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18 December 2008

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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: 18 December 2008
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Uldis K̄inis
Judge Elizabeth Gwaunza

Registrar: Mr Hans Holthuis

Decision of: 18 December 2008

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

DECISION ON EXPERT REPORT AND ADDENDUM OF HARRY KONINGS

Office of the Prosecutor

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PROCEDURAL HISTORY

1. On 18 January 2007, the Prosecution filed an expert report drafted by Harry Konings (“Expert Report”).¹ On 14 February 2008, the Gotovina Defence notified the Chamber pursuant to Rule 94 *bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”) that it did not accept the Expert Report, wished to cross-examine Konings, and challenged his qualifications as well as the relevance of the report.² On the same day, the Markač Defence notified the Chamber that it did not accept the Expert Report, and wished to cross-examine Konings.³ On 15 February 2008, the Čermak Defence notified the Chamber that it did not wish to cross-examine Konings, and did not challenge his qualifications or the relevance of the Expert Report.⁴ On 27 February 2008, the Prosecution filed a response to the Gotovina Notice.⁵

2. On 30 October 2008, the Prosecution filed an addendum to the Expert Report (“Addendum”).⁶ On 3 November 2008, the parties made submissions in court regarding the Addendum.⁷ On 5 November 2008, the Markač Defence notified the Chamber that it did not accept the Addendum, and still wished to cross-examine Konings.⁸ On 24 November 2008, the Gotovina Defence notified the Chamber that it did not accept the Addendum, and reiterated that it wished to cross-examine Konings, and challenged his expert status as well as the relevance of the report.⁹ On 26 November 2008, the Markač Defence filed a motion to strike the Addendum.¹⁰ On 28 November 2008, the Čermak Defence joined the submissions of the Gotovina Addendum Notice regarding the admissibility of the Addendum.¹¹ On 4

¹ Prosecution Submission of Expert Report of Lt. Colonel Konings Pursuant to Rule 94 *bis*, 18 January 2007 (“Prosecution Submission”).

² Defendant Ante Gotovina’s Notice to the Trial Chamber Pursuant to Rule 94 *bis* Concerning the Testimony of Harry Konings, 14 February 2008 (“Gotovina Notice”), para. 1.

³ Defendant Mladen Markač’s Notice Regarding the Prosecution’s Submission of Lt. Colonel Konings’ Expert Report Pursuant to Rule 94 *bis*, 14 February 2008, para. 3.

⁴ Notice Regarding the Prosecution Submission of Expert Report of Harry Konings Pursuant to Rule 94 *bis*, 15 February 2008, para. 2.

⁵ Prosecution’s Response to Gotovina’s Notice Pursuant to Rule 94 *bis* Concerning the Testimony of Harry Konings, 27 February 2008 (“Prosecution Response”).

⁶ Prosecution’s Submission of Addendum to Expert Report of Lieutenant Colonel Harry Konings Pursuant to Rule 94 *bis*, 30 October 2008 (“Prosecution Addendum Submission”).

⁷ T. 11027-11037, 11121-11126.

⁸ Defendant Mladen Markač’s Notice Regarding Prosecution’s Submission of Addendum to Lieutenant Colonel Harry Konings’ Expert Report Pursuant to Rule 94 *bis*, 5 November 2008, para. 3.

⁹ Defendant Ante Gotovina’s Notice to the Trial Chamber Pursuant to Rule 94 *bis* Concerning the Addendum to the Expert Report of Colonel Harry Konings, 24 November 2008 (“Gotovina Addendum Notice”), para. 5.

¹⁰ Defendant Mladen Markač’s Motion to Strike Addendum to Harry Konings’ Expert Report, 26 November 2008 (“Markač Motion”), paras 1, 12.

¹¹ Ivan Čermak’s Notice to the Trial Chamber Concerning the Prosecution’s Submission of Addendum to Expert Report of Harry Konings Pursuant to Rule 94 *bis*, 28 November 2008, para. 4.

