

**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: 22 April 2013
Original: English

IN THE TRIAL CHAMBER

Before: Judge Guy Delvoie, Presiding
Judge Burton Hall
Judge Antoine Kesia-Mbe Mindua

Registrar: Mr. John Hocking

Decision: 22 April 2013

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC

**DECISION ON PROSECUTION MOTION TO ADMIT
GH-164'S EVIDENCE PURSUANT TO RULE 92 *bis***

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 “Prosecution Motion to Admit GH-164’s Evidence Pursuant to Rule 92 *bis*”, filed on 14 January 2013 with a confidential annex (“Motion”). On 28 January 2013, the Defence filed the confidential “Response to Prosecution Motion to Admit GH-164’s Evidence Pursuant to Rule 92 *bis*” (“Response”). On 4 February 2013, the Prosecution filed the “Prosecution Request for Leave to Reply and Reply to Response to Prosecution Motion to Admit GH-164’s Evidence Pursuant to Rule 92 *bis*” (“Reply”).

A. Submissions

2. In the Motion, the Prosecution requests the admission of the evidence of GH-164—a representative of the European Community Monitoring Mission (“ECMM”)—in the form of a written statement, pursuant to Rule 92 *bis* of the Rules. It submits that the evidence is probative, relevant, and reliable and meets the requirements for admission under that Rule.¹ In particular, the Prosecution asserts that a passing reference to Hadžić in the statement is general in nature and is not significantly related to Hadžić’s acts and conduct as charged in the Indictment and thus does not bar admission.² The Prosecution further submits that the evidence of GH-164 is crime-base evidence that is cumulative in nature to other evidence that will be led and that there are no salient factors militating against its admission.³ The Prosecution seeks the admission of 20 associated exhibits (“ECMM Documents”).⁴ The Prosecution also seeks leave to amend its Rule 65 *ter* exhibit list by adding the notarized ICTY witness statement of GH-164.⁵ The Prosecution submits that the notarized version of the statement was recently obtained and was disclosed to the Defence on 23 October 2012.⁶

3. In the Response, the Defence challenges the admissibility of the ECMM Documents as associated exhibits. It argues that they do not form an inseparable part of the evidence of GH-164 because the witness’s comments “amount to little more than a description of what is written down” in the documents.⁷ The Defence specifically objects to the admission of (a) documents for which, it argues, the witness is unable to provide a proper foundation for admission as required by Rule

¹ Motion, paras 1, 5-7.

² Motion, paras 4-5, 7.

³ Motion, para. 7.

⁴ Motion, para. 9, Confidential Annex A.

⁵ Motion, para. 8.

⁶ Motion, para. 8.

⁷ Response, paras 2-3.

89(C);⁸ (b) documents that go to the acts and conduct of Hadžić;⁹ and (c) the portion of Rule 65 *ter* number 01402 that describes events that are not relevant to the Indictment.¹⁰ The Defence does not object to the admission of the statement without the ECMM Documents as associated exhibits. It submits that the statement may lay the foundation for a bar table motion, which it argues is the proper means by which to tender the ECMM Documents. The Defence asserts that a bar table motion will enable the Chamber to properly consider the relevance and reliability of the ECMM Documents pursuant to Rule 89(C).¹¹

4. In the Reply, the Prosecution submits that the ECMM Documents, which the witness authenticates, are an integral part of GH-164's evidence. It argues that the witness supplements the contents of the documents and that the documents in turn complement the witness's evidence by providing specific examples of what is discussed in the witness statement.¹² The Prosecution submits that the witness, based on his experience serving with the ECMM in the former Yugoslavia, was able to authenticate documents even if they were produced after his departure from the region.¹³ The Prosecution argues that the ECMM Documents are not witness statements or transcripts of testimony that, pursuant to Rule 92 *bis*, must not go to proving the acts and conduct of the accused. Therefore, it argues, admission of the ECMM Documents is consistent with the "plain terms" of the Rule.¹⁴ The Prosecution argues that the restrictions contained in Rule 92 *bis* were designed to minimise the risks associated with documents prepared specifically for legal proceedings, such as witness statements or testimony. It asserts that, because the ECMM Documents are contemporaneous reports, they do not pose the same risks as such documents and that the reasoning behind the restrictions in the Rule do not apply to them.¹⁵ The Prosecution argues that the contents of the ECMM Documents will not change depending on whether the witness is cross-examined.¹⁶ The Prosecution indicates that, should the Chamber decline to admit the ECMM Documents as requested, the documents should not be redacted, and the witness should be required to attend to testify.¹⁷ Finally, the Prosecution agrees to tender only the portions of Rule 65 *ter* number 01402 to which the Defence does not object as irrelevant.¹⁸

⁸ Response para. 5.

