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**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER III

Before Judges: Solomy Balungi Bossa, Presiding
Bakhtiyar Tuzmukhamedov
Mparany Rajohnson

Registrar: Adama Dieng

Date: 11 July 2011

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THE PROSECUTOR
v.
Callixte NZABONIMANA
Case No. ICTR-98-44D-T

**CONSOLIDATED DECISION ON DEFENCE MOTION FOR VARIANCE OF
WORD LIMIT OR ALTERNATIVELY FOR AN EXTENSION OF TIME TO
FILE A DEFENCE CLOSING BRIEF, AND PROSECUTION MOTION TO
STRIKE DEFENCE CLOSING BRIEF**

*(Rules 85 and 86 of the Rules of Procedure and Evidence; Practice Direction on Length and
Timing of Closing Briefs and Closing Arguments;)*

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INTRODUCTION

1. At a Status Conference on 7 April 2011, the Trial Chamber informed the parties that it would grant them 60 days from the close of the case to file their closing briefs. It reminded the parties that the briefs should address matters relating to sentencing.¹ On 6 May 2011, the Trial Chamber directed the parties to file their Closing Briefs on 5 July 2011. It further ordered that the Closing Briefs not exceed 30,000 words.²
2. On 4 July 2011, the Defence filed a Motion asking for variation of the order on word limits or, in the alternative, an extension of time to file its Closing Brief (“Motion”).³
3. On 5 July 2011, the Prosecution filed a Response opposing in its entirety the Defence Motion (“Response”).⁴
4. On 5 July 2011, the Chamber issued an order reaffirming its 6 May 2011 order regarding the 5 July 2011 deadline for filing the Closing Briefs, and directed the Defence to file any reply to its Motion by close of business on 7 July 2011.⁵ In that order, the Chamber noted that it would review the arguments of the parties, on an expedited basis, to determine whether it would be appropriate to allow one or both parties to file amended closing briefs at a later date.⁶
5. On 5 July 2011, the parties filed their respective Closing Briefs. The Closing Brief submitted by the Defence contains 52,003 words.
6. On 7 July 2011, the Prosecution filed a Motion to strike the Defence Closing Brief for violation of the Chamber’s 7 April 2011 and 6 May 2011 orders and the Practice

¹ T. 7 April 2011, pp. 3-4.

² T. 6 May 2011, pp. 50-51.

³ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana’s Extremely Urgent Motion for Variance of Word Limit or Alternatively for an Extension of Time to File a Defence Closing Brief in Compliance With the Chamber’s Order, 4 July 2011 (“Motion”).

⁴ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor’s Response to Nzabonimana’s Extremely Urgent Motion for Variance of Word Limit or Alternatively for an Extension of Time to File a Defence Closing Brief in Compliance With the Chamber’s Order, 5 July 2011 (“Response”).

⁵ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Order to File Closing Briefs, As Directed on 6 May 2011, and Order for Expedited Filing (“5 July Order”), 5 July 2011.

⁶ 5 July Order, para. 4.

Direction on Length and Timing of Closing Briefs and Closing Arguments (“Prosecution Motion to Strike”).⁷

7. On 7 July 2011, the Defence filed a Reply to the Prosecution Response, seeking acceptance by the Chamber of its submitted Closing Brief of 52,003 words (“Reply”).⁸

SUBMISSIONS OF THE PARTIES

Defence Motion

8. The Defence requests variance of the word limit to allow it to file a Closing Brief containing 55,000 words; or, alternatively, leave to file the Brief seven days after the Chamber’s issuance of decisions on the pending motions.⁹
9. The Defence submits that extraordinary circumstances exist warranting an extension of the word or time limit, including (i) “the voluminous nature of the documents”; (ii) the complexity of the case; (iii) the “11th hour filing” of a “Notice” by the Prosecution dropping nine paragraphs of the indictment; and (iv) pending motions.¹⁰
10. The Defence asserts that the thousands of documents, including 5,500 pages of English transcripts, many exhibits, motions, and Chambers decisions, amount to an extraordinary circumstance warranting an extension of the 30,000 word limit and filing date.¹¹ The Defence also references the Chamber’s decision of 10 May 2011 allowing 1,000 words for addressing the cross examinations of two witnesses to portray the insufficiency of the 30,000 word limit, since 500 words to address merely the cross examinations of each of the 60 witnesses would already amount to 30,000 words.¹² Further, the Defence refers to the *Nizeyimana* case, in which the Defence was given a 43,000 word limit for a case with 35 less trial days and 117 less exhibits.¹³

⁷ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor’s Urgent Motion for Order that Defence Closing Brief be Struck Out for Violation of Trial Chamber’s Orders Issued on 7 April 2011 and 6 May 2011, and Practice Direction on Length and Timing of Closing Briefs and Closing Arguments, 7 July 2011.

⁸ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Nzabonimana’s Reply to Prosecutor’s Response to Nzabonimana’s Extremely Urgent Motion for Variance of Word Limit or alternatively for an Extension of Time to File a Defence Closing Brief in Compliance with the Trial Chamber’s Order, 7 July 2011.

