

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : **English**

**N°: ICC-02/11-01/11
Date: 16 September 2013**

THE APPEALS CHAMBER

Before:

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

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF THE PROSECUTOR v. LAURENT GBAGBO

PUBLIC

**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

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

The Office of the Prosecutor
Ms Fatou Bensouda

Counsel for the Defence
Mr Emmanuel Altit
Ms Agathe Bahi Baroan
Ms Natacha Fauveau Ivanovic

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

Registrar
Mr Herman von Hebel

Defence Support Section

Deputy Registrar
Mr Didier Daniel Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I INTRODUCTION

1. Pursuant to rule 103 of the Rules of Procedure and Evidence (“RPE”) Professor G.G.J. Knoops and Professor T. Zwart, as part of the AU-ICC project, (“the applicants”) hereby respectfully apply for leave to submit observations as academic *amicus curiae* in the case of the *Prosecutor v. Laurent Gbagbo* in the Situation in the Republic of Côte d’Ivoire.
2. In the case the honourable Appeals Chamber would grant this request for leave to submit observations pursuant to Rule 103 of the RPE, the applicants intend to submit their *amicus curiae* brief within any time limit as to be set by the Appeals Chamber. If leave to submit oral comments is granted, the authors of the brief are prepared to appear at a hearing before the Appeals Chamber.

II RELEVANT PROCEDURAL HISTORY

3. On 18 January 2013, the applicants filed a Request for Leave to Submit Amicus Curiae observations pursuant to Rule 103 of the Rules of Procedure and Evidence.¹ The applicants opted to file the *amicus curiae* brief specifically within the Gbagbo-proceedings since the charges had 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.”²
4. On 14 February 2013, the single Judge Silvia Fernández de Gurmendi rejected the Request for Leave to Submit Amicus Curiae observations of the applicants.³ Judge Fernández de Gurmendi had considered that the decision to grant leave is in essence a discretionary decision, dependant on “whether the proposed observations are of assistance in the determination of any issues pending before the Chamber.”⁴ The single judge was not persuaded that the proposed observations were necessary at that stage of the proceedings (*viz* before the confirmation of the charges hearing), for the proper determination of any issue in

¹ *Prosecutor v. Laurent Gbagbo*, Urgent Request for Leave to Submit Amicus Curiae observations pursuant to Rule 103 of the Rules of Procedure and Evidence, Pre-Trial Chamber I, ICC-02/11-01/11-367, 18 January 2013.

² See William A. Schabas, *An Introduction to the International Criminal Court (1st ed.)*, 2001, Cambridge: Cambridge University Press, p. 115.

³ *Prosecutor v. Laurent Gbagbo*, Decision on the “Urgent Request for Leave to Submit Amicus Curiae observations pursuant to Rule 103 of the Rules of Procedure and Evidence”, Pre-Trial Chamber I, ICC-02/11-01/11-402, 14 February 2013.

⁴ *Prosecutor v. Laurent Gbagbo*, Decision on the “Urgent Request to Leave to Submit Amicus Curiae observations pursuant to Rule 103 of the Rules of Procedure and Evidence”, Pre-Trial Chamber I, ICC-02/11-01/11, 14 February 2013, para. 4.

the Laurent Gbagbo case pending before the Chamber.⁵ The single judge therefore left open that such observations could assist the court at a later stage.

5. On 3 June 2013, the Majority of the Pre-Trial Chamber I issued the “Decision adjourning the hearing on the confirmation of the charges pursuant to article 61(7)(c)(i) of the Rome Statute” in the *Gbagbo*-case (“Adjournment Decision”).⁶ The Presiding Judge appended a dissenting opinion.⁷ The Majority explicitly held in paragraph 15 that the prosecutor’s evidence “viewed as a whole”, is “apparently insufficient”. Yet, due to the apparent relevance and probative value of the evidence, the Pre-Trial Chamber decided not to decline, but to adjourn the confirmation of the charges.⁸
6. On 10 June 2013, the Prosecution filed an “application for leave to appeal the ‘Decision adjourning the hearing on the confirmation of the charges pursuant to article 61(7)(c)(i) of the Rome Statute’”.⁹ The Prosecutor raised three issues of appeal:
 - (i) “Whether the Decision correctly interpreted and applied the evidentiary standard under article 61(7) (‘First Issue’);”
 - (ii) “Whether in this case each ‘incident underlying the contextual elements’ must be established to the standard of proof enshrined in Article 61(7) (‘Second Issue’);”
 - (iii) “Whether the Pre-Trial Chamber has the power to order the Prosecution to amend the Document Containing the Charges (‘DCC’) by including additional facts (‘Third Issue’).”¹⁰
7. On 25 June 2013, the Defence filed an “application for leave to appeal the ‘Decision adjourning the hearing on the confirmation of the charges pursuant to article 61(7)(c)(i) of the Rome Statute’”.¹¹

⁵ *Prosecutor v. Laurent Gbagbo*, Decision on the “Urgent Request to Leave to Submit Amicus Curiae observations pursuant to Rule 103 of the Rules of Procedure and Evidence”, Pre-Trial Chamber I, ICC-02/11-01/11, 14 February 2013, para. 4.

