

**Cour
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**International
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Court**



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Date: 28 February 2012

THE APPEALS CHAMBER

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

**Prosecution's Observations to the admissibility of Ms Mishana Hosseinioun's
"Appeal against the Decision on Application under Rule 103"
(ICC-01/11-01/11-54OA)**

Source: Office of the Prosecutor

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INTRODUCTION

1. Ms Mishana Hosseinioun (“the Appellant”), 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. Ms Hosseinioun now appeals the Chamber’s decision directly to the Appeals Chamber pursuant to article 82(1)(a) and rule 154.
2. The Prosecution submits that the Appeal should be dismissed *in limine*. First, there are no admissibility proceedings before the Court with respect to Saif Al-Islam’s case. Nor is there a ruling “with respect to jurisdiction or admissibility”. The Pre-Trial Chamber’s decision only rejected the Appellant’s request to participate as *amicus* in the proceedings. Second, the Appellant has no standing to file a direct appeal, since she is not a party to the proceedings within the terms of article 82(1).
3. On these grounds the Appeal is inadmissible and should be rejected. If the Appeals Chamber finds the Appeal admissible, the Prosecution will respond to the Appellant’s document in support of appeal and will submit that the Pre-Trial Chamber did not abuse its discretion by rejecting the *amicus* observations.

PROCEDURAL BACKGROUND

4. 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 a specific counsel, who purported to represent Saif Al-Islam,

without confirmation that the Suspect had assigned a power of attorney to that person.¹

5. 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
6. On 30 January 2012, the Appellant filed a 24-page application for leave to submit *amicus curiae* observations, asserting that "she is in 'a unique position to offer observations to the Chamber as she is a very close friend and confidant who is requesting to have access to Saif Gaddafi to assist in the appointment of legal counsel and to safeguard his rights'" ("Amicus Application").⁴
7. On 2 February 2012, the Chamber rejected the *Amicus* Application. It noted that Ms Hosseinioun's observations were not "desirable for the proper determination of the case", as required by rule 103, and also that she effectively sought the Chamber's permission to contact Saif Al-Islam, to give him what she characterized as appropriate legal advice (the "Decision").⁵
8. On 2 February 2012, the Prosecution and OPCD provided observations in respect to the Libyan Response.⁶ A public redacted version of OPCD's response was notified to the parties on 3 February and uploaded onto the ICC website on 6 February.⁷
9. On 7 February 2012, the Appellant sought leave to appeal the Decision (the "Application") and simultaneously filed a direct appeal before the Appeals

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.

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-Conf (OPCD Observations).

⁷ ICC-01/11-01/11-51-Red.

Chamber (the “Appeal”).⁸ On 10 February 2012, the Appellant filed an addendum to her application for leave to appeal.⁹

10. On 13 February, the Prosecution responded to the Application for leave to appeal requesting its rejection *in limine*.¹⁰ On 14 February 2012, the Pre-Trial Chamber rejected the Application on the basis that the Appellant was not a party to the proceedings and therefore lacked standing to file an application under article 82(1)(d).¹¹
11. Also on 14 February 2012, the Appellant filed an addendum to her direct appeal before the Appeals Chamber (“Addendum”).¹² This document reproduces verbatim the addendum filed before the Pre-Trial Chamber and acknowledges the 2 February filing of the OPCD observations (made public on 6 February) and the fact that the Pre-Trial Chamber adopted measures to safeguard Saif Al-Islam’s rights in the instant proceedings.¹³
12. On 23 February, the Appeals Chamber instructed the Prosecution and OPCD to submit observations in relation to the admissibility of Ms Hosseinioun’s Appeal.¹⁴ The Appeals Chamber further noted that subject to its decision on the admissibility of the Appeal, it will issue directions to Ms Hosseinioun with respect to the filing of her document in support of appeal, and to the Prosecution and OPCD to respond.¹⁵
13. On the same day, the Appellant filed her “Document in Support of the ‘Appeal against Decision on Application under Rule 103’”.¹⁶
14. Pursuant to the Chamber’s directions the Prosecution provides its submissions on the inadmissibility of the Appeal. The Prosecution does not address the

⁸ ICC-01/11-01/11-53 and ICC-01/11-01/11-54OA.

