



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-09-92-T
Date: 30 November 2016
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Bakone Justice Moloto
Judge Christoph Flügge

Registrar: Mr John Hocking

Decision of: 30 November 2016

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON DEFENCE MOTION TO STRIKE THE
PROSECUTION FINAL TRIAL BRIEF**

Office of the Prosecutor
Mr Peter McCloskey
Mr Alan Tieger

Counsel for Ratko Mladić
Mr Branko Lukić
Mr Miodrag Stojanović

I. PROCEDURAL HISTORY

1. On 17 December 2015, the Trial Chamber set the word limit for the parties' final trial briefs at 300,000 words.¹ On 25 October 2016, the Prosecution submitted its final trial brief with annexes A to G ("Prosecution Final Trial Brief").² The Prosecution included Annexes A and B in its word count, which totalled 296,898 words.³
2. On 31 October 2016, the Defence filed a motion arguing that Annexes C, D, and G of the Prosecution Final Trial Brief should have been included in the word count and requesting that the Chamber strike the portions of the Prosecution Final Trial Brief exceeding the word limit or order the Prosecution to file a revised brief in conformity with the word count ("Motion").⁴ On 4 November 2016, the Prosecution responded, opposing the Motion ("Response").⁵ On 10 November 2016, the Defence requested leave to reply,⁶ attaching its reply as an annex ("Reply").⁷ On 17 November 2016, the Prosecution requested leave to sur-reply,⁸ attaching its sur-reply as an annex ("Sur-Reply").⁹

II. SUBMISSIONS OF THE PARTIES

A. Annexes C and D

3. The Defence submits that Annexes C and D of the Prosecution Final Trial Brief consist of legal and factual arguments and thus should be included in the word count, and that allowing the Prosecution to exceed the word count would make a fair trial impossible.¹⁰ The Prosecution submits that Annex C should not be included in the word count as it is a non-argumentative collation of evidence without assessment, interpretation, or comment.¹¹ The minimal descriptions Annex C contains were provided for the Chamber's ease of reference, do not constitute arguments, and are

¹ T. 42898.

² Prosecution's Submission of Final Trial Brief, 25 October 2016 (Confidential).

³ Prosecution Final Trial Brief, para. 2.

⁴ Urgent Motion to Strike the Prosecution Final Trial Brief and for an Order Compelling the Prosecution to File a Brief in Conformity with the Word Count, 31 October 2016 (Public with Confidential Annex B), paras 1, 3, 14.

⁵ Prosecution's Response to Defence Urgent Motion to Strike the Prosecution Final Trial Brief, 4 November 2016.

⁶ Defence Motion for Leave to Reply in Support of Urgent Motion to Strike the Prosecution Final Trial Brief, 10 November 2016 ("Request to Reply").

⁷ Request to Reply, Annex A: Defence Reply in Support of Urgent Motion to Strike the Prosecution Final Trial Brief.

⁸ Prosecution Request for Leave to Sur-Reply to Defence Reply in Support of Urgent Motion to Strike the Prosecution Final Trial Brief, 17 November 2016 ("Request to Sur-Reply").

⁹ Request to Sur-Reply, Annex: Prosecution Sur-Reply to Defence Reply in Support of Urgent Motion to Strike the Prosecution Final Trial Brief.

¹⁰ Motion, paras 7-9, 12, Annex B (Confidential); Reply, para. 6.

duplicative of assertions in the Prosecution Final Trial Brief and thus were already included in the word count.¹² The Prosecution also submits that Annex D should not be included in the word count as it is solely a list of evidence and contains no comment, assessment, or interpretation. Prosecution proposes that, should the Chamber find Annex C, Annex D, or both argumentative, they should be counted towards the word limit, as the Prosecution Final Trial Brief would remain under that limit even were both of these annexes to be included.¹⁴

B. Annex G

4. The Defence submits that Annex G of the Final Trial Brief should be included in the word count insofar as it contains arguments, and provides illustrative examples from the “Circumstances of Death According to the Source” and “Comments” columns.

Prosecution to exceed the word count would make a fair trial impossible.

