

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/11-01/11
Date: 27 January 2014

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Single Judge

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE
IN THE CASE OF
THE PROSECUTOR V. LAURENT GBAGBO**

Public

Decision on the "Requête afin que le « Document amendé de notification des charges » déposé par le Procureur le 13 janvier 2014 et les documents afférents soient déclarés irrecevables et écartés par la Chambre préliminaire."

Decision to be notified, in accordance with regulation 31 of the Regulations of the Court, to:

The Office of the Prosecutor

Fatou Bensouda, Prosecutor

James Stewart, Deputy Prosecutor

Counsel for the Defence

Emmanuel Altit

Agathe Bahi Baroan

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Paolina Massidda

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Silvia Fernández de Gurmendi, Single Judge for Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court”), responsible for carrying out the functions of the Chamber in relation to the situation in the Republic of Côte d’Ivoire and the cases emanating therefrom,¹ hereby issues the decision on the “*Requête afin que le « Document amendé de notification des charges » déposé par le Procureur le 13 janvier 2014 et les documents afférents soient déclarés irrecevables et écartés par la Chambre préliminaire.*” (the “Request”).²

1. On 3 June 2013, the Chamber issued, by majority, Judge Silvia Fernández de Gurmendi dissenting, the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute” (the “Adjournment Decision”).³ In the Adjournment Decision, the Chamber decided to adjourn the confirmation of charges hearing, requested the Prosecutor to consider providing further evidence or conducting further investigation with respect to all charges, and established a calendar for further proceedings.⁴ In particular, the Chamber ordered the Prosecutor to “submit by no later than Friday, 15 November 2013 the Amended DCC, amended list of evidence and updated consolidated Element Based Chart”.⁵ This time limit was subsequently extended to 13 January 2014.⁶

2. On 20 December 2013, following a request to this effect by the Prosecutor,⁷ the Single Judge granted the Prosecutor up to 245 pages for the Amended Document Containing the Charges (the “Amended DCC”) with footnotes.⁸

¹ “Décision portant désignation d’un juge unique”, 16 March 2012, ICC-02/11-01/11-61.

² ICC-02/11-01/11-593-Conf.

³ ICC-02/11-01/11-432.

⁴ *Ibid.*, pp. 22-24.

⁵ *Ibid.*, p. 23.

⁶ Pre-Trial Chamber I, “Decision establishing a calendar for further proceedings”, 17 December 2013, ICC-02/11-01/11-576, p. 6.

⁷ ICC-02/11-01/11-579.

3. On 13 January 2014, the Prosecutor filed the “Prosecution’s Submission of *Document amendé de notification des charges, l’Inventaire amendé des éléments de preuve à charge, and le Tableau amendé des éléments constitutifs des crimes*, and Response to issues raised by Pre-Trial Chamber I”,⁹ annexing: (i) a public version of the *Document amendé de notification des charges* without footnotes (Annex 1);¹⁰ (ii) the *Document amendé de notification des charges* with footnotes (Annex 2);¹¹ (iii) the *Inventaire amendé des éléments de preuve à charge* (Annex 3);¹² (iv) the *Tableau amendé des éléments constitutifs des crimes* (Annex 4);¹³ (v) a list identifying all items of evidence in the List of Evidence which were not included in the previous List of Evidence submitted on 17 January 2013 (Annex 5);¹⁴ (vi) a submission entitled “Armed groups in Abobo, including the ‘Commando Invisible’, December 2010 – April 2011” (Annex 6);¹⁵ (vii) a submission entitled “FAFN/FRCI November 2010 – May 2011” (Annex 7);¹⁶ and (viii) an “Investigator’s Report on efforts made to retrieve relevant material from the UNOCI including information related to UNOCI’s inquiries into the Abobo market shelling of 17 March 2011” (Annex 8).¹⁷ On 14 January 2014, the Prosecutor filed *corrigenda* to Annexes 2,¹⁸ 3,¹⁹ 4²⁰ and 6.²¹ On 20 January 2014, the Prosecutor filed a second *corrigendum* to Annex 2.²²

⁸ “Decision on the ‘Prosecution’s request for an extension of the page limit for the Amended Document Containing the Charges’”, ICC-02/11-01/11-582, p. 5.

