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CASE/AFFAIRE NO. IT-03-68-A DATE 18 MAY 2007

FROM/DE Yaiza ALVAREZ REYES, COURT OFFICER

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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-03-68-A
Date: 18 May 2007
Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Liu Daqun
Judge Andrézia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Hans Holthuis

Decision of: 18 May 2007

PROSECUTOR

v.

NASER ORIĆ

Public

**DECISION ON THE MOTION TO STRIKE ANNEXES A, C, D
AND E OF THE PROSECUTION'S APPEAL BRIEF**

The Office of the Prosecutor:

Ms. Christine Dahl

Counsel for Naser Orić:

Ms. Vasvija Vidović
Mr. John Jones

I. INTRODUCTION

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Appeals Chamber" and "International Tribunal", respectively), is seized of appeals from both parties from the Judgement of Trial Chamber II in the case *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, rendered on 30 June 2006 ("Judgement").¹ The Appeals Chamber is also presently seized of the "Motion to Strike Annexes A, C, D and E of the Prosecution's Appeals [*sic*] Brief" filed by Naser Orić ("Orić") on 26 October 2006 ("Motion"). The "Prosecution's Response to Defence Motion [to] Strike Annexes A, C, D and E of the Prosecution's Appeal Brief" was filed on 6 November 2006 ("Response"), and Orić's "Reply to Prosecution's Response to Defence Motion [to] Strike Annexes A, C, D and E of the Prosecution's Appeal Brief" was filed on 10 November 2006 ("Reply").

2. With the Motion, Orić seeks to strike several annexes to the Prosecution's Appeal Brief. He submits that they are not appendices properly filed in accordance with the "Practice Direction on the Length of Briefs and Motions"² ("Practice Direction"). He argues that the annexes impermissibly contain legal and factual arguments,³ and that the Prosecution has thus exceeded the word limit for its Appeal Brief.⁴ The Prosecution responds that the annexes, in general, conform to the Practice Direction.⁵ The Prosecution acknowledges that Annex A to the Appeal Brief ("Annex A") contains a number of errors and submits with the Response a revised version of that annex ("Revised Annex A").⁶ In addition, the Prosecution submits that the Motion should be dismissed because it exceeds the word limit set for motions by the Practice Direction.⁷ Orić replies that the annexes are not only impermissibly argumentative, but that they are also misleading because they do not mention other evidence which, in his view, shows that the evidence referred to in the annexes is unreliable.⁸ Orić objects to the filing of the Revised Annex A with the Prosecution's Response and contends that the Prosecution should submit it by filing a separate motion.⁹

¹ The Prosecution filed the "Prosecution's Notice of Appeal" on 31 July 2006 and "The Prosecution's Appeal Brief" ("Appeal Brief") on 16 October 2006. Orić filed the "Notice of Appeal on Behalf of Naser Orić Pursuant to Rule 108" on 5 October 2006 and the "Defence Appellant's Brief" on 16 October 2006.

² IT/184 Rev. 2 of 16 September 2005.

³ Motion, paras 114-115.

⁴ Motion, paras 110-111.

⁵ Response, para. 1.

⁶ *Ibid.*

⁷ Response, para. 39.

⁸ Reply, paras 14-17.

⁹ Reply, paras 23-27.

II. PRELIMINARY MATTERS

3. At the outset, the Appeals Chamber notes that the Motion greatly exceeds the allowed length for a motion as set out by paragraph C(5) of the Practice Direction. Orić acknowledges this and requests in the Motion leave to exceed the word limit because of the vast “extent of the Prosecution’s misrepresentation” and the fact that the Prosecution, by impermissibly including arguments in the annexes, itself violated the applicable word limits.¹⁰

4. The Appeals Chamber recalls that “[t]he Practice Direction on Length is clear that motions for extensions of word limits must be requested ‘in advance’, not as part of the oversized filing that the applicant seeks to have admitted”.¹¹ In addition, the Appeals Chamber notes that a party seeking leave to exceed the word limit “must provide an explanation of the exceptional circumstances that necessitate the oversized filing”.¹² The Appeals Chamber considers that the reasons given by Orić for the oversized filing¹³ do not amount to exceptional circumstances. Accordingly, Orić failed to follow both requirements found in the Practice Direction. However, the Appeals Chamber considers that it is in the interest of judicial economy and expeditiousness of the proceedings to review the annexes to the Prosecution’s Appeal Brief thoroughly in light of Orić’s submissions rather than to require a whole new round of briefing at this stage. Nevertheless, the Appeals Chamber strongly reminds both parties to comply with the relevant Practice Directions in their filings in the future, and in particular reserves its discretion to reject any oversized filing for which leave has not been granted in advance.

