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PRE-TRIAL CHAMBER I

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Sylvia Steiner
Judge Cuno Tarfusser

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 *Amicus Curiae*
Observations to the Chamber**

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:

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Ms Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of the Applicant

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**Unrepresented Applicants for
Participation/Reparation**

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Detention Section

**Victims Participation and Reparations
Section**

Other

Sir Geoffrey Nice QC
Rodney Dixon

A. Introduction

1. The Applicant, Ms Mishana Hosseinioun, seeks leave to make observations before the Pre-Trial Chamber in respect of the arrest, detention and right to legal representation of Saif Al-Islam Gaddafi. The Applicant is a very close friend and confidant of Saif Gaddafi. She is not a family member and has no connection with the former Government of Libya. As explained below, she is a leading human rights scholar.
2. The Applicant files this Application pursuant to Rule 103(1) of the Rules of Procedure and Evidence which states that: *“At any stage in 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.”*¹ In light of the urgency of the issues involved, the Applicant respectfully requests an extension of the page limit under Regulation 37(2) of the Regulations of the Court, as explained in paragraph 52 below.
3. The Pre-Trial Chamber made a Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi, on 6 December 2011². Libya was granted an extension of the time limit to submit observations, on 10 January 2012³. The Libyan authorities filed confidential observations on 20 January 2012⁴. The Pre-Trial Chamber made an Order Requesting Observations Regarding the “Report of the Registrar on Libya’s Observations regarding the arrest of Saif Al-Islam Gaddafi” on 24 January 2012 which requested observations from the Prosecution and the Office of the Public Counsel for the Defence (OPCD) by 2 February 2012⁵. The Applicant files this Application in advance of the deadline for these observations of the Prosecution and the OPCD so that the parties have full notice of the Application and the important issues it raises.

¹ Rules of Procedure and Evidence of the International Criminal Court, Rule 103(1).

² Public Redacted Version of Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi, ICC-01/11-01/11-39-Red, 6 December 2011.

³ Decision on the request of Libya for extension of time limit to submit observations regarding the arrest of Saif Al-Islam Gaddafi, ICC-O 1/11-01/11-42, 10 January 2012.

⁴ Report of the Registrar on Libya's observations regarding the arrest of Saif Al-Islam Gaddafi, ICC-01/11-01/11-44-Conf-Anx1.

⁵ Order Requesting Observations Regarding the ‘Report of the Registrar on Libya's observations regarding the arrest of Saif Al-Islam Gaddafi’, ICC-01/11-01/11-45, 24 January 2012.

4. The Applicant asks the Court to consider this application with the utmost urgency. The Applicant's foremost concern is that Saif Gaddafi still does not have access to a lawyer, having been arrested nearly three months ago. He is being detained incommunicado in breach of fundamental human rights, which should not be countenanced by the ICC. He could face the death penalty if criminal proceedings are brought in Libya. It is thus essential that he has legal representation and is heard before the ICC while the Pre-Trial Chamber is currently considering where he will be tried. The Applicant is very concerned about the risks to Saif Gaddafi's life and well-being given the manner in which his rights are being violated and the uncertain security situation in Libya and in light of reports that are emerging of extra-judicial killings and torture of persons detained by the authorities in Libya⁶. Leading human rights organisations have expressed grave concerns about the Libyan authorities' approach to Saif Gaddafi's case, and about the deaths and torture of detainees currently held in Libya.

5. Despite these concerns, it is unfortunate that the Prosecutor and the Deputy Prosecutor have expressed views inconsistent with respect for the fundamental rights of Saif Gaddafi and the proper procedures of the ICC⁷. They have not insisted on his getting immediate access to a lawyer and to family and friends. They have indicated that they would not object to Libya trying the case. They have remained silent on the conditions of Saif Gaddafi's detention in Libya and whether it is acceptable for him to face the death penalty.

⁶ ICC must end confusion over trial of Gaddafi, Human Rights Watch, 25 November 2011 (http://www.amnesty.org.au/news/comments/27292/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+aialatest+Amnesty+latest#When:23:05:23Z); Libya: Deaths of detainees amid widespread torture, Human Rights Watch, 26 January 2012 (<http://www.amnesty.org/en/news/libya-deaths-detainees-amid-widespread-torture-2012-01-26>); Libya: Detainees tortured and denied medical care, Doctors without Borders, 26 January 2012 (http://www.msf.org.uk/libyaprison360112_20120126.news); Libyan officials will seek death penalty for Saif al-Islam Gaddafi, The Telegraph, 21 November 2011 (<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8905151/Libyan-officials-will-seek-death-penalty-for-Saif-al-Islam-Gaddafi.html>); Libya Could Hold Seif al-Islam Trial in Two Months, The Tripoli Post, 25 November 2011 (<http://tripolipost.com/articledetail.asp?c=1&i=7361&archive=1>); Saif Gadafy captured in Libya, Irish Times, 19 November 2011 (<http://www.irishtimes.com/newspaper/breaking/2011/1119/breaking8.html>).

