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PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Hans-Peter Kaul
Judge Christine Van den Wyngaert

SITUATION IN LIBYA

IN THE CASE OF

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

Public Document

**Application on behalf of Mishana Hosseinioun for Leave to Submit Observations
to the Pre-Trial Chamber in the Admissibility proceedings**

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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Other

Introduction

1. The Applicant, Ms. Mishana Hosseinioun (whose details are set out at paras. 19-22 below) applies for leave to submit observations before the Pre-Trial Chamber pursuant to Rule 103 in the admissibility proceedings that have been initiated by the “Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute”¹ (“the Admissibility Application”).
2. In accordance with the Pre-Trial Chamber’s “Decision on the Conduct of the Proceedings Following the ‘Application on behalf of the Government of Libya pursuant to Article 19 of the Statute’”, the submissions in response to the Admissibility Application are to be filed by 4 June 2012.² Your Applicant requests leave to submit her observations on the specific matters set out in this application by 4 June, or by such date as ordered by the Chamber.
3. For reasons explained in this application for leave to file observations, the Applicant submits that she has met the requirements of Rule 103. (The applicable law for Rule 103 observations is summarised at paras. 23-26 below.)

Reasons for granting leave under Rule 103

4. Your Applicant seeks leave to submit observations only about the various steps and initiatives that she as a close friend has taken – unsuccessfully – to obtain access to and communicate with Saif al-Islam Gaddafi (“the Accused”) while he has been detained in Libya.

(i) Issues in the admissibility proceedings

5. The Applicant’s observations could assist the Pre-Trial Chamber in its determination of the Admissibility Application as her observations are directly relevant to whether Libya has satisfied the admissibility standard under Articles 17 and 19 of the Rome

¹ Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-130-Red, 1 May 2012 (hereinafter “Admissibility Application”).

² Decision on the Conduct of the Proceedings Following the "Application on behalf of the Government of Libya pursuant to Article 19 of the Statute", ICC-01/11-01/11-134, 4 May 2012 (hereinafter “Decision on Conduct of Admissibility Proceedings”).

Statute. The Chamber will have to consider both whether Libya is investigating or prosecuting the same case as is before the ICC and whether Libya is willing or able genuinely to investigate and prosecute this case.

6. The latter requirement concerns the independence, impartiality, and fairness of the proceedings in the national system.³ A fundamental part of this assessment is whether the Accused's rights are being respected, in particular whether he is being treated properly in detention, has access to his family and friends, and, very importantly, whether he has legal representation of his choosing.
7. As the Chamber will be aware, the Applicant has been trying since January 2012 to obtain access to Mr. Gaddafi so that he could communicate with a close and trusted friend and be assisted in acquiring legal representation if he so chooses. She has not been able to see Mr. Gaddafi or even to make a single phone call to him for over four months. This is an astonishing situation for a country whose authorities claim in their filings to be adhering to international standards.
8. It is evident that the Libyan authorities have been acutely aware that they could not refuse her access outright (especially because they are attempting to promote themselves as democratic and fair-minded authorities). Instead they have frustrated her efforts and made it extremely difficult to make any concrete progress. Most recently, for example, when the Applicant's lawyers contacted the Zintan authorities where Mr. Gaddafi is detained, they were told that the Prosecutor-General of the National Transitional Council (NTC) needed to provide written permission for a visit or contact. However, in the filings of the Libyan authorities the Prosecutor-General blames the Zintan authorities for not co-operating to facilitate access to Mr. Gaddafi.⁴ (The terms 'Government of Libya', 'National Transitional Council' ('NTC') and 'Libyan Authorities' have been used in filings before the court to refer to the same body. The neutral term 'Libyan authorities' will be used in this application save where one of the other terms has to be used for context.)

³ OPCD Request for Authorisation to Present Observations in Proceedings Concerning Mr. Saif Gaddafi, ICC01/11-01/11-33, 28 November 2011, paras. 11-17. See also, *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. 78.)

⁴ Libyan Government Application for leave to reply and reply to OPCD Response to the request to postpone the surrender of Mr Saif Al-Islam Gaddafi pursuant to article 95 of the Statute, ICC-01/11-01/11-149, 16 May 2012, para. 33.

