



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations
of International Humanitarian Law
Committed in the Territory of the
former Yugoslavia since 1991

Case No.: IT-95-5/18-T

Date: 19 September 2014

Original: English

IN THE TRIAL CHAMBER

Before: Judge O-Gon Kwon, Presiding Judge
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Decision of: 19 September 2014

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON MOTION TO STRIKE PROSECUTION FINAL BRIEF

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is seised of the Accused’s “Motion to Strike Prosecution Final Brief”, filed on 3 September 2014 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. On 21 March 2014, the Chamber issued its “Order on Filing of Final Trial Briefs” (“Order on Final Briefs”) ordering the parties to file their final trial briefs no later than 29 August 2014 and, in doing so, to conform to a limit of 300,000 words, which should include any appendices containing legal or factual arguments (“Word Limit”).¹

2. On 29 August 2014, the Office of the Prosecutor (“Prosecution”) filed confidentially its “Prosecution’s Submission on Final Trial Brief” (“Prosecution’s Final Brief”) with ten confidential appendices, totalling 1,106 pages in length.² The Accused similarly filed his confidential “Defence Final Trial Brief” (“Defence Final Brief”) on that date, totalling 876 pages in length. On 2 September 2014, the Prosecution filed a confidential “Corrigendum to Prosecution’s Submission on Final Trial Brief” (“Corrigendum”) replacing the contents of confidential Appendix G to the Prosecution’s Final Brief which, as explained by the Prosecution, should have contained the list of victims of Sarajevo-related incidents alleged in the Third Amended Indictment (“Indictment”) and instead, due to an administrative oversight, contained another list.³

3. In the Motion, the Accused submits that the Prosecution’s Final Brief violates the Word Limit.⁴ He adds that in not counting Appendices E, G, and H (“Appendices”) towards the Word

¹ Order on Final Briefs, p. 3. *See also* Submission on Schedule for Filing of Closing Briefs, 26 February 2014 (where the Accused requested the Chamber to order a filing deadline for the final trial briefs of both parties 12 months after the testimony of the “final witness”); Prosecution Motion for Variation of the Word Limit for its Final Trial Brief and Submission on Timing of Filing of Final Trial Briefs with Appendix A, 3 March 2014 (where the Prosecution proposed that both parties be ordered to file their final briefs by 17 September 2014, and sought permission to file a final trial brief totalling 375,000 words, to be divided in a brief not exceeding 150,000 words accompanied by annexes containing legal and/or factual argument not exceeding 225,000 words); T. 47547 (3 March 2014) (where the Accused informed the Chamber that he did not oppose the Prosecution’s request regarding the Word Limit, and requested that he be afforded the same); and T. 47549–47550 (3 March 2014) (where the Prosecution opposed the Accused’s request for a 12-month deadline for the filing of the final trial brief, but noted that, in relation to the extension of the Word Limit, it did not take a position as to the allocation of words between the brief and the annexes).

² The Prosecution states that Appendices E, G, H, I, and J are duplicative of information in the Prosecution’s Final Brief and/or non-argumentative, and have therefore not been included in the total word count for the Word Limit; Prosecution’s Final Brief, fn. 4.

³ Corrigendum, paras. 1–2.

⁴ Motion, para. 1.

Limit, the Prosecution misapplied the Tribunal's "Practice Direction on the Length of Briefs and Motions" of 16 September 2005 ("Practice Direction").⁵ As a remedy, the Accused requests that the Chamber strike the Prosecution's Final Brief from the record and order the Prosecution to re-file a brief that conforms to the Word Limit or, alternatively, to provide him the opportunity to supplement his final brief to equal the number of words contained in the Appendices.⁶

4. According to the Accused, the issue is not whether the Appendices are duplicative of information but whether they contain legal or factual arguments which, according to the Accused, they do.⁷ Specifically, the Accused contends that Appendices G and H, which detail the evidence of proof of death and injury of victims of a number of incidents alleged in the Indictment contain factual arguments and should be counted towards the Word Limit.⁸ The Accused adds that the Prosecution has gained an unfair advantage by excluding this material from the Word Limit, because he was forced to contest the assertions made there in the main part of the Defence Final Brief.⁹ Similarly, according to the Accused, the Prosecution abused the Word Limit by reproducing evidentiary material in Appendix E, instead of referring to it in the main text of the Prosecution's Final Brief.¹⁰

5. Following a request from the Chamber to receive an expedited response to the Motion, the Prosecution filed the "Prosecution Response to Defence Motion to Strike Prosecution Final Brief" on 10 September 2014 ("Response"), reiterating that the Appendices are non-argumentative in accordance with the Practice Direction, and should therefore not count towards the Word Limit.¹¹

