

**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: 14 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: 14 October 2014

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC

**DECISION ON DEFENCE MOTION FOR ADMISSION OF EVIDENCE OF
DGH-091 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 Ljubomir Novaković (DGH-091) Pursuant to Rule 92 *ter*”, filed on 12 August 2014 (“Motion”). The “Prosecution Response to Motion for Admission of Evidence of Ljubomir Novaković (DGH-091) Pursuant to Rule 92 *ter*” was filed on 26 August 2014 (“Response”). The Defence filed its “Reply to Prosecution Response to Motion for Admission of Evidence of Ljubomir Novaković (DGH-091) Pursuant to Rule 92 *ter*” on 2 September 2014 (“Reply”).

A. Submissions

2. In the Motion, the Defence requests the admission of the prior testimony of DGH-091¹ and four associated exhibits² pursuant to Rule 92 *ter* of the Tribunal’s Rules of Procedure and Evidence (“Rules”) subject to the witness’s in court affirmation.³ The Defence submits that the witness’s evidence is relevant and probative.⁴ The Defence further submits that the prior testimony contains information relevant to: (a) the requirement for a permit from the military authorities in order to cross the bridge between Ilok and Bačka until the second half of 1991; (b) the witness’s involvement in negotiations between the Yugoslav People’s Army (JNA) and the Croatian civilian authorities, which led to the surrender of Ilok; (c) the nature of the meeting in Bačka Palanka of 20 November 1991; and (d) the witness’s relationship with Slavko Dokmanović.⁵ Additionally, the Defence submits that the admission of DGH-091’s written statement will save court time as the witness’s testimony could not be adduced within the one hour allocated for his direct examination.⁶

3. The Prosecution responds that it does not object to the admission of the prior testimony of DGH-091, subject to compliance with the conditions contained in Rule 92 *ter* of the Rules when DGH-091 is present in court. In relation to the associated exhibits, the Prosecution objects to the admission of Rule 65 *ter* number 1D03174 due to the fact that only a surrogate sheet is available on eCourt.⁷ The Prosecution submits that should the evidence of DGH-091 be admitted pursuant to Rule 92 *ter* of the Rules, then two additional associated documents should also be admitted, namely the handwritten notes of an Office of the Prosecutor (OTP) investigator following his interview

¹ Rule 65 *ter* number 1D02465.

² Rule 65 *ter* numbers 1D02462, 1D02463, 1D02464, and 1D03174.

³ Motion, paras 1, 8.

⁴ Motion, paras 5-6.

⁵ Motion, para. 5.

⁶ Motion, para. 7.

⁷ Response, para. 1.

with DGH-091, Rule 65 *ter* number 06569, and the corresponding typed report, Rule 65 *ter* number 06570. The Prosecution further submits that these associated documents were referred to in DGH-091's prior testimony and will therefore assist the Trial Chamber in analysing the witness's evidence.⁸

4. The Defence seeks leave to reply and submits that the Prosecution's request for the inclusion of two additional associated documents in DGH-091's 92 *ter* package is procedurally improper.⁹ The Defence argues that it has no obligation to tender all documents that may have been used during the course of DGH-091's prior testimony. The Defence further argues that the documents can be tendered by the Prosecution during cross-examination.¹⁰ The Defence submits that it has good reasons for not tendering the requested documents as they were neither adopted nor accepted by DGH-091.¹¹ The Defence argues that, in respect of Rule 65 *ter* number 6569, the handwritten notes are illegible and contain many portions that are crossed-out. In respect of Rule 65 *ter* number 6570, the Defence argues that it "similarly bears many redactions" and appears to be an unsigned draft. The Defence asserts that the Trial Chamber in the *Dokmanović* case was so concerned about the reliability of these documents that "it indicated that it would not have allowed them to be used at all had not the Prosecution promised to subsequently produce Mr. Curtis [the OTP investigator] as a rebuttal witness."¹² In relation to Rule 65 *ter* number 1D03174, the Defence asserts that it has only received disclosure of the surrogate sheet.¹³

B. Applicable Law

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;
- (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.

