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PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Cuno Tarfusser

SITUATION IN DARFUR, THE SUDAN

**IN THE CASE OF
*THE PROSECUTOR v. BAHAR IDRIS ABU GARDA***

Public Document

Defence's Response to 'Prosecution's Request Pursuant to Regulation 37(2) of the Regulations of the Court For an Extension of the Page Limit for its Final Written Observations'

Source: Defence

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

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Other

I. Denial of Defence Right of Response

1. In the final session of the Confirmation Hearing on 30 October 2009, the Pre-Trial Chamber granted the Prosecution until 16 November 2009 to file its final written observations.¹
2. On 11 November 2009 at 17:01 hours the Prosecution filed its “Request Pursuant to Regulation 37(2) of the Regulations of the Court For an Extension of the Page Limit for its Final Written Observations”² (“Request”). This after-hours submission³ was registered on 12 November 2009 and transmitted to the Defence by the Court Management-Court Records section of the Registry at 10:16 hours.
3. On 12 November 2009 at 13:11 hours the Pre-Trial Chamber rendered its “Decision on the Prosecutor's request for an extension of the page limit for his final written observations”⁴, thereby denying the Defence an opportunity to respond, and in which the Pre-Trial Chamber granted the Prosecution’s request and set a maximum page limit of 30 pages for the final written observations of both the Prosecution and the Defence.
4. By effectively filing its Request with only 1 (one) full working day of the Court remaining before the deadline for its final written observations, the Prosecution has *again* prevented the Defence from exercising its right of response enshrined in Regulation 24 of the Regulations of the Court.⁵ Despite its substantial institutional and resource advantage, the Prosecution is unwilling to file its requests for extensions of time or page limits in a manner that will allow the Defence any opportunity to respond. As the learned Single Judge stated in his Decision of 11 September 2009, the Prosecution’s “reiterated practice of submitting requests for extension of time limit so close to the moment of their expiration as to make it impossible for the Chamber to decide and for the

¹ ICC-02/05-02/09-T-21-CONF-ENG ET at pg. 82 lines 24-25 through pg. 83, line 1.

² ICC-02/05-02/09-224

³ Regulation 33(2) of the Regulations of the Court provides that “Documents shall be filed with the Registry between 9am and 4pm The Hague time...”

⁴ ICC-02/05-02/09-225

⁵ Regulation 24 of the Regulations of the Court sets out that “The Prosecutor and the defence may file a response to any document filed by any participant in the case in accordance with the Statute, Rules, these Regulations and any order of the Chamber.”

Prosecutor to comply with the time limit originally granted, if the extension of the deadline were to be denied.”⁶

5. Nevertheless, the Defence welcomes the Pre-Trial Chamber’s Decision to set a maximum page limit of 30 pages for both the Prosecution and Defence’s final written observations.⁷
6. However, the Defence does maintain serious concerns with the issues the Prosecution intends to address in its final written observations.

II. Basis of Prosecution’s Request

7. The Prosecution bases its Request on the assertion that “the Defence raised issues of law and fact which the Prosecution *did not fully address* during the Confirmation hearing” including “alleged inconsistencies in the DCC, the Prosecution’s reliance on anonymous witnesses, and identification of evidence.”⁸
8. In its Decision on the Prosecution’s Request, the Pre-Trial Chamber re-phrases the Prosecution’s contention as being “grounded on the fact that (i) the Defence raised issues of fact and law that the Prosecutor *did not have the opportunity* to address during the Confirmation Hearing...”⁹
9. In reality: 1. the Prosecution had every opportunity to address the issues raised by the Defence at the Confirmation Hearing through the Prosecution’s oral submissions and its four (4) aide-mémoires, which totalled 119 pages, and to which the Defence raised no objection; 2. the Prosecution chose not to address *in any manner* the specific issues it lists in its Request, and which are quoted in paragraph 7 above.
10. As such, and in line with the precedent of Pre-Trial Chamber I in *The Prosecutor v. Thomas Lubanga Dyilo*, the Prosecution may only discuss issues in its final written

⁶ Decision on the Prosecutor’s requests for extension of time-limit, ICC-02/05-02/09-98 at pg. 4

⁷ However, the Defence will, in an additional submission, seek the Pre-Trial Chamber’s leave to file, with its final written observations, an annex containing its skeleton argument on peacekeeping presented on 28 October 2009. Defence counsel Mr. Khan alluded to this intention during the presentation of the Defence’s evidence on peacekeeping: “I am not going to go into detail because, in due course, I will set out, *with the Court’s leave*, relevant aspects of the law and these extracts in closing, *written submissions*, if that is necessary, but I think, for the sake of the presentation in any event, the submissions should be freestanding.” (ICC-02/05-02/09-T-19-ENG at pg. 7, lines 8-11). The “equality of arms” cited by the Pre-Trial Chamber in yesterday’s Decision (ICC-02/05-02/09-225 at pg. 5) must allow the Defence to counter in at least some measure the 119 pages contained in the Prosecution’s four (4) aide-mémoires.

