

**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: 30 March 2010
Original: English

IN TRIAL CHAMBER II

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

Registrar: Mr John Hocking

Decision: 30 March 2010

PROSECUTOR

v.

VLASTIMIR ĐORĐEVIĆ

PUBLIC

DECISION ON PROSECUTION'S MOTION FOR ADMISSION OF
VIDEO-RECORDING MFI P1575

The Office of the Prosecutor:

Mr Chester Stamp
Ms Daniela Kravetz

Counsel for the Accused:

Mr Dragoljub Đorđević
Mr Veljko Đurđić

1. This decision of Trial Chamber II (“Chamber”) of the International Criminal 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 the Prosecution’s motion to admit into evidence portions of a video-recording provisionally as MFI P1575 moved orally by the Prosecution on 18 March 2010 (“Motion”).

I. BACKGROUND

2. On 18 March 2010, during the testimony of witness Danica Marinković, the Chamber ordered that a video-recording, of which portions were shown to that witness in court, be marked for identification as P1575.¹ On 19 March 2010, the Chamber ordered the parties to file written submissions on the admissibility of MFI P1575 by Wednesday, 24 March 2010.² On 24 March 2010, the Prosecution and Vlastimir Đorđević (“the Defence”) filed their respective submissions.³

II. APPLICABLE LAW

3. Pursuant to Rule 89(C) of the Rules of Procedure and Evidence (“Rules”), a Chamber may admit any relevant evidence which it deems to have probative value. The Appeals Chamber has held that “evidence is admissible only if it is relevant and it is relevant only if it has probative value, general propositions which are implicit in Rule 89(C).”⁴ A piece of evidence may be so lacking in terms of indicia of reliability that it is not ‘probative’ and is therefore not admissible.⁵ The Appeals Chamber has held, however, that the admission of a document into evidence does not require strict or definitive proof of reliability, but some indicia of *prima facie* reliability.⁶ It is for the party that moves to have a document admitted into evidence to demonstrate its relevance and reliability to justify its

¹ Hearing of 18 March 2010, T 13081-13085.

² Hearing of 19 March 2010, T 13126.

³ *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, “Prosecution’s Submissions on the Admissibility of Exhibit P01575 (MFI) with Annex A” (“Prosecution’s Submission”), and “Vlastimir Đorđević’s Submissions Re MFI P1575” (“Defence Submission”), respectively.

⁴ *Prosecutor v. Galić*, Case No: IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis (C), 7 June 2002, para 35.

⁵ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-AR73.5, “Decision on Appeal Regarding Statements of a Deceased Witness”, 21 July 2000, para 24.

⁶ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.16, “Decision on Jadranko Prlić’s Interlocutory Appeal against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence,” 3 November 2009, para 27.

admission.⁷ The Chamber may exclude evidence under Rule 89(D) of the Rules, if its probative value is substantially outweighed by the need to ensure a fair trial.

III. SUBMISSIONS

4. The Prosecution requests that the Chamber admit into evidence portions of video-footage apparently of scenes in and around Račak village, including scenes depicting bodies of persons, shown to Defence witness Danica Marinković during cross-examination on 18 March 2010.⁸ It is the position of the Prosecution that MFI P1575 contains sufficient authenticating information provided by a person who introduces himself as David Brown, a member of the Kosovo Verification Mission (“KVM”), and who states that the date is 16 January 1999, that the location is “hillside above the town of Stimlje, where we have been taken by a local KLA and villagers to the site of what appears to be a mass, mass-execution.”⁹ The Prosecution submits that although the village of Račak is not specifically mentioned in the video, it is located close to Stimlje, and on the basis of the testimony of other witnesses in this trial, it is clear that the footage actually relates to events in Račak.¹⁰

5. It is the position of the Prosecution, moreover, that MFI P1575 is relevant as a record of the scene at Račak on 16 January 1999, and therefore directly relevant to the events that are alleged to have taken place in Račak on the preceding day.¹¹ In addition, it submits, the video-footage would be able to assist the Chamber in evaluating the credibility of Prosecution and Defence witnesses who have provided evidence about Račak in this trial.¹²

6. The Defence submits that while the incident that took place in Račak on 15 January 1999 was removed from the Fourth Amended Indictment, it has remained a “peripherally” relevant issue in this case, raised by the Prosecution on numerous times in its case-in-chief and cited in the opening statement as “relevant to proof of violence against civilians.”¹³ While noting the incident “is not in the Indictment”, the Defence submits that it has sought to bring evidence to clarify its position concerning the incident, namely that it was not a coordinated killing of civilians as alleged by the Prosecution, but rather “in-fighting sustaining casualties”.¹⁴

⁷ *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-T, “Decision on Prosecution’s Motion for Admission of Exhibits from the Bar Table with Confidential Annexes A to E,” 14 May 2007, para 14.

⁸ Prosecution Submission, paras 2, 11.

