



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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 Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor's Office

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Prosecution response to 'Defence Counsel Request for Determination Pursuant to Article 28(4)(b)(i) of the Code of Conduct'

Specialist Prosecutor's Office

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I. INTRODUCTION

1. Pursuant to Article 40(2) and 40(6) of the Law,¹ Rule 116 of the Rules,² Articles 28(3)(b) and 28(4)(b)(1) of the Code of Conduct,³ Section 16(2)(a) of the Directive,⁴ and the Panel's inherent authority to safeguard the fairness and integrity of the proceedings,⁵ the Trial Panel should determine that a conflict of interest arises from the assignment of Ms Venkateswari ALAGENDRA ('Counsel') to represent Mr Salih MUSTAFA ('MUSTAFA'),⁶ by virtue of her representation of Jakup KRASNIQI ('KRASNIQI') in a substantially related matter.

2. The Request seeks to impose an inappropriately high standard of proof,⁷ which would make it impossible to proactively resolve conflicts of interest, including before they materialise. In light of the substantial overlap between the two cases in which Counsel would be acting and the resulting conflict of interest, her representation of both KRASNIQI and MUSTAFA could seriously and irreversibly prejudice the interests of her clients and the wider interests of justice.

¹ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' are to the Law, unless otherwise specified.

² Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' are to the Rules, unless otherwise specified.

³ Code of Professional Conduct for Counsel and Prosecutors Before the Kosovo Specialist Chambers, KSC-BC-07/Rev1, 28 April 2021 ('Code of Conduct').

⁴ Registry Practice Direction: Directive on Counsel, KSC-BD-04/Rev1, 28 April 2021 ('Directive').

⁵ ICTY, *Prosecutor v. Mejković et al.*, IT-02-65-AR73.1, Decision on appeal by the Prosecution to resolve conflict of interest regarding attorney Jovan Simić, 6 October 2004 ('Mejković Decision'), para.7; ICC, *Prosecutor v. Maxime Jeffroy Eli Mokom Gawaka*, ICC-01/14-01/22-124-Red, Judgment on the appeal of Maxime Jeffroy Eli Mokom Gawaka against the decision of Pre-Trial Chamber II of 19 August 2022 entitled "Decision on legal representation further to the Appeals Chamber's judgment of 19 July 2022", 19 December 2022 ('Mokom Decision'), paras 45, 54; ICC, *Prosecutor v. Nourain and Jamus*, ICC-02/05-03/09, Decision on the Prosecution's Request to Invalidate the Appointment of Counsel to the Defence, 30 June 2011, para.12.

⁶ Notification of Appointment of Venkateswari Alagenda as Counsel to Salih Mustafa with two confidential and *ex parte* Annexes, KSC-BC-2020-06/F02066, 18 January 2024; *see also Specialist Prosecutor v. Mustafa*, Notification of Approval of Counsel for Salih Mustafa with one confidential Annex, KSC-CA-2023-02/F00041, 11 January 2024; *Specialist Prosecutor v. Mustafa*, Information Additional to Notification of Approval of Counsel for Salih Mustafa with two confidential and *ex parte* Annexes, KSC-SC-2024-02/F00004, 18 January 2024.

⁷ Defence Counsel Request for Determination Pursuant to Article 28(4)(b)(i) of the Code of Conduct with Confidential and Ex Parte Annexes 1-4, KSC-BC-2020-06/F02084, 26 January 2024 ('Request').

II. SUBMISSIONS

3. Counsel's simultaneous representation of both KRASNIQI and MUSTAFA creates an irreconcilable conflict of interest.⁸ KRASNIQI is charged with, *inter alia*, the same crimes that are the subject of the *Mustafa* case.⁹ As the Supreme Court Panel has found and Counsel concedes,¹⁰ the two cases are substantially related within the meaning of Article 28(3)(b) of the Code of Conduct. Article 28(4)(a) of the Code of Conduct deems a conflict of interest arising under these circumstances so significant as to mandate judicial intervention. This is also consistent with and should be considered in light of other provisions of the Code of Conduct, which forbid Counsel from representing two or more clients in the same matter,¹¹ and rulings of the ICTY Appeals Chamber, which has held that a conflict of interest is 'more obvious in cases

⁸ A conflict of interest between counsel and client arises in a situation where representation by counsel prejudices or could prejudice the interests of the client and the wider interests of justice. *See* Mokom Decision, para.43.

