



Original: **English**

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

Date: **22 August 2013**

THE APPEALS CHAMBER

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

SITUATION IN LIBYA

IN THE CASE OF

THE PROSECUTOR

v.

SAIF AL-ISLAM GADDAFI and ABDULLAH AL-SENUSSI

Public Document with Public Annexes 1-4

Observations on behalf of Mishana Hosseinioun pursuant to Rule 103

Source: Mishana Hosseinioun, represented by Sir Geoffrey Nice QC and Rodney Dixon

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor
Ms. Fatou Bensouda, Prosecutor

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

Counsel for Saif Gaddafi:
Mr. John Jones QC
Ms. Sarah Bafadhel

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

Legal Representatives of the Applicant

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

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

Amicus Curiae

REGISTRY

Registrar
Mr. Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. Introduction

1. On 9 July 2013, Ms. Mishana Hosseinioun applied to the Appeals Chamber for permission to submit written observations in respect of Libya's appeal against Pre-Trial Chamber I's Decision on the Admissibility of the case against Saif Al-Islam Gaddafi.¹ Ms. Hosseinioun sought leave to submit observations only on particular matters raised in relation to Libya's fourth ground of appeal concerning the Pre-Trial Chamber's finding that Libya's national justice system is "unavailable".² She submitted that these specific observations could "assist the Appeals Chamber ... to show that the Pre-Trial Chamber's findings [in this regard] are not erroneous."³
2. In her application for leave, Ms. Hosseinioun highlighted that her applications before, and the findings of, the African Commission on Human and Peoples' Rights ("the Commission") and the African Court on Human and Peoples' Rights ("the African Court") were relevant to demonstrating that Libya's national justice system is unable to try Mr. Gaddafi in Libya and that the ICC should determine that his case is admissible before the ICC. She specifically asked to make observations before the Appeals Chamber regarding these particular matters.
3. On 15 August 2013, the Appeals Chamber found "it desirable for the proper determination of this appeal to grant leave to Ms Hosseinioun to submit observations in accordance with her request."⁴
4. Ms. Hosseinioun hereby submits her observations pursuant to and in accordance with the limits of the Appeals Chamber's Decision. She sets out below the steps she has taken to seek to secure Mr. Gaddafi's fundamental rights through extensive proceedings before the African Commission and African Court to enforce and protect his rights under the African Charter of Human and Peoples' Rights ("the African Charter"). The relevant documentation from these proceedings has been annexed hereto for the ease of reference of the Court.⁵ As the Complainant in the

¹ Application on behalf of Mishana Hosseinioun for Leave to Submit Observations to the Appeals Chamber pursuant to Rule 103, ICC-01/11-01/11-379, 9 July 2013.

² *Id.*, at paras. 16-20.

³ *Id.*, at para. 18.

⁴ Decision on the 'Application on behalf of Mishana Hosseinioun for Leave to Submit Observations to the Appeals Chamber pursuant to Rule 103, ICC-01/11-01/11-404, 15 August 2013, para. 8.

⁵ These court documents are annexed in accordance with Regulation 36(2)(b) of the Regulations of the Court so that they are readily available to the Chamber and the parties as case references.

Communication before the African Commission and African Court, Ms. Hosseinioun is able to assist the Chamber with observations concerning these proceedings.

5. Ms. Hosseinioun asks that this material is taken into consideration by the Appeals Chamber as being in support of the Pre-Trial Chamber's finding that Libya is unable to try Mr. Gaddafi and that he should be immediately transferred to the ICC for trial. Ms. Hosseinioun stresses that throughout the proceedings before the African Commission and the African Court, Libya has not once even responded to the Commission or the Court. Despite being a party to the African Charter, Libya has completely ignored the African Union's (AU) regional human rights' mechanisms. Most significantly, Libya has failed to address and implement any of the provisional measures for the protection of Mr. Gaddafi's rights under the African Charter as ordered by the Commission and the Court. As a result, Libya has been referred to the AU for action to be taken to enforce the Commission's and the Court's orders. It is submitted that these particular failings, reflecting lack of capacity and/or lack of will to comply with the Commission's or the Court's orders, establish beyond doubt that Libya is unable to deliver justice in any national proceedings for Mr. Gaddafi.

6. Ms. Hosseinioun submits that none of her observations amount to 'additional' or 'new' 'evidence' in the appeal. The proceedings before the African Commission and African Court were raised by Ms. Hosseinioun before the Pre-Trial Chamber and addressed by the OPCD in the proceedings before the Pre-Trial Chamber.⁶ Libya has been aware throughout the admissibility proceedings of the proceedings before the African Commission and the African Court as the filings and decisions of the Commission and the Court have been notified to Libya, and they have been introduced as evidence by OPCD in the admissibility proceedings including in the OPCD's Response to Libya's Admissibility Challenge against Mr. Gaddafi⁷ and during the Admissibility Hearing on 10 October 2012.⁸ Ms. Hosseinioun has made reference in

⁶ Request to dismiss the "Notification by Libyan Government supplemental to its consolidated reply to the responses of the Prosecution, OPCD and OPCV to its further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi" in limine, ICC-01/11-01/11-308, para. 10(d), 15 and ICC-01/11-01/11-308-AnxA; Public Redacted Version of the Corrigendum to the 'Defence Response to the 'Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute,' ICC-01/11-01/11-190-Corr-Red, 31 July 2012, para. 209; Transcript of Admissibility Hearing, ICC-01/11-01/11-T-3-Red, 10 October 2012, page 29, line 2-3.

⁷ Public Redacted Version of the Corrigendum to the 'Defence Response to the 'Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute,' ICC-01/11-01/11-190-Corr-Red, 31 July 2012, para. 209.

