



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: Dr Fidelma Donlon

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**Registry Submissions on Selimi Defence Request for Extension of Legal Privilege
with one confidential Annex**

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1. Pursuant to Rule 23 of the Rules,¹ the Registrar submits her observations on the Selimi Defence request that Trial Panel II (the 'Panel') extend the application of the Counsel-client privilege beyond that provided in the Specialist Chambers ('SC') legal framework ('Request').²

I. PROCEDURAL HISTORY

2. On 1 December 2023, the Panel issued Decision F01977,³ whereby the Registrar was ordered to take certain measures and to implement modifications to the conditions of detention of Mr Hashim Thaçi, Mr Kadri Veseli and Mr Rexhep Selimi (together, the 'Three Accused').⁴ As part of the modified conditions, all non-privileged in-person visits, video visits, and telephone calls require the prior approval of the Registrar so that all relevant considerations (legal, practical, security) can be factored into the decision of whether to authorise a particular visit or communication and/or engage in active monitoring.⁵ In Decision F01977, the Panel recalled that only named Counsel and Co-Counsel are entitled to privileged visits, whereas visits by other Defence Team members (when not accompanied by Counsel or Co-Counsel) are not privileged and therefore subject to the modifications imposed in Decision F01977, including the Registrar's prior approval.⁶

3. On 7 December 2023, in line with Decision F01977, the Registrar notified the Three Accused and their Counsel of the new system in place to implement the

¹ Rules of Procedure and Evidence Before the Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules').

² KSC-BC-2020-06, F02185, Selimi Defence Request for Extension of Legal Privilege to Legal Consultant, 15 March 2024 ('Request').

³ F01977, Further Decision on the Prosecution's Urgent Request for Modification of Detention Conditions for Hashim Thaçi, Kadri Veseli and Rexhep Selimi, 1 December 2023, public ('Decision F01977').

⁴ Decision F01977, paras 51-53, 55-60 and 62-78.

⁵ Id., paras 51-52, 62-63, 66.

⁶ Id., paras 60-61.

modified conditions. On the same date, the Registrar filed an update on the implementation of the modified conditions with the Panel.⁷

4. On 20 February 2024, the Panel issued an Oral Order reminding all Parties of their obligations arising out of the Directive on Counsel and the Code of Professional Conduct, including with respect to the duties of Counsel and Co-Counsel.⁸ In particular, the Panel noted Counsel's responsibility to ensure that competent and available Co-Counsel is in place to appear without delay on Counsel's behalf where Counsel is temporarily unable to do so.

5. Between 26 February and 1 March 2024, Counsel for Mr Selimi sought the Registry's position on whether the Counsel-client privilege could be extended to Dr Rudina Jasini as a Legal Consultant on the Selimi Defence Team if she no longer continued to serve in her current position as Co-Counsel.⁹ The Registry provided information on the SC legal framework, noting that if Dr Jasini were to take up the position of Legal Consultant, her visits and communications with Mr Selimi would only be privileged if accompanied by Counsel or Co-Counsel.¹⁰

6. On 20 March 2024, the Selimi Defence filed the present Request, seeking an extension of the Counsel-client privilege to Dr Jasini if she were to change her position on the Selimi Defence Team from Co-Counsel to Legal Consultant.¹¹

II. SUBMISSIONS

7. The Registry makes the following observations on the Request to extend the Counsel-client privilege beyond the SC legal framework.

⁷ F01989, Registry Update on Implementation Pursuant to Trial Panel II's Further Decision on the Prosecution's Urgent Request for Modification of Detention Conditions, 7 December 20203, public, with confidential Annex 1 and confidential and *ex parte* Annexes 2-4.

⁸ Oral Order, Tr. p. 12506, line 15, to p. 12508, line 20, 20 February 2024, public. *See also* Directive on Counsel, KSC-BD-04-Rev2, 22 February 2024 ('Directive on Counsel'); Code of Professional Conduct for Counsel and Prosecutors Before the Kosovo Specialist Chambers, KSC-BD-07-Rev1, 28 April 2021 ('Code of Professional Conduct').

⁹ *See* Annex 1, confidential.

¹⁰ *Id.*

¹¹ Request, at fn. 2, above.

A. Legal framework

8. In the SC legal framework, privileged communications are those “[c]ommunications made in the context of a professional relationship between a person and his or her Specialist Counsel”.¹² Specialist Counsel is a person on the List of Specialist Counsel (‘List of Counsel’) assigned or appointed to a suspect or Accused in line with the Directive on Counsel.¹³

9. Pursuant to the Directive on Counsel, Counsel and Co-Counsel must be admitted to the List of Counsel to be assigned/appointed to represent a suspect or Accused.¹⁴ Applicants must meet certain requirements to be admitted to the List of Counsel, including 7 to 10 years of years of proven relevant experience in criminal proceedings and ongoing membership in a domestic bar association or similar institution (or a judge or a prosecutor subject to an oversight authority), which must continue for the duration of admission to the List of Counsel.¹⁵ Applications, with supporting documentation, are vetted and approved by the Registry for admission.¹⁶ Both Counsel and Co-Counsel have ongoing obligations, among other things, to notify the Registry if they no longer meet the requirements for admission or if any criminal or disciplinary proceedings have been initiated against them.¹⁷ In contrast, criteria for the Registrar’s approval of Defence Team members are much more limited,¹⁸ and do not include the need for an individual to be subject to an oversight authority.

