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APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding Judge
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Usacka
Judge Daniel David Ntanda Nsereko

SITUATION IN LIBYA

IN THE CASE OF

**THE PROSECUTOR v.
SAIF AL-ISLAM GADDAFI and ABDULLAH AL-SENUSSI**

Public Document

**Document in Support of the “Appeal Against Decision on 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:

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**Victims Participation and Reparations
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Other

A. Introduction

1. The Appellant, Ms. Mishana Hosseinioun, submits this Document pursuant to Regulation 64(2) in support of her Appeal against the Pre-Trial Chamber's Decision of 2 February 2012¹ to reject the Applicant's Application to make observations under Rule 103.² The Appellant has already in her Notice of Appeal of 7 February 2012 set out the grounds of her appeal.³ The Appellant files this Document in Support of her Appeal in order to explain further the error that she submits was committed by the Pre-Trial Chamber.
2. The Pre-Trial Chamber committed a serious error in its Decision of 2 February 2012 by failing to address at all the real basis of the Application under Rule 103. In the Appellant's submission, no reasonable Pre-Trial Chamber could have reached the conclusion of the Pre-Trial Chamber in the present case. The Chamber rejected the Application under Rule 103 on the basis that the Applicant was in effect seeking to contact Mr. Gaddafi in order to provide him with advice she deemed appropriate. A plain reading of the Application shows that this conclusion is irrational and should be overturned by the Appeals Chamber. The Applicant was clearly asking to submit observations under Rule 103 on the issue of Mr. Gaddafi's right to legal representation, which he has been denied by the Libyan authorities, so that he (and not the Applicant) could be in a position to make his *own* representations before the ICC through a lawyer of his choosing on the issue of the admissibility of his case before the ICC.
3. The Applicant emphasised that in light of the reports of instability in Libya and the imminent risks to Mr. Gaddafi's life and well-being, it was critical for the Pre-Trial Chamber to receive her submissions on the issue of Mr. Gaddafi's fundamental human rights to assist the Chamber in the determination of the admissibility of the case before the ICC. The issue of where his trial is to take place is the essential question being considered by the Pre-Trial Chamber in light of the representations received from the

¹ Decision on the Applications of Mishana Hosseinioun and Aisha Gaddafi to submit *Amicus Curiae* observations to the Chamber, ICC-01/11-01/11-49, 2 February 2012 (hereinafter the "Decision of 2 February 2012").

² Application on behalf of Mishana Hosseinioun for Leave to Submit *Amicus Curiae* Observations to the Chamber, ICC-01/11-01/11-46, 30 January 2012 (hereinafter the "Application").

³ Appeal Against Decision on Application Under Rule 103, ICC-01/11-01/11-54, 7 February 2012 (hereinafter the "Notice of Appeal").

Libyan authorities of 20 January 2012.⁴ It is inconceivable that the ICC can determine this matter when Mr. Gaddafi is unrepresented and cannot be heard before the ICC. As a very close friend of Mr. Gaddafi, your Appellant, respectfully requests the Appeals Chamber to permit her to make observations before the Pre-Trial Chamber on his right to have access to a lawyer (and family and friends to assist him if necessary) in order that he can be represented before the ICC to address the venue of his trial. It is a matter that could have the very gravest consequences for Mr. Gaddafi as he could be subjected to the death penalty in Libya.

B. Procedural History

4. On 2 February 2012, the Pre-Trial Chamber rejected the Applicant's Application for leave to make observations under Rule 103 by deciding that the Applicant's request was "misplaced and contrary to the intended purpose of the *amicus curiae* role in criminal proceedings."⁵ The Pre-Trial Chamber determined that the Applicant's Rule 103 Application merely sought "the Chamber's permission to contact Saif Gaddafi and give him access to what they deem to be appropriate legal advice, and therefore do[es] not seek to provide the Chamber with observations which may be 'desirable for the proper determination of the case.'"⁶
5. On 7 February 2012, the Applicant filed an Application for Leave to Appeal before the Pre-Trial Chamber and the present Appeal before the Appeals Chamber. Both the Application for Leave to Appeal and the Appeal submit that the Pre-Trial Chamber erred by "not address[ing] any of the grounds [of the Application] in the Decision."⁷
6. On 14 February 2012, the Pre-Trial Chamber rejected the Application for Leave to Appeal *in limine* by stating that the Applicant "lack[ed] procedural standing to request leave to appeal the Decision" and that the appealable issue presented "does not in fact arise from the Decision."⁸

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, 23 January 2012.

