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

Date: **9 July 2013**

**THE APPEALS CHAMBER**

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

**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 Submit Observations to the Appeals Chamber pursuant to 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**  
Ms. Fatou Bensouda, Prosecutor

**Counsel for the Defence**  
Counsel for Abdullah Al-Senussi:  
Mr. Ben Emmerson QC  
Mr. Rodney Dixon  
Ms. Amal Alamuddin  
Mr. Anthony Kelly  
Professor William Schabas

Counsel for Saif Gaddafi:  
Mr. John Jones QC

**Legal Representatives of Victims**  
Ms. Paolina Massida  
Ms. Sarah Pellet  
Mr. Mohamed Abdou

**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**

**States Representatives**  
Professor Ahmed El-Gehani  
Professor Philippe Sands QC  
Professor Payam Akhavan  
Ms. Michelle Butler

**Amicus Curiae**

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## **REGISTRY**

**Registrar**  
Mr. Herman von Hebel

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

## **I. Introduction**

1. The Applicant, Mishana Hosseinioun, applies pursuant to Rule 103 of the Rules of Procedure and Evidence for permission to submit written observations to the Appeals Chamber on Libya's Appeal against Pre-Trial Chamber I's Decision on the Admissibility of the case against Saif Al-Islam Gaddafi.<sup>1</sup>
2. In particular, Ms Hosseinioun requests to be permitted to submit observations on matters raised under the fourth ground of appeal identified in Libya's Document in Support of the Government of Libya's Appeal against the Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi<sup>2</sup> ("the Appeal"). This ground relates to the Pre-Trial Chamber's finding that Libya's national justice system is unavailable.
3. Ms Hosseinioun has an unbroken record of seeking, for no personal gain and at her own expense, before this Court and before the African Court of Human and Peoples' Rights ("African Court"), to protect Saif Al-Islam Gaddafi's fundamental rights. She seeks to submit written 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.

## **II. The Applicant**

4. Ms Hosseinioun is a personal friend of Mr Gaddafi. She is not a member, nor is she close to any other members, of the Gaddafi family. She has no connection to either the current or the former regime in Libya. She has no power of attorney from Mr Gaddafi and hence does not seek to speak on his behalf. She has no personal interest in this case beside her wish to see that her friend's fundamental rights and well-being are guaranteed.
5. On 2 April 2012, Ms Hosseinioun submitted a Communication to the African Commission on Human and Peoples' Rights ("African Commission") which sought to protect Mr Gaddafi's rights under the African Charter on Human and Peoples' Rights,

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<sup>1</sup> ICC-01/11-01/11-344-Red.

<sup>2</sup> ICC-01/11-01/11-370-Red2.

including his right to be represented by a lawyer of his choosing and to receive visits from family and friends. As a result of Libya's failure to comply with the provisional measures that the African Commission ordered, the Commission brought Ms Hosseinioun's communication before the African Court.

6. The African Court itself then imposed provisional measures which ordered Libya "To refrain from all judicial proceedings, investigations or detention, that could cause irreparable damage to the Detainee, in violation of the Charter or any other international instrument to which Libya is a party; To allow the Detainee access to a lawyer of his own choosing; To allow the detainee visits by family members; [and] To refrain from taking any action that may affect the Detainee's physical and mental integrity as well as his health."<sup>3</sup>
7. References to these proceedings before the African Commission and the African Court were made in the admissibility proceedings before the Pre-Trial Chamber by the OPCD.<sup>4</sup>
8. The African Court recently issued its decision on Libya's non-compliance with these provisional measures and decided to refer the matter to the Assembly of the African Union. It is not presently known when the African Union may next be able to attend to this issue. Ms Hosseinioun has done everything within her power to have it given priority and would be able to explain in detail the results of those actions in written submissions - at the time of writing the Commission has been requested to take all possible steps to ensure that the African Union urgently addresses the matter and does not delay until its next regular meeting.
9. Ms Hosseinioun has pursued all available lines of enquiry in her attempt to guarantee Mr. Gaddafi's rights and well-being in detention. She has been in contact with the Libyan Prosecutor-General, Counsel retained by the Libyan Government in this case, the Libyan Embassy in London, the United Nations Support Mission in Libya, the

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<sup>3</sup> In the Matter of African Commission on Human and Peoples' Rights v. Libya, Application No.022/2013, Order of Provisional Measures, 15 March 2013.

