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-95-5/18-T

Date: 17 June 2010

Original: English

IN THE TRIAL CHAMBER

Before: **Judge O-Gon Kwon, Presiding Judge**
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: **Mr. John Hocking**

Decision of: **17 June 2010**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON PROSECUTION'S MOTION FOR TESTIMONY TO BE HEARD VIA VIDEO-CONFERENCE LINK

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

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 "Prosecution's Motion for Testimony to Be Heard Via Video-Conference Link", filed on 13 May 2010, ("Motion"), and hereby issues its decision thereon.

I. Submissions

1. In the Motion, the Office of the Prosecutor ("Prosecution") requests that the testimony of the witness Dr. Youssef Hajir (KDZ130) ("Witness") be conducted by video-conference link from the Tribunal's Sarajevo field office, in accordance with Rule 81 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules").[1] Arguing that all the prerequisites for hearing testimony by video-conference link are met in this instance, the Prosecution contends that, due to the state of the Witness's health, he is prevented from travelling to The Hague to testify in person.[2] In Confidential Appendix A to the Motion, the Prosecution attaches a letter describing the medical condition of the Witness. The Prosecution asserts that the evidence to be given by the Witness is sufficiently important as he will give "relevant, probative and unique testimony" concerning events in Sarajevo in the period of the Indictment.[3] It notes that the Witness was the director and surgeon at the Dobrinja General Hospital, Sarajevo, throughout the war in Bosnia and Herzegovina, and that his evidence pertains to various sniping and shelling incidents in Sarajevo listed in the Schedules to the Third Amended Indictment ("Indictment"), as well as shelling and sniping in the city generally and its effects on the civilian population. According to the Prosecution, he can also authenticate a number of hospital medical records, death certificates, photographs, and videos relating to these incidents.[4] Moreover, the Prosecution submits that video-link conference enables the Accused to cross-examine the Witness, therefore causing no prejudice to his right to confront the Witness.[5]

2. On 26 May 2010, the Accused filed, confidentially, the "Response to Motion for Video-Link: Dr. Youssef Hajir" ("Response"), in which he states his opposition to the Motion. The Response was filed confidentially as it "deals primarily with [the Witness's health] condition" as described in the Confidential Appendix A to the Motion.[6] The Accused argues, firstly, that the information provided in the Motion and confidential Appendix does not establish that the

[1] Motion, para. 1.
[2] Motion, para. 6.
[3] Motion, para. 7.
[4] Motion, para. 7.
[5] Motion, para. 8.
[6] Response, fn. 1.

Witness is unable to come to The Hague to testify, nor that he is unwilling to do so.[7] He further asserts that there is no reason to believe that the level of stress on the Witness would be significantly greater if he were to testify in person rather than by video-conference link.[8] He suggests that the only difference between these two ways of giving oral evidence is that there is travel involved in the former, and states that the medical information provided does not specify that the Witness is unable to travel.[9] Secondly, the Accused argues that the Witness's testimony is not so important to the case that it would be unfair to proceed without it.[10] He recalls that the Witness will not testify as an eye-witness to any of the incidents listed in the Schedules to the Indictment, and expresses the view that another person should be able to authenticate the relevant medical records.[11] He also notes that there are a number of other witnesses on the Prosecution's Rule 65 *ter* witness list providing evidence about the general conditions in Dobrinja during the war.[12] Finally, the Accused argues that he would suffer prejudice if the Witness is not brought to The Hague to testify as he would not be able to interview the Witness prior to his testimony, and he will not be able to question him effectively by video-conference link.[13] The Accused points to the jurisprudence of the ICTR Appeals Chamber in the *Zigiranyirazo* case, which overturned the decision of the Trial Chamber to travel to The Hague and take testimony of a witness while the accused would remain in Arusha and follow the proceedings by video-conference link.[14]

3. On 31 May 2010, with the leave of the Chamber,[15] the Prosecution filed the "Prosecution Reply to 'Response to Motion for Video-Link: Dr. Youssef Hajir'" ("Reply"). In the Reply, the Prosecution contends that there is no additional requirement to show that the witness is physically unable to travel to the Tribunal.[16] It submits that, according to the practice of the Tribunal, testifying by video-conference link is permissible where there is information that the witness is suffering from a condition such that it would be inadvisable, for medical reasons, for the witness to travel, as well as in situations in which the witness's age and personal circumstances are such that that the witness has a good reason to be unwilling to come in person

[7] Response, para. 4.
[8] Response, para. 5.
[9] Response, para. 6.
[10] Response, para. 8.
[11] Response, para. 8.
[12] Response, para. 8.
[13] Response, para. 9.
[14] Response, para. 10.
[15] Hearing, T. 2997-2998 (28 May 2010). The Prosecution filed the "Prosecution Request for Leave to Reply to 'Response to Motion for Video-Link: Dr. Youssef Hajir'" on 27 May 2010.
[16] Reply, para. 3.