⁷ NEWLY ELECTED GAMBIAN BORN ICC PROSECUTOR SPEAKS ON FATE OF GHADAFI'S SON, ETC, FOROTAA Online, 6 January 2012 (<http://www.foroyaa.gm/modules/news/article.php?storyid=8638>); ICC allows Libya to try Gaddafi son, Aljazeera, 23 November 2011 (<http://www.aljazeera.com/news/africa/2011/11/2011112395821170909.html>); ICC prosecutor happy for Libya to try Gaddafi son, Reuters, 23 November 2011 (<http://www.reuters.com/article/2011/11/23/us-libya-icc-saif-idUSTRE7AM13H20111123>).

6. In these circumstances, the Applicant submits that there are good reasons why it is desirable for the proper determination of this case that the Chamber grant leave to the Applicant to submit observations to the Chamber as soon as possible.
7. First, Saif Gaddafi who is subject to an ICC arrest warrant has been arrested and detained in Libya. He is presently still unable to contact or instruct any lawyer, or to contact family or friends in order to help him do so. He has expressed the wish to find a lawyer and to be represented, but no concrete action appears to have been taken to ensure that he has legal representation of his choosing for the proceedings before the ICC. His case before the ICC cannot be determined in the absence of his having access to a lawyer of choosing. The ICC should not permit the present situation to continue any longer and he should be granted access to a lawyer of his choosing and to family and friends without delay.
8. Second, the proper determination of the case before the ICC requires he have access to a lawyer. Having no lawyer to represent him, he is unable to make submissions to this Chamber on admissibility and other crucial issues which would enable the case to be properly and fairly determined. The case is at a critical stage in which the ICC, as it should, will determine whether the case should be tried before the ICC or not. It cannot be right that the ICC is not in a position to hear directly from Saif Gaddafi on these vital issues, especially given the security situation in Libya and that he could face the death penalty if tried in Libya, or worse, meet the same grim fate as his late father and brother even before he reaches trial.⁸
9. Third, the Prosecutor is not raising any of these matters before the ICC. Although the OPCD has been requested to make observations on behalf of Saif Gaddafi, it has obviously not been able to meet with him or to take any instructions from him. Saif Gaddafi is plainly entitled to have access to a lawyer of his choosing, whom he can instruct to make submissions directly on his behalf, especially in light of the very important issues pertaining to admissibility and his fair trial rights, issues that *are* effectively before the ICC.

⁸ "I'm really surprised that Saif al-Islam has not met the same fate as his father and his brother ... The best thing that the new leadership can do is to hand Saif al-Islam to the International Criminal Court because I don't believe it really has the resources and the means to try Saif al-Islam and give him a fair trial." Fawaz Gerges, professor of international relations at the London School of Economics, told BBC TV.
<http://www.france24.com/en/20111119-saif-al-islam-detained-southern-libya-officials-gaddafi-ntc-nato-africa>.

10. *Fourth*, the Applicant is in a unique position to offer observations to the Chamber as she is a very close friend and confidant who is requesting to have access to Saif Gaddafi to assist in the appointment of legal counsel and to safeguard his rights.

11. The Applicant would ask the Chamber, if granted leave, that the following steps be undertaken in order to ensure that Saif Gaddafi's rights under the ICC Statute, and as guaranteed by international human rights' instruments, are fully respected:

- (i) Libya should be ordered to ensure that Saif Gaddafi is guaranteed his fundamental right to have access to a lawyer of his choosing in order to be represented in the ICC proceedings and generally. In the circumstances this essential process of providing him with access to a lawyer could be greatly assisted by the Applicant having access to him in person, or at least by a telephone call. He should, in any event, be entitled while in detention and pending transfer to Tripoli or elsewhere, to have access to family and friends;
- (ii) Libya should be required to provide clear guarantees about the *circumstances* of Saif Gaddafi's detention in Libya while proceedings are under way before the ICC, as they are. Further, Libya should guarantee that his *rights* as a detainee are being respected under International Law and in accordance with the provisions of the ICC Statute in light of his case being before the ICC;
- (iii) No decisions concerning the admissibility of the case should be made until Saif Gaddafi has been given the opportunity to instruct a lawyer of his choosing and to make submissions before the ICC if he so wishes; and,
- (iv) Under the provisions of the ICC Statute, Libya should be required in the present case either to make an admissibility challenge or comply with its obligations to surrender Saif Gaddafi pursuant to the ICC arrest warrant.

These requests are all based on the provisions of the ICC Statute itself and as enshrined in international human rights instruments. Your Applicant has set out these provisions in summary form below (Part E). If granted leave she would provide observations on these provisions in support of her requests. These provisions

underline why it is important that she submit full observations as soon as possible in the absence of Saif Gaddafi currently being represented before the ICC to ensure that his rights are not violated.

