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**International
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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. LAURENT GBAGBO

PUBLIC

**Request for Leave to Submit *Amicus Curiae* observations pursuant to Rule 103 of the
Rules of Procedure and Evidence**

Source: Professor G.G.J. Knoops¹ and professor T. Zwart

¹ Prof. Knoops was assisted by Ms. E. Vogelvang, paralegal at Knoops'advocaten (LL.M in International Criminal Law).

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

The Office of the Prosecutor

Ms Fatou Bensouda

Counsel for the Defence

Mr Emmanuel Altit

Ms Agathe Bahi Baroan

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Paolina Massidda

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. Pursuant to rule 103 of the Rules of Procedure and Evidence (herein “RPE”) Professor GGJ Knoop and Professor T. Zwart (herein “the applicants”) hereby apply for leave to submit observations as academic *Amicus Curiae* in the case of the *Prosecutor v. Laurent Gbagbo* in the Situation in Ivory Coast.
2. The *Amicus Curiae* Brief addresses the question whether a Pre-Trial Chamber, faced with an adjournment of the confirmation of charges hearing, pursuant to art. 61 (7) (c) (i) of the Rome Statute, should examine both the quantum and quality of the (newly) adduced evidence received by the Pre-Trial Chamber, on the basis of a more strict application of the threshold of ‘*substantive grounds to believe*’ that the person committed each of the crimes charged. At the outset of this Request for Leave, it is to be observed that no decisive precedent thereto features within the system of the International Criminal Court (ICC), considering the absence of a comparable case.²
3. The confirmation of charges hearing is designed to protect the rights of the Defense and the Pre-Trial Chamber should bear in mind this purpose when reviewing the newly submitted evidence of the Prosecution and the Defense.
4. In the case the honourable Pre-Trial Chamber would grant this request for leave to submit observations pursuant to Rule 103 of the RPE, the applicants intend to submit its *Amicus Curiae* brief within any time limit as set by the Pre-Trial Chamber. If leave to submit oral comments is granted, the authors of the brief are prepared to appear at a hearing before the Pre-Trial Chamber.

² Knoop, G.G.J. (2013). *The Achilles heel of ICC Prosecutions*, Justice Magazine, no. 53, p. 14.

II. THE APPLICANTS AND THE INCENTIVE FOR THE *AMICUS CURIAE* BRIEF

5. Professor T. Zwart is a professor of International Human Rights law at Utrecht University and Director of the Netherlands School of Human Rights Research, a consortium of various universities in the Kingdom of the Netherlands. Professor G.G.J. Knoop is a professor of International Criminal Law at Shandong University and practises as a lawyer in international criminal law. Professor Zwart is the initiator of the AU-ICC project, an academic project aiming at addressing the on-going discussion within the AU vis-à-vis its cooperation with the ICC.
6. The request for leave to submit *Amicus Curiae* observations is filed in light of the Pre-Trial Chamber decision of 3 June 2013 in which the hearing on the confirmation of the charges in the case against Laurent Gbagbo is adjourned.³ Judge Fernández de Gurmendi previously considered that the decision to grant leave to file an *Amicus Curiae* brief is in essence a discretionary decision, dependant on “*whether the proposed observations are of assistance in the determination of any issues pending before the Chamber.*”⁴ The applicants, professor Zwart and professor Knoop, are of the opinion that the proposed observations in their *Amicus Curiae* brief can be of assistance as to answering the pivotal question whether a higher or different quality of evidence should be required for a continued confirmation of charges hearing.

III. THE LAW ON *AMICUS CURIAE* BRIEFS

7. Rule 103 (1) of the Rules provides that “*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.*”
8. Pursuant to Rule 103 States, organizations or persons are permitted to submit applications and participate in the proceedings before the Court.

³ *Prosecutor v. Laurent Gbagbo*, ‘Decision on adjourning the hearing on the confirmation of the charges pursuant to article 61(7)(c)(i) of the Rome Statute’, ICC-02/11-01/11, 3 June 2013, para. 41.

