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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-AR73.2
		Date:	30 January 2008
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Mehmet Güney, Presiding**
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Andrésia Vaz
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Decision of: **30 January 2008**

PROSECUTOR

v.

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

PUBLIC

DECISION ON JOINT DEFENCE INTERLOCUTORY APPEAL CONCERNING THE STATUS OF RICHARD BUTLER AS AN EXPERT WITNESS

The Office of the Prosecutor:

Mr. Peter McCloskey

Counsel for the Appellants:

Mr. Zoran Živanović and Ms. Mira Tapušković for Vujadin Popović
Mr. John Ostojić and Mr. Christopher Meek for Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
Mr. Aleksandar Lazarević and Mr. Miodrag Stojanović 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

1. The Appeals 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 ("Appeals Chamber" and "Tribunal", respectively) is seized of the "Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness" ("Joint Defence Appeal") filed by Vujadin Popović ("Popović"), Ljubiša Beara ("Beara"), Drago Nikolić ("Nikolić") and Vinko Pandurević ("Pandurević", and collectively referred to as "the Appellants") on 6 November 2007 against the "Decision on Defence Rule 94*bis* Notice Regarding Prosecution Expert Witness Richard Butler" issued by Trial Chamber II ("Trial Chamber") on 19 September 2007 ("Impugned Decision").

I. PROCEDURAL HISTORY

2. On 9 June 2006, the Prosecution filed the "Prosecution's Notice of Filing Military Report of Richard Butler" ("Prosecution's Notice").[1] On 2 October 2006, Popović opposed the admission of the report prepared by Richard Butler ("Butler") and challenged the status of Butler as an expert witness in the "Rule 94*bis* Notice Regarding Prosecution Expert Witness Butler" ("Popović Rule 94*bis* Notice").[2] Nikolić, and then Pandurević and Beara, joined the Popović Motion respectively on 11 and 17 October 2006.[3] Meanwhile, on 16 October 2006, the Prosecution filed its response to the Popović Motion.[4] On 14 March 2007, the Trial Chamber recognized the Popović Rule 94*bis* Notice as validly filed and authorized the Prosecution to respond to it and to the Joinder Motions.[5] On 28 March 2007, the Prosecution filed a response,[6] and on 4 April 2007 Popović filed his reply,[7] which was joined by Nikolić on 5 April 2007[8] and by Beara on 11 April 2007.[9]

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[1] Richard Butler's report called "VRS Main Staff Command Responsibility Report" was attached as Annex A to the Prosecution's Notice.

[2] The Popović Rule 94*bis* Notice was attached as Annex A to the "Defence Motion Pursuant to Rule 127(A) for Extention [sic] of Time to File the Rule 94*bis* Notice Regarding Prosecution Expert Witness Richard Butler" filed on 2 October 2006 ("Popović Motion"). On 16 January 2007, Popović filed an "*Addendum* to Popović Defence 'Rule 94 *bis* Notice Regarding Prosecution Expert Witness Richard Butler'".

[3] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Motion on Behalf of Drago Nikolić Joining "Defence Motion Pursuant to Rule 127(A) for Extention [sic] of Time to File the Rule 94*bis* Notice Regarding Prosecution Expert Witness Richard Butler", 11 October 2006, and Motion on Behalf of Vinko Pandurević and Ljubiša Beara Joining "Defence Motion Pursuant to Rule 127(A) for Extention [sic] of Time to File the Rule 94*bis* Notice Regarding Prosecution Expert Witness Richard Butler", 17 October 2006 (collectively "Joinder Motions").

[4] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Prosecution's Response to "Defence Motion Pursuant to Rule 127(A) for Extension of Time to File the Rule 94*bis* Notice Regarding Prosecution Expert Witness Richard Butler", 16 October 2006.

[5] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Defence Motion for Extension of Time to File a Rule 94*bis* Notice, 14 March 2007, p. 4.

[6] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Prosecution's Response to Defence Notice and Motions Regarding Prosecution Expert Witness Richard Butler, 28 March 2007.

[7] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Popović Reply to Prosecution's Response to Defence Notice and Motions Regarding Prosecution Expert Witness Richard Butler, 4 April 2007.

[8] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Motion on Behalf of Drago Nikolić Joining the "Popović Reply to Prosecution's Response to Defence Notice and Motions Regarding Prosecution Expert Witness Richard Butler", 5 April 2007.

3. In parallel, on 31 October 2006, the Prosecution filed confidentially the "Prosecution's Notice of Disclosure of Expert Witness Statements under Rule 94*bis*" which included five additional reports of Butler.[10] In reply, the Defendants reiterated their challenge to the admissibility of Butler's evidence and submitted that they wished to cross-examine him only if their challenge failed.[11]

4. On 19 September 2007, the Trial Chamber issued the Impugned Decision in which it permitted the Prosecution to call Butler to testify as an expert witness, pursuant to Rule 94*bis* of the Rules.[12]

5. On 30 October 2007, the Trial Chamber granted the Joint Certification Request[13] to appeal the Impugned Decision.[14] In the Certification Decision, the Trial Chamber specified that "the evidence of Butler need not be delayed pending a decision from the Appeals Chamber as his evidence can be redacted or disregarded if the Trial Chamber's finding is reversed".[15] On 6 November 2007, the Appellants filed the Joint Defence Appeal in which they requested that the Appeals Chamber quash the Impugned Decision and either refer the matter before the Trial Chamber for adjudication *de novo,* or adjudicate the matter itself and rule that both the testimony and the reports of the Prosecution's proposed expert Richard Butler are inadmissible.[16] On 19 November 2007, the Prosecution filed its response seeking the dismissal of the Joint Defence

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[9] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Motion on Behalf of Ljubiša Beara Joining the Popović Reply to Prosecution's Response to Defence Notice and Motions Regarding Prosecution Expert Witness Richard Butler and the Motion on Behalf of Drago Nikolić Joining the Popović Reply to Prosecution's Response to Defence Notice and Motions Regarding Prosecution Expert Witness Richard Butler, 11 April 2007.

[10] The five additional reports of Butler are: (1) Revised VRS Command Report dated 31 October 2002; (2) Narrative Report dated 15 May 2000; (3) Revised Narrative Report dated 1 November 2002; (4) Chapter 8 Analytical *Addendum* to Srebrenica Military Narrative (Revised) dated 2003; and (5) VRS Command Report dated 9 June 2006.

