THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-04-81-A

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Carmel Agius
Judge Liu Daqun
Judge Arlette Ramarosan
Judge William H. Sekule

Registrar: Mr. John Hocking

Date Filed: 13 February 2014

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC WITH ANNEX

MOMČILO PERIŠIĆ'S RESPONSE TO MOTION FOR RECONSIDERATION FILED BY THE PROSECUTION

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MOMČILO PERIŠIĆ'S RESPONSE TO MOTION FOR RECONSIDERATION FILED BY THE PROSECUTION

I. Introduction

1. The Prosecution filed a Motion for Reconsideration on 3 February 2013 (hereinafter "Motion")[1] seeking reconsideration of the acquittal of Momčilo Perišić by the Appeals Chamber on 28 February 2013. The Motion argues that since the Appeals Chamber in *Šainović*[2] decided that "specific direction" is not an element of aiding and abetting, the *Perišić* acquittal must be reconsidered as the *Perišić* Chamber held that specific direction is an element of aiding and abetting.

2. The Motion should be dismissed for a number of reasons: (1) the acquittal in *Perišić* is a final judgement. The Appeal Chamber does not have the power to reconsider final judgements; indeed, the Prosecution concedes[3] that *Žigić* unequivocally holds that "there is no power to reconsider a final judgment"[4]; (2) the Prosecutor had a full and fair opportunity to litigate all legal and factual issues in *Perišić* at the time of the trial and appellate proceedings in that case and suffered no miscarriage of justice in the course of those proceedings; (3) all factual and legal issues raised in the Motion

[1] *Prosecution v. Momčilo Perišić, Case No. IT-81-04*-A, Motion for Reconsideration , 3 February 2014.
[2] *Prosecutor v. Nikola Šainović et al.,* Case No.IT-05-87-A, Judgment, Appeals Chamber, 23 January 2014 para. 1650 ("Šainović AC Judgement").
[3] Motion para 3.
[4] *Prosecutor v. Zoran Žigić*, Case No. IT-98-301/1-A, Decision on Zoran Žigić's Motion for Reconsideration of Appeals Chamber's Judgment, 26 June 2006 ("Žigić Decision"), para 9; See also *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, 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 ("Lukić Decision"); *Prosecutor v. Mile Mrksić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, 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 Mrksić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, 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 ("Šljivančanin Decision"); *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-99-52A-R, Decision on Jean-Bosco Barayagwiza's motion for Review and/or Reconsideration of the Appeal Judgement of 28 November 2007, 22 June 20009, paras 20-21 ("Barayagwiza Decision"); *Ferdinand Nahimana v. The Prosecutor*, Case No: ICTR-99-52B-R, Decision on Ferdinand Nahimana's "Notice of Application for Reconsideration of Appeal Decision Due to Factual Errors Apparent on the Record", 21 April 2008, p.2 ("Nahimana Decision"); *Hassan Ngeze v. The Prosecutor*, Case No. ICTR-99-52-R, Decision on Hassan Ngeze's Motion and Request Related to Reconsideration, 31 January 2008, p.3 ("Ngeze Decision"); *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-Misc.1, Decision on Strugar's Request to Reopen Appeal Proceedings, 7 June 2007, paras 23-25 ("Strugar Decision"); *Prosecutor v, Tihomir Blaskić*, Case No. IT-95-14-R, Decision on Prosecutor's Request for Review or Reconsideration, 23 November 2006, paras 79-80 ("Blaskić Decision"); *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Decision on Request for Review, 7 March 2006, Meron's Separate Opinion para 4. *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Reconsideration of the Decision on Request for Review, 27 September 2006, p.1.

were thoroughly litigated and considered during the trial and on appeal in *Perišić*;[5] (4) the Prosecution has not presented any legally cognizable reason for the Appeal Chamber to depart from the *Žigić* decision or to depart from the final judgment of acquittal in *Perišić*; and (5) a Motion seeking reconsideration of a final judgement of *acquittal* is in direct contravention of the principles of *res judicata* and *ne bis in idem*; principles recognized and embraced in domestic human rights law and related jurisprudence. [6]

3. It would be a dangerous incursion into the rights of the accused to deny a person before the ICTY the protections afforded under international legal instruments and in domestic criminal jurisdictions. A failure to uphold these rights would undermine the integrity of the ICTY and adversely affect the credibility of international criminal justice generally. For these reasons and based on the arguments set forth below the Prosecution Motion for Reconsideration must be denied.

