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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
With public Annex 1

Prosecution's response to the Defence "*Requête afin que soit déclaré irrecevable au fond le Document Contenant les Charges (ICC-02/11-01/11-592-Conf-Anx2-Corr2) déposé par le Procureur le 20 janvier 2014*"

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Introduction

1. The Prosecution filed its amended document containing the charges (“Amended DCC”)¹ in accordance with Pre-Trial Chamber I’s decision adjourning the hearing on the confirmation of charges (“Adjournment Decision”).²
2. The Defence alleges that the Amended DCC fundamentally changes the nature of the charges in this case and requests that it should be rejected (“Defence Request”).³ It also submits that the Amended DCC does not contain sufficient legal and factual specificity, and on that basis it requests the Pre-Trial Chamber to order the Prosecution to amend its charges accordingly.⁴
3. The Amended DCC does not change the substance or the scope of the charges in this case. The Prosecution followed the instructions of the Pre-Trial Chamber in the Adjournment Decision. It conducted further investigations and disclosed further evidence on an array of issues that cover large parts of its case. As instructed by the Pre-Trial Chamber, “with a view to informing the Defence in detail of the content of the charges” the new Amended DCC submitted by the Prosecution sets out “in detail and with precision the facts of the case, including [but not limited to] all incidents forming the contextual elements of the crimes against humanity.”⁵
4. These additional details, including their legal characterisation, are intended to reflect the result of the additional investigations conducted by the Prosecution as well as to provide more detailed notice of the charges to the suspect so as to fully comply with his right under Article 67(1)(a). As a result, the Defence Request should be rejected.

¹ ICC-02/11-01/11-592-Conf-Anx2-Corr2 and ICC-02/11-01/11-592-Anx2-Corr2-Red.

² ICC-02/11-01/11-432.

³ ICC-02/11-01/11-598-Conf-Corr and ICC-02/11-01/11-598-Corr-Red.

⁴ Defence Request, paras.37-52, page 18.

⁵ Adjournment Decision, para.45.

5. Even if, *arguendo*, the Amended DCC did exceed the scope of the Adjournment Decision, this would not result in unfair prejudice to the suspect. The procedure laid out in the Adjournment Decision for the further proceedings in this case ensures that the rights of the suspect are fully respected. Accordingly, the remedy sought by the Defence, namely the rejection of the Amended DCC, is still unwarranted. Rather, it would be in the interest of fair and expeditious conduct of the proceedings in this case that the Pre-Trial Chamber endorse the Amended DCC pursuant to its authority under Article 61(7)(c)(ii).
6. The Prosecution recalls that at the beginning of the confirmation of charges hearing, the Defence already made similar arguments as those advanced in this Request.⁶ In that context, the Chamber ruled that “in accordance with Rule 122(6) of the Rules of Procedure and Evidence, the Chamber will settle this matter in the decision concerning the DCC”.⁷ The same approach should be taken with respect to this additional request.⁸

Submissions

(i) The Amended DCC does not alter the substance or scope of the charges

7. The Amended DCC merely complies with the instruction provided by the Chamber in its Adjournment Decision in which the Pre-Trial Chamber requested the Prosecution to consider “providing [...] further evidence or conducting further investigation” with respect to a list of issues that cover large portions of the Prosecution’s case.⁹ It then ordered the Prosecution to file a “new Amended DCC setting out in detail and with precision the facts of the case”.¹⁰ The additional facts to be included in the Amended DCC were not limited to the “incidents forming the contextual elements of the crimes against humanity”, but

⁶ ICC-02/11-01/11-T-14-ENG, p.17, ln.24-p.22, ln.17.

⁷ ICC-02/11-01/11-T-14-ENG, p.42, lns.23-24.

⁸ Defence Request, paras.53-57.

⁹ Adjournment Decision, para.44.

¹⁰ Adjournment Decision, para.45.

rather were meant to “include[e]”¹¹ such facts. The Pre-Trial Chamber also emphasised that such additional information was to be provided “with a view to informing the Defence in detail of the content of the charges”.¹² In a separate decision, the Pre-Trial Chamber reiterated that the Prosecution “may provide further factual details to the charges, in addition to those already communicated in the previous DCC filed on 17 January 2013”,¹³ and clarified that any additional facts to be included in the Amended DCC cannot change the “factual scope of the charges [...] which has been determined by the DCC of 17 January 2013”.¹⁴

8. The Prosecution complied with these instructions. In its Amended DCC, it provided “further factual details” and “specificity”.¹⁵ The additional details included in the Amended DCC are in part also a result of the Pre-Trial Chamber’s expectation, as expressed in the Adjournment Decision, that the Prosecution provide significantly more evidence. It required that the Prosecutor “largely complete her investigation”,¹⁶ and “present *all* her evidence [as well as] her strongest possible case”,¹⁷ in order to meet the standard of proof applicable at the confirmation stage. The Pre-Trial Chamber also provided a detailed explanation of its “general disposition towards certain types of evidence”.¹⁸ To comply with these requirements, the Prosecution conducted further investigations and disclosed a significant amount of additional evidence. The Amended DCC reflects the fruits of its investigation.
9. However, the additional factual and legal detail provided in the Amended DCC strictly relates to the substance and the scope of the charges that were already

¹¹ Adjournment Decision, para.45.

