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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 annexes 1 and 2

Prosecution's response to the Defence « *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. »*

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Introduction

1. On 17 January 2014, the Defence filed its *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*¹ (“Defence Request”). In this request, the Defence argues that the Prosecution submitted an amended document containing the charges that exceeds the authorized page limit and requests, *inter alia*, that the Chamber declare the amended document containing the charges to be inadmissible.
2. As demonstrated below, the *Document amendé de notification des charges* submitted by the Prosecution² (“Amended DCC”) complies with all applicable rules and decisions of the Chamber; and it does not exceed the authorized page limit. The Defence Request is without merit and should be dismissed.

Pertinent Procedural History

3. On 3 June 2013, Pre-Trial Chamber I (“Chamber”) adjourned the hearing on the confirmation of charges and requested “the Prosecutor to consider providing further evidence or conducting further investigation with respect to all charges, mindful of the questions in paragraph 44 of the present decision” (“Request”). The Chamber also directed, *inter alia*, the Prosecutor to submit “by no later than Friday, 15 November 2013 the amended document containing the charges, amended list of evidence and updated consolidated Element Based Chart”³ (“Decision of 3 June 2013”).

¹ ICC-02/11-01/11-593-Red.

² ICC-02/11-01/11-592-Conf-Anx2, ICC-02/11-01/11-592-Conf-Anx2-Corr of 14 January 2014, and ICC-02/11-01/11-592-Conf-Anx2-Corr2 of 20 January 2014.

³ ICC-02/11-01/11-432; with the deadline for submission of the Amended DCC being subsequently postponed: ICC-02/11-01/11-557; and rescheduled: ICC-02/11-01/11-576.

4. On 20 December 2013, the Chamber issued its "Decision on the "Prosecution's request for an extension of the page limit for the amended document containing the charges"⁴ ("Decision of 20 December 2013") authorizing an extension of the page limit for the Amended DCC, including footnotes, to 245 pages.
5. On 13 January 2014, the Prosecution submitted its Amended DCC as one of the annexes to a cover filing entitled "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"⁵ ("Cover Filing"); and subsequently the Prosecution filed corrigenda to the annexes of the Cover Filing.⁶

Submissions

6. The Amended DCC does not exceed the authorized page limit of 245 pages, or the corresponding maximum "total word count" of 73,500 words. The Prosecution submits that the three annexes to the Amended DCC should not be counted in calculating the page limit. And even if these Annexes were to be counted, the Amended DCC still does not exceed the authorized page limit.
7. The Amended DCC (including its three annexes) is presented on 167 pages and includes a total of 71,959 words without its Annexes and at most 72,806 words if these Annexes are to be counted. Given the requirements for the number of

⁴ ICC-02/11-01/11-582.

⁵ ICC-02/11-01/11-592.

⁶ ICC-02/11-01/11-592-Conf-Anx2-Corr of 14 January 2014; ICC-02/11-01/11-592-Conf-Anx2-Corr2 of 20 January 2014 (It should be noted that this corrigendum was filed subsequent to the Defence Request); ICC-02/11-01/11-592-Conf-Anx3-Corr of 14 January 2014; ICC-02/11-01/11-592-Conf-Anx4-Corr of 14 January 2014; ICC-02/11-01/11-592-Conf-Anx6-Corr of 14 January 2014.

words per page,⁷ it is effectively the equivalent of just under 240 pages (or just under 244 pages if its three annexes are counted).

As to the number of pages (words) in the Amended DCC

8. The Prosecution recalls that the headings, footnotes and quotations are to be counted in calculating the page limits;⁸ however, not to be counted are “Any appendix containing references, authorities, copies from the record, exhibits and other relevant, non-argumentative material.”⁹ The three annexes to the Amended DCC are indeed appendices that present relevant, non-argumentative material:¹⁰
 - a. With respect to Annex 1, this is simply a list of abbreviations and acronyms that have already been presented in the main body of the Amended DCC. It is simply a reference tool and does not present any new information;
 - b. With respect to Annexes 2 and 3, these are organizational diagrams that serve as visual representations of matters already presented in the main body of the Amended DCC.¹¹ They are also reference tools and do not present any new information.

Consequently, none of the three annexes to the Amended DCC should be counted in calculating whether or not the Amended DCC complies with the 245 page limit.

9. The “Word” version of the Amended DCC, including headings, footnotes and quotations, as presented to the Court Management Section (“CMS”), has a “total word count” of 71,959 words. Thus, clearly not in excess of the page limit. In

⁷ See Regulation 36(3) of the Regulations of the Court.

⁸ See Regulation 36(1) of the Regulations of the Court.

⁹ See Regulation 36(2)(b) of the Regulations of the Court.

¹⁰ See Regulation 36(2)(b) of the Regulations of the Court.

¹¹ These charts are visual representations of information found in paragraphs 75-77, 80-81, 86, 132-185, 187-189, 196, 201-203 of the Amended DCC, and these paragraphs are identified as the ‘Sources’ just below each chart.