December 2008, the Prosecution filed a response to the Markač Motion, requesting that it be dismissed, and to the Gotovina Addendum Notice, requesting that the Chamber deny the objections raised therein.¹² On 9 December 2008, the Gotovina Defence filed a request for leave to reply.¹³ On the same day, the Chamber informed the parties that it had decided to grant five minutes in court for the Gotovina Defence to reply.¹⁴ On the following day, the parties made final submissions on the matter in court.¹⁵

ARGUMENTS OF THE PARTIES

3. In its initial Notice, the Gotovina Defence requested that the Chamber exclude the Expert Report for lack of probative value, pursuant to paragraphs (C) and (D) of Rule 89 of the Rules.¹⁶ It argued that the report failed to address any of the key issues relating to whether the use of artillery during Operation Storm was lawful.¹⁷ It argued further that the report did not discuss what targets were selected and hit by the Croatian Army and whether they were legitimate military targets.¹⁸

4. The Prosecution responded that Konings qualifies as an expert in artillery weapons and their military use.¹⁹ Furthermore, it argued that the Expert Report is relevant, probative and admissible.²⁰ It submitted that the report would assist the Chamber in understanding the nature of the artillery weapons used in Operation Storm and the manner in which they were used, and in determining whether that use constituted or contributed to crimes charged in the Indictment.²¹ What targets were selected and hit by the Croatian Army is not, according to the Prosecution, a question of expertise.²² As for whether the targets were legitimate, the Prosecution submitted that the Expert Report need not make such determinations in order to be relevant and probative.²³ In any event, the Prosecution argued, the report does address key

¹² Prosecution's Response to Markač's Motion to Strike the Addendum to Colonel Konings' Expert Report and to Gotovina's Notice Concerning the Addendum to Colonel Konings' Expert Report, 4 December 2008 ("Prosecution Addendum Response"), para. 19.

¹³ Defendant Ante Gotovina's Request to Reply to Prosecution's Response to Gotovina's Notice Concerning the Addendum to Colonel Konings' Expert Report, 9 December 2008.

¹⁴ T. 13365-13366.

¹⁵ T. 13453-13459.

¹⁶ Gotovina Notice, para. 1.

¹⁷ Ibid., paras 1-2.

¹⁸ Ibid., para. 4.

¹⁹ Prosecution Response, paras 1-3, 5.

²⁰ Ibid., paras 1, 4.

²¹ Ibid.

²² Ibid., para. 8.

²³ Ibid.

issues relating to whether the use of artillery during Operation Storm was lawful.²⁴ The Prosecution requested that the Chamber admit the Expert Report.²⁵

5. With regard to the Addendum, the Gotovina Defence argued that the Prosecution should have requested leave to file it.²⁶ It submitted that it was not disclosed by the deadline of February 2008 imposed by the Chamber.²⁷ The Gotovina Defence added that the Addendum amounted to a separate report.²⁸ It argued that the Prosecution intended all along to file a second expert report.²⁹ It argued further that the late filing of the Addendum was prejudicial to the Defence, barring it from putting matters and opinions contained in the Addendum to witnesses who had already testified in the case.³⁰ The Prosecution should, according to the Gotovina Defence, have shown good cause for the late filing.³¹ The Gotovina Defence requested the Chamber to deny admission into evidence of the Addendum.³²

6. The Markač Defence argued that the Prosecution had filed the Addendum after the deadline to do so, and should, under Rule 127 (A) of the Rules, have sought leave and shown good cause for the late filing.³³ It argued further that the late submission had barred the Defence from cross-examining many witnesses on matters raised in the Addendum.³⁴ It also gave the Prosecution the opportunity, according to the Markač Defence, to alter its strategy as the positions of the Accused evolve.³⁵ It submitted that the Addendum was inspired by defences put forth in cross-examination of Prosecution witnesses.³⁶ Finally, the Markač Defence submitted that the late filing interfered with the expeditious administration of justice and harmed the Accused's right to have adequate time and facilities for the preparation of their defence under Article 21 (4) (b) of the Statute of the Tribunal.³⁷

7. The Prosecution responded that it had good cause to submit the Addendum when it did, because it was based on hypothetical facts that were in turn based on evidence received

²⁴ *Ibid.*, paras 9-10.

²⁵ *Ibid.*, para. 11.

²⁶ T. 11027-11028, 11031-11032, 11036-11037.

²⁷ T. 11028-11029; Gotovina Addendum Notice, para. 2.

²⁸ T. 11030.

²⁹ T. 13454-13456; D1097 (e-mail of the Prosecution, 19 March 2008), p. 2.

