

**Cour
Pénale
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**International
Criminal
Court**



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No.: ICC-01/11-01/11
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PRE-TRIAL CHAMBER I

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

SITUATION IN LIBYA

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

Public Document

**Prosecution Response to Mishana Hosseinioun's "Application for Leave to
Appeal against Decision on Application under Rule 103"**

Source: Office of the Prosecutor

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**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keïta
Ms Melinda Taylor

States' Representatives

Amicus Curiae

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

REGISTRY

Registrar

Ms. Silvana Arbia

Counsel Support Section

Deputy Registrar

Mr. Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
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INTRODUCTION

1. Ms Mishana Hosseinioun (“the Applicant”), a person unrelated to the proceedings against Saif Al-Islam Gaddafi (“Saif Al-Islam”) and Abdullah Senussi (“Senussi”), requested Pre-Trial Chamber I to provide observations as *amicus curiae* under rule 103. The Chamber rejected this application and the Applicant seeks now leave to appeal the Decision. The Prosecution submits that the Applicant has no standing under article 82(1)(d) and that her application should be dismissed *in limine*. In addition, the Applicant fails to identify any appealable issue that satisfies the requirements of article 82(1)(d).

PROCEDURAL BACKGROUND

2. On 6 December 2011, Pre-Trial Chamber I requested submissions from the Libyan authorities regarding Saif Al-Islam’s arrest and detention. The Chamber also authorised the Office of Public Counsel for the Defence (“OPCD”) to represent the interests of the defence “in all instances related to the proceedings against Saif Al-Islam until otherwise decided by the Chamber.” The Chamber declined to appoint counsel to represent the interests of Saif Al-Islam without confirmation that a power of attorney was assigned to a specific counsel.¹
3. On 23 January 2012, the National Transitional Council (NTC), through its coordinator for the ICC, submitted a response (“Libyan Response”).² On 24 January, the Chamber instructed the Prosecution and OPCD to provide observations to the Libyan Response.³
4. On 30 January 2012, the Applicant filed a 24-page application for leave to submit *amicus curiae* observations to the Chamber as, according to her, “she is in ‘a

¹ ICC-01/11-01/11-39-Red.

² ICC-01/11-01/11-44 and ICC-01/11-01/11-44-Conf-Anx1.

³ ICC-01/11-01/11-45.

unique position to offer observations to the Chamber as she is a very close friend and confidant who is requesting to have access to Saif Gaddafi to assist in the appointment of legal counsel and to safeguard his rights” (“*Amicus Application*”).⁴ The Application includes many detailed references to media reports and human rights conventions. It is also accompanied by an annex containing a letter addressed to the Libyan Minister of Justice.

5. On 2 February 2012, the Chamber rejected the *Amicus Application* noting that Ms Hosseinioun does not seek to provide the Chamber with observations which may be “desirable for the proper determination of the case”, as required by rule 103 and that she effectively seeks the Chamber’s permission to contact Saif Al-Islam and to give him access to what she deems appropriate legal advice (the “Decision”).⁵
6. On 2 February 2012, the Prosecution and OPCD provided observations in respect to the Libyan Response.⁶
7. On 7 February 2012, the Applicant sought leave to appeal the Decision (the “Application”) and simultaneously filed a direct appeal before the Appeals Chamber.⁷ On 10 February 2012, the Applicant filed an addendum to her Application (“Addendum”).⁸

⁴ ICC-01/11-01/11-46

⁵ ICC-01/11-01/11-49, p.5. Note that the Chamber jointly rejected the applications of two amicus applicants: Ms Hosseinioun’s and Ms. Aisha Gaddafi’s (ICC-01/11-01/11-47).

⁶ ICC-01/11-01/11-50-Conf-Exp (Prosecution’s Observations); ICC-01/11-01/11-51-Red (OPCD Observations). A public redacted version of OPCD’s response was notified to the parties on 3 February and uploaded into the website on 6 February.

⁷ ICC-01/11-01/11-53 and ICC-01/11-01/11-54OA.

⁸ ICC-01/11-01/11-57.