⁶ *Prosecutor v. Laurent Gbagbo*, Decision on adjourning the hearing on the confirmation of the charges pursuant to article 61(7)(c)(i) of the Rome Statute, Pre-Trial Chamber I, ICC-02/11-01/11-432, 3 June 2013.

⁷ *Prosecutor v. Laurent Gbagbo*, Dissenting opinion of Judge Silvia Fernández de Gurmendi, Pre-Trial Chamber I, ICC-02/11-01/11-432-Anx-Corr-Anx, 3 June 2013.

⁸ *Prosecutor v. Laurent Gbagbo*, Decision on adjourning the hearing on the confirmation of the charges pursuant to article 61(7)(c)(i) of the Rome Statute, Pre-Trial Chamber I, ICC-02/11-01/11-432, 3 June 2013, para. 15.

⁹ *Prosecutor v. Laurent Gbagbo*, Prosecution’s application for leave to appeal the “Decision adjourning the hearing on the confirmation of the charges pursuant to article 67(1)(c)(i) of the Rome Statute”, Pre-Trial Chamber I, ICC-02/11-01/11-435, 10 June 2013.

¹⁰ *Prosecutor v. Laurent Gbagbo*, Prosecution’s application for leave to appeal the “Decision adjourning the hearing on the confirmation of the charges pursuant to article 67(1)(c)(i) of the Rome Statute”, Pre-Trial Chamber I, ICC-02/11-01/11-435, 10 June 2013, para. 3.

8. On 31 July 2013, the Majority of the Pre-Trial Chamber I issued the “Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of the charges”.¹² The Majority, whilst rejecting the defence request, granted the Prosecutor’s Application in relation to only the Second Issue out of the three issues on which the prosecution sought leave to appeal the Adjournment Decision. The Presiding Judge appended a dissenting opinion.¹³
9. On 12 August 2013, the Prosecution filed an “appeal against the ‘Decision adjourning the hearing on the confirmation of the charges pursuant to article 61(7)(c)(i) of the Rome Statute’”.¹⁴
10. The contents of the Adjournment Decision of 3 June 2013 and the Decision on the prosecutor’s and defence application of 31 July 2013 touch upon a fundamental question of law on which the applicants intend to assist, namely whether at the stage of the confirmation hearing, the Pre-Trial Chamber is empowered to apply the Political Question Doctrine, while scrutinizing the evidentiary threshold of article 61(7) of the ICC Statute. The applicants are of the opinion that the proposed observations in their *Amicus Curiae* brief can be of assistance as to the final determination of whether the charges should be confirmed in the Gbagbo-case.

III THE APPLICANTS AND THE INCENTIVE FOR THE *AMICUS CURIAE* BRIEF

11. Professor 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 Knoops is a professor of International Criminal Law at Utrecht University and practises as a lawyer in international criminal law. He has appeared before various international criminal tribunals. Professor Zwart is the initiator of the AU-ICC project, an academic project aiming at addressing the on-going discussion within the African Union vis-à-vis its cooperation with the ICC.
12. 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 African Union back into the fold. For this reason, Professor Zwart

¹¹ *Le Procureur c. Laurent Gbagbo*, 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-1 du Statut » (ICC-02/11-01/11-432-tFRA), ICC-02/11-01-11-439, 25 June 2013.

¹² *Prosecutor v. Laurent Gbagbo*, Decision on Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of the charges, Pre-Trial Chamber I, ICC-02/11-01/11-464, 31 July 2013.

¹³ *Prosecutor v. Laurent Gbagbo*, Dissenting opinion of Judge Silvia Fernández de Gurmendi, Pre-Trial Chamber I, ICC-02/11-01/11-464-Anx, 31 July 2013.

¹⁴ *Prosecutor v. Laurent Gbagbo*, 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”, Appeals Chamber, ICC-02/11-01/11-474, 12 August 2013.

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 and Africa attended this two-day expert meeting representing European and U.S. Universities. This expert meeting fuelled, amongst others, the discussion embedded within the proposed *amicus curiae* brief.