¹² Adjournment Decision, para.45.

¹³ ICC-02/11-01/11-589, para.11.

¹⁴ ICC-02/11-01/11-589, para.12, relied on by Defence Request, para.19.

¹⁵ ICC-02/11-01/11-589, para.12.

¹⁶ Adjournment Decision, paras.25, 37.

¹⁷ Adjournment Decision, paras.25, 37 (emphasis added).

¹⁸ Adjournment Decision, para.26; see also paras.27-34.

included in the DCC of 17 January 2013 and does not fundamentally transform¹⁹ the charges.

The factual clarifications do not substantially change the charges

10. Contrary to the contention of the Defence, the Prosecution has not fundamentally changed its charges with respect to the contextual elements of crimes against humanity under Article 7(1) and 7(2)(a). The Prosecution has maintained its case with respect to: (a) the perpetrators of the attack;²⁰ (b) the civilian population that was the victim of the attack;²¹ (c) the *modus operandi* followed by the attackers and the nature of victimisation suffered by the targeted group;²² (d) the State or organizational policy pursuant to or in furtherance of which the attack was committed;²³ (e) the widespread and systematic nature of the attack;²⁴ and (f) the suspect's knowledge of the attack.²⁵ Although the Amended DCC adds a number of acts related to Articles 7(1) and 7(2)(a)²⁶ and relies on a total of over 800 criminal acts committed in the context of 39 incidents *to demonstrate the existence of a course of conduct involving such acts*,²⁷ this does not fundamentally alter the

¹⁹ Defence Request, paras.14-20.

²⁰ The pro-GBAGBO forces (Amended DCC, para.221), comprised of the various branches of the FDS, pro-GBAGBO youth, youth militia and mercenaries (Amended DCC, para.215). The subsidiary facts and the evidence referred to at paras.132-185 provide further notice on the structure and operation of the pro-GBAGBO forces (Amended DCC, footnote 735).

²¹ Civilians perceived to support Ouattara (Amended DCC, para.221), that were identified on political, national, ethnic or religious grounds (Amended DCC, para.220). The subsidiary facts and evidence referred to at paras.55-128 and 205-206 provide further notice with respect to the targeted civilian population (see Amended DCC, footnotes 746-748).

²² Acts of murder, rape and inhumane acts, all committed with discriminatory intent based on political, national, ethnic or religious grounds (Amended DCC, paras. 217-221). The subsidiary facts and evidence referred to at paras.55-128, 205-206 provide further notice with respect to the nature of victimization suffered by the targeted civilian population (see Amended DCC, footnotes 736 -747).

²³ A State or organizational policy to commit a widespread and systematic attack against civilians perceived to support Ouattara, which includes multiple criminal acts such as murder, rape, other inhumane acts and persecution (Amended DCC, paras. 212 and 221). The subsidiary facts and evidence referred to at paras.39-44, 48, 50, 72-97, 131, 186-188 provide further notice with respect to the Policy (see Amended DCC, footnotes 731-732, 748).

²⁴ The attack was both widespread and systematic (Amended DCC, para.221). The subsidiary facts and evidence referred to at paras.72-73 provide further notice with respect to the widespread and systematic nature of the attack (see Amended DCC, footnote 748).

²⁵ GBAGBO knew that his conduct was part of or intended his conduct to be part of a widespread or systematic attack against a civilian population. He also knew that he acted pursuant to or in furtherance of the Policy (Amended DCC, para.224). The subsidiary facts and evidence referred to at paras.205-209 provide further notice with respect to the subjective contextual element (see Amended DCC, footnote 756).

²⁶ Defence Request, para.34.

