UNITED NATIONS

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-03-67-T

Date: 22 October 2010

Original: ENGLISH
French

IN TRIAL CHAMBER III

Before: **Judge Jean-Claude Antonetti, presiding**
Judge Frederik Harhoff
Judge Flavia Lattanzi

Registrar: **Mr John Hocking**

Decision of: **22 October 2010**

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

DECISION ON PROSECUTION'S MOTION FOR ADMISSION OF EVIDENCE RELATING TO MLADIĆ NOTEBOOKS WITH A SEPARATE OPINION FROM PRESIDING JUDGE ANTONETTI ATTACHED

The Office of the Prosecutor

Mr Mathias Marcussen

The Accused

Mr Vojislav Šešelj

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 filed publicly by the Office of the Prosecutor ("Prosecution") on 16 July 2010 ("Motion"),[1] for leave to amend its 65 *ter* Witness and Exhibit Lists, for the admission of extracts from General Mladić's Notebooks ("Mladić Notebook(s)"), and for the admission of the 92 *bis* statements of General Manojlo Milovanović and Prosecution investigator Erin Gallagher.[2]

PROCEDURAL BACKGROUND

2. On 11 May 2010, the Chamber rendered an oral decision requesting that the Prosecution file all the requests it considered necessary before the procedure set out by Rule 98 *bis* of the Rules of Procedure and Evidence ("Rules"), by no later than 1 June 2010,[3]

3. On 19 May 2010, the Prosecution filed a motion seeking an extension of time to file a request to add documents to its 65 *ter* Exhibit List, of which the notebooks belonging to General Mladić.[4]

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[1] "Prosecution's Motion for Admission of Evidence Relating to Mladić Notebooks and for Leave to Amend its Rule 65 *ter* Witness and Exhibit Lists", public, submitted on 16 July 2010 and filed on 19 July 2010 (redistributed on 20 July 2010 due to a pagination error).
[2] The Prosecution seeks the admission of 13 extracts of which: one extract concerning 1 February 1992 from Mladić Notebook No. 4 (notes from 31 December 1991 to 14 February 1992), four extracts concerning 6, 7, 9 and 11 May 1992 from Mladić Notebook No. 5 (notes from 14 February 1992 to 25 May 1992), two extracts concerning 6 and 30 June 1992 from Mladić Notebook No. 6 (notes from 27 May 1992 to 31 July 1992), one extract concerning 8 November 1992 from Mladić Notebook No. 11 (notes from 5 October 1992 to 27 December 1992), three extracts concerning 28 May, 8 July and 24 September 1993 from Mladić Notebook No. 14 (notes from 2 April 1993 to 24 October 1993), one extract concerning 21 December 1993 from Mladić Notebook No. 15 (notes from 28 October 1993 to 15 January 1994) and one extract concerning 13 October 1994 from Mladić Notebook No. 18 (notes from 4 September 1994 to 28 January 1995).
[3] Hearing of 11 May 2010, Transcript in French ("T(F)"), p. 15880.
[4] "Prosecution's Motion for Extension of Time to Seek Addition of Selected Mladić Materials to Rule 65 *ter* Exhibit List", public, 19 May 2010.

4. On 27 May 2010, the Chamber rendered an order granting the Prosecution an extension of time until 16 July 2010 to file its request concerning the documents that were seized from the home of General Mladić's wife in February 2010.[5]

5. During the administrative hearing of 14 June 2010, this future request was mentioned and Vojislav Šešelj ("Accused") presented his submission.[6]

6. The Motion was submitted on 16 July 2010 and filed publicly on 19 July 2010.

7. The Accused did not file any written submission to respond formally to the Motion within the time limit of 14 days from the date on which he received the BCS version, as was his right under Rule 126 *bis* of the Rules.[7]

8. After the expiry of the time limit for filing a response, as provided for by the Rules, the Accused responded orally to the Motion during the administrative hearing of 21 September 2010.[8] On that occasion, the Chamber noted that his response was late, yet let him set forth his arguments.[9] The Accused replied to this point by implicitly requesting an extension of the time limit for a response as provided by the Rules.[10]

ARGUMENTS OF THE PARTIES

A. The Motion

9. The Prosecution requests, firstly, to add to its 65 *ter* Exhibit List and seeks the admission into evidence of thirteen extracts from the Mladić Notebooks.[11]

10. The Prosecution requests, secondly, that General Manojlo Milovanović ("Milovanović") and Prosecution investigator Erin Gallagher ("Gallagher") be added

[5] "Order on Prosecution Motion for Extension of Time to Seek Addition of Materials Belonging to General Mladić to the 65 *ter* List of Exhibits", public, 27 May 2010.
[6] Hearing of 14 June 2010, T(F), p. 16110.
[7] The Accused received the BCS translation of the Motion on 1 September 2010 (*See* Procès verbal of Reception filed on 6 September 2010), and had until 15 September 2010 to respond.
[8] Administrative Hearing of 21 September 2010, T(F), pp. 16381-16400.
[9] Administrative Hearing of 21 September 2010, T(F), p. 16398.
[10] Administrative Hearing of 21 September 2010, T(F), p. 16398.
[11] Motion, paras 2 and 24. *See* also Annex A to the Motion providing more details on the extracts.

to the 65 *ter* Witness List,[12] that Milovanović's 92 *bis* statement taken by the Prosecution on 27 April 2010, confirming that the handwriting in the Mladić Notebooks is indeed that of General Mladić,[13] be admitted into evidence, as well as Gallagher's 92 *bis* statement taken on 8 July 2010 which describes the way in which these documents were given by the Serbian authorities to the Prosecution.[14]

11. The Prosecution states that the thirteen extracts from the Mladić Notebooks are relevant with regard to the joint criminal enterprise as alleged in the Indictment,[15] that they are authentic and reliable,[16] that their admission into evidence would not cause prejudice to the Accused[17] and would be in the interest of justice.[18] The Prosecution, furthermore, justifies the lateness of its Motion by the recent discovery – in February 2010[19] – of the Mladić Notebooks.[20]

12. With regard to the statements of Milovanović and Gallagher, the Prosecution advances that they satisfy all the requirements of Rule 92 *bis* of the Rules, that they are authentic, reliable and relevant and that they serve, therefore, to demonstrate the authenticity of the extracts of the Mladić Notebooks.[21]

B. The Response

13. During the administrative hearings of 14 June 2010 and 21 September 2010, the Accused cast doubt on the authenticity and relevance of all the documents seized at the home of General Mladić's wife[22] and requested that all the Mladić Notebooks be disclosed to him in BCS in a typed version (and not in the handwritten form as they are illegible).[23] The Accused noted in this respect that the transcript of handwritten notes had already been carried out for another witness who testified in this case on Vukovar and who had his own notebook.

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[12] Motion, paras 2 and 24.
[13] Motion, Annex A, p. 6.
[14] Motion, Annex A, p. 6.
[15] Motion, paras 1 and 11-12.
[16] Motion, paras 16-21.
[17] Motion, para. 13.
[18] Motion, para. 15.
[19] Motion, para. 3.
[20] Motion, para. 14.
[21] Motion, paras 20-21.
[22] Hearing of 14 June 2010, T(F), p. 16109. Hearing of 21 September 2010, T(F), pp. 16381-16400.
[23] Hearing of 14 June 2010, T(F), p. 16110.

APPLICABLE LAW

14. In order to favourably receive a request to add exhibits to the 65 *ter* List, the Chamber must be satisfied that this amendment is made in the interest of justice. To that end, the Chamber must:

> (1) in accordance with Articles 20 (1) and 21 (4)(b) of the Statute of the Tribunal ("Statute"), make sure that the rights of the Defence are respected by ensuring that all exhibits are disclosed sufficiently in advance and will not hinder the Accused in the preparation of his defence;[24] and
>
> (2) verify the *prima facie* relevance, reliability and probative value of the exhibits to issues raised in the Indictment or that there is another reason that might justify their addition to the 65 *ter* Exhibit List.[25]

15. The Chamber may also take into account any other factor that it deems valid, such as the complexity of the case or, alternatively, the date on which the Prosecution came into possession of the said documents in order to assess a request for addition.[26]

16. Furthermore, in order to grant a request to amend the 65 *ter* Witness List, the Chamber must verify that it is in the interest of justice to do so and whether or not the Accused is caused prejudice by this amendment.[27]

17. Furthermore, the Chamber examined the documents whose admission is sought pursuant to Rules 89, 92 *bis* and 95 of the Rules and the procedure established in the Order of 15 November 2007 setting out the guidelines for the presentation of evidence and the conduct of the parties during the trial.

