



Original: English

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

Date: 7 May 2012

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernandez 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

Prosecution Response to Mishana Hosseinioun's "Application for Leave to Appeal against 'Decision on the 'Application on behalf of Mishana Hosseinioun for Leave to Submit Observations to the Pre-Trial Chamber'"

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**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
Section**

Other

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”), has requested Pre-Trial Chamber I to be permitted to provide observations under rule 103. It is the Applicant’s second attempt to obtain the Chamber’s permission to contact Saif Al-Islam under the guise of seeking to make observations as *amicus* pursuant to rule 103. Both this Chamber¹ and the Appeals Chamber² previously rejected the Applicant’s improper application. The Chamber rejected the second *amicus* application and the Applicant now seeks leave to appeal that Decision. The Prosecution submits that the Applicant has no standing under article 82(1)(d) and that her application should be dismissed. 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 and 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 at that time.³
3. 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 unique position to offer observations to the Chamber as she is a very close friend

¹ ICC-01/11-01/11-60.

² ICC-01/11-01/11-74.

³ ICC-01/11-01/11-39-Red.

and confidant who is requesting to have access to Saif Gaddafi to assist in the appointment of legal counsel and to safeguard his rights” (“First *Amicus* Application”).⁴

4. On 2 February 2012, the Chamber rejected the First *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 to be appropriate legal advice.⁵
5. On 7 February 2012, the Applicant sought leave to appeal the Decision and also filed a direct appeal before the Appeals Chamber.⁶ On 10 February 2012, the Applicant filed an addendum to her application (“Addendum”).⁷ The Prosecution opposed both the leave application and the appeal.⁸
6. On 14 February 2012, this Chamber dismissed the Applicant’s leave application holding, *inter alia*, that the Applicant has no procedural standing to request leave and the Applicant did not identify a proper appealable issue.⁹
7. On 3 March 2012 representatives of OPCD met with Saif Al-Islam in Libya. On 5 March 2012, OPCD filed a confidential, *ex parte* report concerning the visit in which it informed the Chamber that Saif Al-Islam requested for the OPCD to select counsel or help him select counsel.¹⁰ During the visit, Saif Al-Islam signed a declaration stating that he was willing for the OPCD to continue to represent him before the Court until a counsel is appointed.¹¹

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 and Ms. Aisha Gaddafi (ICC-01/11-01/11-47).

⁶ ICC-01/11-01/11-53 and ICC-01/11-01/11-54OA.

⁷ ICC-01/11-01/11-57.

⁸ ICC-01/11-01/11-58; ICC-01/11-01/11-66 PT OA.

⁹ ICC-01/11-01/11-60.

¹⁰ ICC-01/11-01/70Red2 (public redacted version filed on 10 April 2012), paras.40-41.

¹¹ ICC-01/11-01/11-70Red2 (public redacted version filed on 10 April 2012), para.41.

8. On 9 March 2012, the Appeals Chamber found the Applicant's appeal to be inadmissible and dismissed it.¹²
9. On 13 April 2012, Applicant brought a second application seeking to contact Saif Al-Islam in order to give him access to counsel, and repeated much of the same arguments made in her initial application ("*Second Amicus Application*").¹³
10. On 17 April 2012, this Chamber appointed counsel from OPCD to represent Saif Al-Islam, and reminded OPCD to continue to assist Saif Al-Islam in acquiring counsel consistent with his wishes.¹⁴
11. On 24 April 2012, the Prosecution submitted a motion to strike the *Second Amicus Application*.¹⁵ The same day the Chamber dismissed the *Second Amicus Application* observing that the Applicant 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 authorise and facilitate contact between her and Saif Al-Islam to give him access to what she deems to be appropriate legal advice (the "*Decision*").¹⁶
12. On 1 May 2012 the Applicant sought leave to appeal the *Decision* ("*Application*").¹⁷

SUBMISSIONS

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

13. 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

¹² ICC-01/11-01/11-74.

¹³ ICC-01/11-01/11-108.

¹⁴ ICC-01/11-01/11-113.

¹⁵ ICC-01/11-01/11-125.

¹⁶ ICC-01/11-01/11-124.

¹⁷ ICC-01/11-01/11-131 ("*Application*").

