



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: KSC-BC-2020-05
The Prosecutor v. Salih Mustafa

Before: **Trial Panel I**
Judge Mappie Veldt-Foglia, Presiding Judge
Judge Roland Dekkers
Judge Gilbert Bitti
Judge Vladimir Mikula, Reserve Judge

Registrar: Fidelma Donlon

Date: 2 August 2021

Language: English

Classification: **Public**

Public redacted version of
Decision on Specialist Prosecutor's request for segregation and other measures

To be notified to:

Specialist Prosecutor

Jack Smith

Registry

Fidelma Donlon

Chief Detention Officer

TRIAL PANEL I (Panel) hereby renders this decision related to the conditions of detention of Salih Mustafa (Mr Mustafa or Accused).

I. PROCEDURAL BACKGROUND

1. On 11 June 2021, the Specialist Prosecutor's Office (SPO) submitted the "Prosecution's request for segregation and other measures" (Request).¹
2. On 17 June 2021, the Panel ordered the Registrar to file, by 1 July 2021, submissions on the Request, in particular on: (i) the feasibility of the measures requested by the SPO; (ii) the resources and time needed to implement such measures, should they be ordered; (iii) any additional or alternative measures she considers available, subject to the Panel's decision, to address the risks identified by the SPO; and (iv) any other issues she considers appropriate to raise in relation to the Request.²
3. On 1 July 2021, the Registrar filed the "Registry Submissions Pursuant to Trial Panel I's Order (F00136)" (Registry Submissions).³
4. The Defence for Mr Mustafa did not file any response to the Request. Neither did the Victims' Counsel.

¹ KSC-BC-2020-05, F00133, Specialist Prosecutor, *Prosecution's request for segregation and other measures*, 11 June 2021, confidential and *ex parte*. A confidential redacted version was submitted on 14 June 2021, F00133/CONF/RED.

² KSC-BC-2020-05, F00136, Trial Panel I, *Order for submissions on the "Prosecution's request for segregation and other measures"* (KSC-BC-2020-05/F00133), 17 June 2021, confidential, paras 5-6.

³ KSC-BC-2020-05, F00146, Registrar, *Registry Submissions Pursuant to Trial Panel I's Order (F00136)*, 1 July 2021, confidential.

II. SUBMISSIONS

A. SPO SUBMISSIONS

5. The SPO submits that, at the current stage of the proceedings, when the presentation of the evidence at trial is soon to begin, there exists a concrete risk that Mr Mustafa will reveal [REDACTED].⁴ The [REDACTED] thus poses a concrete danger to the integrity of the proceedings.⁵ The SPO further submits that the risk of unlawful disclosure of [REDACTED] is heightened by the following factors: (i) [REDACTED]; (ii) [REDACTED]; (iii) Mr Mustafa and [REDACTED] have an incentive and the means to interfere with victims and witnesses; (iv) [REDACTED]; and (v) [REDACTED].⁶

6. Accordingly, the SPO requests the Panel to order: (i) the segregation of Mr Mustafa [REDACTED] starting on the day [REDACTED] and for as long as the identified risks persist; (ii) the active monitoring of Mr Mustafa's communications during the same period of time, with the exception of his privileged communications; (iii) the adoption of any other measure which may be identified by the Registry as necessary to mitigate the identified risks; and (iv) Mr Mustafa not to divulge any confidential information or any other identifying information to persons outside of his Defence team.⁷

B. REGISTRY SUBMISSIONS

7. In her submissions, the Registrar undertakes a detailed feasibility study on the measures sought by the SPO for consideration by the Panel, should it order any of the requested measures or other measures.⁸ With regard to the possibility to segregate

⁴ Request, paras 6-7.

⁵ Request, para. 10.

⁶ Request, paras 7-9.

⁷ Request, paras 1 and 18.

⁸ Registry Submissions, paras 13-56.

