



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-02-60-R
Date: 15 July 2008
Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Mr. Hans Holthuis

Decision of: 15 July 2008

VIDOJE BLAGOJEVIĆ

v.

PROSECUTOR

PUBLIC

DECISION ON VIDOJE BLAGOJEVIĆ'S REQUEST FOR REVIEW

Counsel for Vidoje Blagojević:

Mr. Vladimir Domazet

The Office of the Prosecutor:

Mr. Norman Farrell
Ms. Antoinette Issa
Ms. Marie-Ursula Kind
Mr. Matteo Costi

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 Since 1991 (“Appeals Chamber” and “International Tribunal”, respectively) is seized of the “Request for Review of Judgement from 9.May 2007 [sic]” filed by Vidoje Blagojević (“Blagojević”) on 6 May 2008 (“Motion”). The Prosecution responded to the Motion on 10 June 2008.¹

BACKGROUND

2. On 17 January 2005, Trial Chamber I rendered its Judgement in the case of *Prosecutor v. Vidoje Blagojević and Dragan Jokić*² and on 9 May 2007, the Appeals Chamber issued its Judgement on appeals filed by the Office of the Prosecutor (“Prosecution”), Blagojević and Dragan Jokić.³ In his Motion, Blagojević requests that, pursuant to Article 26 of the Statute of the International Tribunal (“Statute”) and Rule 119 of the Rules of Procedure and Evidence of the International Tribunal (“Rules”), the Appeals Chamber review the Trial Judgement and the Appeal Judgement on the ground that his fundamental human rights, and in particular, his right to a defence, were violated.⁴ He further submits that a review is required in light of the Prosecution evidence tendered in the *Prosecutor v. Popović et al.* trial,⁵ and in light of the fact that Momir Nikolić did not testify in that trial.⁶

3. On 9 June 2008, Blagojević requested the disqualification and withdrawal of all of the Judges assigned to the Bench for the Motion.⁷ On 16 June 2008, the President of the International Tribunal, and Presiding Judge in this case, submitted a report referring the matter to the Vice-President pursuant to Rules 15(B)(iv) and 21 of the Rules. On 2 July 2008, the Vice-President dismissed Blagojević’s Request for Disqualification.⁸

¹ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Prosecution’s Response to Vidoje Blagojević’s Request for Review of Judgement, 10 June 2008 (“Response”). However, given that the Response has been filed out of time, and the Prosecution has made no attempt to demonstrate good cause for its late admission, as required under Rule 127(B) of the Rules of Procedure and Evidence, the Appeals Chamber has not considered the submissions contained in this filing. See *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.2, Decision on Joint Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008, para. 7; *Prosecutor v. Milan Lukić et al.*, Case No. IT-98-32/1-AR65.1, Decision on Defence Appeal Against Trial Chamber’s Decision on Sredoje Lukić’s Motion for Provisional Release, 16 April 2007, para. 12.

² *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Judgement, 17 January 2005 (“Trial Judgement”).

³ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Judgement, 9 May 2007 (“Appeal Judgement”).

⁴ Motion, pp. 2-4.

⁵ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T (“Popović”).

⁶ Motion, para. 4.

⁷ *Prosecutor v. Vidoje Blagojević*, Case No. IT-02-60-R, Mr. Vidoje Blagojević Request for Disqualifications of the President and Judges of the Appeals Chamber pursuant to Rule 15 of the Rules of Procedure and Evidence, 9 June 2008 (“Request for Disqualification”).

⁸ *Prosecutor v. Vidoje Blagojević*, Case No. IT-02-60-R, Decision on Motion for Disqualification, 2 July 2008.

DISCUSSION

4. The Appeals Chamber recalls that review proceedings are governed by Article 26 of the Statute and Rules 119 and 120 of the Rules. Review of a final judgement is an exceptional procedure and not an additional opportunity for a party to re-litigate arguments that failed at trial or on appeal.⁹ In order for review to be granted, the moving party must show that: (1) there is a new fact; (2) the new fact was not known to the moving party at the time of the original proceedings; (3) the lack of discovery of that new fact was not the result of a lack of due diligence by the moving party; and (4) the new fact could have been a decisive factor in reaching the original decision.¹⁰ In wholly exceptional circumstances, the Appeals Chamber may nonetheless grant review, even where the new fact was known to the moving party at the time of the original proceedings or had not been discovered because of the moving party's lack of due diligence, if ignoring such new fact would result in a miscarriage of justice.¹¹