II. The Prosecutor's Disagreement With The Holding In Perišić Does Not Constitute Grounds For Reconsideration

4. Before reaching the legal merits of the Motion Mr. Perišić points out the objective reality of the reason why the Motion has been filed. The Prosecution disagrees with the outcome in *Perišić* including the finding that conviction for aiding and abetting requires proof of specific direction. Since *Perišić* was decided, a different Appeal Chamber panel, in a different case, involving different operative facts than *Perišić* has found that specific direction is not an element of aiding and abetting liability.[7]

5. Given that subsequent development the Prosecution now seeks to retroactively relitigate issues already finally decided in *Perišić* by recycling the same arguments that were raised and rejected in *Perišić* regarding "specific direction."[8] Doing so is in clear violation of the settled jurisprudence in *Žigić*. It is also entirely contrary to the position the Prosecution has consistently taken in motions for reconsideration brought

[5] See Chart-Annex A.
[6] The International Covenant on Civil and Political Rights ("ICCPR") Article 14(7), The European Convention of Human Rights ("ECHR") Protocol 7 Art. 4, Statute of the Tribunal, article 10.
[7] Šainović AC Judgement para 1650.
[8] See Annex A.

by convicted accused seeking reconsideration in which the Prosecution has adamantly maintained the law requires finality of judgements. [9]

6. Here the Prosecution is also seeking reconsideration of a final judgement of *acquittal* apparently for the purpose of relitigating the case under an interpretation of the law of aiding and abetting which is less favorable to the accused than the standards set forth in *Perišić.* That objective directly violates the principle of *ex post facto* application of the law and the principle of *in favor rie*, both recognized as corner stones of fundamental fairness in criminal proceedings. A change in the law cannot be applied retroactively to the detriment of the accused. More particularly it would be contrary to the principles just mentioned to apply a subsequent interpretation or application of the law to a person's detriment after a final judgment of acquittal.

III. A Dispute between Co-Equal Chambers Does Not Constitute a Rare and Exceptional Circumstance nor is it Indicative of a Clear Error of Reasoning

7. It is the Prosecutor's position, in arguing that reconsideration should be granted, that this case constitutes a "rare and exceptional" case, such as that envisioned in the separate declaration in the *Žigić* case, which would permit reconsideration of a final judgement so as to avoid a miscarriage of justice.[10] It does not.

8. In this case the panel of appellate judges in *Šainović* disagreed with the panel of appellate judges in the *Perišić* case on the question of whether "specific direction" was an element of aiding and abetting liability. That point of law also divides legal scholars and continues to be a subject of debate among domestic and international criminal law practitioners. In fact, there are dissenting opinions in both *Perišić* and *Šainović*.[11]

9. The existence of divergent views on the same legal issue does not reflect a "clear error of reasoning" in *Perišić* as argued by the OTP.[12] It is not a basis for reconsideration.

[9] See *supra* fn 4 (excluding Blaskić in which the OTP sought and was denied reconsideration. See Blaskić Decision paras 77 – 80).
[10] Motion para 4 and Žigić Decision, Declaration of Judge Shahabuddeen, para 8.
[11] In Šainović, Judge Tuzmukhamedov, opined that it was neither necessary nor appropriate to address specific direction in the context of Lažarević's appeal questioning whether the Majority's position was dispositive of its decision or "is made *obiter dicta*". See para 44, Šainović AC Judgement, Dissenting Opinion, paras 40-48.
[12] Motion para 6-7.

10. In fact, the Prosecution recently relied on the *Perišić* analysis of aiding and abetting in arguing against a motion for reconsideration filed in the *Lukić* case, stating:

> Lukic's reliance on the recent *Perišić* appeals judgment overlooks the *Perišić* Appeals Chambers express discussion of the *Lukic* case in reaching its conclusion that the law on aiding and abetting has remained unchanged. Furthermore, *Perišić* expressly identified Lukic as a "proximate" aider and abetter for which "specific direction" [was] demonstrated implicitly through discussion of other elements of aiding and abetting[13].

