

**UNITED
NATIONS**



Mechanism for International Criminal Tribunals

Case No: MICT-14-67-R.1

Date: 24 July 2015

Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge William Hussein Sekule
Judge Bakone Justice Moloto
Judge Burton Hall
Judge Liu Daqun

Registrar: Mr. John Hocking

THE PROSECUTOR

v.

SRETEN LUKIĆ

PUBLIC

**PROSECUTION'S SUBMISSION OF PUBLIC REDACTED
VERSION OF RESPONSE TO SRETEN LUKIĆ'S REQUEST
FOR REVIEW PURSUANT TO RULE 146**

The Office of the Prosecutor:

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

Counsel for Mr. Sreten Lukić:

Mr. Dragan Ivetić

1. Pursuant to the Appeals Chamber's decision,¹ the Prosecution submits the public redacted version of the "Prosecution Response to Sreten Lukić's Request for Review pursuant to Rule 146", filed on 9 March 2015.
2. The Prosecution has redacted confidential information on Lukić's health.² However, rather than simply redacting any reference to the evidence proffered by Lukić in support of his second ground of review, in the interest of intelligibility the Prosecution has replaced such reference with the phrase "[materials related to the 5 January 1999 meeting]" in the public redacted version.

Word Count: 137



Mathias Marcussen
Senior Legal Officer

Dated this 24th day of July, 2015
At The Hague, The Netherlands.

¹ *Prosecutor v. Sreten Lukić*, Case No.MICT-14-67-R.1, Decision on Sreten Lukić's Application for Review, 8 July 2015 ("Decision"), para.24.

² *See* Decision, para.8 (finding sufficient reasons for partly maintaining the confidentiality of submissions in light of the information on Lukić's health and his reliance on certain confidential material).

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**PROSECUTION RESPONSE TO SRETEN LUKIĆ'S REQUEST
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The Office of the Prosecutor:

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I. Overview¹

1. The Appeals Chamber should dismiss Sreten Lukić's review Application because he fails to satisfy any criteria for review under Article 24 of the MICT Statute and Rule 146 of the MICT Rules.
2. The ill-health of a convicted person can be addressed to the President insofar as it affects the execution of sentence.² It does not constitute a "new fact",³ as Lukić's cardiac condition was raised before the Trial and Appeal Chambers. Review of a final judgement is "an exceptional procedure" rather than "an opportunity for a party to re-litigate arguments that failed at trial or on appeal".⁴ The Application is an improper attempt by Lukić to have the benefit of a second appeal, and should be dismissed accordingly.
3. Lukić fails to show how the [materials related to an interdepartmental meeting held on 5 January 1999 in Beli Dvor in Belgrade] contain facts which could not have been discovered by him earlier through the exercise of due diligence.⁵ The Trial Chamber found that on 5 January 1999 co-accused Šainović held a "[co-ordination]" meeting, which included Milošević, Milutinović, Ojdanić, Stojiljković, Pavković, Lukić, and Đorđević in Beli Dvor in Belgrade".⁶ The [materials related to the 5 January 1999 meeting] do not demonstrate a new fact, but instead support the Trial and Appeals Chambers' conclusions regarding Lukić's role in the JCE. As a participant at the meeting, Lukić knew about it and would have known about the [materials related to the 5 January 1999 meeting] as far back as January 1999. According to his Application, he knew about them as early as 2007,⁷ but fails to demonstrate that he sought them back then or that he resorted to the Chamber's assistance in order to obtain

¹ This response is filed confidentially because it responds to the confidential Application. In light of Lukić's submission that the Application is filed confidentially "[i]nsofar as it relates to medical information" (para.2), the Prosecution requests that the Appeals Chamber order Lukić to file a public redacted version excluding the confidential medical information, following which the Prosecution will file a public redacted version of this response.

² For instance, in *Strugar* the ICTY President granted early release on the ground, *inter alia*, of Strugar's gradually deteriorating medical condition (*see Strugar* Early Release Decision (public redacted), paras.11-12, 15). In *Plavšić* the President considered Plavšić's health as one of the grounds for granting early release (*see Plavšić* Early Release Decision (public redacted), para.11).

³ *M.Simić* Sentencing Judgement, para.98.

⁴ *Naletilić* Review Decision, paras.10, 24. *See also* Third *Niyitegeka* Review Decision, para.13.

⁵ Rule 146(A); *Josipović* Review Decision, paras.21-22; *Blaškić* Review Decision (public redacted version), paras.7-8; First *Niyitegeka* Review Decision, para.6(c).