⁹ Prosecution Submission, para 5.

¹⁰ Prosecution Submission, paras 5-7.

¹¹ Prosecution Submission, para 9.

¹² Prosecution Submission, para 9.

¹³ Defence Submission, para 4.

¹⁴ Defence Submission, para 4.

7. According to the Defence, however, MFI P1575 cannot provide meaningful evidence in the case because Defence witness Danica Marinković could not attest to the contents shown, and even refuted that the bodies displayed in the segments shown to her were the same bodies she saw on 18 January 1999 in the mosque in Račak.¹⁵ The Defence submits that, if at all, the video-footage should have been tendered through KVM personnel during the Prosecution case; they may have provided additional information about the circumstances in which the time the video-footage was shot.¹⁶

8. Finally, the Defence submits the video lacks authenticity, as it is unknown who recorded it, what the purpose of the recording was, what the details of the nature of the editing are, and how it came into the possession of the Prosecution.¹⁷ It submits in addition that besides the person who introduces himself at the beginning of the video-footage, and Ambassador William Walker who can be readily identified from the footage, there are at least 20-30 unknown individuals “combing through the area”, making “forensic and legal conclusions that are not appropriate statements in the record from sources of un contemplated credentials and not subject to further statement or cross-examination.”¹⁸ It is the position of the Defence that the graphic nature of the video-footage “simply serves” to show unidentified bodies, and that given the “dubious” authenticity, its admission would require further testimony and admission of evidence to clarify it, an endeavour which would “go beyond the scope of the peripheral value of the information related to Račak.”¹⁹

IV. DISCUSSION

9. The events in Račak on 15 January 1999 are not the subject of specific murder charges in the Fourth Amended Indictment (“Indictment”).²⁰ These allegations, however, are relevant to other issues in the Indictment, in particular to paragraph 64(g) of the Indictment which describes the Accused’s involvement in the incident that is alleged to have taken place in Račak on 15 January 1999 (“Račak incident”) as a factor relevant to establishing his *mens rea* under Articles 7(1) and 7(3) of the Statute of the Tribunal. The Chamber considers, therefore, that these events are of significance in the determination of the charges against the Accused. The Chamber notes moreover that both parties have adduced considerable evidence on this incident, in particular, concerning the ensuing events on 16, 17 and 18 January 1999 relating to investigations of the incident. It is against

¹⁵ Defence Submission, paras 5, 6.

¹⁶ Defence Submission, para 6.

¹⁷ Defence Submission, para 7.

¹⁸ Defence Submission, para 7.

¹⁹ Defence Submission, para 8.

²⁰ *Prosecutor v. Đorđević*, Case No. IT-05-87/1-PT, Fourth Amended Indictment, 9 July 2008.

this backdrop that the Chamber will consider the Prosecution's request to admit into evidence MFI P1575.

10. MFI P1575 is video-footage comprising of seven short clips, lasting in total for 2 minutes and 6 seconds.²¹ The images displayed in these video-clips include, *inter alia*, the decapitated body of an elderly man, a deceased elderly Albanian man wearing a traditional Albanian cap, and a group of deceased individuals lying together in what appears to be some sort of a ditch. Defence witness Darinka Marinković testified, *inter alia*, that the bodies in the video-clips shown to her were not among the bodies she saw on 18 January 1999 in the village mosque.²²

11. The Chamber has heard evidence in this trial from several witnesses concerning the events in Račak, among them being three persons who have described some events in Račak on 16 January 1999. These are Prosecution witnesses, General Karol John Drewienkiewicz, deputy head of the KVM,²³ Colonel Michael Phillips, Chief of Staff to Ambassador William Walker who served as the head of the KVM,²⁴ and General Jason Maissoneuve, head of Regional Centre 1 of the KVM in Prizren.²⁵ It is the evidence of General Drewienkiewicz that on 16 January 1999, together with Ambassador Walker, he arrived in the Stimlje area and upon approaching the village of Račak, saw police and press everywhere.²⁶ He testified that there was no crime scene investigation taking place in Račak but that the KVM undertook to video-record all the bodies "at close quarters".²⁷ Upon arrival in Račak, he observed the decapitated body of an elderly male by a farmhouse on the western side of the village.²⁸ Further into the village, General Drewienkiewicz observed the bodies of about 24 men, all wearing civilian clothes and approximately 50-60 years old, in a gully on a hill-side, all of whom appeared to have been shot in the head or neck.²⁹ He also testified that prior to his and Ambassador Walker's departure from the village on 16 January 1999, the villagers had moved the bodies into the village mosque.³⁰

12. General Maissoneuve who arrived in Račak on the evening of 15 January 1999 having been sent there by General Drewienkiewicz,³¹ testified that the KVM began "investigations" in the village of Račak on 16 January 1999, and that amongst the bodies he observed in Račak was a

²¹ MFI P1575; Video Clip 1: 23 seconds; Video Clip 2: 24 seconds; Video Clip 3: 33 seconds; Video Clip 4: 5 seconds; Video Clip 5: 7 seconds; Video Clip 6: 20 seconds; Video Clip 7: 14 seconds.