[11] *See, Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Confidential Joint Defence Response to the Prosecution Notice of Disclosure of Expert Witness Statements under Rule 94 *bis*, 14 November 2006; Popović Response to Prosecution's Notice of Disclosure of Expert Witness Statements under Rule 94 *bis*, 9 November 2006; Confidential Notice on Behalf of Vinko Pandurević and Drago Nikolić Pursuant to Rule 94 *bis*(B), 30 November 2006; Notice on Behalf of Vujadin Popović Joining "Notice on Behalf of Vinko Pandurević and Drago Nikolić Pursuant to Rule 94 *bis*(B)", 1 December 2006; and *see* for the Prosecution's replies: *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Confidential Prosecution's Reply to "Joint Defence Response to the Prosecution Notice of Disclosure of Expert Witness Statements under Rule 94 *bis*", 14 November 2006, and Prosecution's Reply to "Popović Response to Prosecution's Notice of Disclosure of Expert Witness Statements under Rule 94 *bis*", 16 November 2006.

[12] *See* Impugned Decision, para. 32.

[13] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Joint Defence Motion for Certification of the Trial Chamber's Decision on Defence Rule 94*bis* Notice Regarding Prosecution Expert Witness Richard Butler, 26 September 2007, and Motion on Behalf of Drago Nikolić Joining the Joint Motion for Certification of the Trial Chamber's Decision on Defence Rule 94*bis* Notice Regarding Prosecution Expert Witness Richard Butler, 27 September 2007 (collectively referred to as "Joint Certification Request").

[14] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Motions for Certification of Decision on Defence Rule 94*bis* Notice Regarding Prosecution Expert Witness Richard Butler, 30 October 2007 ("Certification Decision").

[15] Certification Decision, p. 2.

[16] Joint Defence Appeal, paras 1, 60.

Appeal.[17] On 23 November 2007, the Appellants requested an extension of five days to file their joint reply.[18] They filed the Joint Defence Reply on 27 November 2007.[19]

II. PRELIMINARY ISSUE

6. On the very day of the expiration of the deadline for filing a reply,[20] the Appellants requested an extension of five days to file a joint reply.[21] In support of this request, the Appellants submit that due to "numerous ongoing commitments" involving the four Defence teams in the Joint Defence Appeal and the need for "extensive coordination" between them to reply to the Prosecution's Response, they were not able to file their reply within the required time limit.[22] The Joint Defence Reply was filed four days after the expiration of the deadline and one day ahead of the extension sought, on 27 November 2007.

7. The Appeals Chamber recalls that "sufficient reasons constituting good cause" pursuant to Rule 127(A)(i) and (B) of the Rules are required to recognize a late filing as validly done.[23] Exceptionally, the Appeals Chamber has, in specific circumstances, found good cause to recognize a late filing as validly done in the interests of justice.[24] In the present case, the Appellants sought an extension of five days to file a joint reply to the Prosecution's Response on the grounds that the Defence teams involved had "numerous ongoing commitments", that some of the members of the Defence teams were absent from The Hague, and that "extensive coordination" between them was needed to reply to the Prosecution's Response. The Appeals Chamber recalls that Counsel "is under an obligation to give absolute priority to observe the time limits as foreseen in the Rules" and that

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[17] Prosecution's Response to Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 19 November 2007 ("Prosecution's Response"), paras 2, 19.
[18] Joint Defence Motion Seeking Variation of Time Limits to File a Reply, 23 November 2007 ("Motion to Extend Time Limit"), para. 6.
[19] Joint Defence Reply to Prosecution's Response to Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 27 November 2007 ("Joint Defence Reply").
[20] The Prosecution's Response was filed on Monday 19 November 2007. Thus, pursuant to Article IV.11. of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the International Tribunal (IT/155/Rev. 3), the deadline for any reply was Friday 23 November 2007, the date at which the Motion to Extend Time Limit was filed.
[21] Motion to Extend Time Limit, para. 6.
[22] Motion to Extend Time Limit. paras 3 and 4.
[23] *Prosecutor v. Milan Lukić et al.*, Case No. IT-98-32/1-AR65.1, Decision on Defence Appeal Against Trial Chamber's Decision on Sredoje Lukić's Motion for Provisional Release, 16 April 2007 ("Lukić Decision"), para. 12.
[24] *See*, for example, Lukić Decision, para. 12, in which the Appeals Chamber found that the Trial Chamber did not abuse its discretion in admitting supplementary material to the Prosecution's response filed one day after the deadline "in light of the relevance of the information contained in the Prosecution [supplementary material]" for the issue before it and the "opportunity afforded to the Appellant to reply to it". *See* also *Prosecutor v. Ljube Boškoski et al.*, Case No. IT-04-82-AR63.5, Decision on Ljube Boškoski's Interlocutory Appeal on Second Motion for Provisional Release, 28 August 2006, para. 9, in which the Appeals Chamber admitted an appeal filed one day after the deadline because it considered it to be in the interests of justice due to the "substantial importance of the Appeal for the rights of the Appellants."

"a trip abroad" does not constitute good cause for an extension of the time limit.[25] Absence from The Hague does not constitute good cause either.

8. The Appeals Chamber considers, however, that the filing of a joint reply by four Defence teams does indeed require coordination and thus time. The Appeals Chamber finds additionally that the matter at issue is of substantial importance and that it is in the interests of justice that the Appeals Chamber be in a position to fully assess the arguments of the parties. Furthermore, the Appeals Chamber notes that the Prosecution did not oppose the requested extension. Considering these particular circumstances, the Appeals Chamber accepts, Judge Liu and Judge Schomburg dissenting, the late filing of the Joint Defence Reply as validly done.

III. STANDARD OF APPELLATE REVIEW

9. Trial Chambers exercise broad discretion as regards admission of evidence.[26] Considering that any decision regarding the admission of evidence must therefore be given a margin of deference, the Appeals Chamber will reverse such decision only when an abuse of discretion is established. The question before the Appeals Chamber is thus not whether it agrees with a decision but whether the Trial Chamber has correctly exercised its discretion in reaching this decision.[27] The Appeals Chamber will overturn a Trial Chamber's exercise of its discretion where it is found to be (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion. The Appeals Chamber will also consider whether the Trial Chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.[28]

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[25] *Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion for Extension of Time, 3 May 2007, p. 3. *See,* also *Prosecutor v. Momir Nikolić,* Case No. IT-02-60/1-A, Decision on Second Defence Motion to Enlarge Time for Filing of Replies, 1 April 2005, p. 4, in which the Pre-Appeal Judge stressed that "other professional commitments of counsel should not have any bearing on the responsibilities of counsel towards their client and the International Tribunal".

[26] *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Delalić et al.* Appeal Judgement"), para. 533; *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-A, Judgement, 16 October 2007, para. 38; *Prosecutor v. Vujadin Popović*, Case No. IT-05-88-AR73.1, Decision on Appeals against Decision Admitting Material Related to Borovčanin's Questioning, 14 December 2007 ("*Popović* Decision on Admission of Transcript"), para. 7; *Prosecutor v. Ferdinand Nahimana et al.*, Judgement, Case No. ICTR-99-52-A, 28 November 2007 ("*Nahimana et al.* Appeal Judgement"), paras 202, 282; *Laurent Semanza v. Prosecutor,* Case No. ICTR-97-20-A, Judgement, 20 May 2005 ("*Semanza* Appeal Judgement"), para. 304.