13. The arguments presented by the prosecutor in the confirmation of the charges proceedings, raise the question whether the prosecution is predominantly politically influenced instead of one based on the law. The apparent flaws in the prosecutor's case (as acknowledged by the Pre-Trial Chamber in its decision of 3 June 2013; paras. 15-37) can be counterbalanced by the Political Question Doctrine, on which doctrine the *Amicus Curiae* endeavour to assist the Appeals Chamber. The Political Question Doctrine addresses not per se the legality of the case, but the wisdom of taking it on.
14. The questions of the Pre-Trial Chamber as formulated in paragraph 44 of the decision of 3 June 2013 as well as the mentioned "Second Issue" as formulated in the Decision of 31 July 2013 (especially paragraph 37 thereof, where the Pre-Trial Chamber promulgates the "real question") also raise the issue as to whether a Pre-Trial Chamber may decline a case – within the test of "substantial grounds to believe" pursuant to article 61(7) – on the basis of the Political Question Doctrine.

IV THE LAW ON AMICUS CURIAE BRIEFS

15. 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."
16. Pre-Trial Chambers, in deciding on a submission, have applied "the proper determination test" to various cases.¹⁵ A view that was underlined by the Appeals Chamber granting a leave for *Amicus Curiae* submissions in the case against Thomas Lubanga.¹⁶
17. International Criminal Tribunals have permitted submissions from third parties when it was determined that the submissions assisted the Court in reaching the right decision.¹⁷ Third party

¹⁵ See for example *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on Request for Leave to Submit *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence", Pre-Trial Chamber II, ICC-01/05-01/08, 17 July 2009, para. 10.

¹⁶ *Prosecutor v. Thomas Lubanga Dyilo*, "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'", Appeals Chamber, ICC-01/04-01/06 OA 11, 22 April 2008, para. 7-8.

interventions are guaranteed by the Statutes of other international tribunals and courts, such as the International Criminal Tribunal for the former Yugoslavia (ICTY)¹⁸, the International Criminal Tribunal for Rwanda (ICTR)¹⁹ and the Special Court for Sierra Leone (SCSL)²⁰; all on a similar basis as Rule 103(1).

V SUBJECT-MATTER OF THE *AMICUS CURIAE* BRIEF

18. The cardinal issue to be raised in the *amicus curiae* brief pertains to the adjudicatory scope of article 61(7) of the ICC Statute, more specifically as to whether the Pre-Trial Chamber – within the context of article 61(7) of the ICC Statute – is at liberty to:

- (i) Scrutinize the discretionary power of the prosecutor on the basis of the Political Question Doctrine;
- (ii) Determine the evidentiary threshold of article 61(7) of the ICC Statute on the basis of the Political Question Doctrine.

19. The Political Question Doctrine 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 developed by ICC Pre-Trial Chambers. The scope of 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 – before 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

¹⁷ See for example *Prosecutor v. Jean-Paul Akayesu*, Trial Chamber I, “Order Granting Leave for Amicus Curiae to Appear”, ICTR-96-4-T, 12 February 1998; *Prosecutor v. Laurent Semanza*, Trial Chamber III, “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”, ICTR-97-20-T, 9 February 2001.

¹⁸ 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”).

¹⁹ Rule 74 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda.

²⁰ Rule 74 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

(ii) matters relating to the interests of justice.²¹

20. As to the scope of Article 58, the Pre-Trial Chamber in the case of Omar Al Bashir concerning the situation of Darfur, Sudan held 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:*

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.*²²

21. From a jurisprudential perspective and interest of justice view, the discussion as to whether the *Nolle Prosequi* power and *Political Question Doctrine* can be applied by the judiciary within the ambit of article 61(7) of the ICC Statute is yet to be crystalized 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”.²³ 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.”²⁴

²¹ *Situation in Darfur, Sudan*, “Decision on Application under Rule 103”, Pre-Trial Chamber I, ICC-02-05, 4 February 2009, para. 16.

²² *Ibid.*, para. 18.

²³ See *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, “Decision on the ‘Request for leave to submit Amicus Curiae observations pursuant to Rule 103 of the Rules of Procedure and Evidence’”, Pre-Trial Chamber II, ICC-01/09-01/11, 13 June 2011, para. 7; *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, “Decision on the ‘Request by Ms. Moraa Gesicho to Appear as Amicus Curiae’”, Pre-Trial Chamber II, ICC-01/09-01/11-49, 12 April 2011, para. 14.

²⁴ *Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on Request for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence”, Pre-Trial Chamber II, ICC-01/05-01/08, 17 July 2009, para. 12.

