

**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: 26 October 2015
Original: English

IN THE TRIAL CHAMBER

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

Registrar: Mr. John Hocking

Decision: 26 October 2015

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC

**DECISION ON DEFENCE OMNIBUS MOTION FOR ADMISSION OF
EVIDENCE PURSUANT TO RULE 92 *QUATER***

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 Omnibus Motion for Admission of Evidence Pursuant to Rule 92 *quater*” filed on 13 May 2014, with confidential annexes (“Motion”).¹ On 4 June 2014, the “Prosecution Response to Defence Omnibus Motion for Admission of Evidence Pursuant to Rule 92 *quater* with Annex” was confidentially filed (“Response”).² On 11 June 2014, the Defence filed the confidential “Reply to Prosecution Response to Defence Omnibus Motion for Admission of Evidence Pursuant to Rule 92 *quater* with Annex” (“Reply”). On 18 June 2014, the Prosecution filed the “Prosecution Request for Leave to File Sur-Reply and Sur-Reply to Reply to Prosecution Response to Defence Omnibus Motion for Admission of Evidence Pursuant to Rule 92 *quater* with Annex” (“Sur-Reply”).

2. On 26 May 2014, the Defence filed the “Addendum to Defence Omnibus Motion for Admission of Evidence Pursuant to Rule 92 *quater*” with a confidential annex (“First Addendum”).

3. On 28 May 2014, the Defence filed the “Notice of Compliance with Trial Chamber Order in Relation to Defence Omnibus 92 *quater* Motion”, with confidential annexes (“Notice of Compliance”).³

4. On 15 July 2014, the “Defence Further Submission Regarding its Omnibus Motion for Admission of Evidence Pursuant to Rule 92 *quater*” with confidential annexes was filed (“Further Defence Submissions”).

5. On 18 July 2014, the Defence submitted the “Second Addendum to Defence Omnibus Motion for Admission of Evidence Pursuant to Rule 92 *quater*”, with a confidential annex (“Second Addendum”). On 25 July 2014, the “Prosecution Response to Second Addendum to Defence Omnibus Motion for Admission of Evidence Pursuant to Rule 92 *quater*” was confidentially filed (“Second Addendum Response”). On 1 August 2014, the Defence confidentially filed the “Request for Leave to Reply and Reply to Prosecution Response to Second Addendum to Defence Omnibus Motion for Admission of Evidence Pursuant to Rule 92 *quater*” (“Second Addendum Reply”).

¹ The Trial Chamber set 13 May 2014 as the deadline for the Defence to file any omnibus motion for the admission of evidence pursuant to Rule 92 *quater* of the Rules of Procedure and Evidence of the Tribunal. Scheduling Order for Preparation and Commencement of Defence Case, 20 February 2014, para. 4(d); Order on Close of Prosecution Case-in-Chief, Rule 98 *bis* Proceedings, and Preparation and Commencement of Defence Case, 18 July 2013, para. 12(f)(v).

² The Chamber granted the Prosecution an additional seven days in which to file its Response to the Motion, *see* Email to the parties, 23 May 2014.

³ In an email dated 22 May 2014, the Chamber noted that multiple documents tendered by the Defence in the Motion were not available in eCourt or were missing a translation. The Chamber instructed the Defence to confirm that all tendered documents in relation to the Motion were available on eCourt and accompanied by translations (where necessary) by 28 May 2014. The Chamber also noted that the Defence had omitted to include the Rule 65 *ter* numbers

6. On 6 August 2014, the Defence filed the “Third Addendum to Defence Omnibus Motion for Admission of Evidence Pursuant to Rule 92 *quater*” with a confidential annex (“Third Addendum”). On 5 November 2014, the Defence filed the “Supplement to Third Addendum to Defence Omnibus Motion for Admission of Evidence Pursuant to Rule 92 *quater*” with a confidential annex (“Supplement to Third Addendum”).

7. On 25 August 2014, the Defence filed the “Fourth Addendum to Defence Omnibus Motion for Admission of Evidence Pursuant to Rule 92 *quater*” with confidential annexes (“Fourth Addendum”). On 4 September 2014, the Defence filed the “Fifth Addendum to Defence Omnibus Motion for Admission of Evidence Pursuant to Rule 92 *quater*” with confidential annexes (“Fifth Addendum”). On 8 September 2014, the Prosecution confidentially filed the “Prosecution Response to Fourth and Fifth Addenda to Defence Omnibus Motion for Admission of Evidence Pursuant to Rule 92 *quater*” (“Fourth and Fifth Addenda Response”). On 15 September 2014, the Defence confidentially filed the “Reply to Prosecution Response to Fourth and Fifth Addenda to Defence Omnibus Motion for Admission of Evidence Pursuant to Rule 92 *quater*” (“Fourth and Fifth Addenda Reply”).

A. Submissions

8. In the Motion, the Defence requests the admission of the evidence of 10 witnesses pursuant to Rule 92 *quater* of the Rules of Procedure and Evidence (“Rules”), submitting that each witness is unavailable in accordance with Rule 92 *quater* and that the evidence is reliable and meets the requirements for admission under that Rule.⁴ The Defence submits that the content of the tendered evidence does not go to proof of the acts and conduct of Hadžić to such a degree as to constitute a factor against admission under Rule 92 *quater* (B).⁵

9. The Prosecution opposes the admission of the tendered evidence of nine of the witnesses, asserting that the Defence has failed to meet the requirements of Rule 92 *quater*.⁶ First, the Prosecution submits that the Defence has failed to provide recent and unambiguous medical documentation establishing that four of the witnesses are incapable of answering questions and testifying coherently.⁷ Next, it submits that several of the proposed witnesses provide evidence on issues that are highly contested between the parties, such as the functioning of the Slavonia,

for two documents it appeared to have tendered as associated exhibits and instructed the Defence, by way of a written filing, to confirm the Rule 65 *ter* numbers for those documents by 28 May 2014.

⁴ Motion, paras 1, 5-10, 15.

⁵ Motion, paras 1, 11-13.

⁶ Response, paras 1, 43. The Prosecution requests leave to exceed the 3,000 word limit for this response. Response, para. 2.

⁷ Response, para. 4.

Baranja, and Western Srem (“SBWS”) government under Hadžić, the relationship between the Yugoslav People’s Army (“JNA”) and the SBWS Territorial Defence (“TO”), and events surrounding a 20 November 1991 meeting at Velepomet (“Velepomet Meeting”).⁸ In this regard, the Prosecution asserts that it should be afforded the same opportunity to cross-examine the Defence’s proposed witnesses on these issues and other contested issues, and to have the Chamber assess their credibility in person, as was given to the Defence with regard to the Prosecution witnesses who addressed these issues in its case-in-chief.⁹ The Prosecution submits that the Defence concedes that the evidence of a number of its proposed witnesses goes to the acts and conduct of Hadžić, and that this constitutes a factor against admitting this evidence.¹⁰

10. The Defence replies¹¹ that “the Prosecution claims that the admissibility of Defence Rule 92 *quater* statements should depend on whether they describe issues also covered by Prosecution *viva voce* witnesses.”¹² The Defence submits that the Prosecution’s assertions in this regard falsely equate the situation of a witness who could be called before the Chamber to testify with those who cannot; and that such a principle would asymmetrically advantage the Prosecution which would be permitted to tender Rule 92 *quater* material without any such constraint.¹³ The Defence submits that the Chamber has already admitted a substantial volume of evidence from a variety of sources on the issues cited as “critical” by the Prosecution, which should constitute a factor in favour of, not against, admission.¹⁴ The Defence submits that this Chamber previously decided that evidence may be tendered through Rule 92 *quater* in respect of much more narrowly defined and “critical” issues.¹⁵

11. In the Sur-Reply, the Prosecution exceptionally seeks leave to file a sur-reply because, it submits, the Defence raises for the first time in the Reply that “[n]either the Indictment nor the Pre-Trial Brief alleges that the military operations in and around Bogojevo Bridge, Erdut and Dalj in early August 1991 were a crime.”¹⁶

⁸ Response, para. 5.

⁹ Response, para. 5.

¹⁰ Response, para. 6.

¹¹ The Defence requests leave to file the Reply and leave to exceed the applicable word limit for the Reply. Reply, para. 1.

¹² Reply, paras 2-3, *citing* Response, paras 5, 10, 28.

¹³ Reply, para. 3.

¹⁴ Reply, paras 4-5.

¹⁵ Reply, para. 5.

¹⁶ Sur-Reply, para. 1, *referring to* Reply, para. 11.

12. The remaining filings and submissions relate specifically to particular witnesses and are reflected in the Discussion section below.¹⁷

B. Applicable Law

13. Rule 92 *quater* reads as follows:

(A) The evidence of a person in the form of a written statement or transcript who has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally may be admitted, whether or not the written statement is in the form prescribed by Rule 92 *bis*, if the Trial Chamber:

- (i) is satisfied of the person's unavailability as set out above; and
- (ii) finds from the circumstances in which the statement was made and recorded that it is reliable.

(B) If the evidence goes to proof of acts and conduct of an accused as charged in the indictment, this may be a factor against the admission of such evidence, or that part of it.

It follows from a plain reading of these provisions that evidence pertaining to the acts and conduct of an accused can be admitted under Rule 92 *quater* and that a witness's evidence need not be admitted in its entirety, it being for the Chamber to decide which parts, if any, should be excluded. Evidence going to the acts and conduct of the accused is evidence that concerns the deeds and behaviour of that accused, rather than of anyone else for whose actions he is alleged to be responsible.¹⁸ In addition, the Chamber must ensure that the general requirements for the admissibility of evidence set out in Rule 89 are met, namely that the proffered evidence is relevant and has probative value and that the probative value is not substantially outweighed by the need to ensure a fair trial.¹⁹

14. In assessing the reliability of the proposed evidence, a Chamber can look at the circumstances in which it was obtained and recorded, such as whether a written statement was given under oath; whether it was signed by the witness with an acknowledgement of the truth of its contents; and whether it was given with the assistance of a Registry-approved interpreter. In addition, other factors, such as whether it has been subject to cross-examination, whether the tendered evidence relates to events about which there is other evidence, or whether there is an

¹⁷ The Chamber notes that the Defence seeks leave to file the Second Addendum Reply, Second Addendum Reply, para. 1, and the Fourth and Fifth Addenda Reply, Fourth and Fifth Addenda Reply, para. 1.

¹⁸ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits Pursuant to Rule 92 *quater*, 20 August 2009 (“*Karadžić* Decision”), para. 4; *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, para. 22; *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), 7 June 2002, para. 9.

¹⁹ *Karadžić* Decision, para. 6.

absence of manifest inconsistencies in the evidence tendered, may be considered.²⁰ If one or more of these indicia of reliability is absent, the evidence can still be admitted, and the Chamber will take this into consideration in determining the appropriate weight to be given to it in its overall consideration of all the evidence in the case.²¹

15. When the testimony of an unavailable person is admitted under Rule 92 *quater*, exhibits which accompany that evidence can also be admitted if they form an “inseparable and indispensable” part of the evidence. In order to satisfy this requirement, the witness’s testimony must actually discuss the document, and the document must be one without which the witness’s testimony would become incomprehensible or of lesser probative value.²²

C. Discussion

1. Preliminary matters

16. In accordance with paragraphs (C) (5) and (7) of the Practice Direction on the Length of Briefs and Motions (“Practice Direction”),²³ the Chamber will grant the Prosecution request for leave to file a response to the Motion that exceeds the applicable word limit for responses.

