

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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N°: ICC-02/11-01/11

Date: 18 January 2013

**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**

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

**Source: Professor T. Zwart and professor G.G.J. Knoops (AU-ICC Initiative)**

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

**The Office of the Prosecutor**  
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**Counsel for the Defence**  
Mr Emmanuel Altit  
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**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

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

**States' Representatives**

**Amicus Curiae**

## **REGISTRY**

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Ms Sylvana Arbia

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Mr Didier Daniel Preira

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
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## I INTRODUCTION

1. Pursuant to rule 103 of the Rules of Procedure and Evidence (herein "RPE") Professor GGJ Knoops and Professor T. Zwart, as part of the AU-ICC project, (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 possible need and relevance for the ICC to enter a *nolle prosequi* on the basis of the Political Question Doctrine or "justiciability test", within the ICC system and its ramifications for the Gbagbo case, especially within the context of a confirmation hearing and especially within the proceedings against Mr Gbagbo.
3. 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.

## II THE APPLICANTS AND THE INCENTIVE FOR THE AMICUS CURIAE BRIEF

4. 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. Knoops is a professor of International Criminal Law at Utrecht 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.
5. The ICC has faced resistance from some African States in recent years, *inter alia*, because of the over-representation of African leaders being prosecuted by the ICC. The AU-ICC project aims at bringing the AU back into the fold. For this reason, Professor Zwart organised in October 2012 an expert meeting in The Hague, attended by various international criminal law experts from different African Union States (Ghana, Kenya, Nigeria, Senegal, Sierra Leone

South-Africa, Uganda). Various leading law professors from the West (incl. prof. G.G.J. Knoop) attended this two-day expert meeting representing European and U.S. Universities. This expert meeting triggered the discussion embedded within the *amicus curiae* brief.

6. The applicants opted to file this *amicus curiae* brief specifically within the Gbagbo-proceedings since the charges have yet to be confirmed (Article 61 ICC Statute). According to Schabas, a confirmation hearing “[...] allows the Court to ensure that a prosecution is not frivolous and that there is sufficient evidence for a finding of guilt, thereby protecting the accused from prosecutorial abuse.”<sup>1</sup> Accordingly, these factors constitute the rationale for the submission of an *amicus curiae* brief on the subject outlined below in the Gbagbo case.

### 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.
9. Pre-Trial Chambers, in deciding on a submission, have applied “the proper determination test” to various cases.<sup>2</sup> A view that was underlined by the Appeals Chamber granting a leave for *Amicus Curiae* submissions in the case against Thomas Lubanga.<sup>3</sup>
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.<sup>4</sup> Third party interventions are guaranteed by the Statutes of other international tribunals and

<sup>1</sup> See William A. Schabas, *An Introduction to the International Criminal Court (1<sup>st</sup> ed.)*, 2001, Cambridge: Cambridge University Press, p. 115.

<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> 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.

courts, such as the International Criminal Tribunal for the former Yugoslavia (ICTY)<sup>5</sup>, the International Criminal Tribunal for Rwanda (ICTR)<sup>6</sup> and the Special Court for Sierra Leone (SCSL)<sup>7</sup>; all on a similar basis as Rule 103(1).

#### IV GENERAL JUSTIFICATIONS FOR RULE 103 SUBMISSIONS

11. The central issue to be raised in the *amicus curiae* brief pertains to the scope of the discretionary power of the Prosecutor, especially from the perspective of the “Political Question Doctrine” which was developed by the U.S. Supreme Court (primarily in civil cases) but not yet explicitly addressed within the law of the International Criminal Tribunals. Alternatively, the *amicus curiae* brief intends to assist the Court by introducing a justiciability test, while drawing inspiration from the Political Question Doctrine, which could be subsumed under “other relevant circumstances” as previously mentioned by your Court in one of the Pre-Trial Chamber decisions in the Gbagbo case. The scope of the prosecutorial discretion can be found in Article 58 of the ICC Statute (the power of the Prosecutor to apply for an arrest warrant), Article 61(1) of the ICC Statute (a confirmation of the charges hearing – by the Pre-Trial Chamber – on which the Prosecutor intends to proceed). Article 53(2) of the Statute makes express reference to two additional criteria on which the Prosecution may base its conclusion that there is not a sufficient basis for prosecution:

i. matters relating to admissibility under article 17 of the Statute; and

ii. matters relating to the interests of justice.<sup>8</sup>

12. As to the scope of Article 58, the Pre-Trial Chamber in the case of Omar Al Bashir in the situation of Darfur, Sudan decided that “*in accordance with the analytical framework set out in the Vienna Convention on the Law of Treaties, the literal interpretation of article 58 of the Statute, as well as its contextual interpretation in light of article 53(2) of the Statute, lead to the following two conclusions:*

<sup>5</sup> 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”).