B. Relevant law

12. The central issue to be determined on an application under Rule 103 “is whether the Chamber will be assisted in its ‘proper determination’ of the issues in the case”⁹. The Pre-Trial Chamber in the Situation in Darfur, “Decision Inviting Observations in Application of Rule 103 of the Rules of Procedure and Evidence”, explained that Rule 103(1):

“[...] provides for the Chamber to invite any State, organisation or person to submit any observation on any issue that the Chamber deems appropriate when it is desirable for the proper administration of justice [...]”¹⁰. (Emphasis added).

13. The test affords the Chamber a wide discretion. Hence, in *The Prosecutor v. Jean-Pierre Bemba Gombo*, the Single Judge allowed an applicant’s request to act as *amicus curiae* on the basis that information would be provided that the Chamber “may” find useful.

“Having considered the Request submitted by the Women's Initiatives for Gender Justice, the Single Judge is of the view that the proposed *amicus curiae* brief tends to provide legal information that the Chamber may find useful in the context of the present case. The Single Judge considers, therefore, that granting the Request is both desirable and appropriate for the proper determination of the case”¹¹. (Emphasis added).

14. The Rule is not restricted to legal information: “information and assistance of direct relevance on certain issues that otherwise will not be available to the Court” can be supplied¹². For instance, Rule 103 has been used to admit *empirical* observations arising from *direct* experience (as opposed to specialist legal expertise). See, for

⁹ 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.

¹⁰ Decision Inviting Observations in Application of Rule 103 of the Rules of Procedure and Evidence, ICC-02/05-10, 24 July 2006, p. 6.

¹¹ Decision on Request for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC-01/05-01/08-451, 17 July 2009, para 12.

¹² 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.

example, the “Observations of the United Nations High Commissioner for Human Rights invited in Application of Rule 103 of the Rules of Procedure and Evidence” in the Situation in Darfur¹³.

15. It has also been relied on to allow the Chamber to hear views in addition to those put forward by the parties:

“Turning to the Application itself, the Appeals Chamber noted that the Applicants proposed putting forward another view to that of the Prosecutor who was the only participant to have made submissions before the Appeals Chamber on the merits of the appeal. In light of the issue on appeal, the Appeals Chamber considered it desirable for the proper determination of this appeal to grant the Applicants leave to submit observations”. (Emphasis added).

16. In the present case the Court could derive assistance from the Applicant’s observations (that are not being put forward by the Prosecution) in safeguarding Saif Gaddafi’s fundamental right to a fair trial, including his right to legal representation, before the ICC. The OPCD’s role is not envisaged to be, and could never be, a substitute for Saif Gaddafi’s own legal representation based on his direct instructions. The administration of justice requires fairness in the pre-trial stages of any and every trial. Such fairness is especially significant in a case such as this where the very venue and judicial forum of the trial will be determined in the current stage, being themselves issues which directly impact on the interests of the suspect. It is therefore desirable for the proper administration of justice and for all of the reasons set out in this Application that leave should be granted.

C. The Applicant, Ms. Hosseinioun

17. The Applicant is well-placed to seek leave from the Chamber to submit observations on the rights of Saif Gaddafi. She is a very close friend and confidant who has requested to have contact with him as family and friends are entitled to do under international human rights instruments including the African Charter of Human and Peoples’ Rights and the Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa (see below). The Chamber is invited to review her letter to

¹³ Observations of the United Nations High Commissioner for Human Rights invited in Application of Rule 103 of the Rules of Procedure and Evidence, ICC-02/05-19, 10 October 2006, see the ‘Executive Summary’ on p. 2 and further, paras. 5 and 7.

the Libyan authorities requesting access to Saif Gaddafi, which has been already forwarded to the ICC, the ICRC, and various Embassies. It is attached hereto as Annex 1.

18. The Applicant is not connected to either the current or former regime in Libya. She is not a member, or close to any members, of the Gaddafi family. It is unlikely that family members would be in a position to visit Saif Gaddafi in Libya as they have fled the country and will not wish, or be able, to return.
19. The Applicant has no personal interest in the case, apart from her wish that Saif Gaddafi's rights are safeguarded without delay. She is particularly concerned that the continued violation of his rights does not go unchallenged, especially given that the Prosecutor has shown no concern for those rights, that there have been reports of extrajudicial killings and torture of detainees in Libya and that the Libyan authorities have stated that Saif Gaddafi could face the death penalty.
20. The Applicant is a US-born, Iranian/American national who is a prominent human rights scholar, having served as a long-time Drafter and member of the Board of Directors of the "2048 Project: Humanity's Agreement to Live Together", a former Research Project of the University of California, Berkeley Law School. She also served as the Project's Reporter for the Draft International Convention on Human Rights. She has Bachelor's degrees in Rhetoric and Near Eastern Studies from the University of California, Berkeley, an MPhil in International Relations from the University of Oxford as a Clarendon Scholar, and is currently a Doctoral Candidate at the University of Oxford. Her dissertation is on the topic of the International Human Rights System and the Middle East.
21. The Applicant has written a number of articles and has given interviews on human rights, in both English and Arabic¹⁴.

