

**Case No.:** KSC-BC-2020-04

**Before:** Trial Panel I

Judge Mappie Veldt-Foglia, Presiding Judge

Judge Roland Dekkers

Judge Gilbert Bitti

Judge Vladimir Mikula, Reserve Judge

**Registrar:** Dr Fidelma Donlon

**Date:** 18 January 2023

**Filing Party:** Specialist Defence Counsel

**Original Language:** English

**Classification:** Public

**THE SPECIALIST PROSECUTOR**

v.

**PJETËR SHALA**

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**Public Redacted Version of**

**“Defence Response to Prosecution Request for Restrictions of the Accused’s  
Communications with Strictly Confidential and *Ex Parte* Annex 1”**

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Chief Detention Officer

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## I. INTRODUCTION

1. Pursuant to the Trial Panel's instructions,<sup>1</sup> the Defence for Mr Pjetër Shala ("Defence" and "Accused", respectively) files the present submissions in response to the "Prosecution request for restrictions of the Accused's communications" and the "Registry Submissions Pursuant to Trial Panel I's Order"<sup>2</sup>.
2. In the Request, the Specialist Prosecutor's Office ("SPO") requests the Trial Panel to: (i) order the active monitoring of the Accused's non-privileged communications; (ii) limit the oral communications of the Accused to an approved list; (iii) invite the Registry to make submissions "on the feasibility of, and appropriate measures for, implementation of the request"; (iv) order any other measures "which may be identified by the Registry as necessary to mitigate the risks identified in [the Request]"; and (v) issue an order to the Accused not to divulge any confidential information to persons outside of his defence team.<sup>3</sup> The SPO further requested that these restrictions apply "before the commencement of trial".<sup>4</sup>
3. The Defence opposes the Request as unfounded, unjustified, and, in any event, disproportionate. Accordingly, the Defence invites the Trial Panel to reject it. In the alternative, should the Trial Panel be inclined to impose restrictions beyond the measures currently in force,<sup>5</sup> the Defence requests that the least

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<sup>1</sup> F00351, Decision on Defence Request for Variation of Time Limit (F00349), 15 November 2022 (confidential), paras. 8, 10(c). All further references to filings in this Response concern Case No. KSC-BC-2020-04 unless otherwise indicated.

<sup>2</sup> F00336, Prosecution request for restrictions of the Accused's communications, 4 November 2022 (confidential)("Request"); F00357, Registry Submissions Pursuant to Trial Panel I's Order (F00344) with one confidential and *ex parte* Annex, 24 November 2022 (confidential)("Registry Submissions"). *See also* F00359, Prosecution response to Registry Submissions Pursuant to Trial Panel I's Order with strictly confidential and *ex parte* Annex 1, 28 November 2022 (confidential)("Prosecution Response").

<sup>3</sup> Request, para. 14 (i) – (v). *See also* paras. 1, 13.

<sup>4</sup> Request, para. 1.

<sup>5</sup> Registry Submissions, paras. 12, 21, 28 (consisting of: (a) the passive monitoring of all communications; (b) placing "reasonable limits" on timing, quantity, and duration of non-privileged

restrictive measures be applied and ensure the discreet nature of any measures adopted at a maximum degree. In any event, the Defence objects particularly to: (i) the active monitoring of the Accused's communications with his family members, and (ii) any restrictions on communication with any of the Accused's identified contacts that are listed in the strictly confidential and *ex parte* Annex 1.

## II. PROCEDURAL BACKGROUND

4. The Accused has been detained since his arrest on 16 March 2021. Since 15 April 2021, he has been detained at the KSC Detention Facilities.<sup>6</sup>
5. On 19 April 2021, the Accused pleaded not guilty.<sup>7</sup>
6. On 21 September 2022, the Pre-Trial Judge transmitted the case file to the Trial Panel, pursuant to Rule 98(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules").<sup>8</sup>
7. On 4 November 2022, the SPO filed the Request, with which it sought an order by the Trial Panel to introduce an active monitoring regime on the Accused's communications, limit oral communications to a pre-approved list, and order the Accused not to divulge any confidential information to individuals other than his defence team.

