attendance today.

18 I understand there's another appearance to be made?

19 MR SAAD: [14:37:57] (Interpretation) I am representing the Supreme Council of
20 Libyan Cities and Tribes, Ammara Ali Abdussalam Altaif Saad.

21 PRESIDING JUDGE EBOE-OSUJI: [14:38:18] Thank you very much.

22 We are convened today for the Appeals Chamber's judgment in the appeal of
23 Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I, dated
24 5 April 2019, and titled, quote, "Decision on the Admissibility Challenge by
25 Dr Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the

1 Rome Statute", unquote.

2 This is the summary of the judgment.

3 As always, it is important to keep in mind that this is only a summary of the
4 judgment, conveyed in a form and language that will be more accessible to the public.
5 Consequently, the form and language used in the summary are often different from
6 the form and language used in the actual judgment.

7 For that and other reasons, this summary is not an authoritative document. The
8 authoritative document is the written judgment, which will be made available on the
9 website of the Court soon after this session.

10 On 26 February 2011, the United Nations Security Council referred to the ICC
11 Prosecutor the situation in Libya covering the period dating back to 15 February 2011.
12 Following that referral, the Pre-Trial Chamber issued a warrant of arrest for
13 Mr Saif Al-Islam Gaddafi on 27 June 2011 for the crimes of murder and persecution as
14 crimes against humanity.

15 The allegations relate to suspected attacks by Libyan security forces against the
16 civilian population taking part in demonstrations against the regime of
17 Mr Saif Gaddafi's father, Muammar Gaddafi, or against those perceived to be
18 dissidents of that regime.

19 These alleged attacks apparently occurred during the period from 15 February 2011 to
20 28 February 2011 at least. Mr Saif Gaddafi, whom we shall refer to as Mr Gaddafi
21 throughout this judgment, is alleged to be criminally responsible, as an accomplice,
22 for the commission of the crimes indicated in the warrant of arrest, for reasons that
23 include his senior leadership role in the Libyan state apparatus and for being part of
24 the inner circle of his father's regime.

25 On 4 July 2011, the Registrar of the Court made a request to Libya to arrest

1 Mr Gaddafi and surrender him to the Court. About four months later, by a letter
2 dated 23 November 2011, the National Transitional Council of Libya confirmed that
3 Mr Gaddafi was arrested in Libya four days earlier, on 19 November 2011.
4 But Mr Gaddafi was not transferred to the ICC, as the Registrar had requested.
5 Instead, the relevant authorities in Libya launched a challenge to the admissibility of
6 the case at the ICC.
7 It helps to recall that a challenge to admissibility is an objection saying that the Rome
8 Statute does not allow the ICC to take up the case in question. In this case, Libya's
9 admissibility challenge was mounted on grounds that the relevant authorities in
10 Libya were handling the case. That being so, the ICC's cardinal doctrine of
11 complementarity, being a condition for ICC's exercise of jurisdiction under the Rome
12 Statute, requires the ICC to defer to the proceedings in Libya.
13 The record of the proceedings at the time clearly shows submissions made on behalf
14 of Mr Gaddafi to the effect of saying that he was in favour of dismissing Libya's
15 admissibility challenge and preferring a trial at the ICC instead of in Libya.
16 Although, during the hearing in this particular appeal, a different set of Defence
17 counsel for Mr Gaddafi deny that those earlier representations had been made on the
18 instructions of Mr Gaddafi at that time.
19 On 31 May 2013, the Pre-Trial Chamber dismissed Libya's admissibility challenge.
20 That decision was later confirmed by the Appeals Chamber, on 21 May 2014. That
21 notwithstanding, Mr Gaddafi was still not transferred to the ICC.
22 In the meantime, criminal proceedings were conducted against him in Libya.
23 Eventually, about five years later, on 6 June 2018, Mr Gaddafi filed a challenge of his
24 own to the admissibility of his case at the ICC. His reasons were, first, that as of that
25 date, he had already been tried, convicted and sentenced by a Libyan court sitting in

