

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 Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Hashim Thaçi
Counsel for Kadri Veseli
Counsel for Rexhep Selimi
Counsel for Jakup Krasniqi

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**Public Redacted Version of 'Joint Defence Response to Prosecution request
for video-conference testimony for W04448 and related matters'**

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I. INTRODUCTION

1. The Defence for Messrs Thaçi, Veseli, Selimi, and Krasniqi (collectively, “the Defence”) hereby file their response to the Prosecution request for video-conference testimony for W04448 and related matters¹ (“SPO Request”).
2. The Defence objects to the SPO Request in its entirety. The SPO Request concerning W04448’s testimony via video-link is untimely, unsubstantiated, and constitutes a glaring example of the SPO’s haphazard scheduling practices.
3. In 2011, [REDACTED]. This issue, predictably enough, appears to have caused [REDACTED], complicating his ability to travel. It is utterly unreasonable for the SPO to bring this application weeks before W04448 is due to testify, when his [REDACTED] and prior conduct were known to the SPO from the very outset of their relationship with him.
4. Furthermore, the proposed amendments to the sitting schedule are unreasonable in light of the burden they are expected to pose on the KSC personnel involved. Finally, the request that the Defence revises its cross-examination estimates is premature and oblivious to the various factors affecting such estimates that the Defence can only properly assess immediately prior to its cross-examination.
5. In light of the above, the Defence requests that the Panel reject the relief requested by the SPO in its entirety.

¹ KSC-BC-2020-06/F01826, Prosecution request for video-conference testimony for W04448 and related matters, 2 October 2023.

II. SUBMISSIONS

A. The Video-Link Request is Untimely

6. The SPO claims that it has made the Request “at the earliest opportunity following relevant consultations [REDACTED].”² This significantly misrepresents the state of the SPO’s knowledge of this matter and the extent to which they have conducted themselves with due diligence.
7. The Defence recalls that this witness was intended [REDACTED].³ [REDACTED].⁴ [REDACTED]. [REDACTED].⁵ All of this was known to the SPO long before they elected to rely on W04448 as a witness.
8. In any event, the information disclosed by the SPO demonstrates that the witness himself apprised the SPO of his [REDACTED] as early as October 2019. In that instance, W04448 informed the SPO that he had been notified earlier that year of [REDACTED].⁶ He surmised that the fact that he had “not been cooperative” with [REDACTED] may have had something to do with it.⁷
9. In June 2022, W04448 has again informed the SPO that he does not possess travel documents.⁸ On yet another occasion, [REDACTED].⁹ [REDACTED].¹⁰
10. The SPO has therefore been in full knowledge of the W04448’s [REDACTED] for four years and could have reasonably foreseen that the complications arising therefrom will impact upon his anticipated testimony. Nonetheless, it elected to file the present Request merely two weeks ahead of W04448’s scheduled

² SPO Request, para. 3.

³ [REDACTED]

⁴ [REDACTED]

⁵ [REDACTED]

⁶ 070602-070618, para. 3.

⁷ 070602-070618, para. 4.

⁸ 108612-108612, para. 2.

⁹ 110768-110771, p. 110769.

¹⁰ 110768-110771, pp. 110770-110771.

testimony. The SPO's assertion that the Request has been filed "at the earliest opportunity" is therefore a substantial mischaracterisation.

11. In addition, the Request is an illustration of the SPO's haphazard approach to the scheduling of witnesses. In its notification of the block of witnesses that W04448 is part of, the SPO indicated that it has selected the witness in question on the basis of "a number of (often competing) factors, including: (i) the Panel's direction to prioritise delayed disclosure witnesses with in-court protective measures, in order to limit continuing delayed disclosure after the start of the trial; (ii) publicity; (iii) *witness availability* (emphasis added), testimony modes, examination estimates, and sitting schedules; (iv) the scope, nature, and subject matter of the witness's anticipated testimony; (v) the status of the presentation of evidence; (vi) the need to preserve potential efficiency measures; (vii) the witness's personal circumstances; (viii) security concerns; and (xi) the need to provide adequate notice, to facilitate Defence preparation."¹¹ In previous filings, the SPO has likewise emphasised that "practical and logistical concerns" have informed its decisions in terms of case presentation.¹² The issue of availability has been repeatedly put forward by the SPO in the context of its oral submissions in response to the Trial Panel's enquiries into how the SPO intends to present its evidence.¹³
12. In spite of these numerous representations by the SPO, it nonetheless proceeded with scheduling a witness whose availability for in-court testimony was clearly uncertain already in 2019. The same instance arose also in relation to W03827, W04586, W00208 and W03811, who were all scheduled testify in spite of clear

¹¹ KSC-BC-2020-06/F01630, Prosecution submission of list of the next 12 witnesses, reserve witnesses and associated information with confidential Annexes 1 and 2 and strictly confidential and *ex parte* Annex 3, 28 June 2023, para. 3.

