



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

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

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

Registrar: Dr Fidelma Donlon

Filed by: Dr Fidelma Donlon

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Public Redacted Version of “Corrected Version of Registry’s Submissions on the Prosecution’s Urgent Request for Modification of Detention Conditions”, filing F01943

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I. INTRODUCTION

1. Pursuant to the Order¹ for submissions on the request by the Specialist Prosecutor's Office ('SPO') for the urgent modification of detention conditions, the Registrar makes the following submissions to Trial Panel II ('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 17 November 2023, the SPO submitted an urgent request ('Request')³ to the Panel to order the segregation of Mr Hashim Thaçi, Mr Kadri Veseli and Mr Rexhep Selimi (the 'Three Accused') from all other current Detainees in the Specialist Chambers ('SC') Detention Facilities and to order certain restrictions on their visits and communications.⁴ Pending the Panel's ruling on the merits of the Request, the SPO also requested the immediate suspension of all non-privileged communications of the Three Accused on an interim, urgent basis.⁵

3. The SPO submits that the requested measures are necessary to address the concrete risk of: (a) unlawful attempts to interfere with witnesses and obstruct their testimony; (b) the dissemination from the Detention Facilities of protected witness information, including confidential testimony given in this case; and (c) further threats to the integrity of the proceedings.⁶ The SPO also submits that the requested measures are the least restrictive means to achieve the necessary objectives.⁷

¹ KSC-BC-2020-06, F01936, Trial Panel II, Decision on Prosecution Urgent Request for Modification of Detention Conditions, 17 November 2023, confidential ('Order').

² Order, para. 9, 11(d).

³ KSC-BC-2020-06, F01933, Specialist Prosecutor, Prosecution Urgent Request for Modification of Detention Conditions, 17 November 2023, confidential, with Annexes 1-5, confidential ('Request').

⁴ Request, paras 2, 36-50.

⁵ Request, para. 2(a).

⁶ Request, para. 3.

⁷ Request, para. 3.

4. On the same day, the Panel issued its Order on the Request.⁸ As an interim measure, the Panel ordered the Registrar to temporarily restrict the non-privileged contacts of the Three Accused until the Panel's final determination of the merits of the Request.⁹ To aid its decision-making, the Panel also ordered the Registry to file submissions on the Request by noon on Tuesday, 21 November 2023 and the Defence to respond by 4pm on Wednesday, 22 November 2023.

III. APPLICABLE LAW

5. Pursuant to Articles 3(5), 34(3), 34(12) and 41(7)-(9) of the Law¹⁰ and Rule 23(7) of the Rules,¹¹ 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,¹² as well as various practice directions and instructions, which govern the management and administration of the SC Detention Facilities.¹³ The Practice Directions on Visits and Communications¹⁴ and Counsel Visits and Communications,¹⁵ among others, form an integral part of the Rules of Detention.¹⁶

6. 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 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

⁸ See Order, fn. 1, above.

⁹ Order, paras 5-6, 11(a)-(c).

¹⁰ Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

¹¹ Rules of Procedure and Evidence Before the Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules').

¹² 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.

¹³ 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).

¹⁴ Practice Direction on Visits and Communications, KSC-BD-09-Rev1, 23 September 2020, public ('PD on Visits and Communications').

¹⁵ Practice Direction on Counsel Visits and Communications, KSC-BD-10-Rev1, 23 September 2020, public ('PD on Counsel Visits and Communications').

¹⁶ Detention Rule 63; see also Detention Rule 4(2).

Detention and Practice Directions rest reflect the overriding requirements of humane treatment and respect for human dignity, safety, and security.¹⁷

7. The Rules of Detention, the Practice Directions, and any instructions adopted or issued pursuant to Detention Rule 4,¹⁸ 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. The Panel ordered the Registry 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 it considers available, subject to the Panel's decision, to address the risks identified by the SPO; and (iv) any other issues it considers appropriate to raise in relation to the Request.¹⁹

9. A thorough analysis has been conducted of the feasibility of the measures requested by the SPO (including available resources and the time required for implementation), as well as the other matters requested by the Panel in its Order for submissions.

