

**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 RENEWED DEFENCE MOTION FOR ADMISSION OF
EVIDENCE OF DGH-034 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 “Renewed Defence Motion for Admission of Evidence of DGH-034 Pursuant to Rule 92 *ter*”, filed publicly with confidential annexes A and B on 15 August 2014 (“Renewed Motion”). The “Prosecution Response to Renewed Defence Motion for Admission of Evidence of DGH-034 Pursuant to Rule 92*ter*” was filed on 1 September 2014 (“Response”). The “Reply to Prosecution Response to Renewed Defence Motion for Admission of Evidence of Milan Knežević (DGH-034) Pursuant to Rule 92 *ter*” was filed confidentially with a confidential annex on 9 September 2014 (“Reply”). This Trial Chamber is also partly seised of the “Prosecution Submission Concerning Defence Compliance with Trial Chamber Order of 25 July 2014”, filed on 14 August 2014 (“Prosecution Submission on Decision of 25 July 2014”).¹ 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. 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.”

A. Background

2. On 14 July 2014, the Defence filed a motion seeking the admission of the evidence of DGH-034, in the form of DGH-034’s prior testimony in the case of *Prosecutor v. Dokmanović* (“*Dokmanović* case”),² and its associated exhibit, DGH-034’s prior witness statement admitted in the *Dokmanović* case,³ pursuant to Rule 92 *ter* of the Rules of Procedure and Evidence of the Tribunal (“Rules”).⁴ The Prosecution filed a response on 29 July 2014.⁵ The Defence filed a reply on 5 August 2014.⁶ On 12 August 2014, the Defence withdrew the Original Motion.⁷

¹ Decision on Prosecution Submission Concerning Defence Compliance with Trial Chamber Order of 25 July 2014 and Defence Request for Reconsideration, 26 September 2014, paras 19-20.

² Rule 65 *ter* numbers 1D02332 and 1D02333..

³ Rule 65 *ter* number 1D02335.

⁴ Defence Motion for Admission of Evidence of Milan Knežević (DGH-034) Pursuant to Rule 92 *ter*, 14 July 2014 (“Original Motion”).

⁵ Consolidated Prosecution Response to Motions for Admission of Evidence of DGH-034, DGH-035 and DGH-036 Pursuant to Rule 92 *ter*, 29 July 2014.

⁶ Request for Leave to Reply and Reply to Consolidated Prosecution Response to Motions for Admission of Evidence of DGH-034, DGH-035 and DGH-036 Pursuant to Rule 92 *ter*, 5 August 2014.

⁷ Notice of Withdrawal of Motion for Admission of Evidence of Milan Knežević (DGH-034) Pursuant to Rule 92 *ter*, 12 August 2014.

B. Submissions

3. In the Renewed Motion, the Defence requests the admission of a witness statement of DGH-034 dated 10 August 2014⁸ pursuant to Rule 92 *ter* of the Rules, subject to the witness's in court affirmation.⁹ The Defence submits that DGH-034's evidence is relevant, probative, and that its admission under Rule 92 *ter* of the Rules will promote "the expeditious conduct of proceedings."¹⁰ The Defence submits that the written statement of DGH-034 contains information relevant to (a) the political atmosphere and events leading to the uprising in Darda, Croatia in August 1991; (b) the political objectives of the SNC; (c) the arrival of refugees in Baranja; (d) the role of Radislav Kostić; and (e) DGH-034's appointment as a member of the SBWS and RSK Governments.¹¹ The Defence further submits that DGH-034's evidence could not be adduced within the two hours allocated for his direct examination absent the admission of the witness's statement.¹²

4. In the Response, the Prosecution objects to the admission of DGH-034's statement pursuant to Rule 92 *ter* of the Rules.¹³ The Prosecution asserts that DGH-034's witness statement and its English translation were filed after 8 August 2014, in violation of the Trial Chamber Decision of 25 July 2014,¹⁴ and notes that it has filed a motion to preclude the Defence from calling DGH-034 pursuant to Rule 92 *ter* of the Rules.¹⁵ The Prosecution further argues that the Defence failed to show good cause for its non-compliance with the Trial Chamber's Decision of 25 July 2014, and that rather than seeking a variation of the 8 August 2014 deadline pursuant to Rule 127 of the Rules, it "waited until after the [...] deadline had past before withdrawing its original Rule 92*ter* motion and disclosing a new written statement".¹⁶ It also asserts that the Defence will not be unduly prejudiced if the evidence of DGH-034 is required to be brought *viva voce*.¹⁷

5. Alternatively, the Prosecution asserts that the testimony of DGH-034 in the *Dokmanović* case, which was tendered by the Defence in the Original Motion, "is more appropriate for admission pursuant to Rule 92*ter*" than DGH-034's statement proposed in the Renewed Motion, because it was given under oath and subject to cross-examination.¹⁸ The Prosecution submits that,

⁸ Rule 65 *ter* number 1D03649.

