

**UNITED
NATIONS**



Mechanism for International Criminal Tribunals

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

Date: 7 July 2015

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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

Decision of: 7 July 2015

PROSECUTOR

v.

MILAN LUKIĆ

PUBLIC

**DECISION ON MILAN LUKIĆ'S APPLICATION FOR
REVIEW**

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. Mathias Marcussen

Counsel for Milan Lukić:

Mr. Rodney Dixon

1. The Appeals Chamber of the International Residual Mechanism for Criminal Tribunals (“Appeals Chamber” and “Mechanism”, respectively) is seised of an “Application on Behalf of Milan Lukić for Review of the Trial Judgment of 20 July 2009” filed publicly with confidential annexes on 6 February 2014 (“Application”), and an addendum to the Application filed publicly with confidential annexes on 13 March 2014 (collectively, “Request”).¹ The Prosecution filed a confidential response on 21 March 2014.² Lukić filed a confidential reply on 10 April 2014.³

I. BACKGROUND

2. In its Judgement of 4 December 2012, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) upheld Lukić’s convictions for murder and cruel treatment, as violations of the laws or customs of war under Article 3 of the ICTY Statute, and persecutions, murder, extermination, and other inhumane acts, as crimes against humanity under Article 5 of the ICTY Statute.⁴ Consequently, it affirmed Lukić’s sentence of life imprisonment.⁵ In upholding the convictions of Trial Chamber III of the ICTY (“Trial Chamber”), the Appeals Chamber effectively affirmed the Trial Chamber’s finding that Lukić, a member of the reserve police force of Višegrad,⁶ participated in, *inter alia*, the Drina River Incident, the Pionirska Street Incident, the Bikavac Incident, and the Varda Factory Incident, which occurred in eastern Bosnia in June 1992.⁷

3. In his Request, Lukić submits that his convictions and sentence should be reviewed in light of new evidence which came to his attention after his appeal was concluded.⁸ This evidence consists of: (i) five witness statements concerning the Drina River Incident, the Pionirska Street Incident, the Bikavac Incident, and the Varda Factory Incident;⁹ (ii) a document alleging that Bakira Hasečić, who assisted the Prosecution on Lukić’s case by taking witness statements, had committed

¹ Addendum to “Application on Behalf of Milan Lukić for Review of the Trial Judgement of 20 July 2009” Filed on 6 February 2014, 13 March 2014 (public with confidential annexes 5-7) (“Addendum”).

² Prosecution Response to Milan Lukić’s Application to Review the Trial Judgement of 20 July 2009, 21 March 2014 (confidential) (“Response”). The public redacted version was filed on 28 March 2014.

³ Reply on Behalf of Milan Lukić to the “Prosecution Response to Milan Lukić’s Application to Review the Trial Judgement of 20 July 2009”, 10 April 2014 (confidential) (“Reply”).

⁴ *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, Judgement, 4 December 2012 (“Appeal Judgement”), para. 672. On 4 March 2013, the ICTY Appeals Chamber issued a Corrigendum to the Appeal Judgement. See *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Judgement, 20 July 2009 (“Trial Judgement”), paras. 1099-1100.

⁵ Appeal Judgement, para. 672. See Trial Judgement, para. 1101.

⁶ Trial Judgement, para. 618. See Appeal Judgement, para. 2.

⁷ See Appeal Judgement, paras. 121-227, 252-354, 468-527; Trial Judgement, paras. 192-230, 298-329, 551-631, 703-731.

⁸ Application, paras. 3, 5, 20; Reply, para. 38.

⁹ Application, paras. 3, 22-67.

war crimes against civilians;¹⁰ and (iii) an excerpt from an official record of the Army of Bosnia Herzegovina listing the date and cause of death of a number of individuals.¹¹

4. The Prosecution responds that the Request should be dismissed as Lukić fails to meet any of the criteria for review under Article 24 of the Mechanism’s Statute (“Statute”) and Rule 146 of the Mechanism’s Rules of Procedure and Evidence (“Rules”).¹²

II. APPLICABLE LAW

5. The Appeals Chamber observes that review proceedings are governed by Article 24 of the Statute and Rules 146, 147, and 148 of the Rules. A request to have the Appeals Chamber review a final judgment 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 before the ICTY, the International Criminal Tribunal for Rwanda (“ICTR”), or the Mechanism; (iii) the new fact could not have been discovered through the exercise of due diligence; and (iv) the new fact could have been a decisive factor in reaching the original decision.¹³

6. The jurisprudence of the ICTY and ICTR has established that review of a final judgment is an exceptional procedure and not an additional opportunity for a party to re-litigate arguments that failed on trial or on appeal.¹⁴ A “new fact” within the meaning of the relevant provisions consists of “new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings”.¹⁵ It is irrelevant whether the new fact already existed before the original proceedings or during such proceedings. What matters is “whether the deciding body [...] knew about the fact or not” in reaching its decision.¹⁶

7. 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

¹⁰ Application, para. 61; Addendum, para. 4; Addendum, Annex 5.

