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

Date: 9 November 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 Submit Document to
the Pre-Trial 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

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

Philippe Sands QC
Payam Akhavan
Michelle Butler

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. The Applicant, Ms Mishana Hosseinioun, applies pursuant to Rule 103 of the Rules of Procedure and Evidence for leave to submit to the Pre-Trial Chamber the final decision of the African Commission on Human and Peoples' Rights ("African Commission") that has just been handed down in respect of the question of Libya's compliance with the Provisional Measures ordered by the African Commission regarding the detention of Mr. Saif Al-Islam Gaddafi in Libya. The Chamber will recall that these measures required Libya to (i) ensure that Mr. Gaddafi has access to his lawyers; (ii) can receive visits from family and friends; (iii) disclose the location of his detention, and (iv) guarantee the integrity of his person and his right to be tried within a reasonable time by an impartial court. These fundamental rights are guaranteed by the African Charter on Human and Peoples' Rights which Libya has ratified.
2. The Applicant submits that the decision of the African Commission is relevant to the proper determination of the admissibility of Mr. Gaddafi's case before the ICC.

I. The Applicant

3. The Chamber will be aware from previous filings¹ that the Applicant, Ms. Mishana Hosseinioun, is a very close friend and confidant of Mr. Saif Al-Islam Gaddafi.²
4. The Applicant is not connected to either the current or former regime in Libya. She is not a member, nor close to any members, of the Gaddafi family apart from Mr. Saif Al-Islam Gaddafi. Neither she nor her lawyers have a power of attorney from Mr. Gaddafi, and neither she nor they seek or intend to speak on Mr. Gaddafi's behalf. She has no personal interest in the case, apart from her wish that Mr. Gaddafi's rights are safeguarded without delay.
5. As a very close friend of Mr. Gaddafi, the Applicant has undertaken numerous and repeated steps and initiatives in order to attempt to communicate with Mr. Gaddafi in detention and in order to protect his fundamental rights. The Libyan authorities have failed to respond to any of these requests and steps, and the reality remains that Mr. Gaddafi has now been kept in *incommunicado* detention **for nearly one year** in

¹ ICC-01/11-01/11-46; ICC-01/11-01/11-108 and ICC-01/11-01/11-156.

² Ms Hosseinioun's biography is set out at ICC-01/11-01/11-46 paras. 17 – 21.

violation of his fundamental rights. The Chamber will be aware of some of those steps and initiatives from previous filings.

6. Further, the Pre-Trial Chamber is presently seised of a matter submitted by the Applicant which has been classified as *ex parte* and confidential by the Registry but which Ms Hosseinioun has requested the Chamber to make public, there being no reason at all for any confidentiality.³

II. Request for Leave Pursuant to Rule 103

7. Rule 103(1) of the Rules of Procedure and Evidence provides in part 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 State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.”

8. Consistent with the established jurisprudence, this Chamber has confirmed that Rule 103:

“allows the Chamber to receive amicus curiae observations from either a State, organization or person that are both desirable and appropriate for the proper determination of the case”⁴

9. The Applicant submits that it would be desirable and appropriate for the Chamber to receive the final decision of the African Commission in respect of the implementation of the Provisional Measures because it is relevant to the proper determination of issues which were raised during the recent oral hearing on admissibility before the Chamber.
10. On 10 October 2012, during the oral hearing on admissibility, the Office of Public Counsel for the Defence specifically referred to the Provisional Measures granted by the African Commission in respect of Libya in these terms:

³ ICC-01/11-01/11-220-Conf-Exp+Conf-Exp-Anx1&2.

⁴ Decision on the Applications of Mishana Hosseinioun and Aisha Gaddafi to submit Amicus Curiae observations to the Chamber, 2 February 2012, ICC-01/11-01/11-49 at p. 4.

*“They [Libya] have also failed to respond to orders for provisional measures from the African Court of Human Rights, concerning Mr Gaddafi's case specifically.”*⁵

11. The Applicant has now been informed of the African Commission’s final decision in respect of the question of Libya’s compliance with the Provisional Measures. Formal written notification of the decision is expected very shortly. The Chamber’s receiving this decision will provide it with the most up to date information on the submission made by the Office of Public Counsel for the Defence and of the view taken by the African Commission of Libya’s conduct.

12. Moreover, the Applicant believes that the contents of such a decision, emanating from an international human rights court, with particular and specialist knowledge of and sensitivity to the standards of justice governance in African countries, will assist the Pre-Trial Chamber in considering and evaluating submissions made on behalf of Libya at the oral hearing on admissibility, including:

- *“the GNC now, and the NTC before it, is centrally involved in the creation of the new Libya, has shown itself to be strongly committed to due process and to the rule of law.”*⁶
- *“even if there were to remain any shortcomings in Libya's judicial system as it builds new democratic institutions ... other monitoring mechanisms, such as the African Court on Human and Peoples’ Rights, can make appropriate recommendations within their mandate on such shortcomings.”*⁷
- *“Is it really to be the case, as the OPCD argues, that a national legal system of a country like Libya, coming out of the period it has lived through, is to be held to a higher standard than international courts when it comes to the delivery of justice?”*⁸

⁵ ICC-01/11-01/11-T-3-Red at page 29 lines 2 – 3. Although reference was made to the African Court of Human Rights, in fact the Provisional Measures were granted by the African Commission on Human and Peoples’ Rights.

⁶ ICC-01/11-01/11-T-2-Red at page 24 lines 16 - 18

⁷ Ibid page 43 lines 11 - 16

⁸ Ibid page 46 lines 6 – 8.

- “Libya is behaving reasonably in all the circumstances and should be given the benefit of the doubt in moving forward in this challenging situation.”⁹

13. The ICC would no doubt be interested to know the approach of the African Commission to the duties of countries *in transition* in light of the submissions made by Counsel for Libya in the admissibility proceedings.

14. The Applicant therefore seeks leave pursuant to Rule 103, simply in order to provide a copy of the decision to the Pre-Trial Chamber¹⁰ and to invite the Chamber to take the decision into account in reaching its determination on the issue of admissibility. Recognising that even if the decision is available as an open source and is fully public, the Chamber may feel constrained not to consider and rely on it unless laid before the Chamber in accordance with its Rules and Regulations.



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

Dated 9th November 2012
London, United Kingdom

⁹ *Ibid* page 54 lines 1 – 2.

¹⁰ The decision is not currently publically available to the Applicant’s knowledge, but it may well be publically available in due course on, *inter alia*, the website of the African Commission on Human and Peoples’ Rights.