⁵ Decision of 2 February 2012, p. 5.

⁶ Decision of 2 February 2012, p. 5.

⁷ Leave to Appeal of 7 February 2012, paras. 13-14; Notice of Appeal, para. 20.

⁸ 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. 5 (hereinafter the "Decision of 14 February 2012").

7. On 14 February 2012, the Applicant submitted to the Appeals Chamber an Addendum to the Notice of Appeal which corrected her submissions in respect of the Pre-Trial Chamber's Order of 6 December 2011⁹ and the OPCD's Observations of 3 February 2012 that were submitted pursuant to this Order.¹⁰
8. The Applicant asked the Appeals Chamber to consider the Addendum with the Notice of Appeal. However, if the Appeals Chamber is minded to reject the submission of the Addendum on procedural or other grounds, the Applicant hereby incorporates all of the submissions made in the Addendum in this Document in Support of the Appeal as if they were repeated in this Document so that they can be taken into account by the Appeals Chamber in the determination of this Appeal.

C. Standard of appellate review

9. The law on the standard of review in appellate proceedings is well-established in the ICC's jurisprudence. The Appeals Chamber has consistently "required that for a successful appeal, the error raised by an appellant must have materially affected the impugned decision."¹¹ The Appeals Chamber has further clarified that "an error materially affected the impugned decision if the decision would have been 'substantially different'" if not for the error.¹²
10. In the Appellant's submission this standard is satisfied in the present appeal as the Pre-Trial Chamber's error has materially affected the outcome of the Pre-Trial Chamber's Decision. If the Pre-Trial Chamber had considered the Appellant's actual reasons for making the Application under Rule 103, no reasonable Chamber could have rejected the Application with the reasoning expressed by the Pre-Trial Chamber in the present case.

⁹ Public Redacted Version of Decision Requesting Libya to file Observations the Arrest of Saif Al-Islam Gaddafi, ICC-01/11-01/11-39-Red, 6 December 2011.

¹⁰ Public Redacted Version of "OPCD Observations on Libya's Submissions Regarding the Arrest of Saif Al-Islam" (ICC-01/11-01/11-51-Conf, 2 February 2012), ICC-01/11-01/11-51- Red, 3 February 2012.

¹¹ *Prosecutor v. Katanga*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, para. 37.

¹² *Prosecutor v. Katanga*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, para. 37 citing *Situation in the Democratic Republic of the Congo*, Judgment, ICC-01/04-169, 13 July 2006, para. 84.

D. Preliminary point: the Appellant's standing to appeal

“Party to the proceedings”

11. The Pre-Trial Chamber found in its Decision of 14 February 2012 denying leave to appeal that the Applicant “Ms. Hosseinioun is not ‘a party’ to the proceedings relating to the case” and “as a result, Ms. Hosseinioun has no procedural standing to request leave to appeal the Decision pursuant to Article 82(1)(d).”¹³
12. The Appellant respectfully requests the Appeal Chamber not to adopt this reasoning to reject Ms. Hosseinioun’s appeal. The Pre-Trial Chamber’s approach cannot be right as it would mean that Applicants under Rule 103, whether they are States, organisations or individuals have no right of appeal if their applications are rejected in the first instance. The Pre-Trial Chamber appears not to have considered the Appellant’s arguments on this point as the Chamber does not address them at any point in its Decision. The Appeals Chamber is, of course, not bound by the Pre-Trial Chamber’s Decision, and is urged as the appellate body of the ICC to address the argument on this point raised by the Appellant.
13. The Appellant has made her submissions in the Notice of Appeal concerning her standing to appeal the Decision on her Application.¹⁴ The Appellant reiterates that a literal reading and common sense interpretation of Article 82(1)(a) and Rule 155 can only lead to the conclusion that “either party” must refer to the parties in the application or the proceedings which have given rise to the impugned decision.
14. Article 82(1)(a) states that “Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence.”¹⁵ Rule 155 provides that the Chamber “shall notify all parties who participated in the proceedings that gave rise to the decision referred to.”¹⁶ Read together “party” must include the applicant of the application from which the relevant decision arises; in other words, the parties involved in the original application.