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[24] *The Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, "Decision on Prosecution's Motion to Amend its Rule 65 *ter* Exhibit List", 15 December 2005, p. 3. *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, "Decision on Prosecution Motion to Amend the 65 *ter* Exhibit List", confidential, 26 February 2008, p. 6.
[25] *The Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, "Decision on Prosecution's Motion for Leave to Amend Rule 65 *ter* Witness List and Rule 65 *ter* Exhibit List", confidential, 6 December 2006, p. 8.
[26] *Idem.*
[27] *See, The Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-PT, "Decision on Prosecution's Motion to Amend Rule 65 *ter* Witness List and on Related Submissions", 22 April 2008, para. 9; *The Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, "Decision on Prosecution Motion for Leave to Add and Withdraw Witnesses from the 65 *ter* Witness List", confidential, 3 October 2007, para. 10.

18. The Chamber notes that Rule 92 *bis* of the Rules authorises the presentation of written evidence provided that the said exhibits have probative value and are reliable and "goŠesĆ to proof of a matter other than the acts and conduct of the accused as charged in the indictment". The Chamber exercises its discretionary power to determine whether it is fair to allow this evidence in written form or, if appropriate, whether the witness should be called for cross-examination.

19. Lastly, the Chamber recalls that, should it decide to admit into evidence the exhibits sought for admission in the Motion, it will not make a final assessment of the relevance, reliability and probative value of the said evidence at this stage of the proceedings. This will be done at the end of the trial after all the evidence, both Prosecution and Defence, has been tendered into the record.[28]

DISCUSSION

A. Preliminary remarks

1. Concerning the Accused's late response

20. The Chamber finds that the Accused's oral response, during the administrative hearing of 21 September 2010, was indeed late, but only by some days in relation to the time limit set out by Rule 126 *bis* of the Rules. This response was, furthermore, short. Such a short, oral response thus consitutes a time-saving measure, in particular for the Tribunal's translation service. In addition, this response merely added to the oral submission made by the Accused on 14 June 2010.

21. For all these reasons, the Chamber agrees to take into consideration the Accused's response made during the administrative hearing of 21 September 2010.

2. Concerning the Accused's request for disclosure of all the Mladić Notebooks

22. The Chamber recalls that, by way of the Decision of 7 June 2007, the Pre-Trial Judge ordered the disclosure of evidence in hard-copy format and in a language that

[28] *The Prosecutor v. Jadranko Prlić et al.,* Case No. IT-04-74-T, "Decision to Admit Documentary Evidence Presented by the Prosecution (Ljubuški Municipality Including the HVO Prison and Vitina-Otok Camp)", confidential, 5 October 2007, p. 7.

the Accused understands, as set out by Rules 66 (A)(i), 66 (A)(ii) and 68(i) of the Rules in order to enable the Accused to prepare and organise his defence efficiently.[29]

23. The Chamber considers, as a consequence, in accordance with the above-mentioned decision, that the Accused's request for disclosure of all the Mladić Notebooks by the Prosecution in hard-copy format is justified.

3. Concerning the typewritten transcription of the Mladić Notebooks

24. The Chamber notes that the Prosecution disclosed to the Accused the typewritten transcription in BCS of all the extracts from the Mladić Notebooks mentioned in the Motion.

25. The Chamber finds, consequently, that the Accused's request on this matter is moot.

B. The request to add documents to the 65 *ter* Exhibit List mentioned in the Motion

26. After careful assessment of the documents and written submissions disclosed to the Chamber in this trial, it would seem that:

(1) the addition to the 65 *ter* Exhibit List of documents mentioned in the Motion would not cause prejudice to the Accused who did receive a copy of these documents on 1 September 2010;[30] and that

(2) these document seem *prima facie* to be reliable and to be linked to issues raised in the Indictment.

27. The Chamber considers that it is, therefore, in the interest of justice to add these documents to the 65 *ter* Exhibit List.

C. The request to add Milovanović and Gallagher to the 65 *ter* Witness List

[29] "Decision on Motion Number 289 Regarding Form of Disclosure", filed on 7 June 2007, para. 34. *See* also "Order Clarifying the Decision Regarding Form of Disclosure", 26 June 2007.
[30] The Accused received the BCS translation of the Motion and the Exhibits attached in the Annex on 1 September 2010 (See Procès verbal of Reception filed on 6 September 2010).

28. The Chamber considers that the requirements have been satisfied so that Witnesses Milovanović and Gallagher may be added to the Prosecution's 65 *ter* Witness List, since their statements were admitted on the 65 *ter* Exhibit List.

29. The Chamber finds that it is, therefore, in the interest of justice that Milovanović and Gallagher be added to the 65 *ter* Witness List.

D. The request for the admission of the statements of Milovanović and Gallagher pursuant to Rule 92 *bis* of the Rules

30. The Chamber notes that the Milovanović statement ("Milovanović Statement") together with that of Gallagher ("Gallagher Statement") had been duly certified according to the provisions set out in Rule 92 *bis* of the Rules and that they also satisfy the requirements of *prima facie* authenticity, reliability and probative value. The Chamber considers, furthermore, that these statements are relevant in relation to the purpose for which their admission was sought, namely to attest to the authenticity of the extracts from the Mladić Notebooks. The Chamber considers, therefore, that the Milovanović Statement and the Gallagher Statement may be admitted into evidence pursuant to Rule 92 *bis* of the Rules in order to be analysed in support of the request for the admission of extracts from the Mladić Notebooks and to assess their authenticity.

E. The request for the admission of 13 extracts from the Mladić Notebooks mentioned in the Motion

31. The Chamber notes that in his 92 *bis* Statement, Milovanović declares that General Mladić ("Mladić") was his direct superior and that starting from 1992, they spent the entire war together.[31] Milovanović declares, furthermore, that he recognised Mladić's handwriting in the 18 Mladić Notebooks which were shown to him.[32]

32. The Chamber notes, however, that Milovanović did not recognise Mladić's handwriting on seven pages of the Mladić Notebook No. 18, which are notes that were allegedly taken between 16 January 1996 and 28 November 1996. These seven pages bear the ERN No. 0668-1136, 1137, 1138, 1139, 1140, 1141, 1142. The Motion

[31] *See* Milovanović Statement, para. 9.
[32] *See* Milovanović Statement, para. 5.

does not seek the admission into evidence of these seven pages in this case. On the other hand, the Chamber notes that the Prosecution requests the admission of another extract from 13 October 1994 from Mladić Notebook No. 18 which Milovanović recognised as General Mladić's handwriting and which bears the ERN No. 0668-2082 to 2177.

33. As such, the Chamber notes that Milovanović recognised Mladić's handwriting on some pages of one notebook, but did not recognise this handwriting on other pages of the same notebook.

34. Therefore, the Chamber considers that doubts exist as to the identity of the writer of these documents and, as a consequence, as to the authenticity of all the Mladić Notebooks, and not only those whose admission is sought in this Motion.

35. The Chamber notes, furthermore, that Gallagher describes in her Statement the procedure that was used since the discovery by the Serbian authorities of the Mladić Notebooks in a building in Belgrade until their transportation to and storage at the Prosecution's premises. The Chamber notes that Gallagher mentions that she obtained this information notably from Prosecution investigator Tomasz Blaszczyk.[33]

36. This being the case, the Chamber notes, firstly, that Gallagher did not directly participate in the search operation which led to the discovery of the Mladić Notebooks and, secondly, that Gallagher quotes comments made by another investigator, who was not actually present at the scene of the search operations.[34]

37. The Chamber notes, moreover, that no receipt or any other document on the seizure operation has been disclosed to the Chamber in this case. The Chamber also notes that doubts exist as to the exact date and the chain of custody and handover of the Mladić Notebooks, so that the Chamber at this stage is not in any position to verify that the seized notebooks were not in the possession of a third party who might have been able to falsify them.

38. The Chamber considers in any event that, it cannot exclude the possibility that General Mladić was not the author of part or all of the entries in the Mladić

[33] *See* Gallagher Statement, para. 2.
[34] *See* Gallagher Statement, para. 2.

Notebooks, some of these entries could have been made in the said notebooks by a third party after the dates that are mentioned therein. The Chamber cannot exclude either the possibility that it was General Mladić himself who composed and completed these notebooks *a posteriori.*

39. Under these conditions, the Chamber considers that the extracts from the Mladić Notebooks for which admission is sought do not present sufficient indicia of reliability and probative value to be admitted as evidence, at this stage of the proceedings.

