

**UNITED
NATIONS**



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No. IT-05-87/1-T
Date: 19 May 2009
Original: English

IN TRIAL CHAMBER II

Before: Judge Kevin Parker, Presiding
Judge Christoph Flüge
Judge Melville Baird

Registrar: Mr John Hocking

Decision: 19 May 2009

PROSECUTOR

v.

VLASTIMIR ĐORĐEVIĆ

PUBLIC

**DECISION ON VLASTIMIR ĐORĐEVIĆ'S MOTION TO DENY
ADMISSION OF PROSECUTION DOCUMENTS MFI P757,
MFI P756 and MFI P738**

The Office of the Prosecutor:

Mr Chester Stamp
Ms Daniela Kravetz
Mr Matthias Neuner

Counsel for the Accused:

Mr Dragoljub Đorđević
Mr Veljko Đurđić

1. This decision of Trial Chamber II (“Chamber”) of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“Tribunal”) is in respect of a motion moved orally by Vlastimir Đorđević in court session on 5 May 2009, objecting to the admission into evidence of three Prosecution documents proposed to be tendered through witness Frederick Abrahams (“Witness” or “Mr. Abrahams”). The Prosecution opposed the motion. The Chamber heard oral submissions by the parties.¹ During the course of Mr. Abraham’s evidence, the said documents were marked for identification (“MFI”). The Chamber now issues its decision.

I. SUBMISSIONS

2. In respect of Document MFI P757, a Human Rights Watch report entitled *Kosovo: Rape as a Weapon of Ethnic Cleansing* published in March 2000, Vlastimir Đorđević submits that the document should not be admitted as it is irrelevant in view of its date of publication, which was after the Indictment period, suggesting that the document cannot be used to establish notice of crimes on the part of the Serbian or Yugoslav governmental authorities.² The Prosecution responds that it does not intend to use this document for this purpose, but rather as evidence of the Witness’s knowledge of crimes of a sexual nature committed in Kosovo during the relevant period.³

3. Vlastimir Đorđević also objects to Documents MFI P756, a Human Rights Watch report entitled *Under Orders: War Crimes in Kosovo*, published in October 2001, and MFI P738 consisting of three statements made by the Witness under Rule 92bis, dated 30 May 2002, 24 January 2002 and 11 March 1999. In respect of these documents, Vlastimir Đorđević argues that they are based on hearsay evidence or unidentified sources and are unreliable.⁴ He also suggests that the documents present a biased or incomplete account in view of the Witness’s cooperation and brief employment with the Office of the Prosecutor.⁵ He further submits that the Witness’s statements as to the political and historical background of the conflict in Kosovo are not appropriate since he is a fact witness, not an expert witness.⁶ The Prosecution responds that it only intends to submit certain portions of the report *Under Orders* that the Witness himself researched and which are based on interviews that he personally conducted.⁷ It also points out that hearsay evidence is

¹ *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, Court session of 5 May 2009, Transcript (“T”) 3918-3930.

² T 3918.

³ T 3928.

⁴ T 3921, 3924.

⁵ T 3922, 3925.

⁶ T 3918, 3921-3923, 3925.

⁷ T 3929.

admissible as long as it is of probative value and its weight can be properly assessed by the Chamber.⁸

II. LAW

4. Pursuant to Rule 89(C) of the Rules of Procedure and Evidence (“Rules”), any evidence which is relevant and has probative value may be admitted. The Appeals Chamber has held that summaries and reports created by non-parties (other than written statements by prospective factual witnesses for the purposes of legal proceedings) may be admitted pursuant to Rule 89(C).⁹ However, as these documents are hearsay in nature, these must possess the sufficient indicia of reliability in order to be admissible.¹⁰

III. DISCUSSION

5. In this case, what the Chamber is prepared to admit as possessing the sufficient indicia of reliability are documents based on interviews that Mr. Abrahams himself conducted of people in this general situation. Abrahams having been available to be cross-examined about the interviews he conducted, generally speaking there is an adequate basis, in the view of the Chamber, to assess the accuracy and reliability of the general tenor of the statements of the interviewees. The Chamber is also of a mind that substantially what is referred to in the Witness’s account of the political and historical background of the conflict is in the public arena, so that, to the extent that the Defence suggests that he was selective in his data, the issue of selectivity can be, and was, dealt with in cross-examination.

