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UNITED NATIONS

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-02-60/1-A

Date: 20 January 2005

Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Inés Mónica Weinberg de Roca

Registrar: Mr. Hans Holthuis

Decision of: 20 January 2005

Momir NIKOLIĆ

v.

PROSECUTOR

DECISION ON PROSECUTION'S MOTION TO STRIKE

Counsel for the Appellant

Ms. Virginia C. Lindsay

Counsel for the Prosecutor

Mr. Norman Farrell

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 ("International Tribunal") is seised of a confidential "Prosecution's Motion to Strike" dated 17 November 2004 but filed on 25 November 2004,[1] by which the Prosecution requests the Appeals Chamber to strike parts of Momir Nikolić's submissions in reply.

A. PROCEDURAL HISTORY

2. On 2 December 2003, Momir Nikolić ("Appellant") was sentenced by Trial Chamber I to 27 years of imprisonment[2] for crimes to which he pleaded guilty.[3] The Appellant filed his Notice of Appeal on 30 December 2003 and filed confidentially "Momir Nikolić's Opening Brief on Appeal" ("Appellant's Brief")[4] on 24 May 2004. The Prosecution filed the "Prosecution Response Brief on Appeal" on 5 July 2004.[5] Subsequently, the Appellant filed his Brief in Reply confidentially on 20 August 2004 ("Appellant's Brief in Reply").[6]

3. On 18 June 2004, the Appellant filed a confidential "Motion to Admit Additional Evidence" and, on 21 June 2004, a confidential "Conformed and Supplemented Motion to Admit Additional Evidence", to which the Prosecution confidentially responded on 28 June 2004.[7] The "Appellant's Reply to the Prosecution's Response to 'Conformed and Supplemented Motion to Admit Additional Evidence'" was filed confidentially on 2 July 2004 ("Reply Regarding Additional Evidence") with two appendices attached ("Annexes A and B"). On 20 August 2004, the Appellant filed an additional appendix entitled "Additional Appendix in Support of Appellant's Conformed and Supplemented Motion to Admit Additional Evidence", to which two documents were attached ("Additional Appendix Regarding Additional Evidence").

4. On 1 September 2004, the Appellant filed confidentially "Corrigenda to Appellant's Reply Brief on Appeal". On 15 September 2004, he filed confidentially a "Notice of Withdrawal of Section II.A. of Appellant's Reply Brief on Appeal and Relevant Portions of Related Pleadings".

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[1] *See also* "Public Redacted Version of Prosecution's Motion to Strike", filed on 26 November 2004.
[2] *Prosecutor v. Momir Nikolić*, IT-02-60/1-S, Sentencing Judgement, 2 December 2003.
[3] Joint Motion for Consideration of Amended Plea Agreement between Momir Nikolić and the Office of the Prosecutor, 6 May 2003.
[4] A public version of the Appellant's Brief was filed on 21 September 2004. *See* infra, para. 5.
[5] *See also* "Corrigenda to Prosecution Response Brief on Appeal" filed confidentially on 30 July 2004; "Corrigendum to Prosecution Response Brief on Appeal" filed on 2 November 2004, which lifted the confidential status of the Prosecution Response Brief on Appeal; and "Notice of Lifting Confidential Status of 'Corrigenda to Prosecution Response Brief on Appeal' of 30 July 2004" filed on 9 November 2004.
[6] Appellant's Reply Brief on Appeal, Confidential, 20 August 2004.
[7] Prosecution Response to "Conformed and Supplemented Motion to Admit Additional Evidence."

5. As a result of a decision rendered by the Appeals Chamber on 1 September 2004,[8] the Appellant filed the "Redacted and Conformed Momir Nikolić's Opening Brief on Appeal" on 21 September 2004. On the same day, he also filed a "Corrigendum to Momir Nikolić's Opening Brief on Appeal".

6. Following a decision of the Pre-Appeal Judge granting leave to file an amended notice of appeal,[9] the Appellant filed the "Appellant Momir Nikolić's Amended Notice of Appeal" on 26 October 2004 ("Notice of Appeal").

