UNITED NATIONS

MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

Case No. MICT-13-52-ES.1

Before: **Judge Theodor Meron, President**

Registrar: **Mr. John Hocking**

Date Filed: **14 April 2015**

PROSECUTOR

v.

MILAN LUKIĆ

Public with Confidential Annex A

REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION AND REVIEW OF SENTENCE OF MR. LUKIC IN ESTONIA AND TRANSFER TO THE HAGUE

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COMES NOW Milan Lukić, by and through his counsel[1] and respectfully files the instant REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION AND REVIEW OF SENTENCE OF MR. LUKIC IN ESTONIA AND TRANSFER TO THE HAGUE; and in support states:

I. REQUEST TO EXTEND WORD COUNT

1. Movant seeks authorization pursuant to paragraph 17 of the relevant Practice Direction[2] that the word allowance for this Submission be enlarged from 3000 words to 3496 words. Exceptional circumstances support the sought extension and the additional number of words are not unduly onerous so as to create undue prejudice to the

[1] Despite both prior filings on record clearly referencing the Power of Attorney executed by Mr. Lukic (and the fact that the signed Power of Attorney was filed on record as an annex to the Request for Hearing) naming present counsels to represent him in this matter, the MICT Registry continues to inexplicably represent it has no knowledge of the Power of Attorney, and thus has failed to act on requests made by counsel for appointment of pro-bono legal assistants. The Defence requests that the filings of the Defence (on Record in these Proceedings, processed by the MICT Registry, and comprising the Record maintained by the MICT Registry of these proceedings), be also be made available to the MICT Registry so that they may perform their duties as envisioned by the Statute and the Rules.

[2] Practice Direction on Lengths of Briefs and Motions, 6 August 2013, (MICT/11)

Prosecution or to overly burden the President of the MICT. The Exceptional circumstances that warrant the sought extension are as follows:

a. The Prosecution filed a subsequent Brief citing additional authority and thus had the benefit of two filings, exceeding the word count allotment for their Response. The Defence must address that additional authority and that is precisely the reason for the slight increase being sought which is necessary to adequately address the arguments raised by the Prosection.

For these foregoing reasons, the Movant has fulfilled the criteria for the sought extension of the word allowance, which is itself not a significant departure from the 3000 word limit that is provided under paragraph 15 of the same Practice Direction.

II. PROCEDURAL BACKGROUND

2. The Movant, Milan Lukic, filed a MOTION FOR RECONSIDERATION AND REVIEW OF SENTENCE OF MR. LUKIC IN ESTONIA AND TRANSFER TO THE HAGUE (hereinafter "Defence Post-Sentencing Motion") on 9 March 2015 partly public and partly confidential. This Defence Post-Sentencing Motion was supported by sound argument, citations to authority, and a recent Psychological Review of the Movant by a Psychological Expert Practitioner, as well as by a declaration by the Spouse of Movant.

3. On 23 March 2015 the Prosecution filed their Response to the Defence Post-Sentencing Motion (hereinafter "Prosecution Response"), albeit the same was not served upon Defence counsel until the next day. Subsequent to filing of the Prosecution Response, the Prosecution has first filed a "Corrigendum" to same on 24 March 2015 (served on the Defense 25 March 2015) and even later has filed a Request to Cite Additional Authority in support of their Response, which was filed on 27 March 2015, but only served on the Defense on 30 March 2015.

4. On 7 April 2015, the Movant filed a request for enlargement of time to file their Reply to the Prosecution Response. The Prosecution did not oppose same, and on 13 April 2015 the President of the MICT granted the enlargement of time being sought

(hereinafter "Enlargement Decision"). This Reply is thus timely filed, within the time prescribed by aforesaid Enlargement Decision. It is partly public and partly confidential due to the nature of some of the submissions that relate to the confidential portions of prior filings.

