



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: 19 September 2007

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: 19 September 2007

PROSECUTOR

v.

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

PUBLIC

**DECISION ON DEFENCE RULE 94 *BIS* NOTICE REGARDING
PROSECUTION EXPERT WITNESS RICHARD BUTLER**

Office of the Prosecutor

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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

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 “Rule 94 *bis* Notice Regarding Prosecution Expert Witness Richard Butler” filed by Popović on 2 October 2006, and hereby renders its decision thereon.

I. INTRODUCTION

A. Procedural Background

1. On 9 June 2006, following an oral order issued by the pre-trial Judge,¹ the Prosecution filed the “Prosecution’s Notice of Filing Military Report of Richard Butler”, attaching as Annex A the “VRS Main Staff Command Responsibility Report” (“First Prosecution Notice”).
2. On 2 October 2006, Popović filed a “Defence Motion Pursuant to Rule 127(A) for Extension of Time to File the Rule 94 *bis* Notice Regarding Prosecution Expert Witness Richard Butler” with Annexes A and B (“Popović Motion”), in which Popović requests the Trial Chamber to recognise as validly filed the notice pursuant to Rule 94 *bis* of the Rules of Procedure and Evidence (“Rules”) opposing the acceptance of the report prepared by Richard Butler (“Butler”) and challenging the status of Butler as an expert witness (“Popović Rule 94 *bis* Notice”), which is attached in Annex A.²
3. On 11 November 2006, Nikolić filed the “Motion on Behalf of Drago Nikolić Joining ‘Defence Motion Pursuant to Rule 127(A) for Extension of Time to File the Rule 94 *bis* Notice Regarding Prosecution Expert Witness Richard Butler’” (“Nikolić Motion”), and on 17 October 2006, Pandurević and Beara filed the “Motion on Behalf of Vinko Pandurević and Ljubiša Beara Joining ‘Defence Motion Pursuant to Rule 127(A) for Extension of Time to File the Rule 94 *bis* Notice Regarding Prosecution Expert Witness Richard Butler’” (“Pandurević and Beara Motion”), in which Nikolić, Pandurević and Beara joined the Popović Motion,³ and raised additional arguments in support of the Popović Rule 94 *bis* Notice.⁴

¹ T. 126 (4 April 2006).

² Popović Motion, paras. 1–2, Annex A, Annex B. On 16 January 2007, Popović filed the “*Addendum* to Popović Defence ‘Rule 94 *bis* Notice Regarding Prosecution Expert Witness Richard Butler’” with Annex A (“*Addendum* to Popović Defence Rule 94 *bis* Notice”), in which he raised additional submissions with respect to his objection to Butler Report and the qualification of Butler as an expert witness. *Addendum* to Popović Defence Rule 94 *bis* Notice, pp. 2–3, Annex A.

³ Nikolić Motion, para. 2; Pandurević and Beara Motion, paras. 1–2; Pandurević and Nikolić Rule 94 *bis* Notice, para. 19.

⁴ See Section II *infra*.

4. On 16 October 2006, the day before the filing of the Pandurević and Beara Motion, the Prosecution filed the “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”.”

5. On 14 March 2007, the Trial Chamber rendered the “Decision on Defence Motion for Extension of Time to File a Rule 94 *Bis* Notice”, in which, pursuant to Rule 127(A), the Chamber recognised the Popović Rule 94 *bis* Notice, joined by Nikolić, Pandurević and Beara, as validly filed, and ordered that the Prosecution may file a response to the Popović Rule 94 *bis* Notice, as well as to the arguments submitted by Nikolić, Pandurević and Beara in their respective Motions, no later than 14 days after the filing of this decision.

