



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: KSC-BC-2020-06

**The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi,
and Jakup Krasniqi**

Before: Trial Panel II

Judge Charles L. Smith III, Presiding Judge

Judge Christoph Barthe

Judge Guénaél Mettraux

Judge Fergal Gaynor, Reserve Judge

Registrar: Fidelma Donlon

Date: 11 October 2023

Language: English

Classification: Public

**Public Redacted Version of Decision on Prosecution Request for Video-
Conference Testimony for W04448 and Related Matters**

Acting Deputy Specialist Prosecutor

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TRIAL PANEL II (“Panel”), pursuant to Articles 21(2) and (4)(f), 23(1) and 40(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 141(1) and 144 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 2 October 2023, the Specialist Prosecutor’s Office (“SPO”) filed a request for video-conference testimony for W04448 and related matters (“Request”).¹
2. On 5 October 2023, the Registry filed its assessment regarding the feasibility of facilitating the Request (“Registry Assessment”),² and the Defence filed a response to the Request (“Response”).³
3. On 6 October 2023, the SPO filed a reply to the Response (“Reply”).⁴

II. SUBMISSIONS

4. The SPO requests the Panel to authorise the testimony of W04448 to take place by video-conference from [REDACTED].⁵ It argues that the Panel should grant the Request as it is necessary, proportionate and would not result in undue prejudice to the Accused.⁶ The SPO submits that the [REDACTED] authorities are willing to facilitate W04448’s video-conference testimony from [REDACTED].⁷ The SPO

¹ F01826, Specialist Prosecutor, *Prosecution Request for Video-Conference Testimony for W04448 and Related Matters*, 2 October 2023, confidential.

² F01837, Registry, *Registry Assessment Regarding Prosecution’s Request for Video-Conference Testimony for W04448 and Related Matters*, 5 October 2023, confidential. See CRSPD 334.

³ F01838, Specialist Counsel, *Joint Defence Response to Prosecution Request for Video-Conference Testimony for W04448 and Related Matters*, 5 October 2023, confidential. See CRSPD 334.

⁴ F01841, Specialist Prosecutor, *Prosecution Reply Relating to Video-Conference Request F01826*, 6 October 2023, confidential. See CRSPD 334.

⁵ Request, paras 1, 15.

⁶ Request, paras 2, 4-6, 8-10.

⁷ Request, para. 7.

further requests that: (i) the sitting schedule for W04448's testimony be altered to account for the time difference; and (ii) the Defence be ordered to carefully review and, as relevant, revise cross-examination estimates for each of the four witnesses scheduled for the 9-19 October hearing block so that any necessary adjustments to the schedule can be incorporated into the planning.⁸

5. The Defence objects to the Request on the basis that: (i) the Request is untimely and unsubstantiated;⁹ (ii) the proposed amendments to the sitting schedule are unreasonable in light of the burden they place on a significant number of KSC personnel;¹⁰ and (iii) revision to Defence cross-examination estimates is premature and fails to account for the various factors that can only be properly assessed immediately prior to cross-examination.¹¹ The Defence therefore requests that the Panel reject the Request in its entirety.¹²

6. The SPO replies that the Response relies on speculation, misrepresentations and irrelevant arguments, and does not engage with the well-founded reasons grounding the Request, namely, the witness's security and well-being and the expeditiousness of the proceedings.¹³ The SPO therefore submits that the Request should be granted in full.¹⁴

7. The Registry preliminarily assesses that it is feasible to conduct the testimony of W04448 via video-conference from [REDACTED].¹⁵ However, it submits that a final assessment is dependent on the formal confirmation by relevant state authorities of their willingness and ability to facilitate the testimony of W04448

⁸ Request, paras 12-13, 15.

⁹ Response, paras 2-3, 5-23.

¹⁰ Response, paras 4-5, 24-25.

¹¹ Response, paras 4-5, 26-27.

¹² Response, para. 29.

¹³ Reply, para. 1.

¹⁴ Reply, para. 10.

¹⁵ Registry Assessment, paras 8, 17.

via video-conference in line with certain conditions.¹⁶ The Registry also submits that it can facilitate, on an exceptional basis, an altered sitting schedule, provided that hearings do not last longer than 19:30 hours, if the Accused attend the hearings in person, or until 20:00 hours, if the Accused attend the hearings via video-conference from the Detention Management Unit.¹⁷

III. APPLICABLE LAW

8. Pursuant to Rule 141(1), the testimony of a witness at trial shall be given in person. The Panel may also permit the testimony of a witness by means of video-conference pursuant to Rule 144 in a way not prejudicial to or inconsistent with the rights of the Accused. Pursuant to Rule 144(1) and (3), the Panel may order that testimony be received via video-conference, provided that such technology permits the witness to be properly examined. The Panel shall ensure that the video-conference permits the witness to be examined by the Parties and the Panel at the time the witness so testifies.