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telephone calls and video visits; and c) the opening, inspection and reading by the Chief Detention Officer of all non-confidential correspondence).

<sup>6</sup> F00013, Notification of Arrest of Pjetër Shala Pursuant to Rule 55(4), 16 March 2021, para. 5; F00019, Notification of Reception of Pjetër Shala in the Detention Facilities of the Specialist Chambers and Conditional Assignment of Counsel, 5 April 2021 (strictly confidential and *ex parte*), with Annexes 1-2 (strictly confidential and *ex parte*), para. 2.

<sup>7</sup> T. 19 April 2021 p.11, line 11.

<sup>8</sup> F00284, Decision Transmitting the Case File to Trial Panel I, 21 September 2022.

8. On 9 November 2022, the Accused requested the Chief Detention Officer to provide any records available on his communications and visits during his time in detention, which would enable the Defence to respond to the Request.<sup>9</sup>
9. On 10 November 2022, the Trial Panel instructed the Registry to file submissions on the Request by 24 November 2022, addressing in particular “(i) the feasibility of the measures requested by the SPO; (ii) the resources and time needed to implement the requested measures; (iii) any additional or alternative measures that are available; and (iv) any other issues she considers appropriate to raise in relation to the Request”.<sup>10</sup>
10. On 11 November 2022, the Defence received an inventory on the Accused’s telephone communications and log of visits during his time in detention at the KSC Detention Facilities.<sup>11</sup> The materials received indicate the number of telephone calls the Accused made and received each month as well as the number and category of visits.<sup>12</sup>
11. On 14 November 2022, the Defence requested the Detention Management Unit of the Registry (“DMU”) to provide additional information on the records.<sup>13</sup>
12. On the same day, the Defence requested the Trial Panel for variation of the applicable time limit to file its Response to the Request so that the Defence

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<sup>9</sup> The submission took place further to an email to Detention Management Unit Legal Communication by Defence Counsel, 9 November 2022, at 11:40 am.

<sup>10</sup> F00344, Order for submissions on the “Prosecution request for restrictions of the Accused’s communications” (KSC-BC-2020-04/F00336), 10 November 2022 (confidential), paras. 5, 6.

<sup>11</sup> Response to “Request of log of communications and visits (KSC-REG-SHA-R-130), 11 November 2022 (confidential).

<sup>12</sup> Email to Defence Counsel by Detention Management Unit Legal Communication, 11 November 2022, at 5:04 pm.

<sup>13</sup> Email to Detention Management Unit Legal Communication by Defence Counsel, 14 November 2022, at 9:02 am.

could seek proper instructions from the Accused further to the information sought by the Registry.<sup>14</sup>

13. On 15 November 2022, the Trial Panel granted, in part, the Request for Variation of the Time Limit, and instructed the Defence to file a consolidated response to the SPO Request, Registry Report, and SPO and Victims' Counsel responses to the Registry Report by 2 December 2022.<sup>15</sup>
14. On 22 November 2022, the DMU provided additional information regarding the Accused's communications and visits from his Personal Record.<sup>16</sup> As the Accused's personal records indicate,<sup>17</sup> the vast majority of his communications are with members of his family, childhood friends, and other close friends.
15. On 24 November 2022, the Registry submitted that, should the Trial Panel deem it necessary and proportionate to order the active monitoring of the Accused's visits and communications and limit his oral communications with the outside world to a list of pre-approved individuals, it stands ready to implement such measures.<sup>18</sup> The Registry confirmed, *inter alia*, the following:
  - a) *With respect to restrictions currently implemented:* (i) all telephone conversations of detainees on the non-privileged telephone line are passively monitored; (ii) "[v]isits, whether in-person or via video link, are as a rule supervised in that they are conducted within the sight and general hearing of Detention Officers"; (iii) all correspondence—except confidential correspondence with Counsel, and correspondence clearly

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<sup>14</sup> F00349, Defence Request for Variation of the Time Limit for its Response to the Prosecution Request for Restrictions of the Accused's Communications, 14 November 2022 (confidential), paras. 7-10.

