

MILAN LUKIĆ AND SREDOJE LUKIĆ WILL BE TRIED JOINTLY AT THE ICTY

Milan Lukić and Sredoje Lukić will be tried jointly by the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague on charges of crimes against humanity and war crimes committed during the war in Bosnia and Herzegovina from 1992-1995. Milan Lukić, the leader of a paramilitary group called the “White Eagles” or “Avengers,” and his cousin Sredoje Lukić, who was one of its members, stand accused of murdering, beating, torturing, terrorizing and unlawfully detaining Bosnian Muslims and other non-Serbs in Višegrad, eastern Bosnia and Herzegovina (hereinafter “Bosnia”) between 1992 and 1994. The ICTY’s Appeals Chamber and its special bench for proceedings to consider referring cases to national jurisdictions, called the Referral Bench, decided this conclusively last July.

Reversing the Referral Bench’s decision to transfer the case against both accused to Bosnia, the Appeals Chamber considered that the Security Council had intended for the Tribunal to try at least some paramilitary leaders, and based on the allegations in the indictment [see “The Charges” in accompanying box], Milan Lukić would be perhaps the most significant paramilitary leader to be tried by the Tribunal. The Referral Bench subsequently decided that it was in the interest of justice to try Milan Lukić together with Sredoje Lukić, who had not appealed the Referral Bench’s ruling.

The decision in this case demonstrates that the Tribunal considers the responsibility of significant paramilitary leaders to be as serious as that of high-ranking military, police or civilian officials.

HISTORY OF THE REFERRAL PROCEEDINGS

On 1 February 2005, the ICTY Prosecution filed a request to refer the case of Milan and Sredoje Lukić to the Bosnian authorities for trial. The Prosecutor considered that it was a case which could be prosecuted either in the international forum, or before a competent national court. The Prosecutor proposed that the case be referred to Bosnia and Herzegovina, so that justice could be rendered as close as possible to the victims, who were mostly Bosnian.

At that time both accused were still at large. Sredoje Lukić surrendered to the ICTY on 16 September 2005. Milan Lukić remained at large until 8 August 2005, when he was apprehended in Argentina by agents of its federal police. He remained in detention in Argentina until 21 February 2006, when he was transferred to The Hague pursuant to a decision of Argentine Federal National Criminal and Correctional Court No. 8 of 10 January 2006.

With both accused in the Tribunal’s custody, the Referral Bench, composed of three judges, began considering whether this case should be transferred to Bosnia and Herzegovina.

BOTH ACCUSED PREFERRED TO BE TRIED BEFORE THE TRIBUNAL

In their responses to the Prosecutor’s request, Milan and Sredoje Lukić both objected to having their case transferred to Sarajevo. Both accused argued that, according to the Prosecution’s allegations, the crimes were sufficiently grave, and the accused’s role sufficiently significant to justify trying the case before the ICTY.¹ Milan Lukić’s counsel, for instance, referred to the Prosecution’s allegation that “Milan Lukić is considered to be perhaps the person who killed more people with his own hands than any other during the course of the Bosnian conflict.” He also reminded the Referral Bench that the Security Council had intended that “paramilitary leaders” should be tried by the ICTY.

Both accused also expressed doubts as to whether they would receive a fair trial in Bosnia and Herzegovina. Milan Lukić's counsel referred to some concerns of the Organization for Security and Cooperation in Europe (OSCE), which monitors war crimes trials in the former Yugoslavia, in relation to proceedings at the Court of Bosnia and Herzegovina in Sarajevo. He also submitted that Milan Lukić was "a controversial and highly notorious figure in BiH [Bosnia and Herzegovina], whose very name engenders extremely emotional reactions amongst members of the Muslim community". His opinion was that a trial in Bosnia and Herzegovina would be "divisive" and would "undoubtedly strain the organizational and security resources of the BiH to the breaking point".

