



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

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

Judge Christoph Barthe

Judge Guénaél Mettraux

Judge Fergal Gaynor, Reserve Judge

Registrar: Fidelma Donlon

Date: 27 February 2024

Language: English

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**Public Redacted Version of Decision on Rexhep Selimi's Request for Judicial
Review of Registrar's Decision of 29 January 2024**

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TRIAL PANEL II of the Kosovo Specialist Chambers (“Panel”), pursuant to Articles 3(2), 23, 34(12), 40(2), 40(6)(d) and (f) and 41(9) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”), Rules 23(7), 27, 56(6), and 116(4)(d) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), and Articles 1(1), 6(1) and 9 of the Registry Practice Direction on Detention: Complaints (“Registry Practice Direction on Complaints”),¹ renders this decision.

I. PROCEDURAL BACKGROUND

1. The procedural background concerning the arrest and detention of Rexhep Selimi (“Mr Selimi”) has been set out extensively in previous decisions.²
2. On 1 December 2023, following a motion from the Specialist Prosecutor’s Office (“SPO”),³ the Panel imposed restrictions on the conditions of detention of Mr Selimi based on information submitted to the Panel by the SPO (“F01977 Decision”).⁴
3. On 11 January 2024, Mr Selimi submitted a request to the Registrar for prior approval of visits and communications for the month of February 2024 (“Selimi Requests for Prior Approval”).⁵

¹ KSC-BD-11/Rev1, Registrar, *Registry Practice Direction on Detainees: Complaints*, 23 September 2020.

² See e.g. F00802, Pre-Trial Judge, *Decision on Periodic Detention Review of Rexhep Selimi*, 13 May 2022, confidential, paras 1-12. A public redacted version was issued on 24 May 2022, F00802/RED.

³ F01933, Specialist Prosecutor, *Prosecution Urgent Request for Modification of Detention Conditions*, 17 November 2023, confidential, with Annexes 1-5, confidential.

⁴ F01977, Trial Panel, *Further Decision on the Prosecutor’s Urgent Request for Modification of Detention Conditions for Hashim Thaci, Kadri Veseli, and Rexhep Selimi*, 1 December 2023.

⁵ F02113/A04, Registrar, *Annex 4 to Transmission of Rexhep Selimi’s Request for Judicial Review of the Registrar’s Decision of 29 January 2024*, KSC/REG/IOR/6722, 8 February 2024, confidential and *ex parte*.

4. On 26 January 2024, the Registrar filed a notification and request for guidance concerning the F01977 Decision (“Registrar’s Notification and Request”).⁶
5. On 29 January 2024, the Registrar issued a decision on the Selimi Requests for Prior Approval (“Impugned Decision”).⁷
6. On 7 February 2024, the Selimi Defence submitted to the Registrar a request for judicial review of the Impugned Decision (“Request for Judicial Review”).⁸ The Registrar filed the Request with the Panel the next day (“Transmission of Request for Judicial Review”).⁹
7. On 9 February 2024, the Panel issued its decision on the Registrar’s Notification and Request (“Notification and Request Decision”).¹⁰
8. The Registrar did not make representations to the Panel regarding the Request for Judicial Review pursuant to Article 9(4) of the Registry Practice Direction on Complaints.

⁶ F02082, Registrar, *Registry Notification in Relation to Court-Ordered Protective Measures and Request for Guidance Pursuant to Decision F01977*, 26 January 2024, confidential, with Annexes 1-10, confidential; see also F02108, Specialist Prosecutor, *Prosecution Request Relating to Registry Filing F02092*, 7 February 2024, confidential, with Annexes 1 and 2, confidential; F02109, Specialist Counsel, *Selimi Defence Response to “Registry Notification in Relation to Court-Ordered Protective Measures and Request for Guidance Pursuant to Decision F01977 with confidential Annexes 1-10” F02082, dated 26 January 2024* (“Selimi Response to Registrar’s Notification and Request”), 7 February 2024, confidential.

⁷ F02113/A02, Registrar, *Annex 2 to Transmission of Rexhep Selimi’s Request for Judicial Review of the Registrar’s Decision of 29 January 2024*, KSC/REG/IOR/6722, 8 February 2024, confidential and *ex parte*.

⁸ F02113/A01, Registrar, *Annex 1 to Transmission of Rexhep Selimi’s Request for Judicial Review of the Registrar’s Decision of 29 January 2024*, KSC/REG/IOR/6722, 8 February 2024, confidential and *ex parte*.

⁹ F02113, Registrar, *Transmission of Rexhep Selimi’s Request for Judicial Review of the Registrar’s Decision of 29 January 2024*, KSC/REG/IOR/6722, 8 February 2024, confidential and *ex parte*, with Annexes 1-5, confidential and *ex parte*.

¹⁰ F02115, Trial Panel, *Decision on Registry Notification in Relation to Court-Ordered Protective Measures and Request for Guidance Pursuant to Decision F01977*, 9 February 2024, confidential. A public redacted version was filed the same day, F02115/RED.