⁴ *Prosecutor v. Laurent Gbagbo*, ‘Decision on the “Urgent Request to Leave to Submit *Amicus Curiae* observations pursuant to Rule 103 of the Rules of Procedure and Evidence”’, ICC-02/11-01/11, 14 February 2013, para. 4

9. Pre-Trial Chambers, in deciding on a submission, have applied “the proper determination test” to various cases.⁵ A view that was underlined by the Appeals Chamber granting a leave for *Amicus Curiae* submissions in the case against Thomas Lubanga.⁶
10. International Criminal Tribunals have permitted submissions from third parties when it was determined that the submissions assisted the Court in reaching the right decision.⁷ Third party interventions are guaranteed by the Statutes of other international tribunals and courts, such as the International Criminal Tribunal for the former Yugoslavia (ICTY)⁸, the International Criminal Tribunal for Rwanda (ICTR)⁹ and the Special Court for Sierra Leone (SCSL)¹⁰; all on a similar basis as Rule 103(1).

IV. RELEVANCE OF *AMICUS CURIAE* BRIEF AND SPECIFIC QUESTIONS TO BE ADDRESSED IN THE *AMICUS CURIAE* BRIEF

11. The *Amicus Curiae* brief addresses the following questions:

- Does the Pre-Trial Chamber have the authority to require from the Prosecution a higher standard of proof at a continued confirmation hearing of charges?
- Does the Pre-Trial Chamber have the power to apply a more strict interpretation of the threshold of ‘substantive grounds to believe’ that the person committed each of the crimes charged, as opposed to the level of ‘substantially’ at the

⁵ See for example Pre-Trial Chamber II, “Decision on Request for Leave to Submit *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence”, Case No. ICC-01/05-01/08, 17 July 2009, para. 10.

⁶ 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’”, Case No. ICC-01/04-01/06 OA 11, 22 April 2008, para. 7-8.

⁷ See for example Trial Chamber I, The Prosecutor v. Jean-Paul Akayesu, “Order Granting Leave for *Amicus Curiae* to Appear”, Case No. ICTR-96-4-T, 12 February 1998; Trial Chamber III, Prosecutor v. Laurent Semanza, “Decision on the Kingdom of Belgium’s Application to File an *Amicus Curiae* Brief and on Defence Application to Strike Out the Observations of the Kingdom of Belgium Concerning the Preliminary Response of the Defence”, Case No. ICTR-97-20-T, 9 February 2001.

⁸ Rule 74 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (“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 appear before it and make submissions on any issue specified by the Chamber”).

⁹ Rule 74 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda.

¹⁰ Rule 74 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

prolonged confirmation of charges hearing compared to the initial confirmation of charges hearing?

- What is the interpretative meaning of the axiom “further evidence” as envisioned by article 61 (7) (c) (i) of the Rome Statute within the context of a continued confirmation hearing?
- Can the Pre-Trial Chamber impose a higher quality of the evidence at a prolonged confirmation hearing?

4.1. Table of contents

12. In addition to the foregoing questions, the *Amicus Curiae* brief entails the following preliminary table of contents:

I. Introduction

II. Executive Summary

III. The nature of judicial review pursuant to art. 61 (7) (c) (i) within the ICC-System

3.1. (Teleological) interpretation of the evidentiary standard pursuant to art. 61 (7) of the Rome Statute

