

**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-04-81-A
Date: 3 February 2014

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Carmel Agius
Judge Liu Daqun
Judge Arlette Ramaroson

Registrar: Mr. John Hocking

THE PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

MOTION FOR RECONSIDERATION

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**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

Case No. IT-04-81-A

THE PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

MOTION FOR RECONSIDERATION

A. Overview

1. The Appeals Chamber¹ must reconsider its reversal of Momčilo Perišić's conviction for aiding and abetting murder, inhumane acts, persecutions, and attacks on civilians committed against Bosnian Muslims in Sarajevo and Srebrenica by the Army of Republika Srpska ("VRS").² Reconsideration is necessary to rectify the injustice caused to the tens of thousands of men, women and children killed or injured in Sarajevo and Srebrenica and their families by the Appeals Chamber's application of an erroneous legal standard for aiding and abetting to Perišić's case. Reconsideration is justified in light of the Appeals Chamber's recent holding in the *Šainović* Appeal Judgement that the *Perišić* Appeals Chamber erred in law by requiring, for the first and only time, proof of specific direction as an element of aiding and abetting contrary to the Tribunal's consistent jurisprudence and customary international law.³

¹ On 31 May 2013, Judge Andréia Vaz resigned from her position as Appeals Judge at the ICTY.

² *Prosecutor v. Momčilo Perišić*, Case No.IT-04-81-A, App.Ch., Judgement, 28 February 2013 ("Appeal Judgement"), paras.73-74.

³ *Prosecutor v. Nikola Šainović et al.*, Case No.IT-05-87-A, App.Ch., Judgement, 23 January 2014 ("*Šainović* Appeal Judgement"), para.1650.

B. Cogent Reasons to allow Reconsideration – the Rare and Exceptional

Circumstances of this Case

2. Reconsideration in the rare and exceptional circumstances of this case is the single available option for the Appeals Chamber to address this manifest miscarriage of justice. The ICTY Appeals Chamber has jurisdiction to reconsider its decisions. A chamber's power to reconsider its prior decisions is derived from its inherent responsibility to administer justice and to ensure that its conclusions do not cause prejudice to the parties, and includes the power to reconsider for an error of law.

3. The Prosecution acknowledges that the Appeals Chamber in *Žigić* held that "there is no power to reconsider a final judgement".⁴ In doing so, the Appeals Chamber departed from its previous decision in *Čelebići*⁵ allowing reconsideration where there was a clear error of reasoning in the previous judgement, or the previous judgement was given *per incuriam*, and the judgement of the Appeals Chamber sought to be reconsidered has led to an injustice.⁶ The *Čelebići* Appeals Chamber had reasoned that the Statute entrusts the Tribunal with basic judicial functions to administer justice and with jurisdiction to correct extreme cases of injustice even in the absence of explicit statutory authority.⁷

4. The *Žigić* Appeals Chamber denied reconsideration of final appeal judgements, stating that:

⁴ *Prosecutor v. Zoran Žigić*, Case No.IT-98-30/1-A, App.Ch., Decision on Zoran Žigić's "Motion for Reconsideration of Appeals Chamber Judgement IT-98-30/1-A Delivered on 28 February 2005", 26 June 2006 ("*Žigić* Decision"), para.9. This case-law has been followed in subsequent cases at the Tribunal, see *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No.IT-98-32/1-A, App.Ch., Decision on Sredoje Lukić's Motion Seeking Reconsideration of the Appeal Judgement and on the Application for Leave to Submit an *Amicus Curiae* Brief, 30 August 2013, p.3; *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No.IT-95-13/1-A, App.Ch., Decision on Motion on Behalf of Veselin Šljivančanin Seeking Reconsideration of the Appeal Chamber's Decision of 8 December 2009, 22 January 2010, p.2; *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No.IT-95-13/1-A, App.Ch., Decision on Motion on Behalf of Veselin Šljivančanin Seeking Reconsideration of the Judgement Rendered by the Appeals Chamber on 5 May 2009 – or an Alternative Remedy, 8 December 2009, p.2; *Prosecutor v. Pavle Strugar*, Case No.IT-01-42-Misc.1, App.Ch., Decision on Strugar's Request to Reopen Appeal Proceedings, 7 June 2007, paras.23-25; *Prosecutor v. Tihomir Blaškić*, Case No.IT-95-14-R, App.Ch., Decision on Prosecutor's Request for Review or Reconsideration, 23 November 2006 (public redacted) ("*Blaškić* Decision"), paras.77-80.

