



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: 19 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: 19 February 2014

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTION TO ADMIT THE TESTIMONY OF
BRANKO BASARA 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 Branko Basara Pursuant to Rule 92 *bis*”, filed by the Accused on 4 February 2014 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused requests the admission of the transcript of prior testimony of Branko Basara (“Witness”) in the *Stanišić and Župljanin* case on 12 and 13 October 2009 (“Testimony”) pursuant to Rule 92 *bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”).¹ The Accused argues that he has shown good cause for not having complied with the 27 August 2012 deadline imposed by the Chamber for the filing of motions under Rule 92 *bis* (“Deadline”).² He explains that he had hoped to call the Witness live but that the Witness informed his investigator in January 2014 that he was unable and unwilling to testify due to his failing health.³

2. The Accused further argues that the requirements under Rule 92 *bis* are met and that the Chamber should use its discretion to admit the Testimony into evidence.⁴ He submits that the Witness was Commander of the 6th Krajina Corps of the Army of Republika Srpska, serving in the Sanski Most area in 1992. He states that the Witness testified that, for the most part, members of his unit “behaved accordingly to the instruction to obey international humanitarian law”, that he did everything he could to prevent and punish the perpetrators of crimes, and that crimes that were ultimately committed were committed by paramilitaries who were not under the control of the authorities.⁵ The Accused further submits that the Testimony: i) is relevant to establish that there was no intent to destroy the Bosnian Muslims of Sanski Most, as charged under Count 1 of the Third Amended Indictment (“Indictment”), and that there was no policy or plan to expel Bosnian Muslims from Bosnian Serb controlled areas of Sanski Most or to commit crimes against them;⁶ ii) is cumulative to other witness testimony about Sanski Most;⁷ and iii) does not go to the acts and

¹ Motion, para. 1. The Accused indicates that the transcript of the Testimony bears Rule 65 *ter* number 22059, Motion, para. 9.

² Motion, paras. 2–3.

³ Motion, paras. 2–3.

⁴ Motion, para. 8.

⁵ Motion, para. 9.

⁶ Motion, para. 10.

⁷ Motion, para. 11.

conduct of the Accused.⁸ The Accused further argues that the Office of the Prosecutor (“Prosecution”) had the opportunity to examine the Witness as its own witness in the *Stanišić and Župljanin* case and has benefited from the admission of the Witness’s diary in this case.⁹

3. The Prosecution filed its “Prosecution Response to Motion to Admit Testimony of Branko Basara Pursuant to Rule 92 *bis*” on 12 February 2014 (“Response”), opposing the Motion. The Prosecution argues that the Accused has not shown good cause for failing to meet the Deadline.¹⁰ In any event, the Prosecution adds that the Chamber should assess whether the Testimony is admissible under Rule 92 *quater* as the Accused’s claims that the Witness is unavailable to testify, and argues that the stringent requirements of Rule 92 *quater* are not met in this instance.¹¹ Finally, the Prosecution submits that there remain multiple avenues open to the Accused to secure the Witness’s evidence and advises that it wishes to cross-examine the Witness should the Testimony be admitted into evidence or should his evidence be presented before the Chamber through other avenues.¹²

II. Discussion

4. In relation to the admissibility of the Testimony pursuant to Rule 92 *bis*, 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 his failing health”.¹³ 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 have been examined in light of the requirements for admission of evidence pursuant to Rule 92 *quater*, 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.¹⁴

5. 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

⁸ Motion, para. 11.

⁹ Motion, para. 12.

¹⁰ Response, para. 2.

¹¹ Response, para. 3.

¹² Response, paras. 4–5.

¹³ Motion, para. 2.

¹⁴ See Decision on Accused’s Motion to Admit Testimony of Pero Rendić Pursuant to Rule 92 *bis*, 6 February 2014, para. 7 citing to *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.

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.¹⁵

6. In the Motion, the Accused does not even attempt to make a showing that the Witness is indeed unavailable to testify. In the absence of *any* material in support of the Motion, the Chamber cannot be satisfied that the unavailability requirement under Rule 92 *quater* is fulfilled.

7. Consequently, the Motion fails because the Accused has not demonstrated that the Witness is unavailable pursuant to Rule 92 *quater*. There is therefore no need to assess whether the Motion was filed in a timely manner and whether the other requirements under Rule 92 *quater* are met in relation to the Testimony.

III. Disposition

8. Accordingly, the Chamber, pursuant to Rules 54 and 92 *quater* of the Rules, hereby **DENIES** the Motion.

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



Judge O-Gon Kwon
Presiding

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

[Seal of the Tribunal]

¹⁵ 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 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.