

**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: 19 September 2014
Original: English

IN THE TRIAL CHAMBER

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

Registrar: Mr. John Hocking

Decision: 19 September 2014

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC

**DECISION ON DEFENCE MOTION FOR TESTIMONY TO BE HEARD *VIA*
VIDEO-CONFERENCE LINK (DGH-010)**

The Office of the Prosecutor:

Mr. Douglas Stringer

Counsel for Goran Hadžić:

Mr. Zoran Živanović

Mr. Christopher Gosnell

1. **THIS TRIAL CHAMBER** of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is seised of the “Defence Motion for Testimony of David Česić [*sic*] (DGH-010) to be Heard via Video-Link or, in the Alternative, Motion for Safe Conduct” filed with an annex on 7 August 2014 (“Motion”). On 20 August 2014, the Prosecution filed the “Prosecution Response to Defence Motion for Testimony of David Česić (DGH-010) to be Heard via Video-Link or, in the Alternative, Motion for Safe Conduct” (“Response”). On 26 August 2014, the Defence filed its confidential “Consolidated Reply Regarding Motion for Testimony of DGH-065 to be Heard by Video-Link and for Testimony of David Česić [*sic*] (DGH-010) to be Heard by Video-Link or for Safe Conduct Order” (“Reply”). On 11 September 2014, the Defence filed the “Withdrawal of Alternative Relief Requested in Respect of David Česić [*sic*] (DGH-010)” in which it withdrew its request for a safe conduct order in respect of this witness.

A. Submissions

2. In the Motion, the Defence requests that the testimony of DGH-010 be conducted *via* video-conference link since DGH-010 is unwilling to travel to The Hague to testify because he has never travelled by airplane and has a fear of flying.¹ The Defence asserts that a witness’s fear of flying has previously qualified as a good reason for unwillingness to travel to The Hague to testify.² The Defence submits that DGH-010 is also concerned that sealed indictments against him in Croatia, due to his previous employment with the SBWS and RSK governments, may be executed against him in transit.³ DGH-010 considers that an order of safe conduct will not protect him from arrest because he has heard that Dragomir Pećanac, a defence witness in another case, was arrested in The Hague after an order of safe conduct had been issued.⁴ The Defence further asserts that the testimony of DGH-010—which relates to, *inter alia*, the arrest of Goran Hadžić and Borivoje Savić; the attack on Borovo Selo and its aftermath; hostilities in Dalj; security at the government building in Erdut; named members of the alleged JCE; and the “Serbian National Security”—is sufficiently important to make it unfair to proceed without it.⁵ Finally, the Defence asserts that the use of video-conference link will not violate the right of the parties to confront the witness directly.⁶

¹ Motion, paras 1, 8, 14; Annex.

² Motion, para. 8 *citing* *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Popović’s Motion Requesting Video-Conference Link Testimony of Two Witnesses, 28 May 2008 (“*Popović* Decision”), para. 11.

³ Motion, para. 9.

⁴ Motion, para. 9, fn. 10.

⁵ Motion, para. 11.

⁶ Motion, para. 12.

3. In the Response, the Prosecution opposes the Defence's request that DGH-010 be permitted to testify *via* video-conference link.⁷ The Prosecution submits that there is no indication in the Motion that the witness is physically unable to come to The Hague due to health concerns, and that instead, it is submitted that he is unwilling to come to the Tribunal because he fears flying and fears being arrested.⁸ The Prosecution submits that the Defence has failed to submit medical documentation to support its claim that DGH-010 is unwilling to travel by air for good reasons and that previous decisions have required supporting documentation that clearly indicates why the witness is unable or unwilling to travel as a result of its condition.⁹ The Prosecution further submits that ground transportation between Serbia and The Hague is an alternative means of travel, which, according to the Prosecution, undermines the stated reason for the witnesses' unwillingness to come to the Tribunal.¹⁰ The Prosecution argues that the Defence departs from the law governing video-conference requests as applied during the present proceedings by arguing that it is not necessary to show that the witness is unable, or has good reason to be unwilling, to come to the Tribunal.¹¹ In particular, the Prosecution argues that the Defence's cited approach to the law applicable for testimony *via* video-conference link in the *Popović et al.* case is inconsistent with the jurisprudence of the *Hadžić* Trial Chamber thus far.¹²

