IT-98-30/1-A
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**UNITED NATIONS**

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| | 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-98-30/1-A |
| | | Date: | 26 June 2006 |
| | | Original: | English |

**IN THE APPEALS CHAMBER**

**Before:** **Judge Fausto Pocar, Presiding**
**Judge Mohamed Shahabuddeen**
**Judge Mehmet Güney**
**Judge Liu Daqun**
**Judge Wolfgang Schomburg**

**Registrar:** **Mr. Hans Holthuis**

**Decision:** **26 June 2006**

**PROSECUTOR**

**v.**

**ZORAN ŽIGIĆ a/k/a "ZIGA"**

# DECISION ON ZORAN ŽIGIĆ'S "MOTION FOR RECONSIDERATION OF APPEALS CHAMBER JUDGEMENT IT-98-30/1-A DELIVERED ON 28 FEBRUARY 2005"

**The Office of the Prosecutor:**

Carla Del Ponte

**Counsel for the Applicant:**

Slobodan Stojanović

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 ("Tribunal") is seized of "Zoran Žigić's Motion for Reconsideration of the Appeals Chamber Judgement IT-98-30/1-A delivered on 28 February 2005" ("Motion for Reconsideration"), filed by Zoran Žigić on 7 December 2005.

## I. PROCEDURAL BACKGROUND

2. On 2 November 2001, Trial Chamber I convicted Zoran Žigić for crimes against humanity and violations of the laws or customs of war as a participant in the joint criminal enterprise of the Omarska camp and for committing crimes against humanity and violations of the laws or customs of war in the Omarska, Keraterm and Trnopolje camps.[1] The Trial Chamber sentenced him to a single sentence of twenty-five (25) years' imprisonment.[2]

3. Mr. Žigić appealed both his conviction and the sentence received.[3] In its Judgement of 28 February 2005, the Appeals Chamber reversed Mr. Žigić's conviction for persecution as a crime against humanity, for murder as a violation of the laws or customs of war and for torture as a violation of the laws or customs of war in so far as these convictions related to his participation in the joint criminal enterprise of the Omarska camp. The Appeals Chamber affirmed Mr. Žigić's convictions for crimes against humanity and violations of the laws or customs of war committed in the Omarska, Keraterm and Trnopolje camps. The Appeals Chamber also upheld the sentence of 25 years' imprisonment, dismissing the remaining grounds of appeal against conviction in all other respects.[4]

4. On 7 December 2005, Mr. Žigić filed this Motion for Reconsideration requesting the Appeals Chamber to reconsider its Appeal Judgement and either order a retrial or acquit him of all convictions except for the conviction for persecution against Sead Jusufagić, committed in the Keraterm camp in June 1992, and the conviction for cruel treatment against Witness AK, committed in the Omarska camp in June 1992, for which he admitted criminal responsibility.[5] In its response to the Motion for Reconsideration filed on 19 December 2005, the Prosecution submitted that Mr. Žigić failed to provide any arguments that could meet the threshold for

[1] *Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić and Dragoljub Prcać*, Case No. IT-98-30/1-T, Judgement, 2 November 2001, paras 684-691 ("Trial Judgement").
[2] Trial Judgement, para. 766.
[3] *Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić and Dragoljub Prcać*, Case No. IT-98-30/1-A, Defendant's Notice of Appeal, 15 November 2001; *Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić and Dragoljub Prcać*, Case No. IT-98-30/1-A , Appellant's Brief of Arguments, 21 May 2002 ("Appellant's Brief").
[4] *Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić and Dragoljub Prcać*, Case No. IT-98-30/1-A, Judgement, 28 February 2005, Disposition, p. 243 ("Appeal Judgement").

reconsideration and that the Motion for Reconsideration should be dismissed *in toto*.[6] Mr. Žigić filed a reply to the Prosecution's Response on 27 December 2005,[7] and a "Translation of the Document Attached in Relation to Paragraph 6 of Reply to 'Prosecution's Response to Zoran Žigić's Motion for Reconsideration of the Appeals Chamber Judgement IT-98-30/1-A Delivered on 28 February 2005'" on 4 February 2006.

