MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

IN THE APPEALS CHAMBER

Before: The Appeals Chamber

Registrar: Mr. John Hocking

Date Filed: 6 February 2014

THE PROSECUTOR

v.

MILAN LUKIĆ &
SREDOJE LUKIĆ

Public with Confidential Annexes 1-5

APPLICATION ON BEHALF OF MILAN LUKIĆ FOR REVIEW OF THE TRIAL JUDGMENT OF 20 JULY 2009

Counsel for the Applicant, Mr. Milan Lukić
Mr. Rodney Dixon

The Office of the Prosecutor
Mr. Serge Brammertz

INTRODUCTION

1. Further to the Judgment rendered by the Trial Chamber against Milan Lukić on 20 July 2009,[1] which was subsequently upheld by the Appeals Chamber on 4 December 2012,[2] Counsel for Milan Lukić (the "Applicant" or the "Defence") hereby files this "*Application on Behalf of Milan Lukić for Review of the Trial Chamber Judgment of 20 July 2009*" (the "Review Application") pursuant to Article 26 of the Statute of the International Criminal Tribunal for the former Yugoslavia (the "Statute" and the "International Tribunal") and Rules 119 and 120 of the Rules of Procedure and Evidence of the International Tribunal (the "Rules").

2. The Applicant was convicted of crimes against humanity and war crimes for his involvement in various incidents in the municipality of Visegrad, including in June 1992. He was sentenced to a term of life imprisonment.

3. The Applicant submits that his convictions and sentence should be reviewed in light of new evidence which has come to his attention for the first time since his appeal. This evidence consists primarily of new witness statements from four witnesses[3], which are annexed hereto in Confidential Annexes 1-4[4], and summarised below in respect of the specific incidents and counts to which each is relevant. Due to security and safety concerns, each of the witnesses has sought to remain confidential from the public. The witnesses will therefore be referred to as Witnesses 1-4 in this application. One further witness has come to light recently. He has been interviewed and a statement is being finalised with him. His new evidence corroborates in general terms the new evidence from Witnesses 1-4. His statement will thus be filed as soon as possible as evidence to support the primary new evidence of Witnesses 1-4.

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[1] *Prosecutor v. Milan Lukić and Sredoje Lukić*, Judgement, IT-98-32/1-T, 20 July 2009 (hereinafter the "Trial Chamber Judgement").
[2] *Prosecutor v. Milan Lukić and Sredoje Lukić*, Judgement, IT-98-32/1-A, 4 December 2012 (hereinafter the "Appeals Chamber Judgement"). See also, *Prosecutor v. Milan Lukić and Sredoje Lukić*, Corrigendum to Judgement of 4 December 2012, IT-98-32/1-A, 4 March 2013.
[3] In addition, there are certain new documents which were not available to the Defence previously that are relied on in the application. These are attached at Annex 5. Certain further new documents have just recently been received, which are being analysed, and will be filed as soon as possible as they corroborate the new evidence of Witness 1-4.
[4] The witnesses have prepared and signed their statements in B/C/S, and English translations of each statement are attached.

4. Mr. Lukić faces the most severe sentence that can be imposed by the ICTY, that of life imprisonment, which has only been imposed against a handful of accused.[5] He submits that it is vital that full consideration is given to his review application in light of the new evidence that he has discovered.

5. The Applicant submits that the new evidence satisfies the legal requirements for review under the Statute and the Rules, and he respectfully requests that his review is granted so that the new evidence can be heard and considered. In the Applicant's submission the new evidence, in whole or in part, would have been a decisive factor in the Trial Chamber reaching its original decision (which has subsequently been upheld by the Appeals Chamber). For this reason, the Applicant requests the Appeals Chamber to refer the case to a reconstituted (to the extent possible) Trial Chamber, or, should this not be possible, to a new Trial Chamber to hear and consider the new evidence and to adjudicate on the specific counts to which it relates, in accordance with the established jurisprudence of the ICTY and ICTR.[6]

APPLICABLE LAW

6. 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."*[7]

7. Rule 119 of the Rules states that:

> *"(A) 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*

[5] See Prosecutor v. Tolimir, IT-05-88/2-T, Judgement, 12 December 2012, p. 519; Prosecutor v. Stakić, IT-97-24-T, Judgement, 31 July 2003, p. 253; Prosecutor v. Galić, IT-98-29-A, Judgement, 3 November 2006, p. 185; Prosecutor v. Popović et al., IT-05-88-T, Judgement, 10 June 2010 – see p. 832 in regards to Vujadin Popović and p. 833 in regards to Ljubiša Beara.
[6] See paras 16-18 below.
[7] Statute of the International Criminal Tribunal for the Former Yugoslavia, September 2009, Article 26.