<sup>6</sup> Rule 74 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda.

<sup>7</sup> Rule 74 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

<sup>8</sup> Pre-Trial Chamber I, “Decision on Application under Rule 103”, Case No. ICC-02-05, 4 February 2009, para. 16.

- i. the Prosecution has been granted by the States Parties discretion to decide whether to request the initiation of a case through the issuance of an arrest warrant or a summons to appear. One of the factors that the Prosecution must take into consideration at that stage is whether such a way of proceeding is detrimental to the interests of justice; and*
- ii. the States Parties have not established in the Statute or in the Rules a closed list of criteria, according to which the Prosecution must exercise its discretion to request, or not to request, the issuance of an arrest warrant or a summons to appear.”<sup>9</sup>*

13. The development from a jurisprudential perspective and interest of justice view, the discussion as to whether the *Nolle Prosequi* power and *Political Question Doctrine* is to be applied, when appropriate, at the stage of Article 61. Both have not been crystalized yet within case law of the international tribunals. This justifies the exceptional basis, as required by the Chamber stating that it will only resort to *amicus curiae* observations “on an exceptional basis, when it is of the view that such observations providing specific expertise are needed”.<sup>10</sup> While addressing both doctrines the *amicus curiae* brief will provide “legal information that the Chamber may find useful in the context of the present case.”<sup>11</sup>

## **V RELEVANCE OF THE INTENDED AMICUS CURIAE BRIEF IN THE INSTANT CASE**

### **5.1 Prosecutorial Discretion and the Political Question Doctrine**

14. The *Amicus Curiae* brief introduces the (academic) question whether the Prosecutor should terminate proceedings against President Gbagbo on the basis of the Political Question Doctrine or, alternatively, a justiciability test (drawing on the Political Question Doctrine).

### **5.2 The Political Question Doctrine**

<sup>9</sup> Pre-Trial Chamber I, “Decision on Application under Rule 103”, Case No. ICC-02-05, 4 February 2009, para. 18.

<sup>10</sup> See Pre-Trial Chamber II, “Decision on the ‘Request for leave to submit Amicus Curiae observations pursuant to Rule 103 of the Rules of Procedure and Evidence’”, Case No. ICC-01/09-01/11, 13 June 2011, para. 7; Pre-Trial Chamber II, “Decision on the ‘Request by Ms. Moraa Gesicho to Appear as Amicus Curiae’”, Case No. ICC-01/09-01/11-49, para. 14.

<sup>11</sup> 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. 12.

15. The so-called “political question doctrine”, was initially developed by the U.S. Supreme Court, in particular in the majority opinion of Justice Brennan in *Baker v. Carr* (369 U.S. 186 (1962))
16. The political question doctrine has been applied by the Supreme Court when it has jurisdiction to entertain the claim and when the legal issues raised in the case may have some merit, but when weighty policy or prudential considerations caution against taking on the case. Therefore, the political question doctrine does not relate to the *legality* of the case, but to the *wisdom* of taking it on.
17. According to Chief Justice Marshall in *Marbury v. Madison* (5 U.S. 137 (1803)) the rationale of the power to declare issues non-justiciable as being political questions is to preserve the discretion of the other branches. Therefore, the concept is supposed to act as a safety valve: if by taking a decision in a particular case the court is likely to undermine the position of a political branch or to damage its relations with it, it should abstain.
18. While judging whether or not a decision is justiciable, courts should rely on the safety valve rationale. This point can be made with the help of *Bush v. Gore* (531 U.S. 98 (2000)). In that case the U.S. Supreme Court decided that the standard used in the State of Florida to determine whether a vote was valid, *i.e.* the intent of the voter, was too vague. Consequently, the standard failed to guarantee that each county would count the votes the same way and therefore it violated the Equal Protection Clause. Relying on this conclusion the Court decided that all recounts should cease, which effectively made Governor Bush the winner.
19. Despite the fact that the Court clearly had jurisdiction and the case could be decided using a clear legal standard, *i.e.* the Equal Protection Clause, a case favouring non-justifiability could be made using the safety valve rationale. It is clear that by deciding such a sensitive issue which could have been left to the political branches, in particular Congress and the Florida State Legislature, the Court has undermined its own authority and damaged its legitimacy. This could have been avoided by abstaining and leaving the decision to the politicians.