7. On 11 October 2004, the Appellant filed confidentially a second "Appellant's Motion for Judicial Notice" ("Second Motion for Judicial Notice")[10] to which the Prosecution responded on 21 October 2004.[11] The "Appellant's Reply to Prosecution Response to the Appellant's Motion for Judicial Notice and Motion for Late Filing of Over-Sized Same" was filed confidentially on 27 October 2004 ("Reply Regarding Judicial Notice").

8. On 17 November 2004, the Prosecution filed the "Prosecution's Motion for Extension of Pages" whereby it requested leave to file an attached motion to strike (Annex 1) which exceeded the prescribed page limit.[12] On 22 November 2004, the Pre-Appeal Judge granted the authorization sought by the Prosecution and instructed the Registry to file the 'motion to strike' enclosed as Annex 1 as a separate motion.[13] Following this decision, the Prosecution filed a "Notice in Relation to the Prosecution's Annexed 'Motion to Strike' in a Filing on 17 November 2004", confirming the confidential status of its annexed 'motion to strike'. Subsequently, the Registry filed the "Prosecution's Motion to Strike" confidentially on 25 November 2004 ("Motion").

9. On 26 November 2004, the Prosecution filed confidentially "Corrigenda to Prosecution's Motion to Strike" and the public redacted version of the Motion.

10. On 6 December 2004, the Appellant filed the "Appellant's Consolidated Response to Prosecution's Motion to Strike and Prosecution's Second Motion to Strike and Motion for Leave to File Over-Sized Same" ("Response"), whereby he responds to the Motion but also to the second motion to strike filed by the Prosecution on 3 December 2004.[14] The Appellant also moves the

[8] Decision (Motion to Strike Parts of Defence Appeal Brief and Evidence not on Record, Motion to Enlarge Time, Motion for Leave to File a Rejoinder to the Prosecution's Reply), 1 September 2004 ("Decision on Motion to Strike").
[9] Decision on Appellant's Motion to Amend Notice of Appeal, 21 October 2004.
[10] *See* Decision on Motion for Judicial Notice, 30 September 2004, dismissing the Appellant's first "Motion for Judicial Notice" filed on 20 August 2004 ("First Motion for Judicial Notice").
[11] Prosecution's Response to Motion for Judicial Notice of 11 October 2004, 21 October 2004 ("Response Regarding Judicial Notice").
[12] On the same day, the Prosecution filed a Book of Authorities to Prosecution's Motion to Strike.
[13] Decision on Prosecution's Motion for Extension of Pages, 22 November 2004.
[14] Second Motion to Strike, 3 December 2004.

Appeals Chamber to recognize the Response - which consists of 14 pages - as validly filed, since it exceeds the page-limit provided in the Practice Direction on the Length of Briefs and Motions.[15]

11. The "Prosecution Reply to Appellant's Consolidated Response to Prosecution's Motion to Strike and Prosecution's Second Motion to Strike and Motion for Leave to File Over-Sized Same" was filed confidentially on 10 December 2004 ("Reply").

B. SUBMISSIONS AND DISCUSSION

1) Motion for Leave to File the Oversized Response

12. The Appellant seeks leave to file his oversized Response on the ground that "additional pages were needed for the same reasons given by the Prosecution in relation to their [sic] Motion to Strike."[17] The Prosecution does not oppose the Appellant's request.[18]

13. The Appeals Chamber notes that the Appellant responded in one filing to two different motions and, as a result, considers that the Appellant was entitled to file a joint response of 20 pages or 6,000 words, whichever was greater, pursuant to paragraph (C)(5) of the Practice Direction on the Length of Briefs and Motions. Nevertheless, it appears that the part of the Response devoted to the Motion is 12 pages, whereas the part devoted to the second motion to strike is only one page. The Response therefore exceeds the page-limit. In this respect, the Appeals Chamber reminds the Appellant that, in accordance with paragraph C(7) of the Practice Direction on the Length of Briefs and Motions, a party must seek authorization in advance from the Appeals Chamber to exceed the page limits. The same paragraph provides that the moving party must offer an explanation of the exceptional circumstances that necessitate the oversized filing. The Appeals Chamber considers that mere reference to the Prosecution's arguments does not amount to a proper "explanation." However, considering that the Prosecution has been granted an extension of pages for the filing of its Motion, that it does not oppose the Appellant's request and that it is in the interests of justice in this particular case to accept the Response as filed by the Appellant, the Appeals Chamber decides to recognize the oversized Response as validly filed.