5. With respect to the Prosecution’s filing of its Revised Annex A, the Appeals Chamber considers that it was not improper for the Prosecution to file it with its Response rather than with a separate motion. The revised version corrects a number of errors pointed out by Orić in response to the Motion, and Orić had the opportunity to respond to the content of the Revised Annex A in his Reply.¹⁴

III. PURPOSE AND PERMISSIBLE CONTENT OF ANNEXES

6. The main issue between the parties is the question of what content is permissible in an annex to a party’s brief. Paragraph C(6) of the Practice Direction provides as follows:

¹⁰ Motion, paras 7-9.

¹¹ *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-A, Decision on Appellant’s Motion for Reconsideration and Extension of Time Limits, 30 January 2007, para. 11.

¹² Practice Direction, para. C(7).

¹³ Motion, paras 8-9.

[...] 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. An appendix will be of reasonable length, which is normally three times the page limit for that class of motion or brief (e.g., for a brief that is limited to 30 pages by the above practice direction, the appendix should be limited to 90 pages), although it is understood that the length of appendices will naturally vary more than the length of briefs.

7. Reviewing the jurisprudence with respect to the interpretation of this provision, the Appeals Chamber finds that the issue of whether an appendix inappropriately contains argumentative content has to be decided on a case-by-case basis.¹⁵ It has to be considered that an appendix, being part of a party's brief, "is expected to present one side of the case only".¹⁶ The fact that a party's view of the case is apparent through the annexes to its brief does not necessarily lead to the conclusion that there is argumentative content in those annexes; to some extent, all material a party presents will be affected by that party's view of the case, and its interpretation of the evidence. In addition, an annex that provides description for some of the references cited does not necessarily lead to the conclusion that the annex has argumentative content. An annex, which merely lists page references without any descriptive element, could undermine the ultimate purpose behind the use of appendices, namely to assist the Appeals Chamber in its work.¹⁷ Furthermore, in exceptional circumstances, the interests of justice may even allow for a very limited amount of argumentative material in an annex.¹⁸ Accordingly, the Appeals Chamber finds that the parties enjoy a certain measure of discretion as to what to include in the appendices and will intervene only in cases where a party abuses that discretion.

8. That being said, a party will be well advised to use caution when it considers submitting interpretations of material in an annex. Apart from the possibility of intervention by the Appeals Chamber striking an annex in cases of abuse, the Appeals Chamber recalls that it "cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies".¹⁹ Arguments which are hidden away in an

¹⁴ Cf. *Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006, para. 14.

¹⁵ See, in the present case, Decision on the Prosecution's Motion to Strike Defence Response Brief Annex, 29 January 2007 ("29 January 2007 Decision"). See also *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-A, Decision on Prosecution's Motion to Strike Annexes to the Respondent's Brief, 6 September 2006 ("*Halilović* Decision"), paras 10, 12; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Order Expunging From the Record Annexures "A" Through "G" of Appendix "A" to the Consolidated Respondent's Brief Filed on 22 November 2005, 30 November 2005 ("*Nahimana et al.* Order"); *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, T. 29 August 2006, pp. 27259-27263 ("*Krajišnik* Decision").

¹⁶ *Krajišnik* Decision, p. 27261.

¹⁷ Cf. *Krajišnik* Decision, pp. 27261-27262.

¹⁸ In the *Halilović* case, the Appeals Chamber allowed the submission of a paragraph containing argument as an annex for reasons of confidentiality. See *Halilović* Decision, para. 11.

¹⁹ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006, para. 11, referring to *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Judgement, 22 March 2006, para. 12; *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-A, Judgement, 25 February 2004, para. 12; *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002, para. 43.

appendix instead of being properly presented in the brief risk being summarily dismissed, if the Appeals Chamber decides to address them at all.²⁰

IV. ORIĆ'S OBJECTIONS TO THE ANNEXES TO THE APPEAL BRIEF

A. Revised Annex A

9. With regard to Annex A of the Appeal Brief, entitled "Trial Exhibits Relevant to the Issue of Orić's Effective Control over the Srebrenica Military Police", Orić argues that even the title of this annex amounts to a legal and factual argument, because it implies that each of the exhibits contained in the annex provides evidence related to the issue of Orić's effective control.²¹ In particular, Orić objects to the summaries of the exhibits provided in the column "Document Content" of Annex A. In Orić's view, these summaries consist of selective excerpts of the exhibits and factual arguments which only provide the Prosecution's own interpretation of the exhibits in question.²² In several cases, Orić contends, this interpretation amounts to a misrepresentation and mischaracterization of the exhibit.²³ In addition, Orić objects to the heading "author" of the third column of Annex A. He argues that most of the exhibits were not authenticated, such that, at most, the Prosecution could only identify the "purported author" of the exhibits.²⁴ Finally, Orić submits that the Prosecution refers to a number of documents which are not even part of the trial record.²⁵ Orić then proceeds to analyse a number of the entries in the annex to support his general arguments in detail.²⁶

