

**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: 25 July 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: 25 July 2014

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC

**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**

The Office of the Prosecutor:

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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 Motion Directing 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”, filed with a confidential annex on 19 May 2014 (“Motion”). The Defence filed the “Response to Prosecution Motion Directing 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” on 28 May 2014 (“Response”). On 4 June 2014, the Prosecution filed the “Prosecution Request for Leave to Reply and Reply to Response to Prosecution Motion Concerning Defence Witness Summaries and Disclosure” (“Reply”). On 10 June 2014, the Defence filed the “Request to Clarify Submissions Arising from Prosecution Reply of 4 June Concerning Defence Witness Summaries and Disclosure” (“Sur-Reply”).

2. On 13 May 2014, the Defence filed the Defence Notice of Rule 65 *ter* (G) Filings (“Rule 65 *ter* (G) Filings”). Confidential Annex A of the filings is a list of the Defence witnesses to be called, their proposed pseudonyms, and the mode and time of anticipated testimony. Confidential Annex B contains the summaries of the Defence’s witnesses’ anticipated testimony. Annexes A and B constitute the Defence’s “Witness List”; Annex C contains the Defence’s “Exhibit List”. On 23 May 2014, the Defence filed the “Corrigendum and Addendum to Rule 65 *ter* Filings” (“Corrigendum”) with confidential Annexes A, B, and C, in which it made numerous corrections to its Witness List and requested leave to amend its Exhibit List.¹

I. NOTICE PURSUANT TO RULE 65 *TER* (G)

A. Submissions

3. In the Motion, the Prosecution requests the Chamber to order the Defence to file a Rule 65 *ter* witness list that complies with Rule 65 *ter* (G) of the Rules and the Chamber’s previous orders in relation to Rule 65 *ter* (G) filings.² The Prosecution submits that the Witness List filed on 13 May 2014 by the Defence violates both the orders of the Chamber and also each of the

¹ The Chamber has already ruled on the Defence request to add documents to its Exhibit List. *See* Oral Ruling, 3 July 2014, T. 9265-9266.

² Motion, paras 1, 4, 16, *citing* Order on Close of Prosecution Case-in-Chief, Rule 98 *bis* Proceedings, and Preparation and Commencement of Defence Case, 18 July 2013 (“Order on Defence Case”) and Scheduling Order for Preparation and Commencement of Defence Case, 20 February 2014 (“Scheduling Order”).

requirements of Rule 65 *ter* (G), which prejudices the Prosecution's ability to prepare for the Defence case.³

4. The Prosecution notes that there is no witness summary for DGH-005 and submits that for ten witnesses the summaries are "self-evidently" incomplete because they state "additional information to be provided".⁴

5. The Prosecution further submits that some of the Defence's witness summaries are inadequate and argues that the summaries are not sufficiently detailed to allow the Prosecution to prepare its cross-examination as they merely indicate the topics to be addressed rather than provide a summary of what the witness will say during his/her testimony.⁵ The Prosecution adds that for 29 Rule 92 *ter* hybrid witnesses, the summaries do not adequately identify the evidence that will be adduced *viva voce* in addition to that contained in the statement.⁶ The Prosecution submits that the summaries frequently contain no information for the *viva voce* portion other than the sentence, "the foregoing topics are an updated reflection of the expected topics on which the witness will describe in more detail than in his statement during oral testimony", and that for other Rule 92 *ter* hybrid witnesses, no mention is made at all about the *viva voce* portion of the testimony.⁷

6. In addition, the Prosecution submits that: (i) the designated mode and length of time for the testimony of some witnesses is inconsistent between Annexes A and B of the Rule 65 *ter* (G) Filings; (ii) for some witnesses, the date of birth, place of birth, and father's name are missing, and (iii) the total time estimated for the presentation of the Defence case does not match the total of the estimated times listed in the Witness List for the witnesses' testimony.⁸ The Prosecution further submits that the Defence has not adequately identified the points in the Indictment to which each witness will testify, as per the Chamber's instruction.⁹ In this regard, the Prosecution asserts that the

³ Motion, paras 1, 3-4, confidential Annex A.

⁴ Motion, para. 5, in relation to witnesses DGH-030, DGH-031, DGH-046, DGH-066, DGH-067, DGH-072, DGH-101, DGH-104, DGH-110, and DGH-112.

⁵ Motion, para. 5, confidential Annex A, in relation to witnesses DGH-001, DGH-009, DGH-010, DGH-011, DGH-015, DGH-016, DGH-019, DGH-031, DGH-034, DGH-044, DGH-048, DGH-053, DGH-071, DGH-074, DGH-085, DGH-088, DGH-098, DGH-100, DGH-104, DGH-107, and DGH-113 (Note that DGH-113 was erroneously referred to as DGH-114 in Annex A of the 13 May 2014 Rule 65 *ter* (G) Filings), citing *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on Prosecution Motion for the Provision of an Adequate Witness Summary for the Forthcoming Testimony of Slobodan Božić, 22 January 2009 ("*Prlić et al.* Decision"), p. 5.

⁶ Motion, para. 5, confidential Annex A, in relation to witnesses DGH-006, DGH-010, DGH-017, DGH-019, DGH-021, DGH-030, DGH-039, DGH-043, DGH-046, DGH-049, DGH-053, DGH-065, DGH-067, DGH-069, DGH-071, DGH-072, DGH-075, DGH-076, DGH-086, DGH-087, DGH-088, DGH-091, DGH-099, DGH-100, DGH-101, DGH-104, DGH-107, DGH-110, and DGH-112.