40. As a consequence, noting that there are some doubts at this stage as to the reliability and probative value of the Mladić Notebooks, the Chamber finds it necessary, in the interest of justice, to solve these issues and to do so before the closure of the Prosecution's case. The Chamber considers, therefore, that it is appropriate to defer ruling on the request for admission of extracts from the Mladić Notebooks and to order the appointment of an independent expert whose task will be that of determining whether General Mladić is the author of the notebooks and, if that is the case, whether certain entries were written at intervals over several years.

DISPOSITION

FOR THE FOREGOING REASONS and pursuant to Rules 65 *ter* (E)(iii), 54, 73, 89 (C) and 95 of the Rules,

GRANTS the Accused's request for an extension of time in which to reply to the Motion,

ORDERS the Prosecution to disclose to the Accused a typewritten hard copy in BCS of the entire Mladić Notebooks,

GRANTS the Prosecution's request to add the documents mentioned in the Motion to the 65 *ter* Exhibit List,

GRANTS the Prosecution's request to add Milovanović and Gallagher to the 65 *ter* Witness List,

GRANTS the Prosecution's request for admission into evidence of the Milovanović Statement and the Gallagher Statement in accordance with Rule 92 *bis* of the Rules,

DEFERS the ruling on the request for the admission of extracts from the Mladić Notebooks,

ORDERS the Registry to appoint an independent expert whose task will be:

- to read in the original version the extracts of the Mladić Notebooks whose admission is sought,
- to determine whether General Mladić is the author, by comparing them to other documents written by General Mladić in the same period, whose source and date are certain, known and reliable,
- to highlight any amendment, addition or deletion that might have occurred to the documents under examination,
- if possible, to determine whether some of the entries were written at intervals over several years, by comparing them with other documents whose source and date are certain, written by General Mladić at different times starting with 1991, and
- to inform the Chamber of any other relevant information with regard to the documents under examination.

The appointed expert shall provide the Chamber with an expert report by no later than 15 December 2010.

ORDERS the Prosecution to hand over immediately the original copies of the Mladić Notebooks together with any other document that might be necessary for the successful completion of the task upon request from the appointed expert.

Presiding Judge Antonetti attaches a separate opinion to this Decision.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this twenty-second day of October 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

SEPARATE OPINION FROM PRESIDING JUDGE JEAN-CLAUDE ANTONETTI

1. Being full agreement with the other Judges, I could have refrained from writing this separate opinion. However, I think that these notebooks, if they are real, are incredibly important for both the Prosecution and the Accused and that under these circumstances, extreme vigilance must be exercised by taking into account several factors including the revelation of the truth, the length of the proceedings, the authenticity, etc. I therefore believe it is my duty to write this separate opinion in order to provide more detail on my position on the issue of the so-called "Mladić Notebooks".

2. The almost total lack of information produced by the Prosecution concerning the facts relating to General Mladić led me, in order to have a **better understanding**, to look for factors to be considered by consulting works in the Tribunal library, reading judgements rendered by this Tribunal, reading public transcripts of cases judged at the ICTY or on-going cases, studying well-informed press articles and studying the Indictment against General Mladić.

3. I had the impression whilst reading the Motion that the Prosecution presumes that the Judges have a good understanding of the general context, which is far from the truth in my case, given the complexity of the dismantling of the former Yugoslavia and the fact that I had never had **any contact** with these events before my arrival at the Tribunal in October 2003. In this arena, one should be particularly unassuming and seek clarification, if needs be, from the written submissions of the parties, which the Prosecution failed to do in its Motion by omitting to disclose to us even the essential exhibit in its possession which is the record of the seizure of the documents (the receipt?) written by MUP police officers during the second search operation, according to the words of the investigator for the Office of the Prosecutor.[35] As a consequence, I indicated in the footnotes references that are essential for a clear understanding of my opinion.

4. The Prosecution's Motion for the admission into the proceedings of **13** exhibits led the Chamber – **before ruling on their admission** – to question the "**authenticity**" of the 13 exhibits and, as a consequence, the **18 Mladić Notebooks**.

5. It goes without saying that resorting to the use of a **handwriting expert** will take up several weeks, indeed several months, and there is **a serious risk**, therefore, that this will have an impact on the length of the proceedings especially if a counter-expert is requested.

6. The Chamber's Decision set the date for filing the Expert report, but the expert could, if needs be, request to extend the time limit. As a priority the 13 exhibits consisting of 165 pages need to be analysed, yet the expert might also like to examine all 18 notebooks in their entirety.

7. It is true that before I decided in favour of appointing this expert, I questioned the way in which calling upon this expert would implicitly slow down the trial.

8. The outlook with regard to the trial duration is very depressing, as we have no way of **predicting** due to the Accused's state of health, the on-going contempt proceedings as well as the delays connected with the translation of the Bar Table request[36] and other imponderables to date. In addition to this sombre backdrop, there is growing uncertainty concerning the financing of the Accused's defence and his real desire to begin, if appropriate, after the Rule 98 *bis* procedure, presenting his defence case. I would say even in a few words that these proceedings are becoming ever more unmanageable as time goes by, despite the hard efforts put in by all. Further exhibits that were not expected at the beginning have come up over time such as the so-called Mladić Notebooks when we were only a few steps away from the 98 *bis* procedure of the Rules.

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[35] *The Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Hearing of 20 August 2010, Tomasz Blaszczyk, T(F), p. 6059, "Hearing of 20 August 2010".
[36] "Prosecution's Second Motion for Admission of Evidence from the Bar Table", 17 May 2010.

9. Taking into account all these factors, I do not think it is unreasonable to resort to an expert in this case as the impact on the length of the proceedings will be negligible, given that we are now counting in terms of **years** and not **months**!

10. At first I might have thought that it was appropriate to simply reject the idea for **lack of due diligence** (which I will explain later), but must the presumed lack of due diligence on behalf of the Office of the Prosecutor which was seized of the five Mladić Notebooks a considerable time ago, prevent **the revelation of the truth**? This is a very important issue which may set to one side established jurisprudence with regard to due diligence incumbant upon the parties. There will always be time for the Trial Chamber Judges to look into this issue once the expert's findings have been received. I am going, nevertheless, to address this issue as a preliminary observation.

11. Appointing an expert is a technical measure and does not in any way influence my final decision concerning the admission of the 13 exhibits.

12. The recent hearing of a Prosecution witness in the *Karadžić* case only adds to the confusion surrounding the issue of the Mladić Notebooks.[37] **Mr Blaszczyk**, an investigator for the Office of the Prosecutor,[38] first made a considerable revelation – publicly – namely that there were **two search operations** that led to the seizure of the Mladić Notebooks.[39] The first one goes back to 4 December 2008,[40] after which investigator **Mr Blaszczyk**, who was **not present at the scene of the search operation,**[41] made a selection from amongst **the material** and kept five of the Mladić Notebooks.[42]

13. Likewise, the investigator said that he made a selection from amongst the documents, his wording is ambiguous, were the notebooks amongst these

[37] Hearing of 20 August 2010, Tomasz Blaszczyk, T(F), pp. 6044-6117.
[38] Hearing of 20 August 2010, Tomasz Blaszczyk, T(F), p. 6050.
[39] Hearing of 20 August 2010, Tomasz Blaszczyk, T(F), pp. 6049-6050.
[40] Hearing of 20 August 2010, Tomasz Blaszczyk, T(F), p. 6051.
[41] Hearing of 20 August 2010, Tomasz Blaszczyk, T(F), p. 6053.
[42] Hearing of 20 August 2010, Tomasz Blaszczyk, T(F), p. 6055.

documents?[43] He was not asked any questions on this subject. I note, furthermore, that he returned to Belgrade to pick up the documents.[44]

14. To be sure that there was no confusion, or addition of subsequent material, the list of documents found and seized during the search operation should have been **compared** to the list of documents filed at the Office of the Prosecutor in order to be certain that they were the same documents without missing sections, omissions, or additions.[45] These two lists were not disclosed to the Chamber.

15. The second search operation mentioned by the witness, who once again was **not present** but draws conclusions on facts that were somehow brought to his attention, underlines the fact that there were **15 notebooks** that were duly classified, of which I have written a list in Annex 1.[46]

16. It should be noted that several notebooks were only cited during this hearing – they are notebooks 22842, 22845, 22847, 22848, 22849, 22850.[47]

17. At this stage the 92 *bis* statement of witness **Erin Gallagher** should be closely examined. Witness Erin Gallagher, an investigator for the Office of the Prosecutor who previously worked as an investigator for the Office of the Prosecutor in **San Francisco**, says that she was informed of certain facts by **Tomasz Blaszczyk**. She received further information from another investigator **Piotr Bysina** that "the Serbian National Council for Cooperation" had sent all the material (including the originals) to the Office of the Prosecutor in Belgrade and that it was Bysina who opened the package in the presence of Blaszczyk and that the latter had transported all the material to the Hague on **11 May 2010**. This witness examined the diplomatic seals that Blaszczyk had used (No. 0521736).