17. Having considered the submissions of the parties, the Chamber, in accordance with Rule 126 *bis* of the Rules, will grant the Defence leave to reply to the Response and will grant the request for the Reply to exceed the applicable word limit for replies. The Chamber considers that the submissions in the Reply and the Sur-Reply, which relate to the Defence being on notice of certain crimes charged in the Indictment, will not assist the Chamber in the determination of the Motion. The Chamber will therefore deny leave for the Prosecution to file the Sur-Reply.

18. With respect to the Second Addendum Reply, the Chamber will grant the Defence leave to reply, however it notes that many of the submissions contained in that reply²⁴ would have been more appropriately made in the Second Addendum or in the Motion itself.

²⁰ *Karadžić* Decision, para. 5. See also *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Redacted Version of “Decision on Motion on Behalf of Drago Nikolić Seeking Admission of Evidence Pursuant to Rule 92 *quater*”, filed confidentially on 18 December 2008, 19 February 2009, para. 32.

²¹ *Karadžić* Decision, para. 5; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Gvero’s Motion for the Admission of Evidence Pursuant to Rule 92 *quater*, 3 February 2009, para. 24.

²² *Karadžić* Decision, para. 7; *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, Decision on Prosecution’s Motions for Admission of Evidence Pursuant to Rule 92 *ter* (ST012 and ST019) (confidential), 29 September 2009, para. 18; *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; *Prosecutor v. Ljubičić*, Case No. IT-00-41-PT, Decision on Prosecution’s Motion for Admission of Transcripts Pursuant to Rule 92 *bis* (D) of the Rules, 23 Jan 2004, p. 3.

²³ IT/184 Rev. 2, 16 September 2005.

²⁴ See *supra* para. 24.

19. Finally, the Chamber will grant the Defence leave to reply to the Fourth and Fifth Addenda Response.

2. General issues

20. The Defence has proposed the admission of evidence pursuant to Rule 92 *quater* of witnesses whom it argues are unavailable because they suffer from a bodily or mental condition that renders them incapable of testifying orally. The Appeals Chamber in *Prlić et al.* determined that a witness is unavailable for purposes of Rule 92 *quater* where “the individual in question is objectively unable to attend a court hearing, either because he is deceased or because of physical or mental impairment.”²⁵ It further clarified that an individual who is “theoretically able to attend—as shown by the fact that he can choose to testify” is not “unavailable” within the meaning of Rule 92 *quater*.²⁶ In determining whether a witness is objectively unavailable, the Chamber will consider, accounting for the documentation provided by the Defence, whether a proposed witness is capable of attending a court hearing and testifying, and is capable of answering questions and testifying coherently.²⁷

21. Turning to the Prosecution’s submission that several of the proposed Rule 92 *quater* witnesses provide evidence on issues that are highly contested or critical to the case, the Chamber reiterates that such evidence is admissible under Rule 92 *quater*.²⁸

3. Individual witnesses

22. DGH-014: The Defence asserts that DGH-014 is unavailable to testify and submits medical certificates which indicate that the witness, who is 80 years old, suffers from, *inter alia*, “drowsiness, fatigue, forgetfulness, occasional vertigo, and headaches”, likely caused by sleep

²⁵ *Prosecutor v. Prlić et al.*, IT-04-74-AR73.6, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić’s Questioning into Evidence, 23 November 2007, para. 48.

²⁶ The Appeals Chamber found that the witness, one of the accused in that case, was “theoretically able to attend—as shown by the fact that he can choose to testify—but is not required to do so in order to protect his own fundamental rights” and therefore the witness was not “unavailable” within the meaning of Rule 92 *quater*. *Prosecutor v. Prlić et al.*, IT-04-74-AR73.6, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić’s Questioning into Evidence, 23 November 2007, para. 48. Relying on this jurisprudence, the Trial Chamber in *Tolimir* found that, while there was evidence that a witness suffered from a “chronic mental disorder”, it was not established the he was “objectively unavailable.” The Trial Chamber in *Tolimir* considered that “the Prosecution [had] presented medical evidence that attending court could have harmful after-effects on [the witness], but this [did] not amount to a medical statement to the effect that he [was] incapable of attending a court hearing and testifying or medical evidence that he [was] incapable of answering the questions put to him and testifying coherently.” *Prosecutor v. Tolimir*, IT-05-88/2-T, Decision on Prosecution’s Motion to Admit the Evidence of Witness No. 39 Pursuant to Rule 92 *quater*, 7 September 2011, para. 30.

²⁷ Decision on Prosecution Omnibus Motion for Admission of Evidence Pursuant to Rule 92 *quater* and Prosecution Motion for the Admission of the Evidence of GH-083 Pursuant to Rule 92 *quater*, 9 May 2013 (“Rule 92 *quater* Decision”), para. 23.

²⁸ Rule 92 *quater* Decision, para. 24.

apnoea.²⁹ According to the Defence, DGH-014's evidence, in the form of a written statement, is relevant to (a) the evolution of TO structures; (b) the assistance of the Vojvodina TO to local Serbs in SBWS; and (c) an alleged meeting between the witness and Goran Hadžić.³⁰ The Defence submits that "DGH-014's statement concerns a specific event upon which the Chamber heard testimony during the Prosecution case" but asserts that "the fact itself is peripheral to the crimes actually charged" in the Indictment. It adds that if the "Chamber deems that the event nevertheless does pertain to the 'acts and conduct [...] as charged', then the Defence submits that the Chamber admit the statement and assess its weight in light of the totality of the evidence."³¹ The Defence also submits that the evidence of DGH-014 is corroborated by the evidence of four witnesses, including GH-015, and one exhibit.³²

23. The Prosecution first responds that the Defence has failed to establish that DGH-014 is unavailable, asserting that (a) sleep apnoea is a "relatively minor physical disorder and does not render the witness incapable of attending a court hearing and testifying in person";³³ and (b) the Chamber previously rejected the admission of the written evidence of Prosecution witness GH-064, who suffered from more serious health conditions than DGH-014.³⁴ The Prosecution further notes that the witness provided the Defence with the written statement in February 2013,³⁵ and asserts that this either (a) suggests that DGH-014 is currently able to attend a court hearing to testify and is capable of answering questions coherently,³⁶ or, (b) mitigates in favour of calling DGH-014 *viva voce* as the statement was "presumably" taken after the onset of amnesia.³⁷ The Prosecution further challenges the reliability of the written statement asserting that (a) it was not given under oath; (b) DGH-014 has not been subject to cross-examination; and (c) it contains a number of ambiguous and unsubstantiated assertions.³⁸ The Prosecution asserts that the purpose of the evidence—to impeach the evidence of GH-015 in relation to the meeting with Hadžić—goes directly to the acts and conduct of the accused, is uncorroborated by other evidence, and goes to the critical issue of Hadžić's involvement in planning armed attacks by Serb forces against non-Serbs, all of which are factors against admission pursuant to Rule 92 *quater*.³⁹

²⁹ Fourth Addendum, para. 1, Confidential Annex A, DGH-014 Medical Document, 4 August 2014; Motion, confidential Annex A, p. 1; Second Addendum, confidential Annex, DGH-014 Medical Document, 3 March 2014.

³⁰ Motion, confidential Annex A, p. 1.

³¹ Motion, para. 13.

³² Motion, confidential Annex A, p. 1.

³³ Second Addendum Response, para. 8.

³⁴ Second Addendum Response, para. 8.

³⁵ Response, para. 9.

³⁶ Response, para. 9.

³⁷ Fourth Addendum Response, para. 3.

³⁸ Response, para. 10; Second Addendum Response, para. 9; Fourth Addendum Response, para. 4.

³⁹ Response, para. 10; Second Addendum Response, para. 9; Fourth Addendum Response, para. 4.

24. The Defence replies that DGH-014 is unavailable. It asserts that unlike GH-064, whose medical conditions were physical with no indications of mental impairments, DGH-014 “presents substantial indications of mental incapacity”, in addition to serious physical ailments, which “substantially impact the witness’s ability to hear and answer questions” and render him unavailable to testify.⁴⁰ The Defence submits that the condition of DGH-014 is more similar to that of Prosecution witnesses GH-039 and GH-046, whom the Chamber found were unavailable based on mental impairments.⁴¹ The Defence further argues that “the recording of an extremely short and simple statement does not suggest that the witness is able to withstand the physical and psychological rigours of travel and testimony” and notes that the brevity of DGH-014’s statement is indicative of the witness’s diminished capacities.⁴² The Defence also asserts that DGH-014’s statement is “unambiguous, narrow in scope, and notarized to confirm his signature”⁴³ and is based on the witness’s first-hand knowledge and observation.⁴⁴ It asserts that the evidence of DGH-014, which is largely corroborated by the evidence of GH-015, is far less critical than some evidence that was admitted by the Chamber as incriminating evidence.⁴⁵ The Defence concludes that the statement has sufficient probative value, reliability, clarity, and specificity to be admitted pursuant to Rule 92 *quater*.⁴⁶

25. The Chamber notes that according to a cardiologist’s report dated 3 March 2014, DGH-014 suffers from sleep apnoea which may lead to “less oxygen reaching the brain and is linked to exhaustion, not getting enough sleep, reduced ability to work, forgetfulness, Alzheimer’s”.⁴⁷ The report concludes that “[t]he general clinical status and age of the patient require a specific life regimen without any mental or physical exertion, such as stressful situations and exerting or exhaustive travel, which would represent a direct risk to the deterioration of his general clinical state.”⁴⁸ On 14 May 2014, the cardiologist noted that DGH-014 experiences “moments of brief spontaneous sleep lasting a couple of minutes, spontaneously during the day [...] after which he does not recall what he was doing.”⁴⁹ A more recent medical report, dated 4 August 2014, states that the witness “complains of drowsiness, fatigue, forgetfulness, occasional vertigo and headaches” for which he has undergone diagnostic procedures including an MRI scan of the brain.⁵⁰ The MRI

⁴⁰ Second Addendum Reply, paras 4-8; Fourth and Fifth Addenda Reply, para. 2.

⁴¹ Second Addendum Reply, paras 2-3, 5.

⁴² Reply, para. 8.

⁴³ Reply, para. 9.

⁴⁴ Reply, para. 12.

⁴⁵ Reply, para. 9; Second Addendum Reply, para. 11.

⁴⁶ Reply, para. 12.

⁴⁷ Second Addendum, confidential Annex, DGH-014 Medical Document, 3 March 2014, p. 4.

⁴⁸ Second Addendum, confidential Annex, DGH-014 Medical Document, 3 March 2014, p. 5.

⁴⁹ Second Addendum, confidential Annex, DGH-014 Medical Document, 3 March 2014, p. 6.

⁵⁰ Fourth Addendum, confidential Annex A, DGH-014 Medical Document, 4 August 2014.

scan indicated “reductive changes, without any pathological changes.”⁵¹ The doctor also noted that DGH-014 displayed “slight amnesia” and “was somnolent and sleepy while talking, and at one point almost fell asleep.”⁵² Considering in particular that DGH-014 has shown signs of forgetfulness and amnesia, and experiences episodes of spontaneous sleep after which he does not recall what he was doing, the Chamber is satisfied that DGH-014 is incapable of answering questions put to him and testifying coherently and is therefore objectively unavailable within the meaning of Rule 92 *quater*.