⁸ Transcript of Admissibility Hearing, ICC-01/11-01/11-T-3-Red, 10 October 2012, page 29, line 2-3.

the present Observations to proceedings before the African Commission and African Court that occurred after the Pre-Trial Chamber's decision on admissibility only so that the Court and the parties are brought up to date on the current stage of the legal proceedings.⁹

II. Steps taken to seek to guarantee Mr. Gaddafi's rights

7. As noted in her application of 9 July 2013, Ms. Hosseinioun is a personal friend of Mr. Gaddafi. She is not a member, nor is she close to any other members, of the Gaddafi family. She has no connection to either the current or the former regime in Libya. Ms. Hosseinioun's only interest is to seek to ensure that Mr. Gaddafi's fundamental rights and well-being are safeguarded, guaranteed and actually delivered by those with the authority and power to do so and/or to the maximum extent possible by those with the authority to compel or persuade those with the actual authority or power to do so.
8. Ms. Hosseinioun has pursued all other available avenues to seek to guarantee Mr. Gaddafi's rights and well-being in detention. Her sustained efforts, since January 2012, have included contact with the Libyan Prosecutor-General, Libyan Minister of Justice, Counsel retained by the Libyan Government in this case, the Libyan Embassy in London, US Embassy in Libya, UK Embassy in Libya, the United Nations Support Mission in Libya, the United Nations High Commissioner of Human Rights, the International Committee of the Red Cross, Amnesty International, Human Rights Watch, numerous individuals in the media and other organisations.

⁹ This is akin to any appeal court being informed of, say, developments in the law subsequent to the date of a decision under appeal. It should be noted that in accordance with the ICC's jurisprudence additional evidence is not admissible in an interlocutory appeal before the Appeals Chamber (See, Decision on the "Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility", ICC-01/09-02/11-202, 28 July 2011, paras. 9-12; Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled "Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation", ICC-02/05-03/09-295, 17 February 2010, para. 20; Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges", ICC-01/05-01/08-962, 19 October 2010, para. 32). Ms. Hosseinioun has not sought to introduce any new evidence in the present Observations. In this case there has been a steady flow of 'open source' material about the conduct of the Libyan authorities that has been referred to in the pleadings. Some of it is referred to in the filings with the African Commission and the African Court made to date by Ms Hosseinioun. Respecting the limits of permission granted to her by the Appeal Chamber for this filing and the ICC's case law, Ms Hosseinioun does not seek to add here references to any other 'open source' material.

9. These efforts have been set out in various filings she has made before the Pre-Trial Chamber and in the proceedings before the African Commission and the African Court.

10. Before the Pre-Trial Chamber she has made the following applications:

- a. On 30 January 2012, she submitted a Rule 103 application for leave to request the Chamber to take specified steps in order to ensure that Mr Gaddafi's rights are fully respected¹⁰, including that "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;" that "Libya should be required to provide clear guarantees about the circumstances of Saif Gaddafi's detention in Libya;" that "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;" and that "Libya should be required in the present case either to make an admissibility challenge or comply with its obligations to surrender Saif Gaddafi."¹¹ The Pre-Trial Chamber refused Ms Hosseinioun leave to submit these observations on 2 February 2012.¹²
- b. On 13 April 2012, she applied for leave to make observations about Mr Gaddafi's right freely to choose legal representation as a matter of urgency.¹³ The application emphasised the importance of ensuring Mr. Gaddafi's right to choose counsel at that stage in the proceedings and requested that the Court facilitate access for family and friends to assist Mr. Gaddafi and ensure that that he was made aware of all filings concerning his right to legal representation. The Pre-Trial Chamber did not accept this application.¹⁴

¹⁰ Application on behalf of Mishana Hosseinioun for Leave to Submit *Amicus Curiae* Observations to the Chamber, ICC-01/11-01/11-46, 30 January 2013, para. 11.

¹¹ *Id.*

¹² 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.

¹³ Application on behalf of Mishana Hosseinioun for Leave to Submit Observations to the Pre-Trial Chamber, ICC-01/11-01/11-108, 13 April 2013, para. 2.

¹⁴ Decision on the 'Application on behalf of Mishana Hosseinioun for Leave to Submit Observations to the Pre-Trial Chamber', ICC-01/11-01/11-124, 24 April 2012.

- c. On 23 May 2012, she applied for leave to submit observations on all steps that she had taken to protect Mr. Gaddafi's rights¹⁵ urging that her 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 Statute."¹⁶ The Pre-Trial Chamber rejected this application on 4 June 2012.¹⁷
- d. On 9 November 2012, Ms. Hosseinioun applied for permission to submit the African Commission's decision on Libya's compliance with the Commission's provisional measures arguing that Libya's non-compliance with the Provisional Measures issued by the Commission "is relevant to the proper determination of the admissibility of Mr. Gaddafi's case."¹⁸ The Pre-Trial Chamber has to date not issued a decision on this Rule 103 Application.

11. Following a very large number of refusals by Libya to her requests for access to Mr. Gaddafi, Ms. Hosseinioun took the matter up before the African Commission. The details of these proceedings are set out below.

III. Observations on the proceedings before the African Commission and Court

12. As a result of Ms. Hosseinioun's applications both the African Commission and the African Court have ordered Libya to implement Provisional Measures immediately to guarantee Mr. Gaddafi's rights under the African Charter whilst in detention in Libya. As a party to the African Charter of Human and Peoples' Rights since 1985¹⁹, Libya is bound to uphold the rights enshrined in the African Charter and to abide by the orders and decisions of the African Commission and the African Court. As shown below in the chronology of the proceedings, Libya's complete failure to implement these measures – even to acknowledge the Commission's and the Court's orders –

¹⁵ Application on behalf of Mishana Hosseinioun for Leave to Submit Observations to the Pre-Trial Chamber in the Admissibility proceedings, ICC-01/11-01/11-156, 23 May 2012, para 4.

