



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEÇA KOSOVA

**In:** KSC-BC-2020-07  
**The Prosecutor v. Hysni Gucati and Nasim Haradinaj**

**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

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**“Registry Submissions Pursuant to the Trial Panel’s Order to Provide Information  
on the Detention Regime (F00393)”, filing F00452**

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## I. INTRODUCTION

1. Pursuant to Trial Panel II's Order,<sup>1</sup> Articles 3(5), 34(12) and 41(7) of the Law,<sup>2</sup> and Rule 23(7) of the Rules,<sup>3</sup> the Registrar makes the following submissions on various aspects of the detention regime and other relevant matters specified in the Order.<sup>4</sup>

## II. PROCEDURAL HISTORY

2. On 15 October 2021, the Defence for Mr Hysni Gucati requested that Mr Gucati be released by the Panel under a series of proposed conditions involving the Kosovo Police ('Proposed Conditions').<sup>5</sup>

3. On 22 October 2021, Trial Panel II (the 'Panel') ordered the continued detention of Mr Gucati and Mr Nasim Haradinaj (collectively, the 'Accused'), noting that it will seek information from the Kosovo Police regarding the enforceability of the Proposed Conditions in relation to both Accused and will review their detention again upon receipt of that information.<sup>6</sup>

4. On 22 October 2021, the Panel ordered the Registrar to provide submissions on various aspects of the detention regime at the Specialist Chambers ('SC') Detention Facilities.<sup>7</sup>

## III. APPLICABLE LAW

5. Pursuant to Article 1(2) of the Law, the SC is necessary, *inter alia*, to ensure secure, independent, impartial, fair and efficient criminal proceedings.

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<sup>1</sup> KSC-BC-2020-07, F00393, Trial Panel II, Order to the Registrar to Provide Information on the Detention Regime, 22 October 2021 ('Order').

<sup>2</sup> Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

<sup>3</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules').

<sup>4</sup> Order, para. 9.

<sup>5</sup> F00375, Gucati Defence, Submissions on the Sixth Review of Detention, 15 October 2021, para. 13.

<sup>6</sup> F00390, Panel, Decision on Review of Detention of Hysni Gucati, 22 October 2021; F00391, Panel, Decision on Review of Detention of Nasim Haradinaj, 22 October 2021.

<sup>7</sup> Order, paras 9-10.

6. Pursuant to Rule 56(1) of the Rules, persons subject to a detention order of the SC shall at all times remain under the authority of the SC.
7. Pursuant to Rule 56(6) of the Rules, the Panel may, either *proprio motu* or upon request, rule on conditions of detention and related matters for the purposes of protecting witnesses or victims, confidential information, or the integrity of the proceedings, including by imposing necessary and proportionate restrictions on the communications of a detained person ('Detainee').
8. Pursuant to the agreement between Kosovo and the European Union dated 14 April 2014 (the 'Exchange of Letters'),<sup>8</sup> Kosovo committed to providing "an environment conducive to the proper administration of justice" for the conduct of any criminal proceedings that may arise. To allow such proceedings to operate, it was agreed to set up dedicated separate judicial chambers relocated to a third State, which would be governed by its own statute and rules of procedure and evidence, including provisions on "detention on remand".<sup>9</sup>
9. Pursuant to Articles 3(5), 34(3), 34(12), 41(7)-(9) of the Law and Rule 23(7) of the Rules, the Registrar is responsible for managing and administering the detention function and facilities of the SC. Accordingly, the Registrar has adopted the Rules of Detention,<sup>10</sup> as well as various practice directions and instructions, which govern the management and administration of the SC Detention Facilities.<sup>11</sup> The Practice Directions on Visits and Communications,<sup>12</sup> Counsel Visits and Communications,<sup>13</sup>

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<sup>8</sup> Law No. 04/L-274 on Ratification of the International Agreement Between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo, 23 April 2014, ('Exchange of Letters'), p. 8.

<sup>9</sup> Exchange of Letters, p. 9.

<sup>10</sup> Rules of Detention, KSC-BD-08-Rev1, 23 September 2020, public. Unless otherwise indicated, all references to 'Detention Rules' are to the Rules of Detention.

<sup>11</sup> Detention Rule 4(2). The Chief Detention Officer may also issue instructions of general applicability, upon approval of the Registrar. *See* Detention Rule 4(6).

<sup>12</sup> Practice Direction on Visits and Communications, KSC-BD-09-Rev1, 23 September 2020, public ('PD on Visits and Communications').

<sup>13</sup> Practice Direction on Counsel Visits and Communications, KSC-BD-10-Rev1, 23 September 2020, public ('PD on Counsel Visits and Communications').

Discipline,<sup>14</sup> and Complaints<sup>15</sup> (together, 'Practice Directions') form an integral part of the Rules of Detention.<sup>16</sup>

10. Pursuant to Detention Rule 1(2), the purpose of the Rules of Detention and the above-mentioned Practice Directions is to govern the management and administration of the SC Detention Facilities for persons detained under the authority and direct custody of the SC and to ensure the continued application and protection of their individual rights while in detention. Additionally, the primary principles on which the Rules of Detention and Practice Directions rest reflect the overriding requirements of humane treatment and respect for human dignity, safety, and security.<sup>17</sup>

11. The Rules of Detention, the Practice Directions, and any instructions adopted or issued pursuant to Detention Rule 4,<sup>18</sup> do not affect, and are subject to, any order or decision of the Panel under Rule 56(6) of the Rules.

