



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA 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: Dr Fidelma Donlon

Filed by: Dr Fidelma Donlon

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**Public Redacted Version of “Registry Submissions Pursuant to Trial Panel I’s
Order (F00136)”, filing F00146, dated 1 July 2021**

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I. INTRODUCTION

1. Pursuant to the Order¹ for submissions on the request by the Specialist Prosecutor's Office ('SPO') for segregation and other measures, the Registrar makes the following submissions to Trial Panel I ('the Panel') on the feasibility of the measures requested by the SPO and the other relevant issues and considerations specified in the Order.²

II. PROCEDURAL HISTORY

2. On 11 June 2021, the SPO submitted a request ('Request')³ to the Panel to order the segregation of Mr Salih Mustafa ('the Accused') from each of the accused in cases KSC-BC-2020-06 ('Case 06') and KSC-BC-2020-07 ('Case 07'), starting the day prior to disclosure to the Accused of the identity of the first witness(es) in this case, and for as long as the risks identified in the Request persist; the active monitoring of the Accused's non-privileged communications over the same period; and any other measures that may be identified as necessary to mitigate the risks identified in the Request. The SPO also requested the Panel to order the Accused not to divulge confidential information to persons outside of his Defence team.

3. In the Request, the SPO submits that once the Accused receives the un-redacted statements of SPO witnesses, there is a concrete risk that the Accused could reveal confidential information to the accused in other cases pending before the Specialist Chambers ('SC'), "thereby frustrating protective measures ordered in those cases, creating a risk to the safety of witnesses, and jeopardising the integrity of those other proceedings".⁴

¹ 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 ('Order').

² Order, para. 5.

³ F00133, Prosecution's request for segregation and other measures, 11 June 2021, confidential and *ex parte*. A confidential redacted version was issued on 14 June 2021 (F00133/CONF/RED) ('Request').

⁴ Request, paras 1, 6-8; *see also* Order, paras 1-2.

4. Without prejudice to any future decision on the Request, the Panel ordered the Registrar to file 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.⁵

III. APPLICABLE LAW

5. Pursuant to Rule 56(1) of the Rules, Detainees shall at all times remain under the authority of the SC.

6. Pursuant to Articles 3(5), 34(12) and 41(7) of the Law⁶ and Rule 23(7) of the Rules,⁷ the Registrar is responsible for managing and administering the detention function and facilities of the SC. More detailed provisions related to the manner through which the Registrar exercises her responsibilities for managing and administering the detention facilities are set forth in the Rules of Detention,⁸ and in related practice directions and instructions.⁹ [REDACTED].¹⁰

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 Detainee. The Rules of Detention, and any practice directions or

⁵ Order, paras 5-6.

⁶ Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

⁷ Rules of Procedure and Evidence Before the Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules').

⁸ Rules of Detention, KSC-BD-08-Rev1, 23 September 2020, public. Unless otherwise indicated, all references to 'Detention Rule' are to the Rules of Detention.

⁹ [REDACTED].

¹⁰ [REDACTED].

instructions adopted thereunder, do not affect and are subject to any order or decision of the Panel pursuant to Rule 56(6) of the Rules.

IV. SUBMISSIONS

8. In order to protect the safety of witnesses and the integrity of proceedings before the SC, the SPO submits that it is necessary to adopt proportionate, feasible, and effective measures to mitigate the risk that the Accused could reveal confidential information to the accused in other cases pending before the SC. Specifically, the SPO proposes the segregation of the Accused from each of the accused in Case 06 and Case 07 and the active monitoring of the Accused's non-privileged communications. Each of those restrictions is requested by the SPO to apply from the day before scheduled disclosure to the Accused of the identity of protected witnesses in this case.¹¹

9. The Registrar, advised by the Chief Detention Officer and the Head of the Security and Safety Unit of the Registry, has conducted a thorough analysis of the feasibility of the measures requested by the SPO, and of any additional or alternative measures to address the risks the SPO has identified. Elements of this analysis have included an examination of maintaining good order and security in the Detention Facilities, safeguarding the rights of the Accused, [REDACTED], and [REDACTED].

10. In analysing all of the available options, the SC's legal obligations and the security of a SC-operated facility are decisive factors. [REDACTED]. [REDACTED]¹² [REDACTED]. [REDACTED].