26. The Chamber considers that DGH-014’s evidence is relevant to charges in the Indictment. The Chamber considers that (a) the statement was signed by the witness with an acknowledgement of the truth of its contents; and (b) there are no manifest inconsistencies in the statement.⁵³ The Chamber further considers that the statement was taken in February 2013, a full year prior to the first medical report, which indicated that DGH-014 experienced episodes of forgetfulness,⁵⁴ and 18 months before it was documented that DGH-014 experienced “slight amnesia”.⁵⁵ The Chamber, therefore, does not consider that DGH-014’s current medical condition impacts on the reliability of the written statement. The Chamber notes that the written statement bears upon a meeting that GH-015 alleged had occurred at which, GH-015 alleged, DGH-014 and Goran Hadžić had discussed, *inter alia*, upcoming military operations.⁵⁶ DGH-014, on the other hand, states in his written statement that he did not have such a meeting with Hadžić and that he would not have planned military operations with Hadžić.⁵⁷ While the evidence of DGH-014 contradicts the evidence of GH-015—and is not corroborated by it in this respect—the Chamber notes that Rule 92 *quater* does not require that evidence be corroborated in order to be admitted. The Chamber notes that DGH-014’s evidence goes to the acts and conduct of Hadžić, which is a factor that can go against the admission of this evidence. However, the Chamber notes that DGH-014 is the individual alleged to have been at the meeting and finds that the probative value of the evidence is not substantially outweighed by the need to ensure a fair trial. The fact that DGH-014 has not been subjected to cross-examination goes to the weight to be accorded to it, not its admission. The Chamber is satisfied that the witness is unavailable and finds that the tendered evidence is reliable, is relevant, has probative value, and is appropriate for admission pursuant to Rules 89(C) and 92 *quater*.

⁵¹ Fourth Addendum, confidential Annex A, DGH-014 Medical Document, 4 August 2014.

⁵² Fourth Addendum, confidential Annex A, DGH-014 Medical Document, 4 August 2014.

⁵³ Rule 65 *ter* number 1D00248, DGH-014 Written Statement, 16 February 2013.

⁵⁴ Second Addendum, confidential Annex, DGH-014 Medical Document, 3 March 2014, pp. 1-2.

⁵⁵ Fourth Addendum, confidential Annex A, DGH-014 Medical Document, 4 August 2014.

⁵⁶ Rule 65 *ter* number 1D00248, DGH-014 Written Statement, 16 February 2013, paras 5-6. *See also* GH-015, 16 November 2012, T. 1411-1412 (confidential); GH-015, P245, *Prosecutor v. S. Milošević*, Case No. IT-02-54-T, 29 January 2003, T. 15149, 15151-15152, 15157-15158 (confidential).

⁵⁷ Rule 65 *ter* number 1D00248, DGH-014 Written Statement, 16 February 2013, paras 3-6.

27. DGH-027: The Defence submits a death certificate to demonstrate that DGH-027 is unavailable.⁵⁸ According to the Defence, DGH-027's evidence—in the form of a transcript of his prior testimony in *Prosecutor v. Dokmanović*,⁵⁹ a written statement dated March 2014, a prior written statement dated February 2003, and one associated exhibit, which is an additional written statement dated February 1998 admitted during DGH-027's testimony in *Dokmanović*—is relevant to, *inter alia*, (a) the general functioning of the district government of SBWS; (b) relations between the district government of SBWS and the JNA; (c) the JNA's military administration in certain areas, such as Vukovar and Ilok; and (d) the Velepromet Meeting.⁶⁰ The Defence submits that the transcript of DGH-027's prior testimony, which is his testimony before the ICTY, is presumptively accurate and demonstrates that the Prosecution had a full opportunity to cross-examine DGH-027.⁶¹ The Defence notes the Chamber's preference to receive one written statement for each witness called pursuant to Rule 92 *quater*, but submits that it has tendered DGH-027's prior testimony, which includes the Prosecution's cross-examination of the witness, along with his more recent statement because "it offers a reference point against which to assess the reliability of his more recent statement".⁶² The Defence submits that DGH-027's evidence makes "little reference to Mr. Hadžić's acts and conduct" and asserts that to the extent that he refers to matters concerning the authority and activities of the District Government of SBWS, his testimony is substantially corroborated by other witnesses.⁶³

28. The Prosecution objects to the admission of DGH-027's written evidence.⁶⁴ The Prosecution first submits that the March 2014 written statement appears to be an amalgamation of the witness's prior written statements and testimony in *Dokmanović*. It asserts that tendering the prior testimony as a "reference point against which to assess the reliability of the more recent statement" is not a valid basis to deviate from the Chamber's one-statement guideline.⁶⁵ The Prosecution also asserts that the tendered evidence lacks sufficient indicia of reliability because (a) the February 2003 and March 2014 written statements were not taken under oath and have not been subject to cross-examination;⁶⁶ (b) the witness does not acknowledge the truth of the contents of his March 2014

⁵⁸ Supplement to Third Addendum, confidential Annex, DGH-027 Death Certificate, 1 August 2014. The Defence originally submitted medical certificates to demonstrate that DGH-027 is unavailable. *See* Motion, confidential Annex B. However, DGH-027 passed away after the filing of the Motion. *See* Third Addendum, para. 1.

⁵⁹ Case No. IT-95-13a.

⁶⁰ Motion, confidential Annex A, pp. 2-3.

⁶¹ Motion, para. 7.

⁶² Motion, para. 10.

⁶³ Motion, para. 12, confidential Annex A, pp. 2-3.

⁶⁴ Response, para. 12. In the Response, the Prosecution also asserts that the medical documents provided by the Defence did not establish that DGH-027 is unavailable. *See* Response, para. 11. However, considering that the Defence subsequently provided a death certificate, the Chamber considers this argument to be moot and will not further consider it.

⁶⁵ Response, para. 12.

⁶⁶ Response, para. 12.

written statement;⁶⁷ (c) the Prosecution's interests in the *Dokmanović* case, where it briefly cross-examined the witness, were significantly more limited than in the present proceedings;⁶⁸ and (d) there are significant inconsistencies between DGH-027's evidence and that of other Defence witnesses.⁶⁹ The Prosecution asserts that the evidence of DGH-027 pertains to a number of highly contentious issues in this case, including, *inter alia*, the Velepromet Meeting about which the Chamber previously found the interest of justice required the Prosecution to lead relevant evidence *viva voce*.⁷⁰ Finally, the Prosecution notes that during his previous testimony, DGH-027 merely confirmed that he had made the February 1998 written statement, and therefore this document does not meet the requirements to be admitted as an associated exhibit.⁷¹

29. In its Reply, the Defence asserts that the admission of multiple written statements for DGH-027 will facilitate the Chamber's assessment of his credibility, which was tested by the Prosecution on cross-examination in *Dokmanović*.⁷² The Defence further submits that (a) Rule 92 *quater* evidence, including that of DGH-027, should not necessarily be excluded because it goes to critical issues;⁷³ and (b) the alleged inconsistencies between DGH-027's evidence and the evidence of other Defence witnesses are not so significant as to impact the admissibility, rather than the weight, of the evidence.⁷⁴

30. The Prosecution does not dispute, and the Chamber accepts, that DGH-027 is deceased, and therefore unavailable.⁷⁵ The Chamber considers that the March 2014 written statement is relevant to charges in the Indictment. The Chamber considers that (a) the written statement was read out to the witness in the Serbian language; (b) the evidence relates to events about which other witnesses provide evidence;⁷⁶ and (c) there are no manifest inconsistencies in the statement.⁷⁷ The Chamber further considers that the statement was signed by the witness, who stated that it contains all that he said according to his knowledge and recollection.⁷⁸ In this respect, the Chamber recalls that Rule 92 *quater*, unlike Rule 92 *bis*, does not require a declaration by the witness that the contents of the statement are true and correct to the best of the witness's knowledge and belief.⁷⁹ The Chamber finds that the declaration attached to the witness statement is sufficient to establish that the written

⁶⁷ Response, para. 12.

⁶⁸ Response, para. 12.

⁶⁹ Response, para. 14.

⁷⁰ Response, para. 13.

⁷¹ Response, para. 15.

⁷² Reply, para. 14.

⁷³ Reply, para. 15.

⁷⁴ Reply, para. 15.

⁷⁵ Supplement to Third Addendum, confidential Annex, DGH-027 Death Certificate, 1 August 2014.

⁷⁶ *See, e.g.*, the evidence of Veljko Džakula, Borivoje Savić, Aleksandar Vasiljević, Jovan Šušić, Vojin Šuša, and Milorad Vojnović.

⁷⁷ Rule 65 *ter* number 1D02402, DGH-027 Written Statement, 28 March 2014.

⁷⁸ Rule 65 *ter* number 1D02402, DGH-027 Written Statement, 28 March 2014, p. 9.

statement is an accurate reflection of what was said by DGH-027 and that what he said was based on his knowledge and recollection. Moreover, the Chamber notes that the Defence has tendered the transcript of DGH-027's prior testimony which includes the witness's declaration that he would speak the truth as well as two written statements which both include a declaration that they are "true to the best of my knowledge and recollection."⁸⁰ The Chamber will admit these documents for the limited purpose of assessing DGH-027's credibility. Any inconsistencies between the evidence of DGH-027 and other Defence witnesses⁸¹ will be assessed in light of all the other evidence admitted at trial and goes to the weight to be given to the evidence, not its admission. Finally, while the evidence does briefly refer to Hadžić,⁸² it is not so critical to the case that admitting it in written form and without the opportunity for cross-examination is unduly prejudicial to the Prosecution. The Chamber therefore finds that the probative value of the evidence is not substantially outweighed by the need to ensure a fair trial. The Chamber finds that the tendered evidence is reliable, is relevant, has probative value, and is appropriate for admission pursuant to Rules 89(C) and 92 *quater*.

31. DGH-040: The Defence submits a death certificate to demonstrate that DGH-040 is unavailable.⁸³ According to the Defence, DGH-040's evidence—in the form of a written statement dated May 2013, a written statement dated December 2002, a written statement dated February 2003, the transcript of an interview given to the Office of the Prosecutor ("OTP") in September 2003, and one associated exhibit—is relevant to (a) the organisation and deployment of volunteer groups to Croatia by the Serbian Radical Party ("SRS"); (b) the TO training centre in Erdut; and (c) Radovan Stojičić.⁸⁴ The Defence submits that the 2003 written statement is a continuation of the

⁷⁹ Rule 92 *quater* of the Rules.

⁸⁰ Rule 65 *ter* number 1D02327, *Prosecutor v. Dokmanović*, Case No. IT-95-13a-T, 26 May 1998, T. 3160-3161; Rule 65 *ter* number 1D02326, DGH-027 Written Statement, 26 February 2003, p. 7; Rule 65 *ter* number 1D02325, DGH-027 Written Statement, 26 February 1998, p. 3.

