

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: 24 April 2012

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernandez de Gurmendi, Presiding Judge
Judge Hans-Peter Kaul
Judge Christine Van den Wyngaert

SITUATION IN LIBYA

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

Public Document

**Prosecution's Motion to Strike the "Application on behalf of Mishana
Hosseinioun for Leave to Submit Observations to the Pre-Trial Chamber Dated 13
April 2012"**

Source: Office of the Prosecutor

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

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**

Mr Xavier-Jean Keïta

Ms Melinda Taylor

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Counsel Support Section

Deputy Registrar

Mr. Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Prosecution moves to strike the “Application on behalf of Mishana Hosseinioun for Leave to Submit Observations to the Chamber” brought on 13 April 2012 (the “Application”).
2. The Application contravenes the process by presenting substantive arguments without leave having been granted to participate in the proceedings.
3. Furthermore, this is the Applicant’s third attempt at seeking the Chamber’s permission to contact Saif Al-Islam Gaddafi’s (“Saif Al-Islam”) under the guise of seeking to make observations as *amicus* pursuant to Rule 103. Both this Chamber¹ and the Appeals Chamber² previously rejected the Applicant’s improper application.

Background to the Proceedings

5. On 6 December 2011, this Chamber requested submissions from the Libyan authorities regarding Saif Al-Islam and authorised the Office of Public Counsel for the Defence (“OPCD”) to represent the interests of the defence “in all instances related to the proceedings against Saif Al-Islam until otherwise decided by the Chamber.” The Chamber declined to appoint counsel to represent the interests of Saif Al-Islam at that time.³
6. On 30 January 2012, the Applicant, who is unrelated to the proceedings, filed a 24-page application for leave to submit *amicus curiae* observations to the Chamber

¹ ICC-01/11-01/11-60

² ICC-01/11-01/11-74

³ “Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi”, ICC-01/11-01/11-39-Conf-Exp ,p. 6 and ICC-01/11-01/11-39-Red

("Application"),⁴ in which she requested permission to contact Saif Al-Islam to give him access to counsel.

7. On 2 February 2012, this Chamber summarily rejected the Applicant's application because *inter alia*, the Applicant effectively sought "the Chamber's permission to contact Saif Gaddafi and give him access to what they deem to be appropriate legal advice, and therefore do not seek to provide the Chamber with observations which may be desirable for the proper determination of the case, as required by Rule 103."
8. On 7 February 2012, the Applicant sought leave to appeal this Chamber's decision⁵ and also filed an appeal as of right before the Appeals Chamber⁶. The Prosecution opposed both the leave application and the appeal.⁷
9. On 14 February 2012, this Chamber dismissed the Applicant's leave application holding *inter alia* that the Applicant has no procedural standing to request leave and the Applicant did not identify a proper appealable issue.⁸
10. On 3 March 2012 representatives of OPCD met with Saif Al-Islam in Libya. On 5 March 2012, OPCD filed a confidential, *ex parte* report concerning this visit in which it informed the Chamber that Saif Al-Islam requested for the OPCD to select counsel or help him select counsel.⁹ During the visit, Saif Al-Islam also signed a declaration stating that he was willing for the OPCD to continue to represent him before the Court until a counsel is appointed.¹⁰

⁴ ICC-01/11-01/11-46

⁵ ICC-01/11-01/11-53 ; see also ICC-01/11-01/11-57, Addendum on the Leave Application

⁶ ICC-01/11-01/11-54

⁷ ICC-01/11-01/11-58; ICC-01/11-01/11-66 PT OA

⁸ ICC-01/11-01/11-60

⁹ ICC-01/11-01/11-70Red2 (public redacted version filed on 10 April 2012), paras. 40-41.

¹⁰ ICC-01/11-01/11-70Red2 (public redacted version filed on 10 April 2012), para.41.

11. On 9 March 2012, the Appeals Chamber found the Applicant's appeal to be inadmissible and dismissed it.¹¹
12. On 17 April 2012, this Chamber appointed counsel from OPCD to represent Saif Al-Islam, and reminded OPCD to continue to assist Saif Al-Islam in acquiring counsel, consistent with his wishes.¹²
13. Now, the Applicant again brings an application seeking to contact Saif Al-Islam in order to give him access to counsel and repeats much of the same arguments she presented in her initial application.