11. Additionally, it is noted that the SPO has requested that the Panel adopt proportionate, feasible, and effective measures to mitigate, "to the fullest possible extent", the specific risk that the Accused will reveal the identity of the SPO witnesses against him to the accused in Case 06 and Case 07.¹³ The danger of unauthorised

¹¹ Request, para. 1.

¹² [REDACTED].

¹³ Request, paras 10-11.

disclosure, in the SPO's view, arises from "the Accused's cohabitation with the accused in Cases 06 and 07".¹⁴ [REDACTED]. [REDACTED].

12. As discussed in more detail below, should the Panel deem it necessary and proportionate, segregation [REDACTED], paired with an all-encompassing communications monitoring regime, can be implemented.¹⁵ In accordance with the Rules of Detention, the manner and method of executing any segregation order would ensure: the continued application and protection of the Accused's individual rights while in detention; that the Accused would be detained in conditions that reflect the overriding requirements of humane treatment and respect for his human dignity, safety, and security; that the conditions of detention and/or the treatment of the Accused do not differ when he is in segregation except for those conditions that would interfere with or defeat the aims of segregation; and that the Accused is provided with an opportunity for meaningful human contact for more than two hours per day, at a minimum.¹⁶

A. SEGREGATION

1. Feasibility of measures, resources, and time required for implementation

13. The Detention Facilities of the SC are located within [REDACTED] the Host-State prison, PI Haaglanden. The Detention Facilities are managed by the SC's Detention Management Unit ('DMU') [REDACTED]. [REDACTED]. [REDACTED].

14. The Registrar notes that the SPO has requested specific restrictions to mitigate the risk that the Accused could reveal the identity of the SPO witnesses against him to the accused in Case 06 and Case 07, thereby frustrating the protective measures ordered in those cases, creating a risk to the safety of those witnesses, and jeopardising the integrity of those proceedings.¹⁷ Accordingly, as requested by the Panel, the

¹⁴ Request, para. 10.

¹⁵ Such a regime would not apply to privileged communications with Counsel.

¹⁶ Detention Rules 1(2), 42(1) and 43(2).

¹⁷ Request, paras 6, 10. *See also* above, para. 11.

Registrar has thoroughly analysed the possible methods of segregating the Accused from each of the accused in Case 06 and Case 07, including segregating the Accused:

- a. [REDACTED].
- b. [REDACTED]; and
- c. [REDACTED].

(a) [REDACTED]

15. [REDACTED]. Should the Panel deem it necessary and proportionate to order the segregation of the Accused from other Detainees, the Accused could be fully segregated [REDACTED] from the accused in Case 06 and 07, or in all other cases pending before the SC, [REDACTED].

16. [REDACTED]. [REDACTED].

17. [REDACTED]. [REDACTED]. [REDACTED]. Video-conference facilities would also be available [REDACTED], should the Accused wish to attend proceedings via video-conference, with the authorisation of the Panel.

18. In addition, [REDACTED] would be equipped with facilities for privileged telephone calls with Counsel. Telephones for the purpose of making non-privileged outgoing calls would also be available to the Accused on a continuous basis throughout the day [REDACTED].

19. In-person visits (both privileged and non-privileged) would occur in the regular visiting areas [REDACTED], which would, subject to the Panel's order, not be accessible to other Detainees during that time. In-person visits with the Accused would be arranged so that there is no possibility of contact with other Detainees during transit to and from in-person visits.

20. Facilities for storage of the Accused's documents (both privileged and non-privileged) would be available [REDACTED], [REDACTED].

21. [REDACTED]. At certain times of day, the Accused would also be able to make use of other common areas [REDACTED], such as sports facilities (both indoor and

outdoor), exercise rooms, as well as the library and spiritual room, in the company of Detention Officers. The Accused would also have access to additional services, [REDACTED].

22. In accordance with the Rules of Detention, special attention would be paid to ensuring that the Accused has an opportunity for meaningful human contact for more than two hours per day through a combination of different avenues and activities.¹⁸

23. The Accused would be visited daily by the Chief Detention Officer or a Detention Officer acting on his behalf.¹⁹ [REDACTED].²⁰

24. The Accused would also be visited by the Medical Officer. Specifically, the Rules of Detention require the Medical Officer to regularly examine any Detainee in segregation, including within twelve hours following implementation of any segregation order²¹ and thereafter as often as required, but at least weekly.²² Should segregation of the Accused be ordered by the Panel, special attention would be paid to ensuring that the Medical Officer and other medical staff regularly visit the Accused in segregation.