²² Danica Marinković, T 13083.

²³ General Drewienkiewicz, Exhibit P996, para 32.

²⁴ Colonel Phillips, Exhibit P1303 (*Milutinović* transcript), T 11827; *see also* T 8741.

²⁵ General Maissoneuve, Exhibit P851, para 6.

²⁶ General Drewienkiewicz, Exhibit P996, paras 143, 146.

²⁷ General Drewienkiewicz, T 6521; Exhibit P996, para 148.

²⁸ General Drewienkiewicz, Exhibit P996, para 147.

²⁹ General Drewienkiewicz, Exhibit P996, para 147.

³⁰ General Drewienkiewicz, Exhibit P996, para 151.

³¹ General Maissoneuve, T 5534-5535.

woman of about 18 years old and a boy of about 12 years old.³² He further testified that at around 1100 hours on 16 January 1999 KVM verifiers showed him the bodies of approximately 20 individuals who were lying in a “bit of a line”.³³ He testified that the individuals he observed were not wearing uniforms, were all elderly and male, and that some were wearing typical Albanian caps.³⁴ General Maissoneuve’s observations are recorded in a Report compiled by “KVM Regional Center 1 Prizren.”³⁵ Colonel Phillips, who also accompanied Ambassador Walker to Račak on 16 January 1999, testified that when the KVM entered the village early in the morning, the first thing they saw was an elderly decapitated man.³⁶ They counted around 45 bodies, the majority of them older men, as well as three women and one boy.³⁷

13. It is apparent at this stage of the trial that had the Prosecution sought to have one or more of the witnesses mentioned above identify either the video-footage now tendered, or the scenes depicted in it, the present issue need not have arisen. Persons present in Račak on 16 January 1999 would have been better positioned than Defence Witness Danica Marinković, who inspected the mosque and parts of the village of Račak on 18 January 1999, to assist the Chamber in assessing the reliability and relevance of MFI P1575. On the evidence before the Chamber at this stage, it is not prepared to hold that MFI P1575 is the video described by General Drewienkiewicz, or contains extracts from that video. That is an issue which may need to be revisited at greater depth at a later stage. The Chamber observes, however, that the standard for admission does not require strict or definite proof of reliability; a *prima facie* showing of reliability suffices.

14. In the view of the Chamber, the scenes described by General Drewienkiewicz, General Maissoneuve and Colonel Phillips have apparent correlation to images displayed in MFI P1575. It notes, in particular, the description of the decapitated man and the depiction in Video clip 2, the description of a dead man wearing a traditional Albanian cap and the depiction in Video clip 4, and the description of bodies in a gully and the depictions in Video-clips 6 and 7. The introductory comments to the video-footage are also consistent, though by no means determinative on their own. While there are deficiencies in the evidence relating to MFI P1575, as submitted by the Defence, when taken with the oral evidence discussed above, the Chamber is persuaded that MFI P1575 has sufficient indicia of *prima facie* reliability to justify its admission into evidence.

15. The Chamber also observes that MFI P1575 has potential relevance to its assessment of the descriptions of scenes in Račak on 16 January 1999 provided by witnesses. It may also prove of

³² General Maissoneuve, Exhibit P852 (*Milošević* transcript), T 5797, 5841; *see also* Exhibit P870, p 1.

³³ General Maissoneuve, Exhibit P852 (*Milošević* transcript), T 5795.

³⁴ General Maissoneuve, Exhibit P852 (*Milošević* transcript), T 5795.

³⁵ Exhibit P870, p 1.

³⁶ Colonel Phillips, Exhibit P1303 (*Milutinović* transcript), T 11854.

assistance in contextualizing the sequence of events that took place in Račak on 15 January 1999 and the days thereafter. It may also prove to be of assistance to the Chamber's consideration of other issues of some potential relevance such as whether the bodies in the mosque on 18 January 1999 were the persons killed in Račak on 15 January 1999. There is, however, validity in the submissions of the Defence about the comments of some unidentified individuals depicted in the video-footage. For this reason, apart from the introductory observations discussed earlier in this decision, the Chamber will not place reliance on the words spoken by any of the individuals depicted in MFI P1575 when it gives consideration to this video-footage for the purposes of fact-finding.

V. DISPOSITION

16. On the basis of the above, the Chamber is satisfied that the video-recording presently marked MFI P1575 should become an exhibit.

Dated this thirtieth day of March 2010
At The Hague
The Netherlands



Judge Kevin Parker
Presiding

[Seal of the Tribunal]

³⁷ Colonel Phillips, T 8734-8736, 8821; Exhibit P1312, p 44 in e-court.