

**UNITED
NATIONS**



Mechanism for International Criminal Tribunals

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

Date: 23 March 2015

Original: English

THE PRESIDENT OF THE MECHANISM

Before: Judge Theodor Meron, Presiding

Registrar: Mr. John Hocking

THE PROSECUTOR

v.

MILAN LUKIĆ

PUBLIC with confidential Annex

**PROSECUTION RESPONSE TO MILAN LUKIĆ'S MOTION
FOR RECONSIDERATION AND REVIEW OF SENTENCE IN
ESTONIA AND TRANSFER TO THE HAGUE**

The Office of the Prosecutor:

Mr. Hassan B. Jallow, Prosecutor
Mr. Mathias Marcussen, Senior Legal Officer

Counsel for Milan Lukić:

Mr. Jason Alarid
Mr. Dragan Ivetić

A. Overview

1. Lukić’s Motion for “reconsideration and review” of Estonia’s designation as the state of enforcement of his sentence should be denied.¹ Lukić’s Motion lacks any legal or factual basis to request termination of the enforcement of his sentence in Estonia and transfer to The Hague pending consideration of his claim and designation of a new enforcement state.²
2. The Statute and the Rules do not provide for reconsideration or review of the President’s decision designating the enforcement state and Lukić offers no explanation of the legal basis for his Motion. He has also by separate motion requested an evidentiary hearing to test the material he relies on.³ The Prosecution files this response so that any judicial determination may be made following an adversarial process.
3. Lukić fails to meet the standard for either reconsideration or review. The President, in conformity with the relevant Practice Direction,⁴ considered all the facts relied on by Lukić and he fails to demonstrate any error in the President’s Decision.⁵ Lukić also fails to demonstrate any violation of his rights arising from the conditions of his detention that would warrant the relief requested. Even on the material Lukić proffers, no unjustified interference has been shown.

¹ *Prosecutor v. Milan Lukić*, Case No.MICT-13-52-ES.1, Motion for Reconsideration and Review of Sentence of Mr. Lukić in Estonia and Transfer to The Hague, 9 March 2015 (public with public annexes A-C and confidential annex D) (“Motion”), p.2 and para.3. The Prosecution does not oppose Lukić’s request for an extension of the word limit. The Prosecution files the annex to this response confidentially because it elaborates on the content of the Motion’s confidential Annex D (psychological evaluation).

² Motion, para.3. *See also* paras.11, 20.

³ *Prosecutor v. Milan Lukić*, Case No.MICT-13-52-ES.1, Request for Evidentiary Hearing to Review Confinement Placement of Mr. Lukic in Estonia and Transfer to The Hague for Viva Voce Appearance, 9 March 2015 (“Hearing Request”), paras.1-2 (indicating that the Motion “alleg[es] and mak[es] a prima facie proffer of human rights concerns, if not violations, under the current sentence placing him in Tartu Vangla Prison” “requir[ing] full due process and proper inquiry and investigation, which includes participation by the accused.”)

⁴ Practice Direction on the Procedure for Designation of the State in which a Convicted Person is to Serve his or her Sentence of Imprisonment, MICT/2 Rev.1, 24 April 2014 (“Practice Direction”).

⁵ *Prosecutor v. Milan Lukić*, Case No.MICT-13-52-ES.1, Order Designating State in which Milan Lukić is to serve his Sentence, 3 February 2014 (“Decision”).

B. The Motion Lacks Legal or Factual Basis

a. Lukić fails to satisfy the standard for reconsideration or review

4. Lukić brings his Motion as an application for “reconsideration and review”, but fails to satisfy the standard required for either. Lukić fails to justify reconsideration by the President of the Rule 127(A) Decision,⁶ because he fails to identify or argue, let alone demonstrate, “the existence of a clear error of reasoning in the Decision, or of particular circumstances justifying its reconsideration in order to avoid injustice [...] includ[ing] new facts or new arguments”.⁷ Rather than new facts,⁸ the “usual place(s) of residence” of Lukić’s family—and, “when appropriate and practicable, the financial resources that may be available to visit”—⁹ Lukić’s “linguistic skills”,¹⁰ and “[t]he general conditions of imprisonment”¹¹ in Estonia were all “factors enumerated in the Practice Direction” and considered by the President, “including [Lukić’s] views”¹², in deciding that Lukić would serve his sentence in Estonia. In particular, the “desirability of serving sentences in States that are within close proximity or accessibility of the relatives of the convicted person”¹³ was among the factors that the President took into account. No reconsideration is warranted.