9. The Applicant is not alone in being obstructed by the Libyan authorities. In addition to her direct approaches she has attempted to contact Mr. Gaddafi through the International Committee of the Red Cross (ICRC). However, the ICRC has itself not been able to gain access to Mr. Gaddafi since its only visit in November 2011, some 6 months ago. All of the ICRC's efforts and those of your Applicant have come to nothing. The ICRC has also expressed its concern to the Applicant that no link to Mr. Gaddafi's family has been established or restored since he was captured.⁵
10. It is precisely information of this kind that your Applicant can provide to the Chamber if leave were granted for her to file observations under Rule 103. Such information could assist the Chamber in determining whether the Libyan authorities are conducting themselves in manner that would permit the Chamber to rule that the case is inadmissible.
11. Your Applicant files with this application a summary chart of the main steps that she has taken to get the Libyan authorities to facilitate access to Mr. Gaddafi and of her efforts to safeguard his rights. It is attached as Annex 1. If leave were granted under Rule 103, the Applicant would provide all relevant information about these efforts and initiatives. In addition to those steps referred to above, her observations would include information about the following matters some of which are identified in the attached chart, that would otherwise not be available to the Chamber:
- None of the Applicant's requests to the Prosecutor-General of the NTC to facilitate a visit or phone call has even been acknowledged.
 - She has been told by an official at the Libyan Embassy in London that the direct contact information of the Prosecutor-General "is not for you."⁶
 - Counsel retained by the Libyan authorities and who have filed their Admissibility Application have not acted as a channel for communication for a formal request for access to be submitted to the relevant Libyan authorities (and there is no other lawyer on the ICC's record through whom such an approach could be made).

⁵ See Annex 1, p. 5.

⁶ Annex 1, ln. 30.

- The Applicant has contacted several international organisations involved in Libya including Amnesty International, Human Rights Watch, and the UN Office of the High Commissioner of Human Rights, many of whom have experienced similar difficulties.
- The Applicant has filed a communication about the violation of Mr. Gaddafi's rights with the African Commission on Human and Peoples' Rights⁷. She alone has placed the matter before the African Commission and requested that it should be heard by the African Court of Human Rights. As a result the Commission has requested the NTC to submit its response and, as a provisional measure, to uphold Mr. Gaddafi's rights in detention.⁸ No response has been received from the Libyan authorities.

(ii) Credibility and reliability of the Admissibility Application

12. Another important reason to grant leave to the Applicant to file her observations is that the information she would submit could provide the Chamber with material to assess the credibility and reliability of the assertions made in the Admissibility Application. Such an assessment could be relevant to the determination of whether the case is inadmissible or not. In summary:

- It is contended in the Admissibility Application that Mr. Gaddafi has been able "to receive visits from NGOs and family members".⁹ The ICC Prosecutor made the same statement before the Security Council on 16 May 2012: "Saif also received visits from the ICRC, NGOs and family members."¹⁰ As far as your Applicant is aware, no access to family has been granted and, as noted above, the ICRC has not had any visits since its one visit back in November 2011. Her observations would directly address the real position the Libyan authorities have taken to facilitating visits.

⁷ Communication to Hon Commissioner Dupe Atoki, Chairperson of the African Commission on Human and Peoples' Rights and the Members of the African Commission regarding the Detention of Saif Al-Islam Gaddafi, African Commission for Human and Peoples' Rights, 30 March 2012.

⁸ <http://www.foroyaa.gm/modules/news/article.php?storyid=9591>

⁹ Admissibility Application, para. 35.

¹⁰ ICC Prosecutor Statement to the United Nations Security Council on the situation in the Libyan Arab Jamahiriya, pursuant to UNSCR 1970 (2011), para. 4 (<http://www.icc-cpi.int/NR/exeres/D108F43E-0DE5-4532-9664-FBB2F81C7C1A.htm>).

- In the Admissibility Application it is also claimed that Mr. Gaddafi’s right to counsel has been upheld as he has been given access to ICC lawyers “and the option of retaining a domestic lawyer”¹¹ without acknowledging that he has not been allowed to choose his own lawyers, whether international or domestic.
- “The Libyan Government regards the trial of Mr. Gaddafi ... as a matter of the highest national importance ... in demonstrating that the Libyan justice system is capable of proper investigation and prosecution, and that it can conduct fair trials (that meet all applicable international standards).”¹² The right not to be kept incommunicado and the right to have a lawyer of an accused’s choosing are essential internationally recognised standards that the Applicant’s observations will show are not being accorded to the Accused by the Libyan authorities.
- “The Libyan Government considers that openness and transparency in Libya’s criminal justice system is critical for ensuring that Libyan justice is not only done, but that it is also seen to be done.”¹³ This submission is plainly contradicted by the ways in which the Libyan authorities have obstructed the Applicant’s efforts (and those of other organisations like the ICRC) to guarantee the Accused’s most basic rights.
- “The Libyan Government is committed to meeting all the fair trial requirements”.¹⁴ These include having access to a lawyer of an imprisoned Accused’s choosing and to family and friends.
- “[T]here are allegations of physical abuse and a rushed trial in violation of international standards of due process. These allegations are irresponsible and patently false. No evidence has been tendered to support them.”¹⁵ The Applicant’s observations could provide evidence which the Libyan authorities claim does not exist.

¹¹ Admissibility Application, para. 35.

