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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-09-92-T
Date: 19 October 2012
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Bakone Justice Moloto
Judge Christoph Flügge

Registrar: Mr John Hocking

Decision of: 19 October 2012

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON DEFENCE REQUEST TO DISQUALIFY
RICHARD BUTLER AS AN EXPERT AND BAR THE
PROSECUTION FROM PRESENTING HIS REPORTS**

Office of the Prosecutor

Mr Dermot Groome
Mr Peter McCloskey

Counsel for Ratko Mladić

Mr Branko Lukić
Mr Miodrag Stojanović

I. PROCEDURAL HISTORY AND SUBMISSIONS OF THE PARTIES

1. On 25 January 2012, the Prosecution disclosed the expert reports prepared by witness Richard Butler pursuant to Rule 94 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules") and informed the Chamber of its intention to call this witness to provide *viva voce* evidence.¹ The disclosed documents included the following: (i) *curriculum vitae* ("CV") of witness Butler; (ii) the Bosnian Serb Army ("VRS") Corps Command Responsibility Report; (iii) the VRS Brigade Command Responsibility Report; (iv) the Revised Srebrenica Military Narrative - Operation "Krivaja 95"; (v) Analytical Addendum to the Revised Srebrenica Military Narrative Chapter 8; and (vi) the VRS Main Staff Command Responsibility Report ("Reports").²

2. On 20 February 2012, the Defence filed its objection to the admissibility of the Reports and to witness Butler's qualification as an expert relying on Rules 89 (C) and 94 *bis* and requested, in the event that he is allowed to testify, to cross-examine him.³ It submitted that witness Butler lacks the expertise to deal with the VRS or the JNA as he has never followed any specific course or training focused on the Balkans, the JNA or the military affairs and traditions in the former Yugoslavia, and his limited knowledge of the events in Bosnia is derived solely from his analysis of documents placed at his disposal by the Prosecution.⁴ His reports do not meet the minimum standards of reliability as his methodology is flawed given that he failed to interview local JNA or VRS officers or submit his findings to peer review by other experts, his source material often originates from unknown sources, and the Reports are mere summaries of Prosecution documents.⁵ His conclusions infringed upon the Chamber's competence to determine issues of criminal liability as he combines his opinion with various factual assertions and conclusions in a manner which made it impossible to distinguish between them.⁶ In addition his lack of impartiality, demonstrated by the focus in his career on the investigation and prosecution of international war crimes, his links with the Prosecution and, importantly, his

¹ Prosecution's Notice of Disclosure of Expert Reports of Richard Butler pursuant to Rule 94 *bis* and attached Appendices A and B, 25 January 2012 ("Prosecution's Notice of Disclosure"), para. 1; Corrigendum to Prosecution's Notice of Disclosure of Expert Reports of Richard Butler pursuant to Rule 94 *bis* and Attached Appendix A, 27 January 2012 ("Corrigendum").

² Prosecution's Notice of Disclosure, 25 January 2012, Annex A as amended by Appendix A to the Corrigendum, 27 January 2012.

³ Defence Rule 94 *bis* Notice and Objection relative to Richard Butler, 20 February 2012 ("Defence Rule 94 *bis* Notice"), paras 2, 6-7.

⁴ Defence Rule 94 *bis* Notice, paras 3, 6, 9, 17.

⁵ Defence Rule 94 *bis* Notice, paras 3, 6-7, 12, 23-25, 28-30.

