

In: KSC-BC-2020-06
The Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: **Trial Panel II**
Judge Charles L. Smith, III, Presiding
Judge Christoph Barthe
Judge Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi

Date: 22 November 2023

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Classification: Public

Public Redacted Version of ‘Thaçi Defence Response to Prosecution urgent request for modification of detention conditions (F01933)’

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I. INTRODUCTION

1. The Defence for Mr Hashim Thaçi (“Defence”) has started, but not completed, its review of the audio material disclosed by the SPO on 20 November 2023. It is not yet in a position to verify the accuracy of any of the transcription or translation of the material annexed to the SPO Request.¹ Nor has the Defence been able to take the instructions that would be necessary to respond to the substance of the SPO allegations. While the Defence urgently sought [REDACTED],² these have not been made available to the Defence at the time of filing the present submissions.³ In short, the limited information provided to the Defence has raised far more questions than it has answered.

2. Within these limitations, the Defence makes the following submissions in response to the SPO Request, while reserving its right to make further submissions upon further receipt and review of relevant material.

II. CLASSIFICATION

3. These submissions are filed confidentially pursuant to Rule 82, as they respond to filings with the same classification. A public redacted version will be filed in due course.

III. PROCEDURAL HISTORY

4. On 17 November 2023, the SPO submitted an urgent request for the Trial Panel

¹ KSC-BC-2020-06/F01933, Specialist Prosecutor, *Prosecution urgent request for modification of detention conditions*, 17 November 2023, confidential (“SPO Request”), Annex 4.

² [REDACTED].

³ [REDACTED].

to modify the conditions of detention for Mr Thaçi, Mr Veseli and Mr Selimi.⁴ It was alleged that the three accused had been “revealing the identities of protected witnesses and/or disseminating the content of confidential testimony to persons visiting them”, as well as “issuing of instructions on how witnesses should testify and planned approaches to witnesses.”⁵

5. The same day,⁶ the Trial Panel issued a decision finding that there was a real risk of confidential information being disclosed to individuals not entitled to receive it, so interim measures were necessary while the Panel decided the merits of the SPO Request.⁷ The Panel therefore ordered the Registrar to temporarily restrict the non-privileged contacts of Mr Thaçi, Mr Veseli and Mr Selimi, such that all visits were prohibited, and any other request for contact with a non-privileged person must be pre-authorised by the Registrar and will be actively monitored.⁸ The Panel also ordered the Registry to file submissions on the SPO Request by 12.00pm on 21 November 2023, and for the Defence to respond to the SPO Request and the Registry’s submissions by 4.00pm on 22 November 2023.⁹

6. On 18 November 2023, the Registrar filed a report regarding the implementation of the Decision.¹⁰ [REDACTED].¹¹ [REDACTED].¹²

⁴ SPO Request, paras. 2, 53.

⁵ SPO Request, para. 1.

⁶ In fact, the decision was issued less than five hours after the SPO Request was notified to the parties.

⁷ KSC-BC-2020-06/F01936, Trial Panel II, *Decision on Prosecution Urgent Request for Modification of Detention Conditions*, 17 November 2023, confidential (“Decision”), para. 4.

⁸ Decision, para. 5.

⁹ Decision, paras. 9-10, 11(d).

¹⁰ KSC-BC-2020-06/F01937, Registrar, *Report on the Implementation of Trial Panel II’s Decision (F01936)*, 18 November 2023, confidential (“Registrar’s Report”).

¹¹ Registrar’s Report, paras. 6-7.

¹² Registrar’s Report, paras. 13-21.

7. On 20 November 2023, the defence teams for Mr Thaçi, Mr Veseli and Mr Selimi filed a joint request for [REDACTED].¹³ Following instructions from the Trial Panel, [REDACTED].¹⁴

8. On 21 November 2023, the Registry filed submissions regarding the feasibility of the measures in the SPO Request.¹⁵ [REDACTED].¹⁶

9. [REDACTED].¹⁷

IV. SUBMISSIONS

A. THE NEED TO PROTECT THE INTEGRITY OF THE PRESENT PROCEEDINGS

10. In investigating the allegations cited in the SPO Request, the SPO was bound to act with due care to ensure that its investigations would not affect the right of an accused to a fair trial at a later stage.¹⁸ This Trial Panel has previously held that the general authorities and responsibilities of the SPO set out in the Rules¹⁹ provide “an illustrative list of steps and measures which the SPO can validly adopt to fulfil its mandate as long as it complies with the fundamental rights of the Accused and maintains the integrity of the proceedings.”²⁰

11. The limited information provided to the Defence raises immediate questions as regards the care that has been taken to preserve and safeguard the integrity of the

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ KSC-BC-2020-06/F01943, Registrar, *Registry's Submissions on the Prosecution's Urgent Request for Modification of Detention Conditions*, 21 November 2023, confidential (“Registry Submissions”).

