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

Date: 3 October 2013

THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

**IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO***

Public Document

Request by the Common Legal Representative for leave to present observations on submission under rule 103 of the Rules of Procedure and Evidence to be filed by Mr Darryl Robinson, Ms Margaret deGuzman, Mr Charles Jalloh and Mr Robert Cryer

Source: Office of Public Counsel for Victims

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

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I. PROCEDURAL BACKGROUND

1. On 3 June 2013, Pre-Trial Chamber I issued its “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute” (the “Impugned Decision”)¹ wherein it decided by majority, with Judge Fernández de Gurmendi dissenting,² to adjourn the confirmation of charges hearing and to request the Prosecutor to consider providing further evidence or conducting further investigation with respect to all charges.³

2. On 10 June 2013, the Prosecution submitted a request for leave to appeal the Impugned Decision (the “Prosecution’s Request”).⁴ The Defence requested leave to appeal said decision on 25 June 2013 (the “Defence’s Request”).⁵ The Common Legal Representative filed a response to each request on 17 June and 1st July 2013, respectively.⁶

¹ See the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute” (Pre-Trial Chamber I), No. ICC-02/11-01/11-432, 3 June 2013 (the “Impugned Decision”).

² See the “Corrigendum - Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute - Dissenting opinion of Judge Silvia Fernández de Gurmendi”, No. ICC-02/11-01/11-432-Anx-Corr, 6 June 2013.

³ See the Impugned Decision, *supra* note 1, p. 22.

⁴ See the “Prosecution’s application for leave to appeal the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute”, No. ICC-02/11-01/11-435, 10 June 2013 (the “Prosecution’s Request”).

⁵ See the “Demande d’autorisation d’interjeter appel de la « décision d’ajournement de l’audience de confirmation des charges conformément à l’article 67-7-c-i du Statut » (ICC-02/11-01/11-432-tFRA) du 3 juin 2013”, No. ICC-02/11-01/11-439, 25 June 2013 (the “Defence’s Request”).

⁶ See the “Response of the Common Legal Representative to the ‘Prosecution’s application for leave to appeal the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute””, No. ICC-02/11-01/11-437, 17 June 2013; and the “Réponse du Représentant légal commun des victimes à la « Demande d’autorisation d’interjeter appel de la « décision d’ajournement de l’audience de confirmation des charges conformément à l’article 67-7-c-i du Statut » (ICC-02/11-01/11-432-tFRA) du 3 juin 2013 » déposée par la Défense le 25 juin 2013”, No. ICC-02/11-01/11-442, 1st July 2013.

3. On 31 July 2013, Pre-Trial Chamber I by majority, with Judge Fernández de Gurmendi dissenting,⁷ rejected the Defence's Request and granted the Prosecution's Request only with respect to one reformulated issue.⁸

4. On 12 August 2013, the Prosecution submitted the "Prosecution's appeal against the 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute'" (the "Prosecution's Appeal").⁹

5. On 29 August 2013, the Appeals Chamber granted the Common Legal Representative's request to participate in the proceedings related to the Prosecution's Appeal¹⁰ and allowed her to file observations on the issue under appeal by 27 September 2013.¹¹

6. On 5 September 2013, Professors Darryl Robinson, Margaret deGuzman, Charles Jalloh and Robert Cryer filed a "Request for Leave to Submit *Amicus Curiae* Observations pursuant to Rule 103 of the Rules of Procedure and Evidence", seeking leave to present observations in relation to the Prosecution's Appeal, and in particular on whether multiple incidents are required for the existence of an "attack" and whether the existence of a "policy" may be inferred from the manner in which the acts occur (the "Application").¹²

⁷ See the "Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges - Dissenting opinion of Judge Silvia Fernández de Gurmendi" (Pre-Trial Chamber I), No. ICC-02/11-01/11-464-Anx, 31 July 2013.

⁸ See the "Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges" (Pre-Trial Chamber I), No. ICC-02/11-01/11-464, 31 July 2013.