> *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.*
> *(B) Any brief in response to a request for review shall be filed within forty days of the filing of the request.*
> *(C) Any brief in reply shall be filed within fifteen days after the filing of the response."*[8]

8. Rule 120 of the Rules provides that:

> *"If a majority of Judges of the Chamber constituted pursuant to Rule 119 agree 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."*[9]

The Four Part Test for Review Applications

9. In accordance with the above provisions, the jurisprudence of the ICTY and ICTR has established that in order to grant an application for review the combined effect of Article 26 and Rules 119 and 120 requires that the review application must satisfy four conditions; namely that: "*a) there is a new fact; b) the new fact was not known to the moving party at the time of the original proceedings; c) the failure to discover the new fact was not due to a lack of due diligence on the part of the moving party; and d) the new fact could have been a decisive factor in reaching the original decision.*"[10]

10. The Appeals Chamber has consistently found that pursuant to Article 26 and Rules 119 and 120 the meaning of a "new fact" is "new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings."[11] It has been

[8] ICTY, Rules of Procedure and Evidence, IT/32/Rev. 49, Rule 119.
[9] ICTY, Rules of Procedure and Evidence, IT/32/Rev. 49, Rule 119.
[10] *Prosecutor v. Veselin Šljivančanin*, Decision with Respect to Veselin Šljivančanin's Application for Review, IT-95-1311-R.l, 14 July 2010, p.2 (hereinafter "*Šljivančanin* Review Decision"). See also, *Prosecutor v. Delić*, Decision on Motion for Review, IT-96-21-R-R119, 25 April 2002, para. 8 (hereinafter "*Delić* Review Decision"); *Prosecutor v. Blaškić*, Decision on Prosecutor's Request for Review or Reconsideration, IT-95-14-R, 23 November 2006, para. 7 (hereinafter "*Blaškić* Review Decision); *Prosecutor v. Naletilić*, Decision on Mladen Naletilić's Request for Review, IT-98-34-R, 19 March 2009, para. 10 (hereinafter "*Naletilić* Review Decision"); *Prosecutor v. Josipovic*, Decision on Motion for Review, IT-95-16-R2, 7 March 2003, para. 12 (hereinafter "*Josipovic* First Review Decision"); *Prosecutor v. Radić*, Decision on Defence Request for Review, IT-98-30/1-R.1, 31 October 2006, para. 10 (hereinafter "*Radić* Review Decision"); *Prosecutor v. Rutaganda*, Decision on Request for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification, ICTR-96-03-R, 8 December 2006, para. 8 (hereinafter "*Rutaganda* Review Decision").
[11] *Šljivančanin* Review Decision, p. 2; *Prosecutor v. Jelisic'*, Decision on Motion for Review, Case No. IT-95–10-R, AC, 2 May 2002, p. 3 (hereinafter "*Jelisić* Review Decision"); *Prosecutor v. Tadić*, Decision on Motion

clarified that the "[r]equirement that the new fact has not been in issue at trial means that it must not have been among the factors that the deciding body could have taken into account in reaching its verdict."[12] Therefore, it is "irrelevant whether the new fact already existed before the original proceedings or during such proceedings."[13] Instead, what defines whether a 'new fact' has been in issue at trial, or not, is "whether the deciding body and the moving party knew about the fact or not."[14] The Appeals Chamber in the *Šljivančanin* Review Decision accepted the Defence's new fact precisely because factual findings had been "made on the basis of the evidence before it [the Appeals Chamber], which did not include the new information provided" in the Defence's application for review.[15]

11. It is established in the case law of the ICTR and ICTY that in "wholly exceptional circumstances"[16] an application for review may be granted even when the 'new fact' was known to the moving party or was discoverable through due diligence.[17] The Chamber may treat the second and third prong of the test as only "directory in nature"[18] when "review of its judgement is necessary because the impact of the new fact on the decision is such that to ignore it would lead to a miscarriage of justice."[19] Thus, a Chamber "may grant a motion for review based solely on the existence of a

for Review, IT-94-1-R, 30 July 2002, para. 25 (hereinafter "*Tadić* Review Decision"); *Radić* Review Decision, at para. 12; *Blaškić* Review Decision, at para. 14; *Naletilić* Review Decision, at para. 11; *Rutaganda* Review Decision, at para. 9; *Prosecutor v. Niyitegeka,* Decision on Request for Review, ICTR-96-14-R, 30 June 2006, para. 6 (hereinafter "*Niyitegeka* First Review Decision").

[12] *Tadić* Review Decision, at para. 25; *Radić* Review Decision, at para. 12; *Blaškić* Review Decision, at para. 14; *Prosecutor v. Niyitegeka,* Decision on Request for Review, ICTR-96-14-R6, 6 March 2007, para. 5 (hereinafter "*Niyitegeka* Second Review Decision"); *Naletilić* Review Decision, at para. 11; *Rutaganda* Review Decision, at para. 9.

[13] *Tadić* Review Decision, at para. 25. See also, *Šljivančanin* Review Decision, p. 2; *Niyitegeka* First Review Decision, at para. 6.

[14] *Tadić* Review Decision, at para. 25. See also, *Šljivančanin* Review Decision, p. 2; *Naletilić* Review Decision, at para. 11; *Rutaganda* Review Decision, at para. 9; *Prosecutor v. Simba,* Decision on Aloys Simba's Requests for Suspension of Appeal Proceedings and Review, CTR-01-76-A9, January 2007, para. 13 (hereinafter "*Simba* Review Decision"); *Niyitegeka* First Review Decision, at para. 6.

[15] *Šljivančanin* Review Decision, p. 3.

