

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/11-01/11 OA

Date: 9 March 2011

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 THE LIBYAN ARAB JAMAHIRIYA

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

Public document

**Decision on the admissibility of the “Appeal Against Decision on Application
Under Rule 103” of Ms Mishana Hosseinioun of 7 February 2012**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia

The Office of Public Counsel for the Defence
Mr Xavier-Jean Keïta, Principal Counsel
Ms Melinda Taylor, Counsel

Counsel for the Appellant
Mr Geoffrey Nice
Mr Rodney Dixon

REGISTRY

Registrar
Ms Silvana Arbia

The Appeals Chamber of the International Criminal Court,

In the appeal of Ms Mishana Hosseinioun against the decision of Pre-Trial Chamber I entitled “Decision on the Applications of Mishana Hosseinioun and Aisha Gaddafi to submit *Amicus Curiae* observations to the Chamber” of 2 February 2012 (ICC-01/11-01/11-49),

After deliberation,

Renders unanimously the following

DECISION

The appeal is dismissed.

REASONS

I. PROCEDURAL HISTORY

1. On 30 January 2012, Ms Mishana Hosseinioun (hereinafter: “Ms Hosseinioun”) submitted the “Application on behalf of Mishana Hosseinioun for Leave to Submit *Amicus Curiae* Observations to the Chamber”¹ (hereinafter: “Application under Rule 103”) in which she sought leave pursuant to rule 103 of the Rules of Procedure and Evidence to submit observations in the proceedings before Pre-Trial Chamber I (hereinafter: “Pre-Trial Chamber”) in the case of *the Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*. She sought to submit observations specifically “in respect of the arrest, detention and right to legal representation of Saif Al-Islam Gaddafi”.²

2. On 2 February 2012, the Pre-Trial Chamber issued the “Decision on the Applications of Mishana Hosseinioun and Aisha Gaddafi to submit *Amicus Curiae* observations to the Chamber”³ (hereinafter: “Impugned Decision”) in which it rejected the Application under Rule 103.

¹ ICC-01/11-01/11-46.

² Application under Rule 103, para. 1.

³ ICC-01/11-01/11-49.

3. On 7 February 2012, Ms Hosseinioun filed before the Appeals Chamber the “Appeal Against Decision on Application Under Rule 103”⁴ (hereinafter: “Appeal”) in which she requested the Appeals Chamber to reverse the Impugned Decision. On the same day, she filed before the Pre-Trial Chamber the “Application For Leave to Appeal Against Decision on Application Under Rule 103”⁵ (hereinafter: “Application for Leave to Appeal”) in which she requested the Pre-Trial Chamber to grant leave, pursuant to article 82 (1) (d) of the Statute, to appeal the Impugned Decision.

4. On 14 February 2012, the Pre-Trial Chamber issued the “Decision on the ‘Application of Mishana Hosseinioun for Leave to Appeal Against Decision on Application under Rule 103’”⁶ (hereinafter: “Decision on Application for Leave to Appeal”) in which it rejected the Application for Leave to Appeal.

5. On 14 February 2012, Ms Hosseinioun submitted the “Addendum to Appeal Against Decision on Application Under Rule 103”⁷ (hereinafter: “Addendum to Appeal”).

6. On 23 February 2012, the Appeals Chamber issued the “Directions of the Appeals Chamber”⁸ (hereinafter: “Directions”) in which it set a time limit for the submission of observations in relation to the admissibility of the appeal by the Prosecutor and the Office of Public Counsel for the defence, the latter having been authorized by the Pre-Trial Chamber “to represent the interests of the Defence in all instances related to the proceedings against Saif Al-Islam Gaddafi in the present case until otherwise decided by [the Pre-Trial Chamber]”.⁹ The Appeals Chamber indicated therein that, subject to its decision on the admissibility of the appeal, directions would be given with respect to the submission of the document in support of the appeal and the time limit for the Prosecutor and the Office of Public Counsel for the defence to respond thereto.¹⁰

⁴ ICC-01/11-01/11-54 (OA).

⁵ ICC-01/11-01/11-53.

⁶ ICC-01/11-01/11-60.

⁷ Registered on 15 February 2012, ICC-01/11-01/11-61 (OA).

⁸ ICC-01/11-01/11-64 (OA).

⁹ Pre-Trial Chamber I, “Public Redacted Version of Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi”, 6 December 2011, ICC-01/11-01/11-39-Red, p. 6.

¹⁰ Directions, p. 3.

7. On 23 February 2012, Ms Hosseinioun filed the “Document in Support of the ‘Appeal Against Decision on Application Under Rule 103’”¹¹ (hereinafter: “Document in Support of the Appeal”).

