



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: 9 February 2010

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:** 9 February 2010

**PROSECUTOR**

v.

**RADOVAN KARADŽIĆ**

***PUBLIC WITH CONFIDENTIAL ANNEX A***

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**FURTHER DECISION ON PROSECUTION'S FIRST RULE 92 *BIS* MOTION  
(WITNESSES FOR ELEVEN MUNICIPALITIES)**

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**Office of the Prosecutor**

Mr. Alan Tieger  
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**The Accused**

Mr. Radovan Karadžić

**Appointed 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 “Prosecution’s Motion for Admission of Evidence, and Notifications and Clarification relating to the Trial Chamber’s 10 November 2009 Decision on Prosecution’s First Rule 92 *bis* Motion”, filed on 18 November 2009 (“Motion”), and hereby issues its decision thereon.

### **I. Background and Submissions**

1. On 29 May 2009, the Office of the Prosecutor (“Prosecution”) filed its “Prosecution’s First Motion for Admission of Statements and Transcripts of Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (Witnesses for Eleven Municipalities)” (“First Rule 92 *bis* Motion”), seeking the admission of witness statements and transcripts of prior testimony of various witnesses pursuant to Rule 92 *bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”), as well as numerous associated exhibits related to the witnesses’ written evidence.<sup>1</sup>
2. On 10 November 2009, the Chamber issued its “Decision of Prosecution’s First Motion for Admission of Statements and Transcripts of Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (Witnesses for Eleven Municipalities)” (“Decision on First Rule 92 *bis* Motion”), in which it granted the First 92 *bis* Motion in part, admitting into evidence the written statements and/or transcripts of prior testimony of 14 witnesses, as well as various associated exhibits related to their written evidence.<sup>2</sup>
3. However, the Chamber denied the admission into evidence of the transcript of Džemail Bećirević’s prior testimony in the *S. Milošević* case,<sup>3</sup> and denied without prejudice the admission into evidence of the written statements of two witnesses, KDZ027 and Mersudina Saim-Hodžić,<sup>4</sup> and their associated exhibits with Rule 65 *ter* numbers 11788, 14835, 11782, and 40542, because they were either lacking an English translation or unavailable for review by the Chamber.<sup>5</sup> It also denied without prejudice the admission into evidence of the transcript of prior testimony of KDZ010 from the case of *Prosecutor v. Jelisić* because it appeared that the

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<sup>1</sup> First Rule 92 *bis* Motion, paras. 1, 4–5, Appendix A.

<sup>2</sup> Decision on First Rule 92 *bis* Motion, para. 47. *See also* Corrigendum to Decision of Prosecution’s First Motion for Admission of Statements and Transcripts of Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (Witnesses for Eleven Municipalities), issued on 16 November 2009 (“Corrigendum”), in which the Chamber admitted as public documents some associated exhibits that had been admitted under seal in the Decision on First Rule 92 *bis* Motion.

<sup>3</sup> Decision on First Rule 92 *bis* Motion, para. 24.

<sup>4</sup> Decision on First Rule 92 *bis* Motion, para. 19.

<sup>5</sup> Decision on First Rule 92 *bis* Motion, para. 45.

Prosecution may have mistakenly tendered only a small portion of this transcript for admission.<sup>6</sup> Additionally, the Chamber ordered the Prosecution to: (i) provide the witness statements of KDZ533 and Safeta Hamzić in a form which fully complies with the formal requirements of Rule 92 *bis*(B) of the Rules;<sup>7</sup> (ii) confirm whether KDZ533 requires protective measures, and thus whether his witness statement needs to remain under seal;<sup>8</sup> (iii) redact paragraph 6 from associated exhibit with Rule 65 *ter* number 07127;<sup>9</sup> and (iv) provide a public redacted version of associated exhibit with Rule 65 *ter* number 12156.<sup>10</sup> The Motion addresses these aspects of the Decision on First Rule 92 *bis* Motion.

