



ICTR-98-44D-T
29-08-2011

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

8571
Am

(8571 - 8563)

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 29 August 2011

2011 AUG 29 P 3-41
JUDICIAL RECORDS/ARCHIVES
ICTR
RECEIVED

THE PROSECUTOR

v.

Callixte NZABONIMANA

Case No. ICTR-98-44D-T

**DECISION ON NZABONIMANA'S MOTION FOR RECONSIDERATION OF THE
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 OF 12 JULY 2011**

(Pursuant to Rule 54 of the Rules of Procedure and Evidence)

Office of the Prosecutor
Paul Ng'arua
Memory Maposa
Simba Mawere
Mary Diana Karanja

Defence Counsel
Vincent Courcelle-Labrousse, Lead Counsel
Philippe Larochelle, Co-Counsel

88

8570

INTRODUCTION

1. At a Status Conference on 7 April 2011, the Trial Chamber declared the closure of the Defence case in the present proceedings¹ and informed the parties that they would be granted 60 days to file their Closing Briefs, commencing from end of the testimony of one Prosecution rebuttal witness who had yet to be heard ("7 April Order").² On 6 May 2011, the testimony of the Prosecution rebuttal witness was completed and the Trial Chamber declared the evidence phase of this trial closed. At that time, the Chamber directed the parties to file their Closing Briefs on 5 July 2011, and further ordered that such Briefs not exceed 30,000 words. ("6 May Order").³
2. On 4 July 2011, the Defence filed a Motion seeking an expansion of the word limits imposed by the Trial Chamber or, in the alternative, an extension of time to file its Closing Brief ("Defence Closing Brief Motion").⁴
3. On 5 July 2011, the Chamber issued an order reaffirming the 6 May Order ("5 July Order").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
4. On 5 July 2011, the parties filed their respective Closing Briefs. The Closing Brief submitted by the Defence contained 52,003 words ("Original Defence Brief").
5. On 7 July 2011, the Prosecution filed a Motion to strike the Defence Closing Brief for having filed an illegal oversized Closing Brief ("Prosecution Motion to Strike").⁷
6. On 11 July 2011, the Trial Chamber issued a consolidated decision regarding both the Defence Closing Brief Motion and the Prosecution Motion to Strike, in which it ordered

¹ T. 7 April 2011 pp. 3-4. This pronouncement was made subject to the Trial Chamber's allowance for the Defence to call two further alibi witnesses pursuant to Rule 98 of the Rules of Procedure and Evidence during the first week of May 2011. The 60 day deadline was to run upon the completion of this evidence as well as that of one Prosecution rebuttal witness.

² T. 7 April 2011 pp. 3-4; 10-11.

³ T. 6 May 2011 pp. 50-51.

⁴ *Prosecutor v. Nzabonimana*, Case No. 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.

⁵ *Prosecutor v. Nzabonimana*, Case No. 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.

⁷ *Prosecutor v. Nzabonimana*, Case No. 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.

88

8569

- the Defence to re-file an abridged Closing Brief in compliance with the established 30,000 word limit by the close of business on 13 July 2011 ("Impugned Decision").⁸
7. On 13 July 2011, the Defence filed a motion for reconsideration of the Impugned Decision ("Instant Motion").⁹ Also on 13 July 2011, the Defence filed an abridged version of its Closing Brief, which adhered to the 30,000 word limit imposed by the Chamber ("Abridged Defence Brief").
 8. On 19 July 2011, the Prosecution filed a response to the Instant Motion ("Response").¹⁰
 9. On 22 July 2011, the Defence filed a reply to the Prosecution Response ("Reply").¹¹

SUBMISSIONS OF THE PARTIES

Instant Motion

10. The Defence requests leave to file an abridged version of its Closing Brief containing 40,000 words,¹² arguing that the Impugned Decision should be reconsidered due to "(i) an abuse of discretion by the Chamber; and (ii) an error of law in the Impugned Decision that will result in an injustice to [the accused]; and (iii) a material change in circumstances".¹³
11. First, the Defence asserts that the Chamber abused its discretion because it did not afford the Defence an opportunity to respond to the Prosecution Motion to Strike prior to rendering the Impugned Decision, and without informing the parties in advance that it would be issuing the Impugned Decision prior to the completion of the pleadings.¹⁴

⁸ *Prosecutor v. 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, 11 July 2011.