⁸¹ The Chamber has reviewed the inconsistencies alleged by the Prosecution. In his written statement, DGH-027 states that "Arkan was not at the [Velepromet M]eeting" and that "[i]t never entered our minds for the Government to deal with the Croatian extremists summarily. We had absolutely no jurisdiction or possibility to discuss whether we would become more hard-line with people on the Croatian side, and this was not a subject of discussion because it was all under the purview of the JNA and we could only deal with civilian matters." Rule 65 *ter* number 1D02402, DGH-027 Written Statement, 28 March 2014, para. 21. The Chamber notes that Vojin Šuša (DGH-016) and Boro Milinković (DGH-035), on the other hand, testified that Arkan was present at the meeting. Vojin Šuša, 8 October 2014, T. 11991; Boro Milinković, D187, Written Statement, paras 47-48. Milinković also stated that "[t]he main issue that was being discussed was whether some people who had been arrested should be taken to Serbia." Boro Milinković, D187, Written Statement, para. 48.

⁸² Rule 65 *ter* number 1D02402, DGH-027 Written Statement, 28 March 2014, paras 6, 22. Specifically, DGH-027 indicates that Hadžić asked DGH-027 if he would agree to be the minister of finance in a newly formed SBWS government and that "it [was] possible that Goran Hadžić left the [Velepromet Meeting] because he did leave other sessions to give statements to reporters."

⁸³ Motion, confidential Annex B, DGH-040 Death Certificate, 14 September 2013.

⁸⁴ Motion, confidential Annex A, pp. 4-7.

2002 written statement, and that it is on these two statements that it primarily relies.⁸⁵ While it notes the Chamber's preference to receive one written statement for each witness called pursuant to Rule 92 *quater*, the Defence submits the 2013 written statement to show that DGH-040 recently stood by the statements that he had previously given and the transcript of the interview to provide the fullest picture of DGH-040's verbatim answers to questioning by the OTP.⁸⁶ The Defence submits that the evidence makes "little or no reference to Mr. Hadžić", and to the extent that it does, it does not go to his acts or conduct as charged in the Indictment.⁸⁷ Finally, the Defence submits that the evidence of DGH-040 is corroborated by the evidence of three witnesses.⁸⁸

32. The Prosecution asserts that the written evidence of DGH-040 is unsuitable for admission.⁸⁹ It submits that in addition to the written statements tendered by the Defence, DGH-040 provided an amalgamated written statement to the OTP in 2006. According to the Prosecution, DGH-040 signed each page of the 2006 statement, as well as an acknowledgement that the contents of the statement were truthful and given voluntarily.⁹⁰ However, in the written statement given to the Defence in 2013, DGH-040 claims that the 2006 written statement was a "fake".⁹¹ The Prosecution asserts that DGH-040's claim that the 2006 written statement, which incorporates key aspects of his pre-2006 statements, calls into question the credibility of the previous statements as well.⁹² The Prosecution further asserts that prior misconduct before the Tribunal by DGH-040 calls into question the reliability of his evidence.⁹³ Specifically, the Prosecution asserts that DGH-040 (a) pressured Prosecution witnesses in the *Šešelj* case not to give testimony;⁹⁴ (b) made numerous unfounded accusations of prosecutorial misconduct;⁹⁵ and (c) was convicted of contempt of this Tribunal after he refused to appear as a Prosecution or Chamber witness in the *Šešelj* case.⁹⁶ The Prosecution further asserts that (a) contrary to the Defence's assertion, DGH-040's 2013 written statement does not provide a "reaffirmation of his view that the 2002 and 2003 statements are truthful and correct", but merely confirms that he provided those statements;⁹⁷ (b) the tendered written statements and transcript reference numerous documents that are probative to issues in this case which have not

⁸⁵ Motion, confidential Annex A, pp. 6-7. The Chamber notes that the correct date of the February 2013 written statement should be 13 February 2003 as per pp. 1-3, 15 of the statement and that the reference to 10 December 2003 on p. 1 is incorrect.

⁸⁶ Motion, para. 10.

⁸⁷ Motion, para. 11.

⁸⁸ Motion, confidential Annex A, p. 6.

⁸⁹ Response, para. 16.

⁹⁰ Response, para. 17, *citing* Rule 65 *ter* number 1D02775.

⁹¹ Response, para. 18.

⁹² Response, para. 18.

⁹³ Response, para. 20.

⁹⁴ Response, para. 20, *citing* *Prosecutor v. Šešelj*, Case No. IT-03-67-T, 12 May 2009, T. 16020, 1 April 2008, T. 5552.

⁹⁵ Response, para. 20.

⁹⁶ Response, para. 20, *citing* *The Matter of Ljubiša Petković*, Case No. IT-03-67-R.77.1, Redacted Version of Judgement Pronounced on 11 September 2008, 11 September 2008 (English version 9 December 2008), para. 66.

⁹⁷ Response, para. 19.

been tendered as associated exhibits by the Defence;⁹⁸ and (c) contrary to the Defence's assertion, none of DGH-040's written statements were given under oath or subject to cross-examination.⁹⁹ Finally, the Prosecution submits that the reason for tendering multiple statements, namely, to provide "better insight into the witness's overall reliability", is an impermissible basis to depart from the Chamber's one-statement guideline.¹⁰⁰

33. In its Reply, the Defence submits that it took DGH-040's 2013 written statement to "transparently record the fact that the witness stood by his 2002 and 2003 statements, but has now repudiated his 2006 statement."¹⁰¹ The Defence further submits that "whatever the nature of the witness's alleged subsequent misconduct", there is sufficient indicia of reliability to admit the written statements and transcript from 2002 and 2003, the substance of which the Defence seeks to rely upon.¹⁰² Specifically, the Defence submits that (a) the written statements and transcript were recorded by the OTP; (b) the transcript was recorded verbatim; (c) the written statements were acknowledged by the witness to be truthful; (d) the interview which produced the transcript was given after a full advice of rights; (e) the Prosecution had a full opportunity to question the witness; and (f) the written statements were recorded before Šešelj was indicted.¹⁰³ The Defence submits that the primary purpose for tendering DGH-040's evidence is to impeach GH-010 and not for the purpose of establishing facts about the witness's political career.¹⁰⁴ Finally, the Defence asserts that a tendering party has the discretion to determine which associated exhibits to tender.¹⁰⁵

34. The Prosecution does not dispute, and the Chamber accepts, that DGH-040 is deceased and therefore unavailable.¹⁰⁶ The Chamber considers that DGH-040's evidence is relevant to charges in the Indictment. The Chamber notes that each of the tendered written statements provided by DGH-040 contains indicia of reliability: (a) the statements were written in and read by, or to, the witness in a language he understood; (b) the statements were signed by the witness with an acknowledgement of the truth of their content; and (c) the evidence relates to events about which other witnesses provide evidence.¹⁰⁷ In addition, the Chamber notes that the transcript of the 2003 interview appears to be a verbatim record of that interview.¹⁰⁸ However, the Chamber notes that the

⁹⁸ Response, para. 21.

⁹⁹ Response, para. 20.

¹⁰⁰ Response, para. 16.

¹⁰¹ Reply, para. 16.

¹⁰² Reply, para. 17.

¹⁰³ Reply, para. 17.

¹⁰⁴ Reply, para. 17.

¹⁰⁵ Reply, para. 19.

¹⁰⁶ Motion, confidential Annex B, DGH-040 Death Certificate, 14 September 2013.

¹⁰⁷ Rule 65 *ter* number 1D00453, DGH-040 Written Statement, 24 May 2013; Rule 65 *ter* number 1D03312, DGH-040 Written Statement, 18 December 2002; Rule 65 *ter* number 1D03323, DGH-040 Written Statement, 13 February 2003.

¹⁰⁸ Rule 65 *ter* number 1D03296, Transcript of Interview with DGH-040, 15 September 2003; Rule 65 *ter* number 1D03297, Transcript of Interview with DGH-040, 16 September 2002; Rule 65 *ter* number 1D03238, Transcript of

same indicia of reliability also exist for the 2006 written statement that the witness now repudiates as a “fake”. Specifically, the Chamber notes that it contains an acknowledgement signed by the witness that it had been read to the witness in his native language and that it was true to the best of his knowledge and recollection.¹⁰⁹ In the 2013 written statement, DGH-040 does not provide any basis or explanation for why he now states that the 2006 written statement was “fake”.¹¹⁰ Moreover, while DGH-040 acknowledges in the 2013 written statement that he had provided statements to the OTP in December 2002 and had been interviewed in September 2003, he does not acknowledge the truth of what is contained in the previous written statements or was said during the interview.¹¹¹ The Chamber further considers that in finding DGH-040 guilty of contempt of this Tribunal, a Trial Chamber rejected explanations provided by the witness for why he had not appeared as a witness.¹¹² When viewed as a whole, the Chamber considers that there are considerable problems relating to the credibility of DGH-040. Under these specific circumstances, the Chamber finds that the lack of credibility of DGH-040 renders his evidence devoid of probative value and not appropriate for admission.

35. DGH-050: The Defence submits a death certificate to demonstrate that DGH-050 is unavailable.¹¹³ According to the Defence, DGH-050’s evidence, in the form of a written statement, is relevant to (a) the rise of ethnic tensions in Vinkovci in 1991; (b) the arming of villagers by the TO; and (c) the subordination of DGH-050’s unit to the Army of the Republic of the Serb Krajina and the unit’s contacts with Radovan Stojičić.¹¹⁴ The Defence submits that the written statement was recorded by the OTP and that “[s]tatements in such form were proffered to be a reliable and accurate record of what the witnesses said during the Prosecution case, and admitted on that basis.”¹¹⁵ The Defence submits that the evidence makes “little or no reference to Mr. Hadžić”, and to the extent that it does, it does not go to his acts or conduct as charged in the Indictment;¹¹⁶ and that the evidence is corroborated by the evidence of four Prosecution witnesses.¹¹⁷

36. The Prosecution objects to the admission of DGH-050’s written statement, asserting that it is unreliable, has limited probative value, and primarily relates to the formation and activities of the

Interview with DGH-040, 16 September 2003; Rule 65 *ter* number 1D03298, Transcript of Interview with DGH-040, 17 September 2003; Rule 65 *ter* number 1D03299, Transcript of Interview with DGH-040, 18 September 2003.

¹⁰⁹ Rule 65 *ter* number 1D02775, DGH-040 Written Statement, 18 June 2006.

¹¹⁰ See Rule 65 *ter* number 1D00453, DGH-040 Written Statement, 24 May 2013, para. 2.

¹¹¹ Rule 65 *ter* number 1D00453, DGH-040 Written Statement, 24 May 2013, para. 2.

¹¹² See *The Matter of Ljubiša Petković*, Case No. IT-03-67-R.77.1, Redacted Version of Judgement Pronounced on 11 September 2008, 11 September 2008 (English version 9 December 2008), para. 47.

¹¹³ Fourth Addendum, confidential Annex B, DGH-050 Death Certificate, 31 December 2013.

¹¹⁴ Motion, confidential Annex A, p. 8.

¹¹⁵ Motion, para. 9.

¹¹⁶ Motion, para. 11.

¹¹⁷ Motion, para. 11, confidential Annex A, p. 8.