Annex 1 to the present submission, the Prosecution submits a 'screen capture image' of the Word version of the Amended DCC that was submitted to CMS.¹² Located in the lower left corner of this 'screen capture image' is the clearly visible page count and word count for the Amended DCC.

10. The Prosecution submits that even if the list of acronyms and the two charts were to be included in the word count, the Amended DCC would still not exceed the 245 page limit or 73,500 words. The "Word" version of Annex 1, as presented to CMS, has a "word count" of 437 words. In Annex 2 to the present submission, the Prosecution submits a 'screen capture image' of the Word version of Annex 1 to the Amended DCC that was submitted to CMS. Located in the lower left corner of this 'screen capture image' is the clearly visible page count and word count for this document. Determining the number of words contained in Annexes 2 and 3 to the Amended DCC depends on the method used. One method is to simply convert the charts into "Word" documents with the 'To Word' icon in 'Nitro' and use the automatically generated word count. Another method is to "select all" the content, copy it to a new Word document and then use the automatically generated word count. A third method is to manually count all the words in each chart. Using these three methods, the number of words in Annex 2 would be 157, 185 or 181, respectively; and the number of words in Annex 3 would be 165, 225 or 199, respectively. Adding these sums, and using, with respect to Annexes 2 and 3, the largest of the possibilities, to the total word count of 71,959 (as cited in the previous paragraph) results in an "enhanced total word count" of 72,806 words. Thus, still clearly not in excess of the page limit.

11. The Prosecution recalls that the process of submitting documents, such as the Amended DCC, to the Court also includes their conversion into PDF format by

¹² The Word version of the Amended DCC was submitted to CMS at the same time as the 'PDF' version was sent for registration.

the Parties and Participants, with the “Word” and “PDF” versions being submitted simultaneously to CMS.

12. The Prosecution observes that a PDF document cannot provide a word count. One known method, if not the only one, of counting words in a PDF format document is to “select all” the text in the document and convert it to a Word document. The new Word document will then provide its own “word count”. If this was the method used by the Defence to count the number of words in the Amended DCC, it could explain how they arrived at their exaggerated totals. The Prosecution has experimented with this method (Word to PDF to Word) and observes that it does produce a higher “word count” in the subsequent Word version of the document. Part of the increase appears to be a result of the “footer”¹³ at the bottom of each page being counted in the subsequent version when it is not counted in the earlier version. Furthermore, there is more than one method to convert a document from PDF to Word and the word count of the resulting document may differ depending on the method used. Consequently, converting a PDF document into a Word document is an unreliable method of counting words.

13. Regardless of the “method of counting” used by the Defence, the Prosecution relied on the word count of the Word version of the Amended DCC that it provided to CMS. A copy of this Word version is available and can be provided to the Chamber by CMS.

As to the Cover Filing and its other annexes

14. The Cover Filing is not a part of the Amended DCC. The long-standing practice before the Court is to submit the document containing the charges (or an

¹³ Consisting of the Case number, the page number and the date located at the foot of each page.

amended document containing the charges), and related documents as annexes to a cover filing. This permits the Prosecution to properly submit the documents by identifying them and establishing appropriate levels of confidentiality. It also permits the Prosecution to file at the same time, public versions of confidential documents: as was done in this case with Annex 1 to the Cover Filing. Likewise, it also permits the Prosecution to file related documents that may be useful to the Court and the parties: as was done in this case with Annex 5 to the Cover Filing.

15. In addition to the foregoing, the standard practice of using a cover filing to present a DCC (or Amended DCC), and related documents serves the public interest, as it provides the public with notice that certain documents are being submitted to the Court.
16. In the Defence Request reference is made to some of the content of the Cover Filing;¹⁴ however, it should be noted 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. For example, the fact that certain modes of criminal responsibility are mentioned in the Cover Filing is something that is presented, notably in much greater detail, in the Amended DCC. Its mention in the Cover Filing is simply a courtesy notice.
17. Annexes 6, 7 and 8 to the Cover Filing are not part of the Amended DCC. The contrary suggestion being put forward in the Defence Request¹⁵ is simply not correct.
18. Similarly, the Defence Request is not correct in its assertion that the Chamber, in its Decision of 3 June 2013, intended that all of the six issues raised therein be

¹⁴ ICC-02/11-01/11-593-Red, para.28.

