

**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: 28 November 2014
Original: English

IN THE TRIAL CHAMBER

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

Registrar: Mr. John Hocking

Decision: 28 November 2014

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC

**DECISION ON DEFENCE MOTION FOR ADMISSION OF
EVIDENCE OF DGH-051 PURSUANT TO RULE 92 *TER***

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 Dušan Knežević (DGH-051) Pursuant to Rule 92 *ter*”, filed with confidential annexes on 28 August 2014 (“Motion”). The “Prosecution Response to Motion for Admission of Evidence of Dušan Knežević (DGH-051) Pursuant to Rule 92 *ter* and Request for a Sufficient Rule 65 *ter* Witness Summary” was filed on 8 September 2014 (“Response”). On 15 September 2014, the Defence filed a “Reply to Prosecution Response to Defence Motion for Admission of Evidence of Dušan Knežević (DGH-051) Pursuant to Rule 92 *ter* and Request for a Sufficient Rule 65 *ter* Witness Summary” (“Reply”).

A. Submissions

2. The Defence seeks to admit DGH-051’s written statement, Rule 65 *ter* number 1D02337, pursuant to Rule 92 *ter* of the Rules of Procedure and Evidence (“Rules”) subject to the witness’s in court affirmation.¹ It submits that DGH-051’s written statement is relevant and probative.² The Defence contends that admitting DGH-051’s written statement under Rule 92 *ter* of the Rules will promote the expeditious conduct of the proceedings as the statement’s content could not otherwise be adduced within the two hours currently allotted for DGH-051’s direct examination.³

3. The Prosecution does not object to the admission of DGH-051’s written statement pursuant to Rule 92 *ter* of the Rules, subject to compliance with the conditions contained in this Rule when DGH-051 is present in court.⁴ However, it requests that the Trial Chamber direct the Defence to provide further particulars of the facts on which DGH-051 will testify in the *viva voce* portion of his testimony (“Request”).⁵ In this respect, the Prosecution submits that the updated witness summary merely refers to three broad topics without mentioning the facts about which DGH-051 will testify. It argues that it is not sufficient to say that DGH-051 will “generally elaborate” on given topics.⁶ The Prosecution contends that the Defence has not provided sufficient notice for the Trial Chamber and Prosecution to prepare for DGH-051’s *viva voce* testimony—which is scheduled for two hours.⁷

¹ Motion, paras 1, 8.

² Motion, paras 5-6.

³ Motion, para. 7.

⁴ Response, para. 1.

⁵ Response, para. 2.

⁶ Response, para. 2, *referring to* Decision on 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 (“25 July Decision”), para. 13.

⁷ Response, para. 2.

4. The Defence seeks leave to file a reply and asserts that the Request should be rejected *in limine* because, despite having multiple opportunities, the Prosecution did not object to DGH-051's summary.⁸ The Defence, referring to the Trial Chamber's *proprio motu* order to revise the summary of another witness, contends that the Trial Chamber did not determine that DGH-051's summary was inadequate.⁹

B. Applicable Law

1. Rule 92 ter of the Rules

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.¹⁰ 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.¹¹ 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.¹² Moreover, the evidence sought to be admitted, whether a written statement or a transcript of oral testimony, must

⁸ Reply, paras 1, 3.

⁹ Reply, para. 3. See Reply, fn. 3, referring to Decision on 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, para. 21.

¹⁰ *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.

¹¹ *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.

¹² *Đorđević* Decision, para. 7; *Lukić and Lukić* Decision, para. 15; *Stanišić and Simatović* Decision, para. 19.

fulfil the general requirements of admissibility of Rule 89(C) of the Rules—the proposed evidence must be relevant and have probative value.¹³

2. Rule 65 ter (G) of the Rules

7. Rule 65 *ter* (G) of the Rules, in relevant part, provides:

After the close of the Prosecutor's case and before the commencement of the defence case, the pre-trial Judge shall order the defence to file the following:

- (i) a list of witnesses the defence intends to call with:
 - (a) the name or pseudonym of each witness;
 - (b) a summary of the facts on which each witness will testify;
 - (c) the points in the indictment as to which each witness will testify [...].

8. The main purpose of Rule 65 *ter* (G) of the Rules is to allow the Prosecution to be on notice of the main facts upon which Defence witnesses are expected to testify with a view to allowing the Prosecution to prepare its cross-examination.¹⁴ The Rule requires the Defence to provide a *summary of the facts* of the expected testimony of each witness.¹⁵ Therefore, a mere indication of the topics that will be addressed during the witness's evidence, generally, would not meet the requirements of the Rule if no summary of what the witness actually is expected to say is provided.¹⁶

C. Discussion

9. DGH-051's proposed evidence, in the form of a written statement,¹⁷ contains information about, *inter alia*: (a) the organisation of police in Dalj and surrounding areas in September and October 1991;¹⁸ (b) events in Ilok that DGH-051 witnessed as its police commander;¹⁹ and (c) DGH-051's knowledge of alleged members of the alleged JCE including Badža, Arkan, Jovica Stanišić, and Goran Hadžić.²⁰ In light of the above, the Trial Chamber considers 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.