²⁷ These 39 incidents include the four charged incidents (Amended DCC, para.221). The subsidiary facts and evidence referred to at paras.55-71 and 99-128 provide further notice with respect to the course of conduct

Prosecution's charge. In particular, all the aspects described above that have not changed²⁸ *also go to qualify the alleged course of conduct and to prove its existence*. In addition, the temporal and geographic scope of the attack (including that of the individual acts related to it) has not changed as a result of the added acts.²⁹

11. The added incidents therefore solely (a) extend the number of acts committed in the context of the charged course of conduct; and (b) change the subsidiary facts and evidence that the Prosecution adduces to establish the attack. While this is intended to provide more specific notice to the suspect as ordered by the Pre-Trial Chamber,³⁰ it does not substantially change the charges.
12. The same can be said about other factual clarifications made in the Amended DCC, such as the additional details regarding the origin and background of the Common Plan or the structure of the pro-GBAGBO forces. These are merely intended to reflect the fruits of the additional investigations conducted by the Prosecution as well as to provide more detailed notice of the charges to the suspect.
13. As a result, the substance or scope of the charges has not changed due to the factual specifications included in the Amended DCC. The Prosecution did not change the nature of its case concerning the contextual elements of crimes against humanity, nor did it add new crimes; it continues to impute responsibility for crimes committed in the context of the same four incidents, and has not varied its factual allegations with respect to the types of conduct which form the basis for the suspect's criminal responsibility over the alleged crimes.

involving multiple commission of acts under Article 7(1) against a civilian population (see Amended DCC, footnote 747).

²⁸ The Prosecution's factual allegations with respect to (a) the perpetrators of the attack; (b) the civilian population that was the victim of the attack; (c) the *modus operandi* followed by the attackers and the nature of victimization suffered by the targeted group; (d) the State or organizational policy pursuant to or in furtherance of which the attack was committed; (e) the widespread and systematic nature of the attack; and (f) the suspect's knowledge of the attack. The specific allegations and the material facts, subsidiary facts and evidence that support the facts are referred to in the respective footnotes above.

²⁹ The over 800 acts perpetrated in the context of the 39 incidents took place between 27 November 2010 and 8 May 2011 in Abidjan and in the West of Côte d'Ivoire (see Amended DCC, paras.55-71, 99-128, referred to in Amended DCC, at footnote 747).

³⁰ Adjournment Decision, para.45.

Consequently, the Amended DCC does not change the suspect's procedural risk or jeopardy: he cannot be convicted of additional, previously uncharged crimes due to the factual specification provided by the Prosecution.

The legal clarifications do not substantially change the charges

14. The Prosecution agrees with the Defence that according to Regulation 52, the legal characterisation of the charges is an integral element of the charges.³¹ It is exactly for that reason that the Pre-Trial Chamber's instruction to the Prosecution of "informing the Defence in detail of the content of the charges"³² cannot be limited to providing "precision"³³ with respect to the facts and circumstances included in the charges, but must necessarily extend to their legal characterisation.
15. In addition, bearing in mind the specific features of this case, the fact that the Prosecution in its Amended DCC added three alternative modes of liability does not alter the scope or substance of the charges. In fact, the circumstances of this case are clearly different from the *Bemba* case, where the change of a mode of liability amounted to an amendment of the charges and the Pre-Trial Chamber acted pursuant to Article 61(7)(c)(ii).³⁴
16. First, the added modes of liability are largely based on the same facts, including the same types of conduct that were already alleged in the 17 January 2013 DCC. That version already included facts that go to prove the elements of criminal responsibility for ordering, soliciting and inducing the commission of crimes under Article 25(3)(b).³⁵ It also included – albeit in lesser detail – the same fact

³¹ Defence Request, paras.9, 22-30. ICC-02/11-01/11-325, para.25.

³² Adjournment Decision, para.45.

³³ Adjournment Decision, para.45.

³⁴ Defence Request, para.11.

³⁵ See ICC-02/11-01/11-357-Conf-Anx1-tENG, para.98(i): GBAGBO defined and adopted the Common Plan; para.98(iii): GBAGBO armed pro-GBAGBO forces which committed the crimes charged; para.98(iv) GBAGBO coordinated the implementation of the Common Plan; para.98(v): GBAGBO, either directly or through members of his inner circle, tasked his subordinates with implementing (including by giving orders), or incited them to implement, the Common Plan which resulted in the commission of the crimes; para.98(vi): GBAGBO incited pro-GBAGBO forces to commit crimes by ordering them not to question the lawfulness of the orders they had received, by making it clear to them that they would not be punished for the crimes committed and by failing to

patterns on which the Prosecution is currently relying to establish the criminal responsibility of the suspect pursuant to Article 28.³⁶ Therefore, this is not a case where the “evidence submitted” appears to establish responsibility of the suspect under a different mode of liability,³⁷ but rather a case where all the necessary facts and circumstances underlying the different modes of liability were already included in previous versions of the charges. This is reflected by the fact that, based on the facts included in the DCC of 17 January 2013, a Trial Chamber invoking Regulation 55 could easily modify the legal characterisation of the facts to accord with the forms of participation pleaded in the alternative (Articles 25(3)(b) and 28).