25. Should the Medical Officer determine that continued segregation will be harmful to the physical or mental health of a Detainee, the Rules of Detention provide that the decision to segregate would then be terminated.²³ Should the Medical Officer make such a determination, the Registry would immediately bring such information to the Panel's attention.

26. In terms of time and resources needed for implementing segregation of the Accused [REDACTED], should the Panel so order, [REDACTED] the Registry would be able to implement the order on short notice. [REDACTED].

¹⁸ Detention Rule 42(1).

¹⁹ Ibid.

²⁰ See above, para. 11.

²¹ Detention Rule 43(5).

²² Detention Rule 44.

²³ Detention Rule 45.

27. Noting that, under the Rules of Detention, segregation may not be ordered by the Registrar for a period exceeding 30 calendar days at a time²⁴ and that such measure should cease as soon as the risk justifying it ceases to exist,²⁵ the Registrar would respectfully request that, in the event the Panel orders the restriction, the Panel also indicates a time frame for the applicability of any segregation order and/or its review.

(b) Alternative segregation options

28. In terms of alternative options, as described above, the Registrar has analysed the feasibility and effectiveness of segregation [REDACTED]. It is the assessment of the Registry that these options would provide a lower level of mitigation of the risk of unauthorised disclosure [REDACTED].

(i) Segregation [REDACTED]

29. Were the Accused to be segregated [REDACTED]. [REDACTED].

30. As noted earlier,²⁶ were the Accused to be segregated [REDACTED].

(ii) Segregation [REDACTED]

31. As noted above,²⁷ segregating the Accused [REDACTED] would also pose feasibility and effectiveness challenges, [REDACTED].

(iii) Summary of alternative options

32. In sum, the other segregation options considered by the Registrar are assessed as being less secure, feasible and effective [REDACTED]. [REDACTED].

2. Other relevant issues and considerations

²⁴ Detention Rule 43(6).

²⁵ Detention Rule 45.

²⁶ See above, para. 11.

²⁷ See above, para. 10.

33. In addition to segregation from the accused in Case 06 and Case 07, the SPO also requests the active monitoring of the Accused's non-privileged communications.²⁸ [REDACTED].

34. The effectiveness of segregation as a means of preventing unauthorised disclosure also depends upon whether other measures are in place to mitigate the risk of disclosure, to the fullest extent possible, through the different modes of communication and forms of contact that are available to the Accused during segregation. The feasibility of an all-encompassing communication monitoring regime is discussed in detail below.

B. MONITORING

1. Feasibility of measures, resources, and time required for implementation

35. This section provides additional information on the capabilities and options for monitoring a Detainee's non-privileged telephone conversations, visits (both video and in-person), and correspondence. In terms of time and resources needed for implementing the below measures, should the Panel order active monitoring, the Registry would be able to implement the order [REDACTED]. [REDACTED]. [REDACTED].

(a) Telephone calls

36. The Chief Detention Officer may place reasonable limits on the timing, quantity, and duration of non-privileged telephone calls based on the daily schedule of the Detention Facilities and the availability of telephone facilities. [REDACTED].

37. Currently, pursuant to Article 17 of the Practice Direction on Visits and Communications, all telephone conversations of Detainees on the non-privileged telephone line are passively monitored.²⁹

²⁸ Request, para. 16.

²⁹ 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

38. [REDACTED]. Active monitoring would involve DMU staff *simultaneously listening* (in real-time) to all telephone conversations of the Accused. Where necessary, a specific call could be terminated immediately (or interrupted) if there is reason to believe the communication is in breach of the Panel's order.

39. The system employed for passive monitoring would also continue, thereby automatically recording any non-privileged telephone conversations, including those being actively monitored, should further review be considered necessary by the Panel.

40. Active monitoring could be implemented on specifically designated calls, for a percentage of calls, or on all calls. Should the Panel order the active monitoring of all of the Accused's telephone conversations, it would be feasible for the DMU to implement simultaneous listening as follows:

- a. [REDACTED];
- b. the language used during the call would be limited to one of the 3 working languages of the SC, if the Panel so orders;
- c. the Detainee would be asked to inform the Chief Detention Officer or his delegate the day prior to the call of the language to be used during the call;
- d. the call would be terminated immediately if the Detainee used a language other than the language previously notified to the Chief Detention Officer or if it was perceived by DMU staff that the Detainee was using coded language, if the Panel so orders;
- e. [REDACTED], and the call would be terminated immediately if it was assessed that this was necessary to achieve the unauthorised disclosure of confidential information, if so ordered by the Panel;³⁰

extended. See Practice Direction on Visits and Communications, KSC-BD-09-Rev1, 23 September 2020, art. 17(1) ('PD on Visits and Communications'). In order to ensure safety, security, and good order in the Detention Facilities, the Chief Detention Officer (or his delegate) listens to up to 10 percent of the digitally recorded telephone conversations in the Detention Facilities each week, which are selected randomly. Id., art. 17(3).