[27] *Prosecutor v. Slobodan Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 4; *Milutinović* Decision on Review, para. 6; *Popović* Decision on Admission of Transcript, para. 8.

[28] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.6, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007 ("*Prlić* Decision on Admission of Transcript"), para. 8; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-AR108*bis*.2, Decision on the Request of the United States of America for Review, 12 May 2006, para. 6.

IV. SUBMISSIONS OF THE PARTIES AND DISCUSSION

A. Submissions of the Parties

10. The Joint Defence Appeal is based on three grounds: (1) the Trial Chamber erred in law by holding that "concerns related to connections between the witness and the party that calls him or her or bias to the position of one side, are not related to the qualifications of a witness as an expert";[29] (2) "the Impugned Decision is based on a patently incorrect conclusion of fact whereby the Trial Chamber incorrectly concluded [...] that: 'the circumstances of the present case differ from those upon which the *Milutinović* Trial Chamber based the *Milutinović* Oral Decision', pursuant to which Prosecution Investigator Philip Coo was barred from testifying as an expert in that case";[30] (3) the Trial Chamber committed a mixed error of law and fact, which constitutes an abuse of its discretion, in finding that "Butler's experience renders his opinion on this matter of potential value in assisting the Trial Chamber to understand and/or determine issues in dispute" and that Butler's testimony is admissible.[31]

11. In support of their first ground of appeal, the Appellants submit that "the Trial Chamber's determination constitutes an incorrect interpretation of governing law, namely Rules 94*bis* and 89(D) [of the Rules]". They argue that the admissibility of expert evidence is governed by both of these Rules and not only by Rule 94*bis* "as the Trial Chamber suggests".[32] Thus, according to them, even when the criteria of Rule 94*bis* are met, the evidence that an expert witness "may provide may be ruled inadmissible in accordance with Rule 89(D) if its probative value is overborne by its prejudicial effect."[33] The Appellants further argue that the impartiality and independence of an expert witness are "issues which have an impact on the reliability – and therefore the probative value – of his testimony" and that if the "independence and/or impartiality of a proposed expert witness is such that it renders the evidence he can provide unreliable, such evidence must be ruled inadmissible and the expert should not be permitted to testify".[34] The Appellants clarify that they are "not seeking to establish an exclusionary rule related to present or past employees of the Office of the Prosecutor", but contend that due to a number of circumstances – one of them being the lack of independence and impartiality – the proposed testimony of Butler is so unreliable that its probative value is by far outweighed by its prejudicial effect.[35] They conclude that the Trial

[29] Joint Defence Appeal, para. 17, First Ground of Appeal, quoting Impugned Decision para. 26.
[30] Joint Defence Appeal, para. 17, Second Ground of Appeal, quoting Impugned Decision, footnote 53.
[31] Joint Defence Appeal, para. 17, Third Ground of Appeal, quoting Impugned Decision, para. 25.
[32] Joint Defence Appeal, para. 22.
[33] Joint Defence Appeal, para. 23.
[34] Joint Defence Appeal, para. 28.
[35] Joint Defence Appeal, para. 29.

Chamber erred in law by failing to assess arguments "regarding the quasi absolute lack of reliability affecting the proposed expert testimony of Richard Butler."[36]

12. Regarding their second ground of appeal, the Appellants submit that Prosecution Investigator Philip Coo ("Coo") was barred from testifying as an expert witness in the *Milutinović* case and that his proposed expert report was not admitted in evidence following the Trial Chamber's ruling in that case that "the particular circumstances of [Coo's] involvement in the investigation and preparation of the Prosecution case were such that it could not regard his opinion as bearing the appearance of impartiality on which findings crucial to the determination of guilt of criminal charges might confidently be made".[37] The Appellants contend that the Trial Chamber concluded that the circumstances leading to the *Milutinović* Decision differ from those in the present case and that this conclusion constitutes a manifest error of fact.[38] In this respect, the Appellants allege that contrary to the findings in the Impugned Decision, the circumstances in the two cases are very similar and that the only possible difference would be that Butler's "involvement in the investigation and preparation in the Srebrenica related cases was even more pronounced than that of [Coo]".[39] They further aver that the *Milutinović* Decision is especially relevant to the issue at stake since "it is the only case on point in the jurisprudence" of the Tribunal,[40] and since it addresses "the lack of probative value of the proposed expert testimony and the fact that it was outweighed by its prejudicial effect", as it is submitted in the present case.[41]

13. The Appellants' third ground of appeal is twofold. The Appellants first allege that the Trial Chamber erred in concluding that Butler is qualified to testify as a military expert witness on the organization and general procedures of the VRS.[42] In this respect, they submit that it is "obvious from his CV that Richard Butler does not possess any independently acquired knowledge in relation to the VRS."[43] They further point to another decision issued by the Trial Chamber in this case in which the Trial Chamber, in the Appellants' opinion, assessed the experience of another proposed Prosecution expert witness "in the context of his lack of *independently acquired* knowledge in relation to the operation and workings of the VRS Main Staff", and in which it concluded that the Prosecution had not established that the latter possessed "the specialized knowledge necessary to

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[36] Joint Defence Appeal, para. 30.
[37] Joint Defence Appeal, paras 33-34, quoting *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 ("*Milutinović* Decision"), para. 10.
[38] Joint Defence Appeal, paras 35, 36.
[39] Joint Defence Appeal, paras 37, 38.
[40] Joint Defence Appeal, para. 39.
[41] Joint Defence Appeal, paras 40-42.
[42] Joint Defence Appeal, paras 44, 53. "VRS" will be used throughout this Decision to refer to the Republika Srpska Army.
[43] Joint Defence Appeal, paras 47-49.

testify as an expert" on this matter.[44] The Appellants additionally contend that "at best Richard Butler is only able to establish links between various components of the Prosecution evidence, a function which the Professional Judges of the International Tribunal are fully able to perform without his assistance."[45] On this aspect, they emphasize that this was another reason which led the Trial Chamber in the *Milutinović* case not to allow Coo to testify as an expert witness.[46]

14. As second argument of their third ground of appeal, and relying on case-law of the Supreme Court of Canada, the Appellants aver that "an objective assessment of: (a) [Butler's] qualifications [...] (b) the type of conclusions found in his reports; (c) his particular involvement in the investigation and preparation of this case; (d) his lack of independence and impartiality; (e) the time [...] necessary to hear his evidence; (f) the very limited assistance of the evidence he can offer; and (g) the prejudicial effect of his testimony both in terms of the appearance of justice and fairness of the trial proceedings, can only lead to the conclusion that the Trial Chamber should have ruled his proposed expert testimony inadmissible."[47] The Appellants then allege that the Trial Chamber's holding that the admissibility of Butler's reports will be determined after his testimony – thus allowing the Appellants to test the reliability and probative value of his proposed testimony on cross-examination – is "simply insufficient in light of the [...] circumstances and plainly unreasonable."[48]