5. The Appeals Chamber further recalls that the term "new fact" refers to new evidentiary information supporting a fact that was not in issue during the trial or appeal proceedings.¹² The requirement that the fact was not in issue during the proceedings means that "it must not have been among the factors that the deciding body could have taken into account in reaching its verdict."¹³ Essentially, the moving party must show that the Chamber did not know about the fact in reaching its decision.¹⁴

⁹ *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-03-R, Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification, 8 December 2006 ("*Rutaganda* Review Decision"), para. 8. See also *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Third Request for Review, 23 January 2008 ("*Niyitegeka* Review Decision"), para. 13; *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000 ("*Barayagwiza* Review Decision"), para. 43.

¹⁰ *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-R, Decision on Prosecutor's Request for Review or Reconsideration (Public Redacted Version), 23 November 2006 ("*Blaškić* Review Decision"), para. 7; *Prosecutor v. Mlado Radić*, Case No. IT-98-30/1-R.1, Decision on Defence Request for Review (Public Redacted Version), 31 October 2006 ("*Radić* Review Decision"), paras. 9-11; *Prosecutor v. Zoran Žigić*, Case No. IT-98-30/1-R.2, Decision on Zoran Žigić's Request for Review under Rule 119, 25 August 2006, para. 8; *Prosecutor v. Duško Tadić*, Case No. IT-94-1-R, Decision on Request for Review, 30 July 2002 ("*Tadić* Review Decision"), para. 20. See also *Rutaganda* Review Decision, para. 8; *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-A, Decision on Aloys Simba's Requests for Suspension of Appeal Proceedings and Review, 9 January 2007, para. 8; *Niyitegeka* Review Decision, para. 13.

¹¹ *Blaškić* Review Decision, para. 8; *Radić* Review Decision, para. 11; *Tadić* Review Decision, paras. 26-27. See also *Rutaganda* Review Decision, para. 8; *Niyitegeka* Review Decision, para. 13.

¹² *Tadić* Review Decision, para. 25; *Blaškić* Review Decision, paras. 14-15. See also *Rutaganda* Review Decision, para. 9; *Niyitegeka* Review Decision, para. 14.

¹³ *Blaškić* Review Decision, paras. 14-15; *Tadić* Review Decision, para. 25. See also *Rutaganda* Review Decision, para. 9; *Niyitegeka* Review Decision, para. 6.

¹⁴ *Blaškić* Review Decision, para. 14. See also *Rutaganda* Review Decision, para. 9; *Niyitegeka* Review Decision, para. 14.

6. Blagojević submits that he was denied the right to a fair trial because his counsel lacked his trust and worked against his interests,¹⁵ and because his counsel did not introduce relevant evidence, including a military expert's report.¹⁶ He further submits that his trial was not fair because he was denied the right to appear as a witness in his defence.¹⁷

7. The Appeals Chamber notes that the arguments relating to the fairness of Blagojević's trial on the basis that he was denied the right to counsel of his choice, the right to competent counsel, and the right to appear as a witness in his defence were raised by Blagojević in his appeal against the Trial Judgement and were rejected in the Appeal Judgement.¹⁸ In the latter, the Appeals Chamber specifically considered the argument that Blagojević's counsel worked against his interests and lacked his trust,¹⁹ the argument about the selection of the military expert,²⁰ and the argument that Blagojević was denied the right to testify in his own trial.²¹ The Appeals Chamber notes, moreover, that several of these arguments had been previously raised and disposed of in an interlocutory appeal, thus illustrating that the arguments now raised by Blagojević have been thoroughly considered during the proceedings against him.²² The Appeals Chamber reiterates that review proceedings are not an opportunity to re-litigate unsuccessful appeals or requests.²³ Therefore, the Appeals Chamber is not satisfied that these arguments relate to a new fact which would justify a review of the Trial or Appeal Judgements. Accordingly, the Appeals Chamber dismisses Blagojević's submissions regarding the alleged violation of his right to a fair trial.

8. Blagojević further submits that the Appeals Chamber should review the Trial and Appeal Judgements on the basis that none of the Prosecution evidence in *Popović*, which covers the same period of time and the same criminal acts as those for which he was convicted in Potočari, Bratunac, and at the "Vuk Karadžić" school, implicates him.²⁴ Further, Blagojević submits that

¹⁵ Motion, paras. 2-3.

