

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/04-02/06**

Date: **22 March 2018**

**TRIAL CHAMBER VI**

**Before:** Judge Robert Fremr, Presiding Judge  
Judge Kuniko Ozaki  
Judge Chang-ho Chung

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

**IN THE CASE OF  
*THE PROSECUTOR v. BOSCO NTAGANDA***

**Public**

**Prosecution's application for reconsideration of a discrete portion of the Chamber's "Order providing directions related to the closing briefs and statements"**

**Source:** Office of the Prosecutor

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

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## Introduction

1. The Prosecution seeks reconsideration of a discrete portion of the “Order providing directions related to the closing briefs and statements” (“Order”) issued on 28 December 2017 by Trial Chamber VI (“Chamber”).<sup>1</sup> In particular, the Prosecution seeks reconsideration of the average 300 word-per-page limit for the closing briefs.<sup>2</sup> The Parties and participants did not have an opportunity to make submissions on this part of the Order.
2. First, regulation 36 of the Regulations of the Court (“Regulations”) was amended on 6 December 2016, removing the requirement that there be average word limits per page.<sup>3</sup> This amendment was made to improve the efficiency of proceedings and to create consistency and clarity in format requirements. The amendment incorporated other new features aimed at ensuring readability of filings without the need for the average word count per page. Failure to reconsider the re-imposition of the word limit would lead to the manifestly unsatisfactory result that the Court’s Regulations on formatting would not be applied clearly and consistently across Chambers and there would be no certainty in the proceedings on standard filing format.
3. Second, the word limit also has the manifestly unsatisfactory result of limiting the assistance each of the Parties and participants can provide to the Chamber by restricting the presentation of its case and views. This is a manifestly unsatisfactory consequence where a complex trial spanned nearly three years, there are 18 charges some of which alleged occurred over a one-year period, 7 modes of liability and over 100 witnesses who testified or whose statements were

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<sup>1</sup> ICC-01/04-02/06-2170.

<sup>2</sup> ICC-01/04-02/06-2170, p. 6, para. 14, fn 12.

<sup>3</sup> <https://www.icc-cpi.int/Pages/item.aspx?name=pr1265>; see also « 2016 Report of the Advisory Committee on Legal Texts », <https://www.icc-cpi.int/itemsDocuments/ACLT-2016-Annual-Report-ENG.pdf>

admitted, including the Accused who testified for 121 hours during the trial. And there are over 1600 admitted items of evidence.

4. Third, while the Chamber may amend the page limit under regulation 37 or time limits under regulation 34, there is no equivalent provision in the Regulations that allows the Chamber to amend the formatting requirements under regulation 36.
5. In the alternative, the Prosecution requests that the word count apply only to the main text of each page and not to the footnotes. In the further alternative, the Prosecution seeks reconsideration or an extension of the page limit to 450 pages.

### **Prosecution's submissions**

6. Reconsideration is an exceptional remedy, and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.<sup>4</sup>
7. The Chamber may also reconsider its decision when it is manifestly unsound and its consequences are manifestly unsatisfactory,<sup>5</sup> or when new or previously unavailable information requires the Chamber to reconsider its previous ruling.<sup>6</sup>

*(i) The word count was expressly abolished by a plenary of ICC judges*

8. On 6 December 2016, a plenary of ICC judges<sup>7</sup> adopted amendments to seven of the Regulations during their thirty-fifth plenary session, including the deletion of

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<sup>4</sup> ICC-01/04-02/06-519, pp. 6-7, para. 12; ICC-01/04-02/06-1049-Red, para. 12; ICC-01/04-02/06-1282, pp. 6-7, para. 12. See also ICC-02/04-01/15-468, para. 4; ICC-01/05-01/13-1282, para. 8, ICC-01/05-01/13-1552, para. 6, ICC-01/05-01/13-1854, paras. 75-76.