Mr Mustafa [REDACTED], the Registrar submits that it is feasible to accommodate Mr Mustafa in [REDACTED] of the SC detention facilities, separated [REDACTED].⁹ [REDACTED].¹⁰ [REDACTED] would be used for video visits, including privileged visits/video calls/telephone calls with Defence Counsel, as well as for participation in future hearings before the Panel.¹¹ The [REDACTED] is also equipped for non-privileged outgoing calls on a continuous basis throughout the day,¹² and has also facilities for storage of the Accused's documents (privileged and non-privileged), [REDACTED].¹³ The Registrar submits that Mr Mustafa would have access to a variety of common facilities, from sport facilities, to exercise rooms, library and spiritual room, and that he would have meaningful human contact for more than two hours a day, through [REDACTED], visits by the Chief Detention Officer (or someone on his behalf), the Medical Officer, as well as the Detention Officers.¹⁴ Subject to the Panel's determination, the Registrar submits that in-person visits (privileged and non-privileged) would occur in an area not accessible to other detainees at the same time.¹⁵ Lastly, the Registrar submits that alternative options of segregation [REDACTED] would provide a lower level of risk mitigation than [REDACTED].¹⁶

8. With regard to restrictions to the Accused's communications in the form of telephone calls, the Registrar submits that, depending on the scope of the Panel's order, Detention Management Unit (DMU) staff would listen in real-time to all the Accused's telephone conversations and specific calls could be terminated immediately (or interrupted) if there is reason to believe that they are in breach of the Panel's order.¹⁷ The Registrar further proposes a set of safeguards and procedures for active

⁹ Registry Submissions, para. 15.

¹⁰ Registry Submissions, para. 17.

¹¹ Registry Submissions, paras 17-18.

¹² Registry Submissions, para. 18.

¹³ Registry Submissions, paras 20-21.

¹⁴ Registry Submissions, paras 13-56.

¹⁵ Registry Submissions, para. 19.

¹⁶ Registry Submissions, paras 28-31.

¹⁷ Registry Submissions, paras 38, 40.

monitoring of telephone conversations that would ensure a more efficient implementation of any measures, should they be ordered.¹⁸ Should it be required, actively monitored non-privileged conversations would also be automatically recorded and, if need be, can be transcribed for further review.¹⁹

9. Regarding visits, both via video and in person, the Registrar submits that they both can be actively monitored with simultaneous listening by DMU staff. In the first case, DMU staff [REDACTED] and with the ability to immediately terminate the video visit, if necessary; such video visits, which can be recorded, should be governed by a set of safeguards and procedures, proposed by the Registrar, which would ensure a more efficient implementation of such restrictions, should they be ordered.²⁰ In the second case, DMU staff [REDACTED], and the visit would take place within sight of DMU staff [REDACTED].²¹ The Registrar further submits that, should the Panel order active monitoring of in-person visits, any such order should also address the suspension of private visits, which are by definition conducted outside of the sight and hearing of DMU staff.²²

10. With regard to correspondence, the Registrar submits that the system currently in place, whereby DMU staff open, inspect and read all correspondence to and from the detainee, subject to the exceptions provided in the Practice Direction on Visits and Communications (PD on Visits and Communications),²³ is effective.²⁴ The Registrar submits that the only modification could be that DMU staff be ordered to inspect the

¹⁸ Registry Submissions, para. 40.

¹⁹ Registry Submissions, paras 41-42.

²⁰ Registry Submissions, paras 46-48.

²¹ Registry Submissions, para. 49.

²² Registry Submissions, para. 50.

²³ Registry Practice Direction on Detainees. Visits and Communications. KSC-BD-09-Rev1, 23 September 2020. Correspondence not subject to inspection includes that with Counsel and correspondence marked with the name of the ICRC, the Ombudsperson, the Registrar, and the Panel.

²⁴ Registry Submissions, paras 52-53.

above-mentioned correspondence with a specific objective in mind, i.e. identify unauthorised disclosure of confidential information.²⁵

11. Lastly, the Registrar submits that, depending on the level of risk found by the Panel, additional measures could include: (i) limiting visits or calls to pre-approved people/phone numbers/addresses; (ii) forbidding the introduction of other parties through a third phone line; (iii) forbidding the use of coded language; (iv) forbidding case-related conversation; (v) in case of any breach of the restrictions imposed, excluding from any approved caller list individuals with whom any conditions had previously been violated; and/or (vi) suspending all non-privileged phone calls.²⁶

III. APPLICABLE LAW

12. Pursuant to Article 3(2) of the Law, the SC shall adjudicate and function in accordance with the Constitution of the Republic of Kosovo (Constitution). Article 22 of the Constitution incorporates the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and renders it applicable as a whole before the SC. Articles 3 and 8 of the ECHR protect, respectively, the right not to be subjected to torture, inhuman or degrading treatment or punishment, and the right to respect for private and family life.

13. Pursuant to Article 23(1) of the Law and Rule 80(1) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (Rules), the SC shall provide for the protection of victims and witnesses, including their safety, physical and psychological well-being, dignity and privacy.

