

IT-06-90-T
D 27385 - D 27381
22 September 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: 22 September 2009
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 22 September 2009

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

DECISION ON ADMISSION OF EXPERT REPORT OF GEOFFREY CORN

Office of the Prosecutor

Mr Alan Tieger
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Counsel for Ivan Čermak

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Ms Gillian Higgins

Counsel for Mladen Markač

Mr Goran Mikuličić
Mr Tomislav Kuzmanović

PROCEDURAL HISTORY

1. On 1 July 2009, the Gotovina Defence submitted, pursuant to Rule 94 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules"), a proposed expert report and addendum of Witness Geoffrey Corn.¹ On 29 July 2009, the Prosecution filed a notice in which it opposed admission of sections 1, 3-11 and 13 of the expert report, as well as the addendum, and requested that Corn not be permitted to testify on matters contained therein.² The Prosecution asked to cross-examine Corn on sections 2 and 12 of the expert report, as well as any other parts admitted into evidence.³ On 26 August 2009, the Chamber declined to restrict in advance the scope of oral testimony, deferred its decision on the admission of the expert report and addendum, and informed the parties accordingly through an informal communication. On 7 September 2009, during the first day of Corn's testimony, the Gotovina Defence tendered the expert report, including addendum and attachments, as exhibit D1642, and the Prosecution maintained its objections to admission.⁴ On 11 September 2009, during the last day of Corn's testimony, the Prosecution and the Gotovina Defence made further submissions on the admission of the expert report.⁵

ARGUMENTS OF THE PARTIES

2. The Prosecution argued that Corn is a legal expert who has no artillery expertise, and that sections 1, 3-11 and 13 of the expert report, as well as the addendum, consist of legal analysis and opinions that usurp the Chamber's competence to interpret and apply the laws of armed conflict.⁶ It further submitted that Corn appeared to have no experience or specialized training in operational command.⁷ However, the Prosecution accepted Corn's military expertise for the purpose of sections 2 and 12 of the expert report.⁸ Upon completing its cross-examination of the witness, the Prosecution further argued that the basis of the expert report was insufficiently transparent, in particular since the sources of information included an oral presentation by Defence counsel of which no record had been provided to the Prosecution,

¹ Defendant Ante Gotovina's Submission of Expert Report of Professor Geoffrey Corn pursuant to Rule 94 *bis*, 1 July 2009.

² Prosecution's Notice Regarding Expert Report of Professor Geoffrey Corn (AG-11), 29 July 2009 ("Prosecution's Notice"), paras 3, 7, 15.

³ *Ibid.*, para. 4.

⁴ T. 21150-21151.

⁵ T. 21588-21601.

⁶ Prosecution's Notice, paras 2, 5, 7-12, 14.

⁷ *Ibid.*, para. 11.

⁸ *Ibid.*, para. 4.

thereby negatively affecting its ability to properly cross-examine the witness.⁹ It further argued that it had received insufficient notice of the opinion of the witness on certain critical documents that he had considered and found did not lead him to change his opinions expressed in the expert report.¹⁰

3. The Gotovina Defence argued that Corn's testimony and the supplemental information sheet (admitted into evidence as exhibit D1643) had satisfied any concerns about transparency regarding the basis of the expert report.¹¹ It further argued that since the documents of concern to the Prosecution had not been considered by the witness before drafting the expert report, were not part of that report, and had not been submitted to the witness in direct examination, they had no bearing on the admission of the expert report.¹²

APPLICABLE LAW

4. 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.

5. The general standards of admissibility set forth in Rule 89 of the Rules apply to expert reports.¹³ Rule 89 (C) of the Rules provides that a Chamber may admit any relevant

⁹ T. 21589-21590, 21599.

¹⁰ T. 21589-21590, 21598.

¹¹ T. 21591, 21594-21598.

¹² T. 21591-21600.

¹³ *Prosecutor v. 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.

evidence which it deems to have probative value. 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.¹⁴ 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.¹⁵ 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.¹⁶ The Chamber may deny admission into evidence of an expert report on legal issues that are to be determined by the Chamber.¹⁷ Rule 89 (D) of the Rules provides that a Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

DISCUSSION

6. The expert report combines legal and military analysis, mostly on the conduct of military operations, and applies it in the addendum to a series of factual assumptions pertaining to Operation Storm, as well as one exhibit, P64, admitted into evidence in the present case. The expert report is relevant to allegations made in the Indictment, in particular to the alleged unlawful attacks on civilians and civilian objects, charged as an underlying act of persecutions in Count 1. Having considered the expert report, *curriculum vitae* (admitted into evidence as exhibit D1641), and testimony of Corn, the Chamber is satisfied that he qualifies as an expert in the practical application of the laws of war in military operations. The Chamber finds that many parts of the expert report fall within this area of expertise, and assist it in understanding matters at the intersection between the laws of war and technical aspects of conducting military operations. Although other parts of the expert report are purely legal and of no assistance to the Chamber, it declines to attempt to disentangle and deal separately with those parts. Based on Corn's evidence, the Chamber is satisfied that the expert report meets, at the least, the minimum requirements of transparency in its sources and methodology,

¹⁴ *Prosecutor v. Galić*, Case No. IT-98-29-T, Decision on the Expert Witness Statements Submitted by the Defence, 27 January 2003, p. 4; Decision on Disclosure of Expert Materials, 27 August 2009, para. 10.

¹⁵ *Supra* note 13, para. 21.

¹⁶ 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; Decision on the Expert Report and Addendum of Konings, 18 December 2008, para. 9.

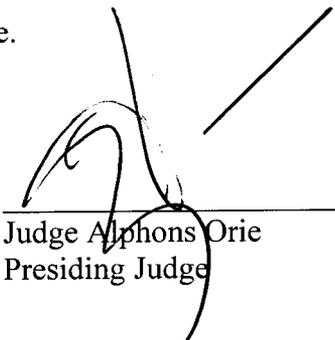
¹⁷ *Nahimana et al. v. Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007, paras 292-294; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on the Admissibility of the Expert Report and Proposed Expert Testimony of Professor Schabas, 1 July 2008, paras 7-8.

allowing the Chamber to find that it has sufficient probative value to warrant admission into evidence. For these reasons, the Chamber is satisfied that the report meets the requirements for admission set out in Rule 89 (C) of the Rules, as well as in the Tribunal's jurisprudence. The Chamber will, in due course and in consideration of all the evidence before it, determine what weight, if any, to attribute to the expert report. The Chamber notes in this regard that the evidence of Corn, a professor of law with certain military experience and knowledge, may assist the Chamber in its interpretation of the evidence of Konings, a military officer with certain legal experience and knowledge, and vice versa. Having considered the timing of the notice given to the Prosecution of the materials that Corn had considered after drafting the expert report, the Chamber finds that the difficulties faced by the Prosecution in this regard are not such as to warrant the exclusion of the expert report under Rule 89 (D) of the Rules.

DISPOSITION

7. For the foregoing reasons, the Chamber **ADMITS** the expert report (exhibit D1642) into evidence.

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



Judge Alphons Orie
Presiding Judge

Dated this 22nd day of September 2009
At The Hague
The Netherlands

[Seal of the Tribunal]