



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: 6 February 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: 6 February 2014

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTION TO ADMIT TESTIMONY OF PERO RENDIĆ
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 “Motion to Admit Testimony of Pero Rendić Pursuant to Rule 92*bis*” filed by the Accused on 8 January 2014 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused requests that the testimony of Pero Rendić (“Witness”) in the *Kvočka et al.* trial on 5 February 2001 (“Testimony”) be admitted pursuant to Rule 92 *bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”).¹ The Accused first argues that he has shown good cause for not having filed the Motion by the 27 August 2012 deadline imposed by the Chamber for the filing of motions under Rule 92 *bis*.² He explains that the Witness was added to his list of witnesses filed pursuant to Rule 65 *ter* on 18 October 2013 (“Revised Witness List”) after Count 1 was reinstated in the Third Amended Indictment (“Indictment”) and that, while he had planned for the Witness to testify live, the Witness has now indicated that he is unwilling and unable to testify due to a heart condition.³

2. The Accused further argues that the requirements under Rule 92 *bis* are met in this instance and that the Chamber should exercise its discretion to admit the Testimony into evidence.⁴ He states that the Witness was employed in the kitchen of the Omarska Camp in 1992 and that he testified that the detainees at Omarska were provided with the same food as the employees and that there was no deliberate effort to mistreat the prisoners through inadequate or unsuitable food.⁵ The Accused thus submits that the Testimony: i) is relevant to establish that there was no intent to destroy the Bosnian Muslims, as charged under Count 1 of the Indictment; ii) is cumulative to other witness testimony about Omarska; iii) does not go to the acts and conduct of the Accused; and iv) does not touch upon a live and important issue in the case.⁶ The Accused also argues that the

¹ Motion, para. 1. The Accused indicates that the Testimony is available in e-court as Rule 65 *ter* number 1D09537, *see* Motion, para. 9. The Accused also notes that there are no exhibits associated to the Testimony, *see* Motion, para. 12.

² Motion, para. 3.

³ Motion, paras. 2–3.

⁴ Motion, para. 8.

⁵ Motion, para. 9.

⁶ Motion, para. 10.

Office of the Prosecutor (“Prosecution”) had the opportunity to fully cross-examine the Witness in the *Kvočka et al.* trial.⁷

3. The Prosecution filed the “Prosecution Response to Motion to Admit Testimony of Pero Rendić Pursuant to Rule 92 *bis*” on 14 January 2014 (“Response”), opposing the Motion on the basis that the Accused has not shown good cause for failing to meet the deadline imposed by the Chamber for the submission of motions under Rule 92 *bis*.⁸ The Prosecution submits that the Accused failed to explain why he did not file the Motion as the time he filed the Revised Witness List after the reinsertion of Count 1 in the Indictment, and that the lack of detail about the Witness’s sudden unwillingness or unavailability “reflects an apparent lack of due diligence in failing to determine the Witness’s ability and willingness to testify before listing him as Rule 92 *ter* on his witness list”.⁹ In the event the Chamber considers that good cause has been shown, the Prosecution advises the Chamber that it does not wish to cross-examine the Witness.¹⁰ Finally, the Prosecution points to areas of the Motion which, in its submission, mischaracterise the Witness’s evidence.¹¹

4. On 17 January 2014, the Chamber informed the parties via email that it had decided, pursuant to Rule 126 *bis*, to deny the Accused’s “Application for Leave to Reply re: Pero Rendić 92 *bis* Motion” filed on 16 January 2014, on the basis that it would not be assisted by a reply.

5. On 4 February 2014, at the request of the Chamber,¹² the Accused filed the “Supplemental Submission: Motion to Admit Testimony of Pero Rendić Pursuant to Rule 92*bis*” (“Supplemental Submission”), wherein he submits that he only became aware of the Witness’s medical condition on 31 December 2013 and provides a declaration of his case manager and a confidential medical report in support (“Declaration” and “Medical Report”, respectively).¹³

III. Discussion

6. 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

⁷ Motion, para. 11.

⁸ Response, paras. 1, 10.

⁹ Response, paras. 4–5.

¹⁰ Response, para. 6.

¹¹ Response, paras. 7–9.