15. In response, the Prosecution submits that the Appeals Chamber and the Trial Chamber in the *Krstić* case and the Trial Chamber in the *Blagojević and Jokić* case allowed Butler to testify as a military expert witness in Srebrenica-related cases.[49] In this respect, the Prosecution points out that the Appeals Chamber was aware of Butler's background and employment with the Prosecution when he testified before it as an expert witness in the *Krstić* case, but that this was not an impediment to hearing him nor to adopting his testimony.[50] The Prosecution further alleges that "it is not necessary to take into account a witness's objectivity or independence from the parties when determining whether he should be allowed as an expert".[51] It submits that the Appellants have failed to cite any jurisprudence of the Tribunal to illustrate their contention, but only refer to a Canadian decision that is not on point.[52] Referring to a decision of the Trial Chamber in the *Brđanin* case, it

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[44] Joint Defence Appeal, para. 50 (emphasis in original), quoting *Prosecutor v. Vujadin Popović*, Case No. IT-05-88-T, Second Decision Regarding the Evidence of General Rupert Smith, 11 October 2007 ("Decision on General Smith"), pp. 3-4.
[45] Joint Defence Appeal, para. 51.
[46] Joint Defence Appeal, para. 52.
[47] Joint Defence Appeal, paras 56-57.
[48] Joint Defence Appeal, para. 58.
[49] Prosecution's Reponse, paras 3-4, referring to *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T and Case No. IT-98-33-A, and *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-T.
[50] Prosecution's Response, paras 3-4.
[51] Prosecution's Response, para. 5.
[52] Prosecution's Response, para. 5.

argues that according to the Tribunal's consistent case-law, an expert witness is "a person whom by virtue of some specialized knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute" and that "Rule 94 bis of the Rules does not [...] set a higher threshold for the admission of evidence of an expert witness than the standard admissibility requirements enshrined in Rule 89(C) of the Rules".[53] The Prosecution adds, in this respect, that in at least seven instances, Trial Chambers have found that "the fact that the witness has been involved in the investigation and preparation of the Prosecution or defence case or is employed or paid by one party does not disqualify him or her as an expert witness or make the expert statement or report unreliable", or have made similar rulings.[54] Relying on decisions issued by the Trial Chambers in the *Brđanin, Slobodan Milošević* and *Dragomir Milošević* cases, the Prosecution also avers that concerns relating to an expert's independence or impartiality are questions of weight, not admissibility.[55]

16. Concerning the Appellants' arguments connected to the *Milutinović* Decision, the Prosecution first submits that the Trial Chamber was "not bound to follow the *Milutinović* Trial Chamber's findings of fact in relation to one witness, when deciding whether to allow a different witness to testify as an expert."[56] Furthermore, the Prosecution alleges that, contrary to the Appellants' contention, the Trial Chamber did consider the *Milutinović* Decision and found that Butler's circumstances were different from those of Coo.[57] It emphasizes that a similar finding was made by the *Boškoski* Trial Chamber.[58] The Prosecution thus concludes that the Trial Chamber did not abuse its discretion in allowing Butler to testify as an expert witness.[59] The Prosecution additionally contends that the Trial Chamber took into account all relevant facts before concluding that Butler possesses specialized knowledge of the organization and general procedures of the VRS, a relevant issue in this case, and that he can potentially assist the Trial Chamber to understand and/or determine the issues in dispute.[60] Finally, the Prosecution submits that the Judges of the Trial Chamber, as professional judges, are capable of hearing evidence and attributing it appropriate weight or disregarding part or all of it.[61] It goes on stating that there is "no requirement for a Trial

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[53] Prosecution's Response, paras 6-7, quoting *Prosecutor v. Radoslav Brđanin,* Case No. IT-99-36-T, Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown, 3 June 2003 ("*Brđanin* Decision"), pp. 3-4.
[54] Prosecution's Response, para. 8 and footnote 14, quoting *Prosecutor v. Dragomir Milošević,* Case No. IT-98-29/1-T, Decision on Admission of Expert Report of Robert Donia ("*Dragomir Milošević* Decision"), 15 February 2007, para. 8.
[55] Prosecution's Response, para. 9, referring to *Brđanin* Decision, *Dragomir Milošević* Decision and *Prosecutor v. Slobodan Milosević,* Case No. IT-05-87-T.
[56] Prosecution's Response, para. 10.
[57] Prosecution's Response, para. 12.
[58] Prosecution's Response, paras 13-14, referring to *Prosecutor v. Ljube Boškoski et al.,* 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 ("*Boškoski* Decision").
[59] Prosecution's Response, paras 13-14.
[60] Prosecution's Response, para. 15.
[61] Prosecution's Response, para. 16.

Chamber to consider an expert witness's impartiality or independence in order to determine that the probative value of an expert witness's evidence is not outweighed by its prejudicial effect".[62] It further submits that Butler's participation in interviews of witnesses and investigations are matters that can be explored and dealt with by the Defence in cross-examination, and that the Appellants are entitled to submit expert findings and call their own expert witnesses to rebut Butler's testimony.[63]

17. With respect to the issues raised in the first ground of their Joint Defence Appeal, the Appellants reply that the *Brđanin* Decision referred to in the Prosecution's Response is consistent with the issue at stake that is not that "Rule 94*bis* sets a higher threshold but rather that the Trial Chamber did not take Rule 89(D) into account when admitting Mr. Butler as an expert witness".[64] Referring to Trial Chamber decisions in the *Galić* and *Martić* cases, the Appellants submit that reliability is "one of the factors which a Trial Chamber must examine at the admissibility stage", and further emphasize that the Canadian decision referred to in the Joint Defence Appeal "is very much on point".[65] Quoting the *Galić* decision mentioned in the Prosecution's Response, the Appellants further contend that this decision "confirms that the independence and impartiality of a proposed expert witness form part of the reliability criteria which must be assessed at the admissibility stage".[66] They also highlight that the Prosecution omitted to refer to the conclusion that "the involvement in a particular case may be such that the reliability of the opinions of the expert cannot be accepted" when it relied on the *Boškoski* Decision.[67] In this regard, the Appellants allege that the other decisions to which the Prosecution referred "focused *solely* on the employment link and/or the financial relationship between the proposed expert and the Office of the Prosecutor, which is very different from the situation" in the present case.[68] They conclude that contrary to the *Boškoski* Trial Chamber, the Trial Chamber did not take all relevant facts into account when reaching the Impugned Decision.[69]

18. In their reply on the second ground of appeal, the Appellants submit that while the Trial Chamber "appears to have given some consideration" to the *Milutinović* Decision, it committed a "patently incorrect error of fact" and that the Prosecution has not "offered a[n] *iota* of evidence" in response.[70] They also point out that the Trial Chamber did not discuss the differences and/or

