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-95-5/18-T

Date: 18 March 2014

Original: English

IN THE TRIAL CHAMBER

Before: **Judge O-Gon Kwon, Presiding Judge**
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: **Mr. John Hocking**

Decision of: **18 March 2014**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC WITH CONFIDENTIAL ANNEX

DECISION ON ACCUSED'S MOTIONS FOR ADMISSION OF EVIDENCE PURSUANT TO RULE 92 *BIS*

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

THIS TRIAL 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 seised of the following motions filed by the Accused on the dates indicated below and hereby issues its decision thereon:

1) Motion to Admit Statement Pursuant to Rule 92 *bis*: Miloš Tomović on 29 January 2014 ("Tomović Motion");

2) Motion to Admit Transcript Pursuant to Rule 92 *bis*: Ranko Mijić on 3 February 2014 ("Mijić Motion");

3) Motion to Admit Transcript Pursuant to Rule 92 *bis*: Nikola Tomašević on 3 February 2014 ("Tomašević Motion");

4) Motion to Admit Transcript Pursuant to Rule 92 *bis*: Dragan Kalinić on 6 February 2014 ("Kalinić Motion");

5) Motion to Admit Statement Pursuant to Rule 92 *bis*: Srboljub Jovičinac on 11 February 2014 ("Jovičinac Motion");

6) Motion to Admit Testimony of Witness KW540 Pursuant to Rule 92 *bis*, confidentially on 11 February 2014 ("KW540 Motion");

7) Motion to Admit Statement Pursuant to Rule 92 *bis*: Božidar Popović on 11 February 2014 ("Popović Motion");

8) Motion to Admit Testimony of Predrag Banović on 11 February 2014 ("Banović Motion");

9) Motion to Admit Testimony of Dušan Đenadija Pursuant to Rule 92 *bis* on 11 February 2014 ("Đenadija Motion");

10) Motion to Admit Testimony of Slavko Budimir Pursuant to Rule 92 *bis* on 12 February 2014 ("Budimir Motion");

11) Motion to Admit Testimony of Rajko Inđić Pursuant to Rule 92 *bis* on 14 February 2014 ("Inđić Motion");

12) Motion to Admit Testimony of Mladen Zorić Pursuant to Rule 92 *bis* on 14 February 2014 ("Zorić Motion");

13) Motion to Admit Testimony of Boro Ljubanić Pursuant to Rule 92 *bis* on 19 February 2014 ("Ljubanić Motion");

14) Motion to Admit Testimony of Marko Deurić Pursuant to Rule 92 *bis* on 3 March 2014 ("Deurić Motion"); and

15) Motion to Admit Testimony of Aleksa Sekanić Pursuant to Rule 92 *bis* on 3 March 2014 ("Sekanić Motion").

I. Background and Submissions

1. Since the end of January 2014, the Accused has filed no less than 15 motions for the admission of evidence in writing pursuant to Rule 92 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules"). Upon the request of the Chamber,[1] the Accused filed the Supplemental Submission on 5 March 2014, providing further information in relation to the Đenadija Motion, the Popović Motion, the Banović Motion, the Sekanić Motion, and the Deurić Motion. The Chamber has decided to examine these motions together for the purpose of efficiency and comprehensiveness as some of these motions share common characteristics, which should be discussed jointly.

2. The Chamber recalls that on 26 April 2012, it issued its "Scheduling Order on Close of the Prosecution Case, Rule 98 *bis* Submissions, and Start of the Defence Case" in which it ordered the Accused to file his list of witnesses pursuant to Rule 65 *ter* along with any motion for the admission of evidence of his witnesses pursuant to Rule 92 *bis* by no later than 27 August 2012 ("Initial Witness List" and "27 August Deadline", respectively).[2] On 28 June 2012, the Chamber pronounced its ruling on the Accused's oral submissions pursuant to Rule 98 *bis* and entered an oral judgement of acquittal in relation to Count 1 of the Third Amended Indictment ("Indictment").[3] On 2 August 2013, once the Appeals Chamber had issued its Judgement and reinstated Count 1 in the Indictment,[4] the Chamber ordered the Accused to file a revised list of witnesses pursuant to Rule 65 *ter*, which would also include witnesses relevant under Count 1.[5]

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1 T. 47546–47547 (3 March 2014).

2 Scheduling Order on Close of the Prosecution Case, Rule 98 *bis* Submissions, and Start of the Defence Case, 26 April 2012, para. 25.

3 T. 28731–28774 (28 June 2012).

4 *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR98bis.1, Judgement, 11 July 2013, para. 117. The Prosecution filed its "Notice of Appeal of Judgement of Acquittal under Rule 98*bis*" on 11 July 2012 and filed the "Prosecution Rule 98*bis* Appeal Brief" confidentially on 24 September 2012, with a public version on 25 September 2012.

5 Decision on Accused's Motions for Severance of Count 1 and Suspension of Defence Case, 2 August 2013, para. 25(d).

The Accused filed a revised witness list pursuant to Rule 65 *ter* on 18 October 2013 ("Revised Witness List").[6]

(1) Tomović Motion

3. In the Tomović Motion, the Accused seeks the admission of the statement given by Miloš Tomović to the Defence on 20 August 2012 ("Tomović Statement").[7] Tomović was the commander of the 1st Battalion of the Territorial Defence ("TO") in Foča.[8] The Accused argues that he has shown good cause for having failed to meet the 27 August Deadline as Tomović declined to testify after that date and the Chamber declined to issue a subpoena against him.[9] He further submits that the criteria for admission of the Tomović Statement under Rule 92 *bis* are met in that i) it is relevant to the allegations in the Indictment in relation to Foča municipality,[10] ii) it is of probative value because Tomović was in a position to have personal knowledge of the disputed events,[11] iii) it does not go to the acts and conduct of the Accused,[12] and iv) it is cumulative of other evidence tendered by the Accused.[13] There are no associated exhibits sought for admission.[14]

4. The Office of the Prosecutor ("Prosecution") filed the "Prosecution Response to Motion to Admit Statement of Miloš Tomović Pursuant to Rule 92 *bis*" on 10 February 2014 ("Tomović Response"), opposing the Tomović Motion.[15] The Prosecution submits that the Accused has shown no good cause for failing to meet the 27 August Deadline.[16] On the substance, the Prosecution argues that the Accused has failed to show that the Tomović Statement is cumulative and that nothing indicates that the certification requirement under Rule 92 *bis*(B) would be met.[17] Rather, the Prosecution asserts that in the event Tomović is indeed willing to certify his statement while refusing to appear before the Chamber to testify, this would call into question the reliability of his evidence.[18] Finally, the Prosecution argues that the Tomović Statement touches upon live and

6 Defence Supplemental Submission Pursuant to Rule 65 *ter*, 18 October 2013, confidential Annex H.
7 The Tomović Statement is uploaded into e-court under 65 *ter* 1D26391.
8 Tomović Motion, para. 1.
9 Tomović Motion, para. 3, referring to Motion for Subpoena to Miloš Tomović, 19 December 2012 and Decision on Accused's Motion to Subpoena Miloš Tomović, 28 January 2013.
10 Tomović Motion, para. 11.
11 Tomović Motion, para. 11.
12 Tomović Motion, para. 12.
13 Tomović Motion, paras. 13.
14 Tomović Motion, Annex "A".
15 Tomović Response, para. 1.
16 Tomović Response, paras. 2–4.
17 Tomović Response, paras. 6–7.
18 Tomović Response, para. 7.

important issues and that, should the Chamber wish to admit it into evidence, Tomović should be called for cross-examination.[19]

(2) Mijić Motion

5. In the Mijić Motion, the Accused moves for the admission of the transcript of the interview of Ranko Mijić given to the Prosecution as a suspect on 3 December 2003 ("Mijić Interview").[20] Mijić was the Chief of the Prijedor Police Department and was in charge of the police investigators working at Omarska.[21] The Accused submits he has shown good cause for not meeting the 27 August Deadline as Mijić refused to testify after that date and the Chamber thereafter declined to issue a subpoena.[22] He further submits that the Mijić Interview meets the criteria under Rule 92 *bis* in that i) it is relevant to the allegations in the Indictment related to the crimes at Omarska,[23] ii) it is probative given that Mijić was in a position to have personal knowledge of the disputed events,[24] iii) it does not go to the acts and conduct of the Accused,[25] and iv) it is cumulative of other evidence on the record.[26] There are no associated exhibits sought for admission.[27]

6. The Prosecution filed the "Prosecution Response to Motion to Admit Transcript Pursuant to Rule 92 *bis*: Ranko Mijić with Confidential Annex A" on 10 February 2014 ("Mijić Response"), opposing the Mijić Motion.[28] The Prosecution first argues that the Accused has shown no good cause for failing to meet the 27 August Deadline.[29] On the merits of the Mijić Motion, it submits that the Accused mischaracterises the information in the Mijić Interview,[30] that he has not demonstrated that it is cumulative of other evidence,[31] that there is no basis for the Accused's claim that Mijić would certify the Mijić Interview, and that if such was indeed the case, the reliability of Mijić's evidence would be called into question.[32] Finally, the Prosecution claims that should the

19 Tomović Response, para. 5.
20 The Mijić Interview is uploaded into e-court under 65 *ter* 1D9634.
21 Mijić Motion, para. 1.
22 Mijić Motion, para. 5.
23 Mijić Motion, para. 10.
24 Mijić Motion, para. 10.
25 Mijić Motion, para. 11.
26 Mijić Motion, para. 12.
27 Mijić Motion, Annex "A".
28 Mijić Response, para. 1.
29 Mijić Response, paras. 2–5.
30 Mijić Response, para. 7.
31 Mijić Response, paras. 8–10.
32 Mijić Response, para. 11.