⁷ Motion, para. 5.

⁸ Motion, paras 6-10.

⁹ Motion, para. 11.

Witness List states that every witness will testify to “All Counts”, and, with one exception, refers to paragraphs 5-25 or 6-25 of the Indictment, which renders the Chamber’s order nugatory.¹⁰

7. In the Response, the Defence opposes the Motion and submits that the Rule 65 *ter* (G) Filings satisfy the requirements of the Rule and the Chamber’s orders related thereto.¹¹ The Defence asserts that the witness summaries are not vague and that when considered in light of the disclosure that has already taken place, or that will take place before the witnesses appear, the summaries provide more than adequate notice of their testimony.¹² The Defence submits that the witness summaries are “not substantively inadequate”, and using the summaries of DGH-019 and DGH-053 as examples, states that the summaries clearly indicate the issues upon which the witnesses will testify.¹³

8. The Defence submits that the *viva voce* component of its witnesses’ testimony has been conveyed realistically and transparently to the Prosecution.¹⁴ The Defence argues that the in-court testimony of a good number of the Rule 92 *ter* hybrid witnesses is for one hour, which is only 30 minutes longer than a regular Rule 92 *ter* witness, for which no indication of in-court testimony is required.¹⁵ The Defence submits that for other witnesses it is not possible to draw a sharp distinction between the subject matter of the Rule 92 *ter* statement and the *viva voce* component of their testimony.¹⁶ The Defence argues that the purpose of the *viva voce* testimony is to go more deeply into the issues of the greatest relevance and importance to the case contained within the Rule 92 *ter* statement and that for those witnesses where more than one hour of testimony has been designated, the Defence has indicated what the additional topics will be.¹⁷ The Defence also submits that its summaries in this regard are similar to those filed by the Prosecution pursuant to Rule 65 *ter* (E), which also reflect the difficulty in starkly differentiating the topics of testimony between the Rule 92 *ter* statement and the *viva voce* testimony.¹⁸

9. With respect to the Prosecution’s submission that the summaries that contain the phrase “[a]dditional details to be provided” are incomplete, the Defence notes that this phrase is a reference to information relating to the witnesses’ dates of birth and fathers’ names rather than substantive information.¹⁹

¹⁰ Motion, para. 11. *See* Order on Defence Case, para. 12(f)(i)(iii) and Rule 65 *ter* (G)(i)(c).

¹¹ Response, paras 1, 19.

¹² Response, para. 3.

¹³ Response, paras 13-14.

¹⁴ Response, para. 11.

¹⁵ Response, para. 11.

¹⁶ Response, para. 11.

¹⁷ Response, para. 11.

¹⁸ Response, para. 12.

¹⁹ Response, para. 8.

10. The Defence submits that it has rectified all of the discrepancies between Annexes A and B of the Witness List by way of its Corrigendum.²⁰ The Defence notes that, due to a technical error, the witness summary for DGH-005 was inadvertently omitted from Annex B of the Rule 65 *ter* (G) Filings and that this error was rectified in the Corrigendum.²¹ The Defence notes that it has now also provided the biographical data omitted from the Rule 65 *ter* (G) Filings for all but seven of its witnesses and undertakes to provide the remaining information as soon as possible.²² The Defence submits that no prejudice is caused to the Prosecution given the extent of its non-compliance and the prompt rectification of the omissions.²³

11. Regarding the Prosecution's submissions that the Defence has not adequately identified the points in the Indictment as to which each witness will testify, the Defence submits that any ostensible over-breadth is squarely attributable to the Prosecution's own Indictment, which, in its view, is "evidently designed to make any allegation in the Indictment relevant to any other allegation in the Indictment", especially as it relates to JCE and the overarching crime of persecution.²⁴

B. Applicable Law

12. Rule 65 *ter* (G) of the Rules provides that 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;

(d) the total number of witnesses and the number of witnesses who will testify for each accused and on each count;

(e) an indication of whether the witness will testify in person or pursuant to Rule 92 *bis* or Rule 92 *quater* by way of written statement or use of a transcript of testimony from other proceedings before the Tribunal; and

²⁰ Response, paras 2, 5. *See* Corrigendum.

²¹ Response, para. 6.

²² Response, para. 7.

²³ Response, para. 7.

(f) the estimated length of time required for each witness and the total time estimated for presentation of the Defence case; and

(ii) a list of exhibits the Defence intends to offer in its case, stating where possible whether the Prosecutor has any objection as to authenticity. The Defence shall serve on the Prosecutor copies of the exhibits so listed.

13. The main purpose of Rule 65 *ter* (G) 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.²⁵ The Rule requires the Defence to provide a *summary of the facts* of the expected testimony of each witness.²⁶ 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.²⁷

C. Discussion

1. Technical errors in the Witness List

14. The Chamber notes that the inconsistencies identified by the Prosecution between Annexes A and B of the Witness List relating to the mode of each witness's testimony and the time required for direct examination, have been satisfactorily resolved by the Defence in its Corrigendum.²⁸ The Chamber considers that these clerical errors, having been rectified within ten days of the filing of the Witness List, will not cause undue prejudice to the Prosecution.

2. Provision of witness details

15. With respect to the Prosecution's submission that for some witnesses the date of birth, place of birth, or father's name have not been included in the Witness List,²⁹ the Chamber recalls that the Defence agreed to include this information in its Witness List at a Rule 65 *ter* conference on 29

²⁴ Response, para. 10.