14. Pursuant to Article 40(2) and (6) of the Law and Rule 116(1) of the Rules, the Panel shall take all necessary measures, on an ongoing basis, as are necessary to

²⁵ Registry Submissions, para. 53.

²⁶ Registry Submissions, para. 54.

facilitate the fair and expeditious conduct of the trial proceedings. This may include, pursuant to Rules 56(6) and 116(4)(d) of the Rules, modifying the Accused's conditions of detention and related matters, and imposing necessary and proportionate restrictions on his communications, for the purpose of protecting witnesses or victims, confidential information or the integrity of the proceedings.

IV. ANALYSIS

A. GENERAL PRINCIPLES

15. The Panel notes, at the outset, that the segregation of an accused is not in itself contrary to Article 3 of the ECHR and, therefore, to the Constitution.²⁷ Prohibiting contact between detainees – for security, disciplinary or protective reasons – does not automatically amount to torture or to inhuman or degrading treatment or punishment.²⁸ Whether such a measure constitutes a violation of Article 3 of the ECHR will depend on the conditions of detention,²⁹ the extent of the social and sensory isolation,³⁰ the duration of the separation,³¹ the objective pursued,³² its effects on the

²⁷ ECtHR, *A.T. v. Estonia (No. 2)*, no. 70465/14, [Judgment](#), 13 November 2018, para. 72; *Öcalan v. Turkey (No. 2)*, nos. 24069/03, 197/04, 6201/06 and 10464/07, [Judgment](#), 18 March 2014, para. 104; *Rohde v. Denmark*, no. 69332/01, [Judgment](#), 21 July 2005, para. 93.

²⁸ ECtHR, *Ramirez Sanchez v. France* [GC], no. 59450/00, [Judgment](#), 4 July 2006, para. 123; *Öcalan v. Turkey (No. 2)*, para. 107; *Babar Ahmad and Others v. the United Kingdom*, no. 24027/07 and 4 others, [Judgment](#), 10 April 2012, para. 208.

²⁹ *Ramirez Sanchez v. France*, paras 120, 126-130, 150; *A.T. v. Estonia (No. 2)*, paras 72, 78; ECtHR, *Harakchiev and Tolumov v. Bulgaria*, nos. 15018/11 and 61199/12, [Judgment](#), 8 July 2014, paras 204, 208; *Öcalan v. Turkey (No. 2)*, paras 110-115; *Babar Ahmad and Others v. the United Kingdom*, paras 209, 213-214 (referring to the physical conditions of detention, such as cell size, available furniture and facilities, availability of natural and artificial light, access to facilities outside the cell, such as a sports room and library, and availability and duration of outdoor exercise).

³⁰ *Ramirez Sanchez v. France*, paras 131-135, 150; *A.T. v. Estonia (No. 2)*, paras 72, 79-80, 83; *Öcalan v. Turkey (No. 2)*, paras 116-136; *Rohde v. Denmark*, paras 93, 97 (considering access to information and the number, frequency and duration of contacts and communications with prison staff, medical specialists, counsel, teachers, spiritual advisers, and family and friends).

³¹ *Ramirez Sanchez v. France*, paras 120, 136; *Rohde v. Denmark*, paras 93-98.

³² *Ramirez Sanchez v. France*, para. 120; *A.T. v. Estonia (No. 2)*, para. 72.

person concerned,³³ and the procedural safeguards afforded to the detainee to guarantee his or her welfare and the proportionality of the measure, including measures taken to ensure his or her physical and mental condition.³⁴ This assessment must be made taking into account the cumulative effects of the conditions of detention.³⁵

16. Similarly, measures of control of a detainee's contacts with the outside world are not, by themselves, incompatible with Article 8 of the ECHR.³⁶ In this regard, the Panel notes that, pursuant to Article 8(2) of the ECHR, an interference with a detainee's right to private and family life, home and correspondence – which includes all forms of private communications³⁷ – may be justified if it is “in accordance with the law”, it pursues one or more of the legitimate aims listed in Article 8(2) of the ECHR³⁸ and is “necessary in a democratic society”.³⁹

17. The requirement that any restrictions be “in accordance with the law” means that the measures should have some basis in the applicable law, which should be accessible to the person concerned and foreseeable as to its effects.⁴⁰ As to the requirement of

³³ [Ramirez Sanchez v. France](#), para. 120; [A.T. v. Estonia \(No. 2\)](#), paras 72, 81; [Babar Ahmad and Others v. the United Kingdom](#), paras 209, 215; [Rohde v. Denmark](#), paras 93, 99.