¹² Admissibility Application, para. 11.

¹³ Admissibility Application, para. 14.

¹⁴ Admissibility Application, para. 57.

¹⁵ Admissibility Application, para. 94.

13. The Chamber should also be informed of a new law enacted by the NTC just after its Admissibility Application was filed which makes “Praising or glorifying Moamar Gaddafi, his regime, his ideas or his sons... punishable by a prison sentence”.¹⁶ This law could be used further to restrict Mr. Gaddafi’s rights and the presentation of his defence; a consideration directly relevant to whether the admissibility test is fulfilled or not.

(iii) Serious concerns about Mr. Gaddafi’s well-being and safety

14. The merits of this application for leave are enhanced by the very serious concerns that have been expressed about Mr. Gaddafi well-being and safety in detention.¹⁷

15. It is a matter of public record that he could face the death penalty in any proceedings in Libya.¹⁸ Assuming that the ICC could contemplate imposition of the death penalty as an appropriate component of a justice system found to meet the admissibility test (an issue not litigated to date in any ICC case) this situation makes clear the absolute need for Mr. Gaddafi to have access to family and friends without delay and to be permitted to obtain legal representation of his choosing.

(iv) Presumption of innocence

16. Your Applicant’s observations are especially important when the Libyan authorities and ICC Prosecutor have made public statements about Mr. Gaddafi’s guilt.¹⁹ Without the ability to communicate with family or friends and to appoint a lawyer of

¹⁶ Libya bans glorification of Gaddafi, ABC News, 3 May 2012 (<http://www.abc.net.au/news/2012-05-03/libya-bans-27glorification27-of-gaddafi-regime/3986428>).

¹⁷ Public Redacted Version of ICC-01/11-01/11-71-Conf-Exp "Report of the Registry on the visit to Libya", ICC-01/11-01/11-71-Red, 5 March 2012, para. 28. The Applicant notes that the Registry’s Public Redacted version of this report was posted on the ICC website for one day and then removed without explanation.

¹⁸ Libyan officials will seek death penalty for Saif al-Islam Gaddafi, 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>); Saif Gaddafi could face death penalty in Libya – minister, Reuters, 20 November 2011 (<http://in.reuters.com/article/2011/11/20/idINIndia-60619320111120>).

¹⁹ Saif al-Islam Gaddafi 'gave direct orders for Libyan opponents to be killed', The Telegraph, 10 May 2012 (<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/9257924/Saif-al-Islam-Gaddafi-gave-direct-orders-for-Libyan-opponents-to-be-killed.html>); Libya has evidence against Saif Gaddafi: ICC, Zeenews, 20 April 2012 (http://zeenews.india.com/news/world/libya-has-evidence-against-saif-gaddafi-icc_770796.html); Evidence of Saif al-Islam ordering killings emerges, Tamil Guardian, 10 May 2012 (<http://www.tamilguardian.com/article.asp?articleid=4791>).

his own choosing Mr. Gaddafi's right to defend himself and to assert his right to be presumed innocent, are severely restricted.²⁰

17. The obvious imbalance between Mr. Gaddafi being kept in isolation while the Libyan authorities, their counsel and the ICC Prosecutor are publicly highlighting what is said to be the evidence against him and making argument about where he must be tried, should be redressed.²¹

18. Furthermore, the security - death - risks associated with publicly discussing the evidence in this way should be highlighted. There must be a real risk that this material could be relied on by Mr. Gaddafi's opponents to kill him.

The Applicant's background

19. The Applicant is Ms. Mishana Hosseinioun (date of birth 30 November 1984). Ms. Hosseinioun is a very close friend and confidant of Mr. Gaddafi.

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 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

²⁰ Libya has evidence against Saif Gaddafi: ICC, Zeenews, 20 April 2012

(http://zeenews.india.com/news/world/libya-has-evidence-against-saif-gaddafi-icc_770796.html)

²¹ The Accomplice, Vanity Fair, 22 August 2011 (<http://www.vanityfair.com/politics/features/2011/08/qaddafi-201108>); The ICC arrest warrants will make Colonel Gaddafi dig in his heels, The Guardian, 4 May 2011

(<http://www.guardian.co.uk/commentisfree/2011/may/04/icc-arrest-warrants-libya-gaddafi>); Where should Saif Gaddafi be put on trial?, The Guardian, 22 November 2012

(http://www.guardian.co.uk/commentisfree/2011/nov/20/saif-gaddafi-trial-libya-the-hague?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+the-guardian%2Fcommentisfree%2Frss+%28Comment+is+free%29).

and the Middle East. The Applicant has written a number of articles and has given interviews on human rights, in both English and Arabic²².