¹³ Decision of 14 February 2012, p. 4-5.

¹⁴ Notice of Appeal, para. 3-8.

¹⁵ Article 82(1)(a).

¹⁶ Rule 155(2).

15. The Statute and Rules do not exclude parties who are not party to the case as a whole from being able to appeal decisions involving them as a party. If the Pre-Trial Chamber's view is correct, it would mean that States who had made admissibility challenges would not be entitled to appeal against admissibility decisions in admissibility proceedings of which they had been a part. Clearly, States are not barred from making such appeals, even though they may not be parties in the proceedings of the case as a whole. In the Kenya Situation, the Pre-Trial Chamber held that the Government of Kenya was not a party to the proceedings of the case as a whole but, indeed, "becomes a participant to the proceedings on admissibility" when the State has raised the issue in its own application.¹⁷ The Government of Kenya was entitled to appeal against the admissibility decision in that case.

"Decision with respect to admissibility"

16. The Appeals Chamber will have to decide whether to reject this appeal on the ground that it does not concern a "decision with respect to jurisdiction or admissibility" pursuant to Article 82(1)(a). This provision at first blush may appear to provide a straightforward way to refuse this appeal. Your Appellant asks the Appeals Chamber to consider carefully her argument that the decision is one that concerns admissibility, and to take into account the gravity of the situation faced by Mr. Gaddafi about which the Appellant wishes to make submissions before the Pre-Trial Chamber. The Pre-Trial Chamber, in the Appellant's submission, has brushed aside her application without considering its substance. The Appeals Chamber is urged not to follow the same approach.

17. The Appellant emphasises that the Decision is one in respect of admissibility because the Pre-Trial Chamber refused submissions on the right to be legally represented before the ICC in the admissibility proceedings. The right of the Accused to be heard on the venue of his trial lies at the heart of these proceedings. The terms of Article 82(1)(a) allow for appeals against all decisions "with respect to" admissibility, and not only the final decision on admissibility. If States Parties had intended to limit the right of appeal to the final decision, the provision would have been expressed as such.

¹⁷ *Prosecution v. Muthaura et al.*, Decision on the 'Request by the Government of Kenya in respect of the Confirmation of Charges Proceedings', ICC-01/09-02/11-340, 20 September 2011, para. 9.

Instead, it is phrased more widely to permit the Appeals Chamber a margin of discretion in deciding which decisions that concern admissibility may be appealed directly to the Appeals Chamber. In the Appellant's submission the right to be represented in the admissibility proceedings, which is of fundamental importance to the Accused and the fairness of the proceedings, should come within the ambit of Article 82(1)(a).

18. The Appellant sought to submit before the Pre-Trial Chamber (if her Rule 103 Application had been granted) that the ICC should **not** give up jurisdiction over Mr. Gaddafi's case of which it is presently seised without first hearing from him on this vital matter. Without in any way seeking to make representations on behalf of Mr. Gaddafi, it has to be said that it would hardly be surprising for anyone facing the death penalty in Libya in proceedings that have been widely characterised as unfair to be urging the ICC to retain jurisdiction over the case of which it is seised and to take all steps to have the case tried before the ICC.

E. The serious error committed by the Pre-Trial Chamber

19. The Appellant bases her appeal on the serious error committed by the Pre-Trial Chamber in failing to consider and address the grounds of her Application under Rule 103.
20. The Appellant submits that the Pre-Trial Chamber ignored her legitimate objective of submitting observations about Mr. Gaddafi's right to legal representation of his choosing so that he may make submissions on the admissibility of the case and the venue of his trial *before* the Pre-Trial Chamber makes any determination of these issues. The Pre-Trial Chamber wrongly found that the Application was "effectively seek[ing] the Chamber's permission to contact Saif Gaddafi and give him access to what they deem to be appropriate legal advice."¹⁸ No reasonable Chamber could have reached this conclusion when the Applicant expressly and repeatedly stated that this was not her intention and there was no basis at all to infer such a motivation. The Pre-Trial Chamber provided no reasons for its conclusion – it simply stated it as its finding.