17. Second, the modes of liability added by the Prosecution in its Amended DCC were always part of the discussion, and the Defence was on notice of this since the very beginning of the proceedings: in its arrest warrant decision against Mr Gbagbo, Pre-Trial Chamber III noted that “the Prosecutor has focused exclusively on individual criminal responsibility under Article 25(3)(a) [...] as opposed to other provisions of that Article or, alternatively, command responsibility under Article 28”.³⁸ It found that this issue [...] may well need to be revisited in due course with the parties and participants”.³⁹
18. In addition, during the confirmation of charges hearing, Judge Kaul stated that he believed that it was “a natural task of the Prosecution to examine carefully all possible modes of criminal responsibility”, and was “interested to know what were [...] the considerations of the Prosecution with regard to criminal

take the measures within his power to prevent or repress the commission of these crimes during the post-election crisis or to punish the perpetrators. The previous version of the DCC also alleged that GBAGBO had a superior-subordinate relation with the pro-GGBAGBO forces, who committed the alleged crimes (para.92) and that GBAGBO held the necessary *mens rea* (paras.99-100).

³⁶ See ICC-02/11-01/11-357-Conf-Anx1-tENG, para.92: GBAGBO controlled the pro-GBAGBO forces, and therefore had a superior-subordinate relationship with them; para.98(vi): GBAGBO failed to take the measures within his power to prevent or repress the commission of these crimes during the post-election crisis or to punish the perpetrators; para.99: GBAGBO knew that the charged crimes would be committed in the normal course of events as a result of the implementation of the Common Plan.

³⁷ Article 61(7)(c)(ii). This provision was adduced by Pre-Trial Chamber II in the *Bemba* case referred to by the Defence.

³⁸ ICC-02/11-01/11-9-Red, para.73.

³⁹ ICC-02/11-01/11-9-Red, para.77.

responsibility pursuant to Article 28, responsibility of commanders and other superiors?”⁴⁰ The Prosecution answered that “based on the facts and the evidence [in this case] we believe that every single mode of liability, except direct personal perpetration, under Article 25(3)(a) is met.”⁴¹ The Prosecution then explained how the facts alleged in the DCC establish the requirements for criminal responsibility under Article 28.⁴² In its written submissions, the Defence acknowledged that it was aware that in this case it must potentially prepare and respond to all modes of liability under Articles 25 and 28⁴³ and specifically challenged the Prosecution’s submissions with respect to command responsibility under Article 28.⁴⁴

(ii) The Amended DCC provides sufficient factual and legal detail

The Amended DCC complies with the Defence’s right of notice pursuant to Article 67(1)(a)

19. The Defence further claims that the Amended DCC does not provide sufficient legal and factual detail⁴⁵ and requests the Pre-Trial Chamber to order the Prosecution to amend the DCC accordingly.⁴⁶ Ironically, in the same Request, the Defence has argued that the Prosecution cannot provide additional and factual detail in a new amended DCC during the confirmation proceedings. In any event, this particular claim is also unfounded.

20. In order to properly interpret the Amended DCC, the Prosecution recalls the decision issued by the Pre-Trial Chamber on 14 December 2012 in which it instructed the Prosecution on how to present its charges (“Charging Decision”).⁴⁷ In this decision, the Pre-Trial Chamber specifically instructed the Prosecution to file an updated DCC in which “the material facts [are] clearly [...] distinguished

⁴⁰ ICC-02/11-01/11-T-17-Red-ENG, p.27, lns.21-24.

⁴¹ ICC-02/11-01/11-T-17-Red-ENG, p.28, lns.14-16.

⁴² ICC-02/11-01/11-T-17-Red-ENG, p.28, ln.17- p.29, ln.9.

⁴³ ICC-02/11-01/11-429-Conf, para.158.

⁴⁴ ICC-02/11-01/11-429-Conf, paras.173-176.

⁴⁵ Defence Request, paras.37-52.

⁴⁶ Defence Request, page.18.

