IT-98-30/1-R.1
D130 - D120
31 OCTOBER 2006

130 AT

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-98-30/1-R.1

Date: 31 October 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 of: **31 October 2006**

PROSECUTOR

v.

MLAĐO RADIĆ

Public Redacted Version

DECISION ON DEFENCE REQUEST FOR REVIEW

Counsel for Mlađo Radić:

Mr. Toma Fila

The Office of the Prosecutor:

Ms. Helen Brady

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 ("Appeals Chamber" and "International Tribunal", respectively), is seized of the "Defence Request for Review" filed by Counsel for Mlađo Radić ("Defence") on 27 February 2006 ("Request for Review"), pursuant to Rule 119 of the Rules of Procedure and Evidence of the International Tribunal ("Rules").

I. BACKGROUND

2. Mlađo Radić stood trial with others for a series of crimes alleged to have been committed from the end of May to the end of August of 1992, at the Omarska camp in the Prijedor municipality of Bosnia and Herzegovina.[1] Mlađo Radić was a shift leader at Omarska who was found by the Trial Chamber to have had substantial authority over the guards on his shift. He was able to walk freely around the camp and use "his power to prevent crimes selectively, while ignoring the vast majority of crimes committed on his shift".[2] The Trial Chamber found that Mlađo Radić knowingly and substantially contributed to the maintenance and functioning of the Omarska camp and willingly and intentionally contributed to the furtherance of the joint criminal enterprise to persecute and otherwise abuse the non-Serbs detained in the camp.[3]

3. Mlađo Radić was held criminally responsible under Article 7(1) of the Statute as a co-perpetrator of certain crimes committed as part of the joint criminal enterprise.[4] Of those crimes, he was convicted for physically perpetrating crimes of sexual violence against females detained in the Omarska camp.[5] The Trial Chamber specifically found that Mlađo Radić raped Witness K and attempted to rape Witness J. It further found that Mlađo Radić committed sexual violence against Witness J, Witness F, Sifeta Susić, and Zlata Cikota through sexual intimidation, harassment, and assault.[6] For these acts, he was found guilty of persecutions as a crime against humanity under Article 5(h) of the Statute of the International Tribunal ("Statute") for crimes which included sexual assault and rape (Count 1), and of torture as a violation of the laws or customs of war under Article 3 of the Statute based on Radić's crimes of rape and other forms of sexual violence (Count 16).[7]

[1] *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Judgement, 2 November 2001 ("Trial Judgement"), paras 1-2.
[2] *Ibid.*, paras 515-517, 526.
[3] *Ibid.*, para. 566.
[4] *Ibid.*, para. 578.
[5] *Ibid.*, para. 575.
[6] *Ibid.*, para. 559.
[7] *Ibid.*, para. 578.

4. In imposing a single sentence of twenty years, the Trial Chamber noted, *inter alia*, that Mlađo Radić committed rape and other forms of sexual assault against several women detained in the camp and that "he grossly abused his position of power in the camp by forcing and coercing the women into sexual activity for his own pathetic gain."[8]

5. On appeal, Mlađo Radić unsuccessfully challenged the Trial Chamber's findings that he raped Witness K, attempted to rape Witness J and committed sexual violence against Witnesses J, F, Sifeta Susić, and Zlata Cikota.[9] Radić's challenge to the Trial Chamber's finding on the reliability of the testimony given by Witness K was rejected by the Appeals Chamber which, having reviewed the relevant parts of the trial transcript, found that it was open to a reasonable trier of fact to have accepted it.[10] The Appeals Chamber did not allow any of Radić's other grounds of appeal and accordingly affirmed the sentence of twenty years imposed by the Trial Chamber.[11]

6. On 27 February 2006, the Defence filed the Request for Review at issue in this Decision seeking review of the Appeal Judgement rendered in this case on 28 February 2005. In particular, the Defence asks that the Appeals Chamber review its decision in the section on "Sexual Crimes" upholding the Trial Chamber's finding that Mlađo Radić raped Witness K and is thereby guilty of torture.[12] The Defence further seeks a corresponding reduction in Mlađo Radić's sentence.[13] In support of the Request for Review, the Defence asserts that it has acquired two witness statements not available to the Defence at the time of the trial and appeal proceedings in this case, which disclose new facts relating to the claim that it was impossible for Mlađo Radić to enter and use the room in which Witness K was found to have been raped.[14] The Defence attaches these witness statements to the Request for Review in addition to a statement by a third witness, which it includes as corroboration for the other two new witness statements.[15]