⁹ Motion, paras 1, 8.

¹⁰ Motion, paras 5-7.

¹¹ Motion, para. 5.

¹² Motion, para. 7.

¹³ Response, paras 1, 4.

¹⁴ Response, paras 1, 4, *referring to* 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 ("Decision of 25 July 2014").

¹⁵ Response, para. 1, *referring to* Prosecution Submission Concerning Defence Compliance with Trial Chamber Order of 25 July 2014, 14 August 2014 ("Motion of 14 August"), para. 6.

¹⁶ Response, para. 4.

¹⁷ Response, para. 6.

¹⁸ Response, para. 5.

in contrast, DGH-034's currently proposed statement "reduces 48 pages of transcript down to three and a half pages", is not accompanied by a record of questions asked and answers given during the interview, and was finalised during Hadžić's testimony, which was publicly broadcasted.¹⁹ In addition, the Prosecution submits that the statement's admission will not save court time because the Defence's allocation of two hours for DGH-034's direct examination remains unchanged.²⁰ It further asserts that two hours for the direct examination of DGH-034 is unjustified in the absence of an amendment to DGH-034's Rule 65 *ter* witness summary.²¹

6. The Defence replies that it proceeded as quickly and reasonably as possible to finalise the Rule 92 *ter* statements of its witnesses which were still outstanding as of 25 July 2014, and that it did not wilfully violate the Decision of 25 July 2014.²² The Defence submits that the Trial Chamber should exercise its discretion under Rule 127(A)(ii) of the Rules to excuse any non-compliance.²³ It contends that no prejudice is caused to the Prosecution, given that: (a) the extent of the non-compliance was minimal, as the BCS version of the statement was disclosed three days after the deadline and the English version followed three days later;²⁴ (b) DGH-034 will not be called to testify less than six weeks prior to the disclosure of the statement, which is a time period that has been deemed fair and appropriate by the Trial Chamber throughout the Trial;²⁵ and (c) the Prosecution was already in a position to understand the gist of the witness's testimony and to investigate matters of anticipated relevance based upon DGH-034's prior testimony which was proposed in the Original Motion.²⁶ The Defence further submits that it could not have completed all outstanding Rule 92 *ter* statements by the 8 August 2014 deadline notwithstanding the exercise of diligence.²⁷

7. Moreover, the Defence asserts that a new statement was needed to replace DGH-034's previously tendered testimony from the *Dokmanović* case because that prior testimony "focuses extensively on matters mainly of relevance to Mr. Dokmanović while not focusing on matters of greatest relevance to this case."²⁸ Therefore, the Defence submits that the proposed statement is more likely to save court time than DGH-034's prior testimony from the *Dokmanović* case.²⁹ Further, the Defence argues that the absence of a verbatim record of questions and answers, as well

¹⁹ Response, para. 5.

²⁰ Response, para. 6.

²¹ Response, para. 6.

²² Reply, paras 3, 5.

²³ Reply, paras 4-10.

²⁴ Reply, para. 8.

²⁵ Reply, para. 8.

²⁶ Reply, para. 9.

²⁷ Reply, para. 10.

²⁸ Reply, paras 9, 11.

²⁹ Reply, para. 13.

as the availability of other public witness testimony in the case, do not weigh against the admissibility of a statement pursuant to Rule 92 *ter* of the Rules.³⁰

C. 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

(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.³¹ 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.³² 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.³³ 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.³⁴

D. Discussion

10. As a preliminary matter, the Trial Chamber notes that the proposed Rule 92 *ter* evidence in the Original Motion was disclosed in compliance with the Decision of 25 July 2014, which

³⁰ Reply, para. 12.

³¹ *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.

³² *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.

³³ *Đorđević Decision*, para. 7; *Lukić and Lukić Decision*, para. 15; *Stanišić and Simatović Decision*, para. 19.