⁹ ICC-01/11-01/11-57.

¹⁰ ICC-01/11-01/11-58.

¹¹ ICC-01/11-01/11-60.

¹² ICC-01/11-01/11-61OA.

¹³ Addendum, paras.2-3.

¹⁴ ICC-01/11-01/11-64OA.

¹⁵ Ibid.

¹⁶ ICC-01/11-01/11-65OA.

arguments on the merits. If the Appeals Chamber finds the Appeal admissible, the Prosecution will respond to those arguments.

SUBMISSIONS

15. The Prosecution submits that the Appeal is without merit and should be dismissed. First, the Appeal was improperly filed under article 82(1)(a); and second, the Appellant is not a party to the proceedings and has therefore no standing to file an appeal under article 82(1).

(a) The Appeal was improperly filed under article 82(1)(a)

16. The Appellant files her Appeal against the Decision under article 82(1)(a) and regulation 154. These provisions only allow “part[ies]” to appeal decisions with respect to “jurisdiction and admissibility”. The Decision below, rejecting the application to appear as *amicus curiae*, is not a decision on either jurisdiction or admissibility. Accordingly, there is no basis for filing this direct appeal.
17. The Appellant argues, however, that her observations as *amicus*, if accepted by the Pre-Trial Chamber, would be related to the abstract issue of admissibility. She indicates that she wanted to provide observations to the Chamber under rule 103 “in order that Saif Gaddafi could obtain legal representation to be heard by the ICC on the question of admissibility before any decision is taken by the ICC on where his trial should be held and *it was this application concerning admissibility that was refused by the Chamber*”.¹⁷ Thus, according to the Appellant, she can directly appeal the decision of the Pre-Trial Chamber denying her participation as *amicus* under article 82(1)(a).

¹⁷ Appeal, para.9 (emphasis added).

18. This argument lacks merit. The impugned Decision is not a decision “with respect to jurisdiction or admissibility”.¹⁸ There are, and were, no admissibility proceedings before this Court under article 19 with respect to the case against Saif Al-Islam. The Pre-Trial Chamber’s Decision also had nothing to do with admissibility; it only determined that the Appellant’s observations were not “desirable for the proper determination of the case”¹⁹ – which, we remind the Court, is not focused at this point on admissibility or jurisdiction.
19. Nor, indeed, does the impugned decision even remotely “concern” admissibility, as the Appellant wrongly urges. At best, the Appellant indicated that she might provide information that would somehow enable the Suspect to obtain legal representation, and his lawyer in turn could make future submissions to the Chamber regarding admissibility. That is plainly not enough to convert the decision denying *amicus* participation to a decision on admissibility itself.
20. Therefore, the Appeal is improperly filed *ultra vires* and improperly characterized as an admissibility appeal. It is not enough that there may be a potentially tangential link between the underlying decision and admissibility.²⁰ As the Appeals Chamber has held previously, “it is the nature or character of a decision and not its implications or effects which determine whether a party is entitled to bring an appeal pursuant to article 82(1)(b) of the Statute.”²¹ If this is not an admissibility decision – and it is not – even a realistic claim that a suspect person might make an admissibility challenge cannot suffice to make the decision appealable under article 82(1)(a).

¹⁸ ICC-01/09-78OA, para.15. The Appeals Chamber understood from the phrase “decision with respect to” that “the operative part of the decision itself must pertain directly to a question on the jurisdiction of the Court or the admissibility of a case. It is not sufficient that there is an indirect or tangential link between the underlying decision and questions of jurisdiction or admissibility”. Further, a decision from the Pre-Trial Chamber or Trial Chamber may constitute a “‘decision with respect to [...] admissibility’ only to the extent that it consisted of or ‘was based on’ a ruling that a case was admissible or inadmissible”.

¹⁹ Decision, p.5.

²⁰ See ICC-01/09-78OA, para.15.

²¹ ICC-01/04-01/10-438OA2, para.17 (emphasis added). The same can be argued with respect to article 82(1)(a).