[16] *Prosecutor v Barayagwiza,* "Decision on Prosecutor's Request for Review or Reconsideration", ICTR-97-19-AR 72, 31 March 2000, para. 65 (hereinafter "*Barayagwiza* Review Decision"). See also, *Šljivančanin* Review Decision, p. 2; *Tadić* Review Decision, at para. 26; *Radić* Review Decision, at para. 11; *Blaškić* Review Decision, at para. 8; *Josipovic* First Review Decision, at para. 13; *Niyitegeka* First Review Decision, at para. 7.

[17] *Barayagwiza* Review Decision, at para. 65. See also, *Šljivančanin* Review Decision, p. 2, 3; *Tadić* Review Decision, at para. 26; *Radić* Review Decision, at para. 12; *Blaškić* Review Decision, at para. 8; *Josipovic* First Review Decision, at para. 13; *Niyitegeka* First Review Decision, at para. 7.

[18] *Tadić* Review Decision, at para. 26; *Barayagwiza* Review Decision, para. 65.

[19] *Blaškić* Review Decision, at para. 8. See also, *Šljivančanin* Review Decision, p. 2, 3; *Radić* Review Decision, at para. 11; *Josipovic* First Review Decision, at para. 13; *Simba* Review Decision, at para. 8.

new fact which could have been a decisive factor in reaching the original decision … in order to prevent a miscarriage of justice."[20]

12. In the *Šljivančanin* Review Decision, the Appeals Chamber found that although the Defence put forward the 'new fact' from a witness who had testified for the Defence at the original trial, the new fact "if proved, could fundamentally alter the balance of evidence relating to this case."[21] The Defence submitted that the 'new fact' "was not in issue" during the trial because the Prosecution and Defence "did not put any questions to either Sljivancanin or [the witness], or to any other witness for that matter, in relation to" the 'new fact'.[22] Significantly, the Appeals Chamber found that "although the ... New Fact was discoverable through due diligence by Sljivancanin's counsel, review of the *Mrksic and Sljivancanin* Appeal Judgement is necessary because the impact of the ... New Fact, if proved, is such that to ignore it *would* lead to a miscarriage of justice."[23]

Evidence of the 'New Fact' within the Application for the Review

13. There is no jurisprudence which clarifies whether a full witness statement dealing with the 'new fact' is required to be submitted with a Review Application or whether it is sufficient to submit a summary of the witness statement which covers the 'new fact'.

14. In the *Šljivančanin* Review proceedings, the Prosecution filed a response objecting to the Defence's attachment of a summary of the witness statement. The Prosecution argued that the "[a]pplication lacks sufficient information ... to assess whether ... [the] new statement establishes a 'new fact' in the context of those in issue at trial and on appeal" and therefore "Šljivančanin should be required to submit the new statement so the Prosecution can respond."[24] The Defence thereafter provided the Chamber and

[20] *Tadić* Review Decision, at para. 26. See also, *Barayagwiza* Review Decision, at para. 65.
[21] *Šljivančanin* Review Decision, at p. 3.
[22] *Prosecutor v. Šljivančanin,* Application on Behalf of Veselin Šljivančanin for Review of the Appeals Chamber Judgment of 5 May 2009, IT-95-13/1-R.1, 28 January 2010, para. 15.
[23] *Šljivančanin* Review Decision, at p. 3.
[24] *Prosecutor v. Šljivančanin,* Prosecution's Motion for Panic's Statement Referenced in Sljicancanin's Application for Review or Alternatively for Dismissal without Prejudice, IT-95-13/1-R.1, 29 January 2010, paras. 1, 3.

the Prosecution with a full witness statement "as a matter of courtesy and with a view to fully cooperating."[25]

15. The Appeals Chamber did not make a finding on the whether a witness summary is sufficient or whether a full statement is required. In the present case, as set out below, the Applicant has filed the full witness statements that deal with the new facts relied on in the present review application.

The Proper Forum for Review

16. The jurisprudence of both the ICTY and ICTR states that "the proper forum for the filing of a request for review is the judicial body which rendered the final judgement."[26] The Appeals Chamber in *Barayagwiza* clarified that a final judgment "is one which terminates the proceedings."[27] Hence, the appropriate forum "for the *filing* of a request for review"[28] where an appeals judgment has been rendered would be with the Appeals Chamber.

17. However, once a review application has been properly *filed* with the Appeals Chamber, "it will be then for the Appeals Chamber to determine ... whether it can deal with the review itself or whether it is necessary to refer the case to a reconstituted (to the extent possible) Trial Chamber, or, should this not be possible, to a new Trial Chamber."[29] The Appeals Chamber has previously noted that once it has considered the parties' submissions, it thereafter has the "discretionary power" to decide whether to refer a motion for review to the Trial Chamber taking into account the "interests of justice and of judicial economy in the circumstances" of the case.[30]

18. It is important to note that in *Šljivančanin*, in which the Appeals Chamber itself decided on the merits of the review, having itself heard the new evidence, the 'new fact' applied directly to "new factual findings" and a "new conviction" made by the

[25] *Prosecutor v. Šljivančanin*, Defence response to Prosecution's Motion for Panic's Statement Referenced in Sljicancanin's Application for Review, IT-95-13/1-R.1, 8 February 2010, para. 2.
[26] *Tadić* Review Decision, at para. 22. See also, *Delić* Review Decision, at para. 11; *Simba* Review Decision, at para. 7.
[27] *Barayagwiza* Review Decision, at para 49.
[28] *Tadić* Review Decision, at para. 22 (emphasis added).
[29] *Tadić* Review Decision, at para. 22. See also, *Simba* Review Decision, at para. 7.
[30] *Simba* Review Decision, at para. 7.