10. The Prosecution responds that the Motion represents an attempt by Orić to reargue objections regarding the authenticity and probative value of the documents.²⁷ The Prosecution rejects Orić's argument that the "description" of the documents in the annex is argumentative, and submits that the descriptions themselves are accurate.²⁸

11. In reply, Orić reiterates that Annex A contains arguments and submits that the extent of the parties' disagreement about the document shows that Annex A is impermissibly argumentative.²⁹

²⁰ Cf. *Le Procureur c/ André Ntagerura et al.*, Case No. ICTR-99-46-A, *Arrêt*, 7 July 2006, para. 176: The Prosecution had submitted in an annex to its Appeal Brief tables to illustrate its arguments. The Appeals Chamber accepted them as illustration, but declined to discuss them in detail.

²¹ Motion, para. 20.

²² Motion, paras 22-23.

²³ Motion, para. 24.

²⁴ Motion, para. 26.

²⁵ Motion, para. 25.

²⁶ Motion, paras 30-98.

²⁷ Response, para. 5.

²⁸ Response, paras 15-34.

²⁹ Reply, para. 6.

12. First, the Appeals Chamber recalls that a party is not expected to present the case in a neutral manner in its submissions; as a party's brief represents the party's view of the case, a party may choose to submit only the evidence which supports its own position in the annexes of its brief.³⁰ This fact will, of course, also be borne in mind by the Appeals Chamber when considering Annex A. Orić's submission that, in several instances the Prosecution did not include evidence impeaching the evidentiary value of certain exhibits in Annex A,³¹ is therefore without merit.

13. Most of Orić's arguments concerning Annex A are related to the columns "Description" and "Document Content". In many instances, Orić contends that the information contained in these columns is either selective or misrepresenting the content of the document, or that the Prosecution does not summarize the document, but submits its own interpretation of it.³² The Appeals Chamber recalls that an annex consisting only of references (in this case, exhibit numbers) without any indication of the content of the exhibits would undermine the ultimate purpose of an annex, namely to provide the Appeals Chamber with a tool facilitating its work.³³ The Appeals Chamber agrees that any description or summary of a document will necessarily be affected by a party's view of the case and therefore may be open to debate between the parties. The Appeals Chamber considers that, insofar as a party's description or summary of the evidence makes the annex more useful, it is not an abuse of form if a party decides to include this type of information in an annex. Further, the Appeals Chamber finds that, if the reliability or the evidentiary value of a piece of evidence is disputed between the parties, the mention of this piece of evidence in an annex does not render the annex inadmissible under paragraph C(6) of the Practice Direction.

14. The same reasoning applies to Orić's objection to the column "author" in Annex A. The fact that the authenticity of some of the exhibits is subject to debate between the parties does not prevent the Prosecution from including them in Annex A, which, as the Appeals Chamber recalls, presents only the Prosecution's view of the case. It would only be impermissible to include arguments as to the authenticity of the documents in an annex, but not listing the documents as such.

15. Regarding Orić's submission that the Prosecution misrepresented the content of the exhibits, the Appeals Chamber notes that Orić limits himself in many instances to contending that the Prosecution presents a one-sided or wrong interpretation of the exhibit, but does not explain what, in his view, the correct interpretation is. Nevertheless, the Appeals Chamber has reviewed Annex A and finds that, contrary to Orić's submissions, the information in the columns "Description" and "Document Contents" in most cases merely presents a fairly accurate description and summary of

³⁰ *Krajišnik* Decision, p. 27261.

³¹ *See, e. g.*, Motion, paras 57, 69, 87 and 88.

³² Motion, paras 22-24.

the exhibits. In some instances, the Prosecution has acknowledged that there were erroneous entries in the Annex, and has filed an amended version to correct these errors. Any remaining inaccuracies are so limited that they do not render Revised Annex A to be in violation of the Practice Direction.

