



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-01-48-A
Date: 6 September 2006
Original: English

IN THE APPEALS CHAMBER

Before: Judge Mehmet Güney, Presiding
Judge Mohamed Shahabuddeen
Judge Andréia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Mr. Hans Holthuis

Decision: 6 September 2006

PROSECUTOR

v.

Sefer HALILOVIĆ

**DECISION ON PROSECUTION'S MOTION TO STRIKE
ANNEXES TO THE RESPONDENT'S BRIEF**

The Office of the Prosecutor:

Mr. Peter Kremer
Ms. Christine Dahl

Counsel for the Accused:

Mr. Peter Morrissey
Mr. Guénaél Mettraux

A handwritten signature in black ink, appearing to be 'G' followed by a flourish.

1. The Appeals 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 ("Appeals Chamber" and "Tribunal", respectively) is seized of an application ("Motion") made by the Office of the Prosecutor ("Appellant") to strike a series of Annexes to the "Respondent's Brief on Appeal" ("Respondent's Brief") filed by counsel for Sefer Halilović ("Respondent") on 17 July 2006. The Reply Brief was filed on 1 August 2006.¹

2. As a preliminary matter, it is necessary to set out the context in which the Motion was made. On 16 November 2005, Trial Chamber I, Section A, rendered its judgement in the case of the Respondent. It acquitted him of murder as a violation of the laws or customs of war, the sole count in the indictment against him. The Appellant filed its Notice of Appeal and its Appellant's Brief on 16 December 2005 and 1 March 2006, respectively, seeking the reversal of the acquittal on that count, the entering of a conviction and the imposition of an appropriate sentence.²

3. The Appellant's Motion is contained within its Reply Brief. By the Motion, the Appellant seeks that the Appeals Chamber strike Annexes A, C, D, E, F, G, H and I of the Respondent's Brief. It objects to the consideration of the said Annexes because, in its view, Annexes C, D, E and G refer to material that is not part of the record on appeal and contain arguments, in violation of Rule 109 of the Rules of Procedure and Evidence ("Rules") and paragraph (C)(6) of the Practice Direction on the Length of Briefs and Motions,³ while Annexes A, F, H and I contain arguments in violation of the said Practice Direction on Length. Furthermore, the Appellant submits that the inclusion of arguments in the Annexes to the Respondent's Brief brings it to an estimated 59,000 words, in violation of the order by the Pre-Appeal Judge which limited it to a length of 45,000 words.⁴

4. The "Response to Motion to Strike" was filed on 11 August 2006 ("Response"). The Respondent opposes the Motion on the grounds that the Appellant's arguments are "baseless and without merit".⁵ The Respondent argues that the Appellant's failure to identify the specific provision under which it seeks the relevant remedy warrants the Motion's dismissal without any further consideration.⁶ In addition, the Respondent submits that, contrary to what the Appellant claims, the Annexes, with a caveat to follow, do not contain any arguments.⁷ The Respondent

¹ Prosecution's Brief in Reply and Motion to Strike, 1 August 2006 ("Reply Brief").

² Prosecution's Notice of Appeal, 16 December 2005, para. 12; Prosecution Appellant's Brief, para. 6.2.

³ Reply Brief, paras 2.1-2.3, referring to IT/184 Rev. 2, Practice Direction on the Length of Briefs and Motions, 16 September 2005 ("Practice Direction on Length").

⁴ Reply Brief, para. 2.1, fn. 1, referring to Decision on Motion for Extension of Number of Words for Respondent's Brief, 14 July 2006.

⁵ Response, para. 9.

⁶ Response, para. 10, referring to para. 12(b) of IT/155 Rev. 3, Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the International Tribunal, 16 September 2005.