⁹ Public Lesser Redacted Version of Amended Indictment, KSC-BC-2020-06/F01323/A01, 27 February 2023 ('Indictment'), paras 75, 109, 160; Public Redacted Version of 'Corrected Version of Prosecution Pre-Trial Brief', KSC-BC-2020-06/F01415/A01, 3 April 2023 ('Pre-Trial Brief'), paras 444-457; *see also* paras 203, 438-443. KRASNIQI and his co-Accused are charged with committing through their participation in a joint criminal enterprise ('JCE'), aiding and abetting, and superior responsibility the crimes at, *inter alia*, Zllash/Zlaš. *See* Indictment, KSC-BC-2020-06/F01323/A01, paras 32-57. Rrustem MUSTAFA, a JCE member named in the Indictment (KSC-BC-2020-06/F01323/A01, para.35), allegedly appointed Salih MUSTAFA as the BIA unit commander. *See* Pre-Trial Brief, KSC-BC-2020-06/F01415/A01, para.203. *See also* *Prosecutor v. Mustafa*, Further redacted version of Corrected version of Public redacted version of Trial Judgment, 8 June 2023, KSC-BC-2020-05/F00494/RED3/COR, 16 December 2022 ('Mustafa Trial Judgment'), para.338.

¹⁰ *Specialist Prosecutor v. Mustafa*, Decision on Prosecution Motion Regarding Conflict of Interest of Defence Counsel, KSC-SC-2024-02/F00008, 25 January 2024 ('Mustafa Decision on Conflict of Interest'), para.8; Request, KSC-BC-2020-06/F02084, para.23.

¹¹ Code of Conduct, Articles 28(3)(a), 28(4)(a); Directive, Section 16(2)(a). Accordingly, the only case cited in the Request in which the same counsel represented two co-accused in the same case does not constitute persuasive jurisprudence within the meaning of Article 3(3) because of the different legal frameworks. Moreover, conflicts issues do not seem to have been judicially determined in that case, which never progressed past the pre-trial stage of proceedings, with one of the two accused dying prior to the commencement of trial. *See* Request, KSC-BC-2020-06/F02084, para.20, *citing* ICC, *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09, Decision on issues relating to disclosure, 29 June 2010, p.2. *See also* ICC, *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09, Public redacted Decision terminating the proceedings against Mr Jerbo, 4 October 2013.

where counsel represents two accused who are, at least partly, charged with the same criminal acts, committed during the same period of time and in the same area'.¹²

4. An accused's right to counsel of their own choosing is limited, *inter alia*, by a conflict of interest affecting the choice of counsel.¹³ If left unresolved, a latent conflict of interest could seriously and irreversibly prejudice the administration of justice.¹⁴ Accordingly, informed consent¹⁵ is not conclusive and does not relieve the Panel of the responsibility to ensure the integrity and fairness of the proceedings.¹⁶

5. Contrary to the Request, the conflict of interest is not 'merely speculative'.¹⁷ The Trial Panel's duty to prevent potential conflicts of interest before they arise necessarily involves the anticipation of issues.¹⁸ Were the Trial Panel to wait until there is definite proof that one of the latent risks has materialised, it would be too late to prevent the conflict from causing undue delay and (potentially irreversible) prejudice in either (or both) of the cases in which Counsel would be acting.¹⁹ In this respect, any conflict of interest assessment in the context of this complex, multi-Accused trial should take into

¹² ICTY, *Prosecutor v. Gotovina et. al.*, IT-06-90-AR73.2, Decision on Ivan čermak's interlocutory appeal against Trial Chamber's decision on conflict of interest of attorneys čedo Prodanović and Jadranka Sloković, 29 June 2007 ('Gotovina Decision'), para.24. ICTY, *Prosecutor v. Jadranko Prlić et.al.*, IT-04-74-AR73.1, Decision on appeal by Bruno Stojić against Trial Chamber's Decision on Request for Appointment of Counsel, 24 November 2004 ('Prlić Decision'), paras 23-25.