¹² Hearing, T. 46310 (3 February 2014).

¹³ Supplemental Submission, para. 3, Annex “A”, Confidential Annex “B”.

admission of evidence of his witnesses pursuant to Rule 92 *bis* by no later than 27 August 2012.¹⁴ On 2 August 2013, once the Appeals Chamber had issued its Judgement and reinstated Count 1 in the Indictment, 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 1.¹⁵ As mentioned above, the Accused filed his Revised Witness List on 18 October 2013.¹⁶ 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.¹⁷ Accordingly, the Chamber takes no issue with the timeliness of the Motion.

7. In relation to the admissibility of the Testimony pursuant to Rule 92 *bis* of the Rules, the Chamber notes that the basis for the Motion is that the Witness has "indicated that he is unable and unwilling to testify due to a heart condition".¹⁸ The Chamber recalls that Rule 92 *quater* specifically governs these exact circumstances, namely when a witness is "by reason of bodily or mental condition unable to testify orally". The Chamber is therefore of the view that the Motion should be examined in light of the Rule 92 *quater* requirements, rather than in light of the Rule 92 *bis* provisions. Deciding otherwise would circumvent the stringent requirements under Rule 92 *quater* that the Chamber must be satisfied in order to make a finding that a witness is unavailable.¹⁹ The Chamber shall therefore proceed to examine the Motion pursuant to Rule 92 *quater*.

8. The Chamber recalls that under Rule 92 *quater* of the Rules, the evidence of an unavailable witness may be submitted in written form if the Chamber finds (i) the witness unavailable within the meaning of Rule 92 *quater*(A), (ii) from the circumstances in which the statement was made and recorded that it is reliable, (iii) the evidence is relevant to the proceedings and of probative value, and (iv) that the probative value of the evidence, which may include evidence pertaining to acts and conduct of an accused, is not outweighed by the need to ensure a fair trial.²⁰

¹⁴ Scheduling Order on Close of the Prosecution Case, Rule 98 *bis* Submissions, and Start of the Defence Case, 26 April 2012, para. 25.

¹⁵ Decision on Accused's Motions for Severance of Count 1 and Suspension of Defence Case, 2 August 2013, para. 25(d).

¹⁶ Defence Supplemental Submission Pursuant to Rule 65 *ter*, 18 October 2013, confidential Annex H.

¹⁷ See Declaration, para. 2; Medical Report.

¹⁸ Motion, para. 2.

¹⁹ See *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Partial Decision on Prosecution's Rule 92 *bis* and Rule 92 *ter* Motion for Five Witnesses, 27 August 2010, para. 32, adopting a similar approach.

²⁰ Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits pursuant to Rule 92 *quater*, 20 August 2009, paras. 4–6; Decision on Prosecution Motion for Admission of Testimony of Sixteen Witnesses and Associated Exhibits Pursuant to Rule 92 *quater*, 30 November 2009, para. 6. See *Prosecutor*

9. In relation to the Witness's unavailability, the Chamber has reviewed the Declaration and the Medical Report. The Chamber does not consider that anything in the Medical Report establishes the Witness's unavailability to testify. Rather, it indicates that he is not fit to travel and should rest. While this information should have led the Accused to look into alternative modes of obtaining the Witness's live testimony without him travelling to The Hague to give it, for instance through the use of a video-conference link, it cannot satisfy the Chamber that the Witness is unavailable for the purposes of Rule 92 *quater*. As for the Declaration, again, it only provides an indication that the Witness is not able to travel and that he needs to rest, but not that he is unavailable to give testimony through other means.

10. Consequently, the Motion fails on this basis and there is therefore no need to assess whether the other requirements under Rule 92 *quater* are met.

IV. Disposition

11. Accordingly, the Chamber, pursuant to Rule 92 *quater* of the Rules, hereby **DENIES** the Motion.

12.

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



Judge O-Gon Kwon
Presiding

Dated this sixth day of February 2014
At The Hague
The Netherlands

[Seal of the Tribunal]

v. Popović et al., Case No. IT-05-88-AR73.4, Decision on Beara's and Nikolić's Interlocutory Appeals Against Chamber's Decision on 21 April 2008 Admitting 92 *quater* Evidence, 18 August 2008, para. 30.