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

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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**

Decision of: **6 October 2010**

THE PROSECUTOR

v.

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

PUBLIC

DECISION ON THE PROSECUTION'S MOTION TO RE-OPEN ITS CASE

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

I. INTRODUCTION

1. 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"), is seized of the "Motion to Admit Evidence in Reopening", filed as a public document by the Office of the Prosecutor ("Prosecution") together with public Annexes 1 and 3 to 5 and confidential Annex 2 on 9 July 2010, whereby the Prosecution respectfully requests that the Chamber grant it leave to re-open its case and authorise the admission into evidence of 18 exhibits – including 15 entries from the Notebooks of Ratko Mladić ("Notebooks") and 3 documents which may attest to the authenticity and the reliability of the said Notebooks which were in the possession of the Prosecution during the presentation of its case – and of two statements pursuant to Rule 92 *bis* of the Rules of Procedure and Evidence ("Rules"), which may also attest to the authenticity and the reliability of the said Notebooks ("Motion").[1]

II. PROCEDURAL BACKGROUND

2. On 22 July 2010, counsel for the Accused Milivoj Petković ("Accused Petković"; "Petković Defence") filed as a public document the "Petković Defence Response to the Prosecution Motion to Admit Evidence in Reopening", wherein the Petković Defence respectfully requests that the Chamber deny the Motion ("Response of the Petković Defence").[2] Should the Chamber decide to grant the Motion, the Petković Defence asks the Chamber for leave to cross-examine the two 92 *bis* witnesses whose respective statements the Prosecution has sought to have admitted into the record.[3] Moreover, the Petković Defence has informed the Chamber that it intends to request the re-opening of its

[1] Motion, para. 1 and 28-36. The 15 entries from the Notebooks requested for admission correspond to Exhibits P 11374, P 11375, P 11376, P 11378, P 11379, P 11380, P 11381, P 11382, P 11383, P 11384, P 11385, P 11386, P 11387, P 11389 and P 11390. The 3 other documents bear reference numbers P 11377, P 11266 and P 11388. The two statements tendered for admission pursuant to Rule 92 *bis* of the Rules are: the 92 *bis* Statement of General Manojlo Milovanović, former Chief of the Main Staff and Deputy Commander of the VRS Main Staff, on 26-27 April 2010 and bearing reference number P 11391 as well as the 92 *bis* Statement of Erin Gallagher, analyst from the Office of the Prosecutor, on 7 July 2010, bearing reference number P 11392.
[2] Response of the Petković Defence, para. 31.
[3] Response of the Petković Defence, para. 32.

case for the purpose of admitting certain entries of the Notebooks and, if necessary, to call witnesses to appear.[4]

3. On 23 July 2010, counsel for the Accused Bruno Stojić ("Accused Stojić"; "Stojić Defence") filed as a public document "Bruno Stojić's Response to Prosecution Motion to Admit Evidence in Reopening" wherein the Stojić Defence asks the Chamber to deny the Motion on ground that the criteria governing the procedure for re-opening the case have not been met ("Stojić Defence Response")[5]. Moreover, the Stojić Defence asked the Chamber to exclude the 92 *bis* Statements of Witnesses Manojlo Milovanović and Erin Gallagher from the record on the ground that this procedural option is not the appropriate option for admitting into the record exhibits pertaining to a significant issue debated by the parties and that cross-examination of these two witnesses is now required.[6]

4. On 23 July 2010, counsel for the Accused Berislav Pušić ("Pušić Defence") filed as a public document "Berislav Pušić's Motion to Join Bruno Stojić's Response to Prosecution Motion to Admit Evidence in Reopening", whereby the Pušić Defence joins the Stojić Defence Response ("Joinder of the Pušić Defence").[7]

5. On 23 July 2010, counsel for the Accused Slobodan Praljak ("Accused Praljak"; "Praljak Defence") filed as a public document "Slobodan Praljak's Response to the Prosecution Motion to Reopen", and two confidential annexes therewith, whereby the Praljak Defence requests that the Chamber deny the Motion ("Response of the Praljak Defence").[8] Should the Chamber decide to grant the Motion, the Praljak Defence asks that the Chamber attempt to further authenticate the Notebooks, informs the Chamber that it intends to seek leave to cross-examine the two 92 *bis* witnesses whose respective statements the Prosecution has asked to have tendered into evidence and requests that the Chamber state whether the entries from the Notebooks identified in confidential Annex B to the Response of the Praljak Defence constitute a sufficient basis for a request for admission into evidence under the said Response to the Motion.[9]

6. On 23 July 2010, counsel for the Accused Jadranko Prlić ("Accused Prlić"; Prlić Defence") filed as a public document, along with a confidential annex of more than 100

[4] Response of the Petković Defence, para. 33.
[5] Stojić Defence Response, paras 1 and 2-23.
[6] Stojić Defence Response, paras 1 and 24.
[7] Joinder of the Pušić Defence Response, para. 3.
[8] Response of the Praljak Defence, paras 1 and 33.

pages, "Jadranko Prlić's Response to Prosecution's Motion to Admit Evidence in Re-Opening", whereby the Prlić Defence, while not contesting the "fresh" nature (within the meaning of the Tribunal's case-law concerning the issue of re-opening the case) of the exhibits on behalf of which the Motion was brought ("Prlić Defence Response")[10], nevertheless, considers that the redundant nature of this evidence and the delay which may be encountered if the Chamber decides to grant the Motion would likely infringe the right of the accused to a fair trial.[11]

7. On 26 July 2010, counsel for the Accused Valentin Ćorić ("Ćorić Defence") filed as a public document the "Joinder of Valentin Ćorić in Bruno Stojić's Response to Prosecution Motion to Admit Evidence in Reopening'", whereby the Ćorić Defence joins the Stojić Defence Response ("Joinder of the Ćorić Defence").[12]

8. On 27 July 2010, the Petković Defence filed as a public document the "Petković Defence Corrigendum to its Response to the Prosecution Motion to Admit Evidence in Reopening", wherein the Petković Defence draws the Chamber's attention to a mistake in paragraph 17 of the Response to the Petković Defence and identifies the phrase omitted inadvertently from the said paragraph ("Corrigendum of the Petković Defence").[13]

9. On 28 July 2010, the Prosecution filed as a public document the "Prosecution Combined Reply to the Defence Responses to the Prosecution Motion to Admit Evidence in Reopening", whereby it responds to certain arguments put forward by the Prlić, Stojić, Praljak and Petković Defences and, at the same time, directs the Chamber's attention to the fact that the Joinder of the Ćorić Defence was filed out of time ("Prosecution's Reply").[14]

[9] Response to the Praljak Defence, para. 33.
[10] Response of the Prlić Defence, paras 20-26.
[11] Response of the Prlić Defence, paras 20-26.
[12] Joinder of the Ćorić Defence.
[13] Corrigendum of the Petković Defence.
[14] Prosecution's Reply, paras 1-17. In an email dated 28 July 2010, the Chamber granted the Prosecution's request to file a joint reply to the responses to the Defence teams to its Motion.