4. The Prosecution distinguishes the case of Dragomir Pećanac as he refused to come to The Hague despite having been issued a safe conduct order to do so. The Prosecution further argues that Pećanac was arrested pursuant to a contempt indictment which was the result of his refusal to appear as a witness in the *Tolimir* case.¹³

5. In the Reply, the Defence seeks leave to file the Reply and submits that the video-conference link decisions of other Trial Chambers, although not binding, have persuasive value and "may even be probative of a 'settled jurisprudence'".¹⁴ The Defence cites a number of decisions from other Trial Chambers, whereby, in its view, an inability to travel to the Tribunal is not a condition for granting testimony *via* video-conference link.¹⁵ The Defence further submits that the *Popović* Decision is not factually dissimilar from the Motion as it refers to "nervousness concerning air travel".¹⁶ Further, the Defence submits that the unwillingness of DGH-010 to come to the

⁷ Response, para. 1.

⁸ Response, para. 2.

⁹ Response, paras 3-4.

¹⁰ Response, para. 5.

¹¹ Response, para. 6.

¹² Response, para. 7.

¹³ Response, para. 10.

¹⁴ Reply, paras 1-4.

¹⁵ Reply, para. 6.

¹⁶ Reply, para. 3.

Tribunal is sufficiently substantiated and that a subjective fear of flying is not a matter of medical expertise, but something that can be attested to by the witness himself.¹⁷

B. Applicable Law

6. Rule 81 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules") provides that "[a]t the request of a party or *proprio motu*, a Judge or Chamber may order, if consistent with the interests of justice, that proceedings be conducted by way of video-conference link". A witness may give his or her testimony *via* video-conference link if three criteria are met: (a) the witness must be unable, or have good reasons to be unwilling, to come to the Tribunal; (b) the witness's testimony must be sufficiently important to make it unfair to the requesting party to proceed without it; and (c) the accused must not be prejudiced in the exercise of his or her right to confront the witness.¹⁸ After having considered the above criteria, the Chamber must ultimately determine whether, on the basis of all the relevant considerations, it would be in the interests of justice to grant the request for video-conference link.¹⁹

C. Discussion

7. DGH-010 stated to a Defence investigator that he is unwilling to travel to The Hague to testify as he has never previously travelled by air and fears doing so, but is willing to testify *via* video-conference link from Belgrade.²⁰

8. At the outset, the Trial Chamber notes the Defence's reference to certain decisions of the Tribunal's jurisprudence to support its view that an "inability" to come to the Tribunal is not a requirement for granting a video-conference link.²¹ It cites decisions from *Popović et al.*, *Delalić et al.*, *Milutinović et al.*, and *Haradinaj et al.* cases where requests for video-conference link were either denied because inability or good reasons for unwillingness to travel were not shown, or granted after having found the existence of good reasons for the witness's unwillingness.²² The

¹⁷ Reply, para. 7.

¹⁸ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution's Motion for Testimony to be Heard via Video-Conference Link, 17 June 2010 ("Karadžić Decision"), para. 5; *Prosecutor v. D. Tadić*, Case No. IT-94-1-T, Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link, 26 June 1996, para. 19. *See also* *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Reasons for Decision on Prosecution's Renewed Motion for Evidence of Witness 82 to be Presented via Video-Conference Link from Zagreb and Reasons for Decision on the Request of the Markač Defence to Conduct Cross-Examination in Zagreb, 26 February 2009, para. 17; *Prosecutor v. J. Stanišić and Simatović*, Case No. IT-03-69-T, Decision on Prosecution Motions to Hear Witnesses by Video-Conference Link, 25 February 2010 ("Stanišić and Simatović Decision"), para. 8.

¹⁹ *Karadžić Decision*, para. 6; *Stanišić and Simatović Decision*, para. 8.

²⁰ Annex, paras 1-3.

²¹ Reply, para. 6.

²² Motion, para. 8; Reply, paras 3, 5-6. In the *Delalić et al.* case, the video-conference link was granted for two witnesses, a husband and a wife, because of the medical condition of one of the witnesses and the medical condition of their son. The Trial Chamber found that "[t]hese critical conditions and circumstances [made] them unwilling to travel

Trial Chamber recalls the settled jurisprudence as set out above and applied by the Trial Chamber during these proceedings which requires that the witness must be *either* “unable”, *or* have “good reasons to be unwilling”, to come to the Tribunal. The Trial Chamber therefore notes that the submission of the Defence and the jurisprudence cited in support are consistent with the legal test as applied by this Chamber.