#### IV. SUBMISSIONS

12. The Panel ordered the Registrar to make submissions on various aspects of the SC detention regime, namely: (A) "its approach to restrictions on visits and communications at the SC's detentions facilities, such as ensuring safety, security, or good order in the detention facilities, preventing disorder or crime, protecting health, or protecting the safety, security, rights, or freedoms of others (notably of witnesses and victims)"; (B) "all applicable and additional restrictions, including the monitoring regime, relating to visits, telephone conversations and correspondence at the SC's detention facilities and related urgent security measures"; (C) "any other relevant aspects of the security environment or detention regime at the SC's detention facilities that may have an impact on visits, telephone conversations and correspondence"; (D) "any other matter relevant to the detention regime pertaining to the Accused at the

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<sup>14</sup> Practice Direction on Discipline, KSC-BD-12-Rev1, 23 September 2020, public ('PD on Discipline').

<sup>15</sup> Practice Direction on Complaints, KSC-BD-11-Rev1, 23 September 2020, public.

<sup>16</sup> Detention Rule 63; *see also* Detention Rule 4(2).

<sup>17</sup> Detention Rule 1(2).

<sup>18</sup> Detention Rule 4(2), (6).

SC's detention facilities, including the enforceability of applicable and additional restrictions during any hospitalisation or admission into medical facilities of the Accused."<sup>19</sup>

#### A. APPROACH TO RESTRICTIONS ON VISITS AND COMMUNICATIONS

13. The mandate of the SC is, *inter alia*, to ensure secure, independent, impartial, fair and efficient criminal proceedings.<sup>20</sup> The Registry of the SC is responsible for the administration and servicing of the SC and all necessary and affiliated functions.<sup>21</sup> Accordingly, the Registrar is responsible for the administration of the SC and may issue any necessary internal rules and instructions for that purpose.<sup>22</sup> Likewise, the Registrar is responsible for managing and administering the detention function and facilities for the SC in line with international standards and the Law.<sup>23</sup> To this end, the Registrar has adopted the Rules of Detention, as well as the Practice Directions that form an integral part of the Rules of Detention,<sup>24</sup> in line with international standards.<sup>25</sup>

##### (i) SC Detention Regime

14. Accordingly, the detention regime at the SC Detention Facilities is regulated in detail in the Rules of Detention, the Practice Directions referred to above, and other relevant practice directions and instructions adopted or issued pursuant to Detention Rule 4. In particular, the Practice Direction on Visits and Communications and the Practice Direction on Counsel Visits and Communications contain detailed provisions

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<sup>19</sup> Order, para. 9.

<sup>20</sup> Article 1(2) of the Law.

<sup>21</sup> Article 34(1) of the Law.

<sup>22</sup> Article 34(3) of the Law.

<sup>23</sup> Article 34(12) of the Law.

<sup>24</sup> Detention Rule 63.

<sup>25</sup> Article 41(9) of the Law.

regarding the regime of necessary and proportionate restrictions on visits and communications in place at the SC Detention Facilities.<sup>26</sup>

15. Pursuant to Detention Rule 4(3), the Chief Detention Officer, acting under the authority of the Registrar, takes all decisions concerning the daily management of the SC Detention Facilities, including the maintenance of safety, security, and good order, and may delegate his or her authority or specific functions, as needed.<sup>27</sup>

16. Pursuant to Detention Rule 4(4), the Chief Detention Officer's primary responsibility is the security and good order<sup>28</sup> of the SC Detention Facilities, the secure custody of all Detainees, their safe and humane treatment, and the safeguarding of their rights. In addition, pursuant to Detention Rule 4(5), the Chief Detention Officer is also responsible for ensuring the safety and security of all persons who enter the SC Detention Facilities. As set forth in Detention Rule 4(7), the Chief Detention Officer shall promptly inform the Registrar of events related to the health of Detainees and the safety and security of the SC Detention Facilities, as appropriate.

## (ii) Necessary and Proportionate Restrictions

17. The restrictions regime at the SC Detention Facilities is divided into two categories: *general* restrictions, which are of general applicability to all Detainees, and *specific* restrictions, which may be imposed on the visits and communications of a specific Detainee.<sup>29</sup> Pursuant to Article 4(2) of the Practice Direction on Visits and Communications, restrictions on visits and communications imposed generally or in a specific case must be necessary to achieve a legitimate aim, such as ensuring safety

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<sup>26</sup> Although the focus of these submissions is on the PD on Visits and Communications, reference is made to relevant areas of divergence from the PD on Counsel Visits and Communications.

<sup>27</sup> Detention Rule 4(3).