Chamber wish to admit the Mijić Interview, Mijić should be called for cross-examination as his evidence touches upon live and important disputed issues in the case.[33]

(3) Tomašević Motion

7. In the Tomašević Motion, the Accused seeks the admission of the transcript of the interview of Nikola Tomašević with the Prosecution on 6 June 2002 ("Tomašević Interview") as well as two associated exhibits (altogether, "Tomašević Material").[34] Tomašević was a Judge of the military court of the Army of Republika Srpska ("VRS") in Banja Luka at the time relevant to the Indictment.[35] The Accused submits he has shown good cause for not meeting the 27 August Deadline as Tomašević refused to testify after that date and the Chamber subsequently declined to issue a subpoena.[36] He further argues that the Tomašević Interview meets the requirements under Rule 92 *bis* in that i) it is relevant to demonstrate that there was no policy or practice to fail to punish crimes committed by Bosnian Serbs against Bosnian Muslims and Bosnian Croats,[37] ii) it is probative as Tomašević was the judge who ordered the release of individuals in the two cases referred to by the Prosecution as examples of this policy,[38] iii) it does not go to the acts and conduct of the Accused,[39] and iv) it is cumulative to other evidence on the record.[40]

8. The Prosecution filed the "Prosecution Response to Motion to Admit Pursuant to Rule *bis*: Nikola Tomašević" on 17 February 2014 ("Tomašević Response"), opposing the Tomašević Motion.[41] The Prosecution first argues that the Accused has failed to show good cause to failing to meet the 27 August Deadline.[42] On the merits, it submits that the Accused mischaracterises Tomašević's evidence,[43] and has failed to demonstrate that the certification requirements under Rule 92 *bis*(B) would be met in relation to the Tomašević Interview, and that if Tomašević was indeed willing to certify the Tomašević Interview but not to testify before the Chamber, this would cast doubt on Tomašević's credibility.[44] Finally, the Prosecution claims that should the Chamber

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33 Mijić Response, para. 6.

34 The Tomašević Interview is uploaded into e-court under 65 *ter* 1D9195. The proposed associated exhibits are listed in Tomašević Motion, Annex "A".

35 Tomašević Motion, para. 1.

36 Tomašević Motion, para. 5.

37 Tomašević Motion, para. 10.

38 Tomašević Motion, para. 11.

39 Tomašević Motion, para. 11. The Chamber notes that there are two paragraphs 11 in the Tomašević Motion and that this refers to the second of these two paragraphs.

40 Tomašević Motion, para. 12.

41 Tomašević Response, para. 1.

42 Tomašević Response, paras. 2–4.

43 Tomašević Response, para. 6.

44 Tomašević Response, para. 7.

wish to admit the Tomašević Interview, Tomašević should be called for cross-examination as his evidence touches upon live and important disputed issues in the case.[45]

(4) Kalinić Motion

9. In the Kalinić Motion, the Accused moves for the admission of the transcript of the interview of Dragan Kalinić as a suspect with the Prosecution on 27 and 28 September 2004 ("Kalinić Interview") as well as 11 associated exhibits (altogether "Kalinić Material").[46] Kalinić was the Minister of Health of Republika Srpska ("RS") at the time relevant to the Indictment.[47] The Accused first argues that he has shown good cause for failing to meet the 27 August Deadline as Kalinić declined to testify after that date and the Chamber subsequently refused to issue a subpoena against him.[48] The Accused further submits that the criteria under Rule 92 *bis* are met in relation to the Kalinić Interview in that i) it is relevant to rebut the allegation in Count 1 of the Indictment that the crimes which occurred in certain municipalities in Bosnia and Herzegovina ("BiH") were committed with the intent to destroy the Bosnian Muslims,[49] ii) it is probative given that he was the person who made the statement at the RS Assembly on 12 May 1992, which the Prosecution seeks to rely on as evidence of genocidal intent,[50] iii) it does not, for the most part, go to the acts and conduct of the Accused,[51] and iv) it is cumulative of other evidence on the record.[52]

10. The Prosecution filed the "Prosecution Response to Motion to Admit Statement of Dragan Kalinić Pursuant to Rule 92 *bis*" on 18 February 2014 ("Kalinić Response"), opposing the Kalinić Motion.[53] The Prosecution first submits that the Accused has not shown good cause for failing to meet the 27 August Deadline.[54] On the substance, the Prosecution argues that the Accused has failed to show that the Kalinić Interview is cumulative of other evidence on the record.[55] It also claims that there is no indication that the Rule 92 *bis*(B) certification requirements would be met and that if they were, the fact that Kalinić did not want to testify but would agree to certify the

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45 Tomašević Response, para. 5.

46 The Kalinić Interview is uploaded into e-court under 65 *ter* 1D9199. The proposed associated exhibits are listed in the Kalinić Motion, Annex "A".

47 Kalinić Motion, para. 1.

48 Kalinić Motion, para. 5.

49 Kalinić Motion, para. 4.

50 Kalinić Motion, para. 10.

51 Kalinić Motion, para. 11, specifying that any portions which go to the acts and conduct of the Accused may be redacted.

52 Kalinić Motion, para. 12.

53 Kalinić Response, para. 1.

54 Kalinić Response, para. 2.

55 Kalinić Response, para. 5.

Kalinić Interview would cast doubt as to his credibility.[56] In any event, the Prosecution submits the Kalinić Interview may not be admitted without Kalinić appearing for cross-examination as it touches upon live and important disputed issues or matters which are pivotal or critical to the Prosecution's case.[57]

(5) Jovičinac Motion

11. In the Jovičinac Motion, the Accused seeks the admission of the statement given by Srboljub Jovičinac to the Defence at an unknown date ("Jovičinac Statement").[58] Jovičinac served as the military prosecutor of the VRS 1st Krajina Corps in Banja Luka at the time relevant to the Indictment.[59] The Accused argues he has shown good cause for not having met the 27 August Deadline as he had wished to call Jovičinac to testify live but that after the Chamber denied the motion he filed for video-conference link, Jovičinac refused to testify.[60] He further submits that the Jovičinac Statement fulfils the requirements under Rule 92 *bis*, namely that i) it is relevant to the allegations in the Indictment that Bosnian Serbs who committed crimes against Bosnian Muslims and Bosnian Croats were not punished,[61] ii) it is of probative value as he was in a position to have personal knowledge of these events,[62] iii) it does not go to the acts and conduct of the Accused,[63] and iv) it is cumulative of other evidence on the record.[64] There are no associated exhibits sought for admission.

12. On 25 February 2014, the Prosecution filed the "Prosecution Response to Motion to Admit Testimony of Srboljub Jovičinac Pursuant to Rule 92 *bis*" ("Jovičinac Response"), opposing the Jovičinac Motion.[65] The Prosecution first argues that the Accused cannot be said to have shown good cause for pursuing an untimely application under Rule 92 *bis* in the absence of having demonstrated a compelling reason why he should not seek to avail himself of the procedures he could have used to obtain Jovičinac's testimony.[66] It also claims that there is no indication that the Rule 92 *bis*(B) certification requirements would be met and that if they were, the fact that Jovičinac did not want to testify but would agree to certify the Jovičinac Statement would cast doubt as to its

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56 Kalinić Response, para. 6.
57 Kalinić Response, paras. 3–4.
58 The Jovičinac Statement is appended to the Jovičinac Motion at Annex "A".
59 Jovičinac Motion, para. 1.
60 Jovičinac Motion, para. 3.
61 Jovičinac Motion, para. 11.
62 Jovičinac Motion, para. 11.
63 Jovičinac Motion, para. 12.
64 Jovičinac Motion, paras. 13–14.
65 Jovičinac Response, para. 1.
66 Jovičinac Response, para. 4.

reliability.[67] Finally, the Prosecution submits that the Jovičinac Statement addresses disputed live and important issues in the case and therefore, should the Chamber be minded to admit it into evidence, Jovičinac should be called for cross-examination.[68]

(6) KW540 Motion

13. In the KW540 Motion, the Accused moves for the admission of the transcript of KW540's prior testimony in the *Stanišić and Župljanin* case on 17 November 2009 ("KW540 Transcript") along with 20 associated exhibits (altogether "KW540 Material").[69] The Accused submits that he has good shown good cause for failing to meet the 27 August Deadline because KW540 refused to testify after that date and the Chamber subsequently declined to issue a subpoena.[70] He asserts that the Rule 92 *bis* requirements are met in relation to the KW540 Transcript as i) it is relevant to the municipalities component of the case and allegations under Count 1 of the Indictment,[71] ii) it does not go to the acts and conduct of the Accused,[72] and iii) it is cumulative to other evidence on the record.[73]

14. On 21 February 2014, the Prosecution filed the "Prosecution Response to Motion to Admit Testimony of Witness KW540 Pursuant to Rule 92 *bis*" ("KW540 Response"), opposing the KW540 Motion.[74] The Prosecution contends that KW540's refusal to testify and the Chamber's subsequent denial to issue a subpoena against him do not establish good cause for not having met the 27 August Deadline in relation to the KW540 Motion.[75] On the merits, the Prosecution submits that KW540 should be called for cross-examination as the KW540 Transcript goes to live and important issues in dispute in the case and KW540 tried to minimise his role when he testified in the *Stanišić and Župljanin* case.[76]

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67 Jovičinac Response, para. 7.

68 Jovičinac Response, para. 6.

69 The Accused requests the admission of both the confidential version of KW540 Transcript uploaded into e-court as 65 *ter* 1D8820 and its public redacted version uploaded into e-court as 65 *ter* 1D8821, *see* KW540 Motion, confidential Annex "A". However, the Chamber notes that the non-redacted portions of 1D8821 refer to matters not pertaining to witness KW540 and not pertaining to this case. The Chamber will therefore only consider the request for admission of 65 *ter* 1D8820. The Chamber further notes that the proposed associated exhibits are listed in KW540 Motion, confidential Annex "A".

70 KW540 Motion, para. 2.

71 KW540 Motion, paras. 9–14. Given the protected status of KW540, the Chamber will provide further detail as to KW540's evidence in a confidential annex appended to this decision.

