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P.O. Box 13888,
2501 EW The Hague,
Netherlands

Churchillplein 1,
2517 JW La Haye,
B.P. 13888, 2501 EW
La Haye. Pays-Bas

Tel.: 31-70-512 5689 /
8751
Fax: 31-70-512 8558

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Mechanism for International Criminal Tribunals

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

Date: 28 January 2016

Original: English

THE PRESIDENT OF THE MECHANISM

Before: Judge Theodor Meron, President

Registrar: Mr. John Hocking

Decision of: 28 January 2016

PROSECUTOR

v.

MILAN LUKIĆ

PUBLIC

**PUBLIC REDACTED VERSION OF THE 22 MAY 2015
DECISION OF THE PRESIDENT ON MOTION FOR
RECONSIDERATION AND REVIEW OF SENTENCE OF
MILAN LUKIĆ**

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. Matthias Marcussen

Counsel for Milan Lukić:

Mr. Jason Alarid
Mr. Dragan Ivetić

The Republic of Estonia

I, **Theodor Meron**, President of the International Residual Mechanism for Criminal Tribunals (“Mechanism”), am seised of the “Motion for Reconsideration and Review of Sentence of Mr. Lukić in Estonia and Transfer to The Hague” filed on 9 March 2015 with public and confidential annexes by Mr. Milan Lukić (“Motion” and “Lukić” respectively). Contemporaneously, Lukić filed a related motion requesting an evidentiary hearing.¹ On 23 March 2015, the Office of the Prosecutor (“Prosecution”) filed a response.² The Prosecution also filed a corrigendum to the Response on 24 March 2015,³ and a supplementary submission on 27 March 2015.⁴ On 14 April 2015, Lukić filed a reply.⁵

A. Background

1. The second amended indictment against Lukić and Sredoje Lukić was filed on 27 February 2006.⁶ On 20 July 2009, Lukić was sentenced to life imprisonment by the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (“ICTY”),⁷ and the ICTY Appeals Chamber affirmed this sentence on 4 December 2012.⁸ On 3 February 2014, I decided that Lukić’s sentence would be enforced at Tartu Vangla Prison (“Tartu Vangla”) in Tartu, Estonia.⁹

B. The Request

2. At the outset, Lukić requests that I accept the Motion despite its exceeding the applicable word limit.¹⁰ He maintains that the additional number of words should be accepted because it would not be “unduly onerous so as to create undue prejudice” to the Prosecution or “overly burden the President of the [Mechanism]”.¹¹ Furthermore, he maintains that the additional words are needed to

¹ Request for Evidentiary Hearing to Review Confinement Placement of Mr. Lukić in Estonia and Transfer to The Hague for *Viva Voce* Appearance, 9 March 2015 (“Second Motion”).

² Prosecution Response to Milan Lukić’s Motion for Reconsideration and Review of Sentence in Estonia and Transfer to The Hague, 23 March 2015 (public with confidential annex) (“Response”).

³ Corrigendum to Prosecution Response to Milan Lukić’s Motion for Reconsideration and Review of Sentence in Estonia and Transfer to The Hague, 24 March 2015 (“Corrigendum”).

⁴ Prosecution Request for Leave to File Supplementary Authority and Supplementary Authority, 27 March 2015 (“Supplementary Filing”).

⁵ Reply in Support of Motion for Reconsideration and Review of Sentence of Mr. Lukić in Estonia and Transfer to The Hague, 14 April 2015 (public with confidential annex) (“Reply”). Prior to his reply, Lukić filed an additional motion requesting an extension of his time limit to submit a reply, which was granted. Decision on Milan Lukić’s Motion Pursuant to Rule 154 to Enlarge the Time Limit for Filing of the Reply Brief, 10 April 2015, p. 2.

⁶ *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Second Amended Indictment, 27 February 2006 (“Indictment”).

⁷ *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Judgement, 20 July 2009 (“Trial Judgement”), para. 1101.

⁸ *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, Judgement, 4 December 2012 (“Appeal Judgement”), p. 221.