Appeals Chamber for the first time in its appeal judgment.[31] Accordingly, given that the Trial Chamber had "made no specific finding" regarding the matter which was the subject of the new fact, and that the Appeals Chamber had "made new factual findings" regarding this matter and had "relied on these findings to conclude that Šljivančanin possessed the *mens rea*"[32] necessary to convict him of a new offence on appeal, it was in the 'interests of justice' and 'judicial economy' for the Appeals Chamber to decide on the merits of the application for review.

APPLICATION OF LEGAL REQUIREMENTS TO NEW EVIDENCE

19. The Applicant has set out below in relation to the incidents for which he was convicted what new facts have been discovered since the judgment was delivered by the Trial Chamber and the Appeals Chamber and how each of these new facts satisfy the requirements of Article 26 and Rules 119 and 120.

20. It is the Applicant's submission that the new facts in relation to each of these incidents constitute proper and justifiable grounds for finding that the convictions against the Applicant in respect of these incidents should be reviewed and that the new evidence, in whole or in part, should be taken into account to reassess the innocence or guilt of the Applicant in respect of all or any of these incidents, as set out below.

21. As submitted above, the Applicant requests that the Appeals Chamber should therefore refer the case to a reconstituted (to the extent possible) Trial Chamber, or, should this not be possible, to a new Trial Chamber to hear this new evidence and to assess the reliability, credibility and the impact that the evidence, in whole or in part, has on the legal and factual findings of the original decision before the original Trial Chamber. Should the Appeals Chamber not be so minded, the Applicant, in the alternative, requests that the Appeals Chamber should itself hear the new evidence, to assess its reliability and credibility in determining the merits of the review.

[31] *Šljivančanin* Review Decision, at p. 1, 3.
[32] *Šljivančanin* Review Decision, at p. 3.

(1) Drina River incident

22. The Applicant was convicted by the Trial Chamber of executing seven men he had rounded up at a place on the bank of the Drina River very near to an intersection in the road at Sase, on 7 June 1992.[33] These crimes were as charged in Counts 1-7.[34] The Applicant's defence of alibi was rejected by the Trial Chamber.[35]

i.) There is a new fact

23. Witness 2 has provided a statement[36] in which he attests that he witnessed this incident on the bank of the Drina River on 7 June 1992 in which he saw five people on the river bank and one other person who approached him who was wounded in his stomach. He knows that this latter man's surname is Kovac. He states that he took this man to the medical centre in Visegrad so that his wounds could be treated. He names the other persons that he saw present at this incident. Milan Lukic was not amongst this group and was not present during this incident.[37]

24. Witness 2 attests that he reported this incident to the police in Visegrad and that he spoke to Witness 1 on the same day about the incident he witnessed. Witness 1 has provided a statement to the Defence which confirms that Witness 2 contacted the police station on 7 June 1992. The details of what was reported are as set out in his statement.[38]

25. This evidence constitutes new facts. Neither of these statements was produced before the Trial Chamber or the Appeals Chamber. This evidence was not heard in any form by the original Trial Chamber, and indeed no witnesses in the trial were asked any questions about the particular matters raised in these new statements. They are entirely new facts and evidence which the Applicant requests should be considered in the review proceedings and any further trial proceedings that follow.

[33] Trial Chamber Judgement, paras. 113, 114, 230.
[34] *Prosecutor v. Lukic et al.*, Second Amended Indictment, IT-98-32/1-PT, 27 February 2006, paras. 3-6 (hereinafter "Second Amended Indictment").
[35] Trial Chamber Judgement, para. 230.
[36] Annex 2.
[37] Annex 2, paras. 11-14.
[38] Annex 1, para. 11.

ii.) *The fact was unknown to the Applicant in the original proceedings*

26. Although Witness 2 testified in the Applicant's trial in January 2009 with the pseudonym MLD4, he was only interviewed by the Defence team at the time about the alleged events that occurred from 13 to 15 June 1992 in Visegrad. He provided the Defence team at the time with a statement about these events only, as requested by them and he consequently only testified at the Applicant's trial about these events. The Prosecution, the Defence and the Trial Chamber never asked him any questions about any incidents that took place outside of the period 13-15 June 1992. He was specifically not asked any questions about the alleged incident on 7 June 1992 and there is nothing to indicate that he was even aware that this incident was relevant to the trial proceedings.

27. The Applicant submits that in these circumstances the information that Witness 2 had about the incident on 7 June was unknown to the Applicant at the time, and remained unknown to him until Witness 2 provided the statement that is submitted with this review application.

28. In fact, the Applicant was only alerted to this new information about the 7 June incident when he was contacted by Witness 1 who had been residing abroad since 2001 during which time the Applicant had been on trial in The Hague. Witness 2 only came forward after the Applicant's appeal judgment was known to him in order to ensure that the Applicant was provided with the information that Witness 1 had that was relevant to the incidents for which the Applicant had been convicted. Witness 1 knew that Witness 2 had reported to him at the police station what he (Witness 2) had witnessed on 7 June. (There is also other information which Witness 1 has in relation to other incidents that is referred to below.)