III. ARGUMENTS OF THE PARTIES

10. In support of the Motion, the Prosecution asserts that the certain entries from the Notebooks which it seeks to tender into evidence, constitute "fresh" evidence within the meaning of the Tribunal's case-law regarding the re-opening of cases, insofar as it was not in the possession of the Prosecution and could not have been obtained before or during its case-in-chief.[15] In this respect, the Prosecution recalls that the Notebooks were discovered by the Serbian authorities during a search of the domicile of Ratko Mladić's spouse in Belgrade on 23 February 2010, that it promptly analysed the material and informed the Chamber and the defence teams as quickly as possible of its intention to file a motion for the re-opening of its case.[16] Furthermore, the Prosecution points out that Exhibits P 11266, P 11377 and P 11388 whose admission is requested in the Motion also constitute "fresh" evidence within the meaning of the Tribunal's case-law governing the issue of re-opening, despite having been in its possession during its case-in-chief, insofar as their importance only became evident after the Notebooks were discovered, and that they particularly confirm the authenticity and the probative value of the said Notebooks.[17] Moreover, the Prosecution argues that the evidence the Motion it seeks to admit is relevant because it concerns the involvement of the Accused in the achievement of the objectives of the joint criminal enterprise ("JCE"), alleged in the amended Indictment of 11 June 2008 ("Indictment") and, notably, the meetings with the representatives of the Bosnian Serb authorities between October 1992 and February 1994, allegedly attended by the Accused Prlić, Stojić, Praljak and Petković.[18] According to the Prosecution, the collaboration of the Accused with the Bosnian Serb leadership responsible for the crimes committed within the context of the creation of Greater Serbia, shows that the Accused themselves intended to commit crimes in furtherance of their goal of establishing a Croat-dominated Herceg-Bosna.[19] Furthermore, the Prosecution points out that, with a view to establishing the authenticity of the Notebooks, it seeks to tender into evidence the 92 *bis* statements of General Manojlo Milovanović, Deputy Commander of the VRS Main Staff and close associate of Ratko Mladić, and Erin Gallagher, a Prosecution analyst, as well as three exhibits identified in Annex I of the Motion, which it already had in its possession.[20] The Prosecution also argues that a possible re-opening of the its case would not affect the

[15] Motion, para. 16.
[16] Motion, paras 17-19.
[17] Motion, paras 20 and 21.
[18] Motion, para. 22.
[19] Motion, para. 22.

Accused's right to a fair trial [21] because it seeks to tender into evidence only a few pieces of highly probative evidence, and does not propose to call any witnesses.[22] Moreover, the Prosecution points out that the discovery of this "fresh" evidence will not modify the charges against the Accused as contained in the Indictment.[23] Finally, the Prosecution notes that the defence teams have had the Notebooks in their possession for some time and, being thus familiar with its contents, should not require additional time to prepare their respective defence to the proposed entries from the Notebooks.[24]

11. The Prosecution asks the Chamber to authorise the tendering into evidence of the exhibits identified in Annex 1 of the Motion on the ground that they are relevant, probative and fully admissible pursuant to the Tribunal's case-law and, more specifically, the practice of the Chamber.[25] Moreover, regarding the two statements it seeks to admit pursuant to Rule 92 *bis* of the Rules, the Prosecution notes that they meet the admissibility criteria of the said Rule because they do not go to the acts and conduct of the Accused as charged in the Indictment.[26] More specifically, the Prosecution argues that these statements seem to prove the authenticity and the probative value of the Notebooks.[27]

12. In the Response of the Petković Defence, the Petković Defence argues that the relevance of the evidence whose admission the Prosecution is seeking is low, since it does not relate to a fundamental aspect of the Prosecution's case, nor probative, in terms of showing the *mens rea* of the Accused in relation to the allegations contained in paragraphs 15 to 17 of the Indictment.[28] More specifically, the Petković Defence notes that the Prosecution's interpretation of the entries from the Notebooks it seeks to admit is erroneous because it is impossible to conclude that the objectives allegedly harboured by the Croat representatives during their meetings with the representatives of the Bosnian Serb authorities mentioned in these entries were criminal, or that they intended to accomplish them by criminal means.[29] Furthermore, the Petković Defence characterises as "dangerously wrong" the argument of the Prosecution that the collaboration of the

[20] Motion, paras 23-25.
[21] Motion, para. 26.
[22] Motion, para. 26.
[23] Motion, para. 27.
[24] Motion, para. 27.
[25] Motion, paras 28-31 and 36.
[26] Motion, para. 34.
[27] Motion, para. 35.
[28] Response of the Petković Defence, paras 8, 9 and 20.

Accused with the Bosnian Serb leadership responsible for the crimes committed within the context of the creation of Greater Serbia, which follows from the proposed entries, shows that the Accused themselves intended to commit crimes in furtherance of their goal of establishing a Croat-dominated Herceg-Bosna.[30] The Petković Defence points out that the efforts of co-operation, which could characterise the relationship of the Bosnian Croats and Serbs in certain localities, do not allow one to conclude, as posited by the Prosecution, that the Croats and the Serbs were political and military allies.[31] Moreover, the Petković Defence notes that paragraphs 15 to 17 of the Indictment, pertaining to the joint criminal enterprise, contain no allegations of cooperation or collaboration between Bosnian Croats and Serbs, and that the Prosecution is using this Motion to introduce new charges.[32] The Petković Defence adds that the fact that Paragraph 27 of the Indictment characterises Croat-Serb relationships in the period covered by the Indictment as co-operation cannot in itself be invoked to argue that this aspect is so fundamental to the Prosecution's case as to justify the re-opening of the Prosecution's case at such a late stage of the proceedings.[33] Moreover, the Petković Defence notes that this co-operation was not referred to in the initial Indictment.[34] Furthermore, the Petković Defence objects to the reasoning of the Prosecution which uses the Accused's "collaboration" with the Bosnian Serbs to establish the *mens rea*.[35]

13. The Petković Defence considers that the motion to tender into evidence the entries from the Notebooks outside of their context will result in an erroneous interpretation of the contents of the Notebooks in question and, more specifically, of the characteristics of the relations between the three conflicting parties in Bosnia and Herzegovina.[36] Consequently, should the Chamber decide to grant the Motion, the Petković Defence notes that it will file a motion for the re-opening of its case in order to request the tendering into evidence of entries from the Notebooks which will place the exhibits the Prosecution seeks to admit back into context and refute the interpretation of the entries from the Notebooks proposed by the Prosecution.[37]

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[29] Response of the Petković Defence, paras 10 and 11.
[30] Response of the Petković Defence, paras 12-20; Corrigendum of the Petković Defence.
[31] Response of the Petković Defence, para. 14.
[32] Response of the Petković Defence, paras 15 and 16.
[33] Response of the Petković Defence, para. 17; Corrigendum of the Petković Defence.
[34] Corrigendum of the Petković Defence.
[35] Response of the Petković Defence, paras 14, 18 and 19.
[36] Response of the Petković Defence, paras 21-23.
[37] Response of the Petković Defence, paras 23 and 33.

14. Moreover, the Petković Defence notes that the potential probative value of the evidence the Prosecution seeks to admit will not outweigh the need to protect the right of the Accused to a fair trial.[38] The Petković Defence recalls that, in this late stage of the trial, a request for re-opening cannot be justified by a mere wish to reinforce the exhibits already tendered into evidence.[39] Moreover, should the Chamber decide to grant the Motion and contrary to what has been posited by the Prosecution, in the view of the Petković Defence, the trial would be further delayed by approximately four to six months, since the defence teams might well ask for authorisation to cross-examine the two 92 *bis* witnesses, file the motions for the re-opening of their respective cases in order to refute the "fresh" exhibits introduced by the Prosecution and call potential witnesses.[40]

15. In conclusion, the Petković Defence contests the authenticity of the Notebooks and requests that the Chamber, should it decide to grant the Motion, authorise it to cross-examine the two 92 *bis* witnesses.[41] Furthermore, the Petković Defence notes the very subjective character of the words written in notebooks such as the Notebooks in question, and therefore stresses the low probative value of the Notebooks which supports its exclusion under Rule 95 of the Rules.[42]

16. In its Response, the Stojić Defence maintains that the proposed entries of the Notebooks and Exhibits P 11266, P 11377 and P 11388 do not constitute "fresh" elements within the meaning of the case-law of the Tribunal governing the issue of re-opening.[43] The Stojić Defence argues that the Prosecution has not established that it has shown the reasonable diligence required by the Tribunal's case-law because it has failed to explain why it did not make efforts to obtain the Notebooks during its case-in-chief and because a delay of almost two months occurred between the seizure of the Notebooks by the Serbian authorities and the Prosecution's filing of a notice informing the parties of its intention to file a motion for the re-opening of its case.[44] The Stojić Defence more specifically points out that the entries from the Notebooks do not alter the meaning of Exhibits P 11377 and P 11388[45] and that these two exhibits, as well as Exhibit P 11266, do not allow for the

