

**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 August 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 August 2014

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC

**DECISION ON DEFENCE MOTION FOR ADMISSION OF EVIDENCE OF
DGH-083 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 DGH-083 Pursuant to Rule 92 *ter*”, filed publicly with a confidential annex on 2 July 2014 (“Motion” and “Confidential Annex”, respectively). The “Prosecution Response to Motion for Admission of Evidence of DGH-083 Pursuant to Rule 92 *ter*” was filed confidentially on 16 July 2014 (“Response”). On 23 July 2014, the Defence filed a “Request for Leave to Reply and Reply to Prosecution Response to Motion for Admission of Evidence of DGH-083 Pursuant to Rule 92 *ter*” (“Reply”).

A. Submissions

2. In the Motion, the Defence requests the admission of DGH-083’s written statement and proposed associated exhibits pursuant to Rule 92 *ter* of the Rules of Procedure and Evidence of the Tribunal (“Rules”), subject to the witness’s in court affirmation.¹ The Confidential Annex contains the statement as well as the proposed associated exhibits in sub-annexes A to I. The Defence further requests the addition of the statement and the proposed associated exhibits to its Rule 65 *ter* exhibit list, which are available in eCourt under Rule 65 *ter* number 1D03607.²

3. The Defence submits that DGH-083’s written statement is relevant, probative, and that its admission under Rule 92 *ter* of the Rules will promote the expeditious conduct of proceedings.³ The Defence argues that the statement is relevant as it contains information pertaining to a number of events which happened in Croatia during 1991 and 1992.⁴ The Defence asserts that the admission of the statement will save court time as the full content of the statement could not be adduced within the 1.5 hours allotted for examination of this witness.⁵

4. In the Response, the Prosecution submits that the Chamber should exclude the statement and sub-annexes A, B, G, and H as they are “fraught with generalisations, unsupported opinion, and *tu quoque* assertions”.⁶ It requests that the Chamber require DGH-083 to testify *viva voce*, or alternatively, redact the “most defective paragraphs” of her statement and allow no more than 30 minutes of examination-in-chief.⁷ The Prosecution does not object to the admission of sub-annexes C, D, and E.⁸

¹ Motion, paras 1, 12.

² Motion, paras 1, 12.

³ Motion, paras 5-7.

⁴ Motion, para. 5.

⁵ Motion, para. 7.

⁶ Response, para. 1.

⁷ Response, paras 1-2, 5, 15-17.

⁸ See Response, paras 1, 17.

5. The Prosecution argues that because DGH-083's proposed evidence is largely based on what she heard from her husband, who was a member of Serb Forces in Croatia at the relevant time, she should provide the evidence in *viva voce* form so that her credibility can be adequately assessed and tested in court.⁹ The Prosecution submits that proposed evidence of DGH-083 that concerns crimes committed against Serbs is *tu quoque* and should be excluded whether it is presented in written or oral form.¹⁰ Moreover, according to the Prosecution, DGH-083's statement is replete with her opinions and "bald conclusions on ultimate issues to be determined by the Trial Chamber."¹¹ It also submits that the statement is full of "sweeping, unsubstantiated generalisations" which lack sufficient probative value to be admitted.¹²

6. With regard to sub-annex G of the Confidential Annex, a letter dated 2 August 1994 by Nora Beloff to Richard Goldstone concerning a report by the United Nations ("UN") Commission of Experts (exhibit P3107), the Prosecution submits that by inserting this annex into DGH-083's statement, the Defence is attempting to circumvent the Chamber's rule on tendering a single Rule 92 *ter* statement and tender into evidence a third-party statement devoid of any genuine nexus to DGH-083.¹³

7. In the Reply, the Defence submits that hearsay evidence is not inadmissible.¹⁴ The Defence adds that "[t]he Prosecution's assertions about 'opinion' and 'generalizations' - aside from being wrong - can be tested during cross-examination."¹⁵ The Defence also submits that none of DGH-083's evidence is tendered to establish *tu quoque*.¹⁶ With respect to sub-annex G, the Defence replies that it is admissible because DGH-083 corroborates its contents and the letter specifically refers to DGH-083.¹⁷

B. Applicable Law

8. 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

⁹ Response, paras 4-5.

¹⁰ Response, paras 6-9.

¹¹ Response, para. 10.

¹² Response, para. 11.

¹³ Response, para. 8.

¹⁴ Reply, para. 2.

¹⁵ Reply, para. 2.

¹⁶ Reply, para. 4.

