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**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-09-92-T
Date: 1 November 2012
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Bakone Justice Moloto
Judge Christoph Flüge

Registrar: Mr John Hocking

Decision of: 1 November 2012

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON PROSECUTION MOTION FOR TESTIMONY
OF WITNESS RM-088 TO BE HEARD VIA
VIDEO-CONFERENCE LINK**

Office of the Prosecutor

Mr Dermot Groome
Mr Peter McCloskey

Counsel for Ratko Mladić

Mr Branko Lukić
Mr Miodrag Stojanović

I. PROCEDURAL HISTORY AND SUBMISSIONS OF THE PARTIES

1. On 8 October 2012, the Prosecution filed a motion requesting that the Chamber order that Witness RM-088's testimony be received via video-conference link on 19 November 2012 ("Motion").¹ The Prosecution submits that it is in the interests of justice that Witness RM-088's evidence be heard via video-conference link from his country of residence.² It submits that the witness's testimony is sufficiently important to make it unfair to proceed without it and the Accused's right to confront the witness will not be unfairly prejudiced by the use of video-conference link.³ It further sets out that the witness is unwilling to appear in person to testify in this case due to concerns about his safety and his employment.⁴ According to the witness, he "would suffer serious problems if he testified before the ICTY" and "cannot take any more than one day off work in order to testify [due to not being able to] afford to lose the income".⁵ Lastly, the Prosecution submits that the Tribunal cannot otherwise compel the witness's personal appearance under the domestic laws of his country of residence.⁶ The Prosecution also requests that the Chamber request the Registry to take all reasonable steps to ensure that a video-conference link is established in accordance with the criteria described in a previous decision of the *Tadić* Trial Chamber.⁷

2. The Defence responded on 22 October 2012, opposing the Motion ("Response").⁸ It submits that the witness does not have good reasons for his unwillingness to testify in The Hague.⁹ In relation to the witness's concerns about his safety, the Defence points out that the witness has been granted the protective measures of pseudonym and closed session and that the Motion does not explain how these measures would fail to assuage the witness's safety concerns.¹⁰ In relation to the witness's financial concerns, the Defence points out that the Tribunal's Victims and Witnesses Section provides witnesses with an attendance allowance which is *inter alia* geared at compensating witnesses for lost wages, and that witnesses additionally have an opportunity to submit to the

¹ Prosecution Motion for Testimony of Witness RM-088 to be Heard via Video-Conference Link, 8 October 2012.

² Motion, paras 1, 15.

³ Motion, paras 1, 11-14.

⁴ Motion, paras 1, 5-6.

⁵ Motion, Annex B.

⁶ Motion, paras 1, 7-9.

⁷ Motion, para. 15; see *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, 25 June 1996, para. 22.

⁸ Defence Response to the Prosecution Motion for Testimony of Witness RM-088 to be Heard via Video-Conference Link, 22 October 2012.

⁹ Response, paras 2, 5.

¹⁰ Response, para. 6.

Tribunal's Registry a claim of exceptional losses for any economic hardship incurred.¹¹ The Defence further submits that granting the Motion would not be in the interests of justice, pointing out that the presence of the witness in The Hague would be favourable due to the following reasons: (a) it would allow the parties to secure a better preparation of the examination; (b) it would allow the Chamber to have an immediate impression of his demeanor; (c) it would allow the Chamber to immediately respond to technical difficulties with a view to ensuring an expeditious trial; and (d) it would reinforce the mental perception of seriousness of the proceedings and serve as a deterrent for any inappropriate behaviour by the witness during the testimony.¹² Lastly, the Defence submits that the Accused's right to confront the witness would be unnecessarily undermined by granting the Motion due to the impersonal and distant interaction of video-conference testimony.¹³

II. APPLICABLE LAW

3. 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 a Chamber may order, if consistent with the interests of justice, that proceedings be conducted by way of video-conference link". According to the case-law of this Tribunal, the Chamber should consider the following factors when determining whether this requirement is met: (i) the witness must be unable, or have good reasons to be unwilling, to come to the Tribunal; (ii) the testimony of the witness must be sufficiently important to make it unfair to the requesting party to proceed without it; and (iii) the accused must not be prejudiced in the exercise of his or her right to confront the witness.¹⁴ However, after considering all relevant factors in a particular case, the ultimate determination to be made when considering a request for video-conference link testimony is whether it would be consistent with the interests of justice.¹⁵

¹¹ Response, para 7.