“Skorpions” unit, which is only marginally relevant to this case.¹¹⁸ The Prosecution submits that in his written statement, DGH-050 stated that he heard about killings near Srebrenica in July 1995 through the media, but, according to the Prosecution, DGH-050 was subsequently convicted for executing six civilians during this incident. The Prosecution asserts that this renders the credibility of the remainder of DGH-050’s evidence questionable.¹¹⁹ Additionally, the Prosecution argues that DGH-050’s evidence is not corroborated by the four witnesses cited by the Defence and that two of these witnesses actually undermine DGH-050’s evidence.¹²⁰ The Prosecution requests that if the Chamber admits DGH-050’s evidence, it also admit, for impeachment purposes, (a) video footage, which it submits shows DGH-050 and others executing six civilians in Bosnia and Herzegovina in 1995 and (b) a judgement of the War Crimes Chamber of the District Court of Belgrade by which DGH-050 was criminally convicted for those acts.¹²¹

37. The Defence replies that there are sufficient indicia of reliability for the statement to be admitted and that the Prosecution’s objections go to the weight that should be afforded to the evidence rather than to its admissibility.¹²²

38. The Prosecution does not dispute, and the Chamber accepts, that DGH-050 is deceased and therefore unavailable.¹²³ The Chamber considers that only paragraphs one through twelve of DGH-050’s written statement are relevant to charges in the Indictment; however, the entire statement is relevant for the purposes of assessing the witness’s credibility. The Chamber considers that (a) the statement was made with the assistance of a Registry-approved interpreter who orally translated the statement into a language the witness understood; and (b) the statement was signed by the witness with an acknowledgement of the truth of its contents.¹²⁴ To the extent that the Prosecution asserts that DGH-050’s evidence is undermined by other witnesses,¹²⁵ the Chamber notes that the evidence will be assessed in light of all the evidence admitted at trial. The Chamber has reviewed the judgement of the War Crimes Chamber of the District Court of Belgrade and the video footage tendered by the Prosecution and decides to admit the judgement for the purpose of

¹¹⁸ Response, para. 23.

¹¹⁹ Response, para. 23.

¹²⁰ Response, para. 24.

¹²¹ Response, para. 25. *See* Rule 65 *ter* number 05017, Video of “Skorpions”, July 1995 and Rule 65 *ter* number 1D03137, Judgement of Republic of Serbia District Court in Belgrade War Crimes Chamber, 10 April 2007.

¹²² Reply, para. 20.

¹²³ Fourth Addendum, confidential Annex B, DGH-050 Death Certificate, 31 December 2013.

¹²⁴ Rule 65 *ter* number 1D02398, DGH-050 Written Statement, 24 January 2004.

¹²⁵ In this respect, the Chamber notes the Prosecution’s submissions. For example, witnesses Goran Stoparić (GH-025) and Borivoje Savić (GH-102) describe the organization and actions of the Skorpions and provide details which DGH-050 does not give in his written statement: Savić “learned that the Skorpions were a special unit of the DB, formed as a satellite unit of the Red Berets at a meeting in Novi Sad” by, among others, Radovan Stojičić. Borivoje Savić, P1733, Written Statement, 24 November 2003, paras 69-70. DGH-050, mentions that leaders of the Skorpions dealt with Stojičić, but does not provide any further details on the relationship or his involvement with the formation of the group. Rule 65 *ter* number 1D02398, DGH-050 Written Statement, 24 January 2004, para. 8.

assessing DGH-050's credibility.¹²⁶ The Chamber, however, does not find it necessary to admit the video exhibit.¹²⁷ The Chamber finds that the witness's statement is reliable, is relevant, has probative value, and is appropriate for admission pursuant to Rules 89(C) and 92 *quater*.

39. DGH-057: The Defence asserts that DGH-057 is unavailable and submits a medical certificate which indicates that DGH-057 suffered a heart attack in February 2014.¹²⁸ According to the Defence, DGH-057's evidence, in the form of a written statement, is relevant to (a) the rise of ethnic tension in 1991 in Croatia, including in Osijek and in relation to the 2 May 1991 clash in Borovo Selo; (b) a meeting between the witness and Goran Hadžić at which Hadžić asked the witness to organise a press office; (c) government meetings that the witness occasionally attended; and (d) the Velepromet Meeting.¹²⁹ The Defence submits that DGH-057's statements concerning Hadžić's conduct are "relatively peripheral in respect of the charges and, accordingly, should be considered suitable for admission."¹³⁰

40. The Prosecution submits that the Defence has failed to establish that DGH-057 is unavailable.¹³¹ With reference to the medical documentation provided, the Prosecution argues that although DGH-057 underwent surgery in February 2014, he was last recorded as being in "good general condition" and released to homecare with the recommendation that he undergo rehabilitation for 21 days.¹³² According to the Prosecution, nothing in the medical documentation demonstrates that the witness is unable to attend court hearings.¹³³ The Prosecution further asserts that the tendered written statement fails to satisfy a number of reliability factors, namely that it was not taken under oath and that the witness did not acknowledge the truth of its contents.¹³⁴ Moreover, the Prosecution submits that DGH-057 has not been subject to cross-examination before the Tribunal and that the statement contains evidence that goes to the acts and conduct of the accused, as well as to contentious issues in the case.¹³⁵ The Prosecution argues that the statement contains general and ambiguous assertions and that there are important omissions from the written statement relating to the SRS and Vojislav Šešelj which affect the credibility of the evidence.¹³⁶ Finally, the Prosecution submits that the primary purpose of the Defence's use of DGH-057's statement is to

¹²⁶ Rule 65 *ter* number 1D03137, Judgement of Republic of Serbia District Court in Belgrade War Crimes Chamber, 10 April 2007.

¹²⁷ Rule 65 *ter* number 05017, Video of "Skorpions", July 1995.

¹²⁸ Motion, confidential Annex A, pp. 9-10; First Addendum, para. 1, confidential Annex A, DGH-057 Medical Document, 11 February 2014.

¹²⁹ Motion, confidential Annex A, pp. 9-10.

¹³⁰ Motion, para. 13.

¹³¹ Response, para. 26.

¹³² Response, para. 26.

¹³³ Response, para. 26.

¹³⁴ Response, para. 27.

¹³⁵ Response, para. 27.

¹³⁶ Response, para. 28.

impeach the evidence of GH-168 and GH-124; both of whom were subject to cross-examination by the Defence.¹³⁷ The Prosecution argues that it should be afforded the same opportunity to cross-examine the evidence of DGH-057.¹³⁸

41. The Defence replies that there is nothing to suggest that DGH-057 is fully recovered from a cardiac episode and heart surgery.¹³⁹ To the contrary, it submits that the recommended rehabilitation was in a centre for “people suffering from chronic and severe illnesses”.¹⁴⁰ The Defence submits that DGH-057’s statement is not impermissibly ambiguous or unreliable and that the Chamber has heard, and will hear, evidence that relates to the same subject matter.¹⁴¹ The Defence argues that the Prosecution does not have the right of cross-examination merely because DGH-057’s statement contradicts one of its own witnesses.¹⁴² The Defence further asserts that the statement of DGH-057 contains the customary certification that was used by the Prosecution, which is appropriate given the nature and scope of the evidence contained therein.¹⁴³

42. The Chamber notes that the medical document indicates that the witness has experienced some serious health issues for which he underwent surgery in February 2014.¹⁴⁴ However, the document also notes that the witness was released for home care with the recommendation that he undergo a 21-day rehabilitation period with regular check-ups thereafter.¹⁴⁵ Based on the documentation submitted by the Defence, the Chamber is not satisfied that DGH-057 is incapable of attending a court hearing and testifying or that he is incapable of answering the questions put to him and testifying coherently. For this reason the Chamber will deny admission of the written statement of DGH-057, without prejudice.

43. *DGH-060*: The Defence submits a death certificate to demonstrate that DGH-060 is unavailable.¹⁴⁶ According to the Defence, DGH-060’s evidence—in the form of a transcript of his testimony in *Prosecutor v. Dokmanović*¹⁴⁷ and three associated exhibits, one of which is a written statement given by the witness to a defence team at the ICTY in 1998—is relevant to (a) the establishment of the district government of the SBWS and its resources and funding and (b) the Velepromet Meeting.¹⁴⁸ The Defence submits that while DGH-060 makes some reference to

¹³⁷ Response, para. 28.

¹³⁸ Response, para. 28.

¹³⁹ Reply, para. 21.

¹⁴⁰ Reply, para. 21.

¹⁴¹ Reply, para. 22.

¹⁴² Reply, para. 22.

¹⁴³ Reply, para. 22.

¹⁴⁴ First Addendum, confidential Annex A.

¹⁴⁵ First Addendum, confidential Annex A.

¹⁴⁶ Fifth Addendum, para. 1, confidential Annex A, DGH-060 Death Certificate, 22 June 2007.

¹⁴⁷ Case No. IT-95-13a-T.

¹⁴⁸ Motion, confidential Annex A, pp. 10-11; Notice of Compliance, confidential Annex A, p. 1.

Hadžić's role at the Velepromet Meeting, the testimony, overall, "makes little reference to Mr. Hadžić's acts and conduct."¹⁴⁹

44. The Prosecution objects to the admission of DGH-060's evidence.¹⁵⁰ It first argues that the Defence's tendering of the 1998 written statement in addition to the transcript contravenes the Chamber's one-statement guideline.¹⁵¹ It submits that DGH-060 was not examined about the 1998 written statement during his testimony and it is, therefore, not appropriate for admission as an associated exhibit.¹⁵² The Prosecution further asserts that DGH-060's evidence lacks sufficient indicia of reliability, is internally inconsistent regarding contentious issues, parts of it relate directly to the acts and conduct of Hadžić, and the evidence related to Željko Ražnatović ("Arkan") lacks credibility and is inconsistent with the evidence of other Defence witnesses.¹⁵³

45. The Defence replies that DGH-060's 1998 written statement was tendered as a documentary exhibit during his testimony in *Dokmanović* and is therefore suitable for admission as an associated exhibit.¹⁵⁴ Moreover, the Defence submits that it did not have the capacity to amalgamate the witness's statement and testimony and that the written statement is "self-evidently intended to complement" the testimony. It, therefore, seeks admission of the 1998 written statement to provide the full context of the witness's testimony.¹⁵⁵ Additionally, the Defence asserts that DGH-060's testimony was given under oath and was subject to cross-examination and that any alleged inconsistencies in the testimony are not severe enough to go to admissibility rather than weight.¹⁵⁶

46. The Prosecution does not dispute, and the Chamber accepts, that DGH-060 is deceased and therefore unavailable.¹⁵⁷ The Chamber considers that the witness's evidence is relevant to charges in the Indictment. The Chamber further considers that the evidence was given under oath before the Tribunal and was subject to cross-examination.¹⁵⁸ Any alleged inconsistencies in the evidence¹⁵⁹ or

¹⁴⁹ Motion, para. 12.

¹⁵⁰ Response, para. 29.

¹⁵¹ Response, para. 29.

¹⁵² Response, para. 29.

¹⁵³ Response, paras 29, 30.

¹⁵⁴ Reply, para. 23.

¹⁵⁵ Reply, para 23.

¹⁵⁶ Reply, para. 24.

¹⁵⁷ Fifth Addendum, para. 1, confidential Annex A, DGH-060 Death Certificate, 22 June 2007.