[38] Response of the Petković Defence, paras 24-25 and 27.
[39] Response of the Petković Defence, para. 26.
[40] Response of the Petković Defence, paras 27, 28 and 32.
[41] Response of the Petković Defence, paras 28 and 32.
[42] Response of the Petković Defence, paras 29 and 30.
[43] Stojić Defence Response, paras 1, 2, 9 and 14.
[44] Stojić Defence Response, paras 3-9.
[45] Stojić Defence Response, paras 10 and 11.

authentication of the said Notebooks because they do not show sufficient indicia of reliability of the Notebooks.[46]

17. Furthermore, the Stojić Defence refers to the advanced stage of the proceedings and points out that the opening of the Prosecution's case would cause an additional delay because the defence teams might have to file motions to reopen their respective cases or replies and request a temporary suspension of the trial in order to introduce forensic and graphological analyses of the Notebooks.[47]

18. Moreover, the Stojić Defence points out that the need to guarantee a fair and expeditious trial is greater than the potential probative value of the evidence which is the subject of the Motion.[48] The Stojić Defence recalls that this evidence is similar to the evidence already tendered and considers that its probative value is therefore slight.[49] The Stojić Defence posits that the Notebooks are similar to hearsay and that the Prosecution has not established their relevance and probative value beyond all reasonable doubt, as required in the case of documentary hearsay evidence.[50] Moreover, the Stojić Defence emphasizes that the excerpt corresponding to Exhibit P 11376, whose admission the Prosecution is seeking, concerns discussions about Posavina and Slavonski Brod and that the Prosecution noted in court that this topic was irrelevant.[51]

19. In conclusion, the Stojić Defence recalls that, when a 92 *bis* statement deals with an important issue between the parties, the Chamber must authorise the parties to cross-examine the authors of the statement.[52] Also, inasmuch as these statements concern the relevance and authenticity of the Notebooks which, according to the Prosecution, are relevant in view of the allegations of the existence of a JCE and the participation of the Accused Stojić in this alleged JCE, and as this point constitutes an important issue of discussion between the parties, the Stojić Defence argues that these statements cannot be admitted under Rule 92 *bis* of the Rules and that protecting the rights of the Accused Stojić to a fair trial requires the authors of these statements to be cross-examined.[53]

[46] Stojić Defence Response, paras 12 and 13.
[47] Stojić Defence Response, paras 1, 16 and 17.
[48] Stojić Defence Response, paras 1-2 and 18-23.
[49] Stojić Defence Response, paras 18-20 and 22.
[50] Stojić Defence Response, para. 21.
[51] Stojić Defence Response, para. 21.
[52] Stojić Defence Response, para. 23.
[53] Stojić Defence Response, paras 1 and 24.

20. In the Response of the Praljak Defence, the Praljak Defence posits that the Prosecution has not provided a single piece of evidence with regard to the relevance and the authenticity of the Notebooks, notably concerning their source or chain of custody during the past fifteen years.[54] The Praljak Defence notes that the statement of a member of the Prosecution describing only how the Notebooks were received is insufficient and notes that the Prosecution could have provided the Chamber with a document such as a receipt, statements of other employees of the Office of the Prosecutor corroborating the first one, or the statements of officials of the Republic of Serbia.[55] Furthermore, the Praljak Defence indicates that, in authenticating Ratko Mladić's Notebooks and handwriting, the Prosecution relies solely on the opinion of a person who worked with him and did not call for an expert opinion of a graphologist or try to locate persons who could testify to the events described in the Notebooks.[56] The Praljak Defence considers the evidence, which the Prosecution claims supports the authenticity and reliability of the Notebooks, incomplete and, in any case, asks that prior to issuing a decision on the admission of the Notebooks, the Chamber grant it the opportunity to cross-examine the witnesses whose statements affirm the authenticity and relevance of the Notebooks.[57] It also asks the Chamber to order the Prosecution to produce additional evidence in order to justify the recent discovery of the Notebooks at the Mladić family home.[58]

21. Furthermore, the Praljak Defence notes that the Prosecution failed to ask the Chamber to add the Notebooks to the list of exhibits filed pursuant to Rule 65 *ter* of the Rules ("65 *ter* List") prior to seeking their admission and has provided no justification for this omission.[59] The Praljak Defence contends that the Prosecution is subject to this obligation and must show why the Notebooks are fundamental to the presentation of its case, which it has neglected to do in the Motion.[60] Furthermore, the Praljak Defence considers that in view of the specific nature of the Notebooks, the Prosecution should have asked that they be admitted under Rule 92 *quater* of the Rules.[61]

22. With regard to Exhibit P 11377, the Praljak Defence contends that the Prosecution cannot reasonably claim that it was not aware of its relevance during the presentation of

[54] Response of the Praljak Defence, para. 8.
[55] Response of the Praljak Defence, para. 8.
[56] Response of the Praljak Defence, para. 9.
[57] Response of the Praljak Defence, para. 12.
[58] Response of the Praljak Defence, para. 13.
[59] Response of the Praljak Defence, paras 14 and 15.
[60] Response of the Praljak Defence, para. 14.

its case and discovered this only while reading the Notebooks.[62] The Praljak Defence also submits that Exhibit P 11266 does not present sufficient guarantees of authenticity insofar as it does not bear any official stamps of the Archives of the Republic of Croatia, which the Prosecution claims as its provenance.[63]

23. The Praljak Defence then points out that the probative value of the Notebooks and the documents the Prosecution seeks to admit is minimal, as the Chamber already has at its disposal numerous exhibits dealing with the topics taken up in the Notebooks.[64] Furthermore, the Praljak Defence considers that, by means of the Notebooks and the documents it seeks to admit, the Prosecution seems to want to show that the Republic of Croatia and the HVO did not provide continuous support to the BH Army's war effort.[65] The Praljak Defence specifically recalls that the Chamber has consistently denied the admission of exhibits concerning such assistance.[66] The Praljak Defence consequently deems the probative value insufficient to justify an extraordinary measure such as the re-opening of the case.[67] Moreover, the Praljak Defence contends that any re-opening of the Prosecution case at such a late stage of the trial would be a disproportionate infringement of the right of the Accused Praljak to a fair trial, especially if the Notebooks and the evidence were admitted without the Praljak Defence being able to cross-examine witnesses whose statements attest to the authenticity and reliability of the Notebooks.[68] The Praljak Defence also submits that the Indictment alleges that Bosnian Serbs and Croats co-operated with one another until the end of 1993.[69] The Praljak Defence argues that later entries of the Notebooks therefore fall outside of the temporal scope of the Indictment and that their admission would infringe on the right of the Accused to a fair trial.[70] Finally, the Praljak Defence indicates to the Chamber that, if the Chamber decides to grant the Motion, it plans to file a motion for the re-opening of its case with a large number of exhibits,[71] including other entries from the Notebooks.[72]

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[61] Response of the Praljak Defence, paras 16 to 18.
[62] Response of the Praljak Defence, para. 19.
[63] Response of the Praljak Defence, para. 20.
[64] Response of the Praljak Defence, para. 25.
[65] Response of the Praljak Defence, para. 24.
[66] Response of the Praljak Defence, para. 24.
[67] Response of the Praljak Defence, para. 27.
[68] Response of the Praljak Defence, paras 28 and 30.
[69] Response of the Praljak Defence, para. 29.
[70] Response of the Praljak Defence, para. 29.
[71] See Confidential Annex B of the Response of the Praljak Defence.
[72] Response of the Praljak Defence, paras 31 and 32.