⁹ ICC-02/11-01/11-592.

¹⁰ ICC-02/11-01/11-592-Anx1

¹¹ ICC-02/11-01/11-592-Conf-Anx2.

¹² ICC-02/11-01/11-592-Conf-Anx3.

¹³ ICC-02/11-01/11-592-Conf-Anx4.

¹⁴ ICC-02/11-01/11-592-Conf-Anx5

¹⁵ ICC-02/11-01/11-592-Conf-Anx6.

¹⁶ ICC-02/11-01/11-592-Conf-Anx7.

¹⁷ ICC-02/11-01/11-592-Conf-Anx8.

¹⁸ ICC-02/11-01/11-592-Conf-Anx2-Corr.

¹⁹ ICC-02/11-01/11-592-Conf-Anx3-Corr.

²⁰ ICC-02/11-01/11-592-Conf-Anx4-Corr.

²¹ ICC-02/11-01/11-592-Conf-Anx6-Corr.

²² ICC-02/11-01/11-592-Conf-Anx2-Corr2.

4. On 17 January 2014, the Defence filed the Request, requesting the Chamber to:

- Déclarer le DCC amendé déposé par le Procureur le 13 janvier 2014 et les documents annexes irrecevables ;
- Les écarter ;
- Ordonner au Procureur de déposer un DCC conforme aux instructions de la Chambre, qui ne dépasse pas soixante-treize mille cinq cent mots et qui comprenne toutes les réponses aux questions posées par la Chambre au Procureur le 3 juin 2013 ;
- Dire que ce DCC doit être rédigé entièrement en français ;
- Déclarer irrecevable le corrigendum « Correction de ICC-02/11-01/11-592-Conf-Anx2, Document amendé de notification des charges avec notes de bas de page » déposé par le Procureur le 14 janvier 2014.²³

5. The Defence submits that, taking into account the maximum average number of words per page as imposed by regulation 36(3) of the Regulations of the Court (the “Regulations”), the Amended DCC with footnotes (Annex 2) exceeds the applicable page limit and should consequently be disregarded.²⁴ Moreover, the Defence submits that due to their content, the cover submission by the Prosecutor and Annexes 6, 7 and 8 should be considered part of the Amended DCC, and that, therefore, the applicable page limit has been exceeded even further.²⁵

6. The Defence also argues that these additional documents, since they constitute important parts of the Amended DCC, should be rejected given that they were not submitted in a language which the suspect fully understands and speaks.²⁶

²³ Request, p. 19.

²⁴ *Ibid.*, paras 23-26.

²⁵ *Ibid.*, paras 27-46.

²⁶ *Ibid.*, paras 48, 50.

7. Next, the Defence submits that the substance of Annexes 6, 7 and 8 should have been included in the Amended DCC as the Regulations proscribe the inclusion of arguments in an annex to a document.²⁷

8. Finally, the Defence objects to the filing of the *corrigendum* to the Amended DCC with footnotes (Annex 2), submitting that by not including in the new filing the lists and tables which were included with the original document, without providing an explanation in the explanatory note, the Prosecutor is effectuating a substantive modification of the DCC, something which is not permitted when filing a *corrigendum*.²⁸ Accordingly, the Defence requests that the *corrigendum* to the Amended DCC with footnotes be declared inadmissible.²⁹

9. On 23 January 2014, the Prosecutor filed a response to the Request (the “Response”).³⁰ The Prosecutor submits that, contrary to the allegation made by the Defence, Annex 2 actually complies with the applicable page limit. She argues that the list of abbreviations and the organizational diagrams are non-argumentative annexes to the Amended DCC and therefore should not be counted in calculating the number of pages, but states that even if they are included, the total word count still does not exceed the authorised limit.³¹ The Prosecutor adds that the Defence may have arrived at an incorrect result by employing an unreliable method of counting words.³²

10. Further, the Prosecutor submits that the cover filing of 13 January 2014 is not part of the Amended DCC and states that filing the document containing the charges as well as other documents as annexes to a cover filing

²⁷ *Ibid.*, para. 57.

