



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: 8 September 2023

Language: English

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**Public Redacted Version of
Decision on Prosecution Request for Video-Conference Testimony for W03827**

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TRIAL PANEL II (“Panel”), pursuant to Articles 21, 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 9 June 2023, the Panel issued a decision where it found without prejudice that W03827’s proposed evidence is appropriate for admission pursuant to Rules 138 and 154 (“Second Rule 154 Decision”).¹
2. On 4 September 2023, the Specialist Prosecutor’s Office (“SPO”) filed a request for video-conference testimony for W03827 (“Request”).²
3. On 6 September 2023, pursuant to an order for expedited responses,³ the Defence for Hashim Thaçi and Rexhep Selimi (“Defence”) jointly responded to the Request (“Response”).⁴
4. On 7 September 2023, pursuant to an order for an expedited reply,⁵ the SPO replied to the Response (“Reply”).⁶

¹ F01595/COR, Panel, *Corrected Version of Decision on Second Prosecution Motion Pursuant to Rule 154*, 9 June 2023, confidential, paras 11-17.

² F01759, Specialist Prosecutor, *Prosecution Request for Video-Conference Testimony for W03827*, 4 September 2023, confidential, with one Annex, confidential and *ex parte*.

³ Transcript of Hearing, 5 September 2023, p. 7223, line 24 to p. 7224, line 19.

⁴ F01768, Specialist Counsel, *Thaçi and Selimi Defence Response to Prosecution Request for Video-Conference Testimony for W03827 and Application for the Dismissal of W03827 Rule 154 Proposed Evidence*, 6 September 2023, confidential, with Annexes 1-2, confidential.

⁵ Transcript of Hearing, 6 September 2023, p. 7429, line 12 to p. 7430, line 2.

⁶ F01773, Specialist Prosecutor, *Prosecution Consolidated Reply Relating to Filing F01759 and Response to Thaçi and Selimi Defence ‘Application for the Dismissal of W03827 Rule 154 Proposed Evidence’*, 7 September 2023, confidential.

5. On 7 September 2023, the Registry filed its assessment regarding the feasibility of facilitating the Request (“Registry Assessment”).⁷

II. SUBMISSIONS

6. The SPO requests the Panel to authorise the testimony of W03827 to take place by video-conference from the [REDACTED].⁸ The SPO argues that the requested measures are necessary, proportional and would not result in undue prejudice to the Accused as the Defence would be able to fully cross-examine the witness.⁹ The SPO notes that W03827 has reported to the SPO that he has serious health concerns, which the SPO and the Witness Protection and Support Office (“WPSO”) have sought to evaluate but that W03827 refused to fully cooperate in respect of this matter.¹⁰ The SPO argues that the Request would: (i) allow for efficiency in the conduct of proceedings; (ii) simplify the required logistical arrangements for W03827’s testimony; and (iii) help prevent any delays required for medical issues that could arise from travel.¹¹ The SPO adds that the witness’s attendance for testimony in The Hague cannot reasonably be anticipated because of his general lack of cooperation and because he does not possess a valid passport.¹² The SPO therefore argues that to avoid disruption and waste of resources that would result, video-conference testimony facilitates fair and expeditious proceedings.¹³ Lastly, the SPO avers that while uncooperative, W03827 is anticipated to comply with a

⁷ F01772, Registry, *Registry Assessment Regarding Prosecution’s Request for Video-Conference Testimony for W03827*, 7 September 2023, confidential and *ex parte*. A confidential redacted version was filed on the same day, F01772/CONFRED.

⁸ Request, para. 1.

⁹ Request, para. 2.

¹⁰ Request, paras 6-7.

¹¹ Request, para. 8.

¹² Request, para. 8.