<sup>15</sup> F00351, Decision on Defence Request for Variation of Time Limit (F00349), 15 November 2022 (confidential), para. 10(a), 10(b).

<sup>16</sup> Email to Defence Counsel by Detention Management Unit Legal Communication, 22 November 2022, at 4:59 pm. *See also*, letter to the Accused by Chief Detention Officer dated 22 November 2022.

<sup>17</sup> See Annex 1.

<sup>18</sup> Registry Submissions, para. 36.

marked with the name of the International Committee of the Red Cross (“ICRC”), the Ombudsperson, the Registrar, and the Panel, among others—is subjected to the security controls of the Detention Facilities; in that it is “opened, inspected and read by the Chief Detention Officer”.<sup>19</sup> In addition: (i) active monitoring of telephone conversations and in-person or video visits of a specific detainee may be imposed by the Registrar where necessary and proportionate or by order of the Panel pursuant to Rule 56(6) of the Rules;<sup>20</sup> and (ii) the Chief Detention Officer may place reasonable limits on the timing, quantity, and duration of non-privileged telephone calls and video visits, with further review should it be considered necessary by the Panel.<sup>21</sup> However, the Chief Detention Officer may not listen to more than 10 percent of telephone calls digitally recorded each week (selected randomly), or of “transcriptions of those recordings” unless a specific restriction is imposed by the Registrar or ordered by a Panel;<sup>22</sup>

- b) *With respect to the proposed restrictions:* the Registry confirmed that, further to a 24 to 48 hours’ notice,<sup>23</sup> it has the resources to implement any of the proposed measures ordered by the Panel, referring, specifically, to: (i) active monitoring of non-privileged telephone calls [REDACTED] “on specifically designated calls, for a percentage of calls, or on all calls” as well as of video visits, with simultaneous listening by DMU staff;<sup>24</sup> (ii) active monitoring of in-person visits, which can be conducted “within the sight of the DMU staff and, to ensure that no un-monitored messages are passed, at least one DMU staff member with the necessary

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<sup>19</sup> Registry Submissions, paras. 12, 21, 28.

<sup>20</sup> Registry Submissions, paras. 13, 21.

<sup>21</sup> Registry Submissions, paras. 11, 22.

<sup>22</sup> Registry Submissions, para. 19.

<sup>23</sup> Registry Submissions, para. 10.

<sup>24</sup> Registry Submissions, paras. 15, 16, 23.

language expertise would be physically present in the visiting room and positioned within audible-hearing distance of the Accused and his visitor(s) for the purpose of simultaneous listening”, adding that the visiting room could also be equipped with a recording device;<sup>25</sup> (iii) “inspect[ing] and read[ing] all correspondence of the Accused with the specific, intended objective in mind, *i.e.*, to review for unauthorised disclosure of confidential information”<sup>26</sup>; and (iv) limiting the Accused’s non-privileged visits and communications to pre-approved individuals, to be applicable further to receipt of such list “together with their identification documents with photographs, the language that the Accused intends to use with them, and the respective telephone numbers they will use”;<sup>27</sup> and

- c) *With respect to confidential information disclosure:* For the purpose of telephone, visiting, and correspondence monitoring regimes, the DMU staff or, accordingly, the person assigned to review the Accused’s correspondence, would be provided with [REDACTED], for the purposes of conducting this targeted monitoring and terminating communications if assessed to be necessary to prevent the unauthorised disclosure of confidential information, if so ordered by the Trial Panel.<sup>28</sup>

16. On 28 November 2022, the SPO responded to the Registry Submissions stating that: (i) it considers it “necessary and proportionate for all non-privileged calls to be monitored”; (ii) it considers the suspension of private visits a necessary measure adding that “[a]llowing visits to take place outside of the sight and hearing of Detention Officers would in fact undermine the effectiveness of all

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<sup>25</sup> Registry Submissions, para. 24.