6. On 28 March 2007, the Prosecution filed a response, which included a request to exceed the regular word limit.⁵ On 4 April, Popović filed the “Popović Reply to Prosecution’s Response to Defence Notice and Motions Regarding Prosecution Expert Witness Richard Butler” (“Popović Reply”), which was joined by Nikolić and Beara.⁶

7. Also related to the Rule 94 *bis* Notice, on 31 October 2006, the Prosecution filed confidentially the “Prosecution’s Notice of Disclosure of Expert Witness Statements under Rule 94 *bis*” (“Second Prosecution Notice”), which included notice of an additional five reports of Butler that were not included in the First Prosecution Notice. On 14 November 2006, all seven Accused filed confidentially the “Joint Defence Response to the Prosecution Notice of Disclosure of expert Witness Statements under Rule 94 *bis*” (“Joint Defence Response”). On 21 November 2006, the Prosecution filed confidentially the “Prosecution’s Reply to ‘Joint Defence Response to the Prosecution’s Notice of Disclosure of Expert Witness Statements under Rule 94 *bis*’”. Furthermore, on 9 November 2006, Popović filed the “Popović Response to Prosecution’s Notice of Disclosure of Expert Witness Statements under Rule 94 *bis*”, and on 16 November 2006, the Prosecution filed the “Prosecution’s Reply to ‘Popović Response to Prosecution’s Notice of Disclosure of Expert Witness Statements under Rule 94 *bis*’”. On 30 November 2006, Pandurević and Nikolić filed a confidential “Notice on Behalf of Vinko Pandurević and Drago Nikolić Pursuant to Rule 94 *bis*(B)”

⁵ Prosecution’s Response to Defence Notice and Motions Regarding Prosecution Expert Witness Richard Butler (“Prosecution Response”), paras. 1–2.

⁶ On 5 April 2007, Nikolić filed 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’” (“Nikolić Reply”), and on 11 April 2007, Beara filed the “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’” (“Beara Reply”), in which Nikolić and Beara joined the Popović Reply. Nikolić Reply, para. 2; Beara Reply, paras. 3–4.

(“Pandurević and Nikolić Rule 94 *bis* Notice”), which Popović joined on 1 December 2006.⁷ On 6 March 2007, the Trial Chamber rendered the “Decision Regarding Prosecution’s Rule 94 *bis* Notice”, which dealt with only procedural matters and not with submissions regarding the status of Butler as an expert witness and the acceptance of the reports prepared by him. These submissions, which are relevant to the current decision, are mentioned and considered below.

B. Preliminary Issue

8. Some of the Accused’s submissions regarding the report(s) prepared by Butler were argued pursuant to the filing of the First Persecution Notice, which included notice of one report of Butler, and prior to the filing of the Second Prosecution Notice, which included notice of an additional five reports of Butler.⁸ The Trial Chamber will treat all these submissions as referring to all six reports of Butler,⁹ and, unless indicated otherwise, will use the general term “Butler Report” to refer to these six reports.

II. SUBMISSIONS

9. Popović, Beara, Nikolić and Pandurević challenge the qualifications of Butler as an expert and the relevance and/or admissibility of the Butler Report,¹⁰ for the reasons detailed below. Popović, Pandurević and Beara submit that Butler need not be excluded as a fact witness, while Nikolić argues that Butler should not be heard either as an expert or as a fact witness.¹¹ If the Trial Chamber rules that Butler can testify, Popović, Beara, Nikolić and Pandurević request that Butler should be available for cross-examination.¹²

10. The Prosecution opposes the challenges to the qualifications of Butler as an expert and the relevance and/or admissibility of the Butler Report,¹³ for the reasons detailed below.

⁷ 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 (“Popović Notice of Joinder”).

⁸ See Joint Defence Response, para. 10; Popović Response to Prosecution’s Notice of Disclosure of Expert Witness Statements under Rule 94 *bis*, paras. 1–5; Pandurević and Nikolić Rule 94 *bis* Notice, para. 16, Annex A, pp. 1–3.

⁹ The six reports prepared by Butler are: (1) VRS Command Report dated 5 April 2000; (2) Revised VRS Command Report dated 31 October 2002; (3) Narrative Report dated 15 May 2000; (4) Revised Narrative Report dated 1 November 2002; (5) Chapter 8 Analytical *Addendum* to Srebrenica Military Narrative (Revised) dated 2003; and (6) VRS Command Report dated 9 June 2006.