⁹ See the "Prosecution's appeal against the 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute'", No. ICC-02/11-01/11-474 OA5, 12 August 2013 (the "Prosecution's Appeal").

¹⁰ See the "Application to Participate in the Interlocutory Appeal Filed by the Prosecution against the 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute' of 3 June 2013", No. ICC-02/11-01/11-475 OA5, 13 August 2013.

¹¹ See the "Decision on the participation of victims in the Prosecutor's appeal against the 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute'" (Appeals Chamber), No. ICC-02/11-01/11-492 OA5, 29 August 2013, operative para. 1.

¹² See the "Request for Leave to Submit *Amicus Curiae* Observations pursuant to Rule 103 of the Rules of Procedure and Evidence", No. ICC-02/11-01/11-499-Anx OA5, 6 September 2013, paras. 10-11.

7. Pursuant to an order issued by the Appeals Chamber on 9 September 2013,¹³ the Prosecution and the Defence responded to the Application on 11 September 2013.¹⁴

8. On 20 September 2013, the Defence filed its response to the Prosecution's Appeal.¹⁵ On 27 September 2013, the Common Legal Representative filed her observations on the Prosecution's Appeal.¹⁶

9. On 1st October 2013, the Appeals Chamber granted the Application, instructing the Applicants to present their observations by 10 October 2013, and inviting the Prosecution and the Defence to respond to said observations by 18 October 2013.¹⁷

II. REQUEST BY THE COMMON LEGAL REPRESENTATIVE

10. The Common Legal Representative contends that by virtue of the fact that the Appeals Chamber has granted the victims she represents the right to participate in the proceedings in relation to the Prosecution's Appeal,¹⁸ the scope of the victims' participation should not be limited to the submission of observations on the

¹³ See the "Order on the filing of responses to request for leave to submit *amicus curiae* observations" (Appeals Chamber), No. ICC-02/11-01/11-500 OA5, 9 September 2013.

¹⁴ See the "Réponse de la défense à la « request for leave to submit Amicus Curiae observations pursuant to Rule 103 of the Rules of Procedure and Evidence » (ICC-02/11-01/11-499-Anx1) déposée le 5 septembre 2013", No. ICC-02/11-01/11-503 OA5, 11 September 2013; and the "Prosecution Response to "Request for Leave to Submit Amicus Curiae Observations pursuant to Rule 103 of the Rules of Procedure and Evidence" (ICC-02/11-01/11-499-Anx1)", No. ICC-02/11-01/11-504 OA5, 11 September 2013.

¹⁵ See the "Réponse de la défense au « Prosecution's appeal against the "Decision adjourning the hearing on the confirmation of charges » (ICC-02/11-01/11-474)", No. ICC-02/11-01/11-509 OA5, 20 September 2013.

¹⁶ See the "Observations of the Common Legal Representative on the 'Prosecution's appeal against the 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute'", No. ICC-02/11-01/11-513 OA5, 27 September 2013.

¹⁷ See the "Decision on the 'Request for Leave to Submit *Amicus Curiae* Observations pursuant to Rule 103 of the Rules of Procedure and Evidence'" (Appeals Chamber), No. ICC-02/11-01/11-516 OA5, 1 October 2013, p. 3.

¹⁸ See the "Decision on the participation of victims in the Prosecutor's appeal against the 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute'", *supra* note 11.

Prosecution's Appeal. The Common Legal Representative submits that the victims admitted to participate in the current appeal proceedings should be allowed to present their views on any submission filed within said proceedings, including *amicus curiae* observations.

11. In this respect, the Common Legal Representative observes that although rule 103 of the Rules of Procedure and Evidence does not explicitly provide the possibility for victims to respond to *amicus curiae* observations, it does however not exclude said possibility and should furthermore be interpreted in conjunction with article 68(3) of the Rome Statute.