⁶ Trial Judgement, vol.3, para.338 (upheld in Appeal Judgement, para.939). *Also* para.337. Exhibit P605 (Nikola Šainović interview with the Prosecution), e-court pp.827-841. This Exhibit was disclosed to Lukić on 10 May 2006.

⁷ [REDACTED] Application, para.28.

them. He therefore cannot seek to rely on [the materials related to the 5 January 1999 meeting] now to have the Appeal Judgement reviewed.

4. Finally, Lukić has waived the possibility of challenging his conviction for forcible displacement. Moreover, “[n]ew jurisprudence”⁸ does not give rise to review because it is not of an evidentiary nature as required under the “new fact” definition. In relying on the *Đordjević* Appeal Judgement, Lukić impermissibly seeks reconsideration of the judgement in his case, requiring the Application’s dismissal.

II. The Medical Information does not warrant review of the Appeal Judgement

a. Lukić fails to show a “new fact” required for review

5. The “Medical Information”⁹ regarding Lukić’s pre-existing [REDACTED] condition does not demonstrate a new fact.¹⁰ Lukić’s [REDACTED] [REDACTED]¹¹ were already at issue before the Trial and Appeals Chambers.¹² Rather than amounting to a new fact the Medical Information is merely supplementary information regarding facts already at issue during the trial and appeal proceedings.¹³
6. At trial, referring to his [REDACTED],¹⁴ Lukić presented medical records relating to [REDACTED] in support of his motions for provisional release,¹⁵ which were unsuccessful on this basis.¹⁶ He also

⁸ Application, para.4. *Also* para. 44.

⁹ See Application, Annex A [REDACTED]

Annex B [REDACTED]

Annex C [REDACTED]

¹⁰ [REDACTED]

¹¹ [REDACTED]

¹² *Naletilić* Review Decision, para.11, referring to *Blaškić* Review Decision (public redacted version), paras.14-15; *Tadić* Review Decision, para.25; *Rutaganda* Review Decision, para.9; Third *Niyitegeka* Review Decision, para.14.

¹³ See *Blaškić* Review Decision, para.40 (noting that offering new evidentiary information in review proceedings in support of a fact, does not lead to the conclusion that the fact itself is new). See also *Josipović* Review Decision, para.18, fn.30; *Delić* Review Decision, para.11.

¹⁴ [REDACTED]

¹⁵ [REDACTED]

¹⁶ Provisional Release Decision of 12 December 2008; Provisional Release Decision of 3 October 2005, p.8 (stating that Lukić’s current health condition is not a reason to provisionally release him).

unsuccessfully raised his medical condition as a mitigating factor,¹⁷ whereupon the Trial Chamber “re-examined the relevant documentation in the record of the proceedings”, and ruled that it did not warrant mitigation of sentence.¹⁸

7. On appeal, Lukić argued that the Trial Chamber erred in not considering the same medical condition in sentencing,¹⁹ describing it as [REDACTED]
[REDACTED]
[REDACTED].²⁰ He also submitted additional medical documentation on his condition to obtain provisional release,²¹ which the Appeals Chamber denied.²² During the Appeals Hearing, Lukić highlighted the effects of detention by citing to medical information on the record,²³ which indicated that [REDACTED]
[REDACTED]
[REDACTED].²⁴ The Appeals Chamber upheld the conclusion that Lukić’s medical condition did not amount to a mitigating factor, noting that the Trial Chamber “explicitly considered contemporary information documenting the state of Lukić’s health”.²⁵ Lukić also repeats the argument that, [REDACTED] the imposed 20-year sentence is a factual life sentence,²⁶ an argument he made before the Appeals Chamber in the context of applying for provisional release and also during the Appeals Hearing.²⁷ Lukić’s attempts to re-litigate these issues do not amount to new facts and should be dismissed.²⁸

¹⁷ T.27374 (26 August 2008) (Lukić Closing Arguments).

¹⁸ Trial Judgement, Volume 3, para.1203, citing Provisional Release Decision of 12 December 2008; Provisional Release Decision of 31 October 2008 (public with confidential annex).

¹⁹ T.520-522 (14 March 2013) (Appeals Hearing).

²⁰ Lukić Reply Brief, paras.133-134, 136(i), 137. *See also* Lukić Appeal Brief (public with confidential annexes), paras.863-867.

²¹

[REDACTED]

²² Provisional Release Decision of 3 April 2013, pp.2-4; Provisional Release Decision of 30 March 2012, pp.2-3.

