

**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-04-75-PT
Date: 4 September 2012
Original: English

IN THE TRIAL CHAMBER

Before: Judge Guy Delvoie, Presiding
Judge Burton Hall
Judge Antoine Kesia-Mbe Mindua

Registrar: Mr. John Hocking

Decision: 4 September 2012

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC

**DECISION ON PROSECUTION'S URGENT MOTION FOR
PARTIAL RECONSIDERATION OF DECISION ON MOTION TO EXPUNGE
PORTIONS OF PROSECUTION'S RULE 65 TER FILING AND FOR MORE
DETAILED SUMMARIES**

The Office of the Prosecutor:
Mr. Douglas Stringer

Counsel for Goran Hadžić:
Mr. Zoran Živanović
Mr. Christopher Gosnell

1. **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 Urgent Motion for Partial Reconsideration of the Decision on Motion to Expunge Portions of the Prosecution’s Rule 65 *ter* Filing and for More Detailed Summaries”, filed on 31 August 2012 (“Motion”).

2. The Motion relates to the “Prosecution Notice of Rule 65 *ter* (E) Filings”, filed confidentially by the Prosecution on 20 June 2012 (“Rule 65 *ter* (E) Filings”),¹ which included the Prosecution witness list (“Witness List”), filed pursuant to Rule 65 *ter* (E)(ii) of the Rules of Procedure and Evidence of the Tribunal (“Rules”). The Prosecution requests that the Chamber reconsider its “Decision on Motion to Expunge Portions of the Prosecution’s Rule 65 *ter* Filing and for More Detailed Witness Summaries”, rendered on 23 August 2012 (“Decision”), in respect of the deadline of 18 September 2012 by which the Chamber ordered the Prosecution to supplement its Rule 65 *ter* summaries for Rule 92 *ter* witnesses from which it will adduce additional evidence *viva voce* (“hybrid witnesses”).²

3. In the Decision, the Chamber determined that it was apparent from the status conference on 14 June 2012 and the filing of the Witness List that the Prosecution had yet to disclose to Hadžić summaries that reflected all the evidence it intended to adduce from the hybrid Rule 92 *ter* witnesses *viva voce*.³ The Chamber, in the exercise of its inherent authority to manage trial proceedings, extended the deadline by which the Prosecution had to submit revised witness summaries for all hybrid witnesses on its Witness List to 18 September 2012.⁴

4. In the Motion, the Prosecution submits that by 18 September 2012 it will be able to submit amended summaries for a number of hybrid witnesses, but not all. Due to time and resource constraints, the Prosecution submits that it has not been able to meet with all hybrid witnesses.⁵ For the hybrid witnesses with whom it has not met, the Prosecution proposes that it submit amended summaries on a rolling basis at least six weeks before the witness testifies, indicating which topics form part of his Rule 92 *ter* statement and which topics will be led *viva voce*.⁶ According to the Prosecution, maintaining the 18 September 2012 deadline would require that the Prosecution revise its hybrid witness summaries at a time when it can only offer its “best, good faith expectation on the

¹ With confidential Annexes A, B, C, and E, and confidential and *ex parte* Annexes D and F. The Pre-Trial Judge allowed the Prosecution to file its corrected Rule 65 *ter* (E) Filings on 20 June 2012.

² Motion, para. 1.

³ Decision, para. 16.

⁴ Decision, paras 16-17.

⁵ Motion, para. 12.

⁶ Motion, para. 7.

topics to be led *viva voce*” for those witnesses it has not met yet.⁷ Should new topics arise during proofing sessions, the Prosecution states that they will be disclosed to Hadžić forthwith.⁸

5. Rule 65 *ter* (E)(ii)(b) of the Rules provides that, within a time limit set by the Pre-Trial Judge, the Prosecution must file a list of witnesses it intends to call with a summary of the facts on which each witness will testify. The Pre-Trial Judge set this time limit as 19 June 2012.⁹

