



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In: KSC-BC-2020-06
Specialist 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: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor's Office

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Public Redacted Version of 'Prosecution reply relating to video-conference request F01826'

Specialist Prosecutor's Office

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I. INTRODUCTION

1. The Response¹ does not engage with the well-founded reasons grounding the Request,² namely, the witness's security and well-being, and the expeditiousness of these proceedings.³ Instead, the Defence relies on speculation, misrepresentations, and irrelevant arguments.

II. SUBMISSIONS

2. The witness has confirmed that he is available and willing to testify.⁴ In such circumstances, and as already found by the Panel, Defence submissions about the witness's history⁵ are 'purely speculative and therefore without merit'.⁶ The Defence will be able to fully cross-examine the witness and the Panel will be able to observe his demeanour.⁷ The Defence fails to demonstrate that its ability to challenge this witness's evidence would be unfairly undermined by video-conference testimony. The jurisprudence cited in the Response must be considered in light of available technology at the time and related developments since, which mean that there is little, if any, 'qualitative difference between examining a witness who is physically present in the courtroom and examining them by [video-link]'.⁸

¹ Joint Defence Response to Prosecution request for video-conference testimony for W04448 and related matters, KSC-BC-2020-06/F01838, 5 October 2023, Confidential ('Response').

² Prosecution request for video-conference testimony for W04448 and related matters, KSC-BC-2020-06/F01826, 2 October 2023, Confidential ('Request').

³ Request, KSC-BC-2020-06/F01826, paras 2, 8-9.

⁴ Request, KSC-BC-2020-06/F01826, para.7.

⁵ Response, KSC-BC-2020-06/F01838, paras 21-23.

⁶ Corrected Version of Decision on Second Prosecution Motion Pursuant to Rule 154, KSC-BC-2020-06/F01595/COR, 9 June 2023, Confidential, para.96.

⁷ Contrary to Defence claims otherwise, all relevant information has been provided to the Panel and Defence concerning W04448's status and the SPO's consultations with relevant authorities. Assertions of any lack of transparency are baseless. *Contra* Response, KSC-BC-2020-06/F01838, para.16.

⁸ ICC, *Prosecutor v. Said*, ICC-01/14-01/21, Decision on the Use of Audio-Video Link Technology, 4 August 2022, paras 13-14. *See also* IRMCT, *Prosecutor v. Kabuga*, MICT-13-38-T, Decision on Prosecution Motion for Video-Conference Link, 12 October 2022 ('*Kabuga* Decision'), paras 8-11 (setting out the evolution of the ICTY, ICTR, and IRMCT Rules, resulting in the current framework where 'there is no principle [...] that witnesses first and foremost must appear directly in court').

3. Further, as is evident even from the Response,⁹ the Specialist Prosecutor's Office ('SPO') has, on an ongoing basis, been liaising with the witness and relevant third parties to monitor and address potential logistical complications. However, the SPO and relevant authorities cannot be expected to make concrete decisions about testimony logistics in the abstract.¹⁰ Rather, such decisions depend on multiple, dynamic factors that must be assessed in light of the concrete situation at the relevant time, including, but not limited to, the *current* circumstances and security situation of the witness, examination time estimates, testimony modes, sitting schedules, and anticipated testimony dates. After several weeks of consultation taking into account such *current* circumstances, the relevant authorities made a decision and the Request was made one working day later.¹¹ Logistical difficulties, including the inability to obtain necessary travel documents in a timely manner, may be sufficient to justify video-conference testimony,¹² particularly when combined with the considerations of witness well-being and security set out in the Request.

4. The Defence's position that 'an accurate estimate may only be provided shortly in advance of its cross-examination, which the Defence has done repeatedly throughout the trial',¹³ underlines the necessity of video-conference and a resulting degree of scheduling flexibility.¹⁴ Based on current estimates, W04448 would not be called during the 9-19 October 2023 block. Thus, considering that the Defence may only provide accurate estimates shortly in advance of cross-examination,

⁹ See, for example, Response, KSC-BC-2020-06/F01838, paras 8-9.

¹⁰ See, similarly, ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Decision on Defence request to hear the testimony of Witness D-0207 via video-link, 5 January 2018, para.3 (after recalling that video-conference requests do not require exceptional justification and the relevant factors (including witness well-being, personal circumstances, and logistical difficulties), declining to address the Prosecution's submission that the Defence should have taken steps to complete the necessary arrangements for the witness to testify at an earlier stage).

¹¹ Request, KSC-BC-2020-06/F01826, para.7.

¹² ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Decision on Defence's request to hear Witness D-0054's testimony via video-link and advance notice concerning Witness D-0210, 23 May 2017, para.3.

¹³ Response, KSC-BC-2020-06/F01838, para.27.

