



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-04-74-T
Date: 25 May 2010
Original: ENGLISH
French

IN TRIAL CHAMBER III

Before: Judge Jean-Claude Antonetti, presiding
Judge Árpád Prandler
Judge Stefan Trechsel
Reserve Judge Antoine Kesia-Mbe Mindua

Registrar: Mr John Hocking

Order of: 25 May 2010

THE PROSECUTOR

v.

Jadranko PRLIĆ
Bruno STOJIĆ
Slobodan PRALJAK
Milivoj PETKOVIĆ
Valentin ĆORIĆ
Berislav PUŠIĆ

PUBLIC

**ORDER TO ADMIT EVIDENCE REGARDING EXPERT WITNESS SLOBODAN
JANKOVIĆ AND EXPERT WITNESS HEINRICH PICHLER**

The Office of the Prosecutor:

Mr Kenneth Scott
Mr Douglas Stringer

Counsel for the Accused:

Mr Michael Karnavas and Ms Suzana Tomanović for Jadranko Prlić
Ms Senka Nožica and Mr Karim A. A. Khan for Bruno Stojić
Mr Božidar Kovačić and Ms Nika Pinter for Slobodan Praljak
Ms Vesna Alaburić and Mr Nicholas Stewart for Milivoj Petković
Ms Dijana Tomašegović-Tomić and Mr Dražen Plavec for Valentin Ćorić
Mr Fahrudin Ibrišimović and Mr Roger Sahota for Berislav Pušić

TRIAL CHAMBER III (“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”),

NOTING the request to admit 9 exhibits tendered by Counsel for the Accused Slobodan Praljak (“Praljak Defence”; “Request of the Praljak Defence”)¹ and the request to admit one exhibit tendered by the Office of the Prosecutor (“Prosecution”)² (“Proposed Exhibit(s)”), all of which pertain to the testimony of Expert Witness Slobodan Janković (“Expert Janković”), who testified pursuant to the procedure in Rule 94 *bis* of the Rules of Procedure and Evidence (“Rules”) from 30 June 2008 through 1 July 2008, concerning the destruction of the Old Bridge of Mostar,

NOTING the “Order for the Production of Additional Evidence and for the Appointment of an Expert Witness for the Chamber” issued publicly by the Chamber *propriu motu* on 9 September 2008 (“Order of 9 September 2008”), in which the Chamber ordered the appointment of an expert tasked with authenticating two of the Proposed Exhibits documented under reference numbers IC 00820³ and IC 00821,⁴ sought for admission in the Request of the Praljak Defence, both of which are video tapes on which the report of Expert Janković (“Janković Expert Report”) is based, and likewise sought for admission in the Request of the Praljak Defence under reference number 3D 032008,⁵

NOTING the 15 October 2008 letter from the Registry of the Tribunal (“Registry”) designating Dr Heinrich Pichler as an expert (“Expert Pichler”) in compliance with the Order of 9 September 2008,

NOTING the “Order on Urgent Deadline for Filing the Report of an Expert Witness for the Chamber”, issued publicly by the Chamber on 14 December 2009 (“Order of 14 December 2009”), in which the Chamber notably recalls having knowledge that

¹ IC 00823.

² IC 00824.

³ This is the video tape provided by television station ORF 2.

⁴ This is the video tape provided by television station RTV Mostar.

⁵ IC 00823.

the original media of the video tape from television station RTV Mostar (IC 00821) was no longer available,⁶

NOTING the expert's final report filed on 22 December 2009 by Expert Pichler ("Pichler Expert Report") in which Expert Pichler specifically indicates that he cannot speak to the authenticity of video recording IC 00821, in that he did not have the original video in his possession,⁷

NOTING the "Order Following the Filing of an Expert Report for the Chamber", issued publicly by the Chamber on 5 February 2010 ("Order of 5 February 2010"), by which the Chamber invited the parties to file their observations with regard to the Pichler Expert Report, no later than 19 February 2010,⁸

