



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: 9 November 2012

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: 9 November 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTION FOR VIDEO LINK TESTIMONY AND
CONSIDERATION OF PROTECTIVE MEASURES FOR WITNESS KW533**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Appointed 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 Accused’s “Motion for Video Link and Consideration of Protective Measures for Witness KW-533”, filed publicly with a confidential annex on 12 October 2012 (“Motion”), and hereby issues its decision thereon.

I. Submissions

1. In the Motion, the Accused requests that the testimony of witness KW533 (“Witness”) be conducted by video link on 27 November 2012 pursuant to Rule 81 *bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”).¹ On 9 November 2012, the Accused’s legal adviser informed the Chamber and the Office of the Prosecutor (“Prosecution”) *via* email that the Accused had decided to postpone the proposed video link until 17 January 2013 so as to combine with other potential video link testimonies. The Accused attaches, in a confidential annex to the Motion (“Annex”), a declaration from his case manager, who spoke with the Witness on the telephone, and which states that the Witness had one leg amputated and is “concerned that a trip to The Hague would be too dangerous for him and too great a risk to his health”.²

2. The Accused also moves for the Chamber to consider the Witness’s request for protective measures of pseudonym, image distortion, and voice distortion, and to issue an order to that effect at the commencement of the Witness’s testimony.³ In the Annex, the Witness states that following a television interview he gave in 1996, he received a threat to his life if he ever returned to Sarajevo.⁴ As a result, the Witness claims to continue “to feel frightened for his safety”.⁵

3. On 16 October 2012, the Prosecution filed publicly with confidential appendix the “Prosecution Response to Karadžić’s Motion for Video-Link and Consideration of Protective Measures for Witness KW-533” (“Response”), in which it opposes the Motion.⁶ The Prosecution argues that the Accused failed to properly establish that the Witness is physically

¹ Motion, para. 1.

² Annex, para. 5.

³ Motion, paras. 2, 3.

⁴ Annex, para. 6.

⁵ Annex, para. 6.

⁶ Response, paras. 1, 6.

unable to travel to the Tribunal to give his testimony because the Accused did not provide documentation regarding the Witness's physical condition.⁷

4. The Prosecution also objects to the Witness's request for protective measures, arguing that the information provided in the Motion provides "an insufficient basis for the Chamber to assess whether there exists an objectively grounded risk to the security or welfare of the Witness or that of his family".⁸ The Prosecution points to the lack of information about the Witness's current place of residence, his whereabouts, and the current effect of the threat made in 1996.⁹

5. Additionally, the Prosecution objects to postponing the granting of protective measures until the commencement of the testimony of the Witness and cites to the "Decision on Motion for Protective Measures for Witness KW-456", issued on 12 October 2012 ("KW456 Decision"), in that regard.¹⁰

6. On 22 October 2012, the Accused filed the "Request for Leave to Reply: Motion for Video Link and Consideration of Protective Measures for Witness KW-533 ("Request for Leave to Reply")", which the Chamber granted orally the same day.¹¹ On 23 October 2012, the Accused filed publicly with a confidential annex the "Reply Brief: Motion for Video Link and Consideration of Protective Measures for Witness KW-533" ("Reply"), in which he provides medical documentation to support his request for the Witness to testify via video link.¹²

II. Applicable Law

7. 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".

8. The Chamber has previously outlined the criteria it considers when assessing whether to allow testimony via video link, namely:

- i. the witness must be unable, or have good reasons to be unwilling, to come to the Tribunal;

⁷ Response, paras. 1, 4.

⁸ Response, paras. 1–2.

⁹ Response, Confidential Appendix, para. 3.

¹⁰ Response, para. 3.

¹¹ Oral Decision, T. 29221–29222 (22 October 2012).

¹² Reply, Confidential Annex A.

- 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.¹³

8. If these criteria are satisfied, then the Chamber must “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”.¹⁴

9. The Chamber has also previously noted that Article 20(1) of the Tribunal's Statute (“Statute”) requires that proceedings be conducted “with full respect for the rights of the accused and due regard for the protection of victims and witnesses”. Article 21(2) entitles the accused to a fair and public hearing, subject to Article 22, which requires the Tribunal to provide in its Rules for the protection of victims and witnesses, including the conduct of *in camera* proceedings and the protection of identity. As has clearly been established in previous Tribunal cases, these Articles reflect the duty of Trial Chambers to balance the right of the accused to a fair trial, the rights of victims and witnesses to protection, and the right of the public to access to information.¹⁵

10. Rule 75(A) of the Rules permits a Trial Chamber to “order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused”. Under Rule 75(B) of the Rules, these may include measures to prevent disclosure to the public and the media of identifying information about witnesses or victims, including voice and image distortion, and the assignment of a pseudonym, as well as the presentation of testimony in private or closed session pursuant to Rule 79 of the Rules.