¹¹ Addendum, paras. 9-13; Addendum, Annex 7.

¹² Response, paras. 1, 44.

¹³ See Article 24 of the Statute; Rule 146(A) of the Rules. See also *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-R, Decision on Request for Review, 29 May 2013 (“*Kajelijeli Review Decision*”), para. 7; *Prosecutor v. Veselin Šljivančanin*, Case No. IT-95-13/1-R.1, Decision with Respect to Veselin Šljivančanin’s Application for Review, 14 July 2010 (“*Šljivančanin Review Decision*”), p. 2; *Mladen Naletilić v. Prosecutor*, Case No. IT-98-34-R, Decision on Mladen Naletilić’s Request for Review, 19 March 2009 (“*Naletilić Review Decision*”), para. 10.

¹⁴ *Kajelijeli Review Decision*, para. 7; *Naletilić Review Decision*, para. 10.

¹⁵ *Kajelijeli Review Decision*, para. 8; *Šljivančanin Review Decision*, p. 2.

¹⁶ *Šljivančanin Review Decision*, p. 2, citing, *inter alia*, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-R, Decision on Motion for Review, 8 August 2002 (“*Tadić Review Decision*”), para. 25.

if a Chamber is presented with “a new fact that is of such strength that it *would* affect the verdict”¹⁷ and determines that “review of its judgement is necessary because the impact of the new fact on the decision is such that to ignore it would lead to a miscarriage of justice”.¹⁸

III. DISCUSSION

A. Drina River Incident

8. The Trial Chamber found that, on 7 June 1992, Lukić, Mitar Vasiljević, and two soldiers rounded up seven captured men to execute them, at the banks of the Drina river close to Sase.¹⁹ The Trial Chamber also found that Lukić and the two soldiers opened fire on the men killing all but two, Witnesses VG014 and VG032, who survived and identified Lukić as one of the perpetrators.²⁰ In addition, the Trial Chamber dismissed Lukić’s alibi that, on the day of the Drina River Incident, he was escorting his mother to Belgrade for medical treatment.²¹ Lukić was therefore convicted of murder, as a violation of the laws or customs of war, and murder and persecutions, as crimes against humanity, for the killing of the five men, namely Meho Džafić, Ekrem Džafić, Hasan Mutapčić, Hasan Kustura, and Amir Kurtalić.²² Lukić was also convicted of cruel treatment, as a violation of the laws or custom of war, and inhumane acts, as crimes against humanity, inflicted on the two survivors.²³ The Trial Chamber’s findings, including its rejection of Lukić’s alibi for this incident, were upheld on appeal.²⁴

9. In his Request, Lukić submits a statement by Witness 2, which states that, on 7 June 1992, he heard shooting while driving through the Sase crossroad and saw a wounded man later identified as Kovac.²⁵ While taking Kovac into his car, the witness heard more shots and saw Mitar Vasiljević and Mitar Knezević coming from the direction of the Drina river.²⁶ Witness 2 took Kovac to the medical centre in Višegrad.²⁷ Subsequently, Vasiljević and Knezević arrived at the medical centre and Witness 2 asked them whether anyone else had been with them.²⁸ Vasiljević replied that there

¹⁷ *Šljivančanin* Review Decision, pp. 2-3, citing, *inter alia*, *Tadić* Review Decision, para. 27 (emphasis in original).

¹⁸ *Šljivančanin* Review Decision, p. 3, citing, *inter alia*, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-R, Decision on Prosecutor’s Request for Review or Reconsideration, 23 November 2006 (“*Blaškić* Review Decision”), para. 8.

¹⁹ Trial Judgement, paras. 192-230, 906-907.

²⁰ Trial Judgement, paras. 192-230, 906-907.

²¹ Trial Judgement, paras. 146-166, 230.

²² Trial Judgement, paras. 911, 998, 1099. See also Appeal Judgement, paras. 121-163, 672.

²³ Trial Judgement, paras. 966, 1000, 1099. See also Appeal Judgement, paras. 121-163, 672.

²⁴ Appeal Judgement, paras. 114, 145, 154, 163.

²⁵ Application, Annex 2, paras. 8, 10.

²⁶ Application, Annex 2, para. 11.

²⁷ Application, Annex 2, para. 12.