72 KW540 Motion, para. 15.

73 KW540 Motion, para. 15.

74 KW540 Response, para. 1.

75 KW540 Response, paras. 2–3.

76 KW540 Response, paras. 4, 6. The Chamber notes that in addition, the Prosecution argues that there is no indication that the Rule 92 *bis*(B) requirements would be met for the KW540 Material. However, the Prosecution seems to be under the wrong impression that a statement is sought for admission as opposed to a transcript of

(7) Popović Motion

15. In the Popović Motion, the Accused seeks the admission of the statement given by Božidar Popović to the Defence on 26 November 2013 ("Popović Statement").[77] Popović was the commander of the Manjača camp in Banja Luka at the time relevant to the Indictment.[78] The Accused argues that good cause has been shown for failing to meet the 27 August Deadline as Popović refused to testify after that date.[79] A declaration of the Accused's case manager appended at Annex "B" to the Popović Motion further indicates that the Accused's legal adviser did not think the conditions would be met for the issuance of the safe conduct requested by Popović.[80] On the merits, the Accused submits that the Popović Statement fulfils the requirements for admission under Rule 92 *bis* in that i) it is relevant to the allegations in the Indictment which relate to the Manjača camp,[81] ii) given Popović's position as camp commander, it is of probative value,[82] iii) it does not relate to the acts and conduct of the Accused,[83] and iv) it is cumulative to other evidence on the record.[84] There are no associated exhibits sought for admission.

16. The Prosecution filed the "Prosecution Response to Motion to Admit Testimony of Božidar Popović Pursuant to Rule 92 *bis*" on 25 February 2014 ("Popović Response"), opposing the Popović Motion.[85] The Prosecution contends that the Accused has failed to show good cause for having failed to meet the 27 August Deadline.[86] On the merits, the Prosecution asserts that the Rule 92 *bis* requirements are not met for the Popović Statement given that the Accused has failed to show it is cumulative to other evidence in the case.[87] It also claims that there is no indication that the Rule 92 *bis*(B) certification requirements would be met and that if they were, the fact that Popović did not want to testify but would agree to certify the Popović Statement would cast doubt as to its reliability.[88] Finally, the Prosecution contends that the Popović Statement addresses live

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testimony; *see* KW540 Response, para. 7. The Chamber shall therefore not consider this part of the KW540 Response.

77 The Popović Statement is attached at Annex "A" to the Popović Motion. Although the Popović Statement is undated, the "Submission on Rule 92 *bis* Motions" filed by the Accused on 5 March 2014 ("Supplemental Submission") indicates that it was obtained on 26 November 2013.

78 Popović Motion, para. 1.

79 Popović Motion, para. 3.

80 Popović Motion, Annex "B".

81 Popović Motion, para. 11.

82 Popović Motion, para. 11.

83 Popović Motion, para. 12.

84 Popović Motion, para. 13.

85 Popović Response, para. 1.

86 Popović Response, paras. 2–4.

87 Popović Response, para. 7.

88 Popović Response, para. 8.

and important issues in dispute in the case, which strongly militates in favour of requiring Popović to appear for cross-examination.[89]

(8) Banović Motion

17. In the Banović Motion, the Accused requests the admission of the statement given by Predrag Banović to the Defence on 20 December 2013 ("Banović Statement").[90] Banović was a guard at the Keraterm camp.[91] The Accused submits he has shown good cause for having failed to meet the 27 August Deadline because Banović was only added to the Revised Witness List once Count 1 had been reinstated into the Indictment and subsequently refused to testify after having been informed that the Chamber had refused to assign counsel for the purpose of his testimony in these proceedings.[92] He otherwise argues that for the most part the Banović Statement fulfils the Rule 92 *bis* requirements in that i) it is relevant to the Accused's case that he or the Keraterm authorities had no intent to destroy the Bosnian Muslims in whole or in part,[93] and ii) does not go to the acts and conduct of the Accused or touch upon a live and important issue in the case.[94] With regard to the cumulativeness requirement, the Accused contends that "it is the only defence evidence about Keraterm Camp. However, the prosecution introduced 100% of its evidence about Keraterm Camp in the form of Rule 92 *bis* statements and adjudicated facts."[95] There are no associated exhibits sought for admission.[96]

18. The Prosecution filed the "Prosecution Response to Motion to Admit Statement of Predrag Banović Pursuant to Rule 92 *bis*" on 25 February 2014 ("Banović Response"), opposing the Motion.[97] In relation to whether the Accused has shown good cause for having failed to meet the 27 August Deadline, the Prosecution submits that the Accused fails to explain why he did not list Banović as a Rule 92 *bis* witness in his Revised Witness List and file the Banović Motion before then.[98] According to the Prosecution, the Accused also failed to consider other avenues of obtaining similar evidence for similarly positioned individuals on his Revised Witness List.[99] On the substance, the Prosecution argues that the Rule 92 *bis* requirements are not met for the Banović

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89 Popović Response, para. 6.

90 The Banović Statement is attached to Annex "A" to the Banović Motion. Although the Banović Statement is undated, the Supplemental Submission indicates that it was obtained on 20 December 2013.

91 Banović Motion, para. 1.

92 Banović Motion, paras. 2–3.

93 Banović Motion, paras. 9–10.

94 Banović Motion, para. 11.

95 Banović Motion, para. 10.

96 Banović Motion, para. 12.

97 Banović Response, para. 1.

98 Banović Response, para. 2.

99 Banović Response, para. 4.

Statement in that i) it is not cumulative to other evidence on the record,[100] and that ii) there is no indication that Banović would be willing to certify the Banović Statement pursuant to Rule 92 *bis*(B), especially because he was concerned about the impact of his testimony on a plea agreement he had entered into with the Prosecution.[101] Finally, the Prosecution argues that the Banović Statement addresses disputed live and important issues in the case and raises specific questions in terms of the truthfulness of the factual basis to the plea agreement entered into with the Prosecution so that it would not be in the interests of justice to admit the Banović Statement without the Prosecution being given an opportunity to cross-examine Banović.[102]

(9) Đenadija Motion

19. In the Đenadija Motion, the Accused requests the admission of the statement given by Dušan Đenadija on 9 June 2012 ("Đenadija Statement").[103] Đenadija was a VRS battalion commander in Prijedor in 1992.[104] The Accused submits he has shown good cause for not having met the 27 August Deadline as Đenadija only informed the Defence of his unwillingness to testify after that date.[105] In Annex "B" to the Đenadija Motion, the Accused's case manager indicates that during a conversation in November 2013, Đenadija indicated that he was not willing to testify due to the War Crimes Chamber of BiH conducting an investigation in which he believed he was a suspect, and that he has subsequently maintained his refusal to testify.[106] On the substance, the Accused argues that the Đenadija Statement meets the Rule 92 *bis* requirements in that i) it is relevant to establish that there was no joint criminal enterprise to expel Bosnian Muslims from Prijedor or intent to destroy them,[107] ii) it is cumulative to other evidence on the record,[108] and iii) it neither goes to the acts and conduct of the Accused nor touches upon a live and important issue in the case.[109] There are no associated exhibits sought for admission.[110]

20. The Prosecution filed the "Prosecution Response to Motion to Admit Testimony of Dušan Đenadija Pursuant to Rule 92 *bis*" on 19 February 2014 ("Đenadija Response"), opposing the

[100] Banović Response, para. 9.
[101] Banović Response, para. 10.
[102] Banović Response, paras. 5–7.
[103] The Đenadija Statement is appended at Annex "A" to the Đenadija Motion. Although the Đenadija Statement is undated, the Supplemental Submission indicates that it was obtained on 9 June 2012.
[104] Đenadija Motion, paras. 1, 9.
[105] Đenadija Motion, paras. 2–3.
[106] Đenadija Motion, Annex "B".
[107] Đenadija Motion, paras. 9–10.
[108] Đenadija Motion, para. 10.
[109] Đenadija Motion, para. 11. The Chamber notes that there are two paragraphs 11 in the Đenadija Motion and that this refers to the second of these two paragraphs.
[110] Đenadija Motion, para. 12.

Đenadija Motion.[111] The Prosecution first argues that the Accused's wish to call Đenadija live and Đenadija's subsequent refusal to testify do not constitute good cause for having failed to meet the 27 August Deadline.[112] On the merits, the Prosecution submits that the Accused has not shown that the Đenadija Statement is cumulative.[113] The Prosecution further contends that there is no indication that the Rule 92 *bis*(B) requirements for the Đenadija Statement have been or will be met and that, if Đenadija decides to certify his statement while refusing to testify, his credibility would be called into question.[114] Finally, the Prosecution submits that the Đenadija Statement raises live and important disputed issues in the case and that, should the Chamber admit it into evidence, Đenadija should be called for cross-examination.[115]

(10) Budimir Motion

21. In the Budimir Motion, the Accused moves for the admission of the prior testimony of Slavko Budimir in the *Stakić* case on 13 March 2003 ("Budimir Transcript") along with 13 associated exhibits (altogether "Budimir Material").[116] Budimir was the secretary for civilian defence for the Prijedor municipality and a member of the Prijedor crisis staff at the time relevant to the Indictment.[117] The Accused argues that he has shown good cause for failing to meet the 27 August Deadline as Budimir declined to testify after that date and the Chamber subsequently declined to issue a subpoena against him.[118] He further contends that the Budimir Transcript meets the Rule 92 *bis* requirements in that i) it is relevant to demonstrate that there was no intent to destroy the Bosnian Muslims in Prijedor and that there was no policy or plan to expel them from Serb controlled areas of Prijedor or to commit crimes against them,[119] ii) it is cumulative to other evidence on the record,[120] and iii) it does not go to the acts and conduct of the Accused.[121]

22. The Prosecution filed the "Prosecution Response to Motion to Admit Testimony of Slavko Budimir Pursuant to Rule 92 *bis*" on 26 February 2014 ("Budimir Response"), opposing the

