

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

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

Date: 15 December 2020

Original: English

IN THE APPEALS CHAMBER

Before:

**Judge Carmel Agius, Presiding
Judge Alphons Orié
Judge Liu Daqun
Judge Graciela Susana Gatti Santana
Judge Ivo Nelson de Caires Batista Rosa**

Registrar:

Mr. Abubacarr Tambadou

Decision of:

15 December 2020

PROSECUTOR

v.

MILAN LUKIĆ

PUBLIC

**DECISION ON MILAN LUKIĆ'S REQUEST FOR REVIEW
AND FOR ASSIGNMENT OF COUNSEL**

The Office of the Prosecutor:

Mr. Serge Brammertz
Mr. Mathias Marcussen

Counsel for Milan Lukić:

Mr. Zoran Živanović

1. The Appeals Chamber of the International Residual Mechanism for Criminal Tribunals (“Appeals Chamber” and “Mechanism”, respectively) is seised¹ of Milan Lukić’s request, filed confidentially on 1 September 2020,² for review of his conviction (“Lukić” and “Request for Review”, respectively) and for assignment of counsel at the expense of the Mechanism (“Request for Assignment of Counsel”).³ The Prosecution filed responses on 14 September 2020⁴ and 12 October 2020,⁵ and Lukić filed replies on 21 September 2020⁶ and 26 October 2020,⁷ respectively.

I. BACKGROUND

2. On 20 July 2009, Trial Chamber III of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) found Lukić guilty of murder and cruel treatment, as violations of the laws or customs of war, and persecutions, murder, inhumane acts, and, by majority, extermination, as crimes against humanity, and sentenced Lukić to a term of life imprisonment.⁸ One of Lukić’s convictions for extermination, as a crime against humanity, was based on his involvement in the killing of 59 persons in an incident on Pionirska street in Višegrad on 14 June 1992 (“Pionirska Street Incident”).⁹

¹ See Order Assigning Judges to a Case Before the Appeals Chamber, 1 October 2020 (“Assignment Order”), p. 2.

² Milan Lukić’s Motion for Review of the Judgement Pursuant to Rule 146(A) and Application with the Motion for Disqualification of President and Three Judges of IRMCT and for the Order for the Assignment of Counsel at the Expense of the IRMCT, 1 September 2020 (confidential) (“Motion”). See also Milan Lukić’s Clarification of the Motion for Review of the Judgement Pursuant to Rule 146(A) and the Renewed Motion for Disqualification of President and Three Judges of IRMCT and for Reclassification of the President’s Order and the President’s Decision, 5 October 2020 (confidential) (“Clarification”).

³ Motion, paras. 9-26, 61-84(c), (d); Clarification, paras. 9-14. The Appeals Chamber notes that, on 28 October 2020, a Three-Judge Panel dismissed Lukić’s request for disqualification of Judge Carmel Agius, Judge Theodor Meron, Judge Liu Daqun, and Judge William Sekule from the bench that would be appointed to adjudicate the Motion. See Motion, paras. 39, 60, 84(b); Decision on Request for Disqualification, 28 October 2020, paras. 10-15. See also Decision on Milan Lukić’s Motion for Disqualification of President and Three Judges of the Mechanism, 2 October 2020; Order Assigning a Three-Judge Panel, 5 October 2020.

⁴ Prosecution Response to Motion for Assignment of Counsel at the Expense of the Mechanism, 14 September 2020 (confidential) (“Response to Request for Assignment of Counsel”).

⁵ Prosecution Response to Milan Lukić’s Motion for Review of the Judgement Pursuant to Rule 146 (A), 12 October 2020 (confidential) (“Response to Request for Review”).

⁶ Milan Lukić’s Motion Seeking Leave to Reply and the Reply to the Prosecution Response to Motion for Assignment of Counsel at the Expense of the Mechanism, 21 September 2020 (confidential) (“Reply to Request for Assignment of Counsel”). In the absence of any objections, the Appeals Chamber grants Lukić’s leave to file his replies.

⁷ Milan Lukić’s Reply to the Prosecution Response to his Motion for Review, 26 October 2020 (confidential) (“Reply to Request for Review”).

⁸ *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Judgement, 20 July 2009 (“Trial Judgement”), paras. 1099-1101.

