

**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: 11 September 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: 11 September 2014

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC

**DECISION ON DEFENCE MOTION FOR ADMISSION OF EVIDENCE OF
DGH-010 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 seised of the “Defence Motion for Admission of Evidence of David Češić (DGH-010) Pursuant to Rule 92 *ter*” with confidential Annexes filed on 21 July 2014 (“Motion”). The Prosecution filed the “Consolidated Prosecution Response to Motions for Admission of Evidence of DGH-010 and DGH-099 Pursuant to Rule 92 *ter*” confidentially on 1 August 2014 (“Response”). The Defence filed the “Request for Leave to Reply and Reply to Consolidated Prosecution Response to Motions for Admission of Evidence of DGH-010 and DGH-099 Pursuant to Rule 92 *ter*” confidentially on 7 August 2014 (“Reply”).

A. Submissions

2. In the Motion, the Defence requests the admission of the written statement of DGH-010 pursuant to Rule 92 *ter* of the Rules of Procedure and Evidence (“Rules”), subject to the witness’s in court affirmation.¹ The Defence submits that DGH-010’s written statement is relevant, probative, and that its admission under Rule 92 *ter* of the Rules will promote “the expeditious conduct of proceedings.”² The Defence submits that the witness’s statement contains information relevant to, *inter alia*, (a) events in Borovo Selo leading to, and on, 2 May 1991; (b) the attack on Dalj; (c) an altercation with GH-015; (d) DGH-010’s role in providing security for government buildings in Erdut; and (e) the events at Velepomet on 20 November 1991.³ The Defence further submits that DGH-010’s evidence could not be adduced within the one and a half hours allocated for his examination without the admission of the witness’s statement.⁴

3. In the Response, the Prosecution objects to the admission of the evidence of DGH-010 pursuant to Rule 92 *ter* of the Rules.⁵ The Prosecution submits that DGH-010 addresses important issues—such as the establishment and activities of the Serbian National Security (“SNB”) unit, the cooperation of SNB members with Arkan’s Men, the credibility of GH-024, and the acts and conduct of Goran Hadžić in relation to the SNB—which should be led *viva voce*.⁶ The Prosecution also asserts that DGH-010’s evidence should be led *viva voce* because the witness has not testified previously before the Tribunal and there is no record of the questions asked and answers given in the interview.⁷ Further, the Prosecution argues that the admission of the statement will prejudice its

¹ Motion, paras 1, 8.

² Motion, paras 5-7.

³ Motion, para. 5.

⁴ Motion, para. 7.

⁵ Response, para. 1.

⁶ Response, paras 2-3.

⁷ Response, para. 3.

ability to seek a remedy for an alleged violation of Rule 90(H)(ii) of the Rules.⁸ In this respect, the Prosecution submits that paragraph 12 of DGH-010's witness statement contains an allegation concerning Prosecution witness GH-024 which was never put to GH-024 when he testified.⁹ Finally, the Prosecution submits that the substantive content of DGH-010's witness statement, which is only three pages, can be led during the one and a half hours of *viva voce* testimony currently scheduled for the witness and the Defence fails to show that the admission of the statement will save in-court time.¹⁰

4. In the Reply, the Defences asserts that (a) DGH-010's testimony is not more important than that of numerous Prosecution witnesses that was tendered and admitted pursuant to Rule 92 *ter* of the Rules;¹¹ (b) testimony going to the acts and conduct of an accused is not a factor against admission pursuant to Rule 92 *ter* and the Prosecution can explore any matters it considers of importance during cross-examination;¹² (c) the Chamber has repeatedly rejected the argument that the absence of a verbatim record of questions and answers should be a factor against admission of evidence pursuant to Rule 92 *ter*;¹³ and (d) as demonstrated by the statements of at least three Prosecution witnesses, statements do not have to be lengthy to be admissible pursuant to Rule 92 *ter*.¹⁴ Finally, the Defence asserts that there was no violation of Rule 90(H)(ii), as the cross-examination of GH-024 took place more than a year before the Defence obtained the information from DGH-010, in the form of his written statement.¹⁵ The Defence further argues that the Prosecution's legally erroneous interpretation of Rule 90(H)(ii) would "asymmetrically burden the Defence".¹⁶

B. Applicable Law

1. Rule 92 *ter*

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

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

(i) the witness is present in court;

⁸ Response, para. 3.

