International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-04-74-T

Date: 24 November 2010

Original: ENGLISH
French

IN TRIAL CHAMBER III

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

Registrar: **Mr John Hocking**

Decision of: **24 November 2010**

THE PROSECUTOR

v.

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

PUBLIC WITH PUBLIC ANNEXES

DISSENTING OPINION OF PRESIDING JUDGE JEAN-CLAUDE ANTONETTI ON THE DECISION ON THE PRALJAK DEFENCE MOTION TO REOPEN ITS CASE

The Office of the Prosecutor:
Mr Kenneth Scott
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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

The Trial Chamber decided **by a majority** to reject the evidence tendered by the Praljak Defence.

As **a matter of principle**, just as a judge ought not a weather vane be, I find myself compelled to remain true to my earlier position, which led me to conclude that we should **deny** the Prosecution's request and, as a consequence, several subsequent motions resulting from the initial request to reopen.

In addition to the matter of principle, I have several other reasons to dissent from the majority, for three other principal reasons.

The first reason relates to Exhibits **3D 03848 and 3D 03849** concerning the authenticity of the Mladić Notebooks.

The judges of the Chamber, who decided to admit the exhibits tendered by the Prosecution, entertaining no doubt as to the authenticity of the documents, based on the testimony of General Milovanović as well as in light of the fact that other Chambers had admitted the said Notebooks (though not all), ought to have assessed side by side the opinion of **experts** and the statements of an eyewitness who saw General Mladić draft the Notebooks yet was unable to confirm that the contents matched, for example, the statements made during the meetings or that this content was written by General Mladić before his very eyes.

As a consequence, the occurrence of this **new fact** (the authorised opinion of 2 experts) ought to have led these judges to change their position by reconsidering the previous decision, either to deny admission to the proposed exhibits based on their late filing, or to appoint an expert.

The second reason concerns the documents that were rejected by a majority.

Had I not asked myself questions about the **late filing** of the motion to reopen the Prosecution case, I would have thought in detail about the motion presented by the Praljak Defence and **responded favourably**.

I **totally disagree** with the analysis of the majority of the Chamber set out in paragraphs 22, 23, 24, 25, 26, 27 and 29 of the Decision. It is nonetheless appropriate

to recall that the "**emergence**" of the Mladić Notebooks in this trial, even though the name of General Mladić never figured in the Indictment or the Pre-Trial Brief, has raised the problem of the existence of a third party (the Serbian forces) in the HVO-BH Army conflict.

Starting from there, it is appropriate, in my opinion, to admit the evidence presented by the Praljak Defence concerning the subjects listed in paragraph 12 of this Decision (particularly the Serbian-Muslim cooperation against the HVO).

This evidence is for me **relevant** and may have some degree of **probative value**. It is therefore evident that the exhibits tendered by the Praljak Defence enter the field of rebuttal of evidence admitted by the Decision of 6 October 2010 (moreover, this is recalled in paragraph 22 of this Decision).

The Praljak Defence sought the admission of six Diary entries (3D 03841, 3D 03842, 3D 03843, 3D 03844, 3D 03845 and 3D 03846).

I do not agree with the reasoning of the majority set out in paragraph 23 of the Decision, because I do not see why the majority has admitted certain elements of the Mladić Notebook and does not admit those presented by the Praljak Defence on anti-Muslim sentiment, the existence of cooperation between the VRS and the BH Army, territorial ambitions of the Serbs, and the Siege of Mostar. All these entries are therefore **directly** and **indirectly** linked to the evidence admitted from the Prosecution Motion.

Exhibit 3D 03841 which was the object of an analysis of the majority in paragraph 24 of the decision should have been admitted because it relates to a meeting between the Presidency of the Bosnian Serbs and VRS military personnel. This exhibit would have enlightened the Chamber on the interactions between the civilian and military authorities in the Former Yugoslavia, all the more so because it is General Mladić who is supposed to have brought up this subject…

It is rather the same with **Exhibit 3D 03842** analysed in paragraph 25 of the Decision. It is paradoxical to note that the majority deprives itself of the point of view of the military and civilian authorities of the Bosnian Serbs on the process linked to international negotiations.