4. In the Motion, the Prosecution resubmits the written statements of KDZ027 and Mersudina Saim-Hodžić with appropriate English translations, and the full transcript of KDZ010's prior testimony. It requests the Chamber to admit this written evidence pursuant to Rule 92 *bis* of the Rules.<sup>11</sup> In relation to the associated exhibits with Rule 65 *ter* numbers 11788 and 14835, the Prosecution states that it has uploaded the English translations of both documents in ecourt. It further states that it has now provided the Chamber with copies of associated exhibits with Rule 65 *ter* numbers 11782 and 40542 (videos which had not been made available for review by the Chamber), and notes that instead of Rule 65 *ter* number 11782, the correct Rule 65 *ter* number for this proposed associated exhibit is 40568. The Prosecution requests the admission into evidence of these four proposed associated exhibits.<sup>12</sup>

5. Furthermore, the Prosecution notifies the Chamber that it has uploaded in ecourt a public version of the associated exhibit with Rule 65 *ter* number 12156, and a redacted version of the associated exhibit with Rule 65 *ter* number 07127, as requested by the Chamber.<sup>13</sup> The Prosecution also notifies the Chamber that it is in the process of obtaining the written statements of KDZ533 and Safeta Hamzić in a way which fully complies with the formal requirements of Rule 92 *bis*(B).<sup>14</sup> Additionally, it notifies the Chamber that KDZ533 has been contacted, and that he has confirmed that he is willing to testify without protective measures.<sup>15</sup> As a result, the Chamber will no longer refer to him by his pseudonym, but by his name, Jusuf Avdispahić.

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<sup>6</sup> Decision on First Rule 92 *bis* Motion, para. 20.

<sup>7</sup> Decision on First Rule 92 *bis* Motion, para. 47(1)(c).

<sup>8</sup> Decision on First Rule 92 *bis* Motion, para. 47(1)(d).

<sup>9</sup> Decision on First Rule 92 *bis* Motion, para. 47(1)(g).

<sup>10</sup> Decision on First Rule 92 *bis* Motion, para. 47(1)(i).

<sup>11</sup> Motion, paras. 2, 21.

<sup>12</sup> Motion, paras. 9–10.

<sup>13</sup> Motion, paras. 11–12.

<sup>14</sup> Motion, para. 13.

<sup>15</sup> Motion, para. 14.

Moreover, the Prosecution notifies the Chamber that it will seek to admit Džemail Bećirević's evidence pursuant to Rule 92 *ter* of the Rules at a later date.<sup>16</sup>

6. Finally, the Prosecution states that it has been informed that Osman Krupinac, one of the witnesses whose evidence was admitted into evidence in the Decision on First Rule 92 *bis* Motion, died in November 2006.<sup>17</sup> It then requests the Chamber "to reconsider its decision to admit Osman Krupinac's evidence under Rule 92 *bis*, recognising that Rule 92 *quater* is the *lex specialis* of Rule 89(F) applicable in the case of deceased or unavailable witnesses", and considering that a Chamber "may reconsider a previous decision in the circumstances where new facts become available, rendering the original decision erroneous."<sup>18</sup>

## II. Applicable Law

7. On 15 October 2009, the Trial Chamber issued the "Decision on the Prosecution's Third Motion for Admission of Statements and Transcripts of Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (Witnesses for Sarajevo Municipality)" ("Decision on Third Rule 92 *bis* Motion"), in which it outlined the law applicable to motions made pursuant to Rule 92 *bis*. The Chamber will not discuss the applicable law again here, but refers to the relevant paragraphs of the Decision on Third Rule 92 *bis* Motion.<sup>19</sup> Similarly, the Chamber has set out the law applicable to motions made pursuant to Rule 92 *quater* in its "Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits pursuant to Rule 92 *quater*", issued on 20 August 2009 ("KDZ198 Decision"), and will not repeat it in detail here.<sup>20</sup>

8. As stated above, the Prosecution has requested the Chamber to reconsider part of its Decision on First Rule 92 *bis* Motion. The Chamber notes in this regard that there is no provision in the Rules for requests for reconsideration, which are a product of the Tribunal's jurisprudence and are permissible only under certain conditions.<sup>21</sup> However, the Appeals Chamber has definitively articulated the legal standard for reconsideration of a decision as follows: "a Chamber has inherent discretionary power to reconsider a previous interlocutory

<sup>16</sup> Motion, para. 15.