II. RELEVANT FINDINGS IN THE IMPUGNED DECISION

9. In making its findings in the Impugned Decision, the Registrar relied upon the materials presented in the Registrar's Notification and Request.¹¹ The Registrar stated that confidential information received in the context of the proceedings or elicited during testimony of witnesses who are subject to court-ordered protective measures may have been disclosed during in-person visits in the Detention Facilities, including during visits with individuals who were the subject of the Selimi Requests for Prior Approval.¹² Based on those, as well as the Panel's F01977 Decision and Articles 4(2) and 7 of the Registry Practice Direction on Visits and Communications,¹³ the Registrar found that active monitoring of certain requested visits and communications is necessary to achieve the legitimate aims of ensuring the integrity of the proceedings and the protection of confidential information.¹⁴ The Registrar also found that active monitoring of certain visits and communications is proportionate to the legitimate aims pursued.¹⁵ Based upon these findings, the Registrar ordered, *inter alia*, that: (i) telephone calls between Mr Selimi and certain others, including [REDACTED], be actively monitored; (ii) video visits between Mr Selimi and [REDACTED] be actively monitored; (iii) telephone communications between Mr Selimi and [REDACTED] be denied; and (iv) the decision on requests for private visits between Mr Selimi and [REDACTED] be deferred.¹⁶

¹¹ Impugned Decision, para. 13.

¹² Impugned Decision, para. 13.

¹³ Impugned Decision, para. 13, *referring to* KSC-BD-09-Rev1, Registrar, Registry Practice Direction on Detainees: Visits and Communications ("Practice Direction on Visits and Communications"), 23 September 2020, Arts 4(2) and 7.

¹⁴ Impugned Decision, para. 13.

¹⁵ Impugned Decision, para. 16.

¹⁶ Impugned Decision, para. 1.

III. SUBMISSIONS

10. The Selimi Defence challenges the Registrar's exercise of discretion in denying, deferring, or monitoring visits and communications in the following decisions: (i) the Registrar's decision to actively monitor the video visits and telephone calls between Mr Selimi and [REDACTED];¹⁷ (ii) the Registrar's decision to deny a telephone call between Mr Selimi and [REDACTED];¹⁸ and (iii) the Registrar's decision to defer Mr Selimi's request for private visits with [REDACTED].¹⁹ The Selimi Defence argues that, in reaching these decisions, the Registrar lacked a sufficient factual basis and her findings are contrary to the Panel's F01977 Decision.²⁰

11. Thus, the Selimi Defence seeks review of the Impugned Decision and requests that the Panel: (i) review the Impugned Decision; (ii) reverse the Impugned Decision insofar as it relates to active monitoring of video visits and telephone calls between Mr Selimi and [REDACTED]; (iii) reverse the Impugned Decision regarding telephone calls between Mr Selimi and [REDACTED]; and (iv) reverse the Impugned Decision insofar as it relates to the Registrar's deferral of its decision on private visits with [REDACTED], which the Selimi Defence frames as, in effect, a denial of private visits between Mr Selimi and [REDACTED].²¹

IV. APPLICABLE LAW

12. Pursuant to Article 3(2) of the Law, the Specialist Chambers shall adjudicate and function in accordance with the Constitution of the Republic of Kosovo ("Constitution") and international human rights law, including the European

¹⁷ Request for Judicial Review, paras 5-12.

¹⁸ Request for Judicial Review, paras 13-18.

¹⁹ Request for Judicial Review, paras 19-20.

²⁰ Request for Judicial Review, para. 21.

²¹ Request for Judicial Review, para. 22.

Convention on Human Rights (“ECHR”). Article 8 of the ECHR protects the right to respect for one’s private and family life, home and correspondence.

13. Pursuant to Rules 56(6) and 116(4)(d), the Panel may rule on conditions of detention and related matters for the purpose of protecting witnesses or victims, confidential information or the integrity of the proceedings, and may impose necessary and proportionate restrictions on the communications of a detained person in order to protect those interests.²²

14. The Parties and participants are under a legal obligation not to disclose to third parties any confidential documents or information linked to the proceedings.²³ In particular, a Party or participant, including the Accused, may not disclose the identity of a protected witness to any third party. Such disclosures can only be made in exceptional circumstances set out by the Pre-Trial Judge,²⁴ and even then, Parties and participants may not reveal that a protected witness is involved with the activities of the KSC/SPO or the nature of such involvement to third parties.²⁵

15. Article 23 in combination with Articles 40(2), 40(6)(d) and (f) of the Law requires the Panel to adopt such measures as might be necessary and proportionate to protect victims and witnesses and to guarantee that confidential information is not disclosed to unauthorised third parties.

16. Pursuant to Articles 1(1) and 8(2) of the Registry Practice Direction on Complaints, the Registrar may make initial written decisions concerning a detainee’s

²² See also F01977 Decision, para. 23.

