

**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: 23 August 2012  
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:** 23 August 2012

**PROSECUTOR**

v.

**GORAN HADŽIĆ**

**PUBLIC**

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**DECISION ON MOTION TO EXPUNGE PORTIONS OF  
THE PROSECUTION'S RULE 65 *ter* FILING AND  
FOR MORE DETAILED WITNESS SUMMARIES**

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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 seised of the “Motion to Expunge Portions of the Prosecution’s Rule 65 *ter* Filing and for More Detailed Witness Summaries”, filed confidentially by Hadžić on 2 July 2012 (“Motion”). The Prosecution filed confidentially the “Prosecution Response to Motion to Expunge Portions of the Prosecution’s Rule 65 *ter* Filing and for More Detailed Witness Summaries” with a confidential annex on 16 July 2012 (“Response”). Hadžić filed confidentially the “Reply to Prosecution Response to Motion to Expunge Portions of the Prosecution’s Rule 65 *ter* Filing and for More Detailed Witness Summaries” on 23 July 2012 (“Reply”).
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”),<sup>1</sup> 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”), and the Prosecution exhibit list (“Exhibit List”), filed pursuant to Rule 65 *ter* (E)(iii) of the Rules.

#### **A. Submissions**

3. In the Motion, Hadžić submits that neither the Witness List nor the Exhibit List comply with the requirements of Rule 65 *ter* (E) of the Rules.<sup>2</sup> Hadžić requests that any undisclosed material referred to in the Rule 65 *ter* (E) Filings that does not pertain to a pending witness protection request<sup>3</sup> be expunged.<sup>4</sup> In particular, Hadžić submits that the Prosecution has “reserved spots” for witnesses of prospective evidence without the required disclosure<sup>5</sup> and that the Prosecution has therefore missed the disclosure deadline for these witnesses and exhibits and should bear the burden of seeking leave from the Chamber to add or supplement the Rule 65 *ter* (E) Filings with additional witnesses and exhibits.<sup>6</sup> Hadžić adds that the request to expunge extends to those witness identities and documentary evidence that have not been disclosed due to pending consent under Rule 70 of the Rules.<sup>7</sup> Hadžić requests that all witnesses whose identities remain undisclosed and are not the subject of a pending witness protection request be removed from the Witness List. Hadžić also requests the Chamber to order that all undisclosed documents that have not been specifically

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<sup>1</sup> 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.

<sup>2</sup> Motion, paras 1, 10, 21.

<sup>3</sup> Prosecution Motion for Protective Measures for Witnesses (confidential), 19 June 2012 (“Protective Measures Motion”).

<sup>4</sup> Motion, paras 1, 10, 21.

<sup>5</sup> Motion, para. 4.

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

<sup>7</sup> Motion, para. 7.

included in the Protective Measures Motion be removed from the Rule 65 *ter* (E) Filings.<sup>8</sup> Hadžić submits that the “ongoing non-compliance with Rule 65 *ter*” by the Prosecution is causing prejudice to him and impairing his preparation for trial.<sup>9</sup>

4. In addition, Hadžić submits that the summaries of the Rule 92 *ter* witnesses provided in the Rule 65 *ter* (E) Filings do not fulfil the requirements of Rule 65 *ter* (E)(ii) of the Rules,<sup>10</sup> arguing that the summaries lack focus and are not tailored to this case. Hadžić submits that the Prosecution has conceded that the summaries of testimony provided in the Rule 65 *ter* (E) Filings are “incomplete” insofar as they relate to witnesses who will provide substantial *viva voce* testimony in addition to their respective Rule 92 *ter* witness statements (“hybrid witnesses”).<sup>11</sup> Hadžić therefore requests: (a) the Chamber to order the Prosecution to supplement and then file “adequate” witness summaries in accordance with Rule 65 *ter* (E) of the Rules for all hybrid witnesses;<sup>12</sup> and (b) the Chamber to clarify that any amendments to any of the Prosecution witness summaries contained in the Rule 65 *ter* (E) Filings may only be permitted with leave of the Chamber.<sup>13</sup>

