

**THE PROSECUTOR V. MILAN LUKIĆ AND SREDOJE LUKIĆ**

Case No. IT-98-32/1-A

International Criminal Tribunal for the former Yugoslavia

Appellate Judgement

December 04, 2012

**Judges:**

Mehmet Güney

Carmel Agius

Fausto Pocar

Liu Daqun

Howard Morrison

**Prosecution:**

Peter Kremer

Virginie Monchy

Matthias Schuster

Matthew Gillett

**Defense:**

**For Milan Lukić**

Tomislav Višnjić

Dragan Ivetić

**For Sredoje Lukić**

Duro Čepić

Jens Dieckmann

Prof. G.G.J. Knoops, as Legal Consultant

**Gender Keyword(s):** Credibility or Character of the Victim

**Procedural History:** On October 26, 1998, the International Criminal Tribunal for the former Yugoslavia (ICTY) confirmed an indictment against Milan Lukić, Sredoje Lukić, and Mitar Vasiljević.<sup>1</sup> On July 20, 2001, the Prosecution was granted leave to file an amended indictment.<sup>2</sup> On July 24, 2001, the Trial Chamber ordered that Vasiljević be tried separately.<sup>3</sup> On February 1, and March 22, 2006, the Trial Chamber granted the Prosecution leave to amend the amended indictment with regard to Milan Lukić and Sredoje Lukić, respectively; the resulting second amended indictment of February 27, 2006, is the operative indictment in this case.<sup>4</sup> Both of the Accused were charged with

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<sup>1</sup> *Prosecutor v. Milan Lukić, Sredoje Lukić, and Mitar Vasiljević*, Indictment, October 26, 1998.

<sup>2</sup> *Prosecutor v. Milan Lukić and Sredoje Lukić*, Decision on Prosecution Motion Seeking Leave to Amend the Second Amended Indictment and on Prosecution Motion to Include UN Security Council Resolution 1820 (2008) as Additional Supporting Material to Proposed Third Amended Indictment as Well as on Milan Lukić's Request for Reconsideration or Certification of the Pre-Trial Judge's Order of 19 June 2008, July 8, 2008 (¶ 1).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* ¶ 2.

persecution, inhumane acts, murder, and extermination as crimes against humanity; and murder and cruel treatment as war crimes.<sup>5</sup> The Accused were not charged with any crimes related to sexual or gender-based violence. On June 16, 2008—approximately two weeks before trial was set to start—the Prosecution moved to amend the second amended indictment in order to add new charges against the accused for rape, enslavement, and torture, as well as to clarify the language concerning the mode of liability of joint criminal enterprise.<sup>6</sup> The Prosecution filed supplementary material in relation to this motion to amend on June 24, 2008.<sup>7</sup> On July 8, 2008, the Trial Chamber denied the Prosecution’s motion, barring the addition of charges related to allegations of sexual and gender-based violence.<sup>8</sup> During the trial, however, the Trial Chamber heard evidence regarding several rapes from witnesses who were presented by the Prosecution as a rebuttal to Milan Lukić’s alibi evidence in relation to several crimes that were charged.<sup>9</sup> For example, Witness VG131 testified that Milan Lukić had raped her as part of her evidence that she saw Milan Lukić in Višegrad around the same time he was alleged to have committed killings there.<sup>10</sup> Witness VG063 also testified as a rebuttal witness to Milan Lukić’s alibi defense, testifying that Milan Lukić raped her and raped two other women around the time and in the area in which several alleged killings took place.<sup>11</sup> Witness VG035 also testified in rebuttal of Lukić’s alibi defense, stating that Milan Lukić had raped her three times prior to participating in the killings of 60 civilians by locking them in a house and setting the house on fire.<sup>12</sup> Milan Lukić challenged many of these witnesses’ credibility, as discussed in detail below.<sup>13</sup> The Trial Chamber also heard evidence of rapes occurring at Uzamnica Camp, a place in which civilians were held as detainees.<sup>14</sup> The Trial Chamber did not make any findings regarding the Defendants’ guilt for the alleged rapes, as they had not been indicted for these crimes.<sup>15</sup> However, the Trial Chamber did consider the evidence of non-indicted crimes, including these and other rapes, in determining whether the Prosecution satisfied the general requirements of crimes against humanity, finding that the evidence established the existence of a widespread and systematic attack on civilians of which the charged acts were a part.<sup>16</sup> On July 20, 2009, the Trial Chamber convicted Milan Lukić as bearing individual criminal responsibility for committing persecution, murder, extermination and other inhumane acts as crimes against humanity and murder and cruel treatment as violations of the laws or customs of war (¶ 4). Specifically, the convictions were based on six distinct incidents between 1992 and 1994 in eastern Bosnia involving the killings of several Muslim civilians through shootings, two incidents in which people were sequestered in houses that were set on fire, and the detention and beating of Muslim civilians at Uzamnica

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<sup>5</sup> *Prosecutor v. Milan Lukić and Sredoje Lukić*, Trial Chamber Judgment, July 20, 2009, ¶¶ 9-10.