24. In the Response of the Prlić Defence, the Prlić Defence points out that the Notebooks and the proposed evidence have no probative value whatsoever.[73] The Prlić Defence notes, in fact, that the Prosecution acknowledged that the Notebooks were an addition to the previously admitted documents concerning the co-operation between the Croats and the Serbs in Bosnia.[74] Notably, the Prlić Defence contends that the Notebooks and the proposed evidence are therefore redundant and that, as such, they should not be tendered into the record, all the more so since their admission might affect the length of the trial.[75]

25. With regard to Exhibits P 11266, P 11377 and P 11388, the Prlić Defence is surprised that, given their contents, the Prosecution had not realised their importance and had not attempted to tender them into evidence during its case-in-chief.[76] The Prlić Defence argues that the Prosecution is trying to have these documents admitted as "fresh", even though they appear more like rebuttal evidence.[77]

26. In conclusion, the Prlić Defence recalls that the right to a fair trial includes the right to be tried as soon as reasonably practicable and posits that a re-opening of the Prosecution case would lead to an unjustifiable prolongation of the trial and put the Accused in an uncertain situation as to the final judgement while still being incarcerated.[78]

27. In the Reply of the Prosecution, the Prosecution asks the Chamber to reject the Confidential Annex of the Response of the Prlić Defence first because it violates the applicable Practice Direction on the length of memos and motions since it is excessively long and allows the Prlić Defence to present additional legal and factual arguments.[79] In that respect, the Prosecution recalls that, in its "*Decision on the Prosecution Motion to Reopen its Case*" of 16 June 2010, the Chamber invites the parties to comply with the Directive.[80] Secondly, the Prosecution argues that, contrary to what has been submitted by the Prlić Defence, the re-opening of the case is not limited to issues which have not been

[73] Response of the Prlić Defence, para. 20.
[74] Response of the Prlić Defence, para. 21.
[75] Response of the Prlić Defence, para. 21.
[76] Response of the Prlić Defence, para. 23.
[77] Response of the Prlić Defence, para. 23.
[78] Response of the Prlić Defence, paras 24, 25 and 26.
[79] Reply of the Prosecution, para. 2.
[80] Reply of the Prosecution, para. 2.

raised and topics on which no evidence has been tendered.[81] On this point, the Prosecution argues that the entries of the Notebooks its Motion seeks to admit confirm the negotiations between Jadranko Prlić and the Bosnian Serb officials, during which topics such as the division of Bosnia and Herzegovina and the common enemy, represented by the Muslim people, were discussed.[82] Thirdly, the Prosecution refutes the arguments of the Prlić Defence regarding the stalling of the trial which would be caused by the Motion and emphasizes that other issues pending with the Chamber are the reason for a delay in the proceedings.[83] Lastly, the Prosecution rejects allegations of manipulation in the selection of the entries from the Notebooks it seeks to admit and points out that their selection was based on the identification of relevant and probative entries.[84]

28. The Prosecution submits that the Response of the Stojić Defence is identical to "*Bruno Stojić's Response to Prosecution Motion to Reopen its Case-in-Chief (Mladić materials)*" of 3 June 2010 and mentions, by reference, the arguments posited in its "*Prosecution Combined Reply to the Defence Responses to the Prosecution Motion to Reopen its Case-in-Chief (Mladić Materials) and Defence Requests to Suspend the Deadline for Response*" of 9 June 2010.[85] Moreover, the Prosecution points out that it rejects the interpretation of the Tribunal's case-law advanced by the Stojić Defence and, more specifically, the obligation of the Chamber to authorise the cross-examination of 92 *bis* witnesses, whose statements would be sought for admission pursuant to Rule 92 *bis* and would touch on an important and contentious issue between the parties.[86]

29. In view of the Response of the Praljak Defence, the Prosecution firstly posits that the obligations set out in Rule 65 *ter* are not applicable to a motion to re-open and that the documents the Prosecution seeks to admit through its Motion should not be included in its 65 *ter* List.[87] In this regard, the Prosecution notes that the defence teams cannot claim prejudice because the Prosecution has given them fair notice of the existence of the Notebooks shortly after they had been discovered.[88] The Prosecution then rejects the argument of the Praljak Defence which points out that the entries from the Notebooks relating to a period after 1993, i.e. Exhibits P 11388, P 11389 and P 11390 whose

[81] Reply of the Prosecution, paras 3 and 4.
[82] Reply of the Prosecution, para. 5.
[83] Reply of the Prosecution, paras 6 and 7.
[84] Reply of the Prosecution, para. 8.
[85] Reply of the Prosecution, para. 9.
[86] Reply of the Prosecution, para. 10.
[87] Reply of the Prosecution, para. 11.

admission is sought in the Motion, deal with events outside the scope of the period relevant to the Indictment and notes, in that respect, that these exhibits relate to events which occurred shortly after April 1994 and consequently fall within the scope of the Indictment.[89] In conclusion, the Prosecution argues that the fact that the Notebooks might be characterised as hearsay does not constitute an obstacle to its admission insofar as the Chamber has previously admitted such evidence.[90] Furthermore, the Prosecution notes that the entries from the Notebooks its Motion seeks to have admitted meet the criteria of Rule 89(C) of the Rules and points out that it has drawn the Chamber's attention to other evidence that might establish the reliability of the said Notebooks.[91] Finally, the Prosecution refutes the argument of the Praljak Defence that it should have sought to tender evidence under Rule 92 *quater* of the Rules.[92] The Prosecution again recalls that the Notebooks cannot be likened to a witness statement and that the Chamber has already admitted evidence of the same type.[93]

30. With regard to the Response of the Petković Defence, the Prosecution points out that it is up to the Chamber to rule on the merit of the arguments presented by the parties on the relevance and probative value of the entries from the Notebooks the Motion seeks to have admitted when it analyses their admissibility.[94] Furthermore, the Prosecution incorporates by reference the arguments presented in its "*Response to Jadranko Prlić's Notice of his Intent to Request Reopening of his Case Should the Trial Chamber Grant the Prosecution Motion to Admit Evidence in Reopening*" of 21 July 2010 in response to the wish of the Prlić Defence to possibly file a motion to reopen its case in order to request the tendering of the Notebook entries into evidence.[95] The Prosecution therefore recalls that the consequence of a party's indication of its wish to tender entries from the Notebooks into evidence through a motion for re-opening suggests that it does not contest the authenticity and reliability of the Notebooks.[96]

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[88] Reply of the Prosecution, para. 11.
[89] Reply of the Prosecution, para. 12.
[90] Reply of the Prosecution, para. 13.
[91] Reply of the Prosecution, para. 13.
[92] Reply of the Prosecution, para. 14.
[93] Reply of the Prosecution, para. 14.
[94] Reply of the Prosecution, para. 15.
[95] Reply of the Prosecution, para. 16.
[96] Reply of the Prosecution, para. 16.

IV. APPLICABLE LAW

31. The Chamber recalls that the option of re-opening a party's case after its case-in-chief is not provided for by the Rules, but that relevant case-law has been established whereby, in exceptional circumstances, the Prosecution may be authorised to reopen its case in order to present fresh evidence it previously did not have access to.[97]

32. The Appeals Chamber considered that, "the primary consideration in determining an application for re-opening a case to allow for the admission of fresh evidence is the question of whether, with reasonable diligence, the evidence could have been identified and presented in the case in chief of the party making the application".[98] According to the Appeals Chamber, this analysis depends on the factual circumstances of each case and is therefore done on a case-to-case basis.[99]

33. Under the Tribunal's case-law, when a Trial Chamber is satisfied that the requesting party has shown due diligence, it can, pursuant to Rule 89(D) of the Rules, refuse to reopen the case if the probative value of the proposed evidence is substantially outweighed by the need to ensure a fair trial.[100] The Trial Chamber must therefore "exercise its discretion as to whether to admit the fresh evidence by weighing the probative value of that evidence against any prejudice its admission might cause to an accused so late in the proceedings".[101] In this respect, within the scope of its discretionary powers, the Chamber must, in particular, examine the following factors : 1) the stage of the trial; 2) the delay likely to be caused by the re-opening; 3) the consequences that the

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[97] See, in particular, the "Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses", public, 27 November 2008, para. 18, citing relevant case-law: *The Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-T, "Decision on the Prosecution's Application to Re-Open its Case", public, 1 June 2005, para. 31 ("*Hadžihasanović* Decision") and *The Prosecutor v. Vujadin Popović et al.,* Case No. IT-05-88-AR73.5, "Decision on Motion to Reopen the Prosecution Case", public, 9 May 2008, para. 23 ("*Popović* Decision of 9 May 2008"). See also *The Prosecutor v. Slobodan Milošević*, IT-02-54-T, "Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case", public with a confidential annex, 13 December 2005, para. 12 ("*Milošević* Decision") and *The Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, "Decision on the Prosecution's Alternative Request To Reopen the Prosecution's Case", public, 19 August 1998, para. 26 ("*Čelebići* Decision").