The third reason concerns the notion of the expeditiousness of the trial.

The Trial Chamber recently issued a scheduling order seeking, on the one hand, to set the date for filing the parties' briefs and, on the other hand, to programme the dates for the closing arguments of the Prosecution and the Defence; I have no option but to deny any requests likely to inconvenience this schedule, given the imperative of an **expeditious trial**.

I would be remiss if I failed to observe that we ended the hearing for the final witness on **1 April 2010** and that, for more than **6 months**, we have been waiting to begin the final term of the trial, having been "paralysed" by several factors:

- the wait for the decision of the Appeals Chamber regarding the appeal lodged by the Praljak Defence regarding the admission of 92 *bis* statements;

- the Prosecution's request to reopen its case following the discovery of the "second wave" of Mladić Notebooks (the first occurred in 2008);

- the time for ruling on the motion for disqualification of Judge Prandler, brought by the Prlić Defence and the Praljak Defence;

- the handling of requests for certification to appeal, brought by several defence teams;

- the handling of requests to reopen, brought by the defence teams.

Under these conditions, after waiting more than **6 months**, it is now time to become **operational** and to proceed, in order to close this trial as expeditiously as possible. I insist, once again, on the fact that the reopening of a trial is a situation that was not contemplated in the earliest days, neither in the Statute nor in the Rules of Procedure and Evidence. It is a **judicial construction** that might have known an entirely different outcome if the judges seized of the first request to reopen had at the time endowed the concept of the **expeditiousness of the trial** cited in the Statute with its full range of meaning.

As to the format of the decision, I totally disagree with the wording set out by the majority that tends to use the words "the Chamber" although they ought to be joined by the words "**by a majority**" so as to avoid any misinterpretation on the part of the reader as to whether the rationale was supported by all or some of the Judges.

In French, "the Chamber" means the three judges; there is no doubt about that. To understand the disposition well, the reader should follow the reasoning included in the body of the decision or else he cannot understand the reasons of a differing opinion.

This was not overlooked by other Judges of the Tribunal who carefully took into account this imperative of clarity by indicating in the body of the decision the fact that one judge dissented and adding, in English, "*by majority, Judge X dissenting*".

It is enough for me to read a recent decision taken in the Karadžić Case entitled "*Decision on the accused's application for binding order pursuant to rule 54 bis (Federal Republic of Germany)*" to have a **confirmation** of this judicial necessity.

As can be seen in Annex 1, this addition is included in paragraphs 21, 22, 27, 34, 35 and 36, and Judge Kwon, **Presiding Judge of Chamber III**, gave a partially dissenting opinion explaining these additions and beginning his opinion with the following words: "*The majority finds that (…)*". I enclose in Annex 1 the paragraphs cited above.

Therefore, I enclose in Annex 2 the paragraphs of the Decision rendered by the Prlić Chamber which ought to contain the words "by a majority".

There is a clerical error in the disposition of the Decision, where number 30 should read 29.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

This twenty-fourth day of November 2010
At The Hague (the Netherlands)

[Seal of the Tribunal]

ANNEXE 1

21. Concernant les événements de Srebrenica, la Chambre considère que l'état d'esprit de l'Accusé est une question controversée qui est étroitement liée à un certain nombre d'accusations portées contre celui-ci. De plus, comme il est dit au paragraphe précédent, l'Accusé n'est pas seulement poursuivi pour génocide s'agissant des événements de Srebrenica. Il lui est également reproché d'avoir commis plusieurs infractions sous-jacentes constitutives de crimes contre l'humanité, notamment persécutions, extermination, assassinat, expulsion et actes inhumains[58]. Puisque l'une des conditions générales requises pour les crimes contre l'humanité est l'existence d'une attaque dirigée contre une population majoritairement civile, la question de savoir si, en 1995, l'enclave était démilitarisée ou lourdement armée est pertinente au regard de ces crimes sous-jacents et donc, de la thèse de l'Accusé. Par conséquent, la Chambre conclut à la majorité, le Juge Kwon étant en désaccord, que tout document pouvant avoir trait à cette question peut également être pertinent en l'espèce.