A. SEPARATION

1. Feasibility of measures

10. The SPO has requested the Panel to order the segregation of the Three Accused from all other current Detainees in the Detention Facilities.²⁰ The crux of the SPO's request is that there be physical separation between the Three Accused and all other Detainees in the Detention Facilities.²¹

¹⁷ Detention Rule 1(2).

¹⁸ Detention Rule 4(2), (6).

¹⁹ Order, para. 9.

²⁰ Request, para. 2(h).

²¹ Cf. Detention Rule 46 (concerning separation in communal areas).

11. The Detention Facilities 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].²²

12. Should the Panel deem it necessary and proportionate to order the separation of the Three Accused from all other Detainees, the Three Accused could be accommodated [REDACTED], physically separated from all other Detainees [REDACTED]. This would involve [REDACTED].

13. [REDACTED]. At different times of day from other Detainees, the Three 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.

14. Telephone facilities for both privileged and non-privileged calls are available [REDACTED]. In addition, visiting facilities would be organized and utilised to ensure that physical separation is maintained.

2. Resources and time required for implementation

15. In terms of the time and resources needed for implementing separation of the Three Accused, should the Panel so order, the Registry would be able to implement the order within [REDACTED]. In order for the order to be technically implemented in a safe and secure manner, and to have the resources available for implementation, both privileged and non-privileged visits in the Detention Facilities may need to be cancelled during this period.²³

16. Given that [REDACTED], at this time, to implement an order for the separation of the Three Accused from other Detainees.

²² [REDACTED].

²³ See PD on Visits and Communications, art. 6(2); PD on Counsel Visits and Communications, art. 14(2).

B. RESTRICTIONS ON NON-PRIVILEGED COMMUNICATIONS

17. The SPO has requested a number of restrictions on the visits and communications of the Three Accused. The feasibility of each of the requested measures is discussed in turn, below.

1. No Non-Privileged In-Person Visits

18. The SPO has requested the Panel to order that no non-privileged in-person visits be permitted, and that contacts only take place via video visit [REDACTED] or telephone.²⁴

19. On an interim basis, in line with the Panel's Order,²⁵ all current visits with non-privileged individuals scheduled with the Three Accused have been cancelled, including video visits. This applies to visits that were due to occur on [REDACTED] November 2023 and visits going forward until the Panel has decided upon the merits of the Request.²⁶ The scheduled visitors were informed as follows: [REDACTED]

20. Should the Panel restrict in-person visits, the DMU would cancel all forthcoming in-person visits that are scheduled with the Three Accused in the same manner. For any future requests for an in-person visit, the DMU would inform the visitor and the Detainee that the in-person visit cannot be scheduled based on an order of the Panel. The DMU would also direct the Three Accused to contact their Counsel should they have any questions or complaints on this matter.

21. Should the Panel restrict in-person visits, it is recommended that any such order also specifically address any possible restrictions on consular visits²⁷ and the suspension or restriction of Private Visits.²⁸

²⁴ Request, para. 2(d).

²⁵ Order, para. 5.

²⁶ F01937, Registrar, Report on the Implementation of Trial Panel II's Decision (F01936), 18 November 2023, confidential.

²⁷ PD on Visits and Communications, art. 20(1).

²⁸ PD on Visits and Communications, art. 24. *See also* Request, fn. 7.

2. Pre-Approved List of Contact Persons

22. The SPO has requested that the Panel restrict the non-privileged communications of the Three Accused to a defined set of immediate family and consular officials to be proposed by the Three Accused and pre-approved by the Panel following submissions from the SPO.²⁹

23. *Telephone calls.* On an interim basis, the telephone accounts of the Three Accused on the non-privileged telephone line were blocked on [REDACTED] November 2023 so that no telephone calls can currently be made on the non-privileged telephone line without the prior authorisation of the Registrar, in line with the Panel's Order.³⁰

24. If the contacts of the Three Accused are limited to a pre-approved list of immediate family members and consular officials, the telephone accounts of the Three Accused can be unblocked when necessary to permit a telephone call to take place with an individual on the pre-approved list. To implement this, the DMU would need a list of the pre-approved telephone numbers so that it can ensure that a telephone call is being placed to an authorised number.

25. [REDACTED]. [REDACTED].