11. The Appeals Chamber has repeatedly held that the Statute of the Tribunal only provides "for a right of appeal and a right of review but not for a second right of appeal by the avenue of reconsideration of a final judgement".[14]

12. The Prosecution fails to recognize or is consciously ignoring the structural reality of the two-tier system of case resolution at the ICTY. [15] Judge Shahabuddeen, discussing the legal effect of the ICTY system in the context of appellate *convictions*, put it succinctly:

> With respect to the juridical force of the decision of the second panel of the Appeals Chamber, nothing in the Statute or in the ICCPR authorises the strangeness of an arrangement whereby one panel of the same judicial body can overturn a decision of, or remit to, or otherwise direct, another panel of the same judicial body. It is difficult to see that the Statute gives more juridical force to decisions of one panel of the Appeals Chamber than to those of another. . . . [16]

13. The law is clear:

> 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 fact or law is not in the interests of justice to the victims of the crimes *or the convicted persons*, who are both entitled to certainty and finality of legal judgments.[17] (Emphasis Added)

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[13] *Prosecution Response to Sredoje Lukic's Motion Seeking Reconsideration of the Appeal Judgment*, 4 July 2013, para 9.
[14] Lukić Decision p.3; Šljivančanin Decision p.2
[15] Lukić and Šljivančanin sentence of appeal and review being enough.
[16] See also *Rutaganda* AJ, Judge Shahabuddeen, Separate Opinion, para 34.
[17] *Žigić* Decision, para 9; see also *Blaskić* 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").

14. Clearly the same principle applies to a person, such as Mr. Perišić, who has been *acquitted* on appeal. The Prosecution cannot be permitted to re-argue the merits of acquittals based on alleged errors of reasoning assessed in hindsight, each time the winds of juridical disagreement blow. Mr. Perišić is entitled to certainty and finality of his legal judgement of acquittal.

15. Similarly, the Prosecution misunderstands, misconstrues or deliberately omits relevant language when it discusses Judge Meron's Separate Opinion in *Niyitegeka.*[18] That separate opinion concerned what legal remedies may be available to an individual finally adjudged guilty of a crime who is subsequently able to demonstrate his factual innocence. Judge Meron stated:

> Such situations are unlikely. Like Judge Shahabuddeen, however, *I do not think the door should be closed on the exceptional case in which proof of innocence is convincingly demonstrated even though the technical requirements of Article 25 are not satisfied.* Should a situation arise where we are presented with convincing evidence of innocence that does not amount to a "new fact" under our jurisprudence, I would likely deem it in the interests of justice to depart from our holding in *Žigić* – a holding that in turn departed from our holding in *Čelebici* – and find that we have inherent jurisdiction to reconsider final judgments when necessary to avoid a clear miscarriage of justice. […] This Tribunal aims to be a model of due process protections. *By refusing to allow convicted persons with an avenue for pursuing claims that do not meet the strict requirements of Article 25 and yet which may be meritorious, we disserve this aim and indeed risk substantive unfairness* (Emphasis Added)[19]

16. The Prosecution was not denied due process of law in the *Perišić* case nor does it claim it was. Neither the Declaration of Judge Shahabbudeen nor the Separate Opinion of Judge Meron argues or suggests that it should ever be permissible to reconsider a final judgement of acquittal in one case because a subsequent judgement in an unrelated case disagrees with prior law or an interpretation of prior law.

17. All legal systems recognize the need for finality of judgments by prohibiting re-litigation of determinations in criminal proceedings following a final judgement of

[18] There were two separate opinions by Judge Meron in *Niyitegeka*, one on 7 March 2006 and the second on 27 September 2006. On 27 September 2006, in paragraph 4, the decision the Prosecution relies on, Judge Meron found that *Niyitegeka* did not meet the requirements for obtaining reconsideration. In the 7 March 2006 Decision, Judge Meron discussed the issue of "factual innocence".