¹⁶ Registry Submissions, para. 54.

¹⁷ [REDACTED].

¹⁸ *See also*, Article 35 of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (“KSC Law”).

¹⁹ Referring particularly to Rules 35 and 38 of the KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, 2 June 2020 (“Rules”).

²⁰ KSC-BC-2020-06/F01424, Trial Panel II, *Decision on Thaçi Defence Motion Regarding Prosecution Agreements on Statement of Limited Use*, 5 April 2023, public, para. 16.

current proceedings. Judicial authorisation for the covert audio-recording was obtained from a Single Judge.²¹ The application for variation of the detention conditions, by contrast, was brought before the Trial Panel. In so doing, the SPO provided the Trial Panel with hundreds of pages of covertly-recorded material, containing a wealth of unproven allegations that directly concern the credibility of evidence in this case.²² The SPO has then asked the Trial Panel to accept its submissions on this material, which are necessarily speculative and imbued throughout with the SPO's own interpretations of objectively vague and often incomprehensible language.

12. There is no doubt that prejudice arises from the SPO placing specific information concerning unproven allegations before the Trial Panel. The question then becomes whether, to a reasonable observer, this information could be seen to contaminate the impartiality of the Trial Panel, when no measures were taken to preserve Mr Thaçi's rights. Put another way, could a reasonable observer conclude that there was a deliberate effort on the part of the SPO to taint the credibility of exculpatory evidence, in a manner that would inevitably impact on the objective appearance of the Judges' ability to assess the credibility of evidence in a fair manner.

13. The importance of this question is reinforced by the absence of a reasonable basis for the SPO to have annexed over **400 pages of transcripts** of covert recordings to the SPO Request, when the majority of this material has no relevance to the SPO Request itself. This inclusion of hundreds of pages of irrelevant material also gives rise to an impression that the SPO has sought to create a litigation advantage in these proceedings through the filing of the SPO Request before the Trial Panel.

²¹ SPO Request, para. 6 & fn. 9.

²² See, for example, SPO Request, Annex 4.

14. There are also obvious questions which will have to be answered about the timing of the SPO Request. The first disclosed recording is from [REDACTED].²³ The SPO is claiming to have been in possession of information relevant to the alleged conduct if not on that date, at some point afterwards. Rather than taking steps to halt the alleged improper conduct or interference, a decision was taken by the SPO to, instead, prioritise the ongoing investigation of this conduct. This prioritisation gives rise to more overarching questions as to compliance with the SPO's obligations under the Protocol²⁴ and the choices made as regards the timing of the SPO's investigative steps. As such, the Defence reserves its right to make further submissions on the above questions as more information comes to light.

B. IN-PERSON FAMILY VISITS

15. The SPO is seeking an order that “no non-privileged in-person visits be permitted, and that such contacts only take place via zoom or telephone”.²⁵ This is, in effect, a blanket prohibition on in-person contact with family members for an indefinite period. It is therefore a disproportionate interference with the right to family life, and is not justified by the furtherance of a legitimate aim.

16. On 20 November 2023, the SPO disclosed audio recordings of the visits between Mr Thaçi and [REDACTED].²⁶ The Defence has made best efforts to review these audio recordings in the time since their disclosure. This preliminary review has revealed no indication of wrongdoing on the part of [REDACTED], reinforced by the

²³ See index of audio recordings provided to the Defence on 20 November 2023: 117089-117091, p. 117090.

²⁴ KSC-BC-2020-06/F00854, Pre-Trial Judge, *Decision on Framework for the Handling of Confidential Information During Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant*, 24 June 2022, public (“Contact Decision”), and see pages 85-91 containing the ‘Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant’ (“Protocol”).

²⁵ SPO Request, para. 2(d).

²⁶ 117089-117091, p. 117090, referring to ERNs 113418 and 115629.

absence of any link being offered by the SPO in the Request between [REDACTED] and the allegations in question. As such, a blanket prohibition on in-person family contact is disproportionate, and not directed towards the legitimate aim of witness protection.