⁹ Order Designating State in Which Milan Lukić is to Serve His Sentence, 3 February 2014, pp. 1-2; Motion, para. 3.

¹⁰ Motion, para. 1.

¹¹ Motion, para. 1.

set forth [REDACTED], the applicable standards and regulations designating an enforcement State, and “precise and detailed” citations to applicable human rights case law.¹²

3. Lukić submits that according to the applicable rules and standards, convicted persons remain in the custody of the Mechanism during the enforcement of their sentences.¹³ On this basis, Lukić reasons that it is the Mechanism’s responsibility to supervise these individuals’ detention and ensure that a state’s enforcement of their sentences meets international standards for detention and human rights.¹⁴ He also submits that the Mechanism may terminate a state’s enforcement of sentences that the Mechanism supervises at its discretion without meeting specific conditions.¹⁵

4. Lukić proceeds to assert that the current conditions of his detention do not comply with international standards for detention and human rights.¹⁶ He claims that he is subject to: (a) curtailment of his right to family and private life, (b) cruel and inhumane treatment, and (c) discrimination.¹⁷

5. In particular, Lukić asserts that the hardships his family faces when visiting him impact his right to family and private life.¹⁸ He alleges that in order to visit him, his wife and young child must travel for over 12 hours and make “many transits”, and submits that this journey is expensive and harmful to his child’s health.¹⁹ Lukić contends that this burden is so serious that it strains family ties in contravention of standards articulated by the United Nations Office of Drugs and Crime, the Committee of Ministers of the Council of Europe, European Court of Human Rights, and other applicable international human rights instruments.²⁰

6. Lukić contends that he is subject to “linguistic isolation” in Tartu Vangla and cannot communicate with his fellow inmates and prison staff.²¹ He maintains that this inability to communicate with those around him amounts to *de facto* solitary confinement.²² [REDACTED].²³ [REDACTED].²⁴

¹² Motion, para. 1.

¹³ Motion, para. 4.

¹⁴ Motion, para. 5.

¹⁵ Motion, para. 4.

¹⁶ Motion, para. 3.

¹⁷ Motion, paras. 7, 12, 17.

¹⁸ Motion, paras. 7-11.

¹⁹ Motion, para. 10.

²⁰ Motion, paras. 8-14.

²¹ Motion, paras. 3, 13.

²² Motion, paras. 13, 15.

²³ Motion, paras. 13-16.

²⁴ Motion, Annex D (confidential).

7. Lukić submits that linguistic barriers prevent him from participating in social, working, and rehabilitation programs, infringing upon his right to be treated without discrimination as set out in Article 2(1) of the International Covenant on Civil and Political Rights, Article 2(2) of International Covenant on Economic, Social, and Cultural Rights, and Article 14 of the European Convention on Human Rights.²⁵

8. In the Second Motion, Lukić requests that the Mechanism hold a full evidentiary hearing on his detention conditions to allow for *viva voce* testimony.²⁶

9. In response, the Prosecution maintains, *inter alia*, that Lukić has no legal or factual bases to request reconsideration or review of the Designation Order.²⁷ In particular, the Prosecution maintains that Lukić fails to justify reconsideration by demonstrating “the existence of a clear error of reasoning in the [Designation Order], or of particular circumstances justifying its reconsideration in order to avoid injustice [...] includ[ing] new facts or new arguments”.²⁸ Rather, the Prosecution maintains that the factors enumerated in the Motion were already considered by the President when choosing the enforcement State.²⁹ The Prosecution asserts that Lukić has not demonstrated a “reviewable error significantly affecting [the Designation Order] to Lukić’s detriment”.³⁰

10. The Prosecution maintains that Lukić fails to demonstrate a violation of his right to family life or cruel and unusual treatment.³¹ It notes that “separation and distance from family are inevitable consequences of detention”, and submits that his visitation rights have been neither denied nor limited.³² In addition, the Prosecution asserts that there are Serbian and Russian-speaking prisoners at Tartu Vangla, but that Lukić chooses not to talk with them;³³ that Lukić fails to support his claims as to the unavailability of reading materials in languages he understands or the “impossibility” of either language classes or participation in social or psychological rehabilitation;³⁴ [REDACTED].³⁵ [REDACTED].³⁶

²⁵ Motion, paras. 13, 16-19.