SUBMISSIONS

(i) *The Applicant is not a party to the proceedings*

8. The Applicant is not a party to the proceedings and therefore she has no standing to seek leave to appeal the Decision under article 82(1)(d). The terms of article 82(1) and rule 155 are clear: only “either party” or “a party” (ie. Prosecution and Defence) may appeal a decision under these provisions. Non-parties unrelated to the proceedings may appeal other decisions only if it is expressly authorized in the relevant provisions.⁹ The jurisprudence of this Court has indicated that Prosecution and Defence are the “parties” for the purposes of certain provisions, including article 82(1)(d).¹⁰ Nor is there a right to file an interlocutory appeal outside the framework of article 82.¹¹
9. Accordingly, Pre-Trial Chamber I rejected a similar application for leave to appeal under article 82(1)(d) in the *Darfur* situation.¹² The Applicant criticizes the Darfur Decision and asks the Chamber to depart from it. She argues that article 82 and rule 155 should not be read restrictively and that “party” for the purposes

⁹ See article 82(2) and (4).

¹⁰ ICC-01/04-01/06-2779, paras.11-12 indicating that The Netherlands and DRC are not “parties” for the purposes of article 82(1)(d) and referring to ICC-01/04-01/06-1432OA9OA10, para.93, where the Appeals Chamber, when dealing with an appeal concerning the participation of victims during the proceedings, decided that the term “parties” in Article 69 of the Statute refers to the defence and the prosecution only. Note that even potential suspects are not parties to the proceedings with *locus standi* until an arrest warrant or summons to appear has been issued against them: ICC-01/09-43, para.9. The Prosecution notes that in ICC-01/04-01/07-675OA7, the Majority of the Appeals Chamber found that the Registrar’s observations regarding the Prosecutor’s document in support of appeal were legitimately made in light of the relevant provisions (articles 43(6) and 68(4) and regulation 24*bis*(1)), and the subject-matter of that appeal (system of witness protection in the ICC). However, at no point did the Majority find that the Registrar was a “party”. Judge Pikis, in his dissenting opinion (para.4), further indicated that: “in accordance with the introductory statement of paragraph one of article 82, an appeal under its provisions may be raised by either party to the proceedings, that is, the Prosecution and the defence. The counter-party to the appeal, the respondent, is the other party to the proceedings. The Registrar is not a party to or a participant in the proceedings. [...] Nowhere in the Statute is a right conferred upon the Registrar or the Registry to participate as of right in any proceedings before the Court.”

¹¹ ICC-01/04-01/06-2799-ConfOA19. Note that Trial Chamber I had granted leave to appeal to The Netherlands and DRC “on an exceptional basis” under article 64(6)(f) and outside the framework of article 82 (ICC-01/04-01/06-2779, paras. 23-24). The Appeals Chamber reversed the decision and found that the right to appeal is exhaustively regulated in the texts of the Court and that the Trial Chamber’s grant of leave was *ultra vires*.

¹² ICC-02/05-192 (“Darfur Decision”). As in the instant case, the Pre-Trial Chamber in that case rejected the application for leave to appeal a decision filed by an organization that was denied to provide submissions under rule 103. The same counsels represented the applicants in both cases.

of these provisions means “one of the parties who participated in the proceedings that gave rise to the decision which is subject to appeal”.¹³ Her criticisms are meritless. A contextual interpretation of the relevant provisions indicate that “party” for the purposes of article 82(1)(d) refers to Prosecution and Defence. The Darfur Decision applied the relevant provisions and followed this Court’s jurisprudence; in particular, the Chamber in that case stated that the wording of the *chapeau* of article 82(1) (“either party”) and rule 155 (“a party”) indicates that only parties may appeal any of the decisions listed therein, and that the two Sudanese groups that had applied to provide observations as *amicus* under rule 103 were not parties within the meaning of article 82(1) and rule 155.¹⁴

10. Because the Applicant is not a party entitled to seek leave to appeal the Decision, the Application should be summarily dismissed.

(ii) *The Applicant does not identify an appealable issue within the terms of article 82(1)(d)*

11. The Appeals Chamber has held that “[a]n issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement of a conflicting opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.”¹⁵

12. This requirement is not met here. The Applicant argues that the Chamber rejected her application because it misunderstood her real motivation to provide submissions as *amicus*¹⁶ and that she wants to ensure that Saif Al-Islam has access

¹³ Application, paras.6-8.

¹⁴ Darfur Decision, p.5.

¹⁵ ICC-01/04-01/06-168OA3, paras.9-10. See also, ICC-01/04-01/06-1433 OA11, (Dissenting Opinion of Judge Song), para.4, specifying that “[a] decision “involves” an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.”