¹⁸ Decision of 2 February 2012, p. 5.

21. The Appellant has made detailed submissions on this point in its Notice of Appeal of 7 February 2012.¹⁹ The Appellant relies on all of these submissions, and in this Document wishes to add to these submissions on three matters: (i) the Appellant provides the Appeals Chamber with the latest reports on the security situation in Libya and Mr. Gaddafi's position as far as it is known from the media; (ii) the Appellant highlights the lack of pro-active steps being taken by the Pre-Trial Chamber or the Prosecutor in light of these circumstances; and, (iii) for completeness, the Appellant includes in this Document certain of the key provisions on the Accused's rights to legal representation and access to family and friends, which she would address in her observations under Rule 103 if permitted by the Appeals Chamber. These points all demonstrate the importance of receiving the Appellant's observations under Rule 103 and the Pre-Trial Chamber's error in refusing this Application for no good reason.

The current security situation in Libya and Mr. Gaddafi's position

22. Developments in Libya which have taken place since the filing of the Notice of Appeal underscore the importance of the observations the Appellant seeks to make before the Pre-Trial Chamber in the course of it determining the admissibility of Mr. Gaddafi's case.

23. The Appeals Chamber is urged to take into consideration the following reports which indicate that Mr. Gaddafi's life and well-being are in danger and that his human rights are being violated:

- On 21 February 2012 it was reported that Saif Gaddafi "is not cooperating" with the committee charged with interrogating him and that he has "rejected accusations against him while insisting on having a lawyer attend the interrogation before trial sessions start."²⁰ The report from the Libyan newspaper Al-Watan shows that Mr. Gaddafi is being interrogated without the presence of counsel and is being denied access to a lawyer.
- A report on 5 February 2012 stated that Saif Gaddafi would be transferred to Tripoli and tried within weeks. Reports say the case will be handed over for

¹⁹ Notice of Appeal, paras. 14-22.

²⁰ Saif Gaddafi refuses to cooperate in investigation, Arabs Today, 21 February 2012 (<http://www.arabstoday.net/en/2012022192978/saif-gaddafi-refuses-to-cooperate-in-investigation.html>).

trial as soon as the on-going investigations against Mr. Gaddafi are completed by the prosecutor general.²¹ No mention is made of him received any legal representation.

- Consistent accusations have been made of detained prisoners being tortured by the Libyan authorities.²²
- Military trials against Libyans accused by the NTC of supporting Gaddafi forces have continued amid allegations of the trials being unfair and the detainees not being able to hire their own lawyers.²³
- The Libyan authorities have requested to have Saadi Gaddafi extradited to Libya for trial. The request has not been acted on by the Niger authorities who have stated that “we cannot hand over someone to a place where he could face

²¹ Libya's Saif Gadhafi could be tried within weeks, official says, CNN, 5 February 2012 (<http://edition.cnn.com/2012/02/05/world/africa/libya-gadhafi/>); Saif Gaddafi's trial could begin within weeks, says NTC, the Independent, 6 February 2012 (<http://www.independent.co.uk/news/world/africa/saif-gaddafis-trial-could-begin-within-weeks-says-ntc-6579559.html>); Col. Moammar Gadhafi's Libyan Legacy: Son Saif al-Islam's Trial to Begin in 'Few Weeks', Business and Law, 6 February 2012 (<http://www.ibtimes.co.uk/articles/293638/20120206/saif-gaddafi-court-trial-niger-muammar-libya.htm>); Saif al-Islam Could Go On Trial Within Weeks, Interior Minister Says, The Tripoli Post, 7 February 2012 (<http://tripolipost.com/articledetail.asp?c=1&i=7854>); Saif Gaddafi to be moved to Tripoli, then tried, Reuters, 12 February 2012; NY protestors urge ICC to take custody of Saif al-Islam Gaddafi, PressTV, 7 February 2012 (<http://www.presstv.ir/detail/225370.html>); Rights Coalition Demand ICC Take Custody of Saif Gaddafi; fears for Safety, Black Star News, 2 February 2012 (<http://blackstarnews.com/news/122/ARTICLE/7941/2012-02-02.html>). (<http://www.reuters.com/article/2012/02/12/us-libya-jalil-idUSTRE81B0G720120212>).