²³ See Rule 82(6); see generally F01226/A01, Trial Panel, *Annex 1 to Order on Conduct of Proceedings*, 25 January 2023, para. 15; F00854, Pre-Trial Judge, *Decision on Framework for Handling Confidential Information During Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or of a Participant* (“Framework Decision on Handling Confidential Information”), 24 June 2022, para. 212(I)(a).

²⁴ Framework Decision on Handling Confidential Information, para. 212(I)(e).

²⁵ Framework Decision on Handling Confidential Information, para. 212(I)(f).

conditions of detention, monitoring and other restrictions placed on visits and communications. The Panel's F01977 Decision allows Mr Selimi to seek judicial review of certain specified decisions of the Registrar regarding conditions of detention.²⁶ Pursuant to Article 9(6) of the Registry Practice Direction on Complaints, the Panel's decision shall be final.²⁷

17. The Registrar has the authority under Articles 34(12) and 41(9) of the Law, Rule 23(7), and the administrative instructions issued thereunder, to adopt any such measures as are necessary and proportionate to ensure that confidential information in the possession of detainees and members of Defence teams present at the Detention Facilities, including information regarding the identity of protected witnesses, is not communicated to unauthorised third parties during visits at those facilities.²⁸ The Panel has made it clear that the Registrar's authority to adopt such measures extends, notwithstanding Article 24(1) of the Registry Practice Direction on Visits and Communications, to Private Visits.²⁹ Where the Registrar (or the Chief Detention Officer) determines that there is a credible risk of confidential information being disclosed during a visit, including a Private Visit, the Registrar (or, acting on her behalf, the Chief Detention Officer) has the authority to refuse such a visit and/or to impose those measures that are proportionate and necessary to effectively addressing that risk.³⁰

²⁶ F01977 Decision, para. 69.

²⁷ Registry Practice Direction on Complaints, art. 9(6).

²⁸ See also Practice Direction on Visits and Communications, Arts. 4(2) and 7; KSC-BD-08-Rev1, Registrar, *Registry Practice Direction: Rules on Detention* ("Rules of Detention"), 23 September 2020, Rules 1(3), 4, and 63; KSC-BD-33/Annex A, Registrar, *Annex A to Detention Management Unit Instruction: Visiting Procedures for Family Members and Other Personal Visitors* ("Annex A to DMU Instruction"), 23 September 2020, Section 6.

²⁹ See Notification and Request Decision, para 32.

³⁰ See Practice Direction on Visits and Communications, Arts. 1(3), 4, and 63; Annex A to DMU Instruction, Section 6(3)(c).

IV. JURISDICTION OF THE PANEL TO REVIEW THE REGISTRAR'S DECISION

18. The primary responsibility over the management of the Detention Facilities is with the Registrar.³¹ As part of her management responsibilities, the Registrar is tasked with adopting rules of detention and a method by which complaints on matters of detention shall be addressed.³² Pursuant to this responsibility, the Registrar has enacted the Rules of Detention, and the Registry Practice Direction on Complaints.³³ The Registrar has also established a procedure by which detainee can challenge a decision of the Registrar regarding conditions of detention.³⁴

19. The Registrar's primary responsibility over the management of the Detention Facilities is subject to oversight by the Panel. The Trial Panel is responsible for the protection of confidential information,³⁵ as well as victims and witnesses.³⁶ The Panel is also responsible for guaranteeing the effective protection of the fundamental rights of the accused, including those relating to detention. As provided by the Rules, the Panel may, upon request, or *proprio motu*, 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 the imposition of necessary and proportionate restrictions on the communications of a detained person.³⁷ The Specialist Chambers are also tasked with judicial oversight of matters related to detention and the Detention Facilities.³⁸ In its F01977 Decision, the Panel made it clear that, in light of the above, Mr Selimi had the right to seek judicial review of a decision of the Registrar

³¹ Law, art. 41(7); Rule 23(7).

³² Law, art. 41(9); Rule 23(7).

³³ *See also* Rules of Detention, Rule 63 (noting that the additional Registrar's practice directions form an integral part of the Rules of Detention).

³⁴ Registry Practice Direction on Complaints, art. 9.

³⁵ Law, art. 40(d).

³⁶ Law, art. 40(f).

³⁷ Rules 56(6), 116(4)(d).

³⁸ Law, art. 41(7); Rule 23(7).

limiting its communications to third parties within seven days of being notified by the Registrar of the refusal.³⁹ Referring to the procedures enacted by the Registrar, the Panel noted that a request for judicial review of such a decision should comply with Article 9(2)-(6) of the Registry Practice Direction on Complaints.⁴⁰

20. Mr Selimi has now requested judicial review of the Registrar's Impugned Decision in accordance with the principles set out above.⁴¹ Based on the above, the Panel is satisfied that it is competent to conduct the review of the Registrar's Decision sought by Mr Selimi.