³⁴ [Ramirez Sanchez v. France](#), para. 139; [Babar Ahmad and Others v. the United Kingdom](#), para. 212.

³⁵ [Ramirez Sanchez v. France](#), para. 119; [Babar Ahmad and Others v. the United Kingdom](#), para. 203.

³⁶ ECtHR, [Khoroshenko v. Russia](#) [GC], no. 41418/04, [Judgment](#), 30 June 2015, para. 123; [Piechowicz v. Poland](#), no. 20071/07, [Judgment](#), 17 April 2012, para. 212; [Onoufriou v. Cyprus](#), no. 24407/04, [Judgment](#), 7 January 2010, para. 143; [Campbell v. the United Kingdom](#), no. 13590/88, [Judgment](#), 25 March 1992, para. 45; [Boyle and Rice v. the United Kingdom](#), nos. 9659/82, 9558/82, [Judgment](#), 27 April 1988, para. 62; [Silver and Others v. the United Kingdom](#), no. 5947/72 and 6 others, [Judgment](#), 25 March 1983, para. 98.

³⁷ ECtHR, [Dragojević v. Croatia](#), no. 68955/11, [Judgment](#), 15 January 2015, para. 78; [Niemitz v. Germany](#), no. 13710/88, [Judgment](#), 16 December 1992, para. 32; [Malone v. the United Kingdom](#), no. 8691/79, [Judgment](#), 26 April 1985, para. 84; [Klass and Others v. Germany](#), no. 5029/71, [Judgment](#), 6 September 1978, para. 41.

³⁸ National security, public safety, economic well-being, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others.

³⁹ [Piechowicz v. Poland](#), para. 212.

⁴⁰ [Khoroshenko v. Russia](#), para. 110.

necessity, this implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim(s) pursued.⁴¹

18. Having said that, the Panel stresses that, in a detention setting, it is an essential part of a detainee's right to respect for family life that contact with close relatives be maintained.⁴²

19. The Panel will assess the SPO's request to segregate the Accused from [REDACTED] and to impose restrictions on his communications against the principles set out above and the need to ensure the protection of victims and witnesses and the integrity of the proceedings. In carrying out this assessment, the Panel will consider the regime of detention as a whole, the cumulative effects of the measures sought and any counterbalancing measures.

B. SEGREGATION FROM OTHER DETAINEES

20. Turning to the facts of the case, the Panel recalls that the SPO intends to call, overall, 15 witnesses to testify at trial.⁴³ Out of these, 11 witnesses (i.e. more than 70%) benefit from protective measures authorised by the Pre-Trial Judge (Witnesses). Specifically, the Panel underlines that the Witnesses were granted some of the most serious protective measures available under the legal framework of the SC: the full range of in-court protective measures to protect their identities from the public during their testimonies;⁴⁴ redactions *vis-à-vis* the Defence of identifying information in their

⁴¹ *Khoroshenko v. Russia*, para. 118; *Onoufriou v. Cyprus*, para. 142; ECtHR, *Kučera v. Slovakia*, no. 48666/99, [Judgment](#), 17 July 2007, para. 127.

⁴² ECtHR, *Messina v. Italy (No. 2)*, no. 25498/94, [Judgment](#), 28 September 2000, para. 61; *Onoufriou v. Cyprus*, para. 91; *Horych v. Poland*, no. 13621/08, [Judgment](#), 17 April 2012, para. 122; *Piechowicz v. Poland*, para. 212.

⁴³ KSC-BC-2020-05, F00082/A02, Specialist Prosecutor, *Witness List pursuant to Rule 95(4)(b)*, 16 February 2021, strictly confidential and *ex parte*. The Panel granted leave to the SPO to add one additional witness (who does not require protective measures) to its list of witnesses; see F00156/RED, Trial Panel I, *Public Redacted Version of Decision on the Specialist Prosecutor's request to amend its exhibit and witness lists and related matters*, 16 July 2021, public.