<sup>28</sup> See Council of Europe, Recommendation Rec(2006)2-rev of the Committee of Ministers to Member States on the European Prison Rules, 1 July 2020, part IV, "Good Order" (noting, in Rule 49, that "Good order in prison shall be maintained by taking into account the requirements of security, safety and discipline, while also providing prisoners with living conditions which respect human dignity and offering them a full programme of activities"); see also Detention Rule 3.

<sup>29</sup> PD on Visits and Communications, arts 4(2), 6 and 7.

and security in the SC Detention Facilities, preventing disorder or crime, protecting health, or protecting the safety, security, rights, or freedoms of others.<sup>30</sup> Restrictions must be proportionate to the aim pursued and can never result in the total deprivation of family contact.<sup>31</sup>

18. Pursuant to Article 17(1) of the Practice Direction on Visits and Communications, *all* telephone conversations of Detainees on the non-privileged telephone line are passively monitored.<sup>32</sup> Passive monitoring means that a Detainee's non-privileged telephone conversations are digitally recorded, and the recordings are retained for a period not exceeding eight months, which may be extended.<sup>33</sup>

19. Pursuant to Article 17(3) of the Practice Direction on Visits and Communications, in order to ensure safety, security, and good order in the SC Detention Facilities, the Chief Detention Officer (or his or her delegate) listens to up to ten percent of the digitally recorded telephone conversations in the SC Detention Facilities each week, which are selected randomly.<sup>34</sup> This passive monitoring regime is a necessary safeguard to, *inter alia*, identify and protect against any conduct that may threaten the good order, safety, or security in the SC Detention Facilities and may constitute a disciplinary offence, including interference with the administration of justice, under the Practice Direction on Discipline.<sup>35</sup>

20. Pursuant to Detention Rule 4(7), any communications of concern are promptly brought to the attention of the Registrar. The Registrar can decide, *inter alia*, on any specific restrictions that may be necessary pursuant to Article 7 of the Practice Direction on Visits and Communications, such as the active monitoring of some or all

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<sup>30</sup> *Id.*, art. 4(2). By contrast, the confidentiality of visits and communications between a Detainee and Counsel shall not be restricted unless, in exceptional circumstances, restrictions are necessary to achieve a legitimate aim of preventing an immediate threat to life or preventing the Counsel-client privilege from being abused to perpetrate a crime. Any such restrictions must also be proportionate to the aim pursued. *See* PD on Counsel Visits and Communications, art. 4(2).

<sup>31</sup> PD on Visits and Communications, art. 4(2).

<sup>32</sup> *Id.*, art. 17(1).

<sup>33</sup> *Id.*, art. 17(1); *see also* Rule 56(6) of the Rules.

<sup>34</sup> PD on Visits and Communications, art. 17(3).

<sup>35</sup> PD on Discipline, art. 7.

of a Detainee's visits and communications, and within twenty-four (24) hours of the decision, inform the Detainee and, where appropriate, the competent Panel.<sup>36</sup>

21. In addition, should a communication of concern relate to protecting the safety, security, rights, or freedoms of others (notably, witnesses and victims), the Registrar is in the unique position to immediately notify the Witness Protection and Support Office ('WPSO'). Pursuant to Article 34(8) of the Law, WPSO, on behalf of the Registrar, is responsible for implementing court ordered or otherwise necessary protective measures, security arrangements, and other appropriate assistance for witnesses and others who are at risk on account of testimony given by witnesses.

22. Should a communication of concern require immediate action by the competent Panel for the purposes of protecting witnesses or victims, confidential information, or the integrity of the proceedings pursuant to Rule 56(6) of the Rules, the Registrar can also submit an urgent application to the competent Panel.

23. In addition, if the Chief Detention Officer (or a Detention Officer, in some circumstances) assesses that the immediate imposition of restrictions on a Detainee's visits and communications is necessary and proportionate, the Chief Detention Officer may take *urgent security measures*, such as temporarily stopping a Detainee's visits and communications for a limited period.<sup>37</sup>

The passive monitoring regime in place at the SC Detention Facilities is also a necessary safeguard should further review of a specific Detainee's recorded telephone conversations be required by the competent Panel, or should a transcription of any recordings be needed.<sup>38</sup> In addition, the passive monitoring regime ensures that, should there be a grounded suspicion of any offences under the Law, any relevant evidence is retained for a certain period, should such recordings, *inter alia*, prove to be relevant to ongoing or future investigations.<sup>39</sup>

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<sup>36</sup> See, e.g., PD on Visits and Communications, arts 7, 17(4).

<sup>37</sup> PD on Visits and Communications, art. 8. See also Section B(v), below.

<sup>38</sup> See Rule 56(6) of the Rules.

<sup>39</sup> See Rules 31(1), 34(1)-(2), 35(1) of the Rules. See also, e.g., ICC, *Prosecutor v. Bemba et al.*, Decision on Bemba and Arido Defence Requests to Declare Certain Materials Inadmissible, [ICC-01/05-01/13-1432](#),



## B. ALL APPLICABLE AND ADDITIONAL RESTRICTIONS AT THE SC DETENTION FACILITIES

24. The SC Detention Facilities are managed by the SC Detention Management Unit ('DMU'). The following restrictions on visits, telephone calls, and correspondence are in place at the SC Detention Facilities.