10. Pursuant to the Directive on Counsel, Co-Counsel has the authority to sign documents and appear in court on Counsel’s behalf, dealing with all arising matters.¹⁹

¹² Rule 111(1) of the Rules.

¹³ See Rules 2(1) and 26(1) of the Rules.

¹⁴ Directive on Counsel, sects 12-13. Alternatively, in the case of appointed Counsel, prospective Counsel may be appointed if he or she is found eligible to be admitted to the List of Counsel. See *id.*, sect. 13(2).

¹⁵ *Id.*, sect. 5.

¹⁶ *Id.*, sects 6-7.

¹⁷ *Id.*, sect. 9.

¹⁸ *Id.*, sect.18(3)(b)-(d).

¹⁹ *Id.*, sect. 18(4).

11. Accordingly, both Counsel and Co-Counsel are bound by the Code of Professional Conduct,²⁰ which sets out basic professional standards that must be met by Counsel, Co-Counsel, and Prosecutors appearing before the SC, including the obligation to respect confidentiality and professional secrecy.²¹ The Code also ensures accountability for misconduct²² and sets out a bespoke disciplinary regime that is applicable to both Counsel and Co-Counsel, as well as Prosecutors.²³ Specifically, Co-Counsel is liable under the Code of Professional Conduct notwithstanding that they may have acted under the direction of supervising Counsel, and are duty bound to refuse to comply with instructions from Counsel that they believe would be in flagrant breach of the Code of Professional Conduct.²⁴

12. Defence Team members other than Counsel or Co-Counsel are not directly liable under the Code of Professional Conduct. The standards and obligations foreseen in the Code of Professional Conduct can only be enforced in respect of Defence Team members through supervisory Counsel or Co-Counsel.²⁵

13. It is against this backdrop that the Registry Practice Direction on Counsel Visits and Communications ('Practice Direction') was adopted to facilitate visits and communications between a Detainee and his or her Counsel.²⁶ The Practice Direction provides that both Counsel and Co-Counsel are entitled to privileged visits and communications with the Detainee they represent.²⁷ Defence Team members may accompany Counsel or Co-Counsel when visiting a Detainee, and these visits are treated as privileged to the same extent as other Counsel visits under the Practice

²⁰ Pursuant to Article 2(2) of the Code of Professional Conduct, the term "Counsel" includes "Co-Counsel".

²¹ See Code of Professional Conduct, art. 6(1)(b), 26.

²² See *id.*, art. 33(1).

²³ *Id.*, art. 3(2), ch. V.

²⁴ *Id.*, art. 35(1), (3).

²⁵ *Id.*, art. 34.

²⁶ Practice Direction on Counsel Visits and Communications, KSC-BD-10-Rev1, 23 September 2020 ('PD on Counsel Visits and Communications').

²⁷ *Id.*, art. 4(2), 6(5).

Direction.²⁸ The same applies to video visits.²⁹ Detainees may also make outgoing telephone calls to both Counsel and Co-Counsel on the privileged telephone line.³⁰

14. The distinction between Counsel/Co-Counsel and other Defence Team members is also reflected in the regime ordered by the Panel in Decision F01977. The Panel expressly differentiated between privileged visits (where Counsel/Co-Counsel are present) and visits with other Defence Team members (without Counsel/Co-Counsel present), which are not privileged.³¹

B. The legal framework has not changed.

15. The legal framework of the SC governing privileged communications and their scope has not changed with the issuance of Decision F01977.

16. The Request incorrectly submits that the Registrar has interpreted Decision F01977 to prohibit all communications between Mr Selimi and members of his Defence Team who do not benefit from privileged communications, unless they have been scheduled and authorised in advance and take place in the presence of Counsel or Co-Counsel.³² The Registrar takes the opportunity to clarify there has been no prohibition on contact between Mr Selimi and members of his Defence Team.

17. With the entry into force of the modified conditions in Decision F01977, Mr Selimi continues to be able to have, as before, privileged visits with Counsel and Co-Counsel, accompanied by other Defence Team members if they so wish. Similarly, Mr Selimi continues to be able to place privileged calls to Counsel and Co-Counsel. Furthermore, as was the case prior to Decision F01977, Mr Selimi continues to be able to have non-privileged visits and telephone calls with Defence Team members (when unaccompanied by Counsel/Co-Counsel). Decision F01977 simply requires the prior

²⁸ *Id.*, art. 9(4).

²⁹ See Registry Instruction on Video Visits, KSC-BD-34-Rev1, 6 September 2021, sect. 7.

³⁰ PD on Counsel Visits and Communications, art.12(2); *cf.* Practice Direction on Visits and Communications, KSC-BD-09-Rev1, 23 September 2020, art. 17(1) (only the non-privileged line is passively monitored).