9. The decisions referenced by the Defence show that there are a variety of circumstances which may amount to a good reason for unwillingness of a witness to travel to The Hague. However, none of those decisions addressed the question that is the subject of the Motion, namely, whether a self-declared fear of flying by a witness is a sufficient basis to grant video-conference link.

10. The Trial Chamber notes a number of decisions in the Tribunal’s jurisprudence dealing with the fear of air travel as a basis for hearing testimony via video-conference link. With regard to the *Popović* Decision, cited by the Defence in support of the Motion, the Trial Chamber notes that the Trial Chamber in that case applied a different legal test. It considered it unnecessary that the unwillingness to come to testify be for good reasons.²³ The Trial Chamber in *Popović et al.* thus did not find that a witness’s fear of air travel qualified as a good reason for unwillingness to travel to The Hague to testify, but rather found that a “good reason” was not required. Respectfully, this Chamber disagrees with that interpretation of the applicable law for the reasons given above. Moreover, by taking away the requirement of showing a good reason to be unwilling to come to the Tribunal, nothing would stand in the way of turning a trial into a video-conference trial if every

to the International Tribunal”. See *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on the Motion to Allow Witnesses K, L, and M to Give Their Testimony by Means of Video-Link Conference, 28 May 1997, para. 20; *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Motion to Allow Witnesses K, L and M to Give Their Testimony by Means of Video-Link Conference, 3 April 1997 (confidential), para. 4. In *Milutinović et al.*, the Trial Chamber found that the Defence had not demonstrated “an adequate basis for the witness’s unwillingness to come to the [sic] Hague.” See *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Ojdanić Motion for Video-Conference Link for Jovan Milanović, 24 August 2007, para. 6. In the first of the three decisions cited by the Defence from the *Haradinaj et al.* case, the Trial Chamber found that the Prosecution had not shown that the witness was unable to travel to The Hague and that it also failed to show good reasons for the witness’s unwillingness to travel to The Hague. As a result, the Trial Chamber denied the Motion. See *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, Decision on Prosecution’s Confidential Motion for Testimony to be Heard via Video-Conference Link, 21 March 2007, pp. 2-3. The second decision concerned a witness who lived under “extreme economic and social hardship”, and who was the sole breadwinner for a family of eleven in total that lived in a basic shelter in a refugee settlement with no running water and faced eviction. The Trial Chamber found that a combination of his personal, family, and security concerns amounted to good reasons for the witness’s unwillingness to be absent for a considerable amount of time in order to travel to The Hague. See *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, Decision on Video-Conference Link for Witness Number 48 in the Tentative Order of Testimony, 28 August 2007, paras 6-8. The third decision concerned a witness of young age who wished to remain in a familiar environment where his family would be able to take care of him. In this case, the Trial Chamber also received advice from the Tribunal’s Victims and Witness’s Section, that it would be preferable to hear the witness *via* video-conference link. The Chamber decided that the combination of these factors constituted a good reason for the witness’s unwillingness to travel to The Hague. See *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, Decision on Prosecution’s Motion for Testimony via Video-Link for Witness 54, 7 September 2007, paras 3, 6.

²³ *Popović* Decision, paras 11-12.

witness would request testimony through video-conference link in order to avoid any inconvenience.

11. In *Stanišić and Simatović* the Prosecution submitted that a witness was “unable to travel due to certain complex health issues, one of which, namely high blood pressure, could be aggravated due to [the witness’s] fear of flying; thus constituting a ‘a reasonable justification’ for the witness’s unwillingness to travel.”²⁴ The Trial Chamber found that the Prosecution had provided a doctor’s report to support its claim that the witness did not feel capable of travelling to The Hague, and “[b]ased on the information before it, the Chamber consider[ed] that the medical condition and the personal circumstances of [the witness] support the application that the Witness is unable to travel to The Hague.”²⁵ In this case, the Motion was not granted solely because of the fear of flying (i.e. the witness’s personal circumstances) but in combination with the witness’s medical situation, namely the risk of aggravating his high blood pressure.

12. In *Stakić* the Trial Chamber considered the Stakić Defence submission that a witness had stated that “he has a phobia to fly” and without further reasoning on the issue granted the request that the witness be permitted to testify *via* video-conference link.²⁶ The Chamber finds this decision not to be persuasive due to its lack of reasoning as to why a “phobia to fly” satisfied the requirement that the witness be unable or have good reasons to be unwilling to come to the Tribunal.