⁶ Defence Rule 94 *bis* Notice, paras. 6, 12, 23-25.

involvement in interviewing witnesses in the present case, requires his disqualification as expert and undermines the probative value of his reports.⁷

3. On 5 March 2012, the Prosecution responded to the Defence objection and invited the Chamber to dismiss it.⁸ It contended that witness Butler is clearly qualified as military expert and has been previously found so in the *Krstić, Blagojević and Jokić, Popović, Tolimir and Karadžić* cases.⁹ It submitted that Butler's experience in the intelligence branch of the U.S. Army and as a Prosecution Military Analyst provided him with the requisite level of specialised knowledge and/or skill to qualify as an expert and was not affected by the fact that it was developed while employed at the Office of the Prosecutor.¹⁰ The subject-matter of his expertise is on the functioning and operation of the VRS as concerns the Srebrenica events.¹¹ According to the Prosecution, the Defence objection to his involvement in the Prosecution's preparation of its case was a matter that could be explored in cross-examination and could be considered in the Chamber's evaluation of his evidence.¹² As to the objection about the provenance of Butler's source material, he properly referred to their origins and all such material had been disclosed to the Defence.¹³ The suggestion about bias is unsubstantiated and, in any event, goes to the weight to be attributed to the proffered reports by the Chamber and not to their admissibility.¹⁴

II. APPLICABLE LAW

4. Rule 85 of the Rules provides, in so far as relevant, as follows:

(A) Each party is entitled to call witnesses and present evidence. (...)

(B) Examination-in-chief, cross-examination and re-examination shall be allowed in each case.

5. Rule 94 *bis* of the Rules provides as follows:

(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:

⁷ Defence Rule 94 *bis* Notice, paras 10-11, 17-22, 26-27, 31.

⁸ Prosecution Response to Defence Rule 94 *bis* Notice and Objection relative to Richard Butler, 5 March 2012 ("Response"), paras 1-2.

⁹ Response, para. 7.

¹⁰ Response, para. 8.

¹¹ Response, paras 11-12.

¹² Response, para. 15.

¹³ Response, para. 16.

¹⁴ Response, para. 17.

- (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 or 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.

6. The general provisions on admissibility set out in Rule 89 (C) and (D) of the Rules apply to expert evidence.¹⁵ Pursuant to Rule 89 (C) a Chamber may admit any relevant evidence which it deems to have probative value, and pursuant to Rule 89 (D) a Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

7. Although Rule 94 *bis* does not provide specific guidelines on the admissibility of expert evidence, Tribunal jurisprudence has established the following requirements for the admissibility of an expert report: the proposed witness is qualified as an expert; the expert report is relevant and of probative value; and the content of the expert report falls within the accepted expertise of the expert witness.¹⁶

8. The purpose of expert evidence is to provide specialised knowledge that may assist the trier of fact in understanding the evidence presented.¹⁷ Expert witnesses are ordinarily afforded wide latitude to offer opinions within their expertise and their views need not be based upon first-hand knowledge or experience.¹⁸ It is however for the Chamber to assess whether the witness has sufficient expertise in a relevant subject area and whether the Chamber may benefit from hearing his or her opinion.¹⁹

9. The expert is obliged to testify with the utmost neutrality and objectivity.²⁰ The party alleging bias on the part of an expert witness may demonstrate the said bias through cross-examination, by calling its own expert witnesses or by means of an expert opinion in reply.²¹

¹⁵ *Prosecutor v. Vujadin 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 (“Appeals Chamber Decision on Status of Richard Butler”), para. 22.

¹⁶ Appeals Chamber Decision on Status of Richard Butler, para. 21.

¹⁷ Appeals Chamber Decision on Status of Richard Butler, para. 27; *Laurence Semanza v. The Prosecutor*, ICTR-97-20-A, Appeal Judgment, 20 May 2005 (“Semanza Appeal Judgment”), para. 303.

¹⁸ Appeals Chamber Decision on Status of Richard Butler, para. 27; *Semanza Appeal Judgment*, para. 303.

¹⁹ *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Second Decision Regarding the Evidence of General Rupert Smith, 11 October 2007 (“*Popović* Second Decision on General Smith”), p. 3; *Prosecutor v. Vujadin Popović*, Case No. IT-05-88-T, Decision on the Admissibility of the Expert Report and proposed Expert Testimony of Professor Schabas (“*Popović* Decision on Professor Schabas Expert Report”), 1 July 2008, para. 7.

²⁰ *Ferdinand Nahimana et al. v. Prosecutor*, Case No. ICTR-99-52-A, Appeals Judgment, 28 November 2007 (“*Nahimana et al. Appeal Judgment*”), para. 199.