111 Đenadija Response, para. 1.
112 Đenadija Response, paras. 2–3.
113 Đenadija Response, paras. 7–8.
114 Đenadija Response, para. 9.
115 Đenadija Response, para. 6.
116 The Budimir Transcript is uploaded into e-court under 65 *ter* 1D8870. The associated exhibits requested for admission are listed in Annex "A" to the Budimir Motion.
117 Budimir Motion, paras. 1, 9.
118 Budimir Motion, para. 2. The Chamber notes that the last part of paragraph 2 refers to KW540 and not to Budimir.
119 Budimir Motion, para. 16 (The Chamber notes that this refers to the first paragraph numbered as 16 in the Budimir Motion); *see also* Budimir Motion, paras. 11–15 (The Chamber also notes that this refers to the first paragraph numbered as 15 in the Budimir Motion).
120 Budimir Motion, para. 15. The Chamber notes that this refers to the second paragraph numbered as 15 in the Budimir Motion.
121 Budimir Motion, para. 15. The Chamber notes that this refers to the second paragraph numbered as 15 in the Budimir Motion

Budimir Motion.[122] The Prosecution first submits that Budimir's refusal to testify and the Chamber's subsequent denial to issue a subpoena against Budimir do not constitute good cause for having failed to meet the 27 August Deadline.[123] On the substance, the Prosecution argues that the Accused has failed to show that the Budimir Transcript is cumulative to other evidence on the record.[124] It also contends that the Budimir Material touches upon live and important issues in dispute in the case and that during his testimony in the *Stakić* case, Budimir tried to minimise his own role; thus, should the Chamber wish to admit it into evidence, Budimir should be called for cross-examination.[125]

(11) Indić Motion

23. In the Indić Motion, the Accused seeks the admission of the statement given by Rajko Indić to the Defence at an unknown date ("Indić Statement").[126] Indić was a judge in the Sanski Most municipality and a member of the 6th Sana Brigade of the VRS at the time relevant to the Indictment.[127] The Accused contends he has shown good cause for not having met the 27 August Deadline as Indić was only added to the Revised Witness List once Count 1 had been reinstated into the Indictment.[128] He further submits that the Indić Statement fulfils the requirements under Rule 92 *bis* in that i) it is relevant to establish that there was no intent to destroy the Bosnian Muslims of Sanski Most,[129] and ii) with the exception of paragraph 16 and the first part of paragraph 17, which the Accused proposes to redact, it neither goes to the acts and conduct of the Accused nor touches upon a live and important issue in the case.[130] There are no associated exhibits proposed for admission.[131]

24. On 27 February 2014, the Prosecution filed the "Prosecution Response to Motion to Admit Testimony of Rajko Indić Pursuant to Rule 92 *bis* ("Indić Response"), opposing the Indić Motion.[132] The Prosecution argues that the Accused has failed to establish good cause for having failed to meet the 27 August Deadline in relation to the Indić Motion.[133] On the merits, the Prosecution argues that the Accused has failed to claim, albeit to show, that the Indić Statement is

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122 Budimir Response, para. 1.
123 Budimir Response, paras. 2–3.
124 Budimir Response, paras. 6–7.
125 Budimir Response, paras. 4–5.
126 The Indić Statement is appended in Annex "A" to the Indić Motion.
127 Indić Motion, para. 1.
128 Indić Motion, para. 2.
129 Indić Motion, para. 10.
130 Indić Motion, para. 11, fn. 5.
131 Indić Motion, para. 12.
132 Indić Response, para. 1.
133 Indić Response, paras. 2–4.

cumulative.[134] In relation to the Rule 92 *bis*(B) certification requirements, the Prosecution also contends that "[g]iven that the [Inđić] Statement is as yet unsigned, and there has been no reason offered by the Accused for the sudden and last-minute change in the mode of testimony for this Witness, the Accused should have demonstrated the Witness's willingness to certify his Statement."[135] Finally, the Prosecution submits that Inđić should be called for cross-examination, should the Inđić Statement be admitted into evidence, as the Accused has not demonstrated its reliability[136] and because it touches upon live and important issues in dispute in the case.[137]

(12) Zorić Motion

25. In the Zorić Motion, the Accused requests that the statement of Mladen Zorić given to the Defence at an unknown date ("Zorić Statement") be admitted into evidence.[138] Zorić was the secretary of the Red Cross in the Prijedor Municipality at the time relevant to the Indictment.[139] The Accused argues good cause has been shown for not complying with the 27 August Deadline because the Zorić Statement "primarily relates to Count one of the Indictment, which was only reinstated in 2013".[140] He contends that the Rule 92 *bis* requirements are met in relation to the Zorić Statement in that i) it is relevant to demonstrate that there was no intent to destroy the Bosnian Muslims in Prijedor and that efforts were made to assist individuals present at Trnopolje,[141] ii) it is cumulative of the evidence of other witnesses on the record,[142] and iii) it neither goes to the acts and conduct of the Accused nor touches upon a live and important issue in the case.[143] In terms of the Rule 92 *bis*(B) certification requirements, the Accused submits that Zorić will sign his statement in the presence of an officer from the Tribunal's Registry if it is admitted into evidence.[144] There are no associated exhibits proposed for admission.[145]

26. The Prosecution filed the "Prosecution Response to Motion to Admit Testimony of Mladen Zorić Pursuant to Rule 92 *bis*" on 28 February 2014 ("Zorić Response"), opposing the Zorić

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134 Inđić Response, para. 7.
135 Inđić Response, para. 8.
136 Inđić Response, paras. 9–11.
137 Inđić Response, paras. 5–6.
138 The Zorić Statement is appended to the Zorić Motion in Annex "A".
139 Zorić Motion, para. 1.
140 Zorić Motion, para. 2. The Chamber notes that Zorić was already listed on the Accused's initial witness list filed on 27 August 2012 under number 575 as being relevant to counts 1 and 3 to 8.
141 Zorić Motion, para. 9.
142 Zorić Motion, para. 10.
143 Zorić Motion, para. 10.
144 Zorić Motion, fn. 5.
145 Zorić Motion, para. 12.

Motion.[146] The Prosecution submits that the Accused has made "no effort whatsoever to show good cause why he was unable to file a Rule 92 *bis* motion for Mr. Zorić in October 2013 alongside his revised 65 *ter* witness list. In fact, Mr. Zorić was scheduled to testify in The Hague in January but was subsequently removed from the Defence witness calendar with no reason offered".[147] On the merits, the Prosecution claims that the Accused has failed to show that the Zorić Statement is cumulative to other evidence on the record.[148] It also argues that there is no basis for the Accused's assertion that Zorić will sign his statement and therefore that the Zorić Statement will meet the Rule 92 *bis*(B) requirements.[149] Finally, the Prosecution claims that the Zorić Statement touches upon live and important issue in dispute in the case and that, as such, should the Chamber wish to admit it into evidence, Zorić should be called for cross-examination.[150]

(13) Ljubanić Motion

27. In the Ljubanić Motion, the Accused seeks the admission of the statement given by Boro Ljubanić to the Defence at an unknown date ("Ljubanić Statement").[151] Ljubanić was Assistant Commander for Intelligence and Security Affairs in the Ključ Brigade of the VRS.[152] The Accused argues that good cause has been shown for not having met with the 27 August Deadline since Ljubanić was only added to the Revised Witness List once Count 1 had been reinstated in the Indictment.[153] He further submits that the Rule 92 *bis* requirements are met with regard to the Ljubanić Statement, namely that i) it is relevant to establish that there was no intent to destroy the Bosnian Muslims of Ključ and that there was no joint criminal enterprise to expel them from Ključ,[154] ii) it is cumulative to the evidence of other witnesses on the record,[155] and iii) it neither goes to the acts and conduct of the Accused nor touches upon a live and important issue in the case.[156] Finally, in relation to the Rule 92 *bis*(B) certification requirements, the Accused states that Ljubanić has signed the Ljubanić Statement and submits that he "is prepared to certify his

[146] Zorić Response, para. 1.
[147] Zorić Response, paras. 2–3.
[148] Zorić Response, paras. 6–7.
[149] Zorić Response, para. 8.
[150] Zorić Response, paras. 4–5.
[151] The Ljubanić Statement is appended to the Ljubanić Motion in Annex "A".
[152] Ljubanić Motion, para. 1.
[153] Ljubanić Motion, para. 2.
[154] Ljubanić Motion, para. 10.
[155] Ljubanić Motion, para. 11.
[156] Ljubanić Motion, para. 11.

statement before a hearing officer of this Tribunal when and if requested".[157] There are no associated exhibits proposed for admission.[158]

28. On 4 March 2014, the Prosecution filed the "Prosecution Response to Motion to Admit Testimony of Boro Ljubanić Pursuant to Rule 92 *bis*" ("Ljubanić Response"), opposing the Ljubanić Motion.[159] The Prosecution first submits that the Accused "makes no effort whatsoever to show good cause why he was unable to file a Rule 92 *bis* motion for Mr. Ljubanić in October 2013 alongside his revised 65 *ter* witness list. In fact, Mr. Ljubanić was scheduled to testify in The Hague in February but was subsequently removed from the Defence witness calendar with no reason offered."[160] The Prosecution further argues that the Accused has not established that the Ljubanić Statement is cumulative to other evidence on the record.[161] It also asserts that the criteria under Rule 92 *bis*(B) are not met in relation to the Ljubanić Statement.[162] Finally, it contends that the Ljubanić Statement addresses live and important issues in the case and that should the Chamber admit it into evidence, Ljubanić should be called for cross-examination.[163]

(14) Deurić Motion

29. In the Deurić Motion, the Accused moves for the admission of a statement given by Marko Deurić to the Defence on 22 February 2014 ("Deurić Statement") as well as one associated exhibit (altogether "Deurić Material").[164] Deurić was the Deputy Commander of the military police of the TO in Bratunac.[165] The Accused claims he has good cause for not having met the 27 August Deadline in relation to the Deurić Motion as Deurić was only added to the Revised Witness List after Count 1 was reinstated into the Indictment.[166] The Accused further submits that the Rule 92 *bis* requirements are met in relation to the Deurić Statement in that i) it is relevant to establish that there was no intent to destroy the Bosnian Muslims of Bratunac and that the crimes in Bratunac resulted from the actions of paramilitaries outside the control of the authorities,[167] ii) it is cumulative to other evidence on the record,[168] and iii) it does not touch upon a live and important