5. In its Response, the Prosecution submits that the Motion should be dismissed due to Hadžić’s failure to justify his request to expunge material from the Prosecution’s Rule 65 *ter* (E) Filings and his failure to demonstrate the need for the additional orders sought in the Motion.<sup>14</sup> The Prosecution submits that both the Witness List and Exhibit List satisfy the requirements of Rule 65 *ter* (E)(ii) and (iii) respectively.<sup>15</sup> The Prosecution submits that it was unable to provide full disclosure for ten witnesses on its Witness List at the time of filing due to Rule 70 restrictions.<sup>16</sup> The Prosecution, in confidential Annex A of the Response, discloses the identities and provides more detailed witness summaries for six of these ten witnesses<sup>17</sup> and notes that it will no longer call GH-122 as an expert witness.<sup>18</sup> The Prosecution, in light of the information provided in confidential Annex A of the Response, submits that currently there are three witnesses whose identities have not been disclosed due to Rule 70 restrictions.<sup>19</sup> The Prosecution submits that Tribunal practice recognises that Rule 70 witnesses may be included in Rule 65 *ter* filings without full disclosure of their identities pending acquisition of the necessary authorisations.<sup>20</sup> The Prosecution further

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<sup>8</sup> Motion, para. 10.

<sup>9</sup> Motion, para. 21.

<sup>10</sup> Motion, paras 11, 16.

<sup>11</sup> Motion, para. 11.

<sup>12</sup> Motion, paras 2, 18, 21.

<sup>13</sup> Motion, para. 18.

<sup>14</sup> Response, paras 1, 4, 7, 12.

<sup>15</sup> Response, para. 2.

<sup>16</sup> Response, para. 3.

<sup>17</sup> Response, para. 3.

<sup>18</sup> Response, para. 3.

<sup>19</sup> Response, para. 3 (GH-115, GH-161, GH-164).

<sup>20</sup> Response, para. 4.

submits that Hadžić has not suffered any unfair prejudice because the Prosecution has adhered to the requirements of Rule 70 and, for all but three witnesses, Hadžić will have received the summaries and materials related to Rule 70 witnesses over three months in advance of the trial, which will be ample time for him to review the material and prepare for cross-examination.<sup>21</sup> The Prosecution also submits that, in relation to the documents that have not been disclosed to Hadžić due to Rule 70 restrictions, “[i]t would serve little purpose to remove these documents from the exhibit list only to then have to re-instate them as the Rule 70 authorisations are received.”<sup>22</sup>

6. The Prosecution submits (a) that the Chamber has already ruled that the Prosecution may provide updated information regarding its Rule 92 *ter* witnesses as it obtains that information and (b) that, in order to facilitate this process, the Prosecution will provide Hadžić with updated witness summaries at least six weeks before the Rule 92 *ter* witnesses testify.<sup>23</sup> According to the Prosecution, Hadžić’s request for clarification that amendments to witness summaries only be allowed with leave of the Chamber ignores well settled Tribunal practice.<sup>24</sup> The Prosecution opposes Hadžić’s request that it be ordered to re-interview and provide final summaries for Rule 92 *ter* witnesses by 16 July 2012, asserting that the Chamber has acknowledged that the Prosecution would continue to contact witnesses as it prepared for trial and that during this process new information could surface that would necessitate adjustment of the witness summaries. The Prosecution points out that Hadžić has cited no Rule or ruling that requires a party to file final, unalterable witness summaries three months in advance of the beginning of its case-in-chief.<sup>25</sup>

7. In the Reply, Hadžić opposes what he deems to be Prosecution amendments to the Rule 65 *ter* (E) Filings as contained in confidential Annex A of the Response, whereby the Prosecution discloses the identities and provides more detailed witness summaries for six of what the Prosecution claims are witnesses subject to Rule 70 consent. Hadžić submits that the Prosecution must seek leave from the Chamber for the addition of the information contained in confidential Annex A of the Response.<sup>26</sup> Hadžić asserts that leave from the Chamber is required to amend the Rule 65 *ter* (E) Filings for the remaining three witnesses identified by the Prosecution that are still subject to Rule 70 consent.<sup>27</sup> Hadžić further submits that Rule 65 *ter* requires the Prosecution to file witness summaries no later than sixty days before trial in accordance with the Prosecution’s obligation to state its case.<sup>28</sup> According to Hadžić, the witness summaries frequently provide only

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<sup>21</sup> Response, para. 5.

<sup>22</sup> Response, para. 6.

<sup>23</sup> Response, para. 8.

<sup>24</sup> Response, para. 9.

<sup>25</sup> Response, para. 10.

<sup>26</sup> Reply, paras 3-4.

<sup>27</sup> Reply, paras 5, 7.

