IT-95-13/1-R.1
D195-0190
20 APRIL 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:	20 April 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**

Order of: **20 April 2010**

PROSECUTOR

v.

VESELIN ŠLJIVANČANIN

PUBLIC

SCHEDULING ORDER FOR HEARING REGARDING VESELIN ŠLJIVANČANIN'S APPLICATION FOR REVIEW

The Office of the Prosecutor:

Mr. Peter Kremer, QC

Counsel for Veselin Šljivančanin:

Mr. Novak Lukić and 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" ("Review Motion") filed by Counsel for Veselin Šljivančanin ("Šljivančanin") on 28 January 2010;

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

CONSIDERING 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,[1] and that this testimony constitutes a "new fact" in the context of Rule 119 of the Rules of Procedure and Evidence ("Rules");[2]

FINDING, Judge Pocar dissenting, that in this exceptional context it is in the interests of justice to convene an Oral Hearing ("Hearing") of the Appeals Chamber to examine legal and evidentiary aspects of Šljivančanin's contentions, namely: (1) the evidentiary value and relevance, if any, of Panić's testimony; and (2) whether Panić's testimony constitutes a "new fact";[3]

EMPHASIZING that the present order in no way expresses the Appeals Chamber's views on any aspect of the Review Motion;

HEREBY ORDERS, Judge Pocar dissenting, that the Hearing shall take place on 3 June 2010, in a courtroom to be determined, and **INFORMS** the parties that the timetable for the hearing shall be as follows:

3 June 2010:

09:00 – 09:15 Introductory Statement by the Presiding Judge (15 minutes)

Examination of Witness Panić:

09:15 – 10:00 Examination-in-chief of Panić by Šljivančanin (45 minutes)

[1] Review Motion, paras 30-38.
[2] *Id.*, paras 12-29.
[3] *Cf.* Rules 54, 107 of the Rules.

10:00 – 10:15 *Pause (15 minutes)*

10:15 – 11:00 Cross-examination of Panić by the Prosecution (45 minutes)

11:00 – 11:15 *Pause (15 minutes)*

11:15 – 11:30 Re-examination of Panić by Šljivančanin (15 minutes)

11:30 – 11:45 Summary Arguments by Šljivančanin (15 minutes)

11:45 – 12:00 Summary Arguments by Prosecution (15 minutes)

Arguments on Whether Panić Testimony Constitutes a "New Fact":

13:30 – 14:15 Submissions of Šljivančanin (45 minutes)

14:15 – 14:30 *Pause (15 minutes)*

14:30 – 15:15 Submissions of the Prosecution (45 minutes)

15:15 – 15:30 Reply of Šljivančanin (15 minutes)

DIRECTS the Registrar to communicate this scheduling order to Panić and to make the necessary arrangements for him to appear at the Hearing;

REQUESTS the Registrar to make all other necessary arrangements for the Hearing as scheduled.

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

Dated this 20th day of April 2010,
At The Hague,
The Netherlands.

Judge Theodor Meron
Presiding Judge

Judge Pocar appends a dissenting opinion.

[Seal of the Tribunal]

DISSENTING OPINION OF JUDGE POCAR

1. I respectfully dissent from the Majority decision to schedule an oral hearing which is, in the present circumstances, outside the scope of the review proceeding as envisaged by the Statute of the Tribunal ("Statute") and Rules 119 and 120 of the Rules of the Tribunal ("Rules"), since it is aimed at assessing "the evidentiary value and relevance" of the testimony of a witness, Mr Panić, through the examination of the witness. Consequently, Mr. Panić is called to testify on an alleged "new fact", before a decision on the existence of such a new fact has been made by the Appeals Chamber.

2. The Appeals Chamber is seised of an application for review by Counsel for Veselin Šljivančanin ("Šljivančanin") pursuant to Article 26 of the Statute and Rules 119 and 120 of the Rules.[1] The Appeals Chamber has therefore to decide whether to grant or dismiss the Review Motion. Pursuant to Article 26 of the Statute and Rules 119 and 120 of the Rules, the existence of a new fact which, if proved, could justify a review of the judgement must be established *prior* to an evidentiary hearing as prescribed by Rule 120 of the Rules. An assessment as to the existence of a new fact is the first step of the review proceeding. Thus, hearing and assessing evidence is only permitted *after* the existence of a new fact has been established.

3. I concede that a hearing could be held with the aim to clarify whether the fact submitted by Šljivančanin constitutes a new fact for purpose of review. However, such a hearing should be strictly limited to a discussion between the parties as to the existence of a new fact. In this case, the scheduling order allows for the examination of Witness Panić without any indication as to the scope thereof. In my view, this is problematic since the existence of the new fact is distinct from the content and relevance of such a fact. It is vital that this distinction is observed and inappropriate to consider these matters in tandem.

4. Nor can derogation from the Rules be justified by an alleged "exceptional context". The scheduling order fails to identify the exceptional context of this request for review. Furthermore, the context of this request cannot be characterised as exceptional with respect to other requests for review submitted to the Appeals Chamber in the past. Thus, there is no reason to derogate from ordinary procedure as set forth in the Rules.

[1] Application on Behalf of Veselin Šljivančanin for Review of the Appeals Chamber Judgment of 5 May 2009, 28 January 2010 ("Review Motion"), p. 1.

5. In light of the above, the Appeals Chamber should first characterise the fact submitted in the request for review as a "new fact" and, subsequently, hold a review hearing after giving the parties an opportunity to present evidence thereon. Indeed, I am troubled with the Majority's decision to hear Panić's testimony without giving the Prosecution an opportunity to call its own witness(es) in rebuttal.

6. Furthermore, the Majority decision to hold a hearing aimed at assessing evidence before having established the existence of a new fact may open the door to the reconsideration of a final judgement, in disregard of the established approach adopted by the Appeals Chamber. The Tribunal has established case-law, based on the principle of finality, that once a judgment is final it cannot be the object of reconsideration.[2] Rather, the only remedy available is a review proceeding. Therefore, any request for reconsideration stands to be rejected, as the Appeals Chamber has done in the recent past in this very case.[3]

7. I am also concerned that the Majority decision may lead to a flood of unjustified requests for review aimed at conducting a "fishing expedition" to try to find new facts. It will be hard for the Appeals Chamber to justify the denial of such future requests for review since it convenes the scheduled hearing in the "interests of justice". Should the Appeals Chamber decide to dismiss such motions it would appear to adopt a double-standard, particularly in the absence of a clearly defined "exceptional context".

8. In conclusion, I firmly believe there is no legal basis for ordering a hearing which falls outside the scope of a review proceeding as governed by the Statute and the Rules, and is in contradiction with well-established jurisprudence of this Tribunal.

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[2] *Prosecutor v. Zoran Žigić*, Case No. IT-98-30/1-A, 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, para. 9. *See also e.g. Prosecutor v. Timohir Blaškič*, Case No. IT-95-14-R, Decision on Prosecutor's Request for Review or Reconsideration, 23 November 2006, paras 79-80 (Public Redacted Version); *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, para. 6; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-Misc.1, Decision on Strugar's Request to Reopen Appeal Proceedings, 7 June 2007, para. 23; *Hassan Ngeze v. The Prosecutor*, Case No. ICTR-99-52-R, Decision on Hassan Ngeze's Motions and Requests related to Reconsideration, 31 January 2008, p. 3.

[3] *Prosecutor v. Mile Mrkšić 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.

Done in English and French, the English text being authoritative

Judge Fausto Pocar

Dated this 20th day of April 2010,
At The Hague,
The Netherlands.

[Seal of the Tribunal]