5. As for review, the Rules only expressly provide for review of judgement.¹⁴ Should the President’s Decision under Rule 127(A) be subject to judicial review, Lukić also fails to identify or argue, let alone demonstrate, a reviewable error significantly affecting that Decision to Lukić’s detriment.¹⁵ He does not show that, in making the Decision, the President (a) failed to comply with the requirements of the relevant legal authorities; or (b) failed to observe the basic rules of natural justice and procedural fairness towards Lukić as the person affected by the Decision; or (c) took into account irrelevant material or failed to

⁶ See *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case Nos.IT-03-69-A & IT-95-5/18-T, App.Ch., Decision on Motion by Radovan Karadžić for Reconsideration of Decision on Motion for Access to Confidential Materials in the *Stanišić and Simatović* Case, 16 February 2015, p.2 (finding that a request for reconsideration, by definition, has to be made before the chamber that rendered the impugned decision).

⁷ *Prosecutor v. Stanislav Galić*, Case No.IT-98-29-A, Pre-Appeal Judge, Decision on Defence’s Request for Reconsideration, 16 July 2004, p.2.

⁸ See Motion, para.3 (Lukić complains of his suffering resulting from his conditions of detention since his transfer to Tartu).

⁹ Practice Direction, para.4(a).

¹⁰ Practice Direction, para.4(e).

¹¹ Practice Direction, para.4(f).

¹² Decision, p.1.

¹³ Practice Direction, para.5.

¹⁴ Rule 146(A) (the convicted person “may make a motion to the President for review of the judgement.”).

¹⁵ *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/I-A, App.Ch., Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Žigić, 7 February 2003 (“*Kvočka et al.* Appeal Decision”), para.14.

take into account relevant material; or (d) reached a conclusion that was unreasonable.¹⁶ While Lukić suggests that he was transferred to Estonia “without considering” his “conditions of detention as foreign prisoner”,¹⁷ he fails to substantiate this allegation in the face of the President’s Decision stating that these factors were taken into account in designating Estonia as the state of enforcement.¹⁸

b. Lukić fails to show any human rights violations

6. Even on the material he currently relies on,¹⁹ Lukić does not make a *prima facie* showing of violation of his rights arising from the conditions of his detention,²⁰ let alone demonstrate any such violation, as he would be required in order to succeed with his Motion. Lukić misstates the UN Human Rights Committee General Comment which provides that “[r]espect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons” and that “[p]ersons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.”²¹ This is particularly applicable to his complaint of interference with his family life, in that even if there was such interference—which the Prosecution denies—he fails to show that it is not justified on legitimate grounds.

i. Family visitation

7. Even on his proffered material, Lukić fails to show that serving his sentence in Estonia violates his right to family life. The ECtHR has held that the European Convention does not grant the right to choose the place of detention, and that separation and distance from family are inevitable consequences of detention.²² Unlike in the cases he puts forward to claim that prison authorities have a positive obligation to assist in maintaining contact with family members, Lukić has not been denied having visits or communicating with family members.²³

¹⁶ *Kvočka et al.* Appeal Decision, para.13.

¹⁷ Motion, para.12.

¹⁸ Decision, p.1.

¹⁹ Lukić notes that the psychological “review” and notarized declaration by his spouse are “to be further elaborated” at the requested hearing: Motion, para.3. *See also* Hearing Request.

²⁰ *Contra* Hearing Request, paras.1-2.

²¹ UN Human Rights Committee (HRC), *CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, 10 April 1992, CCPR/C/21/Rev.1/Add.10, para.3.