²⁸ Application, Annex 2, paras. 13-14.

was no one else.²⁹ Lukić also submits a statement by Witness 1, a policeman who was on duty that day, attesting that Witness 2 reported that Kovac had been shot at the bank of the Drina river by Muslim fighters and that Vasiljević and Knezević had been with Kovac.³⁰ Additionally, Lukić submits the statement of Witness 5 who states that he “never found any information about [Lukić] being involved in any way in the commission of any crimes in Višegrad in 1992”.³¹ Lukić further submits an excerpt from a Bosnia and Herzegovina Army record listing Ekrem Džafić, Hasan Kustura, and Hasan Mutapčić as killed in combat on a different date.³²

10. Lukić contends that the above evidence contains new facts and shows that he was not present during the Drina River Incident.³³ Lukić claims that the failure to discover such facts at an earlier stage was not due to lack of due diligence³⁴ and that Witness 2’s evidence would have been decisive “in that his first-hand account of events involves the participation of persons other than [Lukić].”³⁵ He also maintains that Witness 1’s statement corroborates that of Witness 2³⁶ and that Witness 5’s statement corroborates the evidence of Witnesses 1 and 2.³⁷ In relation to the death of Ekrem Džafić, Hasan Kustura, and Hasan Mutapčić, Lukić argues that the Bosnia and Herzegovina Army record constitutes “new evidence” showing that these individuals were killed at subsequent dates in combat activities.³⁸

11. The Prosecution responds that the statements of Witnesses 1 and 2 do not contain new facts but rather provide further evidence of Lukić’s alibi.³⁹ It adds that their statements are unreliable as the Višegrad Health Centre register does not mention an individual by the name Kovac being brought in or treated on 7 June 1992.⁴⁰ As for the statement of Witness 5, the Prosecution responds that it is unreliable and has no impact on Lukić’s convictions.⁴¹ In relation to the challenged time and manner of death of the three individuals identified as victims, the Prosecution submits that both the Trial Chamber and the ICTY Appeals Chamber rejected Lukić’s arguments in this regard.⁴²

²⁹ Application, Annex 2, paras. 13-14.

³⁰ Application, Annex 1, para. 11.

³¹ Addendum, Annex 6, para. 14.

³² Addendum, paras. 9-12; Addendum, Annex 7, rows 60163, 60210, 61157.

³³ Application, paras. 23, 25, 36; Addendum, paras 7-8.

³⁴ Application, paras. 31-32; Reply, paras. 15-16.

³⁵ Application, para. 35. *See also* Application, paras. 34, 36-37; Reply, paras. 18-27.

³⁶ Application, para. 34. *See also* Application, Annex 1, para. 11; Application, Annex 2, paras. 8-14.

³⁷ Addendum, paras. 6-8.

³⁸ Addendum, para. 13. *See* Addendum, Annex 7, rows 60163, 60210, 61157.

³⁹ Response, paras. 8, 12.

⁴⁰ Response, para. 22. *See also* Response, Annex A.

⁴¹ Response, para. 25.

⁴² Response, paras. 8, 12.

12. Lukić replies that Witnesses 1 and 2 do not provide additional evidence of his alibi but information about how the incident occurred, which was not before the Trial Chamber.⁴³ In addition, Lukić submits that it would be unfair for the Appeals Chamber to rely on the register of the Višegrad Health Centre submitted by the Prosecution as there is no evidence to establish that it is a complete and accurate record.⁴⁴

13. The Appeals Chamber notes that, in support of his request for review, Lukić relies on the statements of Witnesses 1, 2, and 5. Reading these statements, in the manner most favourable to Lukić, suggests that on 7 June 1992 there was an incident close to the Drina river between Mitar Vasiljević, Mitar Knezević and a man named Kovac who was shot by Muslim fighters and that Lukić was not present or otherwise involved in this. The implicit assumption is that the incident described in these statements is the one underlying his relevant convictions. Lukić therefore relies on these statements to challenge the findings made in the original proceedings as to his identification as perpetrator of the crimes committed in the Drina River Incident. In addition, Lukić relies on the excerpt from the Bosnia and Herzegovina Army record, which purportedly contains information about the time and manner of death of three out of the five men killed in the Drina River Incident.

14. The Appeals Chamber recalls the critical distinction between material submitted in support of a fact, which *was not* in 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.⁴⁵ Review will not be available where a fact was previously in issue.⁴⁶ Therefore, it is the definition of the fact in issue in the original proceedings, which will determine the availability of the review procedure.⁴⁷ The burden for showing that the information in the tendered material amounts to a “new fact” lies with the moving party.⁴⁸ The Appeals Chamber must therefore determine whether Lukić has shown that the information in the statements of Witnesses 1, 2, and 5

⁴³ Reply, paras. 14, 18.

⁴⁴ Reply, paras. 22-23, 37.