7. On 7 April 2006, the Prosecution filed, confidentially, the "Prosecution's Response to Mlađo Radić's Request for Review of Appeals Chamber Judgment" ("Confidential Response"), as well as a public redacted version of the Confidential Response (collectively "Response"). The Prosecution argues that the Request for Review should be dismissed because it fails to satisfy the requirements of Rule 119 and is without merit.[16] The Defence then filed the "Defence Reply: [to

[8] *Ibid.*, paras 740, 745.
[9] *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Judgement, 28 February 2005 ("Appeal Judgement"), paras 393 – 410.
[10] *Ibid.*, para. 405.
[11] *Ibid.*, para. 699.
[12] Request, para. 22. *See also* Appeal Judgement, paras 393 – 410; Trial Judgment, paras 559-560.
[13] Request, para. 22.
[14] *Ibid.*, paras 12, 19, Annex B and Annex C to the Request for Review.
[15] *Ibid.*, para. 13, Annex A to the Request for Review.
[16] Response, para. 4.

the] Public Redacted Version [of the] Prosecution's Response to Mlađo Radić's Request for Review of Appeals Chamber Judgment" on 20 April 2006 ("Reply").

8. On 24 April 2006, the Prosecution confidentially filed the "Prosecution Motion for Leave to File Sur-Reply to Defence Reply in Request for Review by Mlađo Radić" ("Motion"), in which it submitted that the Defence Reply is misleading as it only addresses the Public Redacted Response and, as a result, mistakenly claims that the Prosecution failed to identify the portion of the trial transcript in support of its claim that an alleged new fact brought by the Defence in its Request for Review was raised at trial.[17] The "Decision on Prosecution Motion for Leave to File Sur-Reply to Defence Reply in Request for Review by Mlađo Radić" issued by the Pre-Review Judge on 9 May 2006 dismissed the Prosecution's Motion, and noting that the Defence did not in fact receive the Confidential Response until 5 May 2006, allowed the Defence to file an Amended Reply in light of the Confidential Response if it deemed it necessary to do so. The Defence subsequently filed, confidentially, its "Defence Reply: To Prosecution's Confidential Response to Mlađo Radić's Request for Review of Appeals Chamber Judgement" on 15 May 2006.

II. APPLICABLE LAW

9. Review proceedings are governed by the following provisions of the Statute and Rules:

Article 26 of the Statute provides that:

> Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal an application for review of the judgement.

Rule 119 deals with the request for review and stipulates that:

> Where a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber, and could not have been discovered through the exercise of due diligence, the defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber for review of the judgement. If, at the time of the request for review, any of the Judges who constituted the original Chamber are no longer Judges of the Tribunal, the President shall appoint a Judge or Judges in their place.

Rule 120 provides for a preliminary examination and states that:

> If a majority of Judges of the Chamber constituted pursuant to Rule 119 agrees that the new fact, if proved, could have been a decisive factor in reaching a decision, the Chamber shall review the judgement, and pronounce a further judgement after hearing the parties.

10. The combined effect of these provisions of the Statute and the Rules is that in order for a Chamber to proceed to the review of its decision, the moving party must demonstrate that:

[17] Motion, paras 3, 5.

RM

1. there is a new fact;

2. the new fact was not known to the moving party at the time of the proceedings before the Trial Chamber or the Appeals Chamber;

3. the lack of discovery of the new fact was not due to a lack of diligence on the part of the moving party; and

4. the new fact, if proved, could have been a decisive factor in reaching the original decision.[18]

11. In "wholly exceptional circumstances", where the impact of a new fact on the decision would be such that to ignore it would lead to a miscarriage of justice, the Chambers may review their decision even though the new fact was known to the moving party, or was discoverable by it through the exercise of due diligence.[19] As stated in the *Tadić* Review:

> the Appeals Chamber, whenever it is presented with a new fact that is of such strength that it would affect the verdict, may, in order to prevent a miscarriage of justice, step in and examine whether or not the new fact is a decisive factor, even though the second and third criteria under Rule 119 of the Rules may not be formally met.[20]