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[62] Prosecution's Response, para. 17.
[63] Prosecution's Response, para. 18.
[64] Joint Defence Reply, para. 7.
[65] Joint Defence Reply, paras 9-11, referring to *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Defence's Submission of the Expert Report of Professor Smilja Avramov Pursuant to Rule 94*bis*, 9 November 2006 ("*Martić* Decision of 9 November 2006"), and *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T.
[66] Joint Defence Reply, paras 12-13.
[67] Joint Defence Reply, paras 14-15, quoting *Boškoski* Decision, para. 12.
[68] Joint Defence Reply, para. 16 (emphasis in original).
[69] Joint Defence Reply, paras 17-18.
[70] Joint Defence Reply, paras 23-25.

similarities between the situations of Coo and Butler.[71] As to ground three, after stating that the Appeals Chamber is not bound by the decision of the Appeals Chamber in the *Krstić* case and those of the Trial Chambers in the *Blagojević and Jokić* and the *Krstić* cases, the Appellants submit that the Appeals Chamber admitted Butler's testimony on appeal by consent and thus did not decide on either his qualifications or on the reliability of his evidence.[72] The Appellants finally submit that the Prosecution's response "ignores the fact that a minimum degree of reliability is required at the stage of admission"[73] which the proposed evidence of Butler does not meet.[74]

B. Discussion

1) First Ground of Appeal

19. The bulk of the Joint Defence Appeal consists in challenging the Trial Chamber's finding that "concerns related to connections between the witness and the party that calls him or her or bias to the position of one side, are not related to the qualifications of the witness as an expert".[75] In reaching this conclusion, the Trial Chamber argued that "objectivity and independence are not prerequisites for a witness to be qualified as an expert. The determination to be made at this initial stage is whether the witness has sufficient expertise in a relevant subject area such that the Trial Chamber may benefit from hearing his or her opinion. If [...] the answer to that question is yes, then the question of objectivity, impartiality and independence become relevant to assess the weight to be accorded to that opinion evidence".[76] Considering that this question "relate[s] to the weight that should be given to evidence adduced from the expert witness", the Trial Chamber found that it "can therefore be properly addressed during cross-examination of the expert witness".[77] From that, it also concluded that "the mere fact that the expert witness is or was employed by a party, or testified for a party in other cases, does not disqualify him or her from testifying as an expert witness".[78]

20. In a recent Appeal Judgement issued in the *Nahimana et al.* case, the ICTR Appeals Chamber established that:

> *C'est à la Chambre de première instance de déterminer si, au vu des éléments présentés par les parties, la personne proposée peut être reconnue en qualité de témoin expert. L'expert est tenu de déposer « dans la plus stricte neutralité en respectant l'objectivité scientifique ». La partie qui souhaite contester la partialité d'un témoin expert peut le faire par la voie du contre-interrogatoire, en faisant comparaître*

[71] Joint Defence Reply, para. 26.
[72] Joint Defence Reply, paras 32-33.
[73] Joint Defence Reply, para. 36.
[74] Joint Defence Reply, para. 39.
[75] Impugned Decision, para. 26.
[76] Impugned Decision, para. 26.
[77] Impugned Decision, para. 27.
[78] Impugned Decision, para. 27.

> *ses propres témoins experts ou au moyen d'une contre-expertise. Comme pour tout moyen de preuve présenté, c'est à la Chambre de première instance qu'il revient d'apprécier la fiabilité et la valeur probante du rapport et de la déposition du témoin expert.* [79]

In this Appeal Judgement, the ICTR Appeals Chamber also concurred with the principle set forth in the *Brđanin* Decision 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 witness".[80]

21. As properly pointed out by the Trial Chamber, Rule 94*bis* of the Rules "does not provide specific guidelines on the admissibility of testimony given by expert witnesses, or criteria for the admission of their report".[81] Trial Chambers have established 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 reports meet the minimum standards of reliability; (3) the expert statements or reports are relevant and of probative value; (4) the content of the expert statements or reports fall within the accepted expertise of the expert witness.[82] As the Trial Chamber in this case,[83] Trial Chambers have also ruled that "concerns relating to the Witness' independence and impartiality [...] are matter of weight, not admissibility".[84] Such a statement is consistent with the ICTR Appeals Chamber's finding in the *Nahimana et al.* Appeal Judgement, quoted above, that a party alleging bias on the part of an expert witness may demonstrate the said bias through cross-examination, by calling its own expert witness or by means of an expert opinion in reply.[85]

22. However, like any evidence, expert evidence is subject to the provisions contained in Rule 89(C) and (D) of the Rules. While this Rule grants Trial Chambers a broad discretion in assessing admissibility of evidence they deem relevant, this discretion is not unlimited. A piece of evidence may be so lacking in terms of the indicia of reliability that it is not probative and therefore

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[79] *Nahimana et al.* Appeal Judgement, para. 199 (footnotes omitted). The official English translation is not available yet, but an unofficial translation is provided below for convenience:

> It is for the Trial Chamber to decide whether, on the basis of the evidence presented by the parties, the person proposed can be admitted as an expert witness. The expert is obliged to testify "with the utmost neutrality and with scientific objectivity". 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. Just as for any other evidence presented, it is for the Trial Chamber to assess the reliability and probative value of the expert report and testimony.

[80] *Nahimana et al.* Appeal Judgement, para. 282, quoting *Brđanin* Decision, p. 4.
[81] Impugned Decision, para. 22.
[82] *Dragomir Milošević* Decision, para. 6; *Martić* Decision of 9 November 2006, para. 5; *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Defence's Submission of the Expert Report of Milisav Sekulić Pursuant to Rule 94*bis*, and on Prosecution's Motion to Exclude Certain Sections of the Military Expert Report of Milisav Sekulić, and on Prosecution Motion to Reconsider Order of 7 November 2006, 13 November 2006 ("*Martić* Decision of 13 November 2006"), pp. 3-4.
[83] Impugned Decision, paras 26-27.
[84] *Brđanin* Decision, p. 4; *Dragomir Milošević* Decision, para. 9; *Boškoski* Decision, paras 8, 12; *Prosecutor v. Slobodan Milosević*, Case No. IT-02-54-T, Decision on Admissibility of Expert Report of Kosta Čavoški, 1 March 2006, p. 2; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-PT, Decision on the Defence Motions to Oppose Admission of Prosecution Expert Reports Pursuant to Rule 94*bis*, 1 April 2004, p. 4.

inadmissible. This principle should not be interpreted to mean that definite proof of reliability must necessarily be shown for evidence to be admissible. *Prima facie* proof of reliability on the basis of sufficient indicia is enough at the admissibility stage.[86] The Appeals Chamber notes that in a limited number of instances, Trial Chambers have ruled inadmissible the evidence of a proposed expert witness on the ground that this evidence was so lacking in terms of the indicia of reliability because of lack of impartiality and independence or appearance of bias that it was not probative.[87] Such a determination has to be made on a case-by-case basis.[88] Finally, the Appeals Chamber reemphasizes that the decision by a Trial Chamber to admit evidence does not in any way constitute a binding determination as to its authenticity or credibility. These are matters to be assessed by the Trial Chamber at a later stage in the course of determining the weight to be attached to the evidence in question.[89]

23. In the present case, although the Trial Chamber did not specifically discuss this issue, it is obvious that it considered that there were sufficient indicia of reliability of Butler's evidence. In this respect, the Appeals Chamber notes the Trial Chamber's statement that "the mere fact that the expert witness is or was employed by a party, or testified for a party in other cases, does not disqualify him or her as an expert witness",[90] and its finding that "the circumstances of the present case differ from those upon which the *Milutinović* Trial Chamber based the [*Milutinović* Decision]".[91] The Appeals Chamber further observes that the Trial Chamber ruled that accepting

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[85] *Nahimana et al.* Appeal Judgement, para. 199.