³⁰ Compare PD on Visits and Communications, art. 8.

- f. the recording of the conversation could be subsequently reviewed for unauthorised disclosure if ordered by the Panel;³¹
- g. the recording of the conversation would be retained for a period of 8 months,³² unless otherwise ordered by the Panel; and
- h. any conversations of concern would be promptly brought to the attention of the Panel, together with a transcription³³ of only the relevant portion of the conversation that caused concern, if so ordered by the Panel.

41. As described above, non-privileged telephone conversations that are actively monitored would also be automatically recorded as part of the system employed for passive monitoring, should further review be considered necessary by the Panel.

42. It should nevertheless be noted that the Practice Direction on Visits and Communications does not allow the Chief Detention Officer (or his delegate) any latitude to listen to more than 10 percent of telephone calls digitally recorded each week (selected randomly), unless a specific restriction is imposed by the Registrar, or unless ordered by a Panel.³⁴ The same applies to transcriptions of those recordings.³⁵ Should further review of the Accused's recorded telephone calls be required (*after-the-fact listening*),³⁶ or should a transcription of parts of any recordings be needed for a report to the Panel, this could be implemented by the Registry if so ordered by the Panel.

43. Should the Panel order active monitoring of the Accused's non-privileged communications, the Registrar would also respectfully request that the Panel indicate a time frame for the applicability of any active monitoring and/or its review, as well as grounds for termination of telephone calls that are actively monitored.

³¹ See below, paras. 41-42.

³² Detention Rule, 64(1); PD on Visits and Communications, para. 2.

³³ See below, paras. 41-42.

³⁴ PD on Visits and Communications, art. 17(3)-(4).

³⁵ Id., art. 17(4).

³⁶ For example, further review may be required if the DMU staff actively monitoring a telephone conversation are unsure if an unauthorized disclosure has occurred.

(b) Visits

44. Visits, whether in-person or over video, are as a rule supervised in that they are conducted within the sight and general hearing of Detention Officers, [REDACTED].

45. Both in-person and video visits are limited to 10 visiting days per month in total. As part of those 10 visiting days, Detainees are given the opportunity for a minimum of one 45-minute video visit with Close Relatives per week.³⁷ [REDACTED]. The Chief Detention Officer may limit the timing, quantity, and duration of video visits, based on the daily schedule of the Detention Facilities and the availability of staff and facilities or equipment.

46. Similar to telephone calls, video visits could be actively monitored with simultaneous listening by DMU staff, [REDACTED] and with the ability to immediately terminate the video visit.

47. [REDACTED]. [REDACTED], the platform used for video visits could be used to record any non-privileged video visits, should further review be considered necessary by the Panel.

48. Should the Panel order the active monitoring of the Accused's video visits, it would be feasible for the DMU to implement simultaneous listening of non-privileged video visits as follows:

- a. [REDACTED];³⁸
- b. the language used during the call would be limited to one of the 3 working languages of the SC, if the Panel so orders;
- c. the Detainee would be asked to inform the Chief Detention Officer or his delegate the day prior to the video visit of the language to be used during the visit;
- d. the video visit would be terminated immediately if the Detainee used a language other than the language previously notified to the Chief Detention

³⁷ See Registry Instruction on Video Visits, KSC-BD-34, 23 September 2020, sect. 7(8).

³⁸ [REDACTED]. [REDACTED]. [REDACTED].

Officer or if it was perceived by DMU staff that the Detainee was using coded language, if the Panel so orders;

- e. [REDACTED], and the visit would be terminated immediately if it was assessed that this was necessary to achieve the unauthorised disclosure of confidential information, if so ordered by the Panel;³⁹
- f. the video visit would not be recorded unless otherwise ordered by the Panel;
- g. any recording of the video visit, if applicable, could be subsequently reviewed for unauthorised disclosure and/or a relevant portion transcribed, if so ordered by the Panel;
- h. any recording of the video visit, if applicable, would be retained for a period of 8 months,⁴⁰ unless otherwise ordered by the Panel; and
- i. any video visits of concern would be promptly brought to the attention of the Panel, together with a transcription of the relevant portion of the conversation that caused concern, if so ordered by the Panel.