21. Thus, the Appeals Chamber has previously dismissed other similar efforts to construe a decision as one from which direct appeal is permitted.²² As the Appeals Chamber held: “the Statute defines exhaustively the right to appeal against decisions of first instance Courts”.²³ Also, “[t]he decisions that are subject to appeal are enumerated in articles 81 and 82 of the Statute [and] [t]here is no right to appeal ... except as provided thereunder”.²⁴
22. The Prosecution therefore submits that the Appeals Chamber should dismiss the Appeal. Even if the Decision itself were one from which a direct appeal may lie, the Appellant has no legal standing to file a direct appeal in this case.²⁵ As it will be described below, the Appellant is not a party to the proceedings and that she has no standing to appeal any decision under article 82(1).

(b) The Appellant is not a party to the proceedings

23. The Appellant further argues that “article 82 should not be read restrictively or in an overly technical way” and that she has a right to appeal the decision rejecting her participation as amicus.²⁶ This is incorrect.²⁷
24. The terms of article article 82(1) and rules 154 and 155 are clear: only “either party” or “a/the 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.²⁸ The terms of article 82 are clear: third parties unrelated to the proceedings do not

²² See ICC-01/09-02/11-2500A2, para.4; ICC-01/09-78OA, paras.18-21; ICC-01/04-01/10-438OA2, para. 17.

²³ ICC-01/04-168OA3, para.39, quoted in ICC-01/04-01/06-2799OA19, para.7.

²⁴ ICC-01/04-168OA3, para.35, quoted in ICC-01/04-01/06-2799OA19, para.7.

²⁵ A contrario, Appeal, paras.5-8.

²⁶ Appeal, paras.5-8. The Prosecution notes that the Appellant in repeating the same arguments that she advanced before the Pre-Trial Chamber and erroneously refers to rule 155 instead of rule 154. Only the latter refers to article 82(1)(a).

²⁷ The Prosecution notes that it is not clear whether Appellant refers to her legal standing under article 82(1)(a) or (d). The Prosecution will make its submissions with respect to the Appellant’s right to appeal under either provision.

²⁸ See article 82(2) and (4); and article 18(4) (on preliminary rulings regarding admissibility).

have standing to directly appeal decisions, including decisions rejecting their attempt to participate as *amicus curiae*.²⁹

25. At the same time, the Prosecution acknowledges that in the Kenya situation the Appeals Chamber allowed a State party (Kenya) to appeal decisions on the admissibility of the Kenya cases,³⁰ although article 82(1)(a) and rule 154 do not expressly provide for this possibility.³¹ But the instant case is radically different from the Kenya scenario. In that case Kenya had challenged the admissibility of the case under article 19(2) as a “State which has jurisdiction over a case” thus triggering admissibility proceedings.³² The Pre-Trial Chamber found that the cases of *Ruto et al.* and *Kenyatta et al.* were admissible and rejected Kenya’s challenge.³³ In that context, it was reasonable to conclude that Kenya’s standing to appeal (absent any express limitation) flowed automatically from its standing to bring a challenge under article 19. A joint reading of articles 18 and 19 of the Statute would also support this interpretation.³⁴
26. In the present case, however, the Appellant – who claims merely to be a good friend of Saif – has no recognized status equivalent to a State with the statutory right to bring an admissibility challenge. Her ability to participate is entirely dependent on the Chamber’s discretion in accepting *amicus curiae* submissions,

²⁹ For the sake of completeness, the Prosecution notes that the Appeals Chamber’s jurisprudence allows parties to raise issues of fairness or procedural matters in appeals against admissibility decisions only if the Appellant shows how the purported error materially affected the ruling on admissibility. See ICC-02/04-01/05-408OA3, paras.47,51; ICC-01/05-01/08-962OA3, paras. 102; 133-134; ICC-02/04-01/05-408OA3, para.48; ICC-01/09-01/11-307OA, para.87; ICC-01/09-02/11-274OA, para.85. This jurisprudence is not applicable in the instant case as there is no ruling on admissibility, so logically no link between a purported error and such a ruling can be asserted.

³⁰ ICC-01/09-01/11-109OA; ICC-01/09-02/09-104OA.