¹³ Request, para. 8.

summons to attend for testimony via video-conference as he as previously complied with SPO summons to appear.¹⁴

7. The Defence responds that the Request should be dismissed as W03827 is unwilling and unfit to testify and the Request is being made to circumvent these problems.¹⁵ The Defence requests that the Panel find that: (i) the SPO has failed to disclose pursuant to Rule 103, as soon as they were in the SPO's custody, seven notes of meetings, or phone calls, with W03827, or [REDACTED], in which they expressed that W03827 is unfit and unwilling to testify ("W03827 Notes");¹⁶ or (ii) the SPO has failed to meet its disclosure obligations pursuant to Rule 102(3) regarding the W03827 Notes.¹⁷ Specifically, the Defence avers that these notes would have supported the Defence's submissions that W03827's evidence should not have been found "appropriate for admission" by the Panel pursuant to Rule 154 as his evidence was confused and inconsistent.¹⁸ In these circumstances, the Defence requests that the Panel deny the admission of W03827's proposed evidence pursuant to Rule 154 as the W03827 Notes demonstrate that W03827 is unfit and unwilling to testify and that the conditions of Rule 154 to be "present in court" and "available for cross-examination" cannot be met.¹⁹

8. The SPO replies that the Defence fails to address any criteria relevant to an application for video-conference link.²⁰ The SPO adds that W03827's professional and public activities contradict his declarations about his health.²¹ The SPO further submits that the Defence improperly uses the Response to request reconsideration of the Second Rule 154 Decision, without addressing the standard of Rule 79.²²

¹⁴ Request, para. 8

¹⁵ Response, paras 1-2, 36, 38-40.

¹⁶ Response, paras 3, 22-27 *referring to* 090032-090032 RED, 106205-106206 RED, 114061-114063 RED, 114827-114831 RED, 114929-114929, 114930-114930, 114931-114931 RED; *See also* Disclosure 919.

¹⁷ Response, para. 27.

¹⁸ Response, paras 3-5.

¹⁹ Response, paras 5, 30-34, 36-37.

²⁰ Reply, paras 1-5.

²¹ Reply, paras 7-11.

²² Reply, paras 1, 12.

The SPO argues that, in any event, reconsideration is unnecessary because, except for W03827's self-reported fall in 2005, which has no impact on the Rule 154 considerations, the Panel was aware of the issues raised in the Response at the time of the Second Rule 154 Decision.²³ The SPO adds that the Panel's finding in the Second Rule 154 Decision was "without prejudice to the ultimate finding on admission subject to the fulfilment of Rule 154 criteria" and the Defence can object to its admission.²⁴ The SPO argues that the Defence's request for a finding of a disclosure violation should be dismissed as it falls outside the scope of the present litigation.²⁵ In any event, the prejudice claimed by the Defence is illusory as the Defence was aware of W03827's health concerns.²⁶ Lastly, the SPO argues that the W03827 Notes only became disclosable recently. It submits that the relevance of information may change over time, and in the context of evolving circumstances, it rereviewed – and promptly disclosed – additional information pertaining to its contacts with W03827 but it does not necessarily follow that such information would previously have been subject to disclosure.²⁷

9. The Registry assesses that, if granted, the Registry could implement and/or facilitate the video-conference on or after Monday, 11 September 2023.²⁸

III. APPLICABLE LAW

10. 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

²³ Reply, para. 13.

²⁴ Reply, para. 14.

²⁵ Reply, para. 15.

²⁶ Reply, para. 16.

²⁷ Reply, para. 17.

²⁸ Registry Assessment, paras 9, 15, 19.

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 TESTIMONY

11. The Panel recalls that W03827 has been granted in-court protective measures, including the use of a pseudonym and face and voice distortion towards the public.²⁹

12. 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 during testimony remains the preferred option.³⁰ This is to ensure the Panel is in the best possible position to assess the demeanour of the witness and that the rights of the Accused to confront a witness is not negatively affected.³¹ Presence of the witness in court also ensures that the Panel is able to address without delay or impediment any issues, in particular security issues, that might arise from a witness's testimony. When considering whether to allow video-link testimony, the Panel may consider a number of factors, such as the "location, personal and health

²⁹ F00133/COR, Pre-Trial Judge, *Corrected Version of First Decision on Specialist Prosecutor's Request for Protective Measures*, 10 December 2020, strictly confidential and *ex parte*, para. 132(q). A confidential redacted version was filed on 14 December 2020, F00133/COR/CONF/RED.

³⁰ F01558, Panel, *Decision on Prosecution Request for Video-Conference Testimony and Special Measure for W04337* ("26 May 2023 Decision"), 26 May 2023, strictly confidential and *ex parte*, para. 16. A confidential redacted version was issued on 30 May 2023; 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.

