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UNITED
NATIONS

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: 1 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: **1 July 2008**

PROSECUTOR

v.

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

PUBLIC

DECISION ON THE ADMISSIBILITY OF THE EXPERT REPORT AND PROPOSED EXPERT TESTIMONY OF PROFESSOR SCHABAS

Office of the Prosecutor
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Counsel for the Accused
Mr. Zoran Živanović and Ms. Mira Tapušković 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"), is seised of the Prosecution's "Notice Pursuant to Rule 94 *bis* Concerning Defence Non-Military Expert Reports and Two Military Expert Reports and Objection to the Schabas Report and Testimony, filed on 19 May 2008 ("Notice"), and hereby renders its decision thereon.

I. SUBMISSIONS OF THE PARTIES

1. On 1 May 2008, Popović, Beara, Nikolić, Borovčanin, and Pandurević ("Joint Defence") filed a "Joint Notice of Disclosure of an Expert Witness Report Pursuant to Rule 94 *bis* – Historical Legal Expert" ("Joint Defence Notice"), in which the Joint Defence disclosed Professor Schabas' expert report ("Report") and requested the Trial Chamber "to take notice of its disclosure to the Prosecutor."[1]

2. On 19 May 2008, the Prosecution filed the Notice, in which it requests the Trial Chamber not to admit the Report and proposed evidence of Professor Schabas, challenging the relevance of the contents of both his Report and his proposed testimony.[2] It submits that the "report covers purely legal issues"[3] which would not assist the Trial Chamber with information outside of the experience and knowledge of the judges, and "would usurp [the Trial Chamber's] essential function in interpreting and applying the relevant law."[4] It further contends that the Joint Defence's purpose for proposing to call Professor Schabas is "to espouse its preferred legal analysis of one of the crimes with which the Accused are charged," through the "historical background of the notion of genocide."[5]

3. In the "Joint Defence Response to Prosecution Notice Pursuant to Rule 94 *bis* Concerning Defence Non-Military Expert Reports" ("Response"), filed on 2 June 2008, the Joint Defence submits that Professor Schabas meets the definition of an expert as previously set out by the Trial Chamber[6] and that the Report is relevant as it is probative to the notion of genocide.[7] In particular,

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[1] Joint Defence Disclosure Notice, para. 5. The Joint Defence attached Professor Schabas' report in an annex to this notice.

[2] Notice, paras. 4, 9.

[3] *Ibid.*, para. 4.

[4] *Ibid.*, para. 7.

[5] *Ibid.*

[6] Response, para. 4. (Quoting *Prosecutor v. Popović et al,* Case No. IT-05-88-T, Decision on Defence Rule 94 *bis* Notice Regarding Prosecution Expert Witness Richard Butler, 19 September 2007, para. 23).

[7] *Ibid.*, paras. 6–7. The Joint Defence refers to *Prosecutor v. Galić,* Case No. IT-98-29-T, Decision on the Expert Witness Statements Submitted by the Defence, 27 January 2003, p.3, where the Trial Chamber held that an expert witness statement is relevant when it relates to an issue in dispute at the trial and has probative value within the meaning of Rule 98(C).

the Report responds to a "dire need" for clarification of the Genocide Convention as the interpretation has been inconsistent, resulting in conflicts and uncertainties in reference to the crime of genocide in national and international court systems, including international criminal tribunals and the International Court of Justice.[8] The Joint Defence also submits that the analysis of this misinterpretation of the Genocide Convention extends outside of the "law of the International Tribunal and international criminal law in general"[9] and according to the *jura novit curia* principle, the judges in this proceeding are not expected or deemed to know this law.[10] Therefore, as the Report "will neither address the facts of this case, *nor* will [...] attempt to apply any interpretation of the law *per se* to the facts of the case"[11] the Joint Defence requests its admission.[12]

4. On 9 June 2008, the Prosecution filed the "Reply to Joint Defence Response to Prosecution Notice Pursuant to Rule 94 *bis* Concerning the Objection to the Schabas Report and Testimony ("Reply"), in which it contends that the Joint Defence has not previously disputed the Tribunal's jurisprudence on genocide, but "only the application of the law to the specific facts."[13] The Prosecution submits that there is no dire need for clarification in relation to the essential elements of genocide as it "is well-settled in the Tribunal."[14] It contends that "simply, the Joint Defence does not agree with the state of the law in the Tribunal, and in Prof. Schabas, they have found an exponent of a theory more to their liking."[15]

5. The Prosecution also contends that even though there have been situations where experts on the law have been allowed to testify, these witnesses were not proposing "a wholesale rejection of [the] Tribunal caselaw,"[16] and had explicitly stated they were not "seeking to persuade the Chamber that the legal definition of genocide should be expanded or relaxed."[17] Furthermore, the Prosecution

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[8] *Ibid.*, paras. 8–10. The Joint Defence uses the ICJ case of *Application of the Convention on the Prevention and Punishment of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro) on 26 February 2007 as an example of this confusion in international law, arguing that the ICJ appears to have said that the existence of a state policy is an essential element of genocide. (Response, para. 10).