²³ [REDACTED]

²⁴ T.520-522 (14 March 2013) (Appeals Hearing), citing Lukić Provisional Release Motion of 16 March 2012, Exhibit B, Medical Opinion of 13 February 2012, p.12446. [REDACTED]

[REDACTED]

²⁵ Appeal Judgement, para.1827, fn.5934, citing Trial Judgement, Volume.3, para.1203, fn.2970, citing Provisional Release Decision of 12 December 2008; Provisional Release Decision of 31 October 2008. Provisional Release Decision of 12 December 2008 concerns *Lukić* Provisional Release Motion of 3 December 2008.

²⁶

²⁷ [REDACTED]

²⁸ *See Blagojević* Review Decision, para.7 (“The Appeals Chamber reiterates that review proceedings are not an opportunity to re-litigate unsuccessful appeals or requests”); fn.23 referring to *Rutaganda* Review Decision, para.8; *Third Niyitegeka* Review Decision, para.14, *Barayagwiza* Review Decision, para.43.

b. The proffered new facts could not impact on Lukić's sentence

8. Both the Trial Chamber and the Appeals Chamber were aware of, and considered, the [REDACTED] of Lukić's health in sentencing him. The purported new facts could therefore neither have impacted the sentence imposed upon him,²⁹ nor would ignoring them result in a miscarriage of justice.³⁰
9. The Medical Information does not elevate the effect of Lukić's cardiac medical condition on his state of health to an "exceptional case" so that it could impact the Appeal Judgement and be considered in mitigation of sentence.³¹ Specifically, the letter expressing a medical opinion explicitly states that in comparison to Lukić's state of health in 2013, [REDACTED]
[REDACTED]
[REDACTED]³² The comparison is with a report attached to an earlier provisional release application filed before the Appeals Chamber.³³ Referring to the information contained in that report, the Appeals Chamber already found that Lukić's state of health did not amount to a special circumstance warranting provisional release.³⁴ Therefore, nothing in the Medical Information suggests that [REDACTED]
[REDACTED] that it could be considered to meet the "exceptional case" standard.³⁵

III. The [Materials related to the 5 January 1999 meeting] do not warrant review of the Appeal Judgement

a. Lukić fails to show a "new fact" required for review

10. At most, the [materials related to the 5 January 1999 meeting] constitute information purportedly supporting Lukić's challenges to his role as a JCE member and the existence of

²⁹ *Contra* Application, para.24.

³⁰ *See Blaškić* Review Decision (public redacted version), paras.7-8.

³¹ *See* Appeal Judgement, para.1827 ("poor health is mitigating only in exceptional cases"), citing to *Galić* Appeal Judgement, para.436 ("The Appeals Chamber finds that Galić has failed to demonstrate that his health was exceptionally poor"), citing *Blaškić* Appeal Judgement, para.696 ("Poor health is to be considered only in exceptional or rare cases.").

³² Application, Annex C [REDACTED]

³³ [REDACTED]

³⁴ Provisional Release Decision of 3 April 2013.

³⁵ *See M.Simić* Sentencing Judgement, paras.100-101 ("The Trial Chamber is sympathetic with Simić's medical complications and his current medical condition, but is not satisfied that the medical problems are present to such a degree as would justify a reduction of the sentence"). *See also Krstić* Appeal Judgement, para.271 (upholding findings as to Krstić's poor health and concluding that it does not constitute a mitigating circumstance in the context of the *Krstić* case). *Krstić* Trial Judgement, para.723 ("Although sympathetic to General Krstić's discomfort throughout the trial because of medical complications he suffered, the Trial Chamber considers that this circumstance is not related to the objective of sentence." Fn.1518 explains that Krstić's leg was amputated as a result of injuries he sustained from a landmine). *Rutaganda* Trial Judgement, section 7(G), mitigating circumstances, para.472 ("The Trial Chamber notes that Rutaganda is in poor health and has had to seek medical help continuously.")

the Joint Command in 1999,³⁶ examined and rejected at trial and on appeal. Lukić's Application on this ground should be dismissed for this reason alone.