[43]Hearing of 20 August 2010, Tomasz Blaszczyk, T(F), p. 6055: "[A]s far as I remember, it was 25, 26 March 2009, I went to Belgrade to look at the original material seized by the Serb MUP and at that time **I selected the most important – I believe at that time the most important material,** useful material for our investigation. It was five notebooks … plus four video tapes …"
[44] Hearing of 20 August 2010, Tomasz Blaszczyk, T(F), p. 6055.
[45] Hearing of 20 August 2010, Tomasz Blaszczyk, T(F), pp. 6048, 6051, 6056-6058.
[46] Hearing of 20 August 2010, Tomasz Blaszczyk, T(F), pp. 6056-6063.
[47] Hearing of 20 August 2010, Tomasz Blaszczyk, T(F), pp. 6059-6060.

18. It would seem, therefore, that this 92 *bis* witness is of secondary importance in comparison to witness **Tomasz Blaszczyk** who testified in the *Karadžić* case.

19. The fact that the witness mentions **17 notebooks** and not 15 adds to the confusion.[48] What is he referring to? What are these two additional notebooks? How is it that this witness, who seems to have an excellent understanding of the procedure taking into account his previous expertise, is not the 92 *bis* witness in our proceedings, the Prosecution having produced a statement from another witness? Why? We know nothing.

20. The mystery surrounding the number of notebooks only increases if one refers to the 92 *bis* statement of **General Manojlo Milovanović** who states that he examined **18 notebooks** in the Office of the Prosecutor on 22 April 2010. In a table attached in the Annex to his statement, he classifies these 18 notebooks in the following way:

1. Diary : 29 June 1991 to 25 August 1991
2. Diary : 27 August 1991 to 22 November 1991
3. Diary : 23 November 1991 to 29 December 1991
4. Diary : 31 December 1991 to 14 February 1992
5. Diary : 14 February 1992- 25 May 1992
6. Diary : 27 May 1992 to 31 July 1991
7. Diary : 16 July 1992 to 9 September 1992
8. Diary : 10 September 1992 to 30 September 1992
9. Diary : 5 October 1992 to 27 December 1992
10. Diary : 2 January 1993 to 28 January 1993
11. Diary : 2 April 1993 to 24 October 1993
12. Diary : 28 October 1993 to 15 January 1994
13. Diary : 9 January 1994 to 21 March 1994
14. Diary : 31 March 1994 to 3 September 1994
15. Diary : 4 September 1994 to 28 January 1995
16. Diary : 14 July 1995 to 18 September 1995
17. Diary : 28 August 1995 to 15 January 1996
18. Diary : 16 January 1996 to 28 November 1996

[48] Hearing of 20 August 2010, Tomasz Blaszczyk, T, pp. 6055-6056.

21. It should be noted that these 18 notebooks are organised chronologically from 29 June 1991, nevertheless with the following "**time gaps**":

- 26 August 1991

- 30 December 1991

- 26 May 1992

- 1 to 5 October 1992

- 28 December 1992 to 2 January 1993

- 29 January 1993 to 2 April 1993

- 24 to 28 October 1993

- 22 to 31 March 1994

- 29 January 1995 to 14 July 1995

22. It should be noted that certain notebooks straddle the same time periods:

- Notebook No. 12 (28 October 1993 to 15 January 1994)

- Notebook No. 13 (9 January 1994 to 21 March 1994)

- Notebook No. 16 (14 July 1995 to 8 September 1995)

- Notebook No. 17 (28 August to 15 January 1995)

23. Likewise, there is a noticeable gap for the period of 28 January 1995 to 18 September 1995. There must then be one or more notebooks for this period that were not located or which may have been destroyed by General Mladić or which still remain in his possession, if he is alive. It thus appears quite logical that the witness saw **18 notebooks**.

24. The other question that ought to be raised, which is suggested by the hand-writing report, is this: how is it that the Prosecution, which was already in possession

of the notebooks for over a year, did not think it helpful to order a handwriting analysis, relying on its own means? An article published in the newspaper *Vreme* on 24 June 2010 by a certain Dejan Anastasijević says this: "In 2008, during the first search of his home in Belgrade, where his spouse still lives, two were found covering the period from January to April 1993. They contained nothing of significance. Last 23 February, the Serbian police again raided the Mladić home, rummaging through the attic in particular (…) in a specially outfitted cache, the police officers discovered 18 notebooks, minutes of meetings of the Supreme Defence Council, as well as 120 video and audio recordings. In approximately 3,500 pages, the notebooks cover the period running from 29 June 1991 through 28 November 1996".

25. This article, which must be read against the testimony of the Witness Blaszczyk on 20 August 2010 in the *Karadžić* Case, strikes a troubling note concerning the number of notebooks discovered, **2** notebooks in 2008 and **18** notebooks in 2010. Without entering into close examination of the details mentioned in this article, it thus appears that, as early as 2008, that is, over two years ago, the Prosecutor had the option, from a technical point of view, to order a handwriting analysis, in order to have a clear conscience, because two notebooks had been located. He did not do so, and now he is merely side-stepping the issue by annexing two 92 *bis* statements devoid of scientific value in any sense that is relevant to the handwriting.[49]

26. Reading the transcript of the *Karadžić* case[50] thus brings to light the fact that the Prosecution knew about 5 Mladić Notebooks as of December 2008, having taken custody of the said Notebooks on 25 February 2009 by means of the scanned version,[51] and that it had therefore disposed of ample time to request that a handwriting expert provide it with an **airtight technical opinion**. In lieu of accomplishing this basic task, the Prosecution waited **until the last minute** for General Milovanović to appear, to ask his opinion, and at the mere sight of these documents, he could only conclude that this was indeed the handwriting of General

[49] *The Prosecutor v. Šešelj*, Case No. IT-03-67, Annex A of the "Prosecution's Motion for Admission of Evidence Relating to Mladić Notebooks and for Leave to Amend its Rule 65*ter* Witness and Exhibit Lists", 16 July 2010.
[50] Hearing of 20 August 2010, Tomasz Blaszczyk, T(F). 6044-6117.
[51] Hearing of 20 August 2010, Tomasz Blaszczyk, T(F). 6054.

Mladić, while observing that there were loose-leaf sheets featuring another handwriting whose author this same General did not identify.[52]

27. This testimony is an inadequate basis on which to conclude scientifically that this is indeed the handwriting of General Mladić.

28. I am compelled to lay out, in **detailed fashion,** the reasoning which leads me to favour a straightforward decision to deny the motion to admit evidence after the filing of the expert's report in light of the possibility that the expert's report may suggest that the notebooks were indeed drafted by General Mladić. Should the opposite happen, that could lead only to an **automatic denial** of the motion.

29. The first question to ask is: **who** is General Mladić?

30. A **publicly known** fact appears in paragraph 90 of the *Popović et al.* Judgement,[53] which reads thus: "On 12 May 1992, the Army of RS ("VRS") was formed. Radovan Karadžić, the President of the RS, became the Supreme Commander of the VRS; General Ratko Mladić became the Commander of the VRS Main Staff. The VRS enjoyed military superiority, while the Army of BiH ("ABiH") adopted a type of guerrilla warfare, which towards the end of 1992 was quite successful".

31. It thus appears that **General Mladić was the Commander of the Main Staff of the VRS**. To place matters in a clearer light, due to the lack of information supplied by the Prosecution, which thought that all of this was well known by the members of the Chamber, it is stated in paragraph 103 of this Judgement that the VRS had been created out of parts of the JNA and that the command and control of its corps was ensured by the "Main Staff", which, according to paragraph 104, was the highest-ranking operational corps of the VRS, with General Mladić as Commander, who operated under the oversight of Radovan Karadžić, the "Supreme Commander" and who therefore answered directly to Karadžić.[54]

32. Upon reaching this stage, where it has become apparent that **Radovan Karadžić** sits No. 1 atop the chain of command ("Supreme Commander"), why then

[52] Hearing of 20 August 2010, Tomasz Blaszczyk, T(F). 6053-6065, 6097-6098.
[53] *The Prosecutor v. Popović et al.*, Case No. IT-05-88, Judgement, 10 June 2010.
[54] *The Prosecutor v. Popović et al.*, Case No. IT-05-88, Judgement, 10 June 2010.

does the Prosecution not **also** move for the admission of documents produced directly by Radovan Karadžić, especially insofar as his trial is underway and the 65 *ter* (G) List in his case must surely mention the existence of these relevant and interesting documents.