### (i) Telephone calls

25. As noted above, *all* telephone conversations of Detainees on the non-privileged telephone line are passively monitored.<sup>40</sup> In order to ensure safety, security, and good order in the SC Detention Facilities, the Chief Detention Officer (or his or her delegate) listens to up to ten percent of the digitally recorded telephone conversations in the SC Detention Facilities each week, which are selected randomly.<sup>41</sup> Any communications of concern are promptly brought to the attention of the Registrar, who can decide, *inter alia*, on any specific restrictions that may be necessary, and inform the competent Panel, where appropriate.<sup>42</sup>

26. Active monitoring of telephone calls involves DMU staff *simultaneously* listening (in real-time) to telephone conversations of a *specific* Detainee. If necessary and proportionate, the Registrar may decide to actively monitor a Detainee's telephone conversations for a limited period of up to thirty consecutive calendar days, which is renewable for an additional period of up to thirty consecutive calendar days.<sup>43</sup> Should there be a need to actively monitor a Detainee's telephone conversations beyond this

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30 October 2015, paras 15-17; Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", [ICC-01/05-01/13-2275-Red](#), 8 March 2018, paras 6, 379-380; *Prosecutor v. Ntaganda*, Public redacted version of Decision on restrictions in relation to certain detainees, [ICC-01/04-02/06-786-Red4](#), 19 August 2015, paras 3, 9.

<sup>40</sup> PD on Visits and Communications, art. 17(1), (3).

<sup>41</sup> *Id.*, art. 17(3).

<sup>42</sup> *See, e.g.*, PD on Visits and Communications, art. 17(4) (stipulating that "the Registrar may decide that telephone conversations with a specific Detainee shall be listened to, summarised, and transcribed", including both digital recordings of past conversations and future telephone conversations).

<sup>43</sup> *Id.*, arts 4(2), 7(1), 17(4).

a cumulative period of sixty days, the Registrar can submit a request for active monitoring to the competent Panel pursuant to Rule 56(6) of the Rules.

27. The manner in which active monitoring is implemented via a decision of the Registrar in a specific case would depend on the legitimate aim(s) identified and the proportionality of the measures in pursuit of those aim(s). Broadly speaking, active monitoring could be implemented with regard to specifically-designated callers, on a percentage of telephone calls, or on all telephone calls.<sup>44</sup> In addition, an actively monitored call could be terminated immediately in order to, for example, prevent the unauthorised disclosure of confidential information or if it is perceived that a Detainee is using coded language to interfere with the safe and secure conduct of proceedings.<sup>45</sup>

28. The monitoring regime at the SC Detention Facilities also permits the Registrar, where necessary and proportionate, to decide to impose *after-the-fact listening*, should further review of a specific Detainee's recorded telephone calls be required, or should a transcription of any recordings be needed.<sup>46</sup>

29. The efficacy of the monitoring regime at the SC Detention Facilities [REDACTED].<sup>47</sup>

## (ii) Visits

30. Visits, whether in-person or over video, are as a rule supervised, meaning that they are conducted within the sight and general hearing of Detention Officers.<sup>48</sup> In addition, the Registrar may decide to order the recording, listening to, summarising,

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<sup>44</sup> *Id.*, arts 7(2), 17(4).

<sup>45</sup> *Id.*, art. 8. *See also* Section (v), below (describing urgent security measures).

<sup>46</sup> PD on Visits and Communications, art. 17(4).

<sup>47</sup> [REDACTED].

<sup>48</sup> PD on Visits and Communications, art. 15(1). By contrast, Counsel visits are conducted within the sight but not within the direct or indirect hearing of Detention Officers. *See* PD on Counsel Visits and Communications, art. 9(1).

and transcribing of the visits of a specific visitor to a Detainee for a renewable period, if considered necessary and proportionate.<sup>49</sup>

31. Thus, as with telephone calls, the restrictions regime at the SC Detention Facilities permits the Registrar, where necessary and proportionate, to decide to impose specific restrictions on both in-person and video visits, including both *active monitoring* and *after-the-fact listening*.<sup>50</sup> Like telephone calls, in-person and video visits can be actively monitored with simultaneous listening by DMU staff to ensure that no un-monitored messages are passed, as well as recorded, should further review and/or transcription be necessary.

32. The manner in which active monitoring is implemented via a decision of the Registrar in a specific case would depend on the legitimate aim(s) identified and the proportionality of the measures in pursuit of those aim(s). Broadly speaking, active monitoring could be implemented with regard to specifically-designated visitors, on a percentage of visits, or on all visits.<sup>51</sup> In any event, an actively monitored visit could be terminated immediately in order to, for example, prevent the unauthorised disclosure of confidential information or if it is perceived that a Detainee is using coded language to interfere with the safe and secure conduct of proceedings.<sup>52</sup>

33. The Registrar may also decide to impose other specific restrictions on a Detainee's visits, where necessary and proportionate, for example by excluding a specific visitor or a specific category of visitors.<sup>53</sup>

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<sup>49</sup> PD on Visits and Communications, art. 15(2). Temporary restrictions on the confidentiality of a Detainee's visits with Counsel are permitted in exceptional circumstances, with prior notice to the competent Panel, the Detainee, and Counsel. *See* PD on Counsel Visits and Communications, art. 15.