<sup>17</sup> Motion, para. 16. *See also* Confidential Annex A to the Motion, containing a poor quality copy of Osman Krupinac's death certificate. Note, however, that on 21 January 2010, the Prosecution filed its "Prosecution Submission of Death Certificate of Osman Krupinac", providing the Chamber with an official copy of Osman Krupinac's death certificate, which was received by the Prosecution on 20 January 2010, and an English translation of that death certificate.

<sup>18</sup> Motion, para. 17; *see also* para. 21(e).

<sup>19</sup> Decision on Third Rule 92 *bis* Motion, paras. 4–11.

<sup>20</sup> KDZ198 Decision, paras. 4–7.

<sup>21</sup> *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision Regarding Requests Filed by the Parties for Reconsideration of Decisions by the Chamber, 26 March 2009 ("*Prlić* Decision on Reconsideration"), p. 2.

decision in exceptional cases ‘if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice.’”<sup>22</sup> Thus, the requesting party is under an obligation to satisfy the Chamber of the existence of a clear error in reasoning, or the existence of particular circumstances justifying reconsideration in order to prevent an injustice.<sup>23</sup>

### III. Discussion

#### A. KDZ010, KDZ027, and Mersudina Saim-Hodžić

9. Following the provision by the Prosecution of KDZ010’s complete transcript of prior testimony, and the English translations of KDZ027’s and Mersudina Saim-Hodžić’s witness statements, the Chamber will now consider whether this written evidence may be admitted pursuant to Rule 92 *bis*. In relation to KDZ010, the Chamber will also consider the admissibility of four associated exhibits, which the Prosecution tendered for admission in the First Rule 92 *bis* Motion but the Chamber did not address in the Decision on First Rule 92 *bis* Motion as a consequence of not reviewing KDZ010’s written evidence at that time.

#### **(i) Summary of Proposed Evidence**

10. The proposed evidence of KDZ010 and Mersudina Saim-Hodžić is summarised in the paragraphs below. Given that KDZ027 has been granted the protective measure of testimony in closed session in the present proceedings,<sup>24</sup> the summary of his proposed evidence has been set out in Confidential Annex A to this Decision.

11. KDZ010 is a Bosnian Muslim man from the town of Brčko. During his testimony in the *Jelisić* case on 30 November and 1 December 1998, he testified about the circumstances surrounding his arrest in Brčko in early May 1992, and more specifically about his detention at Luka camp from early May to July 1992. Specifically, KDZ010 described the physical and psychological threats made by Serb soldiers and by Goran Jelisić (the then director of the collection centre at Luka camp). He also testified about Goran Jelisić boasting about having killed 150 Muslims at the camp, and on having witnessed Serbian soldiers, and Goran Jelisić

<sup>22</sup> *Prosecutor v. Milošević*, Case No. IT-02-54-AR108bis.3, confidential Decision on Request of Serbia and Montenegro for Review of the Trial Chamber’s Decision of 6 December 2005, para. 25, note 40 (quoting *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, paras. 203–204); *see also* *Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Decision on Defence “Requête de l’Appelant en Reconsidération de la Décision du 4 avril 2006 en Raison d’une Erreur Matérielle”, 14 June 2006, para. 2.

<sup>23</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence’s Request for Reconsideration, 16 July 2004, p. 2; *see also* *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Nikolić’s Motion for Reconsideration and Order for Issuance of a Subpoena Duces Tecum, 2 April 2009, p. 2; *Prlić* Decision on Reconsideration, p. 3.

<sup>24</sup> Order on Chart of Protective Measures for Witnesses, 14 August 2009, Annex A.

himself, beat and kill many detainees. KDZ010 also testified about his transfer to Batković camp in July 1992, and his experience while at the camp.

12. Mersudina Saim-Hodžić is a Bosnian Muslim woman from Zaklopača, a mostly Muslim village in Vlasenica municipality. In her written statement dated 24 May 2000, she described generally events in Vlasenica municipality in April–May 1992 and, in particular, the attack on Zaklopača that took place on 16 May 1992. Mersudina Saim-Hodžić described the threats, arrests, and interrogations of the villagers leading up to the attack, as well as the attack itself. In her statement, she also recalls the names of 59 men who were killed by Serb forces on the day of the attack.