22. La Chambre de première instance note que l'Accusation ne nie pas que i) l'enclave de Srebrenica n'a pas été démilitarisée, même après avoir été déclarée zone de sécurité ; ii) les « forces musulmanes » dans l'enclave ont attaqué les forces et les villages serbes de Bosnie ; et iii) « les forces militaires » dans l'enclave de Srebrenica constituaient des cibles militaires légitimes[59]. Cependant, l'Accusation soutient également que pendant l'attaque de Srebrenica, des objectifs civils et des civils ont été bombardés[60]. De fait, cette allégation est fondamentale au regard de l'accusation plus générale formulée par l'Accusation selon laquelle l'Accusé s'est rendu coupable de crimes contre l'humanité. Par conséquent, même si l'Accusation reconnaît certains faits, il n'en reste pas moins que la question de savoir dans quelle mesure il y avait des « forces armées » dans l'enclave et si elles étaient armées et celle de savoir dans quelle mesure les hommes civils également présents dans l'enclave étaient armés ne sont pas résolues à ce stade de la procédure. Partant, la Chambre de première instance conclut à la majorité, le Juge Kwon étant en désaccord, que les documents concernant l'introduction clandestine d'armes à Srebrenica sont nécessaires pour déterminer l'état d'esprit de l'Accusé en juillet 1995, et pour qu'elle puisse se prononcer sur les conditions générales des crimes contre l'humanité s'agissant des infractions sous-jacentes pour lesquelles l'Accusé est tenu responsable. Le fait que les documents demandés portent sur l'introduction clandestine d'armes à Tuzla et Bihać, sans indiquer explicitement qu'elles ont été livrées à Srebrenica, ne

change rien à l'opinion de la majorité. On peut concevoir que l'Accusé ait besoin de ces documents qui, pour l'essentiel, se rapportent à la quantité d'armes livrées clandestinement à Srebrenica et à la manière dont elles ont été introduites, pour présenter à la Chambre de première instance des arguments crédibles concernant la question de savoir dans quelle mesure les habitants de Srebrenica étaient armés et l'enclave démilitarisée.

27. Il est également important de noter ici que les éléments constitutifs de ce crime visé par l'article 3 du Statut doivent encore être examinés par ce Tribunal. Ainsi, la Chambre devra tout d'abord déterminer précisément quels sont les éléments constitutifs de la prise d'otages sanctionnée par l'article 3, avant de se pencher sur toutes les circonstances entourant la prise d'otages alléguée pour dire si les éléments constitutifs du crime sont réunis. Selon la majorité, le Juge Kwon étant en désaccord, il faudra notamment se prononcer sur l'état d'esprit de l'Accusé dans le cadre de cette accusation et la question de savoir si la livraison clandestine d'armes, si elle est prouvée, pourrait permettre de dire que le personnel de l'ONU a activement participé aux hostilités. De plus, la majorité considère que les documents demandés concernent un point que l'Allemagne *juge* pertinent : des menaces de recourir à la force contre le personnel de l'ONU ont-elles été proférées *pour contraindre une tierce partie, en l'occurrence l'OTAN, à agir d'une certaine manière* ? Partant, la Chambre, à la majorité, conclut que la question de l'implication du personnel de l'ONU dans la livraison clandestine d'armes est pertinente pour ce qui est de la défense de l'Accusé.