¹⁶ Application on behalf of Mishana Hosseinioun for Leave to Submit Observations to the Pre-Trial Chamber in the Admissibility proceedings, ICC-01/11-01/11-156, 23 May 2012, para 5.

¹⁷ Decision on the 'Application on behalf of Mishana Hosseinioun for Leave to Submit Observations to the Pre-Trial Chamber in the Admissibility Proceedings', ICC-01/11-01/11-169, 4 June 2013.

¹⁸ Application on behalf of Mishana Hosseinioun for Leave to Submit Document to the Pre-Trial Chamber pursuant to Rule 103, ICC-01/11-01/11-232, 9 November 2012, paras. 1, 2.

¹⁹ See African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya Application, No. 004/2011, para. 17. Libya signed the African Charter of Human Rights on 30 May 1985, and ratified it on 19 July 1986 (http://www.achpr.org/english/ratifications/ratification_african%20charter.pdf).

demonstrates the inability of the Libyan national justice system to deliver justice in any national proceedings concerning Mr. Gaddafi.

13. Libya's failure to implement the Provisional Measures lends support to the Pre-Trial Chamber's findings in two ways:

- Libya has not implemented the Provisional Measure that Mr. Gaddafi be allowed access to a lawyer of his choosing.²⁰ The Pre-Trial Chamber found that the difficulty of securing a lawyer for Mr. Gaddafi "appears to be an impediment to the progress of proceedings against Mr Gaddafi" and "[i]f this impediment is not removed, a trial cannot be conducted in accordance with the rights and protections of the Libyan national justice system."²¹
- Libya has not implemented the Provisional Measure to allow Mr. Gaddafi to be visited by family members and friends.²² The Pre-Trial Chamber found that Libya is "unable to obtain the accused"²³, and now Libya argues on appeal that the Chamber erred as Mr. Gaddafi has been visited by NGOs. However, despite having been ordered by the African Commission and African Court to allow visits from family and friends, Libya has not complied. All of Ms. Hosseinioun's efforts to visit Mr. Gaddafi have been blocked.

14. Notwithstanding the numerous requests by the African Commission and the African Court to Libya to respond to their directives and decisions, Libya has not engaged at all. This demonstrates that Libya is incapable of providing Mr. Gaddafi with the procedural guarantees of its national system, as enshrined in the African Charter.

²⁰ Order for Provisional Measures, In the Matter of African Commission on Human and Peoples' Rights v. Libya, Application No. 002/2013, 15 March 2013, para. 20; Request for Provisional Measures Under Rule 98 of the Rules of Procedure of the African Commission on Human and Peoples' Rights, Letter from Honourable Commissioner Catherine Dupe Atoki, Chairperson of the African Commission on Human and Peoples' Rights to H.E. Mr. Mustafa Abdul Jalil, Chairman of the National Transitional Counsel, 18 April 2012, p. 2.

²¹ Decision on the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-344-Red, 31 May 2013, para. 214. See also, Document in Support of the Government of Libya's Appeal against the 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi', ICC-01/11-01/11-370-Red2, 24 June 2013, para. 167.

²² Order for Provisional Measures, In the Matter of African Commission on Human and Peoples' Rights v. Libya, Application No. 002/2013, 15 March 2013, para. 20; Request for Provisional Measures Under Rule 98 of the Rules of Procedure of the African Commission on Human and Peoples' Rights, Letter from Honourable Commissioner Catherine Dupe Atoki, Chairperson of the African Commission on Human and Peoples' Rights to H.E. Mr. Mustafa Abdul Jalil, Chairman of the National Transitional Counsel, 18 April 2012, p. 2.

²³ Decision on the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-344-Red, 31 May 2013, paras. 206-208.

Libya's failure to respond was noted several times by the OPCD during the admissibility proceedings before the Pre-Trial Chamber.²⁴

15. The jurisprudence of the African Commission states that the "poor state of criminal justice" in a country does not excuse the failure to secure a person's detention rights in an expeditious manner, and that "whenever there is a crime that can be investigated and prosecuted by the State on its own initiative, the State has the obligation to move the criminal process forward to its ultimate conclusion." This jurisprudence was referred to in the OPCD's Response to the Admissibility Challenge.²⁵

16. The decisions of the African Commission and African Court on the implementation of pre-trial provisional measures highlight that the basic human rights sought for Mr. Gaddafi are not an optional adjunct to a fair trial but are an essential prerequisite for any trial that is to meet the standards expressed in the African Charter. First, there are very obvious practical consequences of any denial of these rights to a person on trial making legal arguments and factual submissions and dealing with witnesses, whether by himself or by a lawyer on his behalf. Second, arbitrary and / or wilful or negligent denial of these rights by a government or prosecuting authority reflects disregard for recognised and binding norms and that very disregard will forever leave uncertainty as to the integrity of any trial. An accused convicted in such circumstances will never have confidence in the process by which he was convicted. The public will never have such confidence. Preserving basic human rights and compelling States thereby to meet required norms can have the most immediate effect on the person detained or tried; but it also affects the overall integrity of the trial itself.

17. The proceedings before the African Commission and the African Court have progressed over the course of nearly 18 months, the details of which are set out below.

