

**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-T  
Date: 29 August 2014  
Original: English

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**IN THE TRIAL CHAMBER**

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

**Registrar:** Mr. John Hocking

**Decision:** 29 August 2014

**PROSECUTOR**

v.

**GORAN HADŽIĆ**

**PUBLIC**

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**DECISION ON DEFENCE MOTION FOR ADMISSION OF EVIDENCE OF  
DGH-053 PURSUANT TO RULE 92 *TER***

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**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 hereby seised of the “Defence Motion for Admission of Evidence of DGH-053 Pursuant to Rule 92 *ter*”, filed publicly with a confidential annex on 1 July 2014 (“Motion”). The “Prosecution Response to Motion for Admission of Evidence of DGH-053 Pursuant to Rule 92 *ter*” was filed confidentially on 16 July 2014 (“Response”). On 23 July 2014, the Defence filed publicly a “Request for Leave to Reply and Reply to Prosecution Response to Motion for Admission of Evidence of DGH-053 Pursuant to Rule 92 *ter*” (“Reply”).

#### A. Submissions

2. In the Motion, the Defence requests the admission of the written statement of DGH-053 pursuant to Rule 92 *ter* of the Rules of Procedure and Evidence (“Rules”) subject to the witness’s in court affirmation.<sup>1</sup> The Defence submits that the statement contains information directly relevant to (a) the origins, evolution, and the relations between different branches of the SDS led by Jovan Rašković and Milan Babić; (b) Hadžić’s efforts to seek political solutions to the rising conflicts; (c) the large number of arrests in relation to incidents in Pakrac in March 1991; (d) DGH-053’s participation, alongside Hadžić, in the talks with Franjo Tudman on 13 March 1991; and (e) the SDS’s relations with the JNA.<sup>2</sup> The Defence contends that the admission of DGH-053’s statement will save time as “[t]he entire content of the witness’s testimony could not be adduced in the 1.5 hours currently allotted for him without the main narrative provided in his tendered statement.”<sup>3</sup>

3. The Prosecution responds that it does not object to the admission of DGH-053’s statement pursuant to Rule 92 *ter* of the Rules, provided that a portion of it is expunged.<sup>4</sup> The Prosecution opposes the admission of this portion on the ground that it contradicts the testimony of GH-028, who was not confronted with the information included in that portion, in violation of Rule 90(H)(ii) of the Rules.<sup>5</sup> It therefore requests that this portion be redacted prior to admission and that no questions be put during DGH-053’s examination-in-chief in relation to it. In the alternative, the Prosecution contends that little weight should be attributed to this evidence.<sup>6</sup> The Prosecution further requests that the Chamber order that DGH-053 be classified as a “regular Rule 92*ter* witness” and only allow the Defence 30 minutes for examination-in-chief rather than the stipulated

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<sup>1</sup> Motion, paras 1, 7, 9.

<sup>2</sup> Motion, paras 5-6.

<sup>3</sup> Motion, para. 8.

<sup>4</sup> The Prosecution objects to the admission of the first paragraph of the fifth page of DGH-053’s statement. Response, para. 2.

<sup>5</sup> Response, paras 2-5.

<sup>6</sup> Response, para. 6.

1.5 hours.<sup>7</sup> It asserts that, contrary to the Chamber’s instructions, the topics for DGH-053’s *viva voce* testimony are not specified either in the Rule 65 *ter* summary or in the Motion.<sup>8</sup> Alternatively, the Prosecution proposes that the witness be heard *viva voce*.<sup>9</sup> The Prosecution notes that it reserves the right to seek a postponement of its cross-examination of DGH-053 should untimely provision of such information hinder the Prosecution’s preparations.<sup>10</sup> The Prosecution also requests that the Chamber find the Defence in violation of Rule 67(A)(ii) of the Rules based upon the delayed disclosure of DGH-053’s witness statement and consequently order the Defence to disclose all currently available Defence witness statements.<sup>11</sup> Finally, the Prosecution identifies a paragraph of the BCS version of DGH-053’s witness statement which has not been translated into English, and requests translation of this paragraph prior to the admission of the statement.<sup>12</sup>