### 5.3 Specific Questions to be addressed in the *Amicus Curiae* brief in this case

20. In the *Amicus Curiae* brief the following questions will be addressed:

- Does the Prosecutor enjoy a *nolle prosequi* power under the Rome Statute?

- Or is underlying the Rome Statute a *Legalitäts* principle which requires the Prosecutor to prosecute any *prima facie* case?
- Can Article 53 or Article 61 serve as a basis for a *nolle prosequi* power and/or a justiciability test?
- Does the Rome Statute and public international law generally offer other bases for such a power or test?
- Are there any precedents for the exercise of this power or test in international criminal law?
- Do OTP decisions in this field require PTC or ICC approval?
- Should a *nolle prosequi* or justiciability test be limited to grounds like “insufficient evidence” or “a lack of prospect of success” (technical grounds)?
- Or can policy and political considerations also play a part within such a test (substantive grounds)?
- Does the lack of political oversight over the Prosecutor justify or caution against a *nolle prosequi* power or justiciability test?
- Will the exercise of a *nolle prosequi* power or justiciability test undermine the legitimacy of the OTP and the ICC?
- Should the Prosecutor itself develop a *nolle prosequi* policy or justiciability test within the scope of Article 53?

#### **5.4 Preliminary table of contents**

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

##### **1. Introduction**

##### **2. The PQD (Nolle Prosequi powers) or justiciability test within the ICC system**

2.1. *The scope of the PQD or justiciability test and its doctrinal basis*

2.2. *Comparative analysis (precedents; national and international re. Kenya and opinion Brennan)*

2.3. *Positioning within Article 53 and 61 (confirmation of charges) of the ICC statute?*

2.4. *Relevance for and Applicability on Gbagbo case; a justiciability test?*

##### **3. The PQD or justiciability test as exponent of prosecutorial discretionary powers**

3.1. *Necessity of PQD or justiciability test within prosecutorial policy: pitfalls of the Ghadafi case*

3.2. *"Greatest responsibility" as threshold and avenue for the influx of the PQD or justiciability test.*

3.3. *The Doctrine of Abuse of powers within International Criminal Law; exponent of the PQD or justiciability test?*

3.4. *Conclusions*

##### **4. The PQD or justiciability test as part of the concept of "constructive complementarity"**

4.1. *The need for constructive complementarity: touchstone of the legitimacy-test of the ICC*

4.2. *Achieving Constructive complementarity through the PQD or justiciability test*

##### **5. The PQD or justiciability test as exponent of Due process rights**

5.1. *Introduction*

5.2. *Equality (of arms)*

5.3. *Behaviour of national authorities and OTP vis-à-vis- defendant's rights.*

5.3.1. *Arraignment stage*

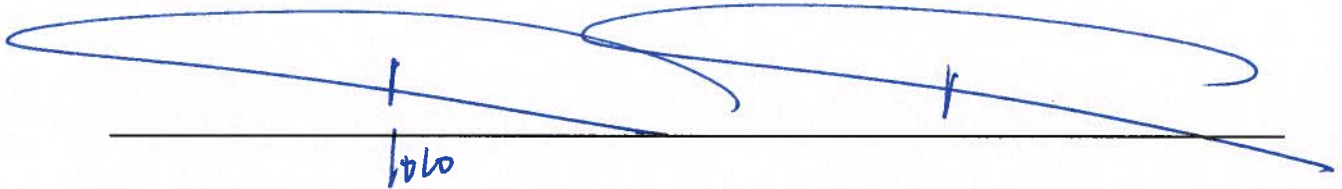
5.3.2. *Transfer stage*

5.3.3. *Provisional release stage*

5.4 *Conclusions.*

**VI Conclusion**

22. For the foregoing reasons, the applicants, professor Zwart and professor Knoops, being part of said AU-ICC project, 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. Knoops

Dated this 18<sup>th</sup> day of January 2013

At Amsterdam, The Netherlands