

**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 Darryl Robinson
Ms Margaret deGuzman
Mr Charles Jalloh
Mr Robert Cryer

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 5 September 2013 and registered on 6 September 2013, filed by Mr Darryl Robinson, Ms Margaret deGuzman, Mr Charles Jalloh and Mr Robert Cryer (ICC-02/11-01/11-499-Anx1),

Renders, unanimously the following

DECISION

1. Mr Darryl Robinson, Ms Margaret deGuzman, Mr Charles Jalloh and Mr Robert Cryer may file consolidated observations of not more than 20 pages on the matters identified in the above-mentioned request by 16h00 on Thursday, 10 October 2013.
2. Mr Gbagbo and the Prosecutor may respond to any observations filed pursuant to paragraph (1) by 16h00 on Friday, 18 October 2013.

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:

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.

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 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 5 September 2013, Mr Darryl Robinson, a professor at Queen’s University, Faculty of Law, Canada, Ms Margaret deGuzman, a professor at Temple University’s Beasley School of Law, United States of America, Mr Charles Jalloh, a professor at the University of Pittsburgh School of Law, United States of America, and Mr Robert Cryer, a professor at Birmingham School of Law, United Kingdom, (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”). The Applicants indicate that they are appropriate individuals to submit *amicus curiae* observations as, “they have internationally recognized expertise on the law of crime against humanity and have conducted extensive research on the subject”.⁶ The Applicants request leave to submit observations on two aspects of the present appeal.⁷ First, the Applicants indicate that they will “furnish jurisprudence from diverse jurisdictions, including national jurisdictions, showing that an ‘attack’ does not require multiple incidents”.⁸ Second, the Applicants indicate that they will “provide authorities showing that direct evidence of a policy is not required” and that “the existence of a policy may be inferred from the manner in which the acts occur”.⁹ According to the Applicants, given the “importance of these issues for this proceeding and for other proceedings involving crimes against humanity prosecutions, it is desirable and appropriate to

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 ICC-02/11-01/11-499-Anx1.

⁶ Application, para. 8.

⁷ Application, para. 10.

⁸ Application, para. 10.

⁹ Application, para. 11.

consider these observations, which will contribute to a proper determination of the important issues at stake”.¹⁰

5. On 9 September 2013, the Appeals Chamber issued an order granting Mr Gbagbo and the Prosecutor until 11 September 2013 to respond to the Application.¹¹

6. On 11 September 2013, Mr Gbagbo filed his response,¹² submitting that the Application should be rejected (hereinafter: “Defence Response”). Mr Gbagbo submits that the points that the Applicants wish to address do not arise from the Impugned Decision and are not useful for or relevant to the resolution of the issue under appeal in the present case.¹³ According to Mr Gbagbo, *amicus curiae* submissions should only be authorised on an exceptional basis and only to address questions in relation to which neither the parties nor the Chamber has sufficient competence, or questions that are so novel that information is lacking or a wide debate is justified.¹⁴ In the present appeal, Mr Gbagbo submits that the questions raised by the Applicants are not especially novel and there is a wide range of material already available in relation to the contextual elements of crimes against humanity.¹⁵ Mr Gbagbo also argues that the Application has been made prematurely as (i) the questions raised therein were not addressed by the Pre-Trial Chamber in the Impugned Decision and will not be addressed by the Appeals Chamber in the present appeal, and (ii) Mr Gbagbo himself has not had the opportunity to submit his response to the document in support of the appeal.¹⁶ Finally, Mr Gbagbo contends that the fact that the Applicants align their position with that of the Prosecutor indicates that their proposed intervention would not add anything to the information which is already before the Appeals Chamber and raises questions about their impartiality.¹⁷

¹⁰ Application, para. 8.

¹¹ “Order on the filing of responses to request for leave to submit *amicus curiae* observations”, ICC-02/11-01/11-500 (OA5).

¹² “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”, ICC-02/11-01/11-503 (OA5).

¹³ Defence Response, paras 18-21.

¹⁴ Defence Response, para. 25.

¹⁵ Defence Response, para. 25.

¹⁶ Defence Response, paras 29-30.

¹⁷ Defence Response, paras 31-34.

7. On 11 September 2013, the Prosecutor filed her response, indicating that she has no objection to the Application.¹⁸

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 present case, the Appeals Chamber finds that the issues that the Applicants propose to address in their observations appear to be of relevance to the grounds of appeal set out by the Prosecutor and that receipt of the proposed observations may be desirable for the proper determination of the appeal.

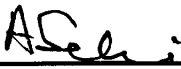
11. The Applicants may file their consolidated observations by 16h00 on Thursday, 10 October 2013. Their observations must comply with the formatting requirements established in the Regulations of the Court and, in particular, must be no longer than 20 pages (regulation 37 (1) of the Regulations of the Court).

12. Pursuant to rule 103 (2) of the Rules of Procedure and Evidence, “[t]he Prosecutor and the defence shall have the opportunity to respond to observations submitted under sub-

¹⁸ “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)”, 11 September 2013, ICC-02/11-01/11-504 (OA5).

rule 1". Accordingly, the Appeals Chamber grants Mr Gbagbo and the Prosecutor until 16h00 on Friday, 18 October 2013 to respond to any observations filed by the Applicants.

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