¹⁴ See as examples: Foulath Hadid and Mishana Hosseinioun, 'The middle east: the question of freedom', 18 October 2010 (<http://www.opendemocracy.net/foulath-hadid-mishana-hosseinioun/middle-east-question-of-freedom>); Articles by Mishana Hosseinioun, openDemocracy (<http://www.opendemocracy.net/author/mishana-hosseinioun>); Abdul Gaffar Hussain and Mishana Hosseinioun, 'Rise of the 'Universal Arab Emirates'', 9 December 2008 (<http://gulfnnews.com/opinions/columnists/rise-of-the-universal-arab-emirates-1.148400>); Interview, Mishana Hosseinioun, young Human Rights Activist, March 2006 (<http://www.youtube.com/watch?v=zu8ikf10RDM>); Mishana Hosseinioun, 'Prospects for a Regional Human Rights Regime in the Middle East', London Debates 2011 (http://events.sas.ac.uk/fileadmin/documents/postgraduate/London_Debates_2011_Papers/Hosseinioun_submission.pdf); Mishana Hosseinioun, The Universal Dream: drafting the Universal Declaration of Human Rights (<http://www.youtube.com/watch?v=NkAI4EKS9NE>);

D. Reasons for granting leave under Rule 103

Background to Saif Gaddafi's detention

22. Resolution 1970 was adopted by the United Nations Security Council (“UNSC”) on 26 February 2011. The UNSC referred the situation in Libya since 15 February 2011 to the Prosecutor of the ICC and decided that the Libyan authorities “shall cooperate fully with and provide any necessary assistance to the Court”.
23. On 27 June 2011, the Court rendered the “Decision on the ‘Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI” and issued a Warrant of Arrest for Saif Al-Islam Gaddafi for two charges of crimes against humanity¹⁵. On 4 July 2011, the Registrar made a “Request to the Libyan Arab Jamahiriya for the arrest and surrender of Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI”¹⁶.
24. On 23 November 2011 the National Transitional Council (NTC) confirmed by letter to the ICC that they had arrested Saif Al-Islam Gaddafi¹⁷. The NTC accepted that it is bound by Security Council Resolution 1970, and that it intended to co-operate with the ICC, saying it “will cooperate fully with the International Criminal Court and the Security Council”¹⁸.
25. Following suggestions that the NTC wished to try Saif Gaddafi in Libya, the ICC issued a press release on 23 November 2011: “Course of action before the ICC following the arrest of the suspect Saif Al Islam Gaddafi in Libya”¹⁹. In the press release, the ICC confirmed that “The warrant of arrest remains outstanding and

Al Arabiya News Channel Interview with Mishana Hosseinioun, 10 March 2007

(<http://www.youtube.com/watch?v=fs5j571hatw&feature=related>).

¹⁵ Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah ALSENUSSI", ICC-01/11-01/11-1, 27 June 2011; Warrant of Arrest for Saif Al-Islam Gaddafi, ICC-01/11-01/11-3, 27 June 2011.

¹⁶ Request to the Libyan Arab Jamahiriya for the arrest and surrender of Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI, ICC-01/11-01/11-5, 4 July 2011.

¹⁷ Implementation of the ‘Decision to Add Document to Case Record’ (ICC-01/11-01/11-29-Conf-Exp)”, ICC-01/11-01/11-34-Anx, 29 November 2011, p. 2.

¹⁸ Implementation of the ‘Decision to Add Document to Case Record’ (ICC-01/11-01/11-29-Conf-Exp)”, ICC-01/11-01/11-34-Anx, 29 November 2011, p. 2.

¹⁹ ICC Press Release, ‘Course of action before the ICC following the arrest of the suspect Saif Al Islam Gaddafi in Libya’, 23 November 2011, ICC-CPI-20111123-PR746.

procedures as provided for in the Rome Statute need to be followed. The Pre-Trial Chamber Judges have the exclusive competence to decide on the continuation of the ICC judicial procedure” and that “Pre-Trial Chamber I of the ICC remains seized of the case and the Libyan obligation to fully cooperate with the Court remains in force”.

What is known of his current situation?

26. It is reported that Saif Gaddafi is currently being held in Zintan, Libya.

27. In a letter dated 23 November 2011, Mustafa Abdel Jalil, Chairman of the National Transitional Council wrote to the Court stating that:

“I wish to confirm to you that the National Transitional Council arrested Saif Al-Islam Gaddafi on 19 November 2011”²⁰.