<sup>50</sup> *Cf.* PD on Visits and Communications, art. 17(4).

<sup>51</sup> *Id.*, arts 7(2), 15(2).

<sup>52</sup> *Id.*, art. 8. *See also* Section (v), below (describing urgent security measures).

<sup>53</sup> PD on Visits and Communications, arts 7(2), 15(2).

### (iii) Correspondence

34. All correspondence is subjected to the security controls of the SC Detention Facilities.<sup>54</sup> Correspondence with Detainees is opened, inspected and read by the Chief Detention Officer, as necessary in the high security environment of the SC Detention Facilities, except for a Detainee's confidential correspondence with Counsel and correspondence clearly marked with the name of the ICRC, the Ombudsperson, the Registrar, and the Panel, among others.<sup>55</sup>

35. The Chief Detention Officer may withhold non-privileged correspondence between a specific Detainee and any other person if the Chief Detention Officer determines that it is necessary and proportionate to do so, and either return the correspondence to the sender or retain it and provide a copy of any offending information to the Registrar,<sup>56</sup> who may decide, *inter alia*, on any specific restrictions that may be necessary, and inform the competent Panel, where appropriate.<sup>57</sup>

### (iv) Additional Restrictions that Could be Implemented

36. This section provides information on additional restrictions relating to visits (both video and in-person), telephone conversations, and correspondence that could be implemented at the SC Detention Facilities, within the available means and resources.

37. It should first be noted that the competent Panel has the authority pursuant to Rule 56(6) of the Rules to order any necessary and proportionate restrictions on the communications of a Detainee, including any of the restrictions that are available to

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<sup>54</sup> *Id.*, art. 19; PD on Counsel Visits and Communications, art. 13(3).

<sup>55</sup> PD on Visits and Communications, arts 18(4), 19(1), 19(5); PD on Counsel Visits and Communications, art. 13(1).

<sup>56</sup> PD on Visits and Communications, arts 19(2)-(3). If withholding privileged correspondence with Counsel, the correspondence may only be opened in the presence of the sender for the limited purpose of determining whether the correspondence contains a prohibited item. *See* PD on Counsel Visits and Communications, art. 17.

<sup>57</sup> PD on Visits and Communications, arts 7, 19(2)-(3).

the Registrar under the Rules of Detention and the Practice Directions, such as the *active monitoring* and *after-the-fact listening* described above.

38. Depending on the circumstances, the following are examples of additional measures that could be implemented within available means and resources, if so ordered by the competent Panel:

- a. limiting visits or calls to pre-approved people/phone numbers/addresses;
- b. limiting visits or calls to specific family members only, in case of concerns regarding a Detainee's contact with other individuals or family members;
- c. forbidding the introduction of other parties through a third phone line and/or video feed;
- d. forbidding authorised callers to place the Detainee on speaker phone;
- e. forbidding the use of coded language or other prohibited language;
- f. forbidding case-related conversation;
- g. limiting the language used during telephone calls or visits;
- h. excluding any individual from an approved caller and/or visitor list, in case of breach of any of the applicable conditions imposed by the Panel;
- i. suspending all non-privileged visits and/or calls;<sup>58</sup>
- j. passive monitoring of visits, through the use of a recording device/implement;<sup>59</sup>
- k. segregation.

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<sup>58</sup> Similar measures have been applied in several cases at the ICC. *See, e.g.,* ICC, *Prosecutor v. Ongwen*, Decision on Mr Ongwen's Request to Add New Persons to his Non-Privileged Telephone Contact List, [ICC-02/04-01/15-533](#), 4 October 2016, paras 10-11; *Prosecutor v. Yekatom and Ngaissona*, Decision Pursuant to Regulation 101 of the Regulations of the Court, [ICC-01/14-01/18-413-Red2](#), 16 February 2021, paras 79, 81-84; Decision on Mr Yekatom's Restrictions on Contacts and Communications in Detention, [ICC-01/14-01/18-485-Red](#), 16 February 2021, paras 13, 22; Decision Pursuant to Regulation 101 of the Regulations of the Court, [ICC-01/14-01/18-357-Red2](#), 17 March 2021, paras 47-49, 52; *Prosecutor v. Ntaganda*, Decision on Prosecution requests to impose restrictions on Mr Ntaganda's contacts, [ICC-01/04-02/06-785-Red](#), 18 August 2015, paras 46-47, 60, 69; *Prosecutor v. Ongwen*, Decision concerning the restriction of communications of Dominic Ongwen, [ICC-02/04-01/15-283](#), 3 August 2015, p. 8.

<sup>59</sup> *See, e.g.,* PD on Visits and Communications, art. 17(1) (describing the passive monitoring of telephone conversations).

39. It should also be noted that the competent Panel has the authority pursuant to Rule 56(6) of the Rules to order the Registrar to take urgent action to implement any necessary and proportionate restrictions. The Registry would implement the Panel's order(s) as swiftly as possible, including any specific conditions ordered by the Panel.