¹⁰ Popović Motion, para. 2; Popović Rule 94 *bis* Notice, paras. 21–23; Nikolić Motion, para. 6; Pandurević and Beara Motion, paras. 2–4; Pandurević and Nikolić Rule 94 *bis* Notice, para. 17; Nikolić Reply, para. 6; Beara Reply, pp. 2–3.

¹¹ Popović Rule 94 *bis* Notice, para. 22; Pandurević and Beara Motion, para. 3; Nikolić Motion, paras. 4, 6. If the Trial Chamber allow Butler to testify as a fact witness, Nikolić, Pandurević and Beara submit that his testimony should be strictly restricted accordingly. Nikolić Motion, para. 5; Pandurević and Beara Motion, para. 3.

¹² Popović Rule 94 *bis* Notice, para. 23; Nikolić Motion, para. 5; Pandurević and Beara Motion, para. 4.

¹³ Prosecution Response, para. 3.

A. The Qualifications of Butler as an Expert

1. “Military Analysis” as an expertise

11. Joined by Popović,¹⁴ Nikolić and Pandurević submit that the Trial Chamber should not recognise “Military Analysis” as an expertise, arguing that this term “is little more than a badge of convenience and that the issues addressed by Mr. Butler in his reports do not reach a degree of technical complexity, such that cannot be otherwise understood by the Trial Chamber.”¹⁵ If the Trial Chamber does recognise such expertise, it should be limited “to evidence of a technical military nature beyond the normal comprehension of the Trial Chamber.”¹⁶ The Butler Report, however, does not provide the Trial Chamber with any expertise that is beyond what the Trial Chamber can assess first hand.¹⁷

12. They also argue that the Prosecution has the obligation to provide sufficient information on the qualifications of Butler as an expert in order for the Trial Chamber to establish whether Butler meets the definition of an expert witness.¹⁸

13. The Prosecution opposes these submissions, and argues that Butler qualifies as an expert witness pursuant to the definition applied in the jurisprudence of this Tribunal.¹⁹

2. Impartiality and independence

14. Joined by Beara, Nikolić and Pandurević,²⁰ Popović submits that Butler is not an impartial witness. Butler “cannot possess the necessary objectivity and independence required by an expert witness”, because of (1) his previous role as a Prosecution employee, which included assignment to the Military Analysis Team for the Srebrenica Investigation from April 1997 to November 2003 and “involvement in the investigation and preparation of the Prosecution case at hand”, as well as the questioning of potential witnesses in this case;²¹ and (2) his appearance as an expert witness for

¹⁴ See para. 7 above.

¹⁵ Pandurević and Nikolić Rule 94 *bis* Notice, para. 20.

¹⁶ *Ibid*, paras. 15, 21, 24.

¹⁷ *Ibid*, paras. 15, 23–24. See also Popović Reply, para. 13. A brief synopsis of the contents of the Butler Report is set out at Annex A attached to the Pandurević and Nikolić Rule 94 *bis* Notice.

¹⁸ *Ibid*, para. 15.

¹⁹ Prosecution Response, paras. 5–6.

²⁰ See paras. 3, 6 above.

²¹ Popović Rule 94 *bis* Notice, paras. 9, 14–17, 19; Pandurević and Nikolić Rule 94 *bis* Notice, paras. 15, 18–19. Popović, joined by Nikolić and Beara, clarified that although “at common law, employment or engagement with the party calling an expert witness is not a bar to the admission of their evidence [...] in Butler’s case, the objection transcends the mere fact of his employment.” Popović Reply, paras. 8–9. See para. 6 above. Annex B of the Popović Motion is an analysis of Butler’s participation in witness interviews.

the Prosecution in the cases of *Prosecutor v. Krstić* and *Prosecutor v. Blagojević and Jokić*.²² Popović cites the oral decision rendered by the *Milutinović* Trial Chamber, in which the Trial Chamber ruled out a particular witness as an expert, because he “is too close to the [...] Prosecution presenting the case [...] to be regarded as an expert.”²³

