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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-06-90-T

Date:

21 May 2008

Original:

**English** 

## IN TRIAL CHAMBER I

Before:

Judge Alphons Orie, Presiding

Judge Uldis Ķinis

Judge Elisabeth Gwaunza

Registrar:

Mr Hans Holthuis

**Decision of:** 

21 May 2008

**PROSECUTOR** 

v.

ANTE GOTOVINA IVAN ČERMAK MLADEN MARKAČ

**PUBLIC** 

# DECISION ON PART OF THE GOTOVINA DEFENCE'S RULE 73 MOTION IN LIMINE

## Office of the Prosecutor

Mr Alan Tieger Mr Stefan Waespi

#### **Counsel for Ante Gotovina**

Mr Luka Mišetić Mr Gregory Kehoe Mr Payam Akhavan

# Counsel for Ivan Čermak

Mr Steven Kay, QC Mr Andrew Cayley Ms Gillian Higgins

#### Counsel for Mladen Markač

Mr Goran Mikuličić Mr Tomislav Kuzmanović

- 1. On 6 March 2008, the Gotovina Defence filed a motion requesting the Chamber to issue an order precluding the Prosecution from introducing expert testimony on whether targets selected and hit during Operation Storm were legitimate military targets. The Gotovina Defence argues that Lt. Colonel Konings' expert report does not identify or examine the targets that were selected and hit during Operation Storm, and that the Prosecution should not be allowed to elicit from the witness evidence on subjects outside the scope of his report, as it would be prejudicial to the Defence.<sup>2</sup>
- 2. The Defence also requested that the Prosecution be barred from claiming that the Prosecution's fact witnesses are experts in artillery and thereby competent to tell the Trial Chamber whether particular targets were civilian or military.<sup>3</sup> This part of the Defence Motion was resolved by an oral decision on 22 April 2008.<sup>4</sup>
- 3. On 25 March 2008, the Markač Defence filed a joinder to the Motion.<sup>5</sup>
- 4. In its Response, filed on 20 March 2008, the Prosecution submitted that the proper time for the Gotovina Defence to object to the evidence of a witness is when the witness's testimony is being elicited (or is about to be elicited), or when the witness's written evidence is tendered.<sup>6</sup> The Prosecution argued that its expert witnesses, including Lt. Colonel Konings, can provide relevant and probative evidence on the nature of military targets and the meaning of military orders without necessarily addressing the events that took place during Operation Storm.<sup>7</sup>
- 5. On 31 March 2008, the Gotovina Defence filed a motion requesting leave to file a reply to the Response. This request was denied on 21 April 2008. 9
- 6. Rule 89 (c) of the Rules of Procedure and Evidence grants a Trial Chamber broad discretion to admit evidence it deems relevant and probative, including expert evidence. The established practice of the Tribunal allows expert witnesses to offer their opinion when it may

Defendant Ante Gotovina's Rule 73 Motion In Limine, 6 March 2008 ("Motion"), paras 1, 20(a), 20(b).

<sup>&</sup>lt;sup>2</sup> Motion, paras 3, 6-7, 11.

<sup>&</sup>lt;sup>3</sup> Motion, paras 12-19, 20(c).

<sup>&</sup>lt;sup>4</sup> T. 1927-1929.

<sup>&</sup>lt;sup>5</sup> Defendant Mladen Markač's Joinder to Defendant Ante Gotovina's Rule 73 Motion In Limine, 25 March 2008.

<sup>&</sup>lt;sup>6</sup> Response, paras 2-3.

<sup>&</sup>lt;sup>7</sup> Response, paras 4-11.

<sup>&</sup>lt;sup>8</sup> Defendant Ante Gotovina's Motion for Leave to File a Reply to Prosecution's Response to Gotovina's Rule 73 Motion In Limine, 31 March 2008.

<sup>&</sup>lt;sup>9</sup> T. 1919

<sup>&</sup>lt;sup>10</sup> Prosecutor v. Popović et al., Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008, para. 22.

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assist the Trial Chamber. 11 An expert opinion as to whether a target was a legitimate military

objective, although ultimately a determination to be made by the Chamber, may assist the

Chamber in making decisions as to the criminal liability of the accused. The Chamber is not

bound by the conclusions of the expert. In light of all the evidence presented at trial, the

Chamber will decide whether to accept the expert's opinion and, if so, what weight it should

be given.

7. The Prosecution is obliged to give notice of evidence that it intends to present

through proper disclosure. If proper notice has been given, a party may examine an expert

witness with respect to matters not included in his or her expert report, so long as they are

within the knowledge of the witness, relevant, and probative.

8. On the basis of the foregoing, the Chamber **DISMISSES** the outstanding part of the

Motion.

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

Judge Alphons Orie Presiding Judge

Dated this 21st day of May 2008 At The Hague The Netherlands

[Seal of the Tribunal]

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<sup>&</sup>lt;sup>11</sup> See e.g., *Prosecutor v. Dragomir Milošević*, Transcript, 8 February 2007, p. 1800; *Prosecutor v. Galić*, Transcript, 20 February 2003, pp. 19909-19911.