33. It should likewise be noted that in the Indictment, he is charged with participating in a criminal enterprise with other parties **yet the name of the Accused Seselj is nowhere mentioned**. Regarding the murders indicted in Annex A for the year 1992, we should mention the municipality of Zvornik for the time running from May 1992 to 8 June 1992, as well as in Annex C for the detention centres ("Ciglana" factory, culture house in Drinjača, technical school, Gero slaughterhouse, culture house in Čelopek and the Ekonomia farm in the municipality of Zvornik without reference to dates … These are Charge 3 (Persecution), Charges 1 and 2 (Genocide, Complicity in Genocide), Charges 4, 5 and 6 (Extermination and Murder).

34. Along the same line of thought, did the arrest of Radovan Karadžić, cloaked in mystery, also lead to the discovery of documents in his possession of the Mladić Notebooks-variety?[55] As of this date, we know absolutely nothing about such matters. It should be noted that, when cross-examining Witness **Blaszczyk**, he mentioned that documents had been seized from persons close to him during his arrest.[56]

35. It must be observed that this description, alluded to in the *Popović et al.* Judgement, originates with Witness **Manojlo Milanović**, whose statement the Prosecutor is seeking to have admitted.[57] At this stage, I will draw no definitive conclusion in this regard inasmuch as the Judgement has been subjected to an appeal, but the paragraphs cited may perhaps better allow us to understand, in some sense, the presumptive role of General Mladić in these events.

36. Another matter concerns the key issue in the fresh exhibit, not stated in the Indictment, which is the role of the VRS and of General Mladić.

[55] Hearing of 20 August 2010, Tomasz Blaszczyk, T(F). 6095 and 6096.
[56] *The Prosecutor v. Popović et al.*, Case No. IT-05-88, Manojlo Milanović, Hearing of 31 May 2007, T(F). 12319.
[57] *The Prosecutor v. Popović et al.*, Case No. IT-05-88, Hearing of 31 May 2007, Manojlo Milanović, T(F). 12319.

37. Reading through the Indictment leads one to note that when the Republika Srpska was created along with its army, the VRS, the Indictment and the Pre-Trial Brief did not at any time stress the fact that the Serbian Radical Party conducted its political and military activities in association with the VRS and thus, General Mladić. Likewise, reading through the Pre-Trial Brief does not enable one to draw any conclusions. This lies at the core of the problem that will be considered at the proper time, in light of the Judgement and the Separate Opinion of Judge Lattanzi in the case of *Jean Mpambara*.[58]

38. The case-law is emphatic on this point: the Accused must know the charges against him with specificity from the outset.[59] It falls to the Trial Chamber, once the expert's report is filed, to rule upon this issue.

39. In reading through the pages disclosed, one is struck by how, systematically, for each of the meetings, General Mladić takes up all of the names of the participants and what they said and makes comments thereon, and does so, either during the meetings or after the meetings.

40. This is quite striking when one is used to what is done in meetings at a high level. The person who chairs the meeting or is essential to it, does not in general take notes, leaving that task to a subordinate, because he needs to call the meeting to order, look at his interlocutors and react to what is said. It is therefore surprising that a person at General Mladić's level could, after many days fill entire pages in real time

[58] Separate Opinion of Judge Lattanzi, Case No. 01-65, Jean Mpambara, 20 September 2006, para. 10 "So, in accordance with the opinion of the Appeals Chamber, the obligation placed upon the Prosecutor to inform the Accused clearly and in detail of the charges brought against him, must be considered, not in isolation, but as a function of the right of the Accused to provide for his own defence. Therefore, it is necessary to evaluate whether the Prosecutor has supplied adequate information in light of the Defence's understanding of the charges. For though it is true that "no sentence of guilt may be made when the obligation to inform the person prosecuted of the legal and factual grounds on which the charges brought against that person are based has violated that person's right to a fair trial", it is no less true that the Chamber must assess with specificity whether the Accused was or was not "in a reasonable position to understand the charges against him or her". Once again, in the language of the Appeals Chamber, if the Trial Chamber "considers that the Indictment is flawed because it is vague or ambiguous, it must seek to find out whether the Accused has at least had a fair trial, or, in other words, whether the flaw observed has prejudiced the Defence".

[59] *The Prosecutor v. Erdemović*, Case No. IT-96-22, Judgement [on Appeal], 7 October 1997, paras 16-21. *The Prosecutor v. Simić*, Case No. IT-95-9-A, Judgement, 28 November 2006, paras 15-25.

when his responsibilities ought to have led him to delegate this task. The experts cited in the Globus magazine article seem to support this possibility.[60]

41. That being the case, this little technical point never ceases to astonish and makes one ask oneself the question: could he, technically, **during** the meeting, have filled pages with handwriting when he was the driving force at these meetings? I have my doubts … to say the least ….

42. There could be a technical explanation, that with the consent of the participants, or **without their knowledge**, an audio recording of the meeting took place and in his office General Mladić, having time to do this, played the tape back and reconstructed what was said by making a summary of the audio recording, retaining only those parts he considered significant but which may have been relative in comparison with what was actually spoken.

43. This motion by the Prosecution concerns **13 entries**, carefully selected from among the 3,500 pages of the Mladić notebooks, to back up its Indictment. These 13 entries, totalling 165 pages, in reality constitute only about 4% of the Mladić notebooks.

44. The Prosecution has seized this Chamber and other Chambers of the Tribunal with a motion seeking either to amend its 65*ter* List or leave to re-open its case.

45. The "miraculous" discovery of the Mladić notebooks, making the assumption that this was done under real-life conditions, must surely lead a professional investigator, and later on, the judge seized of the case, to ask themselves the following questions, after search and seizure:

- are the documents relevant for the case at bar?
- if so, were they drafted by the **perpetrator** of the crime?
- are the documents discovered **authentic** or **counterfeit**?

[60] GLOBUS magazine article, "*Globus istražuje Mladićevi dnevnici ili venika prevara*"/GLOBUS reports: Mladić Diaries or a Big Swindle/, 4 June 2010.

- if the documents display characteristics tending to confirm their authenticity, particularly written documents (this is the case for the Mladić Notebooks), are we then certain that the person who actually held the pen for the document is indeed the person supposed to have drafted that very document?

- if these are counterfeit documents, when were they filed and for what purpose?

46. The questions enumerated above lead me to underscore two other questions of potential importance for our case:

47. The first question goes to the authenticity of the documents: was General Mladić indeed the person who drafted these documents?

48. Although it is true that in the Karadžić case, Judge Kwon found, in deciding to admit them, that that there were no submissions concerning their authenticity, it is nevertheless appropriate to note the reservations **previously** expressed by the Karadžić Defence. The "Stand-By" Counsel, Mr Robinson spoke thus: "ŠyĆes, Mr. President. If I can answer that on Dr. Karadzic's behalf. We're putting the Prosecution to its proof to see whether or not they can prove or it's established that – through the testimony of this next witness with – that these notebooks were authored by General Mladic".[61]

49. The Accused Karadžić himself contested their contents as construed by the Prosecution, focusing on several occasions on their translation.[62] Ultimately, he did not oppose their admission for reasons undoubtedly related to his defence, which I am not called upon to assess. I must, however, observe that his position may be different than that of the other parties in question, who may also have their own reasons for being **for** or **against** admission of the notebooks. That being the case, the fact that he is not opposed does not signify that all doubts have been dispelled concerning their authenticity which would in any event require an expert opinion. I also cannot obscure the fact that in their own interests, the two fugitives were able to meet and jointly put in place a defence structure utilizing the unexpected discovery of the notebooks

[61] Hearing of 20 August 2010, Tomasz Blaszczyk, T(F). 6047 and 6048.

which, in the view of the Prosecution, could at first glance advance the Prosecution's theory of the case, while at the conclusion of the proceedings they might very well serve as Defence evidence.

50. In the arena of international justice, which must be of the **highest quality**, it is necessary to resort to handwriting analysis inasmuch as the author is on the run, because this goes to the credibility of International Justice, which must apply truly elevated standards to forestall criticism.

51. The second possibility to consider is the hypothetical possibility that the Mladić Notebooks, drafted by his own hand, were entirely or partly drafted to serve the needs of his case. A reasonable investigator, trained in the art of investigation, must ask himself whether the fugitive might not have returned to the site (his attic?) to leave behind evidence favourable to him in order to absolve himself of any responsibility by means of a personal log-book which may well have been entirely or partly drafted subsequent to the events. General Milovanović said that this is indeed the handwriting of General Mladić yet he does not provide formal proof of this notebook being drafted line by line in his physical presence. I am also compelled to envisage the possibility that evidence was fabricated by an individual who left behind him, in the style of the fairy tale character "Little Thumb", traces that would absolve him from some or all of the responsibility accruing to him, knowing somehow that one day the investigators might "stumble upon" these documents.