III. DISCUSSION

12. The first issue to be determined is whether the Defence has established in the Request for Review that the preliminary requirement for the availability of a review proceeding has been met, that is, that it is bringing a "new fact". The Appeals Chamber recalls that a "new fact" has been defined as "new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings".[21] The requirement that the new fact was not at issue means that it must not have been among the factors that a Chamber could have taken into account in reaching its verdict.[22]

13. In this case, the Defence submits that the statements of two previously unavailable witnesses attached to its Request for Review reveal new facts demonstrating that there was no possibility for Mlađo Radić to enter and use the room in which the Trial Chamber found that he had raped Witness K.[23] On this basis, the Defence argues that "it is necessary [for the Appeals Chamber] to inspect once more the discrepancy in the testimony of Witness K" upon which the Trial Chamber relied to

---

[18] *Prosecutor v. Niyitegeka,* Case No. ICTR-96-14-R, Decision on Request for Review ("*Niyitegeka* Review"), para. 6; *Prosecutor v. Josipović,* Case No. IT-95-16-R.2, Decision on Motion for Review, 7 March 2003 ("*Josipović* Review"), para. 12; *Prosecutor v. Delić*, Case No. IT-96-21-R-R119, Decision on Motion for Review, 25 April 2002 ("*Delić* Review"), para. 8; *Prosecutor v. Tadić*, Case No. IT-94-1-R, Decision on Motion for Review, 30 July 2002, ("*Tadić* Review"), para. 20; *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, Decision on Prosecutor's Request for Review or Reconsideration, 31 March 2000, ("*Barayagwiza* Review"), para 41.
[19] *Josipović* Review, para. 13 *citing Barayagwiza* Review, para. 65. *See also Niyitegeka* Review, para. 7.
[20] *Tadić* Review, para 27.
[21] *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-R, "Decision on Motion for Review", 2 May 2002, ("*Jelisić* Review"), p. 3; *Niyitegeka* Review, para. 6.
[22] *Tadić* Review, para. 25; *Niyitegeka* Review, para. 6.
[23] Request for Review, para. 19.

convict Mlađo Radić for Witness K's rape.[24] The Defence notes that Witness K testified that she was led upstairs to the conference room within the administrative building of the Omarska camp where Mlađo Radić raped her. However, the Defence submits that the statements provided by new Witnesses Željko Grabovica and Žarko Tejić show that the room in question was exclusively used by Mirko Ješić, Ranko Mijić, Colonel Majstorović and Žarko Tejić and otherwise was locked by them at the end of each working day thereby preventing others, including Mlađo Radić, from gaining access to it. A similar statement given by Witness Mirko Ješić is submitted as corroboration for these alleged new facts, since Mirko Ješić already testified at trial.[25]

14. The Prosecution contends that the witness statements attached to the Defence's Request for Review do not amount to or contain new facts in this case. The Prosecution accepts that the room referred to by Witnesses Tejić, Grabovica, and Ješić is the same room in which Witness K testified to being raped. The Prosecution submits however, that "the location of the room where K was raped, whether it was locked, what times of day people had access and for what purpose were matters about which evidence had been adduced" and therefore, were facts in issue at trial.[26]

15. The Appeals Chamber considers that, in essence, the purported "new facts" raised in the Request for Review go directly to the question of the accessibility – by whom and at what times – of the room in which Witness K testified that she had been raped.[27] Therefore, as a first step, the Appeals Chamber must determine whether the fact of that room's accessibility was in issue before the Trial Chamber.

16. The Appeals Chamber notes that at trial, the room in which the Trial Chamber found that Mlađo Radić raped Witness K was identified as "B1" in Prosecution Exhibit 3/77b and was often referred to by witnesses as the "conference room", "hall", or the "room at the end of the corridor"[28] on the first floor of the administration building in the Omarska camp. Witnesses testified that female detainees at Omarska, for the most part, slept in two rooms along the same corridor, identified as rooms "B10" and "B11" in Prosecution Exhibit 3/77b, and directly across the hall from the office in which Mlađo Radić worked, identified as room "B5".[29] Several women, in addition to Witness K, testified before the Trial Chamber to being sexually assaulted in room "B1", and each of these women described the room in the same way. Many women described the room as having been a meeting room which contained a large conference table and one or more sponge mattresses on the