⁹ Response, paras 6-10.

¹⁰ Response, para. 11.

¹¹ Response, para. 4.

¹² Reply, para. 3.

¹³ Reply, paras 3-4.

¹⁴ Reply, para. 5.

¹⁵ Reply, para. 6.

¹⁶ Reply, para. 6.

¹⁷ Reply, para. 7.

¹⁸ Reply, para. 8.

B. Applicable Law

5. Rule 92 *bis* of the Rules governs admissibility of written witness statements and transcripts from previous proceedings in lieu of *viva voce* testimony. Any evidence admitted pursuant to Rule 92 *bis* must satisfy the fundamental requirements for the admission of evidence, as set out in Rule 89 (C) and (D) of the Rules, namely, the evidence must be relevant and have probative value, and its probative value must not be substantially outweighed by the need to ensure a fair trial.¹⁹ Thus, the Trial Chamber must find that the evidence contained in the proposed statements and transcripts is relevant to the charges in the Indictment. It is for the Prosecution to demonstrate the relevance and probative value of the evidence of which it seeks admission.²⁰

6. For written evidence to be admissible pursuant to Rule 92 *bis*, it must not relate to the acts and conduct of the accused as charged in the Indictment. The phrase “acts and conduct of the accused” has been interpreted in the Tribunal’s jurisprudence as an expression that must be given its ordinary meaning: “deeds and behaviour of the accused”.²¹ Furthermore, a clear distinction must be drawn between: (a) the acts and conduct of others who commit the crimes for which the accused is alleged to be responsible and (b) the acts and conduct of the accused as charged in the Indictment, which establish his or her responsibility for the acts and conduct of those others.²² Evidence pertaining to the latter is inadmissible under Rule 92 *bis* and includes evidence that the Prosecution seeks to rely on to establish that the accused:

- (a) committed (that is, that he or she personally physically perpetrated) any of the crimes charged;
- (b) planned, instigated, or ordered the crimes charged;
- (c) otherwise aided and abetted those who actually did commit the crimes in the planning, preparation, or execution of those crimes;
- (d) was a superior to those who actually committed the crimes;

¹⁹ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Decision on Prosecution’s Third Motion for Admission of Statements and Transcripts of Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (Witnesses for Sarajevo Municipality), 15 October 2009 (“*Karadžić* Decision”), para. 4; *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis*, 7 June 2002 (“*Galić* Appeal Decision”), paras 12-13; *Prosecutor v. S. Milošević*, Case No. IT-02-54-T, Decision on Prosecution’s Request to Have Written Statements Admitted under Rule 92 *bis*, 21 March 2002 (“*S. Milošević* Decision”), para. 6.

²⁰ *Karadžić* Decision, para. 4; *Prosecutor v. Bošković and Tarčulovski*, Case No. IT-04-82-PT, Decision on Prosecution’s First Revised Motion Pursuant to Rule 92 *bis* and on Prosecution’s Motion Pursuant to Rule 92 *ter*, 30 March 2007 (“*Bošković and Tarčulovski* Decision”), para. 95, citing *S. Milošević* Decision, para. 8.

²¹ *Karadžić* Decision, para. 5; *Bošković and Tarčulovski* Decision, para. 8.

²² *Karadžić* Decision, para. 5; *Galić* Appeal Decision, para. 9.

(e) knew or had reason to know that those crimes were about to be or had been committed by his or her subordinates; or

(f) failed to take reasonable steps to prevent such acts or to punish those who carried out those acts.²³

7. Where the Prosecution case is that the accused participated in a joint criminal enterprise (“JCE”) and is therefore liable for the acts of others in that JCE, Rule 92 *bis* (A) excludes any written statement that goes to proof of any act or conduct of the accused upon which the Prosecution relies to establish that the accused either: (a) participated in that JCE or (b) shared with the person who actually did commit the crimes charged the requisite intent for those crimes.²⁴

8. Even if a written statement or the transcript of prior testimony is admissible pursuant to Rule 92 *bis*, it is for the Chamber to determine whether to exercise its discretion and admit the evidence in written form.²⁵ Pursuant to Rule 92 *bis* (A)(i), factors in favour of admission include whether the evidence: (a) is of a cumulative nature; (b) relates to relevant historical, political, or military background; (c) consists of general or statistical analysis of the ethnic composition of the population; (d) concerns the impact of crimes upon victims; (e) relates to issues of the character of the accused; or (f) relates to factors to be taken into account in determining sentence. By contrast, pursuant to Rule 92 *bis* (A)(ii), factors against admission include whether: (a) there is an overriding public interest in the evidence in question being presented orally; (b) a party objecting demonstrates that its nature and source renders it unreliable or that its prejudicial effect outweighs its probative value; or (c) there are any other factors that make it appropriate for the witness to attend for cross-examination.

