

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

**Original: English**

**No. ICC-01/11-01/11 OA 4**

**Date: 15 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 document**

**Decision on the “Application on behalf of Mishana Hosseinioun for Leave to  
Submit Observations to the Appeals Chamber pursuant to Rule 103”**



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

**The Office of the Prosecutor**  
Ms Fatou Bensouda, Prosecutor  
Mr Fabricio Guariglia

**Counsel for the Defence**  
Mr John R.W.D. Jones  
Ms Sarah Bafadhel

**States Representatives**  
Mr Ahmed El-Gehani  
Mr Philippe Sands

**Counsel for Abdullah Al-Senussi**  
Mr Ben Emmerson  
Mr Rodney Dixon

**Counsel for Mishana Hosseinioun**  
Mr Geoffrey Nice  
Mr Rodney Dixon

**REGISTRY**

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**Registrar**  
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of Libya against the decision of Pre-Trial Chamber I entitled “Decision on the admissibility of the case against Saif Al-Islam Gaddafi” of 31 May 2013 (ICC-01/11-01/11-344-Red),

Having before it the “Application on behalf of Mishana Hosseinioun for Leave to Submit Observations to the Appeals Chamber pursuant to Rule 103”, filed on 9 July 2013 and registered on 10 July 2013 (ICC-01/11-01/11-379),

*Renders* unanimously the following

## DECISION

- (i) Ms Mishana Hosseinioun may file observations, as set out in the “Application for Leave to Submit Observations to the Appeals Chamber pursuant to Rule 103”, in relation to the fourth ground of appeal. Such observations shall be filed by 16h00 on Thursday 22 August 2013 and shall not be longer than 20 pages.
- (ii) Libya, the Prosecutor and Mr Gaddafi may respond to any observations filed pursuant to paragraph (i) by 16h00 on Thursday 29 August 2013. Such responses shall not be longer than 20 pages.

## REASONS

### I. BACKGROUND

1. On 7 June 2013, Libya filed “The Government of Libya’s Appeal against Pre-Trial Chamber I’s ‘*Decision on the admissibility of the case against Saif Al-Islam Gaddafi*’”<sup>1</sup> (hereinafter: “Appeal”).

2. On 9 July 2013, Ms Mishana Hosseinioun (hereinafter: “Ms Hosseinioun”) filed the “Application on behalf of Mishana Hosseinioun for Leave to Submit Observations to the Appeals Chamber pursuant to Rule 103”<sup>2</sup> (hereinafter: “Application”) seeking

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<sup>1</sup> ICC-01/11-01/11-350 (OA 4).

<sup>2</sup> ICC-01/11-01/11-379.

leave to file observations, pursuant to rule 103 of the Rules of Procedure and Evidence, on the appeal filed by Libya against the “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”<sup>3</sup> (hereinafter: “Impugned Decision”). She in particular wishes to file observations on matters raised under the fourth ground of appeal which concerns the Pre-Trial Chamber’s finding that Libya’s national justice system is unavailable.<sup>4</sup> Ms Hosseinioun submits that she is a personal friend<sup>5</sup> of Mr Saif Al-Islam Gaddafi (hereinafter: “Mr Gaddafi”) and that she has “an unbroken record of seeking, for no personal gain and at her own expense, [...], to protect [Mr Gaddafi’s] fundamental rights”.<sup>6</sup> She wishes to make “observations on the availability of Libya’s national justice system because such observations may be of benefit to the Court and given her record of seeking to safeguard Mr Gaddafi’s rights”.<sup>7</sup> Ms Hosseinioun wishes particularly to make submissions regarding proceedings she initiated before the African Commission on Human and Peoples’ Rights (hereinafter: “African Commission”) and what occurred thereafter,<sup>8</sup> Mr Gaddafi’s access to counsel<sup>9</sup> and visits from family and friends, the latter being related to the issue of whether Libya could secure the transfer of Mr Gaddafi from his place of detention under the custody of the Zintan militia.<sup>10</sup> Ms Hosseinioun refers to the fact that she submitted four previous applications pursuant to rule 103 of the Rules of Procedure and Evidence before Pre-Trial Chamber I (30 January, 13 April, 23 May and 9 November 2012), three of which were rejected and one of which was never ruled on.<sup>11</sup>

