

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/05-01/08

Date: 17 June 2014

TRIAL CHAMBER III

Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
*v. JEAN-PIERRE BEMBA GOMBO***

Public

**Decision on “Defence Request to Strike out the ‘Prosecution’s closing brief’,
dated 2 June 2014, as inadmissible”**

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

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Detention Section

**Victims Participation and Other
Reparations Section**

Trial Chamber III ("Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* ("Bemba case"), issues the following Decision on "Defence Request to Strike out the 'Prosecution's closing brief', dated 2 June 2014, as inadmissible" ("Decision").

I. Background and submissions

1. On 16 July 2013, the Chamber issued its "Decision on the timeline for the completion of the defence's presentation of evidence and issues related to the closing of the case" ("Decision 2731"),¹ in which it, *inter alia*, established the schedule and gave directions for the filing of closing briefs by the parties and participants. In this context, the Chamber (i) decided that "the prosecution's and defence's briefs may not exceed 400 pages each"; and (ii) ordered "the parties and participants to strictly comply with the format requirements for documents as set out in Regulation 36 of the Regulations".²
2. On 2 June 2014, in line with the Chamber's order,³ the prosecution filed the "Prosecution's closing brief" ("Prosecution Brief").⁴
3. On 4 June 2014, the defence filed its "Defence Request to Strike out the 'Prosecution's closing brief', dated 2 June 2014, as inadmissible" ("Defence Request").⁵ The defence requests that the Chamber (i) "[s]trike out the Prosecution's Closing Brief as inadmissible; (ii) "[o]rder the Prosecution to re-file its Closing Brief in accordance with Regulation 36[(3)]";⁶ and (iii)

¹ Decision on the timeline for the completion of the defence's presentation of evidence and issues related to the closing of the case, 16 July 2013, ICC-01/05-01/08-2731.

² ICC-01/05-01/08-2731, paragraph 38(j) and (l).

³ Decision on closure of evidence and other procedural matters, 7 April 2014, ICC-01/05-01/08-3035, paragraph 7 (ii).

⁴ Prosecution's closing brief, 2 June 2014, ICC-01/05-01/08-3079-Conf.

⁵ Defence Request to Strike out the "Prosecution's closing brief", dated 2 June 2014, as inadmissible, 4 June 2014, ICC-01/05-01/08-3082.

⁶ The defence refers to Regulation 36(4) of the Regulations. However, the Chamber notes that further to an amendment adopted on 14 June 2007, entered into force on 18 December 2007, former sub-regulation 3 was deleted, and former sub-regulation 4 was renumbered as sub-regulation 3.

"[s]uspend all time limits for the filing of the Defence's Final Trial Brief pending receipt of an admissible brief from the Prosecution."⁷

4. In support of its request, the defence claims that, while "the Prosecution's closing brief appears to conform to the page limit imposed by Decision 2731, closer examination of the formatting reveals that this has been achieved by wholesale use of the same formatting trick deprecated in both *Hartmann* and *Lubanga*".⁸ The defence asserts that the prosecution has "systematically removed all spaces between words and characters throughout the footnotes and replaced them with dashes in order to cause Microsoft Word to count a footnote consisting of several words as a single word."⁹ The defence submits that this "formatting trick" enabled the prosecution to "squeeze approximately 385 words into each page", thereby exceeding the 300-word limit under Regulation 36(3) of the Regulations of the Court ("Regulations").¹⁰ According to the defence, "[t]he true word count of the Prosecution's Closing Brief is thus approximately 123,585 words as opposed to the 120,000 allowed, which in a proper format would exceed the page limit by 12 pages."¹¹ Moreover, the defence alleges that the formatting of the footnotes "negatively affects the Defence's ability to review and analyze the references included in the footnotes."¹² Finally, the defence asserts that the prosecution must "have consciously chosen to employ these formatting tricks in the footnoting of its brief in the knowledge that it was engaging in unfair and outlawed

⁷ ICC-01/05-01/08-3082, paragraph 15.