⁹ Response, para. 3.

¹⁰ Response, paras 2, 4.

¹¹ Reply, para. 3.

¹² Reply, para. 4.

¹³ Reply, para. 5.

¹⁴ Reply, para. 6.

¹⁵ Reply, para. 7.

¹⁶ Reply, para. 7.

- (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.¹⁷ 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.¹⁸ 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.¹⁹ 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.²⁰

2. Rule 90(H)(ii)

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

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

8. Rule 90(H)(ii) of the Rules facilitates the fair and efficient presentation of evidence. It affords the witness being cross-examined “the possibility of explaining himself on those aspects of his testimony contradicted by the opposing party's evidence, so saving the witness from having to reappear needlessly in order to do so and enabling the Trial Chamber to evaluate the credibility of his testimony more accurately”.²¹ Further, when a cross-examining party complies with Rule 90(H)(ii) of the Rules it puts the opposing party on notice that the witness's evidence is contested.²²

¹⁷ *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.

¹⁸ *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.

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

²⁰ *Đorđević* Decision, para. 5; *Lukić and Lukić* Decision, paras 15-16.

²¹ *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Judgement, 17 March 2009 (“*Krajišnik*, Appeal Judgement”), para. 367; *Karera v. The Prosecutor*, Case No. ICTR-01-74-A, Judgement, 2 February 2009, (“*Karera* Appeal Judgement”)

9. In order to fulfil the requirement of Rule 90(H)(ii) of the Rules, it is sufficient that the cross-examining party put the nature of its case to the witness.²³ In this regard, Rule 90(H)(ii) of the Rules allows for some flexibility depending on the circumstances of the trial by requiring the cross-examining party to put to the witness the general substance of the contradictory evidence and not every detail that it does not accept.²⁴ In circumstances where it is obvious that the witness's version of events is being challenged, there is no need for the cross-examining party to put its case to the witness.²⁵

10. Non-compliance with Rule 90(H)(ii) of the Rules does not *per se* create a bar to the admission of evidence.²⁶ Where evidence is presented to contradict a Prosecution witness, the nature of which was not put to that witness, it is within the Trial Chamber's discretion to consider appropriate remedies, if any.²⁷ A Chamber must evaluate the circumstances and decide on a case-by-case basis what weight, if any, should be attached to such evidence, taking into account the fact that the Prosecution witness was not given the opportunity to comment on the contradictory evidence.²⁸ Parties may make any argument as to the weight the Chamber should ascribe to the evidence in their final trial briefs and closing arguments.²⁹ If the circumstances are sufficiently egregious, the Trial Chamber may preclude the Defence from adducing such contradictory evidence.³⁰

para. 24; *Prosecutor v. Brdanin and Talić*, Case No. IT-99-36-AR73.7, Decision on the Interlocutory Appeal Against a Decision of the Trial Chamber, as of Right, 13 June 2002, pp. 3-4.

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

²³ *Krajišnik*, Appeal Judgement, para. 368. See also *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Decision on Submissions by Stanišić Defence Regarding Prosecution's Rule 90 (H)(ii) Obligations During Cross-Examination of Defence Witness Borislav Perlević, 12 June 2012 ("*Stanišić and Simatović* Decision of 12 June 2012"), para. 11.

²⁴ *Krajišnik*, Appeal Judgement, para. 368; *Karera* Appeals Judgement, para. 26. See also *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, Decision on Prosecution's Motion Seeking Clarification in Relation to The Application of Rule 90(H)(ii), 12 May 2010 ("*Stanišić and Župljanin* Decision"), para. 17; *Brdanin and Talić* Decision, para. 14.

²⁵ *Krajišnik*, Appeal Judgement, para. 368; *Karera* Appeals Judgement, para. 26; *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Guidance on Rule 90(H)(ii) And Decision on Stanišić Defence Submissions on Rule 90(H)(ii), 19 October 2011 ("*Stanišić and Simatović* Decision of 19 October 2011"), para. 20; *Brdanin and Talić* Decision, para. 14.

²⁶ See *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Lukić Defence Motions for Admission of Documents from Bar Table, 11 June 2008 ("*Milutinović et al.* Decision"), para. 77; See also *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Judgement, 26 February 2009 ("*Milutinović et al.* Trial Judgement"), paras 51-52; *Popović et al.*, Case No. IT-05-88-T, Order Setting Forth Guidelines for the Procedure under Rule 90(H)(ii), 6 March 2007 ("*Popović et al.* Decision of 6 March 2007"), para. 3.

