

**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: 20 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: 20 October 2014

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC

**DECISION ON DEFENCE MOTION FOR ADMISSION OF EVIDENCE OF
DGH-104 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 Dušan Starević (DGH-104) Pursuant to Rule 92 *ter*”, filed with confidential annexes on 20 August 2014 (“Motion”). The Prosecution filed the “Prosecution Response to Defence Motion for Admission of Evidence of DGH-104 Pursuant to Rule 92 *ter*” on 4 September 2014 (“Response”). The Defence filed the “Reply to Prosecution Response to Defence Motion for Admission of Evidence of DGH-104 Pursuant to Rule 92 *ter*” on 11 September 2014.

2. This Trial Chamber is also 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 its “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 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” was filed.

A. Submissions

3. In the Motion the Defence requests the admission of the written statement of DGH-104 pursuant to Rule 92 *ter* of the Tribunal’s Rules of Procedure and Evidence (“Rules”), subject to the witness’s in court affirmation.² The Defence submits that DGH-104’s written statement is relevant and probative, and that DGH-104’s evidence could not be adduced within the two hours allocated for his examination without the admission of the tendered statement.³

4. In the Response the Prosecution objects to the admission of DGH-104’s written statement because the English version of the statement was disclosed to the Prosecution after 8 August 2014, in violation of the Chamber’s 25 July 2014 order (“25 July Order”).⁴ The Prosecution asserts, therefore, that DGH-104 should be called *viva voce*.⁵

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 Motion, paras 1, 8.

³ Motion, paras 5-7.

⁴ Response, para. 1, *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, paras 39, 40.

⁵ Response, para. 1.

5. In the Reply the Defence submits that the written statement of DGH-104 was disclosed to the Prosecution on 8 August 2014 and that the 25 July Order did not specify that the 8 August 2014 deadline required disclosure of a translation of the written statement.⁶ The Defence further asserts that if it was required to have disclosed the English translation on 8 August 2014, its non-compliance was minimal, will cause no prejudice to the Prosecution, and should be excused in respect of DGH-104's written statement.⁷ The Defence submits that (a) given the Prosecution's internal translation capacity, it may be presumed to have had substantive knowledge of the content of the witness's six page statement on, or immediately after, the 8 August deadline;⁸ (b) the Prosecution received the official CLSS translation ten days after the 8 August deadline;⁹ (c) the witness will not be called to testify less than six weeks after the disclosure of the statement, which is the interval that has been required throughout this trial;¹⁰ (d) the Defence was unable to finalize and ensure translation of all its outstanding Rule 92 *ter* statements by the 8 August deadline;¹¹ and (e) depriving the Defence of the opportunity to present DGH-104's evidence pursuant to Rule 92 *ter* is prejudicial as demonstrated by the Prosecution's "strenuous insistence" on the admission of certain Rule 92 *ter* statements.¹²

B. Applicable Law

6. 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.

⁶ Reply, para. 2.

⁷ Reply, para. 3.

⁸ Reply, para. 4.

⁹ Reply, para. 5.

¹⁰ Reply, para. 5. The Chamber notes that the Defence stated that the witness will not be called to testify "less than six weeks prior to the disclosure of the statement." The Chamber considers "prior" to be a typographical error.

¹¹ Reply, para. 6.

¹² Reply, para. 7.

7. 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.¹³ 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.¹⁴ 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.¹⁵ 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.¹⁶

C. Discussion

8. The Trial Chamber notes that the BCS version of the written statement of DGH-104 was disclosed to the Prosecution on 8 August 2014 and that the official CLSS English translation was disclosed on 18 August 2014.¹⁷ The Chamber recalls its previous finding that while not explicitly stated, the parties should have been aware that the 8 August deadline included disclosure of an English translation of the written statement.¹⁸ The Chamber therefore finds that the Defence was in violation of the 25 July Order. However, under the current circumstances, the Chamber does not find that the Defence acted in bad faith in not finalising and disclosing an English translation of the written statement of DGH-104 by the 8 August deadline or that the Prosecution was prejudiced by the late disclosure of the English translation. The English translation of DGH-104’s five-page statement was provided within a short time period of 10 days after the deadline, and the Prosecution has indicated that it is able to conduct at least the initial processing of documents in BCS and therefore glean their content because of the BCS competence of its staff.¹⁹ The Chamber also notes that the witness is not expected to testify before the week of 27 October 2014, at the earliest. The Trial Chamber will therefore not preclude the admission of DGH-104’s written statement due to the disclosure of its translation after the 8 August 2014 deadline.

¹³ *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.

¹⁴ *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.

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

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

¹⁷ Reply, paras 2, 5.

9. DGH-104's proposed evidence, in the form of a written statement, contains information about, *inter alia*, (a) the formation of the RSK government;²⁰ (b) DGH-104's encounters with, and perceptions of, Goran Hadžić;²¹ (c) meetings of the State Committee for Strategic Policy which included alleged members of the alleged JCE;²² (d) the movement of Croats out of Sector South;²³ and (e) DGH-104's involvement in criminal proceedings by the RSK government against Serbs for crimes committed against Croats.²⁴ The Chamber 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.

¹⁸ Decision on Defence Motion for Admission of Evidence of DGH-016 Pursuant to Rule 92 *ter* (confidential), 26 September 2014, para. 15.

¹⁹ Email from the Prosecution to the Trial Chamber and the Defence, 19 September 2014.

²⁰ Rule 65 *ter* number 1D03648, para. 2.

²¹ Rule 65 *ter* number 1D03648, paras 4-5.

²² Rule 65 *ter* number 1D03648, paras 6-8.

²³ Rule 65 *ter* number 1D03648, para. 12.

²⁴ Rule 65 *ter* number 1D03648, paras 14-15.


D. Disposition

10. 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-104, Rule 65 *ter* number 1D03648, 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 evidence of DGH-104, 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 twentieth day of October 2014,
At The Hague,
The Netherlands.



Judge Guy Delvoic
Presiding

[Seal of the Tribunal]