¹⁵⁸ Rule 65 *ter* number 1D03125, *Prosecutor v. Dokmanović*, Case No. IT-95-13a-T, 25 May 1998, T. 3047-3072.

¹⁵⁹ The Chamber has considered the Prosecution's submission in relation to an alleged inconsistency in DGH-060's evidence. The Chamber notes that during his testimony, DGH-060 stated that he believed that "Hadžić convened the [Velepromet Meeting] so that the government could impose itself as some kind of an authority for the town in the future." *Prosecutor v. Dokmanović*, Case No. IT-95-13a-T, 25 May 1998, T. 3071. The Chamber does not find this necessarily inconsistent with DGH-060's written statement in which he said "[t]he discussion [at the Velepromet Meeting] was about the reviving the [*sic*] agriculture in the District." Rule 65 *ter* number 02312, DGH-060 Written Statement, 26 February 1998, p. 2.

between DGH-060's evidence and the evidence of other witnesses¹⁶⁰ will be assessed in light of all the evidence admitted at trial and go to the weight to be given to the evidence, not its admission. Moreover, the Chamber notes that DGH-060 makes only minor references to Goran Hadžić and Arkan,¹⁶¹ and that such references are not so critical that admitting the evidence without the opportunity for cross-examination would be unduly prejudicial to the Prosecution. The Chamber further considers that (a) the 1998 written statement is very short (only 1 page) and was tendered during examination-in-chief after the witness confirmed that he had made the statement;¹⁶² and (b) the direct examination of DGH-060 in the prior case proceeded with the information in the written statement already on the record. The Chamber, therefore, considers that it is appropriate for admission as an associated exhibit. The tendered associated exhibit with Rule 65 *ter* number 1D03127 is referenced in the transcript and is appropriate for admission as an associated exhibit.¹⁶³ However, based on the submissions of the Defence, the Chamber has been unable to locate any reference to Rule 65 *ter* 1D03227, also tendered as an associated exhibit, in the transcript of DGH-060's *Dokmanović* testimony or in his written statement. The Chamber, therefore, does not consider this document to be appropriate for admission as an associated exhibit. The Chamber is satisfied that the tendered transcript and associated exhibits with Rule 65 *ter* numbers 02312 and 1D03127 are reliable, relevant, have probative value, and are appropriate for admission pursuant to Rules 89(C) and 92 *quater*.

47. *DGH-061*: The Defence submits a death certificate to demonstrate that DGH-061 is unavailable.¹⁶⁴ According to the Defence, DGH-061's evidence, in the form of a written statement, is relevant to (a) ethnic tensions that arose after the Croatian Democratic Union's victory in the 1990 elections, including the effect of the decision to relocate a government office from Vukovar to Vinkovci, departure of Serbs from the police force, increased violence against Serbs in 1991, and the arming of Croat civilians; and (b) the witness's arrest for his alleged involvement in the clash at Borovo Selo on 2 May 1991.¹⁶⁵ The Defence submits that the written statement was recorded by the

¹⁶⁰ In this respect, the Chamber has reviewed the references provided by the Prosecution in the Response. During his testimony, DGH-060 stated that Colonel Vojnović was the only military person present when DGH-060 entered the room at the Velepromet Meeting. Rule 65 *ter* number 1D03125, *Prosecutor v. Dokmanović*, Case No. IT-95-13a-T, 25 May 1998, T. 3060-3069. In his written statement, DGH-060 stated that there was "one JNA lieutenant colonel" present at the meeting. Rule 65 *ter* number 02312, DGH-060 Written Statement, 26 February 1998, p. 2. Borislav Bogunović, on the other hand, testified in this case that Mrkšić was present at the Velepromet Meeting. Borislav Bogunović, 9 April 2014, T. 9239-9240. Further, both witnesses testified that the meeting was chaired by a JNA officer, but provided contradictory evidence as to the name of the officer. DGH-060, *Prosecutor v. Dokmanović*, Case No. IT-95-13a-T, 25 May 1998, T. 3061; Borislav Bogunović, 9 April 2014, T. 9200, 9239-9240.

¹⁶¹ Rule 65 *ter* number 1D03125, *Prosecutor v. Dokmanović*, Case No. IT-95-13a-T, 25 May 1998, T. 3054-3055, 3056, 3061-3062, 3065, 3071.

¹⁶² Rule 65 *ter* number 1D03215, *Prosecutor v. Dokmanović*, Case No. IT-95-13a-T, 25 May 1998, T. 3047-3048; Rule 65 *ter* number 02312, DGH-060 Written Statement, 26 February 1998.

¹⁶³ Rule 65 *ter* number 1D03125, *Prosecutor v. Dokmanović*, Case No. IT-95-13a-T, 25 May 1998, T. 3049.

¹⁶⁴ Fifth Addendum, para. 1, confidential Annex B, DGH-061 Death Certificate, 20 July 2014.

¹⁶⁵ Motion, confidential Annex A, p. 12.

OTP and that “[s]tatements in such form were proffered to be a reliable and accurate record of what the witnesses said during the Prosecution case, and admitted on that basis.”¹⁶⁶ The Defence submits that the evidence makes “little or no reference to Mr. Hadžić”, and to the extent that it does, it does not go to his acts or conduct as charged in the Indictment;¹⁶⁷ and that the evidence is corroborated by three Defence witnesses.¹⁶⁸

48. The Prosecution objects to the admission of DGH-061’s written statement.¹⁶⁹ It first asserts that the majority of DGH-061’s evidence relates to his arrest and treatment by Croat authorities, which is not relevant to charges in the Indictment and thus lacks probative value.¹⁷⁰ The Prosecution suggests that it is evidence to establish a *tu quoque* defence, which the Chamber has previously stated is not a valid defence.¹⁷¹ The Prosecution next asserts that DGH-061’s written statement omits all mention of issues that are relevant to charges in the Indictment, such as (a) the witness’s activities between 15 August and 20 November 1991 when he was in Dalj to take part in the new judicial system; (b) the witness’s activities in Dalj on or about 20 November 1991 in relation to persons detained after the fall of Vukovar; and (c) the witness’s visit, as part of a delegation of SBWS judges and prosecutors, to Sremska Mitrovica prison in late 1991 and 1992.¹⁷² According to the Prosecution, failing to include this information diminishes the probative value and reliability of the evidence.¹⁷³ Further, the Prosecution submits that DGH-061’s evidence is not corroborated by any of the witnesses suggested by the Defence, and submits that the Defence is precluded by Rule 90(H) from relying on DGH-061’s statement to impeach Prosecution witness GH-169, because the Defence did not cross-examine GH-169 in relation to DGH-061.¹⁷⁴

49. The Defence replies that DGH-061’s evidence is not tendered to establish a *tu quoque* defence, and argues that the evidence of discriminatory actions by the Croatian government targeting Serbs is to provide a fuller picture of the nature of the political crisis that forms the backdrop of many statements by Serb political leaders, including Hadžić.¹⁷⁵ Further, the Defence

¹⁶⁶ Motion, para. 9.

¹⁶⁷ Motion, para. 11.

¹⁶⁸ Motion, para. 11, confidential Annex A, pp. 12-13.

¹⁶⁹ Response, para. 31.

¹⁷⁰ Response, para. 31.

¹⁷¹ Response, para. 31, *citing* Guideline 27, Order on Guidelines for Procedure for Conduct of Trial, 4 October 2012, p. 5.

¹⁷² Response, para. 32.

¹⁷³ Response, para. 32.

¹⁷⁴ Response, para. 33.

¹⁷⁵ Reply, para. 25, *referring to* Reply to Prosecution Response to Defence Omnibus Motion for Admission of Evidence Pursuant to Rule 92 *bis* (confidential), 11 June 2014, para. 14.

contends that the alleged absence of information which the Prosecution speculates might be incriminating is not a factor against admission.¹⁷⁶

50. The Prosecution does not dispute, and the Chamber accepts, that DGH-061 is deceased and therefore unavailable.¹⁷⁷ The Chamber notes that DGH-061's written statement primarily relates to, and provides significant details about, his arrest in May 1991.¹⁷⁸ While it would be preferable to have a written statement that is more tailored to this specific case, the Chamber is mindful of DGH-061's unavailability and considers that the written statement, which also addresses increasing ethnic tensions,¹⁷⁹ is relevant to providing background information in relation to charges in the Indictment. For the same reason, the Chamber does not consider that the fact that the written statement does not include information about other events relevant to this case diminishes its probative value and reliability. The Chamber further considers that the written statement (a) was read to the witness in the Serbian language by a Registry approved interpreter; (b) is signed by the witness, who stated that the statement was true to the best of his knowledge and recollection; and (c) indicates where the witness was uncertain about particular information.¹⁸⁰ Finally, the Chamber considers that the Prosecution's reference to a possible Rule 90(H) violation¹⁸¹ is not sufficient to preclude admission of the written statement. The Chamber is satisfied that the tendered evidence is reliable, relevant, has probative value, and is appropriate for admission pursuant to Rules 89(C) and 92 *quater*.

51. *DGH-063*: The Defence asserts that DGH-063 is unavailable as he died in 1998 while being detained at the United Nations Detention Unit.¹⁸² According to the Defence, DGH-063's evidence—in the form of a transcript of his testimony in *Prosecutor v. Dokmanović*¹⁸³ and seven associated exhibits—is relevant to (a) political developments and events in Vukovar and Borovo Selo in the lead up to the conflict; (b) the formation and powers of the District Government and Assembly in SBWS, including Goran Hadžić's role; (c) the formation of TO units and the JNA; and (d) the Velepromet Meeting.¹⁸⁴ The Defence submits that DGH-063's evidence makes “little reference to Mr. Hadžić's acts and conduct” and asserts that to the extent that he refers to matters

¹⁷⁶ Reply, para. 25.

¹⁷⁷ Fifth Addendum, para. 1, confidential Annex B, DGH-061 Death Certificate, 20 July 2014.

¹⁷⁸ Rule 65 *ter* number 1D00786, DGH-061 Written Statement, 27 January 1997, pp. 4-9.

¹⁷⁹ Rule 65 *ter* number 1D00786, DGH-061 Written Statement, 27 January 1997, pp. 2-4.

¹⁸⁰ Rule 65 *ter* number 1D00786, DGH-061 Written Statement, 27 January 1997.

¹⁸¹ The Chamber notes that GH-169 testified that DGH-061 was among a particular group. GH-169, 7 October 2013, T. 8774-8775 (confidential), 8 October 2013, T. 8833. However, DGH-061 does not deny this fact in his written statement. In fact, he does not address whether or not he was a member of this group. The Prosecution, therefore, has not substantiated its claim that there has been a Rule 90(H) violation.

¹⁸² Motion, confidential Annex A, p. 15. The Defence does not file any documentation to support this, but notes that “[t]his is understood not to be disputed.” Notice of Compliance, confidential Annex A, p. 15.