V. DISCUSSION

21. As set out above, the Panel is seized with the review of three decisions made by the Registrar: (i) the decision to actively monitor the video visits and telephone calls between Mr Selimi and [REDACTED]; (ii) the decision to deny telephone calls between Mr Selimi and [REDACTED]; and (iii) the decision to defer its decision on Mr Selimi's request for Private Visits with [REDACTED].

A. PRELIMINARY MATTERS

22. The Panel notes that the dates for most of the visits that are the subject of the Request for Judicial Review have now passed. In particular, the Private Visits with [REDACTED] were requested for 9, 10, and 11 February 2024,⁴² and the video visits with [REDACTED] were requested for 2, 3, 5, and 6 February 2024. The Panel further notes that the Registry has indicated that all non-privileged visits, including by video, will take place each month only during a designated 10-day

³⁹ F01977 Decision, para. 69.

⁴⁰ F01977 Decision, para. 69.

⁴¹ Request for Judicial Review, p. 2 and para. 4.

⁴² Selimi Requests for Prior Approval, p. 4.

period, which cannot in principle be modified.⁴³ This 10-day period in the month of February 2024 has passed.⁴⁴

23. There are two points that arise from the above. First, even if the Panel were to make findings about the impugned requested visits, the Registrar would not be able to re-schedule those visits in February. Second, Mr Selimi has already had the opportunity to make fresh requests for visits during the month of March. Should his requests be denied by the Registrar, he may seize the Panel of a timely request for judicial review.

24. With regard to the Registrar's decision to actively monitor telephone calls between Mr Selimi and [REDACTED],⁴⁵ and to reject a telephone call with [REDACTED], the Panel notes that only the requested telephone call of 29 February 2024 has yet to occur.⁴⁶ Nevertheless, the Panel will review the Impugned Decision as it relates to telephone calls both with [REDACTED] and [REDACTED]. Such review will serve to ensure that both the Accused and the Registrar are aware of the Panel's position in relation to the matters raised here and can take it into account in the future.

B. STANDARD OF REVIEW

25. The standard of review to be applied by the Panel in its judicial review of a decision of the Registrar to refuse and/or monitor visits and communications in the Detention Facilities is a matter of first impression before the KSC. The Panel

⁴³ F01989/A01, Registry, *Annex 1 to Registry Update on Implementation Pursuant to Trial Chamber II's Further Decision on the Prosecution's Urgent Request for Modification of Detention Conditions*, 7 December 2023, confidential, p. 2.

⁴⁴ See F02113/A04, *Annex 4 to Transmission of Rexhep Selimi's Request for Judicial Review of the Registrar's Decision of 29 January 2024*, 8 February 2024, confidential and *ex parte*, p. 4, indicating that the 10-day period for non-privileged visits extended from 2-11 February 2024, inclusive.

⁴⁵ Impugned Decision, paras 1, 15.

⁴⁶ Selimi Requests for Prior Approval, p. 4; see also Practice Direction on Complaints, art 9(5), indicating that "[a] Request for Judicial Review shall not stay the execution of the Registrar's decision, unless otherwise ordered by the Competent Panel".

shall review the approaches of other relevant jurisdictions in an effort to identify the factors relevant to such a review.

1. Standard of review before the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and International Criminal Tribunal for Rwanda (“ICTR”).

26. The standard of Review utilised by the ICTY and the ICTR was laid out in *Kvočka et al.*⁴⁷ The ICTY Appeals Chamber in that case identified four factors which it considered relevant to assessing the validity of a decision by the Registrar:⁴⁸

(a) whether the Registrar failed to comply with the legal requirements of its directive;

(b) whether the Registrar failed to observe any basic rules of natural justice, or to act with procedural fairness towards the person affected by the decision;

(c) whether the Registrar took into account irrelevant material or failed to take into account relevant material; or

(d) whether the Registrar reached a conclusion which no sensible person who has properly applied his mind to the issue could have reached.⁴⁹

The standard was subsequently upheld and applied in other cases before these two jurisdictions.⁵⁰

⁴⁷ ICTY: *Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić and Dragoljub Prcać*, IT-98-30-1/A, Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Žigić, 7 February 2003 (“*Kvočka et al. Appeal Decision*”).

⁴⁸ *Kvočka et al. Appeal Decision*, para. 13.

⁴⁹ *Kvočka et al. Appeal Decision*, para. 13.