⁸ ICC-01/05-01/08-3082, paragraph 10. The defence refers to ICTY, *The Prosecutor v. Florence Hartmann*, IT-02-54—R77.5-A, Decision on Further Motions to Strike 17 December 2009, paragraph 11. In this case, the appellant was ordered to comply with a specific word limit and met this word limit by removing spaces between words and before and after punctuation in the footnotes and in the body of the submission. The defence further refers to *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the "Observations de la Défense relatives à l'irrecevabilité du «Prosecution's Document in Support of Appeal against Trial Chamber I's decision of 8 July to stay the proceedings for abuse of process», daté du 26 juillet 2010", 30 July 2010, ICC-01/04-01/06-2543. In this instance, the prosecution failed to comply with the 300- word per page limit under Regulation 36(3) of the Regulations.

⁹ ICC-01/05-01/08-3082, paragraph 11.

¹⁰ ICC-01/05-01/08-3082, paragraphs 11 to 12.

¹¹ ICC-01/05-01/08-3082, paragraph 12.

¹² ICC-01/05-01/08-3082, paragraph 13.

practices.”¹³

5. On 6 June 2014, on the Chamber’s instruction,¹⁴ the prosecution responded to the Defence Request,¹⁵ urging the Chamber to reject it.¹⁶ In this regard, the prosecution submits that (i) it “has not breached the Chamber’s order to file a brief of 400 pages with an average of 300 words per page”;¹⁷ and that (ii) it followed the practice used in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (“Katanga and Ngudjolo case”), where Trial Chamber II allowed the parties and participants to use a format for their closing briefs that resulted in the counting of each reference as one word. Therefore, the prosecution claims that it “in no way engaged in ‘unfair and unlawful practices’ as alleged by the Defence”.¹⁸ In addition, the prosecution highlights that in the *Bemba* case, only the prosecution is required to provide both English and French transcript references, which – if the French references were to be counted as separate words – would afford the defence a higher word limit than the prosecution.¹⁹

II. Analysis and conclusion

6. For the purpose of the present Decision and in accordance with Article 21(1) of the Rome Statute (“Statute”), the Chamber has considered Articles 64(2) and 67(1)(b) of the Statute and Regulations 36 and 37 of the Regulations.

¹³ ICC-01/05-01/08-3082, paragraph 14.

¹⁴ Email from the Chamber to the prosecution on 5 June 2014 at 11.46.

¹⁵ Prosecution’s Response to “Defence Request to Strike out the ‘Prosecution’s closing brief”, dated 2 June 2014, as inadmissible”. 6 June 2014, ICC-01/05-01/08-3083.

¹⁶ ICC-01/05-01/08-3083, paragraph 9.

¹⁷ ICC-01/05-01/08-3083, paragraph 4.

¹⁸ ICC-01/05-01/08-3083, paragraphs 4 and 6. The prosecution refers to: *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision amending the arrangements for the filing of the written submissions, 14 February 2012, ICC-01/04-01/07-3238-tENG.

¹⁹ ICC-01/05-01/08-3083, paragraphs 7 to 8.

The Defence Request

7. The Chamber notes that the Prosecution Brief comprises a total of 321 pages, with an average of approximately 253 words per page.²⁰ This is consistent with the 400-page limit set out in Decision 2731 and the 300-words-per-page limit under Regulation 36(3) of the Regulations. However, the Chamber must address the defence's claim that the prosecution used "unfair and outlawed practices" in the formatting of its footnotes which warrant striking out the Prosecution Brief as inadmissible.
8. The Chamber notes that in the footnotes of its Closing Brief, the prosecution departed from the usual format adopted in the course of the trial proceedings.²¹ The Chamber is of the view that the parties should have consulted on this issue *inter partes*, prior to the prosecution submitting its Closing Brief. This might have avoided expending the parties' and the Chamber's time and resources litigating an issue of marginal significance to the proceedings.
9. As stressed by the defence, the footnote references in the Prosecution Brief are characterised by a scarcity of spaces between characters and the replacement of spaces by hyphens. The relevant references indeed count in Microsoft Word as one word, rather than several words.
10. The Chamber notes that the omission of spaces is not exclusively used for references to transcripts and evidence, as submitted by the prosecution;²² it is also used for a limited number of other references, and notably for citations to

²⁰ According to the prosecution, the average word count is 253.42 words per page. The prosecution's calculation approximately corresponds to the Chamber's calculation in this regard.

²¹ The departure from previous practice was acknowledged by the prosecution: ICC-01/05-01/08-3083, paragraph 4.