A. MFI P757

6. Document MFI P757 is a Human Rights Watch report entitled *Kosovo: Rape as a Weapon of Ethnic Cleansing*, based on interviews with victims of sexual violence, published in March 2000.

7. Although this report has *prima facie* probative value, the Chamber considers that it is not in a position to assess the reliability of the factual contentions contained therein. The Chamber takes into account that Mr. Abrahams did not personally interview the persons whose statements form the

⁸ T 3929.

⁹ See *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.2, Decision on Admissibility of Prosecution Investigator’s Evidence, 30 September 2002 (“*Milošević* Appeal Decision”), para 18(3). See also *ibid.*, para 23; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Evidence Tendered Through Sandra Mitchell and Frederick Abrahams, 1 September 2006 (“*Milutinović et al.*, Decision”), paras 16 and 19.

¹⁰ *Milošević* Appeal Decision, paras 14, 18(2), 21-23. See also *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-AR73.5, Decision on Appeal Regarding Statements of a Deceased Witness, 21 July 2000, para 24.

basis of the report. His role in the making of the report was that of an advisor, drafter and editor.¹¹ The persons interviewed are not identified, and remain anonymous.¹² The Chamber finds that document MFI P757 should be denied admission.

B. MFI P756

8. Document MFI P756 is a Human Rights Watch report entitled *Under Orders: War Crimes in Kosovo*, published in October 2001.

9. The Chamber notes that the Prosecution in this case does not tender the entire report, but only those portions which the Witness personally drafted and researched and which concern interviews he himself conducted.¹³ These portions cover events in the Đakovica/Gjakovë municipality, and certain events in the Pec/Pejë municipality. In view of these factors, the Chamber is satisfied that these portions of *Under Orders* have sufficient indicia of reliability. The Chamber is of the view that Mr. Abraham's brief period of employment as a research analyst with the Prosecution during the period between the drafting and publication of *Under Orders* does not alter this conclusion, or the nature of the report,¹⁴ or necessarily indicate the influence of some consequential bias. Hence, these portions of the report will be admitted.

C. MFI P738

10. Document MFI P738 consists of three statements made by the Witness under Rule 92bis, dated 30 May 2002, 24 January 2002 and 11 March 1999 respectively.

11. Those portions of the statements that summarise reports or parts of reports that have been denied admission in this decision will not be admitted, namely p 16 of the statement of 24 January 2002 (K0225284) (discussing *Kosovo: Rape as a Weapon*) and pp 16-18 of the statement of 24 January 2002 (K0225284-K0225286) (discussing general findings of *Under Orders*). Some portions summarising evidence going to the issue of notice need not be admitted since the documents or reports on which they are based have been admitted separately. Nevertheless, the Chamber finds no reason to exclude them.¹⁵ The Chamber is satisfied that the remainder of the statements may be admitted since the conclusions are either based on the Witness's personal research or are based on information in the public arena, and because they in general help to form a picture of the Witness's understanding of the political context at the time of the Indictment. The

¹¹ T 3989-3990.

¹² See *Milutinović et al.*, Decision, para 21.

¹³ T 3929.

¹⁴ See *Milutinović et al.*, Decision, para. 17.

¹⁵ Cf., *ibid.*, para. 30.

missing page 6 of the statement of 11 March 1999 (K0225293) should be included. With regard to the objection made with respect to Mr. Abraham's partiality due to his relationship with the Office of the Prosecutor, this is a matter which can, and has been, addressed in cross-examination. It can be assessed by the Chamber in relation to the Witness's credibility.

IV. DISPOSITION

For these reasons, and pursuant to Rules 54 and 89 of the Rules, the Trial Chamber hereby **DECIDES** as follows:

- (1) Document MFI P757, *Kosovo: Rape as a Weapon of Ethnic Cleansing*, will not be admitted.
- (2) The tendered excerpts of document MFI P756, *Under Orders: War Crimes in Kosovo* (Rule 65ter 00348.01) are admitted.
- (3) The tendered statements MFI P738 are admitted in part, excluding pp. 16-18 of the statement of 24 January 2002 (K0225284-K0225286).

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

Dated this nineteenth day of May 2009
At The Hague
The Netherlands



Judge Kevin Parker
Presiding

[Seal of the Tribunal]