⁵⁰ See e.g. ICTY: *Prosecutor v. Mile Mrksic et al.*, IT-95-13/1-PT, Decision on Assignment of Defence Counsel, 20 August 2003, para. 22; *Prosecutor v. Momcilo Krajsnik*, IT-00-39-PT, Decision on the Defence's Motion for an Order Setting Aside the Registrar's Decision Declaring Momcilo Krajsnik Partially Indigent for Legal Aid Purposes, 20 January 2004, para. 16; *Prosecutor v. Mile Mrksic et al.*, IT-95-13/1-PT, Decision on Defence Request for Review of the Registrar's Decision on Partial Indigence of Mile

2. The standard of review applied by the International Criminal Court (“ICC”)

27. The approach adopted by the ICC⁵¹ is guided by administrative decisions and standards applied by both international and national courts.⁵² This approach is reflected in *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (“Abd-Al-Rahman Decision”),⁵³ in which the ICC Presidency identified the following factors as relevant to evaluating the validity of Registrar decisions:

- (a) whether the Registrar acted outside the scope of its jurisdiction;
- (b) whether the Registrar committed an error of law;
- (c) whether the Registrar failed to act with procedural fairness;
- (d) whether the Registrar acted in a disproportionate manner;
- (e) whether the Registrar erred in assessment of factors (either giving weight to irrelevant factors or failing to apply relevant factors); or

Mrksic, 9 March 2004, p. 3; *Prosecutor v. Mile Mrksić et al.*, IT-95-13/I-PT, Decision on Appointment of Co-Counsel for Mrksić, 7 October 2005, para. 9.

⁵¹ Note: Pursuant to Articles 38(3), 51 and 52 of the Rome Statute, as well as Regulation 106 of the Regulations of the Court, at the ICC, the power to conduct judicial review of administrative decisions of the Registrar regarding detention matters rests in principle with the Presidency, not a Court’s Chamber. The standard of judicial review was defined by the Presidency in ICC, ICC: Presidency, ICC-RoC72-02/05, Decision on the Application to Review the Registrar’s Decision Denying the Admission of Mr Ernest Midagu Bahati to the list of Counsel (“Bahati Decision”), 20 December 2005, para. 16; and supplemented in ICC, Presidency, ICC-01/04-01/06-731-Conf, Decision on the Application to Review the Decision of the Registrar Denying Mr Balembo Privileged Visits with Mr Lubanga Dyilo, under regulation 221 of the Regulations of the Registry, 27 November 2006, para. 24. *See also* Presidency, ICC-RoC72-01/08-10, Reasons for the ‘Decision on the “Application for Review of Decision of the Registrar’s Division of Victims and Counsel dated January 2008 not to Admit Prof. Dr. Sluiter to the List of Counsel”’, 10 July 2008, para. 20; Presidency, ICC-RoR56-01/09-2, Decision on the Application to Review the Decision of the Registrar Denying the Admission of Ms Magdalena Ayoade to the List of Experts, 6 August 2009, para. 11.

⁵² Bahati Decision, paragraph 16.

⁵³ ICC: Presidency, *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, ICC-RoR220-04/21-1, Decision on ‘Motion for Judicial Review of Registrar’s Decision’ dated 10 August 2021, 18 October 2021, para. 11.

(f) whether the Registrar reached a conclusion which no reasonable person who has properly applied his or her mind to the issue could have reached.⁵⁴

The factors considered by the ICC are in substance largely comparable to those applied by the ICTY and ICTR.

3. Standard of review adopted by the Trial Panel

28. The Panel notes that any approach must guarantee that the Accused's fundamental rights and freedoms are protected while ensuring that the proceedings remain fair.⁵⁵ The standard applied must also ensure that the review is effective in protecting those interests. The Panel is satisfied that the protection of those interests can be effectively guaranteed by applying to the process of review the same general factors outlined above. The Panel finds that the applicable factors may be condensed and encompassed within four areas of inquiry, namely:

- (a) Did the Registrar act within the scope of her legal authority?
- (b) Did the Registrar take into account all relevant facts, give relevant facts their due weight and/or take into account irrelevant facts and circumstances?
- (c) Did the Registrar's actions violate fundamental principles of procedural fairness, natural justice, including the rights of other accused?
- (d) In the absence of an error under the first three factors above, is the Registrar's conclusion nonetheless unreasonable?

The Selimi request for review of the Registrar's impugned decisions will be reviewed in light of these factors.

C. WHETHER THE REGISTRAR ACTED WITHIN HER AUTHORITY

⁵⁴ *Abd-Al-Rahman* Decision, para. 11.

⁵⁵ *See* Law, arts. 2, 41(8).

29. As noted above, the Registry has the authority to adopt necessary and proportionate measures to ensure that confidential information in the possession of detainees, including information regarding the identity of protected witnesses, is not communicated to unauthorised third parties.⁵⁶

30. In the F01977 Decision, the Panel ordered the Registry to engage in active monitoring of audio communications when the Registrar, in the exercise of her discretion, finds it necessary to ensure the integrity of the proceedings, the protection of confidential information and/or to ensure compliance by Mr Selimi or those in contact with him regarding these measures.⁵⁷

31. In its Notification and Request Decision, the Panel affirmed the Registrar's authority to adopt such measures to Private Visits.⁵⁸ Where the Registrar (or the Chief Detention Officer) determines that there is a credible risk of confidential information being disclosed during a visit, including a Private Visit, the Registrar (or, acting on her behalf, the Chief Detention Officer) has the authority to refuse such a visit and/or to impose those measures that are proportionate and necessary to effectively addressing that risk.⁵⁹

32. Based upon the Law, the Rules, and the Panel's Decisions, the Registrar has the authority to implement active monitoring of telephone calls of Mr Selimi, including to family members and in respect of those otherwise entitled to Private Visits.