15. The Prosecution submits that no rule or jurisprudence of this Tribunal bar an expert witness from testifying more than once for the same party,²⁴ or bar a person who participated in the questioning of potential witnesses from being an expert witness.²⁵ The jurisprudence of this Tribunal recognises that a Prosecution employee can testify as an expert witness.²⁶ Furthermore, Butler, who resigned from the Prosecution in 2003, and is currently employed by the government of the United States, “cannot be seen as someone whose livelihood depends on the” Prosecution.²⁷

16. The Prosecution also argues that the jurisprudence of this Tribunal treated concerns relating to the independence and impartiality of an expert witness as matters of weight, which can be properly addressed during cross-examination, and not as matters of admissibility.²⁸

B. The Admissibility of the Butler Report

17. Beara, Nikolić, Pandurević and Popović argue that the Butler Report should be ruled inadmissible.²⁹ Joined by Beara and Nikolić,³⁰ Popović submits that the question of the reliability

²² Popović Rule 94 *bis* Notice, paras. 18–19. Popović further submits that in his current employment, Butler continues to be actively involved in the pursuit of Bosnian Serbs who are alleged war crimes suspects, and thus further shows his “bias and his inability to appear as an impartial and disinterested expert witness”. Popović Reply, para. 25; *Addendum* to Popović Defence Rule 94 *bis* Notice, pp. 2–3, Annex A.

²³ Popović Rule 94 *bis* Notice, paras. 10–13 (referring to *Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević and Sreten Lukić*, Case No. IT-08-87-T, T. 840–844 (13 July 2006) (“*Milutinović* Oral Decision”). Popović submits that the *Milutinović* Oral Decision “places a rigorous test upon the impartiality of the expert as one of the cornerstones to admissibility”, and “reflects that at some point the line must be drawn; the dual roles of active investigator and military expert are incompatible.” Popović agrees that “this is a matter that can be judged on a case by case basis”, but submits that this decision “is founded on a very similar, if not identical, factual scenario” to the scenario in the current case, and that the Prosecution did not advance any compelling submission as to why this Trial Chamber should not follow it. Popović Reply, paras. 4, 6. *See also* Pandurević and Nikolić Rule 94 *bis* Notice, paras. 15, 18–19.

²⁴ Prosecution Response, para. 21.

²⁵ *Ibid.*, para. 19.

²⁶ *Ibid.*, para. 8. The Prosecution also argues that contrary to the Accused’s assertion the practice of accepting an expert testimony from previous or current Prosecution employees is common in common law jurisdictions such as the United States, the United Kingdom and Canada. *Ibid.*, paras. 22–29.

²⁷ *Ibid.*, para. 14.

²⁸ *Ibid.*, paras. 9–10 (referring to *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Decision on Prosecution’s Submission of Statement of Expert Witness Ewan Brown (“*Brđanin* Trial Decision”), 3 June 2003, p. 4; *Prosecutor v. Galić*, Case No. IT-98-29-T, Decision on the Expert Witness Statement Submitted by the Defence, 27 January 2003 (“*Galić* Trial Decision of 27 January 2003”), p. 4; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, T. 9965–9966 (9 September 2002)).

²⁹ Popović Rule 94 *bis* Notice, para. 21; Nikolić Motion, paras. 3–4, 6; Pandurević and Beara Motion, para. 2; Popović Reply, paras. 15, 27. *See also* Pandurević and Nikolić Rule 94 *bis* Notice, para. 25.