5. The Defence submits that the Prosecution Response has failed to rebut the arguments raised in the Defence Post-Sentencing Motion, and thus the relief sought in the Defence Post-Sentencing Motion ought to be granted. Further the Prosecution Response misapprehends the applicable law and authority.

III. SUBSTANTIVE ARGUMENTS.

A. THE DEFENCE POST-SENTENCING MOTION IS PROPERLY BROUGHT AND MEETS THE APPROPRIATE STANDARD.

6. The Prosecution Response several times argues that Defence Post-Sentencing Motion is not properly made before the MICT, including that:

a. The Statute and the Rules do not provide for Review of Sentencing Decisions[3];

b. The standard for Review/Reconsideration has not been met[4];

c. There are new facts or arguments presented as the President has reviewed everything[5]; and

d. There is no showing of a failure to comply with legal authorities, procedural fairness, and basic rules of national justice.[6]

7. The Prosecution position is astounding and in direct contradiction with the Statute of the MICT. Article 25 of the MICT expressly provides the Mechanism has the power and jurisdiction to supervise the enforcement of sentences imposed by the ICTY. The Defence Post-Sentencing Motion is precisely calling upon the MICT to exercise its authority in relation to enforcement of Milan Lukic's sentence, as pronounced by the

[3] Prosecution Response para. 2
[4] Prosecution Response para. 3, 4, 5
[5] Prosecution Response para. 4
[6] Prosecution Response para. 5

ICTY. Article 24 of the MICT expressly provides that a convicted person of the ICTY may present a Request for Review of a Judgment if a new fact not known at the time of the ICTY proceedings comes to light. Respectfully the enforcement of a sentence imposed by a Judgment is part and parcel with the Judgment, and where there are issues raised about the inappropriateness of an enforcement regime, these failings affect the fairness and appropriateness of the Judgment itself. Rule 128 of the MICT obliges the MICT to supervise the enforcement of Sentences. Again, for all the foregoing reasons, the Defence Post-Sentencing Motion is properly brought before the MICT, which has authority to hear same.

8. The MICT is further bound to interpret its Statute and Rules in a manner consistent with the ICTY and ICTR jurisprudence.[7] Under ICTY jurisprudence and Rules, specifically Rule 104 of same, all sentences imposed by the ICTY shall be supervised by it or by a body it designates. The ICTY jurisprudence clearly states that MICT, and not ICTY, has jurisdiction over early release of ICTY prisoners after 1 July 2013.[8] Thus it is clear that matters relating to supervision and modification of enforcement regimes of ICTY sentences is properly before the MICT and is within the jurisdiction and authority of the MICT President. As such the relief sought by the Defence Post-Sentencing Motion is properly brought under the Rules for these instant proceedings. The MICT is under the obligation to ensure that the detention of Mr. Lukic complies with International Standards and Human Rights.

9. The Prosecution Response is not correct that the Standards of Review or Reconsideration have not have not been met, or that all factors raised were considered by the President when assigning Estonia as the enforcement state. Both Review and Reconsideration are appropriate when new facts arise that justify reconsideration in order to avoid injustice.[9] New facts refer to new evidentiary information supporting a fact that

[7] Munyarugarama v Prosecutor, No. MICT-12-09-AR14, Decision on Appeal Against the Referral of Phineas Munyarugarama's Case to Rwanda…(5 October 2012) at para. 6; Ngirabatware v Prosecutor, No. MICT-12-29-A, Judgement (18 December 2014) at para. 6
[8] Prosecutor v Pandurevic, No. IT-05-88-A, Decision on Motion for Early Release (2 February 2015)
[9] see, Prosecution Response, footnote 7

was not in issue or not considered in the original proceedings.[10] What is relevant in evaluating an application for review is not whether the new fact existed but whether the deciding body and the moving party knew about the fact or not in arriving at its decision.[11]