²⁷ *Milutinović et al.* Decision, para. 77; *Stanišić and Župljanin* Decision, para. 21; See also *Brdanin and Talić* Decision, para. 20.

²⁸ *Stanišić and Župljanin* Decision, para. 21; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Judgement, 26 February 2009, paras 51-52; *Milutinović et al.* Decision, para. 77.

²⁹ *Milutinović et al.* Decision, para. 77.

³⁰ *Stanišić and Župljanin* Decision, para. 21; *Popović et al.* Decision of 6 March 2007, para. 3.

C. Discussion

11. DGH-010's proposed evidence, in the form of a written statement, contains information about, *inter alia*, (a) an incident in Borovo Selo on 2 May 1991 and its aftermath;³¹ (b) the formation, membership, and arming of Serb guards in Borovo Selo;³² (c) the attack on Dalj;³³ (d) the formation, membership, and functions of a group that provided security for government buildings in Erdut, including whether it was called the "SNB";³⁴ (e) the presence of certain alleged members of the alleged JCE at government buildings in Erdut;³⁵ and (f) events at Velepromet on 20 November 1991.³⁶

12. The Chamber notes the Prosecution's submission that the admission of paragraph 12 of the tendered witness statement will prejudice its ability to seek a remedy for an alleged violation of Rule 90(H)(ii) of the Rules. The Chamber first notes that the written statement of DGH-010 was signed and confirmed by the witness over one year after GH-024 testified.³⁷ Further, the Chamber has reviewed the contested portion of DGH-010's written statement as well as the portion of GH-024's evidence that relates to the same subject matter.³⁸ While the evidence of DGH-010 contains details not found in the evidence of GH-024, the Chamber is not of the view that the evidence in paragraph 12 contradicts the evidence of GH-024 such that Rule 90(H)(ii) of the Rules would require that it be raised with GH-024. The Chamber is therefore not convinced that paragraph 12 of DGH-010's written statement is inadmissible pursuant to Rule 92 *ter*. The Prosecution may make any argument as to the weight the Chamber should ascribe to the contested portion of DGH-010's statement in its final trial brief and closing arguments.

13. Further, the Chamber does not consider that the evidence in the written statement is of such a nature that it must be led *viva voce*. Moreover, neither the fact that DGH-010 has not testified previously before the Tribunal, nor the lack of a record of the questions asked and answered during the interview, require that the evidence of DGH-010 be led *viva voce*. The Prosecution will have the opportunity to explore the matters it considers of importance during the cross-examination of the witness.

³¹ Rule 65 *ter* 1D02858, Witness Statement of DGH-010, paras 6-7.

³² Rule 65 *ter* 1D02858, Witness Statement of DGH-010, paras 3-5.

³³ Rule 65 *ter* 1D02858, Witness Statement of DGH-010, para. 8.

³⁴ Rule 65 *ter* 1D02858, Witness Statement of DGH-010, paras 11-14, 16, 18.

³⁵ Rule 65 *ter* 1D02858, Witness Statement of DGH-010, para. 15.

³⁶ Rule 65 *ter* 1D02858, Witness Statement of DGH-010, para. 19.

³⁷ The Chamber notes that GH-024 testified before the Tribunal on 4-5 February 2013 and that the written statement of DGH-010 was signed and confirmed by DGH-010 on 2 April 2014. *See* Rule 65 *ter* number 1D02858, Statement of DGH-010.

³⁸ GH-024, P1040, Witness Statement, 30 October 2012, paras 138-143 (confidential).

14. The Chamber considers that the proposed evidence is appropriate to be admitted in written form and finds that the tendered statement is relevant, has probative value, and is appropriate for admission pursuant to Rules 89(C) and 92 *ter* of the Rules.


D. Disposition

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

- a) **GRANTS** the Defence leave to file the Reply;
- b) **DECIDES** that the written statement of DGH-010, Rule 65 *ter* number 1D02858, is appropriate for admission into evidence; and
- c) **INFORMS** the parties that the Trial Chamber will make a final decision on whether to admit the written statement of DGH-010, 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 eleventh day of September 2014,
At The Hague,
The Netherlands.


Judge Guy Delvoie
Presiding

[Seal of the Tribunal]