[9] *Ibid.*, para. 11.

[10] *Ibid.*, paras. 11–13.

[11] *Ibid.*, para. 14.

[12] *Ibid.*, paras. 15–16. The Joint Defence also refers to situations where the reports and testimony of two experts on the law were found admissible in the *Prosecutor v. Mucić et al.*, Case No. IT-96-21, Order on the Prosecution's Motion for Leave to Call Additional Expert Witnesses, 13 November 1997, p.2. and the *Prosecutor v. Milošević*, Case No. IT-02-54, Decision on Prosecution Submission of Expert Statements Pursuant to Rule 94 *bis*, 17 December 2003, para. 2.

[13] Reply, para. 2. Making specific references to the Pre-Trial Briefs of three of the Accused, the Prosecution argues that the very notion of genocide has not been an issue in dispute in this case and some of the Accused have stated that they do "not dispute the law applicable to genocide as held by the Appeals Chamber." *Ibid.* (Quoting "Pre-Trial Brief on Behalf of Drago Nikolić Pursuant to Rule 65 *ter* (F)," 12 July 2006, para. 51).

[14] *Ibid.*, para. 4.

[15] *Ibid.*

[16] *Ibid.*, para. 6.

[17] *Ibid.*, para. 7.

submits that the Joint Defence's comparison of Professor Schabas to an expert on foreign laws outside of the expertise of the Court is inappropriate, because he would testify "with respect to the Tribunal's established jurisprudence on genocide."[18]

II. DISCUSSION

6. Rule 94 *bis* is the general rule dealing with expert witnesses,[19] but it does not provide specific guidelines on the admissibility of testimony given by expert witnesses, or criteria for the admission of their reports.[20] Tribunal jurisprudence has considered the following requirements for the admissibility of expert statements or reports: "(1) the proposed witness is classified as an expert; (2) the expert statements or report meet the minimum standards of reliability; (3) the expert statements or reports are relevant and of probative value; and (4) the contents of the expert statements or reports fall within the accepted expertise of the expert witness."[21]

7. The general rules of admissibility set out in Rules 89(C) and (D) accordingly apply to expert witnesses. Pursuant to Rule 89(C) "a Chamber may admit any relevant evidence which it deems to have probative value." This rule has been interpreted to allow the Trial Chamber to determine "whether the witness has sufficient expertise in a relevant subject area such that the Trial Chamber may benefit from hearing his or her opinion."[22] Although it appears the Appeals Chamber of the Tribunal has not directly addressed this, the ICTR Appeals Chamber noted in the *Nahimana* case that a Trial Chamber has discretion to refuse to accept an expert report or testimony from a witness whose expertise concerns only "legal matters which might be addressed by Counsel in oral or written arguments"[23] or in their Final Briefs.[24] The Trial Chamber agrees with this statement of the law.

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[18] *Ibid.*, para. 8.

[19] Rule 94 *bis* provides that: "(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/ore report of the expert witness, [...] 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 (3) it challenges the qualifications of the witness as an expert or the relevance of all or parts of the statement and/or report and, if so, which parts."

[20] *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 ("*Popović* Appeal Decision"), para. 21; *Prosecutor v. Popović et al,* Case No. IT-05-88-T, Decision on Defence Rule 94 *bis* Notice Regarding Prosecution Expert Witness Richard Butler, 19 September 2007 ("*Popović* Trial Decision"), para. 29; *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-T, Decision on Motion to Exclude the Prosecution's Proposed Evidence of Expert Bezruchenko and His Report, 17 May 2007, para. 8.

[21] *Popović* Appeals Decision, para. 21.

[22] *Popović* Trial Decision, para. 26.

[23] *Prosecutor v. Nahimana et al.,* Case No. ICTR-99-52-A, Appeals Judgement, 28 November 2007, para. 293.

[24] *Ibid.* para. 294.

8. The Trial Chamber is satisfied that Professor Schabas is as an expert in his field. However, the Chamber is of the view that the subject on which his expertise is offered in this case is a matter which falls directly within the competence of the Trial Chamber. Accordingly, neither the Report nor Professor Schabas' proposed testimony would enlighten the Trial Chamber on specific issues of a technical nature that are outside of its experience and knowledge. Expert testimony as to the legal analysis of the crime of genocide is unnecessary and would not be of benefit to the Trial Chamber. However, this finding is without prejudice to the use which may be made of the Report in the course of argument or within Final Briefs. The Joint Defence are free to incorporate or adopt the legal analysis proffered as part of oral and written submissions.

III. DISPOSITION

9. For these reasons, pursuant to Rules 89 and 94 *bis*, the Trial Chamber hereby holds that the Joint Defence will not be permitted to call Professor Schabas as an expert witness, nor tender the Report as an expert report.

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

Carmel Agius
Presiding

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

[Seal of the Tribunal]