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157 Ljubanić Motion, para. 9.
158 Ljubanić Motion, para. 12.
159 Ljubanić Response, para. 1.
160 Ljubanić Response, paras. 2–3.
161 Ljubanić Response, para. 6.
162 Ljubanić Response, para. 8.
163 Ljubanić Response, paras. 4–5.
164 The Deurić Statement is appended to the Deurić Motion in Annex "A". The associated exhibit requested for admission bears 65 *ter* 1D10181.
165 Deurić Motion, para. 1.
166 Deurić Motion, para. 2.
167 Deurić Motion, para. 10.
168 Deurić Motion, para. 11.

issue in the case.[169] Finally, the Accused submits that Deurić is prepared to certify his statement and to satisfy the Rule 92 *bis*(B) requirements.[170]

30. On 7 March 2014, the Prosecution filed the "Prosecution Response to Motion to Admit the Statement of Marko Deurić Pursuant to Rule 92 *bis*" ("Deurić Response"), opposing the Deurić Motion.[171] The Prosecution first argues that no good cause has been established for failing to meet the 27 August Deadline and that on the contrary, the record indicates that the Accused has failed to exercise due diligence with respect to Deurić to ensure a timely motion pursuant to Rule 92 *bis*.[172] The Prosecution further asserts that the Deurić Statement is not cumulative to other evidence on the record and that its reliability is to be called into question.[173] It also submits that the Deurić Statement addresses live and important issues in dispute in the case and that therefore, should the Chamber admit it into evidence, Deurić should be called for cross-examination.[174] Finally, the Prosecution opposes the admission of the untranslated associated exhibit sought for admission in the Deurić Motion.[175]

(15) Sekanić Motion

31. Finally, in the Sekanić Motion, the Accused requests the admission of a statement given to the Defence by Aleksa Sekanić on 17 February 2014 ("Sekanić Statement").[176] Sekanić was a JNA company commander in Zvornik and later a member of the VRS.[177] The Accused submits that he has good cause for not having met the 27 August Deadline in relation to the Sekanić Motion as Sekanić was only added to the Revised Witness List after Count 1 was reinstated into the Indictment.[178] The Accused further submits that the Rule 92 *bis* requirements are met in relation to the Sekanić Statement in that i) it is relevant to establish that there was no intent to destroy the Bosnian Muslims of Zvornik and that the crimes in Zvornik resulted from actions of paramilitaries outside the control of the authorities,[179] ii) it is cumulative to other evidence on the record,[180] and iii) it neither goes to the acts and conduct of the Accused nor touches upon a live and important

[169] Deurić Motion, para. 11.
[170] Deurić Motion, para. 9.
[171] Deurić Response, para. 1.
[172] Deurić Response, paras. 2–3.
[173] Deurić Response, paras. 6–11.
[174] Deurić Response, paras. 4–5.
[175] Deurić Response, paras. 12–13.
[176] The Sekanić Statement is appended to the Sekanić Motion at Annex "A". Although the Sekanić Statement is undated, the Supplemental Submission indicates that it was obtained on 17 February 2014.
[177] Sekanić Motion, para. 1.
[178] Sekanić Motion, para. 2.
[179] Sekanić Motion, para. 10.
[180] Sekanić Motion, para. 11.

issue in the case.[181] Finally, the Accused argues that Sekanić is prepared to certify his statement and that the Rule 92 *bis*(B) certification requirements will therefore be met in relation to the Sekanić Statement.[182] There are no proposed associated exhibits.[183]

32. On 6 March 2014, the Prosecution filed its "Prosecution Response to Motion to Admit Testimony of Aleksa Sekanić Pursuant to Rule 92 *bis*" ("Sekanić Response"), opposing the Sekanić Motion.[184] The Prosecution first argues that no good cause has been established for failing to meet the 27 August Deadline and that "[i]n the absence of any reason, let alone a compelling reason, why the Accused waited until the final days of his case to file such a motion, the Trial Chamber should deny the [Sekanić] Motion as untimely".[185] It also submits that the Sekanić Statement is not cumulative.[186] Lastly, the Prosecution contends that the Sekanić Statement addresses live and important issues in dispute in the case and that therefore, should the Chamber admit it into evidence, Sekanić should be called for cross-examination.[187]

II. Applicable Law

33. Rule 65 *ter*(G)(i)(e) provides that the list of witnesses the Defence intends to call shall bear "an indication of whether the witness will testify in person or pursuant to Rule 92 *bis* or Rule 92 *quater* by way of written statement or use of a transcript of testimony from other proceedings before the Tribunal".

34. Rule 92 *bis* governs the admissibility of written witness statements and transcripts from previous proceedings in lieu of *viva voce* testimony. Any evidence admitted pursuant to Rule 92 *bis* must satisfy the fundamental requirements for the admission of evidence, as set out in Rule 89(C) and (D) of the Rules, namely the evidence must be relevant and of probative value, and its probative value must not be substantially outweighed by the need to ensure a fair trial.[188] It is for

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[181] Sekanić Motion, para. 11.
[182] Sekanić Motion, para. 9.
[183] Sekanić Motion, para. 12.
[184] Sekanić Response, para. 1.
[185] Sekanić Response, para. 3.
[186] Sekanić Response, para. 6.
[187] Sekanić Response, paras.4–6.
[188] *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis*, 7 June 2002 ("*Galić* Appeal Decision"), para. 12; *Prosecutor v. S. Milošević*, Case No. IT-02-54-T, Decision on Prosecution's Request to Have Written Statements Admitted under Rule 92 *bis*, 21 March 2002 ("*S. Milošević* Trial Decision"), para. 6; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Decision on Prosecution Rule 92 *bis* Motion, 4 July 2006 ("*Milutinović* Trial Decision"), para. 5; *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis*, 22 August 2008 ("*Lukić* Trial Decision"), para. 15; *Prosecutor v. Perišić*, Case No. IT-04-81-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis*, 2 October 2008 ("*Perišić* Trial Decision"), para. 15.

the tendering party to demonstrate the relevance and probative value of the evidence of which it seeks admission.[189]

35. For written evidence to be admissible pursuant to Rule 92 *bis*, it must not relate to the acts and conduct of the accused as charged in the indictment. The phrase "acts and conduct of the accused" has been interpreted in the Tribunal's jurisprudence as an expression that must be given its ordinary meaning, *i.e*: "deeds and behaviour of the accused".[190] Furthermore, a clear distinction must be drawn between: (i) the acts and conduct of those others who commit the crimes for which the accused is alleged to be responsible, and (ii) the acts and conduct of the accused as charged in the indictment, which establish his responsibility for the acts and conduct of those others.[191] Evidence pertaining to the latter is inadmissible under Rule 92 *bis*, and includes evidence which goes to whether the accused:

(a) committed (that is, that he personally physically perpetrated) any of the crimes charged;
(b) planned, instigated or ordered the crimes charged;
(c) otherwise aided and abetted those who actually did commit the crimes in their planning, preparation or execution of those crimes;
(d) was a superior to those who actually committed the crimes;
(e) knew or had reason to know that those crimes were about to be or had been committed by his subordinates, or
(f) failed to take reasonable steps to prevent such acts or to punish those who carried out those acts.[192]

36. In addition, where the Prosecution case is that the accused participated in a joint criminal enterprise ("JCE"), and is therefore liable for the acts of others in that JCE, Rule 92 *bis*(A) also excludes any written statement or transcript which goes to proof of any act or conduct of the accused as to whether he (i) participated in that JCE, or (ii) shared with the person who actually did commit the crimes charged the requisite intent for those crimes.[193]

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189 *Lukić* Trial Decision, para. 15.

190 *Prosecutor v. Boškoski and Tarčuloski*, Case No. IT-04-82-PT, Decision on Prosecution's First Revised Motion pursuant to Rule 92 *bis* and on Prosecution's Motion pursuant to Rule 92 *ter*, 30 March 2007 ("*Boškoski* Decision"), para. 36, citing *S. Milošević* Trial Decision, para. 22.

191 *Galić* Appeal Decision, para. 9. *See also Milutinović* Trial Decision, para. 6; *Lukić* Trial Decision para. 17; *Perišić* Trial Decision, para. 11; both referring to the *Galić* Appeal Decision. Similarly before the *Galić* Appeal Decision, *S. Milošević* Trial Decision, para. 22.

192 *Lukić* Trial Decision, para. 17, citing *Galić* Appeal Decision, para. 10.

193 *Galić* Appeal Decision, para. 10.

37. Even if a written statement or the transcript of prior testimony is admissible pursuant to Rule 92 *bis*, it remains for the Chamber to determine whether to exercise its discretion and admit the evidence in written form.[194] Rule 92 *bis*(A)(i) to (ii) sets out non-exhaustive lists of factors in favour of and against the admission of a piece of evidence in written form. Pursuant to Rule 92 *bis*(A)(i), factors in favour of admission include whether the evidence: (i) is of a cumulative nature; (ii) relates to relevant historical, political or military background; (iii) consists of a general or statistical analysis of the ethnic composition of the population; (iv) concerns the impact of crimes upon victims; (v) relates to issues of the character of the accused; or (vi) relates to factors to be taken into account in determining sentence. By contrast, pursuant to Rule 92 *bis*(A)(ii), factors against admission include whether: (i) there is an overriding public interest in the evidence in question being presented orally; (ii) a party objecting demonstrates that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or (iii) there are any other factors which make it appropriate for the witness to attend for cross-examination.

