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

Date: 29 August 2013

THE APPEALS CHAMBER

Before: Judge Anita Ušacka , Presiding Judge
Judge Sang-Hyun Song
Judge Sanji Mmasenono Monageng
Judge Akua Kuenyehia
Judge Erkki Kourula

SITUATION IN LIBYA

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

Public

OPCV's submissions on the observations filed by Ms Mishana Hosseinioun

Source: Office of Public Counsel for Victims

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Fabricio Guariglia

Counsel for Saif Al-Islam Gaddafi

Mr John R.W.D. Jones QC
Counsel for Abdullah Al-Senussi
Mr Ben Emmerson QC

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

Ms Paolina Massidda
Ms Sarah Pellet
Mr Mohamed Abdou

The Office of Public Counsel for the Defence

State Representatives

Professor Ahmed El-Ghani
Professor Philippe Sands QC
Professor Payam Akhavan
Ms. Michelle Butler

Counsel for Mishana Hosseinioun

Mr Geoffrey Nice
Mr Rodney Dixon

REGISTRY

Registrar & Deputy Registrar

Mr Herman von Hebel & Mr Didier
Preira

Defence Support Section

Detention Section

Victims and Witnesses Unit

Victims Participation and Reparations Section

Other

I. PROCEDURAL HISTORY

1. On 31 May 2013, the Pre-Trial Chamber rendered its “Decision on the admissibility of the case against Saif Al-Islam Gaddafi” (the “Impugned Decision”), in which it declared the case against Mr Gaddafi admissible and rejected Libya's challenge to the admissibility of the case.¹

2. On 7 June 2013, the Government of Libya filed the “Appeal against Pre-Trial Chamber I’s ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’”.²

3. On 25 June 2013, the Government of Libya filed the “Document in Support of the Government of Libya’s Appeal against the ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’” (the “Document in support of the Appeal”).³

4. On 9 July 2013, Ms Mishana Hosseinioun (the “Applicant”) filed the “Application on behalf of Mishana Hosseinioun for Leave to Submit Observations to the Appeals Chamber pursuant to Rule 103”, seeking leave to file observations on the appeal filed by Libya against the Impugned Decision on the matters raised in the fourth ground of appeal and related to the unavailability of the national justice system.⁴

¹ See the “Decision on the admissibility of the case against Saif Al-Islam Gaddafi” (Pre-Trial Chamber I), No. ICC-01/11-01/11-344-Red, 31 May 2013 (the “Impugned Decision”).

² See the “Government of Libya’s Appeal against Pre-Trial Chamber I’s ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’”, No. ICC-01/11-01/11-350 OA4, 7 June 2013.

³ See the “Document in Support of the Government of Libya’s Appeal against the ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’”, No. ICC-01/11-01/11-370-Red2 OA4, 25 June 2013 (the “Document in support of the Appeal”).

⁴ See the “Application on behalf of Mishana Hosseinioun for Leave to Submit Observations to the Appeals Chamber pursuant to Rule 103”, No. ICC-01/11-01/11-379 OA4, 9 July 2013 (the “Application”).

5. On 16 July 2013, the Appeals Chamber issued an Order in relation to the filing of victims' observations on the Document in support of the Appeal filed by the Libyan Government in which it instructed, *inter alia*, the OPCV to submit observations by 20 August 2013.⁵ In the same Order, the Appeals Chamber granted Libya, the Prosecution and the Defence until 18 July 2013 to respond to the Application.

6. On 18 July 2013, the Prosecution filed its response to the Application, opposing it.⁶

7. On 15 August 2013, the Appeals Chamber issued the "Decision on the 'Application on behalf of Mishana Hosseinioun for Leave to Submit Observations to the Appeals Chamber pursuant to Rule 103'", in which it granted the request in relation to the fourth ground of appeal, instructed the Applicant to file her observations by 22 August 2013, and authorised Libya, the Prosecution and the Defence to respond to said observations by 29 August 2013.⁷

8. On 20 August 2013, the Principal Counsel of the Office of Public Counsel for Victims (the "OPCV" or the "Office"), acting as legal representative of victims for the purpose of article 19 proceedings, requested the Appeals Chamber to be authorised to submit observations on the submissions to be filed on 22 August 2013 by the Applicant, within the same time-limit already established by the Chamber

⁵ See the "Order in relation to the filing of victims' observations and the request pursuant to rule 103 of the Rules of Procedure and Evidence" (Appeals Chamber), No. ICC-01/11-01/11-383 OA4, 16 July 2013.

⁶ See the "Prosecution Response to 'Application on behalf of Mishana Hosseinioun for Leave to Submit Observations to the Appeals Chamber pursuant to Rule 103'", No. ICC-01/11-01/11-385 OA4, 18 July 2013 (the "Prosecution's Response").

⁷ See the "Decision on the 'Application on behalf of Mishana Hosseinioun for Leave to Submit Observations to the Appeals Chamber pursuant to Rule 103'" (Appeals Chamber), No. ICC-01/11-01/11-404 OA4, 15 August 2013.

for the responses of the Prosecutor, the Defence and the Government of Libya (the “OPCV Request”).⁸

9. On 22 August 2013, the Applicant filed her observations, requesting the Appeals Chamber to find that Libya is unable to investigate and prosecute Mr Gaddafi, and that he should be transferred immediately to the ICC.⁹

10. On 23 August 2013, the Appeals Chamber issued the “Decision on the OPCV Request”, authorising the Office to file its submissions on the Observations by 29 August 2013 (the “Decision”).¹⁰

11. In accordance with the Appeals Chamber’s Decision, the Principal Counsel files the following observations on behalf of victims having communicated with the Court in respect of the case.

