

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

Case No. IT-04-74-T
Original: English

TRIAL CHAMBER III

**Before: Judge Jean-Claude Antonetti, Presiding
Judge Arpad Prandler
Judge Stefan Trechsel
Reserve Judge Antoine Kesia-Mbe Mindua**

Registrar: Mr. John Hocking

Filed: 19 February 2010

THE PROSECUTOR

v.

**JADRANKO PRLIĆ
BRUNO STOJIĆ
SLOBODAN PRALJAK
MILIVOJ PETKOVIĆ
VALENTIN ČORIĆ
BERISLAV PUŠIĆ**

- PUBLIC -

**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**

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I. INTRODUCTION

1. Slobodan Praljak ("Accused"), by and through counsel, ("Praljak Defence"), respectfully submits the following filing pursuant to the "Ordonnance Suite au Dépôt du Rapport d'un Témoin Expert de la Chambre" issued 5 February 2010 ("Order").

II. HISTORY

2. The complete history leading up to the Order is too extensive to be fully accounted here. The Praljak Defence respectfully provides the following overview by describing three periods of that history, in hopes that is of some assistance to the Trial Chamber.
3. The first period of time might include [REDACTED], the subsequent prosecution of Slobodan Praljak, and the admission of the edited video evidence when tendered by the Prosecution.¹
4. The second period of time might include the request of the Praljak Defence to a team of independent experts (Dr. Muhamed Sućeska, Ph.D., C.E.; Slobodan Janković, Ph.D., M.E., Prof. retired; Aco Šikanić, Ph.D., M.E.) (collectively "Independent Experts") to analyze the destruction of the Old Bridge according to the *accessible* video tapes. It is unquestioned by any party that the video tapes used by the Independent Experts were the authentic recordings of the broadcasts by TV ORF 2 and TV Mostar ("Available Video"). The Janković Expert Report² concluded 1) that there was no evidence in the Available Video showing tank fire striking the Old Bridge immediately preceding its destruction ("Conclusion 1");³ and 2) that the Available Video was compatible with the thesis that a detonation

¹ E.g. P01040(3:08-6:38), P07431(14:10-14:35; 1:42:30-1:43:40; 1:44:00-1:45:09).

² Analysis of the Destruction of the Old Bridge According to Accessible Video Tapes, ("Janković Expert Report").

³ Janković Expert Report, p. 5.

cord triggering an explosion had been used to destroy the bridge (“Conclusion 2”).⁴ Pursuant to Rule 94 *bis* of the Rule of Procedure and Evidence⁵ Dr. Janković testified and was cross-examined.⁶ The thrust of the Prosecution’s cross-examination dealt only with one aspect of Conclusion 2, asserting that the evidence showing that a detonation cord triggering an explosion was at least a minute before the final collapse of the Old Bridge.⁷ Neither Dr. Janković nor the Praljak Defence contested the thrust of the Prosecution’s cross-examination, as it was incidental to Conclusion 2 and completely irrelevant to Conclusion 1.

5. The third period of time might start with the Trial Chamber’s *proprio motu* efforts to investigate the origins of the Available Video. The Praljak Defence has always welcomed the Trial Chamber’s efforts along these lines,⁸ given the failure of the Prosecution to provide the original videos, the impossibility for the Praljak Defence to find the original videos, and the reliance of the Prosecution on edited videos. The Praljak Defence has always maintained that the Trial Chamber’s efforts along these lines should not delay the admission of the Janković Expert Report. The Trial Chamber’s *proprio motu* efforts eventually resulted in the Expert Report by Heinrich Pichler (“Pichler Expert Report”) submitted in “Registry Submission Pursuant to Rule 33 (B) Concerning Expert Report” filed 21 December 2009 (“Registry Submission”). The Pichler Expert Report is principally noteworthy for 1) the finding that the Available Video used in the Janković Report were indeed the authentic recordings of the broadcasts by TV ORF 2 and TV Mostar;⁹ and 2) the process behind the authoring of the Pichler Report, which demonstrated [REDACTED].