12. Indeed, pursuant to the jurisprudence of the Court, rule 103 of the Rules of Procedure and Evidence is not "exclusive" in addressing who may respond to *amicus curiae* submissions. In particular, Pre-Trial Chamber I invited the Libyan Government to file a response to the *amicus curiae* submission, "*considering further that the Applicants wish to submit observations relevant for the Chamber's determination on the outstanding Admissibility Challenge* [filed by the Libyan Government]".¹⁹

13. The Common Legal Representative contends that said jurisprudence should apply *mutatis mutandis* to the victims admitted to participate in the current appeal proceedings. In this regard, the Common Legal Representative observes that victims have been allowed on several occasions to submit responses to *amicus curiae* observations filed at all stages of the proceedings before the Court.²⁰

¹⁹ See the "Decision on the 'Application by Lawyers for Justice in Libya and the Redress Trust for Leave to Submit Observations pursuant to Rule 103 of the Rules of Procedure and Evidence'" (Pre-Trial Chamber I), No. ICC-01/11-01/11-153, dated 18 May 2012 and notified on 21 May 2012, para. 7.

²⁰ See for instance the "Decision on the 'Request related to the filing of observations by the *Amicus Curiae*'" (Pre-Trial Chamber I), No. ICC-01/11-01/11-168, 5 June 2012 (dated 4 June 2012), para. 6; the "Decision Inviting Observations from the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict" (Trial Chamber I), No. ICC-01/04-01/06-1175, 18 February 2008, para. 14; the "Decision on the Government of Kenya's application for leave to file observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence" (Trial Chamber V), No. ICC-01/09-01/11-700, 24 April 2013, para. 3; the "Decision on the Government of Kenya's application for leave to file observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence" (Trial Chamber V), No. ICC-01/09-02/11-725, 24 April 2013, para. 3; and the "Decision on the OPCV's

14. In particular, addressing a request filed by the Office of Public Counsel for Victims to respond to *amicus curiae* observations to be filed in the *Gaddafi and Al-Senussi* case, Pre-Trial Chamber I found that

*“rule 103 of the Rules [of Procedure and Evidence] [...] gives it discretion to invite or grant leave for amicus curiae observations on any issue deemed appropriate. As concerns the involvement of parties, rule 103(2) of the Rules provides that the Prosecutor and the Defence shall have the opportunity to respond to any amicus curiae observations. However, while this provision establishes the minimum rights that the Chamber must accord to the Prosecutor and the Defence, it does not prevent as a matter of principle responses from other participants. Taking into account also the purpose of rule 103 of the Rules, the Chamber is of the view that it has the discretionary power to invite or grant leave to participants in proceedings before it to submit responses to amicus curiae observations whenever appropriate in the particular circumstances”.*²¹

15. The Appeals Chamber subsequently endorsed recently said approach in the same case, finding that rule 103(2) of the Rules of Procedure and Evidence does not exclude participants, other than the Prosecution and the Defence, from responding to observations filed under rule 103(1) upon being granted permission.²²

16. Finally, the Common Legal Representative contends that authorising victims to file observations on the *amicus curiae* submission is in conformity with their rights as enshrined in the Rome Statute and is not prejudicial to the rights of the Defence.

request to file observations on the observations of Ms Mishana Hosseinioun” (Appeals Chamber), No. ICC-01/11-01/11-415 OA4, 23 August 2013, para. 10.

²¹ See the “Decision on the ‘Request related to the filing of observations by the *Amicus Curiae*’”, *supra* note 20, para. 5.

²² See the “Decision on the OPCV’s request to file observations on the observations of Ms Mishana Hosseinioun”, *supra* note 20, para. 9.

FOR THE FOREGOING REASONS, the Common Legal Representative respectfully requests the Appeals Chamber to allow her – should she deem it necessary for the protection of the interests of the victims she represents – to submit observations on the *amicus curiae* submissions to be filed by Professors Darryl Robinson, Margaret deGuzman, Charles Jalloh and Robert Cryer, within the same time-limit already established by the Chamber for the responses of the Prosecutor and the Defence.

A handwritten signature in black ink, reading "Paolina Massidda", with a horizontal line underneath the name.

**Paolina Massidda
Principal Counsel**

Dated this 3rd day of October 2013

At The Hague, The Netherlands