



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: 27 March 2008

Original: English

IN TRIAL CHAMBER II

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

Registrar: Mr. Hans Holthuis

Decision of: 27 March 2008

PROSECUTOR

v.

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

PUBLIC

**DECISION ON THE ADMISSIBILITY OF THE NARRATIVES OF
EXPERT WITNESS RICHARD BUTLER**

Office of the Prosecutor

Mr. Peter McCloskey

Counsel for the Accused

Mr. Zoran Živanović and Ms. Mira Tapušковиć 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. Christopher Gosnell for Ljubomir Borovčanin
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Milan Gvero
Mr. Peter Haynes and Mr. Đorđe Sarapa for Vinko Pandurević

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is seised of the “Joint Defence Motion Challenging the Admissibility of the Narratives prepared by Witness Richard Butler” (“Motion”), filed on 6 February 2008, in which the Defence of Popović, Beara, Nikolić, Miletić, Gvero and Pandurević (“Defence”) request the Trial Chamber not to admit into evidence the Srebrenica Military Narrative of 15 May 2000 and the Revised Srebrenica Military Narrative of 1 November 2002 (collectively “Narratives”), prepared by expert witness Richard Butler (“Butler”),¹ and hereby renders its decision thereon.

I. SUBMISSIONS OF THE PARTIES

1. In their Motion, the Defence highlight a number of problems associated with the Narratives which negate their relevance as well as any probative value they may have.² They submit that the Prosecution failed to demonstrate that the Narratives meet the criteria of Rule 89(C).³ According to the Defence, the admission of the Narratives into evidence is consequently not necessary because his testimony suffices to meet the needs of the Trial Chamber concerning the organization and general procedures of the Republika Srpska Army.⁴ They further submit that this is the issue the Trial Chamber recognized as being relevant to this case.⁵

2. The Defence argue specifically that the Narratives cannot be admitted into evidence because of a number of difficulties associated with:

- a) the field of expertise of Richard Butler;
- b) the reliability of the Narratives in relation to the transparency of the method and sources used as well as the involvement of Richard Butler in the investigation of the case;
- c) the nature of the inferences and conclusions in the Narratives which: (i) deal with the very matters upon which the Trial Chamber has to decide; and (ii) are of no assistance to the Trial

¹ Some of the Defence have already challenged the admissibility of the Narratives but the Trial Chamber in its “Decision on Defence Rule 94 *bis* notice regarding Prosecution Expert Witness Richard Butler” of 19 September 2007 (“Butler Decision”) ruled, *inter alia*, that the decision concerning the admissibility of the Butler reports was to be determined after the direct and cross-examination of the witness and any arguments advanced in support or against him and that it would be incumbent on the Prosecution to demonstrate that the reports meet the criteria of Rule 89(C) (Butler Decision, para. 31).

² Motion, paras. 9–59.

³ *Ibid.*, paras. 28, 65.

⁴ Motion, para. 66, Reply, para. 13.

⁵ Motion, para. 34.

Chamber because they are drawn from an incomplete review of the evidence available to the Trial Chamber; and

- d) the conclusions found in the Narratives which go beyond Butler's expertise.⁶

While each one of these difficulties is enough to exclude the Narratives from evidence, the Defence contend that in their totality, the difficulties bar "beyond any doubt" the admissibility of the Narratives into evidence pursuant to Rule 89(C).⁷

3. The Prosecution filed the "Prosecution Response to the Joint Defence Motion Challenging the Admissibility of the Narratives Prepared by Witness Richard Butler ("Prosecution Response") on 11 February 2008. The Prosecution responds that the Narratives are relevant and probative, that the methods and sources used are transparent and reliable and that their content falls within Butler's expertise. Accordingly, the Prosecution requests that the Motion be dismissed in its entirety.⁸

4. The Prosecution submits that the Motion ignores the substantive content of the Narratives which is relevant to the facts in issue in this case.⁹ Butler provides his expert opinion on certain VRS Main Staff, Corps and Brigade military documents, other reliable evidence directly relevant to the "Krivaja 95" operation and the events that followed, and outlines the role of the VRS Main Staff, Drina Corps, Zvornik Brigade, Bratunac Brigade and MUP personnel in these events.¹⁰

5. The Defence reiterated their position in the "Joint Defence Reply to 'Prosecution's Response to the Joint Defence Motion Challenging the Admissibility of the Narratives Prepared by Witness Richard Butler'" ("Reply") on 18 February 2008.¹¹

II. DISCUSSION

1. Introduction

6. There are no rules specifically governing the admissibility of expert reports.¹² The general rules of admissibility set forth in Rules 89(C) and (D) accordingly apply to expert reports. Rule 89(C) provides that the Trial Chamber "may admit any relevant evidence which it deems to have

⁶ *Ibid.*, para. 26 *et seq.*

⁷ *Ibid.*, para. 27, Reply, para. 10

⁸ Prosecution Response, para. 2.