[19] *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Review, 7 March 2006, Judge Meron's Separate Opinion para 4.

acquittal.[20] The rationale for these rules rests on the dual imperatives of protecting the integrity of the legal system and respecting the right to certainty of outcome for individuals who have faced trial on criminal charges as well as the victims of crime.

18. Here the Prosecution is asking this Chamber to unravel an entire fabric of existing legal precedents by (1) ignoring the clear holding of *Žigić*, or reconsidering and overruling that holding, which provides that the Chamber has no power to reconsider final judgements; (2) reconsider the final judgement in *Perišić* even though there has been no showing that any party was denied due process in that case and even though there has been no showing that any party suffered a miscarriage of justice in that case; (3) reconsider the final judgement of acquittal in *Perišić* on the improper, legally insupportable basis that one panel of equally situated judges in *Šainović* subsequently disagreed with the *Perišić* judgement (4) find there was an "error in reasoning" in *Perišić* for the same insupportable reason; and (5) base all of these findings on legal and policy considerations related to cases in which *convictions* were returned, unlike the present case involving a final judgement of acquittal.

19. None of these arguments have legal merit. All should be rejected.

III. Conclusion

20. The Judgment in *Prosecutor v Perišić* is a final judgement. The Prosecution has made no convincing factual or legal argument that there is any basis for reconsideration of that final judgement. The Prosecution's Motion for Reconsideration should be denied.

Respectfully submitted this 13th day of February 2014

Word count: 2, 971 (including Annex)

[20] Christine Van der Wyngaert and Guy Stessens, *The International Ne Bis In Idem Resolving some of the Unanswered Questions*, 1999, 48 International and Comparative Law Quarterly 779; Rosa Theofanis, *The Doctrine of Res Judicata in International Criminal Law*, 2003, 3 International Criminal Law Review 195; MCH Bassouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections And Equivalent Protections in National Constitutions*, 1993, 3 Duke Journal of Comparative and International Law 262.

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Enclosure: Annex A : Sample Arguments Made by Prosecution at Trial or on Appeal

ANNEX

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ANNEX

Sample Arguments Made by Prosecution at Trial or on Appeal Repeated in the Motion

Prosecution Assertions	FTB paras	Appeal Response Brief	Oral hearing	Motion paras
The rejection of specific direction was pronounced by appeal judgements in Mrkšić and Sljivancanin and Lukić and Lukić.	Paras 451, 453	Paras 24-25, 96-99.	30 Oct. 2012 Page 47 line 23 – page 48 line 10, page 50 lines 18-25.	Para 6
Perišić substantially contributed to murder, inhumane acts, persecutions, and attacks on civilians.	Paras 506, 561, 562	Paras 61, 72, 112.	30 Oct 2012 Page 55 line 25 to page 56 line 5.	Para 8
Perišić assistance included ammunition, weaponry, fuel, technical expertise, repair services and personal training.	Paras 463, 481, 554.	Para 74, 75, 77 -79, 107.	30 Oct 2012 Page 57 lines 1-14, lines 22-24, Page 58 line 10 - page 59, line 8.	Para 8
Perišić provided assistance with the knowledge that the VRS would probably commit crimes.	Paras 596	Paras 5, 86, 90, 150, 153, 162, 166, 174, 190, 201.	30 Oct. 2012 Page 45, lines 6-7, lines 12 to 20.	Para 9
Perišić knew that the objectives of the Bosnia Serb leardership involved the partition of Sarajevo.	Paras 68, 490, 501.	Paras 63, 68, 166.	-	Para 9
Through public reports and cables and his own intelligence and security organs, Perišić became aware of the VRS's campaign of sniping and shelling against	Paras 566, 579, 580, 598 - 618, 633-635.	Para 4, 65, 155, 166, 170, 171, 176, 184, 209.	30 Oct 2012, Page 45, lines 12-14.	Para 9

the Sarajevo civilian population.				
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.	Paras 562, 636, 640, 645, 661, 673.	Paras 4, 204, 205, 207, 213.	30 Oct 2012 Page 45 lines 15– 20.	Para 9
Perišić subsequently learned that those acts were being perpetrated.	Paras 673-675, 684-685.	Para 214.	30 Oct 2012 Page 45 lines 16-20.	Para 9