³¹ 26 May 2023 Decision, para. 16; See also ICTY, *Prosecutor v. Delalić et al*, IT-96-21, Trial Chamber, [Decision on the Motion to Allow Witnesses K, L and M to Give Their Testimony by Means of Video-Link Conference](#), 28 May 1997.

situation, availability and security of the witness, as well as the complexity and duration of any logistical travel and other arrangements to be made.”³²

13. The Panel also notes that the use of video-link rather than in person testimony is not intended to serve as a way to accommodate a reluctant witness. The Rules provide for specific provisions where a witness refuses to cooperate or to provide testimony. Nor is a request for video-link the proper avenue to deal with a witness who a Party knows to be unable to testify orally.

14. In determining whether to permit W03827 to testify via video-conference, the Panel has carefully considered all relevant circumstances put forth by the Parties. In particular, the Panel notes that: (i) W03827 has serious health issues, [REDACTED];³³ and (ii) W03827 is of advanced age.³⁴ The Panel also notes that the available technology would permit the Panel to observe the witness’s demeanour while he testifies without causing prejudice to the Defence. The Panel further notes the Registry’s assessment that it would be feasible to conduct the testimony of W03827 via video-conference but that secure video-teleconference facilities are required to implement W03827’s protective measures.³⁵

15. Having carefully considered the Request, the Panel is satisfied that the SPO has established that the circumstances, as presented in the Request, warrant allowing W03827 to testify via secure video-conference. The Panel considers that the information supplied by the SPO establishes that having W03827 give his testimony via secure video-conference at [REDACTED], is more conducive to W03827’s well-being than transferring him to The Hague to testify in person. The Panel is also satisfied W03827’s testimony via secure video-conference will cause

³² 26 May 2023 Decision, para. 16; 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.

³³ Request, paras 6-7.

³⁴ Annex 1 to the Request, p. 1.

³⁵ Registry Assessment, paras 9, 15, 19.

no prejudice to the Accused and is compatible with the effective protection of their rights, as W03827 will be examined under the same conditions as in the courtroom.

16. In light of the above, the Panel is satisfied that the secure video-conference is warranted for W03827's testimony. The Panel, therefore, grants the request for secure video-conference.

B. DEFENCE REQUEST IN THE RESPONSE

17. The Panel notes that the relief sought by the Defence was contained in a response to a Request, on a different subject. A response is not the place to raise new discrete issues. Rule 76 envisages that the sequence of filings is: motion; response; reply. In order to maintain this sequence, the Panel reminds Parties and participants not to seek relief on a discrete issue in a response or a reply. Any Party or participant seeking relief on a discrete issue should generally file a motion, which triggers the sequence and timelines set out in Rule 76.³⁶

1. Alleged disclosure violations

18. The arguments raised by the Defence in respect of alleged disclosure violations are not relevant to deciding the present matter. Therefore, should the Defence wish to raise such matters, it shall do so in the form of a separate application.

2. Admissibility of W03827's Evidence under Rule 154

19. The Panel notes that since the filing of the Response, the SPO has conducted a preparation session with W03827 and has notified the Panel that it does not anticipate being able to fulfil the criteria for admission of W03827's Rule 154

³⁶ F01359, Panel, *Decision Regarding Cross-Examination by Victims' Counsel*, 9 March 2023, para. 11.

statement and that it will therefore lead the evidence of W03827 *viva voce*.³⁷ Accordingly, the Panel considers that the Defence's request to exclude W03827's evidence under Rule 154 is moot. Issues of admissibility of any aspect or elements of the witness's evidence will therefore be addressed at the time when it is presented and offered.

V. DISPOSITION

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

- a) **GRANTS** the Request;
- b) **AUTHORISES** W03827 to testify via video-conference;
- c) **ORDERS** the Registry to make the necessary arrangement for W03827's testimony via video-conference;
- d) **REJECTS** the Defence request for a finding of a disclosure violation; and
- e) **DECLARES MOOT** the Defence request for exclusion of W03827's evidence under Rule 154.



Judge Charles L. Smith, III
Presiding Judge

Dated this Friday, 8 September 2023

At The Hague, the Netherlands.

³⁷ CRSPD312, *Email from SPO to the Panel, Parties and Participants*, 7 September 2023.