⁷ Response, para. 11.

concedes that some footnotes to Annex A contain arguments but that these do not amount to more than 130 words in total and should be regarded as part of the Respondent's Brief, the prescribed length of which they do not exceed.⁸

5. To the Appellant's argument that some of the material contained in the Annexes does not form part of the record on appeal, the Respondent submits that all the material contained in the Annexes is (i) true, (ii) accurately stated, (iii) validly before the Appeals Chamber and (iv) relevant to matters to be decided by the Appeals Chamber.⁹ Furthermore, according to the Respondent, the Appellant has not argued that it has suffered any prejudice or that granting its request to strike would be proportionate and appropriate in the circumstances.¹⁰

6. The Respondent provides a word count for its Respondent's Brief (44,833 words) and submits that the Appellant's conclusion that the Respondent's Brief exceeds the length ordered by the Pre-Appeal Judge is without merit and that, even if it did, the Appellant has not argued that it has suffered any prejudice or that granting its request to strike would be proportionate and appropriate in the circumstances.¹¹

7. In the "Prosecution's Reply in Support of Motion to Strike", filed on 15 August 2006 ("Reply"), the Appellant argues that the Appeals Chamber has the inherent authority to enforce Rule 109 and the Practice Direction on Length.¹² The Appeals Chamber affirms that it has such authority.

8. Paragraph (C)(1)(b) of the Practice Direction on Length provides that a respondent's brief will not exceed 30,000 words, but that, pursuant to paragraph (C)(7), variations from this limit may be authorised if requested in advance and supported by an explanation of the exceptional circumstances for the oversized filing. In this case, the Respondent's motion for extension of number of words in the Respondent's Brief was granted by the Pre-Appeal Judge, which set the length of the Respondent's Brief at 45,000 words in total.¹³

9. In addition, paragraph (C)(6) of the said Practice Direction on Length provides as follows:

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

⁸ Response, para. 11(1).

⁹ Response, para. 16.

¹⁰ Response, para. 17.

¹¹ Response, paras 18-19.

¹² Reply, paras 2-3, referring to *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005.

¹³ See Decision on Motion for Extension of Number of Words for Respondent's Brief, 14 July 2006.

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.

10. The Appeals Chamber considers that, contrary to paragraph (C)(6) of the Practice Direction on Length, Annexes C, D, F, E and H and footnotes 10, 11 and 22 of Annex A contain legal and factual arguments, as follows:

- (1) footnotes 10, 11 and 22 of Annex A contain the Respondent's assessment of findings of the Trial Chamber;¹⁴
- (2) Annexes C, D and E contain the Respondent's assessment of the procedural background relevant to the Appellant's fourth, third and first grounds of appeal, respectively;
- (3) Annex F lists paragraphs in the Appellant's Brief which according to the Respondent contain a misrepresentation or a mischaracterisation, including, but not limited to, those the Respondent otherwise addresses in the Respondent's Brief;¹⁵
- (4) Annex H contains the Respondent's assessment of findings of the Trial Chamber relevant to the Appellant's first ground of appeal.

11. The Appeals Chamber finds that the remainder of Annex A and Annex G do not contain arguments and thus were filed in compliance with paragraph (C)(6) of the Practice Direction on Length. With respect to Annex G it is also necessary to address the Appellant's further submission that it impermissibly refers to material that is not part of the record on appeal.¹⁶ The Appeals Chamber notes, however, that this is not the case.¹⁷ As regards confidential Annex I, which consists of a single paragraph and footnotes thereto and approximately amounts to seventy words, the Prosecution merely submits that it contains argument.¹⁸ While this may be the case, the Appeals Chambers is satisfied by the Respondent's explanation that it was filed as an annex for reasons of

¹⁴ The Appellant submits that "[a]lthough Annex A approaches the correct use of an appendix, it contains argument. E.g., fns. 10, 11, 22": Reply Brief, para. 2.3. The Respondent concedes that these footnotes contain arguments: *see* Response, para. 11(1).

¹⁵ *See* Respondent's Brief, para. 4 and Annex F, p. 26.