⁴⁵ *Blaškić* Review Decision, para. 40; *Prosecutor v. Mlado Radić*, IT-98-30/1-R.1, Decision on Defence Request for Review, 31 October 2006, para. 22; *Prosecutor v. Drago Josipović*, IT-95-16-R2, Decision on Motion for Review, 7 March 2003 (“*Josipović* Review Decision”), para. 18; *Prosecutor v. Hazim Delić*, IT-96-21-R-R119, Decision on Motion for Review, 25 April 2002 (“*Delić* Review Decision”), para. 11, referring to *Prosecutor v. Tadić*, IT-94-1-A, Decision on Appellant’s Motion for the Extension of the Time Limit and Admission of Additional Evidence, 15 October 1998, paras. 30, 32; *Jean Bosco Barayagwiza v The Prosecutor*, ICTR-97-19-AR72, Decision on Prosecutor’s Request for Review or Reconsideration, 31 March 2000, para. 42.

⁴⁶ *Delić* Review Decision, para. 11.

⁴⁷ *Blaškić* Review Decision, paras. 15-18; *Josipović* Review Decision, para. 19.

⁴⁸ *François Karera v. The Prosecutor*, ICTR-01-74-R, Decision on Requests for Reconsideration and Review, 26 March 2012 (“*Karera* Review Decision”), para. 17; *Blaškić* Review Decision, para. 16; *Delić* Review Decision, paras. 10, 13.

and the excerpt from a Bosnia and Herzegovina Army record amount to a new fact - that is, a fact that was not in issue or considered during the trial or appeal proceedings.

15. With respect to the statements of Witnesses 1, 2, and 5, the Appeals Chamber notes that Lukić's presence and participation in these crimes were among the material issues in dispute between the parties and were extensively litigated at trial.⁴⁹ The Trial Chamber found that Lukić was one of the perpetrators of the crimes concerned based, *inter alia*, on the identification evidence of the two survivors, Witnesses VG014 and VG032.⁵⁰ In addition, Lukić led evidence to challenge his involvement in these crimes and support an alibi that on the day of the incident he was in Belgrade.⁵¹ Lukić's presence and participation in the Drina River Incident and the rejection of his alibi were also considered and confirmed on appeal.⁵²

16. Turning to the excerpt from a Bosnia and Herzegovina Army record, the Appeals Chamber notes that the identification of Ekrem Džafić, Hasan Kustura, and Hasan Mutapčić as victims was contested both at trial⁵³ and on appeal.⁵⁴ Lukić's arguments in this regard were rejected on the basis of the testimony of Witnesses VG014 and VG032 and demographic evidence.⁵⁵

17. Therefore, the Appeals Chamber finds that the statements of Witnesses 1, 2, and 5 as well as the Bosnia and Herzegovina Army record are merely additional evidence of issues thoroughly considered during the original proceedings. Lukić has therefore failed to show any new fact meriting review under Rule 146 of the Rules.

B. Pionirska Street Incident

18. The Trial Chamber found that, on 14 June 1992, Lukić, together with a group of armed men, locked a group of at least 66 Muslim civilians in a house on Pionirska street.⁵⁶ Lukić and the other armed men then set the house on fire and shot at the individuals trying to escape through the windows.⁵⁷ In addition, the Trial Chamber rejected Lukić's alibi defence that at the relevant time he was participating in a police operation outside Višegrad in Kopito.⁵⁸ Lukić was convicted of

⁴⁹ Trial Judgement, paras. 101-230.

⁵⁰ Trial Judgement, paras. 201, 207-208, 230.

⁵¹ Trial Judgement, paras. 146-166, 230.

⁵² Appeal Judgement, paras. 65-115, 121-145.

⁵³ See Trial Judgement, paras. 199-200.

⁵⁴ Appeal Judgement, paras. 146-154. See also *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, Decision on Milan Lukić's Second Motion for Admission of Additional Evidence on Appeal, 6 July 2011 (confidential), paras. 31-35, 38.

⁵⁵ Trial Judgement, paras. 199-200; Appeal Judgement, paras. 146-154.

⁵⁶ Trial Judgement, paras. 569, 606, 631, 917, 1010.

⁵⁷ Trial Judgement, paras. 612, 631, 917, 944, 1011.

⁵⁸ Trial Judgement, paras. 478-488, 614-631.

murder, as a violation of the laws or customs of war, and extermination, as a crime against humanity, for the killing of 59 Muslim civilians during the Pionirska Street Incident, and of committing cruel treatment, as a violation of the laws or customs of war, and inhumane acts, as crimes against humanity, against seven individuals who survived the incident.⁵⁹ On appeal, the ICTY Appeals Chamber found that the total number of victims of this incident as found by the Trial Chamber should be reduced by six.⁶⁰ In all other respects, the ICTY Appeals Chamber upheld the Trial Chamber's findings, including the rejection of Lukić's alibi for this incident.⁶¹

