

**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: 26 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: 26 September 2014

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC

**DECISION ON PROSECUTION SUBMISSION CONCERNING DEFENCE
COMPLIANCE WITH TRIAL CHAMBER ORDER OF 25 JULY 2014 AND
DEFENCE REQUEST FOR RECONSIDERATION**

The Office of the Prosecutor:

Mr. Douglas Stringer

Counsel for Goran Hadžić:

Mr. Zoran Živanović
Mr. Christopher Gosnell

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 Submission Concerning Defence Compliance with Trial Chamber Order of 25 July 2014”, filed on 14 August 2014 (“Motion”). The Defence filed the “Response to Prosecution Submission Concerning Defence Compliance with Trial Chamber Order of 25 July 2014, and Request for Reconsideration”, with a confidential annex, on 21 August 2014 (“Response”). On 26 August 2014, the Prosecution filed the “Prosecution Request for Leave to Reply and Reply to Response to Prosecution Submission Concerning Defence Compliance with Trial Chamber Order of 25 July 2014, and Request for Reconsideration” (“Reply”).

A. Background

1. On 25 July 2014, after litigation between the parties regarding the disclosure of the statements of the Defence’s Rule 92 *ter* witnesses, the Chamber ordered the Defence to (i) 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, and (ii) obtain, finalise, and disclose the signed statements of all Rule 92 *ter* witnesses for whom it had not yet done so by 8 August 2014 and to file a disclosure report of the same.¹ On 8 August 2014, the Defence filed the “Notice of Compliance with Trial Chamber Order to of [*sic*] 25 July 2014” (“Notice of Compliance”), which, *inter alia*, set out the actions the Defence had taken in relation to the Order of 25 July.

2. On 12 August 2014, in the course of email correspondence between the Defence and the Chamber’s legal staff, to which the Prosecution was privy, the Defence indicated that for some of its Rule 92 *ter* witnesses it had not yet obtained a finalised Rule 92 *ter* statement and that the Defence understood that there must be disclosure of such a statement no later than six weeks prior to a witness’s appearance.²

B. Submissions

3. In the Motion, the Prosecution submits that the Defence has not adhered to the Order of 25 July in several areas and that these shortcomings are adversely impacting the Prosecution’s ability to prepare for the Defence case.³ The Prosecution submits that the Defence has yet to disclose

¹ Decision on Prosecution Motion Requesting the Defence to Submit a Revised Rule 65 *ter* Witness List and Witness Summaries and for Disclosure in Accordance with Rule 67(A)(II) and the Trial Chamber’s Orders, 25 July 2014 (“Order of 25 July”), paras 39-40.

² Email from Defence to the Chamber and the Prosecution, 12 August 2014 (“Email of 12 August”).

³ Motion, para. 1.

statements for seven of its Rule 92 *ter* witnesses in contravention of the Order of 25 July.⁴ The Prosecution submits that the Defence failed to provide English language translations for four of its witnesses.⁵ The Prosecution submits that only having these statements available in BCS hinders its preparations for these four witnesses.⁶ The Prosecution submits that the appropriate remedy for the Defence's "persistent violations" of the Trial Chamber's orders on disclosure is to preclude the Defence from tendering, pursuant to Rule 92 *ter*, the evidence of the seven witnesses for whom statements have not been obtained and the statements of the four witnesses lacking English translations.⁷

4. The Prosecution also submits that the witness summary for DGH-019, which was revised by the Defence and filed on 8 August 2014 in compliance with the Order of 25 July, remains deficient because the *viva voce* portion of the summary does not put the Prosecution on notice of the main facts about which he will testify.⁸ The Prosecution requests that the Defence be ordered to identify the additional facts about which DGH-019 will testify in a further revised summary.⁹

5. In the Response, the Defence submits that the Motion should be rejected and that assuming that any disclosure violation has occurred, the requested remedy is premature and inappropriate.¹⁰ The Defence submits that the rule applicable throughout this trial has been that Rule 92 *ter* statements are to be disclosed no later than six weeks prior to the witness's testimony.¹¹ The Defence submits that the Prosecution relied on, and benefited from, that six-week deadline throughout its case, and that for ten of its Rule 92 *ter* witnesses it disclosed their statements well into its case and, in some instances, within the six week deadline.¹²

6. The Defence acknowledges that one possible interpretation of the Order of 25 July was that the Chamber set a different deadline for the disclosure of the Defence's Rule 92 *ter* statements.¹³ The Defence requests reconsideration of the Order of 25 July should the Chamber consider that it did order the Defence to disclose all of its Rule 92 *ter* statements by 8 August 2014.¹⁴ The Defence reasons that neither party requested a change to this deadline, nor made submissions on the

⁴ Motion, para. 2, namely DGH-021, DGH, 030, DGH-031, DGH-071, DGH-101, DGH-110, and DGH-113.