29. Witness 1 explains in his statement that he had not come forward at any earlier stage because he feared for his safety and that of his family who still lived in Visegrad if he named the persons who he knew were the real perpetrators of the crimes for which the Applicant was convicted. He had lost contact with the Applicant after the war when he moved abroad and had not followed the Applicant's trial in The Hague. However,

when he found out that the Applicant's appeal had been rejected and that he was sentenced to life imprisonment he decided that he had to get in contact with the Applicant so that the truth could be known. He was determined to testify before the Court if the Court would accept his evidence so that justice would be done.[39]

30. The Applicant submits that as he was unaware during his trial and the appeal proceedings that Witness 1 had this information and could identify Witness 2 as a direct eye-witness to the incident on 7 June, the Court should find that these new facts were unknown to the Applicant in the original proceedings.

iii.) *Failure to discover the new fact was not due to lack of due diligence*

31. In light of the circumstances in which the new facts above have become available to the Applicant after the completion of his trial and appellate proceedings, the Applicant submits that the failure to discover these new facts at any earlier stage was not due to any lack of due diligence on his part. As was found by the Appeals Chamber, the fact that a witness has testified in the original proceedings is not *per se* an indication that there has been a lack of due diligence if the witness was not asked about particular events by the parties and the Judges.[40]

32. In respect of Witness 1, it must be taken into account that he was no longer residing in Visegrad or the region when the Applicant was investigating and preparing for trial. He was not a close friend of the Applicant and as he himself indicates in his statement, he had not taken any efforts to come forward or make it known that he had relevant information due to his very serious security concerns. Furthermore, it should be taken into account that as the evidence at the trial established, the records at the police station in Visegrad were destroyed during the war, and thus it was impossible for the Applicant to have become aware at the time of his trial or thereafter of Witness 2's report to the police station about the events on 7 June 1992 that Witness 1 confirms that he recorded in the police records.

[39] Annex 1, paras. 3, 4.
[40] *Šljivančanin* Review Decision, p. 3. See also, *Prosecutor v. Šljivančanin*, Application on Behalf of Veselin Šljivančanin for Review of the Appeals Chamber Judgment of 5 May 2009, IT-95-13/1-R.1, 28 January 2010, para. 12-15.

33. In any event, as set out below, even if the Appeals Chamber does not find in the Applicant's favour on this point, there are compelling grounds for the evidence to be admitted in order to ensure that a miscarriage of justice is not occasioned, in accordance with the Tribunal's well-established jurisprudence.[41]

iv.) The new fact would have been a decisive factor in reaching the original decision

34. If the Applicant had known about these new facts during his trial there can be no doubt that he would have led this evidence as part of his defence. Indeed, he challenged the evidence of the Prosecution's witnesses in respect of this incident by putting to them that there had been firing from the opposite bank of the Drina River to the location where the persons had allegedly been lined up.[42] However, the Applicant did not call any evidence that could have supported this contention. The only witness who the Applicant was able to call was, as the Trial Chamber found, not involved in this incident.[43] The new facts provided by Witness 2 deal directly with what happened at the scene of the incident at the Drina River on 7 June, as he was an eye-witness to these events. Witness 2 is an independent witness who was present at the scene of the incident that forms the basis of the Counts for which the Applicant was convicted. His account is also confirmed and corroborated by Witness 1 to the extent that he states that Witness 2 contacted the police station on 7 June 1992 about this incident.

35. It is clear that Witness 2's new statement is concerned with the same incident that was addressed in the Indictment and the Trial Judgment. The date, the place, and the general circumstances of the incident are identical. Witness 2's evidence would plainly be decisive in that his first-hand account of events involves the participation of persons other than the Applicant. His evidence would thus call into question the reliability and credibility of the Prosecution witnesses who were relied upon by the Trial Chamber to convict the Applicant. There is nothing to suggest that Witness 2's

[41] See para. 11 above citing *Barayagwiza* Review Decision, para. 65; *Šljivančanin* Review Decision, p. 2; *Tadić* Review Decision, at para. 26; *Radić* Review Decision, at para. 11; *Blaškić* Review Decision, at para. 8; *Josipovic* First Review Decision, at para. 13; *Niyitegeka* First Review Decision, at para. 7.
[42] Trial Chamber Judgement, para. 192.
[43] Trial Chamber Judgement, para. 192.

evidence is incredible or unreliable. He was not found to be an incredible witness by the Trial Chamber in respect of other events[44], and the Prosecution never called any evidence to establish as much.

36. It would therefore constitute a miscarriage of justice if this new evidence was not heard and assessed together with the evidence already before the Trial Chamber. If it had been known to the Applicant at the time of his trial, Witness 2 would have been called as his key defence witness for these Counts, as his evidence directly contradicts that of the Prosecution witnesses. This evidence *independently* establishes that the Applicant was not present during the incident on the bank of the Drina River. It does not in any way concern the alibi defence that the Applicant relied on at trial, which was rejected by the Trial Chamber. Witness 2's evidence provides a completely different defence, that is unrelated although not inconsistent with the alibi defence, which shows that the Prosecution would not have been able to prove the allegations in these Counts beyond a reasonable doubt.