6. Rule 66(A)(ii) of the Rules provides that, within the time limit prescribed by the Pre-Trial Judge, the Prosecution must make available to the Defence in a language that the accused understands copies of statements of all witnesses whom the Prosecution intends to call to testify at trial and copies of all transcripts and written statements taken in accordance with Rule 92 *bis*, Rule 92 *ter*, and Rule 92 *quater*. The Pre-Trial Judge set this time limit as 26 June 2012.¹⁰ The Pre-Trial Judge, pursuant to requests from the Prosecution,¹¹ permitted the Prosecution to make available to the Defence (and the Chamber) a statement of a Rule 92 *ter* witness six weeks prior to the anticipated date of the witness’s evidence, with a final statement to follow before the witness takes the stand.¹²

7. The Prosecution argues that, in setting the six-week deadline for the disclosure of Rule 92 *ter* statements, the Pre-Trial Judge ruled that the disclosure pursuant to Rule 65 *ter* (E)(ii)(b) of the Rules for hybrid witnesses was also to be six weeks prior to the anticipated testimony of such a witness. The Prosecution is reminded that Rule 92 *ter* is a procedural device by which the *viva voce* direct examination of a witness is replaced by the tendering of a statement of what the witness would have said if questioned on the stand and was developed by the Tribunal to expedite proceedings. In setting a deadline of six weeks for the submission of draft Rule 92 *ter* statements, the Pre-Trial Judge anticipated that the exact and comprehensive content of a witness’s Rule 92 *ter* statement could be disclosed after the Rule 66(A)(ii) time limit set for other statements in the case, thereby setting a separate Rule 66(A)(ii) deadline for Rule 92 *ter* statements. This ruling did not remove from the Prosecution its obligation pursuant to Rule 65 *ter* (E)(ii)(b) of the Rules to provide

⁷ Motion, para. 13.

⁸ Motion, paras 9, 15.

⁹ Order on Pre-Trial Work Plan, 16 December 2011, Annex, p. 1.

¹⁰ Order on Pre-Trial Work Plan, 16 December 2011, Annex, p. 1.

¹¹ Prosecution Proposal on Rule 92 *ter* Procedure, 16 December 2011, para. 6; *see also* Defence Response to the Prosecution Proposal on Rule 92 *ter* Procedure, 19 December 2011.

¹² Rule 65 *ter* Conference, 15 February 2012, T. 44-46 (confidential); Rule 65 *ter* Conference, 12 June 2012, T. 68-70 (confidential).

the Defence (and the Chamber), prior to the commencement of the trial, with a summary of the facts on which each witness would testify.¹³


8. The Chamber acknowledges the Prosecution's submission that, should information of any new topics arise during pre-testimony proofing sessions of a witness, that information will be disclosed to the Defence.¹⁴ This is a normal consequence of pre-testimony proofing sessions and a customary feature of litigation at the Tribunal. The same practice will apply to the Defence's case-in-chief, in the event that the Defence decides to call evidence. If the Defence considers that it suffers prejudice from any such disclosures, it may raise the issue at the appropriate time during the trial.

9. For the foregoing reasons, the Prosecution has not fulfilled the standard for reconsideration of the Decision.¹⁵

10. Accordingly, the Trial Chamber hereby DENIES the Motion.

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

Done this fourth day of September 2012,
At The Hague,
The Netherlands.



Judge Guy Delvoie
Presiding

[Seal of the Tribunal]

¹³ The Prosecution was specifically notified that, for Rule 92 *ter* hybrid witnesses, it had to include in its Rule 65 *ter* witness summaries a summary of evidence that would be contained within a Rule 92 *ter* statement and evidence that would be led *viva voce*. Rule 65 *ter* Conference, 12 June 2012, T. 68-70 (confidential).

¹⁴ Motion, para. 9.

¹⁵ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.16, Decision on Jadranko Prlić's Interlocutory Appeal against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009, para. 18; *see also Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR108bis.3, Decision on Request of Serbia and Montenegro for Review of Trial Chamber's Decision of 6 December 2005 (confidential), 6 April 2006, para. 25, fn. 40 (quoting *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, paras 203-204).