NOTING "Slobodan Praljak's Filing Pursuant to the Trial Chamber's Order of 5 February 2010 Regarding the Report of Dr Heinrich Pichler", filed confidentially by the Praljak Defence along with a confidential annex on 19 February 2010 ("Observations of the Praljak Defence"), in which the Praljak Defence submits that the Pichler Expert Report ought to be admitted and that the Pichler Expert Report does not invalidate the conclusions of the Janković Expert Report⁹ and likewise moves to admit correspondence stating that the original video recording of Proposed Exhibit IC 00821 was no longer available, in that the said correspondence would render it possible to confirm that the Janković and Pichler Expert Reports are based on the best available evidence,¹⁰

NOTING the "Prosecution's Observations Regarding Expert Report on the Authenticity of Videotapes IC00820 and IC00821", filed publicly by the Prosecution on 19 February 2010 ("Observations of the Prosecution"), in which the Prosecution

⁶ Order of 14 December 2009, pp. 2 and 3.

⁷ See Pichler Expert Report, p. 2, point 1.1. "Case History".

⁸ Order of 5 February 2010, p. 4.

⁹ See Observations of the Praljak Defence, para. 12.

¹⁰ Observations of the Praljak Defence, para. 27 and Confidential Annex A. To this effect, the Chamber notes that Confidential Annex A contains only a single document whereas the Praljak Defence, in the Observations of the Praljak Defence, seeks the admission of several documents, including the one appearing in Confidential Annex A, referenced in the Order of 14 December 2009. It should likewise be noted that there is a "Redacted Version of Slobodan Praljak's Filing Pursuant to the Trial Chamber's Order of 5 February 2010 Regarding the Report of Dr Heinrich Pichler", filed publicly by the Praljak Defence on 19 February 2010.

submits that the conclusions of the Pichler Expert Report invalidate those of the Janković Expert Report which should not then be admitted,¹¹

CONSIDERING that the Chamber notes, by way of introduction and with reference to the request of the Praljak Defence concerning the admission of the correspondence mentioned in Confidential Annex A, which is annexed to the Observations of the Praljak Defence, that this document was already included in the Order of 14 December 2009; that the Pichler Expert Report tendered for admission states that it was drafted solely on the basis of the evidence provided;¹² that the Chamber therefore considers it unproductive to admit the correspondence listed in Confidential Annex A,

CONSIDERING that the Chamber subsequently observes, in light of the Observations of the Praljak Defence and of the Prosecution, that the admission of the Pichler Expert Report is not disputed and that the Praljak Defence moves for its admission; that in the opinion of the Chamber it is relevant, reliable and carries a certain probative value insofar as it has informed the Chamber as to the authenticity of video recordings IC 00820 and IC 00821 and on how Expert Janković used them to draft his report,

CONSIDERING, therefore, that the Chamber decides it is proper to admit the Pichler Expert Report,

CONSIDERING, moreover, that the Chamber has examined each of the Proposed Exhibits submitted on the basis of criteria for admissibility defined in the “Decision on Admission of Evidence”, rendered publicly by the Chamber on 13 July 2006 (“Decision of 13 July 2006”), and in the “Decision Adopting Guidelines for the Presentation of Defence Evidence”, rendered publicly by the Chamber on 24 April 2008 (“Decision of 24 April 2008”),¹³

CONSIDERING that when it comes to Proposed Exhibit 3D 03208, that is, the Janković Expert Report, the Chamber observes that it was disclosed pursuant to Rule 94 *bis* of the Rules on 9 May 2008 and that the Pichler Expert Report does not call

¹¹ Observations of the Prosecution, paras 14 and 15.

¹² See Pichler Expert Report, p. 2, point 1.1 “Case History”.

¹³ Guideline 8: The Admission of Documentary Evidence through a Witness.

into question the Janković Expert Report in such a way as to affect review of its admissibility,

CONSIDERING that the Chamber recalls that, at this stage, it does not conduct a final evaluation of the probative value of the Proposed Exhibits and that only at the end of the trial will it decide what weight should be assigned to each exhibit admitted into evidence,

CONSIDERING in this regard that the Chamber will specifically take into consideration during final deliberations, the conclusions of the Pichler Expert Report, the various observations of the parties and all of the efforts undertaken by the Chamber, particularly to find the original, unaltered source of video recording IC 00821 in order to evaluate what weight should be assigned to the Janković Expert Report,