⁵ Motion, para. 3, namely DGH-016, DGH-019, DGH-104, and DGH-034 (for whom the Prosecution submits that the 92 *ter* statement was disclosed past the 8 August 2014 deadline, on 11 August 2014).

⁶ Motion, para. 3.

⁷ Motion, paras 5-7.

⁸ Motion, para. 4.

⁹ Motion, paras 4, 7(b).

¹⁰ Response, para. 2.

¹¹ Response, para. 3, *citing* Order on Guidelines for Procedure for Conduct of Trial, 4 October 2012, para. 20; Order on Close of Prosecution Case-in-Chief, Rule 98 *bis* Proceedings, and Preparation and Commencement of Defence Case, 18 July 2013 ("Order of 18 July").

¹² Response, para. 3, confidential Annex A.

¹³ Response, para. 4.

¹⁴ Response, para. 5.

appropriateness of such a significant change, which constitutes a legal error warranting reconsideration.¹⁵ The Defence argues that the deadline of 8 August 2014 substantially disadvantages the Defence because (i) there was a lack of adequate notice by the Chamber for altering the disclosure deadline, which deprived the Defence of a reasonable opportunity to comply, and (ii) it subjected the Defence to a deadline that is substantially less advantageous than that applied during the Prosecution case.¹⁶ The Defence submits that the altered deadline deprives Hadžić of his right under Article 21(4)(e) of the Statute of the Tribunal “to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”.¹⁷

7. In the case that the Chamber does not reconsider the Order of 25 July, the Defence submits that the remedy sought by the Prosecution is premature and argues that it should be permitted to make case-by-case submissions once Rule 92 *ter* statements have been finalised to explain why particular statements were disclosed after 8 August 2014.¹⁸ The Defence further submits that the remedy sought by the Prosecution is inappropriate and not in the interests of justice, because the only consequence of requiring these witnesses to be led *viva voce* instead of pursuant to Rule 92 *ter* would be to slow down the court proceedings and potentially oblige the Defence to re-allocate its intended use of court time.¹⁹ The Defence further submits that any prejudice to the Prosecution is substantially mitigated by the disclosure of previous statements from five of the seven witnesses, which, according to the Defence, will overlap substantially with the witness’s Rule 92 *ter* statements and, in some cases, will be substantially identical.²⁰ The Defence also submits that it has not acted in bad faith and that it has been candid about its interpretation of the disclosure deadlines for Rule 92 *ter* statements with the Prosecution and the Chamber.²¹ The Defence submits that any prejudice caused to the Prosecution by the non-disclosure of these statements is fully mitigated by the four week summer recess.²² Finally, the Defence submits that as of the date of filing the Response, 90 percent of its Rule 92 *ter* statements had been disclosed, compared to the 78 percent of statements that the Prosecution had disclosed as of the start of its case.²³

¹⁵ Response, para. 5, citing *Prosecutor v. Jelisić*, Case No. IT-95-10-A, Judgement, 5 July 2001, para. 27.

¹⁶ Response paras 6-9.

¹⁷ Response, para. 9, citing *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-AR73.3, Decision on Appeal by Dragan Papić against Ruling to Proceed by Deposition, 15 July 1999, para. 24.

¹⁸ Response, para. 10.

¹⁹ Response, para. 11.

²⁰ Response, para. 12.

²¹ Response, paras 16-17.

²² Response, para. 18.

²³ Response, para. 19.

8. The Defence notes that the English translations of the statements of DGH-016, DGH-019, DGH-034, and DGH-104 have now been disclosed and that the Defence acted diligently seeking translations of those documents.²⁴ The Defence submits that since the filing of the Motion the number of non-finalised Rule 92 *ter* statements of its witnesses has dropped to five, and that three more are being imminently finalised.²⁵

9. With respect to DGH-019's witness summary, the Defence submits that it is adequate and identifies the core aspect of his *viva voce* testimony, and it directs the Prosecution to documents already in the Prosecution's possession which relate to his testimony.²⁶