D. WHETHER THE REGISTRAR CONSIDERED THE APPROPRIATE FACTUAL
CIRCUMSTANCES, WHETHER SHE CONSIDERED IRRELEVANT FACTORS, AND/OR
GAVE UNDUE WEIGHT TO CERTAIN FACTORS

⁵⁶ See Practice Direction on Visits and Communications, Arts 4(2) and 7; Rules of Detention, Rules 1(3), 4, and 63; Annex A to DMU Instruction, Section 6.

⁵⁷ Decision F01977, para. 66.

⁵⁸ See Notification and Request Decision, para 32. See also above, para. 17.

⁵⁹ See Practice Direction on Visits and Communications, Arts. 1(3), 4, and 63; Annex A to DMU Instruction, Section 6(3)(c). See also above, para. 18.

33. In the Impugned Decision, the Registrar makes it clear that she relied upon the Panel's previous finding that detainee visits and communications are subject "to the possibility of necessary and proportionate restrictions being placed upon them to protect the rights and security of others, in particular victims and witnesses" to adopt the measures put in place.⁶⁰ The Registrar also cited in support of her decision the Panel's finding "that the Accused are prohibited from disclosing or discussing with anyone other than their counsel and Defence team members information subject to protective measures, in particular the names and details of SPO witnesses, confidential information and/or the content of evidence given in private or closed session".⁶¹

34. On that basis, the Registrar reviewed the records accompanying the Registrar's Notification and Request to assess whether to permit and/or restrict certain visits and communications with, *inter alios*, [REDACTED] and [REDACTED].⁶² First, based on her review, the Registrar concluded that confidential information received in the context of the proceedings or elicited during the testimony of witnesses who are subject to court-ordered protective measures "may have been disclosed" during visits with [REDACTED].⁶³ The Panel has made it clear that such disclosure could not be attributed with any degree of certainty to [REDACTED].⁶⁴ The Panel finds that the active monitoring of calls between Mr Selimi and [REDACTED] could not therefore reasonably have been based on conduct attributed to [REDACTED]. The Panel notes, however, that it found that confidential information had in fact been discussed by 'a person' during a meeting involving Mr Selimi and [REDACTED].⁶⁵ The Panel reiterates in that context that confidential information is not limited to information that would,

⁶⁰ Impugned Decision, para. 10 (*quoting* F01977 Decision, para. 80).

⁶¹ Impugned Decision, para. 11 (*quoting* F01977 Decision, para. 36).

⁶² Impugned Decision, paras 16, 19.

⁶³ Impugned Decision, para. 9; Registrar's Notification and Request, para. 5.

⁶⁴ Notification and Request Decision, para. 21.

⁶⁵ Notification and Request Decision, para. 21.

directly or indirectly, identify a witness but all such information obtained in the context of these proceedings that is subject to protection and/or confidentiality.

35. As regards necessity, there is a real possibility that the confidential information discussed above was disclosed by Mr Selimi to [REDACTED]. The fact that this was not established with certainty would render any punitive measure ordered in respect of [REDACTED] unfair and unreasonable. However, the real possibility that this information could have been disclosed by Mr Selimi to [REDACTED] combined with the fact that Mr Selimi was found to have disclosed such information to non-authorised third parties on at least one other occasion would provide a reasonable basis for the Registrar to conclude that it was necessary to actively monitor communications between Mr Selimi and [REDACTED], to prevent the further disclosure of confidential information.⁶⁶

36. As regards proportionality, the Panel considers that the test involves an assessment of whether the restriction placed upon the detainee is proportionate to the legitimate aim being pursued.⁶⁷ Here, the Panel finds that the Registrar did not implement unreasonably intrusive restrictions under the circumstances. The Panel notes that the Registrar did not prohibit telephone conversations between Mr Selimi and [REDACTED]. The Registrar merely ordered that these conversations would be subject to active monitoring, and the use of active monitoring would only entail interruption in the event of inappropriate behaviour on the part of a participant. The Registrar has therefore ensured that contact between Mr Selimi and [REDACTED], is maintained. The Panel notes, furthermore, that the measure is limited to one individual with whom confidential information was shared, likely by Mr Selimi, and is not being applied to other close relatives of Mr Selimi. Both of these circumstances demonstrate the

⁶⁶ See *again*, Decision on Notification and Request, para. 21 and paras 22-23.