³⁴ *Đorđević Decision*, para. 5; *Lukić and Lukić Decision*, paras 15-16.

mandated the disclosure of all Rule 92 *ter* witness statements by 8 August 2014. DGH-034's statement proposed in the Renewed Motion was signed on 10 August 2014, and disclosed to the Prosecution on 11 August 2014 in BCS and on 14 August 2014 in English. The Trial Chamber further notes the Defence's submission that it considered it necessary to withdraw its Original Motion and tender a new witness statement for DGH-034 pursuant to Rule 92 *ter* of the Rules, but that it was unable to finalise it by 8 August 2014. The Trial Chamber considers that any difficulties in finalising a witness statement within the deadline should have been raised by the Defence with the Trial Chamber. The Trial Chamber therefore finds that the Defence was in violation of the Decision of 25 July 2014. Nevertheless, under the present circumstances, the Trial Chamber does not find that the Defence's non-compliance with the Trial Chamber's Decision of 25 July 2014 was done in bad faith or that the Prosecution suffered prejudice as a result. DGH-034's statement was disclosed within a short period of time after the deadline, and the Prosecution had in its possession the previously tendered prior testimony of DGH-034, on the basis of which it could have initiated its preparation. The Chamber also notes that DGH-034 is not expected to testify before the week of 13 October 2014. Consequently, the Trial Chamber will not preclude the admission of DGH-034's statement due to its disclosure after the 8 August 2014 deadline.

11. The Trial Chamber will now discuss DGH-034's proposed evidence pursuant to Rule 92 *ter* of the Rules. DGH-034's proposed evidence, in the form of a written statement (Rule 65 *ter* number 1D03649), contains information about, *inter alia*, (a) the political climate and events leading to the capture of Darda, Croatia in August 1991;³⁵ (b) DGH-034's appointment as a member of the SBWS and RSK Governments;³⁶ (c) the function and capabilities of the SBWS Government;³⁷ (d) the political objectives of the SNC;³⁸ (e) the role of Radislav Kostić;³⁹ (f) the influx of refugees in Baranja from Western Slavonia;⁴⁰ and (g) the nature of the 20 November 1991 meeting at Velepromet.⁴¹

12. With respect to the Prosecution's submission that DGH-034's previously tendered testimony from the *Dokmanović* case is more appropriate for admission pursuant to Rule 92 *ter* of the Rules than his written statement, the Trial Chamber recalls that it is primarily in the discretion of the presenting party to decide how to conduct its case and considers that the Prosecution's arguments do not militate against the admission of DGH-034's statement pursuant to Rule 92 *ter* of

³⁵ Rule 65 *ter* number 1D03649, paras 6-15.

³⁶ Rule 65 *ter* number 1D03649, paras 16-17, 26.

³⁷ Rule 65 *ter* number 1D03649, paras 18, 20.

³⁸ Rule 65 *ter* number 1D03649, para. 18.

³⁹ Rule 65 *ter* number 1D03649, para. 24.

⁴⁰ Rule 65 *ter* number 1D03649, para. 23.

⁴¹ Rule 65 *ter* number 1D03649, para. 25.

the Rules. To the extent that the Prosecution wishes to utilise DGH-034's prior testimony in the *Dokmanović* case, it may do so during cross-examination, in accordance with the Rules.

13. The Trial Chamber considers that the evidence of DGH-034, as proposed in the Renewed Motion, is appropriate to be admitted in written form and finds that it is relevant, has probative value, and is appropriate for admission pursuant to Rules 89(C) and 92 *ter* of the Rules.

14. Concerning the length of the Defence's prospective examination-in-chief of DGH-034, the Trial Chamber notes that the Defence provided an updated summary of the *viva voce* component of DGH-034's evidence on 8 August 2014.⁴² Compared to the summary appended to the Renewed Motion,⁴³ the *viva voce* component of DGH-034's testimony remains unchanged. Therefore, the Trial Chamber finds no reason to adjust the time allocated for DGH-034's direct examination.

⁴² Notice of Compliance with Trial Chamber Order to of 25 July 2014, 8 August 2014, confidential Annex A, pp. 47-48.

⁴³ Confidential Annex B of the Renewed Motion is a revised Rule 65 *ter* witness summary for DGH-034.


E. 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) **DISMISSES** the Prosecution Submission on the Decision of 25 July 2014 in respect of DGH-034;
- c) **DECIDES** that the evidence of DGH-034 (Rule 65 *ter* number 1D03649) is appropriate for admission into evidence; and
- d) **INFORMS** the parties that the Trial Chamber will make a final decision on whether to admit the evidence of DGH-034, 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 Delvoic
Presiding

[Seal of the Tribunal]