3.2. Teleological interpretation of art. 61 (7) in conjunction with art. 61 (6) of the Rome Statute

3.3. Direct effect of article 69 (4) on the interpretation of article 61 (6) of the Rome Statute

IV. Standards of Proof during the Indictment Procedure before ad hoc Tribunals

4.1. Review of the Indictment procedure

4.2. Quality of the Evidence

4.3. Conclusion

V. Standards of Proof and the Quality of Evidence vis-à-vis Indictments within Domestic Jurisdictions

5.1. Canada

5.2. Germany

5.3. France

5.4. Conclusion

VI. Conclusion

V. GENERAL JUSTIFICATIONS FOR THIS RULE 103 SUBMISSION

5.1. Introduction

13. The central issue to be raised in the *Amicus Curiae* brief pertains to the question whether a Pre-Trial Chamber, faced with an adjournment of the confirmation of charges hearing, pursuant to art. 61 (7) (c) (i) of the Rome Statute, based upon the ICC-system, is empowered to examine both the quantum and quality of the (newly) adduced evidence received by the Pre-Trial Chamber, on the basis of a more strict application of the threshold of ‘substantive grounds to believe’ that the person committed each of the crimes charged, as opposed to the level of ‘substantially’ applicable at the initial confirmation of charges hearing.

5.2. (Teleological) interpretation of the evidentiary standard pursuant to art. 61 (7) of the Rome Statute

14. A teleological interpretation of art. 61(7) within the context of the system of the ICC, in conjunction with the rationale of this burden of proof (preliminary assessment of the evidence for trial purposes), may empower the Pre-Trial Chamber at a prolonged confirmation hearing to arrive – based on the specificities of the case at hand – at a more strict interpretation of the existing evidentiary standard of art. 61 (7), compared to the initial confirmation hearing. The *Amicus Curiae* brief assesses the following arguments which could suggest such a reasoning.

15. Firstly, as previously mentioned, the rationale underpinning the standard of proof for a confirmation hearing pursuant to art. 61 (7) of the Rome Statute is that:

'(i) only those cases proceed to trial for which the Prosecutor has presented sufficiently compelling evidence going beyond mere theory or suspicion; (ii) the suspect is protected against wrongful prosecution; (iii) and judicial economy is ensured by distinguishing between cases that should go to trial and those that should not'.¹¹

16. Pre-Trial Chamber I also recalled that the purpose of the confirmation of charges hearing is *"limited to committing to trial only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought. The mechanism is designed to protect the rights of the Defence against wrongful and unfounded charges".¹²*

17. Secondly, there is the text of art. 61 (7) (c) (i) of the Rome Statute, dictating that the Prosecutor provides 'further evidence'. A grammatical interpretation of these words suggests the initial evidence to be insufficiently 'substantial'. This threshold is only to comply with if the initial evidence is reinforced by 'further evidence'. At this juncture, the axiom of 'further evidence' should transform the initial evidence into a more 'compelling' evidentiary composition.¹³ The nature of judicial review required here may enhance a more strict application of art. 61 (7) of the Rome Statute.

18. The authority of a Pre-Trial Chamber to impose a more strict interpretation of the evidentiary threshold of art. 61 (7) of the Rome Statute, at a continued confirmation hearing, contrasted to its evidentiary interpretation of the initial the confirmation hearing, may also draw on previous ICC Pre-Trial Chamber- rulings:

¹¹ ICC-02/11-01/11-432 , para. 18; embraced by Judge Silvia Fernández de Gurmendi, in: ICC-02/11-01/11-432-Anx, para. 26.

¹² ICC-02/05-02/09-243-Red, para. 39.

¹³ ICC-02/11-01/11-432, para. 18.

- i. The majority of the Pre-Trial Chamber in the Gbagbo-case applied the criterion of '*sufficiently compelling evidence going beyond mere theory or suspicion (...)*'.¹⁴ This criterion of 'sufficiently compelling' may – albeit it being flexible – warrant the conclusion that which was not 'sufficiently compelling' (at the first part of a confirmation hearing) should be even more 'sufficiently compelling' at a prolonged confirmation hearing.
- ii. The same counts for the criterion promulgated by the Pre-Trial Chamber in the Lubanga-case, ruling that judicial review as envisaged by art. 61 (7) of the Rome Statute means to be "(...) *thoroughly satisfied that the Prosecutor's allegations are sufficiently strong to commit the person to trial*".¹⁵ Once the evidence presented at the first session of the continued confirmation hearing was not qualified as being 'sufficiently strong' to have thoroughly satisfied the bench, the 'further evidence' at a prolonged confirmation hearing will be logically more critically scrutinized by the same Bench.