¹² KSC-BC-2020-06/F01208/CONF/RED, Confidential Redacted Version of 'Prosecution submission pertaining to select delayed disclosure witnesses with strictly confidential and *ex parte* Annexes 1-3', KSC-BC-2020-06/F01208, dated 13 January 2023 with confidential Annex 1, 16 January 2023, para. 25.

¹³ Transcript of 16 December 2022, p. 1729, Transcript of 18 January 2023, p. 1819.

indications to the SPO that [REDACTED] would likely hamper their ability to attend the proceedings on site. The SPO's purported consideration of the witness' availability in its scheduling decisions simply does not match the reality of its case presentation.

13. In fact, nor are the rest of the factors advanced by the SPO reflected in this reality. This is readily evidenced by the latest testimonial block where (i) the subject matter of the evidence presented spanned across numerous incidents which largely bore not the slightest connection of a temporal, geographical, substantive or any other nature between one another; (ii) the witnesses called to testify included international, crime-base and structure witnesses; (iii) the majority of the evidence was elicited in private session; and (iv) the overwhelming majority of the witnesses testified pursuant to Rule 154.
14. Despite the Trial Panel's direction that it is necessary for the SPO to present its case in a structured, coherent and logical manner,¹⁴ the considerations underlying the SPO's scheduling decisions remain largely elusive. The SPO's decision to schedule the testimony of W04448, where his availability to testify was under question for several years and whose evidence is entirely unrelated to the evidence presented during this evidentiary block,¹⁵ is yet another prime exemplification of the incoherence characterizing the SPO's presentation of evidence.

B. The Video-Link Request is Unsubstantiated

15. The Trial Panel has determined that while video-conference testimony should not only be considered on an exceptional basis, the witness' presence in the courtroom remains the preferred option.¹⁶ In that respect, other tribunals have

¹⁴ Transcript of 15 February 2023, pp. 1908-1909.

¹⁵ [REDACTED]

¹⁶ KSC-BC-2020-06/F01558, Confidential Redacted Version of Decision on Prosecution Request for Video-Conference Testimony and Special Measure for W04337, 26 May 2023, para. 16.

established that the measure of video-link testimony may only be granted under absolute necessity.¹⁷ However, by reason of filing the Request without any documentary information, the SPO has not established that the circumstances in the present case render the requested measure necessary.

16. The SPO's failure to provide any supporting evidence related to W04448's [REDACTED] prevents the Defence, and the Panel, from ascertaining whether other means of securing the witness' testimony in court may be available. Such means may include, for example, postponing W04448's evidence until [REDACTED] and he can therefore travel easily to The Hague. Furthermore, the SPO's failure to disclose any record of its communications with [REDACTED] likewise precludes any assessment on whether the SPO has exhausted the means available under the KSC's legal framework concerning international cooperation so as to secure W04448's attendance in court.¹⁸ It follows therefore that the SPO has not established that the preferred option of hearing the witness' evidence court cannot reasonably be ensured.
17. Furthermore, the statutory frameworks and jurisprudence of other tribunals established that a request for video-link testimony may be rejected when it is not in the interests of justice to hear the witness' evidence in such manner.¹⁹ One of

¹⁷ ICTR, *Prosecutor v. Nyiramasuhuko et al*, ICTR-98-42-T, Decision on Nyiramasuhuko's Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Some Defence Witnesses, 1 March 2005, para. 40; *Prosecutor v. Nyiramasuhuko et al*, ICTR-98-42-T, Decision on Arsene Shalom Ntahobali's Extremely Urgent Motion for Video-Link Testimony for Witness WDUSA in Accordance With Rule 71(A) and (D) of the Rules of Procedure and Evidence, 15 February 2006, para. 7; *Prosecutor v. Nahimana*, ICTR-99-52-1, Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures, 14 September 2001, para. 37.

¹⁸ In particular, Rule 208 of Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ("Rules"), Articles 40(6)(c), 42(6) and 55 of Law No.05/L-053 on SC and SPO, 3 August 2015 ("Law").

