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

Date: **1 May 2012**

**PRE-TRIAL CHAMBER I**

**Before:** Judge Silvia Fernández 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**

**Application For Leave to Appeal Against “Decision on the ‘Application on behalf of Mishana Hosseinioun for Leave to Submit Observations to the Pre-Trial Chamber’”**

**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:

**The Office of the Prosecutor**

Mr Luis Moreno-Ocampo, Prosecutor  
Ms Fatou Bensouda, Deputy Prosecutor

**Counsel for the Defence**

**Legal Representatives of Victims**

**Legal Representatives of the Applicant**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

Mr Xavier-Jean Keïta, Principal Counsel  
Ms Melinda Taylor, Counsel

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## A. Introduction

1. The Applicant, Ms. Mishana Hosseinioun, files this application requesting leave to appeal against the Pre-Trial Chamber's "Decision on the 'Application on behalf of Mishana Hosseinioun for Leave to Submit Observations to the Pre-Trial Chamber'" dated 24 April 2012.<sup>1</sup>
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 is required to demonstrate that the impugned decision concerns an issue that would significantly affect the fair and expeditious conduct of the proceedings, and for which an immediate resolution by the Appeal Chamber may materially advance the proceedings.
3. The Applicant submits that the Pre-Trial Chamber erred in deciding that the Applicant "does not seek to provide the Chamber with observations" and hence that her Application did not come within the proper ambit of Rule 103.<sup>2</sup> The Applicant did seek to make observations to the Chamber on Mr. Gaddafi's fundamental right to have access to family and friends. Such observations would have involved a request to the Chamber to guarantee this right by taking necessary steps within its powers. The language of Rule 103 does not prohibit States, organisations or individuals from seeking leave to make observations that would include requests to the Chamber for a particular outcome or procedure to be followed. Indeed, observations by definition most often seek to persuade the Chamber to adopt a certain course of action, or provide information which results in orders, directives, or requests being made by the Chamber.
4. The Applicant asks that leave to appeal be granted so that this error, as alleged, can be considered and corrected by the Appeals Chamber. The Chamber should be notified that your Applicant continues to pursue all available avenues outside of the ICC of seeking to guarantee Mr. Gaddafi's right to be allowed to have contact with family and friends. Should she make any progress in any of her initiatives, this application could become moot and would of course be withdrawn. However, as matters stand, with all efforts to gain access to Mr. Gaddafi refused (in respect of any family members and

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<sup>1</sup> Decision on the "Application on behalf of Mishana Hosseinioun for Leave to Submit Observations to the Pre-Trial Chamber", ICC-01/11-01/11-124, 24 April 2012 (hereinafter the "Decision").

<sup>2</sup> Decision, para. 5.

friends), it is an issue that affects the fair conduct of the proceedings. There could be no reason to suggest that the protection of the rights of a detainee and in particular his right to be represented by a lawyer of his choosing does not impinge upon the fairness of the proceedings. Furthermore, the issue if resolved by the Appeals Chamber would materially advance the proceedings in that it could ensure that Mr. Gaddafi was represented in the proceedings by a lawyer of his choosing. Again, it is hard to identify any reason for suggesting that the implementation of the fundamental rights of an accused would not do anything other than materially advance the court proceedings.

## **B. Standing of the Applicant**

5. The Applicant submits that she is a “party” to the proceedings as envisaged in Article 82(1).<sup>3</sup> There is no proper basis to refuse her application for leave to appeal on an interpretation of this provision which allows only the Prosecution and Defence the right to apply for leave to appeal. It would be obviously unfair to permit the Prosecution and Defence to appeal if the Applicant’s Rule 103 application had been granted, but to refuse the Applicant the same right when the application had been refused (as in the present case). The word “party” must refer to the parties who are indeed *party* to the application i.e. those who brought it and those who responded to it. This is the ordinary meaning of party in legal proceedings.
  
6. The Pre-Trial Chamber previously seised of this case took a different view in its decision of 14 February 2012.<sup>4</sup> With respect, the present Pre-Trial Chamber is not bound by this decision and may take a different view (which your Applicant submits would be the better and correct view). Furthermore, the Appeals Chamber has not decided this matter as yet.<sup>5</sup>

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<sup>3</sup> Application on behalf of Mishana Hosseinioun for Leave to Submit Observations to the Pre-Trial Chamber, ICC-01/11-01/11-108, 13 April 2012 (hereinafter the “Rule 103 Application”). 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”.