²⁵ *Prlić et al.* Decision, p. 5; *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-T, "Decision on Urgent Prosecution's Motion for Additional Detail in Rule 65 *ter* Summaries of the Accused Ljube Boškoski and Johan Tarčulovski" (confidential), 24 January 2008 ("*Boškoski* Decision"), para. 10; *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, "Decision on Prosecution Motions Regarding 65 *ter* (G) Defence Submissions" (confidential), 22 August 2006 ("*Mrkšić et al.* Decision"), para. 4; *Prosecutor v. D. Milošević*, Case No. IT-98-29/1-T, "Decision on the Prosecution's Motion for Defence Compliance with Rule 65 *ter* (G)", 26 June 2007, p. 3.

²⁶ *Boškoski* Decision, para. 10; *Mrkšić et al.* Decision, para. 4.

²⁷ *Boškoski* Decision, para. 10; *Mrkšić et al.* Decision, para. 5; *Prlić et al.* Decision p. 5.

²⁸ See Motion, paras 6-7, 10. The Chamber notes in particular that the status of DGH-005 and DGH-021 has been resolved. See Corrigendum, para. 1.

²⁹ Motion, para. 9.

April 2014.³⁰ The Defence will be ordered to provide this information in full for all witnesses for which it has not already done so.

3. Incomplete witness summaries

16. With respect to the Prosecution's submission that the summaries that contain the text "Additional details to be provided" are self-evidently incomplete, the Chamber notes the Defence submission that the phrase relates only to missing biographical information referred to in paragraph 15 of this Decision rather than missing information relating to the substance of these witnesses' evidence.

4. Points in the Indictment

17. The Chamber notes that 60 witnesses have been designated to testify to paragraphs 5-25 of the Indictment; 13 witnesses have been designated to testify to paragraphs 6-25 of the Indictment; two have been designated to testify to paragraphs 6-52 of the Indictment; and all witnesses, with one exception,³¹ are indicated as testifying to "All Counts" in the Indictment.

18. The Chamber determines that the points in the Indictment as to which each witness will testify are sufficiently specific for witnesses DGH-005, DGH-028, DGH-091, and DGH-119 because they identify particular paragraphs of the Indictment to which their testimony primarily relates. For all other witnesses on the Witness List, the Chamber considers that the Defence should identify, with similar precision, the points to which these witnesses will testify with more specific references to paragraphs in the Indictment.³²

5. Summary of *viva voce* portion of evidence for Rule 92 *ter* hybrid witnesses

19. In this case, the Chamber has limited the examination-in-chief of a witness whose evidence is being given pursuant to Rule 92 *ter* to 30 minutes.³³ This time is allotted to allow for the procedural requirements of Rule 92 *ter* to be met and for any corrections or clarifications to be made to a Rule 92 *ter* statement prior to its admission. Conversely, Rule 92 *ter* hybrid witnesses are witnesses who will provide substantial *viva voce* testimony in addition to their respective Rule 92 *ter* witness statements.³⁴ With regard to Rule 92 *ter* hybrid witnesses, the Chamber informed the parties that the calling party must make a clear distinction between the substance of the Rule 92 *ter* portion and the *viva voce* portion of the testimony and that with regard to Defence witnesses, this

³⁰ Rule 65 *ter* Conference, 29 April 2014, T. 104-105 (confidential).

³¹ DGH-091.

³² See Order on Defence Case, para. 12(f)(i)(iii) and Rule 65 *ter* (G)(i)(c).

³³ Order on Guidelines for Procedure for Conduct of Trial, 4 October 2012 ("Order on Guidelines"), Annex, para. 20.

distinction should be evident in the Rule 65 *ter* (G) filings.³⁵ The Chamber is not satisfied that the Defence has sufficiently discharged its obligations in this regard. The summaries in relation to the *viva voce* portion of some witnesses' evidence are inadequate and do not sufficiently put the Prosecution on notice of the main facts upon which the witnesses' are expected to testify.

20. In the exercise of its inherent authority to manage the trial proceedings, the Chamber will set a new deadline by which the Defence must submit revised witness summaries for the following Rule 92 *ter* hybrid witnesses: DGH-006, DGH-010, DGH-017, DGH-019, DGH-030, DGH-046, DGH-049, DGH-053, DGH-065, DGH-067, DGH-071, DGH-076, DGH-086, DGH-088, DGH-091, DGH-099, DGH-104, and DGH-107. The summaries must be revised to provide additional information regarding the *viva voce* portion of the witnesses' evidence and clearly indicate which portion of each witness's evidence will be led *viva voce* and which portion will be presented pursuant to Rule 92 *ter*.

21. The Chamber further notes that DGH-031 was originally designated as a *viva voce* witness.³⁶ In the Corrigendum the Defence designated DGH-031 as a Rule 92 *ter* hybrid witness.³⁷ While the Prosecution has not challenged the summary of the witness's *viva voce* evidence, this change in the mode of testimony had not been made at the time the Motion was filed. The Chamber finds the summary of the witness's *viva voce* evidence to be inadequate and will order *ex proprio motu* that a revised summary be filed.