[86] *Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004, para. 22; *Georges Anderson Nderubumwe Rutaganda v. Prosecutor,* Case No. ICTR-96-3-A, Judgement, 26 May 2003 ("*Rutaganda* Appeal Judgement"), paras 33, 266; *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-AR73.2, Decision on Application of Defendant Zejnil Delalić for Leave to Appeal against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, 4 March 1998, para. 20. *See,* also *Prosecutor v. Dario Kordić et al.*, Case No. IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000, para. 24, and *Prosecutor v. Dario Kordić et al.*, Case No. IT-95-14/2-AR73.6, Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and One Formal Statement, 18 September 2000, para. 24.

[87] In the *Akayesu* case, the Trial Chamber dismissed a Defence motion for the appearance of a person accused in another case before the ICTR for crimes related to those in its case, on the ground, *inter alia,* that "an expert must not only be a recognized expert in his field, but must also be impartial in the case" (*Prosecutor v. Jean-Paul Akayesu,* Case No. ICTR-96-4-T, Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness, 9 March 1998 ("*Akayesu* Decision"), p. 2). In the *Milutinović* Decision, the Trial Chamber found that the proposed expert witness was "too close to the team, in other words to the Prosecution presenting the case, to be regarded as an expert" and that "it could not regard his opinion as bearing the appearance of impartiality on which findings crucial to the determination of guilt of criminal charges might confidently be made" (paras 1, 10). *See,* also the three following decisions as illustrations of instances in which such an issue was raised: (1) In the *Boškoski* Decision, the Trial Chamber stated that "the active involvement of a proposed expert witness in the investigation of the case on behalf of the Prosecution is a factor capable of affecting the reliability of that witness' Report and potential evidence [...] The involvement in a particular case may be such that the reliability of the opinions of the expert cannot be accepted." (para. 12); (2) Decision on General Smith, p. 4, footnotes 14, 15; (3) *Martić* Decision of 9 November 2006, para. 10.

[88] In this respect, the Appeals Chamber rejects the Prosecution's suggestion that because Butler already testified as an expert witness in other cases, including before the Appeals Chamber, this automatically means that the Joint Defence Appeal should be dismissed.

[89] *Rutaganda* Appeal Judgement, footnote 63.

[90] Impugned Decision, para. 27.

[91] Impugned Decision, footnote 53; *See,* also Impugned Decision, para.14 and footnote 23.

Butler as an expert witness and calling him to testify does not mean that his reports will be automatically admitted as evidence. It held that such a determination will be made after the direct and cross-examination of the witness and any arguments advanced in support or against.[92] Accordingly, the Appeals Chamber does not find that the Trial Chamber, having considered that Butler's evidence presented sufficient indicia of reliability, erred in law in stating that "concerns related to connections between the witness and the party that calls him or her or bias to the position of one side, are not related to the qualifications of the witness as an expert".[93]

2) Second Ground of Appeal

24. Concerning the Appellants' contention that the Trial Chamber erroneously found that the facts of the present case differ from those leading to the *Milutinović* Decision, the Appeals Chamber agrees with both parties that the Trial Chamber was not bound to follow the finding of the *Milutinović* Trial Chamber in relation to one witness, when deciding that another witness was qualified to testify as an expert in a different case. Furthermore, as acknowledged by the Appellants,[94] the Trial Chamber did indeed consider the *Milutinović* Decision.[95] It was thus within its discretion to depart from it upon concluding that the circumstances in the two cases were different.

25. Concerning the Appellants' argument relating to the Trial Chamber's failure to discuss the differences and/or similarities between the situations of Coo and Butler, the Appeals Chamber recalls that it is well established that Trial Chambers are not required to articulate every step of their reasoning in reaching a particular finding.[96] Based on the foregoing, the Appeals Chamber finds that the Trial Chamber acted within its discretion in concluding that the circumstances in both cases were different.

3) Third Ground of Appeal

26 The Appellants first challenge Butler's qualification to testify as a military expert witness on the organization and general procedures of the VRS, and specifically submit that he does not possess any independently acquired knowledge in relation to this question.

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[92] Impugned Decision, para. 31.
[93] Impugned Decision, para. 26.
[94] Joint Defence Reply, para. 23.
[95] Impugned Decision, footnotes 23, 53.
[96] *See*, for example, *Delalić et al.* Appeal Judgement, para. 481; *Prosecutor v. Radoslav Brđanin,* Case No. IT-99-36-A, Judgement, 3 April 2007, para. 11; *Aloys Simba v. Prosecutor,* Case No. ICTR-01-76-A, Judgement, 27 November 2007, para. 152.

27. The Appeals Chamber recalls that the evidence of an expert witness is meant to provide some specialized knowledge – be it a skill or knowledge acquired through training[97] – that may assist the fact finder to understand the evidence presented.[98] It is established that:

> Expert witnesses are ordinarily afforded wide latitude to offer opinions within their expertise; their views need not be based upon firsthand knowledge or experience. Indeed, in the ordinary case the expert witness lacks personal familiarity with the particular case, but instead offers a view based on his or her specialized knowledge regarding a technical, scientific, or otherwise discrete set of ideas or concepts that is expected to lie outside the lay person's ken.[99]

28. The Trial Chamber found that Butler has the required specialized knowledge based on his experience of over 13 years in the intelligence branch of the United States Army – including over seven years as a Warrant Officer – and on the position of Military Analyst for the Prosecution that he held from 1997 to 2003 that entailed, *inter alia,* providing analysis of the "structure of the Republika Srpska Army forces in Eastern Bosnia, [...] legal and military regulatory authorities, communications and control, combat regulations and doctrine, as well as operational and tactical combat and combat support operations".[100]

29. The Appeals Chamber is of the opinion that the fact that Butler may have acquired his knowledge on the organization and the general procedures of the VRS solely as a result of his six years of employment with the Prosecution – an allegation which is not substantiated by the Appellants – does not in itself affect his qualification as an expert. In this respect, the Appeals Chamber underlines the Trial Chamber's ruling that before admitting Butler's evidence, it will have to determine, *inter alia,* "whether there is transparency in the methods and sources used by the expert witness, including the established or assumed facts on which the expert witness relied".[101] The Appeals Chamber further recalls that firsthand knowledge or experience is not required for qualifying as an expert;[102] thus the Appellants' argument related to Butler's lack of working experience with the VRS is without merit.