III. Discussion

A. Video Link Testimony

¹³ See Decision on Video-Conference Link and Request for Protective Measures for KDZ595, 18 August 2010 (“KDZ595 Decision”), para. 6; Decision on Prosecution's Motion for Testimony to be Heard Via Video-Conference Link, 17 June 2010, para. 5.

¹⁴ KDZ595 Decision, para. 7 citing *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, para. 8 and *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, para. 8.

¹⁵ See Decision on Motion for and Notifications of Protective Measures, 26 May 2009, para. 11, citing *Prosecution v. Tadić*, Case No. IT-94-1-T, Decision on Prosecutor's Motion Requesting Protective Measures for Witness L, 14 November 1995, para. 11; *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Witness R, 31 July 1996, p. 4; *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Motion by Prosecution for Protective Measures, 3 July 2000, para. 7.

11. In considering the first criterion for determining the appropriateness of hearing evidence by video link, the Chamber has reviewed the information provided by the Accused regarding the Witness's physical condition and his ability to travel to the Tribunal to testify. Having considered the Witness's age, his inability to move without crutches following the amputation of one of his legs, and his statement that "he has great difficulty walking and using stairs", the Trial Chamber is satisfied that the Witness is unable to come to the Tribunal. While the Chamber notes that the medical documentation provided by the Accused in the Reply is from 2007 and that it would have been preferable for the Accused to provide more recent documents, the Chamber is satisfied that the Witness's physical condition is such that a more contemporaneous medical assessment is not necessary to determine that he is unable to travel to The Hague for testimony.¹⁶

12. In considering the second criterion, the Chamber has reviewed the Witness's statement and its relevance to Counts 9–10 and Scheduled Incident G8 of the Indictment.¹⁷ Having conducted that review, the Chamber finds that the anticipated testimony of the Witness is sufficiently important and that it would be unfair to proceed without it.

13. The Chamber recalls that video link testimony allows parties to observe the Witness's reactions, and also allows the Chamber to assess the credibility of the Witness and the reliability of his testimony in the same manner as for a witness who is physically present in the courtroom.¹⁸ Accordingly, the Chamber finds that it is in the interests of justice to grant the request for video link testimony of the Witness.

B. Protective Measures

14. As the Chamber has noted on previous occasions, the party requesting protective measures must demonstrate the existence of an objectively grounded risk to the security or welfare of the witness or the witness' family, should it become publicly known that he or she testified before the Tribunal.¹⁹

15. Having reviewed the Annex, the Chamber notes that the Witness did receive a threat against his life in 1996. However, the Chamber also notes that Witness has not provided a

¹⁶ See KDZ595 Decision, para. 10.

¹⁷ The Witness's statement is available on e-court as 65 *ter* 1D28230.

¹⁸ KDZ595 Decision, para. 12; KDZ084 Decision, para. 10; Decision on Prosecution's Motion for Testimony to be Heard via Video-Conference Link, 22 July 2010, para. 11.

¹⁹ See Decision on Prosecution's Motion for Protective Measures for Witness KDZ487, 24 November 2009, para. 13, citing *Prosecution v. Martić*, Case No. IT-95-11-T, Decision on Defence Motion for Protective Measures for Witnesses MM-096, MM-116 and MM-90, 18 August 2006, pp. 2–3; *Prosecutor v. Mrkšić et al.*,

reason why a threat levied against him in the wake of the war, 16 years ago, would prevent him from testifying before the Tribunal without protective measures. There is no indication that there have been subsequent threats against the Witness. The Chamber notes that the Witness currently resides in the Republika Srpska,²⁰ and has not been provided information regarding whether the Witness still travels to Sarajevo. The Chamber is therefore not satisfied, on the basis of the information before it, that there is an objectively grounded risk to the security or welfare of the Witness should he testify in open session.

16. Finally, the Chamber has already ruled that it “will categorically not entertain” requests to postpone the granting of protective measures until the commencement of a witness’s testimony.²¹ That discussion will not be repeated here.

IV. Disposition

9. For these reasons, pursuant to Articles 20, 21, and 22 of the Statute, and Rules 54, 75 and 81 *bis* of the Rules, the Trial Chamber hereby

- i. **GRANTS** the Motion in part in relation to the request for testimony by video link,
- ii. **DENIES** the remainder of the Motion, and
- iii. **INSTRUCTS** the Registry to take all necessary measures to implement this Decision.

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



Judge O-Gon Kwon
Presiding

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

[Seal of the Tribunal]

Case No. IT-95-13/1-T, Decision on Prosecution’s Additional Motion for Protective Measures of Sensitive Witnesses, 25 October 2005, para. 5.

²⁰ 65 *ter* 1D28230, para. 1.

²¹ See KW456 Decision, para. 12. See also Pre-Defence Conference, T. 28827 (15 October 2012).