CONSIDERING, insofar as Proposed Exhibits IC 00820 and IC 00821 are concerned, that the Chamber finds that the Pichler Expert Report does not call into question their authenticity, rather it provides third-party, independent observations on the use of the report by Expert Janković in reaching conclusions for his own report,

CONSIDERING insofar as Proposed Exhibits 3D 03219, 3D 03220 and 3D 03221 are concerned, that the Chamber observes that these match the *curriculum vitae* of the drafters¹⁴ of the Janković Expert Report and decides that it is proper to admit them as annexes to the Janković Expert Report,

CONSIDERING that the Chamber remarks that Proposed Exhibit 3D 03154 is a letter addressed by Professor Dietrich Hartmann to the Praljak Defence, dated 30 August 2007, in which Professor Dietrich Hartmann offers his opinion regarding the causes of the destruction of the old bridge of Mostar as well as regarding the conclusions of the Janković Expert Report,

CONSIDERING that the Chamber considers that Proposed Exhibit 3D 03154 has the form of an expert report and that it was not submitted in compliance with the requirements of Rule 94 *bis*,

¹⁴ The Janković Expert Report was drafted by Slobodan Janković, Muhamed Sućeska and Aco Šikanić.

CONSIDERING consequently that the Chamber decides by a majority that it is proper to bar the admission of Proposed Exhibit 3D 03154,

CONSIDERING that the Chamber next points out that the Praljak Defence used Proposed Exhibit P 10515 during the re-examination of Expert Janković¹⁵ and that the latter does not appear on the list filed pursuant to Rule 65 *ter* (G) of the Rules (“65 *ter* List”),

CONSIDERING that the Chamber observes that the Praljak Defence did not comply with the provisions of Guideline 8 of the Decision of 24 April 2008¹⁶ with regard to the inclusion on the 65 *ter* List of Proposed Exhibit P 10515,

CONSIDERING that the Chamber does not dispute that the party presenting a witness may request the admission into evidence of documents that are not included in its 65 *ter* List and that it put to the witness during re-examination, inasmuch as these documents were presented to respond to a new topic first raised during cross-examination,

CONSIDERING that the Chamber notes that the Praljak Defence did not explain, either at the hearing or in its request for admission, to what new topic first raised in the cross-examination this Proposed Exhibit related,

CONSIDERING, therefore, that the Chamber finds that the Praljak Defence did not justify the fact that Proposed Exhibit P 10515 was not included on its 65 *ter* List and considers by a majority that it has no choice but to deny the related request for admission,

CONSIDERING that for the other Proposed Exhibits, the Chamber decides to admit into evidence those Proposed Exhibits marked “Admitted” in the Annex attached to this decision, as they were put to Expert Janković and display sufficient indicia of relevance, probative value and reliability,

CONSIDERING that the Chamber decides by a majority not to admit into evidence the Proposed Exhibits marked “Not Admitted” in the Annex attached to this decision,

¹⁵ Hearing transcript in French (“T(F)”), pp. 30219 *et seq.*

¹⁶ Decision of 24 April 2008, para. 26.

as they do not comply with the requirements established by the Decisions of 13 July 2006 and 24 April 2008,

FOR THE FOREGOING REASONS,

PURSUANT TO Rules 54, 89, 94 *bis* and 98 of the Rules,

DENIES the request for admission brought by the Praljak Defence as it touches upon the correspondence appearing in Confidential Annex A attached to the Observations of the Praljak Defence,

PARTIALLY GRANTS the Request of the Praljak Defence regarding evidence put to Expert Witness Janković,¹⁷

GRANTS the request for admission of the Prosecution,

DECIDES that the Pichler Expert Report should be admitted into evidence,

ORDERS the Registry to assign a reference number to the Pichler Expert Report,

DECIDES that the exhibits marked “Admitted” in the Annex attached to this decision should be admitted, **AND**

DENIES in all other respects, by a majority, the Request of the Praljak Defence for the reasons stated in the Annex attached to this Order.

The Presiding Judge of the Chamber is attaching a dissenting opinion to this order.

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

¹⁷ IC 00823.