³¹ As to that narrow issue, commentators to the Rome Statute have adopted different positions with respect to the States’ right to appeal decisions on admissibility and jurisdiction. Some urge that article 82 (1) only allows the “parties” to appeal decisions under article 19 (see Christopher Staker, Commentary on the Rome Statute of the International Criminal Court - Observers’ Notes, Article by Article, Otto Triffterer, 1477 (second edition); see also Robert Roth and Marc Henzelin, “The Appeal Procedure of the ICC”, The Rome Statute of the International Criminal Court, Cassese/Gaeta/Jones, 1550-1551 (2002)). Others argue that States’ standing to appeal should flow automatically from their standing to bring a challenge under Article 19 (see John T. Holmes, ‘The Principle of Complementarity’, The International Criminal court, the Making of the Rome Statute, edited by Roy S. Lee, 64; see also Christopher K. Hall, Commentary on the Rome Statute of the International Criminal Court - Observers’ Notes, Article by Article, Otto Triffterer, 659 (second edition)).

³² ICC-01/09-01/11-19; ICC-01/09-02/11-26.

³³ ICC-01/09-01/11-101; ICC-01/09-02/11-96.

³⁴ See ICC-01/09-78OA, para.16.

consideration of which it deems to be “desirable for the proper determination of the case”.³⁵

27. It does not follow, therefore, that decisions of the Chambers under rule 103 denying the participation of third parties as *amicus* can be appealed in the same way that decisions rejecting State challenges to admissibility may be appealed. *Amicus* applicants are not parties to the proceedings and have no legal standing. This Court has consistently held that non-parties lack standing to appeal under article 82(1)(d).³⁶

28. In sum, the Appellant exhausted the mechanisms afforded to her by the Rome Statute once the Pre-Trial Chamber determined that her submissions were not desirable. Thus, the Appeal should also be dismissed on the grounds that the Appellant lacks standing to file any appeal under article 82(1).

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

29. Finally, the Prosecution submits that the Addendum filed by the Applicant on 14 February - without seeking prior leave from the Appeals Chamber - need not be considered. The Appellant argues that it only had access to OPCD’s Observations

³⁵ ICC-01/04-01/06-1289OA11, para. 8; ICC-02/05-01/09-51OA, para.7 (on the decision being discretionary); ICC-01/05-01/08-602OA2, para.9 (prior leave from the Chamber is necessary before any filing of substantive submissions).

³⁶ ICC-02/05-192; ICC-01/11-01/11-60; 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. See also ICC-01/04-01/07-2288 OA11, para.39. 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 24bis(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.”

after filing her Appeal on 7 February.³⁷ 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”.³⁸ The Appellant however reiterates her desire to provide *amicus* observations on Saif Al-Islam’s rights.³⁹

30. The Applicant should have sought leave from the Appeals Chamber pursuant to regulation 28 of the Regulations of the Court before filing the Addendum,⁴⁰ which is in fact a new substantive submission. Her failure to comply with Regulations and court practices should require that the submission be summarily rejected.⁴¹ Additionally, OPCD’s Observations were uploaded onto the ICC website on 6 February, before she filed her Appeal. The Appellant 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).⁴²

³⁷ Addendum, para.2.

³⁸ Ibid.

³⁹ Addendum, para.3.

⁴⁰ ICC-01/04-01/07-476 OA2, paras.17-18; ICC-01/04-01/06-1476 OA12 OA13, para.3.

⁴¹ Notably, the Applicant made similar transgressions in the Pre-Trial Chamber when she failed to seek advance leave before submitting a 24-page Amicus Application, which also included extensive factual, legal, and substantive points, and her initial inclusion of arguments on the merits in the application for leave to appeal. Similarly, the Appeal improperly addresses the merits of the Chamber’s Decision and provides factual information on Libya: see paras.11-22.

⁴² ICC-01/05-01/08-631-Red OA2, para.34 ; ICC-01/05-01/08-827 OA3, para.6.

CONCLUSION

31. For the reasons set out above, the Prosecution requests that the Appeals Chamber find the Appeal inadmissible. If the Appeals Chamber admits the instant Appeal, the Prosecution reserves its right to respond to the merits of the Appeal and the document in support of appeal.



Luis Moreno-Ocampo,
Prosecutor

Dated this 28th Day of February 2012

At The Hague, The Netherlands