**(ii) Analysis pursuant to Rule 92 bis(A) and (B)**

13. With respect to the admissibility of the proposed written evidence of KDZ010 pursuant to Rule 92 bis, the Chamber is satisfied that his evidence is relevant to a number of charges against the Accused, namely, genocide (Count 1), persecutions (Count 3), extermination (Count 4), murder (Counts 5 and 6), deportation (Count 7), and inhumane acts (forcible transfer) (Count 8), as it specifically relates to the takeover of his municipality, the killing of Bosnian Muslims, the causing of serious bodily or mental harm to Bosnian Muslims, the imposition and maintenance of restrictive and discriminatory measures against Bosnian Muslims, the unlawful detention of Bosnian Muslims at detention facilities (Batković and Luka camps), the establishment and perpetuation of inhumane living conditions in those detention facilities, and killings of detainees.

14. The Chamber also considers that the evidence of KDZ027 is relevant to the charges of persecutions (Count 3), extermination (Count 4), murder (Counts 5 and 6), deportation (Count 7), and inhumane acts (forcible transfer) (Count 8), as it pertains to the takeover of his municipality, the imposition and maintenance of restrictive and discriminatory measures against the Bosnian Muslim population, the unlawful detention of Bosnian Muslims at detention facilities (Vlasenica, Sušica, and Batković), the establishment and perpetuation of inhumane living conditions in detention facilities, and killings of detainees.

15. The Chamber is also satisfied that the proposed evidence of Mersudina Saim-Hodžić is relevant to the charges of genocide (Count 1), persecutions (Count 3), extermination (Count 4), murder (Counts 5 and 6), deportation (Count 7), and inhumane acts (forcible transfer) (Count 8), as it specifically relates to the attack against Zaklopača, the imposition and maintenance of restrictive and discriminatory measures against the Bosnian Muslim population in Vlasenica

municipality, the expulsion of Bosnian Muslims from Vlasenica municipality, and the killing of Bosnian Muslims in Zaklopača.

16. The Chamber is also satisfied of the probative value of the transcript of KDZ010's prior testimony, and of KDZ027 and Mersudina Saim-Hodžić's witness statements.

17. Further, with regard to the admissibility of this proposed written evidence, the Chamber considers that the following factors weigh in favour of its admission through Rule 92 *bis*. First, the Chamber is satisfied that the evidence of the three witnesses is largely crime-base evidence as it recounts the witnesses' experiences of the takeovers of their municipalities and describes the impact of crimes committed against them and other victims. Second, while the Chamber is not in a position, at this stage, to fully assess the extent to which the witnesses' evidence is cumulative of other witnesses' evidence that the Prosecution intends to present, the Chamber has reviewed the Prosecution's Rule 65 *ter* Witness List and is satisfied that KDZ010, KDZ027, and Mersudina Saim-Hodžić's evidence is cumulative as follows:

- KDZ010 and KDZ027's evidence regarding their detention at Batković camp (Schedule C 2.1) is cumulative of each other, as well as of the evidence of Sakib Husrefović, Elvir Pašić, and Mirsad Kuralić, whose written evidence was admitted in the Decision on First Rule 92 *bis* Motion, and of the evidence of KDZ067, KDZ230, and KDZ579;
- KDZ010 and KDZ027's evidence regarding killings at Batković camp (Schedule B 2.1) is cumulative of each other, as well as of the evidence of Sakib Husrefović, whose written evidence was admitted in the Decision on First Rule 92 *bis* Motion, and the evidence of KDZ230;
- KDZ010's evidence regarding his detention at Luka camp (Schedule C 7.2) is cumulative of the evidence of KDZ057 and Sakib Husrefović, whose written evidence was admitted in the Decision on First Rule 92 *bis* Motion, as well as of the evidence of KDZ159 and KDZ410;
- KDZ010's evidence regarding killings of a number of men in Luka camp (Schedule B 5.1) is cumulative of the evidence of KDZ057 and Sakib Husrefović, whose written evidence was admitted in the Decision on First Rule 92 *bis* Motion;
- KDZ027's evidence regarding the detention at Sušica camp (Schedule C 25.3) is cumulative of the evidence of Elvir Pašić and Mirsad Kuralić, whose written evidence

was admitted in the Decision on First Rule 92 *bis* Motion, as well of the evidence of KDZ044, KDZ411 and KDZ579;

- KDZ027's evidence regarding the killings at Sušica camp (Schedule B 18.1) is cumulative of the evidence of KDZ044, KDZ230, and KDZ411; and
- Mersudina Saim-Hodžić's evidence regarding the attack on Zaklopača and the killings related to that attack (Schedule A 15.2) is cumulative of the evidence of KDZ173.