⁵ *Prosecutor v. Zdravko Mucić et al.*, Case No.IT-96-21-*Abis*, App.Ch., Judgement on Sentence Appeal, 8 April 2003 ("*Čelebići* Sentencing Judgement"), para.50. See also *Žigić* Decision, Declaration of Judge Shahabuddeen, para.2.

⁶ *Čelebići* Sentencing Judgement, paras.49-50.

⁷ *Čelebići* Sentencing Judgement, para.50. See also *Žigić* Decision, Declaration of Judge Shahabuddeen, para.2.

To allow a person whose conviction has been confirmed on appeal the right to further contest the original findings against them on the basis of mere assertions of errors of fact or law is not in the interests of justice to the victims of the crimes or the convicted person, who are both entitled to certainty and finality of legal judgements.⁸

It reasoned that existing appeal and review proceedings under the Statute provided sufficient safeguards to prevent the prospect of injustice resulting from an erroneous appeal judgement.⁹ However, in *Žigić* and the subsequent *Niyitegeka* decision in the ICTR, Judges Shahabuddeen and Meron recognised that a rare and exceptional case may arise which would fall outside an appeal or review process and which would justify reconsideration to prevent a manifest miscarriage of justice.¹⁰ In his declaration to the *Žigić* decision, Judge Shahabuddeen stated that “the door to the correction of a clear miscarriage of justice should be held open in an institution with the mission of bringing international criminal justice to a region which needs it.”¹¹ Likewise, in his separate opinion in the *Niyitegeka* case before the ICTR, Judge Meron opined that in exceptional cases the Appeals Chamber should depart from *Žigić* “when necessary to avoid a clear miscarriage of justice”.¹²

5. The rare and exceptional circumstances of this case demonstrate cogent reasons to depart from the *Žigić* holding. Reconsideration is the only option for the Appeals Chamber to rectify the manifest miscarriage of justice to the tens of thousands of men, women and children killed or injured in Sarajevo and Srebrenica and their families resulting from the erroneous *Perišić* decision. Reconsideration is necessary because the *Šainović* Appeals Chamber has declared, only 11 months after the *Perišić* Appeal Judgement, that *Perišić*’s acquittals for aiding and abetting serious crimes committed over several years in Sarajevo and Srebrenica were based on a

⁸ *Žigić* Decision, para.9.

⁹ See *Žigić* Decision, para.9; see also *Blaškić* Decision, para.79 (noting that in *Žigić*, “the Appeals Chamber found that the existing appeal and review proceedings under the Statute provide for sufficient guarantees of due process for the parties in a case before the International Tribunal.”); *Žigić* Decision, Declaration of Judge Shahabuddeen, para.3 (“the Appeals Chamber seems to appreciate that there should be some remedy for a miscarriage of justice not treatable by the normal appeal procedures, but considers that a sufficient remedy is available in review proceedings under article 26 of the Statute relating to a ‘new fact’.”).

¹⁰ *Žigić* Decision, Declaration of Judge Shahabuddeen, para.8; *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, App.Ch., Decision on Request for Review, 6 March 2007 (“*Niyitegeka* Decision”), Separate Opinion of Judge Meron, para.4.

¹¹ *Žigić* Decision, Declaration of Judge Shahabuddeen, para.8. See also *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, App.Ch., Decision on Request for Reconsideration of the Decision on Request for Review, 27 September 2006, Declaration of Judge Shahabuddeen, para.4.