<sup>28</sup> Reply, para. 9.

the slightest reference to him and are “apparently written with a focus on some other accused”.<sup>29</sup> Hadžić is of the view that, by implication, most of the salient material facts are not contained in the witness summaries and are not based on re-interviews with the vast majority of Prosecution witnesses.<sup>30</sup>

## **B. Discussion**

### 1. Witness and Exhibit Lists

8. Rule 65 *ter* (E) (ii) and (iii) of the Rules provide, *inter alia*, that the Prosecution shall file, within a time-limit set by the Pre-Trial Judge and not less than six weeks before the pre-trial conference, “the list of the witnesses the Prosecutor intends to call” and “the list of exhibits the Prosecution intends to offer”, serving on the Defence copies of the listed exhibits. The deadline for the filing of the Witness List and the Exhibit List in the present case was 19 June 2012.<sup>31</sup>

9. With respect to the Witness List submitted by the Prosecution, excluding those witnesses subject to delayed disclosure requests, the details of ten Prosecution witnesses were not fully disclosed to Hadžić in the Rule 65 *ter* (E) Filings.<sup>32</sup> According to the Response, these ten witnesses were subject to the non-disclosure provisions of Rule 70 of the Rules.<sup>33</sup>

10. The Chamber notes the disclosure by the Prosecution of the identities of witnesses GH-149, GH-128, GH-130, and GH-147 and their associated witness summaries after having secured consent from the relevant Rule 70 provider.<sup>34</sup> In the interests of trial efficiency and having considered the rights and interests of Hadžić, the Chamber will exercise its discretion and allow the Prosecution to call these witnesses and tender their associated exhibits during the trial.

11. The Chamber also notes the Prosecution’s notification of its ongoing efforts to seek consent from the relevant Rule 70 provider to disclose GH-115’s identity and witness statement to Hadžić.<sup>35</sup>

12. The Chamber considers that the Prosecution did not disclose in the Rule 65 *ter* (E) Filings the identities of witnesses GH-150, GH-151, GH-161, and GH-164 because the Prosecution had been unable to determine the identity of the witnesses.<sup>36</sup> The Chamber will therefore order that these four witnesses be expunged from the Rule 65 *ter* (E) Filings. Should the Prosecution still wish

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<sup>29</sup> Reply, para. 11.

<sup>30</sup> Reply, paras 11, 13.

<sup>31</sup> Order on Pre-Trial Work Plan, 16 December 2011, Annex, p. 1.

<sup>32</sup> GH-115, GH-122, GH-128, GH-130, GH-147, GH-149, GH-150, GH-151, GH-161, GH-164.

<sup>33</sup> Response, para. 3.

<sup>34</sup> Response, confidential Annex A, pp. 8-11 (GH-149, GH-128, GH-130, GH-147).

<sup>35</sup> Prosecution Notice Regarding Potential Witness ... (Witness GH-115) (confidential and *ex parte*), 16 July 2012.

<sup>36</sup> Rule 65 *ter* (E) Filings, para. 8.

to call these witnesses to provide evidence in this case, the Prosecution may, by way of written motion, seek leave of the Chamber to amend its Rule 65 *ter* (E) Filings accordingly. The Chamber therefore considers moot the “Prosecution Notification Concerning Intercept Witnesses (Croatian Government)” filed confidentially on 25 July 2012 in this case, insofar as it concerns witness GH-151.

13. Bearing in mind the uncertainty inherent in the Rule 70 consent process, the Chamber, in the interests of trial efficiency and having considered the rights and interests of Hadžić, will exercise its discretion and order the Prosecution to disclose to Hadžić all material subject to Rule 70 consent as denoted in the Rule 65 *ter* (E) Filings (including for GH-115) by 18 September 2012 where the relevant consent has been obtained, without the need for further leave of the Chamber. The Chamber is aware that the Prosecution may be unable to obtain the required consent from the Rule 70 provider(s) before this date. In such a case, any reference to a witness or exhibit contained in the Rule 65 *ter* (E) Filings subject to Rule 70 consent that has not been disclosed by this date shall be deemed expunged from the Rule 65 *ter* (E) Filings. The Prosecution, should it receive consent for disclosure after this date, may, by way of written motion, seek leave of the Chamber to amend its Rule 65 *ter* (E) Filings accordingly.

14. The Chamber notes the Prosecution’s decision to no longer call GH-122 as an expert witness.<sup>37</sup>

## 2. Rule 92 *ter* summaries

15. Hadžić has argued that the Prosecution’s summaries for its Rule 92 *ter* witnesses are inadequate and too general in nature.<sup>38</sup> The Chamber recalls that recourse to hybrid witnesses is foreseen in this case, those being witnesses who provide evidence in accordance with Rule 92 *ter* of the Rules and also provide evidence *viva voce*, generally of a distinct nature to that evidence contained in the witness’s Rule 92 *ter* statement or transcript. Insofar as Hadžić objects to the witness summaries for non-hybrid Rule 92 *ter* witnesses, the Chamber considers that Hadžić has failed to show that the summaries are inadequate for the purposes of Rule 65 *ter* (E)(ii) of the Rules.