6. In relation to Appendix E, the Prosecution submits that it contains four charts tendered through Prosecution expert witness Richard Butler and is therefore non-argumentative.¹² Furthermore, the Prosecution claims that parties often include charts and organigrams in their pre-trial and final briefs which do not count towards word limits, as was the case with the Prosecution's Final Pre-Trial Brief, filed on 18 May 2009 ("Prosecution's Pre-trial Brief"), which contained almost identical charts, which, at the time, were not objected to by the Accused.¹³

⁵ Motion, paras. 2–5.

⁶ Motion, paras. 14–15.

⁷ Motion, paras. 3–4, 6, 9, 12.

⁸ Motion, paras. 7–11.

⁹ Motion, para. 10.

¹⁰ Motion, para. 12.

¹¹ Response, paras. 1, 10.

¹² Response, para. 2.

¹³ Response, para. 2, referring to Prosecution's Pre-trial Brief, Appendix D.

7. The Prosecution further submits that Appendices G and H are non-argumentative and aim to be a useful tool to assist the Chamber in making findings on the death and/or injury of individual victims, should it choose to do so.¹⁴ The Prosecution recalls that the Pre-trial Chamber in this case determined that “equivalent lists” in the Prosecution’s Pre-trial Brief did not count towards the word limit and submits that simply adding evidential references to those lists does not render Appendices G and H argumentative.¹⁵ The Prosecution also explains that it has sought to ensure that evidential references in Appendices G and H are cited in other appendices of the Prosecution’s Final Brief.¹⁶ Finally, the Prosecution provides examples of appendices which were found in other cases to have been permissibly excluded from word count under the Practice Direction even though, in its view, they contained more information than Appendices G and H.¹⁷

8. For all these reasons, the Prosecution submits that the Chamber should dismiss the Motion.¹⁸ Alternatively, if the Chamber considers that the Appendices are argumentative, the appropriate remedy would be to strike them from the record.¹⁹

II. Applicable Law

9. The Chamber recalls that the Practice Direction was issued with the aim to establish a limit on the length of written briefs and motions at trial and on appeal.²⁰ Section (C) of the Practice Direction, in relevant paragraphs, reads as follows:

6. Materials excluded from the word limits

Headings, footnotes and quotations count towards the above word limitations. Any addendum containing verbatim quotations of the International Tribunal’s Statute or Rules does not count towards the word limit. Any appendix or book of authorities does not count towards the word limit. An appendix or book of authorities will not contain legal or factual arguments, but rather references, source materials, items from the record, exhibits, and other relevant, non-argumentative material...

7. Variation from word limits

A party must seek authorization in advance from the Chamber to exceed the word limits in this Practice Direction and must provide an explanation of the exceptional circumstances that necessitate the oversized filing...

¹⁴ Response, para. 3.

¹⁵ Response, paras. 4–5, 9.

¹⁶ Response, para. 8.

¹⁷ Response, para. 7.

¹⁸ Response, paras. 1, 10.

¹⁹ Response, para. 11.

²⁰ Practice Direction, para. 1.

8. Reporting the word count

Parties shall conduct a word count of any document they file which is subject to the length limitations set forth in this Practice Direction and shall include this information [...] at the end of the document, before the signature line.

10. Section (C)(6) of the Practice Direction allows the parties discretion as to what to include in the appendices for their final briefs as long as the material included in such appendices is relevant and does not contain factual or legal arguments.²¹ It is therefore for the tendering party to use its discretion to decide the content of such appendices, and for the Chamber to intervene only when such discretion is abused.²²

III. Discussion

11. The Chamber notes that Appendix E contains four organisational charts which were admitted in this case as exhibit P4920 through Prosecution expert witness Richard Butler.²³ The Chamber also notes that almost identical organisational charts were included in the Prosecution's Pre-trial Brief and were not at the time objected to by the Accused.²⁴ While this does not *per se* subsume the need for the charts to comply with Section (C)(6) of the Practice Direction, this Section clearly allows for the inclusion in appendices of "items from the Record" and "exhibits" which shall not count towards word limits. The Chamber considers that the charts in Appendix E fall under this category and shall therefore not count towards the Word Limit.