17. As has been recognised, “contact with the outside world and visits are imperative for a detained person’s well-being”.²⁷ The right to family life, being the right of all individuals to maintain and fully enjoy their family relations, reflects the universal recognition of the family as the fundamental group unit of society, which is entitled to protection and assistance.²⁸ Her Honour Judge Luz del Carmen Ibáñez Carranza has previously held that “a detained person’s right to family life is a fundamental human right which is well-established and articulated in international human rights law” and, as such, it “remains the Court’s obligation to protect the right to family life” and ensure that such right is “not devoid of any meaningful content.”²⁹

18. Relevantly, a wealth of studies and literature, including those conducted during and after the COVID-19 pandemic, have concluded that “video-conferencing and other forms of remote communication are not an adequate substitute for in-person visits.”³⁰ Suspending face-to-face visits, which removed all forms of physicality, were found to disrupt family connections and reduce the recognised benefits of the

²⁷ ICC, *Prosecutor v. Al Hassan*, [ICC-01/12-01/18-557-Red3](#), Trial Chamber X, Decision on Mr Al Hassan’s restrictions and accesses while in detention, 21 January 2020 (“*Al Hassan* January Decision”), para. 10. See also *Prosecutor v. Al Hassan*, [ICC-01/12-01/18-871-Conf-Red4](#), Trial Chamber X, Decision on the Measures Restricting Mr. Al Hassan’s Contacts while in Detention, 11 June 2020 (“*Al Hassan* June Decision”), para. 15.

²⁸ Article 16(3), Universal Declaration of Human Rights.

²⁹ ICC, *Prosecutor v. Ntaganda*, [ICC-RoR220-02/21-6-Red](#), Presidency, Decision on the ‘Request for judicial review of “Decision on Mr Ntaganda’s Request for Review addressed to the Registrar received 14 April 2021”, 11 May 2021 (ICC-RoR220-02/21-1-Conf-Exp), 15 July 2021, (ICCRoR220-02/21-6-Conf-Exp), 18 October 2022, Partly dissenting opinion of Judge Luz del Carmen Ibáñez Carranza, para. 4.

³⁰ Andrea Huber, ‘Contact with the outside world’, University of Essex Human Rights Centre & Penal Reform International, 2016, available at: <https://cdn.penalreform.org/wp-content/uploads/2016/10/Chapter-3-Contact-with-the-outside-world-final.pdf>.

maintenance of detainees' family connections,³¹ and are particularly deficient in meeting the needs of a child/parent relationship.³²

19. For this reason, "[r]estrictions imposed on the contact of the accused person must be justified and proportionate, in accordance with internationally recognised human rights."³³ In effect, this is a balancing act, meaning that "contact restrictions must be necessary, proportionate to the legitimate aim pursued, and balanced against a suspect's right to private and family life".³⁴ The prohibition on in-person family visits is being sought by the SPO without any demonstrated link between this interference and a legitimate aim. Without any showing of a link between witness protection and the suspension of these visits, the prohibition on in-person contact between Mr Thaçi and [REDACTED] is punitive, arbitrary, and lacks a legal basis.

C. [REDACTED]

20. The SPO has requested that the non-privileged communications of the accused be limited to a "defined set of immediate family and consular officials".³⁵ The request for limitations on communication with consular officials, including prior screening of

³¹ S. Minson & C. Flynn, 'Symbiotic Harms of Imprisonment and the Effect on Children's Right to Family Life: Comparing the Impact of covid-19 Prison Visiting Restrictions in the UK and Australia' (2021) 29(2) *The International Journal of Children's Rights*, 305-325, available at https://brill.com/view/journals/chil/29/2/article-p305_305.xml?language=en.

³² OMCT, 'Breaking the Walls of Isolation: Restoring Contact with the Families in a World with COVID-19' in *COVID-19 and Detention Series: Impacts, Lessons And Urgent Actions* (Guidance Note No. 2, April 2022), available at: https://www.omct.org/site-resources/legacy/Guidance-Note_2_English.pdf; see also Key Finding 3 (pages 3-4) in Irish Penal Reform Trust, "'I am worried about the lasting impact this will have": The experiences of people with a family member in prison during COVID-19', available at: https://www.iprt.ie/site/assets/files/6775/results_of_families_of_prisoners_survey_final_web-1.pdf.

³³ *Al Hassan* January Decision, para. 10. See also *Al Hassan* June Decision, para. 15.