## II. STANDARDS OF RECONSIDERATION

5. While there are many precedents confirming the Appeals Chamber's inherent power to reconsider its own decisions in exceptional circumstances,[8] the only decision that addresses the existence of a power to reconsider a final judgement is the decision of the majority in the Judgement on Sentence Appeal rendered in the *Čelebići* case.[9] In that Judgement, a majority of the Appeals Chamber held that the "Appeals Chamber has an inherent power to reconsider any decision, including a judgement where it is necessary to do so in order to prevent an injustice".[10] Whether or not the Appeals Chamber will exercise that power is discretionary.[11] In making this statement, the majority recognised that earlier decisions, which had held that a Chamber may reconsider a decision "where there has been a change of circumstances" or "where the Chamber has been persuaded that its previous decision was erroneous and has caused prejudice", were concerned only with decisions. However, the majority was satisfied that the Appeals Chamber has such a power in relation to a judgement when persuaded:

> (a) (i) that a clear error of reasoning in the previous judgement has been demonstrated by, for example, a subsequent decision of the Appeals Chamber itself, the International Court of Justice, the European Court of Human Rights or a senior appellate court within a domestic jurisdiction, or

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[5] Appellant's Brief, paras 432, 211 and 303.
[6] *Prosecutor v. Zoran Žigić a/k/a "Ziga"*, Case No. IT-98-30/1-A, Prosecution's Response to "Zoran Žigić's Motion for Reconsideration of the Appeals Chamber Judgement IT-98-30/1-A delivered on 28 February 2005", 19 December 2005, para. 90 ("Prosecution's Response").
[7] *Prosecutor v. Zoran Žigić a/k/a "Ziga"*, Case No. IT-98-30/1-A, Reply to "Prosecution's Response to Zoran Žigić's Motion for Reconsideration of the Appeals Chamber Judgement IT-98-30/1-A delivered on 28 February 2005", 27 December 2005 ("Reply to Prosecution's Response").
[8] See *e.g. Jean-Bosco Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72, Decision on Prosecutor's Request for Review or Reconsideration, 31 March 2000, paras 18 and 73; *Joseph Kanyabashi v. Prosecutor*, Case No. ICTR 96-15-AR72, Decision on Motion for Review or Reconsideration, 12 September 2000, p. 2; *Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-A, Decision on Interlocutory Appeal from Refusal to Reconsider Decisions Relating to Protective Measures and Application for a Declaration of Lack of Jurisdiction, 2 May 2002, paras 6 and 10; *Eliézer Niyitegeka v. Prosecutor*, Case No. ICTR-96-14-A, Decision on Defence Extremely Urgent Motion for Reconsideration of Decision Dated 16 December 2003, 19 December 2003, p. 4; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence's Request for Reconsideration, 16 July 2004, p. 2; *Ferdinand Nahimana et al. v. Prosecutor*, Case No. ICTR-99-52-A, Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005, 4 February 2005, p. 2.
[9] *Prosecutor v. Zdravko Mucić, Hazim Delić and Esad Landzo*, Case No. IT-96-21-A*bis*, Judgement on Sentence Appeal, 8 April 2003, paras 49-53 ("*Čelebići* Judgement on Sentence Appeal").
[10] *Čelebići* Judgement on Sentence Appeal, para. 49.
[11] *Ibid.* para. 49.

(ii) that the previous judgement was given *per incuriam*; and

(b) that the judgement of the Appeals Chamber sought to be reconsidered has led to an injustice.[12]

6. In determining that it had this power, the majority of the Appeals Chamber reasoned that it was well established in the jurisprudence of the Tribunal that the Appeals Chamber had an inherent power to ensure that "its exercise of the jurisdiction which is expressly given to it by that Statute is not frustrated and that its basic judicial functions are safeguarded".[13] It considered that the prospect of any injustice resulting from a judgement of the Appeals Chamber "must be met in some way to ensure that the Tribunal's proceedings do not lead to injustice".[14] The Appeals Chamber noted that the right of review on the discovery of a new fact, granted by Article 26 of the Tribunal's Statute is "only a partial answer to the prospect of injustice".[15]

7. While the *Čelebići* Judgement on Sentence Appeal considered that review proceedings under Article 26 of the Statute of the Tribunal constituted a limited answer to the possibility of injustice, the Appeals Chamber notes that the jurisprudence of this Tribunal has nonetheless shown that when proceedings are brought under that Article, the requirement of the existence of a "new fact" has been interpreted broadly, and the conditions of knowledge and due diligence required under Rule 119 of the Rules of Procedure and Evidence of the Tribunal have been waived in "wholly exceptional circumstances" and "where the impact of a new fact on the decision would be such that to ignore it would lead to a miscarriage of justice".[16]

