

**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: 3 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: 3 September 2014

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC

**DECISION ON DEFENCE MOTION FOR TESTIMONY OF DGH-035 TO BE
HEARD VIA VIDEO-LINK OR, IN THE ALTERNATIVE, FOR AN ORDER OF
SAFE CONDUCT**

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 Borivoje Milinković (DGH-035) to be Heard *via* Video-Link or, in the Alternative, for an Order of Safe Conduct” filed on 24 July 2014 (“Motion”). The Prosecution filed the “Prosecution Response to Defence Motion for Testimony of Borivoje Milinković (DGH-035) to be Heard *via* Video-Link or, in the Alternative, for an Order of Safe Conduct” on 1 August 2014 (“Response”). The Defence filed the “Reply to Prosecution Response to Motion for Testimony of Borivoje Milinković (DGH-035) to be Heard *via* Video-Link or, in the Alternative, for an Order of Safe Conduct” on 7 August 2014. The Defence filed the “Addendum to the Defence Motion for Testimony of Borivoje Milinković (DGH-035) to be Heard *via* Video-Link or, in the Alternative, for an Order of Safe Conduct” on 1 September 2014 (“Addendum”).

A. Submissions

2. In the Motion, the Defence requests that DGH-035’s testimony be heard *via* video-conference link pursuant to Rules 73 and 81 *bis* of the Rules of Procedure and Evidence (“Rules”).¹ The Defence asserts that the evidence of DGH-035 is sufficiently important to make it unfair to continue without it. Specifically, the Defence submits that DGH-035 has direct knowledge of Goran Hadžić’s role in the district government and will give evidence with regard to the inter-relationship between the Territorial Defence and the JNA, the role of Radovan Stojičić, and the JNA’s intervention in Dalj in August 1991 and events thereafter.² The Defence further submits that DGH-035 is unwilling to come to The Hague to testify out of a fear of arrest during transit.³ The Defence asserts that the following documents substantiate DGH-035’s fear: (a) a Judgement taken *in absentia* against DGH-035 in Croatia in 1992;⁴ (b) the website *Veritas*;⁵ and (c) the website of the Center for Peace, Non-violence and Human Rights that lists DGH-035 as a defendant.⁶ The Defence submits that DGH-035 heard media reports of the arrest of Dragomir Pećanac in The Hague after he was granted an order of safe conduct. It submits that while the circumstances surrounding the arrest of Pećanac are unique, reports of the arrest have raised further concerns for

¹ Motion, paras 1, 14.

² Motion, para. 8.

³ Motion, para. 9.

⁴ Motion, para. 9, *referring to* Rule 65 *ter* number 01216, Judgement of the Osijek Military Court, Republic of Croatia, 29 July 1992.

⁵ Motion, para. 9, fn. 6; Addendum, Annex.

⁶ Motion, para. 9, fn. 7.

DGH-035 about travel to The Hague.⁷ Finally, the Defence asserts that no prejudice to the Prosecution will arise from the witness's testimony *via* video-conference link.⁸

3. In the alternative, the Defence requests that DGH-035 be granted an order of safe conduct, asserting that all conditions for such have been met.⁹

4. In the Response, the Prosecution asserts that the Defence fails to demonstrate that DGH-035 is unable, or has good reasons to be unwilling, to come to the Tribunal to give evidence.¹⁰ The Prosecution avers that a fear of arrest by domestic authorities is an argument in favour of an order of safe conduct, but not for testimony *via* video-conference link.¹¹ The Prosecution further submits that while it does not object in principle to an order of safe conduct for DGH-035, the Defence has not submitted sufficient documentation to satisfy the requisite conditions.¹² The Prosecution notes that the Defence merely lists internet addresses without putting the supporting material before the Chamber and that by doing so it invites the Chamber to seek and rely on material that is outside the record before it.¹³

5. In the Reply, the Defence asserts that a fear of arrest, combined with a credible basis for that fear, equates to reasons accepted by other Trial Chambers as satisfying the "good reasons" criteria for testimony *via* video-conference link.¹⁴ The Defence further argues that the "good reason" element is not a requirement for permitting testimony *via* video-conference link and that even if fear of arrest does not constitute a "good reason", the request should still be granted based on the witness's genuine and seriously held concern that he could be arrested if he travels to The Hague.¹⁵ Finally, the Defence asserts that in its request it also relied on documentary evidence that is on the Prosecution's Rule 65 *ter* Exhibit List and that there is no bar to reliance on open source material for procedural matters.¹⁶

6. On 28 August 2014, the Defence indicated that the expected date of DGH-035's testimony is 11 September 2014.¹⁷

⁷ Motion, para. 10.

⁸ Motion, para. 12.

⁹ Motion, para. 13.

¹⁰ Response, para. 1.

¹¹ Response, para. 3.

¹² Response, para. 4.

¹³ Response, para. 4.

¹⁴ Reply, para. 2.

¹⁵ Reply, para. 4.

¹⁶ Reply, paras 5-6.

¹⁷ Email from Defence, 28 August 2014.

