

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

**No. ICC-02/11-01/11 OA 5
Date: 1 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 KOUDOU GBAGBO

Public document

Decision

**on the “Request for Leave to Submit *Amicus Curiae* Observations pursuant to
Rule 103 of the Rules of Procedure and Evidence”**

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence

Mr Emmanuel Altit
Ms Agathe Bahi Baroan

Legal Representatives of Victims

Ms Paolina Massidda
Ms Sarah Pellet

Other

Mr T. Zwart
Mr G. G. J. Knoops

REGISTRY

Registrar

Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor 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 (ICC-02/11-01/11-432),

Having before it the “Request for Leave to Submit Amicus Curiae observations pursuant to Rule 103 of the Rules of Procedure and Evidence”, dated 16 September 2013 and registered on 17 September 2013, filed by Mr T. Zwart and Mr G. G. J. Knoop (ICC-02/11-01/11-505),

Renders, unanimously the following

DECISION

The above-mentioned application is rejected.

REASONS

I. PROCEDURAL HISTORY

1. On 3 June 2013, Pre-Trial Chamber I (hereinafter: “Pre-Trial Chamber”), by majority, Judge Fernández de Gurmendi dissenting, decided to adjourn the confirmation of charges hearing and request the Prosecutor to consider providing further evidence or conducting further investigations in relation to all charges¹ (hereinafter: “Impugned Decision”).
2. On 31 July 2013, the Pre-Trial Chamber, by majority, Judge Fernández de Gurmendi dissenting, granted in part 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’” in relation to the following issue:

Whether the Pre-Trial Chamber erred in holding that, when the Prosecutor alleges that an “attack against any civilian population” consists of multiple smaller incidents, none of which alone rises to the level of the minimum requirements of article 7 of the Statute and which allegedly took place at different times and places, a sufficient number of these incidents must be proved to the requisite standard, meaning that each of these incidents must be supported with sufficient evidence before the Chamber can take them

¹ “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute”, ICC-02/11-01/11-432.

into consideration to determine whether those incidents, taken together, indicate that there are substantial grounds to believe that an 'attack' took place.²

3. On 12 August 2013, the Prosecutor, having been granted an extension of the page limit,³ filed the document in support of the appeal.⁴

4. On 16 September 2013, Mr T. Zwart, a professor of International Human Rights law at Utrecht University and Director of the Netherlands School of Human Rights Research and Mr G. G. J. Knoops, a professor of International Criminal Law at Utrecht University and practising lawyer (hereinafter: "Applicants") filed the "Request for Leave to Submit Amicus Curiae observations pursuant to Rule 103 of the Rules of Procedure and Evidence"⁵ (hereinafter: "Application"). If leave to submit observations is granted, the Applicants propose to introduce the question as to whether the Pre-Trial Chamber may decline to confirm the charges on the basis of the political question doctrine or by applying a justiciability test whilst drawing on the political question doctrine.⁶ The Applicants indicate that the political question doctrine was "developed by the U.S. Supreme Court (primarily in civil cases)" to declare certain issues non-justiciable where "weighty policy or prudential considerations caution against taking on the case at trial".⁷ The Applicants clarify that they would assist the Appeals Chamber with the following issues: (i) "[t]he relevance of the [p]olitical [q]uestion [d]octrine and the non-justiciability doctrine within the context of international criminal trials"; and (ii) "[h]ow prosecutorial discretionary power within the context of article 61(7) of the ICC Statute should/could be applied. To that end, the *amicus curiae* brief will examine the [p]olitical [q]uestion [d]octrine within the ambit of the application of the criterion of 'substantial grounds to believe'".⁸

² "Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges", ICC-02/11-01/11-464; "Dissenting opinion of Judge Silvia Fernández de Gurmendi", ICC-02/11-01/11-464-Anx.

³ "Decision on the 'Prosecution's Request for an Extension of the Page Limit for 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'", 7 August 2013, ICC-02/11-01/11-471 (OA5).

⁴ "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'", 12 August 2013, ICC-02/11-01/11-474 (OA5).

⁵ Dated 16 September 2013 and registered on 17 September 2013, ICC-02/11-01/11-505 (OA5).