IV. DISCUSSION

A. VIDEO-CONFERENCE REQUEST

9. The Panel recalls that, while video-conference testimony should not be considered only on an exceptional basis, the presence in the courtroom of a witness

¹⁶ Registry Assessment, para. 8. These conditions include the following: (i) the video-conference location is on secure premises free from interference (to the extent possible, within the control of the competent state authorities), where the confidentiality of the proceedings can be assured; (ii) the video-conference testimony would take place in a room that is sound proof, with appropriate lighting, and where the risk of disruption from outside noise is minimised; (iii) the competent state authorities provide suitable in-situ cabled or wireless open internet connection that is stable and supports video streaming; and (iv) the witness would not be permitted to take any electronic devices into the video-conference room. Registry Assessment, para. 10.

¹⁷ Registry Assessment, para. 16.

during testimony remains the preferred option.¹⁸ The Panel emphasises that, when considering whether to allow video-conference testimony, the Panel may consider a number of factors, such as the “location, personal and health situation, availability and security of the witness, as well as the complexity and duration of any logistical travel and other arrangements to be made.”¹⁹

10. The Panel notes the SPO’s submissions that: (i) W04448 resides in [REDACTED] and, [REDACTED], does not have travel documents, [REDACTED]; and (ii) if W04448 were to travel to The Hague under current circumstances, [REDACTED], and this would threaten his well-being and security.²⁰

11. Having carefully considered the Request, the Panel finds that the SPO has established that the fact that W04448 does not have travel documents warrants allowing W04448 to testify via video-conference. As a general matter, the mere absence of travel documents is not good cause to grant a request for a witness to testify by video conference. It is the calling Party’s responsibility to ensure that a witness has the travel documents necessary to travel to The Hague for testimony. However, in the present circumstances the Panel is satisfied that the SPO has exhausted reasonable efforts to try to secure the necessary documents. In particular, the Panel is satisfied that, contrary to the Defence’s submissions,²¹ the SPO has provided a sufficient basis for the Panel to conclude that [REDACTED].²²

¹⁸ F01558, Panel, *Decision on Prosecution Request for Video-Conference Testimony and Special Measure for W04337*, 26 May 2023, strictly confidential and *ex parte*, para. 16; F01776, Panel, *Decision on Prosecution Request for Video-Conference Testimony for W03827*, 8 September 2023, confidential, para. 12; KSC-BC-2020-07, Transcript of Hearing, 14 January 2022, p. 3034, lines 2-5. *See also* ICTY, *Prosecutor v. Tadić*, IT-94-1-T, Trial Chamber II, [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.

¹⁹ KSC-BC-2020-07, Transcript of Hearing, 14 January 2022, p. 3034, lines 6-10. *See similarly* KSC-BC-2020-04, F00482/RED, Trial Panel I, *Public Redacted Version of Decision on the Specialist Prosecutor’s Request for Video-Conference testimony for TW4-04, TW4-10 and TW4-11*, 13 April 2023, paras 13-14.

²⁰ Request, paras 7-8.

²¹ Response, paras 15-16.

²² 070602-070618, paras 3-4; 108612-108612, para. 2; 110768-110771, pp. 110769-110771. *See also* Response, paras 8-9.

12. The Panel additionally considers: (i) the assurances of the relevant state authorities that they will be able to facilitate the necessary logistical, technical, and security arrangements;²³ and (ii) the preliminary assessment of the Registry that it is feasible to conduct the testimony of W04448 via video-conference.²⁴ The Panel further notes that a final assessment will be conducted by the Registry following a decision by the Panel. In this regard, the Panel encourages the Registry to work expeditiously to ensure that the relevant measures²⁵ are implemented without delay to make the proposed venue suitable for video-conference testimony and to report to the Panel once all preparations have been made for such video-conference.

13. The Panel is not persuaded by the Defence's argument that testimony by way of video-conference would by itself give rise to prejudice to the Defence in light of what the Defence claims is the importance and unique character of the witness's testimony.²⁶ The Panel, the Accused, the Parties and participants will be able to see and hear the witness testifying, and the Panel, the Parties and Victims' Counsel will have the opportunity to question the witness. Furthermore, contrary to the Defence's submissions,²⁷ the Panel will be able to adequately instruct the witness, assess his demeanour and control the proceedings throughout his testimony.

14. For these reasons, the Panel finds it appropriate to hear the testimony of W04448 by way of video-conference.

15. This being said, the Panel agrees with the Defence that the SPO should have initiated this process earlier, so as to avoid requiring the Defence and the Panel to address this matter at a late stage relative to the proposed time of testimony. The SPO has known of the [REDACTED] of the witness for years and should have

²³ Request, para. 7.

²⁴ Registry Assessment, paras 8, 17.

²⁵ Registry Assessment, para. 10.

²⁶ Response, paras 17-20.

