

**UNITED  
NATIONS**



International Tribunal for the Prosecution of  
Persons Responsible for Serious Violations of  
International Humanitarian Law Committed in  
the Territory of Former Yugoslavia since 1991

Case No. IT-95-11-T

Date: 28 November 2006

Original: English

**IN TRIAL CHAMBER I**

**Before:** Judge Bakone Justice Moloto, Presiding  
Judge Janet Nosworthy  
Judge Frank Höpfel

**Registrar:** Mr. Hans Holthuis

**Decision of:** 28 November 2006

**PROSECUTOR**

**v.**

**MILAN MARTIĆ**

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**DECISION ON PROSECUTION MOTION TO ADMIT  
EVIDENCE IN REBUTTAL PURSUANT TO RULE 92  
BIS WITH ANNEXES A, B, AND C**

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**The Office of the Prosecutor:**

Mr. Alex Whiting  
Ms. Anna Richterova  
Mr. Colin Black  
Ms. Nisha Valabhji

**Counsel for the Accused:**

Mr. Predrag Milovančević  
Mr. Nikola Perović

**TRIAL CHAMBER I** (“Trial 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 since 1991 (“Tribunal”);

**BEING SEISED** of the Prosecution Motion to Admit Evidence in Rebuttal Pursuant to Rule 92 *bis* with Annexes A, B, and C, filed on 16 November 2006 (“Motion”), wherein the Prosecution requests the admission into evidence of the Rule 92 *bis* statement of Prosecution witness Peter Galbraith (Annex A), and of two portions of the testimony of Stjepan Mesić in the case of *Prosecutor v. Slobodan Milošević* (Annexes B and C, respectively) (“proposed materials”) as rebuttal evidence pursuant to Rules 85(A)(iii) and 92 *bis* of the Rules of Procedure and Evidence (“Rules”);

**NOTING** the Prosecution’s arguments in the Motion;

**NOTING** the Defence’s Response to Prosecution Motion to Admit Evidence in Rebuttal, filed on 22 November 2006 (“Response”), wherein the Defence objects to the admission of the proposed materials on the ground that:

they do not relate to issues of such significance so as to allow their admission in rebuttal, and because the Prosecution could have used them in cross-examination of Defence witnesses to confront their evidence which it now seeks to rebut,

and requests, should the Trial Chamber decide “that the proposed materials relate to issues of such significance so as to allow their admission”, that Peter Galbraith and Stjepan Mesić be called for cross-examination;<sup>1</sup>

**NOTING** the standard established by the Appeals Chamber for the admission of rebuttal evidence pursuant to Rule 85(A)(iii) of the Rules, which requires that the evidence “must relate to a significant issue arising directly out of defence evidence which could not reasonably have been anticipated”;<sup>2</sup>

**CONSIDERING** that the Prosecution is under a duty to “adduce all evidence critical to the proving of the guilt of the accused by the close of its case”,<sup>3</sup> and that the Prosecution “cannot call additional evidence merely because its case has been met by certain evidence to contradict it”;<sup>4</sup>

<sup>1</sup> Response, p. 2.

<sup>2</sup> *Prosecutor v. Zejnil Delalić, Zdravko Mucić also known as “Pavo”, Hazim Delić, Esad Landžo also known as “Zenga” (Čelebići)*, Case No. IT-96-21-A, Appeal Judgement, 20 Feb 2001, para. 273.

<sup>3</sup> *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Decision on Prosecution’s Motion to Admit Evidence in Rebuttal and Incorporated Motion to Admit Evidence under Rule 92 *bis* in Its Case on Rebuttal and to Re-open Its Case for a Limited Purpose, 13 Sep 2004, para. 6 (“*Blagojević Decision*”). See also *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1, Confidential Decision on Prosecutor’s Motion in Respect of Rebuttal Witness and

**CONSIDERING** that “only highly probative evidence on a significant issue in response to Defence evidence and not merely reinforcing the Prosecution case in chief will be permitted” and that “[e]vidence on peripheral and background issues will be excluded;”<sup>5</sup>

**CONSIDERING**, in relation to the Rule 92 *bis* statement of Peter Galbraith, that the “issue” of “alleged bias of witness”,<sup>6</sup> in relation to which the Prosecution seeks the admission of the statement, did not arise during the Defence case when the photograph in question was admitted into evidence,<sup>7</sup> but that it arose during the Prosecution case during the cross-examination of Peter Galbraith when the Defence challenged the witness’ credibility;<sup>8</sup>

**NOTING** that according to Annex A to the Motion the Rule 92 *bis* statement of Peter Galbraith was taken in The Hague on 12 September 2006, in the presence of, *inter alia*, the Senior Trial Attorney of the Prosecution in the present case, and that the issue in relation to which the Prosecution now seeks admission of the statement was again discussed in court on 13 September 2006 with Defence witness Lazar Macura,<sup>9</sup> and **CONSIDERING** that the Prosecution was in a position on 13 September 2006 to bring up this issue and the Rule 92 *bis* statement, something which the Prosecution refrained from doing;

**CONSIDERING**, in relation to the two portions of the testimony of Stjepan Mesić in *Prosecutor v. Slobodan Milošević*, that while these issues may have arisen directly out of Defence evidence during the testimony of Ratko Ličina and Mile Dakić, respectively, neither of them is a significant issue, and that as the Prosecution must have had the relevant testimony at hand it ought to have brought up the material during the respective cross-examination of Ratko Ličina and Mile Dakić;

**FINDING** that the proposed materials do not meet the standard for admission as rebuttal evidence pursuant to Rule 85(A)(iii);

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Witness Protection Issued Pertaining to Disclosure and Testimony by the Witness, 19 Jun 1998, p. 2: “it would be a misuse of this right to permit it to be used to adduce evidence that should properly have been proved as part of the Prosecution case against the Accused”.

<sup>4</sup> *Čelebići* Appeal Judgement, para. 275.

<sup>5</sup> *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Oral Decision of 18 Oct 2000, T. 26647. *See also* “*Blagojević* Decision”, para. 6.

<sup>6</sup> Motion, para. 7.

<sup>7</sup> Hearing, 13 Sep 2006, T. 8256, oral decision admitting the photograph as Ex. 942.


<sup>8</sup> Hearing, 26 Apr 2006, T. 3851 onwards.

<sup>9</sup> Hearing, 13 Sep 2006, T. 8236 onwards.

**PURSUANT TO** Rule 85(A)(iii),

**DENIES** the Motion.

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



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Judge Bakone Justice Moloto  
Presiding

Dated this twenty-eighth day of November 2006

At The Hague

The Netherlands

**[Seal of the Tribunal]**