⁸ ICC-02/05-02/09-224, para. 3

⁹ ICC-02/05-02/09-225, pg. 3.

observations that “*it* has discussed orally during the confirmation hearing.”¹⁰ The holding of the Single Judge in *Lubanga* was mirrored by Pre-Trial Chamber I in *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, which held that the parties may submit final written observations “in which they address in writing any matters that *they* discussed at the confirmation hearing.”¹¹

11. On the issue of “the Prosecution’s reliance on anonymous” witness summaries, the Defence made abundantly clear at the hearing held on 3 September 2009, that it reserved its right, as “a matter of the record, to make any necessary submissions at the Confirmation Hearing regarding the probative value in relation to these summaries”¹² and that it was putting the Prosecution “on clear notice that” it expected the Prosecution to “to fulfil their obligations under the Statute and the Rules.”¹³ At the Confirmation Hearing session held on 28 October 2009, the Defence again raised the issue of the Prosecution’s use of anonymous witnesses when discussing the Defence’s witness statements:

“Your Honour will bear in mind that *these are not anonymous witnesses*, albeit that protective measures have been put in place for them. *These are not summaries*, although they are brief. These are sworn statements and they must *cast serious doubts on that part of the Prosecution narrative, or evidence*, to the extent that it may be a part of their case that Mr. Abu Garda’s presence in the area was established or necessary for any period of time leading up to the attack on Haskanita.”¹⁴

12. The Prosecution was clearly on notice that the Defence had raised the issue of the use of anonymous witness summaries prior to and during the Confirmation Hearing, and yet chose not to address this issue in its closing arguments.
13. To the extent that the Defence can decipher the meaning of the vague phrase “identification of evidence”, the Defence believes it clearly raised this issue during the examination of the Defence witness¹⁵ on 27 October 2009, and again, the Prosecution chose not to address this issue either during its examination of the Defence witness or during its closing statements.

¹⁰ ICC-01/04-01/06-743-tEN, pg. 3

¹¹ ICC-01/04-01/07-867, pg. 3

¹² ICC-02/05-02/09-T-8-ENG, pg. 8, lines 8-10

¹³ Ibid. at pg. 8, lines 5-6

¹⁴ ICC-02/05-02/09-T-19-ENG, pg. 43, lines 13-9

¹⁵ ICC-02/05-02/09-T-18-CONF-ENG, pg. 45, lines 6-11

14. As regards the issue of “alleged inconsistencies in the DCC”, once more the Defence put the Prosecution on clear notice during its opening statements that it was attacking the very nature of the evidence put forward by the Prosecution in the DCC, stating that the Prosecution’s evidence

*“is deficient; it is unreliable, it is incomplete and deficient; just not in the abstract, but evidentially deficient when one looks at the nature of evidence that is being presented to you. They, of course, have an obligation to present the core evidence, the best evidence...”*¹⁶

And once more the Prosecution chose not to address in its presentation of evidence, aide-mémoires, examination of witnesses, or closing statements this pointed critique of the very basis of the evidence upon which it seeks a confirmation of charges against the accused. Furthermore, the Defence notes that any inconsistencies existent in the DCC on its face must be indicative of inconsistencies in the theory of the Prosecution’s case, the Prosecution’s evidence, or in the case as a whole.

15. The Defence has been accommodating with the Prosecution. The Defence raised no objection¹⁷ when the Prosecution placed lengthy aide-mémoires before the Chamber setting out in detail the Prosecution’s legal and factual arguments.

16. And yet the Prosecution seeks to push its advantage even further, having sought and been granted the right to address issues in its final written observations that it pointedly chose not to address in its oral pleadings.

17. As noted by the learned Single Judge of Pre-Trial Chamber I in the case of *Prosecutor v. Thomas Lubanga Dyilo*, “it is not possible” for final written observations “to deal with any issue that the parties did not wish to address during the confirmation hearing because this would result in fresh discussion between the parties being reintroduced in writing.”¹⁸ The Prosecution considered it unnecessary to address at the Confirmation Hearing any of the issues it listed in its Request, and should therefore be precluded from addressing these issues in its

¹⁶ ICC-02/05-02/09-T-12-CONF-ENG, pg. 39, lines 19-22

¹⁷ ICC-02/05-02/09-T-13-ENG, pg. 15, lines 21-25 through pg. 16, line 1

¹⁸ ICC-01/04-01/06-743-tEN at pg. 3.

final written observations in accordance with the precedents of Pre-Trial Chamber I in the *Lubanga* and *Katanga* cases.

III. Conclusion

18. While the Defence has no objections to the setting of a maximum 30 page limit for written observations of the Prosecution and Defence, for the reasons detailed above, the Defence respectfully requests the Pre-Trial Chamber to require the Prosecution to abide by the precedents of Pre-Trial Chamber I in the *Lubanga* and *Katanga* cases, and limit its final written observations to those issues *it* chose to raise at the Confirmation Hearing.

Respectfully Submitted,



Mr. Karim A. A. Khan

Defence Counsel for Bahar Idriss Abu Garda

Dated this 13th Day of November 2009

At The Hague, The Netherlands