⁴ Janković Expert Report, pp. 7-15.

⁵ Hereinafter, each such rule will simply be designated as a “Rule.”

⁶ T. 30062–30228, 30 June 2008–1 July 2008.

⁷ T. 30145, 30 June 2008.

⁸ See *e.g.* Praljak’s Motion to Presently Admit the Expert Opinion of Dr. Janković on the Old Bridge and Related Video Tapes, and to Expand the Mandate of the Appointed Expert, filed 15 September 2008 (“Request to Expand Pichler’s Mandate”).

⁹ See Pichler Report pp. 9–10.

III. APPLICABLE LAW

6. Rule 89 (C) states in full: “A Chamber may admit any relevant evidence which it deems to have probative value.”
7. Rule 89 (D) states in full: “A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.”
8. Rule 89 (E) states in full: “A Chamber may request verification of the authenticity of evidence obtained out of court.”
9. Rule 94 *bis* concerns the testimony of expert witnesses. It presumes that an expert witness will be called by a party.¹⁰

IV. OBSERVATIONS

A. The Scope of this Filing is Limited.

10. This filing is specifically pursuant to the Trial Chamber’s Order, which stated that the Trial Chamber “INVITE les parties à déposer leurs observations sur le Rapport d’expertise au plus tard le 19 février 2010.”
11. This filing is not a motion. It does not request relief. It does not provide the procedural basis for responsive filings, regardless of title or format. It merely provides the observations of the Praljak Defence, respecting the wishes of the Trial Chamber as expressed in the Order. Every party has the opportunity to provide their own observations pursuant to that Order, so no party can legitimately suggest they had no opportunity to express their views.
12. The principle observations of the Praljak Defence with respect to the Pichler Expert Report are threefold: 1) the Pichler Expert Report supports the admission of the Janković Expert Report; 2) the Pichler Expert Report (including all Annex material included in the Registry Submission) should be admitted; and 3) examination of Dr. Pichler does not appear necessary, but the Praljak Defence should be accorded the same right to examine Dr. Pichler if any other party is granted that right.

¹⁰ Rule 94 *bis* (A) refers to “any expert witness to be *called by a party*” (emphasis added).

B. The Pichler Expert Report Supports the Admission of the Janković Expert Report.

13. The Pichler Expert Report was commissioned to address five points of inquiry.¹¹ Dr. Pichler was evidently frustrated by the failure [REDACTED]. The Praljak Defence shares this frustration, perhaps alongside others in the courtroom. Nonetheless, analysis of the five points of inquiry reveals that the Pichler Expert Report supports the admission of the Janković Expert Report.
14. The first point of inquiry concerns whether or not there is any difference between the material broadcast and the original video material.¹² The Pichler Expert Report clearly indicates that Dr. Pichler was unable to obtain the original video material.¹³ As all parties are aware, [REDACTED]. As a result, the Trial Chamber, Dr. Pichler and the Praljak Defence remain without the original video. The Praljak Defence respectfully submits that this amply demonstrates that the Praljak Defence and the Independent Experts cannot be blamed or impugned. The fault, if fault is to be laid, clearly lies at the feet of those who handled the original video recordings. The Praljak Defence sincerely wishes the originals had been made available at the outset, rather than the chain of events described *supra* in Section II. In short, if the Trial Chamber was waiting to admit the Janković Expert Report until it could fully establish whether the Praljak Defence and the Independent Experts presented the best Available Evidence, that wait should now be over. The Praljak Defence and the Independent Experts' efforts were *bona fide*.
15. The second point of inquiry concerns whether or not there is any difference between the material broadcast and the material to which the Janković Expert Report referred.¹⁴ The Pichler Expert Report contains no evidence that there is any such difference. Rather, it clearly states that "The expert opinion in the file (analysis of the destruction of the old bridge according to accessible video tapes)

¹¹ Pichler Expert Report, p. 4.