¹⁵ ICC-02/11-01/11-593-Red, paras.29-30.

addressed or answered in the Amended DCC.¹⁶ In its Decision of 3 June 2013, the Chamber did comment on what it specifically expected to have included in the Amended DCC in the following terms:

“With a view to informing the Defence in detail of the content of the charges, the Chamber considers it appropriate that the Prosecutor submit a new Amended DCC setting out in detail and with precision the facts of the case, including all incidents forming the contextual elements of crimes against humanity.”¹⁷

19. The Defence Request argues that it is “bien évident”¹⁸ that the six issues identified by the Chamber were to be addressed or answered in the Amended DCC. This argument lacks foundation and is contrary to logic. As quoted above, the Chamber considered, and specified, what it expected to have included in the new Amended DCC. Furthermore, it is the Prosecution’s prerogative to determine the facts and circumstances in support of the chosen charges. As stated by the Appeals Chamber: “[I]t is for the Prosecutor to plead the facts relevant to establishing the legal elements and for the Pre-Trial Chamber to determine whether those facts, if proven to the requisite threshold, establish the legal elements of the attack [under article 7]. [...]”¹⁹

20. In its Decision of 3 June 2013, the Chamber requested that the six identified issues be addressed or answered, to the extent possible, by the Prosecution. As with any question or request from the Chamber, the Prosecution will respond in an appropriate manner. The Prosecution notes that “issues 1 and 6” are similar to questions or requests that could be asked by the Chamber during a *viva voce* hearing; and the information presented in Annexes 6, 7 and 8 to the Cover Filing,

¹⁶ ICC-02/11-01/11-593-Conf, paras.34-37.

¹⁷ ICC-02/11-01/11-432, para.45.

¹⁸ ICC-02/11-01/11-593-Red, para.37.

¹⁹ ICC-02/11-01/11-572 OA5, Judgment on the adjournment of the hearing on the confirmation of charges, 16 December 2013, para.47.

could well have been presented verbally during this continuation of the Confirmation Hearing.

21. Furthermore, with respect to Annexes 6, 7 and 8 to the Cover Filing, the Prosecution observes that in choosing to respond to “issues 1 and 6” in writing, rather than adding annexes to the Cover Filing, the Prosecution could have submitted separate filings to respond to each issue. Irrespective of the method used by the Prosecution to present its response to “issues 1 and 6”, the central fact is that the information in Annexes 6, 7 and 8 to the Cover Filing is presented for the purpose of responding to the Chamber’s questions with respect to “issues 1 and 6”. It is not information being relied upon by the Prosecution to provide a sufficient legal and factual basis to bring Laurent Gbagbo to trial²⁰. Consequently, the information in Annexes 6, 7 and 8 to the Cover Filing is clearly not part of the Amended DCC.

22. The Defence Request suggests that Annexes 6, 7 and 8 to the Cover Filing are “argumentative”.²¹ The foundation of this submission is unclear. The Defence relies on Regulation 37 of the Regulations of the Court; however, Regulation 37 pertains to page limits and not to content of annexes. In turn, Regulation 36(2)(b) specifies that “non-argumentative” annexes are not counted in calculating page limits, and specifies that an annex cannot contain submissions.²² The Prosecution submits that the content of Annexes 6, 7 and 8 to the Cover Filing is almost exclusively factual and is presented in a neutral manner and thus is not argumentative. In any case, even if the Chamber determines that some of the content of these three annexes is argumentative, then those portions of the

²⁰ The Prosecution recognizes that certain source material items cited in the footnotes of Annexes 6, 7 and 8 to the Cover filing are also cited in the Amended DCC; however, in each case the purpose is different. With respect to these three annexes the purpose is to provide the Chamber with information in response to the issues raised.

²¹ ICC-02/11-01/11-593-Red, para.57.

²² See Regulation 36(2)(b) of the Regulations of the Court.

annexes would still only be counted for the purposes of calculating the page limit of the document to which they are appended: the Cover Filing.

23. Lastly, with respect to Annexes 6, 7 and 8 to the Cover Filing, the Defence Request takes issue with these documents being presented in English.²³ The Defence concern is premised on their misrepresentation of these annexes as being part of the Amended DCC. Since these annexes are not a part of the Amended DCC, there is no requirement that they be presented in the same language as the Amended DCC.

As to "Correction de ICC-02/11-01/11-592-Conf-Anx2, du 14 janvier 2014"

24. The Defence takes issue with the *Corrigendum* to Annex 2 of the Cover Filing (being the Amended DCC) that was filed on 14 January 2014.²⁴ The purpose of this *Corrigendum* was to provide the Chamber with the same Amended DCC that was submitted the previous day, but with the hyperlinks properly activated. The three annexes to the Amended DCC were inadvertently omitted when this *Corrigendum* was filed. It was an unfortunate error, but it is apparent that there was no intent to substantively modify the original Amended DCC, nor has this happened in practice. The Prosecution has since filed a second *Corrigendum*²⁵ to address this error.

Conclusions

25. For the reasons set out above, the Prosecution submits that the Defence claim that the Amended DCC exceeds the page limit or that some information that should have been included has deliberately been omitted in order to circumvent the

²³ ICC-02/11-01/11-593-Red, paras.47-56.

²⁴ ICC-02/11-01/11-592-Conf-Anx2-Corr of 14 January 2014.

²⁵ ICC-02/11-01/11-592-Conf-Anx2-Corr2 of 20 January 2014.

page limit has no proper basis. The Defence Request should accordingly be dismissed in its entirety.



Fatou Bensouda, Prosecutor

Dated this 23rd day of January 2014

At The Hague, The Netherlands