Submissions

14. The Application for leave to participate as *amicus curiae* should be dismissed because (1) OPCD has now been appointed to represent Saif Al-Islam thereby obviating any need for persons with no connection to the case to participate as interested observers, and (2) it makes submissions on the merits without first obtaining leave to do so, thereby abusing the *amicus* process.¹³
15. On the first point, the Applicant filed her application before this Chamber issued its "Decision Appointing Counsel from the OPCD as Counsel for Saif Al-Islam Gaddafi,"¹⁴ in which it specifically assigned OPCD as counsel for Saif Al-Islam and reminded OPCD to continue to assist Saif Al-Islam to obtain counsel, consistent with his wishes. Accordingly, her argument that OPCD only represents the defence's "general interests" and that Saif Al-Islam "should not be limited to the OPCD's advice when having to consider legal representation,"¹⁵ is moot.

¹¹ ICC-01/11-01/11-74

¹² ICC-01/11-01/11-113

¹³ Rule 103

¹⁴ ICC-01/11-01/11-113

¹⁵ ICC-01/11-01/11-108, para.18

16. That being sufficient ground to dismiss the application, the Chamber need not reach the alternative basis. However, because the application does not limit itself to seeking leave to participate in the proceedings, but instead presents submissions on the merits, the Chamber might also use this as an opportunity to remind the Applicant and future applicants of the *amicus* process set out in Rule 103.
17. This Applicant brought two similar unsuccessful applications seeking to contact Saif Al-Islam in order to give him access to legal advice, before this Chamber¹⁶ and the Appeals Chamber¹⁷, both of which were summarily rejected. This Application suffers from the same flaw: as this Chamber noted in characterizing as “misplaced” the Applicant’s initial application, the request again fails to “seek to provide the Chamber with observations which may be desirable for the proper determination of the case,” as required by Rule 103.
18. Moreover, Rule 103 provides that an application must seek “leave [...] to submit, in writing or orally, any observation or any issue that the Chamber deems appropriate.” It does not authorize a non-party person or entity to file substantive observations without approval. To the contrary, the Rule specifically requires permission to be sought and to be granted in advance.
19. Following Rule 103, Chambers of this Court have consistently stated that an applicant seeking to participate as *amicus curiae* must secure the leave of the competent Chamber before submitting observations pursuant to this provision.¹⁸ The Chamber will consider the applicant and its suitability to provide the particular submissions,¹⁹ in particular whether the applicant can assist the proper

¹⁶ ICC-01/11-01/11-49

¹⁷ ICC-01/11-01/11-54

¹⁸ ICC-01/04-01/06-1289; ICC-01/04-373; ICC-01/04-01/06-919-tEN; ICC-02/04-01/05-342.

¹⁹ For example, in the *Bemba* case, Pre-Trial Chamber II authorized Amnesty International to provide submissions on concrete legal issues that the Chamber “may find useful” but stressed that they “must confine its

determination of the case²⁰ by providing information or expertise pertinent to the issue before it.²¹ This assessment is made on a case by case basis.²²

Conclusion

20. For the reasons set out in this Response, the Prosecution requests that the Chamber deny and strike the Application.

21. Should the Chamber deny the Prosecution's request to strike the *amicus* Application, the Prosecution requests leave to file a response to it. Should the Chamber grant the request and the would-be amicus thereafter files an appropriate request, the Prosecution will seek leave to respond to that request.



Luis Moreno-Ocampo,
Prosecutor

Dated this 24th Day of April 2012

At The Hague, The Netherlands

submission to the legal aspects outlined in the Request and refrain from making any indication or link to the specific facts of the cases". In the *Kony et al. case*, the same Chamber allowed submissions of the Uganda Victims' Foundation (UVF) and the Redress Trust (Redress) as to "factual information they may be in possession of" but directed that they should refrain "from providing information of a general nature as regards victims' issues and/or analysis of a legal nature". See ICC-01/05-01/08-401, para.12 and ICC-02/04-01/05-333, paras.13-14.

²⁰ ICC-01/04-01/06-1289, para. 8.

²¹ ICC-02/04-01/05-342, para.12.

²² ICC-01/04-373, para. 3.