52. The possibility of subsequent fabrication must be seriously considered, and beyond the detailed statements given by General Mladić's wife or General Mladić himself. All we can do is to propose this hypothesis and submit it to handwriting analysis. Handwriting analysis could indeed, based on the handwritten annotations in the various manuscripts, help to establish the psychological profile of the fugitive and perhaps allow us to reach the conclusion that the annotations were possibly placed **subsequent** to the dates indicated. What may be essential to this analysis would be the possibility that certain annotations were drafted subsequent to the events for purposes

[62] Hearing of 20 August 2010, Tomasz Blaszczyk, T(F). 6089, 6097-6099 and 6102.

of **self-justification or exoneration from responsibility**. Thus, lacking other irrefutable elements, it appears necessary to proceed to handwriting analysis.[63]

53. The fugitive, General Mladić, has been the target of searches for years now – since the publication of his Indictment[64] - by the authorities from the Republic of Serbia, by international missions working under a mandate,[65] and by the Office of the Prosecutor, which has increased its travel in every direction in recent years[66] and made numerous statements.[67]

54. The searches undertaken, for which the judges are not informed about the concrete circumstances and techniques, and which have hitherto been fruitless in

[63] Comment: The Supreme Court of the United States, in its decision *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, defined certain criteria applicable to the skills required for an expert in a proceeding before the courts. They emphasize that these are general criteria which do not *a priori* exclude the field of expertise in graphology.

[64] The original Indictment brought against Radovan Karadžić and Ratko Mladić was confirmed on 25 July 1995. The latter were called to account for genocide and other crimes committed against the civilian population throughout the territory of Bosnia and Herzegovina (Case No. IT-95-5). A second version of the Indictment, accepted on 16 November 1995, addressed the events that occurred in Srebrenica in July 1995 (Case No. IT-95-18). The two Indictments were merged in July 1996 under Case No. IT-95-5/18. The Indictment was amended on 11 October 2002 in respect of Ratko Mladić. On 15 October 2009, the case against Ratko Mladić was officially separated from that against Radovan Karadžić and assigned case number IT-09-92.

[65] Security Council Resolution 1031 (1995) created a multinational peace-keeping force (IFOR) (cf. paras 4 and 14). It was replaced by the NATO Stabilization Force in Bosnia and Herzegovina (SFOR) from January 1996 to December 2004, from which date the stabilisation mission was entrusted to the European Union (EUFOR).

[66] The Prosecutor, Ms Carla del Ponte, went to Sarajevo on 9 March 2005 for the inauguration of the Tribunal in Bosnia and Herzegovina. In February 2006, to Belgrade. On 11 July 2006, in Bosnia and Herzegovina to attend the Srebrenica commemoration ceremony in Potocari. In addition, in November and December 2008, Prosecutor Serge Brammertz went to Zagreb on 10-11 November, then to Sarajevo on 12 and 13 November, as well as to Belgrade on 17 and 18 November. In each of these three capital cities, the Prosecutor met, among others, the representatives of the various governments and persons responsible for cooperation with the Tribunal. Moreover, in 2009, the Prosecutor went to Zagreb on 5 February, to Belgrade on 26 and 27 March, to Sarajevo on 4-5 and 6 May, again to Belgrade on 11 and 12 May, to Croatia on 25 and 27 May, as well as on 28 and 29 September, to Sarajevo on 28 and 29 October and again to Belgrade on 2 and 3 November. Finally, in 2010, the Prosecutor attended the Srebrenica commemoration ceremony in Potocari in April. He then travelled to Belgrade from 12 to 14 May and in Croatia from 25 to 27 May.

[67] These diplomatic statements were made in Brussels. As it turns out, in January 2006, the Prosecutor, Ms Carla Del Ponte, held a series of meetings, accompanied by the General Secretary of NATO, the European Commissioner for Enlargement and European Policy and the Representative for Foreign Affairs and Security Policy of the European Union. In addition, on 26 June 2007, the Prosecutor spoke to the members of the Commission on Foreign Affairs of the European Union about the arrest of Ratko Mladić. Moreover, on 3 July 2007, the Prosecutor met the Representative for Foreign Affairs and Security Policy of the European Union as well as the European Commissioner for Enlargement and European Policy to discuss, among other items, the cooperation of states with the Tribunal. Also, on 5 September 2007, the Prosecutor, accompanied by President Pocar and Registrar Holthuis, travelled to a seminar. Besides that, on 15 September 2008, the Prosecutor, Mr Serge Brammertz, attended a meeting of the ministers of foreign affairs. Finally, on 18 September 2009, the Prosecutor explained how

locating the fugitive, nevertheless led, on **23 February 2010** to the discovery of the said notebooks at the wife's home. This discovery, as I stated above, may have been intended by General Mladić.

55. From a technical standpoint, it staggers belief to think, after all of these years and all of the effort deployed, that someone would discover the notebooks just a few weeks ago! One may rightfully ask what the investigators tasked with finding General Mladić have been doing.

56. The "discovery" of these notebooks is a never-ending source of amazement. The question to ask is what the investigators were up to earlier, during their searches of the Mladić family home – something we will never know – as we do not possess copies of the procedural documents produced by the Serbian authorities responsible for this. The only answer we have is that given by Witness **Blaszczyk** in the *Karadžić* case, who mentioned the Serbian MP, while noting that he was not himself present.[68]

57. One must note that the Prosecutor, in his submission, provides little information concerning the legal context of this discovery, such that a judge in a Chamber presently seized does not know exactly **who** discovered this evidence; they should have copied all of the procedural documents produced from the search, as well as any statements taken – at least – when interviewing the spouse. Though there may be some exhibits that address these issues in the Karadžić case and were admitted into evidence, in **our case, we** have absolutely none of this![69]

58. To follow down the path suggested by the Prosecution, that is, to admit the Mladić Notebooks, would amount to asking the following question: are there other personal notebooks with a value equalling or surpassing the value of these notebooks? The answer appears affirmative, as, following the theory that the JNA officers kept notebooks, there would then be personal notebooks for all former JNA officers who served in the JNA or in other armies.

59. It is manifest that the searches undertaken to find General Mladić are known around the world because the former Prosecutor of the Tribunal thought it fitting to

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cooperation of States with the Office of the Prosecutor was to take place, and did so again during his meeting with Štefan Füte, European Commissioner for Enlargement and European Policy.

[68] Hearing of 20 August 2010, Tomasz Blaszczyk, T(F). 6051 and 6053.

publish, first in Italy, a book co-authored with an "expert-witness" of the Prosecution,[70] for the purpose of specifically discussing this issue as it related to searches for General Mladić and Radovan Karadžić, with, on the publicity page "with the assistance of Chuck Sudetic – Carla del Ponte – *La Caccia – Io e i criminali di guerra*?/The Hunt – War Criminals and I/, published by Feltrinelli in Milan, Italy, which was presented by her at the Book Fair in Buenos Aires, Argentina, in front of 2 members of an international court, including a former judge of our Appeals Chamber….[71]

60. It seems that she did everything possible to capture General Mladić, as the interview conducted in Bordeaux, France, attests.[72] Likewise, she participated in a documentary film *La Liste de Carla* /Carla's List/, focusing on searches for fugitive criminals.