Defence, Annex G contains 90,679 words.¹⁷

5. The Prosecution submits that Annex G should not count towards the word limit as it is a non-argumentative list of evidence based on exhibit P2797, noting that portions of this annex are largely duplicative of evidence already counted towards the word limit.

Annex G arose from a request by the Chamber for assistance with proof of death evidence, that the Prosecution indicated that it would annex the chart annexed to its 22 May 2015 submission (“May 2015 Chart”) to its final brief,¹⁹ and that the Defence did not object to this proposal or suggest that the May 2015 Chart could be considered argumentative.

Death According to the Source” column, the Prosecution notes that the comments in this column were taken directly and verbatim from exhibit P2797 and submits that they are non-argumentative.²¹ With respect to the “Comments” column, the Prosecution submits that the information in this column comprises non-argumentative explanatory comments which provide

¹¹ Response, paras 1-2, 13; Sur-Reply, para. 9.

¹² Response, para. 3; Sur-Reply, para. 2.

¹³ Response, paras 1, 4; Sur-Reply, paras 3, 9.

¹⁴ Response, para. 14, fn. 37; Sur-Reply, para. 9.

¹⁵ Motion, paras 3, 7, 10; Reply, paras 9, 11.

¹⁶ Motion, para. 12.

¹⁷ Motion, para. 11. This assertion appears to be based on the Defence’s use of a “word count tool”, although that tool provided a count of 90,678 words. *See* Motion, Annex A. The Chamber was unable to perform a word count for Annex G due to the format in which it was submitted.

¹⁸ Response, paras. 1, 6-7, 13; Sur-Reply, para. 9.

¹⁹ Prosecution Submission of Proof of Death and Injury Chart for Killed and Wounded Victims, 22 May 2015, Annex A: POD Chart related to killed victims listed in Schedules A, B, F and G of the Victims List (Confidential). As the Prosecution notes, Annex G is not identical to the May 2015 Chart. *See* Response, para. 8.

²⁰ Response, paras 7-8; Sur-Reply, para. 6. *See* Second Omnibus Decision, 26 February 2014, para. 15; Prosecution Submission of Proof of Death and Injury Chart for Killed and Wounded Victims, para. 1.

²¹ Sur-Reply, para. 4.

“information as to why a particular document applies to a particular victim in order to assist the Chamber”.²² The Prosecution proposes that, should the Chamber find portions of Annex G, in particular the “Comments” column, argumentative, the Prosecution could re-file the annex without such portions or column or the Chamber could strike such portions or column.

C. Ewa Tabeau

6. The Defence submits that, in the Response, the Prosecution seems to imply that Annex D was authored by Tabeau in violation of Rule 94 *bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”).

portions of the Prosecution Final Trial Brief that were authored by Tabeau, or for which she rendered assistance.²⁵ The Prosecution advises that Annex D was authored exclusively by Prosecution legal staff.

III. APPLICABLE LAW

7. Section (C) (6) of the Tribunal’s Practice Direction on the Length of Briefs and Motions (“Practice Direction”) provides, in relevant part:

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.

8. Pursuant to Rule 126 *bis* of the Rules, a reply to a response, if any, shall be filed within seven days of the filing of the response, with the leave of the Chamber.

IV. DISCUSSION

A. Preliminary Considerations

9. Given that the Prosecution raises new issues in the Response, the Chamber finds that the Defence has shown good cause for its request to reply and will grant the requested leave.

²² Response, para. 9; Sur-Reply, para. 5.

²³ Response, paras 11, 14; Sur-Reply, para. 9.

²⁴ Reply, para. 7.

²⁵ *Ibid.*

²⁶ Sur-Reply, para. 8.

as the Defence raises new issues in the Reply, the Chamber finds that the Prosecution has shown good cause for its request to sur-reply and will grant the requested leave.

B. Annexes C and D

10. Annex C of the Prosecution Final Trial Brief is titled “Srebrenica Mass Grave Connections” and contains 1,941 words. Annex D is titled “Summary of Srebrenica Demographic, DNA and Forensic Methodology and Protocols” and contains 494 words.²⁷ Assuming *arguendo* that Annexes C and D consist of legal or factual arguments, they could still be counted towards the word limit without the Prosecution Final Trial Brief exceeding that limit.²⁸ The Chamber therefore considers the Motion in this respect to be moot.