¹⁶ Application, paras.13-15.

to a lawyer of his choice.¹⁷ The Applicant further states that the case relates to “Gaddafi’s right to legal representation and to be heard by the Pre-Trial Chamber on the venue of his trial”,¹⁸ and that these rights affect the fair and expeditious nature of the proceedings and outcome of the trial, such that immediate consideration by the Appeals Chamber is required to “decide whether the Pre-Trial Chamber should receive [third party] observations on Mr Gaddafi’s fundamental right[s]”.¹⁹

13. The issue presented – Gaddafi’s right to counsel and to be heard – does not arise from the Decision. Instead, it is at this stage “an abstract question or a hypothetical concern”²⁰ that fails to qualify as an appealable issue. Nor, despite the Applicant’s characterization, does the application in fact present that issue. Rather, the Application ultimately presents a disagreement with the Chamber’s decision not to allow the Applicant to provide her personal observations under rule 103 regarding the suspect’s rights.²¹
14. In addition, the Appellant does not show how the issue affects the other requirements under article 82(1)(a). Crucially, there is no conceivable impact on the fairness of the proceedings or in the outcome of the trial. As the Applicant in fact acknowledges in her late-filed Addendum,²² the Chamber respected the rights of Saif Al-Islam by requesting the OPCD to represent the interests of the defence.²³
15. Likewise, the issue does not affect the expeditiousness of the proceedings, nor would the intervention of the Appeals Chamber materially advance the

¹⁷ Application, para.16.

¹⁸ Application, para.9. Notably, the Application also contains substantive arguments on the merits and factual material unrelated to the present Application, Id. at paras.11 and 13-18. The Prosecution notes that the Applicant’s request for leave to provide observations as *amicus* was itself a lengthy submission that improperly included substantive legal and factual arguments before leave was granted.

¹⁹ Application, para.9.

²⁰ ICC-01/05-01/08-532, para. 17.

²¹ ICC-01/04-01/06-168 OA3, para. 10.

²² Addendum, para.2.

²³ ICC-01/11-01/11-39-Red, p.6. See also ICC-01/11-01/11-45.

proceedings. On the contrary, if the Chambers were denied the discretion to reject *amicus* applications from any non-party to the proceedings that desires to make its own observations concerning a critical defence right, these and other proceedings would be threatened with repeated delays. In addition, the intervention of the Appeals Chamber at this stage is not necessary as the Chamber has ensured that, in light of the circumstances of this case, the rights and interests of Saif Al-Islam are adequately considered through the intervention of OPCD.²⁴

(iii) *The Addendum should be rejected in limine*

16. Finally, the Prosecution submits that the Addendum filed by the Applicant on 10 February - again without seeking prior leave - need not be considered. The Applicant argues that it only had access to OPCD's Observations after filing the Application on 7 February.²⁵ She then notes that OPCD "underscore[s] the Applicant's concern for Mr Gaddafi's fundamental rights" and "accept[s] ... the Chamber's consideration of Mr. Gaddafi's human rights".²⁶ Nonetheless, she continues to reiterate her desire to provide *amicus* observations on Saif Al-Islam's rights.²⁷

17. The Applicant should have sought leave from the Chamber pursuant to regulation 28 of the Regulations of the Court before filing the addendum.²⁸ Her failure yet again to comply with Regulations and court practices – following her failure to seek advance leave from the Chamber before submitting a 24-page *Amicus* Application, her inclusion of extensive factual, legal, and substantive points in the *Amicus* Application itself, and her renewed inclusion of arguments

²⁴ ICC-01/11-01/11-39-Red, p.6. See also ICC-01/11-01/11-45.

²⁵ Addendum, para.2.

²⁶ Ibid.

²⁷ Addendum, para.3.

²⁸ ICC-01/04-01/07-476 OA2, paras.17-18; ICC-01/04-01/06-1476 OA12 OA13, para.3.

on the merits in the application for leave to appeal – should require that the new submission be summarily rejected. Additionally, OPCD's Observations were uploaded into the ICC website on 6 February, thus before she filed her Application for leave to appeal. The Applicant in fact could have seen OPCD's Observations in time, had she checked the website; her failure to do so does not satisfy the requirements of regulation 35(2).²⁹

CONCLUSION

18. For the reasons set out above, the Prosecution requests that the Pre-Trial Chamber reject the Application.



Luis Moreno-Ocampo,
Prosecutor

Dated this 13th Day of February 2012

At The Hague, The Netherlands

²⁹ ICC-01/05-01/08-631-Red OA2, para. 34 ; ICC-01/05-01/08-827 OA3, para.6.