



Original: **English**

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

Date: **11 June 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 on behalf of Mishana Hosseinioun for Leave to Appeal the Decision  
refusing her Application under Rule 103**

**Source:** 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 in the Admissibility Proceedings'" dated 4 June 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 notes the Pre-Trial Chamber's previous ruling that applicants under Rule 103 are not "parties" and have "no standing to request leave to appeal a decision pursuant to article 82(1)(d)."<sup>2</sup> The Applicant submits that this issue has never been addressed and determined by the Appeals Chamber. It is an important issue as it concerns the rights of applicants to be heard by the Appeals Chamber. Your Applicant thus asks that the Pre-Trial Chamber, as a minimum, submit the question of standing for consideration by the Appeals Chamber.
4. The Applicant submits that there are good grounds on the merits of the case for granting leave to appeal should the Chamber submit the matter to the Appeals Chamber.
5. The Applicant submits that the Pre-Trial Chamber erred by failing to give any reasoning for its decision to reject Ms. Hosseinioun's Rule 103 application.<sup>3</sup> While the Applicant recognises that a chamber is not required to deal with each and every argument raised, the Chamber's failure to give any reason has deprived the Applicant of an articulated fair review and / or impartial decision on her application. An

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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 in the Admissibility Proceedings, ICC-01/11-01/11-169, 4 June 2012 (hereinafter the "Decision of 4 June 2012").

<sup>2</sup> Decision on the "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'", ICC-01/11-01/11-170, para. 8.

<sup>3</sup> Application on behalf of Mishana Hosseinioun for Leave to Submit Observations to the Pre-Trial Chamber in the Admissibility proceedings, ICC-01/11-01/11-156, 23 May 2012 (hereinafter the "Application of 23 May 2012").

immediate review by the Appeals Chamber of the Pre-Trial Chamber's duty to give reasoning and of its failure to do so would materially advance and resolve these proceedings by rejecting as erroneous, alternatively by justifying, the limitation on the arguments and evidential material that the Applicant wishes to make available. This material, in the Applicant's submission, would be of assistance to the Pre-Trial Chamber by providing evidence not otherwise available and arguments that have focused from first to last on the single issue of Saif Gaddafi's rights of access to family, friends and lawyers of his own choosing. This issue is central to the legality of his present detention and may become crucial to any assessment of the Pre-Trial Chamber's and the International Criminal Court's performance - more generally - in a first contest between a non-States Party and the court on complementarity issues where the detained person (i) is or may be at physical risk in the territory of the State concerned and (ii) has thus far been denied the basic international human rights of a person detained pending trial.

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

6. The Pre-Trial Chamber has refused a previous application for leave to appeal finding that "applicants seeking to submit observations under Rule 103 of the Rules are not 'parties' within the meaning of article 82(1) of the Statute and have no standing to request leave to appeal a decision pursuant to article 82(l)(d) of the Statute."<sup>4</sup>
7. The Applicant submits that the issue of whether the Applicant has standing to appeal under Article 82(1) has still not been decided by the Appeals Chamber. There has only been one dissenting opinion<sup>5</sup> and one separate opinion<sup>6</sup> handed down on the matter.

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<sup>4</sup> Decision on the "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'", ICC-01/11-01/11-170, para. 8.; See also, 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> *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Reasons for the 'Decision on "Victims and witnesses Unit's considerations on the system of witness protection and the practice of 'preventive relocation'" and "Prosecution's request for leave to file a response to 'Victims and Witnesses Unit's considerations on the system of witness protection and the practice of "preventive relocation", July 2008, ICC-01/04-01/07-675 (OA), dissenting opinion of Judge Pikis, para. 4.

