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United Nations Mechanism
for International Criminal Tribunals

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

Date: 6 August 2015

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Jean-Claude Antonetti
Judge William Hussein Sekule
Judge Carmel Agius
Judge Liu Daqun

Registrar: Mr. John Hocking

THE PROSECUTOR

v.

MILAN LUKIĆ

Public Document

**NOTICE OF APPEAL OF “DECISION ON MILAN LUKIC'S APPLICATION
FOR REVIEW”**

Counsel for the Applicant, Mr. Milan Lukić

Mr. Rodney Dixon QC

The Office of the Prosecutor

Mr. Hassan Bubacar Jallow

Mr. Mathias Marcussen

I. INTRODUCTION

1. The Defence for Milan Lukić hereby files this Notice of Appeal of the “Decision on Milan Lukic’s Application for Review” pursuant to Article 23 of the MICT Statute and Rule 133 of the MICT Rules of Procedure and Evidence.¹
2. This appeal is filed pursuant to Article 23 of the MICT Statute, Rule 133 of the MICT Rules of Procedure and Evidence and the case law of the Tribunal. In accordance with Rule 133, this Notice of Appeal sets out the substance of the alleged error and the relief sought while preserving the right to supplement this Notice of Appeal after reviewing Judge Antonetti’s Dissenting Opinion, which is still to be handed down. The grounds of appeal will be substantiated in full in the Appellant’s brief to be filed pursuant to Rule 138 and having had an opportunity to review Judge Antonetti’s Dissenting Opinion.

II. APPLICABLE LAW AND PROCEDURE

3. Article 23 of the MICT Statute provides that:

“1. The Appeals Chamber shall hear appeals from convicted persons or from the Prosecutor on the following grounds:

- (a) an error on a question of law invalidating the decision; or*
- (b) an error of fact which has occasioned a miscarriage of justice.*

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Single Judge or Trial Chamber.”²

4. Rule 133 of the MICT Rules of Procedure and Evidence states that:

“A Party seeking to appeal a judgement shall, not more than thirty days from the date on which the written judgement was filed, file a notice of appeal, setting forth the grounds. The appellant should also identify the order, decision, or ruling challenged with specific reference to the date of its filing, and/or the transcript page, and indicate the substance of the alleged errors and the relief sought.

¹ Decision on Milan Lukic’s Application for Review, MICT -13-52-R.1, 7 July 2015 (hereinafter “Decision on Application for Review”).

² MICT Statute, Article 23.

The Appeals Chamber may, on good cause being shown by motion, authorise a variation of the grounds of appeal."³

5. The Defence submits that the Appeals Chamber's decision on the Application for Review must be considered a final judgment that is appealable under Article 23 and Rule 133. In *Barayagwiza*, the Appeals Chamber clarified that a final judgment "is one which terminates the proceedings."⁴ The Decision on Mr. Lukić's Application for Review falls within the definition and scope of a final judgment as there are no further proceedings or decisions to be made, and it cannot be considered interlocutory.

6. The Defence submits that the fact that the Appeals Chamber decided the Application for Review should not be a reason to find that Mr. Lukić has no right of appeal at all. As explained in Mr. Lukić's submissions, the Application for Review was filed before the Appeals Chamber only because the case law on applications for review provides that "the proper forum for the filing of a request for review is the judicial body which rendered the final judgement."⁵ However, once a review application has been properly *filed* with the Appeals Chamber, it then has the "discretionary power"⁶ ... "to determine ... whether it can deal with the review itself or whether it is necessary to refer the case to a reconstituted (to the extent possible) Trial Chamber, or, should this not be possible, to a new Trial Chamber."⁷

7. Mr. Lukić had no choice but to file his Review Application with the Appeals Chamber. The ruling by the Appeals Chamber is effectively the first decision on the application, and it must be subject to appeal otherwise the applicant would be denied any right of appeal and there would be no way of reviewing and correcting any errors in the decision.