4. The Defence seeks leave to reply and files the Reply in order to “correct misstatements of law and fact” in the Response.<sup>13</sup> The Defence argues that the contested portion of DGH-053’s statement does not constitute a violation of Rule 90(H)(ii) of the Rules, and certainly is not an egregious violation justifying exclusion of relevant and admissible evidence.<sup>14</sup> The Defence stresses the flexibility with which Rule 90(H)(ii) of the Rules must be applied,<sup>15</sup> and argues that it complied with its obligation to put “the general nature of the case” to the witness.<sup>16</sup> Further, the Defence contends that “[t]here is nothing that GH-028 could now add – or that was not asked – that would clarify any ambiguities that would assist the Chamber in weighing his evidence against that of DGH-053.”<sup>17</sup> The Defence argues that the Prosecution’s proposition that the testimony be given “little weight” should be dismissed *in limine*, alleging that “a response to a Rule 92 *ter* motion is not the appropriate venue for such submissions.”<sup>18</sup> With respect to the length of time requested for direct examination of DGH-053, the Defence submits that 1.5 hours is a reasonable and appropriate length of time, which falls within the overall time-limit for the presentation of the Defence case.<sup>19</sup> In relation to the adequacy of the witness summary, the Defence submits that, taken together, the summary and the witness statement provide the Prosecution with clearer and more specific notice of the content of DGH-053’s prospective testimony than the Defence received in respect of many

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<sup>7</sup> Response, paras 1, 11, 13.

<sup>8</sup> Response, paras 9-11. The Chamber notes that, in paragraph 9 of its Response, the Prosecution refers to DGH-044 instead of DGH-053. The Chamber understands this to be a clerical error.

<sup>9</sup> Response, paras 1, 11, 13.

<sup>10</sup> Response, para. 12.

<sup>11</sup> Response, paras 8, 13.

<sup>12</sup> Reponse, paras 7, 13.

<sup>13</sup> Reply, para. 1.

<sup>14</sup> Reply, para. 9.

<sup>15</sup> Reply, paras 3-6.

<sup>16</sup> Reply, para. 7.

<sup>17</sup> Reply, para. 8.

<sup>18</sup> Reply, para. 10.

<sup>19</sup> Reply, para. 16.

Prosecution witnesses.<sup>20</sup> In addition, the Defence asserts that contrary to the Prosecution's submission, the disclosure of DGH-053's statement was not delayed, but rather provided on 27 May 2014, "the very day it was signed by the witness."<sup>21</sup>

## B. Applicable Law

### 1. Rule 92 ter

5. Rule 92 *ter* of the Rules provides:

(A) A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement or transcript of evidence given by a witness in proceedings before the Tribunal, under the following conditions:

- (i) the witness is present in court;
- (ii) the witness is available for cross-examination and any questioning by the Judges; and
- (iii) the witness attests that the written statement or transcript accurately reflects that witness' declaration and what the witness would say if examined.

(B) Evidence admitted under paragraph (A) may include evidence that goes to proof of the acts and conduct of the accused as charged in the indictment.

6. The main objective of Rule 92 *ter* of the Rules is to ensure an effective and expeditious trial in accordance with the rights of the accused.<sup>22</sup> The jurisprudence of the Tribunal has also applied the Rule as permitting, by necessary inference, the admission of exhibits where they accompany written statements or transcripts and form an "inseparable and indispensable" part of the written evidence.<sup>23</sup> In order to satisfy this requirement, the document must be one without which the witness's testimony would become incomprehensible or of lesser probative value.<sup>24</sup> Moreover, the evidence sought to be admitted, whether a written statement or a transcript of oral testimony, must fulfil the general requirements of admissibility of Rule 89(C) of the Rules—the proposed evidence must be relevant and have probative value.<sup>25</sup>

<sup>20</sup> Reply, paras 13-15.

<sup>21</sup> Reply, para. 11.