2) Motion to Strike

14. The Prosecution moves the Appeals Chamber to strike submissions made in reply by the Appellant as well as annexes and the additional appendix filed in support of the Appellant's motions as set out below:

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[15] Practice Direction on the Length of Briefs and Motions, 7 March 2002, IT/184/Rev.1.
[17] Response, para. 58.
[18] Reply, para. 2.

(1) paragraphs 8 to 9 and 17 to 18 of the Reply Regarding Additional Evidence and Annexes A and B;

(2) the entire Additional Appendix Regarding Additional Evidence;

(3) paragraphs 30 to 32, 85 to 91 and 101 of the Appellant's Brief in Reply;

(4) paragraphs 6, 7, 9 to 14, 21 and 29 of the Reply Regarding Judicial Notice.[19]

15. As a general matter, the Prosecution claims that a review of the Appellant's pleadings in reply demonstrates "a pattern of adding new grounds, supplementing arguments or changing submissions"[20] from those in the original filings. The Prosecution submits that this practice leads to a waste of time and resources, renders the issues raised in the appeal unclear, leaves the Appeals Chamber without full arguments on matters before it and deprives the Prosecution of a right to respond.[21]

16. In his Response, the Appellant submits that the "Prosecution describes in one-sided terms the admittedly complicated history of his efforts [...] to present mitigating evidence that should have been investigated prior to his sentencing hearing and [...] to address problems with the factual basis underlying his guilty plea."[22]

a) Reply Regarding Additional Evidence, Annexes A and B and Additional Appendix Regarding Additional Evidence

17. Since a decision has been rendered on these matters,[23] the Appeals Chamber considers that the Prosecution's request to strike paragraphs 8 to 9 and 17 to 18 of the Reply Regarding Additional Evidence, Annexes A and B and the entire Additional Appendix Regarding Additional Evidence has become moot.

b) Appellant's Brief in Reply

18. Regarding the Appellant's Brief in Reply, the Appeals Chamber recalls that a brief in reply is limited to arguments in reply to the respondent's brief,[24] and, therefore, that it should not include new arguments not related to the opposing party's response or new grounds of appeal. If a party raises in a reply an argument or request for the first time, then the opposing party is deprived of an opportunity to respond, which could harm the fairness of the proceedings.[25] As a result, where

[19] Motion, para. 9.
[20] Motion, para. 1.
[21] Motion, paras 1 and 8. *See* also Prosecution's submissions on the applicable law at paras 10 to 15.
[22] Response, para. 4 (footnotes omitted).
[23] Decision on Motion to Admit Additional Evidence, 9 December 2004.
[24] Practice Direction on Formal Requirements for Appeals From Judgement, 7 March 2002, IT/201, para. 6.
[25] Decision on Motion to Strike, para. 10. *See* also *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Decision on the Motions of Appellants Vlatko Kupreškić, Drago Josipović, Zoran Kupreškić and Mirjan Kupreškić to Admit Additional

arguments are made for the first time in the brief in reply, the Appeals Chamber may strike them at the request of a party or disregard them.[26] Having recalled the formal requirements of a brief in reply, the Appeals Chamber will now examine the parties' submissions.

i) Paragraphs 30 to 32

19. With regard to paragraphs 30 to 32 of the Appellant's Brief in Reply, the Prosecution submits that the Appellant raises an additional error of law based on arguments relating to events which he did not raise in the Appellant's Brief.[27]

20. In his Response, the Appellant submits that the challenged paragraphs do not raise new issues but reply to the Prosecution's erroneous argument.[28] He contends that the "anaemic view of replies proposed by the prosecution would deprive the adversarial process of much of its utility and vitality, and would permit erroneous arguments to go unchallenged."[29] The Appellant submits moreover that paragraph 32 only contains a new insight into the manner in which the Trial Chamber exceeded the agreed factual basis underlying the plea argument.[30]

21. After careful consideration of the briefs, the Appeals Chamber is of the view that the arguments developed by the Appellant in paragraphs 30 to 32 of the Appellant's Brief in Reply do raise a new allegation of an error of law committed by the Trial Chamber, not made in his Notice of Appeal, or in his Appellant's Brief. The Appeals Chamber agrees with the Prosecution that it is not appropriate to use a brief in reply to expand an argument made in an Appellant's brief with new alleged errors. Therefore, the Appeals Chamber finds that these paragraphs fall beyond the scope of a brief in reply and should be struck out.