<sup>6</sup> See *supra* footnote 2, ¶¶ 5-6.

<sup>7</sup> See *supra* footnote 2, ¶¶ 5-6.

<sup>8</sup> *Id.*, ¶ 36. The Trial Chamber held that the Prosecution’s motion was untimely and did not provide adequate notice to the Accused.

<sup>9</sup> *Id.* ¶ 37.

<sup>10</sup> *Id.* ¶¶ 280, 289, 328, 329.

<sup>11</sup> *Id.* ¶¶ 186-188, 227-229, 700-702.

<sup>12</sup> *Id.* ¶¶ 695-698.

<sup>13</sup> *Id.* ¶¶ 189, 723, 755.

<sup>14</sup> *Id.* ¶ 800-801.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* ¶¶ 890-895.

Camp (*id.*). The Chamber sentenced Milan Lukić to life imprisonment (*id.*). The Trial Chamber convicted Sredoje Lukić of bearing individual criminal liability for violating laws and customs of war by perpetrating cruel treatment and aiding and abetting murder and cruel treatment (¶ 5). The Chamber also found Sredoje Lukić guilty of committing crimes against humanity by perpetrating other inhumane acts, and aiding and abetting persecutions, murder, and other inhumane acts (*id.*). The Chamber sentenced him to 30 years of imprisonment (*id.*).<sup>17</sup>

Milan Lukić set forth eight grounds of appeal against the Trial Judgment, seeking acquittal on all grounds, or in the alternative, to reduce the sentence (¶ 6). Among his grounds of appeal, he alleged that the Trial Chamber violated his right to a fair trial by denying him adequate time and facilities to prepare his defense prior to the commencement of the trial, imposing inappropriate restrictions on the conduct of his defense during trial, and failing to address the issue of undue influence upon Prosecution witnesses by third parties (¶ 16). In relation to this last allegation, Milan Lukić argued that Bakira Hasečić, the President of the Women Victims of War Association (Association), influenced several of the Prosecution witnesses, including those who testified that they had been raped, by offering inducements to testify to such allegations in exchange for civilian victims of war benefits afforded to rape victims (¶ 53). Milan Lukić submitted that the Trial Chamber deprived him of his right to a fair trial by denying his request to initiate proceedings for contempt of court against Bakira Hasečić; by curtailing his opportunity to effectively cross-examine the Prosecution witnesses allegedly affected by the undue influence by Hasečić; and by not adequately assessing Hasečić's influence on the Prosecution witnesses' credibility (*id.*). Milan Lukić also asserted several other errors with regard to the Trial Chamber's findings concerning his alibi witnesses and identifications made by witnesses, including some of the witnesses mentioned above who testified that Milan Lukić had raped them (¶¶ 66-68, 230).

Sredoje Lukić appealed on 15 grounds against the Trial Judgment, seeking acquittal on all counts or, in the alternative, a reduction in sentence (¶ 7). His appeal challenged the findings of the Trial Chamber on issues including its consideration of several identification witnesses its conclusions regarding his alibi witnesses; alleged errors in assessing his role in aiding and abetting persecutions, murder, and other inhumane acts; and an incorrect finding that the Prosecution's evidence was sufficient with regard to the persecutions charge (¶¶ 356-67, 419, 423). None of the evidence presented by Prosecution witnesses regarding acts of rape concerned Sredoje Lukić.

Finally, the Prosecution appealed to increase the sentence of Sredoje Lukić and argued that the Trial Chamber had erred in failing to convict him for aiding and abetting in charges of extermination and persecutions as crimes against humanity (¶ 8).

On December 4, 2012, the Appeals Chamber reached its verdict in the case, which is digested here with a focus on the credibility issues raised by the Defendant Milan Lukić concerning victims and witnesses of rape who testified at trial.

**Disposition:** The Appeals Chamber grants one ground of appeal for Milan Lukić, reducing the number of victims killed in one incident from 59 to 53 victims, but rejects the remainder of Milan Lukić's appeals and affirms the sentence of the Trial Chamber (¶ 672). On the issue of whether or not the Trial Chamber erred in its findings with regard to Prosecution rebuttal witnesses who testified about rapes they experienced or witnessed in response to the Defense's alibi witnesses, the Appeals Chamber finds that the Trial Chamber did err in not adequately assessing the possible influence of Bakira Hasečić on some of these witnesses, as a reasonable trier of fact could have found these witnesses credible despite such possible influence (¶¶ 61, 62, 101, 471). With regard to Sredoje Lukić, the Chamber reverses his convictions for some charges of beating detainees, as well as his conviction for aiding and abetting the crimes of cruel treatment as a violation of the laws or customs of war and persecutions and other inhumane acts as crimes against humanity in relation to the beating of detainees in the Uzamnica Camp (¶ 672). The Appeals Chamber rejects the Prosecution's appeal to increase Sredoje Lukić's sentence and instead reduces the sentence to 27 years (*id.*).

