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No.: **ICC-02/11-01/12**

Date: **18/11/2013**

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Hans-Peter Kaul
Judge Christine Van den Wyngaert

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE
IN THE CASE OF
THE PROSECUTOR v. SIMONE GBAGBO

PUBLIC DOCUMENT

**Request for leave to submit *amicus curiae* observations
pursuant to Rule 103(1) of the Rules of Procedure and Evidence**

Source: Counsel for Charles Blé Goudé

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

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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

Introduction

1. Pursuant to Rule 103(1) of the Rules of Procedure and Evidence, Pre-Trial Chamber I is hereby respectfully requested to grant leave to Counsel for Charles Blé Goudé ("the Applicant") to make *amicus curiae* submissions in the context of the admissibility challenge filed by the Republic of Côte d'Ivoire ("Côte d'Ivoire") in the case against Simone Gbagbo ("the Suspect").

2. The proposed *amicus curiae* brief will, in principle, touch on Côte d'Ivoire's general willingness to prosecute individuals suspected of involvement in the post-election violence ("PEV") and its ability "genuinely to prosecute" the Suspect.¹ The proposed submissions will neither enter into a detailed examination of the domestic charges against the Suspect nor the procedural steps initiated against her in Côte d'Ivoire.

3. Should the Pre-Trial Chamber permit observations to be submitted on behalf of the Applicant, Counsel would request the same access to the confidential annexes accompanying the admissibility challenge as granted to the Office of Public Counsel for Victims ("OPCV").

Factual Background

4. On 21 December 2011, Pre-Trial Chamber III issued, under seal, its *Warrant of Arrest for Charles Blé Goudé*.

1. On 6 February 2012, Côte d'Ivoire purportedly commenced criminal proceedings against the Suspect for substantially the same conduct with which she is charged at the International Criminal Court ("ICC").²

¹ Article 17(1)(b) of the Rome Statute.

² ICC-02/11-01/12-11-Red at paragraph 27.

2. On the following day - 7 February 2012, by a strange quirk of fate, the Office of the Prosecutor ("OTP") filed its application for an arrest warrant against the Suspect.

3. On 29 February 2012, Pre-Trial Chamber III issued, under seal, its *Warrant of Arrest for Simone Gbagbo*.³ This warrant of arrest is almost a carbon copy of the warrant of arrest for the Applicant.

4. On 22 November 2012, Pre-Trial Chamber I lifted the seal on the warrant for the arrest of the Suspect.

5. On 17 January 2013, the Applicant was arrested in Ghana and transferred to Côte d'Ivoire where national criminal proceedings have supposedly been instituted against him. The exact nature of these proceedings is not known to herein undersigned counsel ("Counsel") and, for all intents and purposes, the Applicant has been vaporised in truly Orwellian style.

6. On 15 February 2013, Côte d'Ivoire deposited its instrument of ratification of the Rome Statute thereby assuming the obligations and duties arising out of membership of the ICC.

7. On 30 September 2013, the learned Single Judge of Pre-Trial Chamber I lifted the seal on the warrant for the arrest of the Applicant.

8. On 30 September 2013, Côte d'Ivoire filed a challenge to the admissibility of the case against the Suspect with 17 confidential annexes ("the Admissibility Challenge"). A redacted version of the Admissibility Challenge was published the following day.

³ ICC-02/11-01/12-1.

9. On 11 October 2013, Counsel submitted his *Defence request for a decision ordering the authorities of the Republic of Côte d'Ivoire to facilitate a legally privileged interview with Charles Blé Goudé and to clarify their intentions with respect to the proceedings initiated against Charles Blé Goudé at the International Criminal Court*.⁴

10. On 21 October 2013, the OTP responded to the above mentioned Defence application by not opposing Counsel's request for immediate privileged access to the Applicant.⁵

11. On 15 November 2013, Pre-Trial Chamber I rendered its *Decision on the conduct of the proceedings following Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo*.⁶

Submission

12. Rule 103(1) provides as follows: "*At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate*".

13. An admissibility challenge, by its very nature, invites the ICC to pronounce upon the capacity and willingness of a State to conduct a genuine prosecution against a suspect. In the present case, any decision taken with respect to the national proceedings instituted against the Suspect will directly impact on a future admissibility decision concerning the Applicant.

14. Counsel for the Applicant notes that the almost identical alleged involvement of the Suspect and the Applicant in the same criminal enterprise could possibly prompt the Court, at a future date, to order the joinder of

⁴ ICC-02/11-02/11-31.

⁵ ICC-02/11-02/11-33.

⁶ ICC-02/11-01/12-15.

proceedings.⁷ While Counsel makes no comment as to whether he would support or object to such a move, the interests of justice at present would dictate that discrete issues pertaining to the Applicant and the Suspect be determined together in order to avoid inconsistencies and contradictions.