¹² *Niyitegeka* Decision, Separate Opinion of Judge Meron, para.4. While Judge Meron was concerned with injustice to an accused, his rationale is equally applicable to the prospect of injustice to the victims resulting from an erroneous appeal judgement.

clearly erroneous legal standard which misconstrued the prevailing law. Reconsideration based on the *Šainović* Appeals Chamber's unequivocal rejection of the *Perišić* Appeals Chamber's articulation of the legal requirements for aiding and abetting, and the interests of justice for the tens of thousands of victims, substantially outweighs *Perišić*'s interest in finality of proceedings. Justice must be restored to the victims. Reconsideration is the only way to this end.

C. A Clear Error of Reasoning

6. The *Šainović* Appeals Chamber unequivocally rejected the *Perišić* Appeals Chamber's approach as wrong in law and reaffirmed that the elements of aiding and abetting consist only of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime (*actus reus*), and knowledge that these acts assist the commission of the offence (*mens rea*).¹³ The *Šainović* Appeals Chamber held that the *Perišić* Appeals Chamber's conclusion that specific direction is an element of aiding and abetting "direct[ly] and material[ly] conflict[ed] with the prevailing jurisprudence on the *actus reus* of aiding and abetting liability and with customary international law in this regard."¹⁴ The *Šainović* Appeals Chamber emphasised that its rejection of specific direction was not new; rather it was the prevailing law of the Tribunal prior to *Perišić*, as most recently pronounced by appeal judgements in *Mrkšić and Sljivančanin* and *Lukić and Lukić*—both of which the *Perišić* Appeals Chamber had misinterpreted when erroneously acquitting *Perišić*.¹⁵

7. Absent that clear error of reasoning, the *Perišić* Trial Chamber's findings on aiding and abetting the VRS's crimes in Sarajevo and Srebrenica could have been affirmed.¹⁶

¹³ *Šainović* Appeal Judgement, paras.1649-1650.

¹⁴ *Šainović* Appeal Judgement, para.1650.

¹⁵ *Šainović* Appeal Judgement, paras.1621-1625. See also *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No.95-13/1-A, App.Ch., Judgement, 5 May 2009, para.159 (holding that "'specific direction' is not an essential ingredient of the *actus reus* of aiding and abetting.") (emphasis added); *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No.IT-98-32/1-A, App.Ch., Judgement, 4 December 2012, para.424 (stating that "[i]n *Mrkšić and Šljivančanin*, the Appeals Chamber has clarified 'that 'specific direction' is not an essential ingredient of the *actus reus* of aiding and abetting' and finds that there is no 'cogent reason' to depart from this jurisprudence.") (citation omitted).

¹⁶ See Appeal Judgement, paras.56 (observing that the Trial Chamber had considered evidence regarding the "volume of assistance in making findings of substantial contribution"), 57 (noting that the evidence demonstrated that the Supreme Defence Council of the Federal Republic of Yugoslavia "directed large-scale military assistance to the general VRS war effort"), 64 (noting the Trial Chamber's findings that large-scale military assistance was provided to the VRS by the Army of

8. The Trial Chamber found that Perišić substantially contributed to murder, inhumane acts, persecutions, and attacks on civilians committed against Bosnian Muslims in Sarajevo and Srebrenica by overseeing the provision of wide-ranging and considerable technical, logistical and personnel assistance to the VRS, including by providing the commanding officers and units that perpetrated those crimes.¹⁷ His assistance included ammunition, weaponry, fuel, technical expertise, repair services, and personnel training,¹⁸ all of which “sustained the very life line of the VRS and created the conditions for it to implement a war strategy that encompassed the commission of crimes against civilians.”¹⁹