[24] *Ibid.*, para. 20.
[25] *Ibid.*, paras 8, 12-13, 19.
[26] Response, paras 11-13, 15.
[27] *See* Reply, para. 15.
[28] Vinka Andzić, T. 9134; Witness AT, T. 6096; Witness K, T. 4983-4984, Sifeta Sušić, T. 3080.
[29] *See e.g.* Zlata Cikota, T. 3304-3307, 3321; Sifeta Sušić, T. 3012; Witness AT. T. 6065-6067.

floor.[30] The existence of the sponge mattresses led Witness AT to conclude that the room was used for women to be taken to "because no one needed a sponge mattress for a meeting."[31]

17. The question of the room's accessibility by various persons was raised at trial when several women testified to having gone in to clean "B1". Witness Vinka Andzić referred to cleaning the upstairs floor where the inspectors were and was specifically asked by Mr. Toma Fila, Defence Counsel for Mlađo Radić, whether she knew who worked in "B1".[32] Witness Sifeta Sušić was also asked whether she knew who worked in which room on that floor during the daytime.[33] **[Redacted]** Mr. Toma Fila also asked Witness AT whether she knew if Željko Mejakić slept in "B1".[34]

18. **[Redacted]**

19. In addition, as evidenced by its findings, the Trial Chamber heard evidence relating to the times of the day when the room was accessed. The Trial Chamber found that Witness F was taken to room "B1" on several occasions "at any time of the day or night".[35] Likewise, Witness U was found to have been taken "several times at night to a room at the end of the corridor, where she was systematically raped by a string of perpetrators"[36] and "was also taken twice during the day to that same room by another guard, where she was subjected to repeated rapes by multiple assailants".[37] The Trial Chamber also found that Nedzija Fazlić and Witness AT were sexually assaulted in room "B1" on various occasions, accepting their testimony on the basis that it established a consistent pattern of conduct in conformity with Rule 93.[38] With respect to Witness K, the Trial Chamber found that she was raped by Mlađo Radić in the conference room on one occasion.[39]

20. On the basis of the evidence considered at trial, the Appeals Chamber is not persuaded that the accessibility of the room in which Witness K was found to have been raped was not in issue before the Trial Chamber. The Appeals Chamber further recalls that the Defence sought to impeach the reliability of Witness K at trial and on appeal and failed on both occasions.[40] The Appeals Chamber accordingly finds that the two statements annexed to the Request for Review do not reveal a "new fact". As such, the Request for Review fails to satisfy the first requirement for a review by

[30] *See e.g.* Witness U, T. 6228-6229; Witness AT, T. 6097; **[Redacted]**.
[31] Witness AT, T. 6097.
[32] Vinka Andzić, T. 9130, 9132.
[33] Sifeta Sušić, T. 3080-3081, 3099.
[34] Witness AT, T. 6150.
[35] Trial Judgement, para. 100.
[36] *Ibid.*, para. 102.
[37] *Ibid.*, para. 103.
[38] *Ibid.*, paras 105, 547, 554, 556.
[39] *Ibid.*, para. 551.
[40] Trial Judgement, para. 552; Appeal Judgement, para. 405.

the Appeals Chamber of its finding that the Trial Chamber's reliance upon the testimony of Witness K was reasonable.

21. The Appeals Chamber notes the Defence's contention that "the lack of possibility of entrance and use of the room by Mlađo Radić (or anyone else but the people identified in the Request for Review for that matter) was never discussed *in this light* during trial."[41] That may be so. However, the Appeals Chamber emphasizes that in order for review proceedings to be available, the Defence must establish that the question of accessibility of the room where Witness K was found to have been raped was not in issue or not considered by the Trial Chamber in reaching its verdict.

22. The Appeals Chamber recalls that the jurisprudence of the International Tribunal has consistently distinguished between a "new fact" within the meaning of Rule 119 and "additional evidence" within the meaning of Rule 115.[42] Whereas additional evidence, though not merely cumulative, goes to the proof of facts that were in issue at trial, evidence of a new fact, while generically in the nature of additional evidence, is evidence of a fact that was not in issue or considered in the original proceedings.[43] Indeed, in applying to present additional evidence before the Appeals Chamber, the moving party is required to "clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed."[44] The Appeals Chamber finds that the witness statements attached to the Defence's Request for Review amount to additional evidence and do not, in any event, qualify as new facts.

