

IT-03-69-T
D 20507 - D 20502
25 February 2010

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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-03-69-T
Date: 24 February 2010
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Michèle Picard
Judge Elizabeth Gwaunza

Registrar: Mr John Hocking

Decision of: 24 February 2010

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON PROSECUTION MOTIONS TO HEAR
WITNESSES BY VIDEO-CONFERENCE LINK**

Office of the Prosecutor

Mr Dermot Groome

Counsel for Jovica Stanišić

Mr Geert-Jan Alexander Knoops
Mr Wayne Jordash

Counsel for Franko Simatović

Mr Mihajlo Bakrač
Mr Vladimir Petrović

I. PROCEDURAL HISTORY

1. On 2 May 2008, the Prosecution filed a motion requesting the Chamber to authorise Witnesses C-1141 and C-1232 to testify via video-conference link (“VCL”).¹ On 16 May 2008, the Stanišić Defence filed its response to the First Motion requesting that it be denied.²

2. On 15 January 2010, the Prosecution filed a motion in which it renewed its request to have Witness C-1141 testify via VCL and stated that it had withdrawn Witness C-1232 from its witness list, thereby rendering the First Motion moot with respect to the latter witness.³ Simultaneously, it requested that Witnesses C-1129 and C-1215 be allowed to testify via VCL.⁴ Therefore, in this decision, the Chamber shall examine the applications concerning witnesses C-1141, C-1129 and C-1215. The Prosecution indicated its intention to call these three witnesses in the first and second week of March 2010.⁵

3. No responses to the Second Motion were filed.

II. SUBMISSIONS

A. Prosecution

4. The Prosecution submits that Witness C-1129, Witness C-1141, and Witness C-1215 (“the Witnesses”) are elderly and/or unwell. Consequently, it contends that the Witnesses are unable, or “unwilling with good reason”, to travel to The Hague for their testimony.⁶ More specifically, it submits that:

- i) Witness C-1129 is unable to travel due to certain complex health issues, one of which, namely high blood pressure, could be aggravated due to Witness C-1129’s fear of flying; thus constituting a “reasonable justification” for the witness’s unwillingness to travel;⁷

¹ Prosecution Motion for Testimony via Video-Conference Link for Witnesses C-1141 and C-1232, partly confidential, 2 May 2008 (“First Motion”).

² Defence Response to the “Prosecution Motion for Testimony via Video-Conference Link for Witnesses C-1141 and C-1232”, confidential, 16 May 2008 (“Stanišić Response”).

³ Prosecution Motion for Video-Conference Link, 15 January 2010 (“Second Motion”), paras 3, 11. In the First Motion, the Prosecution had given notice that it intended to also request that Witness C-1089 would be allowed to testify via VCL. In the Second Motion, it announced that Witness C-1089 will be subject of a separate motion. See footnote 4 on p. 2 of the Second Motion.

⁴ Second Motion, para. 1.

⁵ *Ibid.*

⁶ Second Motion, para. 6.

⁷ Annex A to Second Motion, para. 1; see also Annex B.

- ii) Witness C-1141 has a heart condition, which makes Witness C-1141 unable to travel to The Hague and which already led to the witness testifying via VCL in 2006 in another case before the Tribunal. It is further submitted that Witness C-1141 is currently in a “very challenging emotional state” due to the passing away of Witness C-1141’s partner;⁸
- iii) Witness C-1215 is unable or, alternatively, “reasonably unwilling” to travel to The Hague due to the witness’s old age and frail physique, as well as the physical condition of Witness C-1215’s partner.⁹

5. The Prosecution argues that the evidence that would be provided by each of the Witnesses is “sufficiently important” to this case, and therefore that it would be unfair to proceed without the Prosecution having had the opportunity to present the said evidence.¹⁰ The Witnesses will respectively provide evidence that relates to alleged crimes in Erdut, Dubica and Baćin, and Dalj.¹¹ Additionally, the Prosecution submits that the evidence that would be provided by the Witnesses is “critical” to the case.¹²

B. Stanišić Defence

6. The Stanišić Defence submits that the First Motion is premature as – at that time – it had not been established whether it would be possible for Jovica Stanišić to follow a VCL testimony via the internal VCL provided to Stanišić at the United Nations Detention Unit (“UNDU”).¹³ The Stanišić Defence further submits that in the situation that Stanišić would not be able to follow the testimonies of witnesses testifying via VCL, his rights to a fair trial would be violated, in particular the right of an accused to have a witness examined “before him” pursuant to Article 21 (4) (e) of the Tribunal’s Statute.¹⁴

III. APPLICABLE LAW

7. Rule 81 *bis* of the Rules of Procedure and Evidence of the Tribunal (“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”.

⁸ Annex A to Second Motion, para 2; see also Annex C.

⁹ Annex A to Second Motion, para. 3; see also Annex D.

¹⁰ Second Motion, para. 7.

¹¹ Second Motion, para. 8; Annex A, paras 4-5.

¹² *Ibid.*

¹³ Response, paras 3-9.

¹⁴ Response, paras 14, 17.