<sup>4</sup> Public Redacted Version of the Corrigendum to the 'Defence Response to the 'Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute,' ICC-01/11-01/11-190-Corr-Red, 31 July 2012, para. 209; Request to dismiss the 'Notification by Libyan Government supplemental to its consolidated reply to the response of the Prosecution, OPCD and OPCV to its further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi' in limine, ICC-01/11-01/11-308, 3 April 2013, para. 10(d), 15, ICC-01/11-01/11-308-AnxA.

United Nations High Commissioner of Human Rights, the International Committee of the Red Cross, Amnesty International, Human Rights Watch, and other organisations.

10. Before this Court, Ms Hosseinioun has submitted four previous Rule 103 applications to Pre-Trial Chamber I. On 30 January 2012, she applied for leave to request the Chamber to take specified steps in order to ensure that Mr Gaddafi's rights are fully respected.<sup>5</sup> On 13 April 2012, she applied for leave to make observations about Mr Gaddafi's right to be permitted to obtain legal representation of his choosing as a matter of urgency.<sup>6</sup> On 23 May 2012, she applied for leave to submit observations about the various steps that she had taken - unsuccessfully - to attempt to obtain access to Mr Gaddafi.<sup>7</sup> On 9 November 2012, she applied for permission to submit the final decision of the African Commission to the Pre-Trial Chamber<sup>8</sup>. In each of these Rule 103 Applications, Ms Hosseinioun sought permission to make limited observations on issues specifically relating to Mr Gaddafi's fundamental rights. The latest application was never ruled on, while the others were refused by the Pre-Trial Chamber. However, she has consistently submitted that as a result of her efforts before the African Commission, the African Court and other bodies she should be permitted to make observations which could assist the Court.

11. Ms Hosseinioun has done everything that a friend of a detained person could be expected to do in order to seek access to Mr Gaddafi and to safeguard his rights. Ms Hosseinioun is thus in a unique position to assist the Appeals Chamber on issues relating to Mr Gaddafi's fundamental rights and to do so from the single and focused perspective of ensuring respect for his basic human rights, rights that her efforts have established through a court – the African Court of Human and Peoples Rights – to have been disregarded and denied.

### **III. Applicable Law**

12. Rule 103(1) provides that “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

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<sup>5</sup> ICC-01/11-01/11-46 para. 11.

<sup>6</sup> ICC-01/11-01/11-108 para. 2.

<sup>7</sup> ICC-01/11-01/11-156 para 4.

<sup>8</sup> ICC-01/11-01/11-232.

State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.”<sup>9</sup>

13. Under the Court’s jurisprudence a Chamber has a broad discretion under Rule 103 to grant leave to any party at *any* stage of the proceedings. In determining whether observations are desirable, a Pre-Trial Chamber has held that “the first and foremost factor for leave to be granted pursuant to rule 103 of the Rules is whether the relevant application relates to an issue that is actually before the competent Chamber.”<sup>10</sup>

14. The Appeals Chamber has held that Rule 103 gives the Chamber a discretion to grant leave to submit observations if it “may assist the ... Chamber in the proper determination of the case.”<sup>11</sup> .