ii) Paragraphs 85 to 91

22. The Prosecution submits that paragraphs 85 to 91 of the Appellant's Brief in Reply set out the Appellant's reply to a response that the Prosecution has not made, as it considered that the issue fell outside the scope of the Notice of Appeal.[31]

23. The Appellant concedes that "paragraph 87 is not a proper reply to the Prosecution's Response Brief and apologises for having included it".[32] He adds that the Appeals Chamber is "able

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Evidence, filed confidentially on 26 February 2001, ("*Kupreškić* Decision"), para. 70; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Decision on Prosecution's Motion to Strike out Portions of Kordić's Reply filed 13 April 2004, 11 May 2004, ("*Kordić* Decision"), para 14.

[26] *See Prosecutor v. Vasiljević*, IT-98-32-A, Appeal Judgement, 25 February 2004, para. 15.

[27] Motion, para. 32 ; Reply, paras 6-10.

[28] Response, paras 16-21.

[29] Response, para. 19.

[30] Response, para. 20.

[31] Motion, paras 37-40.

[32] Response, para. 25.

to disregard the offending paragraph without having recourse to an order to strike."[33] However, he submits that the reference made in the Respondent's Brief to the Prosecution's separate pending request to strike paragraphs 122 to 124 and 227 from the Appellant's Brief made a reply necessary and that it is "only fair that the Appellant should have an equal opportunity to set out his grounds for opposing" the Prosecution's request.[34]

24. In its Reply, the Prosecution submits that the Appellant appears not to be disputing that these arguments are in fact new, but that the Appellant alleges that the Prosecution made it necessary for him to make them, because it summarized the reasons why it had requested paragraphs 122 to 124 and 227 of the Appellant's Brief to be struck out. The Prosecution contends that this argument is without merit.[35]

25. The Appeals Chamber notes that the Prosecution did not respond to the arguments developed in paragraphs 122, 123, 124 and 227 of the Appellant's Brief.[36] The Appeals Chamber does not agree with the Appellant's submission that it can merely ignore the offending paragraph and that recourse to an order to strike is unnecessary. Recalling that the Appellant had the opportunity to develop his arguments in support of each ground of appeal in the Appellant's Brief and that a brief in reply is limited to arguments in reply to the respondent's brief,[37] the Appeals Chamber finds that paragraphs 85 to 91 of the Appellant's Brief in Reply exceed the scope of a brief in reply. The benefit of striking out parts of a submission is not only to guarantee the fairness of the proceedings but also to clarify for the parties, and for the public, which arguments have been considered by the Chamber in reaching a particular decision. The fact that the Appeals Chamber would easily "be able to disregard the offending paragraph" is devoid of legal merit. The Appeals Chamber finds that paragraphs 85 to 91 should be struck out from the Appellant's Brief in Reply.

iii) Paragraph 101

26. The Prosecution submits that paragraph 101 should be struck out from the Appellant's Brief in Reply as it raises a new ground of appeal not included in the Appellant's Notice of Appeal.[38]

27. In his Response, the Appellant argues that the Prosecution was on notice of the issue raised in this paragraph, responded to it and, therefore, that the Appellant's reply was proper and should not be struck out.[39]

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[33] Response, para. 25.
[34] Response, para. 24.
[35] Reply, paras 11-15.
[36] Incidentally, the Appeals Chamber points out that it held in a subsequent decision that these paragraphs were covered by the eleventh ground of appeal of the Appellant's Notice of Appeal. *See* Decision on Motion to Strike, para. 23.
[37] Practice Direction on Formal Requirements for Appeals From Judgement, 7 March 2002, IT/201, para. 6.
[38] Motion, paras 41-45.