to the seat of the Tribunal.[17] The Prosecution argues furthermore that the ICTR Appeals Chamber decision in the *Zigiranyirazo* case, cited by the Accused, is not relevant to its request because it addressed solely the scope of right of an accused to be tried in his "presence", and the impact on that right where an accused is required to follow trial proceedings by video-conference link.[18] It does not concern the physical presence of a witness during the proceedings.[19]

II. Applicable Law

4. Rule 81 *bis* of the 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".

5. A witness may give his or her testimony via video-conference link if three criteria are met, namely:

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.[20]

6. After having considered these 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.[21]

[17] Reply, para. 3.
[18] Reply, para 5.
[19] Reply, para. 5.
[20] *Prosecutor v Kvočka et al*., Case No. IT-98-30/1-A, Decision on Prosecution's Request for Testimony by Video-Conference Link And Protective Measures, 2 July 2004; *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 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. *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, ("*Gotovina* Decision"), para. 17; *Prosecutor v 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.
[21] *Popović* Decision, para. 8; *Stanišić* Decision, para. 8.

III. Discussion

7. In considering whether the Prosecution's request that the testimony of the Witness be conducted by video-conference link, the Chamber will first address the criteria (ii) and (iii), as above, and conclude with a discussion of the requirements set out in (i).

8. In respect of the second criterion, the Chamber notes that the Witness is expected to give evidence about a number of scheduled shelling and sniping incidents, and the injuries suffered by Sarajevo residents as a result of those incidents, as well as the alleged sniping and shelling campaign in Sarajevo. As a result of his capacity as the director and surgeon of the Dobrinja General Hospital during the time period covered by the Indictment, he will, moreover, authenticate hospital medical records, death certificates, and photographs and videos related to shelling and sniping in Dobrinja. Accordingly, the Chamber is convinced that the Witness's evidence is sufficiently important that it would be unfair to proceed without it.

9. With regard to the third criterion, the Chamber notes the jurisprudence of this Tribunal to the effect that the use of video-conference link does not violate the rights of the accused to cross-examine the witness or to confront the witness directly.[22] The Chamber also agrees with other Trial Chambers that video-conferences do in fact allow the cross-examining party to observe the witnesses' reactions, and also allow the Chamber to assess the credibility and reliability of the testimony in the same manner as for a witness physically present in the courtroom.[23] Accordingly, and bearing in mind the circumstances of the Witness and the nature of his expected evidence, the Chamber is satisfied that the Accused will not suffer prejudice as a consequence of the Witness testifying by video-conference link.

10. The Chamber is also of the view that the absence of opportunity for the Accused to interview the Witness prior to his testimony does not constitute a violation of the Accused's rights, and will not cause him prejudice, as he is assisted by legal advisors and others who can travel to interview the Witness, should that be necessary. The Chamber considers that the *Zigiranyirazo* decision cited by the Accused does not assist in this regard.

11. However, and in relation to the first criterion, the Chamber is concerned by the dearth of information provided by the Prosecution in support of its Motion. In particular, it notes that the Prosecution does not explicitly address the fact that the Witness testified in person at the seat of

[22] *Prosecutor v Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Motion for Testimony of K74 to Be Heard Via Video-Link Conference, 16 November 2006, para. 2: *Prosecutor v. Hadžihasanović*, Case No. IT-01-47-T, Decision on Prosecution Motion for Receiving Testimony by Video-Conference Link, 11 March 2004, p. 4. *See also Stanišić* Decision, para. 9; *Gotovina* Decision, para. 18.

[23] *See for example Stanišić* Decision, para. 9; *Gotovina* Decision, para. 18.

the Tribunal in the *Galić* case in January 2007, and in the *Perišić* case in January 2009, and does not make any submissions regarding changes in the Witness's health condition between then and now. While the medical certificate accompanying the Motion refers to the Witness undergoing certain medical procedures in 2009, the Chamber cannot simply assume that these procedures took place after the Witness testified in the *Perišić* case. Thus, absent specific details as to how the Witness's medical situation has changed since he had testified in The Hague in January 2009, or regarding his newfound unwillingness to travel to the Tribunal, the Chamber is not satisfied as to his inability or unwillingness to testify in person in this case. For this reason, it will deny the Motion without prejudice.

IV. Disposition

12. Accordingly, the Trial Chamber, pursuant to Rules 54 and 81 *bis* of the Rules, hereby **DENIES t**he Motion without prejudice.

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

Judge O-Gon Kwon
Presiding

Dated this 17 day of June 2010
At The Hague
The Netherlands

[Seal of the Tribunal]