



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-05-88-T

Date: 28 May 2008

Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O-Gon Kwon
Judge Kimberly Prost
Judge Ole Bjørn Støle – Reserve Judge

Registrar: Mr. Hans Holthuis

Decision of: 28 May 2008

PROSECUTOR

v.

**VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVIČANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ**

PUBLIC

**DECISION ON POPOVIĆ'S MOTION REQUESTING VIDEO-
CONFERENCE LINK TESTIMONY OF TWO WITNESSES**

Office of the Prosecutor

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Mr. Zoran Živanović and Ms. Mira Tapušковиć for Vujadin Popović
Mr. John Ostojić and Mr. Christopher Meek for Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
Mr. Aleksandar Lazarević and Mr. Christopher Gosnell for Ljubomir Borovčanin
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Milan Gvero
Mr. Peter Haynes and Mr. Đorđe Sarapa for Vinko Pandurević

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 “Vujadin Popović’s Motion for Testimony of Witnesses no. 3 and no. 4 to be Heard Via Video-Conference Link with Annex”, filed confidentially on 21 May 2008 (“Motion”).

I. SUBMISSIONS OF THE PARTIES

A. Motion

1. Popović requests the Trial Chamber to order that (1) Witness no. 3 on the list of witnesses filed pursuant to Rule 65 *ter* of the Rules of Procedure and Evidence (“Rules”) on 30 April 2008 – for whom it is submitted that he is unwilling to travel to The Hague to testify before the Tribunal and that “he does not want to fly”¹ – be permitted to testify by way of video-link, and (2) Witness no. 4 on the Popović Witness List – for whom it is submitted that due to his poor health he is unable and unwilling to travel to The Hague to testify before the Tribunal² – also be permitted to testify by way of video-link.

2. Popović argues that the testimony of Witness no. 3 and Witness no. 4 (“Witnesses”) is very important for his case. Witness no. 3 allegedly took part in an intercepted phone conversation with Popović on 16 July 1995 which the Prosecution has tendered into evidence,³ and Witness no. 4 was Head of Communications in the Drina Corps during the period relevant to the Indictment, and will testify about a range of communication issues, including devices capable of intercepting conversations, frequency plans and communications paths within the Army of the Republika Srpska.⁴ Popović argues that the importance of this evidence, coupled with unwillingness (in the case of Witness no. 3) and inability (in the case of Witness no. 4) to testify, satisfies the requirements under which the Trial Chamber may grant the Motion.

3. The Motion also indicates that it is possible for both Witnesses to testify from Belgrade.⁵

B. Response

4. On 26 May 2008, the Prosecution filed confidentially the “Prosecution Response to Vujadin Popović’s Confidential Motion for Testimony of Witnesses no. 3 and no. 4 to be Heard Via Video-

¹ Motion, para. 8.

² *Ibid*, para. 13.

³ *Ibid*, para. 5.

⁴ *Ibid*, para. 10.

⁵ *Ibid*, para. 14.

Conference Link” (“Response”). In its Response, the Prosecution argues that “[b]ecause the Motion fails to establish with respect to either witness that video-link testimony is the only viable alternative, the Motion should be denied”.⁶ The Response indicates that the reason behind Witness no. 3’s unwillingness to travel to The Hague is nervousness concerning air travel.⁷ The Prosecution argues that since it is possible for Witness no. 3 to travel overland to The Hague (for example, by bus or train), the Trial Chamber should not grant the Motion.⁸

5. In relation to Witness no. 4, the Prosecution argues that the medical documentation submitted by Popović⁹ does not prove that the Witness is unable to travel to The Hague, therefore the Motion should be denied and Popović encouraged to liaise with the Tribunal’s Victims and Witness Unit in order to facilitate for Witness no. 4 a satisfactory means of travel to The Hague and to accommodate his medical needs.¹⁰

6. The Prosecution also notes that the situation with regard to both Witnesses differs from the circumstances under which two Prosecution witnesses gave evidence via video-link. In the case of the Prosecution witnesses, neither could be compelled under the applicable national law to give live testimony in The Hague. The Prosecution argues that since the Witnesses are both in Serbia, the Trial Chamber may subpoena them to testify in The Hague.¹¹

II. THE LAW

7. Rule 81 *bis* provides:

At the request of a party or *proprio motu*, a Judge or a Chamber may order, if consistent with the interests of justice, that proceedings be conducted by way of video-conference link.

III. DISCUSSION

8. Pursuant to Rule 81 *bis*, the Trial Chamber has the discretion to allow a witness to testify via video-link, provided that to proceed in this manner is consistent with the interests of justice. The jurisprudence of this Tribunal has identified criteria to guide the exercise of this discretion, namely that (a) the evidence must be sufficiently important to make it unfair to proceed without it, and (b)

⁶ Response, para. 1.