Very little is known about the conditions under which Saif Gaddafi is being held. He was visited by the ICRC, which has given no details about the visit besides that he is in good health. This is in sharp contrast to assertions made by Ukrainian-born Doctor, Andrei Murakhovsky, who treated him for a gangrenous wound to his right hand, believed to have been sustained during a NATO attack²¹. Dr. Murakhovsky reported that:

“This wound is not in good condition and requires amputation. The wound is covered with gangrenous tissue and necrotic tissue,” adding that “His index finger has been ripped off at the level of the middle phalange (finger bone), the bones are all shattered... It’s the same thing with the thumb of that hand.”²²

Fred Abrahams of Human Rights Watch (HRW) visited him on December 2011²³. Mr. Abrahams reported that²⁴:

²⁰ Implementation of the ‘Decision to Add Document to Case Record’ (ICC-01/11-01/11-29-Conf-Exp), ICC-01/11-01/11-34-Anx, 29 November 2011, p. 2.

²¹ The Troubling Case of Saif Gadhafi: ICC Prosecutor's Career Move Switches Horses and Legal Theories in Libya, Foreign Policy Journal, 26 November 2011 (<http://www.foreignpolicyjournal.com/2011/11/26/the-troubling-case-of-saif-gadhafi/>). See also: Saif Gaddafi's Injuries 'Turning Gangrenous', Sky News, 25 November 2011 (<http://news.sky.com/home/world-news/article/16117382>).

²² The Troubling Case of Saif Gadhafi: ICC Prosecutor's Career Move Switches Horses and Legal Theories in Libya, Foreign Policy Journal, 26 November 2011 (<http://www.foreignpolicyjournal.com/2011/11/26/the-troubling-case-of-saif-gadhafi/>). See also: Saif Gaddafi's Injuries 'Turning Gangrenous', Sky News, 25 November 2011 (<http://news.sky.com/home/world-news/article/16117382>).

²³ In His First Interview, Saif al-Islam says He Has Not Been Given Access to a Lawyer, Human Rights Watch, 30 December 2011 (<http://www.hrw.org/news/2011/12/30/his-first-interview-saif-al-islam-says-he-has-not-been-given-access-lawyer>).

²⁴ In His First Interview, Saif al-Islam Says He Has Not Been Given Access to a Lawyer, Human Rights Watch, 30 December 2011 (<http://www.hrw.org/news/2011/12/30/his-first-interview-saif-al-islam-says-he-has-not-been-given-access-lawyer>).

“The big problem,” he said of his conditions of detention, “is the total isolation.” Various government officials and military commanders had come to visit him, including the “so-called prime minister,” he said. But he was unable to contact anyone of his own choosing, including by telephone.

“I need to contact my family or my friends in order to find a lawyer,” he told me.

28. As far as the Applicant is aware, there has been no other opportunity for Saif Gaddafi to communicate confidentially with any person. He has to date been unable to instruct a lawyer, despite his clear request to find a lawyer. He has not, so far as is known to the Applicant, had any contact with any friends or family.

29. The Chamber has asked for information from the Libyan authorities including about Saif Gaddafi’s status of arrest, whether he is held incommunicado, and whether and when the Registrar or a representative could meet Saif Gaddafi to seek his views on being assigned counsel. The response that has been received from the Libyan authorities is at present confidential. This response is to be considered by the Chamber and the Chamber may consider it opportune now to receive observations under Rule 103 from the Applicant.

30. It is recorded that Libya’s General Prosecutor, Abdelaziz al-Hasadi, told Human Rights Watch that access to a lawyer would only be granted once a secure facility in Tripoli was built, and Saif Gaddafi was held there²⁵.

“Al-Hasadi told Human Rights Watch that he would allow Gaddafi access to a lawyer as soon as the government prepared a secure detention facility in Tripoli where Gaddafi could be held without risk of attack, either by those wishing to free him or by those wishing him harm. The prosecutor’s office is working to prepare such a location, he said”.

31. No estimate has been provided of how long this may take; there is no publicly available evidence that a secure detention facility in Tripoli is being prepared; no assurance has been provided that the Zintan Military Council will acquiesce to a transfer even were such a facility to be built. There is, in fact, no good reason why Saif Gaddafi has so far not been granted any access to a lawyer or to family or friends,

²⁵ Libya: Ensure Gaddafi Son’s Access to Lawyer, Human Rights Watch, 21 December 2011 (<http://www.hrw.org/news/2011/12/21/libya-ensure-gaddafi-son-s-access-lawyer>).

through whom he could instruct a lawyer given that visits by HRW and ICRC were arranged and took place without risk to Saif Gaddafi or to those visiting him.

32. There are serious concerns, voiced by international human rights organisations, about the stability of Libya, the treatment of detainees in Libya, torture and extra-judicial execution, the capabilities of the domestic justice system, and tensions and divisions between the captors in Zintan and the NTC. Recent events in Bani Walid and the upcoming elections are likely to increase the problems that the country faces.

33. The Applicant will submit in her observations, were leave granted, that Saif Gaddafi is currently detained in Libya without access to legal assistance or to counsel of his choosing. His detention is arbitrary. He has not been brought before a competent judicial authority in the custodial State, Libya. There is reason to believe that he has been questioned without counsel present. There is no assurance that he will be accorded the opportunity to instruct counsel at any definite point in the future. He has been given no opportunity to contact friends or family, even by telephone.