⁴⁷ ICC-02/11-01/11-325.

from those facts of a mere subsidiary nature.”⁴⁸ The Chamber defined “subsidiary facts” as “factual allegations presented by the Prosecutor in the DCC, or at the confirmation of charges hearing, with a view to demonstrating or supporting the existence of material facts”⁴⁹ and found that “subsidiary facts may be analysed by the Pre-Trial Chamber insofar as relevant to determine the existence of material facts, but are not themselves part of the charges and are not subject to confirmation by the Pre-Trial Chamber under article 61(7) of the Statute.”⁵⁰ In making these findings, the Pre-Trial Chamber relied on a decision in the *Banda and Jerbo* case,⁵¹ where Pre-Trial Chamber I also referred to such “subsidiary facts”⁵² and found that “the Pre-Trial Chamber is not required to confirm or not confirm the ‘document containing the charges’ which is an instrument of an explanatory nature provided by the Prosecutor for the ultimate benefit of the Defence and the Chamber itself, and whose content, with the exception of the charges, is not the subject-matter of the decision on the confirmation of charges.”⁵³ Pre-Trial Chamber II and Trial Chamber V endorsed this approach.⁵⁴

21. The Prosecution presented its Amended DCC subject to the above instructions. However, while only the material facts determine the “factual parameters of the case at trial”,⁵⁵ the subsidiary facts and the evidence contained in the DCC also serve the purpose of giving notice to the suspect as to the manner in which the Prosecution intends to establish its case. In addition, consistent with other jurisprudence before this Court,⁵⁶ the Prosecution’s List of Evidence⁵⁷ and its

⁴⁸ Charging Decision, para.28.

⁴⁹ Charging Decision, para.27.

⁵⁰ ICC-02/11-01/11-325, para.27.

⁵¹ See Charging Decision, footnote 24.

⁵² ICC-02/05-03/09-121-Corr-Red, paras.36-37.

⁵³ ICC-02/05-03/09-121-Corr-Red, para.38.

⁵⁴ ICC-01/09-02/11-382-Red, paras.56-60; ICC-01/09-01/11-373, paras.44-48; ICC-01/09-02/11-536, paras.13-14.

⁵⁵ Charging Decision, para.27.

⁵⁶ ICC-01/04-01/07-1547, paras.2, 12, 30; ICC-01/04-01/07-956, para.5.

⁵⁷ ICC-02/11-01/11-592-Conf-Anx3-Corr.

Elements-Based Chart⁵⁸ that were provided to the Defence in this case equally serve the purpose of putting the Defence on such notice.

22. While it is true that the Appeals Chamber found that the regulatory framework of the Court does not distinguish between material facts and subsidiary facts,⁵⁹ it also accepted that a DCC may contain “background or other information”.⁶⁰ There is no reason why that background or other information would not serve the purpose of giving at least a degree of notice to the suspect or the accused. In any event, in this case, the Pre-Trial Chamber expressly drew the distinction between material facts and subsidiary facts and made it clear that the latter are of relevance to determine the existence of the former.
23. As a result of the procedural history in this case, the Prosecution submits that all subsidiary facts included in paragraphs 1-210 and the evidence referred to in footnotes 1-728 of the Amended DCC, as well as the List of Evidence⁶¹ and Elements-Based Chart,⁶² must be taken into consideration in determining whether the suspect’s right under Article 67(1)(a) has been respected.

The Amended DCC does not lack legal specificity

24. The Defence claims that the Amended DCC lacks legal specificity because it does not provide a definition of the elements of crimes against humanity, of the underlying crimes of murder, rape, inhumane acts and persecution, or of the modes of liability.⁶³
25. The Defence appears to misunderstand the scope of a charging document. According to Regulation 52, the necessary ingredients of a document containing the charges are (a) information identifying the suspect; (b) a statement of facts; and (c) a legal characterisation of the facts. The third of these elements merely

⁵⁸ ICC-02/11-01/11-592-Conf-Anx4-Corr.

⁵⁹ ICC-02/11-01/11-572 OA5, para.37.

⁶⁰ ICC-01/04-01/07-3363 OA13, para.50.

⁶¹ ICC-02/11-01/11-592-Conf-Anx3-Corr.

⁶² ICC-02/11-01/11-592-Conf-Anx4-Corr.

⁶³ Defence Request, paras.37, 39, 42-44, 47-48, 52.

requires the Prosecution to identify to which of the crimes under Articles 6, 7 or 8 the alleged facts relate and which precise form of participation under Articles 25 and 28 applies.