¹⁹ See, for example, ICTY Rule 81 *bis*; STL Rule 124, SCSL, *Prosecutor v. Taylor*, SCSL-03-1-T, Decision on Prosecution Motion to Allow Witnesses to Give Testimony by Video-Link, 30 March 2007, para. 25; STL, *Prosecutor v. Ayyash et al*, STL-II-01/T/TC, General Decision on Video-Conference Link Testimony and Reasons for Decision on Video-Conference Link Testimony of Witness PRH128, 25 February 2014, para. 27; ICTY, *Prosecutor v. Mladic*, IT-09-92-T, Decision on Prosecution Motion for Testimony of Witness RM-088 to be Heard via Video-Conference Link, 1 November 2012, paras. 4-13; ICTR,

the factors to be considered in this assessment is the importance of the witness' testimony to the calling party's case.²⁰ Certain chambers interpreted that factor in the sense of the anticipated testimony being sufficiently important so that the calling party would be prejudiced if that evidence was not presented.²¹ Nevertheless, it ought to also be considered whether the witness is expected to testify about matters that are strongly contested by the parties or which pertain to core issues in the case.²² This would ensure that the Defence is in the best position to read the body language of the witness, to make eye contact, to gauge any bias or prejudice towards the Accused and to avoid any difficulties of a technical nature, which become all the more warranted in light of the highly contested nature of the evidence.

18. Therefore, the importance criterion is not only a consideration of whether it would be unfair to the calling party to proceed without hearing that evidence, but also of whether the evidence in question is of such importance that it warrants being heard in the courtroom. It is not appropriate to hear witnesses who testify about core contested issues in the case via video link, unless there are compelling reasons for doing so²³ - and Chambers have denied video-link

Prosecutor v. Bagosora et al, ICTR-98-41-T, Decision on Testimony by Video-Conference, 20 December 2004, para. 4.

²⁰ ICTR, *Prosecutor v. Nyiramasuhuko et al*, ICTR-98-42-T, Decision on Arsene Shalom Ntahobali's Extremely Urgent Motion for Video-Link Testimony for Witness WDUSA in Accordance With Rule 71(A) and (D) of the Rules of Procedure and Evidence, 15 February 2006, para. 8; *Prosecutor v. Zigiranyirazo*, ICTR-2001-73-T, Decision on Defence Motion for a Hearing by Video-Link for Witness BNZ60, 14 March 2007, para. 2; *Prosecutor v. Rukundo*, ICTR-2001-70-T, Decision on the Defence Motions for Additional Time to Disclose Witnesses' Identifying Information, To Vary its Witness List and for Video-Link Testimony, and on the Prosecution's Motion for Sanctions, 11 September 2007, para. 23.

²¹ ICTY, *Prosecutor v. Karadzic*, IT-95-5/18-T, Decision on Accused's Second Motion for Video Link Testimony for Cedomir Kljajic, 30 May 2013, para. 5; Decision on Video-Conference Link and Request for Protective Measures for KDZ595, 18 August 2010, para. 6.

²² ICC, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-721-Anx, Decision on the Mode of Testimony of Rule 68(3) Witnesses – Partially Dissenting Opinion of Judge Henderson, 11 October 2016, para. 2.

²³ ICC, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-721-Anx, Decision on the Mode of Testimony of Rule 68(3) Witnesses – Partially Dissenting Opinion of Judge Henderson, 11 October 2016, para. 6.

requests when the testimony in question fell under the latter category.²⁴ The centrality of W04448's evidence to the SPO's case, discussed below, alongside the fact argued above that the SPO has failed to substantiate the existence of compelling reasons that render testimony via video-link as the only appropriate course of action, therefore strongly militate against the relief sought by the SPO.

19. With respect to W04448, the Defence notes that the witness' evidence deals with highly contested issues in the present case, including the acts and conduct and presence of Messrs Selimi and Thaçi [REDACTED];²⁵ the acts and conduct of named JCE members in the Indictment,²⁶ [REDACTED].²⁷ With respect to the alleged presence of the Accused at the location above, the SPO expressed that it will seek to elicit that evidence "during [the witness'] testimony in the courtroom"²⁸ as that evidence is contained in the witness' SPO interview which has not been tendered for admission pursuant to Rule 154. On the basis of that representation alone, it is evident that W04448's *viva voce* testimony will address issues of paramount importance to the Accused' alleged criminal responsibility. Furthermore, the Defence notes that the SPO relies entirely on W04448's evidence to support the allegation [REDACTED].

