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No.: ICC-02/11-01/11
Date: 20 September 2013

APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF THE PROSECUTOR v. LAURENT GBAGBO

Public

**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)**

Source: Office of the Prosecutor

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

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Submissions

1. On 16 September 2013, Professor Zwart and Professor Knoops, professors of international human rights and international criminal law, respectively, (the “Applicants”) sought leave from the Appeals Chamber to submit observations pursuant to Rule 103 (“Request”)¹ in the Prosecution’s 12 August 2013 appeal² against the Pre-Trial Chamber’s 3 June 2013 “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute” (“Decision”).³ The Applicants seek to provide observations on “a. The relevance of the Political Question Doctrine and the non-justiciability doctrine within the context of international criminal trials; b. How 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 Political Question Doctrine within the ambit of the application of the criterion of ‘substantial grounds to believe’”.⁴
2. Notwithstanding the Appeals Chamber’s discretion to grant requests to submit observations,⁵ the observations need at least to address the issues *sub judice* in order to provide any meaningful assistance to the Appeals Chamber.⁶ In this case, the Appeals Chamber is called to rule on confined legal matters, namely, the applicable standard of proof of the underlying incidents of contextual elements of crimes against humanity, and the Pre-Trial Chamber’s interpretation and application of the standard of proof under Article 61(7) to the Prosecution’s evidence.
3. The Prosecution submits that the Request should be rejected because 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

¹ ICC-02/11-01/11-505.

² ICC-02/11-01/11-474.

³ ICC-02/11-01/11-432.

⁴ ICC-02/11-01/11-505, para. 27; see also paras 10, 18, 22.

⁵ ICC-01/04-01/06-1289 OA 11, para. 8; ICC-02/05-01/09-51 OA para. 7; ICC-01/05-01/08-602 OA 2, para. 10.

⁶ ICC-01/04-01/06-1289 OA 11, para. 8; ICC-02/05-01/09-51 OA para. 9.

appeal. Indeed, the “Political Question” doctrine is a theory advocating against the Court taking on cases when “weighty policy or prudential considerations” caution against it.⁷ The “wisdom”⁸ of the Court taking this case on is not at issue in this appeal and, consequently, the Request will not assist the Appeals Chamber in its determination of the matters before it.

4. The Prosecution notes that the Request is in stark contrast to a recent request under Rule 103 by four international law professors,⁹ which fell squarely within the issues under appeal¹⁰ and to which the Prosecution did not oppose¹¹ because, in the Prosecution’s view, their submissions will assist the Appeals Chamber in the proper determination of the matters before it. Moreover, the Request is a rehearsal of a previous request made by the Applicants in February 2013 before the Pre-Trial Chamber¹² updated to reflect the state of proceedings.¹³ 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”.¹⁴ On the same grounds, the instant Request should be rejected.

⁷ ICC-02/11-01/11-505, para. 24.

⁸ *Ibid.*

⁹ ICC-02/11-01/11-499-Anx1.

¹⁰ The proposed observations would address: (a) “whether multiple incidents are required for an ‘attack’”; and (b) “what constitutes ‘sufficient evidence ... that an ‘attack’ took place’”. ICC-02/11-01/11-499-Anx1, paras 10, 11.

¹¹ ICC-02/11-01/11-504.

¹² ICC-02/11-01/11-367.

¹³ Compare “The cardinal issue to be raised in the *amicus curiae* brief pertains to [...] whether the Pre-Trial Chamber – within the context of article 61(7) of the ICC Statute – is at liberty to: [...]”, ICC-02/11-01/11-505, para. 18, with “The central issue to be raised in the *amicus curiae* brief pertains to the scope of the discretionary power of the Prosecutor [...]”, ICC-02/11-01/11-367, para. 11.

¹⁴ ICC-02/11-01/11-402, para. 5.

Relief Sought

5. For the above reasons, the Prosecution requests that the Request be rejected.



Fatou Bensouda, Prosecutor

Dated this 20th day of September 2013
At The Hague, The Netherlands