11. Lukić's purported "new fact"—that the [materials related to the 5 January 1999 meeting] demonstrate that he did not contribute to the JCE by providing the link between the policy-makers in Belgrade and the commanders in Kosovo, including through his presence in high-level meetings—was strongly contested at trial and on appeal. The Appeals Chamber dismissed Lukić's challenges to the findings in the Trial Judgement.³⁷
12. Similarly, Lukić's next purported "new fact", namely that the [materials related to the 5 January 1999 meeting] demonstrate that the Joint Command did not exist in 1999, does not meet the requirements for review of the Appeal Judgement.³⁸ The existence and authority of the Joint Command in 1999 was strongly contested during trial and appeal proceedings and, therefore, "at issue". The Appeals Chamber dismissed Lukić's challenges to the Trial Chamber's findings in their entirety.³⁹

b. Lukić's failure to discover the alleged "new facts" results from his own lack of due diligence

13. Lukić fails to demonstrate that the [materials related to the 5 January 1999 meeting] contain facts which he could not have discovered through exercising due diligence.⁴⁰ Lukić asserts that he had previously requested the [materials related to the 5 January 1999 meeting] in 2007, but fails to provide any evidence that he had done so.⁴¹ The correspondence from the Serbian authorities only shows that he requested the [materials related to the 5 January 1999 meeting] on 23 September 2014—exactly eight months after the issuance of the Appeal Judgement—and that they were provided to him on 8 December 2014.⁴² Lukić argues that he learned of the existence of the [materials related to the 5 January 1999 meeting] from other

³⁶ Application, paras.29-32.

³⁷ Appeal Judgement, paras.1367-1368 (citing *inter alia* Trial Judgement, vol.3, paras.1051, 1118, 1131), 1407 (under the headings "Lukić's role as the 'bridge' between the policy-makers in Belgrade and the commanders of MUP units in Kosovo" and "Lukić's participation in high-level meetings")-1425 (citing *inter alia* Trial Judgement, vol.3, paras.1005, 1019-1033, 1037, 1050-1051, 1131).

³⁸ *Contra* Application, para.32.

³⁹ Appeal Judgement, paras.666 (summarising the findings in the Trial Judgement regarding the existence and role of the Joint Command in 1998 and the accused's participation therein), 772-832 (under the heading "Existence and authority of the Joint Command in late 1998 and 1999", citing, *inter alia*, Trial Judgement vol.1, paras.1021-1022, 1112-1117, 1150-1151, 1112).

⁴⁰ [REDACTED]
Application, para.28.

⁴² Application, Annex D [REDACTED]

accused,⁴³ and in the correspondence the Serbian authorities note that the [materials related to the 5 January 1999 meeting] are provided “under the same conditions under which [they were] submitted” in response to a request from Milan Milutinović’s attorney in a document dated 16 May 2006.⁴⁴ However, this statement, together with the statement in the correspondence from the Serbian authorities that the [materials related to the 5 January 1999 meeting] have “not been previously submitted to Lukić’s counsel”,⁴⁵ do not demonstrate that Lukić requested this document when he said he did, back in 2007.

14. Even assuming that Lukić requested the [materials related to the 5 January 1999 meeting] from Serbia in 2007 and encountered difficulties in obtaining them, he has failed to demonstrate that he exercised due diligence by seeking the Trial Chamber’s assistance pursuant to ICTY Rule 54*bis*.⁴⁶ Having failed to do so, Lukić cannot claim to have exercised due diligence by producing the [materials related to the 5 January 1999 meeting] eight years later, after the trial and appeal proceedings against him have concluded.

c. The proffered new facts could not impact on Lukić’s conviction or sentence

15. Even if the [materials related to the 5 January 1999 meeting] were accepted as containing new facts that were not discoverable with due diligence, Lukić’s conviction should not be vacated or his sentence reduced.⁴⁷ Lukić fails to make the requisite showing that any of these facts could have had a “decisive” impact on the Appeal Judgement.⁴⁸ Lukić also fails to show that this is an “exceptional” case in which review is merited, despite the lack of new facts or due diligence, in order to avoid a miscarriage of justice.⁴⁹
16. The Trial Chamber found, and the Appeal Chamber upheld, Lukić to be an important member of the JCE. It did so based on his contributions to the JCE one of which was to serve as the bridge between the policy-planners in Belgrade and those on the ground in Kosovo.⁵⁰ Neither the existence of the JCE nor Lukić’s role within it depends on the [materials related

⁴³ Application, para.28.

⁴⁴ Application, Annex D

⁴⁵ Application, Annex D

⁴⁶ See Appeal Judgement, paras.92-93.

⁴⁷ *Contra* Application, para.32*bis*.

⁴⁸ *Blaškić* Review Decision (public redacted version), para.7.

⁴⁹ *Blaškić* Review Decision (public redacted version), para.8.