21. 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 apart from the Accused Saif Gaddafi. It is unlikely that family members would be in a position to visit Mr. Gaddafi in Libya as they have fled the country and will not wish, or be able, to return.²³ Only one application of any kind has been made to the ICC, so far as is known publicly, on behalf of a family member, one day after (and probably consequential upon) the Applicant's first filing.²⁴
22. The Applicant has no personal interest in the case, apart from her wish that Mr. Gaddafi's rights are safeguarded without delay. Neither she nor her lawyers have a power of attorney from Mr. Gaddafi, and neither she nor they seek or intend to speak on Mr. Gaddafi's behalf. The Applicant has made it absolutely clear that her efforts to guarantee Mr. Gaddafi's right to legal representation of his choosing, and access to family and friends, are in no way intended to impose counsel or advice on Mr. Gaddafi.

The applicable law

23. Rule 103(1) provides that "At any stage of the proceedings, a chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a

²² 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://gulfnews.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>); Al Arabiya News Channel Interview with Mishana Hosseinioun, 10 March 2007 (<http://www.youtube.com/watch?v=fs5j571hatw&feature=related>).

²³ Mr. Gaddafi has informed the OPCD that he was told by the Libyan Attorney-General that "it would not be possible for him to receive any family visits." Public Redacted Addendum to the Urgent Report Concerning the Visit to Libya, ICC-01/11-01/11-70-Red, 5 March 2012, para. 45.

²⁴ Application on behalf of Aisha Gaddafi for leave to submit amicus curiae observations concerning her brother - Saif al-Islam Gaddafi, ICC-01/11-01/11-47, 31 January 2012.

State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.”²⁵

24. Under the ICC’s jurisprudence a Chamber has a broad discretion under Rule 103 to grant leave to any party at *any* stage. In determining whether observations are desirable, a Pre-Trial Chamber has held that “the first and foremost factor for leave to be granted pursuant to rule 103 of the Rules is whether the relevant application relates to an issue that is actually before the competent Chamber.”²⁶
25. The Appeals Chamber has held that Rule 103 gives the Chamber a discretion to grant leave to submit observations if it “may assist the ... Chamber in the proper determination of the case.”²⁷ In a previous determination of a Rule 103 application, leave to submit observations was granted because the Chamber “considered it desirable” to hear “another view to that of the Prosecutor who was the only participant to have made submissions.”²⁸
26. Trial Chamber I clarified that observations of an Applicant might assist “in its ‘proper determination’ of the issues” when the observations seek “to supply information and assistance of direct relevance on certain issues that otherwise will not be available to the Court.”²⁹

Conclusion

27. The Applicant has, as the attached Annex 1 reveals, done all that a citizen who happens to be a friend of a detained accused person can do to ensure his rights are established and guaranteed. She has done so against a background of seeming tension and disagreement within the ICC in which she has not, of course, been involved, grateful though she is for the stand taken by the OPCD.

²⁵ Rules of Procedure and Evidence, Rule 103(1).

²⁶ Decision on Application under Rule 103, ICC-02/05, 4 February 2009, para. 8.

²⁷ *Prosecutor v. Lubanga*, Decision on Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence”, ICC-01/04-01/06-1289, 22 April 2008, para. 8. See also, Reasons for ‘Decision on the Application of 20 July 2009 for Participation under Rule 103 of the Rules of Procedure and Evidence and on the Application of 24 August 2009 for Leave to Reply, ICC-02/05-01/09 OA, 9 November 2009, para. 7.

²⁸ Reasons for ‘Decision on the Application of 20 July 2009 for Participation under Rule 103 of the Rules of Procedure and Evidence and on the Application of 24 August 2009 for Leave to Reply, ICC-02/05-01/09 OA, 9 November 2009, para. 9.

²⁹ *Prosecutor v. Lubanga*, Decision Inviting Observations from Special Representative of the Secretary General of the United Nations for Children and Armed Conflict, ICC-01/04-01/06-1175, 18 February 2008, para. 7.

28. However at the core of the present part of proceedings is whether ‘complementarity’ conditions exist in Libya sufficient for it to try Mr Gaddafi, even unto death. On this single issue the Applicant has revealed an objective and analytical approach to the single issue she wishes to advance. She has taken many steps, evidence of which would all be relevant to the Chamber in its determination but most, if not all, of which will not be available to the Chamber unless leave is granted. She asks the Chamber to say that for the above reasons she, of all those involved to date, should be heard, to provide evidence and argument of unimpeachable value and integrity because she is free from any but a proper, and openly revealed, interest – to ensure respect for the basic human rights of a detained person, reviled by many, but whom she is prepared publicly to say is a friend in need.
29. For reasons set out in this application, the Applicant respectfully requests that she is granted leave to submit observations on the specific issues outlined above to the Pre-Trial Chamber under Rule 103.



Sir Geoffrey Nice QC
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Dated 23rd May 2012
London, United Kingdom