**(v) Urgent Security Measures**

40. In addition to the restrictions described above, the detention regime at the SC Detention Facilities allows the Chief Detention Officer (or a Detention Officer, in some circumstances) to apply urgent security measures during both privileged and non-privileged visits and communications.

41. In cases of urgency, where the Chief Detention Officer assesses that the immediate imposition of restrictions on a Detainee's visits and communications is necessary to achieve a legitimate aim<sup>60</sup> and proportionate to the aim pursued, the Chief Detention Officer may: 1) immediately terminate or interrupt any visit or telephone conversation; 2) relocate a visitor or a Detainee to a separate location in the SC Detention Facilities, if and to the extent necessary to ensure the safety of a visitor or a Detainee; and 3) temporarily stop, or limit the duration of, a Detainee's visits and communications for as long as necessary and, in any event, no longer than three (3) consecutive calendar days.<sup>61</sup> Where, due to urgency, immediate action is required, a Detention Officer may take the same urgent security measures and promptly inform the Chief Detention Officer thereafter.<sup>62</sup>

42. Any urgent security measures taken and the underlying reasons are promptly brought to the attention of the Registrar,<sup>63</sup> who can decide, *inter alia*, on any specific

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<sup>60</sup> Legitimate aims identified in Article 4(2) of the PD on Visits and Communications include "ensuring safety, security or good order in the [SC] Detention Facilities, preventing disorder or crime, protecting health, or protecting the safety, security, rights, or freedoms of others."

<sup>61</sup> PD on Visits and Communications, art. 8(1). Comparable urgent security measures are also permitted during Counsel visits and communications. *See* PD on Counsel Visits and Communications, art. 16.

<sup>62</sup> PD on Visits and Communications, art. 8(3).

<sup>63</sup> *Id.*, art. 8(2).

restrictions that may be necessary, and inform the competent Panel, where appropriate.<sup>64</sup>

### C. OTHER RELEVANT ASPECTS OF THE SECURITY ENVIRONMENT

43. As detailed above, the SC Detention Facilities are a high security environment where access is strictly controlled. Relevant aspects of this environment that have an impact on visits, telephone conversations, and correspondence are set forth below.

#### (i) High Security Environment

44. The SC's Detention Officers are highly qualified and receive training on applying the visits and communications regime at the SC Detention Facilities, including on all applicable security measures.<sup>65</sup> [REDACTED].

45. Detention Officers are also trained to carry out personal searches and the searching of cells, including in detecting and preventing any attempt to escape or to hide prohibited items.<sup>66</sup> The Detention Rules and related instructions outline the manner in which searches are conducted.<sup>67</sup>

46. Detainee's cells are inspected daily and searched regularly as a matter of routine in the SC Detention Facilities.<sup>68</sup> A special search of a Detainee's cell may be authorised by the Chief Detention Officer if there is a reasonable suspicion that the cell contains a prohibited item.<sup>69</sup> Further, in case of danger to the security or good order of the Detention Facilities or to the health and safety of a Detainee or any other person, and insofar as necessary and proportionate, the Registrar may decide that a Detainee's cell

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<sup>64</sup> See, e.g., PD on Visits and Communications, art. 17(4).

<sup>65</sup> Detention Rule 38.

<sup>66</sup> *Id.*

<sup>67</sup> Detention Rule 38-40; see also Annex A to DMU Instruction on House Rules of the Detention Facilities, KSC-BD-29, 23 September 2020 ('House Rules'), sect. 23; [REDACTED].

<sup>68</sup> Detention Rule 40; see also House Rules, sect. 23; [REDACTED].

<sup>69</sup> *Id.*

be monitored by video surveillance for a certain period.<sup>70</sup> Any such monitoring shall be reported to the competent Panel.<sup>71</sup>

47. As regards visitors, the Chief Detention Officer, [REDACTED], must approve each visitor of a Detainee, based on a detailed visitor application form and supporting documentation.<sup>72</sup> A visitor may be denied permission to visit if a specific restriction has been imposed by the Registrar or if the Chief Detention Officer determines that it is necessary and proportionate to do so.<sup>73</sup>

48. To enter the Host-State prison and the SC Detention Facilities, an approved visitor must also comply with the relevant security requirements, present valid proof of identity,<sup>74</sup> and consent to be searched.<sup>75</sup> Any visitor who withdraws his or her consent to any security controls will be refused access to the prison and the SC Detention Facilities.<sup>76</sup>

49. Any item received from outside the SC Detention Facilities, including any item introduced by a visitor, is also subject to the security controls of the SC Detention Facilities and, where applicable, the Host-State prison, including the use of X-ray machines and other screening devices.<sup>77</sup> Comprehensive instructions regulate prohibited items and restrictions on substances in the SC Detention Facilities,<sup>78</sup> as well as procedures for importing and exporting items to and from the SC Detention Facilities.<sup>79</sup> This includes detailed security procedures regarding what can be brought

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<sup>70</sup> Detention Rule 41.