38. Additionally, in exercising its discretionary power, the Chamber may consider whether (i) the written statement goes to proof of the acts and conduct of a subordinate of the accused or of some other person for whose acts and conduct the accused is charged with responsibility;[195] and (ii) the evidence in question relates to a "live and important issue between the parties, as opposed to a peripheral or marginal issue",[196] and/or is "pivotal" or "critical" to the case.[197] If the Chamber considers that the evidence fits into one of these categories, it may decide to exercise its discretionary power not to admit the evidence in question pursuant to Rule 92 *bis*, to admit it in full or in part, or to admit the evidence but require the witness to appear for cross-examination.[198]

39. Moreover, when the evidence sought to be admitted pursuant to Rule 92 *bis* consists of a written statement, the formal requirements set out in Rule 92 *bis*(B) must be fulfilled.[199] However,

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194 *Milutinović* Trial Decision, para. 7.

195 *Galić* Appeal Decision, para. 13; *see also S. Milošević* Trial Decision, para. 22; *Milutinović* Trial Decision, para 7; *Prosecutor v. D. Milošević*, Case No. IT-98-29/1-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis*, 3 April 2007, p. 4; *Lukić* Trial Decision, paras. 19–20.

196 *S. Milošević* Trial Decision, paras. 24–25; *Prosecutor v. Martić*, Case No. IT-95-11-T, Decision on Prosecution's Motion for the Admission of Written Evidence Pursuant to Rule 92 *bis* of the Rules, 16 January 2006 ("*Martić* Trial Decision"), para. 15.

197 *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-T, Decision on the Admission of Rule 92 *bis* Statements, 1 May 2002, para. 14; *Lukić* Trial Decision, para. 19.

198 *Galić* Appeal Decision, para. 13.

199 Rule 92 *bis*(B) requires that there be attached to the statement a declaration by the person making it as to the truth and accuracy of its contents, to the best of his or her knowledge and belief. This declaration must be witnessed by "a person authorised to witness such a declaration in accordance with the law and procedure of a State" or "a Presiding Officer appointed by the Registrar of the Tribunal for that purpose." That authorised person or Presiding Officer must verify in writing:

(a) that the person making the statement is the person identified in the said statement;

it is permissible in certain circumstances for a party to propose written statements for provisional admission pending their certification under Rule 92 *bis*(B).[200] The Chamber considers that, as the Rule 92 *bis*(B) certification requirement is only obviated for transcripts of testimony where the witness has made the solemn declaration under Rule 90(A) to speak the truth, this certification requirement also applies to transcripts of witness interviews, in relation to which individuals do not make a solemn declaration.[201]

40. Should the Chamber consider that the written evidence is admissible, the Chamber may order the witness to be brought for cross-examination pursuant to Rule 92 *bis*(C), and under the conditions set out in Rule 92 *ter* of the Rules. In making this determination, the Chamber should always take into consideration its obligation to ensure a fair trial under Articles 20 and 21 of the Statute of the Tribunal ("Statute").[202] Furthermore, there are a number of criteria established in the case-law of the Tribunal, which should be taken into account when making such a determination, including (i) the cumulative nature of the evidence;[203] (ii) whether the evidence is "crime-base" evidence;[204] (iii) whether the evidence touches upon a "live and important issue between the parties, as opposed to a peripheral or marginally relevant issue";[205] and (iv) whether the evidence describes the acts and conduct of a person for whose acts and conduct the accused is charged with responsibility (subordinate, co-perpetrator) and how proximate the acts and conduct of this person are to the accused.[206] Moreover, a general factor to be taken into consideration in relation to written evidence in the form of a transcript of previous testimony is whether the witness was extensively cross-examined.[207]

(b) that the person making the statement stated that the contents of the written statement are, to the best of the person's belief and knowledge, true and correct;

(c) that the person making the statement was informed that if the content of the written statement is not true then he or she may be subject to proceedings for giving false testimony; and

(d) the date and place of the declaration.

200 *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 *bis*, 12 September 2006 ("*Popović* Trial Decision"), paras. 19–21; *Martić* Trial Decision, paras. 11, 37.

201 *See Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Prosecution Twenty-Third Motion to Admit Evidence Pursuant to Rule 92 *bis*, 25 October 2013, para. 6; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Prosecution's Twenty-First Motion to Admit Evidence Pursuant to Rule 92*bis*: VRS, Dutchbat, and Bosnian Muslim Witnesses, 16 October 2013, para. 14.

202 *Lukić* Trial Decision, para. 20.

203 *Lukić* Trial Decision, para. 20, citing *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, Decision on Prosecution's Motion for Admission of Transcripts and Written Statements pursuant to Rule 92 *bis*, confidential, 21 October 2005 ("*Mrkšić* Decision"), para. 9.

204 *Lukić* Trial Decision, para. 20, citing *Mrkšić* Decision, para. 8; *see also Boškoski* Decision, para. 19.

205 *Lukić* Trial Decision, para. 20, citing *S. Milošević* Trial Decision, paras. 24–25.

206 *Galić* Appeal Decision, para. 13.

207 *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 27.

41. In addition to the admission of a witness's written evidence, documents accompanying the written statements or transcripts which "form an inseparable and indispensable part of the testimony" can also be admitted pursuant to Rule 92 *bis*.[208] Not every document referred to in a witness's written statement and/or transcript from a prior proceeding automatically forms an "inseparable and indispensable part" of the witness's testimony. Rather, a document falls into this category if the witness discusses the document in his written statement or transcript, and if that written statement or transcript would become incomprehensible or have lesser probative value without the admission of the document in question.[209]

III. Discussion

A. Motions related to witnesses listed on the Initial Witness List

a. *Instances in which subpoenas were requested by the Accused and denied by the Chamber*

42. The Chamber will first address the motions which relate to witnesses on the Initial Witness List for whom subpoenas to testify were requested by the Accused and later denied by the Chamber. These are the Tomović Motion, the Mijić Motion, the Tomašević Motion, the Kalinić Motion, the KW540 Motion, and the Budimir Motion. Tomović, Mijić, Tomašević, Kalinić, KW540, and Budimir were all listed on the Initial Witness List as witnesses scheduled to testify pursuant to Rule 92 *ter*.[210] After the filing of the Initial Witness List, the Accused requested that subpoenas to testify be issued in relation to these witnesses, which the Chamber refused in all cases.[211] The Chamber first notes its concern that for all of these six witnesses, the Accused first argued in the relevant motions requesting subpoenas for them that their testimony was unique and later, or very soon after for some, argued that on the contrary their evidence sought for admission under Rule 92 *bis* was cumulative to other evidence on the record.

43. In relation to the timeliness of these motions, the Chamber first notes that the Tomović Statement was obtained by the Defence on 20 August 2012 and that Tomović's refusal to testify

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[208] *Prosecutor v. D. Milošević*, Case No. IT-98-29/1-T, Decision on Admission of Written Statements, Transcripts and Associated Exhibits Pursuant to Rule 92 *ter*, 22 February 2007, p. 3; *Perišić* Trial Decision, para. 16; *Lukić* Trial Decision, para. 21.

[209] *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, Decision on Confidential Prosecution Motion for the Admission of Prior Testimony with Associated Exhibits and Written Statements of Witnesses pursuant to Rule 92 *ter*, 9 July 2008, para. 15; *Perišić* Trial Decision, para. 16; *Lukić* Trial Decision, para. 21.

[210] *See* Initial Witness List, p. 160 for Tomović, p. 101 for Mijić, p. 159 for Tomašević, p. 64 for Kalinić, p. 167 for KW540, and p. 16 for Budimir.

[211] Decision on Accused's Motion to Subpoena Miloš Tomović, 28 January 2013; Decision on Accused's Motion to Subpoena Ranko Mijić, 11 January 2013; Decision on Accused's Motion to Subpoena Nikola Tomašević, 11 December 2013; Decision on Accused's Motion to Subpoena Dragan Kalinić, 18 December 2013; Decision on Accused's Motion to Subpoena Witness KW540, confidential, 3 February 2014; Decision on Accused's Motion to Subpoena Slavko Budimir, 22 January 2013.

occurred after the 27 August Deadline. Similarly, Kalinić was contacted by the Defence in June 2012 and did not communicate his refusal to testify until after the 27 August Deadline. In relation to KW540, the Chamber notes that while this witness seems to have been first contacted well after the 27 August Deadline, the Accused claims that KW540 was aware he was listed on the Initial Witness List and would be called to testify.[212] For Budimir, who testified previously before the Tribunal, the only information before the Chamber is that the Defence contacted him twice, "the most recent occasion being on 21 November 2012".[213] In these circumstances, and giving the Accused the benefit of the doubt, the Chamber will exercise some degree of flexibility in relation to Budimir. The Chamber therefore takes no issue with the timeliness of the Tomović Motion, the Kalinić Motion, the KW540 Motion, or the Budimir Motion. However, the Chamber notes that Mijić and Tomašević, who had never testified previously at the Tribunal, were first contacted well after the 27 August Deadline. Accordingly, while it is correct that they both refused to testify after the 27 August Deadline, as indicated in the Mijić Motion and the Tomašević Motion, this is only because the Defence first contacted them well after this deadline. The Chamber is therefore not satisfied that good cause has been shown for failing to meet the 27 August Deadline in relation to the Mijić Motion and the Tomašević Motion and will therefore not assess these two motions any further.

44. The Chamber recalls that when the evidence sought to be admitted pursuant to Rule 92 *bis* consists of a written statement or of an out-of-court interview, the formal certification requirements set out in Rule 92 *bis*(B) must be fulfilled.[214] These requirements include that the person making the statement shall state that the contents of the statement are true and correct, to the best of his knowledge, and shall be informed that if the content of the statement is not true, he may be subject to proceedings for false testimony. For those witnesses of relevance here, the Rule 92 *bis*(B) requirements thus have to be fulfilled in relation to the Tomović Statement and the Kalinić Interview.[215] Tomović and Kalinić have both refused to testify, even when they were informed that subpoenas would be requested. There is thus absolutely no basis for the Chamber to be satisfied that these two witnesses would agree to certify to the contents of the material the Accused seeks to tender through them. The Chamber further notes that the Accused has made no attempts to prove the contrary. Therefore, while in certain circumstances, it is permissible to admit the proposed evidence pending the certification requirements,[216] the Chamber is not satisfied that they have been

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[212] *See* Motion for Subpoena to Witness KW540, confidential, 16 December 2013, confidential Annex "A".