²⁶ Second Motion, p. 2.

²⁷ Response, paras. 4, 5.

²⁸ Response, para. 4 (*quoting Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence’s Request for Reconsideration, 16 July 2004, p. 2).

²⁹ Response, para. 4.

³⁰ Response, para. 5.

³¹ Response, paras. 7-10, 13.

³² Response, paras. 7, 8, 10.

³³ Response, Confidential Annex, para. 3.

³⁴ Response, paras. 14-15.

³⁵ Response, Confidential Annex, para. 4.

³⁶ Response, Confidential Annex, para. 5.

11. In his reply, Lukić again asks permission to exceed the applicable word count.³⁷ He maintains that the additional number of words he requests are not “unduly onerous so as to create undue prejudice” to the Prosecution or “overly burden the President of the [Mechanism]”.³⁸ In addition, he alleges that the Prosecution effectively exceeded the word limit for its response with its Supplementary Filing.³⁹ Finally, he maintains that the excess words are needed to address the additional authority presented by the Prosecution.⁴⁰

12. Lukić rejects the Prosecution’s submission that there is no legal or factual basis for his Motion.⁴¹ He posits that [REDACTED] constitutes a “new fact” that was unknown at the time of the Designation Order, and that he is entitled to judicial consideration of the new evidence.⁴² He further maintains that reviewable error exists to the extent that “certain criteria or regimes” that the President may have considered while making his initial decision are not currently being respected or applied by the enforcement State, or else have been withheld.⁴³

13. Lukić reiterates that there has been a violation of his human rights in contravention of international standards, [REDACTED].⁴⁴ He concludes by maintaining his position that termination of Estonia’s enforcement of his sentence is just and appropriate.⁴⁵

C. Applicable Law and Standards

14. Article 25 of the Statute of the Mechanism (“Statute”) provides that imprisonment shall be served in a State designated by the Mechanism from a list of States with which the United Nations has agreements for this purpose, and that such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the Mechanism.⁴⁶

15. Article 3(3) of the Agreement between the Government of the Republic of Estonia and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for the former Yugoslavia (“Enforcement Agreement”) provides that conditions of imprisonment shall be governed by Estonian law, subject to the supervision of the ICTY. Article 9(2) of the Enforcement Agreement provides that the Mechanism may at any time request the termination of enforcement in

³⁷ Reply, para. 1.

³⁸ Reply, para. 1.

³⁹ Reply, para. 1.

⁴⁰ Reply, para. 1.

⁴¹ Reply, para. 7.

⁴² Reply, para. 10.

⁴³ Reply, para. 11.

⁴⁴ Reply, paras. 11-12 (*citing* Annex D).

⁴⁵ Reply, paras. 30-31.

⁴⁶ *See also* Rule 127(A) and Rule 128 of the Rules of Procedure and Evidence of the Mechanism (“Rules”).

Estonia and transfer the convicted person to another State or to the Mechanism. These provisions apply *mutatis mutandis* to the Mechanism.⁴⁷

16. The Practice Direction on the Procedure for Designation of the State in which a Convicted Person Is to Serve His or Her Sentence of Imprisonment (“Practice Direction”) guides the President’s decision to designate a State for the enforcement of a prison sentence.⁴⁸ The Practice Direction provides that the President shall designate a State following advice by the Registrar as to which States have indicated a willingness to enforce a sentence of an individual accused.⁴⁹ Paragraph 5 of the Practice Direction allows the President, if he so wishes, to request the opinion of the convicted person and of the Prosecution.