<sup>71</sup> *Id.*

<sup>72</sup> PD on Visits and Communications, arts 11-12.

<sup>73</sup> *Id.*, art. 12(1).

<sup>74</sup> *Id.*, art. 13(1).

<sup>75</sup> *Id.*, art. 13(2); *see also* DMU Instruction on Security Requirements to Enter the Detention Facilities, KSC-BD-32, 23 September 2020.

<sup>76</sup> PD on Visits and Communications, art. 13(3).

<sup>77</sup> Detention Rule 25; PD on Visits and Communications, art. 14(1).

<sup>78</sup> Detention Rules 25, 27; DMU Instruction on Items and Substances Prohibited in the Detention Facilities, KSC-BD-31, 23 September 2020.

<sup>79</sup> Detention Rule 4(6); PD on Visits and Communications, arts 14, 18(3); PD on Counsel Visits and Communications, art. 11.



to a visit.<sup>80</sup> Personal visitors may not directly exchange any item with a Detainee during a visit.<sup>81</sup>

50. Among the prohibited items are any devices and items that can be used for electronic communications.<sup>82</sup> To provide Counsel and Detainees with additional means of exchanging materials for the preparation of the defence, the SC has created a Secure Electronic Data Sharing System ('SEDS') for the electronic exchange of case-related materials through a secure file sharing location on the SC network, which a Detainee can access in his or her cell.<sup>83</sup>

## (ii) Media Communications

51. Communications between Detainees and the media, whether direct or indirect, are subject to the prior authorisation of the Registrar.<sup>84</sup> Detainees are not permitted access to the media through visits, but the Registrar may permit a Detainee to communicate with the media through written correspondence and by telephone, subject to certain restrictions.<sup>85</sup>

52. For example, as a general matter, Detainees are prohibited from disclosing to the media, directly or indirectly, any information that relates to: any other Detainee; staff of the DMU in such a way that they, or persons associated with them might be identified; the layout, configuration, or physical description of the SC Detention

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<sup>80</sup> House Rules, sects 6, 9, 20; DMU Instruction on Visiting Procedures for Family Members and Other Personal Visitors, KSC-BD-33, 23 September 2020, sects 18, 20.

<sup>81</sup> PD on Visits and Communications, art. 14(2).

<sup>82</sup> DMU Instruction on Items and Substances Prohibited in the Detention Facilities, sect. 3(1)(q).

<sup>83</sup> See Registry Instruction on Secure Electronic Data Sharing Between Counsel and Detainees, KSC-BD-39, 4 March 2021.

<sup>84</sup> PD on Media Communications, KSC-BD-28, 23 September 2020, art. 4(1). See also *id.*, art. 5(3).

<sup>85</sup> PD on Media Communications, art. 4(2) ("A Detainee may be permitted by the Registrar to communicate with the media through written correspondence and by telephone, unless the Registrar has reason to believe that the particular request to communicate could: a. disturb safety, security, or good order in the [SC] Detention Facilities; b. be harmful to the prevention of disorder or crime; c. be undertaken for the purpose of disseminating confidential or strictly confidential information; d. pose a threat to the health, safety, security, reputation or rights of others; or e. compromise the administration of justice or otherwise undermine the authority and mandate of the [SC]."). See also *id.*, arts 7-8.

Facilities; or judicial proceedings before the SC classified as confidential or strictly confidential.<sup>86</sup> In addition, it is prohibited for a telephone interview with a Detainee to be recorded by the media or disseminated live through any medium.<sup>87</sup>

53. In terms of monitoring, all telephone conversations of a Detainee with the media are both digitally recorded and simultaneously listened to by the Chief Detention Officer, and transcripts may be transcribed and provided to the Registrar.<sup>88</sup> Similarly, all incoming and outgoing correspondence between a Detainee and the media is opened, inspected and read by the Chief Detention Officer, and a copy of such correspondence may be provided to the Registrar.<sup>89</sup>

54. The Registrar may also impose specific restrictions on media communications,<sup>90</sup> including enumerating practical arrangements for the interview, the type of communication, the language to be used, and any lesser or greater restriction that is necessary and proportionate.<sup>91</sup> Written communications with the media are closely monitored for compliance with any specific restrictions imposed on the communication in the decision of the Registrar granting the request.<sup>92</sup>

55. Lastly, where the Chief Detention Officer assesses that the immediate imposition of restrictions on a Detainee's communication with the media is necessary and proportionate, he or she may take urgent security measures by immediately terminating or interrupting the communication.<sup>93</sup>

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<sup>86</sup> PD on Media Communications, art. 11(3).

<sup>87</sup> *Id.*, art. 15(2).

<sup>88</sup> *Id.*, art. 16(1).

<sup>89</sup> *Id.*, art. 18(1).

<sup>90</sup> *Id.*, art. 12(1); *see also* fn. 85, above.

<sup>91</sup> *Id.*, arts 8, 12(1), 18(2).

<sup>92</sup> *Id.*, art. 8.

<sup>93</sup> *Id.*, art. 14(1).