26. *Video visits.* Video visits [REDACTED] can be implemented in a similar way with a pre-approved list of contact persons. A valid form of identification for each of the pre-approved visitors (i.e., a passport or national identification card) would need to be provided to the DMU so that verifications of identity can be made at the start of each video visit.³¹

27. [REDACTED]. [REDACTED].

28. *Correspondence.* Pursuant to Article 2 of the Practice Direction on Visits and Communications, a "communication" is defined as any telephone call or

²⁹ Request, para. 2(b).

³⁰ Order, para. 5.

³¹ See Registry Instruction on Video Visits, KSC-BD-34-Rev1, 6 September 2021, public, sect. 4(6) ('Instruction on Video Visits').

correspondence between a Detainee and any other person.³² In view of the SPO Request, the Registry would require direction from the Panel on whether all non-privileged correspondence with the Three Accused would also be limited to a list of pre-approved contact persons in the same way as telephone calls.³³

29. To implement such a measure, the DMU would need a list of postal addresses for pre-approved communications so that it can ensure that correspondence sent and received is to or from an authorised address. Any items received from unauthorised contacts would be returned to the Detainee or to sender, without prejudice to the rules governing prohibited items.³⁴ The same would apply to the import/export of items for Detainees, including with consular officials,³⁵ if so ordered by the Panel.

3. No common visitors

30. The SPO has requested the Panel to order that there are no common visitors between the Three Accused and other Detainees.³⁶ Specifically, the SPO requested that the Registry be ordered to: (i) refuse visits to any other Detainees going forward from persons who have previously, or will in the future, be permitted to visit the Three Accused; and (ii) that persons who visit any of the other Detainees going forward be denied visits to the Three Accused.³⁷

31. In terms of implementation, the Chief Detention Officer keeps a log of all visitors (for both in-person and video visits),³⁸ and the different aspects of this measure can be implemented, should the Panel so order. Given that the visiting logs are extensive, the logs would be reviewed as expeditiously as possible to identify common visitors.

³² PD on Visits and Communications, art. 2.

³³ Request, fn. 76. The Registry notes that the SPO has also specifically requested that the import/export of items from consular officials not be permitted. *See also* Request, fn. 6.

³⁴ *See* Detention Rule 25.

³⁵ PD on Visits and Communications, arts 14, 20(2).

³⁶ Request, para. 2(f).

³⁷ Request, para. 46(i).

³⁸ PD on Visits and Communications, art. 10(4); Instruction on Video Visits, sect. 3(1).

32. In terms of consular visits, the SPO has noted that an exception to this proposed restriction may be required with respect to consular staff.³⁹ Should the Panel order that there are no common visitors, it is recommended that any such order also specifically address consular representatives.

4. No Case or Evidence Related Content

33. The SPO has requested the 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).⁴⁰

34. As discussed further below, content restrictions on non-privileged communications can be implemented as part of an active monitoring regime.

5. Other relevant issues and considerations

35. *Media Communications.* It is recommended that any order of the Panel restricting visits and communications also address media communications,⁴¹ understanding that Detainees are not permitted to have access to the media through visits.⁴²

C. ACTIVE MONITORING

36. The SPO has requested the active monitoring (by an Albanian language speaker) of all non-privileged communications in whatever form.⁴³ Specifically, the SPO has requested the (i) active monitoring and audio and video recording of all non-privileged video visits [REDACTED], and the preservation of such records until the conclusion of trial; (ii) the active monitoring and audio recording of all telephone calls, and the preservation of such records until the conclusion of trial; and (iii) the careful

³⁹ Request, fn. 71.

⁴⁰ Request, para. 2(g).

⁴¹ Request, fn. 5.

⁴² Practice Direction on Media Communications, KSC-BD-28, 23 September 2020, public, art 4(2).

⁴³ Request, para. 2(c).

review and copying of all correspondence and import/export items, and the preservation of such records until the conclusion of trial.⁴⁴

37. Following a detailed scrutiny of resources available to the DMU, the Registry would like to present a schedule that enables the DMU to implement active monitoring. 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 promptly.

1. Active Monitoring and Audio and Video Recording of Video Visits [REDACTED]

38. 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].