²² REPORT: MILITIAS THREATEN HOPES FOR NEW LIBYA, AMNESTY INTERNATIONAL, 16 FEBRUARY 2012 (<http://www.amnesty.org/en/library/asset/MDE19/002/2012/en/dd7c1d69-e368-44de-8ee8-cc9365bd5eb3/mde190022012en.pdf>); Libya: 'Out of control' militias committing widespread abuses - new report, Amnesty International, 16 February 2012-02-23 (http://www.amnesty.org.uk/news_details.asp?NewsID=19948); Chaos in Libya: Amnesty denounces militias' widespread abuses, Middle East online, 16 February 2012 (<http://www.middle-east-online.com/english/?id=50682>); Gaddafi-era Libyan diplomat tortured to death after detainment: rights group, National Post, 3 February 2012 (<http://news.nationalpost.com/2012/02/03/gaddafi-era-libyan-diplomat-tortured-to-death-after-detainment-rights-group/>); Libya: Lagging Effort to Build Justice System, IEWY News (<http://www.iewy.com/40472-libya-lagging-effort-to-build-justice-system.html>); Libyan detainees died after torture, human rights group says, CNN, 26 January 2012 (http://edition.cnn.com/2012/01/26/world/africa/libya-msf-torture/index.html?hpt=hp_t1); Libyan militias commit war crimes, Amnesty says, GulfNews, 16 February 2012 (<http://gulfnews.com/news/region/libya/libyan-militias-commit-war-crimes-amnesty-says-1.981803>)

²³ Libya court postpones trial of Gaddafi loyalists, Reuters, 6 February 2012 (<http://uk.reuters.com/article/2012/02/05/uk-libya-trial-idUKTRE8140ME20120205>); 41 in court at first Libya trial of Gaddafi loyalists, NDTV, 5 February 2012 (<http://www.ndtv.com/article/world/41-in-court-at-first-libya-trial-of-gaddafi-loyalists-173534>); Trial of Gaddafi loyalists continues, 15 February 2012 (<http://www.zapaday.com/event/361450/0/Trial+of+Gaddafi+loyalists+continues.html>).

the death penalty or where he is not likely to have a trial worthy of the name.”²⁴

- It is reported that the Libyan authorities are struggling to maintain control of militia groups and uprisings in Libya.²⁵

24. The Appellant submits that these and other reports show the clear risks that Saif Gaddafi currently faces in detention in Libya and that he could be tried very soon there in proceedings that are widely regarded by respectable commentators as unfair and in which he would be subject to the death penalty. As far as is known to the Appellant, no Government, NGO, or any other body has had access to and inspected the judicial and prison system operated by the Libyan authorities, let alone stated that the judicial and procedural mechanisms in Libya are to be regarded as fair and in accordance with internationally recognised standards.

The Pre-Trial Chamber and Prosecutor’s failure to address these concerns

25. The Pre-Trial Chamber in its Order of 6 December 2011 has requested further information from the Libyan authorities on Mr. Gaddafi’s conditions of detention and access to legal representation.²⁶ However, the Appellant’s concern remains that neither the Pre-Trial Chamber nor the Prosecutor have taken pro-active steps to ensure that Mr. Gaddafi’s rights are respected by the Libyan authorities and that he is entitled to have legal representation of his choosing in the proceedings before the ICC.

²⁴ Libya wants Gaddafi son extradited, Reuters, 11 February 2012

(<http://www.reuters.com/article/2012/02/11/us-libya-saadi-idUSTRE8191QK20120211>).