6. Other challenges to witness summaries

22. The Prosecution has argued that the summaries for the following witnesses are inadequate in that they are not sufficiently detailed to allow the Prosecution to prepare its cross-examination, and merely indicate the topics expected to be addressed, instead of providing a summary of what the witness will say during his/her testimony.³⁸ The Chamber has accounted for the Defence's assertion that all of its witness summaries provide adequate notice of each witness's testimony and makes the following determinations:

23. Regarding the summaries for witnesses DGH-001, DGH-009, DGH-011, DGH-015, DGH-016, DGH-044, DGH-048, DGH-100, and DGH-113, the Chamber finds that they contain sufficient details on the topics to which the witnesses are expected to testify and identify the main facts of

³⁴ See Order on Guidelines, Annex, para. 21, fn. 4.

³⁵ Rule 65 *ter* Conference, 15 February 2012, T. 46-47 (confidential); Rule 65 *ter* Conference, 12 June 2012, T. 68-69 (confidential); Rule 65 *ter* Conference, 29 April 2014, T. 105 (confidential).

³⁶ Rule 65 *ter* (G) Filings, confidential Annexes A and B.

³⁷ Corrigendum, confidential Annexes A and B.

³⁸ Motion, para. 5.

which they have personal knowledge. Accordingly, the Chamber considers that the Prosecution is on notice, in accordance with Rule 65 *ter* (G), of the main facts upon which these witnesses are expected to testify.

24. Regarding the summaries for Rule 92 *ter* hybrid witnesses DGH-010, DGH-019, DGH-031, DGH-104, and DGH-107, the Chamber has determined above that the summaries as they relate to the *viva voce* portion of their evidence are inadequate.³⁹ With respect to the Prosecution challenges to the summaries of their Rule 92 *ter* evidence, the Chamber finds that they contain sufficient details on the topics to which they are expected to testify and identify the main facts of which they have personal knowledge. Accordingly, the Chamber considers that the Prosecution is on notice, in accordance with Rule 65 *ter* (G), of the main facts upon which these witnesses are expected to testify pursuant to Rule 92 *ter*.

25. For the following witnesses, the Prosecution submits that their respective summaries do not provide sufficient detail of the *viva voce* portion of their testimony: DGH-021, DGH-039, DGH-043, DGH-069, DGH-072, DGH-075, DGH-087, DGH-100, DGH-101, DGH-110, and DGH-112.⁴⁰ In the Rule 65 *ter* (G) Filings, these witnesses were designated as Rule 92 *ter* hybrid witnesses. However, in the Corrigendum, the Defence clarified that these witnesses are either *viva voce* witnesses or non-hybrid Rule 92 *ter* witnesses. Accounting for the fact that these witnesses are not hybrid witnesses, the Chamber considers that the summaries are sufficient.

26. The Chamber will deal with challenges to the summaries of the following witnesses on an individual basis:

DGH-005: The Chamber notes that the summary was not included in the Witness List filed on 13 May 2014. It was provided by way of the Corrigendum, which was filed within ten days of the Witness List. The Chamber considers that this clerical error was rectified within a reasonable timeframe and does not cause undue prejudice to the Prosecution. However, this witness was originally designated as a non-hybrid, Rule 92 *ter* witness. In the Corrigendum, the Defence clarified that he is a hybrid witness. While the Prosecution has not challenged the summary in this regard, the Chamber notes that there is no summary information provided on the *viva voce* portion of the witness's evidence. The Chamber finds that the summary should be revised to include a summary of his expected *viva voce* evidence and will order *ex proprio motu* that a revised summary be filed.

³⁹ See *supra*, paras 19-21.

⁴⁰ Motion, para. 5, confidential Annex A.

DGH-009: The Chamber notes that DGH-009 is designated as a *viva voce* witness, but that the summary reads as though it relates to a Rule 92 *ter* hybrid witness because it contains a distinct section summarising the expected *viva voce* portion of his testimony. The Defence will be ordered, *ex proprio motu*, to revise the witness summary in accordance with the indicated mode of testimony.

DGH-034: The Prosecution submits that the summary lists topics the witness will address but does not indicate what the witness will say about those topics. According to the Prosecution, in his prior testimony in the *Dokmanović* case (which the Defence indicates will be tendered pursuant to Rule 92 *ter* in this case⁴¹), DGH-034 did not testify about the functioning of the [SAO SBWS] government and due to the insufficient information contained in the summary on that topic, the Prosecution has no information about parts of his anticipated evidence.⁴² The Chamber determines that the Defence, in order to put the Prosecution on sufficient notice, should provide additional information on what the witness will say regarding the functioning of the government sessions and the scope of the government's authority. The Defence will be ordered to provide this information by way of a revised summary.

DGH-053: The Prosecution submits that the summary lists topics the witness will address but does not indicate what the witness will say about those topics.⁴³ The Defence responds that the summary is adequate because: the Defence has identified the witness's job when tensions started to rise in Croatia in 1990 and 1991; identified his position within the SDS party; notified that he will address cleavages within the party; described a specific meeting between Goran Hadžić and Franjo Tudman, whose date is given and which should be well known to the Prosecution already; and advised that the witness moved directly from Osijek to Serbia in the fall of 1991.⁴⁴ The Chamber determines that the summary reflects sufficient details on the topics to which DGH-053 is expected to testify and identifies the main facts of which he has personal knowledge. Accordingly, the Chamber considers that the Prosecution is on notice of the main facts upon which DGH-053 is expected to testify pursuant to Rule 92 *ter*. However, as noted above, the Chamber finds the summary of the *viva voce* portion of the witness's evidence to be inadequate.⁴⁵

DGH-066: The Defence has clarified that this is a *viva voce* witness.⁴⁶ However, the Chamber notes that the summary reads as though it relates to a Rule 92 *ter* hybrid witness because it contains a

⁴¹ Corrigendum, confidential Annex B, p. 31.