19. Once the Prosecutor has been afforded the procedural avenue of art. 61 (7) (c) (i) of the Rome Statute, the level of judicial review as set out by art. 61 (7) of the Rome Statute, as to the availability of "(...) *concrete and tangible proof demonstrating a clear line of specific allegations* (...) "¹⁶, may thus be intensified.

20. This implies that the nature of the confirmation hearing inherently is that of a "legal dialectic process" during which the Pre-Trial Chamber tests the quality of the evidence as to whether it withstands the evidentiary threshold of art 61 (7) of the Rome Statute.

5.3. Teleological interpretation of art. 61 (7) in conjunction with art. 61 (6) of the Rome Statute

¹⁴ Id. , para. 18.

¹⁵ ICC-02/11-01/11-432 , para. 18; see also: ICC-01/04-01/06-803-tEN, para. 39.

¹⁶ ICC-02/11-01/11-432, para. 18.

21. As the Pre-Trial Chamber determined in its Decision to adjourn the confirmation hearing, it would be “*unhelpful to formulate rigid formal rules*”, when reviewing the quality of individual items of evidence.¹⁷ However, the Pre-Trial Chamber has promulgated its general disposition towards certain types of evidence.¹⁸ Firstly, the Pre-Trial Chamber held that it would prefer as much forensic and other material evidence as possible.¹⁹ Secondly, hearsay statements as documentary evidence will usually have less probative value.²⁰ Thirdly, reliance on anonymous hearsay evidence, as found in NGO-reports and press articles, will be problematic, as the Pre-Trial Chamber is deprived of information about the source of the information.²¹ In the past, Pre-Trial Chamber I had already determined that NGO reports, emails and press articles that contain hearsay evidence is problematic since it may present the Defense with difficulties to ascertain the truthfulness and authenticity of the evidence.²² As a general rule, the Chamber held that such anonymous hearsay evidence should only be used to corroborate other evidence.²³

22. Furthermore, article 61 (6) of the Rome Statute promulgates that at the confirmation hearing, an Accused may: (a) object to the charges; challenge the evidence provided by the Prosecution; and (c) present evidence. The fact that the Defense may submit evidence should imply that the judges of the Pre-Trial Chamber have the task of weighing the evidence of both the Prosecution and the Defense. As the Pre-Trial Chamber held,

*“The introduction of conflicting evidence by the Defence necessarily engages the Chamber in an assessment of the credibility and weight of this evidence in light of the whole of the evidence submitted for the purposes of the confirmation hearing”.*²⁴

¹⁷ Id., para. 26.

¹⁸ Id., para. 26.

¹⁹ Id., para. 27.

²⁰ Id., para. 28.

²¹ Id., para. 29.

²² ICC-01/04-01/06-803-tEN, para. 106.

²³ Id., para. 106.

²⁴ ICC-01/04-01/10-465-Red, para. 46.

23. Hence, the fact that the Defense has the right to challenge evidence and to submit its own exculpatory evidence, sets forth that the Pre-Trial Chamber must assess and weigh the evidence of the Prosecution on the basis of relevance and admissibility. Article 61 (6) of the Rome Statute demonstrates that the hearing on the confirmation of charges is an adversarial proceeding, in which the Prosecution has to adduce proof that it has substantial grounds to believe the Accused has committed the alleged crimes, while the defense has the opportunity to challenge the facts and even provide the Pre-Trial Chamber with its own evidence.