<sup>26</sup> Registry Submissions, para. 29.

<sup>27</sup> Registry Submissions, paras. 30, 31.

<sup>28</sup> Registry Submissions, paras. 25(d), 29.



other measures proposed by the Registry”; and (iii) it repeated its request for an order requiring the Accused not to share any confidential materials or information with anyone outside his defence team.<sup>29</sup>

### III. SUBMISSIONS

17. It is a well-established principle of international human rights law that detainees must continue to enjoy all fundamental rights and freedoms while detained with the exception of their right to liberty.<sup>30</sup> The Accused does not forfeit his human rights, including his right to respect for private and family life, and any restriction on his rights must be specifically justified as strictly necessary in each individual case.<sup>31</sup>
18. The right to protection of private and family life is an “inviolable right”.<sup>32</sup> The Accused’s contact with the outside world,<sup>33</sup> including with his family, is crucial for his physical and psychological well-being.<sup>34</sup>
19. To date, the Accused has been detained on remand for approximately 20 months. As the European Court of Human Rights (“ECtHR”) has established, long-term prison regimes must seek to compensate for the dissocialising effects of imprisonment in a positive and proactive way.<sup>35</sup> The ECtHR has also

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<sup>29</sup> Prosecution Response, paras. 2-5.

<sup>30</sup> ECtHR, *Khoroshenko v. Russia* [GC], no. 41418/04, 30 June 2015, para. 116 referring to *Dickson v. the United Kingdom* [GC], no. 44362/04, 4 December 2007, para. 67; *Hirst v. UK (No. 2)* [GC], no. 74025/01, 6 October 2005, para. 69; *Boulois v. Luxembourg* [GC], no. 37575/04, 3 April 2012, para. 82.

<sup>31</sup> ECtHR, *Khoroshenko v. Russia* [GC], para. 117; *Płoski v. Poland*, no. 26761/95, 12 November 2002, paras. 32, 35; *Dickson v. the United Kingdom* [GC], para. 68.

<sup>32</sup> Article 38 of Kosovo Constitution.

<sup>33</sup> ECtHR, *Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, 23 February 2016, para. 194; *Khoroshenko v. Russia* [GC], para. 123.

<sup>34</sup> ECtHR, *Messina v. Italy (no. 2)*, no. 25498/94, 28 September 2000, paras. 61, 62; *Lavents v. Latvia*, no. 58442/00, 28 November 2022, para. 139, *Khoroshenko v. Russia* [GC], para. 106.

<sup>35</sup> ECtHR, *Khoroshenko v. Russia* [GC], para. 144 referring to the 11<sup>th</sup> General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (“CPT”)(CPT/Inf(2002) 16), para. 33, where the CPT stated, *inter alia*: “[l]ong-term imprisonment can have a number of desocialising effects upon inmates. In addition to becoming institutionalised, long-term prisoners may experience a range of psychological problems (including loss of self-esteem and



emphasized “the importance of preventing the breakdown of prisoners’ family ties by maintaining all forms of contact” as well as that “[a]ny limitations upon prisoners’ contact with the outside world should be based exclusively on security concerns of an appreciable nature or resource considerations”.<sup>36</sup>

20. Pursuant to Article 36 of the Kosovo Constitution, and Article 8 of the European Convention on Human Rights (“ECHR”), any interference to the right to privacy and family life including communications, must be: (i) in accordance with the law; (ii) necessary, for, *inter alia*, the prevention of disorder and crime and the protection of rights and freedoms of others; and (iii) proportionate to the legitimate aim pursued.<sup>37</sup>
21. In addition, the International Criminal Court’s jurisprudence has confirmed that, other than assessing whether restrictions on communications are necessary and proportionate to a legitimate aim pursued, the existence of an

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impairment of social skills) and have a tendency to become increasingly detached from society; to which almost all of them will eventually return. In the view of the CPT, the regimes which are offered to prisoners serving long sentences should seek to compensate for these effects in a positive and proactive way”.