<sup>4</sup> Decision on the ‘Application of Mishana Hosseinioun for Leave to Appeal Against Decision on Application under Rule 103’, ICC-01/11-01/11-60, 14 February 2012, p. 4, 5.

<sup>5</sup> See Decision on the Admissibility of the “Appeal Against Decision on Application Under Rule 103” of Ms Mishana Hosseinioun of 7 February 2012, Separate Opinion of Judge Daniel David Ntanda Nsereko, ICC-01/11-01/11-74, 9 March 2012, para. 3.

### C. Grounds for Leave to Appeal

7. The Applicant submits that the Pre-Trial Chamber erred when deciding that the Applicant “does not seek to provide the Chamber with observations”<sup>6</sup> but instead “effectively requests that the Chamber authorize and facilitate contact between her and Mr Gaddafi, in order to give him access to what she deems to be appropriate legal advice.”<sup>7</sup>
8. The Applicant *did* seek to provide observations which could assist the Pre-Trial Chamber pursuant to the provisions of Rule 103. The Applicant repeatedly stated that she sought leave to submit observations on the urgent need to ensure communication and contact between Mr. Gaddafi and his family and friends in order that he could be assisted in obtaining legal representation depending on his wishes.<sup>8</sup> She stressed that these observations would concern Mr. Gaddafi’s fundamental human rights. Her observations would have been geared towards getting the Chamber to use its powers to facilitate contact and access in order to safeguard Mr. Gaddafi’s rights.
9. These submissions are not inconsistent with the plain terms of Rule 103 which do not prevent *amici curiae* or others participating in proceedings before the ICC in order to seek particular orders or procedures to be followed by the Chamber in the determination of the issues before it. The Applicant submits that observations by their very nature could include submissions on procedures to be followed or steps to be taken in the course of the proceedings.<sup>9</sup>
10. The Applicant’s Rule 103 Application specifically noted, as she has continuously stressed throughout these proceedings, that “The Applicant has no personal interest in the case” and her “efforts to guarantee Mr. Gaddafi’s right to legal representation of his choosing are in no way intended to impose counsel on Mr. Gaddafi.”<sup>10</sup> The Pre-Trial Chamber thus erred in determining that the Applicant’s Rule 103 Application effectively tries to impose “what she deems to be appropriate legal advice”. It should

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<sup>6</sup> Decision, para. 5.

<sup>7</sup> Decision, para. 5.

<sup>8</sup> See, for example, Rule 103 Application, para. 2, 3, 4, 17-22, 26, 27.

<sup>9</sup> See, for example, *Prosecutor v. Lubanga*, Decision on Request pursuant to Rule 103 (1) of the Statute, ICC-01/04-01/06-480, 26 September 2006.

<sup>10</sup> Rule 103 Application, para. 11.

instead have been acknowledged that Mr. Gaddafi has not had access to any family and friends since his detention in November 2011, which must be regarded as a serious violation of his fundamental rights. This is the point that your Applicant seeks to press, not to impose her legal advice. There is no basis at all for such a suggestion.

11. The Applicant's proposed observations should not be considered moot in light of the OPCD's appointment as interim counsel for Mr. Gaddafi, as suggested by the Prosecutor.<sup>11</sup> He has not acknowledged the violations of Mr. Gaddafi's fundamental rights. There is nothing in Rule 103 which prohibits the Applicant from seeking to make observations before the Chamber on the issues of Mr. Gaddafi's right to have contact with family and friends and legal representation of his choosing. As submitted above, these issues impinge upon the fairness of the proceedings which would be materially advanced by their resolution without delay.

#### **D. Conclusion**

12. For these reasons, the Applicant submits that the requirements of Article 82(1)(d) have been satisfied. The Applicant respectfully requests the Pre-Trial Chamber to consider the merits of this Application and to grant leave to appeal.

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<sup>11</sup> 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", ICC-01/11-01/11-125, 24 April 2012, paras. 14, 15.



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

Dated 1<sup>st</sup> May 2012  
London, United Kingdom