34. S'agissant des documents décrits dans la catégorie i), la Chambre de première instance conclut à la majorité, le Juge Kwon étant en désaccord, qu'ils sont pertinents et nécessaires pour ce qui est de la défense de l'Accusé, pour les raisons exposées aux paragraphes 20 à 27 ci-dessus. La Chambre conclut également qu'ils sont décrits avec suffisamment de précision, car l'Accusé a précisé le thème général sur lequel ils portent et limité sa demande à une période (février 1995) et à un territoire (Tuzla). La recherche de ces documents ne ferait donc pas peser une charge trop lourde sur l'Allemagne. Partant, la Chambre, à la majorité, juge que les documents relevant de la catégorie i) visée dans la Demande remplissent les conditions posées à l'article 54 *bis* du Règlement.

35. S'agissant des documents décrits dans la catégorie ii), la Chambre de première instance conclut à la majorité, le Juge Kwon étant en désaccord, qu'ils sont pertinents et nécessaires pour ce qui est de la défense de l'Accusé, comme expliqué aux paragraphes 20 à 27 ci-dessus. La Chambre considère aussi que les documents de cette catégorie sont décrits avec

suffisamment de précision, car l'Accusé a limité sa demande les concernant à un territoire (Tuzla) et à une période (février 1995) et a précisé le thème général sur lequel ils portent. La recherche de ces documents ne devrait donc pas faire peser une charge trop lourde sur l'Allemagne. Partant, la Chambre,

36. S'agissant des documents décrits dans la catégorie iii), la Chambre de première instance conclut à la majorité, le Juge Kwon étant en désaccord, qu'ils sont pertinents et nécessaires pour ce qui est de la défense de l'Accusé, comme expliqué aux paragraphes 20 à 27 ci-dessus. De plus, elle est également convaincue que l'Accusé a décrit la catégorie de documents avec suffisamment de précision, car il en a décrit l'objet, la période (février 1995), le territoire (Tuzla) et les parties concernées. La recherche de ces documents ne devrait donc pas faire peser une charge trop lourde sur l'Allemagne. Pour ces raisons, la Chambre, à la majorité, juge que les documents relevant de la catégorie iii) visée dans la Demande remplissent les conditions de l'article 54 *bis* du Règlement.

ANNEX 2

19. According to Tribunal case-law, when a Trial Chamber is satisfied of the requesting party's due diligence, it has the power, under Rule 89 (D) of the Rules, to exclude evidence where its probative value is substantially outweighed by the need to ensure a fair trial.[1] The Chamber must therefore exercise its discretion as to whether to admit the fresh evidence by weighing its probative value and any injustice that could be caused, in this case to the co-accused, by admitting it late in the proceedings.[2]

20. The Appeals Chamber classifies "fresh evidence" as being notably: (1) evidence that could not have been found with the exercise of reasonable diligence before the close of the case and (2) documents already in its possession whose importance was revealed only in the light of fresh evidence.[3]

V. DISCUSSION

21. The Chamber recalls that in its Decisions of 6 and 27 October 2010 it pointed out that the motions for reopening of a case likely to be filed by the Defence teams to refute the evidence admitted by the Decision of 6 October 2010 should conform to the case-law criteria for reopening.[4] In that respect, the Trial Chamber recalled in its Decision of 27 October 2010 that with regard to potential Diary excerpts not linked to what has been admitted as part of the reopening of the Prosecution case, these excerpts have lost their fresh nature in view of the date when this Diary was discovered and the date when the Defence teams found out about it.[5] On the other hand, the Chamber specified that the Diary excerpts likely to be tendered for admission by the Defence teams to refute the evidence admitted by the Decision of 6 October 2010, namely those exhibits relevant to allegations about the possible involvement of the Accused in achieving the objectives of the alleged JCE,[6] would not lose their "fresh" nature in case of possible motions to reopen a case to the extent

[1] *See* in this sense, *mutatis mutandis*, *Čelebići* Judgement, para. 283.
[2] *Čelebići* Judgement, para. 283; *Hadžihasanović* Decision, para. 35.
[3] *Čelebići* Judgement, paras 282 and 283; *Popović* Decision of 24 September 2008, para. 11.
[4] Decision of 6 October, p. 29; Decision of 27 October 2010, pp. 9 and 10.
[5] Decision of 27 October 2010, p. 8.

that it is possible to consider that their importance became apparent in light of the evidence admitted by the Decision of 6 October 2010.[7] Furthermore, the Chamber indicated that this statement should also apply to exhibits already in the possession of the Defence teams if their requests for admission have a similar foundation.[8] Therefore, the Chamber will consider whether the Praljak Defence Motion corresponds to the reopening criteria and if the evidence requested for admission by the Praljak Defence has a "fresh" nature from the outset.