¹² Response, paras 2, 11.

¹³ Response, paras 2, 12. The Chamber notes that the Response contains two paragraphs numbered '12'. The present reference is intended to refer to the 'second' paragraph 12 under sub-heading II. C. of the Response.

¹⁴ *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, 25 June 1996, para. 19; *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Reasons for Decision on Urgent Stanišić Defence Motion for Video-Conference Link for Testimony of Witness Leković, 4 November 2011 ("Stanišić & Simatović Decision"), para. 5; *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Reasons for Decision Granting Prosecution's Motion to Cross-Examine Four Proposed Rule 92 *bis* Witnesses and Reasons for Decision to Hear the Evidence of those Witnesses via Video-Conference Link, 3 November 2009 ("Gotovina Decision"), para. 7; Decision on Prosecution Motion for Testimony of Witness RM-145 to be Heard via Video-Conference Link, 7 September 2012 ("RM-145 Decision"), para. 5.

¹⁵ Stanišić & Simatović Decision, para. 5; Gotovina Decision, para. 7; RM-145 Decision, para. 5.

III. DISCUSSION

4. The test for granting video-conference link testimony is whether hearing a witness in this way is consistent with the interests of justice. The particular circumstances of every request will need to be considered. The Chamber has considered the arguments raised by the parties and will consider whether the requested video-conference link testimony is consistent with the interests of justice.

(a) Importance of the witness's testimony

5. The parties agree on the importance of the witness's testimony. Having reviewed the witness's Rule 65 *ter* summary, the Chamber is satisfied that the witness's testimony is sufficiently important to make it unfair to the calling party to proceed without it. This factor weighs in favour of granting the Motion.

(b) Rights of the Accused

6. The Defence argues that the Accused's right to confront the witness would be unnecessarily undermined should the Motion be granted. The Chamber has previously held that a video-conference link should be regarded as an extension of the courtroom to the location of the witness, and that its use respects the rights of the Accused to cross-examine and directly confront the witness while observing his or her reactions.¹⁶ As such, the Chamber finds that this factor does not weigh against granting the Motion.

(c) Reasons for witness's unwillingness to testify personally in The Hague

7. The Prosecution submits two reasons for the witness's unwillingness to testify personally in The Hague: concerns for his safety and concerns for loss of income due to being absent from work when testifying. In relation to concerns for the witness's safety, the Chamber recalls that the witness has been granted full protective measures and that these protective measures continue to apply in the present case pursuant to Rule 75 (F) (i) of the Rules.¹⁷ As such, it remains unclear and the Motion does not further elaborate why testifying personally in The Hague would pose a greater risk to the witness's safety than testifying through video-conference link. In relation to the witness's financial concerns, the Chamber notes that the Registry has established procedures to cover any economic loss of witnesses incurred due to their cooperation with the Tribunal. The Chamber does

¹⁶ RM-145 Decision, para. 6.

¹⁷ See *Prosecutor v. Karadžić*, Case no. IT-95-5/18-PT, Decision on Protective Measures for Witnesses, 30 October 2008, para. 34.

not agree with the Prosecution's arguments in this regard and therefore finds that the witness's reasons for his unwillingness to testify personally in The Hague do not weigh in favour of granting the Motion.

(d) The parties' ability to prepare for the examination of the witness

8. The Defence submits that the witness's physical presence in The Hague would enhance the parties' ability to prepare for his examination. While circumstances may exist that would favour that a witness testifies personally in The Hague in order to enhance the parties' ability to prepare for his or her examination, such circumstances have not been specified by the Defence in relation to Witness RM-088 nor can the Chamber see any such reason. Under these circumstances, the Chamber finds that this factor, as argued by the Defence, does not weigh against granting the Motion.

(e) The Chamber's ability to assess the witness's demeanor

9. The Defence argues that having the witness testify in The Hague would enhance the Chamber's ability to assess his demeanor. In this regard, the Chamber recalls its previous finding that a video-conference link should be regarded as an extension of the courtroom to the location of the witness, and that video-conference link technology similarly allows the Chamber to observe a witness's demeanor and assist it in assessing the credibility and reliability of the testimony.¹⁸ As such, the Chamber finds that this factor does not weigh against granting the Motion.