¹² *Ibid.*

¹³ *Ibid.*, pp. 4–11.

¹⁴ Pichler Expert Report, p. 4.

contains (as indicated under 3.1) essentially the same pictures as the EVN file.”¹⁵ Again, if the Trial Chamber was waiting to admit the Janković Expert Report until it could evaluate the efforts of the Praljak Defence and the Independent Experts to present the best Available Evidence, that wait should now be over. The Praljak Defence and the Independent Experts’ efforts were *bona fide*. [REDACTED]

16. The third point of inquiry concerns whether or not the sequence of images on each video tape represent a continuous sequence or not. The clear implication of the Pichler Expert Report, an implication uncontested by any party, is that there are discontinuities in the Available Evidence. It remains unknown whether or not there are discontinuities in the original video tape.
17. The primary result of this conclusion is clear: the Prosecution’s reliance on this video evidence to prove individual criminal responsibility with respect to the destruction of the Old Bridge beyond a reasonable doubt is misguided. As to the effect on the admissibility or evidentiary weight of the Janković Expert Report, two issues are worth noting. First, while use of the original video materials might have been ideal, [REDACTED], and noting the inability of Dr. Pichler and the failure of the Prosecution to secure and produce that material, it is nonsensical to ask the impossible—the Janković Expert Report was clearly and unambiguously based on the *Available* Evidence, not unavailable evidence. Second, the use of *Available* Evidence rather than the original, unavailable video material has only a marginal effect on the weight of the conclusion of the Janković Expert Report, and has no effect on admissibility. Conclusion 1 of the Janković Expert Report (that there was no evidence in the Available Video showing tank fire striking the Old Bridge immediately preceding its destruction) remains untouched; *there remains no evidence—video, testimonial, or otherwise—showing tank fire striking the Old Bridge immediately preceding its destruction*. There is no evidence or argument against the fact that there is no video evidence of a tank shell hitting the Old Bridge immediately before it fell. The discontinuities also do not change the conclusion that the Available Video was compatible with the thesis that a detonation cord triggering an explosion had been used to destroy the bridge

¹⁵ EVN is an abbreviation for European Video Network, corresponding to the ORF video. *See* Pichler Expert Report, p. 6.

(Conclusion 2).¹⁶ The Prosecution has done *nothing* to debunk the strong evidence that a detonation cord was used, and *nothing* to show that that detonation cord and explosive was not the last and ultimate cause of the destruction of the Old Bridge. It may have taken time to collapse after the detonation cord was used (from an area not under the control of the HVO), but that is not evidence supporting the Indictment. One could hypothesize, without the continuous video evidence, that there was some proximate cause (subsequent to the detonation cord) of the Old Bridge's final collapse, but that is mere speculation—not the basis for proof beyond a reasonable doubt.

18. The fourth point of inquiry concerns which images may have been removed or added.¹⁷ This assumes, of course, an original video that is continuous, an assumption that has no evidence to substantiate it. The original video may have been continuous, or the video recording may have been halted to change position and zoom. Ultimately, knowing which, if any, [REDACTED], is not currently possible.
19. The fifth point of inquiry¹⁸ asks for an image-by-image analysis of any alteration, removal, or addition, is unanswerable with respect to the original video material, but there is no indication that the Praljak Defence or Independent Experts altered, removed, or added any image—again indicating that the time for admission of the Janković Expert Report has certainly come.
20. The clear implication of the Pichler Expert Report is that the Janković Expert Report should be admitted. The Praljak Defence does not concede that the Pichler Expert Report was necessary for the admission of the Janković Report, but the Praljak Defence does welcome the Pichler Report as a clear vindication of the efforts of the Praljak Defence and the Independent Experts. With the Pichler Expert Report filed, there remains no reason to further delay the admission of the Janković Expert Report, tendered on 9 May 2008, over 21 months ago.

¹⁶ Janković Expert Report, pp. 7-15.

¹⁷ Pichler Expert Report, p. 4.