[98] *The Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, 20 February 2001 ("*Čelebići* Appeals Judgement"), para. 283.

[99] *The Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.5, "Decision on Vujadin Popović's Interlocutory Appeal Against the Decision on the Prosecution's Motion to Reopen its Case-in-Chief ", 24 September 2008, para. 10 ("*Popović* Decision of 24 September 2008"); *The Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR73.6, "Decision on Ivan Čermak and Mladen Markač Interlocutory Appeals Against Trial Chamber's Decision to Reopen the Prosecution Case", public, 1 July 2010, para. 24 ("*Gotovina* Decision of 1 July 2010").

[100] *Čelebići* Appeals Judgement, para. 283.

[101] *Čelebići* Appeals Judgement, para. 283; *Hadžihasanović* Decision, para. 35.

presenting of fresh evidence against an Accused might have on the fairness of the trial against his co-accused and 4) probative value of the evidence to be presented.[102]

34. The Appeals Chamber is more specific in the characterisation of "fresh evidence": 1) evidence which was not in the possession of a party at the conclusion of its case and which by the exercise of all diligence could not have been obtained by the party by the close of its case, and 2) evidence it had in its possession, but the importance of which was revealed only in the light of fresh evidence.[103]

V. DISCUSSION

1. Time-Limits and Directions of the Tribunal

35. The Chamber first notes out that a confidential annex of almost 108 pages is attached to the Response of the Prlić Defence and that this annex constitutes an extension of the body of argument developed in the Response of the Prlić Defence. On this point, the Chamber again recalls for the parties, as it recently did in the "*Décision portant sur la requête de l'accusation en réouverture de sa cause"* of 16 June 2010 ("Prlić Decision of 16 June 2010"), the need to comply with the "Practice Direction on the Length of Briefs and Motions" of 16 September 2005, insofar as the authorised word limits and the subject matter of the annexes are concerned[104]. Consequently, the Chamber decides, by majority, that it is proper to bar admission of the confidential annex attached to the Prlić Defence Response and will not take into account the arguments set forth in the said annex when conducting its analysis.

36. Moreover, the Chamber points out that the Joinder of the Ćorić Defence was filed on 26 July 2010. The time-limit of 14 days afforded the parties for filing their respective responses pursuant to Rule 126 *bis* of the Rules ran until 23 July 2010. The Chamber therefore finds that the Joinder of the Ćorić Defence is out of time and that it should be dismissed.

[102] *Čelebići* Appeals Judgement, paras 280 and 290; *Popović* Decision of 24 September 2008, para. 27.; *Gotovina* Decision of 1 July 2010, para. 31.
[103] *Čelebići* Appeals Judgement, paras 282 and 283; *Popović* Decision of 24 September 2008, para. 11.
[104] Decision of 16 June 2010, p. 5.

37. The Chamber will now examine whether the Motion satisfies the requirements for re-opening. In doing so, the Chamber must first examine whether the evidence tendered for admission by the Prosecution is of a "fresh" nature.

2. Criteria for Re-Opening

(i) The "fresh" nature of the exhibits tendered for admission and assessment of the diligence employed by the Prosecution in obtaining said exhibits

38. In order to establish the "fresh" nature of the exhibits tendered for admission, the Chamber must assess the diligence shown by the requesting party in obtaining the exhibits sought for admission. To this end, the Chamber must take into account the existence of any indicia which might have allowed the discovery of these exhibits or signalled their importance at an earlier stage of the proceedings.

39. The Stojić Defence argues that the Notebooks do not constitute a "fresh" exhibit within the meaning of the case-law on the re-opening of a case inasmuch as the Prosecution has not demonstrated reasonable diligence because it did not provide acceptable reasons why it could not and did not engage in efforts to identify, obtain and tender the Notebooks before the close of its case.[105] Moreover, citing the Appeals Chamber's case-law in the *Čelebići*, case, the Stojić Defence considers that given the late state of the trial, the two-month period between the seizure of the Notebooks and the Prosecution's filing of the notice on re-opening its case is not justified.[106]

40. The Chamber first points out that the Prosecution did not have the Notebooks when it ended its case on 24 January 2008 and that it would have been unable to obtain them, even if all diligence had been employed, by the close of its case. The Chamber points out that the seizure of the Notebooks at the domicile of Ratko Mladić's wife by the Serbian authorities took place on 23 February 2010 and that a scanned handwritten copy in electronic format of the original version in Cyrillic of the said Notebooks was sent to the Prosecution by the Serbian authorities on 29 March 2010.[107] A majority of the Chamber therefore finds that it has no indicia supporting the allegations of the Stojić Defence and leading to the assumption that the Prosecution knew about the said Notebooks before 23 February 2010 or even by 29 March 2010. Furthermore, the

[105] Response of the Stojić Defence, paras 1, 5 and 9.
[106] Response de la Stojić Defence, paras 6-9

Chamber notes that the Prosecution has presented a detailed chronology of the steps taken, from the seizure of the Notebooks by the Serbian authorities on 23 February 2010 until the complete disclosure of their translated versions to the defence teams on 16 July 2010.[108] In view of the Notebooks' size and the date the electronic version of the original in Cyrillic was sent to the Prosecution by the Serbian authorities on 29 March 2010 followed by the original version submitted to the Prosecution's office in Belgrade on 27 April 2010, the Chamber holds that the time between the moment the Prosecution learned of the Notebooks on 29 March 2010 and the moment the notice that it might seek to re-open its case was filed on 21 April 2010 was indeed reasonable. In addition, the Chamber observes that one month elapsed between the Prosecution's receipt of the original manuscript version of the Notebooks on 11 May 2010 at its office in The Hague and the disclosure of an electronic copy to the Defence teams on 11 June 2010.[109] The Chamber notes, moreover, that the Prosecution disclosed the translated versions of the said Notebooks to the Defence teams in BCS and in English within a period of approximately one month, that is, from 11 June 2010 to 16 July 2010.[110] The Chamber therefore finds that the Prosecution disclosed the original scanned version and the translated versions of the said Notebooks to the defence teams within a time period it also characterizes as reasonable.[111] In light of these observations, the Chamber finds that the entries from the Notebooks whose admission the Prosecution is seeking in connection with its Motion constitute "fresh" exhibits within the meaning of the Tribunal's case-law for the re-opening of cases.