### **Key Gender-Based Holdings:**

#### CREDIBILITY OR CHARACTER OF THE VICTIM:

- As noted above, both at trial and on appeal, Milan Lukić questioned the credibility of victims of rape and witnesses to rapes (¶¶ 57, 99-100, 241-42, 471).<sup>18</sup> On appeal, Milan Lukić claimed that the Trial Chamber violated his right to a fair trial by denying his request to initiate contempt proceedings against Bakira Hasečić, the President of the Women Victims of War Association; by limiting his ability to effectively cross-examine Prosecution witnesses who may have been influenced by Hasečić; and by failing to adequately assess the impact of Hasečić's influence on the testimony of Prosecution witnesses (¶ 53). On the first issue, the Appeals Chamber finds that the Defense waived its right to appeal the Trial Chamber's decision denying the Defense motion to institute contempt proceedings against Hasečić by failing to appeal that decision within 15 days (¶ 56). Next, the Appeals Chamber responds to Lukić's argument regarding his inability to cross-examine Prosecution witnesses regarding any influence Hasečić may have had on their testimony (¶ 57). The Appeals Chamber recalls that the Prosecution disclosed information suggesting that Hasečić had 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 (¶ 57). Having been put on notice of this potential credibility issue, Milan Lukić did cross-examine several Prosecution witnesses about their relationship with the Association (*id.*). The Appeals Chamber also notes that, more than four months before the end of trial, the Trial Chamber allowed the Defense to alter its witness list in order to call women who had alleged Hasečić had influenced them, but observes that the Defense did not recall the Prosecution witnesses who had already testified to examine them on this issue (*id.*). For these reasons, the Appeals Chamber rejects the notion that Milan Lukić was not given adequate opportunity to cross-examine the witnesses (¶ 58). On the third issue, the Appeals

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<sup>16</sup> See *supra* footnote 9.

Chamber assesses the Defense's assertion that the Trial Chamber did not adequately address the potential impact of Hasečić on several witnesses' testimony (¶ 59). The Appeals Chamber notes that the Trial Chamber acknowledged in its judgment that Hasečić may have influenced some of the witnesses, but failed to address Hasečić's influence on other witnesses (¶¶ 61-62). The Appeals Chamber therefore conducts its own review with respect to those witnesses:

- *Witness VG063* testified at trial that Milan Lukić had been present at the place and time of two different incidents involving killings and that he had raped her near the time and place of one of these incidents and had raped two other women near the time and place of the other incident (*id.*).<sup>19</sup> Milan Lukić challenged Witness VG063 during cross-examination, suggesting that her testimony was influenced by payments received from the Association and its president, Hasečić.<sup>20</sup> Witness VG063 denied that these payments affected her testimony.<sup>21</sup> The Appeals Chamber finds that the Trial Chamber did take Hasečić's possible influence into account in evaluating VG063's credibility (¶ 61). Therefore, Milan Lukić has not proven that the Trial Chamber erred in this regard (*id.*).
- *Witnesses VG119 and VG094* both testified that they had seen Milan Lukić in the area of one of the fires that killed 70 Muslim civilians on the night of the fire and that Lukić raped VG094 on that occasion.<sup>22</sup> The Trial Chamber found their evidence credible and that it helped place Lukić at the scene of the crime.<sup>23</sup> The Appeals Chamber finds that, despite the fact that the Defense cross-examined both of these witnesses on the issue of their involvement with the Association, the Trial Chamber did not address the possible influence of the Association on these witnesses' testimony (¶ 62). The Appeals Chamber finds that the potential influence of Hasečić was a serious allegation and thus the Trial Chamber should have provided its reasons for finding these witnesses to be reliable despite their involvement with the Association (*id.*). Having found that the Trial Chamber erred in this way, the Appeals Chamber makes its own assessment regarding Hasečić's alleged influence on these witnesses (¶ 63). The Appeals Chamber finds that Witness VG119 provided a statement to the Association but did not receive any benefits as a result (¶ 471). The Appeals Chamber finds therefore that "a reasonable trier of fact could have concluded that membership in the Association did not influence VG119's evidence" (*id.*). With regard to Witness VG094, the Appeals Chamber notes that VG094 was a member of the Association and did receive benefits due to her status as a rape victim (*id.*). The Appeals Chamber compares statements Witness VG094 made prior to her involvement with the Association and after she became involved with it

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<sup>17</sup> *Id.* ¶¶ 183-188,

<sup>18</sup> *Id.* ¶¶ 189, 296.