²⁴ STL, *Prosecutor v. Ayyash et al*, STL-11-01/T/TC, Decision on Prosecution Motion for Video-Conference Link Testimony for Witnesses PRH032, PRH067, PRH089, PRH090 and PRH553, 27 August 2015, para. 9.

²⁵ See, for example, 070602-070618, p. 070613; 078188-TR-ET-Part 1, pp. 5, 8; KSC-BC-2020-06/F01396, Prosecution updated motion for admission of evidence of Witnesses W03827, W04408, W04577, W04644, W04781, W04018, W04255, W01493, and W04448 pursuant to Rule 154 with confidential Annexes 1-9, 24 March 2023, para. 93;

²⁶ In particular, [REDACTED] – see, for example, 070606-070618, paras. 6, 12, 25, 40-41; 078188-TR-ET-Part 1, p. 27; 078099-078186, p. 59.

²⁷ 070602-070618, pp. 070613, 070616-070618; 090116-090118, p. 090117; 078188-TR-ET-Part 1, p. 13; KSC-BC-2020-06/F01396, Prosecution updated motion for admission of evidence of Witnesses W03827, W04408, W04577, W04644, W04781, W04018, W04255, W01493, and W04448 pursuant to Rule 154 with confidential Annexes 1-9, 24 March 2023, para. 94.

²⁸ KSC-BC-2020-06/F01396, Prosecution updated motion for admission of evidence of Witnesses W03827, W04408, W04577, W04644, W04781, W04018, W04255, W01493, and W04448 pursuant to Rule 154 with confidential Annexes 1-9, 24 March 2023, footnote 130.

20. In light of the above, the importance and unique character of the witness' evidence militate against hearing the testimony via video-link. Hearing the witness' evidence in court would therefore ensure "that the Panel is in the best possible position to assess the demeanour of the witness and that the right of the Accused to confront a witness is not negatively affected."²⁹
21. The necessity for the Trial Panel to be able to assess the witness' demeanour as best as possible is all the more pervasive in light of the reliability concerns underlying W04448's evidence. W04448 was [REDACTED] and his evidence is marred by numerous contradictions that severely affect the reliability of his account.³⁰ The potential for drastic changes in W04448's anticipated testimony is further evident from his statement to the SPO when, on the [REDACTED], he informed the SPO that he is willing to testify before the KSC, yet the next day he expressed that he was no longer willing to testify.³¹
22. The Trial Panel has acknowledged that "the witness's history and inconsistencies in the evidence may give rise to issues of credibility"³² and stated that such "inconsistencies can be further and effectively addressed in court through questioning."³³ For the Panel to be in a position to best observe the witness' demeanour during the course of such questioning, the witness should testify in court. This course of action would also ensure that "the Panel is able to address without delay or impediment any issues",³⁴ which in the present case are made

²⁹ KSC-BC-2020-06/F01558, Confidential Redacted Version of Decision on Prosecution Request for Video-Conference Testimony and Special Measure for W04337, 26 May 2023, para. 16.

³⁰ KSC-BC-2020-06/F01463, Joint Defence Response to 'Prosecution updated motion for admission of evidence of Witnesses W03827, W04408, W04577, W04644, W04781, W04018, W04255, W01493, and W04448 pursuant to Rule 154 with confidential annexes 1-9', 17 April 2023, paras. 56-68.

³¹ 070602-070618, paras. 2 and 5.

³² KSC-BC-2020-06/F01595, Decision on Second Prosecution Motion Pursuant to Rule 154, 9 June 2023, para. 96.

³³ *Id.*

³⁴ KSC-BC-2020-06/F01558, Confidential Redacted Version of Decision on Prosecution Request for Video-Conference Testimony and Special Measure for W04337, 26 May 2023, para. 16.

likely by the witness' previous history and resulting unpredictability as to whether he will elect to testify, and if he does, whether he will do so truthfully. In spite of the SPO's assertions equating the two modes of testimony,³⁵ the witness' presence in court will greatly facilitate the Trial Panel's ability to control and instruct the witness, while also allowing it to inspect in the greatest detail the witness' behaviour during his testimony.