Proceedings before the African Commission

²⁴ Public Redacted Version of the Corrigendum to the 'Defence Response to the 'Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute,' ICC-01/11-01/11-190-Corr-Red, 31 July 2012, para. 209; Transcript of Admissibility Hearing, ICC-01/11-01/11-T-3-Red, 10 October 2012, page 29, line 2-3.

²⁵ Public Redacted Version of the Corrigendum to the 'Defence Response to the 'Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute,' ICC-01/11-01/11-190-Corr-Red, 31 July 2012, para. 209.

18. Ms. Hosseinioun submitted her Communication²⁶ to the African Commission on 30 March 2012, requesting the Commission to “a.) Direct Libya not to proceed further with any actions concerning the legal proceedings, investigation against or detention of Mr. Gaddafi that will cause irreparable damage to Mr. Gaddafi before this case is heard before the Commission, ...[including] interrogation or legal proceedings without counsel of his choosing, as well as, the application of the death penalty following any proceedings; b.) Find that the NTC is in violation of Mr Gaddafi’s rights under Articles 6 and 7 of the African Charter; c.) Direct the NTC to allow Mr Gaddafi access to a lawyer immediately and without delay; and d.) Submit Mr Gaddafi’s case to the African Court on Human and Peoples’ Rights, pursuant to Article 5(1)(a) of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights.”²⁷

19. In response to the Communication (Communication 411/12), the Commission issued Provisional Measures on 18 April 2012 pursuant to Rule 98 of the African Commission’s Rules of Procedure requiring Libya “Ensure that Mr. Saif Al-Islam Gaddafi has access to his lawyers; Can receive visits from his family members and friends; Disclose the location of his detention; and Guarantee the integrity of his person and his right to be tried within a reasonable time by an impartial court or tribunal as per Articles 4 and 7 respectively of the African Charter.”²⁸ This ruling is attached hereto as Annex 1.

20. On 18 May 2012, Ms. Hosseinioun was informed that the African Commission considered her Communication at its 51st Ordinary Session from 18 April to 2 May 2012 and decided to be seized of it. The Commission requested the Applicant to submit arguments on the Admissibility of the Communication by 21 July 2012 with Admissibility to be considered at the 52nd Ordinary Session from 9 to 22 October 2012.²⁹

²⁶ 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,” filing to the African Commission, 30 March 2012.

²⁷ 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,” filing to the African Commission, 30 March 2012, para. 2.

²⁸ Request for Provisional Measures Under Rule 98 of the Rules of Procedure of the African Commission on Human and Peoples’ Rights, Letter from Honourable Commissioner Catherine Dupe Atoki, Chairperson of the African Commission on Human and Peoples’ Rights to H.E. Mr. Mustafa Abdul Jalil, Chairman of the National Transitional Counsel, 18 April 2012.

²⁹ Letter from the African Commission, ACHPR/COMM/411/12/LBY/0.1/412/12, 18 May 2012.

21. On 2 July 2012, Ms. Hosseinioun submitted an application to the African Commission³⁰ which noted that “there has been no response [from Libya] to the request for provisional measures” of 18 April 2012 and therefore she asked that the Commission refer Communication 411/12 to the African Court pursuant to Rule 98(4),³¹ Rule 118(2)³² and 118(4).³³

22. On 9 July 2012, Ms. Hosseinioun made submissions to the Commission on the Admissibility of Communication 411/12 in accordance with the Commission’s instructions of 18 May 2012. Ms. Hosseinioun asked the Commission to “[f]ind that her Communication is admissible” and “[e]xpeditely consider of her Communication either by convening an Extraordinary Session pursuant to Rule 27 or otherwise”³⁴ in light of the fact that “Mr. Gaddafi has already been detained arbitrarily and incommunicado for a period of six months” with no change in the condition of his detention.³⁵ Ms. Hosseinioun further noted that to date Libya had not responded to the Commission’s Provisional Measures of 18 April 2012.³⁶ Annexed to the submissions on admissibility was a statement from Ms. Hosseinioun providing evidence of the steps she had taken to seek to uphold Mr. Gaddafi’s fundamental rights to a lawyer and to have access to family and friends.³⁷

23. On 19 July 2012, Ms. Hosseinioun received confirmation from the African Commission “acknowledg[ing] receipt of your submissions” and noting that “In accordance with Rule 105(2) of the Rules of Procedure ... your submissions on Admissibility have been transmitted to the Respondent State, who is required to forward its written submission on Admissibility to the Secretariat, within two months

³⁰ Application by Mishana Hosseinioun for the Commission to Refer Her Communication to the Court Pursuant to Rule 118, 2 July 2012.

³¹ Rule 98(4) of the Rules of Procedure for the African Commission on Human and Peoples’ Rights provides that: “*The Commission shall request the State Party concerned to report back on the implementation of the Provisional Measures requested. Such information shall be submitted within fifteen (15) days of the receipt of the request for provisional measures.*”

³² Rule 118(2) provides that: “*If the Commission has made a request for Provisional Measures against a State Party in accordance with Rule 98, and considers that the State has not complied with the Provisional Measures requested, the Commission may pursuant to Article 5(1)(a) of the Protocol, refer the communication to the Court and inform the complainant and the State concerned.*”

³³ Rule 118(4) provides that: “*The Commission may seize the Court at any stage of the examination of a communication if it deems necessary.*”

³⁴ Submissions on Admissibility on Behalf of Mishana Hosseinioun, 9 July 2012, para. 31.

³⁵ *Id.*, at paras. 7, 8.

³⁶ *Id.*, at para. 8.