B. Annex C

16. “Annex C to Prosecution’s Appeal Brief” (“Annex C”) consists of a number excerpts from a publication of the International Committee of the Red Cross, “Customary International Humanitarian Law” (“ICRC Study”)³⁴ on the question of a superior’s responsibility to punish past criminal acts of his subordinates. Orić submits that these excerpts are impermissibly argumentative, because they contain interpretations of national legal provisions.³⁵ In addition, Orić questions the reliability of the ICRC Study.³⁶

17. The Prosecution responds that the table accurately reprints some paragraphs of the ICRC study to support the arguments in paragraphs 102-120 of the Prosecution’s Appeal Brief. The Prosecution argues that objections to these arguments should be presented in Orić’s response to the Appeal Brief and they do not demonstrate that Annex C is impermissibly argumentative.³⁷

18. The Appeals Chamber notes that the Prosecution relies in its Appeal Brief on the ICRC Study to show that state practice confirms that command responsibility “extends to superiors who have notice that subordinates have committed crimes in the past”.³⁸ The Appeals Chamber agrees with the Prosecution that any objections to the merit of the ICRC Study should be presented in Orić’s response to the Appeal Brief, but not in a motion to strike annexes. The fact that the Prosecution presents extracts from an academic study which Orić finds unpersuasive does not render Annex C impermissibly argumentative. The Appeals Chamber further notes that the extracts are *verbatim* taken from the ICRC study and therefore do not represent the Prosecution’s own interpretation. Such a presentation is covered by the Practice Direction which allows “references [and] source materials” to be included in a book of authorities or an annex.³⁹ The Practice Direction does not require, as Orić seems to argue, that these materials should be presented as photocopies.⁴⁰ The fact that the Prosecution, instead of supplying photocopies, submits the material in the form of

³³ Cf. *Krajišnik* Decision, pp. 27261-27262.

³⁴ J. M. Henckaerts, L. Doswald-Beck (eds), *Customary International Humanitarian Law*, International Committee of the Red Cross, (Cambridge University Press 2005).

³⁵ Motion, paras 100-101.

³⁶ Motion, para. 102.

³⁷ Response, para. 35.

³⁸ Appeal Brief, para. 109.

³⁹ Practice Direction, para. C(6).

⁴⁰ Motion, para. 104: “The Defence would not object if the Prosecution were instead to attach as an Annex simply the paragraphs from [the ICRC Study] to which it refers”.

a table of *verbatim* extracts, does not render Annex C impermissibly argumentative under the Practice Direction.

C. Annexes D and E

19. In “Annex D to Prosecution’s Appeal Brief” and “Annex E to Prosecution’s Appeal Brief” (“Annex D” and “Annex E”, respectively) the Prosecution lists a number of ICTY (Annex D) and ICTR (Annex E) indictments containing charges under Article 7(3) of the Statute (Article 6(3) of the ICTR Statute in Annex E). Orić argues that these tables are “disguised set[s] of submissions”, because the Prosecution, in his view, submits with the Annexes that responsibility under Article 7(3) of the Statute is charged as a mode of responsibility.⁴¹ In addition, Orić contends that the Prosecution did not simply reproduce the language used in the indictments, but added its own interpretation.⁴²

20. The Prosecution responds that Annexes D and E were submitted to support the argument that the Trial Chamber erred in considering Article 7(3) of the Statute as a distinct offence rather than a mode of responsibility.⁴³ In the Prosecution’s view, these tables are simply summaries of the indictments and do not contain argument.⁴⁴

21. The Appeals Chamber notes that in paragraph 165 of the Appeal Brief, the Prosecution submits that out of a large number of pending indictments, which have been confirmed both by the International Tribunal and the ICTR, none charges superior responsibility as a distinct offence.⁴⁵ Annexes D and E simply present lists of these indictments. It may be open to debate whether these indictments actually charge superior responsibility as a mode of responsibility; but this does not render the table, as a mere list of indictments, impermissibly argumentative.

22. The column “Language Used” in both Annexes lists mostly *verbatim* quotations from the indictments. In a few instances, there is instead of a *verbatim* quotation a short phrase summarizing the relevant part of the indictment.⁴⁶ In the view of the Appeals Chamber, this does not constitute a clear case of argumentative content.

⁴¹ Motion, paras 105-109.

⁴² Motion, para. 107.

⁴³ Response, para. 37.

⁴⁴ Response, para. 38.

⁴⁵ Appeal Brief, para. 165.

⁴⁶ See, e. g., Annex D, p. 1, referring to the indictment in the case *Prosecutor v. Radovan Karadžić* (Case No. IT-95-5/18-I): “Lists 7(3) charges under heading ‘*Individual Criminal Responsibility*’ – does not provide further detail” (emphasis in original).

V. DISPOSITION

23. On the basis of the foregoing, the Appeals Chamber **DENIES** the Motion in its entirety.

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



Judge Fausto Pocar
Presiding

Dated this 18th day of May 2007,
at The Hague,
The Netherlands.

[Seal of the International Tribunal]