24. The pivotal element of art. 61 (6) of the Rome Statute therefore seems to revolve around the quality of the evidence. The mere fact that the Rome Statute endows the defense with the right to not only challenge the evidence of the prosecution but also allows the defense to adduce its own (exculpatory) evidence, dictates that judicial review in this regard encompasses a stringent appreciation of the quality of the evidence adduced by the Prosecutor. After all, article 61 (6) of the Rome Statute would be illusory when, on the one hand, the defense may, during an adversarial process called "confirmation of charges hearing", challenge the evidence which should sustain the rigors of trial, whilst on the other hand the Pre-Trial Chamber could merely test the quality of the evidence superficially. The essence of this confirmation procedure 'sui generis' lies exactly in this quality test.

25. Contrary to ICTY-ICTR Review of the indictment procedure (see above), the ICC confirmation of charges hearing is, as the *Amicus Curiae* brief will address, to be characterized as an adversarial ("contradictoire") hearing, whereby the defense is entitled to: (i) challenge the evidence prosecutor; and (ii) submit its own (exonerating) evidence.²⁵

26. The nature of the confirmation of charges hearing at the ICC seems thus quite distinct from the indictment procedure at the ICTY-ICTR. The Appeals Chamber of the ICC has attached considerable weight to the right of the Defense to contest the evidence of

²⁵ Article 61(6) of the Rome Statute.

the Prosecution and to provide the Pre-Trial Chamber with its own exculpatory evidence.²⁶ As promulgated by the Appeals Chamber:

*“If these rights are availed of, the evidence inevitably will be contested. For these rights to have any meaning, the Pre-Trial Chamber must therefore evaluate the contested evidence and resolve any ambiguities, contradictions, inconsistencies or doubts as to credibility introduced by the contestation of the evidence”.*²⁷

27. Henceforth, the *Amicus Curiae* Brief, advancing this analysis, may assist the Pre-Trial Chamber in digesting the new materials of both the Prosecution and the Defense.

5.4. Direct effect of article 69 (4) on the interpretation of article 61 (6) of the Rome Statute

28. According to Triffterer, the same rights of the accused that should be applied at a hearing, as included in the Statute, apply *mutatis mutandis* at the confirmation hearing.²⁸ According to the Appeals Chamber, the Rules of Procedure and Evidence also allow the Pre-Trial Chamber to assess freely all the evidence submitted in order to determine its relevance or admissibility in accordance with article 69 (4) of the Rome Statute.²⁹

29. The Appeals Chamber is not convinced that the Pre-Trial Chamber only has the right to determine the relevance and/or admissibility of the evidence, but not the weight of the evidence, as previously argued by the Prosecution.³⁰ The Rules of Procedure and Evidence do not preclude the Pre-Trial Chamber from evaluating the evidence or otherwise limit the Pre-Trial Chamber’s authority to freely assess all the evidence.³¹ As the Prosecution should have largely completed its investigation at the stage of the

²⁶ ICC-01/04-01/10-514, para. 40.

²⁷ *Id.*, para. 40.

²⁸ Shibahara, K, *Article 61*. In: Triffterer, O. (1999). *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Nomos Verlagsgesellschaft: Baden-Baden, p. 791.

²⁹ ICC-01/04-01/10-514, para. 41.

³⁰ *Id.*, para. 42.

³¹ *Id.*, para. 42.

confirmation of charges hearing, whilst the Prosecution is not allowed to submit additional evidence during trial, the Pre-Trial Chamber should be able to assess the significance of the evidence. This is to ensure continuity in the presentation of the case and to safeguard the rights of the Defense, which should not be presented with a wholly different evidentiary case at trial.³²

30. The Pre-Trial Chamber has the authority to evaluate ambiguities, inconsistencies and contradictions in the evidence or doubts as to the credibility of the witnesses, even if the witnesses did not testify in front of the Pre-Trial Chamber.³³ As the Appeals Chamber argued:

*“Any other interpretation would carry the risk of cases proceeding to trial although the evidence is so riddled with ambiguities, inconsistencies, contradictions or doubts as to credibility that it is insufficient to establish substantial grounds to believe the person committed the crimes charged”.*³⁴

31. The Pre-Trial Chamber may exercise its discretion in determining the relevance and/or admissibility of any item of evidence.³⁵ When determining the relevance and admissibility of evidence, the probative value needs to be taken into account, which means that

*“the Chamber must look at the intrinsic coherence of any item of evidence, and to declare inadmissible those items of evidence of which probative value is deemed prima facie absent after such an analysis. Any other assessment of the probative value of any given item of evidence will be made in light of the whole body of evidence introduced at the confirmation hearing”.*³⁶

32. The Pre-Trial Chamber held that

³² ICC-02/11-01/11-432, para. 25.