10. In the instant case, the Psychological Review of Dr. Hough[12] was conducted AFTER the transfer of Milan Lukic to Estonia, and considers the conditions of the incarceration, as well as their affect upon Mr. Lukic. There is no way that this evidence can be qualified as anything other than a "new fact" which was unknown at the time of the decision to send Milan Lukic to Estonia, and is a decisive factor that must be considered to avoid injustice. The findings of Dr. Hough, among other things are that there is a lack of a rehabilitation system having been made available to Mr. Lukic in Estonia, and if the Tartu Vangla is not equipped for same that Mr. Lukic should be transferred to another facility able to effectuate same. Dr. Hough stresses rehabilitation is a goal of sentencing and a factor to be considered in early release and that Mr. Lukic is denied the right to same. It is well established that the ICTY (and therefore the MICT) have established the purposes of punishment recognized under the jurisprudence of the Tribunal are retribution, deterrence and rehabilitation.[13] Thus the Movant is entitled to have this new evidence considered.

11. The Prosecution also fails to consider that the Defence has raised errors or the failure to comply with various guidelines and legal authorities and ensure fairness and respect to the Human Rights of Mr. Lukic. The Review of Dr. Hough expressly provides that certain criteria or regimes that are existing or were announced have not been applied to Mr. Lukic. Thus even if the ICTY in determining the enforcement state had such measures in mind, they are not being respected and not being applied by the enforcement

[10] Naletilic v Prosecutor, No. IT-98-34-R, Decision on Mladen Naletilic's Request for Review (19 March 2009) at para. 31; Prosecutor v Sljivancanin, No. IT-95-13/1-R.1, Decision with Respect to Veselin Sljivancanin's Request for Review (14 July 2010) at p. 3
[11] Prosecutor v Sljivancanin, No. IT-95-13/1-R.1, Decision with Respect to Veselin Sljivancanin's Request for Review (14 July 2010) at p. 3
[12] Confidential Annex D of the Defence Post-Sentencing Motion
[13] Prosecutor v Blagojevic & Jokic, No. IT-02-60-T, Judgement (17 January 2005) at para. 817; Prosecutor v Kordic & Cerkez, No. IT-65-14/2-A, Judgement (17 December 2004) at para.1073

state and are being withheld. Accordingly Review is appropriate. Further, it is missed by the Prosecution that the appropriate UN Regulations and European Convention have not been complied with in regards to the enforcement of the Sentence in Estonia.[14] Accordingly, either they were NOT considered (when they ought to have) when the decision was made to transfer him to Estonia, or they were considered, and it was not know the Estonian authorities would act in a manner contrary to same when the decision was made. Either way, Mr. Lukic is entitled to have this matter submitted for review and relief.

B. THERE HAS BEEN A SHOWING OF VIOLATIONS TO MILAN LUKIC'S HUMAN RIGHTS.

12. The Prosecution completely ignores that the psychological review of Dr. Hough has expressed concern over the conditions of detention on the psychological health of Mr. Lukic. **See Confidential Annex A** All the foregoing findings and observations of Dr. Hough demonstrate the negative impact of these terms of condition on Mr. Lukic, and demonstrate that the Prosecution's assertions are incorrect.[15]

13-19. **See Confidential Annex A**

C. THE PROSECUTION RESPONSE RELIES INCORRECTLY ON JURISPRUDENCE CITED.

20. The Prosecution cites to a Decision from the rSCSL in the Charles Taylor Case in support of its opposition to the Movant's filings.[16] This citation is misplaced.

21. The Prosecution inaccurately references this Decision by the Residual Special Court of Sierra Leone (rSCSL) because *no parallel is to be found* between Taylor's and Lukić's situation.

[14] Defence Post-Sentencing Motion, para. 6-18
[15] See, Prosecution Response, para. 17
[16] Request to Cite Additional Authority in support of their Response, which was filed on 27 March 2015

22. In this matter and in opposing Taylor's transfer from his detention centre in the UK to one in Rwanda, the Prosecutor of the rSCSL states as a major reason, his "great concern over [Taylor's] ability to threaten their security and to undermine peace and security in Liberia and the sub-region."[17] He adds that these concerns, "militate against granting the requested relief"[18]

23. In Taylor's case, there is a specific desire and rationale to keep him further away; no such rationale exists for Lukić.