## III. DISCUSSION

8. While review proceedings require a moving party to bring some evidence of a new fact, the power to reconsider in the *Čelebići* Judgement on Sentence Appeal only requires a moving party to assert that an Appeal Judgement is in error, allowing in effect the submission of a second appeal. Applications for reconsideration of judgements filed before this Chamber show that applicants

[12] *Ibid.* para. 49.
[13] *Ibid.* para. 50; *see* also para. 52: The Appeals Chamber considered that "the absence of any reference in the Tribunal's Statute to the existence of a power to reconsider is no answer to the prospect of injustice where the Tribunal possesses an inherent jurisdiction to prevent injustice." and that "[t]here is nothing in the Statute which is inconsistent with the existence of an inherent power of the Appeals Chamber to reconsider its judgement in the appropriate case".
[14] *Ibid.* para. 51.
[15] *Ibid.*
[16] *Prosecutor v. Drago Josipović*, Case No. IT-95-16-R2, Decision on Motion for Review, 7 March 2003, para. 13, citing *Prosecutor v. Duško Tadić*, Case No. IT-94-1-R, Decision on Motion for Review, 30 July 2002, paras 20 and 25-27; *see* also *Prosecutor v. Hazim Delić*, Case No. IT-96-21-R-R119, Decision on Motion for Review, 25 April 2002, paras 15, 19 and 22; *Jean-Bosco Barayagwiza v. Prosecutor* Case No. ICTR-97-19-AR72, Decision on Prosecutor's Request for Review or Reconsideration, 31 March 2000, paras 41-44, 65-69; *Nahimana et al. v. Prosecutor*, Case No. ICTR-99-52-A, Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of

typically do just that. In filing this Motion for Reconsideration, Mr. Žigić merely repeats arguments he presented to the Appeals Chamber alleging errors of fact on the part of the Trial Chamber. He makes no serious attempt to establish the existence of a clear error but merely relies upon his assertion that the Appeals Chamber should have found the Trial Chamber in error in its acceptance of facts that established his criminal responsibility for the crimes underpinning his conviction. Accordingly, Mr. Žigić has used his purported right to a reconsideration of a final judgement to file a frivolous application, which constitutes an abuse of process.

9. 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. Nor is it consistent with the Statute of this Tribunal, which 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. The Appeals Chamber is satisfied that the existing appeal and review proceedings established under the Statute provide sufficient guarantees to persons convicted before this Tribunal that they have been tried fairly and in accordance with norms of due process. In light of these considerations, the Appeals Chamber has come to the view that cogent reasons in the interests of justice[17] demand its departure from the majority opinion in the *Čelebići* Judgement on Sentence Appeal. Accordingly, this Appeals Chamber holds that there is no power to reconsider a final judgement. The Appeals Chambers notes, however, that its departure from *Čelebići* does not affect the power of the Tribunal to reconsider its decisions, which cannot be subject to review proceedings.

10. The Motion for Reconsideration is **denied**.

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

Done This 26th Day of June 2006,
At The Hague, The Netherlands

Fausto Pocar
Presiding Judge

**[Seal of the Tribunal]**

19 January 2005, 4 February 2005, p. 2; *Juvénal Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, paras 203-204.

[17] See *Prosecutor v. Zlatko Aleksovski*, Case No. IT-96-14/1-A, Judgement, 24 March 2000, paras 107-109.

# DECLARATION OF JUDGE SHAHABUDDEEN

1. On the merits, I agree with the dismissal of the motion for reconsideration of the final judgement in this case. However, I am not persuaded by the holding of the Appeals Chamber, as stated in paragraph 9 of today's decision, "that there is no power to reconsider a final judgement". By express deliberation, that holding departs from the holding in the *Čelebići* "Judgement on Sentence Appeal".[1] I doubt the justification for the departure.

2. The reasoning of the Appeals Chamber in *Čelebići* has not been fully answered in this case. I see no response, or no sufficient response, to its central argument that the Statute has entrusted the Tribunal with basic judicial functions to administer justice and therefore with jurisdiction to correct extreme cases of injustice even in the absence of explicit authority in the Statute to do so. In the circumstances, I am not clear as to which are the "cogent reasons" that peremptorily "demand" a "departure" from the "majority opinion in *Čelebići*". A court may be in a position to effect a departure; yet not every disagreement (however strongly felt) with previous case law requires a departure.[2] In this respect, it has to be remembered that "the majority opinion in *Čelebići*" was the judgement in that case, just as the present majority opinion is the decision in this case.