28. The Prosecution replies that the Appellant never relied on or referred to the authorities he cited in his Appellant's Brief in support of the allegation he makes for the first time in paragraph 101 of the Appellant's Brief in Reply.[40]

29. The Appeals Chamber agrees with the Prosecution's submission that, in paragraph 101, the Appellant alleges an error of law committed by the Trial Chamber which was not raised in the Appellant's Notice of Appeal, or in the Appellant's Brief. Accordingly, the Appeals Chamber finds that paragraph 101 should be struck out.

c) Reply Regarding Judicial Notice

30. The Prosecution submits that the Appellant failed to substantiate the requests made in the Second Motion for Judicial Notice and that he subsequently provided the necessary substantiation in his Reply Regarding Judicial Notice, which contained as a result a number of new arguments and new claims.[41]

31. The Appellant opposes the Prosecution's submissions, stating that the arguments developed in the disputed paragraphs come in response to the Prosecution's arguments.[42]

32. Before addressing the merits of the parties' submissions, the Appeals Chamber reemphasizes the procedure for the filing of written submissions before the Appeals Chamber. A three-stage process is established by the Rules and the relevant Practice Directions for the filing of written submissions before the International Tribunal. For motions filed during appeals from judgement, as is the case here, the moving party is requested to file a motion containing (i) the precise ruling or relief sought; (ii) the specific provision of the Rules under which the ruling or relief is sought; and (iii) the grounds on which the ruling or relief is sought.[43] The opposite party is entitled to file a response stating whether or not the motion is opposed and the grounds therefore,[44] and the moving party may file a reply[45] restricted to dealing with issues raised in the opposite party's response.[46] The Appeals Chamber recognizes that it is not possible to require a party to anticipate all the arguments made in response by the opposite party. The very purpose of a reply is to permit the moving party to rebut the arguments raised in opposition by the other party. Subject to a rejoinder, this can sometime necessitate submitting an argument not developed in the initial

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[39] Response, paras 26-28.
[40] Reply, paras 16-21.
[41] Motion, paras 46-55.
[42] Response, paras 29-33.
[43] Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the International Tribunal, IT/155/Rev. 1, 7 March 2002 ("Practice Direction"), para. 10.
[44] Practice Direction, para. 11.
[45] Practice Direction, para. 12.

motion. However, this right to fully address the opposing party's arguments does not allow the moving party to use its reply to make new claims or to raise totally new arguments. As the Appeals Chamber has already stated, if a party raises in a reply an argument or request for the first time, then the opposing party is deprived of an opportunity to respond and this can harm the fairness of the proceedings.[47] That is notably why the core of the moving party's arguments must be provided in the initial motion and not raised for the first time in the reply.

33. Regarding the Appellant's request for judicial notice, the Appeals Chamber points out that it previously dismissed the First Motion for Judicial Notice on the ground that it did not fulfil the requirements of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the International Tribunal[48] and that the clarifications submitted by the Appellant in his reply were provided too late to cure the defects related to the vagueness of that motion, the opposing party having been deprived of its right to respond with full knowledge of the Appellant's arguments.[49] Having in mind that the Appellant was fully aware that he was requested to raise the core of his arguments in his Second Motion for Judicial Notice and that he was not allowed to exceed the scope of his reply by adding new claims, the Appeals Chamber will now examine the parties' submissions concerning the Reply Regarding Judicial Notice.

i) Paragraphs 6, 7 and 9

34. The Prosecution argues that the arguments developed in paragraphs 6, 7 and 9 of the Appellant's Brief in Reply explain for the first time the purported relevance of the facts of which the Appellant wants the Appeals Chamber to take judicial notice. It submits that these arguments are new and should be struck out.[50]

35. In his Response, the Appellant opposes the Prosecution's request regarding paragraphs 6 and 7 on the ground that they are a direct answer to the Prosecution's arguments in response. With regard to paragraph 9, the Appellant concedes that this paragraph sets out in more detail the relevance of the adjudicated facts proffered for judicial notice from the *Krstić* Trial Judgement. Nevertheless, he submits that, given the Prosecution's Response Regarding Judicial Notice, it

[46] Decision on Motion to Strike, para. 10. *See* also *Kupreškić* Decision, para. 70; *Kordić* Decision, para. 14. *See, mutatis mutandis*, Practice Direction on Formal Requirements for Appeals From Judgement, 7 March 2002, IT/201, para. 6.
[47] Decision on Motion to Strike, para. 10. *See* also *Kupreškić* Decision, para. 70; *Kordić* Decision para 14.
[48] Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the International Tribunal, IT/155/Rev. 1, 7 March 2002.
[49] Decision on Motion for Judicial Notice, 30 September 2004.
[50] Motion, para. 47.