34. He has been held in these conditions for nearly 3 months, notwithstanding Libya's general expressions of intent to respect human rights. His treatment is part of a larger pattern of arbitrary detention of prisoners without access to counsel or communication with friends or family, of extra-judicial executions and of the torture of persons in custody in Libya.

35. It should be noted that in UNSC Resolution 2016 of 27 October 2011, the Security Council expressed "grave concerns about continuing reports of reprisals, arbitrary detentions, wrongful imprisonment and extrajudicial executions in Libya".²⁶ It reiterated its call to the Libyan authorities to respect human rights and urged "respect for the human rights of all people in Libya, including former officials and detainees, during and after the transitional period".²⁷ It decided that it:

"Strongly urges the Libyan authorities to refrain from reprisals, including arbitrary detentions, calls upon the Libyan authorities to take all steps necessary to prevent reprisals, wrongful imprisonment and extrajudicial

²⁶ UN Security Council Resolution 2016, S/RES/2016 (2011), 27 October 2011, p. 1.

²⁷ UN Security Council Resolution 2016, S/RES/2016 (2011), 27 October 2011, p. 2.

executions, and *underscores* the Libyan authorities' responsibility for the protection of its population".²⁸

36. Saif Gaddafi may be at physical risk. He is certainly at risk of not being accorded all his legal rights in proceedings that could take place in Libya or that could, or should, take place at the ICC in The Hague. Responsibility for reducing these risks may be assumed - at least, perhaps, be shared to an extent - by the ICC allowing representations to be made on Saif Gaddafi's behalf by the Applicant. Her representations would work *through* the ICC to ensure that his rights *and safety* are in fact guaranteed to the maximum extent possible. Not to allow her to make such representations would be to leave the ICC and the authorities in Libya - whether the authorities in Zintan or other Libyan authorities - with exclusive co-responsibility for whatever may befall. The ICC, as the sole *international* criminal justice system charged with maintaining Saif Gaddafi's rights, may owe a real duty to equip itself with all available legal and factual arguments to ensure it discharges its duty to a man in custody, in this case to a man widely condemned un-tried by a world that might be careless of what happens to him.

The proper determination of the case

37. The proper determination of this case, as with any case, requires access to a lawyer when requested by a suspect or an accused. In the Applicant's submission it is therefore vital that the Chamber receive the Applicant's observations in respect of legal representation and that proper and fair procedures be followed by the ICC being seised of the present case. Saif Gaddafi undoubtedly has a right to immediate access to a lawyer under the Rome Statute, International Law, and Libyan law (these provisions are listed in detail below in Part E). He also has the right to have contact with friends and family. As noted above, the Applicant is seeking, as a minimum, to have telephone contact with Saif Gaddafi, as a first 'port of call', to assist him with obtaining legal representation.

38. The NTC has stated that they wish to try Saif Gaddafi in Libya for international and national crimes. The admissibility of the case before the ICC will thus have to be litigated before the ICC. Saif Gaddafi is currently unable to make submissions

²⁸ UN Security Council Resolution 2016, S/RES/2016 (2011), 27 October 2011, p. 2.

regarding any of these issues in his own case before the ICC which are fundamental to the future of his case.

39. Under the Statute the admissibility of the case raised by the custodial State cannot be determined without the opportunity for Saif Gaddafi to make submissions before the ICC if he so chooses. It would be incompatible with the ICC Statute for the Court to allow Libya to challenge the admissibility of the case without hearing from Saif Gaddafi or the counsel of his choice, especially when Libya has itself put him in the position in which he is unable to participate or to instruct counsel. Libya should not benefit from its own denial to a detainee of his basic rights.
40. The Chamber has granted the OPCD's request to present observations concerning the general interests of the Defence in any proceedings convened by the Chamber in regard to the admissibility of the case and the status of Saif Gaddafi²⁹. However, this procedure can clearly not substitute for Saif Gaddafi having legal representation and being in a position to make submissions himself, through his chosen counsel, before the ICC. Neither the ICC Prosecutor nor the OPCD have to date highlighted that Saif Gaddafi should be represented directly through his own counsel before the ICC.
41. It must be emphasised that the Pre-Trial Chamber has a wide discretion under Rule 103 to allow observations from any person on any issue that the Court deems appropriate. In light of the above reasons, it is submitted by your Applicant that it would be both desirable for the determination of the case, and appropriate, to allow such representations.

E. Main legal provisions under the ICC Statute and Human Rights law

42. The Applicant, of course, understands that unless and until leave is granted, her observations are not admissible under Rule 103. However, to assist the Chamber in deciding whether it is desirable for the proper administration of justice that leave be given, the Applicant provides an outline of the main legal provisions which she would ask the Court to apply in Saif Gaddafi's case. It is hoped that this summary could assist the Chamber in deciding whether to grant leave to the Applicant.