3. As regards paragraph 7 of today's decision, 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". In this respect, the Appeals Chamber says that "the requirement of the existence of a 'new fact' has been interpreted broadly, and the conditions of knowledge and due diligence required under Rule 119 of the Rules have been waived in 'wholly exceptional circumstances' and 'where the impact of a new fact on the decision would be such that to ignore it would lead to a miscarriage of justice'".[3] The Appeals Chamber does not, however, explain the source of its power to "waive" a requirement imposed by the Rules and, indeed, by the Statute itself: article 26 applies only when "a new fact has been

[1] *Prosecutor v. Mucić and others*, Case No. IT-96-21-A*bis*, Judgement on Sentence Appeal, 8 April 2003.
[2] I am reminded of a dissenting remark by Lord Hoffmann to the effect that, if the Board of the Privy Council "feels able to depart from a previous decision simply because its members on a given occasion have a 'doctrinal disposition to come out differently', the rule of law itself will be damaged and there will be no stability in the administration of justice ....". See *Lewis v. Attorney General of Jamaica and Another* [2001] 2 AC 50 at 90.
[3] Footnote omitted

discovered which was not known at the time of the proceedings". What is being said looks remarkably like recourse to the inherent jurisdiction of the court – the very same source of authority which is recognised by the judgement in *Čelebići* but which today's decision rejects.

4. In any case, the Appeals Chamber does not controvert the specific statement in *Čelebići* (supported by cited authority[4]) that the right of review under article 26 "has been interpreted as excluding issues of law".[5] This apart, it seems to me that, however "broadly" the requirement of the existence of a new fact is interpreted, a limit is reached where review under that provision can no longer cater for all imaginable cases of miscarriage of justice not treatable by the normal appeal procedures; a legal system always has to provide for extreme cases.

5. The alternative is that a motion for reconsideration of a final judgement must be packaged as an article 26 motion for review even in cases which do not involve a "new fact" as reasonably understood. This approach is artificial. A better alternative is that, in such cases recourse must be had to the Tribunal's inherent jurisdiction as a judicial body. It will not be the first time that recourse is had to that jurisdiction. Nor need it be thought that, because the jurisdiction is described as "inherent", it comes from nowhere; it is impliedly given by the Statute itself, being an understood accompaniment of the jurisdiction which it expressly grants.

6. As regards paragraph 8 of today's decision, I disagree with the proposition that "the power to reconsider in *Čelebići* only requires a moving party to assert that an Appeals Judgement is in error …". I take it that this means that the present majority understands that the majority in *Čelebići* held that the Appeals Chamber was under a duty to reconsider on "the basis of mere assertions of errors of fact or law", language which it employs in paragraph 9 of today's decision.[6] I do not see so ample a duty being suggested by the language actually used by the majority in *Čelebići*. Paragraphs 49 and 53 of the judgement in *Čelebići* made it clear that there were limiting conditions applicable to a request for reconsideration of a final judgement.

7. If the Appeals Chamber has power to reconsider a final judgement on a simple assertion of error, there would be an obvious risk of a flood of applications for reconsideration. The risk

[4] *Prosecutor v. Jelisić,* IT-95-10-R, Decision on Motion for Review, 2 May 2002, p 3; *Prosecutor v Tadić,* IT-94-1-R, Decision on Motion for Review, 30 July 2002, para. 25.
[5] IT-96-21-A*bis*, 8 August 2003, para. 51, footnotes omitted.

of such a flood was considered in *Čelebići* but was discounted. And rightly so: in the three years that have gone by since *Čelebići* there has not been anything that may be described as a cascade of applications for reconsideration of a final judgement; nor am I aware of any expression of judicial dissatisfaction on this head. The reason is that the limiting conditions, as laid down in *Čelebići,* do not permit the Tribunal to grant reconsideration of a final judgement on a simple assertion of error.

8. On the other hand, in extreme cases, which fall outside of the appeal process or the review process, 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. The majority view in *Čelebići* holds that door open; in my opinion, the majority view in this case closes it.

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

Mohamed Shahabuddeen

Dated 26 June 2006
At The Hague
The Netherlands

**[Seal of the Tribunal]**

[6] Paragraph 9 of today's decision suggests that *Čelebići* means that original findings may be contested "on the basis of mere assertions of errors ..."