¹⁷ Reply, para. 8.

(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.

9. 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.¹⁸ 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.¹⁹ 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.²⁰ 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.²¹

C. Discussion

10. DGH-083's proposed evidence, in the form of a written statement, contains information about, *inter alia*, (a) historical and political developments in Croatia, including the changes after the 1990 elections;²² (b) the takeover of Baranja, and Beli Manastir in particular, in August 1991 and events following the takeover;²³ (c) the treatment of Croats in Baranja after the takeover;²⁴ and (d) the arrival of refugees to the Baranja area.²⁵ The Chamber accordingly 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. In relation to the Prosecution's concerns as to DGH-083's credibility, the Chamber is of the opinion that DGH-083's credibility can be fully assessed and tested during cross-examination.

¹⁸ *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.

¹⁹ *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.

²⁰ *Đorđević* Decision, para. 7; *Lukić and Lukić* Decision, para. 15; *Stanišić and Simatović* Decision, para. 19.

²¹ *Đorđević* Decision, para. 5; *Lukić and Lukić* Decision, paras 15-16.

²² See e.g., paras 2-24 of DGH-083's written statement.

²³ See e.g., paras 25-32 of DGH-083's written statement.

²⁴ See e.g., paras 59-69 of DGH-083's written statement.

²⁵ See e.g., paras 37, 52-58 of DGH-083's written statement.

11. With respect to the proposed associated exhibits contained in sub-annexes A-I of the Confidential Annex, the Chamber notes that sub-annexes F and I are already admitted into evidence as exhibits P3107 and P2416.2398, respectively.

12. Turning to the remaining proposed associated exhibits, the Chamber fails to see the relevance of sub-annex A, Franjo Tudman's commentary on the Jewish community as presented in the excerpts of a book entitled "Wastelands-Historic Truth", to the case at hand. The Chamber is not satisfied that the document forms an inseparable and indispensable part of DGH-083's written statement. Sub-annex B is a letter by DGH-083, dated 25 November 1991. The letter contains relevant information relating to the takeover of Beli Manastir on 18 August 1991, an event also described in DGH-083's written statement.²⁶ The Chamber is therefore satisfied that the document has probative value and that it forms an inseparable and indispensable part of the written statement.

13. Confidential sub-annex C contains a summary of a report that DGH-083 confirmed giving.²⁷ Confidential sub-annex D is a telegram by DGH-083.²⁸ Confidential sub-annex E is a follow-up to the telegram found in sub-annex D.²⁹ The Chamber is satisfied that sub-annexes C, D, and E are relevant, have probative value, and form an inseparable and indispensable part of DGH-083's written statement.

14. Sub-annex G is a letter by Nora Beloff to Richard Goldstone regarding a report of the UN Commission of Experts (exhibit P3107). The letter specifically references DGH-083's account of events in Osijek, and DGH-083 makes positive reference to the letter in her written statement. Sub-annex H is an obituary for Ms. Beloff, published in *The Independent*, which clarifies Ms. Beloff's background. The Chamber finds that the letter and the obituary are relevant, have probative value, and form an inseparable and indispensable part of DGH-083's written statement.

15. With regard to the length of the Defence's prospective examination-in-chief of DGH-083, 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-083, when it granted the Defence 140 hours for its case-in-chief.³⁰ The Chamber notes that it is primarily within the discretion of the presenting party to decide how to use time allocated for the presentation of its case. The Chamber sees no reason to modify the time allotted for this witness.

²⁶ See paras 25-30 of DGH-083's written statement.

²⁷ See para. 70 of DGH-083's written statement.

²⁸ See paras 73 and 76 of DGH-083's written statement.

²⁹ See para. 75 of DGH-083's written statement.

³⁰ 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.

D. Disposition

16. 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) **DECIDES** that the written statement of DGH-083 is appropriate for admission into evidence;
- (c) **DECIDES** further that sub-annexes B, C, D, E, G, and H are appropriate for admission into evidence;
- (d) **GRANTS** the Defence's request to add the written statement of DGH-083 and sub-annexes B, C, D, E, G, and H to its Rule 65 *ter* exhibit list;
- (e) **DENIES** the Motion in all other respects; and
- (f) **INFORMS** the parties that the Chamber will make a final decision on whether to admit the written statement of DGH-083, if the conditions set forth in Rule 92 *ter* have been fulfilled, when the witness gives evidence in these proceedings.

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

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



Judge Guy Delvoic
Presiding

[Seal of the Tribunal]