⁹ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Nzabonimana's Extremely Urgent Motion for Reconsideration of the 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 of 12 July 2011, 13 July 2011.

¹⁰ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor's Response to Nzabonimana's Extremely Urgent Motion for Reconsideration of the Consolidated Decision on Defence Motion for Variance of Word Limit or Alternatively for an Extension of Time to File a Defence Closing Brief, and Prosecutor's Motion to Strike Defence Brief of 12 July 2011, 19 July 2011.

¹¹ *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Defence Reply to Prosecutor's Response to Nzabonimana's Extremely Urgent Motion for Reconsideration of the Consolidated Decision on Defence Motion for Variance of Word Limit or Alternatively for an Extension of Time to File a Defence Closing Brief, and Prosecutor's Motion to Strike Defence Brief of 12 July 2011, 22 July 2011.

¹² Motion, paras. 1, 20-21, 27.

¹³ Motion, para. 12.

¹⁴ Motion, para. 13.

BB

8568

Consequently, the Accused suffered prejudice as this approach contravened the "elementary principle of natural justice of the right to be heard".¹⁵

12. Second, the Defence submits that the Trial Chamber further abused its discretion when it imposed a three day deadline to file the Abridged Defence Brief, which did not allow for adequate time for the Defence team to consult its client prior to making the necessary redactions in order to comply with the 30,000 word limit.¹⁶ It states that downsizing a Closing Brief from 52,003 words to 30,000 words entails a "wholesale review of the structure" of the Brief, requiring the Defence to discard many arguments as to the Accused's innocence, which constitutes an error of law under Article 20(4)(b) of the Statute of the Tribunal ("Statute"), resulting in prejudice.¹⁷
13. Third, the Defence submits that the Impugned Decision erred in law by concluding that the 7 April and 6 May Orders were violated because the Original Defence Brief contained approximately 22,000 more words than permitted. The Defence asserts that the Defence Closing Brief Motion "operated as a stay of the 7 April and 6 May 2011 Orders" until the Impugned Decision was issued on 11 July 2011.¹⁸ Furthermore, the 5 July Order only dealt with the extension of the deadline and did not address the issue of exceeding the word limit, which the Defence Closing Brief Motion clearly addressed.¹⁹ The Defence avers that it was "reasonably foreseeable" that it would file an oversized Closing Brief in order to comply with the time constraints.²⁰
14. Finally, the Defence submits that the Defence Closing Brief Motion proposed a Brief of 55,000 words and the Instant Motion requests permission to file a Brief containing 40,000 words. Citing previous jurisprudence of the Chamber, the Defence asserts that this constitutes a "material change in circumstance warranting reconsideration of the Impugned Decision."²¹

Response

15. The Prosecution submits that the Instant Motion is without merit and thus should be denied in its entirety as it does not meet the grounds for reconsideration, and the

¹⁵ Motion, para. 15.

¹⁶ Motion, para. 16.

¹⁷ Motion, para. 22.

¹⁸ Motion, para. 23.

¹⁹ Motion, para. 24.

²⁰ Motion, para. 24.

²¹ Motion, para. 27.

88

Defence has acted in “bad faith”.²² The Prosecution also requests that the Trial Chamber deny fees to the Defence in relation to the Instant Motion.²³