3. On 16 July 2013, the Appeals Chamber issued an order, *inter alia*, granting Libya, Mr Gaddafi and the Prosecutor until 18 July 2013 to respond to the Application.<sup>12</sup> Only the Prosecutor filed a response<sup>13</sup> (hereinafter: “Prosecutor’s Response”). The Prosecutor opposes the Application and submits that it should be

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<sup>3</sup> 31 May 2013, ICC-01/11-01/11-344-Red.

<sup>4</sup> Application, para. 2.

<sup>5</sup> Application, para. 4.

<sup>6</sup> Application, para. 3.

<sup>7</sup> Application, para. 3.

<sup>8</sup> Application, paras 5 - 8, 18, 20, 22.

<sup>9</sup> Application, paras 17 - 18.

<sup>10</sup> Application, paras 19 - 20.

<sup>11</sup> Application, para. 10.

<sup>12</sup> “Order in relation to the filing of victims’ observations and the request pursuant to rule 103 of the Rules of Procedure and Evidence”, ICC-01/11-01/11-383 (OA 4).

<sup>13</sup> “Prosecution Response to ‘Application on behalf of Mishana Hosseinioun for Leave to Submit Observations to the Appeals Chamber pursuant to Rule 103’”, 18 July 2013, ICC-01/11-01/11-385 (OA 4).

rejected.<sup>14</sup> The Prosecutor notes that Ms Hosseinioun “effectively seeks to introduce additional information in the appeal proceedings”, relating to, in particular, the provisional measures ordered by *inter alia* the African Commission.<sup>15</sup> In her submission, rule 103 of the Rules of Procedure and Evidence should not be used to allow third parties to introduce additional evidence on the record and the information on the proceedings before *inter alia* the African Commission is already part of the record (having been submitted by the Office of Public Counsel for the defence).<sup>16</sup> She submits that, in any event, evidence on appeal can be introduced in exceptional circumstances only, which do not exist in this case.<sup>17</sup> The Prosecutor avers that Ms Hosseinioun does not appear to have expertise or concrete knowledge about the current situation in Libya to assist the Appeals Chamber in determining the matters before it.<sup>18</sup>

## II. MERITS

4. Rule 103 of the Rules of Procedure and Evidence, regulating “*Amicus curiae* and other forms of submission”, provides:

1. At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.

2. The Prosecutor and the defence shall have the opportunity to respond to the observations submitted under sub-rule 1.

3. A written observation submitted under sub-rule 1 shall be filed with the Registrar, who shall provide copies to the Prosecutor and the defence. The Chamber shall determine what time limits shall apply to the filing of such observations.

5. The Appeals Chamber’s decision under rule 103 (1) of the Rules of Procedure and Evidence is discretionary.<sup>19</sup> It may permit the filing of observations either by

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<sup>14</sup> Prosecutor’s Response, paras 4, 7.

<sup>15</sup> Prosecutor’s Response, para. 5.

<sup>16</sup> Prosecutor’s Response, para. 5.

<sup>17</sup> Prosecutor’s Response, para. 5.

<sup>18</sup> Prosecutor’s Response, para. 6.