²² *Selmani v. Switzerland* (dec.) no. 70258/01, ECHR, 2001, p.5.

²³ *Contra* Motion, para.5, fn.13. *Messina v. Italy* (No.2), no.25498/94, ECHR, Reports of Judgments and Decisions 2000-X, paras.61-62; *Kučera v. Slovakia*, (merits and just satisfaction), no.48666/99, ECHR, 2007, para.127; *Hilgartner v. Poland*, (merits and just satisfaction), no.37976/06, no.45678/98, ECHR, 2009, para.40.

8. Lukić also fails to show a *de facto* interference with family visitation—there is no complaint regarding other types of contact.²⁴ Mrs. Lukić’s stated aim to visit Lukić with their daughter “at least once a month” and indication that she did not do so for the month of December suggests that in the little over a year that Lukić has been serving sentence in Estonia he has been visited at least eleven times by his wife and youngest child.²⁵ This hardly demonstrates a “*de facto* interference” amounting to violation.
9. Regarding visitation expenses, other than stating that “we’ have borrowed all over the place”,²⁶ it is not alleged that Lukić himself is in need of money.²⁷ Lukić also does not state whether he or his family have sought to avail themselves of any financial assistance that are be available to similarly-situated persons.
10. Lukić’s argument that imprisonment in Estonia violates his right to family life should also be rejected because, even where—unlike in his case—there is detention in a prison at a distance that renders any visit very difficult if not impossible, such detention may in exceptional circumstances only constitute interference with family life.²⁸ *Hacisuleymanoglu* involved a Turkish applicant sentenced in Italy who still had 19 years to serve of his prison sentence and who was denied transfer to his country of origin to serve it. The ECtHR held that there was no specific obligation to transfer the applicant and no violation of his right to family life despite the difficulty of his family to travel the distance to his place of detention.²⁹
11. Lukić’s reliance on *Khodorkovskiy and Lebedev v. Russia* is inapposite.³⁰ In that case, the disproportionality of the interference with the prisoners’ family life lay in that “[in] absence of a clear and foreseeable method of distribution of convicts among penal colonies, the system failed to ‘provide a measure of legal protection against arbitrary interference by public authorities’” [...] with “results incompatible with the respect for the applicants’ private and family lives.”³¹ Such is not the case before the MICT, where the relevant Practice Direction provides “a clear and foreseeable method” of designation of enforcement state, guarding

²⁴ See Annex D (confidential), pp.6-8.

²⁵ Annex C.

²⁶ Annex C.

²⁷ Confidential Annex, para.1.

²⁸ *Hacisuleymanoglu v. Italy*, no.23241/94, Commission (plenary) decision of 20 October 1994, D.R. no. 79-B (“*Hacisuleymanoglu*”), pp.121, 125.

²⁹ *Hacisuleymanoglu*, pp.125, 126.

³⁰ Motion, para.9.

³¹ *Khodorkovskiy v. Russia* (merits and just satisfaction), no.11082/06 and no.13772/05, ECHR, 2013, paras.850-851.

against interference and belying the claim that such designation is aimed as additional punishment.³²

12. Rather than “deliberate[ly]” sending Lukić “to the end of the world”,³³ the President took into account all relevant factors in the Practice Direction,³⁴ including Lukić’s marital status, his dependent children and their place or residence,³⁵ and “the desirability of serving sentences in States that are within close proximity or accessibility of the relatives of the convicted person”.³⁶

ii. Estonian language classes and rehabilitation program

13. Lukić’s “conditions of detention as foreign prisoner” are far from “amount[ing] to cruel and inhumane treatment”.³⁷ The ECtHR has held that ill-treatment must attain a minimum level of severity if it is to fall within the scope of the European Convention’s Article 3 protecting from inhuman or degrading treatment or punishment, and that the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.³⁸ Lukić’s conditions of detention do not reach that level of severity.