22. In this respect, the Chamber notes that out of the 24 exhibits requested for admission by the Praljak Defence in the Motion, six are Diary excerpts,[9] two are documents dated 12 October 2010 requested for admission to refute the Diary's authenticity,[10] and 16 are exhibits that were already in the possession of the Praljak Defence during the presentation of its case.[11] The Chamber notes that the Praljak Defence does not justify sufficiently how the exhibits requested for admission in its Motion constitute "fresh" evidence according to case-law criteria on the reopening of a case. The Chamber notes furthermore **by a majority** that the Praljak Defence failed notably to recall the law applicable to the reopening of a case in its Motion. Nevertheless, the Chamber recalls that in its Decision of 27 October 2010, it pointed out that the Diary excerpts likely to be requested for admission by the Defence teams in case of motions for reopening would not lose their "fresh" nature if they went towards refuting the evidence admitted on behalf of the Prosecution.[12] With respect to the Diary excerpts requested for admission by the Praljak Defence in its Motion, the Chamber notes **by a majority** that with regard to Exhibits 3D 03843, 3D 03844, 3D 03845 and 3D 03846 the Praljak Defence did not identify the numbers of the exhibits admitted by the Decision of 6 October that would refute them. Furthermore, the Chamber notes that the Praljak Defence argues that, by the admission of these exhibits, it intends to refute the Prosecution's allegations that Slobodan Praljak incited

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[6] Decision of 6 October 2010, paras 59 and 61; Decision of 1 November 2010, p. 7.
[7] Decision of 27 October 2010, pp. 7-9.
[8] Decision of 27 October 2010, p. 8.
[9] 3D 03841 (P 11375), 3D 03842, 3D 03843, 3D 03844, 3D 03845 and 3D 03846.
[10] 3D 03848 and 3D 03849.
[11] 3D 03838, 3D 03839, 3D 02215, 3D 03028, 3D 01238, 3D 02819, 3D 01310, 3D 03823 (ENG 3D44-0339 to 3D44-0342), 3D 03824, 3D 03825, 3D 03836, 3D 03840, 3D 03086, 3D 03847, 3D 03837 and 3D 03850.
[12] Decision of 27 October 2010, pp. 7-9.

anti-Muslim sentiments,[13] the existence of cooperation between the VRS and the BH Army,[14] the intention of the Bosnian Croats, pursuant to their meetings with Serb authorities, to commit crimes in order to achieve their objective of a Herceg-Bosnia dominated by Croats,[15] and the siege of Mostar.[16] The Chamber recalls **by a majority** that the allegations the Praljak Defence intends to refute by the admission of Exhibits 3D 03844, 3D 03845 and 3D 03846 do not come under the scope of the motions to reopen the case likely to be filed by the Defence teams, as defined specifically by the Chamber in the Decisions of 6 and 27 October 2010 and 1 November 2010.[17] With specific regard to Exhibit 3D 03845, the Chamber notes that, by way of its request for admission, the Praljak Defence intends to refute an argument put forth by the Prosecution in its "Prosecution Motion to Admit Evidence in Reopening", filed as a confidential document on 9 July 2010, the merits of which were explicitly rejected in the Decision of 6 October 2010.[18] Furthermore, the Chamber notes **by a majority** that Exhibit 3D 03843, by which the Praljak Defence intends to refute the Prosecution's allegations concerning the Accused Praljak's incitement of anti-Muslim sentiments, does not contain any reference to the Accused Praljak. Moreover, the Chamber notes **by a majority** that Exhibits 3D 03843 and 3D 03844, relating specifically to co-operation between the Muslims and the VRS in zones not covered by the Amended Indictment of 11 June 2008, and Exhibit 3D 03846, relating to the Serbian perception of the situation in the Neretva valley in October 1993, also relate to topics that fall outside of the scope of the reopening. Consequently, the Chamber deems **by a majority** that Exhibits 3D 03843, 3D 03844, 3D 03845 and 3D 03846 cannot qualify as "fresh" evidence and are inadmissible for the purposes of the Motion.