³ MICT Rules of Procedure and Evidence, Rule 133.

⁴ *Prosecutor v Barayagwiza*, "Decision on Prosecutor's Request for Review or Reconsideration", ICTR-97-19-AR 72, 31 March 2000, para. 49.

⁵ Application On Behalf Of Milan Lukić For Review Of The Trial Judgment Of 20 July 2009, MICT-13-52-R.1, 6 February 2014, paras. 16-18. See, *Prosecutor v. Tadić*, Decision on Motion for Review, IT-94-1-R, 30 July 2002, para. 22; *Prosecutor v. Delić*, Decision on Motion for Review, IT-96-21-R-R119, 25 April 2002, para. 11; *Prosecutor v. Simba*, Decision on Aloys Simba's Requests for Suspension of Appeal Proceedings and Review, CTR-01-76-A9, January 2007, para. 7.

⁶ *Prosecutor v. Tadić*, Decision on Motion for Review, IT-94-1-R, 30 July 2002, para. 22; *Prosecutor v. Simba*, Decision on Aloys Simba's Requests for Suspension of Appeal Proceedings and Review, CTR-01-76-A9, January 2007, para. 7. See also, Application On Behalf Of Milan Lukić For Review Of The Trial Judgment Of 20 July 2009, MICT-13-52-R.1, 6 February 2014, para. 17.

⁷ *Prosecutor v. Tadić*, Decision on Motion for Review, IT-94-1-R, 30 July 2002, para. 22. See also, Application On Behalf Of Milan Lukić For Review Of The Trial Judgment Of 20 July 2009, MICT-13-52-R.1, 6 February 2014, para. 17.

Furthermore, Mr. Lukić should not be denied the remedy of appeal just because the Appeals Chamber made the discretionary decision to consider and rule on the Application for Review itself and not to refer the matter to a Trial Chamber for consideration (which could then have been appealed).

8. The Defence submits that it would be grossly unfair to deny applicants whose review applications were considered by the Appeals Chamber a right of appeal, particularly in the present case in which there is a fundamental error of law that lies at the very foundation of the Appeals Chamber's decision (as set out below), and which needs to be considered and litigated. Mr. Lukić would otherwise have no means of having this critical legal point of principle – that has resulted in his entire review being dismissed – addressed and determined in the proceedings before the ICTY.
9. It is the submission of the Defence that the present appeal must therefore be considered on its merits by a reconstituted Appeals Chamber.

III. SUBMISSIONS

10. The Defence for Mr. Lukić files this Notice of Appeal in order to preserve its right of appeal under the time limit set out in Rule 133. As noted above, the Dissenting Opinion of Judge Antonetti is still to be handed down⁸, and the Defence reserves the right to amend this Notice of the Appeal once it is received. The Defence also submits that the time for filing the Appellant's Brief pursuant to Rule 138(A) should not commence to run until the date on which Judge Antonetti's Dissenting Opinion is handed down – i.e. within 75 days of receiving the Dissenting Opinion.
11. The ground of appeal relied on by the Defence is that the Appeals Chamber erred in law in its interpretation of what constitutes a “new fact” for the purpose of considering a review application under Rule 146.
12. In its Decision, the Appeals Chamber in defining what constitutes a “new fact” makes a *“critical distinction between material submitted in support of a fact, which was not in*

⁸ Première Partie De L'opinion Dissidente Du Juge Jean-Claude Antonetti Jointe à La Decision Du 7 Juillet 2015, MICT-13-S2-R.1, 20 July 2015.

issue or considered in the original proceedings, and material, which consists of additional evidence relating to a fact that was in issue or considered in the original proceedings.” The Appeals Chamber erroneously held that a review cannot be available in respect of materials concerning a fact that “*was previously in issue.*”⁹