[213] Motion to Subpoena Slavko Budimir, 27 December 2012, para. 4.

[214] *See* para. 39 *supra*.

[215] There is no Rule 92 *bis*(B) requirement for the KW540 Transcript or the Budimir Transcript.

[216] *See* para. 39 *supra*.

or can be met in relation to Tomović and Kalinić. The Chamber will therefore not assess the Tomović Motion and the Kalinić Motion any further.

45. The Chamber will address the remaining requirements for admission under Rule 92 *bis* of the KW540 Material in a confidential annex appended to this decision. For the purpose of this public decision, it suffices to state that the Chamber finds that the KW540 Transcript may be admitted pursuant to Rule 92 *bis* without requiring KW540 to appear for cross-examination and that documents with Rule 65 *ter* numbers 04813, 05187, 05555, 1D8822, 1D8823, 1D8824, 1D8826, 1D8827, 1D8828, 1D8829, 1D9917, and 1D26631 may be admitted as associated exhibits to the KW540 Transcript, with 65 *ter* 04813, 1D8822, 1D8826, and 1D8827 to be admitted under seal as their admission as public exhibits may reveal the identity of KW540

46. The Chamber will now examine the remaining Rule 92 *bis* requirements in relation to the Budimir Material.

i) Summary of proposed evidence for Budimir

47. Budimir held various positions in Prijedor at the time relevant to the Indictment. He was a member of, and secretary to, the Municipal Secretariat for National Defence, as well as a member of the Crisis Staff and the Executive Board of the Municipal Assembly beginning on 30 April 1992.[217] He was present during the take-over of Prijedor on 30 April 1992.[218] He testified to the functioning of the Municipal Assembly and the Executive Board,[219] as well as to the power of the Crisis Staff.[220] He gave evidence that, prior to the incidents at Hambarine, neither the Crisis Staff nor the Secretariat for National Defence discussed preparations for a conflict with the Bosnian Muslims and Bosnian Croats.[221] He also stated that he never witnessed the Crisis Staff discuss "collection centres" in Prijedor, or the events that occurred at Hambarine on 23 May 1992, in Kozarac between 24 and 26 May 1992, or the Brdo region in July 1992.[222] He further testified to the mobilisation of Bosnian Serb forces in the region and the issuance of certificates for those who wished to leave Prijedor.[223]

ii) Analysis pursuant to Rule 92 *bis*(A) for Budimir

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[217] Budimir Transcript, T. 12830–12833 (3 March 2003), T. 13060 (6 March 2003).
[218] *See* Budimir Transcript, T. 12836–12840 (3 March 2003).
[219] Budimir Transcript, T. 13129 (6 March 2003).
[220] Budimir Transcript, T. 13029 (5 March 2003).
[221] Budimir Transcipt, T. 13114 (6 March 2003).
[222] Budimir Transcript, T. 13105–13107 (6 March 2003).
[223] Budimir Transcript, T. 13016–13019 (5 March 2003); T. 13142 (6 March 2003).

48. With regard to the admissibility of the Budimir Transcript, the Chamber is satisfied that the proposed evidence is relevant to Counts 1 and 3–8 of the Indictment, and in particular Scheduled Incidents A10.1–10.2, Scheduled Incidents B15.1–15.6, and Schedule C20.1–20.4 of the Indictment. Furthermore, given that the proposed evidence for Budimir is a transcript of testimony from a prior case given under solemn declaration pursuant to Rule 90(A), the Chamber is satisfied of its probative value for the purposes of admission pursuant to Rule 92 *bis*.

49. The Chamber considers that the following factors weigh in favour of admitting the Budimir Transcript through Rule 92 *bis*. First, it generally concerns the structure and functioning of various institutions in Prijedor, general background information as to the take-over of Prijedor, mobilisation within the municipality, as well as crime-base evidence. Further, having conducted its own review of the evidence since the Accused does not provide particular details as to the cumulative nature of the Budimir Transcript,[224] the Chamber is satisfied that it is cumulative of other evidence on the record including the testimony of Boško Mandić, Draško Vujić, Dragan Radetić, Simo Mišković, and Milomir Stakić.

50. Further, the Chamber notes that although there are portions of the Budimir Transcript that go to the acts and conduct of the Accused, it is satisfied that these parts may be redacted and that the remainder of the proposed evidence for Budimir does not relate to the acts and conduct of the Accused or which goes to establish that he participated in a JCE, as charged in the Indictment. In particular, the following portions should be redacted: T. 12862, l. 5–T.12872, l. 12; T.12958, l. 19–T.12959, l. 18; T. 12965, l. 1–T. 12966, l. 11; T. 13056, l. 23–T.13058, l. 18; T. 13064, l. 6–T.13066, l. 3; T. 13094, l. 10–22; T. 13141, l.1–8; T. 13168, l. 10–13; T. 13171, l. 14–22. Thus, the Chamber considers that, having excluded these portions, there are factors in favour of admitting into evidence the remainder of the Budimir Transcript.

51. The Chamber notes that Budimir does address live issues in dispute in this case, namely the occurrence of crimes in Prijedor. Nonetheless, given that the Chamber is already in possession of a significant amount of cumulative evidence on these issues, the Chamber will not use its discretion to deny the admission of the Budimir Transcript on this basis. There is therefore no factor against the admission of the Budimir Transcript pursuant to Rule 92 *bis*.

52. In addition, the Chamber has determined that the portion of the Budimir Transcript which was conducted in private session[225] will be redacted as it discusses issues not relevant to this case.

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[224] Budimir Motion, para. 15; Budimir Response, para. 6.

[225] Budimir Transcript, T. 13087, l.19–13093, l. 21.

iii) Analysis pursuant to Rule 92 *bis*(C)

53. The Chamber recalls that with regard to written evidence that is admissible pursuant to Rule 92 *bis*, the Chamber has discretion to require a witness to appear for cross-examination; if it does so decide, the provisions of Rule 92 *ter* shall apply. The Chamber has considered whether the evidence: (i) is cumulative; (ii) is crime-based; (iii) touches upon a "live and important issue between the parties"; and (iv) describes the acts and conduct of the Accused.

54. Having reviewed the entirety of the proposed evidence, the Chamber is of the view that the degree of cumulativeness of the Budimir Transcript makes it unreasonable to require Budimir to appear for cross-examination. The Chamber also finds that as Budimir was a witness called by the Chamber in the *Stakić* case and was subject to cross-examination by both parties, the Chamber sees no reason to exercise its discretion to now call him for cross-examination in these proceedings.

iv) Associated Exhibits

55. The Accused requests the admission of 13 exhibits associated with the Budimir Transcript, as listed in Annex "A" to the Budimir Motion. As set out in this decision, only those associated exhibits that "form an inseparable and indispensable part of the testimony" may be admitted. To fall within this category, the witness must have discussed the associated exhibit in the transcript of his or her prior evidence, and the transcript would become incomprehensible or of less probative value if the exhibit was not admitted.[226]

56. The Chamber first notes that there are no English translations for 65 *ter* 1D08873 and 1D08878. The Chamber shall therefore not admit 65 *ter* 1D08873 into evidence. The Chamber however notes that the line of questioning for which 65 *ter* 1D08878 was used only related to the photograph within the document, therefore the Chamber does not take issue with admitting the document, despite its lack of an English translation, and will admit it into evidence.

57. Second, in relation to 65 *ter* 1D4600, the Chamber notes that it has already been admitted as D460, as part of a larger document. It shall therefore not be admitted again.

58. Turning now to 1D8877 and 1D8879, the Chamber is of the view that they do not form an inseparable and indispensable part of the Budimir Transcript. Budimir does not comment in any manner on these documents and as such the Budimir Transcript is not rendered incomprehensible

[226] *See* para. 41 *supra*.

or of less probative value without 1D8877 or 1D8879.[227] They shall therefore not be admitted into evidence.

59. The Chamber notes that the remaining eight proposed associated exhibits were all discussed and sufficiently commented upon by Budimir, that they therefore form an inseparable and indispensable part of the Budimir Transcript, and that failure to admit them would make it incomprehensible. Therefore, the Chamber shall admit the following documents as associated exhibits: Rule 65 *ter* 20221, 1D8872, 1D8874, 1D8875, 1D8876, 1D8880, 1D21217, and 1D26648.

b. *Other instances of witnesses already on the Initial Witness List*

60. In relation to the Jovičinac Motion, the Chamber first notes that the Jovičinac Statement is undated but refers to Jovičinac's testimony in the *Stanišić and Župljanin* case in February 2012, which was taken by video-conference link.[228] In relation to the good cause argument for failing to meet the 27 August Deadline, the Chamber is of the view that the Accused did not exercise due diligence in waiting until 20 January 2014 to request that Jovičinac testify via video-conference link in this case. The Chamber further notes that it denied this request because the Accused did not support Jovičinac's account that he could not travel to The Hague to testify by any medical documentation.[229] These are requirements that the Accused was well aware of and should have anticipated before the 27 August Deadline. Rule 92 *bis* cannot now, at the very last stage of the presentation of the Accused's defence case, be used to remedy the fact that the Accused not only failed to support his video-conference link motion with the adequate medical documentation but also made the strategic decision not to consider Rule 92 *bis* as a preferred course of tendering evidence. Accordingly, the Chamber is of the view that the Accused has not shown good cause for failing to meet the 27 August Deadline in relation to the Jovičinac Motion and will not assess whether it meets the requirements under Rule 92 *bis*.