²⁸ *Ibid.*, paras 61-65.

²⁹ *Ibid.*, para. 66.

³⁰ ICC-02/11-01/11-594.

³¹ *Ibid.*, paras 8-10.

³² *Ibid.*, paras 12-13.

allows her to properly submit the documents by identifying them and establishing appropriate levels of confidentiality.³³ The Prosecutor also argues that the content of the cover filing does not present any substantive information, evidence or arguments that are not already presented in the Amended DCC itself, and that the reference to certain modes of criminal responsibility is simply a courtesy notice.³⁴

11. The Prosecutor also submits that Annexes 6, 7 and 8 are not part of the Amended DCC, and that the contrary suggestion of the Defence is “simply not correct”.³⁵ She argues that “it is the Prosecution’s prerogative to determine the facts and circumstances in support of the chosen charges”.³⁶ The Prosecutor insists that the information in Annexes 6, 7 and 8 is presented for the purpose of responding to the questions raised by the Chamber in the Adjournment Decision, and “is not information being relied upon by the Prosecution to provide a sufficient legal and factual basis to bring Laurent Gbagbo to trial”.³⁷

12. In the submission of the Prosecutor, no issue under regulation 36(2)(b) of the Regulations arises with respect to Annexes 6, 7 and 8, as their content “is almost exclusively factual and is presented in a neutral manner and thus is not argumentative”.³⁸ In any case, the Prosecutor states that these Annexes would only add to the page count of the document to which they are appended, namely the cover filing of 13 January 2014.³⁹ As to the Annexes being presented in English, the Prosecutor submits that since they are not part

³³ *Ibid.*, para. 14.

³⁴ *Ibid.*, para. 16.

³⁵ *Ibid.*, para. 17.

³⁶ *Ibid.*, paras 18-19.

³⁷ *Ibid.*, para. 21.

³⁸ *Ibid.*, para. 22.

³⁹ *Id.*

of the Amended DCC, “there is no requirement that they be presented in the same language as the Amended DCC”.⁴⁰

13. Finally, the Prosecutor submits that the “three annexes to the Amended DCC were inadvertently omitted” in the first *corrigendum*, but that a second *corrigendum* has since rectified this error.⁴¹

14. The Single Judge notes article 57(2) of the Rome Statute (the “Statute”) rules 7 and 121 of the Rules of Procedure and Evidence (the “Rules”), and regulation 36 of the Regulations.

15. The Single Judge notes first the Defence submission that the Request should be adjudicated by the full Chamber.⁴² In the present case, following a decision to this effect by the Chamber,⁴³ the functions of the Chamber are exercised by the Single Judge, with the exception of those decisions listed in article 57(2)(a) of the Statute and in the Rules and unless the full Chamber decides otherwise in accordance with rule 7(3) of the Rules. As the present decision is not of a type which under article 57(2)(a) of the Statute or under the Rules must be issued by the full Chamber and given that the full Chamber, after consultation, has decided not to make use of its prerogative under rule 7(3) of the Rules to decide on this Request, the Single Judge remains competent to exercise the functions of the Chamber in relation to this Request.

16. Turning to the merits of the Request, the Single Judge notes the Defence arguments to the effect that not only the document formally filed by the Prosecutor as the Amended DCC but also other documents simultaneously filed by the Prosecutor in the record of the case should be considered part of the Amended DCC for the purpose of determining whether the Prosecutor

⁴⁰ *Ibid.*, para. 23.

⁴¹ *Ibid.*, para. 25.

⁴² Request., paras 15-18.