61. The current Prosecutor, **Mr Serge Brammertz**, following in the footsteps of his predecessor, said some time ago at a meeting with the foreign press in The Hague, that "*il y a un écart entre le discours politique, ce qui se passe sur le terrain et ce qui doit être fait pour être efficace* /there is a gap between the political discourse, what happened on the ground and what needs to be done to be effective/" and he added "*la situation est encore loin d'être parfaite* /the situation is still far from perfect/*"*.[73]

62. The Statute requires the Tribunal to conduct trials **expeditiously**. Thus, in Article 20 of the Statute, it stipulates: "ŠtĆhe Trial Chambers shall ensure that a trial is fair and expeditious". An expeditious trial is a requirement that is uniform across all systems of Law; moreover, the European Court of Human Rights has repeatedly

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[69] Hearing of 20 August 2010, Tomasz Blaszczyk, T(F). 6056.
[70] *The Prosecutor v. Prlić et al.*, Case No. IT-04-74, "Prosecution Submission of the Expert Report of Charles A. Sudetić dated 14 February 2007, with Corrigendum", public document filed on 23 May 2007. Oral Decision by the Chamber of 4 July 2007 denying the motion, T(F). 20762 and 20763, upheld 6 September 2007: "Decision on Prosecution Motion for Review of a Decision, or in the Alternative, for Admission of Documentary Evidence". See also T(F). 37187 and 37205.
[71] See the article on the website swissinfo.ch dated 22 May 2010.
[72] Interview in *Libération*, 21 October 2006 (excerpts):
Q: For Mladic?
A: There is a real lack of political will in Belgrade. Fortunately the International Community now unanimously insists on his transfer to The Hague.
Q: Where is Mladic now?
A: He is in Serbia, in Belgrade and the surrounding area, because he moves about freely.
[73] AFP Dispatch of 29 October 2010, "*Mladic libre : pire des signaux* /Mladić free: worst of signs/" (ICT).

defined the concept of a reasonable time.[74] In his report to the Security Council, the Secretary General of the United Nations mentioned the obligation to ensure an expeditious trial.[75]

63. This concept of an expeditious trial is understandable, for in every trial at the ICTY, there is an accused in provisional detention. This being the case, provisional detention may not be extended to an extreme for reasons related to the implementation of procedure by the parties, thus making the proceedings unnecessarily long. Especially so, in that for the present case, the Accused is about to surpass all of the records in the field of provisional detention.

64. In this regard, we should take note of the fact that the Rules of Procedure and Evidence promulgated by the Judges make mention, in several rules, of the obligation of an expeditious trial.[76]

65. In this context, the occurrence of a new procedural event must be examined with greatest care so that the bedrock principle of procedure, an expeditious trial, is not undermined. This is the reason why this Tribunal's jurisprudence has established strict preconditions for the re-opening of the case, which is everywhere understood to occasion new delays.

66. In the History of Nations, it would be easy to list the discoveries that have have been uncovered following fabrications or manipulations.[77] The best example is that of the case of the Irishmen of Vincennes. [78] This shameful precedent has led me

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[74] Judgement on Appeal, 27 November 1991, *Kenmache v. France*, para. 60; Judgement on Appeal, *Reinhardt and Slimane-Kaïd v. France*, 31 March 1998, para. 97 "/The Court recalls that the reasonableness of the duration of a proceeding is to be assessed according to the circumstances of the case and with regard to the criteria set forth by the jurisprudence appurtenant thereto, particularly the complexity of the case, the conduct of the moving party and that of the authorities having jurisdiction./"

[75] Report of the Secretary General of the United Nations S/25704 and Corr., p. 27, para. 99.

[76] Rules of Procedure and Evidence ("RPE"), adopted 11 February 1994, as amended on 10 December 2009: Rule 72 (B)(ii) of the RPE "Preliminary Motions"; Rule 73 (B) of the RPE "Other Motions"; Rule 90 (F)(ii) "Testimony of a Witness"; Rule 98*ter* (C) and (D) "Judgement"; Rule 117 (B) "Judgement on Appeal".

[77] *Cour de Cassation*, Criminal Chamber, Public Hearing of 26 March 2003, 02-81.307, unpublished decision.

[78] See generally several cases known for having aroused controversy, such as the *Calas* case in which a verdict on appeal rendered by an assembly of 80 Judges and by the Royal Council rehabilitated Calas. Also in fact the *Dreyfus* case, when, in 1894, Captain Alfred Dreyfus, an Alsatian Jew, was accused of espionage and sentenced by a military tribunal to demotion and deportation to Devil's Island. Two years later, it was proven that the Judgement was based on falsified documents and there were serious reasons to think that an officer saddled with debt, Commandant Esterhazy, was the real guilty party. In addition, the fire at the Reichstag, for which, on 10 January 2008, the services of the German Federal

to be very circumspect about this fabulous discovery in the Prosecution's favour, given the media coverage it has enjoyed[79] whereas our practice has hitherto been to keep confidential evidence that could lead to confidential or even *ex parte* requests, without all the media circus.

67. According to the statement attached to the motion, in keeping with the customary practice of the officers in the JNA, officer Mladić kept a notebook in which he wrote daily about the notable events of the day.[80]

68. To the extent that what the chief of the main staff says corresponds to the truth – and I have no evidence at this time that would allow me to think otherwise – I am nevertheless able to conclude, for the time being, that these are personal notes written down on individual pages which, for the most part, relate to the various events which occurred during the period covered by the Indictment. This may be confirmed by the statements of the Prosecution's witness in the *Karadžić* case.

69. From a technical point of view, it is undeniable that such characterisation, as long as it is relevant, may involve a certain probative value, though this would require that these notes be compared to other documents. Relevance and probative value would be better established if the witness were here, so that the contents of these writings themselves could be shown to him. This is a hypothetical possibility because, as an accused, he could refuse to answer, which falls squarely within his rights. Likewise, from a hypothetical standpoint, the Accused Karadžić could provide his

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Prosecutor (Generalbundesanwaltschaft beim Bundesgerichtshof Karlsruhe), considered that the sentence of **Marinus van der Lubbe** was formally "illegal" and for this reason annulled the verdict 75 years later. Moreover, the case of the Rosenberg couple which led to a decision of the United States District Court, Southern District of New York, Case No. C.134-245, "*United States of America v. Julius Rosenberg, Ethel Rosenberg, Anatoli A. Yakovlev, also known as "John", David Greenglass and Morton Sobell*", followed by vociferous criticism both around that country and internationally. Finally, the *Katyń* case, in which the leader of the USSR, Mikhail Gorbachev admitted in 1990 that the NKVD was responsible for the massacre and offered an official apology to the Polish people.

[79] On 18 June 2010, the Prosecutor, Serge Brammertz, speaking to the Security Council, publicly announced that "[t]he Serbian authorities have provided notebooks containing the handwritten war-time of Ratko Mladić, and associated tapes. These were seized during a search operation conducted by the Action Team in charge of tracking fugitives in February 2010. The valuable, voluminous material recovered is currently being analysed, and we have sought and will continue to seek its introduction as evidence in several trials."

[80] *The Prosecutor v. Šešelj*, Case No. IT-03-67, Annex A, "Prosecution's Motion for Admission of Evidence Relating to Mladić Notebooks and for Leave to Amend its Rule 65*ter* Witness and Exhibit Lists", 16 July 2010.

views on the matter, if he accepted to testify, as have done other accused in other cases (the Accused Šešelj having testified in the Milošević trial).[81]

70. The flight of the person in question, from whom we have had no news for some time, does not or will not, in the short term, permit us to confront the author of the diaries. Thus, all that has been said remains purely **relative** and requires comparison of other exhibits previously admitted with the contents of the notebooks; and thus the contents of the notebooks, because of their authors, must be corroborated with other exhibits, in order to enhance the probative value of all exhibits already admitted, rather than the other way round.

71. My conclusion is therefore, for that reason, that the probative value of the notebooks is quite low, based on the lack of other exhibits not brought to our attention. I am bound to conclude that they should be denied admission without further ado.

72. The need for an expeditious trial means that all parties involved in the trial must be personally responsible for their actions.

73. The Prosecutor must, as the Statute contemplates, prepare a case file that results from a serious, professional investigation.

74. The Defence, in its essential task of exercising the rights of the Accused, must, like the Prosecutor, prepare its evidence in a manner that is professional in light of what is at stake.

75. As for the Judges, their task, as fixed by the Status and more particularly by Rule 90 (F) of the Rules of Procedure and Evidence, is to ensure an expeditious trial, and to do so by every procedural method available to them, provided that they employ them and do not leave it to the parties to conduct the trial. Rule 54 of the Rules of Procedure and Evidence supplies the Judges with the means they require: they may issue orders for the conduct of the trial and do so ***proprio motu***.

76. Against this backdrop, the jurisprudence is quite interesting because it quite specifically lays out the contours of Judicial action and reminds the parties of their

[81] *The Prosecutor v. Milošević*, Case No. IT-02-54, Testimony on 19, 23, 24, 25, 30 and 31 August

obligations. Thus, in 1998, in a decision rendered in the *Delalić* case, the "*Čelebići* Decision", the Chamber succeeded in clarifying that the re-opening of the presentation of Prosecution evidence could only be authorised "in exceptional circumstances, where the justice of the case so demands".[82] This argument was then re-iterated in 2005, in the Tribunal's holding in the *Milošević* case,[83] then in the *Hadžihasanović and Kubura* case.[84] The Prosecution is thus tasked with exercising its **duty of diligence**. This duty of diligence was, moreover, fleshed out in the *Čelebići* Decision, where the Chamber actually explained that, as a general matter, the later the Prosecution's motion to introduce new evidence came in the proceedings, the less the Chamber was likely to grant the said motion and therefore the Chamber had denied the Prosecution's motion.[85] Later still, the concept of diligence was defined as well. The Trial Chamber said in the *Milošević* Decision that "ŠiĆt is even clearer that the reasonable diligence standard is not satisfied where no attempt to locate or obtain the evidence in question was made until after the close of the party's case, and no explanation for such delay is provided…." It is clearly settled in the case-law of the Tribunal that it is the party seeking re-opening of the presentation of its case that must prove that the evidence is "fresh".[86]

77. Being then aware of the first Mladić notebook in February 2009,[87] it was up to the Prosecution to inform the parties and the Chamber of that fact. From my perspective, the lack of diligence is alone sufficient for the motion to be denied. This will have to be examined after the expert's report is filed.

