



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-98-30/1-R.1  
Date: 9 May 2006  
Original: English

**IN THE APPEALS CHAMBER**

**Before:** Judge Fausto Pocar, Pre-Review Judge

**Registrar:** Mr. Hans Holthuis

**Decision of:** 9 May 2006

**PROSECUTOR**

v.

**MLAĐO RADIĆ**

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**DECISION ON PROSECUTION MOTION FOR LEAVE TO FILE SUR-REPLY TO  
DEFENCE REPLY IN REQUEST FOR REVIEW BY MLAĐO RADIĆ**

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**Counsel for Mlado Radić:**

Mr. Toma Fila

**The Office of the Prosecutor:**

Ms. Helen Brady

**I, FAUSTO POCAR, PRE-REVIEW JUDGE<sup>1</sup>** in this case,

**RECALLING** the Judgement rendered by the Appeals Chamber in *Prosecutor v. Kvočka et al.*,<sup>2</sup> on 28 February 2005 (“Appeal Judgement”);

**NOTING** the “Defence Request for Review” of the Appeal Judgement filed by Counsel for Mlado Radić on 27 February 2006 (“Request”); the “Prosecution’s Response to Mlado Radić’s Request for Review of Appeals Chamber Judgment” filed confidentially on 7 April 2006 (“Confidential Response”); the public redacted version of the “Prosecution’s Response to Mlado Radić’s Request for Review of Appeals Chamber Judgment” filed on 7 April 2006 (“Public Redacted Response”); and the “Defence Reply: to the Public Redacted Version of Prosecution’s Response to Mlado Radić’s Request for Review of Appeals Chamber Judgment” filed by Counsel for Mlado Radić on 20 April 2006 (“Reply”);

**BEING SEIZED OF** the “Prosecution Motion for Leave to File Sur-Reply to Defence Reply in Request for Review by Mlado Radić” filed on 24 April 2006 (“Motion”);

**NOTING** that although Mlado Radić has not yet filed a response to the Motion it is, in any event, unnecessary to the disposition of the Motion;

**NOTING** the Prosecution’s submission in its Motion that the Reply only addresses the Public Redacted Response rather than the full Confidential Response and that, as a result, it is misleading, particularly in relation to the claim that the Prosecution failed to identify the portion of the trial transcript which suggests that the “new fact” was raised at trial;<sup>3</sup>

**NOTING** that the Prosecution seeks leave to clarify the reference it made to that portion of the trial transcript in the Confidential Response “in order that the Appeals Chamber and Mr. Radić may properly assess the Prosecution’s argument that the Request does not amount to ‘new facts’”;<sup>4</sup>

**CONSIDERING** that a party is not provided with the right to file a sur-reply because “[a] respondent, in his response to a motion, must give his full answer to the issues raised in that

<sup>1</sup> Order of the Presiding Judge Appointing a Pre-Review Judge, 5 May 2006.

<sup>2</sup> Case No. IT-95-30/1-A.

<sup>3</sup> Motion, paras. 3, 5.

<sup>4</sup> Motion, para. 7.

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motion” and that “except where the interests of justice require, he will not be permitted the opportunity to give further answers or to elaborate the answers already given to those issues;”<sup>5</sup>

**CONSIDERING** however that leave to file a sur-reply will usually be granted “where the reply raises a new issue to which the respondent has not already had the opportunity to respond”<sup>6</sup> in light of the fact that the proper scope of a reply is limited to responding to matters raised in a response and may not contain new material;<sup>7</sup>

**CONSIDERING** that it is not sufficient that a matter raised in the reply may merely “call” for a further response;<sup>8</sup>

**CONSIDERING** that Counsel for Mlado Radić did not receive the Confidential Response until 5 May 2006 and therefore, did not have the opportunity to address the Confidential Response in the Reply;<sup>9</sup>

**FINDING** that, in any event, Mlado Radić’s failure to specifically address the Confidential Response in his Reply does not raise any new issue and therefore, does not exceed the proper scope for replies established in the jurisprudence of the International Tribunal;

**FINDING** further that the filing of a sur-reply would not assist the Appeals Chamber in its assessment of the Prosecution’s argument that the Request does not raise “new facts” and is therefore not required in the interests of justice;

<sup>5</sup> *Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić & Dragoljub Prcać*, Case No. IT-98-30/1-A, Decision on Application by Prosecution for Leave to File Further Response, 6 June 2003, (“*Kvočka et al. Decision*”), para. 2. For an example of where the Appeals Chamber found it was in the interests of justice to grant leave to file a sur-reply, see *Prosecutor v. Pavle Strugar, Miodrag Jokić & Others*, Case No. IT-01-42-AR72, Decision on “Prosecution’s Application for Leave to File a Reply to the Defence’s Reply to the Prosecution’s Response to the Defence’s Brief on Interlocutory Appeal on Jurisdiction,” 12 September 2002, p. 2 (“[T]he Practice Direction does not provide for further filing of briefs but [...] under Section VII, headed “Variation of Procedure”, paragraph 16 explicitly states that the ‘provisions of this Practice Direction are without prejudice to any such orders or decisions that may be made by the Appeals Chamber’[...]” and “CONSIDERING that [...] it may assist the Appeals Chamber to have further clarification of the Issue insofar as it relates to the current appeal [...] the Prosecutor may file a brief document clarifying the Issue [...]”).

<sup>6</sup> *Kvočka et al. Decision*, para. 2. See also *Prosecutor v. Nikola Šainović & Dragoljub Ojdanić*, Case No. IT-99-37-AR65, Decision on Provisional Release, 30 October 2002, para. 5 (“Neither the Rules nor the practice of the Tribunal provide a party with a right to respond to a reply, although leave will usually be granted to file a further response where the reply raises a new issue.”).

<sup>7</sup> *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Prosecution’s Motion to Strike Portion of Reply, 30 September 2002, p. 3.

<sup>8</sup> *Kvočka et al. Decision*, para. 2.

<sup>9</sup> The Registry of the International Tribunal originally confirmed receipt of the Confidential Response by Counsel for Mlado Radić on 7 April 2006. However, on 5 May 2006 the Registry was informed that Counsel for Mlado Radić had in fact not received the Confidential Response. The Registry informed the Pre-Review Judge that receipt of the Confidential Response by Counsel for Mlado Radić was finally confirmed on 5 May 2006.

**ON THE BASIS OF THE FOREGOING,**

**DISMISS** the Motion in its entirety and **ALLOW** Counsel for Mlado Radić to file an Amended Reply in light of the Confidential Response, if they deem it is necessary to do so, within four days of the issuance of this Decision.

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

Done this 9th day of May 2006,  
At The Hague,  
The Netherlands.



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Judge Fausto Pocar  
Pre-Review Judge

**[Seal of the International Tribunal]**