"should be acceptable to re-visit the question of relevancy, even if it means providing additional details."[51] He concludes that the challenged paragraphs come within the proper scope of a reply.

36. In reply, the Prosecution submits that the Appellant concedes that the arguments developed in paragraphs 6, 7 and 9 were not included in the Second Motion for Judicial Notice and that these paragraphs can thus be dismissed.[52]

37. Having carefully examined the relevant pleadings, the Appeals Chamber finds that the arguments contained in paragraphs 6, 7 and 9 of the Reply Regarding Judicial Notice were not raised in the Second Motion for Judicial Notice. The Appeals Chamber considers that these arguments exceed the proper scope of a reply in that they should have been raised in the Second Motion for Judicial Notice as they significantly substantiate the Appellant's request for judicial notice. The limited scope of a reply does not allow the Appellant to cure defects related to the vagueness of his Second Motion for Judicial Notice, where permitting the Appellant to do so would deprive the Prosecution of its right to respond. The Appeals Chamber finds therefore that the arguments contained in paragraphs 6, 7 and 9 of the Reply Regarding Judicial Notice go beyond the scope of a reply and should be struck out.

ii) Paragraphs 10 to 14

38. The Prosecution submits that paragraph 10 contains a new request for judicial notice of two facts upon which the Appellant relies for a new set of arguments in paragraphs 11 to 14.[53]

39. The Appellant admits that he added two additional requests for judicial notice in his Reply Regarding Judicial Notice.[54] He requests the "Appeals Chamber's indulgence" and that the two new facts be judicially noticed despite his failure to identify them in the Second Motion for Judicial Notice.[55] He argues that his omission was not tactical but was instead due to "an oversight and the result of [his Counsel] working alone with insufficient resources."[56] He submits that "even if the Appeals Chamber decides to disregard these two additional requests, there is no need to strike the paragraphs," as they are "not so offensive as to require an order to strike."[58] As to paragraph 14, the Appellant submits, *inter alia*, that he set out those policy considerations in his Second Motion for Judicial Notice but that the same considerations underlie all of the facts proposed under Rule 94(B)

[51] Response, para. 35.
[52] Reply, para. 23.
[53] Motion, para. 48.
[54] Response, para. 37.
[55] Response, para. 38.
[56] Response, para. 38.
[58] Response, para. 39.

of the Rules including the *Krstić* adjudicated facts.[59] He argues that striking the "mention of those policy considerations from the Reply would be overly formalistic and punitive"[60] and that, in any event, since the Prosecution did not respond to the policy arguments, it was not prejudiced by the mention of the policy interests in a related but separate section of the Reply.[61]

40. The Prosecution replies, *inter alia*, that the Appellant concedes that the request for judicial notice in paragraph 10 is new and that, instead of conceding that paragraphs 10 to 14 be struck, he repeats his request without addressing the Prosecution's argument. The Prosecution also maintains that paragraph 14 is a new argument not limited to the arguments it made in response.[62]

41. The Appeals Chamber finds that paragraph 10 contains two completely new requests for judicial notice. It further notes that paragraphs 11 to 14 develop the Appellant's arguments in support of these two new requests. Therefore, the Appeals Chamber finds that the Appellant exceeded the scope of a reply by submitting paragraphs 10 to 14. The disputed paragraphs should be struck out from the Reply Regarding Judicial Notice.

42. The Appeals Chamber wishes to add that the object of striking parts of a written submission is not to "punish" a party or to correct "offensive" submissions, as the Appellant seems to consider. On the contrary, as stated earlier in this decision, such a procedure allows a judicial body to fully enlighten the parties, and the public, as to the arguments it took into consideration in reaching a particular decision.[63] The Appellant's arguments related to the "offensive" character of the paragraphs or the "punitive" aspect of the striking are therefore devoid of merit. Moreover, the Appeals Chamber considers that it cannot give weight to the Appellant's argument regarding his Counsel's working conditions. Indeed, the Appeals Chamber notes that the filings made by the Appellant's Counsel reveal a general pattern of confusion, of adding new arguments in the replies, and of changing submissions in replies from those in the original filings.[64] In the opinion of the Appeals Chamber, this filing does not differ from this pattern and its defects cannot be merely excused by the Appellant's Counsel's working conditions at the time of the preparation of the filing.

iii) Paragraph 21

[59] Response, paras 40-44.
[60] Response, para. 42.
[61] Response, para. 44.
[62] Reply, paras 24-26.
[63] *See supra,* para. 25.
[64] *See* Decision on Motion for Leave to Supplement Conformed and Supplemented Motion to Admit Additional Evidence, 9 December 2004, page 3.