⁴⁴ The in-court protective measures adopted are: assignment of pseudonyms and identification of the Witnesses accordingly throughout the proceedings; redaction of the Witnesses' names and identifying information from the SC's public records; non-disclosure to the public of any records identifying the

statements and related material; withholding of certain items from the Defence until 30 days before testimony; and, most importantly, delayed disclosure to the Defence of their identities until 30 days before their respective testimonies.⁴⁵ These measures were premised on the finding that there exist objectively justifiable risks to the Witnesses and/or their families if their identities are disclosed to the Defence and that, accordingly, the requested measures were necessary and proportionate.⁴⁶

21. The Panel further recalls that it has found, pursuant to Article 41(6)(b)(ii) of the Law, that there is a risk that Mr Mustafa may obstruct the progress of SC proceedings by interfering with victims and witnesses, and/or their families, and that his continued detention is thus necessary.⁴⁷ In addition, the Panel observes that [REDACTED] has been found to present a similar risk of obstruction of SC proceedings, thus rendering their respective detention necessary.⁴⁸

22. In the Panel's determination, it is of critical importance that [REDACTED]. [REDACTED].⁴⁹

23. When considering all above-mentioned factors in light of the current situation in the SC detention facilities, where Mr Mustafa [REDACTED],⁵⁰ the Panel considers that there exists a serious risk that Mr Mustafa [REDACTED]. In particular, the Panel notes

Witnesses; testimony with face and voice distortion; and closed or private sessions for any in-court discussion or testimony identifying the Witnesses.

⁴⁵ KSC-BC-2020-05, F00041/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of First Decision on Specialist Prosecutor's Request for Protective Measures* (First Decision on Protective Measures), 20 October 2020, confidential; F00053/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Second Decision on Specialist Prosecutor's Request for Protective Measures* (Second Decision on Protective Measures) 24 November 2020, confidential; F00090/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Third Decision on Specialist Prosecutor's Request for Protective Measures* (Third Decision on Protective Measures), 1 March 2021, confidential.

⁴⁶ First Decision on Protective Measures, paras 19, 22, 25, 29, 32, 37; Second Decision on Protective Measures, paras 18-19, 24, 30, 36, 49; Third Decision on Protective Measures, paras 12, 15-16.

⁴⁷ KSC-BC-2020-05, F00158, Trial Panel I, *Fifth decision on review of detention*, 23 July 2021, public, paras 20-22, 25.

⁴⁸ [REDACTED]

⁴⁹ Request, para. 8.

⁵⁰ Registry Submissions, para. 13.

that Mr Mustafa is alleged to [REDACTED]. [REDACTED]. [REDACTED].⁵¹ [REDACTED].⁵² [REDACTED].

24. Therefore, the Panel is of the view that, should the risk of divulgence of confidential information in relation to the Witnesses materialise, [REDACTED]. Accordingly, the segregation of Mr Mustafa [REDACTED] is necessary.⁵³

25. In this regard, the Panel is of the view that segregation [REDACTED] would pose excessive challenges from an organisational point of view, which are likely to result in an unsubstantial decrease of the risks of unlawful disclosure.⁵⁴ Segregation by transferring Mr Mustafa to [REDACTED] would pose similar challenges, [REDACTED]. Therefore, the Panel finds it necessary to segregate Mr Mustafa in [REDACTED], as proposed by the Registrar,⁵⁵ to attain the legitimate aim of protecting the Witnesses and finds that there are no other alternatives available to pursue this aim.

26. The Panel also notes that the Defence has not raised objections against any of the proposed measures.

27. The Panel recalls that whether such a measure amounts to a violation of Article 3 of the ECHR depends on the conditions of detention, the extent of the social and sensory isolation, the duration of the separation, the objective pursued, its effects on the person concerned, and the procedural safeguards afforded to the detainee to guarantee his or her welfare and the proportionality of the measure, including measures taken to ensure his or her physical and mental condition.⁵⁶ Accordingly, the

⁵¹ [REDACTED]

⁵² [REDACTED]

⁵³ See, similarly, ICC, *Prosecutor v. Yekatom and Ngaïssona*, Trial Chamber V, [Public Redacted Version of Decision on Mr Ngaïssona's Restrictions on Contacts and Communications in Detention](#), ICC-01/14-01/18-484-Red2, 16 February 2021, para. 17.

⁵⁴ See also Registry Submissions, para. 29.

⁵⁵ Registry Submissions, paras 15-27.

⁵⁶ See *supra* para. 15.

Panel considers it appropriate to enforce a number of safeguards, as proposed by the Registrar, and in line with the applicable human rights standards.⁵⁷

28. Mr Mustafa shall therefore be:

- segregated in [REDACTED] of the SC detention facilities with access to all facilities and services as described in paragraphs 17-18, 20-21 of the Registry Submissions;
- afforded with meaningful human contact for at least two hours per day;
- visited daily by the Chief Detention Officer or a Detention Officer acting on his behalf; and
- visited by the Medical Officer, in line with the terms specified in paragraphs 24-25 of the Registry Submissions.