⁷ See Motion, para. 8.

⁸ Response, para. 5.

⁹ See Motion, Annex 1.

¹⁰ Response, paras. 6 and 7.

¹¹ *Ibid*, paras. 3, 8 and 9.

the witness must be unable or unwilling to testify before the Tribunal in The Hague.¹² While these are the central considerations, the Trial Chamber notes that what it is called upon to determine is whether it would be in the interests of justice, on the basis of all the relevant considerations, to proceed with testimony by video-link.

9. For the reasons outlined in the Motion, the Trial Chamber is satisfied that the evidence of both Witnesses is sufficiently important that it would be unfair to proceed without it.¹³ Consequently, the first criterion is met in the case of both Witnesses.

10. The Prosecution states that a party should prove that “video-link testimony is the only viable alternative” to presenting live evidence in order for such a motion to be granted.¹⁴ This consideration is not a pre-requisite, but rather one of many factors the Trial Chamber may consider when reaching its overall conclusion as to whether granting such a motion would be in the interests of justice.

A. Witness no. 3

11. The second criterion is whether the Witness is unable or unwilling to testify live before the Tribunal in The Hague. Considering the application of the second criterion to Witness no. 3, the Trial Chamber notes that it has previously stated

[T]he Trial Chamber considers it unnecessary to require that unwillingness be for good reasons. In the view of the Trial Chamber, while the basis for refusal may be relevant to the broader and paramount question of interests of justice, good reasons for unwillingness should not constitute a pre-requisite for the use of video evidence. ... [A]lthough the witness may be unwilling to testify live before the Tribunal without good reasons, there may be cases where it is nevertheless in the interests of justice to allow certain witnesses' testimony to be heard via video-link.¹⁵

The second criterion is therefore met, as Witness no. 3 has consistently refused to travel outside Serbia to testify.¹⁶

12. The final consideration for the Trial Chamber is whether it is in the interests of justice to order Witness no. 3 to testify via video-link. The Trial Chamber considers the testimony of Witness

¹² *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Defence Motion to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link, 25 June 1996 (“*Tadić Video-Link Decision*”), para. 19; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, [Confidential] Decision on Prosecution’s Request for Testimony by Video-Conference Link and Protective Measures, 2 July 2004, p. 3 (citing *Tadić Video-Link Decision*, para. 19.)

¹³ See Motion, paras. 4 and 5.

¹⁴ Response, para. 1.

¹⁵ [Confidential] Decision on Prosecution’s *Confidential* Motion for Testimony of Witness 88 to be Heard Via Video Link, 26 June 2007, para. 11 (also cited in [Confidential] Decision on Prosecution Motion Requesting Video-Conference Link Testimony of Witness 167 and Protective Measures, 23 August 2007, para. 13).

¹⁶ Motion, para. 8.

no. 3 highly relevant, and does not consider that the interests of justice would be better served by facilitating bus or train travel to The Hague, nor does it consider that compelling a party to exhaust all alternative arrangements is necessary in the interests of justice. Against this backdrop, taking into account all the relevant considerations, the Trial Chamber finds that it would be consistent with the interests of justice to hear the evidence of Witness no. 3 via video-link.

B. Witness no. 4

13. According to the Motion, the poor health of Witness no. 4 renders him both unable and unwilling to travel to The Hague to give live testimony.¹⁷ Again, the second criterion is met by the Witness' clear unwillingness to travel outside Serbia to testify. The Trial Chamber does not consider that it would be in the interests of justice to compel a witness who is unwell to travel from Serbia to The Hague to give live testimony before the Tribunal, nor does it consider to be in the interests of justice to order an in depth analysis into the seriousness of the Witness' illness. Proof that the Witness is unwell, coupled with his unwillingness to travel to The Hague to testify is enough to satisfy the Trial Chamber that, taking into account all relevant considerations, the interests of justice are best served by allowing Witness no. 4 to testify via video-link.

IV. DISPOSITION

14. For the foregoing reasons, pursuant to Rules 54 and 81 *bis*, the Trial Chamber

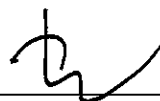
GRANTS the Motion;

ORDERS that the evidence of the witnesses listed as no. 3 and no. 4 on the Popović Witness List will be heard by way of video-link between Serbia and the seat of the Tribunal in The Hague on a date to be specified; and

DIRECTS the Registrar of the Tribunal to take all reasonable steps in the circumstances of the present case to ensure that the guidelines established in the *Tadić Video-Link Decision* are followed.

¹⁷ *Ibid*, para.13.

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



Judge O-Gon Kwon

Dated this twenty-eighth day of May 2008
At The Hague
The Netherlands

[Seal of the Tribunal]