23. With regard to Exhibit 3D 03841/P 11375, also a Diary excerpt about a meeting of the Bosnian Serb Presidency in the presence of members of the VRS Main Staff, held on 27 September 1992 in Pale, the Chamber notes that it denied **by a majority** the admission into evidence of this exhibit in its Decision of 6 October 2010 on the ground that it does not mention the Accused and does not contain information

[13] Confidential Annex A to the Supplement, p. 6.
[14] Confidential Annex A to the Supplement, pp. 6 and 7.
[15] Confidential Annex A to the Supplement, pp. 7 and 8.
[16] Confidential Annex A to the Supplement, p. 12.
[17] Decision of 6 October 2010, paras 59 and 61; Decision of 27 October 2010, pp. 9 and 10; Decision of 1 November 2010, p. 7.
[18] Decision of 6 October 2010, pp. 52 and 58-60.

relevant to the possible involvement of the Accused in achieving the objectives of the alleged JCE.[19] The Chamber deems **by a majority** that the Bosnian Serb perception of the territorial intentions of the Croats in September 1992 that emerges from the transcript of this meeting does not go towards refuting the remarks allegedly made by the Accused Praljak at the meeting of 5 October 1992 in Pečuj,[20] which the Chamber deemed, in its Decision of 6 October 2010, to be relevant to the possible involvement of this Accused in achieving the objectives of the alleged JCE.[21] Consequently, the Chamber deems **by a majority** that Exhibit 3D 03041/P 11375 cannot qualify as "fresh" evidence and is inadmissible for the purposes of the Motion.

24. With regard to Exhibit 3D 03842, another Diary excerpt requested for admission by the Praljak Defence relating to a meeting between representatives of Bosnian Serb military and civilian authorities and the MUP on 21 September 1992 in Rudo, the Chamber notes that the Prosecution does not object to its admission.[22] Nonetheless, the Chamber notes **by a majority** that the content of this exhibit, namely the Serbs' perception of the international negotiations conducted under the aegis of Cyrus Vance and Lord Owen, does not go to refuting the remarks allegedly made by the Accused Praljak during a meeting in Pečuj on 5 October 1992 and mentioned in Exhibit P 11376 admitted by the Decision of 6 October 2010. The Chamber deems **by a majority**, therefore, that Exhibit 3D 03842 cannot qualify as "fresh" evidence and is inadmissible for the purposes of the Motion.

25. With regard to the 16 exhibits that were in the possession of the Praljak Defence during the presentation of its case, the Chamber notes that the Praljak Defence did not justify the "fresh" nature of these exhibits according to the case-law criteria for reopening. Nonetheless, the Chamber recalls that in its Decision of 27 October 2010, it indicated that exhibits in the possession of the Defence teams requested for admission as part of their respective motions for reopening in accordance with the Decision of 6 October 2010 may qualify as being "fresh" if their importance becomes apparent in light of what was admitted on behalf of the Prosecution.[23] The Chamber notes that the Prosecution raised objections to 15 of these

[19] Decision of 6 October 2010, para. 60.
[20] P 11376.
[21] Decision of 6 October 2010, para. 60.
[22] Annex to the Prosecution Response, p. 2.
[23] Decision of 27 October 2010, p. 8.