⁹ Trial Judgement, paras. 941-947, 1100. See also Trial Judgement, paras. 9, 14. Judge Christine Van den Wyngaert disagreed with the majority’s finding that the killings during the Pionirska Street Incident had a scale of massiveness required for the crime of extermination and, consequently, dissented from the majority’s decision to convict Lukić of extermination with respect to this incident. See Trial Judgement, Partly Dissenting Opinion of Judge Van den Wyngaert (“Judge Van den Wyngaert’s Partly Dissenting Opinion”), paras. 1114, 1128.

3. On 4 December 2012, the ICTY Appeals Chamber upheld Lukić’s convictions and affirmed his sentence.¹⁰ In relation to Lukić’s conviction for the Pionirska Street Incident, the ICTY Appeals Chamber overturned the Trial Chamber’s conclusion regarding the number of persons who were killed during the incident, finding that the total number of victims was 53, and upheld the Trial Chamber’s findings in all other respects.¹¹ On 7 July 2015, the Mechanism Appeals Chamber dismissed, by majority, Lukić’s first request for review of his convictions, finding that the new alibi evidence advanced by Lukić in relation to his involvement in the Pionirska Street Incident did not constitute a new fact for the purposes of review.¹²

4. In the Request for Review, Lukić seeks review of both the Trial Judgement and the Appeal Judgement on the basis that there is a new fact, which may result in his acquittal of the charge of extermination for the Pionirska Street Incident and in the imposition of a more lenient sentence.¹³ According to Lukić, the new fact is that, on 30 October 2019, the Court of Bosnia and Herzegovina found Radomir Šušnar, a co-perpetrator of Lukić, guilty of killing 26 victims during the Pionirska Street Incident (“Šušnar Judgement”), in contrast to the 53 victims of the same incident established by the ICTY Appeals Chamber.¹⁴ Lukić submits that the omission of 27 victims from the domestic indictment against Šušnar demonstrates the existence of the new fact, which could have been a decisive factor in reaching the original decision against him.¹⁵ In support of his submission regarding the impact of the new fact, Lukić argues that a reduction in the number of victims killed during the Pionirska Street Incident could have led the ICTY Appeals Chamber to conclude that the “massiveness” requirement for the crime of extermination has not been met.¹⁶ Lukić adds that the new fact was not known to him prior to the rendering of the Šušnar Judgement and could not have been discovered through the exercise of due diligence.¹⁷

¹⁰ *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, Judgement, 4 December 2012 (“Appeal Judgement”), para. 672.

¹¹ Appeal Judgement, paras. 313-354, 672. In a separate opinion, Judge Howard Morrison considered that some of the factors, which were taken into account by the majority of the Trial Chamber in assessing whether the “massiveness” requirement for the crime of extermination was met, were irrelevant but that the quantity of persons killed in the Pionirska Street Incident was numerically sufficient for the element of massiveness to be established. See Appeal Judgement, Separate Opinion of Judge Morrison (“Judge Morrison’s Separate Opinion”), paras. 2, 17.

¹² Decision on Milan Lukić’s Application for Review, 7 July 2015 (“*M. Lukić* Decision of 7 July 2015”), paras. 23, 38. Judge Jean-Claude Antonetti dissented from the majority’s decision to dismiss Lukić’s first request for review. See *M. Lukić* Decision of 7 July 2015, para. 38; Première partie de l’opinion dissidente du Juge Jean-Claude Antonetti jointe à la Décision du 7 juillet 2015, 20 juillet 2015 (English translation filed on 4 August 2015); Deuxième partie de l’opinion dissidente du Juge Jean-Claude Antonetti jointe à la Décision du 7 juillet 2015, 1 octobre 2015 (English translation filed on 31 December 2015).

¹³ Motion, paras. 24-25, 84(d); Clarification, paras. 10-14. See Motion, paras. 9-23.

¹⁴ Motion, paras. 9-11.

¹⁵ Motion, paras. 11, 24. See also Motion, para. 16.

¹⁶ Motion, paras. 17-23, referring, *inter alia*, to Judge Van den Wyngaert’s Partly Dissenting Opinion, paras. 1114, 1117, 1120, 1124-1125; Judge Morrison’s Separate Opinion, paras. 2, 17.

¹⁷ Motion, paras. 12-16.