⁵⁰ See Appeal Judgement, paras.1367, 1409-1412. See also, Trial Judgement, vol.3, paras.1051, 1131.

to the 5 January 1999 meeting] expressly mentioning crimes.⁵¹ The Appeals Chamber found that “the alleged absence of documentary evidence and insider witness testimony indicating a common purpose to expel Kosovo Albanians does not in and of itself render erroneous the Trial Chamber’s finding that such a common purpose existed”, and dismissed the Defence arguments in this respect as “merely pointing out the lack of such evidence”, and thus “fail[ing] to demonstrate why the Trial Chamber’s finding based on the other evidence should not stand”.⁵² In the same way, as upheld by the Appeal Chamber, the finding that Lukić was the bridge between the policy-planners in Belgrade and those on Kosovo rested on a wealth of evidence, and was not in any event made solely on the basis of his presence in meetings in Belgrade at Beli Dvor.⁵³ It was also not the sole significant contribution by Lukić to the common purpose.⁵⁴

17. Rather than refute the role attributed to him by the Trial and Appeals Chambers,⁵⁵ the [materials related to the 5 January 1999 meeting] actually support the conclusions regarding that role by confirming that Lukić was the bridge between the policy-planners in Belgrade and those on the ground in Kosovo,⁵⁶ and his participation in high-level meetings.⁵⁷ The [materials related to the 5 January 1999 meeting] show that on 5 January 1999, at the meeting chaired by the President of the FRY and attended by the Serbian and FRY high-

⁵¹ *Contra* Application, paras.29-30. *See* Appeal Judgement, para.604 (finding that the Trial Chamber concluded, “on the basis of circumstantial evidence derived from a number of factors,” that there was a common purpose shared by the members of the JCE to forcibly displace the Kosovo Albanian population both within and outside Kosovo through a widespread and systematic campaign of terror and violence).

⁵² *See* Appeal Judgement, para.658. Also paras.605, 656-657.

⁵³ Appeal Judgement, paras.1400-1406, 1410-1412. *See further*. Trial Judgement, vol.3, para.1005 (finding that on 6 May 1999 Lukić instructed the chiefs of the Kosovo SUPs and the PJP and SAJ commanders in Kosovo to familiarize their forces with the contents of an article from *Politika* which related to a meeting in Belgrade involving Milošević and various high-ranking officials, including Lukić himself, citing *inter alia* Exhibits 5D1289, 6D874, and Gvozden Gagić’s testimony, T.24476-24478, T.24517-24524), 1021 (finding that Lukić was involved in the meeting at which the Plan for Combating Terrorism was adopted and in implementing measures to ensure the proper execution of the Plan, citing *inter alia* Exhibit P948, pp.68-73, Duško Matković’s testimony, T.14634-14637 and statement, Exhibit P2913 (public version), p.9), 1050 (referring to a number of meetings chaired by Lukić at which he briefed high-level officials on the security situation in Kosovo and citing *inter alia* to Exhibits 6D798, P3121, and P2805), 1059 (concluding that the MUP Staff received various reports from the SUPs, collated them, and sent them to Belgrade, further showing that Lukić held an instrumental position in co-ordinating information exchange between the MUP forces in Kosovo and the MUP headquarters in Belgrade).

⁵⁴ *See e.g.* Appeal Judgement, paras.1360 (upholding the Trial Chamber’s finding that Lukić was a JCE member), 1367-1370 (confirming the Trial Chamber’s finding that Lukić had both *de jure* and *de facto* powers over MUP forces deployed in Kosovo), 1374 (finding that Lukić failed to show an error in the Trial Chamber’s finding that he issued numerous dispatches on behalf of the MUP Staff containing tasks and instructions for the SUP, PJPs and SAJ units operating in Kosovo), 1389-1393 (upholding the Trial Chamber’s finding on Lukić’s presence and role during MUP Staff meetings in 1998-1999); 1435-1439 (dismissing Lukić’s submissions challenging that he planned and coordinated MUP actions). Trial Judgement, vol.3, para.1131 (concluding that Lukić’s contribution to the JCE was significant, *inter alia*, by being *de facto* commander over MUP forces deployed in Kosovo from mid-1998 to mid-1999 and by being directly involved in the planning process and in ensuring that day-today operations were conducted by the various MUP forces in accordance with those plans).

⁵⁵ *Contra* Application, para.30.

⁵⁶ Appeal Judgement, paras.1367, 1409-1412. Trial Judgement, vol.3, paras.1051, 1131.