9. The fact that the written statement goes to proof of the acts and conduct of a subordinate of the accused or of some other person for whose acts and conduct the accused is charged with responsibility is relevant to the exercise of the Trial Chamber’s discretion in deciding whether the evidence be admitted in written form. Where the evidence is pivotal to the Prosecution case, or where the person whose acts and conduct the written statement describes is too proximate to the accused, the Trial Chamber may find that it would not be fair to the accused to permit the evidence to be given in written form.²⁶

²³ *Karadžić* Decision, para. 5; *Galić* Appeal Decision, para. 10.

²⁴ *Karadžić* Decision, para. 6; *Galić* Appeal Decision, para. 13.

²⁵ *Karadžić* Decision, para. 7; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Decision on Prosecution Rule 92 *bis* Motion, 4 July 2006, para. 7.

²⁶ *Galić* Appeal Decision, para. 13; *Karadžić* Decision, para. 8.

10. When the evidence sought to be admitted pursuant to Rule 92 *bis* consists of a written statement, the formal requirements set out in Rule 92 *bis* (B) must be fulfilled. However, various Chambers have taken the approach that, in order to expedite the proceedings, it is permissible for a party to propose written statements for provisional admission pending their certification under Rule 92 *bis* (B).²⁷

11. Should the Chamber consider that the written evidence is admissible, the Chamber may order the witness to be brought for cross-examination pursuant to Rule 92 *bis* (C) and under the conditions set out in Rule 92 *ter* of the Rules. In making this determination, the Chamber should always take into consideration its obligation to ensure a fair trial under Articles 20 and 21 of the Statute of the Tribunal.²⁸ Furthermore, there are a number of criteria established in the case-law of the Tribunal, which should be taken into account when making such a determination, including: (a) the cumulative nature of the evidence;²⁹ (b) whether the evidence is “crime-base” evidence;³⁰ (c) whether the evidence touches upon a “live and important issue between the parties, as opposed to a peripheral or marginally relevant issue”;³¹ and (d) whether the evidence describes the acts and conduct of a person for whose acts and conduct the accused is charged with responsibility (*i.e.*, subordinate, co-perpetrator) and how proximate the acts and conduct of this person are to the accused.³² Moreover, a general factor to be taken into consideration in relation to written evidence in the form of a transcript of previous testimony is whether the witness was extensively cross-examined and whether there is a “common interest” between the Defence in the previous case and the present case.³³

12. In addition to the admission of a witness’s written evidence, documents accompanying the written statements or transcripts which “form an inseparable and indispensable part of the testimony” can also be admitted pursuant to Rule 92 *bis*.³⁴ Not every document referred to in a

²⁷ *Karadžić* Decision, para. 9; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution’s Confidential Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*, 12 September 2006 (“*Popović et al.* Decision”), paras 19-21; *Prosecutor v. Martić*, Case No. IT-95-11-T, Decision on Prosecution’s Motion for the Admission of Written Evidence Pursuant to Rule 92 *bis* of the Rules, 16 January 2006, paras 11, 37.

²⁸ *Karadžić* Decision, para. 10; *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis*, 22 August 2008 (“*Lukić and Lukić* Decision”) para. 20.

²⁹ *Karadžić* Decision, para. 10; *Lukić and Lukić* Decision, para. 20, citing *Prosecutor v. Mrksić et al.*, Case No. IT-95-13/1-T, Decision on Prosecution’s Motion for Admission of Transcripts and Written Statements pursuant to Rule 92 *bis* (confidential), 25 October 2005 (“*Mrksić et al.* Decision”), para. 9.

³⁰ *Karadžić* Decision, para. 10; *Lukić and Lukić* Decision, para. 20, citing *Mrksić* Decision, para. 8; see also *Boškoski and Tarčuloski* Decision, para. 19.

³¹ *Karadžić* Decision, para. 10; *Lukić and Lukić* Decision, para. 20, citing *S. Milošević* Decision, paras 24-25.

³² *Karadžić* Decision, para. 10; *Galić* Appeal Decision, para. 13.

³³ *Karadžić* Decision, para. 10; *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, para. 27.