18. Finally, the Chamber is satisfied that the evidence of KDZ010, KDZ027, and Mersudina Saim-Hodžić does not pertain to the acts and conduct of the Accused as charged in the Indictment, or to any acts or conduct which go to establish that the Accused participated in a joint criminal enterprise ("JCE"), as charged in the Indictment, or shared with the person who actually did commit the crimes charged in the Indictment the requisite intent for those crimes.<sup>25</sup>

19. The Chamber notes that KDZ010, KDZ027, and Mersudina Saim-Hodžić's evidence describes the acts of a number of individuals who held various positions in the Bosnian Serb political, police, and military structures, such as Ratko Mladić, Goran Jelisić (director of the collection centre at Luka camp); Ivan Repić (guard at Luka camp); Rajko Dukić (SDS leader in Vlasenica municipality), and Milenko Đurić (also member of the SDS in Vlasenica municipality). KDZ027 referred to various other individuals in his written statement; however, the statement is under seal, and thus their names have not been listed here, but have been included in Annex A to this Decision.

20. The Chamber notes that Ratko Mladić is identified in paragraph 11 of the Indictment as a member of a JCE, along with the Accused. The other individuals referred to by the witnesses may be considered members of the JCE as provided for in paragraph 12 of the Indictment. However, having considered the evidence pertaining to these individuals, the Chamber is satisfied that it neither indicates that the Accused participated in one of the alleged JCEs charged in the Indictment, nor that he shared the intent of any of the individuals named above and in Annex A to commit the acts as described by the witnesses. Thus, the Chamber does not consider that the identification alone in the witnesses' evidence of Ratko Mladić, Goran Jelisić, Ivan Repić, Rajko Dukić, Milenko Đurić, and the individuals whose names are listed in Annex

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<sup>25</sup> The Chamber notes that KDZ027's statement makes reference to the Accused's presence in KDZ027's municipality, and to an alleged meeting between the Accused, Ratko Mladić, and a third individual. The Chamber is satisfied that these minor and generalised references have no bearing on the Accused's acts and conduct as charged in the Indictment, or could be said to be a factor against admission of this evidence pursuant to Rule 92 *bis*.



A, is sufficient to render it inadmissible in terms of Rule 92 *bis*, and will not exercise its discretionary power to deny admission of their evidence on this basis.

21. The Trial Chamber further considers that there are no other factors that weigh against the admission of the transcript of prior testimony and the witness statements into evidence pursuant to Rule 92 *bis*. It is also satisfied that the written statements of KDZ027 and Mersudina Saim-Hodžić satisfy the formal requirements set out in Rule 92 *bis*(B) of the Rules. On the basis of these and the above-mentioned factors, the Chamber considers that the evidence of KDZ010, KDZ027, and Mersudina Saim-Hodžić is admissible pursuant to Rule 92 *bis*(A).

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

22. The Chamber once again recalls that, with regard to written evidence that is admissible pursuant to Rule 92 *bis*, the Chamber has discretion to require witnesses to appear for cross-examination; if it does so decide, the provisions of Rule 92 *ter* shall apply. In making this assessment, the Chamber has taken into account the criteria pertaining to Rule 92 *bis*(C) established in the case-law of the Tribunal, and described in detail in the Decision on Third Rule 92 *bis* Motion.<sup>26</sup> In particular, the Chamber has considered whether the evidence: (i) is cumulative; (ii) is crime-base; (iii) touches upon a “live and important issue between the parties”; and (iv) describes the acts and conduct of a person for whose acts and conduct the Accused is charged with responsibility, and how proximate the acts and conduct of this person are to the Accused.

23. First, the Chamber notes that KDZ027 and Mersudina Saim-Hodžić have never been cross-examined; however, it does not consider this fact to, *per se*, necessitate the witnesses’ appearance for cross-examination. Secondly, the Chamber is satisfied that none of the witnesses’ evidence bears directly upon the Accused’s responsibility as alleged in the Indictment or represents a “critical” or “pivotal” element of the Prosecution’s case.