<sup>5</sup> Trial Chamber I has accepted the possibility of reconsidering decisions in exceptional circumstances. See ICC-01/04-01/06-2705, paras. 13-18. Other Chambers, like Pre-Trial Chamber II in the Uganda Situation, have concluded that there is no express statutory authority to reconsider rulings (see, e.g., ICC-02/04-01/05-60, para. 18). The Prosecution notes that the Appeals Chamber has affirmed that this Court may exercise inherent judicial powers, as in its authority to issue a permanent stay of proceedings even though no article or rule expressly provides for it (ICC-01/04-01/06-772 OA4, paras. 36-39).

<sup>6</sup> ICC-01/05-01/08-1691-Red, para. 17. An analogous application of article 84 also supports this submission.

<sup>7</sup> Article 52 of the Rome Statute.

the reference to a limit of 300 words per page. The press release announcing the amendments to the Regulations stated that “[t]hese amendments aim to improve efficiency by allowing all parties and participants in proceedings before the Court to have increased clarity on a range of procedural matters”.<sup>8</sup> The press release further explained that, “Regulation 36 has been modified to introduce certain specifications concerning [...] the calculation of page limits”.<sup>9</sup> The reference to a limit of 300 words per page was removed from the amended version of the Regulations and other changes were introduced, such as an exhaustive list of font styles and sizes, as well as the prohibition from placing substantial submissions in the footnotes of a document. The average word limit, like much of regulation 36(3), is primarily aimed at the readability of documents. The mandated font styles and sizes in regulation 36 and limitations on substantive arguments in the footnotes will facilitate readability just as well as an average word limit. Hence, the average word limit was deleted.

9. Yet, in setting the format requirements for the closing briefs, the Chamber ordered the Parties and participants to comply with regulation 36 of the Regulations. The Chamber, however, added an additional direction in footnote 12 according to which “the average page shall not exceed 300 words”.<sup>10</sup> The Parties and participants were not heard on this point.

10. Reintroducing the limit of the 300 words per page is manifestly unsatisfactory. It runs counter to the stated aim of the amendment: to improve efficiency by giving greater clarity on procedural matters.<sup>11</sup> It also imposes a burden on the Parties

<sup>8</sup> <https://www.icc-cpi.int/Pages/item.aspx?name=pr1265> .

<sup>9</sup> <https://www.icc-cpi.int/Pages/item.aspx?name=pr1265> .

<sup>10</sup> ICC-01/04-02/06-2170, p. 6, para. 14, fn. 12.

<sup>11</sup> See, « Presidency 2015-2018: End of Mandate Report by President Silvia Fernández de Gurmendi”, [https://www.icc-cpi.int/itemsDocuments/180309-pres-report\\_ENG.pdf](https://www.icc-cpi.int/itemsDocuments/180309-pres-report_ENG.pdf), p. 7, para. 34 : « 34. Upon a proposal of the Prosecutor and following consideration by the ACLT, in December 2016, the judges adopted a range of amendments to various regulations which aimed to improve efficiency by allowing all parties and participants in proceedings to have increased clarity on a range of procedural and technical matters. These issues concerned page limits, time limits and other procedural matters (Amendments to regulations 20 (2), 24 (5), 33 (1) (d), 34, 36 ,38, and 44 (1)).”

and participants that the Court expressly removed because other imposed limits ensure the readability of briefs without needing the average word limits. The Chamber's re-imposition of the word limit undermines clarity and consistency in proceedings before different Chambers.

*(ii) The word count limit risks compromising the Chamber's truth-seeking function*

11. The word limit also has the manifestly unsatisfactory effect of undermining the Chamber's truth-seeking function. It limits the assistance the Parties and participants can provide to the Chamber on the evidence that was admitted. The final closing submissions come at the end of a trial spanning nearly three years and covering 18 charges and 7 modes of liability, with some charges extending over a one-year period. The Parties and participants will analyse a large volume of evidence in their closing briefs. This evidence includes: a) the testimony and admitted statements of 79 Prosecution witnesses, including 11 Prosecution experts and their reports, and Court expert P-0975; b) the testimony of 3 victims; c) the testimony and admitted statements of 19 Defence witnesses, including 121 hours of the Accused's testimony; and d) 1636<sup>12</sup> admitted items including documents, reports, videos and photographs.