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.¹⁸ 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).¹⁹

14. Accordingly, Pre-Trial Chamber I rejected a similar application for leave to appeal under article 82(1)(d) made by the Applicant in this case²⁰ and by another applicant in the *Darfur* situation.²¹ The Applicant invites the Chamber to depart from its previous decision in this case.²² She argues that article 82 and rule 155 should not be read restrictively and that “party” for the purposes of these provisions “must refer to the parties who are indeed *party* to the application i.e. those who brought it and those who responded to it.”²³ 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.

¹⁸ See article 82(2) and (4).

¹⁹ ICC-01/11-01/11-60. This Chamber decided that considering article 82(1) provides that “[e]ither party may appeal” a decision included in paragraph (d) of that article, Ms. Hosseinioun is not “a party” to the proceedings relating to this case. ICC-01/11-01/11-74. Judge Ntanda Nsereko of the Appeals Chamber in his separate opinion indicated that Ms Hosseinioun is not a “party” with the right to appeal as the term “party” in its ordinary sense refers to the Prosecutor and Defence. See also ICC-01/04-01/06-2779, paras.11-12 in which Trial Chamber I indicated that The Netherlands and DRC are not “parties” for the purposes of article 82(1)(d) and referred 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 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.”

²⁰ ICC-01/11-01/11-60.

²¹ 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.

²² Application, para.6.

²³ Application, para.5.

15. The Chamber rejected the Applicant's previous application for leave to appeal on the basis that she had no procedural standing as article 82(1) of the Statute provides that "[e]ither party may appeal" a decision included in paragraph (d) of this article, and Ms. Hosseinioun is not "a party" to the proceedings relating to this case.²⁴ Similarly, 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 155.²⁵

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

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

17. 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."²⁶

18. This requirement is not met here. The Applicant argues that the Chamber erred when deciding that she does not seek to provide the Chamber with "observations" as required under rule 103, as she sought to provide observations

²⁴ ICC-01/11-01/11-60, pp.4-5.

²⁵ Darfur Decision, p.5.

²⁶ 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."

on the need for contact between Saif Al-Islam and his family and friends so he can be assisted in obtaining access to a lawyer of his choice.²⁷ She argues that her submissions regarding the procedures to be followed in these proceedings, namely her request for the Chamber to order and facilitate access to Saif Al-Islam, amount to “observations” under rule 103.²⁸ The Applicant states that the issue of Saif Al-Islam’s access to family members and friends to ensure that Saif Al-Islam is represented by a lawyer of his choice is an issue that affects the fair conduct of proceedings, and if resolved by the Appeals Chamber would materially advance the proceedings.²⁹

19. The issue presented – Saif Al-Islam’s right of access to family and friends to ensure his right to choose his own legal counsel – does not arise from the Decision. Instead, it is at this stage “an abstract question or a hypothetical concern”³⁰ 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.³¹

20. Crucially, there is no conceivable impact on the fairness of the proceedings or in the outcome of the trial. As the Applicant acknowledged in her previous Addendum,³² the Chamber respected the rights of Saif Al-Islam by requesting the OPCD to represent the interests of the defence.³³ She further acknowledges that the OPCD has since met with Saif Al-Islam, who signed a declaration for the

²⁷ Application, paras. 8 and 10.

²⁸ Application, para.9.

²⁹ Application, para.4.

³⁰ ICC-01/05-01/08-532, para. 17.

³¹ ICC-01/04-01/06-168 OA3, para. 10.

³² Addendum, para.2.

³³ ICC-01/11-01/11-39-Red, p.6. See also ICC-01/11-01/11-45 and ICC-01/11-01/11-113.

OPCD to either select counsel or help him in this matter,³⁴ and the OPCD has been appointed as interim counsel for Saif Al-Islam.³⁵

21. Likewise, the issue does not affect the expeditiousness of the proceedings, nor would the intervention of the Appeals Chamber materially advance the 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.³⁶

CONCLUSION

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



Luis Moreno-Ocampo,
Prosecutor

Dated this 7th Day of May 2012

At The Hague, The Netherlands

³⁴ ICC-01/11-01/11-108, para. 2 (iv) and para. 22. See also ICC-01/11-01/11-113.

³⁵ Application, paras.2 and 11. See also ICC-01/11-01/11-113.

³⁶ ICC-01/11-01/11-39-Red, p.6. See also ICC-01/11-01/11-45 and ICC-01/11-01/11-113.