39. Should the Panel order the active monitoring of the Three Accused's non-privileged video visits, it would be feasible for the DMU to implement the active monitoring as follows, within the available means and resources:

- a. the Three Accused would be allowed to each have [REDACTED] **video visits** per month, with a duration of [REDACTED], to be scheduled at pre-identified times based on the daily schedule of the Detention Facilities and the availability of staff;⁴⁵
- b. the language used during the visit would be limited to one of the 3 working languages of the SC and identified in advance;
- c. in terms of content monitoring, DMU staff monitoring the video visit could assess if any content restrictions were not being observed and take appropriate action, if so ordered by the Panel;

⁴⁴ Request, para. 2(c)(i)-(iii).

⁴⁵ To ensure equitable use of the Detention Facilities, Detainees are allowed a maximum of 10 visiting days in any 30-day period. *See* DMU Instruction on Visiting Procedures, KSC-BD-33, 23 September 2023. As part of those 10 visiting days, Detainees are given the opportunity to have in-person and/or video visits. *See* Instruction on Video Visits, sect. 3(1).

- d. the video visit could be audio and video recorded, if so ordered by the Panel;
- e. any recording of the video visit, if applicable, would be retained for a period of 8 months,⁴⁶ unless otherwise ordered by the Panel; and
- f. any video visits of concern would be promptly brought to the attention of the Panel.

40. The Registrar notes that the above schedule is underpinned by an assumption that there would be no in-person visits that would require a similar regime of active monitoring. In the event that there is a regime that includes the active monitoring of in-person visits, the above schedule would need to be reduced.

2. Active Monitoring and Recording of Telephone Calls

41. 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, which means, among other things, 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.⁴⁷

42. Active monitoring involves DMU staff listening to all telephone conversations of the Three Accused. [REDACTED].⁴⁸

43. Active monitoring could be implemented on specifically designated calls. It would be feasible for the DMU to implement the active monitoring as follows, within the available means and resources:

⁴⁶ The standard retention schedule for digital recordings would be applied to recordings of video visits. *See* Detention Rule, 64(1); PD on Visits and Communications, art 17(2).

⁴⁷ *See* PD on Visits and Communications, art. 17(1)-(2). 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).

⁴⁸ Order, para. 5.

- a. in addition to the [REDACTED] video visits described above, the Three Accused would each be allowed to make [REDACTED] **non-privileged telephone calls** per month, with a duration of [REDACTED], to be scheduled at pre-identified times based on the daily schedule of the Detention Facilities and the availability of staff];
- b. the language used during the call would be limited to one of the 3 working languages of the SC and identified in advance, if the Panel so orders;
- c. in terms of content monitoring, DMU staff monitoring the telephone call could assess if any content restrictions were not being observed and take appropriate action, if so ordered by the Panel;
- d. the system employed for passive monitoring would also continue on actively monitored calls, thereby automatically recording any non-privileged telephone conversations, including those being actively monitored;
- e. the recording of the conversation would be retained for a period of 8 months,⁴⁹ unless otherwise ordered by the Panel; and
- f. any conversations of concern would be promptly brought to the attention of the Panel.

3. Active Monitoring and Copying of Correspondence

44. Currently, all correspondence is subjected to the security controls of the Detention Facilities.⁵⁰ 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

⁴⁹ Detention Rule, 64(1); PD on Visits and Communications, art. 17(2).

⁵⁰ PD on Visits and Communications, art. 19; PD on Counsel Visits and Communications, art. 13(3).

and correspondence clearly marked with the name of the ICRC, the Ombudsperson, the Registrar, and the Panel, among others.⁵¹

45. The Registry could implement an order by the Panel to open, inspect and read all correspondence of the Three Accused, excepting the above categories, with the specific, intended objective in mind, *i.e.*, to review for specific content restrictions.

46. Incoming and outgoing correspondence is not currently copied or retained unless the correspondence contains prohibited content. If ordered by Panel, the Registry could also copy and retain correspondence for the period ordered. Any import/export items could also be treated like correspondence for this purpose.