⁵⁷ *Contra* Application, para.31. *See* Appeal Judgement, paras.1411, 1413-1425, citing *inter alia* Trial Judgement, vol.3, para.1019.

ranking officials, Lukić reported “what members of the police force were doing [in Kosovo]”.⁵⁸

18. Lukić misstates the Trial and Appeal Judgements, which found that he was involved “in implementing measures to ensure proper execution” of the Plan for Combating Terrorism, not in “meetings where the Plan was implemented”.⁵⁹ While the Trial Chamber found that “[t]here is little evidence of meetings in Belgrade in 1999 to discuss plans for the suppression of 'terrorism'”,⁶⁰ the [materials related to the 5 January 1999 meeting] provide evidence of one such meeting, following which “[t]wo large-scale plans—the *Grom 3* and *Grom 4* plans—were prepared within the VJ at the beginning of the year and in April 1999”⁶¹ envisaging co-operation with MUP forces during the implementation of these tasks.⁶² “The period between January and the beginning of March 1999 was therefore devoted to planning the major VJ/MUP operations that were conducted from the latter part of March 1999.”⁶³
19. Contrary to Lukić’s assertion, the absence of reference to the Joint Command in the [materials related to the 5 January 1999 meeting] does not affect the Trial Chamber’s findings, as upheld by the Appeals Chamber, on the existence and authority of the Joint Command in 1999.⁶⁴ The finding upheld by the Appeals Chamber that in 1999 the coordination system established in 1998 between the VJ and the MUP continued to function is unaffected by the absence of express reference to the Joint Command in the [materials related to the 5 January 1999 meeting].⁶⁵ This finding was based on a wealth of evidence,⁶⁶ and Lukić does not explain how in his submission the absence of evidence in the shape of a lack of express reference to the Joint Command in the [materials related to the 5 January 1999 meeting] undermines that evidence. Also on this point the [materials related to the 5 January 1999 meeting] actually support rather than refute the continuation of VJ and MUP coordination in Kosovo into 1999. Thus, in the [materials related to the 5 January 1999 meeting], Lukić reports on the activities of the police forces “both in coordination with the army and independently”, followed by Šainović reporting that the “joint activities of army commands and units and the police are being successfully coordinated in terms of both place

⁵⁸ See Application, Annex D [REDACTED]
⁵⁹ Application, para.31 citing Appeal Judgement, para.1411. Also fn.4685. Trial Judgement, vol.3, para.1021.
⁶⁰ Trial Judgement, vol.1, para.1012.
⁶¹ Trial Judgement, vol.1, para.1012. Appeal Judgement, para.776, fn.2603.
⁶² Trial Judgement, vol.1, para.1013. Also para.1016. Appeal Judgement, paras.776, 1336.
⁶³ Trial Judgement, vol.1, para.1017 (upheld Appeal Judgement, paras.1335, 1339).
⁶⁴ Contra Application, para.32. See Appeal Judgement, para.831.
⁶⁵ Appeal Judgement, paras.773, 781-782, 828-829.
⁶⁶ See Appeal Judgement, paras.784-832.

and the timing of operations”.⁶⁷ None of his purported “new facts” could have had a decisive impact on the Appeal Judgement nor would ignoring them cause a miscarriage of justice.

IV. Subsequent findings by the ICTY Appeals Chamber in a different case do not warrant review of the Appeal Judgement

a. Lukić has waived his right to challenge his convictions for deportation and forcible transfer

20. Lukić has waived the possibility of challenging now his convictions for deportation and forcible transfer on the basis of forcible displacement to Montenegro. Under this ground, despite ostensibly challenging the Appeal Judgement’s findings,⁶⁸ he in fact only challenges the findings in the Trial Judgement.⁶⁹ Lukić failed to appeal these findings when he had the opportunity to do so. Despite filing a notice of appeal containing 37 grounds and an oversized appeal brief,⁷⁰ Lukić never challenged the findings that he is now seeking to review. The review process is not designed for a party to remedy its own failings.⁷¹

b. Lukić fails to show a “new fact” required for review

21. “New jurisprudence”⁷² does not give rise to review because it “is not of an evidentiary nature” as required under the “new fact” definition.⁷³ Rather than review, Lukić seeks reconsideration (only requiring the moving party to assert that a judgement is in error).⁷⁴ The ICTY Appeals Chamber has held that there is no power to reconsider a final judgement.⁷⁵ Appeal and review proceedings provide sufficient fair trial and due process guarantees.⁷⁶ Thus, reconsideration of a final judgement would in effect amount to the submission of a

⁶⁷ Application, Annex D [REDACTED]

⁶⁸ Application, para.8.

⁶⁹ Application, paras.38-42, 48.

⁷⁰ Appeal Judgement, para.15. *Also* Annex A, Procedural Background, para.6.

⁷¹ *See Delić* Review Decision, para.15.

⁷² Application, para.4, *see also* para. 44.

