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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

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

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

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A. BACKGROUND

1. On 16 July 2013, the Chamber issued its “Decision on the timeline for the completion of the defence presentation of evidence and issues related to the closing brief” (“Decision 2731”),¹ in which it established, *inter alia*, a schedule and gave directions for the filing of closing briefs and the presentation of final oral submissions by the parties and participants. In this context, the Chamber ordered that (i) the Prosecution brief and the Defence brief may not exceed 400 pages; (ii) “the parties and participants shall strictly comply with the format requirements for documents as set out in Regulation 36 of the Regulations”.²

2. On 7 April 2014, the Chamber issued its “Decision on the closure of evidence and other procedural matters” (“Decision 3035”),³ in which it declared the submission of evidence closed. In addition, the Chamber (i) ordered the Prosecution and the Legal Representative of Victims, Maitre Marie-Edith Douzima Lawson, to submit their final closing briefs by 2 June 2014.⁴

3. On 2 June 2014, the Prosecution filed its “Prosecution’s closing brief”.⁵ The Prosecution filed no request for an extension of the permitted page limit for its closing brief.

B. APPLICABLE LAW

4. Regulation 29 (1) of the Regulations of the Court provides:

“[i]n the event of a non-compliance with the provisions of any regulation, or with an order of a Chamber made thereunder, the Chamber may issue any order that is deemed necessary in the interests of justice”.

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

² ICC-01/05-01/08-2731, para. 33.

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

⁴ ICC-01/05-01/08-3035, para.5.

⁵ Prosecution’s closing brief, 2 June 2014, ICC-01/05-01/08-3079.

5. Regulation 36(1) of the Regulations of the Court ("Regulations") provides that headings, footnotes and quotations should be counted in calculating the page limits, except for any addendum containing verbatim quotations of the Statute, Rules or Regulations, and any appendix containing references, authorities, copies from the record, exhibits and other relevant, non-argumentative material.⁶

6. Regulation 36(4) of the Regulations of the Court provides:

"All documents shall be submitted on A4 format. Margins shall be at least 2.5 centimetres on all four sides. All documents that are filed shall be paginated, including the cover sheet. The typeface of all documents shall be 12 point with 1.5 line spacing for the text and 10 point with single spacing for footnotes. An average page shall not exceed 300 words."

7. Failure to comply with the orders of the Chamber and/or the Regulations of the Court as to page and word limits cannot be simply regarded as some technical deficiency. It is rather an invalidation of the filing. A filing which does not comport to page and /or word limits is just as inadmissible as one which is filed outside a time limit without permission. Failure to comply moreover represents a prejudice to the opposing party who obeys the limits imposed. The importance of compliance with such orders and rules has been emphasized repeatedly by several international tribunals. At the International Criminal Tribunal for the Former Yugoslavia, the Appeals Chamber in *Hartmann*, ordered the Appellant to re-file her appeal brief in conformity with the relevant Rules and Practice Directions, as well as its Decision on Motions to Strike and Requests to Exceed Word Limit, 6 November 2009 ("6 November Decision").⁷ From an examination of the appeal brief, the Appeals Chamber found that:

From an examination of the appeal brief, which bears a word count of 8,998 words, it was clear that the Appellant was able to come within

⁶ Regulation 36(1) and (2) of the Regulations of the Court.

⁷ *The Prosecutor v. Florence Hartmann*, Decision on Motions to Strike and Requests to Exceed Word Limit, IT-02-54—R77.5-A, 6 November 2009 ("6 November Decision"), para. 27.

the 9,000 word limit by removing spaces between words and characters throughout the footnotes. Footnotes, of course, count toward the overall word limit, pursuant to paragraph 6 of the Practice Direction on the Length of Briefs and Motions. The Appellant therefore seems to have "tricked" Microsoft Word's automatic word-count function into counting a footnote consisting of several words as a single word. Such an approach is contrary to both the spirit and letter of the relevant Practice Directions.⁸

8. Furthermore, the Appeals Chamber recalled that "a violation of regulation 36 (3) of the Regulations of the Court "cannot be corrected by retroactively granting an extension of the page limit".⁹

9. Similarly, in *Lubanga*, the Appeals Chamber of the ICC ordered the Prosecution to re-file by 4pm the same day, a confidential and public redacted version of a document in support of the appeal that did not exceed 40 pages in length and complied with the provisions of Regulation 36(3) of the Regulations of the Court.¹⁰ The Defence for Mr Lubanga Dyilo had requested the Appeals Chamber to declare the document¹¹ inadmissible for violating the page limit authorized by the Appeals Chamber. In its submission, the Defence asserted that, on average, the document contained approximately 383 words per page.¹² The Defence argued that it was unfair to Mr Lubanga Dyilo since he "intends to abide by the Decision of the Appeals Chamber of 22 July 2010".¹³

C. SUBMISSIONS

10. Whilst at first blush the Prosecution's closing brief appears to conform to the page limit imposed by Decision 2731, closer examination of the formatting reveals

⁸ *The Prosecutor v. Florence Hartmann*, Decision on Further Motions to Strike, IT-02-54—R77.5-A, 17 December 2009, para.11.

⁹ ICC-01/04-01/06-1445, page 8.

¹⁰ ICC-01/04-01/06-2543, para. 14.

¹¹ ICC-01/04-01/06-2538-Conf.

¹² ICC-01/04-01/06-2539, page 12.

¹³ ICC-01/04-01/06-2539, page 14.

that this has been achieved by wholesale use of the same formatting trick deprecated in both *Hartmann* and *Lubanga*.

11. In precisely the same way 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. This formatting trick has allowed the Prosecution to exceed the 300 maximum word limit per page and thus effectively to exceed the page limit authorized by the Chamber.

12. On average, the prosecution has managed to squeeze approximately 385 words into each page, which is 28% over the maximum permitted number in the Regulations of the Court.¹⁴ The 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.

13. The formatting of the footnotes also negatively affects the Defence's ability to review and analyze the references included in the footnotes. It makes it very difficult for the Defence to use word processing search facilities and to distinguish between each reference in a timely and efficient manner, which is all the more important given the limited time the parties have to draft their final briefs.

14. The Prosecution must, moreover, 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 practices. In the circumstances the Defence requests the Chamber to strike out as inadmissible the Prosecution's Closing Brief.

¹⁴ For example, at page 6 of the Closing Brief, when dashes are replaced by spaces, as it should be, the word count reaches 314 words as opposed to the 240 word count originally indicated, instead of the 300 word limit. At page 9, the word count is originally of 223 words. Once the dashes replaced by spaces in the relevant parts, the word count is of 463. Finally, page 11 counts originally 207 when it should actually count 378 words after replacing the relevant dashes.

D. RELIEF REQUESTED

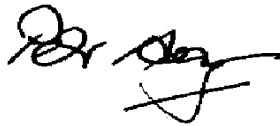
15. In light of the above arguments, the Defence respectfully request that the Chamber:

STRIKE OUT the Prosecution's Closing Brief as inadmissible;

ORDER the Prosecution to re-file its Closing Brief in accordance with Regulation 36(4) of the Regulations of the Court as well as Decision 2731.

SUSPEND all time limits for the filing of the Defence Final Trial Brief pending receipt of an admissible brief from the Prosecution.

The whole respectfully submitted.



Peter Haynes QC
Lead Counsel of Mr. Jean-Pierre Bemba

The Hague, The Netherlands

4 June 2014