⁶ Application, para. 22.

⁷ Application, paras 19, 24.

⁸ Application, para. 27.

5. On 19 September 2013, the Appeals Chamber issued an order granting Mr Gbagbo and the Prosecutor until 20 September 2013 to respond to the Application.⁹

6. On 20 September 2013, the Prosecutor filed her response to the Application,¹⁰ submitting that the Application should be rejected (hereinafter: “Prosecutor’s Response”). The Prosecutor indicates that the “proposed observations deal with policy topics (the Court’s discretion to continue with a case at confirmation) that are unrelated to the confined legal matters on appeal”.¹¹ The Prosecutor notes that a similar request had been made by the Applicants before the Pre-Trial Chamber in February 2013 and that the “Pre-Trial Chamber rejected that request because the ‘proposed observations are [not] necessary, at this stage of the proceedings, for the proper determination of any issue pending before the Chamber in the present case’”.¹² The Prosecutor submits that the Application should be dismissed on the same grounds.¹³

7. On 20 September 2013, Mr Gbagbo filed his response to the Application,¹⁴ submitting that the proposed observations may be useful in the resolution of the question under appeal (hereinafter: “Mr Gbagbo’s Response”).¹⁵ According to Mr Gbagbo, the Applicants highlight the ability of the Pre-Trial Chamber to examine, in context, the approach of the Prosecutor, as well as the proof that she presents in support of her allegations.¹⁶ Mr Gbagbo is of the view that the proposed observations may provide a valuable perspective, in particular with regard to the possible conclusions that the Pre-Trial Chamber could draw from their findings in the Impugned Decision as to the weakness of the Prosecutor’s evidence.¹⁷ Mr Gbagbo indicates that the Applicants appear to be able to provide the theoretical tools that would allow the Appeals Chamber to respond to the issue under appeal as formulated by the Pre-Trial Chamber.¹⁸ Accordingly, Mr Gbagbo submits that the Application should be granted.¹⁹

⁹ “Order on the filing of responses to request for leave to submit *amicus curiae* observations”, ICC-02/11-01/11-507 (OA5).

¹⁰ “Prosecution response to the ‘Request for Leave to Submit Amicus Curiae observations pursuant to Rule 103 of the Rules of Procedure and Evidence’ (ICC-02/11-01/11-505)”, ICC-02/11-01/11-508 (OA5).

¹¹ Prosecutor’s Response, para. 3.

¹² Prosecutor’s Response, para. 4.

¹³ Prosecutor’s Response, para. 4.

¹⁴ “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-02/11-01/11-505) déposée le 16 septembre 2013”, ICC-02/11-01/11-510 (OA5).

¹⁵ Mr Gbagbo’s Response, para. 4.

¹⁶ Mr Gbagbo’s Response, para. 5.

¹⁷ Mr Gbagbo’s Response, para. 5.

¹⁸ Mr Gbagbo’s Response, para. 6.

II. MERITS

8. Rule 103 of the Rules of Procedure and Evidence, regulating “Amicus curiae and other forms of submission”, provides:

1. 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.

2. The Prosecutor and the defence shall have the opportunity to respond to the observations submitted under sub-rule 1.

3. A written observation submitted under sub-rule 1 shall be filed with the Registrar, who shall provide copies to the Prosecutor and the defence. The Chamber shall determine what time limits shall apply to the filing of such observations.

9. The Appeals Chamber’s decision under rule 103 (1) of the Rules of Procedure and Evidence is discretionary. It may permit the filing of observations either by inviting such submissions *proprio motu* or, as in this case, following a request for leave to address the Chamber.

10. In the application under consideration, the Appeals Chamber finds that the issues that the Applicants propose to address in their observations are not related to the Prosecutor’s appeal. Therefore, in the circumstances of the present appeal, the Appeals Chamber does not find it desirable for the proper determination of the matter to receive observations from the Applicants. Thus, in accordance with rule 103 (1) of the Rules of Procedure and Evidence, the Application is rejected.

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



Judge Akua Kuenyehia
On behalf of the Presiding Judge

Dated this 1st day of October 2013

At The Hague, The Netherlands

¹⁹ Mr Gbagbo’s Response, para. 7.