<sup>36</sup> ECtHR, *Danilevich v. Russia*, no.31469/08, 19 October 2021, para. 60 referring to the 2<sup>nd</sup> General Report of CPT (“CPT Standards 2002”, revised in 2011)(CPT/Inf(92) 3), para. 51 where the CPT stated: “[it] is also very important for prisoners to maintain reasonably good contact with the outside world. Above all, a prisoner must be given the means of safeguarding his relationships with his family and close friends. The guiding principle should be the promotion of contact with the outside world; any limitations upon such contact should be based exclusively on security concerns of an appreciable nature or resource considerations. The CPT wishes to emphasise in this context the need for some flexibility as regards the application of rules on visits and telephone contacts vis-à-vis prisoners whose families live far away (thereby rendering regular visits impracticable). For example, such prisoners could be allowed to accumulate visiting time and/or be offered improved possibilities for telephone contacts with their families”.

<sup>37</sup> ICC, *The Prosecutor v. Mahamat Said Abdel Kani*, Case No. ICC-01/14-01/21-247-Red, Public Redacted Version of Decision on the Defence Application for Interim Release of Mahamat Said Abdel Kani and Contact Restrictions, 3 March 2022, paras. 20-23; *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaißsona*, Case No. ICC-01/04-01/08-402, Decision Pursuant to Regulation 101 of the Regulations of the Court, 6 December 2019, para. 27; *The Prosecutor v. Bemba et al.*, Case No. ICC-01/05-01/13-1257, Decision on Kilolo Defence Motion for Inadmissibility of Material, 16 September 2015, para. 16; ICTY, *Prosecutor v. Radoslav Brđjanin*, Case No. IT-99-36-T, Decision on the Defence “Objection to Intercept Evidence”, 3 October 2003, paras. 29, 30; ECtHR, *Messina v. Italy*, paras. 59-74; *Lavents v. Latvia*, paras. 134-143; *Van der Ven v. The Netherlands*, no. 50901/99, 4 February 2003, paras. 64-72; *Kornakovs v. Latvia*, no. 61005/00, 15 June 2006, paras. 134-136.

“objectively justifiable risk” must be assessed for the determination of whether the current restrictions are warranted or whether additional measures must be implemented.<sup>38</sup>

22. Having noted that the possibility of restricting a detainee’s ability to communicate with people outside of a detention facility has been recognised by the ECtHR, the SPO purports to justify the Request by arguing that the requested restrictions: (i) “would have a legal basis in the applicable law” pursuant to Rules 56 and 116(4)(d) of the Rules;<sup>39</sup> (ii) “pursue a legitimate aim”, “in order to avoid interference with witnesses and victims and to protect the integrity of the proceedings”;<sup>40</sup> (iii) are “necessary to ensure the protection of witnesses and victims as well as the integrity of the proceedings”; and (iv) “are further proportionate to mitigate the risk as set out above”.
23. The Defence submits that the Request is unjustified and unsubstantiated as no objectively justifiable risk warrants the requested set of generic measures which are neither necessary nor proportionate to the alleged legitimate aim pursued.
24. At the outset, the Defence notes that the SPO addresses the requested measures as a whole, without justifying—including through indicating an “objectively justifiable risk” of interference—the necessity and/or proportionality of each proposed restriction to the rights of the Accused. In fact, the SPO does not even distinguish between the reasons why the proposed measures are necessary and the reasons why they are proportionate and merely repeats the purported “legitimate aims” allegedly pursued by the requested communications restrictions. This in itself is an indication that the SPO has failed to meet the

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<sup>38</sup> ICC, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Case No. ICC-01/12-01/18, Decision on the measures restricting Mr Al Hassan’s contacts while in detention, 4 November 2021, para. 25.