29. With the abovementioned safeguards in place and the possibility for the Accused to have contacts with his close relatives and a limited number of other persons as set out in Section C below, the Panel considers it appropriate to order the Registrar to segregate Mr Mustafa as of 19 August 2021, at noon.

30. The segregation regime ordered in the present decision shall be further subject to the following modalities in order for the Panel to assess its continued necessity and proportionality:

- the Registrar shall submit reports on the enforcement of the segregation regime and its eventual effects on the Accused to the Panel, the Parties and Victims' Counsel every 30 days (as of 19 August 2021), or at any time earlier if deemed necessary;
- the Parties and Victims' Counsel may respond, if they so wish, to such reports;

⁵⁷ [Ramirez Sanchez v. France](#), para. 139; [A.T. v. Estonia](#), para. 73; [Babar Ahmad and Others v. the United Kingdom](#), para. 212.

- upon submissions from the SPO and the Defence, the Panel shall review⁵⁸ the segregation regime established in the present decision every three (3) months, or at any time earlier if considered appropriate; and
- this is without prejudice to the right of either Party to request a modification, in whole or in part, or the termination of the segregation regime at any time.

C. RESTRICTIONS ON THE ACCUSED'S COMMUNICATIONS

31. With regard to the criteria established in Article 8 of the ECHR,⁵⁹ the Panel observes that Rules 56(6) and 116(4)(d) of the Rules, together with internal regulations of the Registry,⁶⁰ foresee the possibility to adopt restrictions with regard to the Accused's contacts. Both legal texts have been made available to Mr Mustafa, in a language he understands, at the beginning of the present proceedings,⁶¹ and were foreseeable to him through the professional advice of his Defence team. Accordingly, restrictions to the Accused's contacts are in accordance with the applicable law before the SC.

32. Regarding the necessity of the requested measures, the Panel considers that the measure of segregation, as ordered above, is meaningless without a simultaneous set of proportionate restrictions to Mr Mustafa's contacts with the outside world. If such contacts were left unrestricted, the risk of unlawful disclosure of confidential information related to the Witnesses would be unmanageable. Accordingly, the Panel finds that some restrictions to the Accused's contacts with the outside world are

⁵⁸ See, similarly, [Ramirez Sanchez v. France](#), para. 139; [Babar Ahmad And Others v. The United Kingdom](#), para. 212; [A.T. v. Estonia](#), para. 73.

⁵⁹ See *supra* paras 16-17.

⁶⁰ PD on Visits and Communications, Articles 6-7 and Chapters II-IV; Registry Practice Direction on Detainees. Counsel Visits and Communications, KSC-BD-10-Rev1, 23 September 2020, public, Chapter IV.

⁶¹ KSC-BC-2020-05, F00031, Registrar, *Report on Compliance with the Oral Order of the Pre-Trial Judge*, 7 October 2020, public.

necessary for the protection of the Witnesses, in line with Article 8(2) of the ECHR and Rule 56(6) of the Rules.⁶² The Panel also finds that the measures, as set forth below, are proportionate to the legitimate aim pursued, namely to protect the Witnesses.

33. The Panel stresses, however, that the restrictions adopted by the present decision do not apply to privileged contacts with Defence Counsel and his team. Likewise, special visits within the meaning of Section 5(1)(d) of the Registry Instruction on Video Visits (Instruction on Video Visits) and Article 23(1) of the PD on Visits and Communications shall remain unaffected.⁶³

1. Visits

34. With regard to (non-privileged) in-person and video visits, the Panel finds it appropriate to limit them to close relatives only,⁶⁴ and for a maximum of 10 visits per month, whether in-person or via video⁶⁵ or a combination thereof. The Panel also considers it appropriate to set up an active monitoring system (in addition to the passive monitoring normally in force). With regard to the video visits, active monitoring shall be set up in accordance with the following terms:

- Within one (1) week of notification of the present decision, the Defence, upon consultation with Mr Mustafa, shall file in the record of the case (available to the Registry and SPO only) a list of close relatives, whom Mr Mustafa wishes

⁶² See, similarly, ICC, *Ntaganda*, Appeals Chamber, ICC-01/04-02/06-1817-Red, [Judgment on Mr Bosco Ntaganda's appeal against the decision reviewing restrictions on contacts of 7 September 2016](#), 8 March 2017, para. 102.

⁶³ Registry Instruction on Video Visits, KSC-BD-34, 23 September 2020.

⁶⁴ Registry Submissions, para. 45; See Registry Practice Direction Rules of Detention, KSC-BD-08-Rev1, 23 September 2020, Rule 2.2; and Instruction on Video Visits, KSC-BD-34, 23 September 2020, public, Section 7(1) where 'close relatives' are defined.