49. Should the Panel order the active monitoring of the Accused's in-person visits, it would be feasible for the DMU to implement simultaneous listening of in-person visits in a similar way as with video visits. [REDACTED].⁴¹ The in-person visit would be conducted within the sight of DMU staff and, [REDACTED] within audible-hearing distance of the Accused and his visitor(s) for the purpose of simultaneous listening. The number of visiting days (10 days in any 30-day period) would continue to follow the normal visiting regime in the Detention Facilities applicable to in-person visits.⁴²

³⁹ Compare PD on Visits and Communications, art. 8.

⁴⁰ It is proposed that the standard retention schedule for digital recordings be applied to recordings of video visits. See Detention Rule, 64(1); PD on Visits and Communications, para. 2.

⁴¹ [REDACTED]. [REDACTED]. [REDACTED].

⁴² DMU Instruction on Visiting Procedures, KSC-BD-33, 23 September 2020, sect. 11.

50. Should the Panel order active monitoring of in-person visits, it is recommended that any such order also address any suspension of Private Visits, which are by definition conducted outside of the sight and hearing of Detention Officers.⁴³

51. As noted above, the Registrar would also respectfully request that the Panel indicate a time frame for the applicability of any active monitoring and/or its review, as well as grounds for termination of visits that are actively monitored.

(c) Correspondence

52. Currently, all correspondence is subjected to the security controls of Detention Facilities.⁴⁴ Correspondence with Detainees is opened, inspected and read by the Chief Detention Officer, as necessary in the high security environment of the 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.⁴⁵

53. The current practice is effective, and the only change required to achieve the objective would be an order by the Panel to open, inspect and read all correspondence of the Accused with the specific, intended objective in mind, *i.e.*, to review for unauthorised disclosure of confidential information. [REDACTED]. Incoming and outgoing correspondence would not be copied or retained unless the correspondence contains prohibited content, unless otherwise ordered by the Panel.

2. Other relevant issues and considerations

54. Depending on the level of risk assessed by the Panel, the following additional measures could be ordered: 1) limiting visits or calls to pre-approved people/phone numbers/addresses; 2) forbidding the introduction of other parties through a third

⁴³ PD on Visits and Communications, art. 24.

⁴⁴ PD on Visits and Communications, art. 19; Practice Direction on Counsel Visits and Communications, KSC-BD-10-Rev1, 23 September 2020 ('PD on Counsel Visits and Communications'), art. 13(3).

⁴⁵ PD on Visits and Communications, arts. 18(4), 19(1), 19(5); PD on Counsel Visits and Communications, art. 13(1).

phone line; 3) forbidding the use of coded language; 4) forbidding case-related conversation. Following any breach of such order, the Panel could also decide to further 5) exclude from any approved caller list individuals with whom any condition had previously been violated; and/or 6) suspend all non-privileged phone calls.⁴⁶

V. CONCLUSION

55. Should the Panel deem it necessary and proportionate to order the segregation of the Accused from other Detainees and/or other measures such as the active monitoring of the Accused's visits and communications pursuant to Rule 56 of the Rules, the Registry stands ready to implement those measures in line with the Panel's order. It is feasible to implement a range of measures, if deemed necessary by the Panel, and the Registrar would respectfully request that the Panel indicate a time frame for the applicability of any such measures and/or their review.

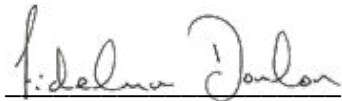
56. Should the Panel have any questions in relation to the feasibility of the measures requested by the SPO or in relation to this submission, the Registrar stands ready to provide any additional information or clarifications required.

⁴⁶ Similar measures have been applied in several cases at the ICC. *See, e.g., 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; *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; *Ongwen*, Decision concerning the restriction of communications of Dominic Ongwen, [ICC-02/04-01/15-283](#), 3 August 2015, p. 8.

VI. CLASSIFICATION

57. This filing is submitted as confidential pursuant to Rule 82(4) of the Rules.

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A handwritten signature in cursive script, reading "Fidelma Donlon", written in black ink on a white background. The signature is positioned above a horizontal line.

Dr Fidelma Donlon

Registrar

Tuesday, 31 January 2023

At The Hague, the Netherlands