B. Applicable Law

1. Video-Conference Link

7. Rule 81 *bis* of the 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

2. Safe Conduct

8. Article XVIII of the Headquarters Agreement concluded between the Tribunal and The Netherlands on 27 May 1994 contains the following provisions with regard to “witnesses and experts appearing before the Tribunal”:

1. Without prejudice to the obligation of the host country to comply with requests for assistance made, or orders issued by, the Tribunal pursuant to Article 29 of its Statute, witnesses and experts appearing from outside the host country on a summons or a request of the Tribunal or the Prosecutor shall not be prosecuted or detained or subjected to any other restriction of their liberty by the authorities of the host country in respect of acts or convictions prior to their entry into the territory of the host country.

2. The immunity provided for in paragraph 1 above shall cease when the witness or expert having had, for a period of fifteen consecutive days from the date when his or her presence is no longer required by the Tribunal or the Prosecutor, an opportunity of leaving, has nevertheless remained in the territory of the host country, or having left it, has returned, unless such return is on another summons or request of the Tribunal or the Prosecutor.

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. 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. 8; *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 Decision*”), para. 8.

¹⁹ *Karadžić Decision*, para. 6; *Popović Decision*, para. 8; *Stanišić Decision*, para. 8.

3. Witnesses and experts referred to in paragraph 1 above shall not be subjected by the host country to any measure which may affect the free and independent exercise of their functions for the Tribunal.²⁰

9. In the *Tadić* case, it was established that safe conduct, although not explicitly provided for in the Statute of the Tribunal, can be ordered under the general power contained in Rule 54 of the Rules.²¹ Safe conduct orders have been issued in cases before the Tribunal with respect to crimes within the jurisdiction of the Tribunal, and when deemed to be in the interests of justice and a fair trial.²²

C. Discussion

10. The Chamber is satisfied that the testimony of DGH-035 is sufficiently important to make it unfair to the Defence to proceed without it. The Chamber also considers that the Osijek Military Court in Croatia convicted DGH-035 *in absentia* for crimes in relation to his activities in 1991 and sentenced him to 14 years in prison. Specifically, the court found that the actions of DGH-035 and his co-accused “resulted in the death of several people, serious violence, considerable destruction and threat to the security of the Republic [of Croatia]”.²³ Further, the Chamber notes that as of August 2014, an article on the website of the Center for Peace, Non-violence and Human Rights, lists DGH-035 as a co-defendant in a case before the Osijek County Court related to the expulsion of non-Serbs from Dalj in April 1992²⁴ and according to the website *Dokumentaciono Informacioni Centar Veritas* there are outstanding proceedings against DGH-035 in the County Attorney’s Office in Osijek.²⁵ Considering in particular the judgement of the Osijek Military Court, the Trial Chamber is satisfied that the Defence has provided information that substantiates DGH-035’s concern that he may be arrested if he travels to The Hague to give evidence.

11. However, under these circumstances, the Chamber is not satisfied that the witness is unable to come to the Tribunal to testify. Rather, the Chamber finds it is in the interests of justice and a fair trial to issue an order of safe conduct for DGH-035 that will enable him to travel to the Tribunal to give evidence without fear of being arrested. The Chamber notes that the arrest of Dragomir

²⁰ Agreement between the United Nations and the Kingdom of The Netherlands Concerning the Headquarters 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, 27 May 1994.

²¹ *Prosecutor v. 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 (“*Tadić* Decision”).

²² See Decision on Prosecution Urgent Motion for Issuance of Safe Conduct Order for Witness GH-003, 9 October 2012, para. 4; *Tadić* Decision, para. 12.

²³ Rule 65 *ter* number 01216, Judgement of the Osijek Military Court, Republic of Croatia, 29 July 1992, pp. 6, 8.

²⁴ Center for Peace, Non-violence and Human Rights, Monitoring war crime trials: Crime in Dalj 2, <http://www.centar-za-mir.hir/arhiva/index.php.1037.html>.

²⁵ Addendum, Annex.

Pećanac after having been granted an order of safe conduct was under different circumstances²⁶ and is not relevant to the present determination.

D. Disposition

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

GRANTS the Defence leave to file the Reply;

GRANTS the Motion, in part;

ORDERS safe conduct for witness DGH-035 for his travel to and attendance in The Hague as a witness in this case on the following terms and conditions:

- (a) The witness shall not be prosecuted, detained, or subjected to any other restriction of his liberty while in The Netherlands by the authorities of the host country in respect of acts or convictions prior to his entry into the territory of the host country;
- (b) This safe conduct shall commence for the witness on a date to be scheduled by the Victims and Witnesses Section of the Tribunal, in consultation with the Defence, and will remain applicable only for a period of seven consecutive days from the date when the presence of the witness is no longer required by the Trial Chamber;
- (c) In case of illness that prevents the witness from leaving The Netherlands, the relevant seven-day period will commence when he is again able to travel;
- (d) This safe conduct shall cease when the witness, having had an opportunity to leave The Netherlands for a period of seven consecutive days from the date when his presence is no longer required by the Trial Chamber, has nevertheless remained in The Netherlands or, having left it, has returned;

²⁶ *Contempt Case of Dragomir Pećanac*, Judgement on Allegations of Contempt, 9 December 2011, paras 2, 4.

INSTRUCTS the Registrar of the Tribunal to take all necessary measures for the implementation of the present order;

DENIES the Motion in all other respects.

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

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



Judge Guy Delvoic
Presiding

[Seal of the Tribunal]