30. Concerning the Appellants' contention regarding the Decision on General Smith, the Appeals Chamber finds that the Appellants present a distorted interpretation of the Trial Chamber's

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[97] *Nahimana et al.* Appeal Judgement, para. 198; *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Oral Ruling on Qualification of Expert Witness Mbonyinkebe, 2 May 2005; *Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Oral Decision on the Qualification of Mr. Edmond Babin as Defence Expert Witness, 13 April 2005, para. 5; *Brdanin* Decision, p. 4; *Prosecutor v. Stanislav Galić*, IT-98-29-T, Decision on the Expert Witness Statements Submitted by the Defence, 27 January 2003, p. 3.

[98] *Semanza* Appeal Judgement, para. 303. *See* also *Nahimana et al.* Appeal Judgement, para. 198; *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Casimir Bizimungu's Urgent Motion for the Exclusion of the Report and Testimony of Déo Sebahire Mbonyinkebe (Rule 89(C)), 2 September 2005, para. 11; *Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motion for Exclusion of Expert Witness Statement of Filip Reyntjens, 28 September 2004, para. 8; *Akayesu* Decision, p. 2.

[99] *Semanza* Appeal Judgement, para. 303; *Nahimana et al.* Appeal Judgement, para. 198.

[100] Impugned Decision, para. 24.

[101] Impugned Decision, paras 30-31 (footnotes omitted).

[102] *See, supra,* para. 27.

holding. Contrary to the Appellants' allegations, the Trial Chamber, in this case, did not assess "General Smith's experience in the context of his lack of *independently acquired* knowledge".[103] Moreover, it was perfectly within the Trial Chamber's discretion to find that Butler had the required technical knowledge on the organization and procedures of the VRS while General Smith had not. The Appellants have not shown that the Trial Chamber committed any error in this respect.

31. Concerning the Appellants' argument related to lack of probative value and overriding prejudicial effect, the Appeals Chamber notes the Trial Chamber's holding that organization and general procedures of the VRS are issues that are relevant to this case – a conclusion not disputed by the Appellants – and that "Butler's experience renders his opinion on this matter of potential value in assisting the Trial Chamber to understand and/or determine issues in dispute".[104] The Appellants did not provide the Appeals Chamber with any evidence capable of altering this finding. Regarding concerns related to Butler's independence and impartiality, the Appeals Chamber found above that the Appellants have not demonstrated any error of the Trial Chamber in considering that Butler's evidence presents sufficient indicia of reliability. The extent of Butler's involvement with the Prosecution in the investigation and preparation of this case can be explored during cross-examination, thus giving the Appellants full opportunity to challenge the admissibility of Butler's reports.[105] In this respect, it is worth emphasizing again that the Trial Chamber stated that accepting Butler as an expert and calling him to give evidence does not automatically entail that his reports would be admitted as evidence.[106] It is also noteworthy recalling that Judges of the Tribunal, as professional judges, are able to weigh evidence and consider it in its proper context, or when applicable, to disregard any particular piece of evidence they have heard or read.[107] Furthermore, they are required to write a reasoned decision, which is subject to appeal.[108] The Appeals Chamber also notes that the Appellants do not substantiate their contention related to the type and the nature of the conclusions of Butler's reports. As to the time necessary to hear Butler's evidence, the Appeals Chamber cannot see how it could affect the admissibility of his evidence.

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[103] Joint Defence Appeal, para. 50 (emphasis in original). In the Decision on General Smith, the Trial Chamber considered that the question was "not *whether* General Smith is competent to testify as an expert but, rather, the scope of that expert testimony", and found that the Prosecution had not established that "General Smith possesses the specialized knowledge necessary to testify as an expert witness with regard to the function and operation of the VRS Main Staff or the Command doctrine of the VRS at the relevant time" (pp. 3-4).

[104] Impugned Decision, para. 25.

[105] In a rather similar instance, the Trial Chamber, after having found that the circumstances of the case were not the same as those in the *Milutinović* Decision, stated that "[t]he degree of [the expert witness'] connection with the Prosecution can be explored by the Defence in cross-examination and will be taken into account by the Chamber in assessing the weight to be attached to the evidence of the expert witness. It will be open to both Defence teams to examine the extent to which the involvement of [the expert witness] in the interviewing of witnesses and his subsequent reliance on statements and material obtained with his active participation affected the content of his Report and testimony" (*Boškoski* Decision, para. 12).

[106] Impugned Decision, para. 31.

32. Considering the above, the Appellants have not shown that the Trial Chamber abused its discretion in allowing Butler to testify as an expert witness.

V. DISPOSITION

In light of the foregoing, the Appeals Chamber

DECLARES, Judge Liu and Judge Schomburg dissenting, the Joint Defence Reply as validly filed;

DISMISSES the Joint Defence Appeal;

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

Done this 30th day of January 2008,
At The Hague,
The Netherlands.

Judge Mehmet Güney
Presiding Judge

Judge Liu and Judge Schomburg append a joint partly dissenting opinion.

[Seal of the Tribunal]

[107] *Prlić* Decision on Admission of Transcript, para. 57. *See*, also the Trial Chamber's statement in the Certification Decision, p. 2, that Bulter's evidence "can be redacted or disregarded if the Trial Chamber's finding is reversed".
[108] *Prlić* Decision on Admission of Transcript, para. 57.

JOINT PARTLY DISSENTING OPINION OF JUDGE LIU AND JUDGE SCHOMBURG

1. We fully agree with the outcome of the decision. However, we cannot go along with the majority[1] in recognizing the filing of the Joint Defence Reply "as validly done"[2] even though it was submitted four days after the expiration of the deadline.[3] In doing so the Appeals Chamber sets a precedent applicable to all filing deadlines in that they can be simply ignored by the parties in cases where there is more than one accused.

2. Rules 127(A) and (B) of the Rules of Procedure and Evidence ("Rules") provide that the Appeals Chamber "may, on good cause being shown by motion ... recognize as validly done any act done after the expiration of a time so prescribed on such terms, if any, as is thought just and whether or not that time has already expired." Thus, as a first a step, a party has to demonstrate "good cause" for the Appeals Chamber to consider its late filing.[4] As a second step, the Appeals Chamber has to exercise its discretion and subsequently "may" authorize such a variation.