²⁹ Decision on the request of Libya for extension of time limit to submit observations regarding the arrest of Saif Al-Islam Gaddafi, ICC-O 1/11-01/11-42, 10 January 2012.

Rights under the Rome Statute

43. The minimum rights accorded to Saif Gaddafi must include those of a person under investigation, even if the Case has now progressed to the issuing of a warrant for his arrest. Article 55 governs the rights of persons under investigation. Article 55(1)(d) mandates that a person “Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute”. (Emphasis added).
44. Article 55(2) provides that “Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned: [...]
- (c) To have legal assistance of the person's choosing [...]
 - (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel”. (Emphasis added).
45. Rule 111 requires recording of questioning, and emphasises that due regard is to be paid to Article 55 rights.
46. Upon a request for arrest and surrender, further rights are added by the Rome Statute. Article 59 deals with arrest proceedings in the ‘Custodial State’ (i.e., the State with custody of the relevant person arrested). The general obligations of any Custodial State in relation to the rights of those arrested are set out in Article 59(2) and (3), emphasis added:
- “2. A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:
- (a) The warrant applies to that person;
 - (b) The person has been arrested in accordance with the proper process;
 - and
 - (c) The person's rights have been respected.
3. The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender.”

47. Pre-trial rights once a warrant of arrest has been issued are further supplemented by Article 60 of the Rome Statute. Article 60(2) provides that “A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions”. This logically further heightens the need for access to a lawyer to be given. Rules of Procedure and Evidence, Rule 184 requires the Registrar to make arrangements for surrender with the ‘requested State’. “The person shall be surrendered to the Court by the date and in the manner agreed upon between the authorities of the requested State and the Registrar”³⁰. (Emphasis added).

48. Once a person is considered an ‘Accused’, Article 67 rights apply. Minimum guarantees include Article 67(1)(b), “To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence”; Article 67(1)(c), “To be tried without undue delay”; and Article 67(1)(d), “to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require”.

49. Rule 117(2) provides in relation to detention in the custodial State, that “At any time after arrest, the person may make a request to the Pre-Trial Chamber for the appointment of counsel to assist with proceedings before the Court and the Pre-Trial Chamber shall take a decision on such request”.

International Human Rights instruments

50. The rights accorded under the Rome Statute should be interpreted in the context of established International Human Rights laws, standards and norms. The right of detainees to access legal counsel is a fundamental part of the right to a fair trial, and of the right that restrictions on liberty are limited to those necessary, proportionate, and in accordance with law.

³⁰ Rule 184(2).

51. Further, Libya has ratified a number of Conventions: the African Charter of Human and Peoples' Rights, the Cairo Declaration on Human Rights in Islam, and the International Covenant on Civil and Political Rights, as will follow.

52. Request for Leave to Exceed the 20 page limit. By setting out herein the most relevant provisions it is necessary for the Applicant to seek leave to file this document of 24 pages. She respectfully requests that the Pre-Trial Chamber grants an extension of the 20 page limit under Regulation 37 (2) of the Regulations of the Court on the basis that the exceptional number of potentially relevant instruments that may not *all* be well known to the Court constitutes exceptional circumstances that justify the request being granted.³¹ Incorporating this reference material in this single Application may be much more convenient for the court than to ask for the material to be referenced separately.

53. African Charter of Human and Peoples' Rights:

Article 6

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

Article 7

1. Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal. [...]

54. Cairo Declaration on Human Rights in Islam:

Article 19

- (a) All individuals are equal before the law, without distinction between the ruler and the ruled.
- (b) The right to resort to justice is guaranteed to everyone.
- (c) Liability is in essence personal.
- (d) There shall be no crime or punishment except as provided for in the Shari'ah.
- (e) A defendant is innocent until his guilt is proven in a 'fast' / 'fair' (original text and translations ambiguous for this word) trial in which he shall be given all the guarantees of defence.

³¹ Regulations of the Court, Reg. 37(2).

55. International Covenant on Civil and Political Rights

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. [...]
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

56. The African Commission on Human and Peoples' Rights adopted Principles and Guidelines on the Rights to a fair Trial and Legal Assistance in Africa, pursuant to a Resolution on the Right to a Fair Trial and Legal Assistance, adopted at its 26th session held in November 1999, in which it decided to prepare general principles and guidelines on the right to a fair trial and legal assistance under the African Charter. It provides in relevant part as follows:

A. GENERAL PRINCIPLES APPLICABLE TO ALL LEGAL PROCEEDINGS:

Fair Hearing

The essential elements of a fair hearing include:

(f) an entitlement to consult and be represented by a legal representative or other qualified persons chosen by the party at all stages of the proceedings;

M. PROVISIONS APPLICABLE TO ARREST AND DETENTION:

Rights upon arrest:

a) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his or her arrest and shall be promptly informed, in a language he or she understands, of any charges against him or her.