⁶⁵ Video visits have a duration of no more than 45 minutes (see Section 7(8) of the Instruction on Video Visits).

to meet by video or in person, including their identification documents with photographs and the language that Mr Mustafa intends to use with them;

- The SPO shall respond within one (1) week of notification of said list and raise any objections to some or all names therein, substantiating the risk of unlawful disclosure of information;
- Visits shall be suspended until the SPO has filed its objections, if any; persons objected to by the SPO shall be removed from the list of authorised visitors until a decision in this respect is taken by the Panel; visits of persons not objected to by the SPO can resume after the response time;
- The language used during all video visits shall be one of the three working languages of the SC and the same for all visits (Albania, Serbian, English);
- The video visit shall be terminated immediately if Mr Mustafa uses a language other than the designated language;
- Coded language of any kind and non-verbal signals are prohibited and the video visit shall be terminated immediately if Mr Mustafa or the visitor use such coded language or non-verbal signals;
- Case-related conversation is prohibited, and the video visit shall be terminated immediately if Mr Mustafa or the interlocutor discusses any case-related issues;
- The SPO shall provide DMU staff, through the Registrar, [REDACTED]; the video visit shall be terminated if DMU staff assess that this is necessary to avoid unlawful disclosure of the identity or identifying information of any of the Witnesses;
- The video visits shall be recorded, reviewed for unauthorised disclosure if deemed appropriate by DMU staff,⁶⁶ and stored for a period of eight months;

⁶⁶ The amount of recordings or transcripts of (video) visits subject to review by DMU staff shall not be limited by the provisions of the PD on Visits and Communications (*see* Article 15).

- The Registrar shall bring to the Panel's attention any issues she considers appropriate, including portions of transcripts of concerned video visits; and
- DMU staff shall remind (orally or in writing) the above terms to Mr Mustafa and/or a visitor before the commencement of each video visit.

35. With regard to in-person visits, in addition to the terms established above for video visits, which are equally applicable to in-person visits, active monitoring shall be set up in accordance with the following terms:

- DMU staff shall [REDACTED] to monitor the visit;
- the visiting room shall be equipped with [REDACTED]; and
- private visits shall be suspended for the duration of the restrictions, unless otherwise decided by the Panel.

36. The above restrictions shall be put in place as of 19 August 2021, at noon.

2. Telephone Calls

37. With regard to telephone calls, the Panel finds it appropriate to limit them to close relatives only, to one (1) call per day (from Monday to Friday, during working hours), and for a maximum of 30 minutes per call. The Panel also considers it appropriate to set up an active monitoring system (in addition to the passive monitoring normally in force). The active monitoring shall be set up in accordance with the following terms:

- Within one (1) week of notification of the present decision, the Defence, upon consultation with Mr Mustafa, shall file in the record of the case (available to the Registry and SPO only) a list of close relatives, whom Mr Mustafa wishes to talk to by telephone, including their identification

documents with photograph, the language that Mr Mustafa intends to use with them and the respective telephone number(s) they will use;

- The SPO shall respond within one (1) week of notification of said list and raise any objections to some or all names or telephone numbers therein, substantiating the risk of unlawful disclosure of information;
- Telephone calls shall be suspended until the SPO has filed its objections, if any; persons objected to by the SPO shall be removed from the list of authorised callers/recipients until a decision in this respect is taken by the Panel; telephone calls with persons not objected to by the SPO can resume after the response time;
- The language used shall be one of the three working languages of the SC and shall be the same for all calls (Albanian, Serbian, English);
- The telephone call shall be terminated immediately if Mr Mustafa uses a language other than the designated language;
- Coded language of any kind is prohibited and the telephone call shall be terminated immediately if Mr Mustafa uses such coded language;
- The telephone call shall be terminated immediately if Mr Mustafa's interlocutor passes the telephone on to another person or if the interlocutor puts the telephone on speaker;
- The SPO shall provide DMU staff, through the Registrar, [REDACTED]; the telephone call shall be terminated if DMU staff assess that this is necessary to avoid unlawful disclosure of the identity or identifying information of any of the Witnesses;

- The telephone call shall be recorded, reviewed for unauthorised disclosure if deemed appropriate by DMU staff,⁶⁷ and stored for a period of eight months; and
- The Registrar shall bring to the Panel's attention any issues she considers appropriate, including portions of transcripts of concerned telephone calls.