⁶⁷ See F01977 Decision, para. 46 (noting ECtHR, *Khoroshenko v. Russia* [GC], no. 41418/04, [Judgment](#) ("*Khoroshenko v. Russia*"), 30 June 2015, para. 118).

Registrar's efforts to implement restrictions that provide necessary and proportionate prevention against the possibility of further disclosure of confidential information. The Panel finds no error in the Registrar's conclusion that active monitoring of telephone calls between Mr Selimi and [REDACTED] is a reasonably proportionate measure.

37. Therefore, the Panel finds no reason to conclude that the Registrar inappropriately weighed relevant facts and circumstances or considered irrelevant matters in her decision to order the active monitoring of phone calls between Mr Selimi and [REDACTED] or that she erred or abused her discretion when assessing the necessity and/or proportionality of this measure. Considering, however, that the the active monitoring of phone calls between Mr Selimi and [REDACTED] is of a preventive nature, the Registrar shall ensure that it reviews its continued necessity over the course of time.

38. Second, regarding the Registrar's decision to deny telephone calls between Mr Selimi and [REDACTED], the Panel considers that such an assessment calls for a slightly different balancing exercise. While [REDACTED] was present during visits when confidential information was impermissibly discussed, there is no indication that [REDACTED] he personally engaged in impermissible disclosure of such information. Furthermore, as a Defence team member, [REDACTED] was permitted to possess that information and Mr Selimi was permitted to discuss it with him (though not in the presence of non-authorized third parties, such as [REDACTED]).⁶⁸ The Panel notes also that, as a Defence team member, [REDACTED] is presumed to be acting at all times under the authority of lead counsel, who is in turn bound to comply with the relevant sections of the Directive⁶⁹ and Code of Conduct. The Panel also notes that team members are

⁶⁸ See also KSC-BD-07-Rev1, Registrar, *Registry Practice Direction: Code of Professional Conduct for Counsel and Prosecutors Before the Kosovo Specialist Chambers* ("Code of Professional Conduct"), 28 April 2021, arts. 12(4) and 26(1).

⁶⁹ KSC-BD-04, Registrar, *Registry Practice Direction: Directive on Counsel*, 6 November 2017.

important to the effective functioning of a Defence team and that they will often need to discuss with the Accused sensitive issues pertaining to the preparation of the Defence case. Such discussions should normally be conducted without monitoring. The Panel notes, furthermore, that it ordered lead counsel for Mr Selimi to remind members of his team of their obligations not to disclose confidential information of unauthorised third parties or to participate in discussions where confidential information is provided to such parties.⁷⁰ In those circumstances, the Panel finds that the Registrar erred in concluding that the denial of a call between Mr Selimi and [REDACTED] was necessary, or that it was a proportionate measure in light of the above considerations. The Panel further finds that in the present circumstances it is not necessary to prohibit such calls.

39. The Panel therefore orders the Registrar to permit telephone communications between Mr Selimi and [REDACTED] at this stage. Given the finding of error, this aspect of the Impugned Decision need not be assessed further under the criteria below.

E. WHETHER THE REGISTRAR'S ACTIONS VIOLATED FUNDAMENTAL PRINCIPLES OF FAIRNESS, JUSTICE, OR THE ACCUSED'S RIGHTS

40. The Selimi Defence does not specifically allege a violation of Mr Selimi's rights under the ECHR. However, the Panel is nonetheless bound to ensure that this has not occurred.⁷¹ The Panel also notes that the Selimi Defence previously asserted that modifications to Mr Selimi's conditions of detention would violate his rights under Article 8 of the ECHR,⁷² that they are inconsistent with the Practice Direction on the Rules of Detention,⁷³ and that they are disproportionate and unjustified.⁷⁴

⁷⁰ Notification and Request Decision, para. 29.

⁷¹ See the Law, art. 3(2).

⁷² Selimi Response to Notification and Request, paras 31-45.

⁷³ Selimi Response to Notification and Request, paras 34-35.

⁷⁴ Selimi Response to Notification and Request, paras 36-37, 41-45.

41. The Panel has previously found that many of the guarantees provided in the Registry's Practice Directions on detention go beyond what detainees are entitled to as a matter of fundamental rights.⁷⁵ This is the case, for instance, in respect of private visits and communications with close relatives. The Panel recalls, furthermore, that measures which limit or control a detainee's contacts with the outside world are not *per se* incompatible with the effective protection of the fundamental rights of detainees such as those provided by Article 8 of the ECHR.⁷⁶ Specifically, Article 8 of ECHR does not guarantee the right to make telephone calls, and in facilities where telephone calls are permitted as a matter of course, legitimate restrictions may be placed on their use without violating a detainee's rights.⁷⁷ Further, restrictions that interfere with a detainee's right to respect for his private and family life, his home, and his correspondence may be justified if they are "in accordance with the law", they pursue one or more of the legitimate aims listed in Article 8(2) and the measures are necessary and proportionate under the circumstances.⁷⁸

42. The Selimi Defence submits that the Registrar erred in unfairly attributing conduct incompatible with the integrity of proceedings to [REDACTED].⁷⁹ The Panel finds that there is no conduct attributed to [REDACTED] in the Impugned Decision, and the only reference to [REDACTED] in the Registrar's Notification and Request is that he was present at a non-privileged in person visit with Mr Selimi on 15 July 2023.⁸⁰ The Panel finds that the Registrar has based its determination on the conduct of Mr Selimi, not [REDACTED]. Further, the Panel notes that the circumstances used to justify the Registrar's decision rest solely upon the conduct of Mr Selimi, and therefore

⁷⁵ F01977 Decision, para. 30.