In addition, Milan Lukić argued that he would face injury or death if transferred to Bosnia and Herzegovina. In support of that claim he referred to the police raid on his family home in Višegrad on 18 April 2004. During that raid, his unarmed brother was killed. Milan Lukić's defence claimed that the raid on the Lukić home was for the purpose of intercepting Milan Lukić in anticipation of an alleged meeting with a representative of the ICTY Prosecutor, at which it was feared he would reveal knowledge about the whereabouts and activities of other persons wanted by the Tribunal and other States.

Milan Lukić's defence further reported that that while he had been in custody in Argentina, the then Director of the Republika Srpska police, Dragomir Andan, visited him in prison and warned him "against providing any information about Andan or others." Milan Lukić's defence said that "Andan threatened the Accused, stating that he would eventually be transferred from the Tribunal to BiH, where he would no longer be protected."

Both accused also opened up the possibility of referring the case to a state other than Bosnia and Herzegovina. Sredoje Lukić proposed that it would be better to have the case tried in Serbia and Montenegro. Milan Lukić additionally suggested that the Referral Bench hear Argentina's views on the question of referral.

On 15 September 2006, the Referral Bench held a hearing to discuss the Prosecution's motion for referral to Bosnia. In addition to the Prosecution and Defence, state representatives of Serbia and Argentina were present in the courtroom, and Bosnian authorities participated via video-link from Sarajevo.

BOSNIA AND HERZEGOVINA AND SERBIA BOTH WANTED TO TRY THE CASE

All three states involved in the referral proceedings—Bosnia and Herzegovina, Serbia and Argentina—expressed their specific views on the question of referral.

The Bosnian authorities submitted that the case was suitable for referral and trial before the War Crimes Chamber of the Court of Bosnia and Herzegovina, established in 2005. It stated that the country's legal system was adequate to ensure a fair trial for the accused.

The Serbian government, on the other hand, requested that the ICTY refer the case to Serbia, stating that it also has jurisdiction and can ensure a fair trial. In addition, the Serbian authorities reminded the Referral Bench that Serbian courts had already sentenced Milan Lukić to 20 years *in absentia* for kidnapping and murdering 16 Muslims from the western Serbian town of Sjeverin in 1992, and that he was under investigation in the Štrpci case, in which 19 Bosnian Muslims were abducted from the Belgrade-Bar train at the town of Štrpci in western Bosnia in February 1993, and subsequently killed. The Serbian representative also said that the citizens of Serbia would be best informed and would best face up to the terrible crimes committed during the Bosnian conflict if the trial were to be held in Serbia. The Serbian representative further said that judgements against Serbs for crimes committed against members of other ethnic groups would be best accepted if pronounced by a Serbian court.

The government of Argentina submitted that if the Tribunal decided to refer the case to a national court and that court intended to try Milan Lukić for acts other than those contained in the indictment at the time of his transfer from Argentina, the Tribunal should first seek Argentina's authorisation. The Referral Bench, however, ruled that Argentina could not place such restrictions as far as crimes from the Tribunal's jurisdiction—war crimes, crimes against humanity and genocide—were concerned.

REFERRAL BENCH DECIDED TO TRANSFER THE CASE TO BOSNIA AND HERZEGOVINA

Having considered all submissions and arguments from the parties and the governments involved, the Referral Bench decided that the gravity of the criminal conduct and the level of responsibility alleged in the indictment were such that the case could be transferred to a national jurisdiction. The judges considered that Bosnia and Herzegovina had a stronger nexus to the case than Serbia since the crimes were committed on its territory, and the victims were Bosnian nationals. The Referral Bench decided to refer the case to Bosnia and Herzegovina, having concluded that its courts would be able to provide the accused a fair trial, and that there was not enough evidence to indicate that Lukić's life and security would be threatened.

Milan Lukić appealed the Referral Bench's decision. Sredoje Lukić did not do so, but the Referral Bench stated that he would not be transferred to Sarajevo separately until the Appeals Chamber ruled on Milan Lukić's appeal.