8. On 28 February 2012, the Prosecutor submitted the “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)”¹² (hereinafter: “Observations of the Prosecutor”). On the same day, the Office of Public Counsel for the Defence filed the “OPCD Observations on the ‘Directions of the Appeals Chamber’”¹³ (hereinafter: “OPCD Observations”).

II. DETERMINATION BY THE APPEALS CHAMBER

9. Ms Hosseinioun submits the Appeal under article 82 (1) (a) of the Statute.¹⁴ Under this article “[e]ither party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: (a) A decision with respect to jurisdiction or admissibility”. Ms Hosseinioun contends that the appeal is admissible (in her words, that she has “standing to appeal the decision”) on the basis that, first, she is a party to the proceedings¹⁵ and, second, the Impugned Decision is a decision with respect to admissibility.¹⁶ The Prosecutor responds that the appeal is inadmissible as the Impugned Decision is not a decision with respect to jurisdiction or admissibility and that Ms Hosseinioun neither is a party within the meaning of article 82 (1) of the Statute nor has any other Statutory right to bring the appeal.¹⁷ The Office of Public Counsel for the defence did not take a position on the admissibility of the appeal.¹⁸

10. The Appeals Chamber addressed in detail the scope of article 82 (1) (a) of the Statute in its “Decision on the admissibility of the ‘Appeal of the Government of Kenya against the “Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute

¹¹ ICC-01/11-01/11-65 (OA).

¹² ICC-01/11-01/11-66 (OA).

¹³ ICC-01/11-01/11-68 (OA).

¹⁴ Appeal, para. 2.

¹⁵ Appeal, paras 5-8.

¹⁶ Appeal, paras 9-11.

¹⁷ Observations of the Prosecutor, *passim*.

¹⁸ OPCD Observations, para. 5.

and Rule 194 of the Rules of Procedure and Evidence”¹⁹ (hereinafter: “*Decision in Kenya OA*”). Given the relevance of that decision to the present appeal, the Appeals Chamber finds it useful to recall, in full, the pertinent paragraphs concerning the scope of article 82 (1) (a) of the Statute. The Appeals Chamber stated:

15. Article 82 (1) (a) of the Statute provides that either party may appeal “a decision with respect to jurisdiction or admissibility”. The Appeals Chamber understands 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. As previously held by the Appeals Chamber, a decision of a Pre-Trial 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. The French version of article 82 (1) (a) of the Statute confirms this interpretation as it provides that a party may only appeal a “[d]écision sur la compétence ou la recevabilité”.

16. The Appeals Chamber's reading of the plain meaning of article 82 (1) (a) of the Statute is also confirmed by its relationship with other provisions of the Statute. Article 82 (1) (a) of the Statute must be read in conjunction with articles 18 and 19 of the Statute. Article 18 (4) of the Statute provides that the State concerned or the Prosecutor may appeal to the Appeals Chamber against a preliminary ruling of the Pre-Trial Chamber regarding admissibility in accordance with article 82 of the Statute. Article 19 of the Statute provides that the Court may decide on the admissibility of a case either on its own motion, on request of the Prosecutor or in response to a challenge brought by certain specified persons or States. Article 19 (6) of the Statute provides that “[d]écisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82”. In the view of the Appeals Chamber, the specific references to article 82 of the Statute and the use of identical language in articles 19 (6) and 82 (1) (a) of the Statute indicate that the right to appeal a decision on jurisdiction or admissibility is intended to be limited only to those instances in which a Pre-Trial or Trial Chamber issues a ruling specifically on the jurisdiction of the Court or the admissibility of the case.

17. The Appeals Chamber has also previously held with respect to appeals under article 82 (1) (b) of the Statute that the “effect or implications of a decision confirming or denying the charges do not qualify or alter the character of the decision”. The Appeals Chamber finds that the same logic applies to appeals under article 82 (1) (a) of the Statute. It is the nature, and not the ultimate effect or implication of a decision, that determines whether an appeal falls under article 82 (1) (a) of the Statute. Even if the ultimate impact of a decision of a Pre-Trial or Trial Chamber were to affect the admissibility of

¹⁹ *Situation in the Republic of Kenya*, 10 August 2011, ICC-01/09-78 (OA).

cases, that fact would not, in and of itself, render the decision a “decision with respect to [...] admissibility” under article 82 (1) (a).²⁰ [Citations omitted]

11. The Impugned Decision constituted a decision rejecting a request by Ms Hosseinioun to submit observations under rule 103 of the Rules of Procedure and Evidence. The Pre-Trial Chamber did not even consider, let alone issue a ruling on, the admissibility of the case against Mr Gaddafi. As such, it cannot be considered a “decision with respect to [...] admissibility”. The fact that Ms Hosseinioun alleges positive consideration of her Application under Rule 103 ultimately may have had some effect on or implications for the Pre-Trial Chamber’s consideration of the admissibility of the case of Mr Gaddafi, even if true, cannot render the Impugned Decision a decision with respect to admissibility. It was simply a decision on whether she may submit observations under rule 103 of the Rules of Procedure and Evidence. As the Appeals Chamber has found twice before, a decision of such a nature is not and cannot be considered to be a decision with respect to jurisdiction or admissibility under article 82 (1) of the Statute.²¹ The appeal is therefore clearly inadmissible.