43. Further, the Prosecution claims that, in paragraph 21, the Appellant raises a new argument regarding his position in the Bratunac brigade, which constitutes a new ground of appeal.[65]

44. The Appellant responds that paragraph 21 is a direct response to one of the Prosecution's arguments and is within the proper scope of a reply.[66]

45. In its Reply, the Prosecution submits that the Appellant is wrong and "seems to be trying to blur the issues" and provides a summary of the parties' submissions in order to show that the Appellant has inappropriately raised a new error in his Reply Regarding Judicial Notice.[67]

46. In light of the Second Motion for Judicial Notice, the Response Regarding Judicial Notice and the Reply Regarding Judicial Notice, the Appeals Chamber finds that the Appellant has raised a new ground of appeal in paragraph 21. As a result, this paragraph should be struck out from the Reply Regarding Judicial Notice.

iv) Paragraph 29

47. Finally, the Prosecution argues that, in paragraph 29 of his Reply Regarding Judicial Notice, the Appellant addresses for the first time the source of the material presented as supporting facts No. 2 to 13, seeking to characterize the documents as something akin to Rwandan Laws of which the Trial Chamber of the International Criminal Tribunal for Rwanda in the *Bagosora* case[68] took judicial notice.[69]

48. In his Response, the Appellant submits that he did not cite the *Bagosora* decision in his Second Motion for Judicial Notice because he was unaware of it.[70] He adds that upon being made aware of it when the Prosecution raised it in its Response to Judicial Notice, he was unable to find a copy of the decision from any source except the Prosecution. He argues that he "should be allowed an opportunity to at least note the specific documents judicially noticed in the *Bagosora* decision" in reply to the Prosecution's raising the case in the first place.[71]

49. The Prosecution submits in its Reply that, rather than addressing the Prosecution's arguments made in its Response to Judicial Notice, "the Appellant sought to rely on the decision and liken Expert Report [sic] to the laws and regulations discussed in *Bagosora*."[72]

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[65] Motion, paras 49-52.
[66] Response, paras 45-48.
[67] Reply, paras 27-30.
[68] *Prosecutor v. Bagosora*, ICTR-98-41-T.
[69] Motion, paras 53-54.
[70] *Prosecutor v. Bagosora*, ICTR-98-41-T, Decision on the Prosecutor's Motion for Judicial Notice pursuant to Rules 73, 89 and 94, 11 April 2003. The Appellant refers to the wrong decision in his Response (*See* footnote 37).
[71] Response, paras 49-51.
[72] Reply, paras 31-33.

50. The Appeals Chamber notes that, in paragraph 29, the Appellant merely lists the documents judicially noticed in the *Bagosora* case, without submitting any specific argument. Therefore, the Appeals Chamber finds that paragraph 29 does not go beyond the scope of a reply and that the Prosecution's request should be dismissed.

C. DISPOSITION

51. For the foregoing reasons, the Appeals Chamber grants the Appellant's request for leave to file the oversized Response and grants, in part, the Motion. Consequently, the Appeals Chamber dismisses as moot the Prosecution's request to strike paragraphs 8-9, and 17-18 of the Reply Regarding Additional Evidence, Annexes A and B and the entire Additional Appendix Regarding Additional Evidence; strikes paragraphs 30 to 32, 85 to 91 and 101 from the Appellant's Brief in Reply and paragraphs 6, 7, 9 to 14 and 21 from the Reply Regarding Judicial Notice; and denies the Prosecution's request to strike paragraph 29 of the Reply Regarding Judicial Notice.

52. The Appeals Chamber orders the Appellant to file a redacted version of the Appellant's Brief in Reply no later than Friday, 28 January 2005.

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

Done this 20th day of January 2005
At The Hague,
The Netherlands.

Theodor Meron
Presiding Judge

[Seal of the Tribunal]