⁸ Response, para. 2.

⁹ Reply, paras 1-3.

¹⁰ Reply, para. 3.

¹¹ Reply, para. 4, *referring to* Rule 65 *ter* number 1D02465, T. 2469-2470.

¹² Reply, para. 4, *referring to* Rule 65 *ter* number 1D02465, T. 2468-2469.

¹³ Reply, para. 5.

(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.¹⁴ 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.¹⁵ 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.¹⁶ 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.¹⁷

C. Discussion

7. DGH-091’s proposed evidence, in the form of his prior testimony in the *Dokmanović* case, contains information about, *inter alia*, (a) the issuance of permits on either side of the Ilok bridge during the second half of 1991 by military authorities; (b) the referendum in Ilok and the movement of people out of Ilok thereafter; (c) the witness’s relationship with, and perceptions of, Slavko Dokmanović; and (d) the nature and purpose of the meeting on 20 November 1991 in Bačka Palanka.

8. The tendered associated exhibits, Rule 65 *ter* numbers 1D02462, 1D02463, 1D02464, and 1D03174, are discussed in DGH-091’s prior testimony and form an inseparable and indispensable part of the evidence. The Trial Chamber notes that Rule 65 *ter* number 1D03174 is a hunting suit in the Registry’s possession and therefore only the surrogate sheet currently appears in eCourt. The Trial Chamber will order the Defence to obtain a photograph of the hunting suit from the Registry and to upload the photograph to eCourt.

¹⁴ *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.

¹⁵ *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.

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

¹⁷ *Đorđević* Decision, para. 5; *Lukić and Lukić* Decision, paras 15-16.

9. Regarding the Prosecution's request that Rule 65 *ter* numbers 06569 and 06570 be included in DGH-091's 92 *ter* package, the Trial Chamber considers that these are not documents without which the witness's testimony would become incomprehensible or of lesser probative value. The documents are OTP investigator notes that were not shown to DGH-091 while testifying in the *Dokmanović* case and ultimately were not admitted through him. Should the Prosecution wish to tender these documents, it should do so during DGH-091's cross-examination.

10. The Trial Chamber considers that the prior testimony of DGH-091, Rule 65 *ter* number 1D02465, and the tendered associated exhibits, Rule 65 *ter* numbers 1D02462, 1D02463, 1D02464, and 1D03174, are appropriate for admission in written form and finds that the tendered evidence is relevant, has probative value, and is appropriate for admission pursuant to Rules 89(C) and 92 *ter* of the Rules.

D. Disposition

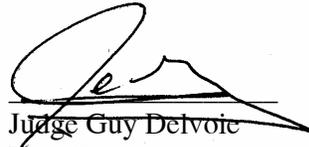
11. Accordingly, the Trial Chamber, pursuant to Rules 54, 89(C), 92 *ter*, and 126 *bis* of the Rules, hereby:

- (a) **GRANTS** the Defence leave to file the Reply;
- (b) **DECIDES** that the prior testimony of DGH-091, Rule 65 *ter* number 1D02465, and the tendered associated exhibits, Rule 65 *ter* numbers 1D02462, 1D02463, 1D02464, and 1D03174, are appropriate for admission into evidence;
- (c) **INFORMS** the parties that the Trial Chamber will make a final decision on whether to admit the evidence of DGH-091, if the conditions set forth in Rule 92 *ter* of the Rules have been fulfilled, when the witness gives evidence in these proceedings;
- (d) **ORDERS** the Defence to obtain a photograph of Rule 65 *ter* number 1D03174 from the Registry and upload it on eCourt before DGH-091 testifies in the present proceedings; and

(e) **INSTRUCTS** the Registrar of the Tribunal to take all necessary measures for the implementation of the present order.

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

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



Judge Guy Delvoic
Presiding

[Seal of the Tribunal]