24. However, as noted above, the evidence of KDZ010, KDZ027, and Mersudina Saim-Hodžić describes the activities of a number of individuals who held various positions in the Bosnian Serb political, military, and police structures and who, in terms of paragraphs 11 and 12 of the Indictment, could have been members of a JCE with the Accused. While KDZ010 and Mersudina Saim-Hodžić testified about the actions of some of these individuals, the Chamber considers that their acts or conduct, as described by the witnesses, are not sufficiently proximate to the Accused to require the witnesses to appear for cross-examination on this ground.

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<sup>26</sup> Decision on Third Rule 92 *bis* Motion, para. 10.

25. However, the Chamber considers that, given the fact that KDZ027 has never been cross-examined, and that his evidence provides a very detailed account of the takeover of his municipality and the activities of the SDS leaders prior to, and during, the takeover, as well as of aspects of the structure and organisation at Batković camp, it is appropriate for the Chamber to exercise its discretion to call him for cross-examination. KDZ010 and Mersudina Saim-Hodžić shall not be required to appear for cross-examination.

**(iv) Associated Exhibits**

26. The Prosecution seeks the admission into evidence of four associated exhibits in relation to KDZ010. As set out in the Decision on Third Rule 92 *bis* Motion, only those documents that “form an inseparable and indispensable part of the testimony” are admissible as associated exhibits. To fall into this category, the witness must have discussed the document in his or her transcript or written statement, and that transcript or written statement would become incomprehensible or of less probative value if the document is not admitted.<sup>27</sup>

27. The Chamber notes that KDZ010 discussed the proposed associated exhibits bearing Rule 65 *ter* numbers 07550, 07570, and 08465 (photographs) during his testimony in the *Jelisić* case. The Chamber considers that they form an inseparable and indispensable part of KDZ010’s testimony, and that failure to admit them would make said testimony incomprehensible or of lesser probative value. The Prosecution has also tendered KDZ010’s pseudonym sheet (Rule 65 *ter* number 14931) as a proposed associated exhibit. The Chamber considers that the pseudonym sheet is necessary for the identification of the witness and that it forms an inseparable and indispensable part of the witness’s testimony.

28. The Chamber is thus satisfied that the proposed associated exhibits with Rule 65 *ter* numbers 07550, 07570, 08465, and 14931, fulfil the requirements for admission into evidence, and will therefore be admitted in this case, with exhibit numbers to be assigned by the Registry. Due to protective measures in place for KDZ010, the associated exhibit with Rule 65 *ter* number 14931 shall be admitted into evidence under seal.

**B. Admissibility of Associated Exhibits Previously Denied Without Prejudice**

29. As noted above, in the Decision on First Rule 92 *bis* Motion, the Chamber denied without prejudice the admission into evidence of four associated exhibits. Following the Prosecution’s implementation of the Decision in these respects, the Chamber will now assess the admissibility of the associated exhibits.

30. The associated exhibit with Rule 65 *ter* number 11788 is a statement given by KDZ216 to the Sarajevo Security Services Centre in 1993, which was not discussed by the witness in her prior testimony. The Chamber acknowledges that, in the Decision on First Rule 92 *bis* Motion, it admitted KDZ216's ICTY witness statement (Rule 65 *ter* number 11787), which had also not been discussed by the witness during her prior testimony, by considering that failure to admit it would lessen the probative value of such testimony.<sup>28</sup> In the present case, however, the Chamber considers that the probative value of KDZ216's evidence would not be lessened by failing to admit the statement given to the Sarajevo Security Services Centre in 1993 and that, together with the fact that it was not discussed by the witness in her testimony, the statement does not form an inseparable and indispensable part of KDZ216's testimony. It will therefore not admit it into evidence. Similarly, the associated exhibit with Rule 65 *ter* number 40568, which is a video, was also not discussed by KDZ216 in her prior testimony. The Chamber will also deny admission into evidence of this associated exhibit.

