

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: 2 October 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: **2 October 2014**

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC

**DECISION ON DEFENCE MOTION FOR ADMISSION OF EVIDENCE OF
DGH-046 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 Nebojša Pavković (DGH-046) Pursuant to Rule 92 *ter*”, filed publicly with two confidential annexes on 22 July 2014 (“Motion”). The “Prosecution Response to Motion for Admission of Evidence of DGH-046” was filed confidentially on 6 August 2014 (“Response”). On 13 August 2014, the Defence filed a “Request for Leave to Reply and Reply to Prosecution Response to Motion for Admission of Evidence of DGH-046 Pursuant to Rule 92 *ter*” (“Reply”).

A. Submissions

2. In the Motion, the Defence requests the admission of the written statement of DGH-046 and its associated exhibits 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-046’s written statement is 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 statement contains information directly relevant to (a) the forces present in Vukovar in 1991 and their command structure, including the Guards motorised Brigade (“GmB”), the TO and volunteer units; (b) the presence and role of Radovan Stojičić; (c) the visit of a humanitarian convoy to Vukovar headed by Bernard Kouchner in mid-October 1991; (d) events surrounding the fall of Vukovar, including the surrender of Croat forces, the evacuation of military forces, civilians and the wounded; (e) the scope of the command and control of the JNA over the TO forces; (f) the JNA’s concern with sabotage and infiltration by Croat forces; (g) the presence of officers from the Federal Secretariat of National Defence (“SSNO”) on the evening of 20 November 1991 in Negoslavci; (h) the information subsequently obtained by the witness on the fate of the wounded evacuated from the Vukovar Hospital; and (i) the witness’s lack of knowledge of any activities of the government of the SAO SBWS during the time period relevant to the Indictment.³

3. The Prosecution objects to the admission of DGH-046’s evidence, arguing that the tendered statement addresses important issues which should be led *viva voce*.⁴ Such issues, according to the Prosecution, include, *inter alia*, the command and control over the SBWS TO in the Vukovar area and the removal and fate of prisoners taken from the Vukovar Hospital.⁵ The Prosecution contends that these issues should be led *viva voce* “particularly given that DGH-046 has been convicted by

¹ Motion, paras 1, 8, Annex B (confidential).

² Motion, paras 6-7.

³ Motion, para. 5.

⁴ Response, paras 2-3.

this Tribunal and sentenced to 22 years' imprisonment and this will be the first time he gives evidence before the Tribunal".⁶ The Prosecution also argues that the Defence fails to show that the admission of DGH-046's statement pursuant to Rule 92 *ter* of the Rules will result in any saving of in-court time, and that the content of the statement can be adduced within the five hours allotted for the witness's testimony without its admission.⁷ Further, the Prosecution asserts that DGH-046's statement contains two propositions that were not put to Prosecution witness Aleksander Vasiljević while he was testifying in these proceedings, in violation of Rule 90(H)(ii) of the Rules.⁸ In the alternative, if the Motion is granted, the Prosecution requests that, "given the egregious nature of the Rule 90(H)(ii) violation", these portions of the witness's statement be expunged from the admitted evidence.⁹ Finally, the Prosecution notes that the Trial Chamber has ordered the Defence to provide a revised summary of the *viva voce* portion of the evidence of DGH-046 by 8 August 2014.¹⁰

4. In the Reply, the Defence submits that the admission of the tendered statement "will undoubtedly save court time" in light of the nature of the issues addressed in the statement and its length.¹¹ The Defence further asserts that the Prosecution would not be prejudiced considering that "[t]he events and persons that [DGH-046]'s statement discusses have already been adduced by the Prosecution, to a large extent, through Rule 92 *ter* itself".¹² With respect to the Prosecution submission that the Defence violated Rule 90(H)(ii) of the Rules, the Defence argues that Vasiljević's cross-examination "clearly elicited the contradictory position of the witness", and that DGH-046's evidence only came into the Defence's possession nine months after the conclusion of Vasiljević's testimony.¹³ The Defence adds that even if it is found that there was a violation of Rule 90(H)(ii), the circumstances do not warrant the "draconian remedy of excluding otherwise relevant, probative and exculpatory evidence."¹⁴

B. Applicable Law

1. Rule 92 *ter*

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

⁵ Response, para. 3.

⁶ Response, para. 3.

⁷ Response, paras 2, 4.

⁸ Response, para. 3.

⁹ Response, fn. 7.

¹⁰ Response, fn. 11.

¹¹ Reply, para. 2.

¹² Reply, para. 3.

¹³ Reply, para. 4.

¹⁴ Reply, para. 4.

(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
- (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.¹⁵ 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.¹⁶ 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.¹⁷ 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.¹⁸

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

¹⁵ *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.

¹⁶ *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.

¹⁷ *Đorđević* Decision, para. 7; *Lukić and Lukić* Decision, para. 15; *Stanišić and Simatović* Decision, para. 19.

¹⁸ *Đorđević* Decision, para. 5; *Lukić and Lukić* Decision, paras 15-16.

his testimony more accurately".¹⁹ 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.²⁰

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.²¹ 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.²² 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.²³

10. Non-compliance with Rule 90(H)(ii) of the Rules does not *per se* create a bar to the admission of evidence.²⁴ 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.²⁵ 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.²⁶ Parties may make any argument as to the weight the Trial Chamber should ascribe to the evidence in their final trial briefs and closing arguments.²⁷ If the circumstances are sufficiently

¹⁹ *Prosecutor v. Krajnić*, Case No. IT-00-39-A, Judgement, 17 March 2009 ("Krajnić, Appeal Judgement"), para. 367; *Karera v. The Prosecutor*, Case No. ICTR-01-74-A, Judgement, 2 February 2009, ("Karera Appeal Judgement") 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.