13. Based on this incorrect definition of what constitutes a “new fact”, the Appeals Chamber found that the new evidence submitted concerning the Drina River Incident,¹⁰ Pionirska Street Incident,¹¹ the Bikavac Incident¹² and the Varda Factory Incident¹³ did not amount to new facts which could be the subject of a review. The Chamber reasoned that the new evidence all concerned Mr. Lukić’s alibi and his “presence and participation in these crimes”¹⁴, which had been in dispute and litigated at trial.¹⁵ The Appeals Chamber’s reasoning is plainly in error. As has been previously held, a “new fact” is not restricted to an issue that has never been previously disputed. It can be evidence that was not previously available which is relevant to issues in dispute in the case and which “the deciding body could have taken into account in reaching its verdict”¹⁶. The Appeals Chamber’s interpretation of a “new fact” misconstrues the ICTY’s case law, as was set out in Mr. Lukić’s Application for Review.¹⁷

14. The Defence will provide its full arguments on this matter in its brief. The Appeals Chamber’s interpretation is flawed as it essentially makes Mr. Lukić’s assertion of innocence a “fact”, and means that as long as an application for review submits new evidence that goes to Mr. Lukić’s innocence – that he was not present for the crimes and did not participate – then the review application must be dismissed.

⁹ Decision of Application for Review, para. 14.

¹⁰ Decision of Application for Review, paras. 15-17.

¹¹ Decision of Application for Review, paras. 23-24.

¹² Decision of Application for Review, paras. 29-30.

¹³ Decision of Application for Review, paras. 36-37.

¹⁴ Decision of Application for Review, paras. 15-17, 23-24, 29-30, 36-37.

¹⁵ Decision of Application for Review, para. 15.

¹⁶ *Prosecutor v. Tadić*, Decision on Motion for Review, IT-94-1-R, 30 July 2002, para. 25; *Prosecutor v. Radić*, Decision on Defence Request for Review, IT-98-30/1-R.1, 31 October 2006, para. 12; *Prosecutor v. Blaškić*, Decision on Prosecutor’s Request for Review or Reconsideration, IT-95-14-R, 23 November 2006, para. 14; *Prosecutor v. Niyitegeka*, Decision on Request for Review, ICTR-96-14-R6, 6 March 2007, para. 5; *Prosecutor v. Naletilić*, Decision on Mladen Naletilić’s Request for Review, IT-98-34-R, 19 March 2009, para. 11; *Prosecutor v. Rutaganda*, Decision on Request for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification, ICTR-96-03-R, 8 December 2006, para. 9. See also, Application On Behalf Of Milan Lukić For Review Of The Trial Judgment Of 20 July 2009, MICT-13-52-R.1, 6 February 2014, para. 10.

¹⁷ Application On Behalf Of Milan Lukić For Review Of The Trial Judgment Of 20 July 2009, MICT-13-52-R.1, 6 February 2014, paras. 9-12.


15. It should be highlighted that in *Šljivančanin* the Appeals Chamber granted a Review Hearing based on new evidence from a witness who had testified for the Defence at the original trial concerning a conversation the accused had, which was litigated during the proceedings.¹⁸ The Appeals Chamber's interpretation in the present case of what constitutes a "new fact" would have prevented it from granting the review in *Šljivančanin*.

IV. RELIEF SOUGHT

16. Accordingly, the Defence respectfully requests that the present appeal should proceed before a reconstituted Appeals Chamber, and that the Defence is permitted to file its Appeal brief within 75 days of the date on which the Dissenting Opinion is handed down. The Defence submits that the fundamental error of law as identified herein, requires the Appeals Chamber to overturn its decision and to reconsider the Review Application applying the correct legal standard.

Word Count: 2368 words

RESPECTFULLY SUBMITTED



Rodney Dixon QC

Counsel for Milan Lukić

6 August 2015

¹⁸ *Prosecutor v. Veselin Šljivančanin*, Decision with Respect to Veselin Šljivančanin's Application for Review, IT-95-1311-R.1, 14 July 2010, p. 3.