²¹ Appeals Chamber Decision on Status of Richard Butler, para. 21; *Nahimana et al. Appeal Judgment*, para. 199.

Accordingly, in principle questions of objectivity, impartiality, and independence of an expert become relevant when assessing the weight to be accorded to the expert evidence and not its admissibility.²² It cannot be excluded however that the Chamber may find the evidence of a proposed expert witness so lacking in terms of the indicia of reliability, for instance because of lack of impartiality, that the proposed evidence is not probative.²³

III. DISCUSSION

10. With regard to the Defence request to cross-examine witness Butler, the Chamber notes that the Prosecution intends to call him to give evidence in court. It therefore considers that witness Butler will be available for cross-examination.

11. As to witness Butler's expertise, the Chamber reiterates that it retains its discretion to evaluate a proposed expert witness's credentials despite the fact that the witness has already testified as an expert in other cases.²⁴ Witness Butler's CV demonstrates that he has more than 15 years' relevant experience in military intelligence and analysis concerning various forces, including the former Western Group of Forces of the Soviet Army and Warsaw Pact allies, and different geographical regions including the Persian Gulf, Southwest Asia, the Horn of Africa and the Middle East. In particular, he has served as Warrant Officer and Chief Warrant Officer for the U.S. Army during which period his duties included providing detailed analysis of ground forces including on command and control, mobilisation, operational movements, tactical operations and logistics and combat and training methodologies. The Chamber considers that through his experience, witness Butler has developed an expertise in military analysis.

12. The Defence objection that witness Butler does not have direct experience relating to the military in former Yugoslavia and has not followed any specific training in that respect is without merit. The Chamber reiterates that expert opinion need not be based upon first-hand knowledge or experience and that, in ordinary cases, expert witnesses lack personal familiarity with the particular circumstances of a case and are required to give their professional opinion on such circumstances by applying their specialised knowledge and skills, often on the basis of facts observed and reported by others.²⁵ On this basis, witness Butler has been consistently

²² Appeals Chamber Decision on Status of Richard Butler, para. 21.

²³ Appeals Chamber Decision on Status of Richard Butler, para. 21; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Request for Certification of Interlocutory Appeal of Decision on Admission of Witness Philip Coo's Expert Report, 30 August 2006, para. 10.

²⁴ Appeals Chamber Decision on Status of Richard Butler, footnote 88.

²⁵ Appeals Chamber Decision on Status of Richard Butler, para. 27.

accepted as expert in a number of proceedings before the Tribunal.²⁶ In addition, in the case of *Prosecutor v. Vujadin Popović et al.* the Appeals Chamber upheld the Trial Chamber's decision finding witness Butler as having the technical knowledge required to testify as an expert and dismissed an objection, similar to that raised in the present case, related to lack of working experience with the VRS.²⁷ Consequently, the Chamber concludes that witness Butler may testify as an expert in military analysis on the organisation and general procedures of the VRS.

13. Turning to the objection that the Reports do not meet the minimum standards of reliability because of witness Butler's methodology, the Chamber reiterates that expert witnesses are afforded wide latitude to reach their conclusions within their expertise. With regard to the submission that the reliability of the Reports is undermined by the fact that witness Butler has not interviewed JNA or VRS officers, the Chamber notes that the Defence has not demonstrated that interviewing such officers is methodologically indispensable for the discussion of the issues addressed by witness Butler. The conclusions drawn by him on, often, facts observed and reported by others and findings reached elsewhere do not provide a final answer to issues relevant to the Indictment. They assist the Chamber in making the determinations it has to make in the context of the totality of the evidence. To the extent that the knowledge of JNA or VRS officers can add to or shed a different light on the conclusions drawn by witness Butler on the basis of the material he analysed, the Defence has an opportunity to test those conclusions and present relevant evidence.