41. For the three documents in the Prosecution's possession during the presentation of its case, namely Exhibits P 11266, P 11377 and P 11388, and whose admission into evidence is also sought under the Motion, the Chamber notes that the Prosecution argues that the significance of these materials, which resides more specifically in the fact that that they make it possible to confirm the authenticity and the reliability of the Notebooks, did not become apparent until after those Notebooks were discovered.[112] The Chamber learned that the Stojić and Prlić Defence teams were contesting the "fresh" nature of these

[107] Motion, paras 7, 8, 17 and 18.
[108] Motion, paras 7-11.
[109] Motion, para. 9 and 10.
[110] Motion, paras 10 and 11. The Chamber notes that as of 7 July, the Prosecution had disclosed to the Defences all of the translations of the entries of Notebooks entries tendered for admission in connection with the Motion. The Prosecution then continued, until 16 July 2010, to forward translations but only for the entries not sought for admission. See footnote 6, Motion, p. 2.
[111] Motion, paras 7-11 and 18.

three documents based on the fact that the discovery of the Notebooks in no way altered their significance[113] and that the Praljak Defence was disputing the "fresh" nature of Exhibit P 11377.[114] The Chamber finds nonetheless that the significance of these documents, and more specifically the meetings whose scheduling or actual occurrence is cited therein, did not become apparent until the discovery of the Notebooks' entries making mention thereof.[115] Thus, the Chamber embraces the Prosecution's argument and considers more specifically that the significance of these documents resides in the fact that they make it possible to corroborate the authenticity and reliability of those Notebook entries mentioning the meetings identified in these documents, namely Exhibits P 11376, P 11385 and P 11389. Accordingly, the Chamber finds that these three documents constitute "fresh" evidence within the meaning of the case-law on re-opening a case and that it would be proper, should the Chamber decide to admit the entries of the Notebooks referring to the meetings mentioned in these exhibits, to admit these documents into evidence.

42. The Chamber observes that the "fresh" nature of the two statements tendered for admission by the Prosecution in connection with the Motion under Rule 92 *bis* has not been contested by the defence teams. The Chamber finds that the two statements also constitute "fresh" evidence insofar as only the discovery of the Notebooks made it necessary for the Prosecution to obtain the two statements in order to confirm the authenticity and the reliability of the said Notebooks and that the Prosecution would therefore not have been able to produce and request their admission into evidence, despite all due diligence employed during the presentation of its case.

43. Further to its analysis, the Chamber characterises as "fresh" all of the documents to which the Motion is directed. The Chamber thus holds that they might be admissible at this stage of the trial. The Chamber must now then apply the broad power of assessment it enjoys under Rule 89 (D) of the Rules in deciding whether to grant the Motion.

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[112] Motion, paras 20 and 21.
[113] Stojić Defence Response, paras 1 and 10-14; Response of the Prlić Defence, para. 23.
[114] Response of the Praljak Defence, paras 1 and 19.
[115] P 11376 concerns a meeting held on 5 October 1992 that is mentioned in Exhibit P 11377. P 11266 concerns a meeting held on 8 July 1993 that is mentioned in Exhibit P 11385. P 11389 concerns a meeting held on 3 February 1994 that is mentioned in Exhibit P 11388.

(ii) Exercise of the Chamber's discretion: the weight to be assigned to the probative value of the "fresh" exhibits and the protection of the rights of the accused to a fair trial

44. In the exercise of its discretion, the Chamber must weigh the probative value of the "fresh" evidence tendered for admission in connection with the Motion in light of the right to a fair trial for the accused while bearing in mind that "it is only in exceptional circumstances where the justice of the case so demands that a party should be permitted to re-open its case to present new evidence."[116]

45. In weighing the probative value of these "fresh" exhibits, the Chamber must take into account the arguments and possible challenges to the authenticity, relevance and therefore probative value claimed by the parties in the respective responses as well as any distinctive features these exhibits demonstrate when compared with the exhibits previously admitted.

a. Authenticity

46. Initially, the Chamber must consider the authenticity of the materials tendered for admission in the event the Chamber decides to rule in favour of the Motion, and more particularly, the authenticity of the Notebooks, challenged by the defence teams. The Chamber first notes that the Prosecution has requested the admission into evidence of two statements under Rule 92 *bis* of the Rules as well as of three documents in the possession of the Prosecution during the presentation of its case on the ground that they attest to the authenticity and the reliability of the Notebooks.[117] The authenticity of the Notebooks has elicited various objections by the Stojić, Praljak and Petković Defence teams who expressed their wish to cross-examine their authors should the Chamber ultimately rule in favour of their admissibility.[118] The Chamber takes note of the objections concerning the authenticity of the Notebooks but points out that the Praljak, Petković and Stojić Defences have also informed the Chamber that they may file a request to re-open their cases with a view to *inter alia* requesting the admission of entries from the Notebooks for the purpose

[116] *Milošević* Decision, para. 33, citing the *Čelebići* Decision, para. 27.
[117] Motion, paras 1 and 23-25.
[118] Response of the Stojić Defence, para. 24; Response of the Praljak Defence, paras 8-13; Response of the Petković Defence, para. 28.

of refuting those entries which may be admitted into evidence.[119] The Chamber finds that these notices display a certain inconsistency in the reasoning of the three Defence teams and considerably lessen the weight of their arguments contesting the Notebooks' authenticity.

47. The Chamber then points out that in its oral decision of 20 August 2010, the *Karadžić* Chamber authorised the admission into the record as a public document of almost everything in the Notebooks.[120] The Chamber holds by a majority that the admission of almost everything in the Notebooks as a public document by another Chamber of the Tribunal constitutes an indicia which must be taken into account when assessing the authenticity of the material.

48. Furthermore, the Chamber finds that the two statements tendered for admission under Rule 92 *bis* of the Rules, namely Exhibits P 11391 and P 11392, one of which pertains to Ratko Mladić's hand-writing and the other to the security conditions in respect of what transpired with the Notebooks from the time they were seized by the Serbian authorities at the domicile of Ratko Mladić's wife until the time they were received by the Prosecution in The Hague, make it possible to provide indicia of the authenticity and reliability of the Notebook entries tendered for admission, by substantiating in particular the fact that they were written by Ratko Mladić, and that the materials brought before the Chamber in connection with the Motion are original inasmuch as they have not been tampered with since their seizure by the Serbian authorities.

49. Moreover, after analyzing the two statements, the Chamber notes in particular that a written attestation is attached to each of the two statements, that they do not go to the acts and conduct of the various accused and finds therefore that the conditions in Rule 92 *bis* of the Rules have been satisfied. Accordingly, should the Chamber decide to grant the Motion in part or in full, the two statements tendered for admission under Rule 92 *bis* of the Rules would be admissible.

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[119] Response of the Praljak Defence, paras 1, 31 and 32; Response of the Petković Defence, para. 33; "Notification of the Defence for Bruno Stojić concerning his Intention to Request Reopening of its Case if the Trial Chamber Grants the Motion for Admission of Evidence within the Scope of Reopening the Defence case, filed on 8 July 2010",, public document, 7 September 2010, paras 1 and 6-8.

[120] *The Prosecutor v R. Karadžić,* public hearing of 20 August 2010, Transcript in French ("T(F)"), p. 61013. Three notebooks included in the "Notebooks" were not admitted and concern the period 29 June 1991 to 29 December 1991.

50. As concerns the three documents in the Prosecution's possession during the presentation of its case,[121] the Chamber notes that they attest to the scheduling or the occurrence of certain events reported in the entries of the Notebooks tendered for admission. In view of their contents, the Chamber finds that the three documents make it possible to confirm the authenticity and the reliability of the Notebooks.