⁴³ “Décision portant désignation d'un juge unique”, 16 March 2012, ICC-02/11-01/11-61.

has complied with the applicable page limit, also in light of the fact that they include substantive submissions which, in the Defence assertion, cannot be contained in an annex. The Single Judge is not persuaded by these arguments. Due to the formal nature of the document containing the charges, and because the choice and notification of charges are a prerogative of the Prosecutor, the charging document must be understood to be the document identified as such by the Prosecutor. While the Chamber must verify that the document containing the charges includes a statement of the facts which provides a sufficient legal and factual basis to bring the person to trial, in accordance with regulation 52 of the Regulations, the Chamber, in the view of the Single Judge, does not have the power to review documents in the record of the case and determine which, according to their substance, should be considered as setting out the charges. In the present case, there can be no doubt as to what document constitutes the Amended DCC. The Prosecutor has clearly identified as such document ICC-02/11-01/11-592-Anx1 and the identical but footnoted document ICC-02/11-01/11-Conf-Anx2-Corr2.

17. The other documents identified in the Request were not intended by the Prosecutor as forming part of the Amended DCC. Annexes 6, 7 and 8, filed simultaneously with the Amended DCC on 13 January 2014, include factual submissions which the Prosecutor intentionally did not include in the Amended DCC, but which she nevertheless placed before the Chamber in response to certain issues raised in the Adjournment Decision.⁴⁴ The Single Judge notes in this regard that the Prosecutor clearly states in the cover filing of 13 January 2014 that the material presented in Annexes 6 and 7 is “not generally incriminating”, and that, “[c]onsequently, this material is not sourced in the Amended DCC or the Amended [List of Evidence]”. Further, as concerns the submissions included in the cover filing of 13 January 2014,

⁴⁴ See ICC-02/11-01/11-592, para. 8.

the Single Judge takes the view that such submissions outside of the Amended DCC cannot be considered substantively to form part of the charges against Mr Gbagbo. Conversely, the charges are described in the Amended DCC clearly put forward by the Prosecutor as such. Finally in this regard, the Single Judge also notes that in the Response, the Prosecutor states that neither the cover filing nor Annexes 6, 7 and 8 are to be considered part of the Amended DCC.⁴⁵

18. Furthermore, the Single Judge does not accept the Defence argument that the Prosecutor should have included the substance of Annexes 6, 7 and 8 in the Amended DCC because regulation 36(2)(b) of the Regulations prohibits the inclusion of substantive submissions in an annex to a document. In fact, Annexes 6, 7 and 8 are not annexes to the Amended DCC and, as explained above, are not presented by the Prosecutor as complementing the Amended DCC.

19. Therefore, the Single Judge concludes that Annexes 6, 7 and 8 and the cover submission of the Prosecutor are not to be considered to form part of the Amended DCC, and, accordingly, that there is no basis to take them into account when verifying whether the Prosecutor has complied with the page limit applicable to the Amended DCC, or to require the Prosecutor to revise the Amended DCC in order to include therein the arguments currently contained in Annexes 6, 7 and 8 and the cover submission or to provide a translation in French, as suggested by the Defence.

20. As concerns the compliance with the applicable page limit, the Single Judge observes that, contrary to the Defence submission, the Amended DCC in the version which includes footnotes (Annex 2 in its entirety, including the

⁴⁵ Response, paras 14, 17.

table and two charts at pages 165-168) remains inside the limit of 245 pages of 300 words per page that has been authorised by the Single Judge.⁴⁶

21. Finally, as regards the Defence argument in relation to the filing by the Prosecutor of a *corrigendum* to the Amended DCC with footnotes, the Single Judge notes that in a second *corrigendum* the Prosecutor has included again the table and two charts that were included in the original document but omitted in the first *corrigendum*.⁴⁷ The Single Judge also notes that the same table and charts have been accessible to the Defence in Annex 1 without interruption since its notification on 13 January 2014. No intervention by the Single Judge is therefore necessary for the protection of the rights of the Defence.

FOR THESE REASONS, THE SINGLE JUDGE

REJECTS the Request.

Done in both English and French, the English version being authoritative.



Judge Silvia Fernández de Gurmendi
Single Judge

⁴⁶ This conclusion is based on the Microsoft Word version of the second corrigendum of Annex 2 as provided to the Registry by the Prosecutor.

⁴⁷ ICC-02/11-01/11-592-Conf-Anx2-Corr2, pp. 166-168.

Dated this Monday, 27 January 2014

At The Hague, The Netherlands