¹³ *Dordević* Decision, para. 5; *Lukić and Lukić* Decision, paras 15-16.

¹⁴ 25 July Decision, para. 13 and references cited therein.

¹⁵ 25 July Decision, para. 13 and references cited therein.

¹⁶ 25 July Decision, para. 13 and references cited therein.

¹⁷ The Trial Chamber notes that the statement enclosed in confidential Annex A is missing the first four pages. Consequently, the Trial Chamber will rely on the document uploaded to e-court as Rule 65 *ter* number 1D02337.

¹⁸ Rule 65 *ter* number 1D02337, paras 7-16.

¹⁹ Rule 65 *ter* number 1D02337, paras 28-38.

²⁰ Rule 65 *ter* number 1D02337, paras 8, 14, 17-24, 39, 45, 48-49, 52-55.

10. With respect to the Request, the Trial Chamber first notes that it would be erroneous to interpret, as the Defence does, the absence of a *proprio motu* order to revise DGH-051's summary as an implicit acknowledgment of its adequacy. The Defence contention that since the Prosecution has not previously objected to DGH-051's summary the Request should be rejected *in limine* is similarly devoid of merit. The Trial Chamber reiterates that the main purpose of Rule 65 *ter* (G) of the Rules is to allow the Prosecution to be on notice of the main facts upon which Defence witnesses are expected to testify with a view to allowing the Prosecution to prepare its cross-examination.²¹ If the Prosecution's ability to prepare its cross-examination of DGH-051 is impeded by the Defence's failure to fulfil its obligations under this Rule, the fact that the Prosecution has not previously objected to the sufficiency of DGH-051's summary does not preclude it from now seeking a remedy.

11. Turning to the question of whether DGH-051's witness summary is sufficient to put the Prosecution on notice of the main facts upon which he will testify, the Trial Chamber notes that the *viva voce* portion of the summary, in its entirety, reads as follows: "The witness will generally elaborate on the matters described above, in particular the role of the Serbian MUP in SBWS, the police in Dalj and surrounding villages, and the military administration in Ilok".²² It is incumbent upon the Defence to provide a summary of the facts of the expected testimony of each witness. Here, however, the *viva voce* portion of the summary merely identifies the topics to be addressed during DGH-051's testimony, without summarising what DGH-051 is actually expected to say when elaborating on: (a) the role of the Serbian MUP in SBWS; (b) the police in Dalj and surrounding villages; and (c) the military administration in Ilok. The Trial Chamber therefore considers that the *viva voce* portion of the summary provided is deficient. In order to give the Prosecution sufficient notice, the Defence should provide a summary of the facts on which DGH-051 will testify which includes information about the aforementioned topics.

²¹ 25 July Decision, para. 13 and references cited therein.

²² Motion, confidential Annex B. The Trial Chamber notes that although the Defence submits that an updated witness summary, with track changes, was attached as confidential Annex B, the document in confidential Annex B: (a) does not contain any track changes; and (b) is substantively the same as the three versions of DGH-051's Rule 65 *ter* summary filed in May and August 2014. See Motion, confidential Annex B; Notice of Compliance with Trial Chamber Order to of [sic] 25 July 2014, 8 August 2014, confidential Annex B, pp. 79-80; Corrigendum and Addendum to Rule 65 *ter* Filings, 23 May 2014, confidential Annex B, pp. 58-59; Defence Notice of Rule 65 *ter* (G) Filings, 13 May 2014, confidential Annex B, pp. 56-58.


Disposition

12. Accordingly, the Trial Chamber, pursuant to Rules 54, 65 *ter*, 89(C), 92 *ter*, and 126 *bis* of the Rules, hereby:

- a) **GRANTS** the Defence leave to file the Reply;
- b) **GRANTS** the Motion;
- c) **DECIDES** that DGH-051's written statement is appropriate for admission into evidence;
- d) **INFORMS** the parties that the Trial Chamber will make a final decision on whether to admit DGH-051's written statement, if the conditions set forth in Rule 92 *ter* of the Rules have been fulfilled, when the witness gives evidence in these proceedings; and
- e) **GRANTS** the Request;
- f) **ORDERS** the Defence – by no later than 12 January 2015 – to file a revised version of the Rule 65 *ter* (G) filing which provides a summary of the facts on which DGH-051 will testify, including information on what DGH-051 will say when elaborating on: (i) the role of the Serbian MUP in SBWS; (ii) the police in Dalj and surrounding villages; and (iii) the military administration in Ilok.

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

Done this twenty-eighth day of November 2014,
At The Hague,
The Netherlands.


Judge Guy Delvoie
Presiding

[Seal of the Tribunal]