¹⁶ Motion, p. 4. A military expert's report was in fact filed by Blagojević during the trial, although the expert did not testify. Ex. D209/1a, Report titled, "Assessment of the Analytical Shortcomings of Richard Butler's Srebrenica Military Narrative and Testimony" by Marc Schifanelli, 24 May 2004. Blagojević, however, objected on appeal to the selection of this expert and about the fact that he was not able to testify. *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Defence of Accused Mr. Vidoje Blagojević Brief on Appeal (Partly Confidential – Annex A), 30 October 2005 ("Blagojević Appeal Brief"), paras. 2.19-2.20; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Defence of Vidoje Blagojević Response to Prosecution Response to Appeal Brief of Vidoje Blagojević (Confidential), 27 December 2005 ("Blagojević Reply Brief"), paras. 2.32-2.37; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, AT. 5 December 2005 pp. 97, 123.

¹⁷ Motion, p. 4.

¹⁸ See Appeal Judgement, paras. 12-30.

¹⁹ Appeal Judgement, paras. 12-21.

²⁰ Appeal Judgement, paras. 24-25. See Blagojević Appeal Brief, paras. 2.19-2.20; Blagojević Reply Brief, paras. 2.32-2.37; AT. 5 December 2005 pp. 97, 123.

²¹ Appeal Judgement, paras. 26-29.

²² *Prosecutor v. Vidoje Blagojević*, Case No. IT-02-60-AR73.4, *Ex Parte* and Confidential Reasons for Decisions on Appeal by Vidoje Blagojević to Replace his Defence Team, 7 November 2003.

²³ *Rutaganda* Review Decision, para. 8; *Niyitegeka* Review Decision, para. 14; *Barayagwiza* Review Decision, para. 43.

²⁴ Motion, p. 4.

Momir Nikolić, on whose testimony the Trial Chamber relied in his case, “refused to testify and did not testify as the witness of the Prosecution” in *Popović*, and that it should now be established if Momir Nikolić still accepts the testimony he provided in Blagojević’s case.²⁵

9. The Appeals Chamber considers that the issues which Blagojević seeks to raise in support of review proceedings, namely his criminal liability for the crimes for which he was convicted in Potočari, Bratunac, and at the “Vuk Karadžić” school, and the credibility of witness Momir Nikolić, were issues that were fully considered during both the trial and the appeal proceedings.²⁶ The fact that the same events were the subject of Prosecution evidence in another case, and that a witness who testified in Blagojević’s trial may have refused to testify in another trial do not constitute “new facts” within the meaning of Rule 119.²⁷ As the jurisprudence of the Appeals Chamber makes clear, evidence of a new fact is evidence of a fact that was not in issue or considered in the original proceedings.²⁸ As the information put forward by Blagojević in his Motion relates to issues that have already been considered in both the trial and appeal proceedings, he has failed to demonstrate how such information constitutes “new facts” for the purposes of review. Moreover, neither Blagojević’s complaint before the European Court of Human Rights, nor the jurisprudential developments in the *Stanisić* case, constitute new evidentiary information as required for a “new fact” under Rule 119.

DISPOSITION

For the foregoing reasons, the Appeals Chamber,

DISMISSES the Motion;

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



Judge Fausto Pocar
Presiding

Dated this 15th day of July 2008,
at The Hague, The Netherlands.

[Seal of the International Tribunal]

²⁵ Motion, p. 4.

²⁶ Trial Judgement, paras. 24, 262, 472, 495; Appeal Judgement, paras. 80-83 (credibility of Momir Nikolić); Trial Judgement, pp. 12-148, 149-185, 202-283; Appeal Judgement, pp. 14-55 (Blagojević’s liability for crimes committed in Potočari, Bratunac, and at the “Vuk Karadžić” school).

²⁷ *Radić* Review Decision, para. 22; *Prosecutor v. Drago Josipović*, Case No. IT-95-16-R.2, Decision on Motion for Review, 7 March 2003, para. 18; *Prosecutor v. Hazim Delić*, Case No. IT-96-21-R-R119, Decision on Motion for Review, 25 April 2002, paras. 10-11.

²⁸ *Radić* Review Decision, para. 22. See also *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-R, Decision on Request for Review, 30 June 2006, para. 12.