<sup>6</sup> 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

8. The Applicant urges the Pre-Trial Chamber not to permit this unresolved issue to block full appellate-level analysis of the decision in this application that may, on an appeal, be revealed as erroneous. Thus, at a minimum, the Pre-Trial Chamber is asked to find it should not prevent resolution of the substantive issue, simply by refusing leave, until any issue of standing has been authoritatively decided. For this reason alone, the Pre-Trial Chamber is requested to say that it should grant leave for the Appeals Chamber to decide whether there is any right to review the first instance decision on an application under Rule 103.

### **C. Ground for Appeal**

9. The Applicant submits that the Pre-Trial Chamber committed an error by failing adequately to state any reason as a basis for rejecting the Application of 23 May 2012.
10. The jurisprudence of the ICC has highlighted the duty of Pre-Trial Chambers to give reasoned decisions. It has been held that “in making a decision, the Pre-Trial Chamber need not individually recite each and every factor before it, but ‘it must identify which facts it found to be relevant in coming to its conclusion.’”<sup>7</sup>
11. In addition, extensive case law before the European Court of Human Rights has affirmed the existence of such a duty by stating “that according to its established case-law, reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based.”<sup>8</sup> Where a decision did not “adequately state[s] the reasons on which [it is] based”,<sup>9</sup> the European Court of Human Rights considered “that the applicant did not have the benefit of fair proceedings” and “the lack of a reasoned decision also hindered the applicant from raising” issues on appeal.<sup>10</sup>
12. The Pre-Trial Chamber merely stated in its decision that the Application “would be of no assistance for the resolution of the Admissibility Challenge”.<sup>11</sup> No reasons were

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<sup>7</sup> Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, ICC-01/04-01/06-774, para 30.

<sup>8</sup> *Kyriakides v. Cyprus*, 39058/05, 18 October 2008, para. 24. See also, *Ruiz Torija v. Spain*, 9 December 1994.

<sup>9</sup> *Kyriakides v. Cyprus*, 39058/05, 18 October 2008, para. 24

<sup>10</sup> *Salov. v. Ukraine*, 65518/01, 6 September 2005, para. 92.

<sup>11</sup> Decision of 4 June 2012, para. 4.

given for this conclusion. The Applicant is entitled to know why her observations and considerable efforts are no of assistance in the present proceedings<sup>12</sup>.

13. The Applicant respectfully draws to the Pre-Trial Chamber's attention that she has had very considerable resources deployed to do what she can as a friend to secure Saif Gaddafi his legal rights. There is no suggestion of any other motive on her part and her record of human rights engagement speaks clearly of the sincerity of what she is doing.

14. It is to her, at first sight, curious that all efforts to contribute to the material before the court on these issues should have been blocked. There may be some implication or concern by the court to the effect that the Applicant and her lawyers wish to represent Saif Gaddafi. If there is any such suggestion its source should be identified and the proposition clarified to the Applicant, in the interests of visibility of process and so that Saif Gaddafi may know how decisions about his rights have been made. For the avoidance of doubt the Applicant sought independent advice on which lawyers she should approach to achieve the very specific, limited and clearly identified purposes in her applications to date. Those lawyers had, and have, no particular or expressed interest in representing Saif Gaddafi at any trial, or expectation of doing so. They acted on the Applicant's behalf in accordance with the 'cab rank' principle that motivates the Bar of England and Wales (to which they belong) and that is required of them as a matter of professional conduct in domestic work. Any implication of the kind contemplated would be without foundation of any kind. The court will, no doubt, understand how legal systems work best when all those working within them confine their actions to what may be demanded of them professionally, no more. That is the position with counsel who sign this filing, in case, as above, there is any implication to a contrary effect.

#### **A. Conclusion**

15. For reasons set out above, the Applicant respectfully requests that leave to appeal the issue of standing should be allowed and that pending resolution of that issue, and / or in any event, leave to appeal the Pre-trial Chamber's decision should be granted.

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<sup>12</sup> Decision of 4 June 2012, para. 4.



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

Dated 11<sup>th</sup> June 2012  
London, United Kingdom