

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: 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 the Video-Conference Testimony of W01493**

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I. INTRODUCTION

1. In accordance with Rule 79 of the Rules,¹ the Defence for Messrs Thaçi, Veseli, Selimi and Krasniqi (“Defence”) hereby respond to the Prosecution request for the video-conference testimony of W01493.² The Defence submits that the Request is untimely, unsubstantiated and, if granted, will cause undue prejudice to the rights of the Accused.

II. SUBMISSIONS

A. The Request is Untimely

2. At the outset, the Defence avers that the Request is untimely. Whereas the Prosecution seeks to justify the use of video-link testimony on the basis that W01493 suffers from “serious health conditions which are likely to be exacerbated by travel to The Hague,”³ it simultaneously concedes that it knew about these issues since “late 2022.”⁴ In particular, it knew, at the time, that:
 - a. W01493 was receiving “[REDACTED];”
 - b. W01493 was unable to work full-time [REDACTED];
 - c. W01493 was expected to [REDACTED] (which occurred as expected in late 2022);
 - d. W01493 would [REDACTED] before testifying; and

¹ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (‘Rules’). All references to ‘Rule’ or ‘Rules’ herein refer to the Rules, unless otherwise specified.

² F01859/CONF/RED, *Confidential Redacted Version of ‘Prosecution request for the video-conference testimony of W01493’*, 16 October 2023, confidential and F01867, *Prosecution supplement to video-conference request F01859*, 19 October 2023, confidential.

³ F01859/CONF/RED, para. 6.

⁴ F01859/CONF/RED, para. 6.

- e. W01493 expected to have “[REDACTED]” in August 2023.⁵
3. This is not the first time the Prosecution has made a video-link request shortly before a witness is due to testify. Indeed, in the context of a near identical request for W04448, the Trial Panel observed 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.”⁶ The Panel’s reasoning was based on the Prosecution’s established knowledge of the personal situation afflicting the witness and its inability to foresee that securing their in-person testimony would be challenging, despite obvious indications in support thereof.⁷
4. Furthermore, in rendering the abovementioned Decision, the Trial Panel observed that it was incumbent upon the calling Party to ensure that video-link requests were filed “sufficiently in advance of the date of the witness’s expected testimony” and specifically directed the Prosecution to “ensure that any future applications for video-conference testimony is made at the earliest possible opportunity.”⁸ Inasmuch as the Prosecution seeks to minimise the untimeliness of its request with reference to an [REDACTED] W01493 [REDACTED] in September 2023,⁹ and its (supplemental) decision not to call the witness during the upcoming evidentiary block,¹⁰ the Defence contends that neither reason is persuasive, nor capable of mitigating the fact that the Prosecution has failed to abide by the Panel’s directions.

⁵ F01859/CONF/RED, para. 6.

⁶ F01851, *Decision on Prosecution Request for Video-Conference Testimony for W04448 and Related Matters*, 11 October 2023, confidential, para. 15.

⁷ F01851, para. 15.

⁸ F01851, para. 16.

⁹ F01859/CONF/RED, para. 6.

¹⁰ F01867, para. 1.

5. In this regard, the Defence notes that even if the [REDACTED] were to significantly impair W01493's [REDACTED] in the manner described, it nonetheless recalls that there were no difficulties in organising the in-person attendance of W02652 – [REDACTED]. Moreover, with respect to the decision to postpone W01493's testimony, the Defence avers that it is simply a veiled, *ex post facto*, attempt to make the Request appear timely. The reality, however, is that the Prosecution has now given itself more time to secure the physical attendance of W01493.
6. The Request remains unjustifiably and inexcusably late. It is capable of rejection on this ground alone.

B. The Request is Unsubstantiated

7. The Prosecution claims that the three conditions set out in Rules 141(1) and 144 are fulfilled because:
 - a. W01493 will take the solemn declaration, testify in real-time and in the presence of the Parties and Panel who, in turn, can question the witness, observe his demeanour and assess his credibility;
 - b. The [REDACTED] authorities can ensure that the testimony will be truthful and open, with due regard for W01493's "safety, physical and psychological well-being, dignity and privacy;" and
 - c. There is "little, if any, qualitative difference between examining a witness in the courtroom and examining them via video-link."¹¹
8. Absent evidence to the contrary, the Defence cannot dispute the ability of [REDACTED] authorities to adequately facilitate W01493's testimony. However, it observes that in recent weeks, two scheduled video-link

¹¹ F1859/CONF/RED, para 5.

appearances (W04448 and W00208) have been cancelled with very short notice, causing disruption to the court schedule. While the reasons for those cancellations are unknown to the Defence, its strong preference is for this witness to be brought to The Hague, where any needs or concerns regarding his testimony can be addressed by Court personnel and, ultimately, his testimony can be secured in a timely manner.

9. Moreover, the Defence vehemently contest the Prosecution's claim that the remaining conditions for video-link testimony are met. To this end, the Defence recalls the general rule that a witness' physical presence in the courtroom is the preferred medium for testimony. This view was endorsed by the Trial Panel in its Decision on W04448's video link request, whereby reference was made to, *inter alia*, the ICTY case of *Prosecutor v. Tadić*.¹² This is noteworthy because the Trial Chamber in that case opined that "[t]he evidentiary value of testimony provided by video-link, although weightier than testimony given by deposition, is not as weighty as testimony given in the courtroom."¹³ This is because issues like demeanour and witness credibility are best assessed in-person, rather than through remote means.
10. The Defence seeks to emphasise that, when [REDACTED]:

[REDACTED].¹⁴
11. W01493 is a KLA insider witness, who is expected to testify over the course of approximately three days. [REDACTED]. His presence, or lack thereof, will necessarily impact the manner in which the Panel and Parties can assess his

¹² F01851, para. 9, fn. 18.

¹³ 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.

¹⁴ [REDACTED].

evidence. There is, therefore, in this particular instance, a qualitative difference between in-person and remotely facilitated testimony.

12. Lastly, the Defence seeks to address the Prosecution's reliance upon the many occasions W01493 expressed "[REDACTED]."¹⁵ It is the Defence's position that this argument neglects to consider that W01493 benefits from almost all of the protective measures required to anonymise his testimony before the Court – namely, pseudonym, face and voice distortion, as well as private/closed session.¹⁶ Any suggestion that [REDACTED] is threatened by in-person testimony casts unwarranted and unsubstantiated doubt on the protective measures regime which the Prosecution has wholeheartedly endorsed as necessary and effective since the pre-trial phase of this case.
13. W01493 should be called to testify in-person. The Prosecution has more than enough time to facilitate his physical attendance before the Court and should do its utmost to ensure that that be the case. A failure to do so would directly prejudice the rights of the Accused to effectively examine a witness called to testify against them.

III. CLASSIFICATION

14. This response is filed confidentially pursuant to Rule 82(4) as it pertains to a confidential Request submitted by the Prosecution. The Defence undertakes to submit a public redacted version of the present filing when directed by the Trial Panel.

IV. CONCLUSION

15. In light of the foregoing, the Defence requests that the Trial Panel:

¹⁵ F01859/CONF/RED, para. 7.

¹⁶ [REDACTED].

- a. **REJECT** the Prosecution's request;
- b. **DIRECT** the Prosecution to take the necessary measures to facilitate W01493's in-person testimony.

Word Count: 1,494

Respectfully submitted on Thursday, 26 October 2023, in The Hague.



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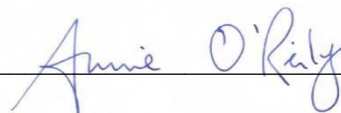


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