19. In support of his request for review, Lukić relies on the statements of Witnesses 1, 3, 4, and 5. Witness 3's statement suggests that, on 14 June 1992, he heard Lukić's voice on a police radio reporting on a police operation in Kopito which, according to Lukić, shows that he was not present at Pionirska street.⁶² Witness 1's statement indicates that, on the same date, Lukić was in Kopito on police duty and that, when the witness visited Pionirska street that day, he did not see Lukić.⁶³ According to Witness 4's statement, her husband confessed before his death that he was the "main person responsible for the crimes committed at Pionirska Street" and that Lukić was not present during the incident on 14 June 1992.⁶⁴ Witness 5's statement reflects that he "never found any information about [Lukić] being involved in any way in [...] any crimes in Višegrad in 1992".⁶⁵ Finally, Lukić argues that "certain additional evidence", implicating Prosecution Witness Huso Kurspahić in the commission of war crimes against civilians, should be taken into account.⁶⁶

20. Lukić submits that the alibi evidence of Witness 3 constitutes a new fact, which was "not heard in any form" in the original proceedings, and that it is corroborated by the evidence of Witness 1, which also sets out a new fact.⁶⁷ He argues that the alleged new facts were not available during the original proceedings⁶⁸ and that failure to discover them was not a result of lack of due diligence.⁶⁹ Lukić further argues that the new evidence would have been decisive as "it would have cast a reasonable doubt on the Prosecution's case and obliged the Prosecution to establish [Lukić's] presence at Pionirska street beyond reasonable doubt".⁷⁰ With respect to the statement of Witness 5,

⁵⁹ Trial Judgement, paras. 919, 947, 971, 1015, 1099-1100.

⁶⁰ Appeal Judgement, paras. 352-353, 672.

⁶¹ Appeal Judgement, paras. 269-354, 672.

⁶² Application, paras. 39, 46; Application, Annex 3, paras. 8-10.

⁶³ Application, para. 47; Application, Annex 1, paras. 12-13.

⁶⁴ Application, Annex, 4, paras. 6-7.

⁶⁵ Addendum, Annex 6, para. 14.

⁶⁶ Application, para. 51, *referring to* the "Blackbook" by Prsro Tohoy.

⁶⁷ Application, paras. 40, 48.

⁶⁸ Application, paras. 30, 41-42, 57, 64.

⁶⁹ Application, paras. 31-33, 43-45, 58, 65-66; Reply, paras. 15-16.

⁷⁰ Application, paras. 46-50.

Lukić submits that it is relevant in that it corroborates the evidence of Witnesses 1, 2, 3, and 4.⁷¹ Finally, Lukić argues that had the information regarding Witness Kurspahić previously been known, it would have been used in cross-examination given that his testimony was relied upon to identify Lukić.⁷²

21. The Prosecution responds that the statements of Witnesses 1, 3, and 4 do not contain new facts but only amount to additional evidence in support of Lukić's alibi and that nothing in the statement of Witness 5 gives rise to new facts.⁷³ It also argues that Lukić fails to show that the alleged new facts were not discoverable through the exercise of due diligence.⁷⁴ The Prosecution further argues that the proposed evidence would have no impact on Lukić's convictions related to this incident given the overwhelming evidence from credible witnesses showing Lukić's responsibility.⁷⁵ In addition, the Prosecution responds that Lukić's reference to Witness Kurspahić should be summarily dismissed as Lukić fails to provide any material in support of his claim.⁷⁶

22. Lukić replies that the statement of Witness 4 has "nothing to do with any alibi" and is a "completely new fact about the commission of the crime", and that the statement of Witness 3, although clearly relating to Lukić's alibi, "concerns entirely new circumstances that were not litigated and considered by the Chamber".⁷⁷

23. Lukić relies on the statements of Witnesses 1, 3, 4, and 5 to suggest that at the relevant time he was not at Pionirska street but was participating in a police operation in an area known as Kopito. However, Lukić's presence and participation in the Pionirska Street Incident as well as his alibi that he was deployed to Kopito were extensively litigated at trial.⁷⁸ The Trial Chamber concluded that Lukić's presence and conduct during the Pionirska Street Incident was confirmed by credible and reliable witnesses, including six survivors of the incident, whereas Lukić's alibi was inconsistent and implausible on central matters.⁷⁹ The Trial Chamber concluded that Lukić's alibi was not reasonably possibly true and made detailed findings in relation to Lukić's conduct during the incident, including that he closed the door to the house, that he thereafter opened the door and placed an explosive device into the room which ignited the fire inside, and that he shot at persons

⁷¹ Addendum, paras. 6-8. Reply, para. 14.

⁷² Application, para. 51.

⁷³ Response, para. 12.

⁷⁴ Response, paras. 14-17.

⁷⁵ Response, paras. 19, 28-33.

⁷⁶ Response, para. 43.

⁷⁷ Reply, para. 14.

⁷⁸ Appeal Judgement, paras. 272-274. Trial Judgement, paras. 478, 481-512, 529-550, 578-629. *See also Josipović Review Decision*, para. 20.

