

**UNITED  
NATIONS**

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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

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**IN THE TRIAL CHAMBER**

**Before:** Judge Alphons Orie, Presiding  
Judge Uldis Ķinis  
Judge Elisabeth Gwaunza

**Registrar:** Mr. John Hocking

**Date:** 27 August 2009

**THE PROSECUTOR**

v.

**ANTE GOTOVINA  
IVAN ČERMAK  
MLADEN MARKAČ**

***PUBLIC***

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**PROSECUTION'S OBJECTION TO DOCUMENTS TO BE  
USED WITH EXPERT ANTHONY R. JONES**

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Mr. Stefan Waespi

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Mr. Luka S. Mišetić, Mr. Gregory Kehoe and Mr. Payam Akhavan for Ante Gotovina  
Mr. Stephen Kay, Mr. Andrew Cayley and Ms. Gillian Higgins for Ivan Čermak  
Mr. Goran Mikuličić and Mr. Tomislav Kuzmanović for Mladen Markač

**THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA**

**Case No. IT-06-90-T**

**THE PROSECUTOR**

**v.**

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***Introduction***

1. The Prosecution seeks notification regarding the anticipated use by the Gotovina Defence of 14 documents in connection with the testimony of expert Anthony Jones, none of which are referenced in his expert report.<sup>1</sup> Further, the Prosecution objects (subject to conditions specified below) to the use of seven of these 14 documents.

***Discussion***

2. Out of 37 documents identified by the Gotovina Defence<sup>2</sup> that may be used during the expert's testimony, only 23 are discussed in his expert report. The Gotovina Defence has not indicated which, if any, of the remaining 14 documents were provided to Mr. Jones at the time he drafted his expert report.<sup>3</sup>

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<sup>1</sup> D288, P1140, D652, P2585, D1578, D1583, 65<sup>ter</sup> 1D1374, D1596, P895, P822, D793, D1511, P2347 and 65<sup>ter</sup> 1D2934.

<sup>2</sup> See emails from Gotovina Defence to all parties and Chambers, 18 August 2009, 08:05PM, and 20 August 2009, 2:16PM.

<sup>3</sup> The Prosecution already has articulated its position that it should be notified as to which documents were provided to Mr. Jones, or which documents he relied on in reaching his opinion and conclusions: see Prosecution's Further Submission on Disclosure of Expert Materials, 31 July 2009 and Prosecution's Clarification of its Further Submission on Disclosure of Expert Materials, 4 August, 2009.

3. The Prosecution has no notice of Mr. Jones' opinions about any of these 14 documents, which, if any, of these documents he has already considered in reaching his conclusions, or whether the existence or contents of any of these documents would change any of the opinions contained in his report, and if so, in what manner.
4. Reliability and transparency requirements, and the interests of efficiency, mandate that, at a minimum, the Gotovina Defence notify the Prosecution as to which of the 14 documents were provided to Mr. Jones before he drafted his report, and were therefore considered by him in forming his opinions.<sup>4</sup>
5. Seven of these 14 documents are key exhibits pertaining to central issues in this case that were available and known to the parties prior to the drafting of Mr. Jones' expert report. These are, P822, P895, P1140, and D652 (all relating to the commission of crimes by Gotovina's subordinates and Gotovina's notice of, and reaction to, such crimes), P2585 (Gotovina's analysis of Operation Storm), D1596 (Gotovina's proposal on the selection, deployment and control of NCO's), and D793 (changes to Gotovina's key subordinate personnel).
6. If the Gotovina Defence failed to provide one or more of these key exhibits to Mr. Jones at the time he drafted his expert report, the Gotovina Defence should not be permitted to present those documents to him during his testimony. To do so would be tantamount to eliciting an oral addendum to Mr. Jones' expert report with virtually no prior notice to the Prosecution, and no justification for such lack of notice.
7. There is no proper basis to deny the Prosecution and the Trial Chamber of timely notice of Mr. Jones' opinions on key exhibits in this case, and the extent to which the existence or contents of these exhibits may alter the conclusions he has drawn in his report. Advance disclosure of such matters is mandated by the interests of transparent, fair and efficient proceedings.
8. In addition, D1511 and P2347 relate to the issue of the manner in which Serb civilians left the Krajina during Operation Storm. This issue falls outside the scope of Mr. Jones' expert report, and is primarily a factual issue unrelated to Mr. Jones' expertise. Further, the Prosecution has no notice of Mr. Jones' opinions, if

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<sup>4</sup> See, Prosecution's Further Submission on Disclosure of Expert Materials, 31 July 2009.

any, on this central issue in this case. Again, eliciting opinions on this matter during Mr. Jones' testimony would be tantamount to eliciting an oral addendum to his report without adequate notice to the Prosecution.

9. In its statement regarding Gotovina Defence expert Ivan Pokaz, the Trial Chamber:

“...emphasise[d] that an expert is expected to give his expert opinion in full transparency of the established or assumed facts he relies upon and of the methods used when applying his knowledge, experience, or skills to form his expert opinion. *The sources used in support of any 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 on which the expert report -- on which the expert witness reached his or her conclusions, and thereby to assess the probative value of the expert report. The result might be non-admission or that only limited weight can be attached to the expert report.”<sup>5</sup>

10. This Trial Chamber has also made clear that “[i]f proper notice is given, a party may examine an expert witness with respect to matters not included in his or her report...”<sup>6</sup>

### **Conclusion**

11. For these reasons, the Prosecution requests the Trial Chamber:
- a. to order the Gotovina Defence to notify the Prosecution as to which, if any, of the 14 documents identified in paragraph 1 were provided to Mr. Jones prior to the drafting of his expert report;
  - b. to preclude the Gotovina Defence from presenting any of the seven documents identified in paragraph 5 to Mr. Jones during his testimony that were not provided to Mr. Jones at the time he drafted his expert report; and
  - c. to preclude the Gotovina Defence from presenting the two documents identified in paragraph 8 to Mr. Jones during his testimony.

Word Count: 943 words




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<sup>5</sup> Tr. 20881:12-22 (emphasis added).

<sup>6</sup> Decision on Part of the Gotovina Defence's Rule 73 Motion in Limine, 21 May 2008, para. 7 (emphasis added).

Dated this 27<sup>th</sup> day of August 2009  
At The Hague, The Netherlands