⁴² Motion, confidential Annex A, p. 3.

⁴³ Motion, confidential Annex A, p. 4.

⁴⁴ Response, para. 13.

⁴⁵ See *supra*, paras 19-20.

⁴⁶ Corrigendum, confidential Annex A, p. 2; confidential Annex B, pp. 75-76.

distinct section summarising the expected *viva voce* portion of his testimony. The Defence will be ordered, *ex proprio motu*, to revise the witness summary in accordance with the indicated mode of testimony.

DGH-067: The Prosecution submits that the three-line summary only specifies one issue that the witness will testify about, and does not explain further why this topic merits a statement and 1.5 hours testimony.⁴⁷ The Defence has clarified that the estimated time for direct examination of this Rule 92 *ter* hybrid witness is one hour.⁴⁸ Having accounted for this clarification, the Chamber determines that the summary as it relates to the witness statement sufficiently puts the Prosecution on notice of the main facts upon which the witness is expected to testify pursuant to Rule 92 *ter*. However, as noted above, the Chamber finds the summary of the *viva voce* portion of the witness's evidence to be inadequate.⁴⁹

DGH-071: The Prosecution submits that the summary contains a vague reference to the role of the JNA without further clarity.⁵⁰ The Chamber determines that the challenged sentence, “[t]he witness will describe the role of the JNA in the arrival and the arrival of volunteers from Šešelj’s party” is unclear and does not sufficiently put the Prosecution on notice of the main facts upon which the witness is expected to testify in this particular regard. The Defence will be ordered to provide additional information related to this evidence by way of a revised summary. As noted above, the Chamber also finds the summary of the *viva voce* portion of the witness's evidence to be inadequate.⁵¹

DGH-074: The Prosecution submits that the witness summary is not sufficiently detailed because the summary vaguely states that “the witness describes his understanding of the relationship between Arkan and Badža, including with reference to a specific incident when Arkan threatened Croats in Borovo Selo”, but provides no further detail on this issue.⁵² The Chamber determines that the Defence, in order to put the Prosecution on sufficient notice, should provide additional information on the specific incident referred to above. The Defence will be ordered to provide additional information related to this evidence by way of a revised summary.

DGH-085: The Prosecution submits that the summary is not sufficiently detailed because it states that the witness will “describe the occasions on which he met” Goran Hadžić, but does not say

⁴⁷ Motion, confidential Annex A, p. 4.

⁴⁸ Corrigendum, confidential Annex A, p. 2; confidential Annex B, p. 76.

⁴⁹ See *supra*, paras 19-20.

⁵⁰ Motion, confidential Annex A, p. 4.

⁵¹ See *supra*, paras 19-20.

⁵² Motion, confidential Annex A, p. 4.

when and where any of these meetings occurred.⁵³ The Chamber determines that the Defence, in order to put the Prosecution on sufficient notice, should provide additional information on the meetings the witness had with Goran Hadžić. The Defence will be ordered to provide additional information related to this evidence by way of a revised summary.

DGH-088: The Prosecution submits that the summary is not sufficiently detailed because the summary states, “[t]he witness will describe being taken to Borovo Selo school and describe what she experienced and saw there, which did not include seeing Goran Hadžić”, but does not provide any indication of what she did see at the school.⁵⁴ The Chamber determines that the Defence, in order to put the Prosecution on sufficient notice, should provide additional information regarding what the witness will say about what she experienced and saw at the school. The Defence will be ordered to provide additional information related to this evidence by way of a revised summary. As noted above, the Chamber also finds the summary of the *viva voce* portion of the witness’s evidence to be inadequate.⁵⁵

DGH-098: The Prosecution submits that the summary is not sufficient because it suggests that the witness has information relating to a certain Mr. Vujić but the proposed Rule 92 *ter* material contains no information relating to Vujić.⁵⁶ The Prosecution requests that the Defence provide any statement which contains information relating to Vujić.⁵⁷ The Prosecution further submits that the summary is inadequate because it announces the topic without describing what the witness will say about Vujić.⁵⁸ The Chamber determines that the Defence, in order to put the Prosecution on sufficient notice, should provide additional information on what the witness will say in relation to Mr. Vujić, of which no indication can be gleaned from either his testimony in the *Dokmanović* case or his witness statement of 28 January 1998.⁵⁹ The Defence will be ordered to provide additional information related to this evidence by way of a revised summary.

II. DISCLOSURE PURSUANT TO RULE 67(A)(II)

A. Submissions

27. In the Motion, the Prosecution requests the Chamber to order the Defence to provide copies of all witness statements that the Defence presently possesses and identify the witnesses from

⁵³ Motion, confidential Annex A, p. 5.

⁵⁴ Motion, confidential Annex A, p. 5.

⁵⁵ *See supra*, paras 19-20.

⁵⁶ Motion, confidential Annex A, p. 5.

⁵⁷ Motion, confidential Annex A, p. 5.

⁵⁸ Motion, confidential Annex A, p. 5.