APPEALS CHAMBER OVERTURNED THE DECISION ON REFERRAL

The Appeals Chamber granted Milan Lukić's appeal on 11 July 2007. The Judges agreed that the gravity of the crimes charged, in combination with the level of responsibility, demanded holding the trial before the Tribunal. The Appeals Chamber considered that the Security Council had intended for the Tribunal to try at least some paramilitary leaders. Based on the allegations in the indictment, the Appeals Chamber said that Milan Lukić would be perhaps the most significant paramilitary leader the Tribunal would try. Therefore, the Appeals Chamber overturned the decision to refer Milan Lukić's case to Bosnia and Herzegovina, noting also that this opened the possibility for the Referral Bench to reconsider its decision in relation to Milan Lukić's co-accused, Sredoje Lukić.

Subsequently, the Prosecution filed a motion to cancel the order to refer Sredoje Lukić's case to Bosnia and Herzegovina. After the Referral Bench ascertained that Sredoje Lukić's defence, and Bosnian authorities agreed with that proposal, the Referral Bench revoked its order to refer the case. The judges considered that it was in the interests of justice to try Milan Lukić and Sredoje Lukić jointly, because the cases against the two accused share similar facts, and separate trials could risk increasing the trauma for witnesses, who would have had to testify twice.

With the referral proceedings concluded, the case against Milan Lukić and Sredoje Lukić will now continue with regular pre-trial preparations, and it will be tried before the ICTY in due course.

THE CHARGES

The Tribunal's Prosecution alleges that between 7 June 1992 and 10 October 1994, Milan and Sredoje Lukić, acting in concert with others, murdered Bosnian Muslims in the Višegrad municipality in eastern Bosnia, treated them cruelly and inhumanely, harassed, terrorized and psychologically abused them, as well as detained them unlawfully and under inhumane conditions. Among their co-perpetrators was Mitar Vasiljević, another member of Milan Lukić's paramilitary group called the "White Eagles," or the "Avengers," who was tried separately before the Tribunal.

The Tribunal indictment charged Milan Lukić and Mitar Vasiljević with shooting seven Bosnian Muslim men on the bank of the Drina River on 7 June 1992, killing five of them. Milan Lukić is also charged with shooting and killing seven other Bosnian Muslim men on the banks of the Drina River on 10 June 1992 and with killing a Bosnian Muslim woman in Višegrad's Potok neighbourhood during the same month.

The indictment further alleges that on 14 June 1992, Milan Lukić, Sredoje Lukić and others forced approximately 70 Bosnian Muslim women, children, and elderly men into a house on Pionirska Street in a neighborhood of Višegrad known as Nova Mahala. Once these people were barricaded inside, the house was set alight and Milan and Sredoje Lukić fired automatic weapons at persons trying to save themselves by climbing out the windows of the burning building. The indictment alleges that they killed almost all of the persons locked in the house during the incident, including seventeen children who were between the ages of two days and fourteen years.

In a similar incident, the indictment alleges that on 27 June 1992, Milan Lukić and Sredoje Lukić, like before acting together with others, again forced about 70 Bosnian Muslim people into a house in the Bikavac quarter of Višegrad. They blocked the exits, and threw in several explosive devices. Fire quickly engulfed the house, killing all but one of the victims. Among the dead are two babies, a five-year old girl, and three children between eight and eleven years of age.

In addition to the charges related to these incidents, the Tribunal also charged Milan and Sredoje Lukić with beating Bosnian Muslim men detained at the Uzamnica military barracks in Višegrad from August 1992 to October 1994. Together with other members Milan Lukić's paramilitary group, they repeatedly struck the detainees with their fists, rifle butts, and wooden sticks and kicked them.