37. The Applicant accordingly requests that the new facts above are admitted in new trial proceedings, as the failure to do so would undermine the interests of justice and would occasion a miscarriage of justice.

(2) Pionirska Street incident

38. The Applicant was convicted of crimes committed in Pionirska Street in Visegrad on about 14 June 1992.[45] These crimes were as charged in Counts 1 and 8-12.[46] The Trial Chamber rejected the Applicant's alibi that he was not in Visegrad on 14 June 1992 but on a police patrol in Kopito, away from Visegrad. In particular, the Trial Chamber found that the evidence in respect of the Applicant's alibi displayed discrepancies, and in light of these discrepancies, the Trial Chamber found "that the alibi does not tend to show that Milan Lukic was not present on 13 - 15 June 1992 during the Pionirska street incident."[47]

[44] Trial Chamber Judgement, paras. 70, 72, 73, 89, 479, 497.
[45] Trial Chamber Judgement, paras. 630-631.
[46] Second Amended Indictment, paras. 3, 4, 7-10.
[47] Trial Chamber Judgement, para. 630.

i.) *There is a new fact*

39. Witness 3 has provided a statement in which he confirms that the Applicant was definitely in Kopito on 14 June 1992.[48] He states that he knows this because he heard the Applicant's voice on a police radio on both 14 and 15 June 1992.[49] The radio device was located at a police checkpoint outside of the Hotel Visegrad where he was residing at the time. When the witness was himself at the checkpoint on 14 and 15 June he heard the applicant's voice over the radio reporting from Kopito about the police actions that were being undertaken there. The witness recognised the Applicant's voice as he had known the Applicant since May 1992.[50]

40. This evidence constitutes new facts. It was not heard in any form by the original Trial Chamber or before the Appeals Chamber. No witnesses in the trial were asked any questions about the allegations made in Witness 3's statement. They are entirely new facts and evidence which the Applicant requests should be considered in the review proceedings and any further trial proceedings that follow.

ii.) *The fact was unknown to the Applicant in the original proceedings*

41. Witness 3 was interviewed by the Applicant's defence team for his trial in 2008. The witness confirms in his statement at Annex 3 that he was not asked any questions about any incident in Pionirska street during the interview or at any time thereafter.[51] The witness explains that after the Appeals Judgment in the Applicant's case was delivered, when he met with the Applicant's sister-in-law in February 2013 he told her for the first time that he had information about these incidents.[52]

42. The Applicant was thus unaware that Witness 3 had any information about the Pionirska street incident until after his Appeals Judgment had been handed down. He could have, of course, obtained this evidence through interviewing Witness 3 in

[48] Annex 3.
[49] Annex 3, paras. 8, 9.
[50] Annex 3, para. 10.
[51] Annex 3, para. 5.
[52] Annex 3, para. 7.

preparation for his trial. However, the interview of Witness 3 in 2008 was conducted by the Applicant's Defence team at the time. The Applicant was not present, and the Applicant had no information available to him to suggest that Witness 3 knew anything about his whereabouts on 13 - 15 June 1992. Indeed, even if Witness 3 had been asked about the Pionirska street incident in 2008 he would have not been able to provide any evidence about the incident itself. His only evidence, which is now available, goes to the whereabouts of the Applicant. It is based entirely on what he heard over the radio on 14 and 15 June at the checkpoint outside the Hotel Visegrad.

iii.) Failure to discover the new fact was not due to lack of due diligence

43. Given the manner in which these new facts have become known to the Applicant after the completion of his trial and appellate proceedings, the Applicant submits that the failure to discover these new facts at any earlier stage was not as a result of a lack of due diligence on his part.

44. The Applicant emphasises that there is nothing to show that he could or should have been aware that this witness possessed very specific information relevant to his whereabouts on 13 - 15 June 1992.

45. In any event, as set out below, there are compelling grounds for this new evidence to be admitted to ensure that a miscarriage of justice is not occasioned.

iv.) The new fact would have been a decisive factor in reaching the original decision

46. This evidence would certainly have been led as part of the defence case during the Applicant's trial. It directly supports the Applicant's defence that he was not present at Pionirska street on 14 June 1992 as he was participating in a police operation in Kopito. The Applicant submits that the new evidence is compelling first-hand evidence which would have supported his alibi and thus required the Trial Chamber to consider whether the Prosecution had proved his case beyond a reasonable doubt. Though the Trial Chamber rejected the evidence of witness MLD4 concerning Mr. Lukic's alibi, this was only due to limited inconsistencies between MLD4's account

and another witness's account. MLD4 was not found to be unreliable, instead the Trial Chamber found the conflicting account of the other witness to be "more reliable."[53] The new evidence put forward in this review application independently supports Mr. Lukic's alibi, and it is not the same evidence which was found to be inconsistent. It involves a separate and distinct account, which was not available to Mr. Lukic at his trial and the Trial Chamber.[54]

47. Moreover, the new evidence from Witness 3 is corroborated by the new witness statement from Witness 1. Witness 1 confirms that the Applicant was in Kopito on police duty on 14 June 1992 and that he spoke to the Applicant about two or three days after 14 June when the Applicant returned from Kopito to the police station in Visegrad.[55] Witness 1 also states that he was called out to, and visited, Pionirska street on 14 June when he was on police duty. He attended the scene as there were reports of shootings there. He identifies the persons who he met who were present there, namely Dragan Savić, Aleksandar Simsić, Mitar Knezević and one other person.[56] Milan Lukic was not present.