⁵⁹ *See* Rule 65 *ter* documents 1D03153 and 1D03152 which are designated as the witness’s Rule 92 *ter* transcript of prior testimony and associated exhibit respectively.

whom it has yet to obtain statements, along with an indication of when it will be in a position to provide these statements.⁶⁰ The Prosecution submits that the Defence has failed to comply with the Chamber's order pursuant to Rule 67(A)(ii) to upload to eCourt, statements, if any, of its witnesses by 13 May 2014, which compounds the prejudice caused to the Prosecution by the deficiencies in the Defence Witness List.⁶¹ The Prosecution states that on 20 February 2014, the Chamber had ordered the Defence to (i) upload and release in eCourt copies of all written statements, if any, of all witnesses whom the Defence intends to call to testify at trial; and (ii) copies of all written statements or transcripts taken in accordance with Rule 92 *bis* and Rule 92 *quater* that the Defence intends to present at trial by 13 May 2014.⁶² The Prosecution submits that the Defence has misconstrued one of the guidelines issued by the Trial Chamber for the conduct of trial, requiring that Rule 92 *ter* motions be filed at least six weeks prior to the witness testifying, as altering the disclosure obligation for Rule 92 *ter* statements.⁶³

28. The Prosecution notes that the Defence intends to call 52 of its witnesses pursuant to Rule 92 *ter* but only identified the witness statements for 11 of these witnesses.⁶⁴ The Prosecution also notes that for two other Rule 92 *ter* witnesses (DGH-010 and DGH-039), the identified statements are not available in eCourt and requests that these be immediately uploaded to eCourt.⁶⁵ The Prosecution requests that the statements of the remaining Rule 92 *ter* witnesses be identified and provided in eCourt along with statements of any of its other witnesses in the possession of the Defence.⁶⁶ The Prosecution avers that the Rule 65 *ter* witness summaries, which distinguish between the portions that are canvassed in the Rule 92 *ter* statement and the portions that will be elicited *viva voce*, "strongly suggest" that the Defence is currently in possession of written statements for its hybrid Rule 92 *ter* witnesses.⁶⁷

29. In the Response, the Defence opposes the Motion and submits that the Prosecution assertion that the Defence has not disclosed statements of witnesses is incorrect and without foundation.⁶⁸ The Defence states that it is not withholding, in violation of Rule 67(A)(ii), any statements of its

⁶⁰ Motion, paras 2, 15.

⁶¹ Motion, paras 2, 14; Reply, para. 6.

⁶² Motion, paras 2, 12, *citing* Order on Defence Case and Scheduling Order.

⁶³ Motion, paras 2, 14, *citing* Order on Guidelines, Annex, para. 20, which states that "[m]otions for the admission of a Rule 92 *ter* statement should be submitted to the Chamber at least six weeks prior to the witness taking the stand. Revisions to the Rule 92 *ter* statement, if any, may be submitted to the Chamber and the opposing party after the witness's arrival in The Hague. Finalised statements shall be filed no later than 24 hours (one working day) prior to the witness taking the stand and should clearly mark the changes to the draft statement in a clear and comprehensive manner, for example, by use of the "track changes" function in Microsoft Word. [...]".

⁶⁴ Motion, para. 13, *citing* Defence Notice of Rule 65 *ter* (G) Filings, para. 3. The 11 witnesses being: DGH-009, DGH-016, DGH-034, DGH-035, DGH-036, DGH-042, DGH-043, DGH-091, DGH-098, DGH-100, and DGH-102.

⁶⁵ Motion, para. 13. From these submissions, the Trial Chamber understands that the Defence uploaded to eCourt the 11 statements that were also identified in its Rule 65 *ter* filings.

⁶⁶ Motion, para. 13.

⁶⁷ Motion, para. 14.

witnesses from the Prosecution.⁶⁹ The Defence apologises for disclosing the statement of DGH-039 after the 13 May 2014 deadline due to an oversight.⁷⁰ The Defence asserts that non-finalised or draft “statements” of its witnesses are not subject to disclosure.⁷¹ It argues that it has no obligation to identify witnesses for whom it has yet to obtain a statement and indicate when it will be in a position to provide statements for them—an obligation that it submits would be “unprecedented, burdensome, intrusive, and prejudicial”.⁷²

30. In the Reply, the Prosecution seeks leave to reply to the Defence submission that it is not withholding witness statements presently in its possession.⁷³ The Prosecution refers to an email exchange of 4 June 2014 between the parties, to which the Chamber was copied, where the Defence stated (i) that it is not obliged to disclose statements for witnesses pursuant to Rule 92 *ter* any earlier than six weeks prior to their intended testimony and (ii) that since DGH-010 is not intended to take the stand in the next six weeks, the Defence has no obligation to disclose his statement presently.⁷⁴ The Prosecution submits that this indication by the Defence is contrary to its assertion in the Response that it has not withheld statements in its possession and also contradicts the express terms of Rule 67(A)(ii) and the Order on Defence Case.⁷⁵ It maintains that the statement of DGH-010, which “obviously exists now”, must be disclosed along with all other witness statements currently in the possession of the Defence.⁷⁶ The Prosecution submits that the Defence reference to the Order on Defence Case is inapposite, since that order refers to the filing of Rule 92 *ter* motions and finalised witness statements but does not override, as it could not have, the express terms of Rule 67(A)(ii) by permitting delayed disclosure of statements in the Defence’s possession until six weeks prior to the witness’s testimony.⁷⁷

31. In the Sur-Reply, the Defence requests leave to file supplementary submissions to counter “an allegation of impropriety”, made by the Prosecution in the Reply, in the interests of justice and fairness.⁷⁸ The Defence submits that the 19 Rule 92 *ter* witnesses for whom no Rule 92 *ter* statement has yet been disclosed, belong to two categories: first, witnesses for whom no Rule 92 *ter*

⁶⁸ Response, paras 1, 4, 15, 16-17, 19.