³⁷ Submissions on Admissibility on Behalf of Mishana Hosseinioun, Statement of Ms. Mishana Hosseinioun to the African Commission on Human and Peoples’ Rights, 9 July 2012.

of this letter, that is, by 19 September 2012.” The Commission further noted that Ms. Hosseinioun’s “application to refer the Communication to the African Court will be considered by the African Commission during its 12th Extra-Ordinary Sessions” on 30 July to 4 August 2012.³⁸

No response from Libya

24. On 27 August 2012, Ms. Hosseinioun was informed by the African Commission that during the 12th Extra-Ordinary Sessions from 30 July to 4 August 2012 it was decided that the Provisional Measures would be sent again to Libya in order to give the Libyan authorities a second chance to provide observations on their implementation. The Commission informed Ms. Hosseinioun that the Commission would consider any response from the Libyan authorities, or lack thereof, at the Commission’s Ordinary Session from 9 to 22 October 2012 to decide whether Ms. Hosseinioun’s application to refer Libya to the African Court for non-compliance with the Provisional Measures is warranted.³⁹

25. On 31 August 2012, a letter was sent on behalf of Ms. Hosseinioun requesting official notification of the African Commission’s determination at the 12th Extra-Ordinary Sessions from 30 July to 4 August 2012.⁴⁰

26. On 8 September 2012, Ms. Hosseinioun submitted an application to the African Commission emphasising the urgency of the implementation of the Provisional Measures granted on 18 April 2013⁴¹ and requested “that the Commission exercise its discretion to allow oral submissions on the Complainant’s behalf at an oral hearing on the issue of the Respondent State’s compliance with the Provisional Measures at its 52nd Ordinary Session, in order to allow the Complainant to respond to any submissions made by the Respondent State and to update the Commission on the very latest position when the Commission considers and decides the matter.”⁴²

³⁸ Letter from the African Commission, ACHPR/COMM/411/12/LBY/0.1/617/12, 19 July 2012.

³⁹ Telephone and Email Correspondence with the African Commission, 27 August 2012.

⁴⁰ Letter to Dr. Mary Maboreke, Secretary of the African Commission, concerning Communication 411/12 – Mr. Saif Al-Islam Gaddafi (represented by Mishana Hosseinioun) v. Libya, 31 August 2012.

⁴¹ Application by Mishana Hosseinioun for the Commission to Hear Oral Submissions on Her Behalf on Libya’s Compliance with Provisional Measures at the 52nd Ordinary Session, 8 September 2012, para. 1.

⁴² Application by Mishana Hosseinioun for the Commission to Hear Oral Submissions on Her Behalf on Libya’s Compliance with Provisional Measures at the 52nd Ordinary Session, 8 September 2012 at paras. 2, 24.

27. On 18 September 2012, Ms. Hosseinioun supplemented her application for an oral hearing of 18 September following Libya's announcement "that the trial of Mr. Gaddafi will be delayed by five months as the authorities intend to use in his case evidence obtained in the interrogation of Abdullah Al-Senussi against Mr. Gaddafi."⁴³ Ms. Hosseinioun submitted that "the determination of whether Libya has complied with Provisional Measures remains a matter of great urgency"⁴⁴ and considering the reports that Mr. Gaddafi is to be detained for a further five months "it is all the more important that he is allowed to have access to his friends and family, and to a lawyer of his choosing, at once."⁴⁵

Proceedings before the African Court

28. On 9 November 2012, Ms. Hosseinioun was informed by the African Commission that due to Libya's non-response and non-compliance with the Commissions' Provisional Measures of 18 April 2013, the Commission decided during the 52nd Ordinary Session to refer Communication 411/12 to the African Court on Human and Peoples' Rights pursuant to Rule 118(2) and 122(2) of the Rules of Procedure of the African Commission and Article 5(1)(a) of the Protocol of the African Charter. The Commission further explained that the Communication files would be submitted to the African Court and copies would be sent to Ms. Hosseinioun.⁴⁶ This decision is attached hereto as Annex 2.

29. On 17 December 2012, Ms. Hosseinioun submitted an urgent application to the African Court pursuant to Article 27 of the Protocol of the African Charter requesting that in light of the African Commission's referral of Communication 411/12 to the African Court and the fact that Mr. Gaddafi's incommunicado detention for over one year constitutes a "case of extreme emergency", that the Court adopt Provisional Measures "in the same terms as the Provisional Measures adopted by the African Commission"⁴⁷. She requested the Court to "direct Libya to safeguard Mr. Gaddafi's

⁴³ Supplementary Submissions on the Application by Mishana Hosseinioun for the Commission to Hold an Oral Hearing on this Communication at the 52nd Ordinary Session, 18 September 2012, para. 2.

⁴⁴ Supplementary Submissions on the Application by Mishana Hosseinioun for the Commission to Hold an Oral Hearing on this Communication at the 52nd Ordinary Session, 18 September 2012, para. 5.

⁴⁵ *Id.*, at para. 3.

⁴⁶ Letter from the African Commission, ACHPR/COMM/411/12/LBY/1015/12, 9 November 2012.