3. Time limits in the Rules are set to be observed. As stated by the Appeals Chamber in *Prosecutor v. Aleksovski*, "the purpose of the Rules is to promote a fair and expeditious trial."[5] Therefore their observance is an important ingredient in assuring the fairness of the proceedings.[6] Similarly, the ICTR Appeals Chamber held in *The Prosecutor v. Kayishema and Ruzindana* that

> procedural time-time limits are to be respected, and that they are indispensable to the proper functioning of the Tribunal and to the fulfilment of its mission to do justice. Violations of these time-limits, unaccompanied by any showing of good cause, will not be tolerated.[7]

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[1] *See* Decision, para. 8 and Disposition.
[2] Rules 127(A) and (B) of the Rules of Procedure and Evidence; Article IV 11 Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, IT/155 Rev. 3., 16 September 2005.
[3] In this context we note that the Defence filed a request for extension of time only on the day when the deadline for the filing of the reply was to expire. In a recent decision in a different case, the Appeals Chamber has held that "in seeking an extension of time, a party should file its request so as to allow the Appeals Chamber enough time to determine its merits prior to the expiry of the deadline." *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR65.2, Decision on Prosecution Request for Extension of Time, 15 January 2008, p. 2.
[4] There is no alternative to the "good cause" requirement in the Rules, which take precedence over the Practice Direction, which does not impose such a requirement. In the hierarchy of norms, the Rules approved by and amended by the Judges supersede a Practice Direction. Thus, to that end the aforementioned Practice Direction is irrelevant.
[5] *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 19.
[6] This reflects the fundamental right to be tried without undue delay as enshrined *inter alia* in Article 14(3)(c) of the ICCPR and consequently in Article 20(1) of the Statute.
[7] *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Judgement (Reasons), para. 46 (footnotes omitted). We also note footnote 54 of that Judgement, which by referring to Rule 127 of the ICTY Rules of Procedure and Evidence states that "[T]he fact that an act performed after the expiration of a prescribed time may be recognized as validly done illustrates the following principle: timely filing is the rule, and filing after the expiration of a time-limit constitutes late filing, which is normally not permitted. However, *if good cause is shown*, the Rule establishes that despite the expiration of time and tardy filing, an act may be recognized as validly done, as permitted derogation

4. Moreover, although the Appeals Chamber holds in paragraph 8 of the Decision that it would be "in the interests of justice" to consider the contents of a belated Joint Defence Reply, it did not find that the joint motion amounted to good cause justifying the extension. Clearly, such an exception is not foreseen in Rule 127 nor in Rule 48 of the Rules as it is in the interests of justice that a case be heard as expeditiously as possible, irrespective of whether there is a joinder or not. We note that in exceptional cases, the notion of "interests of justice" may go beyond the "good cause" requirement, *e.g.* if it is shown by motion that ignoring the content of a brief would lead to a miscarriage of justice.

5. The mere fact that there is a plurality of accused in one case cannot have any impact on the parties' duty to comply with the time limits. In particular, a joint trial cannot *per se* serve as "good cause." It has to be recalled that the International Tribunal tries individual accused who, in principle, have to bring motions, responses and replies individually. On the one hand, we acknowledge the merits of a joint brief. On the other hand, this cannot justify a departure from the clear time limits set in the Rules in general.

6. Even if the Rules were to allow the recognition of late filings in cases where there is no "good cause", we fail to see why it would be in the interests of justice in this particular case to recognize the Joint Defence Reply. Surely, the argument that the Appeals Chamber must "be in a position to fully assess the arguments of the parties"[8] could apply to each and every case and document filed before it. In the present case, the document in question is a reply, but the Appeals Chamber fails to point out why it is of such a substantial importance to the Appeals Chamber that its exclusion could lead to a miscarriage of justice, that is, that there are compelling reasons to override the time limits in the Rules.[9] Likewise, the consideration that "the Prosecution did not oppose" the late filing cannot on its own influence the decision, as compliance with the Rules cannot possibly be subject to the consent of the parties

7. Furthermore, the decision gives the impression that, as a rule, time limits do not apply to multiple-accused trials. Of course, Defence counsel in multiple-accused cases are allowed to coordinate certain technical aspects of their work including filing joint motions. However, this has to be done in strict compliance with the Rules and the time limits specified therein. According to

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from the usual rule. Thus, the Rule reinforces the principle that procedural time-limits are to be respected." (Italics added for emphasis).

[8] Decision, para. 8.

[9] For example, in *Prosecutor v. Vidoje Blagojević and Dragan Jokić,* Case No. IT-02-06-A, Decision on Motions for Access to Confidential Materials, 16 November 2005, para. 4, in recognizing a reply as validly filed on the basis that it benefits the Appeals Chamber in the resolution of a Motion, the Appeals Chamber clearly pointed out that " it clarifies that Mr Nikolić does not seek access to *ex parte* materials." In the present case no such showing was made, nor was there any finding on the part of the Appeals Chamber that the reply rebutted any of the arguments in the Prosecution's response.

the Appeal Chamber's jurisprudence, Counsel assigned to represent accused at this Tribunal are expected to organise their work schedules in order to meet their obligations to respect the time limits for filings on appeals laid down in the Practice Direction.[10] Thus, it is against the interests of justice to allow late filings of briefs and other documents solely because there is more than one accused. Each submission of an individual accused has to be assessed on its own merits in order to grant the individual a fair trial. Furthermore, the Appeals Chamber fails to consider that each Defence counsel has to work solely in the interests of his own client, which at times may be in conflict with the interests of co-accused. A "joint defence" as such is not foreseen under the Rules;[11] indeed in some jurisdictions it is explicitly prohibited because a conflict of interest is presumed by law.[12] Thus, a "joint defence" cannot serve to justify "good cause" or "the interests of justice."

8. In conclusion, the time limit in the Rules in the present case was not respected, nor was good cause shown. Although the Appeals Chamber has in the past allowed late filings on the basis that they are of substantial importance in the interests of justice, that was meant to be limited to exceptional cases where ignoring a submission would amount to a miscarriage of justice. This exception is not justified in the present case, and it is our view that the flexibility displayed by the Appeals Chamber in the present case may render all time limits in the Rules meaningless in all cases where there is more than one accused.

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

Dated this thirtieth day of January 2008,
At The Hague, The Netherlands.

Liu Daqun
Judge

Wolfgang Schomburg
Judge

[Seal of the International Tribunal]

[10] *Prosecutor v. Rasim Delić*, Case No. IT-04-83-AR72, Decision on Interlocutory Appeal Challenging the Jurisdiction of the Tribunal, 8 December 2005, para. 3.
[11] *See e.g.* Article 16(G) of the Directive on the Assignment of Defence Counsel (Directive No. 1/94), IT/73/Rev.11, as amended 29 June 2006.
[12] *Cf.* Section 146 of the German Code of Criminal Procedure (Strafprozeßordnung), which stipulates that "Defence counsel may not appear for more than one person accused of the same offense. In a single proceeding he may also not appear for more than one person accused of different offenses." (unofficial translation).