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D26301 - D26298
27 August 2009

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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: 27 August 2009
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 27 August 2009

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

DECISION ON DISCLOSURE OF EXPERT MATERIALS

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

Procedural History and Submissions of the Parties

1. On 24 July 2009, the Prosecution submitted that it seeks from the Defence lists of all the information provided to their proposed expert witnesses, any communications between the Defence and their proposed expert witnesses, and any draft reports circulated between the proposed experts and the Defence ("Request").¹ The Prosecution acknowledged that there is no particular rule under which this material must be disclosed, but submitted that these are matters that need to be raised in cross-examination and that it is in the interests of judicial economy that such material is disclosed in advance, as the cross-examination of proposed Defence expert witnesses could be curtailed.²
2. On 24 July 2009, the Gotovina Defence submitted that it had fulfilled its obligations under Rule 67 of the Tribunal's Rules of Procedure and Evidence ("Rules").³ On the same day, the Markač Defence pointed out that there is no rule under which the material should be disclosed.⁴
3. On 24 July 2009, the Čermak Defence submitted that with regard to its proposed expert witnesses, there had been no constraints in terms of which documents to consider for the creation of the expert reports, thus making disclosure of underlying material practically impossible for the Čermak Defence.⁵ The Čermak Defence further submitted that communications need not be disclosed as they are covered by legal professional privilege.⁶ The Čermak Defence submitted that there is no requirement for the Defence to supply the Prosecution with draft reports, as the issue of whether a proposed expert changed his mind over time is something for the Prosecution to explore during cross-examination.⁷
4. On 27 July 2009, the Gotovina Defence made further submissions, reiterating that it had no obligation under Rule 67 (A) of the Rules to disclose the requested materials, and arguing that, since the Chamber had at no time during the Prosecution's case imposed upon the Prosecution the obligation to disclose the requested materials, either under the broader obligations of Rule 66 (B) of the Rules or for reasons of judicial economy, similarly, no such

¹ T. 20691-20692.

² T. 20692, 20695-20696.

³ T. 20693-20694, 20696-20697.

⁴ T. 20701.

⁵ T. 20699-20700.

⁶ T. 20700.

⁷ T. 20701.

obligation should now be imposed upon the Gotovina Defence.⁸ The Gotovina Defence also drew attention to the Chamber's ruling of 19 November 2008, where, in relation to Witness Theunens, the Chamber stated that it had "not concluded that, on the basis of the facts presented to it, [that] there is an obligation under the Rules to disclose a copy of a previous version of the report to the Defence".⁹

5. On 31 July 2009, the Prosecution made further submissions, reiterating the Request, and arguing that, for the Prosecution to be able to explore the basis of the expert's opinions and for an expert report to meet the minimum standards of reliability, sufficient information as to the sources and methodology used in support of the expert report is required.¹⁰

6. On 3 August 2009, the Markač Defence joined the Gotovina Submission.¹¹

7. On 5 August 2009, the Prosecution clarified its Request, stating that it only seeks materials and communications directly pertaining to the preparation or production of an expert report or the expert's testimony in the present case.¹²

8. On 18 August 2009, the Čermak Defence joined the Gotovina Submission.¹³

Discussion

9. As the parties acknowledge, there is no specific rule that covers materials sought in the Request. The Request does not fall within the ambit of Rule 67 of the Rules. Rather, the Prosecution seeks disclosure of certain materials for the purposes of judicial economy and an expeditious trial. The Chamber finds that there is no obligation for the Defence to disclose to the Prosecution the material sought in the Request.

10. Nevertheless, an expert witness is expected to give his or her expert opinion in full transparency of the established or assumed facts he or she relies upon and of the methods used when applying his or her knowledge, experience, or skills to form his or her expert opinion.¹⁴

⁸ Gotovina Defence's Further Submission on Disclosure of Expert Materials, 27 July 2009 ("Gotovina Submission"), paras 2, 5-7.

⁹ Gotovina Submission, para. 4; see T. 12143-12144.

¹⁰ Prosecution's Further Submission on Disclosure of Expert Materials, 31 July 2009, paras 2-5, 8.

¹¹ Defendant Mladen Markač's Joinder to Defendant Ante Gotovina's Further Submission on Disclosure of Expert Materials, 3 August 2009, para. 2.

¹² Prosecution's Clarification of its Further Submission on Disclosure of Expert Materials, 5 August 2009, paras 2-4.

¹³ Ivan Čermak's Joinder to Defendant Ante Gotovina's Further Submission on Disclosure of Expert Materials, 18 August 2009, para. 3.

¹⁴ *Prosecutor v. Galić*, Case No. IT-98-29-T, Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philipps, 3 July 2002, p. 2; *Prosecutor v. Galić*, Case No. IT-98-29-T, Decision on the Expert Witness

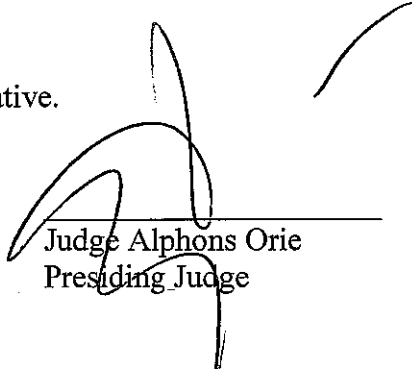
A minimum degree of transparency in the sources and methods used in an expert report is required at the stage of admission into evidence in order for the Chamber to determine the report's probative value.¹⁵ The sources and methodology used in support of any proposed expert opinion must be clearly indicated and accessible. If such transparency is lacking, this will seriously affect the parties' and the Chamber's possibility to test or challenge the factual basis and the methodology on which the expert witness reached his or her conclusions, and thereby affect their possibility to assess the probative value of the proposed expert report. The result might be non-admission or that only limited weight can be attached to the expert report.¹⁶

11. With regard to communications between the proposed experts and the Defence, as well as prior drafts of expert reports, the Chamber considers that the parties are able to raise these matters with the proposed experts during their examinations. Moreover, the Chamber finds that due to the often large number of communications and the constantly changing nature of drafts, judicial economy could in fact be better served by exploring these matters with the proposed experts during cross-examination, as opposed to receiving a vast amount of documents in advance.

Disposition

12. For the foregoing reasons, the Chamber **DENIES** the Request.

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



Judge Alphons Orie
Presiding Judge

Dated this twenty-seventh day of August 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

Statements Submitted by the Defence, 27 January 2003 ("Galić 2003 Decision"), p. 3; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Decision on Prosecution's Motion for Admission of Exert Statements, 7 November 2003, para. 19.

¹⁵ Galić 2003 Decision, p. 4.

¹⁶ See T. 20881.