³⁴ ICC, *Prosecutor v. Yekatom & Ngaissona*, [ICC-01/14-01/18-413-Red2](#), Pre-Trial Chamber II, Decision Pursuant to Regulation 101 of the Regulations of the Court, 16 February 2021, para. 78. See also *Prosecutor v. Al Hassan*, [ICC-01/12-01/18-2498-Red](#), Trial Chamber X, Decision Reviewing the Measures Restricting Mr. Al Hassan's Contacts while in Detention, 3 July 2023, paras. 20-21.

³⁵ SPO Request, para. 2(b).

attendees, active monitoring of visits, and limitations on import-export and written communications,³⁶ is alleged to be justified by evidence of conduct by [REDACTED].³⁷

21. In relation to [REDACTED], the SPO states that “there is evidence that [REDACTED] were closely involved in the implementation of instructions from THAÇI and VESELI regarding KSC proceedings”.³⁸ This allegation misrepresents the circumstances existing at the time, and lacks foundation in fact, unjustifiably damaging the reputation of [REDACTED].

22. As the SPO acknowledges, [REDACTED]. For much of that time, Mr Thaçi was the President of Kosovo, and Mr Veseli was the Speaker of the Parliament. As such, [REDACTED]. Moreover, the SPO does not allege that [REDACTED] engaged in any improper conduct. Similarly, there has been no suggestion by the SPO of improper conduct by [REDACTED]. In fact, [REDACTED]. At no point during this process, or at any time since, has there been any suggestion of improper conduct while [REDACTED].

23. The SPO also states that there is evidence Mr Thaçi and his interlocutors involved in interference efforts are attempting to draw on prior connections within [REDACTED].³⁹ In support of this vague assertion, the SPO cites to two extracts from recorded conversations involving Mr Thaçi where [REDACTED] is mentioned in passing:⁴⁰ the first excerpt includes a discussion regarding [REDACTED],⁴¹ while in the second excerpt, Mr Thaçi [REDACTED].⁴² There is nothing in the content of the discussions, or the context surrounding them, that indicates any link with the current

³⁶ SPO Request, fns. 4 and 6.

³⁷ SPO Request, para. 43.

³⁸ SPO Request, para. 43.

³⁹ SPO Request, para. 43.

⁴⁰ SPO Request, fn. 68.

⁴¹ See Annex 4, 4.9 116083-TR-AT Part 1-ET, p. 91, line 11 to p. 92, line 5.

⁴² See Annex 4, 4.9 116083-TR-AT Part 1-ET, p. 115, line

proceedings, or warrants any suggestion that this represents an attempt to involve [REDACTED] in ‘interference attempts’. Instead the SPO is asking the Panel to draw significant, prejudicial, inferences from objectively innocuous conversations, in order to justify severe limitations.⁴³

24. The SPO has not provided any factual basis, grounded in either current or historical circumstances, justifying the proposed limitation on contact with [REDACTED]. There has been no allegation of actual improper conduct by [REDACTED], nor any evidence provided that would allow the Panel to conclude that [REDACTED] contact with Mr Thaçi would lead to ‘interference attempts’.

D. PRIVILEGED VISITS

25. The SPO does not allege any improper conduct by any member of the Thaçi Defence. There is therefore no justification for the SPO’s requested requirement that the Trial Panel must pre-authorise legal team members to accompany Counsel/Co-Counsel when visiting Mr Thaçi, which would place an undue burden on the Defence. Counsel and Co-Counsel regularly attend the UNDU or meet with Mr Thaçi together with: (i) Albanian-speaking members of the Defence team, in order to facilitate communication with Mr Thaçi; and (ii) other non-Counsel team members who play a central role in the preparation of the defence. These visits ensure the proceedings can keep moving at their current pace. Meetings with Mr Thaçi are often reactive, scheduled around a changing Court schedule, and would be significantly disrupted by the requirement of prior authorisation for attendees. While, of course, Counsel and Co-Counsel are present in meetings to supervise all exchanges, each member of the Thaçi Defence team has been vetted prior to appointment by the Registry. [REDACTED]. Any misconduct on behalf of any Defence team member would result

⁴³ [REDACTED].

in their removal from the Defence team,⁴⁴ with appropriate disciplinary or other sanctions.

26. The SPO submits that this additional requirement of Trial Panel clearance for UNDU visits is justified because [REDACTED].⁴⁵ Without more, this cannot impugn all non-Counsel members of all Defence teams. Nor does the cited exchange between Mr Veseli and a visitor on 6 October 2023, indicate any misconduct or breaches on the part of any Defence team member. In fact, it appears to indicate Mr Veseli's position that there is no need for any misconduct because the accused are adequately represented by competent counsel, who he describes elsewhere as very good and complementary to each other.⁴⁶ This is an equally reasonable interpretation of this inherently opaque exchange.