⁷³ *Jelišić* Review Decision, p.3 (dismissing the applicant’s submission that the development in the case law of the ICTY with respect to the approach to sentencing—whereby a plea of guilty and a showing of remorse should be considered as two separate mitigating factors—constituted a new fact warranting review of the (trial and appeal) judgements against him). *Also* p.2. *See also Blagojević* Review Decision, para.9 (dismissing the applicant’s request for review on the basis that recent practice in another case did not constitute new evidentiary information as required for a new fact under ICTY Rule 119).

⁷⁴ *Žigić* Review Decision, para.8.

⁷⁵ *Žigić* Review Decision, para.9; *Perišić* Review Decision, p.2.

⁷⁶ *Žigić* Review Decision, para.9; *Perišić* Review Decision, p.2.

second appeal, which is not in the interest of justice.⁷⁷ The MICT Appeals Chamber should follow this case-law,⁷⁸ and dismiss this ground of Lukić's Application on this basis.

c. The *Dorđević* Appeals Chamber's findings could not impact the judgement

22. Lukić has failed to show that the *Dorđević* Appeal Judgement—finding that the *Dorđević* Trial Chamber erred in concluding that forcible displacement to Montenegro amounts to deportation⁷⁹—is a new fact warranting a review of the judgement against him.

23. The finding of the *Dorđević* Appeals Chamber that forcible displacement to Montenegro does not amount to deportation does not render Lukić's convictions for forcible transfer for the same facts invalid.⁸⁰ While *Dorđević* was found guilty only for deportation (and persecution through deportation), Lukić was found responsible of both deportation and other inhumane acts (forcible transfer) for the incidents of forcible displacement in Peć on 27 and 28 March 1999 and in Kosovska Mitrovica town.⁸¹ Assuming Lukić had been wrongly convicted for deportation, his responsibility for forcible transfer for the same facts would still stand.

24. As conceded by Lukić, the indictments against him and *Dorđević* are not identical.⁸² Further, Lukić received timely, clear and consistent information of the charges against him,⁸³ and was therefore in a reasonable position to understand them.⁸⁴ Even if not a material fact for forcible transfer,⁸⁵ this notice included destination of the forcible displacements in the challenged incidents. On 8 July 2005, a year before trial started, the Pre-Trial Chamber

⁷⁷ *Žigić* Review Decision, paras.8-9.

⁷⁸ *Munyarugarama* Referral Appeal Decision, paras.5-6 (stating that, because of the "normative continuity" between the MICT Statute and the Rules with the ICTY and ICTR Statutes and Rules, the MICT Statute and Rules should be interpreted in such a manner as to be consistent with the jurisprudence and practice of both the ICTY and the ICTR, as a matter of "due process and fundamental fairness").

⁷⁹ *Dorđević* Trial Judgement, para.1683. The *Dorđević* Appeals Chamber found that the *Dorđević* Trial Chamber failed "to articulate the basis in customary international law upon which it found that a *de facto* border could be established in these circumstances". The Appeals Chamber went on to assess whether, in light of customary international law, the circumstances of that case supported the finding that a *de facto* border existed within the territory of the FRY, between Kosovo and Montenegro, and found no support in customary international law for that position. *Dorđević* Appeal Judgement, paras.534-536.

⁸⁰ *Contra* Application, para.43.

⁸¹ Trial Judgement, vol.3, para.1138.

⁸² Application, para.33. *See e.g.* Lukić Indictment, para.73 ("and, in particular, paragraph 29").

⁸³ At trial or on appeal, Lukić did not challenge notice in the Indictment for deportation/ forcible transfer, let alone that the Indictment did not correctly plead forcible displacement to Montenegro. *See e.g.* T.12779 (18 May 2007) (oral ruling on motions for judgement of acquittal): while "[n]o specific challenges were raised by the Defence to counts 1 and 2", the Trial Chamber found "sufficient evidence on which it could be found that deportation and forcible transfer as crimes against humanity were carried out by forces of the FRY and Serbia" in municipalities including Peć and Kosovska Mitrovica.

⁸⁴ *Naletilić* Appeal Judgement, paras.26-27.