12. The Chamber further notes that Appendix G consists of a chart listing the full name, date of birth, and sex of all the victims of the incidents charged in Schedules A and B of the Indictment, in relation to the municipalities' component of the case.²⁵ The total word count of Appendix G is 22,247 words. Similarly, Appendix H consists of a chart listing the full name, date of birth, and sex of all the victims of the incidents charged in Schedules F and G of the Indictment, in relation to the Sarajevo component of the case, as well as whether each victim was wounded or killed.²⁶ The total word count of Appendix H is 5,144. The Chamber notes that both Appendices G and H are similar to an appendix filed in the Prosecution's Pre-trial Brief, which the Pre-trial Chamber considered

²¹ See *Prosecution v. Krajišnik*, Case No. IT-00-39-T, Oral Ruling, T. 27260–27261 (29 August 2006) ("*Krajišnik* Oral Ruling"). See also *Prosecutor v. Orić*, Case No. IT-03-68-A, Decision on the Motion to Strike Annexes A, C, D and E of the Prosecution's Appeal Brief, 18 May 2007 ("*Orić* Decision"), para. 7; *Prosecutor v. Orić*, Case No. IT-03-68-A, Decision on the Motion to Strike Defence Reply Brief and Annexes A–D, 7 June 2007, para. 6; *Prosecutor v. Gotovina and Markač*, Case No. IT-06-90-A, Decision on Prosecution's Motion to Strike Ante Gotovina's Reply Brief, 18 October 2011 ("*Gotovina* Decision"), p. 2.

²² *Orić* Decision, para. 7; *Gotovina* Decision p. 2.

²³ Richard Butler, T. 24724, 24735–24738 (17 April 2012).

²⁴ See Prosecution's Pre-trial Brief, Appendix D.

²⁵ See Prosecution's Final Brief, para. 11; Corrigendum, Appendix G.

²⁶ See Prosecution's Final Brief, para. 11; Appendix H.

should not count towards the total word count.²⁷ The main difference between the two—and thus the origin of the Accused’s challenge—is that both Appendices G and H contain one extra column entitled “proof of death” and “proof of injury”, respectively, where the Prosecution has listed exhibits numbers, adjudicated facts, and transcript pages of witness testimony to prove each victim’s injury or death.

13. The Tribunal’s jurisprudence recognises that appendices will, by their own nature, be affected by the tendering party’s point of view and its interpretation of the evidence.²⁸ Further, the Chamber notes that appendices listing evidence which give support to the tendering party’s case have been deemed non argumentative and, thus in compliance with Section (C)(6).²⁹ In these cases, parties have not only been allowed to include references in the appendices, but a description of such references, so as to facilitate the Chamber’s work.³⁰ To go even further, the Appeals Chamber has held that in exceptional circumstances, the interests of justice may allow for a very limited amount of argumentative material in an appendix.³¹

14. Having considered the contents of the last column in Appendices G and H, the Chamber notes that they contain references without any description or summaries of the evidence and, as such, do not contain legal or factual arguments. In addition, vast majority of those references are already included in the relevant footnotes of Appendix B (with respect to the municipalities’ component of the case) and Appendix C (with respect to the Sarajevo component of the case), both of which have been counted towards the Word Limit. The Chamber thus considers Appendices G and H to be simply means of illustrating the Prosecution’s arguments visually³² and, as such, finds the information contained therein in compliance with Section (C)(6) of the Practice Direction.

²⁷ See Decision on Prosecution’s Request for Extension of Word Limit to Identify Victims in the Pre-trial Brief, 14 May 2009, para. 3; Prosecution’s Pre-trial Brief, Appendix B.

²⁸ *Orić* Decision, paras. 7, 12; *Gotovina* Decision, p. 2; *Krajišnik* Oral Ruling, T. 27261.

²⁹ See *Orić* Decision, paras. 12–13; *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Decision on Streten Lukić’s Motion for an Order Requiring the Prosecution to Re-file its Respondent’s Brief, 2 February 2010, p. 3; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on Petković Defence Motion to Strike Annex A from Prosecution’s Final Trial Brief, 24 January 2011, p. 4 (confidential); *Krajišnik* Oral Ruling, T. 27261.

³⁰ *Orić* Decision, para. 13; *Gotovina* Decision, p. 2; *Krajišnik* Oral Ruling, T. 27261.

³¹ *Orić* Decision, para. 7.

³² See *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, Judgement, para. 176.

IV. Disposition

15. Accordingly, the Chamber, pursuant to Rule 54 of the Tribunal's Rules of Procedure and Evidence hereby **DENIES** the Motion.

Done in English and French, the English text being authoritative.



Judge O-Gon Kwon
Presiding

Dated this nineteenth day of September 2014
At The Hague
The Netherlands

[Seal of the Tribunal]