<sup>22</sup> *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on the Application of Rule 92 *ter* of the Rules, 3 July 2007, p. 2; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Motion to Convert *Viva Voce* Witnesses to Rule 92 *ter* Witnesses, 31 May 2007, p. 2.

<sup>23</sup> *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Decision on Vlastimir Đorđević's Motions for Admission of Evidence Pursuant to ICTY Rule 92*ter*, 22 January 2010 ("Đorđević Decision"), para. 7; *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 ("Lukić and Lukić Decision"), para. 15; *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Decision on Prosecution's Motion for the Admission of Written Evidence of Witness Slobodan Lazarević Pursuant to Rule 92 *ter* with Confidential Annex, 16 May 2008 ("Stanišić and Simatović Decision"), para. 19.

<sup>24</sup> *Đorđević* Decision, para. 7; *Lukić and Lukić* Decision, para. 15; *Stanišić and Simatović* Decision, para. 19.

<sup>25</sup> *Đorđević* Decision, para. 5; *Lukić and Lukić* Decision, paras 15-16.

## 2. Rule 90(H)(ii)

### 7. Rule 90(H)(ii) of the Rules provides:

In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness.

8. Rule 90(H)(ii) of the Rules facilitates the fair and efficient presentation of evidence. It affords the witness being cross-examined “the possibility of explaining himself on those aspects of his testimony contradicted by the opposing party’s evidence, so saving the witness from having to reappear needlessly in order to do so and enabling the Trial Chamber to evaluate the credibility of his testimony more accurately”.<sup>26</sup> Further, when a cross-examining party complies with Rule 90(H)(ii) of the Rules it puts the opposing party on notice that the witness’s evidence is contested.<sup>27</sup>

9. In order to fulfil the requirements of Rule 90(H)(ii) of the Rules, it is sufficient that the cross-examining party put the nature of its case to the witness.<sup>28</sup> In this regard, Rule 90(H)(ii) of the Rules allows for some flexibility depending on the circumstances of the trial by requiring the cross-examining party to put to the witness the general substance of the contradictory evidence and not every detail that it does not accept.<sup>29</sup> In circumstances where it is obvious that the witness’s version of events is being challenged, there is no need for the cross-examining party to put its case to a witness.<sup>30</sup>

10. Non-compliance with Rule 90(H)(ii) of the Rules does not create a *per se* bar to the admission of evidence.<sup>31</sup> Where evidence is presented to contradict a Prosecution witness, the

<sup>26</sup> *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Judgement, 17 March 2009 (“*Krajišnik*, Appeal Judgement”), para. 367; *Karera v. The Prosecutor*, Case No. ICTR-01-74-A, Judgement, 2 February 2009, (“*Karera* Appeal Judgement”) para. 24; *Prosecutor v. Brdanin and Talić*, Case No. IT-99-36-AR73.7, Decision on the Interlocutory Appeal Against a Decision of the Trial Chamber, as of Right, 13 June 2002, pp. 3-4.

<sup>27</sup> *Karera* Appeal Judgement, fn. 55, citing with approval *Prosecutor v. Brdanin and Talić*, Case No. IT-99-36-T, Decision on “Motion to Declare Rule 90(H)(ii) Void to the Extent it is in Violation of Article 21 of the Statute of the International Tribunal” by the Accused Radoslav Brdanin and on “Rule 90(H)(ii) Submissions” by the Accused Momir Talić, 22 March 2002 (“*Brdanin and Talić* Decision”), paras 13-14.

<sup>28</sup> *Krajišnik*, Appeal Judgement, para. 368. See also *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Decision on Submissions by Stanišić Defence Regarding Prosecution’s Rule 90 (H)(ii) Obligations During Cross-Examination of Defence Witness Borislav Perlević, 12 June 2012 (“*Stanišić and Simatović* Decision of 12 June 2012”), para. 11.

<sup>29</sup> *Krajišnik*, Appeal Judgement, para. 368; *Karera* Appeals Judgement, para. 26. See also *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, Decision on Prosecution’s Motion Seeking Clarification in Relation to The Application of Rule 90(H)(ii), 12 May 2010 (“*Stanišić and Župljanin* Decision”), para. 17; *Brdanin and Talić* Decision, para. 14.