15. Permitting the Applicant to raise submissions in the context of the present Admissibility Challenge would not constitute unnecessary duplication of legal arguments proffered by the other parties and participants since they would be presented, uniquely, from the vantage point of an alleged co-perpetrator.

16. In order to neutralise the risk of prejudice to the Suspect, Counsel would refrain from making any submissions as to the substantive nature of the proceedings being conducted against the Suspect. As mentioned in the introductory paragraphs to this petition, Counsel proposes to confine himself to general observations on the capacity of the judicial system in Côte d'Ivoire and the willingness or, rather, "selective" willingness of the authorities to prosecute crimes arising out of the PEV.

17. Permitting the Applicant to make submissions on admissibility in the Suspect's case would also be in the interests of judicial efficiency and economy avoiding, as it would, unnecessary duplication, at a later stage, of submissions made in the context of the present proceedings.

18. Counsel for the Applicant is aware of Pre-Trial Chamber II's decision ICC-01/09-35 and wishes to distinguish it. In that case the current Deputy-

⁷ c.f.; Article 64(5) of the Rome Statute and Rule 136 of the Rules of Procedure and Evidence. See, further, ICC-01/04-01/07-257: Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui, 10 March 2008, at paras 8-9 where the Pre-Trial Chamber ruled that "although article 64(5) of the Statute and rule 136 of the Rules are included in Chapter VI of the Statute and of the Rules which deals with the 'Trial Procedure', the Chamber considers that the contextual interpretation of such provisions, in light of the above-mentioned provisions relating to the Pre-Trial proceedings of a case before the Pre-Trial Chamber included in Chapter V of the Statute and the Rules, does not preclude joint proceedings at the Pre-Trial stage, but rather supports the general rule that there is a presumption of joint proceedings for persons prosecuted jointly".

President of Kenya – William Ruto was disqualified from making *amicus curiae* observations with respect to an admissibility challenge filed in proceedings which targeted him as a potential suspect. The Pre-Trial Chamber specifically held that that the "[t]he core rationale underlying an *amicus curiae* submission is that the Chamber be assisted in the determination of the case by an independent and impartial intervener having no other standing in the proceedings". The Pre-Trial Chamber reasoned as follows: "it is unfeasible that the said person be permitted to submit an *amicus curiae* application and/or observation and subsequently be called upon to respond to his or her own observations. If rule 103 of the Rules was meant to permit a person under the Court's investigation to submit *amicus curiae* observations, it would have excluded him or her from responding to his or her own observations". The same reasoning cannot apply to the Applicant. The present admissibility challenge is not in the more general "situation" but in the case against the Suspect. Furthermore, the Applicant is not a party to the proceedings against the Suspect and would not, therefore, be placing himself in the mutually exclusive role of assisting Court and, thereafter, being required to respond to such assistance.

19. Counsel is also aware that elsewhere in the Kenya Situation, the ICC has stipulated that *amicus curiae* observations will only be accepted where specific expertise is required.⁸

20. Notwithstanding, the Applicant suggests, that the "independence / impartiality" and "specific expertise" requirements mentioned in paragraphs 18 and 19 above were rendered in first instance and would appear to be qualified, if not contradicted, by a later decision of the Appeals Chamber. In the *Ruto &*

⁸ Pre-Trial Chamber II, "Decision on the 'Request for leave to submit Amicus Curiae observations pursuant to Rule 103 of the Rules of Procedure and Evidence'", ICC-01/09-01/11-124, para. 7; Pre-Trial Chamber II, "Decision on the 'Request by Ms. Moraa Gesicho to Appear as Amicus Curiae'", ICC-01/09-01/11-49, para. 14; Pre-Trial Chamber II, "Decision on the 'Request for leave to submit Amicus Curiae Observations on behalf of the Kenyan Section of the International Commission of Jurists Pursuant to Rule 103 of the Rules of Procedure and Evidence'", ICC-01/09-01/11-84, para. 8.

Sang case,⁹ a number of African Union States were permitted to make *amici curiae* submissions solely on the basis of "*the novelty of the issues raised*".¹⁰ The intervention of the same African Union States, however, was by no means neutral and did not provide any particular expertise. The intervention was, rather, part of a coordinated and concerted political effort to support the accused person's request to be excused from continuous presence at his trial.