⁹ Motion, para. 4.

¹⁰ Motion, para. 6.

¹¹ Motion, paras. 7-8.

¹² Motion, para. 9.

¹³ Motion, para. 10.

11. The Defence asserts that the complexity of the case suffices as an extraordinary circumstance, evidenced by the 43 factual allegations spanning the *communes* of Gitarama *préfecture* and the overlap of relevant evidence between the Tribunal, *Gacaca*, and Rwandan courts of the allegations and the Prosecution witnesses.¹⁴
12. Following the Prosecution “Notice” to the Defence that it would not be seeking conviction on nine paragraphs of the indictment, the Defence contends that either more time or more words is necessary to address the effects of this move on both Nzabonimana’s trial and the organization of the Brief.¹⁵
13. The Defence concludes that it cannot file its Brief until it has received decisions on two pending motions.¹⁶ In support of this contention, the Defence submits that the decisions on whether to admit written statements under 92 *bis* and on reconsideration of the 7 April 2011 decision bear directly on the content of the Brief.¹⁷

Response

14. The Prosecution opposes the Defence motion in its entirety and submits that none of the circumstances alleged by the Defence are sufficient to constitute extraordinary circumstances that warrant an extension of either time or word limits.¹⁸
15. The Prosecution asserts that it is in the same position as the Defence with the volume of materials and complexity of the case, but that it bears a higher burden of proof.¹⁹
16. The Prosecution contends that the Chamber’s directives are not prejudicial to the Defence, since they were issued with ample notice on 7 April 2011 and repeated on 6 May 2011. Yet, the Defence did not object until 24 hours before the 5 July 2011 deadline for the filing of closing briefs.²⁰

¹⁴ Motion, para. 11.

¹⁵ Motion, para. 12.

¹⁶ Motion, para. 13.

¹⁷ Motion, para. 13.

¹⁸ Response, paras. 12-15.

¹⁹ Response, paras. 16-17.

²⁰ Response, paras. 20-24.

17. If the Defence violates the Chamber's directives regarding word limit and filing, the Prosecution submits that it will be prejudiced. As the Practice Direction requires that the briefs of the two parties be filed simultaneously, any violation would contravene the principle of "equality of arms." If the Defence were permitted to file an amended brief, the Defence might address arguments raised by the Prosecution in its closing brief, while the Prosecution would have no opportunity to respond to the Defence brief.²¹
18. The Prosecution objects to the Defence claim that its "notice" withdrawing various paragraphs of the indictment was made in the "11th hour", arguing that "the Prosecutor gave the Defence five days' notice of the withdrawal of the charges."²² The Prosecution further contends that it "could only have come to the decision to withdraw those paragraphs of the Indictment after reviewing the totality of the evidence,"²³ and concludes that it "could have opted to press for convictions on those paragraphs but considered it more prudent to present his best case in a leaner and more concise Brief."²⁴
19. In regard to the pending decisions, the Prosecution asserts that the Chamber has allowed for *addenda* to Closing Briefs in the past with respect to pending issues.²⁵ The Prosecution also contends that the Chamber did not err in its 7 April 2011 decision directing the parties to include sentencing submissions in their Closing Briefs.²⁶

Reply

20. In its Reply, the Defence argues that the Trial Chamber's 5 July Order "did not enjoin the Defence to file its Brief with the prescribed word limit."²⁷ The Defence asserts that an increase in the number of words permitted should be granted to both parties.²⁸ Finally, the Defence argues that it complied with the Practice Direction by applying for an extension in advance of the filing of the final briefs, and asserts that it could not have done so prior to the "consolidation of the entire Brief".²⁹

²¹ Response, paras. 26-30.

²² Response, para. 32.

²³ Response, para. 33.

²⁴ Response, para. 34.

²⁵ Response, paras. 39-40.

²⁶ Response, paras. 37-38.

²⁷ Reply, para. 3.

²⁸ Reply, paras. 9-10.

²⁹ Reply, para. 13.

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Prosecution Motion to Strike

21. The Prosecution submits that the Defence Closing Brief should be struck out because the Defence has breached the principle of equality of arms in filing an oversized Closing Brief.³⁰ The Prosecution asserts that the Defence “is according itself an unfair advantage over the Prosecutor by allocating to itself more resources (22,003 words) to express itself”.³¹ The Prosecution contends that it is prejudiced because the oversized Brief “drains vital resources from the Prosecutor”.³²

DELIBERATIONS

Applicable Law

22. The Practice Direction on Length and Timing of Closing Briefs and Closing Arguments (“Practice Direction”) provides:

1.3 LENGTH

In single-accused trials, briefs shall not exceed 30,000 words....

1.6 SIMULTANEOUS FILINGS

A single time limit for filing briefs shall be set, requiring the parties to file their briefs simultaneously...