14. Lukić’s claim of an “inability [...] to communicate with his co-inmates and prison staff [that] puts him in a de facto situation of isolation”³⁹ is belied by the material relied on.⁴⁰ Lukić’s contention that he is subjected to “linguistic isolation”⁴¹ is also not made out.⁴² Lukić also does not show “unavailability of readings in languages Lukić understands”.⁴³ He also fails to substantiate his claim of “impossibility to follow language classes”.⁴⁴ That Lukić “has still not been provided language classes” does not show “impossibility”⁴⁵ or that it is “likely to

³² See Annex C. See also Motion, Annex D (confidential), p.8.

³³ Annex C.

³⁴ Decision, p.1.

³⁵ The status as dependent of Lukić’s 19 months old child (Motion (dated 9 March 2015), para.10 and Annex C (letter to counsel from Danijela Lukić, dated 16 January 2015)) would have been known and communicated at the time of the Registrar’s confidential memorandum under the Practice Direction conveyed to the President on 29 November 2013 (Decision, p.1).

³⁶ Practice Direction, para.5.

³⁷ Motion, para.12.

³⁸ *Kudla v. Poland* [GC](merits and just satisfaction), no.30210/96, ECHR, Reports of Judgments and Decisions 2000-XI, paras.91-92.

³⁹ Motion, para.13.

⁴⁰ Confidential Annex, para.2.

⁴¹ Motion, para.13.

⁴² Confidential Annex, para.3.

⁴³ Motion, para.13. Confidential Annex, para.4.

⁴⁴ Motion, para.16.

⁴⁵ Motion, fn.24.

continue”.⁴⁶ Finally, his request to be transferred to “a more suitable place of detention”—without specifying that it need be a facility where the majority of the prison population speaks B/C/S—suggests that “linguistic isolation” is not such a source of concern. Indeed, in suggesting Finland, Germany or Denmark as more suitable places of detention, Lukić’s wife appears to overlook this language requirement.⁴⁷

15. Since he does not show the “impossibility to follow language classes”, Lukić also does not demonstrate the “impossibility to participate in social or psychological rehabilitation programs”.⁴⁸
16. Lukić’s reliance on *Dougoz v. Greece* for his claim that account needs to be taken of the cumulative effects of these conditions, as well as of the specific allegations made by the complainant,⁴⁹ is also misplaced. The *Dougoz v. Greece* case concerned the physical conditions of detention before deportation, characterized by overcrowded, inadequate facilities for sanitation, sleeping arrangements and recreation, amounting to inhuman or degrading treatment contrary to Article 3 of the European Convention.⁵⁰ Considering that Lukić does not complain of inadequate physical facilities, this case does not assist him.
17. The claim that his conditions of detention “heavily impact[...] the prisoner’s overall mental health”,⁵¹ does not reflect Lukić’s psychological evaluation.⁵² The state of Lukić’s mental health as described therein does not show that his conditions of detention amount to cruel and inhumane treatment.⁵³

C. Testing of evidence

18. As shown, even on the material proffered, the Motion should be denied. It is therefore not necessary for the deciding body to enter into a determination of the probative value of the material filed with the Motion. Should the deciding body, however, find it necessary to consider the credibility and reliability of the alleged facts, the probative value of the underlying material needs to be tested for example by an independent psychological

⁴⁶ Motion, para.15. Confidential Annex, para.5.

⁴⁷ Motion, Annex C.

⁴⁸ Motion, para.13. Confidential Annex, para.6.

⁴⁹ Motion, para.12.

⁵⁰ *Dougoz v. Greece* (merits and just satisfaction), no.40907/98, ECHR, Reports of Judgments and Decisions 2001-II, paras.46, 48.

⁵¹ Motion, para.12.

⁵² Confidential Annex, para.7.

⁵³ *Contra* Motion, para.12.

evaluation of Lukić, independent verification of Lukić's financial means or granting Lukić's request for an evidentiary hearing.⁵⁴

D. Conclusion

19. For the foregoing reasons, Lukić's Motion should be denied.

Word Count: 2,861



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Senior Legal Officer

Dated this 23rd day of March, 2015
At The Hague, The Netherlands.

⁵⁴ Motion, para.20. *See also* Hearing Request.