II. SUBMISSIONS

A. Relevance of the *Amicus Curiae* Brief to the issue on appeal

12. The Appeals Chamber has considered it desirable for the proper determination of the appeal to grant the Applicant’s request to submit observations in relation to the question of the unavailability of the Libyan judicial system.¹¹ This issue stems from the fourth ground of appeal as set out in the Document in support of the Appeal, namely whether “[t]he Chamber erred in fact and in law in its

⁸ See the “Request in relation to the observations to be filed by Ms Mishana Hosseinioun”, No. ICC-01/11-01/11-412 OA4, dated 20 August 2013 and notified on 21 August 2013 (the “OPCV Request”).

⁹ See the “Observations on behalf of Mishana Hosseinioun pursuant to Rule 103”, No. ICC-01/11-01/11-414 OA4, 22 August 2013 (the “Observations”).

¹⁰ See the “Decision on the OPCV’s request to file observations on the observations of Ms Mishana Hosseinioun” (Appeals Chamber), No. ICC-01/11-01/11-415 OA4, 23 August 2013 (the “Decision”).

¹¹ See the “Decision on the ‘Application on behalf of Mishana Hosseinioun for Leave to Submit Observations to the Appeals Chamber pursuant to Rule 103’”, *supra* note 7, para. 8.

determination that, due to the unavailability of its national judicial system, Libya is unable to obtain the accused or the necessary evidence and testimony or otherwise carry out its proceedings, pursuant to article 17(3) of the Statute.”¹²

13. The Principal Counsel notes that the Observations presented seem, for the most part, irrelevant to the issue on appeal. Indeed, the Applicant makes reference to several incidents of non-compliance by the Libyan authorities, describing mainly Libya’s failure to report back and implement the numerous decisions and directives emanating from the African Commission on Human and Peoples’ Rights (the “African Commission”) and the African Court on Human and Peoples’ Rights (the “African Court”).¹³

14. The Applicant cites two decisions in support of the argument that the proceedings before the African Commission and the African Court are relevant to the findings of the Pre-Trial Chamber as regards Libya’s ability to investigate and prosecute the case against Mr Gaddafi. First, the Applicant refers to a request from the African Commission to the Chairman of the Nation Transitional Council requiring Libya to implement provisional measures so as to: (i) ensure that the defendant has access to his lawyers; (ii) can receive visits from his family members and friends; disclose the location of his detention; and guarantee the integrity of his person and his right to be tried within a reasonable time by an impartial court or tribunal.¹⁴ Second, the Applicant also relies upon an order by the African Court requiring Libya to implement the same provisional measures.¹⁵

15. The Principal Counsel agrees with the Applicant’s contention that the abovementioned decisions support the Pre-Trial Chamber’s factual determination

¹² See the Document in support of the Appeal, *supra* note 3, p. 74.

¹³ See the Observations, *supra* note 9, paras. 24 *et seq.*

¹⁴ *Idem*, Annex 1, p. 2.

¹⁵ *Ibid.*, Annex 3, p. 6.

in relation to Libya's failure to appoint defence counsel for Mr Gaddafi.¹⁶ This is particularly the case in light of the absence of any response or clarification from the Libyan Government. Nevertheless, it is worth noting that the findings underlying those decisions are based solely on the basis of the Communication submitted by the Applicant without further investigation or involvement on the part of the African Commission or the African Court. Indeed, the Commission's decision clearly states that the provisional measures taken "[do] *not in any way affect the final position of the Commission on the Communication*" and that no conclusion can be drawn from the allegation made therein.¹⁷ Likewise, the African Court's order made it clear that "*the measures [...] would not in any way prejudice the findings the Court might make on [...] the application and the merits of the case*".¹⁸ These factors may therefore, in the Principal Counsel's view, affect the relevance of said documents in the context of the admissibility proceedings pending before the Court.

16. The Applicant further contends that Libya's failure to implement the provisional measure consisting in enabling Mr Gaddafi to be visited by family members and friends supports the Pre-Trial Chamber's conclusion that Libya is unable to obtain the suspect.¹⁹ However, the Applicant does not clarify how said failure by the Government can be attributed to its inability to obtain Mr Gaddafi.²⁰

17. Despite the fact that the Observations seem irrelevant to the issue on appeal, they appear to be correlated to it insofar they contain information from which the Appeals Chamber may infer *indicia* of the inability of the national system within the meaning of article 17 of the Rome Statute.

¹⁶ *Ibid.*, para. 13.

¹⁷ See the Observations, *supra* note 9, Annex 1, p. 2.

¹⁸ *Idem*, Annex 3, p. 6.

¹⁹ *Ibid.*, para. 13.

²⁰ *Ibid.*

B. The issue of the admissibility of additional information on appeal

18. The Principal Counsel notes the Prosecution's submissions according to which the Applicant seeks to introduce additional information in the appeal proceedings.²¹ In this respect, the Appeals Chamber ruled that the question regarding whether or not the Observations would amount to additional evidence in the Appeal "*can only be assessed after having received such observations*".²²

19. The Principal Counsel observes that the Applicant addresses only factual matters and thus, the Observations necessarily contain additional information that was not put before the Pre-Trial Chamber.

20. While sharing the Prosecution's view that rule 103 of the Rules of Procedure and Evidence should not serve, in principle, as a vehicle for the presentation of new evidence on appeal, the Principal Counsel, considers that it is within the Appeals Chamber's discretion to accept, or not, such additional information.

Respectfully submitted.



Paolina Massidda
Principal Counsel

Dated this 29th day of August 2013

At The Hague, The Netherlands

²¹ See the Prosecution Response, *supra* note 6, para. 5.

²² See the "Decision on the 'Application on behalf of Mishana Hosseinioun for Leave to Submit Observations to the Appeals Chamber pursuant to Rule 103'", *supra* note 7, para. 9.