51. As a consequence, the Chamber finds that admission of nearly the entirety of the Notebooks by the *Karadžić* Chamber, the request for admission to the record of two 92 *bis* statements relevant to the authenticity of the hand-writing of the Notebooks' author and of the materials disclosed by the Prosecution as well as the request to admit into evidence documents corroborating the scheduling or the holding of meetings whose contents are related in the entries of the Notebooks tendered for admission, constitute sufficient indicia of the authenticity of the said Notebooks. The Chamber therefore does not consider it necessary to order a graphological or forensic analysis of the Notebooks or a cross-examination of the authors of the two statements whose admission is sought under Rule 92 *bis* of the Rules.[122]

b. Relevance and Probative Value

52. The Prosecution argues that the entries from the Notebooks tendered for admission are relevant in view of the allegations of a JCE, and particularly the allegations of participation by the Accused Prlić, Stojić, Praljak and Petković in accomplishing the objectives of the JCE.[123] It puts forward *inter alia* that their high probative value, their limited size and the modest delays in the trial which would be occasioned by their admission into evidence weigh strongly in favour of admission.[124] According to the Prosecution, the "collaboration" of the accused with the Serb leaders of Bosnia responsible for crimes in connection with the achievement of Greater Serbia which these entries illustrate goes to confirm the fact that the Accused themselves intended to commit crimes in order to realize their objective of a Croat-dominated Herceg-Bosna[125]. In their respective responses, the Petković and Stojić Defence teams submit that the themes covered in the entries from the Notebooks tendered for admission and the subjective

[121] These three documents bear reference numbers P 11377, P 11266 and P 11388.
[122] P 11391 (92 *bis* Statement of General Manojlo Milovanović, former Chief of the Main Staff and Deputy Commander of the Main Staff of the VRS, 26 and 27 April 2010) and P 11392 (92 *bis* Statement of Erin Gallagher, analyst from the Office of the Prosecutor, 7 July 2010).
[123] Motion, paras 1 and 22.
[124] Motion, paras 1, 22, 26 and 27.

nature of the contents of the Notebooks attest to their low relevance and weak probative value in light of the allegations in the Indictment[126]. Furthermore, the Praljak and Petković Defence teams argue that the Prosecution's logic in its discussion of the relevance of the entries is inconsistent, point out that the Indictment contains no allegation of cooperation between Serbs and Croats and submit that the contents of the entries do not make it possible to draw conclusions as to the *mens rea* of the Accused Prlić, Stojić, Praljak and Petković concerning the JCE.[127] Moreover, the themes discussed in the entries of the Notebooks tendered for admission, such as *inter alia* the Posavina, Slavonski Brod or the transfer of MTSs between Croatia and the BH Army, were characterised as irrelevant by the Prosecution itself during hearings.[128]

53. Specifically in respect of the argument submitted by the Stojić, Prlić and Praljak Defence teams regarding the fact that the entries tendered for admission are not substantively different from those already admitted into evidence and that for this reason do not warrant a measure as extraordinary as re-opening the case,[129] the Chamber recalls that the documents tendered for admission in connection with a request for re-opening a party's case need not be limited to subjects never raised at trial. These exhibits can therefore address points previously raised, including those raised by documents previously admitted into evidence.

54. Nevertheless, even if it were assumed that the documents tendered for admission by the Prosecution are relevant, the Chamber must take into account the potential impact of their admission and thus the re-opening of the Prosecution's case on the expeditiousness of the trial and the right of the accused to a fair trial. Only by weighing their relevance against this impact should the Chamber decide to admit them.

55. In this case, the Chamber notes that the Prosecution's request to open its case comes after the close of the presentation of the Defence case, that is, at a very late stage of the proceedings. This has moreover been pointed out by the Stojić, Praljak and Petković

[125] Motion, para. 22.
[126] Stojić Defence Response, paras 19-23; Response of the Petković Defence, paras 10 and 11.
[127] Response of the Praljak Defence, para. 22; Response of the Petković Defence, paras 11-20.
[128] Stojić Defence Response, paras 21; Praljak Defence Response, para. 24; Praljak Defence Response paras 10 and 11.
[129] Stojić Defence Response, paras 19 and 20; Prlić Defence Response, para. 21; Praljak Defence Response, para. 25.

Defence teams.[130] The Chamber also points out that the Prlić, Stojić, Praljak and Petković Defence teams have highlighted the delays that re-opening the Prosecution's case would be likely to introduce into the proceedings and have asserted that such delays constitute a violation of the rights of the Accused to a fair trial, and more particularly the right to be tried without excessive delay, and that these rights outweigh the probative value of the materials tendered for admission in connection with the Motion.[131]

56. The Chamber first points out that the defence teams received the electronic version of the Notebooks in Cyrillic on 11 June 2010 and that they have been informed of the contents of the entries tendered for admission since 9 July 2010, the date the Motion was filed. The Chamber notes that the number of "fresh" exhibits which may be admitted into evidence in connection with the Motion is moreover limited in that the Motion concerns only 15 entries in the Notebooks, each one approximately 5 to 10 pages. The Chamber therefore considers that even if the Defence teams did not have specific knowledge of the purpose of the Motion, they did have appropriate and adequate time to analyse and draft any refutation of the Prosecution's arguments in view of the content of these entries from the Notebooks.

57. The Chamber holds nevertheless that the limited size of the exhibits tendered for admission in connection with the Motion and the fact that the Defence teams have had adequate time to prepare their response are not sufficient in and of themselves to justify re-opening and admitting "fresh" evidence at this stage of the proceedings. In addition, when exercising its discretionary power and in the interests of justice, the Chamber must limit as much as possible the prejudice to the Accused and the possible delay of the proceedings due to the admission of "fresh" Prosecution evidence and to avoid thereby inflicting an injustice on the various accused by undermining the fairness of the trial. This means therefore that the Chamber must strike a balance between the admission of "fresh" evidence which might be relevant and probative and compliance with the requirements of the fair and expeditious conduct of the proceedings.[132] In this exercise, the Chamber must bear in mind that only the particularly high probative value of the exhibits tendered for

[130] Stojić Defence Response, paras 1 and 16; Praljak Defence Response, para. 1(f); Petković Defence Response, paras 26 and 27.
[131] Prlić Defence Response, paras 24-26; Stojić Defence Response, paras 1, 17, 18 and 23; Praljak Defence Response, paras 1(f), 1(g), 31 and 32; Petković Defence Response, paras 26 and 27.
[132] See also, *Čelebići* Appeals Judgement, par. 288 citing *Čelebići* Decision, para. 37.

admission would justify re-opening the Prosecution's case – on an exceptional basis and at the cost of unavoidable delay – at this late stage of the proceedings.[133]

58. To reconcile these requirements, and bearing in mind the particularly advanced stage of the proceedings here, the Chamber finds it necessary to adopt a strict approach regarding the admission of these "fresh" exhibits. That is why, the Chamber is of the opinion that the exhibits tendered for admission must, and without adding new charges not alleged in the Indictment, directly involve the criminal responsibility of the various Accused if their probative value is to be judged sufficient to justify re-opening.[134]

59. The Chamber decides therefore to limit the admission of the evidence presented in the Motion to evidence essential to the case, namely, the evidence going directly to the alleged participation of certain accused in the JCE. This notwithstanding, the Chamber reminds the parties that, in the admission stage, it need not conduct a conclusive assessment of the relevance, reliability and probative value of the evidence, which it will do only at the close of the proceedings once all the inculpatory and exculpatory evidence, has been entered into the record.[135]

60. The Chamber points out that the 15 Notebooks entries tendered for admission concern the meetings in which representatives of the Bosnian Serb authorities participated, and in certain cases, representatives of the Bosnian Croat authorities between 1992 and 1994. In keeping with what was observed by the Stojić Defence,[136] the Chamber observes that Exhibits P 11374 and P 11378, which concern respectively a meeting of the presidency of the Bosnian Serbs in Pale on 18 August 1992 and a report of the members of the Main Staff of the VRS dated 18 October 1992, raise strategic issues and the nature of the relationship between the Bosnian Serbs and the Bosnian Croats and are irrelevant in light of the allegations that the Accused participated in the implementation of the purposes of the JCE. Moreover, the Chamber points out that Exhibit P 11375, which concerns a meeting of the representatives of the presidency of the Bosnian Serbs and the VRS held on 27 September 1992, Exhibit P 11379, which pertains to a meeting of the Bosnian Serb representatives with President Ćosić on 21 October 1992, Exhibit P 11382, which pertains to a meeting of the Serbian representatives of the territorial units

[133] *Milošević* Decision, para. 37.
[134] See in this respect *Milošević* Decision, para. 37
[135] See the "Decision on the Motions for Admission of Documentary Evidence (Čapljina/Stolac Municipalities)", public document, 23 August 2007, p. 7.

comprising the former Yugoslavia which took place on 8 January 1993, Exhibit P 11385, which pertains to a meeting of the Bosnian Serb representatives on 8 July 1993 and Exhibit P 11390, which pertains to a report by the members of the Main Staff of the VRS dated 11 June 1994, do not mention the Accused and do not contain information relevant to the participation of the Accused in achieving the purposes of the alleged JCE. The Chamber concurs with the argument of the Stojić Defence concerning the lack of relevance of Exhibit 11383, which goes to a meeting between the Bosnian Serb delegation and representatives of the international community in Geneva on 11 January 1993, when viewed in light of the allegations of the Indictment.[137] As concerns Exhibits P 11381 and P 11384, which cover two negotiating sessions in Geneva dated 4 and 23 January 1993, the Chamber observes that the Accused Petković was present at the first meeting but nevertheless finds that the substance of the two meetings is not relevant in respect of the participation of the Accused in the furtherance of the purposes of the alleged JCE. Regarding Exhibit P 11387, the Chamber points out that it concerns a meeting between the Bosnian Serb representatives and Bo Pellnas on 15 August 1993, and makes no mention of the accused or their possible participation in the furtherance of the purposes of the alleged JCE. Accordingly, the Chamber finds that the 11 aforementioned entries do not display sufficient relevance in respect of the participation of the Accused in the furtherance of the purposes of the alleged JCE and that they therefore do not have sufficient probative value to support their admission.