48. This is an additional new fact that the Applicant asks the Court to admit as new evidence corroborating the new facts provided by Witness 3. The new evidence of Witness 3 as supported by Witness 1's statement would clearly have been decisive in reaching the original decision because it would have directly addressed the concerns expressed by the Chamber about the discrepancies in the accounts of the alibi witnesses the Chamber did hear at trial. The accounts given by Witness 3 and Witness 1 are consistent, and there is nothing to suggest that they are unreliable. This evidence therefore could have formed a firm basis for the Trial Chamber to find that the Applicant's alibi did tend to show that he was not present during the Piornirska street incident.

49. As the Trial Chamber held, in putting forward an alibi the accused need only produce evidence tending to show that he was not present at the time of the alleged crime.[57] In

[53] Trial Chamber Judgement, para. 620.
[54] Trial Chamber Judgement, paras. 619, 620.
[55] Annex 1, para. 12.
[56] Annex 1, para. 13.
[57] Trial Chamber Judgement, paras. 28, 29.

other words, an accused need only produce evidence likely to raise a reasonable doubt in the Prosecution's case and the onus remains on the Prosecution to establish beyond reasonable doubt that the facts alleged by the Prosecution are nevertheless true.

50. The Applicant submits that the new evidence would have been decisive because it would have cast a reasonable doubt on the Prosecution's case and obliged the Prosecution to establish the Applicant's presence at Pionirska street beyond reasonable doubt. It would therefore constitute a miscarriage of justice if this new evidence was not heard and assessed by the Trial Chamber to determine whether the Prosecution had proved its case beyond a reasonable doubt or not. The Applicant accordingly requests that the new facts are admitted in new trial proceedings, as they are critical to whether the Prosecution has proved the Applicant's presence or not, and it would occasion a miscarriage of justice were the Court to refuse to hear this evidence at all.

51. The Applicant also requests that certain additional evidence which would have had an impact on the Prosecution's case is taken into account. The Applicant notes that the Prosecution relied on the testimony of Mr. Huso Kurspahić as evidence identifying Mr. Lukic at the Pionirska street incident.[58] The Applicant has recently become aware that Mr. Kurspahić has been charged for committing war crimes against civilians.[59] Had this information about his alleged participation in the commission of serious crimes been known at the time of trial, it would have been used in cross-examination, and should thus be taken into consideration as an additional factor when determining this ground for review.

(3) <u>Bikavac incident</u>

52. The Applicant was convicted of crimes committed at Bikavac on or about 27 June 1992.[60] These crimes are as charged in Counts 1, and 13-17.[61] The Trial Chamber rejected the Applicant's alibi, finding that it was not reasonably possibly true.[62]

[58] Trial Chamber Judgement, paras. 434-436.
[59] See Tohoy, Prsro, "Blackbook", pp. 773-789. Also see para. 61 below.
[60] Trial Chamber Judgement, para. 731.
[61] Second Amended Indictment, para. 11.
[62] Trial Chamber Judgement, para. 725-731.

i.) *There is a new fact*

53. In his new witness statement Witness 3 described how on the night of 27 June 1992 in the Hotel Visegrad, he overheard a conversation between various persons who were bragging about having earlier attacked Muslim houses in Bikavac. He named these persons as Dragan Savić, Mitar Knezević, Šime, Mile Lakić and Dragan Laki.[63]

54. This new evidence is corroborated by new evidence provided from two other witnesses. First, Witness 1 states that it was reported to him as a police officer that a group staying at the Hotel Visegrad consisting of volunteers from Serbia as well as Dragan Savić, Aleksandar Simsić, and Mitar Knezević had been responsible for committing the crimes at Bikavac.

55. Second, Witness 4 has provided a statement in which she details her husband's confession to her on his death bed. She states that her husband confessed to her before he died that he had been responsible for committing various crimes in Visegrad including those committed at Bikavac on 27 June 1992.[64]

56. The evidence of all three of these witnesses confirms that the Applicant was not present at Bikavac on 27 June 1992. This evidence constitutes new facts. None of it was led at trial, and no witnesses at trial were asked any questions about these allegations.

ii.) *The fact was unknown to the Applicant in the original proceedings*

57. The evidence of all three of these witnesses was not known to the Applicant at the time of his trial or his appeal:

- Witness 3 - He was never asked about the Bikavac incident in his interview by Defence Counsel for the Applicant in his trial in 2008.

[63] Annex 3, para. 13.
[64] Annex 4.

- Witness 1 - As submitted above, he had lost contact with the Applicant when he moved abroad and was not in contact with the Applicant before or during his trial.