⁹ *Ibid.*, para. 6.

¹⁰ *Ibid.*

¹¹ Reply, paras. 4–31.

¹² *Prosecutor v. Popović et al*, Case No. IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness ("Appeals Chamber Decision"), 30 January 2008, para. 21; Butler Decision, para. 29.

probative value” while Rule 89(D) provides that “A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.”

7. The Trial Chamber concurs with the parties that the Narratives are relevant in content—they relate to the fall of Srebrenica and subsequent events.¹³

8. While the Rules favour the admissibility of evidence, a piece of evidence may be so lacking in terms of the indicia of reliability that it is not probative and therefore not admissible.¹⁴ This is a determination that has to be done on a case-by-case basis.¹⁵ Nevertheless, *prima facie* proof of reliability on the basis of sufficient indicia is enough at the admissibility stage.¹⁶

9. Tribunal jurisprudence has also considered the following requirements for the admissibility of expert statements or reports: “(i) the proposed witness is classified as an expert; (ii) the expert statements or reports meet the minimum standards of reliability; (iii) the expert statements or reports are relevant and of probative value; and (iv) the contents of the expert statements or reports fall within the accepted expertise of the expert witness.”¹⁷

10. The Trial Chamber now moves on to consider the specific challenges made to the admissibility of the Narratives.

2. Limits of expertise

11. The Trial Chamber notes the Defence’s argument that the admissibility of the Narratives should be considered solely in the light of Butler’s expertise as identified by the Trial Chamber.¹⁸ The Defence argue that when an expert report includes conclusions beyond the limits of that expert’s field of expertise, the report should be excluded.¹⁹

12. The Trial Chamber refers to its Butler Decision in which it laid down the limits of Butler’s expertise and notes that, in substantial part, the Narratives fall within this expertise. Wherever the Narratives include opinion which goes beyond the limits established in the Butler Decision, the Trial Chamber will have no regard to that evidence as expert opinion.

¹³ Prosecution Response para. 6, Reply, para. 13.

¹⁴ Appeals Chamber Decision, para. 22, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness (“*Kordić* 21 July 2000 Decision”), 21 July 2000, paras. 24, 27.

¹⁵ Appeals Chamber Decision, para. 22.

¹⁶ *Ibid.* See also *Kordić* 21 July 2000 Decision, paras. 24, 27.

¹⁷ Appeals Chamber Decision, para. 21.

¹⁸ Motion, para. 35, Reply, para. 30.

¹⁹ Motion, paras. 23–25.

3. Minimum standard of reliability—transparency of sources and methodology used

13. As the Appeals Chamber highlighted, in assessing the admissibility of an expert report, consideration must be given to whether there is transparency in the methodology and sources used by the expert witness, including any established or assumed facts on which the expert relied.²⁰ The Defence interpret this to mean that for the purposes of admissibility, the underlying sources for statements made or opinions advanced must be identified with exact references including ERN numbers and exhibit numbers.²¹ They argue that the Trial Chamber must be able to test the reliability of these sources and references for the Narratives to be admitted.²² In the case of the Narratives, they submit that this threshold requirement has not been met.²³

14. The Trial Chamber does not agree. For the purposes of admissibility, the Trial Chamber must be satisfied globally on the basis of the evidence of the expert and the expert report itself, as to a minimum standard of reliability in terms of the transparency of sources and methods. While it is necessary for the expert to outline generally the methods as well as the sources used, it is equally clear that this need not involve detailed references for each and every statement. It is in fact the very nature of such opinion evidence that in addition to specific sources, the expert will apply his or her general knowledge and information gained as a result of the development of expertise in the formation of his or her opinion. Such conclusions and opinions, based on the knowledge and know-how an expert may have gathered over the years, are inherent to the evidence of an expert witness.

15. The Trial Chamber is satisfied that, taking into consideration Butler's expertise, the references included in the Narratives, as well as the explanations provided during the course of his extensive testimony and cross-examination, there are overall sufficient indicia of reliability in terms of sources and methods relied upon for the purpose of admissibility.

16. As to the Defence submissions that the Narratives are based on incomplete, obsolete, or insufficient sources, or that there are errors made in references or quotations, or that the selection of the material cited in the Narratives was biased, the Trial Chamber considers that these are all matters which will go ultimately to the weight to be given to this evidence at the end of trial, not to its admissibility.²⁴

²⁰ Appeals Chamber Decision, para. 29.