³⁰ T. 11031, 13457-13458.

³¹ T. 11030-11031, 11122, 11124-11125; Gotovina Addendum Notice, para. 3.

³² T. 11031-11032; Gotovina Addendum Notice, para. 6.

³³ Markač Motion, paras 2-3, 5-7, 9.

³⁴ *Ibid.*, para. 10.

³⁵ *Ibid.*

³⁶ T. 11033, 13457-13458; Markač Motion, para. 11.

³⁷ *Ibid.*, para. 10.

during the trial.³⁸ In addition, the Prosecution submitted that it had not, at the time the Expert Report was filed, received one of the three documents analyzed by Konings in the Addendum.³⁹ The Prosecution also argued that it caused no prejudice to the Defence because, under a previous ruling of the Chamber, the Prosecution was entitled to elicit the evidence contained in the Addendum from Konings on the stand, even without having filed the Addendum, so long as it had given proper notice to the Defence.⁴⁰ The Prosecution added that the Addendum was short, clear and concise.⁴¹ It submitted that it is appropriate to query an expert about evidence adduced during trial.⁴² It argued further that since the Addendum was based on evidence adduced in the trial, the Defence could not logically have cross-examined previous witnesses on its content, and that the situation was no different from the cross-examination of any witness who testifies after any other witness.⁴³ Finally, it submitted that the Defence could seek to recall any witness, or call back any witness during its own case.⁴⁴

APPLICABLE LAW

8. Rule 94 *bis* of the Rules provides:

(A) The full statement and/or report of any expert witness to be called by a party shall be disclosed within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge.

(B) Within thirty days of disclosure of the statement and/or report of the expert witness, or such other time prescribed by the Trial Chamber or pre-trial Judge, the opposing party shall file a notice indicating whether:

(i) it accepts the expert witness statement and/or report; or

(ii) it wishes to cross-examine the expert witness; and

(iii) it challenges the qualifications of the witness as an expert or the relevance of all parts of the statement and/or report and, if so, which parts.

(C) If the opposing party accepts the statement and/or report of the expert witness, the statement and/or report may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.

³⁸ Prosecution Addendum Response, paras 1, 3-6.

³⁹ *Ibid.*, paras 6, 8-10.

⁴⁰ *Ibid.*, paras 7, 11-13, 15; T. 11034-11035, 11124-11126.

⁴¹ Prosecution Addendum Response, para. 14.

⁴² *Ibid.*, paras 16-17.

⁴³ *Ibid.*, para. 18.

⁴⁴ *Ibid.*

9. The general standards of admissibility set forth in Rule 89 of the Rules apply to expert reports.⁴⁵ Rule 89 (C) of the Rules provides that a Chamber may admit any relevant evidence which it deems to have probative value. In addition, the Tribunal's jurisprudence sets out the following requirements for admissibility of expert reports: 1) the witness who drafted the report is considered an expert by the Chamber; and 2) the content of the expert report falls within the accepted expertise of the expert witness.⁴⁶ An expert is a person who by virtue of some specialized knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute.⁴⁷

10. In the case of late submission of a statement or report under Rule 94 *bis* (A) of the Rules or in the case of submission of addenda, the Chamber will determine whether it would be in the interests of justice to consider admitting it into evidence. In this respect, the Chamber will consider whether the statement, report or addendum is *prima facie* relevant and probative, whether the Prosecution has shown good cause to submit it at this stage, and the extent to which the submission creates an additional burden on the Defence.⁴⁸

DISCUSSION

11. The Prosecution was under a deadline to disclose the Expert Report to the Defence by February 2008.⁴⁹ It respected that deadline by filing it on 18 January 2007. It then filed an Addendum on 30 October 2008. The Chamber will determine whether it is in the interests of justice to consider the Addendum for admission into evidence.

12. The Addendum consists of an analysis of a set of hypothetical facts regarding the use of artillery against Knin during Operation Storm, an aerial photograph of Knin with certain marked locations, and three Croatian Army documents relating to the use of artillery during Operation Storm.⁵⁰ It is properly characterized as an addendum to the Expert Report, which consists principally of general theory and data regarding the use of artillery in military operations,⁵¹ but also contains opinions of Konings on four Croatian Army documents of

⁴⁵ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008, para. 22.