9. Perišić provided assistance with the knowledge that the VRS would probably commit crimes and that his assistance would assist in the commission of those crimes.²⁰ For example, with respect to Sarajevo, Perišić knew that one of the strategic objectives of the Bosnian Serb leadership involved the partition of Sarajevo and through public reports and cables and his own intelligence and security organs, became aware of the VRS’s campaign of sniping and shelling against the Sarajevo civilian population.²¹ For Srebrenica, Perišić was aware of the build-up of the eventual VRS attack on Srebrenica and the VRS’s past catalogue of crimes against Bosnian Muslims, including murder, forcible displacement and other inhumane acts as part of a campaign of ethnic cleansing, resulting in his knowledge that the VRS would commit those acts once Srebrenica had fallen under VRS control and subsequently learned of those crimes as they were being perpetrated.²²

10. On the basis of these undisturbed findings by the Trial Chamber, all of the elements for Perišić’s aiding and abetting liability were proven beyond reasonable doubt. However, because the Appeals Chamber did not address Perišić’s other

Yugoslavia which was “administered and facilitated” by Perišić), 68 (noting that “the Trial Chamber considered extensive evidence suggesting that Perišić knew of crimes being committed by the VRS, especially with respect to Sarajevo”); 71 (“The Appeals Chamber has already noted that the Trial Chamber identified evidence of the large scale of VJ assistance to the VRS, as well as evidence that Perišić knew of VRS crimes.”). *See also Prosecutor v. Momčilo Perišić*, Case No.IT-04-81-T, T.Ch., Judgement, 6 September 2011 (“Trial Judgement”), paras.1621-1627, 1632-1649.

¹⁷ Trial Judgement, paras.1007, 1009, 1234-1237, 1594-1602, 1621-1623. *See also Appeal Judgement*, paras.62-64.

¹⁸ Trial Judgement, paras.1621-1627. *See also Appeal Judgement*, para.64.

¹⁹ Trial Judgement, para.1623.

²⁰ Trial Judgement, paras.1636, 1638, 1648. *See also Appeal Judgement*, para.68.

²¹ Trial Judgement, paras.1632-1633, 1636.

²² Trial Judgement, paras.1637-1638, 1648.

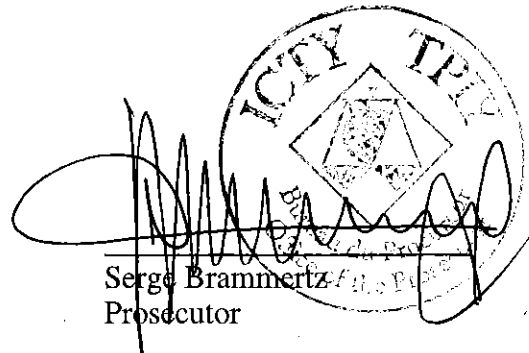
grounds of appeal,²³ the Appeals Chamber should decide Perišić's remaining grounds of appeal on the basis of the correct legal standard and the appeal record.

D. Conclusion

11. The Prosecution requests the Appeals Chamber to reconsider the *Perišić* Appeal Judgement on the basis that cogent reasons exist to depart from *Žigić* to correct a manifest miscarriage of justice to the victims in the rare and exceptional circumstances of this case.

12. In reconsidering Perišić's acquittal for aiding and abetting the crimes in Sarajevo and Srebrenica, the Prosecution requests the Appeals Chamber to decide Perišić's criminal responsibility for aiding and abetting murder, inhumane acts, and persecutions as crimes against humanity, and murder and attacks on civilians as violations of the laws or customs of war (Counts 1-4, 9-12 of the Indictment) in Sarajevo and Srebrenica, including by addressing Perišić's remaining grounds of appeal, on the basis of the correct legal standard.

Word Count: 1,353



Serge Brammertz
Prosecutor

Dated this 3rd day of February 2014
At The Hague, The Netherlands

²³ Perišić's remaining grounds of appeal consist of Grounds 1, 4 to 12, 14 to 17 and parts of Grounds 2 and 3. *See* Appeal Judgement, para.74.