IV. DISPOSITION

23. Having found that the Request for Review presents no "new fact" within the meaning of Article 26 of the Statute and Rules 119 and 120 of the Rules, the Appeals Chamber declines to consider whether the second, third and fourth requirements for review have been met.

[41] Reply, para. 7 (emphasis added).
[42] *See e.g. Delić* Review, paras 10-11, *Josipović* Review, para. 18.
[43] *Niyitegeka* Review, para. 12.
[44] Rule 115(A).

24. On the basis of the foregoing, the Appeals Chamber **DISMISSES** the Defence Request for Review in its entirety.[45]

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

Done this 31st day of October 2006,
At The Hague,
The Netherlands.

Judge Fausto Pocar
Presiding Judge

[Seal of the International Tribunal]

[45] The Appeals Chamber notes that in the Reply, the Defence further requests that an oral hearing be held pursuant to the Request for Review. *See* Reply, para. 17. The holding of an oral hearing which is provided for under Rule 120 is, however, contingent on the requirements of Rule 119 being fulfilled. Given that the Request for Review has been dismissed, the Appeals Chamber denies the Defence's request for an oral hearing.

DECLARATION OF JUDGE SHAHABUDDEEN

1. I agree with the outcome of today's decision but not with some of its reasoning. The material shows that there was a rule that one of four people had to be in the room at all times during the day and that the room was locked during the night, so that the room was never left either unattended or unlocked. This fact, though obviously relevant to whether there was any raping in the room, was not introduced at trial. The defence now seeks to introduce it in the Appeals Chamber as a new fact.

2. In denying the request of the defence, the decision of the Appeals Chamber says, in paragraph 15, that "in essence, the purported 'new facts' raised in the Request for Review go directly to the question of the accessibility—by whom and at what times—of the room in which Witness K testified that she had been raped. Therefore, as a first step, the Appeals Chamber must determine whether the fact of that room's accessibility was at issue before the Trial Chamber." The decision further states, in paragraph 21, that "in order for review proceedings to be available, the Defence must establish that the question of accessibility of the room . . . was not in issue or not considered by the Trial Chamber in reaching its verdict." As the defence did not establish that, its request was denied.

3. I apprehend that the object of these statements is to show that the existence of the rule could not be a new fact, because the question whether the rule existed was embraced by the issue of accessibility which was before the Trial Chamber. But, with respect, this approach of the Appeals Chamber redefines the question: the question becomes not whether the existence of the rule is a new fact, but whether the *general issue* of accessibility could have embraced the *particular issue* as to whether the rule existed. It could have, but that is not the point. The question was whether the existence of the rule was a new fact (i.e., apart from the issue whether there was due diligence, referred to below). That question has to be considered separately from that general issue of accessibility.

4. Nor, for the same reason, can it be said that the material was additional evidence. Evidence is additional only if it relates to an issue which was already before the Trial Chamber: the Trial Chamber did not have before it an issue as to whether the rule existed. Evidence as to the existence of the rule cannot therefore be additional evidence. I am not able to support the statement in paragraph 22 of today's decision that the material "might, if at all, amount to additional evidence", but does not in any event "qualify as new facts".

5. Moreover, the scope of a "new fact" has to be considered. In its recent decision on the request for reconsideration filed by Mr. Radić's co-accused Mr. Žigić,[1] the Appeals Chamber decided that it has no power to reconsider a final judgement in cases not involving a "new fact". In support, it relied in part on its view that the "new fact" requirement has been interpreted "broadly", such that it still affords those who have suffered an injustice a meaningful right of review.[2] In my view, this is not an opportune time to adopt a new and more stringent interpretation of the "new fact" requirement.

6. I consider that it would be more logical, and more helpful to the jurisprudence of the Tribunal, to dismiss the Request on the basis that the defence has not demonstrated that the fact in question could not have been discovered through the exercise of due diligence, and that a waiver of the due diligence requirement in order to prevent a miscarriage of justice is not warranted.

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

31 October 2006
The Hague
The Netherlands.

Mohamed Shahabuddeen

[Seal of the International Tribunal]

[1] *Prosecutor v. 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.
[2] *Ibid.*, para. 7.

34