24. Given this, in the "Deliberations" (Section III) of this Decision, the Chamber emphasizes that "Taylor's case is an exceptional one" [19] and that even the "Security Council in Resolution 1688 expressly stated that his presence in the sub-region would be an impediment to the stability and a threat to peace of Liberia and Sierra Leone." [20]

25. Further, the isolation imposed upon Taylor was not unavoidable as is the isolation upon Lukić because of linguistic difficulties, but in Taylor's case, his isolation was enforced for his own safety. Indeed, the Chamber ruled that this isolation was "not intended to infringe upon his rights but secure them."[21] Further, it must be stressed that in the case of Taylor, where he speaks English and thus is able to communicate fully within the penal system of the United Kingdom, we do not have the same linguistic isolation, lack of rehabilitation, and lack of ability to communicate with medical and other personnel as is complained of in regards to Mr. Lukic and Estonia.

26. Accordingly, there is no guidance for the MICT considering Lukić's request which can draw from this Decision of the rSCSL.

[17] Decision, page 17, paragraph 25.
[18] Decision, page 16, paragraph 24.
[19] Decision, page 38, paragraph 59.
[20] Decision, page 40, paragraph 62.
[21] Decision, page 53, paragraph 110.

27. Notably, however in this Decision however, there are some useful citations of treaties and sources which SUPPORT the relief being sought by Movant Lukic.

28. Specifically, the Council of Europe Recommendation, Rec(2006)2 of the Committee of Ministers of the Member States of the European Prison Rules, adopted on 11 Jan 2006. Rule 24.4 states: The arrangements for visits shall be such as to allow prisoners to maintain and develop family relationships in as normal a manner as possible. As has been demonstrated by the Defence filings, the development of familial relationships has been negatively affected, especially as to the daughters of Lukic residing in Serbia, who have not been able to visit him even once in Estonia.

29. The Prosecution also notes that the Defence incorrectly relies on the ECHR case of *Khodorkovsky and Lebedev vs Russia* – this case dealt with transparency in assignment of inmates and possible intereference by the authorities in their assignment.[22] The Prosecution's dismissal of the applicability of this case law ignores the arguments being raised by Movant[23] as to the manner of selection of Estonia, based on understanding of conditions that are NOT being conducted in the manner foreseen, so it is still relevant.

III. CONCLUSION AND RELIEF SOUGHT

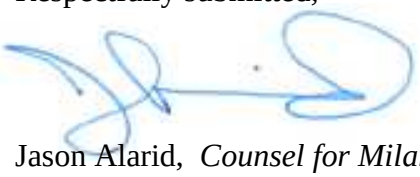
30. The Defence stands by its arguments as raised in its prior filing, that Mr. Lukić is subjected to hardships and distress going beyond the expected and unavoidable suffering triggered by his detention. These hardships result from the place of his detention rather than detention in itself. Lukić's excessive suffering can be remedied by his transfer to another detention centre, meaning the limitations to his rights may only be regarded as currently unreasonable and unjustified. Thus, the conditions of his detention neither meet international standards nor fulfill his most basic human rights.

[22] Prosecution Response para. 11
[23] See, para.

31. As such, the MICT should exercise its authority pursuant to Article 9(2) of the Agreement between the Tribunal and the Court and immediately **terminate** the enforcement of Lukić' sentence, and **order** his transfer to The Hague to allow for testimony at a hearing on the matter, examination, and alleviate human rights concerns pending further deliberations and investigation by the Court.

Word count 3,308 (3,496 including the Request to Extend word count)

Respectfully submitted,



Jason Alarid, *Counsel for Milan Lukić* Dragan Ivetić, *Counsel for Milan Lukić*

Dated This 14th of April 2015
The Hague, The Netherlands