<sup>30</sup> *Krajišnik*, Appeal Judgement, para. 368; *Karera* Appeals Judgement, para. 26; *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Guidance on Rule 90(H)(ii) And Decision on Stanišić Defence Submissions on Rule 90(H)(ii), 19 October 2011 (“*Stanišić and Simatović* Decision of 19 October 2011”), para. 20; *Brdanin and Talić* Decision, para. 14.

<sup>31</sup> See *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Lukić Defence Motions for Admission of Documents from Bar Table, 11 June 2008 (“*Milutinović et al.* Decision”), para. 77; See also *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Judgement, 26 February 2009 (“*Milutinović et al.* Trial Judgement”), paras 51-52; *Popović*

nature of which was not put to that witness, it is within the Trial Chamber's discretion to consider appropriate remedies, if any.<sup>32</sup> A Chamber must evaluate the circumstances and decide on a case-by-case basis what weight, if any, should be attached to such evidence, taking into account the fact that the Prosecution witness was not given the opportunity to comment on the contradictory evidence.<sup>33</sup> Parties may make any argument as to the weight the Chamber should ascribe to the evidence in their final trial briefs and closing arguments.<sup>34</sup> If the circumstances are sufficiently egregious, the Trial Chamber may preclude the Defence from adducing such contradictory evidence.<sup>35</sup>

### C. Discussion

11. As a preliminary matter, the Chamber notes that the Prosecution's submissions relating to disclosure under Rule 67(A)(ii) of the Rules have been addressed in a decision issued by the Chamber on 25 July 2014.<sup>36</sup> Accordingly, this decision will not address these submissions.

12. In relation to the Prosecution's submission that a portion of DGH-053's statement should be expunged because it constitutes a violation of Rule 90(H)(ii) of the Rules, the Chamber notes that it has reviewed the relevant transcript pages of GH-028's testimony, which stand in contrast to the content of the contested part of DGH-053's statement.<sup>37</sup> Indeed, during GH-028's cross-examination the Defence did not put to the witness that it intends to present contradictory evidence on the point at issue. However, GH-028 was asked several times to repeat and confirm his answer to the question posed by the Defence on the disputed issue. In these circumstances, the Chamber does not consider that there was an egregious violation of Rule 90(H)(ii) of the Rules. The Chamber is thus not convinced that the contested portion of DGH-053's statement should be redacted. The Prosecution may make any argument as to the weight the Chamber should ascribe to the contested portion of DGH-053's statement<sup>38</sup> in its final trial brief and closing arguments.

13. The Chamber will now address the admission of DGH-053's evidence under Rule 92 *ter* of the Rules. DGH-053's proposed evidence, in the form of a written statement, contains information

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*et al.*, Case No. IT-05-88-T, Order Setting Forth Guidelines for the Procedure under Rule 90(H)(ii), 6 March 2007 ("Popović *et al.* Decision of 6 March 2007"), para. 3.

<sup>32</sup> *Milutinović et al.* Decision, para. 77; *Stanišić and Župljanin* Decision, para. 21; *See also Brđanin and Talić* Decision, para. 20.

<sup>33</sup> *Stanišić and Župljanin* Decision, para. 21; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Judgement, 26 February 2009, paras 51-52; *Milutinović et al* Decision, para. 77.

<sup>34</sup> *Milutinović et al.* Decision, para. 77.

<sup>35</sup> *Stanišić and Župljanin* Decision, para. 21; *Popović et al.* Decision of 6 March 2007, para. 3.

<sup>36</sup> Decision on the Prosecution Motion Requesting the Defence to Submit a Revised Rule 65 *ter* Witness List and Witness Summaries and for Disclosure in Accordance with Rule 67(A)(ii) and the Trial Chamber's Orders, 25 July 2014 ("Decision on Defence Rule 65 *ter* Witness List"), paras 36-39.