b) Anyone who is arrested or detained shall be informed upon arrest, in a language he or she understands, of the right to legal representation and to be examined by a doctor of his or her choice and the facilities available to exercise this right.

c) Anyone who is arrested or detained has the right to inform, or have the authorities notify, their family or friends. The information must include the fact of their arrest or detention and the place the person is kept in custody.

e) States must ensure that any person arrested or detained is provided with the necessary facilities to communicate, as appropriate, with his or her lawyer, doctor, family and friends, and in the case of a foreign national, his or her embassy or consular post or an international organization.

f) Any person arrested or detained shall have prompt access to a lawyer and, unless the person has waived this right in writing, shall not be obliged to answer any questions or participate in any interrogation without his or her lawyer being present.

g) Anyone who is arrested or detained shall be given reasonable facilities to receive visits from family and friends, subject to restriction and supervision only as are necessary in the interests of the administration of justice and of security of the institution.

h) Any form of detention and all measures affecting the human rights of a person arrested or detained shall be subject to the effective control of a judicial or other authority. In order to prevent arbitrary arrest and detention or disappearances, states should establish procedures that require police or other officials with the authority to arrest and detain to inform the appropriate judicial official or other authority of the arrest and detention. The judicial official or other authority shall exercise control over the official detaining the person.

Right to be brought promptly before a judicial officer:

a) Anyone who is arrested or detained on a criminal charge shall be brought before a judicial officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.

Right to be detained in a place recognised by law:

a) Any person deprived of liberty shall be held in an officially recognised place of detention.

N. PROVISIONS APPLICABLE TO PROCEEDINGS RELATING TO CRIMINAL CHARGES:

Right to counsel:

(a) The accused has the right to defend him or herself in person or through legal assistance of his or her own choosing. Legal representation is regarded as the best means of legal defence against infringements of human rights and fundamental freedoms.

(b) The accused has the right to be informed, if he or she does not have legal assistance, of the right to defend him or herself through legal assistance of his or her own choosing.

(c) This right applies during all stages of any criminal prosecution, including preliminary investigations in which evidence is taken, periods of administrative detention, trial and appeal proceedings.

(d) The accused has the right to choose his or her own counsel freely. This right begins when the accused is first detained or charged. A judicial body may not assign counsel for the accused if a qualified lawyer of the accused's own choosing is available.

Right to adequate time and facilities for the preparation of a defence:

(a) The accused has the right to communicate with counsel and have adequate time and facilities for the preparation of his or her defence.

(b) The accused may not be tried without his or her counsel being notified of the trial date and of the charges in time to allow adequate preparation of a defence.

(c) The accused has a right to adequate time for the preparation of a defence appropriate to the nature of the proceedings and the factual circumstances of the case. Factors which may affect the adequacy of time for preparation of a defence include the complexity of the case, the defendant's access to evidence, the length of time provided by rules of procedure prior to particular proceedings, and prejudice to the defence.

(d) The accused has a right to facilities which assist or may assist the accused in the preparation of his or her defence, including the right to communicate with defence counsel and the right to materials necessary to the preparation of a defence.

(e) All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate with a lawyer, without delay, interception or censorship and in full confidentiality.

The right to confer privately with one's lawyer and exchange confidential information or instructions is a fundamental part of the preparation of a defence. Adequate facilities shall be provided that preserve the confidentiality of communications with counsel.

57. In addition, other human rights' instruments must be taken into account. The Universal Declaration of Human Rights provides:

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

58. The Convention for the Protection of Human Rights and Fundamental Freedoms (“the European Convention”) provides:

Article 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and the facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

59. The Standard Minimum Rules for the Treatment of Prisoners Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977 provides:

37. Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.

84. (2) Un-convicted prisoners are presumed to be innocent and shall be treated as such.

92. An untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution.

93. For the purposes of his defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions.

Libyan Law

60. Libyan domestic law provides for access to counsel and freedom from arbitrary detention, according to Human Rights Watch:

“Under Libya’s code of criminal procedure, the state must allow a detainee access to a lawyer during investigation if he or she asks for one. Special laws enacted during Muammar Gaddafi’s rule allow restrictions on access to a lawyer, but these restrictions are inconsistent with Libya’s transitional Constitutional Declaration, which entered into force on August 3, 2011. The declaration also provides for a ‘fair trial at which [the accused] has the guarantees necessary for exercising his right of defense.’”³²

F. Conclusion

³² Libya: Ensure Gaddafi Son’s Access to Lawyer, Human Rights Watch, 21 December 2011 (<http://www.hrw.org/news/2011/12/21/libya-ensure-gaddafi-son-s-access-lawyer>).

61. For all of these reasons the Applicant, Mishana Hosseinioun, respectfully requests that she be granted leave to submit observations to the Pre-Trial Chamber in respect of the detention and legal representation of Saif Gaddafi pursuant to Rule 103 as soon as possible.



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

Dated 30th January 2012
London, United Kingdom