<sup>19</sup> *Id.* ¶¶ 295-296.

<sup>20</sup> *Id.* ¶ 721.

<sup>21</sup> *Id.* ¶¶ 721, 723.

and recalls her description of her involvement with the Association at trial, in which she explained that she had been required to become a member of the Association in order to receive civilian victim of war benefits, but that she was not an activist in the Association (*id.*). Based on this evidence, the Appeals Chamber finds that Witness VG094's involvement "had no material impact on her evidence" (*id.*). The Appeals Chamber thus concludes that a reasonable trier of fact could have concluded that the credibility of both Witness VG094 and Witness VG119 was not undermined by their involvement with the Association and that the Trial Chamber's error in not adequately assessing the possible impact of this involvement does not invalidate the Trial Judgment (*id.*).

- *Witness VG131* testified at trial as a rebuttal witness to Milan Lukić's alibi evidence, stating that Milan Lukić was in Višegrad on June 9, 1992, and that he came to her apartment that day as well as that night around midnight, took her from her apartment to the Vilna Vlas hotel, and raped her there.<sup>24</sup> The Trial Chamber cited Witness VG131's testimony as reliable and helping to establish that Milan Lukić was present in Višegrad June 9 and 10, placing him near the Varda furniture factory where the Prosecution alleged he was responsible for the shooting deaths of several men taken from the factory.<sup>25</sup> On appeal, Milan Lukić argued that in assessing her identification of him, the Trial Chamber should have taken into account the fact that Witness VG131 allegedly saw him in the middle of the night when it was dark and during a traumatic event (¶ 99). Milan Lukić also argued that the Trial Chamber had not adequately assessed the influence of Hasečić and the Association on Witness VG131's testimony (*id.*). The Appeals Chamber finds first that Witness VG131 testified that she first met Milan Lukić when he came to her apartment during the day and introduced himself, prior to the rape that occurred later that night (¶ 100). Thus, it was reasonable for the Trial Chamber not to discount Witness VG131's identification of Milan Lukić based on the fact that when she saw him later, it was dark and she was experiencing a traumatic event (*id.*). On the issue of Hasečić's influence on Witness VG131's testimony, the Appeals Chamber finds that, although the Defense cross-examined Witness VG131 on the issue of her involvement with the Association, the Trial Chamber did not address the possible influence of the Association on her testimony (¶ 62). The Appeals Chamber finds that the potential influence of Hasečić was a serious allegation and thus the Trial Chamber should have provided its reasons for finding Witness VG 131 to be reliable despite her involvement with the Association (*id.*). Having found that the Trial Chamber erred in this way, the Appeals Chamber makes its own assessment regarding Hasečić's alleged influence on this witness (¶ 63). The Appeals Chamber reviews Witness VG131's testimony at trial regarding her involvement with the Association, noting that she testified that she met Hasečić when she first applied for benefits

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<sup>22</sup> *Id.* ¶¶ 278-280.

<sup>23</sup> *Id.* ¶¶ 326-328.

based on her status as a rape victim (¶ 101). The Appeals Chamber compares two out-of-court statements Witness VG131 made about the rape allegations, one prior to Witness VG131's meeting with Hasečić and one after, and finds no inconsistency between these statements, nor between Witness VG131's out of court statements and her in-court testimony, that would indicate that Witness VG131 changed her evidence as a result of her involvement with the Association (*id.*). Therefore, the Appeals Chamber finds that a reasonable Trial Chamber could have found that Witness VG131's evidence was not affected by her involvement with Hasečić and the Association (*id.*). Based on this finding, the Appeals Chamber concludes that Milan Lukić has failed to show that the Trial Chamber erred in finding Witness VG131 credible (*id.*).

**RAPE:**

- As noted above, evidence of Milan Lukić's commission of several rapes were heard at trial, despite the fact that he was not charged with this crime. Specifically, evidence of rapes was used in support of the Trial Chamber's finding of a widespread and systematic attack against civilians, satisfying this element of crimes against humanity.<sup>26</sup> Additionally, as discussed under "Credibility or Character of the Victim" above, victims of rape testified in rebuttal to Milan Lukić's alibi evidence and Milan Lukić alleged on appeal that their testimony was influenced by Bakira Hasečić, the President of the Women Victims of War Association (¶ 53). The Appeals Chamber finds that Milan Lukić did not establish Hasečić's effect on these witnesses, nor did he establish an err on the part of the Trial Chamber in finding these witnesses credible (¶¶ 61, 101, 471).

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<sup>24</sup> See *supra* footnote 15.