⁴⁷ Urgent Application to the African Court on Human and Peoples' Rights by Mishana Hosseinioun for the Court to Adopt Provisional Measures Pursuant to Article 27(2) and Rule 51, 17 December 2012, para. 24.

personal integrity and fundamental human rights while he is in detention in Libya.”⁴⁸ Ms. Hosseinioun further requested that the President of the African Court convene an extraordinary session to adopt Provisional Measures and that the African Court monitor the implementation of the Provisional Measures by requiring compliance within 15 days of receipt, as done by the African Commission.⁴⁹

30. On 20 December 2012, the African Court responded to Ms. Hosseinioun’s application of 17 December 2012 stating that the Commission would have to file the application in this matter and that “[o]nce the Court is seized of the matter, it will take all appropriate actions deemed necessary.”⁵⁰

31. On 8 January 2013, the African Commission submitted an application to the African Court requesting that the Court adopt Provisional Measures which order Libya “1. Not to proceed further with any actions concerning the legal proceedings, investigation against or detention that will cause irreparable damage to the Victim; 2. To allow the Victim access to a lawyer immediately and without delay.”⁵¹

32. On 22 January 2013, Counsel for Ms. Hosseinioun submitted a letter to the African Court, in light of an announcement that Mr. Gaddafi would be tried in a month’s time, in order to emphasise the importance of adopting Provisional Measures now that Communication 411/12 was before the African Court. Ms. Hosseinioun accordingly renewed her application of 17 December 2012 requesting the adoption of Provisional Measures. The letter requested an extraordinary session be convened to consider Provisional Measures and asked for authorisation to make oral submissions and / or give evidence. The letter further communicated that correspondence with the African Commission indicated that the African Commission would send the case file imminently.⁵²

33. On 23 January 2013, Ms. Hosseinioun’s Counsel sent an urgent letter to the African Commission “in order to request confirmation that the African Commission has

⁴⁸ Urgent Application to the African Court on Human and Peoples’ Rights by Mishana Hosseinioun for the Court to Adopt Provisional Measures Pursuant to Article 27(2) and Rule 51, 17 December 2012, paras. 1, 24.

⁴⁹ *Id.*, at para. 24.

⁵⁰ Letter from the Registry of the African Court, AFCHPR/Reg./EXT/2012/660, 20 December 2012.

⁵¹ Application filed before the African Court on Human and Peoples’ Rights on grounds of Failure to Comply with a Request for Provisional Measures, 8 January 2013, p. 3.

⁵² Letter to Justice Sophia A. B. Akuffo, concerning Communication No: 411/12 Saif Al-Islam (represented by Mishana Hosseinioun) v. Libya, 22 January 2013.

transferred the summary of Communication 411/12 and the communication file to the African Court.”⁵³

34. On 31 January 2013, the African Court received an application from the African Commission instituting proceedings against Libya in light of the Commission’s decision during the 52nd Ordinary Session to refer Communication 411/12 to the African Court on Human and Peoples’ Rights. The application (now referred to as Application No. 002/2013 before the African Court) was founded on the same alleged violations of the rights of Mr. Gaddafi under Articles 6 and 7 of the African Court as were alleged in Communication 411/12.⁵⁴

35. On 22 February 2013, the Registry of the African Court acknowledged receipt of the African Commission’s application instituting proceedings, and on 12 March 2013 the Registry transmitted copies of the Commission’s application to the Libyan authorities; inviting Libya to respond to the application, pursuant to Rule 37, within sixty days.⁵⁵

36. On 25 February 2013, the Registry of the African Court informed Ms. Hosseinioun that the African Commission had transferred the entire Communication file to the African Court, and that the African Court was now seized of Communication 411/12.⁵⁶

37. On 4 March 2013, a letter was sent by Counsel on behalf of Ms. Hosseinioun to the African Court noting that the African Court was now seized of Communication 411/12 and requesting that “when considering Communication 411/12 during the upcoming Ordinary Session the Court consider our urgent application of 17 December 2012” and Letter of 22 January 2013.⁵⁷

38. On 15 March 2013, the African Court issued its Order of Provisional Measures which found that “[i]n view of the alleged length of detention of the Detainee without access to a lawyer, family or friends; and with due regard to the Respondent’s alleged failure

⁵³ Letter to Dr. Mary Maboreke, Secretary of the African Commission, concerning Communication 411/12 – Mr. Saif Al-Islam Gaddafi (represented by Mishana Hosseinioun) v. Libya, 23 January 2013.

⁵⁴ See, Order for Provisional Measures, In the Matter of African Commission on Human and Peoples’ Rights v. Libya, Application No. 002/2013, 15 March 2013, para. 1.

⁵⁵ See, *Id.*, at para. 5.

⁵⁶ Telephone correspondence with the Registry of the African Court, 25 February 2013.

⁵⁷ Letter to Justice Sophia A. B. Akuffo, concerning Communication No: 411/12 Saif Al-Islam (represented by Mishana Hosseinioun) v. Libya, 4 March 2013.

to respond to the Provisional Measures requested by the Applicant; and the requirement of the principles of justice that require every accused person to be accorded a fair and just trial, the Court decided to order provisional measures *suo motu*.”⁵⁸ The African Court found that “[i]n the opinion of the Court, there exists a situation of extreme gravity and urgency, as well as a risk of irreparable harm to the Detainee.”⁵⁹ The African Court therefore issued Provisional Measures which ordered Libya “1. To refrain from all judicial proceedings, investigations or detention, that could cause irreparable damage to the Detainee, in violation of the Charter or any other international instruments to which Libya is a party; 2. To allow the Detainee access to a lawyer of his own choosing; 3. To allow the detainee visits by family members; 4. To refrain from taking any action that may affect the Detainee’s physical and mental integrity as well as his health; 5. To report to the Court within fifteen (15) days from the date of receipt of this Order, on the measures taken to implement this Order.”⁶⁰ This Order is attached hereto as Annex 3.