31. In relation to the associated exhibit with Rule 65 *ter* number 14835, the Chamber notes that, contrary to the Prosecution's assertion in the Motion, the English translation of this document has not been uploaded in court. Consequently, the Chamber has been unable, once again, to analyse the content of this document and, for this reason, will not admit it into evidence.

32. The associated exhibit with Rule 65 *ter* number 40568 was tendered as an associated exhibit along with Jusuf Avdispahić's evidence. According to the Prosecution, this associated exhibit is a "90 minute videotape of destruction inflicted on Zvornik in April 1992". However, it appears to be a video of a conference attended by, among others, the Accused and Ratko Mladić. Moreover, the video does not have English subtitles, and thus the Chamber has not been able to fully analyse its content. In any case, the Chamber notes that the existence of a video "on the destruction that was inflicted in Zvornik during the war in April 1992" is mentioned in Jusuf Avdispahić's witness statement, but that the contents of the video were not even briefly discussed. Therefore, the Chamber considers that this video does not form an inseparable and indispensable part of Jusuf Avdispahić's testimony, and will not admit it into evidence.

### C. Uploading of Exhibits and Clarification of Protective Measures

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<sup>27</sup> Decision on Third Rule 92 *bis* Motion, para. 11.

<sup>28</sup> Decision on First Rule 92 *bis* Motion, para. 42.

33. The Chamber notes that, as stated in the Motion, the Prosecution has uploaded in court a redacted version of the associated exhibit with Rule 65 *ter* number 07127, and a public redacted version of the exhibit with Rule 65 *ter* number 12156 in accordance with the Chamber's orders in the Decision on First Rule 92 *bis* Motion.

34. Furthermore, following confirmation by the Prosecution that Jusuf Avdispahić is willing to testify without protective measures, the Chamber sees no need for Jusuf Avdispahić's written statement to remain under seal, and will therefore alter its status from under seal to being a public document. The Chamber notes, however, that the public version of the statement shall remain provisionally admitted into evidence, subject to the Prosecution providing it in a form which fully complies with the formal requirements of Rule 92 *bis*(B).

#### D. Request for reconsideration

35. In the Decision on First Rule 92 *bis* Motion, the Chamber admitted Osman Krupinac's written statement dated 16 November 2001 under Rule 92 *bis*.<sup>29</sup> The Prosecution now requests reconsideration of this decision because it was recently informed that the witness died in November 2006, and thus the evidence should instead be admitted by the Chamber under Rule 92 *quater*.<sup>30</sup>

36. The Chamber recalls that the test for admission of evidence pursuant to Rule 92 *bis* is significantly stricter than the test for admission of evidence of deceased or unavailable witnesses pursuant to Rule 92 *quater*. Given that the Chamber has already found that Osman Krupinac's written statement fulfils the formal requirements of Rule 92 *bis*, and that the written statement is already in evidence, the Chamber does not see any practical benefit in reconsidering its decision to admit Osman Krupinac's written statement pursuant to Rule 92 *bis*, and then to readmit it pursuant to Rule 92 *quater*.

37. Moreover, the Chamber considers that the Prosecution has failed to demonstrate how the legal standard for reconsideration, as articulated by the Appeals Chamber, has been met in the present case. The Prosecution has not satisfied the Chamber that the admission of Osman Krupinac's written statement pursuant to Rule 92 *bis* demonstrates a "clear error of reasoning" by the Chamber, or that such decision requires reconsideration to prevent an injustice. For these reasons, the Chamber will not reconsider the Decision on First Rule 92 *bis* Motion.

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<sup>29</sup> Decision on First Rule 92 *bis* Motion, para. 47(1)(a).

<sup>30</sup> The Chamber notes that the death certificate indicates that Osman Krupinac died in April 2006, and not November 2006.

38. Having said that, the Chamber accepts the Prosecution's request as a notification, based on which it will modify its records for administrative purposes to reflect the status of Osman Krupinac's written statement as admitted pursuant to Rule 92 *quater*. In this regard, the Chamber encourages the Prosecution to notify it of the occurrence of any similar circumstances in the future, as it assists the Chamber in keeping its records of witnesses as accurate as possible.

#### E. Other issues

39. The Chamber will now turn into addressing other minor issues arising from the Decision on First Rule 92 *bis* Motion, in addition to those raised by the Prosecution in the Motion, which have already been dealt with above.