<sup>39</sup> Request, paras. 5, 6.

<sup>40</sup> Request, paras. 7, 10.

evidential burden of substantiating grounds to justify each restriction as necessary, proportionate, and consistent with the applicable law. In addition to pursuing a legitimate aim, an interference with the right to protect the private and family life of the Accused must also not exceed what is strictly required to pursue that aim.

**A. The SPO fails to identify an objectively justifiable risk and the necessity of the requested measures**

25. The imposition of restrictions including increased monitoring of the Accused's communications should be the exception and not the rule.<sup>41</sup> According to established jurisprudence of international criminal courts, restrictions which interfere with the rights of a detained person "must be based on the existence of an objectively justifiable risk".<sup>42</sup>
26. The SPO fails to justify further restrictions on the Accused's communications. Specifically, they fail to identify a single piece of evidence that is capable of substantiating an objectively justifiable risk that the Accused might interfere with witnesses and victims so as to endanger the integrity of the proceedings. Nor has the Registry reported or indicated any challenge resulting from the current monitoring regime applicable to the Accused.
27. In addition, the SPO fails to provide any justification for requesting the augmentation of the restrictions imposed on the Accused's communications it seeks at *this* stage of the proceedings. Nothing in the SPO's submissions

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<sup>41</sup> ICC, *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Public Redacted Decision of "Decision on requests to call witnesses in relation to sentencing and for increased monitoring of Mr Ntaganda's contacts and scheduling the sentencing hearing", 20 August 2019, para. 57.

<sup>42</sup> ICC, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Case No. ICC-01/12-01/18, Decision on the measures restricting Mr Al Hassan's contacts while in detention, 4 November 2021, para. 16 referring to the previous decisions on restrictions in the same case: Case No. ICC-01/12-01/18-557-Red3, Decision on Mr Al Hassan's restrictions and accesses while in detention, 21 January 2020, para. 10; and Case No, ICC-01/12-01/18-93-Conf-Exp-Red, Second Decision on the Restrictions on Contact with Other Persons during the Pre-Trial Proceedings, 20 July 2018, para. 63.

indicates a change of circumstances capable of justifying the implementation of further restrictions on the Accused's right to communicate with his family and the outside world. Instead, the SPO purports to justify the Request on the basis of the Accused's *past* conduct allegedly consisting of "threatening statements in relation [REDACTED] in the generically cited "context of the broader climate of witness intimidation and interference in Kosovo", as well as "the disclosure of the identities and materials pertaining to delayed disclosure witnesses [REDACTED]" which allegedly provide the Accused "with increased insight into the case against him and the identity of incriminating witnesses".<sup>43</sup>

28. In so doing, the SPO fails to indicate: (i) a "reasonable suspicion" that the Accused has attempted to contact, let alone exercise any form of influence on individuals who are related to the proceedings; as well as (ii) any demonstrated link between such perceived "climate" and the Accused's personal conduct to the present proceedings, in light especially of the findings in established international criminal jurisprudence that restrictions to communications plainly *cannot* be justified on the sole basis of a general threat to Prosecution witnesses.<sup>44</sup>
29. As to the alleged "threatening statements" and the Accused's "increased insight" into the case against him, the Defence adopts and reiterates its previous submissions on the matter.<sup>45</sup> In addition, the Defence Motion to

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<sup>43</sup> Request, para. 8. *See also*, paras. 3, 41 above.

<sup>44</sup> ICC, *Prosecutor v. Al Hasssan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Case No. ICC-01/12-01/18-871-Red4, Decision on the measures restricting of Mr Hassan's contacts while in detention, 11 June 2020", 11 June 2020, para. 16 (where the Trial Chamber X stated, *inter alia*, that: "the fact that there is a general threat to Prosecution witnesses cannot be the sole basis to continue to impose all of the Pre-Trial restrictions").