D. Discussion

17. As a preliminary matter, I recall that per the Practice Direction on Lengths of Briefs and Motions, submissions such as those submitted by Lukić are normally limited to 3,000 words.⁵⁰ Parties must seek authorization in advance before exceeding this limit, providing an explanation of the exceptional circumstances which impel their request.⁵¹ Lukić failed to request extension of word limits before filing the Motion and Reply,⁵² and I am entitled to reject his motion on these grounds alone.⁵³ In addition, I consider Lukić’s contention that the Prosecution also exceeded its word limit by filing supplementary authority to be without merit. The additional submissions it provided were separate from the Response.⁵⁴ Finally, I recall that the quality and effectiveness of a brief “do[] not depend on length but on the clarity and cogency of the arguments presented”, and “excessively long briefs do not necessarily facilitate the administration of justice”.⁵⁵ However, while I urge adherence

⁴⁷ Security Council Resolution 1966 (2010) provides that all existing agreements still in force as of the commencement date of the Mechanism shall apply *mutatis mutandis* to the Mechanism. Accordingly, the Enforcement Agreement applies to the Mechanism. See U.N. Security Council Resolution 1966, U.N. Doc. S/RES/1966 (2010), 22 December 2010, para. 4 (“The Mechanism shall continue the jurisdiction, rights and obligations and essential functions of the ICTY and the ICTR, respectively, subject to the provisions of this resolution and the Statute of the Mechanism, and all contracts and international agreements concluded by the United Nations in relation to the ICTY and the ICTR, and still in force as of the relevant commencement date, shall continue in force *mutatis mutandis* in relation to the Mechanism.”). According to Article 25(2) of the Statute, “[t]he Mechanism shall have the power to supervise the enforcement of sentences pronounced by the ICTY, the ICTR or the Mechanism, including the implementation of sentence enforcement agreements entered into by the United Nations with Member States”.

⁴⁸ MICT/2 Rev. 1.

⁴⁹ MICT/2 Rev. 1, paras. 2-5.

⁵⁰ MICT/11, para. 15.

⁵¹ MICT/11, para. 17.

⁵² Motion, para. 1; Reply, para. 1. Rule 142(A) of the Rules. Cf. *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision Concerning Defence Motion to Exceed Word Count and Defence Motion Pursuant to Rule 15(B) Seeking Disqualification of Judge Christoph Flügel, 22 January 2014 (“*Mladić* Word Count Decision”), p. 2 (“[A]lthough this provision of the Practice Direction on the Length of Briefs and Motions typically refers to motions filed before a chamber, the provision applies, *mutatis mutandis*, to motions filed before the President of the Tribunal”).

⁵³ *Mladić* Word Count Decision, p. 2.

⁵⁴ See Corrigendum; Supplementary Filing.

⁵⁵ *Prosecutor v. Ante Gotovina and Mladen Markač*, Case No. IT-06-90-A, Decision on Ante Gotovina’s and Mladen Markač’s Motions for Leave to Exceed the Word Limit, 20 July 2011, p. 2.

to the prescribed word limits, I may, at my discretion, allow motions that exceed the word limit even where circumstances are not exceptional in order to facilitate expeditious proceedings.⁵⁶ I consider that, on balance, waiving applicable word limits in this case will speed proceedings, and accordingly will proceed to consider the Motion.⁵⁷

18. I also observe that the Statute, Rules, and Practice Direction, even considered together, do not explicitly confer to convicted persons the right to petition for a change in the state which enforces their sentence. I note, however, that in situations where an individual has already been transferred to the enforcement State and subsequent allegations are made that the enforcement State is violating the convicted person's human rights, I have granted review. Accordingly, I will consider the contentions of the Motion on their merits. I further note that the Prosecution is not conferred a general right to make submissions on sentence enforcement matters.⁵⁸ Nonetheless, in the interests of justice I will consider the Response and additional submissions of the Prosecution.