27. These examples cannot impugn, in a blanket manner, the professional integrity of Defence team members. Nor can they undermine the professional courtesy and respect which must still be considered to exist between the SPO, Defence teams, and the Trial Panel if the present trial is going to proceed. This professional respect cannot be reconciled with Defence team members having to repeatedly seek authorisation to be allowed to do their jobs. Nor is this additional restriction proportionate to the additional burdens placed on the Defence, or properly directed at a legitimate risk.

E. NON-PRIVILEGED COMMUNICATIONS

28. The SPO has asked the Trial Panel to order the active monitoring of all non-privileged communications in whatever form, "until the conclusion of the trial", and the preservation of such records "until the conclusion of the trial".⁴⁷ Given the

⁴⁴ KSC-BD-04-Rev1, Registry Practice Direction, Directive on Counsel, 28 April 2021, s. 18(7).

⁴⁵ SPO Request, para. 47.

⁴⁶ See Annex 4, 4.8 061023-130747-TR-ET, p. 5, lines 10-15.

⁴⁷ SPO Request, para. 2(c).

anticipated length of the proceedings in this case, a more proportionate response would be for the active monitoring to be ordered for an initial and set period of time, to be renewed by the Trial Panel as necessary. The Defence does not oppose, for example, the Registry suggestion for the preservation of recordings of video visits for eight months, being the standard retention schedule for digital recordings.⁴⁸

29. The SPO is also asking the Trial Panel to order that “the content of all non-privileged communications to/from the Three Accused be confined to matters unrelated to the evidence and witnesses in this case (regardless of the classification of such information as public or confidential)”.⁴⁹

30. The impact of lengthy pre-trial incarceration, in the absence of any additional restrictions and limitations, is already significant and severe. Contact and conversation with those in “the outside world” is recommended and important.⁵⁰ Restricting a detainees’ discussions to the point that they cannot discuss even publicly available information, is not directed at a legitimate aim, and is disproportionate. Regardless, even if this prohibition is put in place,⁵¹ the Defence seeks to clarify that, for example, this limitation should “not prevent the accused from expressing his general feelings about the present proceedings or discussing other aspects of his life at the Detention Centre”.⁵²

⁴⁸ Registry Submissions, para. 39(e), citing “Detention Rule, 64(1); PD on Visits and Communications, art 17(2)”.

⁴⁹ SPO Request, para. 2(g).

⁵⁰ ICC, *Prosecutor v. Al Hassan*, [ICC-01/12-01/18-550-Red3](#), “Registry Observations to Defence Request to Access Audio Files (ICC-01/12- 01/18-525-Conf-Exp) and the Prosecutor’s Application on Restrictions on Contact (ICC-01/12-01/18-505-Conf-Exp)” filed on 13 January 2020, ICC-01/12-01/18-550, 12 February 2020, para. 31.

⁵¹ SPO Request, para. 2(g).

⁵² ICC, *Prosecutor v. Said*, [ICC-01/14-01/21-31-Red](#), Single Judge, Public Redacted Version of ‘Decision on the “Prosecution’s Request for Extension of Contact Restrictions”’, 5 March 2021, ICC-01/14-01/21-31-Conf, 26 April 2022, para. 38.

V. CONCLUSION

31. On the basis of the above submissions, the Defence requests that the Trial Panel **REJECT** the SPO's request for an order to:

- (i) Prohibit in-person family visits;⁵³
- (ii) Restrict privileged visits to Counsel and Co-Counsel, requiring prior authorisation of other team members from the Trial Panel;⁵⁴
- (iii) Place any restrictions on [REDACTED];⁵⁵
- (iv) Impose active monitoring and preservation of records of non-privileged communication "until the end of the trial";⁵⁶ and
- (v) Prohibit non-privileged communication about public information concerning the proceedings.⁵⁷

[Word count: 3,876 words]

Respectfully submitted,



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Wednesday, 22 November 2023

At Tampa, United States

⁵³ SPO Request, para. 2(d).

⁵⁴ SPO Request, paras. 2(e), 47, 49.

⁵⁵ SPO Request, para. 2(b).

⁵⁶ SPO Request, para. 2(c).

⁵⁷ SPO Request, para. 2(g).