61. As concerns Exhibits P 11376, P 11380, P 11386, and P 11389, the Chamber observes that they pertain to meetings held between 1992 and 1994 between Serb representatives from Bosnia, with representatives of the Croatian government occasionally attending, and in which representatives of the Bosnian Croat authorities participated, including the Accused Praljak[138], the Accused Prlić[139], the Accused Stojić[140] and the Accused Petković[141]. The Chamber finds that the statements allegedly made by the aforementioned Accused and recounted in these entries are relevant when viewed in light of the allegations of the possible participation of these Accused in achieving the purposes of the alleged JCE. The Chamber therefore holds that these exhibits are relevant

[136] Stojić Defence Response, para. 22.
[137] Stojić Defence Response, para. 22.
[138] P 11376 and P 11380.
[139] P 11376, P 11380 and P 11389.
[140] P 11376 and P 11380.
[141] P 11380 and P 11386.

and have sufficient probative value to allow their admission into evidence at this stage of the proceedings.

62. As concerns Exhibits P 11266, P 11377 and P 11388, the Chamber has established that they constitute "fresh" exhibits within the meaning of the Tribunal's case-law on re-opening.[142] The Chamber notes that their significance, which surfaced with the discovery of the Notebooks, resides in the fact that they make it possible to corroborate the scheduling or the holding of meetings mentioned in Exhibits P 11385, P 11376 and P 11389, respectively. The Chamber first recalls that it finds that Exhibit P 11385 has no relevance and probative value when viewed in the light of the allegations of direct participation of the various Accused in carrying out the purposes of the JCE, for the reasons set out in this Decision. Exhibit P 11266, which is related to it, thus has no relevance. The Chamber found that Exhibits P 11376 and P 11389 are relevant and have probative value. It thus appears that Exhibits P 11377 and P 11388, which are related to them, are also relevant and have probative value because they make it possible to corroborate the scheduling or the occurrence of two meetings which the Accused Praljak, Prlić and Stojić attended and during which these Accused allegedly made statements connected with their possible participation in the furtherance of the purposes of the alleged JCE. The Chamber also notes that the two documents satisfy the criteria for admissibility set out in Rule 89 (C) inasmuch as Exhibits P 11377 and P 11388 show indicia of authenticity and reliability and are relevant and probative.

63. The Chamber finds therefore that that Exhibits P 11376, P 11380, P 11386, P 11389, P 11377 and P 11388 are sufficiently relevant and have sufficiently high probative value to justify their admission in connection with the Prosecution's re-opening of its case.

64. Bearing this finding in mind, the various "Notices"[143] filed by the Defence teams as well as the arguments of the Defence teams in their respective responses informing the Chamber of their intention to request the re-opening of their cases should the Chamber

[142] *Popović* Decision of 24 September 2008, para. 11.
[143] "*Notice de la Défense Prlić relative a une possible demande de réouverture de sa cause dans l'hypothèse où la Chambre décidait de faire droit à la demande de l'Accusation relative à la réouverture de sa cause*", public document with confidential annex, 14 July 2010; Response of the Praljak Defence, paras 1, 31 and 32; Response of the Petković Defence, para. 33; "*Notification de la Défense de Bruno Stojić concernant son intention de demander la réouverture de la présentation de ses moyens si la Chambre de première instance fait droit à la demande d'admission d'éléments de preuve dans le cadre de la réouverture de la présentation des moyens à décharge déposé le 8 juillet 2010*", public document, 7 September 2010, paras 1 and 6-8.

admit entries from the Notebooks, the Chamber recalls that such requests for re-opening will have to be limited to refuting solely those entries admitted by this Decision. Such requests cannot in any way constitute general requests for re-opening based on entries from the Notebooks other than those directly related to the entries admitted by this Decision. The Chamber recalls that the Defence teams have known about the contents of the Notebooks ever since 11 June 2010, the date an electronic copy was disclosed and that the Prosecution forwarded to the Defence teams the translated versions of the said Notebooks in BCS and in English between 11 June 2010 and 16 July 2010.[144] In view of the time elapsed between being informed about the contents of the Notebooks and the filing of any request for re-opening,[145] the diligence required, which the Chamber recalled was a fundamental condition for granting leave to a party to re-open its case, would not be satisfied. The Chamber therefore holds that because they failed to submit a request for re-opening based on the discovery of the Notebooks within a reasonable time, as the Prosecution did, the Defence teams have, at their own initiative, *de facto* restricted their options for requesting re-opening of their cases solely to the possibility of refuting the evidence admitted as the Prosecution had requested.

VI. DISPOSITION

FOR THE FOREGOING REASONS,

PURSUANT TO Rules 54, 85, 89 and 92 *bis* of the Rules,

GRANTS IN PART, by a majority, the Prosecution's Motion,

DECIDES BY A MAJORITY that Exhibits P 11376, P 11377, P 11380, P 11386, P 11388, P 11389, P 11391 and P 11392 should be admitted.

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[144] Motion, para. 11. The sixteenth of July 2010 signals the date of complete transmission of the English translations of the Notebooks by the Prosecution to the Defence teams.

[145] The Chamber recalls that the Defence teams only informed the Chamber that if it authorised the re-opening of the Prosecution case, the Defence teams would also request re-opening of their case. Such a position cannot be likened to a formal request for re-opening and the Chamber cannot therefore take this into account when evaluating the diligence the parties would have shown in requesting that their case be re-opened. For an example, see *mutatis mutandis,* "Decision on the Prosecution Request for Reexamination or, in the Alternative, Certificaiton of Appeal of the Order Rejecting the Request for Suspension of the Time Limit for Filing its Request in Reply" public document, 6 July, p.10 and Oral Decision on the notices filed by the parties on 15 June 2009, French transcript, p. 41355, in which the Chamber reminded the parties that it is not seized of a question unless a party files a motion in the proper form.

DENIES admission to Exhibits P 11374, P 11375, P 11378, P 11379, P 11381, P 11382, P 11383, P 11384, P 11385, P 11387 and P 11390, for the reasons set forth in this Decision,

DENIES by a majority admission to the confidential Annex of the Response of the Prlić Defence,

DISMISSES by a majority the Joinder of the Ćorić Defence for the reasons set forth in this Decision,

AND,

DIRECTS by a majority that those Defence teams wishing to file a request to re-open their respective cases in order to refute the entries from the Notebooks admitted into evidence by this Decision do so within 15 days from the date this Decision is filed.

RECALLS by a majority for the Defence teams wishing to file a request to re-open their cases that such a request must be limited to refuting the entries admitted by this Decision and cannot in any manner constitute a general request to re-open their cases.

The Presiding Judge of the Chamber, Judge Jean-Claude Antonetti, attaches a dissenting opinion to this decision.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this sixth day of October 2010
At The Hague
The Netherlands

[Seal of the Tribunal]