



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-05-88-T  
Date: 30 July 2008  
Original: English

**IN TRIAL CHAMBER II**

**Before:** Judge Carmel Agius, Presiding  
Judge O-Gon Kwon  
Judge Kimberly Prost  
Judge Ole Bjørn Støle – Reserve Judge

**Registrar:** Mr. Hans Holthuis

**Decision of:** 30 July 2008

**PROSECUTOR**

v.

**VUJADIN POPOVIĆ  
LJUBIŠA BEARA  
DRAGO NIKOLIĆ  
LJUBOMIR BOROVIČANIN  
RADIVOJE MILETIĆ  
MILAN GVERO  
VINKO PANDUREVIĆ**

**PUBLIC**

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**DECISION ON THE REQUEST FOR RECONSIDERATION OF THE  
DECISION ON THE ADMISSIBILITY OF THE EXPERT REPORT AND  
PROPOSED EXPERT TESTIMONY OF PROFESSOR SCHABAS**

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**Office of the Prosecutor**

Mr. Peter McCloskey

**Counsel for the Accused**

Mr. Zoran Živanović and Ms. Mira Tapušević for Vujadin Popović  
Mr. John Ostojić and Mr. Predrag Nikolić for Ljubiša Beara  
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić  
Mr. Aleksandar Lazarević and Mr. Christopher Gosnell for Ljubomir Borovčanin  
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Radivoje Miletić  
Mr. Dragan Krgović and Mr. David Josse for Milan Gvero  
Mr. Peter Haynes and Mr. Đorđe Sarapa for Vinko Pandurević

**THIS TRIAL CHAMBER** of the 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 (“Tribunal”);

**BEING SEISED OF** the “Joint Defence Request for Reconsideration of the Decision on the Admissibility of the Expert Report and Proposed Expert Testimony of Professor Schabas”, filed jointly by Popović, Beara, Nikolić, Borovčanin and Pandurević (“Joint Defence”) on 10 July 2008 (“Motion”);

**NOTING** that in the Motion, the Joint Defence requests the Trial Chamber to reconsider the “Decision on the Admissibility of the Expert Report and Proposed Expert Testimony of Professor Schabas” issued on 1 July 2008 (“Impugned Decision”), which denied the admissibility of Professor Schabas’ testimony as expert witness and of his expert report;<sup>1</sup>

**NOTING** that the Joint Defence argues that:

1. the Trial Chamber committed a “clear error in reasoning” by failing to assess the scope of Professor Schabas’ expertise and properly defining it as going beyond the concept of genocide in international criminal law,<sup>2</sup> and failing to consider the potential impact of this concept on matters of State responsibility, which involves highly specialized expertise that is not within the usual subject-matter of the Tribunal.<sup>3</sup> In this regard, it is submitted that the testimony of legal experts on highly specialized areas of law is appropriate in some national jurisdictions,<sup>4</sup> and that the Trial Chamber is fully capable of ensuring that Professor Schabas testifies within the scope of his expertise;<sup>5</sup> and
2. reconsideration is “necessary to prevent an injustice,”<sup>6</sup> as presenting his expertise “in the form of legal submissions is not an adequate substitute for his appearance as an expert witness”;<sup>7</sup>

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<sup>1</sup> Impugned Decision, para. 9. *See also* Motion, paras. 1, 18(a), (b). The Joint Defence further requests the Trial Chamber to hold that Professor Schabas is an expert pursuant to Rule 94 *bis*(A) and that his report and testimony are properly admissible. *Ibid.*, para. 18(c).

<sup>2</sup> Motion, para. 4.

<sup>3</sup> Motion, paras. 5–8.

<sup>4</sup> Motion, para. 11. The Joint Defence refers to the admissibility of some lawyers and law professors to testify as experts in insurance coverage disputes in the United States. *Ibid.*

<sup>5</sup> Motion, paras. 12–14.

<sup>6</sup> Motion, para. 15.

<sup>7</sup> Motion, para. 16.

**NOTING** that in the “Prosecution Response to Defence Motion Requesting Reconsideration of the Decision Denying Admission of Professor Schabas’ Expert Testimony”, filed on 25 July 2008 (“Response”) the Prosecution submits that:

1. the Trial Chamber did not err in its reasoning, but employed “sound reasoning and acted within its discretion” in denying the admissibility of Professor Schabas’ testimony and report as expert evidence;<sup>8</sup> and
2. reconsideration of the Impugned Decision is not necessary to prevent an injustice, as there are other alternative means of making use of Professor Schabas’ expertise;<sup>9</sup>

**CONSIDERING** that according to the jurisprudence of the Tribunal, a Chamber has “inherent discretionary power to reconsider a previous decision in exceptional cases if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice”;<sup>10</sup>

**RECALLING** that in the Impugned Decision the Trial Chamber recognised Professor Schabas’ expertise in the “legal analysis of the crime of genocide” and concluded that the subject on which this expertise is offered is a matter which “falls directly within the competence of the Trial Chamber”;<sup>11</sup>

**CONSIDERING** that the Trial Chamber did not in any way misconstrue the expertise of Professor Schabas and the content of his proposed expert report and testimony;

**CONSIDERING** that, as stated in the Impugned Decision, none of the matters on which Professor Schabas would offer evidence fall into areas in which the Trial Chamber requires expert assistance;

**CONSIDERING** therefore that no clear error of reasoning has been demonstrated and the Trial Chamber is not satisfied that there are circumstances justifying reconsideration to prevent injustice;

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<sup>8</sup> Response, paras. 4–9.

<sup>9</sup> Response, para. 10.

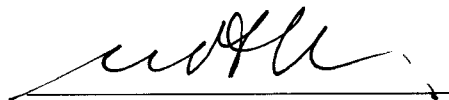
<sup>10</sup> See, for example, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-AR73.1, Decision on Zdravko Tolimir’s Request for Reconsideration of Appeals Chamber’s Decision of 28 March 2008, 18 June 2008, para. 8. See also Decision on the Beara Motion for Reconsideration and Beara and Nikolić Joint Motion for Certification of the Decision Denying Motion for a *Subpoena Duces Tecum* Compelling Momir Nikolić to Disclose his Personal Notes, 10 January 2008, p. 4.

<sup>11</sup> Impugned Decision, para. 8.

**PURSUANT TO** Rules 54, 89 and 94 *bis*,

**HEREBY DISMISSES** the Motion.

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



Carmel Agius  
Presiding

Dated this thirtieth day of July 2008  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**