<sup>37</sup> GH-028, 27 June 2013, T. 6419-6420 (confidential).

<sup>38</sup> *See* Rule 65 *ter* number 1D02401.1, p. 5 (first paragraph).

about, *inter alia*, (a) the origins, evolution, and divergent factions of the SDS;<sup>39</sup> (b) the armed clashes in Pakrac in March 1991;<sup>40</sup> (d) DGH-053's participation, alongside Hadžić, in the talks with Franjo Tuđman on 13 March 1991;<sup>41</sup> and (e) the SDS's relations with the JNA.<sup>42</sup> The Chamber considers that the proposed evidence is appropriate to be admitted in written form and finds that the tendered statement is relevant, has probative value, and is appropriate for admission pursuant to Rules 89(C) and 92 *ter* of the Rules.

14. With regard to the length of the Defence's prospective examination-in-chief of DGH-053, the Chamber recalls that it reviewed the Defence's Rule 65 *ter* witness list and the times allocated for each witness, including the 1.5 hours allocated for the *viva voce* testimony of DGH-053, when it granted the Defence 140 hours for its case-in-chief.<sup>43</sup> The Trial Chamber therefore considers that this issue has already been addressed and finds no reason at this stage to adjust the time allocated for the examination of DGH-053.

15. The Chamber further recalls its decision of 25 July 2014 in which it has already considered the Prosecution's submission that the topics for the *viva voce* portion of DGH-053's evidence were not adequately specified.<sup>44</sup> The Chamber ordered the Defence to provide a revised summary with additional information regarding the *viva voce* portion of DGH-053's expected testimony.<sup>45</sup> The Defence provided the Chamber and the Prosecution with a revised summary on 8 August 2014.<sup>46</sup>

16. The Chamber notes that the BCS version of DGH-053's statement includes a paragraph that has not been translated into English.<sup>47</sup> The Chamber will therefore order that a full English translation of DGH-053's statement be provided.

#### **D. Disposition**

17. Accordingly, the Trial Chamber, pursuant to Rules 54, 89(C), 92 *ter*, and 126 *bis* of the Rules, hereby:

- a) **GRANTS** the Defence leave to file the Reply;

<sup>39</sup> Rule 65 *ter* number 1D02401.1, pp. 2-3.

<sup>40</sup> Rule 65 *ter* number 1D02401.1, pp. 3-4.

<sup>41</sup> Rule 65 *ter* number 1D02401.1, p. 4.

<sup>42</sup> Rule 65 *ter* number 1D02401.1, p. 4.

<sup>43</sup> See Decision on the Application of Rule 73 *ter* (E) and on Defence Motion to Modify the Trial Schedule During the Testimony of Mr. Hadžić, 24 June 2014, paras 2-4.

<sup>44</sup> Decision on Defence Rule 65 *ter* Witness List, paras 19-20.

<sup>45</sup> Decision on Defence Rule 65 *ter* Witness List, para. 40.


<sup>46</sup> See Notice of Compliance with Trial Chamber Order to of (*sic*) 25 July 2014, 8 August 2014, Annex A (confidential), pp. 81-82.

<sup>47</sup> The paragraph that is missing from the English version of DGH-053's statement is the sixth paragraph on page 4 of the BCS version beginning with the phrase "Znam da je SDS protestovao...". See Rule 65 *ter* number 1D02401.1, p. 4.

- b) **ORDERS** the Defence to upload onto eCourt a complete English translation of DGH-053's statement before the date on which DGH-053 is scheduled to testify, and to notify the Chamber and the Prosecution when it has done so;
- c) **DECIDES** that the written statement of DGH-053 is appropriate for admission into evidence; and
- d) **INFORMS** the parties that the Trial Chamber will make a final decision on whether to admit the written statement of DGH-053, if the conditions set forth in Rule 92 *ter* of the Rules have been fulfilled, when the witness gives evidence in these proceedings.

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

Done this twenty-ninth day of August 2014,  
At The Hague,  
The Netherlands.



Judge Guy Delvoic  
Presiding

**[Seal of the Tribunal]**