5. In the Request for Assignment of Counsel, Lukić seeks the assignment of counsel, at the expense of the Mechanism, to assist him with searching the trial record of the Court of Bosnia and Herzegovina in order to obtain material in support of the new fact.¹⁸ Lukić argues that granting him access to legal aid is in the interests of justice.¹⁹

6. In response, the Prosecution submits that Lukić fails to demonstrate the existence of a new fact, as the information that he provides is not of an evidentiary nature and relates to an issue that has already been considered during the ICTY trial and appeal proceedings.²⁰ The Prosecution further responds that, since Lukić's ground of review has no chance of success, the Request for Assignment of Counsel should be dismissed as unfounded.²¹

7. In reply, Lukić maintains that the domestic indictment and the *Šušnar* Judgement are of evidentiary nature in the specific circumstances of this case, and that the new number of victims killed during the Pionirska Street Incident was not considered during the ICTY proceedings, therefore, constituting a new fact.²² Lukić further submits that he requires legal assistance as the decision of the domestic authorities to indict *Šušnar* for the killing of only 26 victims may be based on evidence showing that the rest of the alleged victims are still alive.²³

II. DISCUSSION

8. At the outset, the Appeals Chamber recalls that review proceedings under Article 24 of the Statute and Rule 146 of the Rules of Procedure and Evidence ("Rules") are available only with respect to a final judgement.²⁴ The Appeals Chamber will, therefore, only consider whether the Appeal Judgement should be reviewed.

9. A request for review will be granted if the moving party shows that the following cumulative conditions are met: (i) there is a new fact; (ii) the new fact was not known to the moving party at the time of the trial or appeal proceedings; (iii) the new fact could not have been discovered

¹⁸ Motion, paras. 80-81.

¹⁹ Motion, para. 83. Lukić also submits that his right to privileged communication with counsel is currently not guaranteed and that, therefore, he needs in-person communication with counsel, at the expense of the Mechanism, at the prison facility where he is serving his sentence. *See* Motion, para. 82. The Appeals Chamber notes that Lukić has been previously advised to raise issues related to his right to privileged communication with the appropriate authorities of the State where he is serving his sentence or with the President of the Mechanism. *See Prosecutor v. Milan Lukić*, Case No. MICT-13-52-ES.1, Decision on a Request for Legal Assistance for the Purposes of Post-Conviction Proceedings, 14 October 2019 (confidential), p. 3, and references cited therein.

²⁰ Response to Request for Review, paras. 1-3, 6-9.

²¹ Response to Request for Assignment of Counsel, paras. 4, 7. *See also* Response to Request for Assignment of Counsel, paras. 1-3, 5-6.

²² Reply to Request for Review, paras. 6-20.

²³ Reply to Request for Assignment of Counsel, Registry Pagination 532.

²⁴ *See* Decision on Prosecution's Motion to Strike Milan Lukić's Notice of Appeal of Decision on Application for Review, 13 November 2015, n. 5. *See also* Assignment Order, p. 1.

through the exercise of due diligence; and (iv) the new fact could have been a decisive factor in reaching the original decision.²⁵ A review of a final judgement is an exceptional procedure and not an additional opportunity for a party to re-litigate arguments that failed on trial or on appeal.²⁶

10. The term “new fact” refers to new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings.²⁷ The requirement that the fact was not in issue during the proceedings means that it must not have been among the factors that the deciding body could have taken into account in reaching its verdict.²⁸ It is irrelevant whether the new fact already existed before or during the original proceedings. What matters is “whether the deciding body and the moving party knew about the fact or not” in reaching the decision.²⁹ In this regard, there is a critical distinction between material submitted in support of a fact that was not in issue or considered in the original proceedings, and material which consists of additional evidence relating to a fact that was previously in issue.³⁰

11. The Appeals Chamber is not persuaded by Lukić’s submission that the indictment and the judgement in the case against Šušnar before the Court in Bosnia and Herzegovina constitute a new fact for the purpose of review proceedings. An indictment merely contains allegations of facts with which an accused is charged and is of no evidentiary value in the context of review proceedings.³¹

²⁵ *Laurent Semanza v. Prosecutor*, Case No. MICT-13-36-R, Decision on a Request for Access and Review, 9 April 2018 (“*Semanza* Decision of 9 April 2018”), para. 12; *Prosecutor v. Valentin Ćorić*, Case No. MICT-17-112-R.1, Decision on a Request for Review, 16 March 2018 (“*Ćorić* Decision of 16 March 2018”), para. 4, and references cited therein.