¹⁸ Pichler Expert Report, p. 4.

C. The Pichler Expert Report Should Be Admitted.

21. The Praljak Defence welcomed the Trial Chamber's effort to find and analyze the original video material.¹⁹ Indeed, the Praljak Defence suggested the Pichler Expert Report should be even broader, covering all of the video evidence pertaining to the Old Bridge, including the evidence tendered by the Prosecution.²⁰
22. Now that the Pichler Expert Report has been submitted, it should be admitted. One might suppose that it has already become part of the record, as it has been officially submitted by the Registry in the Registry Submission of 21 December 2009. For the sake of clarity, however it should be formally admitted as part of the evidentiary record. The Pichler Expert Report (including all Annex material included in the Registry Submission) will assist the Trial Chamber by establishing a clear record.
23. The Praljak Defence respectfully submits that the Pichler Expert Report is probative and relevant because it shows the limits of the evidence relied upon by the Prosecution. While Dr. Pichler was not specifically tasked with evaluating the video material tendered by the Prosecution, despite the Praljak Defence's respectful suggestion that this would be both efficient and equitable, the Pichler Expert Report demonstrates the limitations of the Prosecution's evidence because the source of the video evidence used by the Prosecution and the Independent Experts is identical—the broadcast media. It is not the kind of evidence, with a clear chain of custody and unquestioned provenance, that lends itself to provide the basis for a criminal conviction. With that said, the Praljak Defence is fortunate that the video evidence is clear enough to establish that no tank shell hit the bridge immediately before the collapse, and that there remains video evidence of the possible use of a detonation cord very shortly before the collapse.
24. The Pichler Expert Report also assists the Praljak Defence in refuting any suggestion or implication that the Praljak Defence's efforts and the efforts of the Independent Experts were anything other than *bona fide*.

¹⁹ See Request to Expand Pichler's Mandate.

²⁰ *Ibid.*, paras. 28–31.

25. Finally, the Pichler Expert Report clearly supports the admission of the Janković Expert Report, as explained *supra*, and should be admitted for that reason.
26. The Praljak Defence recognizes that it is an unusual step for the Trial Chamber to commission an expert report. The fact that Rule 94 *bis* does not appear to consider this possibility does not, however, negate the power of the Trial Chamber to commission this report, and of course to admit the report.
27. [REDACTED] should also be formally admitted because it confirms that the Pichler Expert Report and the Janković Expert Report are based on the best available evidence. The Trial Chamber's worthy efforts to uncover the truth have proven very useful.

D. No Examination of Dr. Pichler Is Necessary, But If Examination Is Granted To Any Party, It Should Also Be Granted to the Praljak Defence.

28. Rule 94 *bis* (B) allows for a routine thirty day time period after the disclosure of an expert report to file a request to cross-examine an expert witness. That thirty day period has passed in this instance. The Praljak Defence respectfully submits that there is no clear indication that the Order constitutes a variation in this deadline. The language regarding an "opposing party" is unusual with respect to an Expert Report submitted by the Registry, but that does not create any justification for a variation in the application of the thirty day deadline.
29. Dr. Pichler's activities were relatively transparent, and no evident need for the examination of Dr. Pichler presents itself. That said, if any party requests and is granted time to examine Dr. Pichler, the Praljak Defence should also be granted time to examine Dr. Pichler. The Pichler Expert Report bolsters the credibility of the Janković Expert Report and degrades the credibility of the Prosecution's conclusions based on the video material tendered by the Prosecution. Accordingly, the Praljak Defence has an interest in questioning Dr. Pichler if any other party examines Dr. Pichler.

V. SUMMARY OBSERVATIONS

30. The findings of the Pichler Expert Report support the admission of the Janković Expert Report.

31. There is no reason not to admit the Pichler Expert Report in full.

32. There is no reason to call Dr. Pichler to testify, but if he is so called, the Praljak Defence should be able to examine him as well.

Word Count: 2763

Respectfully submitted,

By



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