1 Tripoli for substantially the same conduct as alleged in the proceedings before the
2 ICC. That being so, the Rome Statute forbids yet another trial at the ICC.
3 He argued, additionally, that he had subsequently been granted an amnesty by the
4 Libyan authorities, on the basis of a certain piece of Libyan legislation passed in 2015
5 called Law No. 6, and was, for that reason, released from prison on or around
6 12 April 2016. He argued that the ICC must respect that amnesty.
7 On 5 April 2019, the Pre-Trial Chamber dismissed that admissibility challenge from
8 Mr Gaddafi. That decision is the subject of this appeal.
9 Mr Gaddafi's appeal was argued on two grounds.
10 Under the first ground, it was argued that the Pre-Trial Chamber erred in law in
11 deciding that the provisions of the Rome Statute, which forbids prosecuting someone
12 again at the ICC if that person has already been prosecuted elsewhere, may apply
13 only if the earlier judgment had become truly final in the eyes of the law.
14 This issue is important because of two considerations. The first is that there is a
15 question whether Mr Gaddafi's trial in Libya was conducted in his absence. If so,
16 Libyan law, as it was canvassed before us, requires that a person tried in his or her
17 absence will be retried whenever he or she finally turns up within that domestic
18 judicial system. So if it was really the case that Mr Gaddafi was tried in his absence
19 and that trial could be redone at a later time, it means that the judgment of the first
20 trial is only a provisional judgment, so to speak, and not a final judgment.
21 The second consideration is that the issue -- or concerning the issue of finality of
22 judgment was engaged in the appeal because the penalty imposed upon him at the
23 conclusion of his trial in Libya was the death penalty. Under Libyan law, as
24 canvassed before us, all death penalty judgments must undergo a review by the court
25 of cassation, that is, the final appellate court that handles criminal matters.

1 That cassation review has not been done in the case of Mr Gaddafi, and that is a
2 further reason to see the judgment of the Libyan court as a provisional judgment and
3 not a final judgment.

4 In the circumstances, the Pre-Trial Chamber held that Mr Gaddafi's trial in Libya was
5 not final, for the two reasons outlined above, those being: (1) that Mr Gaddafi was
6 tried in his absence, thus meaning that his trial may have to be redone in future; and
7 (2) his sentence of death has not been reviewed by the court of cassation.

8 The sum of the Pre-Trial Chamber's decision is this. As long as the judgment in
9 Libya was not final for any or both of those two reasons, the case of Mr Gaddafi is not
10 forbidden for prosecution at the ICC. That is to say, using the double-negative
11 formulation, the case is not inadmissible at the ICC. Therefore, Mr Gaddafi's
12 admissibility challenge must fail.

13 Counsel for Mr Gaddafi argued that the Pre-Trial Chamber was wrong. According
14 to counsel, no such finality is required as a matter of law for the earlier judgment,
15 before a subsequent trial is forbidden at the ICC. According to them, it is enough
16 that the earlier, domestic trial proceedings - even at the first level of the
17 courts - concluded with a verdict on the merits. For reasons fully laid out in the
18 judgment, the Appeals Chamber rejects the arguments made on behalf of Mr Gaddafi
19 as to this ground of appeal.

20 The Appeals Chamber holds that the Pre-Trial Chamber did not commit an error in
21 finding that the judgment on the earlier occasion must be a final judgment, before it
22 can bar subsequent proceedings at the ICC on grounds that the same case has already
23 been tried elsewhere before.

24 The reasons for the Appeals Chamber's holding in this regard include this
25 consideration, but not the only one. The jurisdiction of the ICC is complementary on

1 the contingency that the earlier case was not conducted genuinely. It is good
2 practice to withhold concerns about the genuineness of earlier proceedings at the
3 national level, in order to see what that system does as a whole. It is possible that
4 the appellate process in the domestic system is able to correct any errors at the first
5 instance trial, errors that might raise concerns about genuineness of the trial at first
6 instance. Conversely, it is possible that the lack of genuineness of the judicial
7 process can occur at the appellate level in a way that negates a first instance trial that
8 was conducted genuinely.

9 In the circumstances, it becomes important to require finality for the national
10 proceedings before deciding that those proceedings were enough to bar a case being
11 tried at the ICC.

12 Under Mr Gaddafi's second ground of appeal, it was argued on his behalf that, even if
13 finality of the domestic proceedings were required, such finality was effectively
14 achieved in respect of Mr Gaddafi's trial in Libya.

15 As it was argued, this was because Law No. 6 granted him amnesty. By that grant of
16 amnesty, the Libyan proceedings against him became final for all intents and
17 purposes. It was argued on behalf of Mr Gaddafi that the Pre-Trial Chamber erred
18 by failing to see things that way.