⁴⁶ *Ibid.*, para. 21.

⁴⁷ Decision and Guidance with Regard to the Expert Report, Addendum, and Testimony of Reynaud Theunens, 17 November 2008, para. 14 and the sources cited therein.

⁴⁸ *Ibid.*, para. 18.

⁴⁹ T. 325-328; see *supra* note 47, at para. 16.

⁵⁰ Prosecution Addendum Submission, Addendum, Appendix A.

⁵¹ Prosecution Submission, paras 1-15, Annex A.

August 1995 relating to the use of artillery during Operation Storm.⁵² The matters addressed in the Expert Report and Addendum are relevant to the Indictment, in particular to the alleged unlawful attacks on civilians and civilian objects, charged as an underlying act of persecutions in Count 1. The probative value depends, *inter alia*, on whether the author qualifies as an expert in the subject matter of the report. The Chamber expects the Prosecution to establish this expertise on the record, at the outset of the testimony of Konings. With this proviso, the Chamber is satisfied that the Expert Report and Addendum are *prima facie* relevant and probative.

13. The Chamber is not convinced by the argument that good cause for late submission was shown because the hypothetical facts put to Konings in the Addendum were based on evidence received during trial, since anticipated evidence, in particular documents already in the possession of the Prosecution, could have been put to Konings at an earlier stage, and then corrected to the extent necessary during the examination-in-chief of Konings. The Prosecution argued that it had received one of the three documents analyzed by Konings in the Addendum after the filing of the Expert Report but does not explain why the two other documents were not analyzed in the Expert Report. The Chamber therefore finds that the Prosecution has not shown good cause why the Addendum was filed nine months after the deadline for filing the Expert Report. However, the Chamber will consider whether it is nevertheless in the interests of justice to consider the Addendum for admission into evidence.

14. The Addendum is neither lengthy nor particularly complex, and contains Konings's analysis of just three brief documents. While the Addendum was filed on 30 October 2008, Konings is currently scheduled to testify after the winter recess, giving the Defence more than two months to prepare for cross-examination on matters and opinions contained in the Addendum. The Chamber is not convinced that the Defence has suffered prejudice from its inability to put the Addendum to witnesses in cross-examination since no witnesses likely to provide helpful evidence when commenting on the Addendum, such as artillery experts or persons involved in the use of Croatian Army artillery during Operation Storm, had testified at the time of the filing of the Addendum. In the absence of specific and reasoned examples, the Chamber is also not convinced by the argument that the Addendum was inspired by defences put forth in cross-examination of Prosecution witnesses. In light of all of these considerations, the Chamber finds that the burden on the Defence caused by the late filing of

⁵² *Ibid.*, para. 16.

the Addendum does not prevent the Chamber from considering the Addendum for admission into evidence.

15. As mentioned, the Expert Report consists principally of general theory and data regarding the use of artillery in military operations. The remainder of the Expert Report and the Addendum apply this expertise to the content of documents and hypothetical facts. Although the Chamber may be assisted by abstract expertise, it is certainly further assisted by an expert drawing conclusions from the evidence presented or to be presented in the case. The assistance of an expert in this respect, subjected to cross-examination and possibly confronted by other expert opinion, enhances the Chamber's ability to reach sound conclusions and increases the transparency of this process.

16. In light of all these considerations, the Chamber finds that it is in the interests of justice to consider the Addendum for admission into evidence.

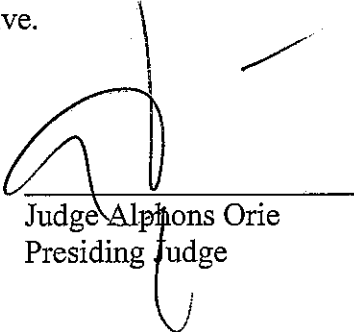
17. The Chamber understands the Markač Defence's request to strike the Addendum to be a request not to admit it into evidence.⁵³ The Chamber will defer the decision on admission of the Expert Report and the Addendum until the testimony of Konings.

DISPOSITION

18. For the foregoing reasons, the Chamber

DEFERS the decision on the admission of the Expert Report and Addendum until the time of the testimony of Harry Konings.

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



Judge Alphonse Orié
Presiding Judge

Dated this 18th day of December 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

⁵³ *Supra* note 47, at para. 23.