8. The jurisprudence of the Tribunal has identified three criteria to guide the Chamber when deciding whether a witness should be allowed to give his or her testimony via VCL.¹⁵ According to those criteria:

- i. the witness must be unable, or have good reasons to be unwilling, to come to the Tribunal;
- ii. the witness's testimony 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.¹⁶

After having considered these criteria and all relevant factors in a particular case, the Chamber's ultimate determination to be made in such an exercise, is whether the testimony via VCL would be consistent with the interests of justice.¹⁷

9. In the case of *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, the Trial Chamber explained that

according to the jurisprudence of the Tribunal, video conferencing is an extension of the Trial Chamber to the location of the witness that neither denies the accused his or her right to confront the witness, nor causes him or her material prejudice by the physical absence of the witness. Video conferencing therefore respects the right of the accused to cross-examine and directly confront witnesses while observing their reactions, and allows the Chamber to assess the credibility and reliability of the testimony in the same manner as for a witness in the courtroom. Testimony by video-conference link should be given as much probative value as testimony presented in the courtroom.¹⁸

¹⁵ See e.g. *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, 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.

¹⁶ *Gotovina Decision*, para. 7; see further e.g. *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić, Esad Landžo*, 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. 17; *Prosecutor v. Miroslav Kvočka, Mlađo Radić, Zoran Žigić and Dragoljub Prcać*, Case No. IT-98-30/1-A, Decision on Prosecution's Request for Testimony by Video-Conference Link and Protective Measures, confidential, 2 July 2004, p. 3; *Prosecutor v. Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj*, Case No. IT-04-84-T, Decision on Prosecution's Confidential Motion for Testimony to Be Heard via Video-Conference Link, 21 March 2007, para. 3.

¹⁷ *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, and Vinko Pandurević*, Case No. IT-05-88-T, Decision on Prosecution's Motion for Requesting Video-Conference Link Testimony of Witness 167 and Protective Measures, confidential, 23 August 2007, para. 10; *Gotovina Decision*, para. 7.

¹⁸ *Gotovina Decision*, para. 8.

IV. DISCUSSION

10. The Chamber has reviewed the issues which the Witnesses are expected to provide evidence on¹⁹ and considers the evidence that would be given to be sufficiently important to make it unfair to the Prosecution to proceed without this evidence.

11. The Chamber notes that, since 20 January 2010, Stanišić has been following the proceedings in person, from the courtroom. Under these circumstances, the arguments raised in the Response in relation to the internal VCL with the UNDU are thus currently moot. Furthermore, a VCL that allows a witness to be physically present in a location other than the Tribunal whilst testifying should be seen as an extension of the courtroom to the location of the Witnesses and its use does not prejudice the rights of either Jovica Stanišić or Franko Simatović to confront the Witnesses.²⁰

12. The Prosecution has provided a doctor's report to support its claim that Witness C-1129 does not feel capable of travelling to The Hague.²¹ Based on the information before it, the Chamber considers that the medical condition and the personal circumstances of Witness C-1129 support the application that the Witness is unable to travel to The Hague.

13. The Chamber notes that the letter on the medical condition of Witness C-1141 provided by the Prosecution dates back to 19 February 2006 and appears to be the one used for the application for VCL-testimony for this witness's testimony in a previous case before the Tribunal, and as such would not be appropriate for use in 2010 for the purposes of the present case.²² However, based on the personal circumstances of the witness and the fact that the witness is over seventy-five years of age, the Chamber considers that Witness C-1141 has good reasons to be unwilling to travel to The Hague in order to testify.

14. The Chamber considers that the medical information provided in relation to Witness C-1215 does not sufficiently supports the Prosecution's claims as to the medical situation of Witness C-1215, because it is outdated and largely pertains to medical treatments that would not prevent someone from being able to travel to The Hague in order to testify. Notwithstanding the Prosecution's failure to substantiate it submissions, the Chamber sees no reason to doubt the concerns expressed by the witness to the Prosecution. Considering that Witness C-1215 was born

¹⁹ As substantiated in Second Motion, paras 7-9; Annex A to Second Motion, paras 4-5.

²⁰ *Gotovina* Decision, para. 8.

²¹ Annex B to Second Motion.

²² Annex C to Second Motion.

well before 1930 as well as the personal circumstances reported by Witness C-1215, the Chamber finds that the witness has good reasons not to travel to The Hague.

15. Taking into account all of the above, the Chamber concludes that it is consistent with the interests of justice to hear the testimonies of the Witnesses via VCL.

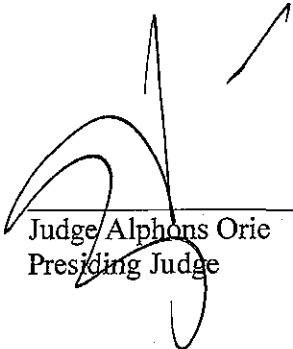
V. DISPOSITION

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

GRANTS the Second Motion.

DECLARES moot the First Motion, in as far as it pertains to Witness C-1232.

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



Judge Alphons Orie
Presiding Judge

Dated this twenty-fourth day of February 2010
At The Hague
The Netherlands

[Seal of the Tribunal]