VI SPECIFIC ISSUES TO BE ADDRESSED BY THE *AMICUS CURIAE*

The insertion of the Political Question Doctrine within the scope of article 61(7)

22. The *Amicus Curiae* brief introduces the (academic) question whether within the confirmation proceedings (i.e. against President Gbagbo), the Pre-Trial Chamber is at liberty to (non-) confirm the charges on the basis of the Political Question Doctrine or, alternatively, by applying a justiciability test whilst drawing on the Political Question Doctrine.
23. The so-called “Political Question Doctrine”, was initially developed by the U.S. Supreme Court, in particular by the majority opinion of Justice Brennan in *Baker v. Carr* (369 U.S. 186 (1962))
24. The Political Question Doctrine has been applied by the U.S. Supreme Court when it had 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 at trial. Hence, the Political Question Doctrine does not relate to the *legality* of the case, but to the *wisdom* of taking it on.
25. 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.
26. In paragraph 37 of the Decision of 31 July 2013, the Pre-Trial Chamber dictates the “real question”, namely “whether the Chamber can expect the Prosecutor to back up her allegations with sufficient evidence, or whether it is permissible for her to make factual allegations without sufficient evidence and still propose them as a basis for drawing inferences about the charges.”²⁵ In the case the Appeals Chamber would find it permissible for a prosecutor to “make factual allegations without sufficient evidence [...]”, the proposed Political Question Doctrine could serve as a legal remedy or safeguard against prosecutorial abuse of the ICC Statute, i.e. the principles which should underlie article 61(7).
27. From the foregoing, the applicants seek to assist the Appeals Chamber with the following issues:

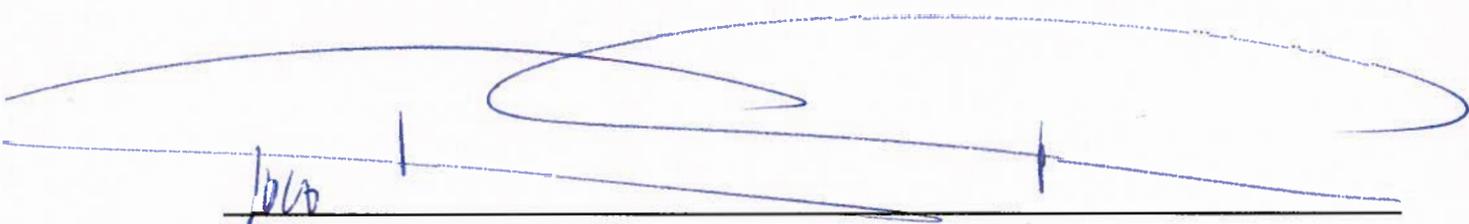
²⁵ *Prosecutor v. Laurent Gbagbo*, Decision on Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of the charges, Pre-Trial Chamber I, ICC-02/11-01/11-464, 31 July 2013, para. 37.

- 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”.

28. Attached to this request the Appeals Chamber finds a detailed table of contents (**Appendix I**), which enables the Appeals Chamber to assess the relevance of this brief.

VII CONCLUSION

29. For the foregoing reasons, the applicants, professor Zwart and professor Knoops, being part of said AU-ICC project, respectfully request that the Appeals 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 16th day of September 2013

At Amsterdam, The Netherlands

APPENDIX I – TABLE OF CONTENTS

I	The Applicants and the Incentive for the <i>Amicus Curiae</i> brief	
II	Reasons for submitting the <i>Amicus Curiae</i> brief	
III	Entering a Nolle Prosequi for reasons of Justiciability within International Criminal Law and the ICC System	
	3.1. Introduction.....	
	3.2. Articles 53 and 61 of the Rome Statute serve as the basis of the Nolle prosequi power	
	3.3. Conclusion	
IV	The Feasibility of the Justiciability test within the ICC-System	
	4.1. Necessity of Political Question Doctrine or Justiciability to monitor prosecutorial policy.....	
	4.2. The doctrine of abuse of powers within International Criminal Law; exponent of the justiciability test	
V	How the so-called non-justiciability doctrine may assist the OTP and the ICC in maintaining their legitimacy	
	5.1. The need for a mechanism to keep politics out of the work of the OTP and the ICC.....	
	5.2. The non-justiciability doctrine	
	5.3. The suitability of the justiciability doctrine for international criminal law	
	5.4. Potential motives and foundations for entering a nolle prosequi or Justiciability test in the present case	
	5.4.1. The nature and purpose of the Rome Statute-test	
	5.4.2. The legitimacy-test	
	5.4.3. The victor’s justice-test	
	5.4.4. The principle of evenhandedness-test.....	
	5.4.5. The rights of the defence-test	
	5.5. Conclusions.....	
VI	Conclusions and Recommendations	
Appendix I: Biographies		
	Professor T. Zwart.....	
	Professor G.G.J. Knoops	