40. The Chamber stated in paragraph 29 of the Decision on First Rule 92 *bis* Motion that Sakib Husrefović's written statement (dated 26–27 May 1995) satisfies the formal requirements set out in Rule 92 *bis*(B) of the Rules, while in fact the statement does not have the attestation required by such Rule. Consequently, Sakib Husrefović's written statement should have only been provisionally admitted by the Chamber, subject to the Prosecution obtaining the necessary attestation. Following from this, the associated exhibits of Sakib Husrefović's evidence, and which bear Rule 65 *ter* numbers 21181, 21182, and 21183, should have also only been provisionally admitted by the Chamber. The Chamber will, therefore, modify the Decision on First Rule 92 *bis* Motion insofar as it concerns Sakib Husrefović's written statement and associated exhibits, and will only provisionally admit these documents.

41. Similarly, the Chamber admitted the transcripts of KDZ023 and KDZ059's prior testimony in the *S. Milošević* case under seal, while, in fact, both witnesses testified in open session. For this reason, the Chamber will change their status to public documents, and not under seal.

42. The Chamber has also noted that in the Decision on First Rule 92 *bis* Motion, when admitting into evidence the transcripts of KDZ057 and KDZ072's prior testimony under seal, it did not expressly order the Prosecution to provide the Registry, as soon as possible, a confidential version of such transcripts, as well as public, redacted versions of the same, ensuring the redaction of both the testimony given in private session and any redactions ordered by the Trial Chambers in the *Krajišnik* and *Šešelj* cases, respectively. Again, for sake of clarity, the Chamber considers that it is necessary to expressly order the Prosecution to do so.

43. Upon a further review of the document with Rule 65 *ter* number 12144, which was admitted into evidence by the Chamber in the Decision on First Rule 92 *bis* Motion, the

Chamber has noted that the English translation uploaded in court for the document does not match the original BCS document. The Chamber will therefore request the Prosecution to replace the currently uploaded English translation with the correct one, and to inform the Chamber as soon as it has done so.

#### IV. Disposition


44. Accordingly, pursuant to Rules 54, 89, and 92 *bis* of the Rules, the Trial Chamber hereby:

A. **GRANTS** the Motion **IN PART** and **ORDERS** that:

1. KDZ010's prior testimony in the *Jelisić* case (Rule 65 *ter* number 90024) and Mersudina Saim-Hodžić's written statement (Rule 65 *ter* number 90022) are admitted into evidence without requiring the witnesses to appear for cross-examination;
2. KDZ027 shall appear for cross-examination and his evidence shall be presented in accordance with Rule 92 *ter*;
3. The status of Jusuf Avdispahić's written statement, and of KDZ023 and KDZ059's transcripts of prior testimony in the *S. Milošević* case is to be changed from under seal to public;
4. The status of the admission into evidence of Sakib Husrefović's written statement and the three associated exhibits pertaining to his evidence (Rule 65 *ter* numbers 21181, 21182, and 21183) is changed, so that the documents are provisionally admitted into evidence, subject to the Prosecution providing the written statement in a form which fully complies with the formal requirements of Rule 92 *bis*(B);
5. The Prosecution shall, as soon as possible, provide the Registry with confidential versions of the transcripts of prior testimony of KDZ057 and KDZ072, as well as public, redacted versions of the same, ensuring the redaction of both the testimony given in private session and any redactions ordered by the Trial Chambers in the *Krajišnik* and *Šešelj* cases, respectively;

6. The associated exhibits with Rule 65 *ter* numbers 07550, 07570, and 08465 are admitted into evidence;
  7. The confidential associated exhibit with Rule 65 *ter* number 14931 is admitted into evidence under seal; and
  8. The Prosecution shall, as soon as possible, replace the incorrect translation of the document with Rule 65 *ter* number 12144 with the correct translation, and inform the Chamber as soon as it has done so.
- B. **REQUESTS** the Registry to assign exhibit numbers to these exhibits;
- C. **DENIES** the Motion in all other respects.

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

  
\_\_\_\_\_  
Judge O-Gon Kwon  
Presiding

Dated this ninth day of February 2010  
At The Hague  
The Netherlands

[Seal of the Tribunal]