16 exhibits, relating notably to Serb/Muslim cooperation against the HVO, cooperation between the Muslims and the Croats/HVO against the Serbs and the military conflict between the Serbs and Croats, and argued their lack of relevance to the scope of the Motion.[24] The Chamber notes in particular that the Praljak Defence requested the admission into evidence of excerpts of Exhibit 3D 03823 and Exhibits 3D 03838, 3D 03839, 3D 02215, 3D 03028, 3D 01238, 3D 02819, 3D 03824, 3D 3825, 3D 03826, 3D 03086 as they go to refuting the allegations about the intentions of the Bosnian Croats regarding Jajce and the cooperation between the Bosnian Croats and the VRS to the detriment of the Muslims in October 1992;[25] the admission into evidence of Exhibit 3D 01310, as it attests to the efforts made by the Accused Praljak to end the conflict in Slavonski Brod;[26] the admission of Exhibit 3D 03847, as it refutes the Prosecution's allegations regarding Croatia's intention to request the presence of UNPROFOR at Croatian borders and that the efforts made by Franjo Tuđman, attested to in this exhibit, go to refuting the allegations of Slobodan Praljak's involvement, as Tuđman's agent, in the alleged JCE;[27] the admission of Exhibit 3D 03837, as it goes to refuting the allegations about the existence of agreements on Croatia's borders[28] and the admission of Exhibit 3D 03850, as it illustrates the emergence of fear amongst the Croats in April 1991 and allows, as such, to refute the statements allegedly made by the Accused Praljak during a meeting held on 8 July 1993 and mentioned in Exhibit P 11386 admitted by the Decision of 6 October 2010.[29] The Praljak Defence requests, finally, the admission of Exhibit 3D 03840, an undated letter from Slobodan Praljak, deputy Defence Minister of Croatia, addressed to the Office of the President of the Federative Socialist Republic of Croatia, D. Ćosić, as it goes to refuting the allegations concerning cooperation between the VRS and the Croats against the Muslims in October 1992.[30] With regard to the aforementioned 16 exhibits, the Chamber notes **by a majority** that in its Motion, the Praljak Defence does not refute the evidence admitted on behalf of the

[24] Response, Annex to Prosecution Response.
[25] Confidential Annex to the Supplement, pp. 1-5, 13-15.
[26] Confidential Annex to the Supplement, p. 13. This argument is also given in support of the requests for admission of Exhibits 3D 02824, 3D 02825 and 3D 02826, Confidential Annex to the Supplement, pp. 13 and 14.
[27] Confidential Annex to the Supplement, pp. 15-17.
[28] Confidential Annex to the Supplement, p. 17.
[29] Confidential Annex to the Supplement, p. 21. The Chamber notes that Exhibit P 11386, a transcript of the meeting on 8 July 1993 in Njivice in the presence of Milivoj Petković, does not contain remarks by the Accused Praljak.
[30] Annex to the Supplement, pp. 14 and 15.

Prosecution in the Decision of 6 October 2010, relating to the possible involvement of the Accused in achieving the objectives of the alleged JCE. The Chamber deems **by a majority** that the reasons provided by the Praljak Defence in support of the requests for admission of these 16 exhibits demonstrate the wish of the Praljak Defence to refute allegations that do not fall under the scope of the reopening. The Chamber deems **by a majority**, therefore, that these 16 exhibits cannot consequently qualify as "fresh" evidence and are inadmissible on this ground.

26. With regard to Exhibits 3D 03848 and 3D 03849, namely the correspondence between the Praljak Defence and a Croatian graphologist and the expert report of this graphologist, both dated 12 October 2010, the Chamber notes that the Praljak Defence obtained a graphological analysis of the Diary within six days of the filing of the Decision of 6 October 2010. The Chamber notes that the Praljak Defence already objected to the authenticity of the Diary in its Response to the Prosecution's Motion to reopen the case.[31] The Chamber notes nonetheless that the admission of new documents should be requested within the scope of the reopening of a case, and that therefore the Praljak Defence did not need to request admission of these two documents in the Response of 23 July 2010. The Chamber deems furthermore that the Praljak Defence displayed the due diligence needed by obtaining the two documents on 12 October 2010, six days following the Decision of 6 October 2010 and subsequently by requesting their admission. In this respect, the Praljak Defence motion meets the criteria for reopening. The Chamber notes, however, that the Prosecution argues that the Chamber already ruled **by a majority** on the authenticity of the Diary in its Decision of 6 October 2010 and objects to the procedural means chosen by the Praljak Defence to seek the admission of these two exhibits.[32] According to the Prosecution, the Praljak Defence should have requested the admission of this evidence under Rule 94 *bis* of the Rules.[33]