¹⁸³ Case No. IT-95-13a-T

¹⁸⁴ Motion, confidential Annex A, pp. 13-15.

concerning the authority and activities of the District Government of SBWS, his testimony is substantially corroborated by other witnesses.¹⁸⁵

52. The Prosecution objects to the admission of DGH-063's prior testimony arguing that it is unreliable because, *inter alia*, it was given at his own trial and was therefore self-serving.¹⁸⁶ The Prosecution further submits that DGH-063 gave the evidence only after several insider witnesses had testified on his behalf, which significantly diminishes the weight that can be assigned to it.¹⁸⁷ Further, the Prosecution argues that many contentious issues relevant to the present case, such as the Velepromet Meeting and the relationship between the SBWS government and the JNA, were not thoroughly tested during DGH-063's cross-examination in *Dokmanović*.¹⁸⁸ Finally, the Prosecution submits that the evidence lacks sufficient indicia of reliability because it contains internal contradictions on contentious issues in this case.¹⁸⁹

53. The Defence replies that the Prosecution's objections go to the weight that should be afforded to the evidence rather than to its admissibility.¹⁹⁰ It submits that, while the Prosecution may not have tested the witness during his testimony in *Dokmanović* on all issues of relevance to this case, the overlap between the two cases is substantial, and therefore any failure to cross-examine on these issues is attributable to the Prosecution.¹⁹¹

54. The Prosecution does not dispute, and the Chamber accepts, that DGH-063 is deceased and therefore unavailable.¹⁹² The Chamber considers that the witness's evidence is relevant to charges in the Indictment. The Chamber further considers that the evidence was given under oath before the Tribunal and was subjected to cross-examination.¹⁹³ The conditions under which the evidence was given, as well as any inconsistencies within it,¹⁹⁴ go to the weight to be accorded to the evidence,

¹⁸⁵ Motion, para. 12, confidential Annex A, pp. 13-15.

¹⁸⁶ Response, para. 34.

¹⁸⁷ Response, para. 34.

¹⁸⁸ Response, para. 34.

¹⁸⁹ Response, para. 35.

¹⁹⁰ Reply, para. 26.

¹⁹¹ Reply, para. 26.

¹⁹² See *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13a-T, Order Terminating Proceedings against Slavko Dokmanović, 15 July 1998.

¹⁹³ Rule 65 *ter* number 1D02409, *Prosecutor v. Dokmanović*, Case No. IT-95-13a-T, 27 May 1998; Rule 65 *ter* number 1D02408, *Prosecutor v. Dokmanović*, Case No. IT-95-13a-T, 28 May 1998.

¹⁹⁴ In this respect, the Chamber has reviewed the inconsistency alleged by the Prosecution in the Response. The Chamber notes that DGH-063, when asked if he had felt it was important to be at the Velepromet Meeting, stated "I was a member of the government. Mr. Hadžić was Prime Minister. Therefore, what the Prime Minister asked individual members to do was something that they were supposed to do. But I said yesterday that I think it was decisive that the members of the delegation from Kladovo wanted to see the town." Rule 65 *ter* number 1D02408, *Prosecutor v. Dokmanović*, Case No. IT-95-13a-T, 28 May 1998, T. 3462. The Chamber finds that a subsequent statement in his testimony, referenced by the Prosecution as contradictory, was in fact a clarification of this statement. Specifically, the question directed at DGH-063 was: "You had indicated a few moments ago that your Prime Minister had told you that you needed to be there, and so, as a minister, you felt it was your duty or your obligation to go. So, I mean, this was really one of your main reasons for going to Vukovar, was it not? It wasn't just incidental to being there?" DGH-063

not its admission. In relation to the tendered associated exhibits, the Chamber notes that the relevant portions of the transcript from the audio tapes surrounding the witness's arrest were read into the case record in *Dokmanović* and therefore do not need to be admitted separately.¹⁹⁵ The Chamber determines that the remaining tendered associated exhibits are referenced in the transcript and form an inseparable and indispensable part of the testimony.¹⁹⁶ The Chamber notes, however, that the document with Rule 65 *ter* number 1D03204 has already been admitted as exhibit P1654.1645 and will not be admitted again. The Chamber is satisfied that the witness is unavailable and finds that the tendered evidence is reliable, is relevant, has probative value, and is appropriate for admission pursuant to Rules 89(C) and 92 *quater*.

55. *DGH-064*: In the Motion, the Defence asserts that DGH-064 is unavailable because he is mentally impaired.¹⁹⁷ In support, it submits medical certificates, dated from 1991 to 2003, which indicate that DGH-064 suffered from migraines and post-traumatic stress disorder ("PTSD").¹⁹⁸ In the Fourth Addendum, the Defence submits additional medical documentation that indicates that in 2009 DGH-064 was diagnosed with relapsing and remittent multiple sclerosis, cerebral meningioma, and cerebellar cavernoma.¹⁹⁹ According to the Defence, DGH-064's evidence, in the form of a written record of a witness interview undertaken by an Investigating Judge of the Military Court in Belgrade, is relevant to the events at Ovčara Farm between 17 and 22 November 1991.²⁰⁰ The Defence submits that the evidence makes "little or no reference to Mr. Hadžić", and to the extent that it does, it does not go to his acts or conduct as charged in the Indictment;²⁰¹ and that the evidence is corroborated by five Defence witnesses.²⁰²

56. The Prosecution submits that the Defence has failed to establish that DGH-064 is unavailable because (a) the witness testified before the Tribunal in 2006 which undermines the claim that the medical documents dated from 1991 to 2003 demonstrate that the witness is currently

responded: "It was not an order issued by Mr. Hadžić. It was more of a recommendation that we should be there, that we should show up there." Rule 65 *ter* number 1D02408, *Prosecutor v. Dokmanović*, Case No. IT-95-13a-T, 28 May 1998, T. 3468.

¹⁹⁵ Rule 65 *ter* number 1D02409, *Prosecutor v. Dokmanović*, Case No. IT-95-13a-T, 27 May 1998, T. 3494-3501; Rule 65 *ter* number 1D03202, Transcript of Arrest of DGH-063, undated.

¹⁹⁶ Rule 65 *ter* number 1D03174, Hunting Suit of Slavko Dokmanović; Rule 65 *ter* number 1D03204, Transcript Video, 20 November 1991; Rule 65 *ter* number 02796, Resolution on Resolving Inter-Ethnic Tensions, undated; Rule 65 *ter* number 1D02190, Memorandum to President of the Republic of Croatia from Slavko Dokmanović, 9 April 1991; Rule 65 *ter* number 1D02191, Conclusion of the Municipality of Vukovar, 10 April 1991; Rule 65 *ter* number 1D02189, "Appeal by Slavko Dokmanović, president of Vukovar Municipality", undated.

¹⁹⁷ Motion, confidential Annex A, pp. 17-19.

¹⁹⁸ Motion, confidential Annex B.

¹⁹⁹ Fourth Addendum, para. 1, confidential Annex C.

²⁰⁰ Motion, confidential Annex A, pp. 17-18.

²⁰¹ Motion, para. 11.

²⁰² Motion, para. 11, confidential Annex A, pp. 17-18. The Defence also, incorrectly, submits that the written statement was recorded by the OTP and that "[s]tatements in such form were proffered to be a reliable and accurate record of what the witnesses said during the Prosecution case, and admitted on that basis." See Motion, para. 9.

unavailable;²⁰³ (b) the Defence itself has taken the position that PTSD, depression, or a heart condition are not conditions that render a person unavailable to testify;²⁰⁴ and (c) the documentation attached in the Fourth Addendum does not explain if there is ongoing treatment, his current symptoms, or his current ability to testify.²⁰⁵ The Prosecution further objects to the admission of DGH-064's 2001 interview record arguing that when testifying in 2006, DGH-064 stated that (a) the record was incorrect on important details, such as his presence at Ovčara, (b) it was prepared on the basis of notes taken by a clerk who was writing down the investigating judge's summary of DGH-064's answers, (c) he was not given the opportunity to re-read the statement before signing it, and (d) the interview record omitted details which he included in subsequent statements.²⁰⁶

57. In reply, the Defence asserts that the Prosecution "understates the severity of the witness's conditions".²⁰⁷ It further argues that DGH-064's interview record was substantially affirmed by his testimony in *Prosecutor v. Mrkšić et al.*,²⁰⁸ in particular, his description of the scene inside the Ovčara hangar on 20 November 1991 is corroborated by his testimony in that case.²⁰⁹ According to the Defence, the discrepancy between the interview record and his subsequent testimony is not so substantial as to go to admissibility rather than weight.²¹⁰ However, the Defence submits that it "would nevertheless not oppose the admission of the witness's testimony from the *Mrkšić* case in its entirety."²¹¹

58. The Chamber notes that DGH-064 testified as a *viva voce* witness at the Tribunal over the course of four days in April 2006 without any complications of which the Chamber has been made aware.²¹² Therefore, the Chamber does not consider that the medical documents from 1991 to 2003 demonstrate that DGH-064 is currently unavailable to testify. The Chamber notes that it is apparent from the medical documentation attached to the Fourth Addendum that the Defence did not request updated medical information for this witness until 16 June 2014—one month after the filing deadline for the Rule 92 *quater* motion.²¹³ The Chamber will however consider the newly received documentation. The Chamber notes that in 2009, thus after his testimony at the Tribunal, DGH-064

²⁰³ Response, para. 36, *citing* Defence Response to Supplement to Prosecution's Omnibus Motions for Admission of Evidence Pursuant to Rule 92 *quater* and Rule 92 *bis* (confidential), 11 October 2012, para. 7. *See also* Fourth and Fifth Addendum Response, para. 7.

²⁰⁴ Response, para. 36, *citing* Defence Response to Supplement to Prosecution's Omnibus Motions for Admission of Evidence Pursuant to Rule 92 *quater* and Rule 92 *bis* (confidential), 11 October 2012, para. 7.

²⁰⁵ Fourth and Fifth Addendum Response, para. 7.

²⁰⁶ Response, para. 37; Fourth and Fifth Addenda Response, para. 7.

²⁰⁷ Fourth and Fifth Addenda Reply, para. 3.

²⁰⁸ Case No. IT-95-13/1.

²⁰⁹ Reply, para. 28.

²¹⁰ Reply, para. 28.

²¹¹ Reply, para. 29.

²¹² *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, 25-28, April 2006.

²¹³ Fourth Addendum, Confidential Annex C, Letter from Republic of Serbia Ministry of Justice in Reply to Defence Counsel Request of 16 June 2014, 28 July 2014.

was diagnosed with multiple sclerosis, cerebral meningioma, and cerebellar cavernoma. DGH-064 has been hospitalised for these conditions on a number of occasions due to a deterioration of the illness and to receive “immunomodulating” therapy.²¹⁴ The Chamber is satisfied that the conditions highlighted in the Fourth Addendum are serious enough to render DGH-064 incapable of answering questions put to him and testifying coherently and that he is therefore objectively unavailable within the meaning of Rule 92 *quater*.

59. The Chamber considers that DGH-064’s evidence is relevant to charges in the Indictment. The written statement tendered by the Defence is a summary of evidence given by DGH-064 before an investigative judge of the Military Court in Belgrade.²¹⁵ The witness was “advised to tell the truth, that he must not withhold any facts, and was then warned that giving false testimony is a criminal offence”, but there is no indication that he took an oath.²¹⁶ During his testimony in *Mrkšić et al*, DGH-064 stated that (a) he did not re-read this statement before the military court in Belgrade, as would have been the standard procedure; (b) the statement was taken based on the notes of the clerk, during which time he was “using free speech describing the events”, and the magistrate was dictating to the clerk what DGH-064 had said; and (c) the witness only realised certain errors in the statement regarding his presence at the Ovčara hangar at a later date, because he had not had the opportunity to re-read it.²¹⁷ In light of these circumstances, the Chamber finds that the tendered evidence does not contain sufficient indicia of reliability and is therefore not appropriate for admission pursuant to Rules 89(C) and 92 *quater*. The Chamber notes the Defence’s position that it would not oppose the admission of DGH-064’s testimony in the *Mrkšić et al*. case in full.²¹⁸ However, the *Mrkšić et al*. testimony has not been tendered.