³⁰ *See* para. 6 above.

and accuracy of the Butler Report is related to the admissibility of the Report, and not to the weight that should be given to it.³¹

18. Nikolić, Pandurević and Popović argue that the Butler Report contains matters which are not within Butler's direct knowledge as well as matters and opinions regarding the criminal liability of the Accused.³² If the Trial Chamber cannot be satisfied that the Butler Report is reliable and accurate, the information contained in the Butler Report cannot assist the Trial Chamber to understand or determine issues in dispute,³³ and casts doubt upon its probative value.³⁴

19. Popović also submits that the fact that reports of Butler have been admitted in previous cases before this Tribunal is irrelevant, because Butler's status as an expert witness was not challenged in these cases.³⁵ Beara and Nikolić join this submission.³⁶

20. Nikolić and Pandurević add that the admission of the Butler Report would infringe upon the rights of the Accused to a fair trial.³⁷ Should the Butler report be regarded by the Trial Chamber as admissible, Nikolić requests the Trial Chamber to delay the admission of the report until the completion of the cross examination.³⁸

21. The Prosecution argues that Trial Chambers of this Tribunal have already held that concerns "relating to the [...] the accuracy of evidence or the extent to which evidence will be helpful to the Trial Chamber are matters of weight, not admissibility, and can be properly addressed during cross-examination".³⁹ The Prosecution also points out that Butler has already testified as an expert witness in the cases of *Prosecutor v. Krstić* and *Prosecutor v. Blagojević and Jokić*,⁴⁰ and that the Butler Report is either identical to or updates previous reports that were admitted in those cases.⁴¹ Barring Butler from testifying would be inconsistent with the decisions of the *Krstić* and *Blagojević and Jokić* Trial Chambers, which "admitted substantially similar reports and testimony as valid

³¹ Popović Reply, para. 15. Popović submits that a similar tendency exist in the United States, United Kingdom and Canada. *Ibid*, paras. 18-23. *See also Ibid*, paras. 12-13, 27. Nikolić submits that such an approach is also compatible with continental law principles as well as the jurisprudence of the Tribunal. Nikolić Reply, para. 4.

³² Pandurević and Nikolić Rule 94 *bis* Notice, paras. 15, 22-24; Popović Reply, para. 11.

³³ Pandurević and Nikolić Rule 94 *bis* Notice, para. 15; Popović Reply, para. 11.

³⁴ Popović Reply, para. 9.

³⁵ *Ibid*, para. 24.

³⁶ Nikolić Reply, para. 2; Beara Reply, paras. 3-4.

³⁷ Pandurević and Nikolić Rule 94 *bis* Notice, para. 25.

³⁸ Nikolić Motion, para. 5.

³⁹ Prosecution Response, paras. 9-10. *See also* para. 16 and fn. 28 above.

⁴⁰ The Prosecution submits that the "same specialised knowledge, skill and training that assisted the Trial Chambers in those cases will assist this Trial Chamber to better understand and determine the issues in this case." Prosecution Response, para. 6.

⁴¹ *Ibid*, para. 15.

expert evidence.”⁴² The Prosecution thus submits that the Trial Chamber should first hear the evidence given by Butler and then decide the weight that should be given to Butler’s testimony and Report.⁴³

III. DISCUSSION

A. The Qualifications of Butler as an Expert

22. Rule 94 *bis* is the general Rule dealing with expert witnesses.⁴⁴ It does not provide specific guidelines on the admissibility of testimony given by expert witnesses, or criteria for the admission of their report.⁴⁵

23. Similarly to other Trial Chambers of the ICTY, this Trial Chamber defines an “expert witness” as a witness that “has at his or her disposal the special knowledge, experience, or skills needed to potentially assist the Trial Chamber in its understanding or determination of issues in dispute”.⁴⁶ One of the distinctions between an expert witness and a fact witness is that due to the qualifications of an expert, he or she can give opinions and draw conclusions, within the confines of his or her expertise, and present them to the Trial Chamber.⁴⁷ Furthermore, while a non-expert witness may be “called to testify about the crimes with which the accused is directly charged”, the testimony of an expert witness with special knowledge in a specific field is “intended to enlighten the Judges on specific issues of a technical nature”.⁴⁸

⁴² *Ibid*, paras. 15–16.

⁴³ *Ibid*, para. 3

⁴⁴ 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/or 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.”