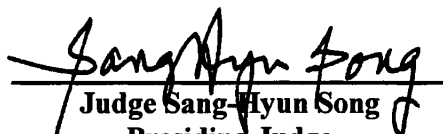
12. For the aforementioned reasons, the Appeals Chamber finds the appeal inadmissible and, therefore, dismisses the appeal *in limine*. As the appeal is dismissed *in limine*, the Appeals Chamber finds it unnecessary to address the filing of either the Addendum to Appeal or the Document in Support of the Appeal.

13. Judge Daniel David Ntanda Nsereko appends a separate opinion to this decision.

²⁰ *Decision in Kenya OA*, paras 15-17.

²¹ *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, “Decision on the ‘Appeal against the Single Judge’s Decision on the “Request by Ms. Moraa Gesicho to Appear as Amicus Curiae””, 17 August 2011, ICC-01/09-01/11-270 (OA 2); *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, “Decision on the ‘Appeal against the Single Judge’s Decision on the “Request by Ms. Moraa Gesicho to Appear as Amicus Curiae””, 17 August 2011, ICC-01/09-02/11-250 (OA 2).

Done in both English and French, the English version being authoritative.


Judge Sang-Hyun Song
Presiding Judge

Dated this 9th day of March 2012

At The Hague, The Netherlands

Separate Opinion of Judge Daniel David Ntanda Nsereko

1. I agree fully with the majority that the appeal should be dismissed as inadmissible on the basis that the Impugned Decision is not a decision with respect to admissibility under article 82 (1) (a) of the Statute. I issue this separate opinion as I believe it is also important to address Ms Hosseinioun's argument that she is a "party" with the right to appeal the Impugned Decision. In my view, Ms Hosseinioun is not a party with the right to appeal the Impugned Decision for the following reasons.

2. As the Appeals Chamber has previously indicated, the term "party" refers in its ordinary sense to the Prosecutor and the Defence.¹ There is no reason to give it a different interpretation in the context of article 82 (1) of the Statute. To the contrary, this interpretation is confirmed by the fact that article 82 (1) of the Statute refers to "either party" and not to "any party", thereby indicating that the right to appeal is limited to the two parties in the narrow sense, namely the Prosecutor and the Defence. I am also not persuaded by Ms Hosseinioun's argument that, the plain meaning of the text notwithstanding, article 82 "should not be read restrictively or in an overly technical way, which would leave the court open to criticism of failing to confront the important legal issues raised by the appeal". I agree with the reasoning of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia which, when confronted with a similar issue, stated succinctly:

If this view of the matter appears overly legalistic, any other ruling would open up the Tribunal's appeals procedures to non-parties - witnesses, counsel, *amicus curiae*, even members of the public who might nurse a grievance against a Decision of the Trial Chamber. This could not be. The Tribunal has a limited appellate jurisdiction which categorically cannot be invoked by non-parties.²

3. I note that non-parties, in particular States which challenge jurisdiction or admissibility, may have rights to appeal decisions of the Pre-Trial and Trial Chambers. However, as explained by the Prosecutor, such rights stem directly from


¹ *Prosecutor v Thomas Lubanga Dyilo*, "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432 (OA 9, OA 10), para. 93. See also *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Reasons for the 'Decision on 'Victims and Witnesses Unit's considerations on the system of witness protection and the practice of 'preventive relocation'" and "Prosecution's request for leave to file a response to 'Victims and Witnesses Unit's considerations on the system of witness protection and the practice of 'preventive relocation'"", 11 July 2008, ICC-01/04-01/07-675 (OA), dissenting opinion of Judge Pikis, para. 4.

² *In the case of Dragan Opacic*, "Decision on Application for Leave to Appeal", 3 June 1997, IT-95-7-Misc. 1, para. 6.



other provisions of the Statute and do not support Ms Hosseinioun's contention that a non-party has a right to appeal a decision solely on the basis of article 82 (1) of the Statute.³ As an applicant seeking *amicus curiae* status under rule 103 of the Rules of Procedure and Evidence, Ms Hosseinioun is not a party entitled to bring this appeal either within the meaning of article 82 (1) of the Statute or within any other Statutory provision. Accordingly, the appeal must also be dismissed for this reason.

Done in both English and French, the English version being authoritative.


Judge Daniel David Ntanda Nsereko

Dated this 9th day of March 2012

At The Hague, The Netherlands

³ See Response to the Document in Support of the Appeal, para. 25.