60. DGH-108: The Defence submits a death certificate to demonstrate that DGH-108 is unavailable.²¹⁹ According to the Defence, DGH-108’s evidence—in the form of a transcript of his prior testimony in *Prosecutor v. Stanišić and Simatović*²²⁰ and nine associated exhibits²²¹—is relevant to, *inter alia*, (a) the deployment of Serbian police officers to the SBWS in 1991 and their relationship to both the Novi Sad Corps of the JNA and the SBWS TO Staff (under Radovan

²¹⁴ Fourth Addendum, Confidential Annex C, Letter from Republic of Serbia Ministry of Justice in Reply to Defence Counsel Request of 16 June 2014, 28 July 2014.

²¹⁵ Rule 65 *ter* number 1D02983, Record of Witness Interview, Belgrade Military Court.

²¹⁶ Rule 65 *ter* number 1D02983, Record of Witness Interview, Belgrade Military Court, p. 2.

²¹⁷ *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, 27 April 2006, T. 7835.

²¹⁸ Reply, para. 29.

²¹⁹ Fourth Addendum, confidential Annex B, DGH-108 Death Certificate, 22 March 2012.

²²⁰ Case No. IT-03-69. On 13 August 2014, the Defence informed the Chamber and the Prosecution via email that it had omitted to tender the closed session portions of DGH-108’s testimony from 13 and 14 February 2012 and that it now tenders them (Rule 65 *ter* numbers 1D02836.1 and 1D02837.1).

²²¹ In the Notice of Compliance the Defence withdraws its request for the admission of multiple associated exhibits, noting that “[s]ome exhibits have also been identified as redundant with documents already listed on the Prosecution’s

Stojičić), (b) the relationship between Željko Ražnatović (“Arkan”) and the Novi Sad Corps, and (c) the roles and affiliations of Radoslav Kostić and Ilija Kojić.²²² The Defence submits that the evidence makes “little or no reference to Mr. Hadžić”, and to the extent that it does, it does not go to his acts or conduct as charged in the Indictment,²²³ and that the evidence is corroborated by four Defence witnesses.²²⁴

61. The Prosecution does not oppose admission of DGH-108’s evidence pursuant to Rule 92 *quater*, but submits that on certain issues the evidence is unreliable.²²⁵ The Prosecution requests that three documents which point to inaccuracies in the evidence and were admitted during DGH-108’s testimony in *Stanišić and Simatović* be added to the Defence’s associated exhibits.²²⁶ Further, the Prosecution objects to the admission of two tendered associated exhibits (Rule 65 *ter* numbers 1D03116 and 1D03117) because, according to the Prosecution, they do not form an “inseparable or indispensable” part of DGH-108’s evidence.²²⁷ The Prosecution also opposes the admission of a further associated exhibit (Rule 65 *ter* number 04895) because the relevant portions of this video are encompassed in Prosecution exhibit P241.²²⁸ The Prosecution notes that the associated exhibit with Rule 65 *ter* number 1D03121 has already been admitted as P152 and is therefore unnecessary.²²⁹

62. The Defence replies that it does not oppose the admission of the three additional associated exhibits proposed by the Prosecution.²³⁰ The Defence maintains that the associated exhibits objected to by the Prosecution be admitted, specifically noting that DGH-108’s testimony regarding Rule 65 *ter* numbers 1D03116 and 1D03117 is more extensive than the Prosecution acknowledges and that his testimony in relation to those exhibits would be incomprehensible without their admission.²³¹

63. The Prosecution does not dispute, and the Chamber accepts, that DGH-108 is deceased, and therefore unavailable.²³² The Chamber considers that the witness’s evidence is relevant to charges in the Indictment. The Chamber further considers that the evidence was given under oath before the

Rule 65 *ter* exhibit list or otherwise deemed unnecessary for tendering.” Notice of Compliance, para. 1. The Chamber will not further consider these documents.

²²² Motion, confidential Annex A, pp. 20-21; Notice of Compliance, confidential Annex A, pp. 2-4.

²²³ Motion, para. 11.

²²⁴ Motion, para. 11, confidential Annex A, p. 21.

²²⁵ Response, para. 38.

²²⁶ Response, para. 38. The Prosecution refers to documents designated as P03080, P03081, and P03082 in *Stanišić and Simatović* and with Rule 65 *ter* numbers 06555, 06556, and 06557 in this case.

²²⁷ Response, para. 39. In the Motion the Defence incorrectly lists Rule 65 *ter* number 1D03316. The correct Rule 65 *ter* number is 1D03116. *See* Reply, para. 30.

²²⁸ Response, para. 39.

²²⁹ Response, para. 39.

²³⁰ Reply, para. 30.

²³¹ Reply, para. 30.

Tribunal and was subjected to cross-examination.²³³ With respect to the Prosecution's request to admit Rule 65 *ter* number 06555,²³⁴ the Chamber notes that this document was ultimately denied admission in *Stanišić and Simatović* because the Chamber was not satisfied as to its authenticity.²³⁵ However, because the document was primarily used to identify the names of certain individuals, which do not appear in the transcript, the Chamber will admit Rule 65 *ter* number 06555 for this limited purpose. The Chamber finds that the tendered associated exhibits, including the three proposed by the Prosecution, as referenced in the testimony, form an inseparable and indispensable part of the testimony.²³⁶ The Chamber is satisfied that the witness is unavailable and finds that the tendered evidence is reliable, is relevant, has probative value, and is appropriate for admission pursuant to Rules 89(C) and 92 *quater*.

64. The Chamber notes, however, that *Hadžić* exhibit P241 does encompass the video footage contained in *Stanišić and Simatović* exhibits P690 and P691 (Rule 65 *ter* numbers 1D03212 and 1D03113) and Rule 65 *ter* number 1D03121 has already been admitted as exhibit P152 in this case. These documents will not be admitted in duplicate. The Chamber further notes that Rule 65 *ter* number 1D03211 appears to have been tendered under seal in *Stanišić and Simatović* but has been tendered publicly by the Defence in this case.²³⁷ Out of an abundance of caution the Chamber will admit Rule 65 *ter* number 1D03211 under seal and request the Defence to clarify whether it should be confidential or public. With respect to Rule 65 *ter* number 1D02835, the Chamber notes that it contains testimony given in private session and should have been tendered under seal; it will be admitted under seal and the Defence will be ordered to upload a public redacted version of the transcript to eCourt, which will also be admitted.

²³² Fourth Addendum, confidential Annex B, DGH-108 Death Certificate, 22 March 2012.

²³³ Rule 65 *ter* number 1D02834, *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, 8 February 2012; Rule 65 *ter* number 1D02835, *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, 9 February 2012; Rule 65 *ter* number 1D02836, *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, 13 February 2012; and Rule 65 *ter* number 1D02837, *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, 14 February 2012.

²³⁴ Exhibit number P3080 in *Stanišić and Simatović*.

²³⁵ *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Oral Ruling, 7 June 2012, T. 20087-20088.

²³⁶ With respect to Rule 65 *ter* number 1D03117, the Chamber notes that the Defence has incorrectly referred to this exhibit as D697 in the *Stanišić and Simatović* case whereas the correct exhibit number for this document assigned in *Stanišić and Simatović* was D696. See *Stanišić and Simatović*, Case No. IT-03-69-T, 13 February 2012, T. 17197-17201. The Chamber notes that the Defence reference to Rule 65 *ter* number 1D03316 as an associated exhibit for this witness is a typographical error, and that the correct Rule 65 *ter* number for this document is 1D03116. See Response, para. 39; Reply, para. 30. The Chamber also notes with respect to Rule 65 *ter* number 1D03116, that the Defence has incorrectly referred to this exhibit as D696 in the *Stanišić and Simatović* case whereas the correct exhibit number for this document assigned in *Stanišić and Simatović* was D697. See *Stanišić and Simatović*, Case No. IT-03-69-T, 13 February 2012, T. 17202-17206.

²³⁷ *Stanišić and Simatović*, Case No. IT-03-69-T, 9 February 2012, T. 17108.

D. Disposition


65. Accordingly, the Trial Chamber, pursuant to Rules 54, 89, 92 *quater*, and 126 *bis* of the Rules and paragraphs (C) (5) and (7) of the Practice Direction, hereby:

- (a) **GRANTS** the Prosecution leave to exceed the applicable word limit in its Response;
- (b) **GRANTS** the Defence leave to file the Reply and to exceed the applicable word limit therein;
- (c) **DENIES** the Prosecution leave to file the Sur-Reply;
- (d) **GRANTS** the Defence leave to file the Second Addendum Reply;
- (e) **GRANTS** the Defence leave to file the Fourth and Fifth Addenda Reply;
- (f) **GRANTS** the Motion, in part;
- (g) **ADMITS** the following documents into evidence:
 - (i) *DGH-014*: Rule 65 *ter* number 1D00248;
 - (ii) *DGH-027*: Rule 65 *ter* numbers 1D02402, 1D02327, 1D02326, 1D02325;
 - (iii) *DGH-050*: Rule 65 *ter* numbers 1D02398, 1D03137;
 - (iv) *DGH-060*: Rule 65 *ter* numbers 1D03125, 02312, 1D03127;
 - (v) *DGH-061*: Rule 65 *ter* numbers 1D00786;
 - (vi) *DGH-063*: Rule 65 *ter* numbers 1D02408, 1D02409, 1D03174, 02796, 1D02190, 1D02191, 1D02189;
 - (vii) *DGH-108*: Rule 65 *ter* number 1D02834, 1D02835 (under seal), 1D02836.1 (under seal), 1D02836, 1D02837.1 (under seal), 1D02837, 1D03211 (under seal), 1D03114, 1D03115, 1D03116, 1D03117, 1D03118, 06555, 06556 (under seal), 06557 (under seal);
- (h) **DENIES** without prejudice the admission of the tendered written evidence of *DGH-057*;
- (i) **DENIES** admission of the tendered written evidence of *DGH-040* and *DGH-064*;

- (j) **ORDERS** the Defence—by not later than 9 November 2015—to inform the Chamber whether Rule 65 *ter* number 1D03211 should remain under seal or can instead be made public;
- (k) **ORDERS** the Defence—by no later than 9 November 2015—to (i) upload to and release in eCourt a public redacted version of to Rule 65 *ter* number 1D02835 and (ii) file a written notice on the official record of the proceedings when it has done so, after which time the public redacted version shall be deemed admitted into evidence;
- (l) **DENIES** the Motion in all other respects;
- (m) **INSTRUCTS** the Registry to take all appropriate and necessary measures to implement this decision.

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

Done this twenty-sixth day of October 2015,
At The Hague,
The Netherlands.



Judge Guy Delvoie
Presiding

[Seal of the Tribunal]