IT-95-13/1-R.1
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14 July 2010

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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-95-13/1-R.1
		Date:	14 July 2010
		Original:	English

BEFORE THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Andrésia Vaz

Registrar: **Mr. John Hocking**

Decision of: **14 July 2010**

PROSECUTOR

v.

VESELIN ŠLJIVANČANIN

PUBLIC

DECISION WITH RESPECT TO VESELIN ŠLJIVANČANIN'S APPLICATION FOR REVIEW

The Office of the Prosecutor:

Ms. Helen Brady
Mr. Paul Rogers

Counsel for Veselin Šljivančanin:

Mr. Novak Lukić
Mr. Stéphane Bourgon

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 "Tribunal", respectively):

RECALLING that the Appeals Chamber is seised of the "Application on Behalf of Veselin Šljivančanin for Review of the Appeals Chamber Judgment of 5 May 2009", filed by Veselin Šljivančanin ("Šljivančanin") on 28 January 2010 ("Review Motion");

NOTING the public redacted "Prosecution Response to Šljivančanin's Application for Review", filed by the Office of the Prosecutor ("Prosecution") on 9 March 2010 ("Response"), and the "Reply to Prosecution Response to Šljivančanin's Application for Review", filed by Šljivančanin on 29 March 2010;

NOTING that the Appeals Chamber issued a judgement on 5 May 2009, which, *inter alia*, upheld Šljivančanin's conviction for aiding and abetting torture as a violation of the laws or customs of war and added, Judges Pocar and Vaz dissenting, a new conviction for aiding and abetting murder as a violation of the laws or customs of war;[1]

NOTING that the Review Motion asserts that Miodrag Panić ("Panić") is prepared to offer testimony that invalidates Šljivančanin's conviction for aiding and abetting murder as a violation of the laws or customs of war, and that the content of the conversation that would be the subject of this testimony constitutes a "new fact" in the context of Rule 119 of the Rules of Procedure and Evidence of the Tribunal ("Rules");[2]

NOTING that the Review Motion seeks, *inter alia*, review of the *Mrkšić and Šljivančanin* Appeal Judgement and the quashing of Šljivančanin's conviction for aiding and abetting murder as a violation of the laws or customs of war;[3]

NOTING that the Response contends that the Review Motion should be dismissed, as the "witness statement Šljivančanin seeks to introduce does not establish a 'new fact'" and was previously known to Šljivančanin or was discoverable through due diligence, and further contends that dismissing the Review Motion would not occasion a miscarriage of justice;[4]

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[1] *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Judgement, 5 May 2009 ("*Mrkšić and Šljivančanin* Appeal Judgement"), paras 103, 211, pp. 169-170.
[2] Review Motion, paras 9-10, 30-38, Attachment A.
[3] *Id.*, para. 39.
[4] Response, paras 4, 40-41.

RECALLING the "Scheduling Order for Hearing Regarding Veselin Šljivančanin's Application for Review", issued by the Appeals Chamber on 20 April 2010 ("Scheduling Order"), Judge Pocar dissenting, which convened an oral hearing on 3 June 2010 ("Hearing");[5] the "Order Responding to Prosecution's Motion on Hearing Management and Revised Scheduling Order", issued by the Appeals Chamber on 21 May 2010 ("Revised Scheduling Order"), Judge Pocar dissenting;[6] and the testimony and arguments presented during the Hearing;[7]

CONSIDERING that, pursuant to Article 26 of the Statute of the Tribunal ("Statute") and Rules 119 and 120 of the Rules, for a party to succeed in persuading the Appeals Chamber to review a judgement, the party must first satisfy the following cumulative requirements:

a) there is a new fact;

b) the new fact was not known to the moving party at the time of the original proceedings;

c) the failure to discover the new fact was not due to a lack of due diligence on the part of the moving party; and

d) the new fact could have been a decisive factor in reaching the original decision;[8]

CONSIDERING that a "new fact" within the meaning of Article 26 of the Statute and Rules 119 and 120 of the Rules consists of "new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings";[9]

CONSIDERING that what is relevant in evaluating an application for review is not "whether [a] new fact already existed before [...] original proceedings or during such proceedings" but, rather, "whether the deciding body and the moving party knew about the fact or not" in arriving at its decision;[10]

CONSIDERING that, in "wholly exceptional circumstances", review may still be permitted even though the "new fact" was known to the moving party or was discoverable by it through the exercise of due diligence if a Chamber is presented with "a new fact that is of such strength that it