²⁶ *See, e.g., Semanza* Decision of 9 April 2018, para. 13; *Ćorić* Decision of 16 March 2018, para. 5; *Prosecutor v. Ferdinand Nahimana*, Case No. MICT-13-37-R.1, Decision on Nahimana’s Request for Review, 16 November 2015 (“*Nahimana* Decision of 16 November 2015”), para. 7; *Prosecutor v. Sreten Lukić*, Case No. MICT-14-67-R.1, Decision on Sreten Lukić’s Application for Review, 8 July 2015 (“*S. Lukić* Decision of 8 July 2015”), para. 6; *M. Lukić* Decision of 7 July 2015, para. 6.

²⁷ *See, e.g., Semanza* Decision of 9 April 2018, para. 13; *Ćorić* Decision of 16 March 2018, para. 5; *Nahimana* Decision of 16 November 2015, para. 7; *Eliézer Niyitegeka v. The Prosecutor*, Case No. MICT-12-16-R, Decision on Niyitegeka’s Request for Review and Assignment of Counsel, 13 July 2015 (“*Niyitegeka* Decision of 13 July 2015”), para. 7; *S. Lukić* Decision of 8 July 2015, para. 6; *M. Lukić* Decision of 7 July 2015, para. 6.

²⁸ *See, e.g., Semanza* Decision of 9 April 2018, para. 13; *Ćorić* Decision of 16 March 2018, para. 5; *Nahimana* Decision of 16 November 2015, para. 7; *Niyitegeka* Decision of 13 July 2015, para. 7.

²⁹ *See, e.g., Semanza* Decision of 9 April 2018, para. 13; *Nahimana* Decision of 16 November 2015, para. 7; *S. Lukić* Decision of 8 July 2015, para. 6; *M. Lukić* Decision of 7 July 2015, para. 6.

³⁰ *M. Lukić* Decision of 7 July 2015, para. 14, and references cited therein. In “wholly exceptional circumstances”, review may still be permitted even though the “new fact” was known to the moving party or was discoverable by it through the exercise of due diligence, if a chamber is presented with “a new fact that is of such strength that it would affect the verdict” and determines that “review of its judgement is necessary because the impact of the new fact is such that to ignore it would lead to a miscarriage of justice”. *See, e.g., Semanza* Decision of 9 April 2018, para. 14; *Ćorić* Decision of 16 March 2018, para. 6; *Nahimana* Decision of 16 November 2015, para. 8; *S. Lukić* Decision of 8 July 2015, para. 7; *M. Lukić* Decision of 7 July 2015, para. 7.

³¹ *See Semanza* Decision of 9 April 2018, para. 23; *François Karera v. The Prosecutor*, Case No. ICTR-01-74-R, Decision on Requests for Reconsideration and Review, 26 March 2012, para. 30. *See also M. Lukić* Decision of 7 July 2015, para. 30; *Eliézer Niyitegeka v. The Prosecutor*, Case No. MICT-12-16-R, Decision on Niyitegeka’s Request for Assignment of Counsel, 6 November 2014, para. 8.

Contrary to Lukić's arguments,³² the circumstances in which an indictment is prepared do not alter the character of an indictment as a charging instrument. The allegations therein do not amount to established facts. The character is underlined in the present case by the observations of the Court of Bosnia and Herzegovina in the *Šušnar* Judgement that, according to the witness evidence presented before it, the number of civilians killed was "significantly higher", but "since the Prosecution did not list their names in the indictment or their total number, except for the number of 26 civilians, the [Court] was led by what was stated in the indictment".³³ Accordingly, the decision of the Prosecution of Bosnia and Herzegovina to name only 26 victims in the domestic indictment against *Šušnar* does not constitute new information of an evidentiary nature for the purposes of review proceedings.

12. Turning to the *Šušnar* Judgement, it was noted already above that the relevant factual findings in it were limited by the scope of the indictment. Where the Court of Bosnia and Herzegovina explicitly emphasized that the total number of victims was significantly higher than the one pled in the indictment, it becomes manifest that the court, by convicting for 26 victims only, has not in any way contradicted the finding of the number of victims by the ICTY Appeals Chamber. Accordingly, there is nothing about the *Šušnar* Judgement that constitutes new information of an evidentiary nature for the purposes of review proceedings.