¹⁴ See also *Kabuga* Decision, para.14 (considering, *inter alia*, the need to ensure a timely and regular flow of witness evidence, as well as the risks of delays and disruptions, and logistical difficulties).

appropriately tailored and responsible planning – which respects the well-being and security of the witness, and avoids unnecessary waste of time and resources – would be impossible, even if the witness’s travel could be arranged.¹⁵

5. Otherwise, the Defence relies on irrelevant and inapposite arguments, including about (i) the relationship between the witness’s evidence and other witnesses scheduled in this block,¹⁶ and (ii) ‘timely’ preparation notes.¹⁷ Such arguments are also unfounded. First, the subject matter of W04448’s testimony overlaps to some extent with [REDACTED].¹⁸ This demonstrates the coherence of the SPO’s scheduling decisions,¹⁹ which necessarily take into account not just the subject matter of the witness’s evidence and the status of the presentation of evidence, but also, *inter alia*, logistical and security considerations, and, when possible, communicated Defence scheduling preferences, including in relation to W01493 and W04448.²⁰

6. Second, the Defence never made any *inter partes* request for provision of W04448’s preparation notes in advance of the deadline set in the Conduct of Proceedings Order.²¹ Rather, the *inter partes* communication referred to in the Response concerned another witness (W04577), and was made on 27 September 2023, more than a month after the SPO indicated that W04577 would be called during the 9-19 October 2023 block and after the logistical arrangements for the witness’s travel and preparation session had already been in place for some time.²² The Response fails to mention that the SPO specifically indicated to the Defence that it may be able to accommodate such requests in future when made sufficiently in advance of scheduled

¹⁵ Request, KSC-BC-2020-06/F01826, para.9.

¹⁶ Response, KSC-BC-2020-06/F01838, para.14.

¹⁷ Response, KSC-BC-2020-06/F01838, para.27.

¹⁸ [REDACTED]. [REDACTED]. See [REDACTED].

¹⁹ *Contra* Response, KSC-BC-2020-06/F01838, para.14.

²⁰ See Prosecution response to THAÇI and SELIMI Defence request to postpone reserve witnesses, KSC-BC-2020-06/F01820, 27 September 2023, Confidential, para.2, fn.7.

²¹ Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01, 25 January 2023 (‘Conduct of Proceedings Order’), para.94.

²² Email from SPO to SELIMI Defence dated 28 September 2023 at 17.35.

testimony.²³ However, consistent with the purposes of witness preparation, important considerations taken into account when making logistical arrangements for witness preparation and testimony include the need to assist the witness in giving relevant, accurate, and structured testimony, and ensure witness well-being.²⁴

7. The Defence additionally appears to confuse witness availability to testify with the means by which a witness will testify.²⁵ The fact that a witness may – for reasons of health, well-being, or otherwise – require video-link testimony, does not make them unavailable.²⁶ Equally, the Defence’s submissions regarding the composition of the last evidentiary block are misleading.²⁷

8. Finally, Defence opposition to an altered sitting schedule²⁸ would result in the witness commencing testimony at [REDACTED], which would undermine the very purposes of video-conference testimony, and threaten the well-being of the witness and his ability to give relevant, accurate, and structured testimony.

III. CLASSIFICATION

9. This reply is confidential pursuant to Rule 82(4) of the Rules.²⁹

²³ Email from SPO to SELIMI Defence dated 28 September 2023 at 17.35 (‘While it may be possible, in future, to accommodate requests of this nature when made sufficiently in advance of scheduled testimony, the SPO would also have to consider the witness’s well-being. Finalising witness preparation significantly in advance of testimony would necessarily result in a prolonged stay in The Hague for such witnesses, several of which (after the preparation session) would entail merely waiting for testimony to commence’).

²⁴ Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.86(i).

²⁵ Response, KSC-BC-2020-06/F01838, paras 10-11.

²⁶ Additionally, certain witnesses cited by the Defence as examples in this regard were in fact reserve witnesses (W04586 and W00208)

²⁷ Response, KSC-BC-2020-06/F01838, para.12 (including, amongst other things, ignoring the fact that one witness W03880 (who was scheduled to testify without protective measures and on the same topic as other witnesses scheduled that block) had to be deferred for unexpected medical reasons). *See* Email from SPO to Panel, Parties, and participants dated 1 September 2023 at 14.49.

²⁸ Response, KSC-BC-2020-06/F01838, paras 24-25.

²⁹ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (‘Rules’).

IV. RELIEF REQUESTED

10. For the foregoing reasons and those given previously, the Request should be granted in full.

Word Count: 1474

\signed\

Ward Ferdinandusse

Acting Deputy Specialist Prosecutor

Friday, 6 October 2023

At The Hague, the Netherlands.