12. Indeed, it will be necessary to compare the testimony of witnesses against admitted items of evidence and to cite to the testimony of several witnesses, including that of the Accused. To do so, the Parties and participants will need to refer to lengthy and extensive transcript references. The Parties and participants will also have to address relevant legal arguments with references to judicial authorities. This is necessary to ensure completeness and accuracy of arguments presented and, ultimately, to assist the Chamber.

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<sup>12</sup> 1572 items admitted for the truth of their content and 79 items admitted for impeachment purposes (15 items were admitted for *both* purposes but we have not counted them twice in the overall number of admitted items).

13. Citations in footnotes take up significant space and increase overall word count significantly. The end result is that the word count can only be met if the Parties and participants either: (i) decrease the citations in footnotes thereby decreasing the quality of the arguments and removing important references to admitted evidence, or (ii) move text to the next page by creating blank spaces on each page. The creation of blank spaces results in the Parties and participants having considerably fewer pages than instructed in the Order; for a 400 page document, the Parties may only be able to file 350 pages or even less. This was a routine consequence in prior closing briefs where the word limits were in force.<sup>13</sup>

14. Again, for a complex trial spanning nearly three years and featuring a trial record with extensive witness testimony, including the Accused, and documentary evidence, this result is manifestly unsatisfactory. It reduces the information available to the Chamber, weakens the depth of arguments and impacts each Party and participant's ability to present its case thoroughly.

*(iii) The Chamber lacks authority to vary or introduce word count limits*

15. Reintroducing the word limit is manifestly unsound because the Chamber does not have the authority to do so under the Regulations. Unlike regulation 34 or regulation 37 which provide express authorisation for a Chamber to vary time or page limits, the Regulations contain no provisions granting the Chamber the power to vary or impose a word count.<sup>14</sup>

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<sup>13</sup> Trial Chambers ordered page limits in three cases at this Court, and the imposition of the average word-per-page limit decreased the page limit as follows: (i) *Bemba*, ICC-01/05-01/08-3079-Conf-Corr : 400 pages were granted but the final Closing Brief was 321 pages in order to accommodate the word limit; (ii) *Katanga & Ngudjolo*, ICC-01/04-01/07-3251-Conf : 300 pages were granted with an extension of the page limit to 350 pages while the final Closing Brief was 324 pages due to the word limit; (iii) *Lubanga*, ICC-01/04-02/06-2748-Conf: 250 pages were granted but the final Closing Brief was 215 pages due to the word limit.

<sup>14</sup> ICC-02/11-23-US-Exp, paras. 8 and 9: “*The Chamber notes that while the Regulations provide for variations of time and page limits, no provision exists concerning the variation of the format requirements in Regulation 36. The format requirements ensure consistency in the appearance of Court documents and serve a practical purpose unrelated to the substance of the document. The Chamber will therefore treat the prosecution’s Request as an application for an additional extension of the page limit [...].*” The Prosecution has requested the reclassification of this decision.

### Alternative requests

16. In the alternative, the Prosecution requests that the word count per page apply to the text of the closing brief but not to the footnotes.
17. In the further alternative, should the Chamber maintain the word count limit covering text *and* footnotes, the Prosecution requests an increase in the page limit to 450 pages, under regulation 37, in order to offset the consequent reduction in available pages caused by the word-per-page limit.

### Relief sought

18. For the reasons set out above, the Prosecution requests that the Trial Chamber grant its request for reconsideration of the limit of an average of 300 words per page and impose no word limit in line with amended regulation 36. In the alternative, the Prosecution requests that the word count apply only to the text of each page and not to the footnotes.
19. In the further alternative, the Prosecution seeks reconsideration of the page limit to 450 pages or an extension of the page limit to 450 pages under regulation 37.



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**Fatou Bensouda**  
**Prosecutor**

Dated this 22<sup>nd</sup> day of March 2018  
At The Hague, The Netherlands