⁷⁹ Trial Judgement, paras. 630-631. *See also* Trial Judgement, paras. 330-333, 389.

attempting to escape from the house.⁸⁰ With the exception of the number of individuals killed during this incident, all of Lukić's challenges, including those regarding the Trial Chamber's assessment of alibi and identification evidence, were carefully considered and rejected on appeal.⁸¹ Therefore, the statements of Witnesses 1, 3, and 4 that Lukić was not present or that another individual participated in the Pionirska Street Incident on 14 June 1992 are merely additional evidence of issues already considered during the original proceedings.⁸² As such, Lukić has failed to submit any new fact for the purposes of review under Rule 146 of the Rules.

24. Lastly, the Appeal Chamber notes that Lukić has failed to substantiate his submission that Witness Kursphahić was implicated in the commission of war crimes.⁸³ Given that it was incumbent on Lukić, as the moving party in this case, to provide the material supporting his claims,⁸⁴ the Appeals Chamber will not consider this matter further.

C. Bikavac Incident

25. The Trial Chamber found that, on or about 27 June 1992, a group of armed men, including Lukić, herded approximately 60 Muslim civilians into Meho Aljić's house in Bikavac, a neighbourhood of Višegrad, and subsequently fired at the house, threw grenades into it, and then set it on fire.⁸⁵ The Trial Chamber convicted Lukić of murder, as a violation of the laws or customs of war, and extermination as a crime against humanity, for the killing of at least 60 Muslim civilians;⁸⁶ of cruel treatment, as a violation of the laws or customs of war, and inhumane acts, as crimes against humanity, against Zehra Turjačanin, the sole survivor of the killings;⁸⁷ and of persecution, as a crime against humanity, for the destruction of Meho Aljić's house.⁸⁸ Although the ICTY Appeals Chamber found that the Trial Chamber had erred in failing to explain why it considered certain witnesses credible, it found that this error did not invalidate the Trial Judgement and upheld all of the Trial Chamber's findings including the identification of Lukić as a perpetrator in the Bikavac Incident.⁸⁹

26. In support of his request, Lukić submits the statements of Witnesses 1, 3, 4, and 5. Witness 3's statement suggests that the witness did not see Lukić in Višegrad on 27 June 1992, and

⁸⁰ Trial Judgement, para. 631.

⁸¹ Appeal Judgement, paras. 291, 306, 352-354, 672. *See also* Appeal Judgement, paras. 272-290, 292-305.

⁸² *See supra* para. 14.

⁸³ Application, para. 51, n. 59.

⁸⁴ *See supra* para. 14.

⁸⁵ Trial Judgement, paras. 709, 921. *See also* Appeal Judgement, para. 468.

⁸⁶ Trial Judgement, paras. 923, 951, 1099-1100.

⁸⁷ Trial Judgement, paras. 973, 976, 1099.

⁸⁸ Trial Judgement, paras. 1020, 1099.

⁸⁹ Appeal Judgement, paras. 62-64, 470-471, 479, 482, 504, 518, 526-527.

that, on the same day, he overheard a conversation at Hotel Višegrad between Dragan Savić, Mitar Knezević, Šime, Mile Lakić, and Dragan Laki, bragging about having attacked Muslim houses in Bikavac earlier that day.⁹⁰ According to the statement of Witness 1, as a police officer, he received a report that a group staying at Hotel Višegrad, including Dragan Savić, Aleksandar Simsić, and Mitar Knezević, had been responsible for committing the crimes at Bikavac.⁹¹ It follows from the statement of Witness 4 that her husband confessed before dying that he was responsible for the crimes committed in Bikavac.⁹² Witness 5's statement suggests that he "never found any information about [Lukić] being involved in any way in the commissions of any crimes in Višegrad in 1992".⁹³ Lukić also relies on a document filed on 23 February 2001 with the Višegrad District Public Prosecutor's Office requesting the conduct of an investigation against Bakira Hasečić for crimes committed between 11 and 16 April 1992 against Bosnian Serb civilians as well as the referral dated 20 April 2001 of the criminal charges against Hasečić to the Sarajevo County Prosecutor's Office.⁹⁴

27. Lukić submits that the statements of Witnesses 1, 3, and 4 set out new facts confirming that on 27 June 1992 he was not in Bikavac.⁹⁵ He argues that the evidence of the three witnesses was not known to him during the original proceedings and that the failure to discover these alleged new facts was not due to any lack of due diligence.⁹⁶ Further, Lukić argues that this evidence would have been decisive "in that it would have constituted relevant and reliable evidence about the persons who perpetrated the crimes in Bikavac" and "would in turn have raised reasonable doubts about the Prosecution's case that [Lukić] was present and committing the crimes at Bikavac".⁹⁷ He also submits that the statement of Witness 5 is relevant in that it corroborates the statements of Witnesses 1, 3, and 4.⁹⁸ With respect to Hasečić, Lukić argues that the documents he relies upon undermine the credibility and reliability of Prosecution evidence.⁹⁹

28. The Prosecution responds that the statements of Witnesses 1, 3, 4, and 5 do not set out any decisive new fact or information,¹⁰⁰ and that they could have been discovered earlier with the exercise of due diligence.¹⁰¹ Regarding the documents related to Hasečić, the Prosecution responds

⁹⁰ Application, para. 53; Application, Annex 3, paras 13-14.