10. The Prosecution replies that the Defence is in breach of the Chamber's "unequivocal order" to disclose all Rule 92 *ter* statements by 8 August 2014 and that its belated attempt to deny the Prosecution any remedy for this violation should be rejected.²⁷ According to the Prosecution, reconsideration is not justified as there has been no material change in circumstances and the Defence has failed to demonstrate a clear error of reasoning or that reconsideration is necessary to prevent an injustice.²⁸ The Prosecution submits that the Defence should have sought certification to appeal the Order of 25 July or filed a motion for adjustment to the timeline prior to the 8 August 2014 deadline.²⁹ The Prosecution submits that the Defence has had ample time to finalise all of its Rule 92 *ter* statements and that the Order of 25 July is not less favourable to the Defence because it had greater time to prepare the statements than did the Prosecution.³⁰ The Prosecution affirms its position that the Chamber should exercise its discretion to preclude the Defence from tendering the evidence of these witnesses pursuant to Rule 92 *ter*.³¹ The Prosecution argues that the impact of the 8 August 2014 deadline to the Defence is minimal because the Defence can still lead those witnesses for whom a statement was not timely disclosed, *viva voce*.³²

²⁴ Response, para. 13. The Defence notes that the English translation of DGH-016's statement was uploaded in e-court on 12 August 2014, the one of DGH-034 on 14 August 2014, and the ones of DGH-019, and DGH-104 on 18 August 2014. The Chamber understands this to mean that the English translations of the respective statements were released to the Prosecution by these dates. *Ibid.*

²⁵ Response, para. 20. The Defence notes that DGH-021 will now testify *viva voce* instead of pursuant to Rule 92 *ter* as initially advised, that the statement for DGH-101 has been disclosed in English and BCS, that the statement of DGH-110 will be disclosed on 22 August 2014, and that the statements for DGH-071, and DGH-113 will be finalised in the near future. *Ibid.* The Chamber notes that the statement of DGH-113 was disclosed on 22 August 2014. *See* Email from Defence to the Chamber and the Prosecution, 22 August 2014.

²⁶ Response, paras 14-15.

²⁷ Reply, paras 2-3, 8.

²⁸ Reply, paras 4, 8.

²⁹ Reply, para. 4.

³⁰ Reply, paras 5-6.

³¹ Reply, para. 8.

³² Reply, para. 7.

C. Applicable Law

11. The applicable law on Rule 65 *ter* (G) witness summaries and disclosure pursuant to Rule 67(A)(ii) was set out in detail in the Order of 25 July by this Trial Chamber, and need not be repeated here.³³

12. The Order of 25 July reads in relevant part:

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;³⁴

13. Regarding reconsideration, a Chamber has the discretion to reconsider a previous interlocutory decision in exceptional cases if the requesting party has demonstrated that the impugned decision contains a clear error of reasoning or that particular circumstances, which can be new facts or new arguments, justify its reconsideration to prevent an injustice.³⁵

D. Discussion

14. Having considered the submissions of the parties, the Chamber, in accordance with Rule 126 *bis* of the Rules, will grant the Prosecution leave to reply to the Response.

1. Witness summary for DGH-019

15. The Chamber is satisfied that the witness summary provided by the Defence on 8 August 2014 for DGH-019 contains sufficient details on the topics to which he is expected to testify and identifies the main facts of which he has personal knowledge.³⁶ Accordingly, the Chamber considers that the Prosecution is on notice, in accordance with Rule 65 *ter* (G), of the main facts upon which DGH-019 is expected to testify *viva voce*.

2. Disclosure of Rule 92 *ter* statements

16. The Chamber recalls that during the Prosecution case, the Chamber altered the deadline for disclosure of Rule 92 *ter* statements as articulated below:

³³ Order of 25 July, paras 12-13 and 32-34 respectively.

³⁴ Order of 25 July, para. 40.

³⁵ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-A, Decision on Motions for Reconsideration, 5 September 2014, p. 3; *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-A, Decision on Mićo Stanišić's Motion Seeking Reconsideration of Decision on Stanišić's Motion for Declaration of Mistrial and Župljanin's Motion to Vacate Trial Judgement, 24 July 2014, para. 11.