<sup>19</sup> Appeals Chamber, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, “Reasons for ‘Decision on the Application of 20 July 2009 for Participation under Rule 103 of the Rules of Procedure and Evidence and on the Application of 24 August 2009 for Leave to Reply’”, 9 November 2009, ICC-02/05-01/09-51 (OA), para. 7; Appeals Chamber, *Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on the application of 14 September 2009 for participation as an *amicus curiae*”, 9 November 2009, ICC-

inviting such submissions *proprio motu* or, as in this case, following a request for leave to address the Chamber.<sup>20</sup> Furthermore, the Appeals Chamber notes that rule 103 of the Rules of Procedure and Evidence is a procedure that is not only applicable with respect to *amicus curiae* but also, as indicated by the heading, to “other forms of submission.” Such submissions may be filed, as set out in sub-rule 1, by a “State, organization or person”.<sup>21</sup>

6. Ms Hosseinioun wishes to submit observations in relation to the question of the unavailability of the Libyan judicial system that arises from the fourth ground of appeal, which is:

The Chamber erred in fact and in law in finding that, due to the unavailability of its national judicial system, Libya is unable to obtain the accused or the necessary evidence and testimony or is otherwise unable to carry out its proceedings, pursuant to article 17(3) of the Statute.<sup>22</sup>

7. The Appeals Chamber recalls the specific circumstances of this case: in particular, that the Pre-Trial Chamber, in the Impugned Decision, found the case *Prosecutor v. Mr Saif Al-Islam Gaddafi* admissible, also “remind[ing] Libya of its obligation to surrender [Mr Gaddafi] to the Court”;<sup>23</sup> and that, following Libya’s appeal against this decision, the Appeals Chamber rejected Libya’s request to grant suspensive effect and recalled Libya’s obligation to surrender Mr Gaddafi to the Court.<sup>24</sup> The Appeals Chamber furthermore notes that Mr Gaddafi has been in detention in Zintan, Libya, since November 2011 and notes that counsel are not in direct contact with him.

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01/05-01/08-602 (OA 2), para. 10; Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on ‘Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence’”, 22 April 2008, ICC-01/04-01/06-1289 (OA 11), para. 8.

<sup>20</sup> Appeals Chamber, *Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on the application of 14 September 2009 for participation as an *amicus curiae*”, 9 November 2009, ICC-01/05-01/08-602 (OA 2), para. 10.

<sup>21</sup> See also *Prosecutor v. Laurent Koudou Gbagbo*, “Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings”, 12 December 2012, ICC-02/11-01/11-321 (OA 2), para. 39.

<sup>22</sup> “Document in Support of the Government of Libya’s Appeal against the ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’” dated 24 June 2013, registered on 25 June 2013, ICC-01/11-01/11-370-Red2, para. 3.

<sup>23</sup> Impugned Decision, p. 91.

<sup>24</sup> “Decision on the request for suspensive effect and related issues”, 18 July 2013, ICC-01/11-01/11-387 (OA 4), para. 27.

8. Based on these considerations, the Appeals Chamber finds it desirable for the proper determination of this appeal to grant leave to Ms Hosseinioun to submit observations in accordance with her request.

9. As set out above, the Prosecutor opposes the Application. However, she does not explain why Ms Hosseinioun would not have knowledge of the issues on which she intends to make observations. Furthermore, the argument of the Prosecutor that Ms Hosseinioun's observations would amount to additional evidence in the appeal, if at all relevant, can only be assessed after having received such observations in relation to which the Prosecutor will, in any event, have a right to respond.

10. In this context, the Appeals Chamber recalls that, pursuant to rule 103 (2) of the Rules of Procedure and Evidence, the Prosecutor and Mr Gaddafi have a right to respond to any observations filed. As the appeal in this case has been filed by a State, the Appeals Chamber also finds it appropriate for that State, Libya, to be given the opportunity to file a response. Accordingly, Libya, the Prosecutor and Mr Gaddafi are given time, as set out in paragraph (ii) of this decision, to file a response to the observations to be filed by Ms Hosseinioun.

Done in both English and French, the English version being authoritative.



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**Judge Anita Ušacka**  
**Presiding Judge**

Dated this 15th day of August 2013

At The Hague, The Netherlands