39. On 2 April 2013, Ms. Hosseinioun received a letter from the African Commission which transmitted copies of a notification sent on 18 March 2013 regarding the African Court’s 15 March 2013 Order for Provisional Measures. The notifications sent by the Registrar of the African Court were sent to The Minister of Foreign Affairs of the Republic of Libya (carbon copying the Permanent representative of Libya to the AU), the Chairperson of the African Union Commission and the Executive Secretary of the African Commission on Human and Peoples’ Rights.⁶¹

No response from Libya

40. On 1 May 2013, Ms. Hosseinioun submitted an application to the African Court seeking leave to make submissions on the issue of Libya’s compliance with the Provisional Measures ordered by the Court pursuant to Rules 29(3)(c) and 45 of the Rules of the Court. The application further requested that considering Libya’s failure to respond to or implement the 15 March 2013 Provisional Measures, the Court: “a) Find Libya to be in violation of the Interim Measures ordered by the Court; b) Assign one of its members to conduct an inquiry and to carry out a visit to Mr Gaddafi in

⁵⁸ Order for Provisional Measures, In the Matter of African Commission on Human and Peoples’ Rights v. Libya, Application No. 002/2013, 15 March 2013, para. 16.

⁵⁹ *Id.*, at para. 17.

⁶⁰ *Id.*, at para. 20.

⁶¹ Letter from the African Commission, ACHPR/COMM/411/12/LBY/376/13, 2 April 2013.

order to review the steps taken by Libya to comply with the Interim Measures ordered, pursuant to Rule 45(3); and c) Refer the case to the Assembly of the African Union, with a recommendation that the Assembly consider imposing the appropriate sanctions on Libya; and d) Amend paragraph 3 of the Order for Interim Measures to allow visits by family members and friends.”⁶²

41. On 1 May 2013, Ms. Hosseinioun sent the African Commission a letter noting that more than fifteen days had passed since the African Court had notified the Libyan authorities on 18 March 2013 of the Court’s Order for Provisional Measures. The letter referred to Rule 51(4) of the Rules of the Court⁶³ and asked that the African Commission also apply to the African Court to request that the Court a.) make a clear finding of Libya’s non-response and non-compliance with the African Court’s Order of 15 March 2013, b.) notify Libya’s non-compliance to the Assembly of the African Union for appropriate action to be taken against Libya and c.) assign one of its member to conduct an inquiry and carry out a visit to Mr. Gaddafi.⁶⁴

42. On 9 May 2013, a letter from the African Commission notified Ms. Hosseinioun that on 12 April 2013⁶⁵ the African Court decided on its own motion to give “an extension of fourteen (14) days to the Ministry of Foreign Affairs of Libya to inform the Court of the measures the Government of Libya has taken to comply with the order for interim measure.” The letter noted that the African Court “has indicated that in the event Libya does not notify the Court of the measures, the Court will proceed in accordance with Article 31⁶⁶ of the Protocol to the African Charter.”⁶⁷

⁶² Complainant’s Application for Leave to Make Submission and / or to File Evidence Pursuant to rules 29(3)(c) and 45 of the Rules of Court and for the African Court on Human and Peoples’ Rights to Find that Libya has not Complied with the Interim Measures Ordered on 15 March 2013, In the Matter of African Commission on Human and Peoples’ Rights v. Libya, Application No. 002/2013, 1 May 2013, para. 29.

⁶³ Rule 51(4) of the Rules of the Court provides in part that: “*in the event of non-compliance with these measures by the State concerned, the Court shall make all such recommendations as it deems appropriate.*”

⁶⁴ Letter to Dr. Mary Maboreke, Secretary of the African Commission, concerning African Commission on Human and Peoples’ Rights v Libya Formerly referred to as Communication No: 411/12 Saif Al-Islam Gaddafi (represented by Mishana Hosseinioun) v Libya, 1 May 2013.

⁶⁵ See, Interim Report of the African Court on Human and Peoples’ Rights notifying the Executive Council of Non-Compliance by a State, in accordance with Article 31 of the Protocol, 4 June 2013, paras. 5, 6. Note that the Libyan authorities were notified of the extension on 16 and 22 April 2013 through their Embassies in Addis Ababa, Ethiopia and Dar es Salaam, Tanzania.

⁶⁶ Article 31 of the Protocol of the African Charter provides that: “*The Court shall submit to each regular session of the Assembly, a report on its work during the previous year. The report shall specify, in particular, the cases in which a State has not complied with the Court’s judgment.*”

⁶⁷ Letter from the African Commission, ACHPR/COMM/411/12/LBY/578/13, 9 May 2013.

43. On 27 May 2013, Ms. Hosseinioun submitted an application to the African Court which asserted that “it is now clear that Libya has not responded to the Order for Interim Measures, despite being granted the indulgence of an extension of time.”⁶⁸ Referring to the requests made on 1 May 2013 concerning Libya’s non-response and non-compliance, Ms. Hosseinioun asked that the Court: “a. Find Libya to be in violation of the Order for Interim Measures; b. Assign one of its members to conduct an inquiry and to carry out a visit to Mr Gaddafi in order to review the steps taken by Libya to comply with the Interim Measures ordered, pursuant to Rule 45(3); and c. Refer the case to the Assembly of the African Union, with a recommendation that the Assembly consider imposing the appropriate sanctions on Libya, pursuant to Article 31 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights; and d. Amend paragraph 3 of the Order for Interim Measures to allow visits by family members and friends.”⁶⁹

44. On 27 May 2013, Ms. Hosseinioun sent a letter to the African Commission notifying the Commission of, and attaching, a copy of the application submitted on the same day requesting the Court find that Libya failed to respond to or implement the 15 March 2013 Order for Provisional Measures despite being granted a fourteen day extension.⁷⁰