On 29 November 2002, the Tribunal found Mitar Vasiljevic guilty of participating in the killings on the Drina River on 7 June 1992. In its judgement, the Trial Chamber wrote that the Muslim men were forced to line up on the bank of the river and were shot from behind while pleading for their lives. When it appeared that one of the victims was still alive and lying in the water, one or more of the gunmen shot the man at close range. Two of the men escaped across the Drina after pretending to be dead. The Trial Chamber acquitted Vasiljević of involvement in the killings on Pionirska Street, with which he had also been charged, after accepting his evidence that he could not have been present at the scene of the crime when the killings took place. Mitar Vasiljević was sentenced to fifteen years in prison.

NO FURTHER TRANSFERS ARE UNDER CONSIDERATION BY THE REFERRAL BENCH

With the revocation of Sredoje Lukić's referral to Bosnia and Herzegovina, the Tribunal's Referral Bench has now decided on all motions for transfer of cases filed to date by the Prosecutor.

A total of eight cases involving thirteen persons indicted by the ICTY have been referred to courts in the former Yugoslavia, mostly to Bosnia and Herzegovina. The case against Rahim Ademi and Mirko Norac was referred to Croatia, and the case of Vladimir Kovačević to Serbia. On the basis of the ICTY indictment and the supporting evidence provided by the Tribunal's Prosecutor, these cases are tried in accordance with the national laws of the state in question.

Motions for referral involving a total of four accused were denied. In addition to Milan and Sredoje Lukić, the Referral Bench denied the Prosecution's request to transfer the cases against Dragomir Milošević and Rasim Delić, considering that the gravity of the crimes charged, in combination with the position of the accused, required that these cases be tried at the ICTY. Milošević was commander of the Bosnian Serb Army's (VRS) Sarajevo-Romanija Corps and Delić was Commander of the Main Staff of the Army of Bosnia and Herzegovina.

Three motions for referral were withdrawn. Serbia and Montenegro on the one hand and Croatia on the other had strongly opposed views on which state should try the "Vukovar three"—Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin—if the case were to be referred to a national jurisdiction. Subsequently, the Referral Bench granted the Prosecution's request to withdraw its motion to transfer the case, concluding that "*on balance, the interests of justice appear to be better met by this trial being conducted before this Tribunal*". The cases of Ivica Rajić and Dragan Zelenović were also initially proposed for referral to national courts, but both accused pleaded guilty and were sentenced by the ICTY.

BACKGROUND TO REFERRAL OF CASES

In the first years of the Tribunal's existence, the ICTY Prosecutor charged dozens of low or intermediate level perpetrators as part of a so-called 'pyramid indictment strategy' that was intended over time to lead investigators up the chain-of-command to the highest level suspects.

When the Tribunal in 2003 adopted a strategy to complete its work, many of the lower level accused indicted earlier by the ICTY had already been tried in The Hague. Others, however, had only been arrested or surrendered recently and were at the pre-trial stage. The Security Council directed the Tribunal to transfer such persons to national jurisdictions, as it was not obligatory that their trials be held before an international court, which should use its resources to try senior leaders suspected of being most responsible for crimes within its jurisdiction.

The ICTY's Rules of Procedure and Evidence were amended accordingly, allowing a Referral Bench to decide whether to transfer the case against a particular accused to a national court. The judges would look at the gravity of the crimes charged and the level of responsibility of the accused, as well as whether the State concerned is able to satisfy international human rights and fair trials standards.

¹ Counsel for Milan Lukić pointed out that the referral proceedings put the Prosecution and the Defence "in the anomalous position of arguing, as a legal matter, the opposite of their true stance." Lukić's counsel observed that the Prosecution finds itself arguing that the crimes, and the accused's role in them, were not so serious. The Defence on the other hand, "finds [itself] arguing that, accepting the allegations against him as true, solely for the purposes of this transfer proceeding, the crimes are very grave and his role paramount." The Defence made clear that the Accused denies each and every allegation against him.