[31] "Prosecution Motion to Admit Evidence in Reopening", public with public annexes 1 and 3 to 5 and confidential annex 2, 9 July 2010 ("Prosecution Motion to Reopen") and "Slobodan Praljak's Response to the Prosecution Motion to Reopen", public with two confidential annexes, 23 July 2010 ("Response of 23 July 2010").
[32] Response, para. 17; Confidential Annex to the Response, p. 8.
[33] *Ibidem*.

27. It is appropriate, therefore, for the Chamber to examine the adequacy of the procedural method chosen by the Praljak Defence to request admission into evidence of these two exhibits, one of them being a graphological expert report on the Diary. In this respect, the Chamber recalls **by a majority** that the procedure on the admission of expert reports is governed by Rule 94 *bis* of the Rules. The Chamber deems **by a majority** therefore that it is appropriate to deny the admission of Exhibits 3D 03848 and 3D 03849 since the admission procedure chosen by the Praljak Defence is inappropriate considering the nature of the evidence sought for admission.

28. To conclude, the Chamber examines the Praljak Defence motion regarding the *viva voce* testimony of Slobodan Praljak for the purpose of refuting the evidence admitted in the Decision of 6 October 2010.[34] The Chamber notes that the Prosecution does not object to this motion but asks the Chamber, in the event that it decides to grant it, to place strict time limits upon the testimony of Slobodan Praljak and that its content should be limited in scope to refuting the evidence admitted by the Decision of 6 October 2010.[35] The Chamber notes that the Praljak Defence invokes the right of the Accused Praljak to respond[36] without reasoning this part of its Motion. The Chamber notes that the request regarding the Accused Praljak's *viva voce* testimony has not been additionally reasoned in the Supplement. The Chamber notes that the Praljak Defence merely invoked the right of the Accused Praljak to respond in its Motion and Supplement without providing facts to justify why the Accused Praljak needs to testify as a *viva voce* witness and without setting out the topics on which he wishes to comment in order to refute the evidence admitted on behalf of the Prosecution. Consequently, the Chamber deems that the Praljak Defence exercised its right to respond in the Motion and in its Supplement, but did not present facts justifying why the Accused Praljak should testify *viva voce* before the Chamber within the context of the reopening of his case. Moreover, the Chamber recalls that the Praljak Defence could once again exercise its right to respond in its final brief and closing arguments. The Chamber decides, therefore, to reject the request for the testimony of the Accused Praljak put forth by the Praljak Defence.

[34] Motion, paras 1, 4, 6 and 7; Supplement, paras 15-18.
[35] Response, para. 18; Supplement, paras 15-18.
[36] Motion, paras 1, 4, 6 and 7.

29. The Chamber deems **by a majority** consequently, for the foregoing reasons, that the Praljak Defence has failed to meet the criteria required for a motion to reopen a case, that it did not use the proper requesting procedure for Exhibits 3D 03848 and 3D 03849, and that it is appropriate to deny admission into evidence of the 24 exhibits tendered for admission in the Motion, and the request regarding the *viva voce* testimony of the Accused Praljak as part of the reopening of his case.

VI. CONCLUSION

FOR THE FOREGOING REASONS,

PURSUANT TO Rules 54, 85 and 89 of the Rules,

DENIES by a majority the Motion.

Presiding Judge Jean-Claude Antonetti dissents with respect to paragraphs 22 to 27 and 30 of this decision and will subsequently attach a dissenting opinion to the present decision.

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

Jean-Claude Antonetti
Presiding Judge

Done this twenty-third day of November 2010
At The Hague
The Netherlands