15. Trial Chamber I clarified that observations of an Applicant might assist “in its ‘proper determination’ of the issues” when the observations seek “to supply information and assistance of direct relevance on certain issues that otherwise will not be available to the Court.”<sup>12</sup>

#### **IV. Written Observations will Assist on Issues before the Appeals Chamber**

16. In its Document Supporting Appeal, Libya’s fourth ground of appeal asserts that “irrespective of the meaning of ‘unavailability’, the Chamber erred in fact and in law by finding that, due to the ‘unavailability’ of the Libyan judicial system, it is ‘unable’ in particular material regards in relation to the case against Mr Gaddafi”.<sup>13</sup>

17. One of these “material regards”, which is challenged by Libya in the Appeal, concerns the lack of legal representation for Mr Gaddafi in the national proceedings.<sup>14</sup>

<sup>9</sup> Rules of Procedure and Evidence, Rule 103(1).

<sup>10</sup> Decision on Application under Rule 103, ICC-02/05, 4 February 2009, para. 8.

<sup>11</sup> *Prosecutor v. Lubanga*, 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”, ICC-01/04-01/06-1289, 22 April 2008, para. 8. See also, 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, ICC-02/05-01/09 OA, 9 November 2009, para. 7.

<sup>12</sup> *Prosecutor v. Lubanga*, Decision Inviting Observations from Special Representative of the Secretary General of the United Nations for Children and Armed Conflict, ICC-01/04-01/06-1175, 18 February 2008, para. 7.

<sup>13</sup> ICC-01/11-01/11-370-Red2 para. 154.

<sup>14</sup> Ibid paras. 167 – 171.

18. Ms Hosseinioun submits that she could assist the Appeals Chamber with observations to show that the Pre-Trial Chamber's findings are not erroneous. In particular, it is relevant to the Appeals Chamber's determination of this issue to note that immediate access to a lawyer was one of the provisional measures ordered by both the African Commission and the African Court. Ms Hosseinioun seeks leave to make submissions including filing the conclusions of the African Court on the issue of whether Libya has complied with this aspect of the provisional measures. If it is Libya's sincere submission that it will be able to find a lawyer for Mr Gaddafi in due course, it is relevant to consider whether Libya was able to find a lawyer for him when so ordered by the African Court, and why it failed to do so.
19. Further, Libya seeks to appeal the finding that "Libya has not yet been able to secure the transfer of Mr. Gaddafi from his place of detention under the custody of the Zintan militia into State authority".<sup>15</sup> In support of its submission that the Libyan State does exercise control in Zintan, Libya argues that there are "numerous examples" of the "central Libyan Government exercising its authority in Zintan",<sup>16</sup> which include that representatives of the International Committee of the Red Cross and Human Rights Watch have visited Mr Gaddafi on "several occasions".<sup>17</sup>
20. Ms Hosseinioun is in a position to assist the Chamber with observations to show that the Pre-Trial Chamber did not err in its findings on this issue. Another of the provisional measures ordered by the African Court and the African Commission required Libya to allow family and friends to visit Mr Gaddafi. Ms Hosseinioun submits that the African Court's conclusions about whether Libya has complied with this measure are relevant to the issue of whether Libya has control over Mr Gaddafi in Zintan.
21. Ms Hosseinioun has repeatedly sought to visit Mr. Gaddafi and remains willing to do so. Were access granted to her, she would of course be able to report to the Court on the results of her contact with Mr. Gaddafi. Her submissions would not have to be limited in the way some communications – for example to the ICRC – may have to be

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<sup>15</sup> Ibid para. 155.

<sup>16</sup> Ibid para. 158.

<sup>17</sup> Ibid para. 159. Libya does not indicate in its submissions how many visits these organisations have been permitted, nor when the last of those visits took place.

limited or confined and could thus be of great assistance to the administration of the Court and to the preservation of Mr Gadaffi's basic human rights.

22. As noted above, Ms Hosseinioun could also inform the Court of the steps she is currently taking to request the African Union to act urgently on the referral of the matter to it by the African Court and of the outcome of these proceedings.

## **V. Relief Requested**

23. For all of these reasons, Ms Hosseinioun respectfully requests to be granted leave to file written submissions under Rule 103 in respect of the specific matters identified in this Application.



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

Dated 9<sup>th</sup> July 2013  
London, United Kingdom