5. VARIATION FROM WORD AND TIME LIMITS

(i) On application by a party or *proprio motu*, the Trial Chamber may vary the word and time limits in this Practice Direction if a legal recess or extraordinary circumstances necessitate a variation.

(ii) A party seeking variation of the word and/or the time limits shall seek authorization from the Trial Chamber in advance and shall provide an explanation of the circumstances necessitating the variation sought.

23. Rule 54 provides that:

At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

³⁰ Prosecution Motion to Strike, para. 15.

³¹ Prosecution Motion to Strike, para. 15.

³² Prosecution Motion to Strike, para. 16.

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Analysis

Prejudice to the Prosecution

24. The Chamber recalls that the principle of equality of arms falls within fair trial guarantees and considers its obligation “to ensure that neither party is put at a disadvantage when presenting its case.”³³ However, as held by the Appeals Chamber, the argument that allowing one party an extension for good cause requires allowing the other party the same extension “is to read into the right to equality of *arms* a right to equality of *relief*, even when the circumstances are quite different in each case and provide no basis whatsoever for granting equal relief.”³⁴ On this note, the Trial Chamber observes that the Practice Direction allows for an application for extension by a single party under extraordinary circumstances.³⁵
25. With respect to the Prosecution’s argument that it would be prejudiced by the Defence’s ability to read the Prosecution Closing Brief prior to submitting its own, the Appeals Chamber has held that the purpose of the Closing Brief is not to respond to the other party, but to prepare its own case addressing the allegations in the indictment.³⁶
26. The Chamber concludes the Prosecution would not necessarily be prejudiced by allowing the Defence to file an amended Closing Brief after the filing of the Prosecution Brief. However, the Appeals Chamber jurisprudence prohibits the Defence from responding to any submission made by the Prosecution in its Closing Brief, in any amended filing.

Volume of evidence and Complex nature of the Case

27. The Chamber considers that the Prosecution and the Defence are in the same position with respect to the voluminous and complex nature of the case but recalls that the Prosecution carries a higher burden of proof. The Trial Chamber finds no merit in the Defence argument that a mathematical formula relating to the number of witnesses is appropriate in determining the word count of a final brief. More importantly, the Defence was aware of the complex nature of the case, and the volume of the evidence, when the Trial Chamber issued both orders relating to the final Briefs. Yet, it failed to address

³³ *Prosecutor v. Tadic*, IT-94-I-A, Judgement (AC), 15 July 1999, paras. 44, 48.

³⁴ *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-A, Decision on Application by Mario Cerkez for Extension of Time to File his Respondent's Brief (AC), 11 September 2001, paras. 7-9.

³⁵ Practice Direction, 5 (i).

³⁶ *Prosecutor v. Semanza*, ICTR-97-20-A.. Judgement (AC), 20 May 2005, para. 36.

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these issues until the eve of the filing date. The Chamber concludes that the Defence had ample time to address these concerns earlier.

Pending Motions

28. With respect to the pending motions, the Chamber recalls that the parties may apply to submit *addenda* to address any issues arising from decisions issued after the filing of the Closing Briefs.³⁷

Late Developments with respect to the Indictment

29. In its Motion, the Defence states that it seeks an extension of time to “address [the Prosecution’s notice that it would be dropping a number of paragraphs from the Indictment] and its effects on Nzabonimana’s case.”³⁸ The Chamber is of the view that it would not be appropriate to address the impact of this development in the Closing Brief, as the Prosecution would have no opportunity to respond to any submissions made by the Defence regarding the impact of the Prosecution notice on the Defence case. It would be more appropriate to pursue this issue pursuant to Rule 73.

Violation of Trial Chamber Orders

30. The Trial Chamber concludes that the Defence violated the Trial Chambers’ Orders of 7 April and 6 May 2011 by filing a Closing Brief containing approximately 22,000 more words than permitted in those orders. No permission to file a more extensive brief was granted in the Trial Chamber’s 5 July Order.

FOR THESE REASONS, THE TRIAL CHAMBER

- I. DENIES** the Defence motion;
- II. ORDERS** the Defence to re-file an abridged Closing Brief in compliance with the 30,000 word limit by the close of business 13 July 2011;
- III. CAUTIONS** that any attempt to respond to arguments made by the Prosecution in its Closing Brief will be sanctioned;
- IV. DIRECTS** the Registry to pay appropriate fees only for the completion of the re-filed abridged Closing Brief, as ordered in this decision, provided that it is in compliance with the word limit and deadline stipulated herein.

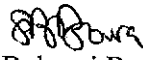
³⁷ T. 7 April 2011, pp. 4: 9-11.

³⁸ Motion, para. 12.

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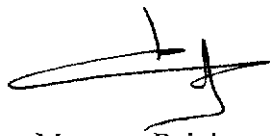
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Arusha, 11 July 2011, done in English.


Solomy Balungi Bossa
Presiding Judge


Bakhtiya Fuzilkhamedov
Judge




Mparany Rajohnson
Judge