³⁴ *Karadžić* Decision, para. 11; *Prosecutor v. D. Milošević*, Case No. IT-98-29/1-T, Decision on Admission of Written Statements, Transcripts and Associated Exhibits Pursuant to Rule 92 *ter*, 22 February 2007, p. 3; *Lukić and Lukić* Decision, para. 21.

witness's written statement or transcript from a prior proceeding automatically forms an "inseparable and indispensable part" of the witness's testimony. Rather, a document falls into this category if the witness discusses the document in his or her written statement or transcript and if that written statement would become incomprehensible or have lesser probative value without admission of the document.³⁵

13. Rule 65 *ter* (E)(iii) of the Rules provides, *inter alia*, that the Prosecution shall file, within a time-limit set by the Pre-Trial Judge and not less than six weeks before the Pre-Trial Conference, "the list of exhibits the Prosecutor intends to offer", serving on the defence copies of the listed exhibits. In the exercise of its inherent discretion in managing the trial proceedings, and if satisfied that this is in the interests of justice, a Trial Chamber may grant a Prosecution request to amend the filed exhibit list.³⁶ In doing so, a Trial Chamber must be satisfied that, taking into account the specific circumstances of the case, good cause is shown for amending the original list and that the newly offered material is relevant and of sufficient importance to justify the late addition. Moreover, a Trial Chamber must carefully balance any amendment to the original list with an adequate protection of the rights of the accused.³⁷

C. Discussion

14. GH-164's proposed Rule 92 *bis* package contains information on, *inter alia*, (a) the operations and report writing methodology of the ECMM while it was active in the former Yugoslavia during the period relevant to the Indictment, (b) crimes committed in the former Yugoslavia, and (c) interactions between the ECMM and the authorities in the regions where it operated.³⁸ The ECMM Documents are discussed in the witness statement and form an inseparable and indispensable part of the evidence. The Trial Chamber finds that the tendered evidence is relevant and has probative value.

15. However, the Trial Chamber notes that several of the ECMM Documents go to proof of the acts and conduct of Hadžić as charged in the Indictment.³⁹ The Chamber considers that, while each of the individual ECMM Documents is a contemporaneous report, the Rule 92 *bis* package as a

³⁵ *Karadžić* Decision, para. 11; *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, para. 15.

³⁶ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on the Prosecution's Motion for Leave to File a Supplemental Rule 65 *ter* Exhibit List, 18 March 2010 ("*Karadžić* Decision"), para. 7; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.1, Decision on Appeals Against Decision Admitting Material Related to Borovčanin's Questioning, 14 December 2007 ("*Popović* Appeal Decision"), para. 37.

³⁷ *Karadžić* Decision, para. 8; *Popović* Appeal Decision, para. 37.

³⁸ Motion, para. 6; 65 *ter* number 06379.

whole—the witness statement and the choice to include each of the documents—was prepared for the purposes of legal proceedings. Therefore, the entire Rule 92 *bis* package falls within the stringent requirements of Rule 92 *bis*.⁴⁰ The Chamber therefore finds that the tendered evidence of GH-164 does not meet the requirements for admission pursuant to Rule 92 *bis*. The Prosecution may move to admit the evidence pursuant to Rule 92 *ter* or call the witness *viva voce*.

16. The Chamber notes the absence of objection from the Defence in relation to the addition to the Exhibit List of the notarized ICTY witness statement of GH-164. The Trial Chamber finds that this statement is of sufficient importance to justify its addition to the Exhibit List at this stage of the trial. The Trial Chamber will therefore allow the addition of Rule 65 *ter* number 06379 to the Exhibit List.

D. Disposition

17. Accordingly, the Trial Chamber, pursuant to Rules 54, 65 *ter*, 89(C), 92 *bis*, and 126 *bis* of the Rules, hereby

(a) **GRANTS** the Prosecution leave to file the Reply;

(b) **GRANTS** the Prosecution's request for leave to add Rule 65 *ter* 06379 to the exhibit list;
and

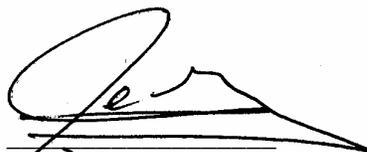
³⁹ See para. 67 of Witness Statement (65 *ter* number 06379) where the witness alleges that “Goran Hadžić and Milan Martić are reported to have made statements seeking to undermine the Vance Plan”; and 65 *ter* numbers 05333, 01321, 05427, 05433, 05432, 05376, 05360.

⁴⁰ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002, para. 31. See also *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-04-84-R77.4, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis* and/or 92 *ter*, 2 September 2008, para. 15.

(c) **DENIES** the Motion.

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

Done this twenty-second day of April 2013,
At The Hague,
The Netherlands.



Judge Guy Delvoic
Presiding

[Seal of the Tribunal]