26. However, the charging document is not an instrument to make detailed legal submissions with respect to the interpretation of the elements of crime and modes of liability. It suffices for the purposes of notice that the Prosecution clearly sets out the legal characterisation of the facts charged as well as the precise form of participation under Articles 25 and 28, as mandated by Regulation 52(c) of the Regulations of the Court.⁶⁴

The Amended DCC does not lack factual specificity

27. The Defence asserts that the Amended DCC does not provide sufficient factual specificity because it does not distinguish between the different modes of liability.⁶⁵ The Prosecution is free and independent in the “selection of which facts to charge”.⁶⁶ In this case, the Prosecution alleges that the facts charged at paragraphs 212-224, and in particular those included at paragraphs 222-224 of the Amended DCC establish the elements of all modes of liability under Article 25(3)(a) (indirect co-perpetration); 25(3)(b) (ordering, soliciting and inducing); 25(3)(d) and 28. For liability under Article 28, the Prosecution alleges additional facts that are contained at paragraphs 225-231 of the Amended DCC.
28. As a matter of law, there is significant overlap between the different modes of liability under the Statute and especially those under Article 25. In addition, and more importantly, in this particular case, the same set of facts can be used to establish the elements of different modes of liability. For instance, the Prosecution alleges that the suspect, as an indirect co-perpetrator pursuant to Article 25(3)(a), contributed to the commission of the crimes among others by

⁶⁴ It is normally at the trial stage where the parties present more detailed legal submissions in the context of the pre-trial and closing briefs. However, these submissions are not part of the charging instrument.

⁶⁵ Defence Request, paras.45-48.

⁶⁶ ICC-02/11-01/11-464, para.51.

issuing orders and instructions to his subordinates⁶⁷ and by failing to take measures within his powers to prevent, repress or report the crimes committed by his subordinates.⁶⁸ These factual allegations also meet the requirements of some of the elements of ordering, soliciting and inducing pursuant to Article 25(3)(b), as well as command responsibility pursuant to Article 28.

29. This scenario is not uncommon and it was even foreseen by the drafters of the Regulations of the Court, when providing at Regulation 55 that a Chamber may modify the legal characterisation of the charged facts to accord with a form of participation under Articles 25 and 28, other than that charged in the DCC. This provision can only be applied if there is factual (and legal) overlap between the modes of liability under Article 25 and 28, as the same facts can be used to establish more than one.
30. In its Amended DCC, the Prosecution could have repeated all the same facts with respect to each mode of liability charged instead of stating in the title before paragraph 212 that the following facts apply to all modes of liability. However, this would have led to an overly voluminous and repetitive DCC without providing any additional specificity for the benefit of the Defence.
31. The Defence's assertion that the Amended DCC does not provide sufficient detail with respect to the facts pleaded in relation to each of the contextual elements for crimes against humanity is equally unfounded as demonstrated at paragraph 10 above. Indeed, specific notice to that effect is not only provided by the material facts charged in the amended DCC,⁶⁹ but also by the subsidiary facts⁷⁰ and evidence included in the DCC,⁷¹ as well as the List of Evidence⁷² and the Elements-Based Chart.⁷³

⁶⁷ Amended DCC, para.222(iv) and (v)(a).

⁶⁸ Amended DCC, para.222(v)(b) and (c).

⁶⁹ Amended DCC, paras.212, 217-220, 221, 215, 224, which at footnotes 731-732, 735-748, 756 refer to the relevant subsidiary facts.

⁷⁰ Amended DCC, paras.39-44, 48, 50, 55-128, 131-185, 186-188, 205-209.

⁷¹ Amended DCC, footnotes 77-95, 103-105, 109-110, 118-442, 425-645, 710-726.

32. The Amended DCC also provides sufficient factual specificity in spite of the significant factual and evidentiary overlap between the Common Plan, the State or Organizational Policy and the Common Purpose.⁷⁴ This characterisation of the facts best describes the evidence collected by the Prosecution. In this sense, it is not only the Prosecution's right, but also its duty to present its case in a manner that adequately reflects the facts that have been established by the evidence. This is not modified by the fact that the legal concepts referred to above are different, as acknowledged by the Prosecution.⁷⁵ However, there is some degree of overlap between them, which is corroborated by a finding of Pre-Trial Chamber II determining that the "concept of 'common plan' is functionally identical to the statutory requirement of Article 25(3)(d) [...] that there be a 'group of persons acting with a common purpose'. A common purpose must include an element of criminality, but does not need to be specifically directed at the commission of a crime."⁷⁶

The Defence's additional complaints are unsupported

33. The Prosecution further uses this opportunity to briefly respond to a number of related complaints that the Defence made in a separate filing of 4 February 2014.⁷⁷ First, the Defence complains about the cross-referencing system used in the Amended DCC.⁷⁸ As already explained above, subsidiary facts and evidence referred to in footnotes to the subsidiary facts are used in the Amended DCC to provide further notice with respect to the material facts charged. By providing concrete cross-references to the relevant subsidiary facts and evidence, the Prosecution assists the Defence in its interpretation of the DCC. These cross-

⁷² ICC-02/11-01/11-592-Conf-Anx3-Corr, items referring to paragraphs 39-44, 48, 50, 55-128, 131-185, 186-188, 205-209 and footnotes 77-95, 103-105, 109-110, 118-442, 425-645, 710-726.