2005, then again on 1, 5, 6, 7, 14, 15, 16 and 20 September 2005.

[82] *The Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, "Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case", 19 August 1998 ("*Čelebići* Decision"), para. 27.

[83] *The Prosecutor v. Milošević*, Case No. IT-02-54-T, "Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case with Confidential Annex", 13 December 2005 ("*Milošević* Decision"), paras 33 and 37.

[84] *The Prosecutor v. Hadžihasanović & Kubura*, Case No. IT-01-47-T, "Decision on the Prosecution's Application to Re-Open Its Case", 1 June 2005 ("*Hadžihasanović* Decision"), para. 47.

[85] *The Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, "Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case", 19 August 1998 ("*Čelebići* Decision").

[86] *The Prosecutor v. Milošević*, Case No. IT-02-54-T, "Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case with Confidential Annex ", 13 December 2005 ("*Milošević* Decision").

[87] *The Prosecutor v. Popović et al.*, Case No. IT-05-88, "Prosecution's Second Motion to Reopen Its Case and/or Admit Evidence in Rebuttal under Rule 85(A)", confidential document, 27 March 2009, §§ 6-8.

78. In Continental systems of law, trials are extremely short, lasting some few days or weeks, regardless of the complexity of the trial,[88] with the exception of cases involving the mafia in Italy, which last several months.[89] In Common Law systems, the duration of a trial is also limited.[90] Moreover, as concerns the International Criminal Tribunals, it must be observed that at Nuremberg and at Tokyo, the trials were fast.[91] In Cambodia, the *Duch* trial at the Extraordinary Chambers for prosecuting the crimes committed by the Khmer Rouge lasted less than a year and a half.[92]

79. In the midst of all this, it seems that the Šešelj trial will become the longest trial in History for provisional detention. The trial began on 7 November 2007, though it must be noted that he has been in provisional detention since 24 February 2003, a world record. As such, at this stage, I cannot be anything but **viscerally and categorically opposed** to any requests that would prolong the length of the trial, except for those requests that purport to concern an extraordinary event substantially affecting the Indictment. Likewise, I cannot fail, in trying to take into account all procedural risks, to estimate that, as of today, it is foreseeable (I am essentially persuaded thereof) that (if one includes the possible period needed by the Appeals Chamber), a final judgement will not occur prior to 2013. The Accused may thus be held in provisional detention for 10 years. This is hypothetical, yet it must not be

[88] Article 309 of the French Code of Criminal Procedure (as amended by Law No. 93-1013 of 24 August 1993, which amended Law No. 93-2 of 4 January 1993 introducing reforms in criminal procedure): "*Le président a la police de l'audience et la direction des débats. Il rejette tout ce qui tendrait à compromettre leur dignité ou à les prolonger sans donner lieu d'espérer plus de certitude dans les résultats.*/The presiding judge watches over the hearings and directs argument. He or she rejects anything that might tarnish their dignity or prolong them without hope of greater certainty as to their outcome". Article 331 of the Swiss Code of Criminal Procedure, 5 October 2007.

[89] See, e.g., the "maxi-trial" in Palermo, which opened on 10 February 1986 and closed on 17 November 1987, and which thus lasted somewhat more than a year and a half, considered 465 accused and handed down 365 sentences in all.

[90] In Canada, see, e.g., the Criminal Code (Decree 650-2005), 19 October 2005, Section VII "Court Sittings", para. 17 "Fixing of the dates of sittings. The sittings of the court shall be fixed by the president judge, the judge responsible for the court or the judge, in all cases, after consulting the clerk." In Canada, in 2001-2002, the average time spent on a trial for an aggravated robbery was 218 days, for serious offences the average was 224 days and 293 days for sexual assaults (see "An Examination of the Average Length of Prison Sentence for Adult Men in Canada: 1994 to 2002" by Roger Boe, Larry Motiuk and Mark Nafekh, 2004, Correctional Service of Canada). In the United Kingdom, see e.g. Article 245 of the Code of Criminal Procedure: "The president is appointed for the duration of each quarter and for each assize court by an order made by the president of the court of appeal which fixes the date for the beginning of the sessions", 1 January 2006.

[91] At Nuremberg, the trial against the War Criminals opened on 20 November 1945, and ended on 1 October 1946. At Tokyo, the Tribunal sat from 3 May 1946 to 12 November 1948.

[92] Duch's trial began on 17 February 2009 and ended on 26 July 2010.

ignored. The situation in which we find ourselves results from two factors principally, the first is the fact that the Prosecution took almost 4 years to open its first trial, and the second involves the *Stand By* Counsel requirement, which had the effect of slowing down the opening of the trial. Against this overall context and taking into account the countless procedural risks of this case, resorting to the use of handwriting analysis is understandable because, after all this time, it is a mere drop in the ocean….

80. In any event, handwriting analysis seems requisite to me and depending on the results, the situation will suddenly become quite clear:

- either the notebooks are authentic and that is when the issue will arise for the Chamber to determine whether to admit them; or

- the notebooks are not authentic and it will be the Chamber's duty not to admit them without asking further questions such as what diligence was employed.

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

/signed/

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Jean-Claude Antonetti
Presiding Judge

Done this twenty-second day of October, 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

ANNEX 1

OTP No.: List of inventory sheet nos for notebooks assigned at the time of the search	Description of the notebook in the inventory list at the time of the search (if specified during the hearing)	65*ter* *Karadžić* Case no. IT-95-5/18-T, Hearing of 20 August 2010	Title, contents, date and place (if specified during the hearing)	Number of pages (if specified during the hearing)	Citations in the transcript: *Karadžić* Case no. IT-95-5/18-T, Hearing of 20 August 2010
41	Notebook with red-brick colour and JNA emblem.	22838		394 pages of handwritten text	T(F). 6058 and T(F). 6050.
39	Workbook with red-brick colour and JNA emblem.	22839		399 pages of handwritten text	T(F). 6058 and T(F). 6050.
40	Notebook with red-brick colour and JNA emblem, in which a letter from "FAD" was found, along with two small sheets with handwritten text. A witness said a Post-It note was glued to the first page by an officer of the Serbian MUP.	22840	"Pale, 1992, Tuesday 9 June, 2000 hrs, meeting with the Presidency of SR BH", Participants Karadžić, Koljević, Plasvić, Krajisnik, Djerić, Mladić, Gvero and Tolimir. This notebook also references the date of 6 June 1992 (T(F), p. 6098). The Accused discusses a problem with translation of the notebook (T(F), pp. 6097-6099).	396 pages of handwritten text, and the witness added that it was indeed Mne Mladić who wrote this notebook of 396 pages.	T(F). 6058, 6061, 6076, 6097-6099.
37	Notebook with red-brick colour and JNA emblem, in which were found 4 handwritten notes.	22841		180 pages of handwritten text	T(F). 6058 et 6059.
33		22842			(T(F). 6059).
46		22843	17 December 1992, the note book recounts information submitted to the National Assembly at the 23rd session of the National Assembly of the Republika Srpska.		T(F). 6077 and 6078.
30		22844	"Pale, 19 January 1993, 25th session of the Assembly of the Republika Srpska ."		T(F). 6078 and 6079.
36		22845			(T(F). 6059).
44		22846	18 November 1993, the notebook discusses the negotiators present in Geneva, representing all of the parties.		T(F). 6080.
35		22847			(T(F). 6060).
31		22848			(T(F). 6060).
34		22849			(T(F). 6060).
29		22850			(T(F). 6059).

32		22851	Pertains to Dobanovci and the date of the 25 August 1995 "Meeting of the Serb Leaders" (according to the witness: further to notebook with 65*ter* no. 13452 seized in 2008). The Accused spoke to this notebook, raising a problem with translation in the notebook (p. 6089).		T(F). 6060, 6084, 6089.
28		22852	The Accused raises a problem with translation for this document addressing a meeting on 22 March 1996, a meeting which Mladić and his collaborators had with Karadžić.		T(F). 6102.