### (iii) Segregation and Separation

56. The Rules of Detention also contain detailed provisions on segregation or separation within the SC Detention Facilities of one or more Detainees from all or some of the other Detainees.<sup>94</sup>

57. Segregation may be ordered by the Registrar to preserve security or good order in the SC Detention Facilities, to protect the Detainee or Detainees in question, or to ensure the integrity of, or prevent prejudice to, the proceedings against the Detainee or Detainees.<sup>95</sup> A Detainee may make a request for segregation for his or her own protection.<sup>96</sup> Segregation may not be ordered for a period exceeding thirty calendar days at a time.<sup>97</sup> Apart from physical separation, the conditions of detention do not differ when the Detainee is in segregation except for those conditions that would interfere with or defeat the aims of segregation.<sup>98</sup>

58. The Rules of Detention also provide for the separation of Detainees in communal areas on the same grounds as for segregation.<sup>99</sup> After consulting the Registrar, separation is implemented by the Chief Detention Officer, who may organise the use of communal facilities of the SC Detention Facilities in such a way as to separate certain groups of Detainees from other Detainees.<sup>100</sup>

#### D. OTHER MATTERS RELEVANT TO THE DETENTION REGIME

59. Other matters relevant to the detention regime at the SC Detention Facilities, including the enforceability of applicable and additional restrictions during any hospitalisation or admission of the Accused into medical facilities, are set forth below.

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<sup>94</sup> Rules of Detention, chapter VII.

<sup>95</sup> Detention Rule 43(3). The competent Panel may also order the segregation of a Detainee. *See* Section B(iv), above.

<sup>96</sup> Detention Rule 43(7).

<sup>97</sup> Detention Rule 43(6).

<sup>98</sup> Detention Rule 43(2).

<sup>99</sup> Detention Rule 46(1).

<sup>100</sup> *Id.*

**(i) Internal Medical Facilities**

60. Detainees enjoy *at least* the same standards of health care as is available in the Host State. Within the SC Detention Facilities, the Medical Officer is the primary treating physician for all Detainees and is responsible for the care of their physical and mental health.<sup>101</sup> At all times, a qualified medical practitioner is available without delay in cases of urgency.<sup>102</sup>

61. A designated area within the SC Detention Facilities is equipped and furnished for the provision of primary medical care and treatment, including dental care.<sup>103</sup> Where, in the opinion of the Medical Officer, specialist treatment is required, a Detainee receives this treatment as far as possible within the SC Detention Facilities.<sup>104</sup> [REDACTED].<sup>105</sup>

62. Additionally, if a Detainee chooses to consult with a verified external medical practitioner at his or her own expense, such consultations take place within the SC Detention Facilities, and the relevant practitioner is subject to the same security controls as those in place for other visitors.<sup>106</sup>

63. Thus, the maintenance of security, safety, and good order continues to be overseen and enforced by custodial staff of the SC when a Detainee is receiving primary medical care in the SC Detention Facilities [REDACTED]. In this respect, the SC can enforce any applicable or additional restrictions during a Detainee's hospitalisation or admission into the above-mentioned internal medical facilities.

**(ii) External Medical Facilities**

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<sup>101</sup> Detention Rules 30(2), 30(4), 34(1).

<sup>102</sup> Detention Rule 30(3).

<sup>103</sup> Detention Rule 30(1).

<sup>104</sup> Detention Rule 32(4).

<sup>105</sup> The SC Detention Facilities are located within Unit 4 of the Host-State prison, PI Haaglanden. *See also* Detention Rule 2 (defining "Prison" as the "penitentiary complex maintained by the authorities of the Host State within which the [SC] Detention Facilities [...] are located"). [REDACTED]. If more intensive care is required, a Detainee can also be transferred to an external hospital, as discussed in more detail in Section (ii), below.

<sup>106</sup> Detention Rule 34(3)-(4), (8).

64. Owing to the presence of a treating physician and the facilities available within the SC Detention Facilities [REDACTED], there is a reduced need for Detainees to visit external medical facilities. This can, however, be facilitated when the Medical Officer refers a Detainee [REDACTED] for external medical care.<sup>107</sup>

65. The Chief Detention Officer is responsible for arranging the transfer of a Detainee to any external medical facility [REDACTED].<sup>108</sup> In the event of a medical transport, the SC also ensures the availability of an interpreter on location at the external medical facility.

66. The medical transport itself is carried out by the transport and support service of the Host State authorities, [REDACTED].<sup>109</sup> [REDACTED]. [REDACTED].

## V. CONCLUSION

67. The above submissions provide an overview of the SC detention regime. Should the Panel have any questions in relation to the above submissions, the Registrar stands ready to provide any additional information or clarifications required.

## VI. CLASSIFICATION

68. This filing is submitted as confidential pursuant to the Panel's Order.<sup>110</sup>

**Word count: 6206**



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**Dr Fidelma Donlon**

**Registrar**

Monday, 24 January 2022

At The Hague, the Netherlands

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<sup>107</sup> Detention Rule 32(1)-(2), (4).

<sup>108</sup> Detention Rule 59(1).

<sup>109</sup> Detention Rule 59(2).

<sup>110</sup> Order, para. 9.