²⁷ Response, paras 20-23.

foreseen the complications that have now arisen.²⁸ The Panel observes that the SPO: (i) elected to call W04448 as part of the second block of witnesses at the end of June 2023;²⁹ (ii) engaged in weeks of consultations with the [REDACTED] authorities thereafter, seeking to secure necessary documents and authorisation;³⁰ (iii) received confirmation on 29 September 2023 that the [REDACTED] authorities are unable to provide such documents and authorisation;³¹ and (iv) filed the Request on 2 October 2023.

16. The Panel emphasises that it is the calling Party's responsibility to file requests for video-conference testimony sufficiently in advance of the date of the witness's expected testimony, in order to permit the opposing Party to respond and the Panel to have reasonable time to assess the merits of the request, and for the Registry to make the necessary logistical arrangements. The Panel therefore directs the SPO not to call the witness before 30 October 2023 to enable the Registry to make all necessary practical arrangements. The Panel also directs the SPO to ensure that any future applications for video-conference testimony is made at the earliest possible opportunity.

B. ALTERED SITTING SCHEDULE AND RELATED REQUESTS

17. The Panel notes that that the [REDACTED] authorities have indicated that the earliest time testimony can be accommodated at [REDACTED] is [REDACTED] (15:00 hours in The Hague).³² The Panel considers the Defence's argument that altering the sitting schedule to account for the time difference might negatively

²⁸ See Response, paras 8-10, referring to 070602-070618, paras 3-4; 108612-108612, para. 2; 110768-110771, pp. 110769-110771.

²⁹ F01630, Specialist Prosecutor, *Prosecution Submission of List of the Next 12 Witnesses, Reserve Witnesses and Associated Information*, with Annexes 1-2, confidential, and Annex 3, strictly confidential and *ex parte*, 28 June 2023.

³⁰ See Request, para. 7; Reply, para. 3.

³¹ See Request, para. 7.

³² Request, para. 12.

affect the work schedule of the Panel, Parties and participants, interpreters, stenographers and other courtroom personnel.³³ The Panel agrees that, as a general matter, it is the responsibility of the calling Party to ensure that a witness who testifies by video-conference does so during ordinary courtroom hours in The Hague, regardless of the location of the witness. However, the Panel notes the exceptional nature of the Request, and that the Registry submits that the Request can be facilitated.³⁴ The Panel therefore finds it appropriate to alter the sitting schedule. For these reasons, the Panel schedules the hearings for W04448's testimony to commence at 15:00 hours and to continue until 19:30 hours, with a 30-minute break between 17:00 hours and 17:30 hours.

18. Turning to the issue of cross-examination estimates, the Panel recalls that it directed the SPO not to call W04448 before 30 October 2023.³⁵ The SPO's request for revised cross-examination estimates for the 9-19 October hearing block is therefore moot. However, the Panel is mindful that cross-examination estimates impact the SPO's witness scheduling and can disrupt the expeditiousness of the evidentiary phase of the proceedings.³⁶ The Panel is also mindful of the need for the Registry, the Panel, the Parties and participants to know in advance the days on which the Panel will need to sit on a revised schedule. The Panel therefore directs the Defence to provide updated cross-examination estimates for W04448 by Friday, 20 October 2023, and urges the Defence to ensure that such estimates are based on questions focusing exclusively on issues relevant to this case and in dispute between the Parties.

³³ Response, para. 25.

³⁴ Registry Assessment, para. 16.

³⁵ *See above* para. 16.

³⁶ Transcript of Hearing, 19 July 2023, p. 6089, lines 13-15.

V. CLASSIFICATION

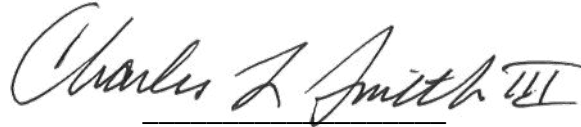
19. The Panel notes that the Request, the Registry Assessment, the Response and the Reply were filed confidentially. The Panel orders the Parties and the Registry to file public redacted versions of the Request, the Registry Assessment, the Response and the Reply, by Friday, 20 October 2023.

VI. DISPOSITION

20. For the above-mentioned reasons, the Panel hereby:

- a) **GRANTS** the Request, in part;
- b) **AUTHORISES** W04448 to testify via video-conference on or after 30 October 2023;
- c) **ORDERS** the Registry to make the necessary arrangement for W04448's testimony via video-conference;
- d) **ALTERS** the sitting schedule for W04448's testimony and **SCHEDULES** the relevant hearings to commence at 15:00 hours and to continue until 19:30 hours, with a 30-minute break between 17:00 hours and 17:30 hours;
- e) **ORDERS** the Defence to provide updated cross-examination estimates for W04448 by **Friday, 20 October 2023**; and

- f) **ORDERS** the Parties and the Registry to file public redacted versions of the Request, the Registry Assessment, the Response and the Reply, by **Friday, 20 October 2023**.

A handwritten signature in black ink, reading "Charles L. Smith, III". The signature is written in a cursive style with a horizontal line underneath the name.

Judge Charles L. Smith, III

Presiding Judge

Dated this Wednesday, 11 October 2023

At The Hague, the Netherlands.