²⁵ REPORT: MILITIAS THREATEN HOPES FOR NEW LIBYA, AMNESTY INTERNATIONAL, 16 FEBRUARY 2012 (<http://www.amnesty.org/en/library/asset/MDE19/002/2012/en/dd7c1d69-e368-44de-8ee8-cc9365bd5eb3/mde190022012en.pdf>); Libya: 'Out of control' militias committing widespread abuses - new report, Amnesty International, 16 February 2012-02-23 (http://www.amnesty.org.uk/news_details.asp?NewsID=19948); Libya Struggles to Curb Militias as Chaos Grows, New York Times, 8 February 2012 (http://www.nytimes.com/2012/02/09/world/africa/libyas-new-government-unable-to-control-militias.html?pagewanted=2&_r=1); As Libya celebrates a year of freedom, evidence grows of its disintegration, the Guardian, 19 February 2012 (<http://www.guardian.co.uk/world/2012/feb/19/libya-government-absent-revolution-anniversary>); The Libya mission one year later: Into the unknown, Ottawa Citizen, 18 February 2012 (<http://www.ottawacitizen.com/news/Libya+mission+year+later+Into+unknown/6172099/story.html>); Chaos in Libya: Amnesty denounces militias’ widespread abuses, Middle East online, 16 February 2012 (<http://www.middle-east-online.com/english/?id=50682>); Libya: Lagging Effort to Build Justice System, IEWY News (<http://www.iewy.com/40472-libya-lagging-effort-to-build-justice-system.html>); Libyan militias commit war crimes, Amnesty says, GulfNews, 16 February 2012 (<http://gulfnews.com/news/region/libya/libyan-militias-commit-war-crimes-amnesty-says-1.981803>); Why Libya Is Becoming More Dangerous After Gaddafi's Fall, TIME, 17 February 2012 (<http://www.time.com/time/world/article/0,8599,2107024,00.html?xid=gonewsedit>).

²⁶ 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, para. 11.

26. It should be noted that the Prosecutor in his response to the Applicant's Leave to Appeal did not once express any concern about the violations of the Suspect's rights.²⁷ Instead, he attacked the Application and argued that it should be rejected. These submissions are in stark contrast to the Prosecutor's outspoken views on the judicial systems of States Parties. He has, for example, accused the Government of Kenya of being involved in witness intimidation in the Kenya cases.²⁸ The inconsistencies in the Prosecutor's approach are plainly evident and unexplained.

27. In the absence of the Prosecutor being willing to address the central issues in the current proceedings, it is essential that Pre-Trial Chamber is assisted by the Appellant's participation in the proceedings under Rule 103.

The main International Human Rights instruments

28. In addition to the provisions in the ICC Statute and Rules, the Appellant relied on various International Human Rights instruments in her Rule 103 Application.²⁹ These are set out below for the Appeals Chamber. They are all provisions which the ICC should apply in conjunction with its Statute and Rules (see Article 21). These provisions require that Mr. Gaddafi has access to a lawyer and is able to make representations about the charges he faces before the ICC. Had the Appellant been permitted to make observations, the application of these provisions to the present case would have been included in her submissions to assist the Pre-Trial Chamber in determining the way forward.

29. 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

²⁷ Prosecution Response to Mishana Hosseinioun's 'Application for Leave to Appeal against Decision on Application under Rule 103', ICC-01/11-01/11-58, 13 February 2012.

²⁸ Prosecution's Response to "Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194", ICC-01/09-02/11-86, 10 May 2011, paras. 5, 6, 8, 9, 17, 19, 22, 24.

²⁹ Application, para. 50-60.

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. [...]

30. 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. 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.

32. 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.

33. 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.

34. 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.

35. 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.

36. Libyan domestic law provides for access to counsel and freedom from arbitrary detention:

“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.’”³⁰

F. Conclusion

37. For all of the above reasons, the Appellant submits that the requirements of Article 82(1)(a) and the standard for appellate review are satisfied in that the Pre-Trial Chamber has committed a serious error in its Decision which has materially affected its outcome. The Appellant respectfully requests the Appeals Chamber to reverse the Decision and to permit the Appellant’s observations to be filed under Rule 103.



Sir Geoffrey Nice QC
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Counsel on behalf of Mishana Hosseinioun

Dated 23rd February 2012
London, United Kingdom

³⁰ 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>).