⁶⁹ Response, paras 16-17.

⁷⁰ Response, para. 17.

⁷¹ Response, para. 17, *citing Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Decision on Prosecution Urgent Motion Related to Non-Compliance of Stanišić Defence with Rule 65 *ter*(G) and Rule 67 of the Rules, 12 October 2011, paras 25-26, 30.

⁷² Response, paras 15, 18.

⁷³ Reply, paras 1, 4-5.

⁷⁴ Reply, para. 5, *citing* Email from Defence Counsel, 4 June 2014.

⁷⁵ Reply, para. 6.

⁷⁶ Reply, para. 7.

⁷⁷ Reply, para. 8.

⁷⁸ Sur-Reply, para. 1.

statement has been finalised and for whom the Prosecution does not object to the non-disclosure;⁷⁹ and second, witnesses for whom signed Rule 92 *ter* statements are in the possession of the Defence.⁸⁰ With regard to the second category, the Defence notes that very recently it came into possession of a small number of such statements, including the statement of DGH-010.⁸¹ The Defence adopts the view, as expressed in the email exchange of 4 June, that the second category of Rule 92 *ter* statements are not subject to disclosure until six weeks prior to the witness taking the stand.⁸² It argues that the Trial Chamber has the authority to, and did in fact, alter the disclosure obligation imposed by Rule 67(A)(ii) by the Order on Defence Case, which deems all statements that may be subject to further revisions to be “draft statements”.⁸³

B. Applicable Law

32. Rule 67(A)(ii) of the Rules provides that, within the time-limit prescribed by the Trial Chamber, at a time not prior to a ruling under Rule 98 *bis*, but not less than one week prior to the commencement of the Defence case, the Defence shall provide to the Prosecutor copies of statements, if any, of all witnesses whom the Defence intends to call to testify at trial; copies of all written statements taken in accordance with Rule 92 *bis*, Rule 92 *ter*, or Rule 92 *quater*, which the Defence intends to present at trial; and copies of the statements, if any, of additional witnesses shall be made available to the Prosecutor prior to a decision being made to call those witnesses.

33. In the Order on Defence Case, the Chamber ordered the Defence, by no later than six weeks prior to the commencement of the Defence case, to upload to and release in eCourt (to the Chamber, Prosecution, and Registry), pursuant to Rule 67(A)(ii): copies of statements, if any, of all witnesses whom the Defence intends to call to testify at trial; and copies of all written statements or transcripts taken in accordance with Rule 92 *bis* or Rule 92 *quater* that the Defence intends to present at trial.⁸⁴ The Chamber also ordered the Defence to file a list of exhibits the Defence intends to tender in its case and upload to and release in eCourt (to the Chamber, Prosecution, and Registry) copies of the exhibits.⁸⁵

34. In addition, the Chamber, recalling the Order on Guidelines, informed the Defence that (i) it shall file any motions for the admission of a Rule 92 *ter* statement at least six weeks prior to the witness taking the stand, (ii) revisions to the Rule 92 *ter* statement, if any, may be submitted to the

⁷⁹ Sur-Reply, para. 2.

⁸⁰ Sur-Reply, para. 3.

⁸¹ Sur-Reply, para. 3, *referring* to the email exchange of 4 June 2014.

⁸² Sur-Reply, para. 4.

⁸³ Sur-Reply, para. 4, *citing* Order on Defence Case, para. 12(g).

⁸⁴ Order on Defence Case, para. 12(f)(iv).

⁸⁵ Order on Defence Case, para. 12(f)(vi).

Chamber and the Prosecution after the witness's arrival in The Hague, (iii) finalised statements shall be disclosed no later than 24 hours (one working day) prior to the witness taking the stand and should clearly mark the changes to the draft statement in a clear and comprehensive manner, for example, by use of the "track changes" function in Microsoft Word, and (iv) the Defence is encouraged to finalise Rule 92 *ter* statements prior to a witness's arrival in The Hague.⁸⁶

C. Discussion

35. As a preliminary matter, the Chamber will grant the Prosecution leave to file the Reply, which addresses new issues related to the Motion that were raised by the parties on 4 June 2014 via email. Because the Reply raises new issues to which the Defence has not had the opportunity to respond, the Chamber will grant the Defence leave to make supplementary submissions through the filing of a Sur-Reply.⁸⁷

36. In the Corrigendum the Defence corrected a number of errors in the Witness List relating to the designated mode of testimony for some of its witnesses, clarifying that it would call 42 witnesses pursuant to Rule 92 *ter*.⁸⁸ In light of the Corrigendum, the Chamber understands the Defence submission on the non-disclosure of 19 Rule 92 *ter* witnesses⁸⁹ to mean that, as of the filing of the Sur-Reply, the statements of 23 out of the 42 Rule 92 *ter* witnesses had been disclosed to the Prosecution.⁹⁰ The Chamber also notes that the statement of DGH-039 was disclosed by the Defence, with apologies for the delay, since the filing of the Motion as well as the statement of DGH-010.⁹¹

37. The Chamber considers that the Defence has conflated the Chamber's Order on Defence Case in relation to the time line set for disclosure of witness statements and the time line for filing motions pursuant to Rule 92 *ter*. When it ordered the Defence to file its Rule 92 *ter* motions at least six weeks prior to the witness taking the stand, the Chamber did not alter the disclosure obligation of the Defence under Rule 67(A)(ii). Indeed, it was pursuant to this Rule on disclosure that the

⁸⁶ Order on Defence Case, para. 12(g), *citing* Order on Guidelines, Annex, para. 20.