- Witness 4 - She explains in her statement that she did not share her husband's confession with anyone until March 2013.

iii.) *Failure to discover the new fact was not due to lack of due diligence*

58. In light of the circumstances in which this new evidence has come to light, the Applicant submits that he cannot be blamed for not being in a position to rely on it during his trial. Even if the Appeals Chamber is of the view that it could have been discovered at an earlier stage, the Applicant submits that nevertheless it should be admitted because it is relevant to demonstrating who was responsible for the crimes committed at Bikavac. It would thus occasion a miscarriage of justice if it were excluded as it shows that the Applicant was not involved in the commission of these offenses, which were perpetrated by other named persons.

v.) *The new fact would have been a decisive factor in reaching the original decision*

59. The Applicant submits that this new evidence would have been decisive in reaching the original decision in that it would have constituted relevant and reliable evidence about the persons who perpetrated the crimes at Bikavac. This would in turn have raised reasonable doubts about the Prosecution's case that the Applicant was present and committing the crimes at Bikavac. At the very least the Trial Chamber would have had to consider whether this evidence cast reasonable doubt on the Prosecution's case and whether the Prosecution had in fact discharged its burden of proving the Applicant's presence beyond reasonable doubt.

60. The Applicant would certainly have relied upon this evidence if it had been in his possession at trial. Although he led alibi evidence, which was not accepted by the Trial Chamber, he would have been perfectly entitled to lead evidence in his defence about the perpetrators of the crimes in order to show that the Prosecution had not

proved its case and the Applicant's involvement to the requisite criminal standard. Even if the Trial Chamber had not accepted his alibi evidence, the Chamber would have had to consider and assess the Defence's other evidence which showed that the crimes were perpetrated by other persons and not the accused. Indeed, the very fact that the Trial Chamber did reject the Defence's alibi evidence means that the new evidence that is the subject of this application could have been decisive to the Trial Chamber's findings on these counts.

61. Furthermore, the Applicant submits that there are certain new documents which are relevant to the credibility and reliability of the evidence relied on by Prosecution at trial. Certain individuals who were central to the Prosecution's case have been charged in Bosnia-Herzegovina with war crimes. These documents are attached at Annex 5 and show that Bakira Hasečić has been charged with war crimes in Bosnia-Herzegovina.[65] Ms. Hasečić worked with the Prosecution on Mr. Lukic's case collecting and taking witness statements. They also show that a Prosecution witness against Mr. Lukic has been charged with war crimes in Serbia. This is information which the Defence could rely on in the event that Applicant's review application was granted on the basis of the new witness evidence.

(4) Varda Factory incident

62. The Applicant was convicted of killing persons from the Varda Factory on 10 June 1992.[66] These crimes were charged in Counts 1, 6 and 7. The Applicant's alibi for this event was rejected by the Trial Chamber.[67]

i.) There is a new fact

63. Witness 1 states in his statement that the Applicant was not sent from the police station on 10 June to the Varda Factory.[68] He explains that the Applicant may have been in Belgrade at this time because he did go there from time to time in June 1992.

[65] See Annex 5 (only in B/C/S). The original documents are in B/C/S, and no English translations have been located and it has not been possible to obtain translation services at this stage of the review proceedings.
[66] Trial Chamber Judgement, para. 329.
[67] Trial Chamber Judgement, para. 329.
[68] See Annex 1, para. 16.

He further confirms as the Applicant's colleague at the Visegrad police station, that he was aware of what activities Mr. Lukic was undertaking and what his movements were at the time.

ii.) *The fact was unknown to the Applicant in the original proceedings*

64. As explained above, the Applicant was unaware of Witness 1's whereabouts during his trial and appeal. He only became aware that Witness 1 had information which could assist his case when he was visited by Witness 1's son at the Detention Unit in March 2013.[69]

iii.) *Failure to discover the new fact was not due to lack of due diligence*

65. As already explained in respect of other new evidence provided by Witness 1, the Applicant could not have discovered this new evidence through the exercise of due diligence. The Applicant did not know Witness 1's whereabouts, and was not in contact with him during his trial and appeal.

66. Witness 1 has stated that he did not come forward and make it known that he had relevant evidence due to the safety concerns that he had for his family who were still living in Visegrad.

iv.) *The new fact would have been a decisive factor in reaching the original decision*

67. Witness 1 would certainly have been called as a Defence witness to give the evidence set out above in relation to the Drina River incident, the Piornirska street incident and the Bikavac incident. He would thus have also testified about his knowledge of the Varda Factory incident. His new evidence in respect of this latter incident would have been decisive in that it would have provided evidence from the Applicant's colleague at work at the time as to his whereabouts, and whether he was in fact dispatched to the Varda Factory on the day in question. This relevant new evidence

[69] See paras. 29 above. See also, Annex 1, para. 2.

could have raised reasonable doubt about the Prosecution's case that the Applicant was present at the Varda Factory.

RELIEF SOUGHT

68. In light of the arguments and submissions presented above, the Defence respectfully requests the Appeals Chamber to:

a. GRANT the Review Application;

b. RECONSTITUTE the Trial Chamber or a new Trial Chamber to review the Trial Chamber's Judgment in respect of the specific Counts identified herein;

c. DIRECT the Trial Chamber to call all or any of the witnesses to hear their new evidence before the Trial Chamber in respect of the specific Counts identified herein;

d. ALTERNATIVELY, hear all or any of the witnesses before the Appeals Chamber and decide the review application.

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RESPECTFULLY SUBMITTED

Rodney Dixon
Counsel for Milan Lukić
6 February 2014