⁹¹ Application, para. 54; Application, Annex 1, paras. 14-15.

⁹² Application, para. 55; Application, Annex 4, paras. 4-7.

⁹³ Addendum, Annex 6, para. 14.

⁹⁴ Application, para. 61; Addendum, para. 4; Addendum, Annex 5

⁹⁵ Application, para. 56. *See also* Reply, para. 14.

⁹⁶ Application, paras. 57-58.

⁹⁷ Application, para. 59.

⁹⁸ Addendum, paras. 6-7; Addendum, Annex 6.

⁹⁹ Application, para. 61.

¹⁰⁰ Response, paras. 8-12.

¹⁰¹ Response, paras. 14-17.

that Lukić fails to show why these were not discoverable during the original proceedings and how they could undermine Lukić's convictions.¹⁰² Furthermore, the Prosecution argues that Hasečić's connection with the Prosecution witnesses was thoroughly litigated at trial and on appeal.¹⁰³

29. The Appeals Chamber notes that Lukić relies on the relevant witness statements to suggest that he was not in Višegrad at the time of the Bikavac Incident and that a group of others were responsible for the crimes committed there. However, in doing so he is merely challenging issues litigated at trial and, in particular, his presence and participation in the Bikavac Incident, as well as his alibi that at the time of the incident he was in Rujište.¹⁰⁴ Lukić has therefore failed to submit any new information as to a fact that was not in issue during the original proceedings and could impact his conviction.¹⁰⁵ The Trial Chamber found the Prosecution witnesses who testified as to Lukić's presence and involvement in the crimes at Bikavac, including Zehra Turjačanin who was the sole survivor of the incident, to be credible and reliable, whereas Lukić's alibi evidence was considered wholly unreliable.¹⁰⁶ Lukić's alibi was rejected as not reasonably possibly true and detailed findings were made as to his acts and conduct at the incident, namely that he shot at and threw grenades into the house, which he subsequently set on fire.¹⁰⁷

30. In addition, the ICTY Appeals Chamber found that the Trial Chamber had erred in failing to explain why it considered Prosecution Witnesses VG094 and VG119 credible despite their involvement with Hasečić who allegedly used her power to grant rape victim status and the material benefits related to such status in order to coerce women to give false statements of crimes committed against them.¹⁰⁸ Nonetheless, the ICTY Appeals Chamber was satisfied that a reasonable trier of fact could have concluded that the credibility of Witnesses VG094 and VG119 was not undermined by their involvement with Hasečić and that the Trial Chamber's error did not invalidate its relevant findings.¹⁰⁹ In this respect, the Appeals Chamber notes that the request for an investigation against Hasečić and the referral of charges on which Lukić relies upon in his Request do not constitute material of an evidentiary nature.¹¹⁰ All remaining challenges regarding the Bikavac Incident, including those related to Lukić's identification, were dismissed on appeal.¹¹¹

¹⁰² Response, para. 41.

¹⁰³ Response, para. 41.

¹⁰⁴ Trial Judgement, paras. 690-691, 695-702, 716-731.

¹⁰⁵ See *supra* para. 14.

¹⁰⁶ Trial Judgement, paras. 716-724, 731.

¹⁰⁷ Trial Judgement, para. 731.

¹⁰⁸ Appeal Judgement, paras. 62-64, 470.

¹⁰⁹ Appeal Judgement, para. 471.

¹¹⁰ See also *Karera* Review Decision, para. 30.

¹¹¹ Appeal Judgement, paras. 57, 479, 518, 526-527.

31. For these reasons, the Appeals Chamber considers that, the evidence provided in support of the request for review of the findings related to this incident, is merely additional evidence of issues already considered in the original proceedings. Accordingly, Lukić has failed to submit any new fact for the purposes of review under Rule 146 of the Rules.