<sup>45</sup> F00341, Defence Response to "Prosecution submissions for eight review of detention", 8 November 2022 (confidential), paras. 12 and 16 ("[t]he Prosecution has recently submitted that no safety concerns regarding [REDACTED] have been expressed and that any security threat concerning [REDACTED] remains of a "general nature". Increased insight into evidence is plainly not a relevant factor when such evidence is not linked to specific risks and the applicable evidentiary standard for detention. It is an inevitable consequence of the trial approaching and would justify the continued detention of all

exclude from the case file in this case of statements obtained in breach of the Accused's fundamental rights is pending.

**B. The proposed restrictions are not strictly required to pursue the alleged legitimate aim**

30. Any restrictions on the communications of the Accused must not exceed the stated purpose of "avoid[ing] undue interference with witnesses and victims and [protecting] the integrity of the proceedings".<sup>46</sup>
31. Without prejudice to the above, the Defence submits that the proportionality of the requested measures has not been established. Restrictive measures imposed on a prisoner "must be linked to the actual or potential harm the prisoner has caused or will cause by his or her actions [...] in the prison setting".<sup>47</sup>
32. In addition, as the ECtHR found, for the justification of limitations upon prisoners' contact with the outside world on security grounds, "the approach to assessment of proportionality of State measures taken with reference to 'punitive aims' has evolved over recent years, with a heavier emphasis now having to be placed on the need to strike a proper balance between the

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accused in proceedings before the KSC. In addition, according to the summary of the three witnesses' anticipated testimony and the records of their interviews with the SPO [REDACTED]), para. 12 ("[t]he cited "threatening" statements cannot be reasonably interpreted as a genuine and actual direct or indirect threat or expressed intent to harm or influence any protected witness in the case. Importantly, such statements related to a particular context and were given when Mr Shala was questioned in the absence of a lawyer, in breach of his rights as a suspect, and without knowing that he would be prosecuted and that [REDACTED] would be a prosecution witness. In fact, when [REDACTED] sought to establish contact with Mr Shala, Mr Shala perceived this as a threat and simply refused to engage in any exchange with him firmly blocking any further contact. As Mr Shala has repeatedly confirmed he commits to fully respect the conduct of these proceedings and will not contact either directly or indirectly any Prosecution witness nor will he otherwise act in any way that could be perceived as obstructing the administration of justice"). *See also*, F00281, Motion to Exclude Evidence from the Case File to be Transmitted to the Trial Panel with Confidential Annexes 1-3, 20 September 2022 (confidential with confidential Annexes 1-3).

<sup>46</sup> Request, para. 7.

<sup>47</sup> Council of Europe, CPT, 21st General Report of the CPT, 10 November 2011, CPT/Inf (2011) 28, para. 55(a).

punishment and rehabilitation of prisoners”; adding that “[r]ehabilitation, that is, the reintegration into society of a convicted person, is required in any community that established human dignity as its centrepiece. Article 8 of the Convention requires the State to assist prisoners as far as possible to create and sustain ties with people outside prison in order to promote prisoners’ social rehabilitation”.<sup>48</sup>

33. The Accused is already subject to extensive restrictions on his communications with the outside world, including the passive monitoring of all telephone conversations and the supervision (“within the sight and general hearing of Detention Officers”) of his in-person and video visits, as well as strict security controls to all his non-privileged correspondence.<sup>49</sup> The SPO has not put forth a single reason (based on the Accused’s personal conduct or on the basis of any concrete evidence) justifying stricter restrictions than the ones in force and as intrusive as active monitoring of his private telephone calls and communications, including with his family members, or even prohibiting communications with individuals who would not be included in a pre-approved list.
34. The Defence also notes that the Accused has the right to “be presumed innocent until proven guilty beyond reasonable doubt”, which is expressly protected under Article 21(3) of the Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office. The Accused intends to challenge all the allegations in the charges through all legal avenues.
35. In light of the above, the Defence invites the Trial Panel to take into consideration the Accused’s rehabilitative rights as well as that, throughout his