¹⁶ Reply Brief, para. 2.2.

¹⁷ Annex G is entitled "Extract of Defence Letter of 31 Oct 2003, addressed to Senior Trial Attorney, Mr Ekkerhard Withopf (as attached to its Motion of 17 Nov 2003)". It reproduces an extract of a letter addressed to the Appellant by the Respondent, which was attached as Confidential Annex A to the Respondent's partly confidential "Motion for Particulars", filed on 17 November 2003. The number accorded by the Registry to the page bearing the relevant extract is D3969 of the case file IT-01-48(PT). It is thus part of the trial record, which comprises, *inter alia*, documents D1 to D10388 of the case file IT-01-48: *see* Certificate on the Trial Record, 21 December 2005. Rule 109 provides that "[t]he record on appeal shall consist of the trial record, as certified by the Registrar". The Appellant appears to concede that the extract is part of the record on appeal when it states, in reply: "Annex G contains an excerpt of a letter from Defence counsel that was attached to a motion for particulars that Halilović brought and lost". *See* Reply, para. 10.

¹⁸ Reply Brief, para. 2.3. *See* also Reply, para. 12.

confidentiality because the remainder of the Respondent's Brief is a public filing.¹⁹ In these circumstances, the Appeals Chamber is of the view that Annexes G, I and A, save for its footnotes 10, 11 and 22 were filed in conformity with paragraph (C)(6) of the Practice Direction on Length.

12. However, because they contain argument, Annexes C, D, E, F and H and footnotes 10, 11 and 22 of Annex A to the Respondent's Brief cannot be considered as appendixes properly filed under paragraph (C)(6) of the said Practice Direction on Length and therefore excluded from the word count. If they were to be understood as part of the Respondent's Brief, the final length of the Respondent's Brief would exceed the length set by the Pre-Appeal Judge when he granted the Respondent's motion for extension of number of words. In the view of the Appeals Chamber, the appropriate remedy in this case lies in requiring the Respondent to re-file the Respondent's Brief in conformity with the Practice Direction on Length and in line with the limit of 45,000 words ordered by the Pre-Appeal Judge. The Appellant will be allowed to re-file its Reply Brief if it deems necessary to do so. The Appeals Chamber emphasises that this is not an opportunity for the Parties to add fresh arguments to these filings.

13. In light of this conclusion, it is not necessary to address the Appellant's submission that Annexes C, D and E to the Respondent's Brief impermissibly refer to material that is not part of the record on appeal.²⁰ The Appeals Chamber is convinced that, in re-filing the Respondent's Brief, the Respondent will be careful to ensure that the brief does not circumvent the provisions of Rule 115 and the applicable Practice Directions.

¹⁹ According to the Respondent, "Annex I could only be annexed for obvious reasons of confidentiality of the Order to which it refers": Response, para. 11(2).

²⁰ For Annex G, *see* para. 11, fn. 19, above.



FOR THE FOREGOING REASONS;

HEREBY GRANTS the Motion in part;

ORDERS the Respondent to re-file the Respondent's Brief to comply with the word limit of 45,000 words by no later than 20 September 2006;

FURTHER ORDERS the Appellant, if it deems necessary to do so, to re-file its Reply Brief by no later than one week from the date of filing of the re-filed Respondent's Brief, in which case the Appellant should, for the purposes of the record, incorporate the Motion by way of an Annex;

DECLARES null and void the Respondent's Brief filed on 17 July 2006, and, if the Appellant re-files its Reply Brief, the Reply Brief filed on 1 August 2006;

AND ORDERS the Registry to remove from the case file the Respondent's Brief filed on 17 July 2006, and, if the Appellant re-files its Reply Brief, the Reply Brief filed on 1 August 2006.

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



Judge Mehmet Güney

Presiding Judge

Dated this 6th day of September 2006

At The Hague, The Netherlands

[Seal of the Tribunal]