61. Having regard to the Popović Motion, the Chamber notes that Popović was listed on the Initial Witness List as a Rule 92 *ter* witness relevant to Counts 1 and 3 to 8.[230] The Accused argues that "after providing a statement and agreeing to testify, Mr. Popović subsequently refused to testify".[231] According to the Supplemental Submission, the Accused's defence team made an initial

[227] The Chamber notes that 1D8877 is only discussed at Budimir Transcript, T. 12964 and not at T. 12973 as alleged in the Budimir Motion, Annex "A".

[228] Jovičinac Motion, Annex "A", para. 2; *see also* Motion to Video Link for Srboljub Jovičinac, 20 January 2014, para. 5.

[229] Decision on Motion for Video-conference link Testimony for Srboljub Jovičinac, 27 January 2014, para. 7.

[230] Initial Witness List, p. 121.

[231] Popović Motion, para. 3.

contact with Popović on 20 November 2013 and eight days later, Popović stated he would not testify. Having first contacted Popović one year and three months after the 27 August Deadline, the Accused cannot then use Popović's post 27 August Deadline refusal to testify as a justification not to have met this deadline. The Popović Motion thus fails on the basis that the Accused has not shown good cause for having failed to meet the 27 August Deadline and the Chamber will not examine the Rule 92 *bis* requirements in relation thereto.

62. Turning now to the Zorić Motion, the Chamber notes the Accused's argument that he "has good cause for not having made such a motion as to Mr. Zorić as his evidence primarily relates to Count One of the Indictment, which was only reinstated in 2013".[232] Zorić was already listed on the Initial Witness List as a Rule 92 *ter* witness relevant for Counts 1, and 3 to 8, and was scheduled to testify in January 2014.[233] The Chamber is concerned by the fact that by the time the Zorić Motion was filed,[234] the Accused was not even attempting to put forth any serious good cause argument for having failed to meet the 27 August Deadline in relation thereto. The Chamber is thus not satisfied that good cause for having failed to meet the 27 August Deadline has been demonstrated in relation to the Zorić Motion and will not assess whether it meets the requirements under Rule 92 *bis*.

63. Finally for the category of witnesses already listed on the Initial Witness List, the Chamber turns to the Đenadija Motion. Đenadija was listed on the Initial Witness List as a Rule 92 *ter* witness relevant to Counts 1 and 3 to 8.[235] The Accused's defence team contacted Đenadija and took a statement from him well before the 27 August Deadline;[236] however, Đenadija only expressed his unwillingness to testify recently, on 22 November 2013.[237] Being willing to exercise a degree of flexibility, the Chamber is satisfied that the Accused has shown good cause for failing to meet the 27 August Deadline in relation to the Đenadija Motion.

64. Therefore, the Chamber will consider whether the Rule 92 *bis*(B) requirements have been fulfilled in relation to the Đenadija Statement. Đenadija has refused to testify on the basis of his belief that he was a suspect in an ongoing investigation by the BiH War Crimes Chamber.[238] There is thus no basis for the Chamber to be satisfied that Đenadija would agree to certify to the contents

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[232] Zorić Motion, para. 2.

[233] Initial Witness List, p. 179; Defence Witnesses for January 2014, 18 December 2013, Annex "A".

[234] The Zorić Motion was filed on 14 February 2014 and is the 12th of the pending Rule 92 *bis* motions.

[235] Initial Witness List, p. 28.

[236] Supplemental Submission; *see also* Initial Witness List, p. 28, referring to Đenadija's statement which is uploaded into e-court as 65 *ter* 1D20313.

[237] Supplemental Submission.

[238] Đenadija Motion, Annex "B".

of the statement the Accused seeks to tender through him. The Chamber further notes that the Accused has made no attempts to prove the contrary. In conclusion, the Chamber is not satisfied that the Rule 92 *bis*(B) requirements have been or can be met in relation to Đenadija. The Chamber will therefore not assess the Đenadija Motion any further.

B. Motions related to witnesses listed on the Revised Witness List

65. The Chamber will first examine the Sekanić Motion and the Deurić Motion together as they present similar circumstances. Sekanić and Deurić were both listed on the Revised Witness List as Rule 92 *ter* witnesses relevant to Counts 1 and 3 to 8.[239] In spite of the Chamber's willingness to exercise a degree of flexibility, as shown above, the Accused has made absolutely no showing that could justify not having listed Sekanić and Deurić as Rule 92 *bis* witnesses in the Revised Witness List, as provided for in Rule 65 *ter*(G)(i)(e), and filed the relevant motions at that time.[240] By the time these last two motions were filed, the Accused was no longer even attempting to explain why he was filing these motions at this very late stage of the proceedings. This is not acceptable and shows that the Accused did not exercise due diligence in relation thereto. The Sekanić Motion and the Deurić Motion thus fail on that basis.

66. Next, the Chamber will turn to the Inđić Motion and the Ljubanić Motion as they present similar circumstances. Inđić and Ljubanić were both listed on the Revised Witness List as Rule 92 *ter* witnesses relevant to Counts 1 and 3 to 8 and scheduled to testify pursuant to Rule 92 *ter* in February 2014.[241] The Accused does not refer to any change in the situation of these witnesses since the filing of the Revised Witness List. In spite of the Chamber's willingness to exercise a degree of flexibility, the Accused has made absolutely no showing that could justify not having listed Inđić and Ljubanić as Rule 92 *bis* witnesses in the Revised Witness List, as provided in Rule 65 *ter*(G)(i)(e), not having filed the relevant motions at that time, and having scheduled these witnesses to testify right before filing the respective Rule 92 *bis* motions.[242] The Accused cannot decide at the very last stage of his defence case to use Rule 92 *bis* extensively for no apparent reason while having made the strategic decision to present his case through the use of Rule 92 *ter*,

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239 Revised Witness List, pp. 57, 79.

240 *See for instance* Decision on Accused's Motion to Admit Testimony of Pero Rendić Pursuant to Rule 92 *bis*, 6 February 2014, para. 6, wherein the Chamber stated: "the Accused filed his Revised Witness List on 18 October 2013. The Witness appeared on the Revised Witness List as a Rule 92 *ter* witness. Having reviewed the Supplemental Submission, the Chamber is satisfied that the Accused only became aware of the Witness's health condition at the end of December 2013, after having made an initial contact with the Witness which did not indicate that coming to the Tribunal to testify would be an issue. Accordingly, the Chamber takes no issue with the timeliness of the Motion."

241 Revised Witness List, p. 64 (in relation to Inđić); Revised Witness List, p. 71 (in relation to Ljubanić). *See also* Defence Submission of Order of Witnesses for February and March 2014, 19 December 2013, confidential Annex "A"; Defence Witness List, 20 January 2014, Annex "A".

242 *See* fn. 213 *supra*.

for which the Chamber granted him 325 hours on the basis of the representations made in the Initial Witness List and later in the Revised Witness List. Accordingly, the Indić Motion and the Ljubanić Motion fail on the basis that they are untimely and the Chamber will not examine the Rule 92 *bis* requirements in relation thereto.

67. Finally, the Chamber will consider the Banović Motion. Banović was first listed on the Revised Witness List after Count 1 was reinstated.[243] On 28 January 2014, after having first given indications that he would testify,[244] he informed the Defence that he refused to testify due to the Chamber's denial to assign counsel during his testimony.[245] Exercising a degree of flexibility, in light of the information before it, the Chamber takes no issue with the timeliness of the Banović Motion.

68. On the merits of the Banović Motion, the Chamber first notes that Banović refused to testify because "he was concerned about his right to self incrimination and the impact of his testimony on a plea agreement he had entered into with the [Prosecution]".[246] The Chamber is of the view that the same concerns would equally apply whether his evidence is received orally or writing. There is thus no basis for the Chamber to be satisfied that Banović would agree to certify to the contents of his statement. The Chamber further notes that the Accused has made no attempts to prove the contrary. Therefore, while in certain circumstances, it is permissible to admit the proposed evidence pending the certification requirements,[247] the Chamber is not satisfied that they have been or can be met in relation to Banović. The Banović Motion thus fails on this basis and the Chamber will not assess the remaining Rule 92 *bis* requirements.

IV. Disposition

69. Accordingly, the Chamber, pursuant to Rules 54 and Rule 92 *bis* of the Rules, hereby:

a) **GRANTS** the KW540 Motion in part and **ADMITS** under seal the KW540 Transcript along with the following documents as associated exhibits: 65 *ter* 05187, 05555, 20948, 1D8823, 1D8824, 1D8828, 1D8829, 1D9917, and 1D26631 (publicly) as well as 65 *ter* 04813, 1D8822, 1D8826, and 1D8827 (under seal);

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[243] Revised Witness List, p. 58.

[244] *See* Motion for Safe Conduct Order: Witness Predrag Banović, 17 January 2014; Order for Safe Conduct, 23 January 2014.

[245] Banović Motion, Annex "B", para. 7.

[246] Banović Motion, Annex "B", para. 3.

[247] *See* para. 39 *supra*.

b) **INSTRUCTS** the Accused to upload the English translation of 65 *ter* 20948 into e-court by no later than Wednesday 2 April 2014;

c) **GRANTS** the Budimir Motion in part and **ADMITS** the Budimir Transcript, save for the portions identified in paragraphs 50 and 52 *supra*, along with the following documents as associated exhibits: Rule 65 *ter* 20221, 1D8872, 1D8874, 1D8875, 1D8876, 1D8878, 1D8880, 1D21217, and 1D26648.

d) **INSTRUCTS** the Registry to assign the appropriate exhibit numbers;

e) **DENIES** the remainder of the KW540 Motion and the Budimir Motion; and

f) **DENIES** the Tomović Motion, the Mijić Motion, the Tomašević Motion, the Kalinić Motion, the Jovičinac Motion, the Popović Motion, the Banović Motion, the Đenadija Motion, the Inđić Motion, the Zorić Motion, the Ljubanić Motion, the Deurić Motion, and the Sekanić Motion.

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

Judge O-Gon Kwon
Presiding

Dated this eighteenth day of March 2014
At The Hague
The Netherlands

[Seal of the Tribunal]