13. In *Orić*, the Trial Chamber granted a request for a witness to testify *via* video-conference link where that witness was unable to travel to The Hague due to a “diagnosed phobia of airplane travel”.²⁷ In contrast to the present case, in support of its request, the Prosecution in *Orić* submitted a “Specialist’s Report” stating that the witness “[c]laims that he cannot “travel long distance”, especially not by airplane. He should testify but wishes to postpone it due to his fear of travel. [...] He has no other problems.” The diagnosis was “Neurotic Disorder-phobic reactions per anamnesi”.²⁸

14. Having considered the jurisprudence of the Tribunal and the arguments of the parties, the Trial Chamber finds that a mere expression of a fear of flying, without any supporting medical or

²⁴ *Stanišić and Simatović* Decision, para. 4.

²⁵ *Stanišić and Simatović* Decision, para. 12.

²⁶ *Prosecutor v. Stakić*, Case No. IT-97-24-T, Decision on the Defendant, Milomir Stakić’s Motion for Testimony by Video Conference Link per Rule 71 bis, 6 February 2003 (confidential), p. i. The Trial Chamber notes that prior to 12 July 2007, testimony by video-conference link was governed by Rule 71 *bis* of the Rules.

²⁷ *Prosecutor v. Orić*, Case No. IT-03-68-T, Decision on Prosecution Motion for the Testimony of Witnesses via Video-Conference Link, 2 November 2004, p. 2.

²⁸ *Prosecutor v. Orić*, Case No. IT-03-68-T, Prosecution Motion for the Testimony of Witnesses via Video-Conference Link, 26 October 2004, Confidential Annex A.

psychiatric evidence, is not sufficient to meet the requirement that a witness is unable, or has good reasons to be unwilling, to come to the Tribunal.

15. As another reason for granting the video-conference link, the Defence submits that DGH-010 fears that sealed indictments issued against him by Croatia might be executed during his transit to The Hague. According to the Defence, DGH-010 had “heard through various media reports” that a “Defence witness in another case,” Dragomir Pećanac, was arrested after a safe conduct order had been issued.²⁹ In that case, a safe conduct order was issued for Pećanac so that he could testify in the *Tolimir* case.³⁰ However, Pećanac refused to comply with a subpoena ordering him to appear before the Tribunal as a witness.³¹ As a result of his refusal, an order in lieu of indictment was issued against him, pursuant to which he was arrested in Serbia where he resided.³² He was thus not arrested while in transit. He was ultimately convicted for contempt of the Tribunal.³³ A safe conduct order cannot be used to shield a summoned witness against the legal consequences of his refusal to testify. The Trial Chamber thus finds that the arrest of Pećanac was under different circumstances and is not relevant to the present determination. Moreover, fear of arrest while traveling to The Hague is a matter more appropriately discussed in the context of a request for a safe conduct order rather than in an application for a video-conference link. In light of the foregoing, the Trial Chamber further finds that DGH-010’s fear of arrest while in transit to the Tribunal does not constitute inability to travel or good reasons for an unwillingness to come to the Tribunal.

16. On the basis of the above, the Trial Chamber finds that the Defence has not fulfilled the first requirement of the legal test set out above, namely that the witness must be unable, or have good reasons to be unwilling, to come to the Tribunal, and it will not address the other two prongs of that test. It finds, therefore, that the Defence has failed to show that it would be in the interests of justice to grant the request for video-conference link.

²⁹ Motion, para. 9.

³⁰ *In the Contempt Case of Dragomir Pećanac*, Case No. IT-05-88/2-R77.2, Judgement on Allegations of Contempt, 9 December 2011 (“*Pećanac* Judgement”), para. 2.

³¹ *Pećanac* Judgement, paras 33-34, 38.

³² *Pećanac* Judgement, paras 1, 5. *See also*, *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Order to the Government of the Republic of Serbia Concerning Subpoena, confidential, 31 August 2011 (part of Exhibit C00001 in the *Pećanac* case).

³³ *Pećanac* Judgement, para. 46.

D. Disposition

17. Accordingly, the Trial Chamber, pursuant to Rules 54, 81 *bis*, and 126 *bis* of the Rules hereby:

- (i) **GRANTS** the Defence leave to file the Reply with respect to DGH-010;
- (ii) **DENIES** the Motion.

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

Done this nineteenth day of September 2014,
At The Hague,
The Netherlands.



Judge Guy Delvoic
Presiding

[Seal of the Tribunal]