⁴⁵ *Prosecutor v. Bošković 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 (“*Bošković Trial Decision*”), para. 8.

⁴⁶ *Brdanin Trial Decision*, p. 4. *See also* *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Prosecution’s Motions for Admission of Transcripts Pursuant to Rule 92 *bis* (D) and of Expert Reports Pursuant to Rule 94 *bis*, 13 January 2006 (“*Martić Trial Decision of 13 January 2006*”), para. 37; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-PT, Decision on the Defence Motion to Oppose Admission of Prosecution Expert Reports Pursuant to Rule 94 *bis*, 1 April 2004 (“*Strugar Trial Decision*”), p. 4; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Decision on Prosecution’s Motions for Admission of Expert Statements, 7 November 2003 (“*Blagojević Trial Decision*”), para. 19; *Prosecutor v. Galić*, Case No. IT-98-29-T, Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Phillips, 3 July 2002 (“*Galić Trial Decision of 3 July 2002*”), p. 2.

⁴⁷ *Prosecutor v. 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 Trial Decision of 9 November 2006*”), para 9 (quoting *Prosecutor v. Galić*, Case No. IT-98-29-T, Decision on the Prosecution Motion for Reconsideration of the Admission of the Expert Report of Prof Radinović, 21 February 2003, para 9); *Blagojević Trial Decision*, para. 19.

⁴⁸ *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Defence Motion for Exclusion of Portions of Testimony of Expert Witness Dr Alison Des Forges, 2 September 2005 (“*Bizimungu ICTR Trial Decision*”), para. 18

24. According to the material supplied by the Prosecution, Butler served as a Warrant Officer in the intelligence branch of the United States Army from November 1989 until March 1997.⁴⁹ From 1997 until 2003 he worked for the Prosecution as a Military Analyst, and has *inter alia* analysed 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.”⁵⁰

25. The organization and general procedures of the Republika Srpska Army is an issue which is relevant to this case. The Trial Chamber finds 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.

26. The Trial Chamber emphasizes that in its view, 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, as is the case here, the answer to that question is yes, then the questions of objectivity, impartiality and independence become relevant to assess the weight to be accorded to that opinion evidence. Consequently, 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.

27. As indicated, such concerns relate to the weight that should be given to evidence adduced from the expert witness.⁵¹ They can therefore be properly addressed during cross-examination of the expert witness,⁵² and will be evaluated by the Trial Chamber in assessing the weight to be

(quoting *Prosecution v. 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).

⁴⁹ Butler worked as an Intelligence Analyst from January 1982 until January 1988. Prosecution Response, Attachment.

⁵⁰ *Ibid.*, para. 14, Attachment.

⁵¹ *Brdanin* Trial Decision, page 4. See also *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Admissibility of Expert Report of Kosta Čavoški, 1 March 2006 (“*Slobodan Milošević* Trial Decision”), p. 2; *Strugar* Trial Decision, p. 4; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Admission of Expert Report of Robert Donia, 15 February 2007 (“*Dragomir Milošević* Trial Decision”), para. 9; *Boškoski* Trial Decision, para. 8.

⁵² *Brdanin* Trial Decision, page 4; *Slobodan Milošević* Trial Decision, p. 2; *Strugar* Trial Decision, p. 4; *Dragomir Milošević* Trial Decision, para. 9; *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. The right to cross-examine expert witnesses on their expert reports was emphasized in a previous decision of this Trial Chamber, where it stated that “where expert reports have not been accepted by the Accused, the reports may not be admitted against the Accused without permitting the Defence to cross-examine the experts at trial pursuant to Rule 94 bis(C)”. Decision on Prosecution’s Confidential Motion for Admission of Written Evidence in lieu of *Viva Voce* Testimony Pursuant to Rule 92 bis, 12 September 2006, para 53. The Trial Chamber notes that a similar approach was taken by the *Bizimungu* Trial Chamber of the ICTR. The latter held that the fact that the impartiality and independence of an expert witness are yet to be determined by the Trial Chamber does not preclude the Trial Chamber from making determinations in relation to the admissibility of the evidence the witness has given so far, but

accorded to the evidence. As a logical consequence of this position, the Trial Chamber also concludes 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.⁵³

28. The Trial Chamber thus does not find that the concerns regarding the impartiality and independence of Butler disqualify him from testifying as an expert witness.