21. Moreover, it is worthwhile noting that the parallel rule of procedure and evidence at the International Criminal Tribunal for Rwanda¹¹ has been interpreted with the following qualification: "*the general definition of amicus curiae does not call for impartiality on the part of the filing party.*"¹²

22. Despite all the aforementioned, the common denominator appears to be a test which would require the Chamber to decide whether the *amicus curiae* contribution would assist it in determining the issue at stake.¹³ With this in mind, the Appeals Chamber has identified a category of undesirable *amici* who would "*serve merely to repeat submissions already provided by the parties and participants*" and from whom submissions are thus not "*desirable for the proper determination of the case*".¹⁴ For example, Trial Chamber V in the *Kenyatta* case denied a request to file an *amicus curiae* brief by the Kenya Human Rights Commission regarding victim protection because it found that the proposed information would be provided by the OTP and the Victims and Witnesses Unit.¹⁵ Similarly, in the *Ruto, Kosgey & Sang* case, Pre-Trial Chamber II rejected an *amicus curiae* request by a Kenyan NGO planning to deal with the impact on

⁹ ICC-01/09-01/11-942.

¹⁰ *ibid* at para. 10.

¹¹ Rule 74.

¹² Trial Chamber II, "Decision on the *amicus curiae* application by the Government of the Kingdom of Belgium", ICTR-96-7-T.

¹³ See Appeals chamber, "Decision on 'Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence'", ICC-01/04-01/06-1289, para. 8.

¹⁴ Appeals Chamber, "Decision on the application of 14 September 2009 for participation as an *amicus curiae*", ICC-01/05-01/08-602 OA2, para. 11.

¹⁵ TC V, "Decision on the Kenya Human Rights Commission's request to file an *amicus curiae* brief", ICC-01/09-02/11-168.

victims of a suggested re-location of proceedings away from the seat of the Court. In that instance it was held that the observations of the parties and the victims would be “sufficient.”¹⁶ A further example of an “undesirable” *amicus curiae* brief would be one that impinged on prosecutorial discretion or opined as to whether evidence collected would be admissible or probative.¹⁷

23. Counsel is hopeful that, with the Court's assistance, he will soon be able to take specific instructions from the Applicant. At present, however, it is not known what view he will take of the matter at hand. It is not known either whether a conflict of interest could exist between him and the Suspect. Assuming for the sake of argument that the Applicant should be minded to oppose a potential admissibility challenge in his own case, he could find himself prejudiced by a prior ruling as to “capacity” in the case against the Suspect. Indeed, it is not known, at the present moment in time, how the OTP, the Suspect and OPCV will react to the Admissibility Challenge. Theoretically, all of the aforementioned could agree not to contest the Admissibility Challenge which, subject to the learned Pre-Trial Chamber's overriding discretion, would make a powerful case in favour of acceding to Cote d'Ivoire's request.

24. It is, thus, worthwhile noting those situations where a request to file an *amicus curiae* brief was allowed because it was the only dissenting voice. For example, in the *Bashir* case, the Appeals Chamber permitted *amici curiae* submissions to be made by the SWTUF and SIDG finding that the presentation of “another view to that of the Prosecutor who was the only participant to have made submissions” would be “desirable for the proper determination of the appeal”.¹⁸

¹⁶ PTC II, “Decision on the ‘Request for leave to submit Amicus Curiae observations pursuant to Rule 103 of the Rules of Procedure and Evidence’”, ICC-01/09-01/11-124, para. 8.

¹⁷ PTC II, “Decision on the ‘Request by Ms. Moraa Gesicho to Appear as Amicus Curiae’”, ICC-01/09-01/1.

¹⁸ Appeals Chamber, “Reasons for ‘Decision on the Application of 20 July 2009 for Participation under Rule 103 of the Rules of Procedure and Evidence and on the Application of 24 August 2009 for Leave to Reply’”, ICC-02/05-01/09 OA, para. 9.

Concluding Remarks

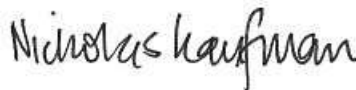
25. As mentioned above, Côte d'Ivoire has yet to clarify its intentions with respect to the Applicant. It could be the case that Côte d'Ivoire is waiting for the Pre-Trial Chamber to rule on the admissibility of the case against the Suspect before declaring whether it intends to challenge the admissibility of the case against the Applicant. Such a strategy should not be allowed. Côte d'Ivoire has an obligation immediately to comply with the ICC warrant for the Applicant's arrest failing which it should, without delay, challenge the admissibility of his case while permitting Counsel to interview his client.

26. Counsel is, nevertheless, mindful of the fact that as soon as Côte d'Ivoire should announce an intention to challenge the admissibility of the case against the Applicant, this petition could be rendered moot. In such an eventuality, the Applicant would request that the admissibility proceedings in his case run parallel to those of the Suspect similar to the fashion adopted in the Kenya Situation.

Relief Sought

27. In light of the above, the Pre-Trial Chamber is requested as follows:

- 1) to permit Counsel for the Applicant to file an amicus curiae brief which will touch on the issues set out in paragraph 2 above, and;
- 2) to grant Counsel for the Applicant access to all the confidential materials annexed to the Admissibility Challenge and supplied to OPCV.



Nicholas Kaufman
Counsel for Charles Blé Goudé

Done this 18th day of November 2013

Jerusalem, Israel