38. The above restrictions shall be put in place as of 19 August 2021, at noon.

3. Correspondence

39. With regard to correspondence, the Panel considers that the current screening system in place within the SC detention facilities is effective to reduce the risks identified in the present decision.⁶⁸ In this respect, the Panel finds it appropriate to attach a few additional terms to the current screening system:

- The SPO shall provide DMU staff, through the Registrar, with [REDACTED]; Mr Mustafa's correspondence containing information that may lead to the divulgence of the identity of any of the Witnesses shall be retained by DMU staff; and
- The Registrar, shall bring to the Panel's attention any correspondence potentially falling within the parameters of unlawful disclosure, as set out in the present decision.

40. The above restrictions shall be put in place as of 19 August 2021, at noon.

41. Lastly, the Panel considers it appropriate to subject the system of restrictions adopted in paragraphs 34-40 above, to the same reporting mechanism established with regard to segregation. Accordingly:

⁶⁷ The amount of telephone calls (or their transcripts) subject to review by DMU staff shall not be limited by the provisions of the PD on Visits and Communications (*see* Article 17(3)-(4)).

⁶⁸ Registry Submissions, para. 52.

- the Registrar shall submit reports to the Panel, the Parties and Victims' Counsel every 30 days (as of 19 August 2021), or at any time earlier if deemed necessary;
- the Parties and Victims' Counsel may respond, if they so wish, to such reports;
- upon submissions from the SPO and the Defence, the Panel shall review⁶⁹ the necessity and proportionality of the restrictions on contacts and communications every three (3) months, or at any time earlier if considered appropriate; and
- this is without prejudice to the right of either Party to request a modification, in whole or in part, or the termination of the restrictions on contacts at any time.

D. VIOLATIONS OF THE TERMS

42. Should any of the terms set out in the present decision be breached by Mr Mustafa or any person interacting with him (in person, by video, telephone or correspondence), the Panel may further restrict or suspend Mr Mustafa's contacts with the outside world or modify his conditions of detention. The Panel also reminds Mr Mustafa and any person interacting with him (in person, by video, telephone or correspondence) that revealing confidential information disclosed in official proceedings or failing to obey a judicial ruling may constitute an offence under the 2019 Criminal Code of Kosovo (No. 06/L-074) by virtue of Article 15(2) of the Law.⁷⁰

⁶⁹ See, similarly, [Ramirez Sanchez v. France](#), para. 139; [Babar Ahmad And Others v. The United Kingdom](#), para. 212; [A.T. v. Estonia \(No. 2\)](#), para. 73.

⁷⁰ As to the applicability of the 2019 Criminal Code of Kosovo, see KSC-BC-2020-07, F00147/RED, Pre-Trial Judge, *Decision on Defence Preliminary Motions*, 8 March 2021, public, paras 29-34; F00057, Pre-Trial Judge, *Decision on Defence Challenges*, 27 October 2020, public, para. 24.

V. DISPOSITION

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

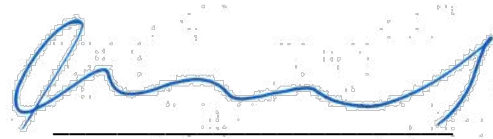
- a. **GRANTS** the Request;
- b. **ORDERS** the Registrar to segregate Mr Mustafa as of **Thursday, 19 August 2021, at noon**, in accordance with terms set out in paragraphs 24, 28-30 of the present decision;
- c. **ORDERS** the Registrar to restrict Mr Mustafa's contacts with the outside world in accordance with the terms set out in paragraphs 33-40;
- d. **ORDERS** the Registrar to submit a consolidated report in accordance with the terms set out in paragraphs 30 and 41 of the present decision every 30 days (as of 19 August 2021), or at any time earlier if deemed necessary;
- e. **ORDERS** the SPO to submit observations on the continuation of the measures imposed through the present decision by **Monday, 8 November 2021** and the Defence to respond by **Friday, 12 November 2021**, if it so wishes;
- f. **ORDERS** Mr Mustafa not to divulge any identifying information of the Witnesses or any other confidential information contained in case file KSC-BC-2020-05 or any other proceedings before the SC to anyone outside his Defence team; and
- g. **DETERMINES** that the Defence will be notified of the present decision on **Wednesday, 18 August 2021, at noon**, in redacted form as necessary.



Judge Mappie Veldt-Foglia
Presiding Judge



Judge Gilbert Bitti



Judge Roland Dekkers

Dated this Monday, 2 August 2021
At The Hague, the Netherlands.