B. The Admissibility of the Butler Report

29. There are no rules that deal specifically with the admissibility of expert reports, and therefore their admission is subject to the requirements of Rule 89(C), which are (1) relevance, and (2) probative value.

30. In addition, trial chambers examined the following to determine the admissibility of expert reports: (1) whether there is transparency in the methods and sources used by the expert witness,⁵⁴ including the established or assumed facts on which the expert witness relied;⁵⁵ (2) whether the report is reliable;⁵⁶ and (3) whether the contents of the report falls within the accepted expertise of the witness.⁵⁷

31. The Trial Chamber considers that this issue has been raised prematurely. In the normal course, the expert witness Butler will appear to testify. The fact that Butler is accepted as an expert and called to give evidence does not mean that the reports he has prepared automatically are to be admitted before the Chamber as evidence.⁵⁸ As the defence have not agreed to their admission under Rule 94 *bis*, that decision falls to be determined after the direct and cross examination of the witness and any arguments advanced in support or against. In the course of direct examination it

that “the Chamber will weigh the testimony of [the expert witness] in light of her role as an expert witness and in accordance with the right of the accused to cross-examination”. *Bizimungu* ICTR Trial Decision, para 28.

⁵³ See *Martić* Trial Decision of 13 January 2006, para. 39; *Blagojević* Decision, para. 37; *Brdanin* Trial Decision, p. 4. This Trial Chamber is of the view that the circumstances of the present case differ from those upon which the *Milutinović* Trial Chamber based the *Milutinović* Oral Decision.

⁵⁴ *Galić* Trial Decision of 27 January 2003, p. 4 (requiring “a minimum degree of transparency in the sources and methods used” in order to determine whether the expert statement has probative value, and stating that “in determining whether the minimum degree of transparency [...] is met, the Trial Chamber takes into consideration the subject matter of the statement, the type of expertise concerned, as well as whether the statement refers to specific events explicitly charged in the indictment, or to the background information”).

⁵⁵ *Blagojević* Trial Decision, para. 19 (quoting *Galić* Trial Decision of 3 July 2002, p. 2).

⁵⁶ *Dragomir Milošević* Trial Decision, para. 6 (referring to *Martić* Trial Decision of 9 November 2006; *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Defence’s Submission of the Expert Report of Milisav Sekulić, and on Prosecution Motion to Reconsider Order of 7 November 2006, 13 November 2006; *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-T, Decision on Report of Prosecution Expert Klaus Reinhardt, 11 February 2004; *Galić* Trial Decision of 3 July 2002).

⁵⁷ *Dragomir Milošević* Trial Decision, para. 6.

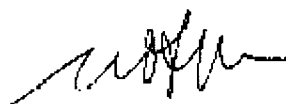
⁵⁸ See *Galić* Trial Decision of 27 January 2003, p. 4 (where the Trial Chamber held that “the mere fact that an expert witness appears in court does not mean that the whole expert witness statement will necessarily be admitted”).

will be incumbent upon the Prosecution to demonstrate that the reports meet the criteria of Rule 89(C) as interpreted by the jurisprudence of the Tribunal. The Accused in turn may challenge admissibility through cross examination. Only then will the Chamber be in a position to properly assess whether the reports of the expert witness should be admitted.

IV. DISPOSITION

32. Disposes of the submissions raised by the Accused and the Prosecution, pursuant to Rule 94 *bis* of the Rules, the Trial Chamber hereby permits the Prosecution to call Butler to testify as an expert witness.

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



Carmel Agius
Presiding

Dated this nineteenth of September 2007
At The Hague
The Netherlands

[Seal of the Tribunal]