³¹ Decision F01977, paras 60-61.

³² Request, para. 11.

approval of the Registrar before any non-privileged visits and telephone calls can take place.³³

18. Although Decision F01977 placed certain restrictions on the Three Accused's visits and communications, the scope of legal privilege has not been modified. Defence Team members have always been permitted to accompany Counsel/Co-Counsel during privileged visits and to have non-privileged visits and communications with the Accused when Counsel/Co-Counsel are not present. Likewise, Defence Team members have never been permitted to have privileged visits and communications when Counsel/Co-Counsel are not present. Decision F01977 has not changed this framework.

19. The only material change that is contemplated is the Selimi Defence's intention to change certain roles and responsibilities among its Defence Team members. The manner in which Counsel chooses to organise his or her Defence team does not constitute sufficient reason to deviate from the applicable legal framework.

C. The case law cited by the Selimi Defence is not persuasive.

20. Finally, in terms of the International Criminal Court ('ICC') jurisprudence referenced in the Request, it is important to note that the extension of legal privilege to include the case manager of the Ngaïssona Defence Team was granted by the Pre-Trial Chamber because the team did not have, at the time, a Co-Counsel.³⁴

³³ Decision F01977, para. 60. In this respect, the Registrar's decision to deny a *non-privileged* telephone call between Mr Selimi and a specific member of the Defence Team was taken pursuant to Decision F01977 based on the fact that confidential information was impermissibly discussed in the presence of the Defence Team member and a third party. *See* F02155, Public Redacted Version of Decision on Rexhep Selimi's Request for Judicial Review of Registrar's Decision of 29 January 2024, 27 February 2024, para. 38. However, the Defence Team member could continue to accompany Counsel/Co-Counsel during *privileged* visits and communications. Following judicial review, the Panel found that it was not necessary to deny the non-privileged telephone call with the relevant Defence Team member but ordered Counsel to remind Defence Team members "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". *See id.*, para. 38.

³⁴ ICC, Pre-Trial Chamber II, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Public Redacted Version of "Decision Pursuant to Regulation 101 of the Regulations of the Court", ICC-01/14-01/18-176-Red2, 8 February 2021 (date of original: 15 April 2019), para. 34.

Subsequently, once the Defence Team had expanded, the Trial Chamber found that the previously warranted exceptional extension of privilege to a case manager was no longer justified.³⁵ In assessing privileged communications, the Trial Chamber noted that the fact that legal privilege is only afforded to Counsel, Co-Counsel and Legal Assistants to Counsel (who, at the ICC, must also fulfil certain requirements and are vetted for admission to the List of Legal Assistants) is “particularly justified by the fact that ‘other staff’ are not directly bound by the Code of Conduct, and that the accountability regimes under [...] the Regulations of the Registry do not apply to them”.³⁶ According to the Trial Chamber, the Regulations of the Registry serve “an important filtering function”, namely ensuring “that only individuals with the relevant legal background, who are bound by the Code of Conduct and the accountability regimes, are entitled to legally privileged communications”.³⁷ The Trial Chamber further emphasised that Counsel can of course employ such other staff as needed to assist Counsel, but “they must accept the consequence that legal privilege does not apply to these team members”.³⁸

21. Additionally, it should be noted that the extension of legal privilege in the referenced *Turinabo* decision at the International Residual Mechanism for Criminal Tribunals (‘IRMCT’) was issued in the exceptional context of the global COVID-19 pandemic.³⁹ The decision, which extended legal privilege to qualified attorneys in the same location as the Accused (when Lead Defence Counsel was located in a separate country from the Accused), considered that “confidential communications with members of the Defence team may be permitted in *exceptional circumstances* where,

³⁵ ICC, Trial Chamber V, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Public Redacted Version of “Decision on the Ngaïssona Defence Request on the Scope of Privileged Communications”, ICC-01/14-01/18-712-Red, 16 February 2021 (date of original: 4 November 2020), para. 21.

³⁶ *Id.*, para. 17; *see also id.*, para. 14.

³⁷ *Id.*, para. 17.

³⁸ *Id.*, para. 18.

³⁹ IRMCT, Single Judge, *Prosecutor v. Turbinao, et al.*, “Order on the Extension of Attorney-Client Privilege”, MICT-18-116-PT, 25 September 2020, p. 2.

inter alia, Defence Counsel cannot access his or her client for an *essential* purpose”.⁴⁰
There are no such exceptional circumstances present here.

C. Conclusion

22. In light of above, the Registrar submits that the SC legal framework, which does not extend the Counsel-client privilege to Legal Consultants, should be applied. Defence Team members can nevertheless continue to enjoy privileged visits and communications when accompanied by Counsel or Co-Counsel.

III. CLASSIFICATION

23. Pursuant to Rule 82(3) of the Rules, Annex 1 to this filing is submitted as confidential, as it includes internal Registry communications with Counsel and references personal details of SC staff.

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Dr Fidelma Donlon

Registrar

Wednesday, 20 March 2024

At The Hague, the Netherlands

⁴⁰ Id. (emphasis added).