16. With regard to hybrid witnesses, the Chamber has informed the parties that the calling party must make a clear distinction between the substance of the Rule 92 *ter* portion of the testimony and the *viva voce* portion of the testimony and that, with regard to Prosecution witnesses, this distinction

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<sup>37</sup> Response, para. 3; Prosecution Notice of Compliance with Rule 94 *bis* (A), 10 July 2012, para. 3.

<sup>38</sup> See Motion, paras 11, 16; see also Rule 65 *ter* (E) Filings, confidential Annex B.

should be evident in the Rule 65 *ter* (E) Filings.<sup>39</sup> At the status conference on 14 June 2012, the Prosecution informed the Chamber and Hadžić that there was not a lot of information in the hybrid witness summaries related to evidence that would be led *viva voce*.<sup>40</sup> The Prosecution also stated that “it is still in the process of determining the additional issues and exhibits about which [these witnesses] are able to provide evidence.”<sup>41</sup> It is therefore apparent that the Prosecution has not yet disclosed to Hadžić summaries that reflect all the evidence it intends to adduce from these witnesses *viva voce*. The Chamber therefore will, in the exercise of its inherent authority to manage the trial proceedings, set a new deadline by which the Prosecution must submit revised witness summaries for all hybrid witnesses on its Witness List. The summaries must clearly state that the witness is a hybrid witness, indicate which portion of each witness’s evidence will be led *viva voce* and which portion will be presented pursuant to Rule 92 *ter* of the Rules, and be supplemented with a summary of the *viva voce* portion of the witness’s testimony.

### C. Disposition

17. Accordingly, for all the foregoing reasons, the Trial Chamber, pursuant to Rules 54, 65 *ter*, 68 *bis*, 92 *ter*, and 126 *bis* of the Rules, hereby:

**GRANTS** Hadžić leave to file the Reply;

**GRANTS** the Motion in part;

**ORDERS** *ex proprio motu* the Prosecution, by 18 September 2012, to disclose to Hadžić the identities and related materials of all Rule 70 witnesses (including GH-115) contained in the Prosecution Witness and Exhibit Lists where:

- (a) such disclosure has not yet taken place;
- (b) consent has been obtained from the Rule 70 provider(s);
- (c) the witness is not subject to protective measures or a pending protective measures request before the Tribunal that would preclude disclosure;

**DECIDES** that, should the Prosecution fail to meet the 18 September 2012 deadline above, those witnesses and related non-disclosed exhibits will be deemed to be expunged from the Prosecution

<sup>39</sup> Rule 65 *ter* Conference, 15 February 2012, T. 46-47 (confidential); Rule 65 *ter* Conference, 12 June 2012, T. 68-69 (confidential); Status Conference, 14 June 2012, T. 41.

<sup>40</sup> Status Conference, 14 June 2012, T. 39.

<sup>41</sup> Rule 65 *ter* (E) Filings, para. 5.

Witness and Exhibit Lists and that any further amendment of the Prosecution Witness and Exhibit Lists may only be made with leave of the Chamber;

**EXPUNGES** from the Prosecution's Witness List all references and information relating to witnesses GH-150, GH-151, GH-161, and GH-164;

**INVITES** the Prosecution to file a written motion with the Chamber seeking leave to amend its Rule 65 *ter* (E)(ii) Witness List (including witness summaries) should it wish to add witnesses GH-150, GH-151, GH-161, and GH-164;

**ACCEPTS** the late disclosure with respect to witnesses GH-149, GH-128, GH-130, and GH-147 as set out in confidential Annex A of the Response;


**ORDERS** the Prosecution to revise, file with the Chamber, and disclose to Hadžić by 18 September 2012, the witness summaries for all hybrid witnesses in the Rule 65 *ter* (E) Filings:

- (a) clearly designating those witnesses as hybrid witnesses;
- (b) making a clear distinction in the summaries between the portion of each witness's evidence that will be led *viva voce* and that which will be presented pursuant to Rule 92 *ter* of the Rules; and
- (c) including summary information of the *viva voce* portion of the hybrid witnesses' testimonies pursuant to Rule 65 *ter* (E)(ii) of the Rules;

**DISMISSES** the Motion in all other respects.

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

Done this twenty-third day of August 2012,  
At The Hague,  
The Netherlands.



Judge Guy Delvoic  
Presiding

[Seal of the Tribunal]