⁷³ ICC-02/11-01/11-592-Conf-Anx4-Corr, pp.2-38. Consistent with the agreement between the Prosecution and the Defence, this Elements-Based Chart shall not be understood as a limitation for the Prosecution in its use of the evidence referred to therein for the purpose of the confirmation hearing. Neither does it limit the Chamber's power to freely assess all the evidence before it.

⁷⁴ Defence Request, para.50. See also Amended DCC, footnote 733.

⁷⁵ Defence Request, paras.50-51.

⁷⁶ ICC-01/04-01/10-465-Red, para.271.

⁷⁷ ICC-02/11-01/11-603.

⁷⁸ ICC-02/11-01/11-603, para.43.

references are clear and precise and the footnoted evidence specifically relates to discrete facts. The Prosecution followed this approach in the presentation of the Amended DCC because it is partially dictated by the Charging Decision and is also more user-friendly. It does certainly not create a “labyrinth”, as alleged by the Defence.

34. The Defence further alleges that it is impossible to identify in the Amended DCC the members of the group of persons acting with a Common Purpose under Article 25(3)(d) or the nature of their Common Purpose.⁷⁹ The Prosecution notes that this allegation is inconsistent with the Defence’s submission in the Defence Request, where it demonstrated that it is aware of the nature of the Prosecution’s allegation with respect to Common Purpose under Article 25(3)(d).⁸⁰ In any event, the Prosecution reiterates that paragraph 213 of the Amended DCC provides detail as to the members of the Common Plan. The subsidiary facts included at paragraphs 75-78 provide further notice to that effect. Footnote 733 attached to paragraph 213 clarifies that in this case there is a factual overlap between the Common Plan and the Common Purpose under Article 25(3)(d). Accordingly, it is the case of the Prosecution that the Common Plan and the Common Purpose have essentially the same members and the same scope.
35. Finally, the Defence also complains that the Prosecution in its Amended DCC has changed the narrative concerning an essential element under Article 25(3)(a) by alleging that the Common Plan originated in 2000.⁸¹ This example does not demonstrate that the Prosecution has changed the scope of the charges. While the Amended DCC provides additional specificity with respect to the origins (i.e. the background) of the Common Plan, paragraph 212 of the Amended DCC states that the Common Plan evolved over time and that only by the time prior to the Presidential Election it became what the Prosecution has originally argued in its DCC of 17 January 2013.

⁷⁹ ICC-02/11-01/11-603, para.43.

⁸⁰ Defence Request, paras.50-51.

⁸¹ ICC-02/11-01/11-603, para.49.

(iii) The suspect suffers no unfair prejudice as a result of the Amended DCC

36. As demonstrated above, the Amended DCC does not vary the substance or scope of the charges and does not exceed the parameters of the Adjournment Decision. However, even if, *arguendo*, the Amended DCC did alter the charges, this would not result in unfair prejudice to the suspect. The procedure laid out in the Adjournment Decision for the further proceedings in this case ensures that the rights of the suspect are fully respected. As a result, the remedy sought by the Defence, namely the rejection of the Amended DCC, is unwarranted.

The Amended DCC does not violate the suspect's rights under Article 67(1)

37. The Amended DCC does not affect the right to be informed of the charges.⁸² The Amended DCC includes additional factual and legal specificity in order to inform the Defence in detail of the content of the charges. Although the Defence challenges the provision of such additional detail, the Pre-Trial Chamber intended this to be made available for the benefit of the suspect.⁸³ Moreover, as demonstrated above, the Defence arguments that the Amended DCC lacks factual and legal detail are unfounded.
38. The Amended DCC does also not affect the suspect's right to prepare his defence.⁸⁴ The Adjournment Decision set out a calendar for further proceedings, which included deadlines for disclosure of evidence, including the filing of the Amended DCC, and for submissions by the parties.⁸⁵ The Pre-Trial Chamber updated this calendar on 17 December 2013.⁸⁶ This updated calendar fully complies with the procedural requirement under Rule 121(3) that sets the legal standard for fairness in this respect. Accordingly, the Prosecution must provide the Defence with its document containing the charges no later than 30 days

⁸² Defence Request, paras.3-6.

⁸³ Adjournment Decision, para.45.

⁸⁴ Defence Request, para.4.

⁸⁵ Adjournment Decision, p.22, item c).