16. The Prosecution recalls that on 6 May 2011, the Trial Chamber clearly directed the parties to comply with the Practice Direction on Length and Timing of Closing Briefs and Closing Arguments (“Practice Direction”), which states that Closing Briefs shall not exceed 30,000 words.²⁴ The Prosecution further notes that it was not until 4 July 2011—the eve of the filing deadline—that the Defence filed its Closing Brief Motion seeking a variation of the word limit, and that on the deadline itself, filed a Closing Brief that violated the prior pronouncements of the Trial Chamber as well as the governing Practice Direction.²⁵ As the word limit imposed by these authorities had not been varied by the Chamber at the time the Defence filed its Original Closing Brief,²⁶ the Defence’s wilful disregard of the Chamber’s Orders and the Practice Direction should not be condoned.²⁷
17. The Prosecution dismisses the Defence submissions that the Defence Closing Brief Motion acted as a stay of prior judicial Orders as “unsupported by law”,²⁸ and argues that the Chamber was justified in acting *proprio motu* pursuant to Rule 54 of the Rules of Procedure and Evidence (“Rules”) in reinforcing its prior Orders by way of the 5 July Order. The Prosecution notes its own compliance with the Chamber’s binding directives and submits that the 30,000 word limit is reasonable given the “nature and complexity of the case” and “the burden of proof on either party”.²⁹ Thus, in concurrence with the principle of “equality of arms”, the Chamber should not exercise its discretion in varying the word limit for the Defence.³⁰
18. Moreover, the Prosecution contends that the Defence claim that it was not granted the opportunity to respond to the Prosecution Motion to Strike is simply “not true”, as the Defence submissions were considered as part of the Defence Closing Brief Motion, meaning the Defence’s opportunity to be heard was not prejudiced,³¹ and further notes that the Defence had two months in which to consult with their client in preparing the

²² Response, paras. 4, 5, 28.

²³ Response, paras. 68-69.

²⁴ Response, paras. 29-30.

²⁵ Response, para. 32.

²⁶ Response, paras. 49-52.

²⁷ Response, para. 59.

²⁸ Response, paras. 33-37.

²⁹ Response, paras. 53-54.

³⁰ Response, para. 56.

³¹ Response, paras. 46, 48.

Closing Brief.³² Moreover, submits the Prosecution, the Defence will have the opportunity to address any outstanding issues during Closing Arguments.³³

19. Finally, the Prosecution submits that the Defence argument that an offer to file an abridged version of its Closing Brief of 40,000 words constitutes a material change in circumstances warranting reconsideration “lacks merit”.³⁴

Reply

20. The Defence asserts that it suffered prejudice in filing its Abridged Closing Brief on 13 July 2011, as many elements proving its client's innocence were omitted from the Closing Brief and filing an abridged version of 40,000 words would “cure this prejudice”.³⁵ The Defence further dismisses the Prosecution assertions that the Defence acted in bad faith are “frivolous allegations”.³⁶
21. The Defence submits that Rule 54 of the Rules does not “give the Chamber license to act *proprio motu* and issue orders without hearing parties”, as this contravenes a “fundamental principle.. of natural justice”,³⁷ and claims that it was denied the opportunity to advance further arguments in support of its request for an expanded Closing Brief.”³⁸
22. Finally, the Defence asserts that the Closing Arguments will be an “unduly short” period of time in which to present the arguments omitted from the Closing Brief.³⁹

DELIBERATIONS

Applicable Law

23. Article 20 (4) (b) of the Statute states that:

In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: [...]

(b) To have adequate time and facilities for the preparation of his or her defence and to communicate with the counsel of his or her own choosing [...]

³² Response, para. 58.

³³ Response, para. 60.

³⁴ Response, paras. 63-64.

³⁵ Reply, para. 12.

³⁶ Reply, paras. 13-15.

³⁷ Reply, para. 16.

³⁸ Reply, para. 17.

³⁹ Reply, para. 18.

8565

24. Pertinent sections of the relevant Practice Direction establish that:

- 1.3. (i) In single-accused trials, briefs shall not exceed 30,000 words [...]
- 1.6. A single time limit for filing briefs shall be set, requiring the parties to file their briefs simultaneously [...]
4. (i) In single-accused trials, closing briefs shall be filed no later than 60 days after the closure of the evidence phase [...]
5. (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 authorisation from the Trial Chamber in advance and shall provide an explanation of the circumstances necessitating the variation sought.

25. 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.