²¹ Motion, paras. 12, 46–47.

²² *Ibid.*, paras. 14, 38, Reply, paras. 21–24.

²³ Motion, para. 36.

²⁴ See *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/I-T, Decision on Admission of Expert Report of Robert Donia (“*Milošević Decision*”), 15 February 2007 paras. 8–9; *Prosecutor v. Brdanin*, Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown, Case No. IT-99-36-T (“*Brdanin Decision*”), 3 June 2003, p.

4. The inferences and conclusions made

17. The Defence argue that there are a number of examples of conclusions in the Narratives which invade the jurisdiction of the Trial Chamber and thus are of no assistance and therefore are inadmissible.²⁵ An expert report contains “the expert’s opinions and conclusions on the specific areas which fall within his or her expertise.”²⁶ Generally, however, an expert witness shall not offer his opinion on the criminal liability of the accused—this is a matter that falls within the competence of the Trial Chamber.²⁷ The question now posed is whether Butler usurps the Trial Chamber’s role and adjudicates the case against the Accused.

18. The Trial Chamber has considered the *Prosecution v. Kordić and Čerkez* case (“*Kordić Decision*”) which the Defence cite in support of excluding expert reports when the potential expert had drawn conclusions on the very matters upon which the Trial Chamber is to decide.²⁸ In the *Kordić* case, the expert’s conclusion which the Trial Chamber objected to was the following: “Given the range of his [*Kordić*’s] implied and actual powers, the reasonable conclusion, based on the available evidence, is that he would have been aware of such activities, and his degree of involvement and span of command responsibility extended over all significant armed elements and their major actions.”²⁹

19. The Narratives do not draw any similar conclusions on the ultimate issue—the responsibility of the Accused—in the same way as the expunged expert report in the *Kordić* case did. Nor do the Narratives draw conclusions on the state of mind of any of the Accused or whether there is enough evidence to prove beyond reasonable doubt that the Accused were guilty as charged, as was the case of the expert report considered by the *Blagojević* Trial Chamber.³⁰ After a careful review, the Trial Chamber is not satisfied that the Narratives contain inferences and conclusions on the ultimate issues before it so as to justify their exclusion. However, while the Narratives are proffered to assist the Trial Chamber and will be considered in that context, the Trial Chamber is not bound to accept or rely upon any factual underpinnings put forward or opinions

4; *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. 11.

²⁵ Motion, paras. 17–21, 48–54.

²⁶ *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, para. 12.

²⁷ *Milošević Decision*, para. 11; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Oral Decision of 22 July 2004 (“*Blagojević Decision*”), T. 12110, *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-T, Decision on Report of Prosecution Expert Klaus Reinhardt, 11 February 2004, p. 4.

²⁸ Case No. IT-95-14/2, 28 January 2000.

²⁹ *Kordić Decision*, T. 13270.

³⁰ *Blagojević Decision*, T. 12110.

offered by the expert witness. It remains the Trial Chamber's sole province, duty and power to draw inferences, reach conclusions and find facts in rendering judgment.³¹

5. Application of Rule 89(D)

20. The Trial Chamber finds that there is no fair trial issue which could make it consider excluding the Narratives pursuant to Rule 89(D). It is not satisfied that there would be an added burden for the Defence should the Narratives be admitted since, as the Prosecution has pointed out, they have been on notice of the Narratives since at least February 2005.³²


21. Moreover, as the Appeals Chamber has already pointed out in this case, "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."³³

III. DISPOSITION

22. For the foregoing reasons, pursuant to Rules 89(C), 89(D) and 94 *bis* of the Rules, the Trial Chamber hereby

- a) **DENIES** the Motion and admits the Narratives into evidence in their entirety, and
- b) **ORDERS** the Prosecution to highlight the differences between the Srebrenica Military Narrative of 15 May 2000 and the Revised Srebrenica Military Narrative of 1 November 2002 for the benefit of the Trial Chamber.

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



 O-Gon Kwon
 Judge

Dated this day of 27 March 2008
 At The Hague
 The Netherlands

[Seal of the Tribunal]

³¹ *Cf. Prosecutor v. Kunarac, Kovač and Vuković*, Case Nos. IT-96-23-T & IT-96-23/1-T, Decision on Prosecution's Motion for Exclusion of Evidence and Limitation of Testimony, 3 July 2000, para. 4.

³² Prosecution Response, para. 25.

³³ Appeals Chamber Decision, para. 22.