⁸⁶ ICC-02/11-01/11-576.

before the confirmation hearing.⁸⁷ In this case, the Prosecution was required to file its Amended DCC by 13 January 2014, while the Defence has until 13 February 2014 to file its evidence and 13 March 2014 to file its final submissions. Bearing also in mind that the Defence was in possession of the prior version of the DCC since 17 January 2013, it can hardly claim that it does not have enough time to prepare its defence. This is also not affected by the additional incriminating evidence disclosed to the Defence, since the Prosecution disclosed most of its additional incriminating evidence by 15 November 2013, in accordance with the original schedule set out by the Adjournment Decision.⁸⁸

39. Similarly, the Amended DCC does not affect the suspect's right to challenge the charges and to present evidence.⁸⁹ The Adjournment Decision and the subsequent calendar provide for specific deadlines for the Defence to submit observations on the Prosecutor's evidence and to provide an amended list of evidence that it intends to use and to file final written submissions.⁹⁰

Adding facts and modes of liability during confirmation proceedings does not per se result in unfair prejudice

40. Adding facts and modes of liability in the Amended DCC, even if this were to change the scope of the charges, would not *per se* result in any unfair prejudice to the accused. Article 61(7)(c)(ii) expressly provides for this possibility. Although the Pre-Trial Chamber issued its Adjournment Decision pursuant to 61(7)(c)(i), it could also have ordered the Prosecution to amend the charges and therefore require a substantial change of the scope of the charges, without this causing unfair prejudice to the suspect, especially since the proceedings foreseen in the Adjournment Decision prevent any such prejudice.

⁸⁷ Defence Request, para.5.

⁸⁸ ICC-02/11-01/11-589, para.11.

⁸⁹ Defence Request, para.6.

⁹⁰ ICC-02/11-01/11-576, p.6.

41. Moreover, the Prosecution is not prevented from adding factual allegations to its charges even after the confirmation process is concluded either pursuant to Article 61(8) (if charges are not confirmed) or pursuant to Article 61(9) (if charges are confirmed). This further demonstrates that the addition of factual allegations after the commencement of a confirmation hearing is not *per se* unfair. Indeed, it would be in the interest of fair proceedings and judicial economy to add such facts as early as possible, even during the confirmation proceedings, thus providing notice to the Defence.
42. Similarly, to add alternative modes of liability to the Amended DCC does not result in unfair prejudice. In this case, where facts relevant to the added modes of liability were already included in the DCC of 17 January 2013, it actually gives the accused early notice in relation to these modes of liability. In case that the charges are confirmed, it avoids that a Trial Chamber is forced to resort to Regulation 55 to modify the legal characterisation of the facts to a different mode of liability if it considers that the latter is the one established by the evidence – a procedure that can be more cumbersome for the Defence.

Due to the absence of prejudice, the remedy requested by the Defence is unwarranted

43. Because the suspect incurs no unfair prejudice as a result of the additional factual and legal specificity provided in the Amended DCC - even if, *arguendo*, the Amended DCC exceeds the scope of the Adjournment Decision and Article 61(7)(c)(i) - the remedy requested by the Defence is unwarranted. In order for a party to claim a remedy, it must demonstrate that it suffered material prejudice as a result of the procedural violation.⁹¹
44. If the Pre-Trial Chamber nevertheless believes that the Amended DCC exceeds the scope of the Adjournment decision and that of Article 61(7)(c)(i) because of

⁹¹ See for instance *Prosecutor v. Karadzic*, (IT-95-5/18-T), Decision on Accused's eighty-fourth Disclosure violation Motion, 16 January 2014, para.15; *Prosecutor v. Krstic* (IT-98-33-A) Judgement, 19 April 2004, para.153; *Prosecutor v. Bralo* (IT-95-17-A) Decision on Motions for Access to *Ex Parte* Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006, para.31.

the nature of additional factual and legal specificity provided, then it may cure that violation by endorsing all additions provided in the Amended DCC acting pursuant to its authority under Article 61(7)(c)(ii). As demonstrated above, this would not cause any unfair prejudice to the suspect, would clarify any question regarding the procedural foundations of the Amended DCC and would be in the interest of judicial economy and the fairness of the further proceedings in this case.

Conclusion

45. For the reasons set out above, the Prosecution submits that the Defence Request should be rejected.
46. If, *arguendo*, the Pre-Trial Chamber is of the view that the Amended DCC exceeds the scope of the Adjournment Decision, then the Pre-Trial Chamber should endorse the Amended DCC acting pursuant to its authority under Article 61(7)(c)(ii).



Fatou Bensouda, Prosecutor

Dated this 7th day of February 2014

At The Hague, The Netherlands