²² ICC-01/05-01/08-3083, paragraph 4.

the Confirmation Decision.²³

11. For the references to transcripts, the Chamber finds that the practice followed in the *Katanga* and *Ngundjolo* case is acceptable in the *Bemba* case. In this regard, the Chamber notes the prosecution's submission that in the *Bemba* case, only the prosecution is required to make reference to both the English and the French version of transcripts.²⁴ Counting references to the French version as separate words would increase the word-count in the footnotes of the prosecution's brief and thus affect the prosecution's ability to comply with the 300-word per page limit under Regulation 36(3) of the Regulations. This would not be the case for the defence, which - except in case of discrepancies - may choose to refer to either language version.²⁵
12. The Chamber also considers that the defence failed to substantiate its argument that the prosecution's formatting practice affects the defence's ability to review and analyse footnote references and the use of word processing search facilities. The Chamber finds that the use of a consistent system of witness codes, transcripts and evidence numbers allows the reader, including the defence, to identify any relevant references.
13. Finally, the Chamber notes the defence's submission that if the prosecution had followed the standard formatting technique in the footnotes, it would have exceeded the authorised page limit by 12 pages. If the calculation provided by the defence is correct,²⁶ this would correspond to a three percent excess, which the Chamber considers to be limited. Given the limited nature of the alleged excess, the Chamber is of the view that invalidating the

²³ Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424. *See* for example footnotes 11, 13, 103, and 113.

²⁴ *See* ICC-01/05-01/08-2731, paragraph 34.

²⁵ *See* ICC-01/05-01/08-2731, paragraph 34.

²⁶ The prosecution challenges the defence's calculation: ICC-01/05-01/08-3083, paragraphs 3 and 4.

Prosecution Brief, and ordering the modification of the footnotes, would be disproportionate and risk unnecessary delay of the proceedings.

14. However, in light of the principle of equality of arms and in order to avoid any prejudice to the defence, the Chamber hereby decides that for the purpose of its closing brief, the defence may follow the same format for footnote references as the prosecution. Should the defence chose to follow the usual format adopted in the course of the trial proceedings, the Chamber grants the defence an extension of page limit of up to 12 pages for the filing of its final brief.

Order for a corrigendum

15. The Chamber notes that the Prosecution Brief contains two “Chapter 4” headings.²⁷ To avoid any confusion and to facilitate the analysis by the defence, the legal representative and the Chamber, the prosecution shall file a corrigendum to the Prosecution Brief, correcting any error in the formatting and numbering of headings. In addition, the Chamber considers it beneficial for the defence, the legal representative and the Chamber to receive a table of contents of the Prosecution Brief. To avoid any changes in the page numbers of the Prosecution Brief, the table of contents shall be filed as an annex.²⁸

16. Any corrections to the Prosecution Brief shall be limited to errors or oversights of a typographical nature²⁹ and no changes of substance are allowed. In addition, the corrigendum shall contain an annex listing all edits that have been made. Given these directions, the filing of a corrected version

²⁷ ICC-01/05-01/08-3079-Conf, page 72 and page 151. The Chamber notes that the prosecution’s closing brief is currently classified as confidential. However, the Chamber notes that the mere reference to this document does not undermine the confidential nature of the document as such.

²⁸ See ICC-01/05-01/08-2731, paragraph 38(k). The Chamber ordered that the total number of pages of the annexes accompanying each brief shall not exceed one-third of the number of page allocated for the brief.

²⁹ In this regard, the Chamber notes, for example, that footnote 2210 appears in yellow highlight.

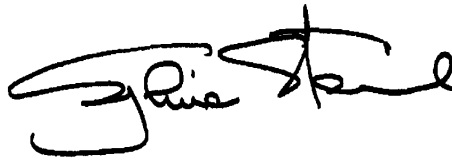
of the Prosecution Brief and the submission of an annex will not delay or otherwise prejudice the defence's preparation of its own closing brief. Accordingly, the defence's closing brief shall be filed by 25 August 2014, as previously ordered by the Chamber.³⁰

17. The Chamber hereby

- (i) REJECTS the Defence Request; and
- (ii) ORDERS the prosecution to file a corrigendum and a table of contents to the Prosecution Brief by 20 June 2014.

³⁰ Decision on the timetable and on the sentencing procedure, 26 May 2014, ICC-01/05-01/08-3071, paragraph 18(ii).

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 17 June 2014

At The Hague, the Netherlands