(f) The impact on trial expediency due to possible technical delays

10. The Defence argues that possible technical delays may be better addressed if the witness is present in The Hague, thus minimising any negative impact on trial expediency. While it may be true that video-conference link testimony has a higher risk of slight delays than in-person testimony due to technical problems, experience has shown that any such delay would not be anything more than marginal and that its impact on the Accused's right to a fair and expeditious trial would be negligible. As such, the Chamber finds that this factor does not weigh against granting the Motion.

(g) A witness's perception of the seriousness of the proceedings

11. The Defence argues that a witness's perception of the seriousness of the proceedings is heightened when testifying personally in The Hague. While one cannot exclude that circumstances may exist that would favour that a witness testifies personally in The Hague in order to heighten his

¹⁸ See RM-145 Decision, para. 6.

perception of the seriousness of the proceedings, indications of any decreased perception have not been established in relation to Witness RM-088 nor can the Chamber see any such reason. Under these circumstances, the Chamber finds that this factor, as argued by the Defence, does not weigh against granting the Motion.

(h) The Chamber's possibility to receive the evidence of the witness

12. The Prosecution argues that the Tribunal does not have the power to compel the witness to testify personally in The Hague due to the domestic laws of the witness's country of residence. According to the Prosecution, this is a factor to consider when determining whether to grant the Motion. The Chamber notes that it can issue subpoenas to witnesses, ordering them to testify. Further, states have an obligation to cooperate with the Tribunal under Article 29 of the Statute, for example by way of serving a subpoena. Despite this, securing a person's presence in The Hague, whether as a witness or an accused of contempt of court (in case an indictment is issued for failing to comply with a subpoena), is not always without practical problems and may take considerable time. The Chamber further notes that the witness remains willing to assist the Chamber in its truth-finding mandate by providing testimony, albeit only through the use of video-conference link. The Chamber notes that the Motion indicates the witness's strong conviction, as opposed to a mere preference, against testifying personally in The Hague. Furthermore, the Motion indicates that he has already compromised and changed his initial refusal to testify at all, thereby demonstrating his commitment to provide testimony to the Chamber. Under these circumstances, the Chamber finds that this factor weighs in favour of granting the Motion.

Conclusion

13. Taking all of the above into consideration, in particular the witness's willingness to provide testimony to the Chamber, and noting that the Prosecution only exceptionally requests the Chamber to order testimony via video-conference link, the Chamber concludes that it is consistent with the interests of justice to order video-conference link testimony for Witness RM-088.

14. In relation to the Prosecution's request asking the Chamber to direct the Registry to follow criteria established in a decision by the *Tadić* Trial Chamber in 1996, the Chamber considers that such an instruction is not necessary as the Registry has substantial experience and is fully capable of organizing a video-conference link that satisfies the standards required by this Chamber.

IV. DISPOSITION

15. For the foregoing reasons, pursuant to Rule 81 *bis* of the Rules, the Chamber

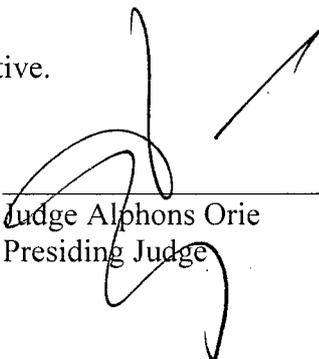
GRANTS the Motion;

DENIES the Prosecution's request to direct the Registry to follow criteria established by the *Tadić* Trial Chamber in 1996;

REQUESTS the Registry to communicate with the witness's country of residence in an effort to find an appropriate location for the video-conference link and to take all other necessary measures to ensure that Witness RM-088 can testify via video-conference link on 19 November 2012 from his country of residence;

INFORMS the parties that the Chamber will sit on 19 November 2012 from 2.15 p.m. until 7 p.m.

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



 Judge Alphons Orié
 Presiding Judge

Dated this first day of November 2012
 At The Hague
 The Netherlands

[Seal of the Tribunal]