C. Annex G

11. Annex G of the Prosecution brief is titled “Victim Charts” and contains several columns, including one titled “Circumstances of Death According to the Source” and one titled “Comments”. This annex is similar, but not identical, to a chart prepared by Prosecution expert witness Ewa Tabeau and admitted into evidence as exhibit P2797 and to a chart annexed to a 22 May 2015 Prosecution submission.²⁹

12. The “Circumstances of Death According to the Source” column of Annex G contains explanations regarding the cause of death of the listed victims. The appendices to include “items from the record [and] exhibits” without counting towards the word limit.

from exhibit P2797.³¹ The Chamber thus finds that the Defence has not demonstrated that this column of Annex G contains argumentation which should properly be counted towards the word count.

13. With respect to the examples provided by the Defence from the “Comments” column of Annex G, the Chamber notes that they include, *e.g.*, a comment asserting that certain documents are

²⁷ As the Prosecution did not include word counts for Annexes C and D, the Chamber has performed these counts. They are consistent with counts determined by the Defence. *See* Motion, para. 11.

²⁸ The word count including Annexes C and D totals 299,333 words.

²⁹ *See* Prosecution Submission of Proof of Death and Injury Chart for Killed and Wounded Victims, 22 May 2015, Annex A: POD Chart related to killed victims listed in Schedules A, B, F and G of the Victims List (Confidential) (“May 2015 Chart”).

³⁰ Practice Direction, Section (C) 6.

³¹ Exhibit P2797, pp. 107-108, 137, 160, 179, 211, 300-301, 315. With respect to example (a), the Defence incorrectly lists the date as “25.02.1992”, while both Annex G and exhibit P2797 list the date as “25.05.1992”. Similarly, with respect to example (h) as it pertains to victim no. 8, the Defence incorrectly lists the text as “died at”, while both Annex G and exhibit P2797 list the text as “was killed in”. *See* Reply, para. 9.

linked to particular alleged victims.³² While the Prosecution attempts to distinguish argumentation from providing “information as to why a particular document applies to a particular victim”, the Chamber finds that drawing such links between the evidence and alleged victims is argumentative, as it suggests how the Chamber should interpret evidence.

the word limit.

stricken if the Chamber were to consider it argumentative, the Chamber decides that this column will be disregarded and for clarity of the record instructs the Prosecution to re-file Annex G without the “Comments” column.

D. Ewa Tabeau

14. As the Prosecution has clarified that Annex D of the Prosecution Final Trial Brief was authored exclusively by Prosecution legal staff, the Defence’s request with respect to the author of this annex has been rendered moot. As the Defence has not provided any basis for its further request as to whether Tabeau authored or assisted in authoring any other portion of the Prosecution Final Trial Brief, the Chamber will deny the remainder of the Defence’s request regarding Tabeau.

V. DISPOSITION

15. For the foregoing reasons, pursuant to Rules 54 and 126 *bis* of the Rules and Section (C) (6) of the Practice Direction, the Chamber

GRANTS leave to reply and to sur-reply;

GRANTS the Motion **IN PART**;

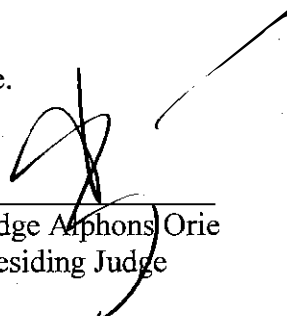
DECIDES that the “Comments” column in Annex G of the Prosecution Final Trial Brief is to be disregarded;

GRANTS the Prosecution until 7 December 2016 to file a revised version of Annex G of the Prosecution Final Trial Brief without the “Comments” column; and

³² See Reply, para. 11 (c).

DENIES the remainder of Defence's requests in the Motion and the Reply.

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



Judge Alphons Orie
Presiding Judge

Dated this thirtieth day of November 2016
At The Hague
The Netherlands

[Seal of the Tribunal]