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PRE-TRIAL CHAMBER I

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Sylvia Steiner
Judge Cuno Tarfusser

SITUATION IN LIBYA

IN THE CASE OF

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

Public Document

Application For Leave to Appeal Against Decision on Application Under Rule 103

Source: Applicant 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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Legal Representatives of Victims

Legal Representatives of the Applicant

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**Victims Participation and Reparations
Section**

Other

A. Introduction

1. The Applicant, 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 application in order to request leave to 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. The application for leave to appeal is made pursuant to Article 82(1)(d) of the Statute, Rule 155, and Regulations 33 and 65. The Applicant has also filed an appeal pursuant to Article 82(1)(a) directly to the Appeals Chamber, without prejudice to this Application.

B. Standing of the Applicant

3. Article 82(1)(d) provides that: “Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”.
4. To be granted leave to appeal, the Applicant must therefore satisfy the Pre-Trial Chamber of two matters: (i) that she is a party to the proceedings and (ii) that the Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.
5. In respect of the first matter, the Applicant would urge the 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 Applicant submits that the 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 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 present application for leave to appeal. In the present case the Applicant 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 Pre-Trial Chamber should not refuse to consider the vital issues raised on account of a purported procedural bar (which, in the Applicant's submission, does not exist).

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>).

9. With respect to the second issue, the requirements of Rule 82(1)(d), your Applicant submits that there could hardly be a clearer case of the issue in question, namely Mr. Gaddafi's right to legal representation and to be heard by the Pre-Trial Chamber on the venue of his trial, affecting the *fair* and expeditious nature of the proceedings and the outcome of the trial. It is the very fairness of the treatment of the accused according to international human rights standards, as enshrined in the Rome Statute and elsewhere that lies at the heart of the Application. Immediate consideration of this matter by the Appeals Chamber could materially advance the proceedings precisely because it could decide whether the Pre-Trial Chamber should receive observations on Mr. Gaddafi's fundamental right to legal representation and to be heard before the ICC in the his own case.

10. In the Applicant's submission, it is evident from the errors in the Decision (as set out below) that the Pre-Trial Chamber, thus far, has shown no regard to the human rights of Mr. Gaddafi, and appears determined to proceed without making any efforts to hear his submissions. Your Applicant therefore has serious concerns about whether the Pre-Trial Chamber will even entertain this application for leave to appeal. Your Applicant would urge the Chamber to consider carefully this application mindful of the grave situation faced by Mr. Gaddafi.

11. In particular, the Pre-Trial Chamber should have in mind the current circumstances facing Mr. Gaddafi in which the risks to his life are escalating:
 - 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 torture³.

³ 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>).

- 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"⁴.
- 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 state⁵.
- 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 case⁶.
- 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.⁷
- It has also recently been reported if the ICC fails to act, Mr. Gaddafi could be tried "within weeks" in Libya.⁸
- 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.⁹

⁴ 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>).

⁵ 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%A4me-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>).

⁶ See above.

⁷ <http://www.independent.co.uk/news/world/africa/saif-gaddafis-trial-could-begin-within-weeks-says-ntc-6579559.html>

⁸ <http://edition.cnn.com/2012/02/05/world/africa/libya-gadhafi/>

12. The Chamber should be mindful of the fact that the Prosecutor has raised no concerns about these events. The Pre-Trial Chamber has not yet 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 the trial.

C. Errors in the Decision

13. 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.

14. In the Applicant'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*.

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

16. It is his ***rights*** that were at the central 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

⁹ Libya court postpones trial of Gaddafi loyalists, Reuters, 6 February 2012 (<http://uk.reuters.com/article/2012/02/05/uk-libya-trial-idUKTRE8140ME20120205>).

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 Applicant 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”.

17. Indeed, the terms of the Application, had they been properly considered, clearly show this to be your Applicant’s true intention:

- Saif Gaddafi “has expressed the wish to find a lawyer and to be represented, but no concrete action appears to have been taken to ensure that he has legal representation of his choosing for the proceedings before the ICC”. (para. 7)
- He “undoubtedly has a right to immediate access to a lawyer under the Rome Statute, International Law, and Libyan law. [...] He also has the right to have contact with friends and family”. (para. 37)
- “The ICC, as the sole *international* criminal justice system charged with maintaining Saif Gaddafi’s rights, may owe a real duty to equip itself with all available legal and factual arguments to ensure it discharges its duty to a man in custody, in this case to a man widely condemned un-tried by a world that might be careless of what happens to him”. (para. 36)
- “The Chamber has granted the OPCD’s request to present observations concerning the general interests of the Defence [...]. However, this procedure can clearly not substitute for Saif Gaddafi having legal representation and being in a position to make submissions himself, through his chosen counsel, before the ICC”. (para. 40)
- “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 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”. (para. 39)

- “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”. (para. 16)
- “The OPCD’s role is not envisaged to be, and could never be, a substitute for Saif Gaddafi’s own legal representation based on his direct instructions. The administration of justice requires fairness in the pre-trial stages of any and every trial”. (para. 16).
- “The proper determination of this case, as with any case, requires access to a lawyer when requested by a suspect or an accused”. (para. 37)
- “Neither the ICC Prosecutor nor the OPCD have to date highlighted that Saif Gaddafi should be represented directly through his own counsel before the ICC”. (para. 40)

18. Deciding an application on the basis of the Pre-Trial Chamber’s conjecture as to the *motivations* of the Applicant (that she was applying under Rule 103 to give Mr. Gaddafi access to what she deemed to be appropriate legal advice) 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.

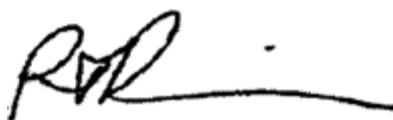
19. As the Appeals Chamber has repeatedly stated, “courts do not base their decisions on impulse, intuition and conjecture or on mere sympathy or emotion” as to do so “would lead to arbitrariness and would be antithetical to the rule of law”¹⁰.

¹⁰ 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.

20. 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 these matters, especially since the Prosecutor has not raised them before the Chamber.¹¹ 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. This is plainly an issue that affects the fairness of the proceedings and which if addressed by the Appeals Chamber could advance the proceedings to uphold the rights of the accused, as required by Article 82(1)(d).

D. Conclusion

21. For all of these reasons, the Applicant submits that each of the requirements of Article 82(1)(d) have been satisfied, and respectfully requests that leave to appeal is granted. The Applicant urges the Pre-Trial Chamber to permit the Applicant to proceed to the Appeals Chamber without delay.



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

¹¹ "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