23. In particular, if W0448 refuses to answer questions posed by the parties and the issue arises as to whether he may have committed an offence under the Trial Panel's jurisdiction set out in Article 6(2) of the Law, W0448 may ultimately have to be extradited from [REDACTED] and then ultimately to the Host State of the KSC, an unnecessarily complicated and costly exercise. Given the previous actions of this witness, this possibility is far from speculative.

C. The Proposed Amendments to the Sitting Schedule Are Unwarranted

24. While the Defence maintains that the video-link request should be rejected altogether, should the request be granted, the Defence submits that the amendments proposed by the SPO to the sitting schedule are unreasonable. The SPO has indicated that the earliest time W04448's testimony at [REDACTED] (15.00 in The Hague).³⁶ The SPO has specified however that this limitation is only applicable [REDACTED] and acknowledged the possibility that W04448's testimony may be accommodated at an alternative location, where this limitation would not be applicable.³⁷
25. The expected duration of W04448's testimony is currently 15 hours. Should the sitting schedule commence at 15:00, the hearings are bound to extend well into the evening hours in light of the length of W04448's anticipated testimony. This

³⁵ SPO Request, para. 10.

³⁶ SPO Request, para. 12.

³⁷ SPO Request, para. 11, footnote 17.

course of action will negatively affect the work schedule not only of the Trial Panel and that of the Parties' and Participants', but also that of interpreters, stenographers and other courtroom personnel. This effect could nonetheless be easily avoided by the SPO securing an alternative location where the witness could testify during the court's normal functioning hours. While mindful that this might result in Registry personnel requiring to be present *in situ* at the testimony location outside of normal business hours, the Defence submits that the disruption to the KSC' schedule would be greater should testimony commence late into the afternoon and extend late into the evening, particularly in light of the number of personnel that would be thus affected.

D. The Request for the Defence to Revise its Cross-Examination Estimates is Unfounded

26. While mindful of the logistical arrangements required to facilitate W04448's testimony should the video-link request be granted, the Defence reiterates that its cross-examination estimates are contingent upon a number of issues that cannot be minutely anticipated by the Defence except immediately prior to the start of its cross-examination, including (i) the nature of the evidence proffered during the course of direct examination; (ii) the clarifications made by witnesses during the course of their preparation session; (iii) the extent to which the areas that a party intended to cross-examine on have already been addressed by the cross-examining parties before it; (iv) the materials on the SPO's presentation queue that have not been previously notified as documents that the SPO intends to use with the witness in question; (v) the demeanour of the witness and his/her attitude towards the cross-examining party; and (vi) the succinct or otherwise verbose nature of the witness' answers.
27. Given that the information relevant to the factors described above is not available to the Defence at this time with respect to the W04577, W03880, W04769 and

W04448,³⁸ and requests for timely provision of Preparation Notes have been outright rejected by the SPO in *inter partes* correspondence which would have assisted with this task,³⁹ the relief requested by the SPO is entirely premature. The Defence has previously undertaken to apprise the Trial Panel and the Parties and Participants of any revised estimates whenever such need arises,⁴⁰ and, if such need will indeed arise during the course of its preparation for the listed witness, it will issue a notification as soon as practically possible. Nevertheless, in light of the factors outlined above, an accurate estimate may only be provided shortly in advance of its cross-examination, which the Defence has done repeatedly throughout the trial.

III. CONFIDENTIALITY

28. The present response is filed confidentially pursuant to Rule 82(4) as they respond to confidential submissions filed by the SPO. The Defence undertakes to submit a public redacted version of the present filing in due course.

IV. CONCLUSION

29. In light of the above, the Defence respectfully requests the Trial Panel to: (i) TAKE NOTICE of the Defence objections; and (ii) REJECT the SPO Request in its entirety.

³⁸ The SPO has not disclosed to the Defence any record of a preparation session with, nor has it released its presentation queue for any of the three witnesses identified in the Request at the time of filing the present Response.

³⁹ For example, the Selimi Defence wrote to the SPO on 27 September 2023 seeking that the SPO provide preparation notes for W4577 by close of business on 4 October 2023 to facilitate effective preparation for cross-examination and, by implication, more accurate cross-examination estimates. The SPO rejected this request on 28 September 2023 on the basis that it was late and that logistical arrangements had already been made.

⁴⁰ KSC-BC-2020-06/F01657, Joint Defence Response to Prosecution Submission of List of the Next 12 Witnesses, Reserve Witnesses and Associated Information (F01630), With Confidential Annexes 1-11, 7 July 2023, para. 2.

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Respectfully submitted on 5 October 2023,



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