³³ ICC-01/04-01/10-514, para. 46.

³⁴ Id., para. 46.

³⁵ ICC-01/04-01/07-717-Corr, para. 77.

³⁶ Id., para. 77.

“[p]robative value is the weight to be given to a piece of evidence, and weight constitutes the qualitative assessment of the evidence. Each piece of evidence has to provide a certain degree of probative value in order to be constructive and decisive for the Chamber in making its determination pursuant to article 61(7) of the Statute.”³⁷

33. Whether a single piece of evidence can be seen as relevant depends on the relationship between the piece of evidence and the fact that is sought to be proven.³⁸

“In assessing the relevance of the evidence, the Chamber makes a determination on the extent to which it is rationally linked to the fact in question.”³⁹

34. Inconsistencies in the evidence do not require the Pre-Trial Chamber to reject the evidence completely as unreliable.⁴⁰ However, a pre-Trial Chamber does have the discretion to evaluate the inconsistencies in the evidence and considers whether the evidence, as a whole, can be seen as reliable and credible.⁴¹ The *Amicus Curiae* brief seeks to assist the Pre-Trial Chamber in finding the legal boundaries in this regard.

5.5. Conclusion

35. **In conclusion**, based upon the foregoing sources, the *Amicus Curiae* brief discerns the power of the Pre-Trial Chamber of the ICC to weigh the quality of the evidence of the Prosecution and to evaluate any ambiguities, inconsistencies and contradictions in the evidence or doubts as to the credibility of the witnesses. The Pre-Trial Chamber assesses both the relevance and the probative value of the evidence, regardless of the type of evidence and which party disclosed the evidence.⁴² When evaluating and weighing the evidence, the Pre-Trial Chamber, as the *Amicus Curiae* brief examines,

³⁷ ICC-01/05-01/08-424, para. 42.

³⁸ *Id.*, para. 41.

³⁹ *Id.*, para. 41.

⁴⁰ ICC-01/04-01/07-717-Corr, para. 116.

⁴¹ *Id.*, para. 116.

⁴² ICC-01/05-01/08-424, para. 44.

can impose a stricter appreciation of the evidence as to the quality of the evidence at the second part of the prolonged confirmation of charges hearing. When a Pre-Trial Chamber is of the view that the evidence is inconsistent, ambiguous or contradictory, this may result in a decision not to confirm the charges.⁴³

36. Furthermore, the *Amicus Curiae* brief will take into account the position of the Pre-Trial Chamber as to the purpose of the confirmation of charges hearing being “to protect the rights of the Defence against wrongful and unfounded charges”.⁴⁴

VI. CONCLUSION

37. Attached to this request the Pre-Trial Chamber finds the biographies of professor dr. G.G.J. Knoop and professor dr. T. Zwart (**Appendix I**), which enables the Pre-Trial Chamber to assess the relevance of this brief.

38. For the foregoing reasons, the applicants, professor Zwart and professor Knoop respectfully requests that the Chamber grant leave to submit their observations, by way of filing an *Amicus Curiae* brief, and order that a proposed brief be timely filed in the present matter pursuant to Rule 103.



Professor T. Zwart

Professor G.G.J. Knoop

Dated this 6th day of May 2014

Amsterdam, The Netherlands

⁴³ ICC-02/05-02/09-243-Red, para. 43.

⁴⁴ ICC-02/11-01/11-432, para. 18.