⁸⁷ *Prosecutor v. Radić*, Case No. IT-98-30/1-R.1, Decision on Prosecution Motion for Leave to File Sur-Reply to Defence Reply in Request for Review by Mlado Radić, 9 May 2006, pp 2-3; *Prosecutor v. Gotovina and Markač*, Case No. IT-06-90-A, Decision on Prosecution's Request for Leave to File Sur-Reply to Respond to False Allegations in Markač's Reply Brief, 1 November 2011, p. 1; *Prosecutor v. Bošković and Tarčulovski*, Case No. IT-04-82-A, Decision on Johan Tarčulovski's Motion for Leave to Present Appellate Arguments in Order Different from that Presented in Notice of Appeal, to Amend the Notice of Appeal, and to File Sur-Reply, and on Prosecution Motion to Strike, 26 March 2009, para. 15.

⁸⁸ Corrigendum, Annex A.

⁸⁹ Sur-Reply, para. 2.

⁹⁰ The Chamber notes that, since the filing of these submissions, the statements for some witnesses, for example, DGH-044, DGH-046, DGH-053, DGH-065, DGH-083, DGH-086, and DGH-099 have been disclosed by the Defence in the context of the respective Rule 92 *ter* motions for these witnesses.

⁹¹ *See* Rule 65 *ter* document 1D00465 and Response, para. 17 for DGH-039 and Rule 65 *ter* document 1D02858 for DGH-010.

Chamber directed the Defence to provide copies of all statements, if any, in its possession for all witnesses whom the Defence intends to call to testify at trial to the Prosecution by 13 May 2014.⁹²

38. While the Defence's disclosure obligation does not attach to draft or non-finalised Rule 92 *ter* statements, the Chamber considers that a statement once reviewed and signed by a witness and in the possession of the Defence, becomes a finalised statement and subject to disclosure. Any possibility of further revision does not render such signed statements "draft statements", as argued by the Defence, under paragraph 12(g) of the Order on Defence Case.⁹³

39. The Chamber considers that signed Rule 92 *ter* statements in the possession of the Defence ought to have been disclosed to the Prosecution and uploaded to eCourt as and when they came into the possession of the Defence. This obligation applies to the statements of the witnesses referred to by the Defence in paragraph 3 of the Sur-Reply, which have yet to be disclosed. The Chamber will direct the Defence to disclose to the Prosecution all signed statements immediately. With respect to any Rule 92 *ter* witness for whom their Rule 92 *ter* statement has yet to be obtained or signed, the Chamber will set a deadline by which the Defence must obtain, have signed, and disclose these to the Prosecution. Accordingly, the Chamber considers moot the request for the Defence to inform the Prosecution of when it intends to obtain and finalise statements for the witnesses for whom it does not already have one. The Chamber reminds the Defence of its obligation to disclose the statements of any other witnesses on its Witness List that it possesses.

III. DISPOSITION

40. Accordingly, the Trial Chamber, pursuant to Rules 54, 65 *ter*, 67, and 126 *bis* of the Rules, hereby:

GRANTS the Prosecution leave to file the Reply;

GRANTS the Defence leave to file the Sur-Reply;

GRANTS the Motion in part;

ORDERS the Defence to disclose to the Prosecution copies of all signed statements, presently in the possession of the Defence, for any of its Rule 92 *ter* witnesses by 31 July 2014;

⁹² Order on Defence Case, para. 12(f)(iv)(i).

⁹³ Order on Defence Case, para. 12(g).

ORDERS the Defence to obtain, finalise, and disclose the signed statements of all Rule 92 *ter* witnesses for whom it has not yet done so by 8 August 2014 and to file a disclosure report of the same;

ORDERS the Defence—by no later than 8 August 2014—to file a revised version of Annex B of its Rule 65 *ter* (G) Filings:

- (a) providing the date of birth, place of birth, and the witness's father's name for all witnesses for which it has not already done so;
- (b) indicating the points in the Indictment to which each of its witnesses, barring DGH-005, DGH-028, DGH-091, and DGH-119, will testify with specific references to paragraphs in the Indictment to which their anticipated testimony primarily pertains;
- (c) providing revised summaries with additional information regarding the *viva voce* portion of the expected testimony and clearly distinguishing the portions of *viva voce* evidence from Rule 92 *ter* evidence for witnesses: DGH-005, DGH-006, DGH-010, DGH-017, DGH-019, DGH-030, DGH-031, DGH-046, DGH-049, DGH-053, DGH-065, DGH-067, DGH-071, DGH-076, DGH-086, DGH-088, DGH-091, DGH-099, DGH-104, and DGH-107;
- (d) providing revised summaries rectifying the deficiencies described in this Decision at paragraph 26 for witnesses: DGH-009, DGH-034, DGH-066, DGH-071, DGH-074, DGH-085, DGH-088, and DGH-098; and

DENIES the Motion in all other respects.

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

Done this twenty-fifth day of July 2014,
At The Hague,
The Netherlands.



Judge Guy Delvoic
Presiding

[Seal of the Tribunal]