

IT-06-90-T
D 10021 - D 10019
21 May 2008

10021



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 Ķiniš
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.¹ 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.²

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.³ This part of the Defence Motion was resolved by an oral decision on 22 April 2008.⁴

3. On 25 March 2008, the Markač Defence filed a joinder to the Motion.⁵

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.⁶ 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.⁷

5. On 31 March 2008, the Gotovina Defence filed a motion requesting leave to file a reply to the Response.⁸ 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.¹⁰ The established practice of the Tribunal allows expert witnesses to offer their opinion when it may

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

² Motion, paras 3, 6-7, 11.

³ Motion, paras 12-19, 20(c).

⁴ T. 1927-1929.

⁵ Defendant Mladen Markač's Joinder to Defendant Ante Gotovina's Rule 73 Motion In Limine, 25 March 2008.

⁶ Response, paras 2-3.

⁷ Response, paras 4-11.

⁸ 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.

⁹ T. 1919.

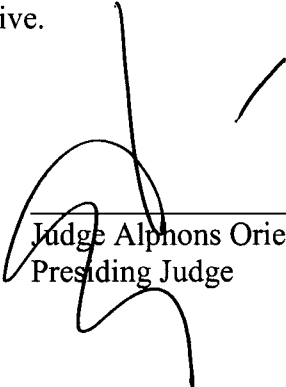
¹⁰ *Prosecutor v. Popović et al.*, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008, para. 22.

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 Orié
Presiding Judge

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

[Seal of the Tribunal]

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