19 It is important to note that the Pre-Trial Chamber found that Law No. 6 did not apply
20 to Mr Gaddafi.

21 On appeal, Mr Gaddafi's counsel raised several arguments of a highly technical
22 nature to challenge the Pre-Trial Chamber's findings on this ground.

23 Having considered all those arguments, the Appeals Chamber is not persuaded that
24 the Pre-Trial Chamber committed an error. The Appeals Chamber's reasoning in
25 this regard includes, but is not limited to, the following considerations:

1 Counsel for Mr Gaddafi submitted that the Pre-Trial Chamber erred when it found
2 that he had been charged with crimes amounting to identity-based murders. That
3 category of crimes is excluded from the amnesty. His counsel put forward
4 arguments as to how the term "identity-based murder" should be interpreted.
5 However, counsel has not provided any authority in Libyan law to support this
6 interpretation such as to contradict the Pre-Trial Chamber's understanding of the term.
7 The Appeals Chamber also notes that the Pre-Trial Chamber stated that its finding
8 was consistent with the Libyan government's position that Law No. 6 did not apply to
9 Mr Gaddafi.

10 Furthermore, in that regard there is no information in the Appeals Chamber's finding
11 tending to show that Mr Gaddafi rendered the apology that the Law No. 6 requires of
12 those wishing to claim amnesty offered under that law. As well, there is no
13 information tending to show that Mr Gaddafi made any pledge of repentance and to
14 not reoffend, nor is there any information tending to show any effort on Mr Gaddafi's
15 part to reconcile with victims.

16 All these appear as necessary conditions before the offered amnesty can avail anyone,
17 according to Article 2 of Law No. 6.

18 As part of his argument that he benefited from the amnesty under Law No. 6, it was
19 contended that Mr Gaddafi's release from prison was evidence of that benefit. But
20 the Appeals Chamber finds that there is no clarity from the information and
21 submissions before the Appeals Chamber which authoritatively explains the basis on
22 which Mr Gaddafi was released from prison.

23 It is noted, in particular, that there is no evidence of a reasoned decision from the
24 competent judicial authority certifying his benefit of the amnesty. According to
25 Law No. 6, in Article 6, such a written decision is an apparent requirement of

1 Law No. 6 for purposes of the amnesty offered.

2 It may be noted in this respect that Libya was at all material times a country going
3 through a difficult transition phase in which different armed factions controlled
4 different parts of the country. Some confusion must be assumed in certain respects.

5 It is notable that Libyan authorities have repeatedly averred - including more recently
6 before the Appeals Chamber - that Law No. 6 does not apply to Mr Gaddafi.

7 In that regard, the Appeals Chamber does not consider that it was erroneous for the
8 Pre-Trial Chamber to take into account the unambiguous statements by the Libyan
9 government made before it at the time, in addition to other considerations that the
10 Pre-Trial Chamber took into account in reaching its decision.

11 Accordingly, the Appeals Chamber concludes that the Pre-Trial Chamber did not err
12 when it found that the case against Mr Gaddafi is not inadmissible before the Court.

13 In the outcome, the Appeals Chamber unanimously rejects the appeal lodged by
14 Mr Gaddafi and confirms the decision of the Pre-Trial Chamber.

15 This brings us to the end of the summary of the Appeals Chamber's judgment.

16 Once more, it is stressed that this summary is not an authoritative document. It is
17 intended only to convey the essence of the Appeals Chamber's judgment. The
18 authoritative pronouncements of the Judges are those contained in the written
19 judgment, which will be filed after this hearing.

20 I and Judge Bossa jointly append a concurring separate opinion to this judgment.

21 Judge Ibáñez Carranza will in due course file a concurring separate opinion to this
22 judgment. Both separate opinions were merely for Judges concerned to make certain
23 points they consider important and interesting to make in this case concerning the
24 question of amnesty, how that is to interact with the complementarity regime and also
25 how that has been treated under international law.

- 1 These opinions separate do not take away from the unanimity of the Appeals
- 2 Chamber's finding on the main judgment.
- 3 Finally, I wish to thank all Court staff for their assistance in facilitating today's
- 4 hearing.
- 5 The hearing is now adjourned.
- 6 Thank you very much.
- 7 THE COURT USHER: [14:58:12] All rise.
- 8 (The hearing ends in open session at 2.58 p.m.)