⁷⁶ See F01977 Decision, para. 45 (citing [Khoroshenko v. Russia](#) [GC], para. 123; [Piechowicz v. Poland](#), no. 20071/07, [Judgment](#) ("[Piechowicz v. Poland](#)"), 17 April 2012, para. 212.

⁷⁷ See e.g. ECtHR, [A.B. v. The Netherlands](#), no. 37328/97, [Judgment](#), 29 January 2002, paras 92-93.

⁷⁸ See F01977 Decision, para. 46 (noting national security, public safety, economic well-being, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others (Article 8(2) of the ECHR)).

⁷⁹ Request for Judicial Review, para 7.

⁸⁰ Notification and Request, para. 7.

could reasonably justify active monitoring of telephone calls between Mr Selimi and any visitor to whom he has previously disclosed confidential information.

43. Based on the above, the Panel finds that when ordering the active monitoring of calls between Mr Selimi and [REDACTED] the Registrar acted in a manner consistent with the effective protection of the rights of those concerned and did not did not violate the fundamental principles of natural justice and procedural fairness.

F. WHETHER THE REGISTRAR'S CONCLUSION IS OTHERWISE UNREASONABLE

44. The Registrar determined that active monitoring of telephone communications between Mr Selimi and [REDACTED] was a necessary and proportionate condition under the circumstances.⁸¹ The Panel has already determined that the Registrar acted within her authority, properly balanced relevant factual circumstances, and did not violate Mr Selimi's rights. The Panel further considers that the outcome of the Impugned Decision relevant here, i.e., that a phone call between Mr Selimi and [REDACTED] in late February 2024 will be actively monitored, is not unreasonable under the circumstances.

G. CONCLUSION

45. Regarding the active monitoring of telephone calls between Mr Selimi and [REDACTED], the Panel finds that the Registrar acted within the authority provided by the Law, the Rules, and the Decisions of this Panel. The Panel determined, furthermore, that the Registrar did not abuse her discretion in this matter, that the measure is both necessary and proportionate, is consistent with the effective protection of the rights of those concerned, did not violate the fundamental principles of natural justice and procedural fairness and is not otherwise unreasonable.

46. Regarding the denial of a call between Mr Selimi and [REDACTED], the Panel has found that the Registrar erred in her determination that the measure was necessary and proportionate in the circumstances. This is without prejudice to the

⁸¹ Impugned Decision, paras 13, 16.

possibility of the Registrar adopting such measures in the future should new information justify such a course of action. Such measures would, however, have to account for the factors and considerations outlined above in paragraph 38.

VI. CLASSIFICATION

47. The Panel notes that the Mr Selimi's Request for Judicial Review,⁸² as well as the core filing of the Registrar's Transmission of Request for Judicial Review and the accompanying Impugned Decision⁸³ of the Registrar were filed as *confidential and ex parte*.⁸⁴ The Panel therefore orders the Selimi Defence and Registry to submit public redacted versions of their respective filings or a request for their former filing to be reclassified as public by no later than Thursday, 7 March 2024.

VI. DISPOSITION

48. For the above-mentioned reasons, the Panel hereby:

- (a) **REJECTS** the Selimi Defence's requests for reversal of the Registrar's decision in respect of the active monitoring of calls between Mr Selimi and [REDACTED];
- (b) **GRANTS** the Selimi Defence's requests for reversal of the Registrar's decision in respect of the denial of a call between Mr Selimi and [REDACTED] and **ORDERS** the Registrar not to deny such calls unless new circumstances so demand;
- (c) **DISMISSES** as moot the Selimi Defence's request to reverse the Registrar's decision to actively monitor video visits between Mr Selimi

⁸² See above, fn. 8.

⁸³ See above, fn. 7.

⁸⁴ See above, fn. 9.

and [REDACTED];

- (d) **DISMISSES** as moot the Selimi Defence's request to reverse the Registrar's alleged effective denial of a Private Visit between Mr Selimi and [REDACTED]; and
- (e) **ORDERS** the Selimi Defence and the Registry to submit public redacted versions of their respective filings or a request for their former filing to be reclassified as public by Thursday, 7 March 2024.



Judge Charles L. Smith, III
Presiding Judge

Dated this Tuesday, 27 February 2024
At The Hague, the Netherlands.