26. With respect to reconsideration, the Trial Chamber recalls that Trial Chambers have the "inherent power" to reconsider their own decisions, under the following exceptional circumstances:

- i. when a new fact has been discovered that was not known by the Trial Chamber;
- ii. where new circumstances arise after the original decision;
- iii. where there was an error of law or abuse of discretion by the Trial Chamber resulting in an injustice.⁴⁰

Analysis

27. The Chamber recalls that in filing its Original Brief, the Defence violated the Trial Chamber's Order of 6 May, as well as the dictates of the Practice Direction pertaining to word limits for Closing Briefs, by more than 22,000 words. Moreover, the Defence did not raise its concerns with the established word limit until 4 July 2011, on the eve of its filing deadline,⁴¹ and offered no justification for filing its Closing Brief Motion so late, after having ample notice of the deadlines and word limits imposed by the Chamber.⁴²

⁴⁰ See e.g. *Prosecutor v Karemera et al.*, Case No. ICTR 98-44-PT, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005, para. 8; *Karemera*, Case No. ICTR-99-44-T. Decision on Reconsideration Measures for Prosecution Witnesses, 30 October 2006, para. 2; *Karemera*, Case No. ICTR-99-44-T, Decision on Reconsideration of Admission of Written Statements in lieu of Oral Testimony and Admission of the Testimony of Prosecution Witness GAY, 28 September 2007, paras. 10-11.

⁴¹ Original Defence Motion.

⁴² 5 July Order, para. 3.

88

8564

28. Given these considerations, the Trial Chamber shall consider the Defence arguments in support of reconsideration in turn. First, the Chamber recalls that the Impugned Decision was a consolidated decision that dealt with substantially overlapping arguments arising from the Defence Closing Brief Motion and the Prosecution Motion to Strike. Given the sum total of the pleadings the Trial Chamber had at its disposal pertaining to the Defence's oversized Closing Brief, the Chamber sees no merit in the argument that the Defence was denied a sufficient opportunity to be heard on this issue.
29. Second, the Trial Chamber is unmoved by the Defence argument that the Impugned Decision's imposition of a three-day deadline for the Defence to file its Abridged Closing Brief violated the Accused's right to adequate preparation as enshrined in Article 20 (4) (b) of the Statute. The plain fact of the matter is that the Defence had ample notice to prepare a Closing Brief that conformed with the Order of this Chamber as well as the governing Practice Direction, and it failed to raise any issues in this regard until the eve of its filing deadline. Consequently, the Defence was obliged to have a Closing Brief prepared in conformity with the 30,000 word limit ready to be filed by the 5 July 2011 and it cannot now, *ex post facto*, claim hardship for its own failure to act diligently and in accordance with the law in the first place.
30. Third, the Trial Chamber is bewildered by the specious Defence argument that the mere fact that the Defence filed a Motion requesting an oversized Closing Brief—on the very eve of the filing deadline it had notice of for months—could somehow suspend or obviate a binding Order of this Chamber. Such an argument is completely at odds with the most basic principles of the relationship between unaddressed party pleadings and standing Orders of the Trial Chamber. Likewise, the Chamber finds the Defence argument that it was "reasonably foreseeable" that the Defence would file an illegal oversized Closing Brief to be remarkably presumptuous and unfounded in the most basic principles of law.
31. Finally, the Trial Chamber does not consider that the Defence's current proposition to file a new abridged Closing Brief of 40,000 words to constitute a material change in circumstances warranting reconsideration. The Chamber notes that were it to grant such a request, the Defence would have effectively benefitted from a doubling of its original deadline to file its Closing Brief. In this regard, the Chamber notes that the Prosecution—which bears the burden of proof in these proceedings, incidentally—duly complied with the original deadline and word limit imposed by this Chamber without

88

8563

incident. Thus, the Chamber concludes that to allow the Defence such a disproportionate allowance at this stage in the proceedings would cause an unacceptable prejudice to the Prosecution.

FOR THESE REASONS, THE TRIAL CHAMBER

DENIES the Defence Motion in its entirety.

Arusha, 29 August 2011, done in English.



Solomy Balungi Bossa
Presiding Judge



Bakhtiyar Tuzmukhamedov
Judge
(absent at time of signature)



Mparany Rajohnson
Judge