⁸⁵ *See Popović* Trial Judgement, para.904 (for forcible transfer, the ultimate location does not form part of the elements of the offence). *Also* para.935.

issued a decision on the form of the indictment indicating that “the Indictment clearly charges the deportation and forcible transfer of Kosovo Albanian civilians”, with many “internally displaced persons remain[ing] inside the province” while “others eventually crossed over one of Kosovo borders into Albania, Macedonia, Montenegro, or crossed the provincial boundary between Kosovo and Serbia.”⁸⁶ The ICTY Rule 65ter summaries of the witnesses who were relied upon for the challenged findings—which Lukić received in May 2006 and which contain a summary of the facts and the charges in the Indictment as to which each witness would testify, including specific references to counts and relevant paragraphs in the indictment⁸⁷—mentioned that these witnesses were forcibly displaced to Montenegro⁸⁸ or in that direction.⁸⁹ The Prosecution in its opening statement mentioned that “[a] few from Peć actually went into Montenegro”.⁹⁰ The Prosecution’s accompanying visual presentation showed a map reflecting the forcible displacement to Montenegro.⁹¹ Furthermore, this map and a similar one of the forcible displacement routes from Kosovska Mitrovica formed part of the ICTY Rule 65ter list of exhibits, to be introduced through the Prosecution expert witness Patrick Ball whose expertise lay in applying statistical analysis to demographic issues.⁹² This timely, clear and consistent notice put Lukić in a reasonable position to understand that he was charged with forcible displacement to Montenegro.⁹³

25. This notice was understood. Lukić cross-examined on displacement to Montenegro,⁹⁴ and made submissions on its significance to the Prosecution’s case.⁹⁵ This demonstrates that he

⁸⁶ Lazarević Decision on Form of the Indictment, para.41 (concerning a previous version of the Indictment).

⁸⁷ Naletilić Appeal Judgement, para.27 (finding that ICTY Rule 65ter witness summaries may in some cases serve to put the accused on notice).

⁸⁸ Rule 65ter(E) Submissions, Annex A, Prosecution Witness List Pursuant to Rule 65ter(E)(ii) [REDACTED]

⁸⁹ Rule 65ter(E) Submissions, Annex A, Prosecution Witness List Pursuant to Rule 65ter(E)(ii) [REDACTED]

⁹⁰ T.463-464 (Prosecution Opening Statement) (10 July 2006).

⁹¹ See also T.464 (Prosecution Opening Statement) (10 July 2006).

⁹² See Rule 65ter(E) Submissions, Annex B: Prosecution Exhibit List pursuant to Rule 65ter(E)(iii) [REDACTED]

[REDACTED] But see Naletilić Appeal Judgement, para.27. Note however that in the *Milutinović et al.* case exhibits were placed under general headings, indicating for example the type of conduct intended to prove (e.g.: murders) and that the Pre-trial Judge ordered the Prosecution to indicate, with respect to each exhibit, the witness who would offer the exhibit in evidence (see Rule 65ter(E) Submissions, para.1), thus providing additional detail. See also Trial Judgement, vol.3, paras.21-29.

⁹³ See also Prosecution Final Trial Brief, paras.311, 394-399, 407-411.

⁹⁴ See T.4424-4425 (cross-examination of Edison Zatriqi) (29 September 2006).

⁹⁵ Lukić Final Trial Brief, para.928 (arguing that the fact that witness Edison Zatriqi “went to Montenegro clearly shows that there was no plan whatsoever to depart (*sic*) people out of Yugoslavia”). Also generally section XV for Peć and Kosovska Mitrovica town incidents. Further T.27345 (Lukić Closing Arguments) (26 August 2008) (addressing displacement to Montenegro).

was put on notice of the Prosecution's case and was able to respond to allegations,⁹⁶ thereby showing that his ability to prepare his case was not materially impaired.⁹⁷

26. Lukić's request for review with respect to other incidents of deportation and forcible transfer for which he was found responsible should be equally dismissed.⁹⁸ Lukić's argument that the findings in the *Dorđević* Appeal Judgement also impact findings made in the context of the municipality of Gnjilane/Gjilan⁹⁹ overlooks that, in addition to the arguments made above, the forcible displacement from this municipality and across "Kosovo's boundary with the province of Serbia" was expressly pleaded in the Indictment.¹⁰⁰

V. Conclusion

27. For the reasons explained above, the Appeals Chamber should dismiss the Application.

Word Count: 5582



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Dated this 9th day of March, 2015
At The Hague, The Netherlands.

⁹⁶ *Naletilić* Appeal Judgement, para.27.

⁹⁷ *See, by analogy, Naletilić* Appeal Judgement, fn.76 (finding that an accused who fails to object to the indictment at trial has the burden of proving *on appeal* that his ability to prepare his case was materially impaired). But note that Lukić did not raise this issue on appeal either.

⁹⁸ Application, para.48.

⁹⁹ Application, para.48, citing Trial Judgement, vol.2, paras.892, 928, 935-936.

¹⁰⁰ Indictment, para.72i