D. Varda Factory Incident

32. The Trial Chamber convicted Lukić of murder as a violation of the laws or customs of war and as a crime against humanity for the killing of Nusret Aljošević, Nedžad Bektaš, Mušan Čančar, Ibrišim Memišević, Hamed Osmanagić, Lutvo Tvrtković and Sabahudin Velagić on the bank of the Drina river in front of the Varda factory on or about 10 June 1992.¹¹² Specifically, the Trial Chamber found that Lukić himself had selected the victims from the Varda factory and forced them to the bank of the Drina river where he shot and killed them.¹¹³ On appeal, the ICTY Appeals Chamber dismissed all of Lukić's challenges in relation to this incident.¹¹⁴

33. In relation to this incident, Lukić submits the statements of Witnesses 1 and 5 and an official Bosnia and Herzegovina Army record to support his request. According to the statement of Witness 1, Lukić was not sent from the police station to the Varda factory on 10 June 1992 and that, in fact, Lukić may have been in Belgrade since he occasionally went there.¹¹⁵ Witness 5's statement indicates that he "never found any information about [Lukić] being involved in any way in the commission of any crimes in Višegrad in 1992".¹¹⁶ The record lists Nedžad Bektaš and Mušan Čančar as having been killed in combat on a date other than the date of this incident.¹¹⁷

34. Lukić argues that the alleged new fact concerning Witness 1 was not known during the original proceedings, that his failure to discover it was not due to lack of due diligence, and that the new fact would be decisive in that it would have provided evidence from his colleague as to his whereabouts at the time.¹¹⁸ As to the statement of Witness 5, Lukić maintains that it corroborates the evidence of Witness 1.¹¹⁹ Regarding the death of Nedžad Bektaš and Mušan Čančar, Lukić claims that the Bosnia and Herzegovina Army record constitutes "new evidence", which supports

¹¹² Trial Judgement, paras. 913-914, 1099. *See also* Trial Judgement, paras. 298-329.

¹¹³ Trial Judgement, paras. 329, 913.

¹¹⁴ Appeal Judgement, paras. 181, 203, 226-227.

¹¹⁵ Application, para. 63; Application, Annex 1, para. 16.

¹¹⁶ Addendum, Annex 6, para. 14.

¹¹⁷ Addendum, paras. 11-12; Addendum, Annex 7, rows 60360, 60429.

¹¹⁸ Application, paras. 64-67; Reply, para. 14.

¹¹⁹ Addendum, paras. 6-7.

the statement of Witness 1 and that it was not known to Lukić during the original proceedings as he only became aware of it after it was used in the proceedings against Radovan Karadžić.¹²⁰

35. The Prosecution responds that the statement of Witness 1 is not a new fact and could only constitute additional evidence for Lukić's alibi which was rejected on trial and on appeal, and that nothing in the statement of Witness 5 gives rise to a finding of new facts.¹²¹ In relation to the time and manner of death of Nedžad Bektaš and Mušan Čančar, the Prosecution responds that both the Trial Chamber and the ICTY Appeals Chamber rejected Lukić's argument in this regard.¹²²

36. The Appeals Chamber notes that the issue regarding Lukić's presence and participation in the Varda Factory Incident were material issues litigated at trial.¹²³ The Trial Chamber found that Lukić was one of the perpetrators of the killings based, *inter alia*, on identification evidence from a witness who saw the entire incident unfold.¹²⁴ The Trial Chamber also dismissed Lukić's alibi that, on the day of the incident, he was in Belgrade escorting his mother for medical treatment.¹²⁵ On appeal, Lukić's presence and participation in the Varda Factory Incident as well as his alibi were considered and his arguments in this regard were dismissed.¹²⁶ Furthermore, the identification of Nedžad Bektaš and Mušan Čančar as victims of this incident was contested at both trial¹²⁷ and on appeal,¹²⁸ and Lukić's arguments in this regard were dismissed.¹²⁹

37. Accordingly, the information included in the Bosnia and Herzegovina Army record and the statements of Witnesses 1 and 5 is merely additional evidence of issues already considered during the original proceedings. As such, it does not amount to new facts for the purpose of review under Rule 146 of the Rules.

¹²⁰ Addendum, paras. 12-13.

¹²¹ Response, para. 12.

¹²² Response, para. 12.

¹²³ Trial Judgement, paras. 231-297. *See supra* para. 14.

¹²⁴ Trial Judgement, paras. 257-262. *See also* Trial Judgement, paras. 300, 304.

¹²⁵ Trial Judgement, paras. 146-230, 277.

¹²⁶ Appeal Judgement, paras. 165-203.

¹²⁷ Trial Judgement, paras. 275-276, 307-319, 329.

¹²⁸ Appeal Judgement, paras. 204-211, 219-222.

¹²⁹ Trial Judgement, para. 319; Appeal Judgement, para. 226.

IV. DISPOSITION

38. For the foregoing reasons, the Appeals Chamber **DISMISSES**, Judge Antonetti dissenting, the Request in its entirety. Judge Antonetti's dissenting opinion on the Request will be filed separately.

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

Done this 7th day of July 2015,
At The Hague,
The Netherlands



Judge Theodor Meron, Presiding

[Seal of the Mechanism]