19. Turning to the merits of the Motion, I first observe that there is a very high threshold that must be met before I will change the enforcement State where a convicted person is serving his or her sentence. The process of selecting an enforcement State is very complex and involves a number of challenging diplomatic, judicial, and logistical considerations. Therefore, I will consider requests for change in enforcement State where there have been allegations of basic human rights violations but only grant such a request in the most serious of circumstances, where I have judged that there is a direct and continuing threat to the rights of an individual which cannot be cured through coordination with relevant national authorities.

20. Assessing the contentions advanced by Lukić's in this framework, I find that they are individually and collectively insufficient to justify a change to the enforcing State.

21. The ICTY has previously acknowledged that international law recognises that all prisoners, whether in the pre-trial, trial, or post-conviction phases, have a right to maintain their family ties and contact with family members. I note, however, that Lukić effectively concedes that he receives [REDACTED] visits from family members.⁵⁹ While the journey may be expensive and inconvenient, this difficulty does not rise to the level of constituting a violation of the right to maintain family ties.

⁵⁶ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.4-A, Decision on Vojislav Šešelj's Motion to Disqualify Judges Arlette Ramaroson, Mehmet Güney, and Andréia Vaz, 10 January 2013 ("Šešelj Decision"), para. 17.

⁵⁷ Šešelj Decision, para. 17.

⁵⁸ Cf. *Prosecutor v. Zoran Žigić*, Case No. MICT-14-81-ES.1, Decision on Zoran Žigić's Request to Withhold Consent for the Execution of the Republic of Austria's Extradition Decision, 12 December 2014, para. 10.

⁵⁹ Motion, para. 10; Motion, Annex D (confidential), p. 6.

22. I am sympathetic to the difficulties Lukić enumerates with respect to the challenges of adapting to a new language and the limits they place on his ability to communicate with others and access rehabilitation programs. However, I find that Lukić has not demonstrated the impossibility of following language courses while in detention, and of obtaining educational and leisure materials in languages other than Estonian.⁶⁰ [REDACTED].⁶¹ [REDACTED].⁶² In any event, “not being able to speak the language of the enforcement State” is one of the many considerations taken into account when designating the enforcement State and is not a sufficient basis for reconsideration or review. In these circumstances, Lukić fails to demonstrate circumstances so grave that a change to the enforcement State is required.

23. I am unconvinced by Lukić’s claim that his inability to access rehabilitation services and programs due to language barriers is a form of discrimination. I am not satisfied that Lukić has demonstrated any intentional acts by Tartu Vangla authorities targeting him for negative treatment.⁶³ In addition, I note that with possible language training classes, Lukić will be able to access relevant additional services.

24. Even considering Lukić’s contentions together rather than individually, I am not convinced that they approach the threshold necessary to justify a change of enforcement State. The challenges he enumerates, while real, do not threaten his fundamental rights. Of course, insofar as national authorities or our Registrar can assist in addressing communication challenges faced by Lukić, or in efforts to maintain family ties, they should do so. However, I underscore that national prison authorities retain jurisdiction over the day-to-day conditions in their prisons and over the regulations that govern detention of convicted persons.

25. Given that, on their face, Lukić’s contentions are insufficient to justify reconsideration of the Designation Order, the Second Motion is moot.

E. Disposition

26. In view of the foregoing, the Motion is **DENIED**.

⁶⁰ See Response, paras. 13, 15. See also Motion, para. 13.

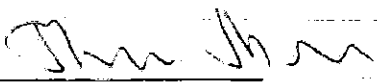
⁶¹ Motion, Annex D (confidential), p. 7.

⁶² Motion, Annex D (confidential), p. 7; Reply, Annex A (confidential), paras. 13, 15.

⁶³ While Lukić asserts that he is treated with discrimination and “prevented from participating [in] social, work, and rehabilitation programmes on the basis of language and citizenship”, he does not give any indication or evidence that the Estonian prison authorities have purposefully subjected him to unequal treatment which would be required to legitimize a claim of discrimination. Motion, paras. 17-18.

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

Done this 28th day of January 2016,
At The Hague,
The Netherlands.



Judge Theodor Meron
President

[Seal of the Mechanism]