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this twenty-fifth day of May 2010

At The Hague

The Netherlands

[Seal of the Tribunal]

Annex

Exhibit Number (Digital Order Where Possible)	Party That Proposed Admission of the Exhibit	Admitted/Not Admitted/Marked for Identification (MFI)
3D 03208	Praljak Defence	Admitted
3D 03154 (pages 3D35-1175, 3D35-1176 et 3D35-1177)	Praljak Defence	Not admitted by a majority (Proposed Exhibit resembles expert testimony and should have been tendered in compliance with Rule 94 of the Rules)
3D03219	Praljak Defence	Admitted
3D03220	Praljak Defence	Admitted
3D03221	Praljak Defence	Admitted
P 10515	Praljak Defence	Not admitted by a majority (Proposed Exhibit not found on the 65 <i>ter</i> List of the Praljak Defence, which did not explain at the hearing or in its motion for admission to which new topic first raised in cross-examination this document related, and thereby did not justify its failure to include it beforehand on its 65 <i>ter</i> List)
IC 00820	Praljak Defence	Admitted
IC 00821	Praljak Defence	Admitted
IC 00822	Praljak Defence	Admitted
P 10511	Prosecution	Admitted

Dissenting Opinion of Presiding Judge Jean-Claude Antonetti

The majority has decided to bar the admission of Documents 3D 03154 and P 10515 on grounds that they were not included on the 65 *ter* List or that they were expert opinions subject to the 94 *bis* procedure in the Rules.

The majority states: “[c]onsidering that the Chamber considers that Proposed Exhibit 3D 03154 has the form of an expert report and that it was not submitted in compliance with the requirements of Rule 94 *bis* (...)”.

I do not share this view, because the Praljak Defence never requested that the letter be categorised as an expert report, otherwise the Praljak Defence would have made a request to this effect. On the other hand, it is worthwhile to note that the expert report is the one provided by Mr Janković and that the other documents are attached exhibits supplied by the Praljak Defence in conjunction with this expert report. They are, in a sense, integral parts of the report.

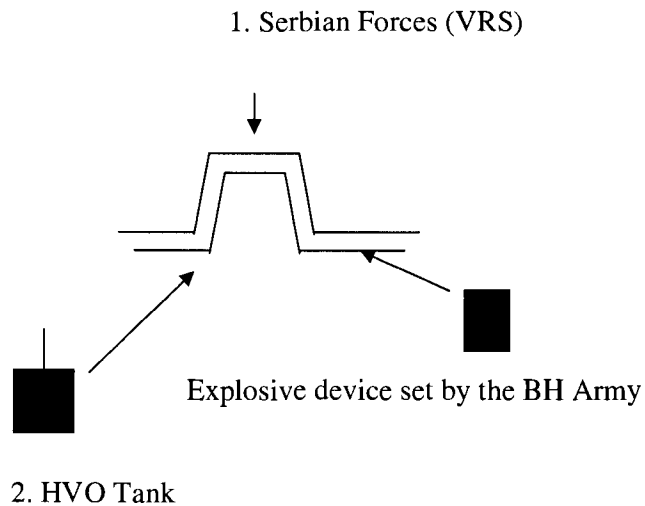
It would be contradictory to accept only the expert report without taking into consideration every other document with a direct bearing upon it.

The majority rejects Document P 10515, due to its absence from the 65 *ter* List.

This line of argument seems to me an insufficient reason for not admitting the said document. A reasonable trier of fact must constantly have at the forefront of his or her mind the intent **that the truth be revealed**, not merely his or her interpretation of the Rules.

The Trial Chamber, when it holds its upcoming **secret** deliberations, will need to adjudicate the matter of the destruction of the Old Bridge and, for purposes of deliberating effectively without causing prejudice to the Prosecution and to the Defence, the judges will need to examine closely the causes of the Bridge’s destruction.

For the time being, using the exhibits adduced, three hypotheses must be considered. These hypotheses are brought together in the following diagramme:



For this reason, excluding Document P 10515 from evidence is tantamount to blocking valuable debate regarding the true perpetrators of the destruction of the **Old Bridge** during closed-door deliberations.

Jean-Claude Antonetti
Presiding Judge

This twenty-fifth day of May 2010
At The Hague
The Netherlands

[Seal of the Tribunal]