45. On 4 June 2013, the African Court transmitted an Interim Report to the Executive Council of the African Union which provided notification of Libya’s non-compliance with the Order of Provisional Measures of 15 March 2013. The Interim Report noted that “an Order of Provisional Measures issued by the Court is as binding as any judgment of the Court” and that “by not informing the Court of the measures taken to implement the order, in spite of an extension of time to do so, Libya has failed to comply with a judgment of the Court.” The Interim Report’s recommendations called for: “a.) The Assembly to express itself on Libya’s non-compliance with the Court Order, and to call upon Libya to comply forthwith and, also, for Libya to report to the Court within 14 days on what measures Libya has taken to comply with the Court Order; b.) The Assembly to adopt a decision calling upon all Member States of the

⁶⁸ Complainant’s Application for the African Court on Human and Peoples’ Rights to Find that Libya has not Complied with the Interim Measures Ordered on 15 March 2013, In the Matter of African Commission on Human and Peoples’ Rights v. Libya, Application No. 002/2013, 27 May 2013, para. 9.

⁶⁹ *Id.*

⁷⁰ Letter to Dr. Mary Maboreke, Secretary of the African Commission, concerning African Commission on Human and Peoples’ Rights v Libya Formerly referred to as Communication No: 411/12 Saif Al-Islam Gaddafi (represented by Mishana Hosseinioun) v Libya, 27 May 2013.

Union to comply with and implement Judgments and Orders of the Court, in accordance with Article 30 of the Protocol; [and] c.) The Assembly to take such other measures as it deems appropriate to ensure that Libya fully complies with the Court order.”⁷¹ A copy of the Interim Report was transmitted to the African Commission on 4 June 2013 by the Registry of the African Court.⁷² This Report is attached hereto as Annex 4.

46. On 21 June 2013, a letter was received from the African Commission informing Ms. Hosseinioun of the African Court’s Interim Report, and providing Ms. Hosseinioun a copy of the Interim Report.⁷³
47. On 5 July 2013, Ms. Hosseinioun sent a letter to the African Commission informing the Commission of the announcement of the Libyan Prosecutor-General’s office that Mr. Gaddafi’s trial will begin in August 2013 while emphasising the fact that Mr. Gaddafi has now been in incommunicado detention for 18 months. The letter noted the urgency of putting the Interim Report before the African Union for consideration and asked that the Commission “consider approaching the Executive Council to ask for this case to be considered by the African Union on an urgent basis through electronic communications or some other means” and alternatively consider “whether there are other mechanisms within the Rules that would allow this matter to be addressed urgently.”⁷⁴
48. On 1 August 2013, Ms. Hosseinioun wrote another letter to the African Commission to follow up on Ms. Hosseinioun’s letter of 5 July 2013 and to “reiterate our request that under these unique and urgent circumstances the African Commission take immediate action to place the Interim Report and the Court’s recommendations before the Assembly of the African Union for consideration.” The letter noted that, pursuant to the announcement of the Libyan Prosecutor-General office, Mr. Gaddafi’s trial is “due to begin in the coming days” creating a “very real possibility that the trial will be completed and the death penalty imposed before the Assembly of the African Union

⁷¹ Interim Report of the African Court on Human and Peoples’ Rights notifying the Executive Council of Non-Compliance by a State, in accordance with Article 31 of the Protocol, 4 June 2013, para.10.

⁷² Letter from the Registry of the African Court to the Executive Secretary of the African Commission, AFCHPR/Reg./APPL./002/2013/011, 4 June 2013.

⁷³ Letter from the African Commission, ACHPR/COMM/411/12/LBY/749/13, 21 June 2013.

⁷⁴ Letter to Dr. Mary Maboreke, Secretary of the African Commission, concerning African Commission on Human and Peoples’ Rights v Libya Formerly referred to as Communication No: 411/12 Saif Al-Islam Gaddafi (represented by Mishana Hosseinioun) v Libya, 5 July 2013.

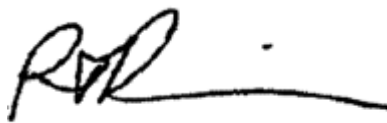
convenes its next Ordinary Session.” The letter further stated that “[i]t is for this reason that convening an urgent Extra-Ordinary Session of the Assembly of the African Union, or putting the matter before the Assembly through alternative electronic communications or other means, is vital to guaranteeing Mr. Gaddafi’s fundamental human rights under the African Charter.”⁷⁵

49. On 12 August 2013, a letter was received from the African Commission notifying Ms. Hosseinioun that “Further to your email of 1 August 2013 ... your concerns have been brought to the attention of the relevant Commissioner Rapporteur, as well as the African Court on Human and Peoples’ Rights.”⁷⁶

50. No response has been received from Libya to any of these latest developments. Libya continues to flout the orders of the African Commission and the African Court by the unbroken and unchanging pattern of refusals and / or failures to comply with its legal obligations as set out above.

IV. Conclusion

51. Ms. Mishana Hosseinioun respectfully requests that these observations and the materials submitted are considered by the Appeals Chamber as demonstrating that Libya is unable to try Mr. Gaddafi, and that he should be transferred immediately to the ICC for trial.



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

Dated 22nd August 2013

London, United Kingdom

⁷⁵ Letter to Dr. Mary Maboreke, Secretary of the African Commission, concerning African Commission on Human and Peoples’ Rights v Libya Formerly referred to as Communication No: 411/12 Saif Al-Islam Gaddafi (represented by Mishana Hosseinioun) v Libya, 1 August 2013.

⁷⁶ Letter from the African Commission, ACHPR/COMM/411/12/LBY/931/13, 12 August 2013.