²⁰ *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.

²¹ *Krajnić*, 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.

²² *Krajnić*, 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.

²³ *Krajnić*, 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.

²⁴ *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.

²⁵ *Milutinović et al.* Decision, para. 77; *Stanišić and Župljanin Decision*, para. 21; *See also Brdanin and Talić Decision*, para. 20.

²⁶ *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.

²⁷ *Milutinović et al.* Decision, para. 77.

egregious, the Trial Chamber may preclude the Defence from adducing such contradictory evidence.²⁸

C. Discussion

11. As a preliminary matter, the Trial Chamber notes that the Defence provided an updated summary of the *viva voce* portion of the evidence of DGH-046 on 8 August 2014.²⁹

12. DGH-046's proposed evidence, in the form of a written statement, contains information about, *inter alia*, (a) the engagement and deployment of the JNA and the GmB in the area of Vukovar in 1991;³⁰ (b) the forces present in the Vukovar area, their command structure and reporting system;³¹ (c) the witness's involvement in the negotiations for the surrender of Croatian forces and his knowledge of how it was carried out;³² (d) the witness's knowledge of the evacuation of Croatian forces and civilians from Vukovar;³³ and (e) the witness's involvement in escorting the wounded from Vukovar Hospital to Croatian Authorities on 19-21 November 1991.³⁴ The Trial Chamber does not consider that DGH-046's evidence is of such a nature as to require him to be heard *viva voce*. Moreover, the fact that DGH-046 has not testified previously before the Tribunal does not require that his evidence 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. The Trial Chamber finds that the tendered associated exhibits listed in the Annex of the Motion form an inseparable and indispensable part of DGH-046's evidence.³⁵ The Trial Chamber notes however that a number of them have already been admitted.³⁶

13. The Trial Chamber notes the Prosecution's submission that DGH-046's statement contains portions that were not put to Vasiljević during his testimony in these proceedings in violation of Rule 90(H)(ii) of the Rules. The Trial Chamber has reviewed the contested portions of DGH-046's statement as well as the relevant parts of Vasiljević's evidence.³⁷ Indeed, although the points at

²⁸ *Stanišić and Župljanin* Decision, para. 21; *Popović et al.* Decision of 6 March 2007, para. 3.

²⁹ Notice of Compliance with Trial Chamber Order to of 25 July 2014, 8 August 2014, confidential Annex A, pp. 66-72.

³⁰ Rule 65 *ter* number 1D03614, paras 3-8.

³¹ Rule 65 *ter* number 1D03614, paras 9-22, 30, 53-56, 58.

³² Rule 65 *ter* number 1D03614, paras 26-29.

³³ Rule 65 *ter* number 1D03614, para. 29.

³⁴ Rule 65 *ter* number 1D03614, paras 32-41.

³⁵ Rule 65 *ter* numbers 1D03381, 00503, 00656, 1D03389.

³⁶ The following have already been admitted as exhibits: P2011, P2542, P3036, P2558, P2271.2186, P1989.1981, P2941, P1678.1645, P1983.1981, P2601, P2610, P1995.1981, P2598, P2559, P1997.1981, P2601, D55, D11. The Chamber notes that many of the document numbers referred to in the English translation of DGH-046's statement are erroneous. Nonetheless, the Chamber was able to understand what are the correct document numbers based on the original statement and the exhibits list provided by the Defence in the Annex to the Motion. See Motion, Annex B (confidential).

³⁷ Rule 65 *ter* number 1D03614, paras 36, 42; Aleksander Vasiljević, 4 September 2013, T. 8113-8114, 8121-8124.

issue were raised during Vasiljević's testimony,³⁸ the Defence did not explicitly put to the witness that it intends to present contradictory evidence on these points. However, the Trial Chamber notes that the Defence only obtained DGH-046's statement five months after the conclusion of Vasiljević's testimony.³⁹ In these circumstances, the Trial Chamber does not consider that there was an egregious violation of Rule 90(H)(ii) of the Rules, such that the contested portions of DGH-046's statement should be redacted. The Prosecution may make any argument as to the weight the Trial Chamber should ascribe to the contested portions of DGH-046's statement in its final trial brief and closing arguments.

14. In light of the above, the Trial 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.

³⁸ Aleksander Vasiljević, 4 September 2013, T. 8113-8114, 8121-8124.

³⁹ The Chamber notes that the DGH-046's statement indicates the following interview dates: 13 February 2014, 20 March 2014, 21 March 2014, 29 April 2014, 14 May 2014, 11 July 2014 (Rule 65 *ter* number 1D03614, p. 1). Vasiljević's testimony took place on 2-5 September 2014 (Aleksandar Vasiljević, 2-5 September 2013, T. 7879-8188).

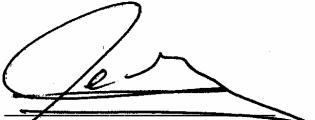
D. Disposition

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-046 and its associated exhibits (Rule 65 *ter* numbers 1D03614, 1D03381, 00503, 00656, 1D03389) are 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-046, if the conditions set forth in Rule 92 *ter* of the Rules have been fulfilled, when the witness gives evidence in these proceedings.

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

Done this second day of October 2014,
At The Hague,
The Netherlands.



Judge Guy Delvoie
Presiding

[Seal of the Tribunal]