“In setting a deadline of six weeks for the submission of draft Rule 92 *ter* statements, the Pre-Trial Judge anticipated that the exact and comprehensive content of a witness' Rule 92 *ter* statement could be disclosed after the Rule 66(A)(ii) time limit set for other statements in the case, thereby setting a separate Rule 66(A)(ii) deadline for Rule 92 *ter* statements.”³⁷

17. However, this alteration did not negate the Prosecution's disclosure obligations under Rule 66(A)(ii) to disclose copies of the statements of all witnesses whom the Prosecution intended to call to testify at trial. The alteration only applied to copies of all written statements taken in accordance with Rule 92 *ter*, which were to be generated from those statements previously disclosed by the Prosecution in accordance with Rules 66(A)(ii) and 65 *ter* (E)(iii). These are the so-called “amalgamated statements”, which the Chamber expressed a preference for in this case, as opposed to the tendering of multiple Rule 92 *ter* statements for the same witness.³⁸

18. With respect to the Defence's submission that the Prosecution benefited from the six-week disclosure rule, the Chamber notes that the Rule 92 *ter* statements of GH-145,³⁹ GH-110,⁴⁰ GH-004,⁴¹ and GH-028⁴² were all amalgamated statements, which appear to have been drawn substantially from timely disclosed prior testimony or statements. GH-024, GH-147, as well as GH-130 were subject to delayed disclosure pursuant to Rules 69 or 70 of the Rules.⁴³

19. The Chamber notes that the Order of 25 July contained an instruction to the Defence to finalise and disclose all 92 *ter* statements by 8 August 2014. However, accounting for the above, the Chamber has no reason to believe that the Defence has acted in bad faith by not finalising and disclosing its Rule 92 *ter* statements by either 13 May 2014 or 8 August 2014. The Chamber does not consider it necessary to reconsider the Order of 25 July bearing in mind that the Defence has taken numerous steps in compliance with the 8 August deadline and in the meantime has disclosed

³⁶ See Notice of Compliance with Trial Chamber Order to of 25 July 2014, 8 August 2014, confidential Annex A, pp. 35-36.

³⁷ Decision on Prosecution's Urgent Motion for Partial Reconsideration of Decision on Motion to Expunge Portions of Prosecution's Rule 65 *ter* Filing and for More Detailed Witness Summaries, 4 September 2012, para. 7. See also, Rule 65 *ter* Conference, 15 February 2012 (confidential), T. 44-46; Rule 65 *ter* Conference, 12 June 2012 (confidential), T. 68-70; Status Conference, 14 June 2012, T. 37-44; Prosecution Proposal on Rule 92 *ter* Procedure, 15 December 2011; Defence Response to the Prosecution Proposal on Rule 92 *ter* Procedure, 19 December 2011.

³⁸ Rule 65 *ter* Conference, 15 February 2012 (confidential), T. 44.

³⁹ P2333, Amalgamated Witness Statement of GH-145, paras 2, 4, fn. 1; Prosecution Notice of Rule 65 *ter* (E) Filings, 19 June 2012, confidential Annex C, p. 27.

⁴⁰ P1981, Amalgamated Witness Statement of GH-110, paras 1-3; Prosecution Notice of Rule 65 *ter* (E) Filings, 19 June 2012, confidential Annex C, p. 29.

⁴¹ P2300, Amalgamated Witness Statement of GH-004, fn.1; Prosecution Notice of Rule 65 *ter* (E) Filings, 19 June 2012, confidential Annex C, p. 8, confidential Annex E, p. 76.

⁴² P2284, Amalgamated Witness Statement of GH-028, paras 1-2; Prosecution Notice of Rule 65 *ter* (E) Filings, 19 June 2012, confidential Annex C, p. 29.

⁴³ Decision on Prosecution Motion for Protective Measures for Witnesses (confidential), 24 August 2012, para. 42(a)(xl); Decision on Motion to Expunge Portions of the Prosecution's Rule 65 *ter* Filing and for More Detailed Witness Summaries, 23 August 2012, para. 10. The Chamber does not consider the disclosure of the statements related to GH-138 (a witness who appeared pursuant to Rule 92 *ter* after the Chamber rejected an application for that witness's evidence to be admitted pursuant to Rule 92 *bis*). The statement was also disclosed timely, see Rule 65 *ter* number 02339) and GH-167 (a witness who was added to the Witness List with leave of the Chamber during the Prosecution's case) to be relevant to this litigation.

all Rule 92 *ter* statements.⁴⁴ The Chamber will determine whether the Prosecution has suffered undue prejudice resulting from the timing of the disclosure of the English translations of the 92 *ter* statements and the appropriate remedy in such instances when assessing the individual circumstances for each of the concerned witnesses in the respective 92 *ter* decisions.

E. Disposition

20. 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;

DISMISSES the Defence request for reconsideration;

DISMISSES the Motion in part;

REMAINS SEISED of the remainder of the Motion;

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

Done this twenty-sixth day of September 2014,

At The Hague,

The Netherlands.



Judge Guy Delvoic
Presiding

[Seal of the Tribunal]

⁴⁴ Procedural Matters, 17 September 2014, T. 11579.