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[5] Scheduling Order, p. 1.
[6] Judge Pocar reiterated his dissenting opinion on the Hearing for the same reasons expressed in his dissenting opinion appended to the Scheduling Order. *See* Revised Scheduling Order, p. 3.
[7] Hearing, AT. 3 June 2010, pp. 6-141.
[8] *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-R, Decision on Prosecutor's Request for Review or Reconsideration, 23 November 2006 (public redacted version) ("*Blaškić* Decision"), para. 7. *See also Mladen Naletilić, a.k.a "Tuta" v. Prosecutor*, Case No. IT-98-34-R, Decision on Mladen Naletilić's Request for Review, 19 March 2009 ("*Naletilić* Decision"), para. 10; *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* Decision"), para. 8.
[9] *Blaškić* Decision, para. 14 (citation and quotation marks omitted). *See also id.*, paras 17-18; *Naletilić* Decision, para. 11; *Rutaganda* Decision, para. 9.
[10] *Prosecutor v. Duško Tadić*, Case No. IT-94-1-R, Decision on Motion for Review, 8 August 2002 ("*Tadić* Decision"), para. 25. *See also Naletilić* Decision, para. 11; *Rutaganda* Decision, para. 9.

would affect the verdict"[11] and determines that "review of its judgement is necessary because the impact of the new fact on the decision is such that to ignore it would lead to a miscarriage of justice";[12]

NOTING that Trial Chamber II ("Trial Chamber") made no specific finding regarding the content of a conversation between Šljivančanin and Mile Mrkšić ("Mrkšić") at approximately 8:00 p.m. on 20 November 1991 ("Conversation");

NOTING that in the *Mrkšić and Šljivančanin* Appeal Judgement, the Appeals Chamber made new factual findings regarding the Conversation, reasoning that "Mrkšić must have told Šljivančanin that he had withdrawn the [Yugoslav People's Army ("JNA")] protection from the prisoners of war held at Ovčara",[13] and that the Appeals Chamber relied on these findings to conclude that Šljivančanin possessed the *mens rea* for aiding and abetting murder as a violation of the laws or customs of war;[14]

NOTING that at the Hearing, Panić testified that he was in a position to follow the Conversation and that Mrkšić did not tell Šljivančanin that he had ordered that JNA protection be withdrawn from the prisoners of war held at Ovčara;[15]

CONSIDERING that the Appeals Chamber's factual findings regarding the content of the Conversation were made on the basis of the evidence before it, which did not include the new information provided by Panić;

CONSIDERING that the new information provided by Panić concerning the Conversation constitutes a "new fact" ("Panić New Fact"), that, if proved, could fundamentally alter the balance of evidence relating to this case, eliminating the basis for the *Mrkšić and Šljivančanin* Appeal Judgement's conclusion that Šljivančanin possessed the *mens rea* for aiding and abetting murder as a violation of the laws or customs of war;[16]

CONSIDERING FURTHER that, although the Panić New Fact was discoverable through due diligence by Šljivančanin's counsel, review of the *Mrkšić and Šljivančanin* Appeal Judgement is

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[11] *Tadić* Decision, para. 27 (emphasis added). *See also Rutaganda* Decision, para. 8; *Blaškić* Decision, para. 8.
[12] *Blaškić* Decision, para. 8 (citation omitted). *See also Naletilić* Decision, para. 10; *Rutaganda* Decision, para. 8; *Jean Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000 ("*Barayagwiza* Decision"), paras 63-69.
[13] *Mrkšić and Šljivančanin* Appeal Judgement, para. 62. The Appeals Chamber based its new factual findings on Šljivančanin's testimony at trial. *See id.*
[14] *See id.*, paras 62-63.
[15] Hearing, AT. 3 June 2010, pp. 6-84. *See also* Review Motion, para. 9, Attachment A. The Appeals Chamber notes that Panić had testified broadly on this subject before the Trial Chamber, but that, in context, this testimony was too vague to be determinative absent further specification. *See* Panić Trial Testimony, T. 9 November 2006, p. 14330.
[16] *Cf. Barayagwiza* Decision paras 64-65, 71.

necessary because the impact of the Panić New Fact, if proved, is such that to ignore it *would* lead to a miscarriage of justice;

CONSIDERING that, pursuant to Rule 120 of the Rules, a hearing to consider evidence on the Panić New Fact ("Review Hearing") will be held;

CONSIDERING that the Review Hearing will allow the parties to provide supporting and rebuttal evidence concerning the Panić New Fact and that, before setting the date and structure of the Review Hearing, it is appropriate to consider the scope of evidence, if any, the parties wish to present;[17]

FOR THE FOREGOING REASONS,

GRANTS in part the Review Motion insofar as it requests review of the *Mrkšić and Šljivančanin* Appeal Judgement;

ORDERS the parties to submit in writing, no later than 30 July 2010, a list of evidence and witnesses, if any, each proposes to introduce at the Review Hearing;

FURTHER ORDERS the parties to include with respect to each piece of evidence or witness: (i) a brief description of anticipated relevance; and (ii) the proposed time allocation for any witness;

EMPHASISES to the parties that all evidence they propose to submit must be limited to supporting or casting doubt on the Panić New Fact; and

INFORMS the parties that a scheduling order for the Review Hearing will be issued in due course.

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

Dated this 14th day of July 2010,
At The Hague,
The Netherlands.

Judge Theodor Meron
Presiding

[Seal of the Tribunal]

[17] *Cf.* Rules 54 and 107 of the Rules.