4. Other relevant issues and considerations

47. Should preservation of audio and video recordings be required until the conclusion of trial, as requested by the SPO,⁵² this could be implemented by the Registry pursuant to an order of the Panel. Likewise, should preservation of copies of correspondence and import/export items be required until the conclusion of trial, as requested by the SPO,⁵³ this could also be implemented by the Registry pursuant to an order of the Panel.

48. 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. forbidding the participation of unauthorised individuals in telephone calls and on video visits [REDACTED];
- b. forbidding authorised callers to place the Detainee on speaker phone;
- c. forbidding the use of coded language;

⁵¹ PD on Visits and Communications, arts. 18(4), 19(1), 19(5); PD on Counsel Visits and Communications, art. 13(1).

⁵² Request, para. 2(c)(i)-(ii)

⁵³ Request, para. 2(c)(iii).

- d. forbidding the recording of telephone calls and video visits by participants;⁵⁴
- e. 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.

D. PRIVILEGED CONTACTS

49. The SPO has requested the Panel to order that privileged visits be restricted to Counsel and Co-Counsel only.⁵⁵ If additional Defence team members are needed to accompany Counsel and Co-Counsel to a visit, the SPO requests that prior authorisation is sought from the Panel.⁵⁶ Subject to any order of the Panel, the Registry can implement this measure.⁵⁷

50. It is recommended that any order of the Panel also address whether Defence team members other than Counsel and Co-Counsel have continued access to the Secure Electronic Data Sharing system ('SEDS').⁵⁸

E. REPORTING

51. The SPO has requested that the Panel order the Registry to bring any (suspected or attempted) violation of the Panel's orders to the immediate attention of the Panel and Parties.⁵⁹ The SPO has also requested that the Registry report on a monthly basis to the Panel and Parties on (i) logs of all visits and calls (both privileged and non-privileged) of all four Accused in this case, including the date, time and participants, (ii) whether they have been actively monitored and/or recorded, (iii) all items/correspondence exchanged (whether sent or received), including by way of

⁵⁴ Cf. Instruction on Video Visits, sect. 4(7).

⁵⁵ Request, para. 2(e).

⁵⁶ Request, para. 49.

⁵⁷ Cf. PD on Counsel Visits and Communications, arts 6(5), 9(4).

⁵⁸ The SEDS system provides Counsel and Detainees with additional means of exchanging materials for the preparation of the Defence. See Registry Instruction on Secure Electronic Data Sharing Between Counsel and Detainees, KSC-BD-39, 4 March 2021.

⁵⁹ Request, paras 2(i), 50.

import-export, and including the identity of the sender and receiver, the nature of the item, and whether a copy has been preserved; (iv) whether the Registry has noted any irregularities; and (v) whether the Registry has encountered any difficulties in execution of the Panel's order.⁶⁰

52. As part of this reporting, the SPO has requested that the details of non-privileged visits to Mr Jakup Krasniqi be included in the Registry's reporting.⁶¹ The Registry assumes that this request is limited to the non-privileged visit logs of Mr Krasniqi.

53. Subject to any order of the Panel, for ease of reporting, the Registry recommends that the reporting period be on a calendar month basis, within 7 days following the end of each calendar month.

V. CONCLUSION

54. Should the Panel deem it necessary and proportionate to order the separation of the Three Accused from other Detainees and/or other measures such as the active monitoring of the Three Accused's visits and communications, 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.

55. Should the Panel have any questions in relation to this submission, the Registrar stands ready to provide any additional information or clarifications required.

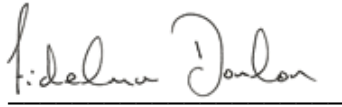
VI. CLASSIFICATION

56. Pursuant to Rule 82(4) of the Rules, this submission is filed as confidential, and as it contains internal Registry information related to the detention function and facilities.

⁶⁰ Request, para. 50.

⁶¹ Request, para. 46(ii).

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Dr Fidelma Donlon
Registrar

Tuesday, 21 November 2023
At The Hague, the Netherlands

Explanatory Note:

- clerical errors have been corrected in footnote 8 and paragraphs 36 and 39(d)
- *“would also be limited to a list of pre-approved contact persons”* is substituted for *“subject to the prior authorisation of the Registrar”* in paragraph 28
- *“excepting the above categories”* has been added to paragraph 45