13. The Appeals Chamber further notes that Lukić has been convicted of several other charges, in particular: extermination with respect to another event, murder, persecutions, and inhumane acts, as crimes against humanity, as well as cruel treatment and murder as violations of the laws or customs of war.³⁴ These included more than 70 murders in addition to the Pionirska Street Incident.³⁵ Referring to the totality of Lukić's convictions, the ICTY Appeals Chamber noted that the crimes for which Lukić is held responsible are "extremely grave", and that the reduction in the number of victims killed during the Pionirska Street Incident from 59 to 53 did not impact his sentence of life imprisonment.³⁶ In these circumstances, the Appeals Chamber considers that, even if review were authorized and Lukić could demonstrate a further reduction in the number of victims of the Pionirska Street Incident, the only practical result would be a correction of the factual record of this case. It would not, in view of the gravity of his other crimes, result in any reduction to his sentence.

³² See Reply to Request for Review, paras. 12-19 (where Lukić argues that a distinction should be drawn between an indictment prepared with the intention of securing a plea agreement and a "regular indictment made after thorough investigation").

³³ See Motion, para. 10, Annex I, para. 219 (English translation filed on 18 November 2020).

³⁴ Appeal Judgement, paras. 3-4, 544, 547, 672; Trial Judgement, paras. 951, 1099-1100.

³⁵ Appeal Judgement, paras. 3-5, 672; Trial Judgement, paras. 1099-1100.

³⁶ Appeal Judgement, para. 669. See also Trial Judgement, para. 740.

14. Finally, with respect to the Request for Assignment of Counsel, the Appeals Chamber recalls that, as a matter of principle, it is not for the Mechanism to assist a convicted person whose case has reached finality with any new investigation he would like to conduct by assigning him legal assistance at the Mechanism's expense.³⁷ A review under Article 24 of the Statute is an exceptional remedy and an applicant is only entitled to assigned counsel at the expense of the Mechanism if the Appeals Chamber authorizes the review, or, before such an authorization, if it deems it necessary to ensure the fairness of the proceedings.³⁸ This necessity is, to a great extent, assessed in light of the potential grounds for review put forward by the applicant.³⁹ Having found that the potential ground for review invoked by Lukić has no chance of success, the Appeals Chamber considers that assigning Lukić legal assistance at the Mechanism's expense is not necessary to ensure the fairness of the proceedings.

III. DISPOSITION

15. For the foregoing reasons and pursuant to Rule 146 of the Rules, the Request for Review and the Request for Assignment of Counsel are **DISMISSED**.

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

Done this 15th day of December 2020,
At The Hague,
The Netherlands



Judge Carmel Agius, Presiding

[Seal of the Mechanism]

³⁷ *Prosecutor v. Gérard Ntakirutimana*, Case No. MICT-12-17-R, Decision on a Request for Assignment of Counsel, 4 July 2018 (“*Ntakirutimana* Decision of 4 July 2018”), para. 5; *Prosecutor v. Vujadin Popović*, Case No. MICT-15-85-R.1, Decision on a Request for Assignment of Counsel, 23 September 2016 (“*Popović* Decision of 23 September 2016”), p. 2; *Prosecutor v. Augustin Ngirabatware*, Case No. MICT-12-29, Decision on Prosecution's Motion Regarding Protected Witnesses and Ngirabatware's Motion for Assignment of Counsel, 5 May 2016 (“*Ngirabatware* Decision of 5 May 2016”), para. 20; *Niyitegeka* Decision of 13 July 2015, para. 8.

³⁸ *Ntakirutimana* Decision of 4 July 2018, para. 5; *Popović* Decision of 23 September 2016, p. 2; *Ngirabatware* Decision of 5 May 2016, para. 20; *Niyitegeka* Decision of 13 July 2015, para. 8.

³⁹ *Ntakirutimana* Decision of 4 July 2018, para. 5; *Popović* Decision of 23 September 2016, p. 2; *Ngirabatware* Decision of 5 May 2016, para. 20; *Niyitegeka* Decision of 13 July 2015, para. 8.



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