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<sup>48</sup> ECtHR, *Danilevich v. Russia*, para. 47 referring to *Polyakova and Others v. Russia*, nos. 35090/09 and 3 others, 7 March 2017, para. 88; with further references to *Hirst v. UK (No. 2)* [GC], para. 69; *Khoroshenko v. Russia* [GC], para. 121.

<sup>49</sup> Registry Submissions, paras. 12, 21, 28.



detention, no reported instances exist as to any attempt to obstruct the proceedings or interfere in any manner therewith. In addition, as disclosed by the DMU, the Accused's contacts further confirm the rupture of his ties to the Kosovo scene let alone influential figures, that he did not attempt to interfere with witnesses, victims, or the integrity of the proceedings, and that his non-privileged communications are made only to his family, close friends, and acquaintances.

36. Any restriction of the Accused's right to privacy and family life must be appropriately balanced with the stated legitimate aim and be assessed in light of the aforesaid circumstances.
37. The Defence submits that the current restrictions to the Accused's communications are more than adequate safeguards against any concerns to achieve the objectives sought and no further restrictions can be justified. On the contrary, and in light of the circumstances of the present case, they would disproportionately affect his right to privacy and family life.
38. The Defence will turn to address the requested restrictions:
39. *Active monitoring of the Accused's communications:* In light of the above circumstances, the Defence reiterates that no valid reason has been put forward to justify the proposed measures with such far-reaching consequences on the Accused's right to privacy and protection of his family life (resulting, *inter alia*, into the suspension of *all* private visits of the Accused). The proposed measure is neither strictly necessary nor proportionate, and the request to impose it should be rejected.
40. In the alternative, should the Trial Panel be inclined to impose an active monitoring regime, the Defence requests that the Accused's communications



with his family are excluded from its scope. This would ensure some privacy in the Accused's communications with his family.

41. In addition, the Defence further requests that any active monitoring does not involve the use of visible devices (e.g. microphone or recording device) and does not take place in a hostile and humiliating environment, which would be the case should the physical presence of a Detention Officer be required. The Defence reiterates the need for use of the least intrusive and most discreet measures.
42. *Pre-approved list of contacts for communications:* For the same reasons, this proposed measure is unwarranted. The Accused's communications have been passively monitored for nearly 20 months without raising any reason as to why such communications must be restricted. The Defence invites the Trial Panel to acknowledge the unnecessary and disproportionate nature of this measure. In the alternative, should this measure be adopted, the Defence requests the Trial Panel to order that the list of contacts indicated in Annex 1 be included in any pre-approved list.
43. *Order to the Accused not to divulge any confidential information:* This is another entirely unnecessary measure. The Accused has aptly demonstrated his full commitment to the rules concerning the confidentiality of information throughout the proceedings.

#### **IV. CLASSIFICATION**

44. Pursuant to Rule 82(3) and 82(4) of the Rules, the present Response is filed confidentially as it relates to confidential filings.

#### **V. RELIEF REQUESTED**

45. For the above reasons, the Defence respectfully requests the Trial Panel to reject the Request.

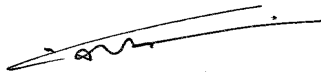
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Respectfully submitted,



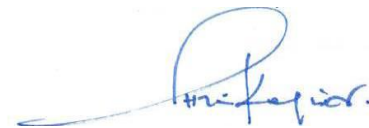
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**Jean-Louis Gilissen**  
**Specialist Defence Counsel**



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**Hédi Aouini**  
**Defence Co-Counsel**



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**Leto Cariolou**  
**Defence Co-Counsel**

Wednesday, 18 January 2023

The Hague, the Netherlands