14. As to the submission that witness Butler's methodology is flawed because he has not submitted his findings to peer review, the Chamber notes that the main purpose of such review is to improve the quality of the performance of professionals and to test the standards applied by them. In legal proceedings this is achieved by testing the expertise through cross-examination and presentation of contradicting factual or expert evidence. Parties to the proceedings are not expected to apply standards of peer review, a mechanism which serves in the academic world as a self-regulating system, but can transparently test the evidence of an expert before the Chamber.

²⁶ See also *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, Decision on Expert Reports by Richard Butler, 4 March 2009, paras 13-19; *Prosecutor v. Vujadin Popović et al.*, IT-05-88-T, Decision on Defence Rule 94 bis Notice regarding Prosecution Expert Witness Richard Butler, 19 September 2007, paras 22-28; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Decision on Prosecution's Motions for Admission of Expert Statements, 7 November 2003, para. 30; *Prosecutor v. Krstić*, Case No. IT-98-33-A, Order of the Appeals Chamber granting the Appellant's Oral Rule 115 Motion, 24 November 2003; *Prosecutor v. Krstić*, Case No. IT-98-33-T, Decision on the Testimony of Witness Richard Butler, 30 March 2001.

²⁷ Appeals Chamber Decision on Status of Richard Butler, paras 29-30.

15. As to the Defence submission concerning the lack of transparency in identifying witness Butler's sources and the infringement on the Chamber's competency to determine issues of criminal liability, the Chamber notes that in the absence of specific submissions in this respect, the Defence concerns may be addressed in the course of cross-examination. Furthermore, any challenges to the admissibility of the Reports, in whole or in part, on grounds that they fall outside the scope of his accepted expertise can also be dealt with in cross-examination.

16. With regard to the Defence challenge to witness Butler's evidence on grounds of his alleged lack of impartiality, the Chamber notes that the fact that he has acquired his knowledge on the VRS in the course of his employment with the Prosecution is not, on its own, a sufficient reason to bar him from testifying.²⁸ The Appeals Chamber in the *Popović et al.* and *Nahimana et al.* cases has accepted that "the mere fact that an expert witness is employed or paid by a party does not disqualify him or her from testifying as an expert".²⁹ This is particularly the case given the fact that no indication exists that the expert witness is not aware of his paramount obligation to provide frank and objective advice to the Chamber. In the present circumstances, the Defence has failed to substantiate the allegation made that witness Butler's involvement in the Prosecution's preparation of the present case was such that he should not be allowed to testify as an expert. It has also failed to substantiate the allegation that the Reports are tainted because of the focus in his career on the prosecution of war crimes. It follows that the allegation of bias is unsubstantiated and does not cast doubt on the Chamber's findings as to witness Butler's expertise or on the Reports' probative value. In any event, any further submissions on alleged bias can be explored in the course of cross-examination or addressed by means of an expert opinion in reply.

IV. DISPOSITION

17. For the foregoing reasons, and pursuant to Rule 94 *bis* of the Rules, the Chamber hereby

DECIDES that witness Butler may testify as an expert witness;

DENIES the Defence request to bar the Prosecution from presenting the Reports at trial;

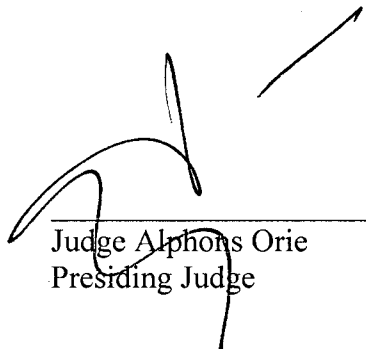
²⁸ See also the Appeals Chamber Decision on Status of Richard Butler, para. 29

²⁹ Appeals Chamber Decision on Status of Richard Butler, paras 20, 23; Nahimana et al. Appeal Judgment, para. 282.

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DEFERS its decision on admission into evidence of the Reports, either in part or in their entirety, until the time of witness Butler's testimony.

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



Judge Alphons Orié
Presiding Judge

Dated this nineteenth of October 2012
At The Hague
The Netherlands

[Seal of the Tribunal]