¹³ Mejakić Decision, para.8; Gotovina Decision, para.55.

¹⁴ Gotovina Decision, para.55; Prlić Decision, paras 19-22, 24-27; Mokom Decision, para.43.

¹⁵ Further, whether consent can be truly informed in a case such as this is questionable, as it would require the clients to be fully conscious of all possible implications, and possible limitations that simultaneous representation could impose. 'The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials [...] A few bits of unforeseen testimony or a single previously unknown or unnoticed document may significantly shift the relationship between multiple defendants. These imponderables are difficult enough for a lawyer to assess, and even more difficult to convey by way of explanation to a criminal defendant'. See Gotovina Decision, para.33, fn.28 (and the sources cited therein). *Contra* Request, KSC-BC-2020-06/F02084, para.24.

¹⁶ Gotovina Decision, para.35; Prlić Decision, paras 27-30; see also IRMCT, *Prosecutor v. Turinabo et al.*, MICT-18-116-PT, Decision on Request for Review of Registrar's Decision, 25 January 2019, para.39.

¹⁷ *Contra* Request, KSC-BC-2020-06/F02084, para.25.

¹⁸ Gotovina Decision, para.16; Prlić Decision, paras 25, 32.

¹⁹ Mokom Decision, para.61 (considering that, where judicial intervention is warranted, deferring such action may affect the right of the accused to be tried in an expeditious manner); Gotovina Decision, para.55 (finding that failure to resolve the relevant conflict of interest early may 'have much more disastrous consequences in the future'); Prlić Decision, paras 25, 32.

account not only the evidence heard, submissions made, and strategies apparent now, but also all possible evidence, submissions, strategies, and potential implications and limitations at future stages of the trial, including when the SPO presents evidence of the alleged crimes at Zllash/Zlaš.

6. The potential conflict of interest is grounded in realistic factual scenarios. For instance, Counsel's duty of confidentiality towards one client may conflict with her duty of loyalty towards the other in situations where she receives privileged information from one client that she would otherwise be obligated to use in representing the other.²⁰ This risk is especially acute since witnesses are anticipated to testify and evidence to be tendered in the *Thaçi et. al.* trial about the crimes committed at, and MUSTAFA's involvement in, the Zllash/Zlaš detention compound. When deciding if and how to examine such witnesses and challenge such evidence, Counsel would face an irreconcilable choice between, on the one hand, respecting the confidentiality of information and, on the other, effectively informing and representing each of her clients.²¹ By the time Counsel receives such information, she may have no choice but to withdraw from this case, thereby causing undue delay and prejudice to KRASNIQI.

7. Likewise, Counsel may not adopt a certain strategy or make a particular submission on behalf of one client, so as not to prejudice the interests of the other.²² For example, in defending KRASNIQI against the allegations relating to the Zllash/Zlaš detention compound, Counsel may be discouraged from shifting blame to alleged subordinates,²³ which would include MUSTAFA.²⁴ While the Request posits

²⁰ See e.g. Code of Conduct, Articles 24-27; see, similarly, ICC, *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11, Public Redacted Version of Reasons for the Decision on the Replacement of Duty Counsel for a Witness, 10 December 2014 ('Ruto Decision'), paras 49-61.

²¹ See, similarly, Ruto Decision, paras 49-61.

²² See, similarly, Gotovina Decision, para.23.

²³ Prlić Decision, para.24.

²⁴ See Indictment, KSC-BC-2020-06/F01323/A01, paras 55-57; see also para.35 (defining the 'JCE Members and Tools', who are also alleged subordinates of KRASNIQI and his co-Accused). Likewise, MUSTAFA has attempted to shift blame from his BIA unit to other KLA units, including Brigade 153 and/or the Karadak Zone. See e.g. *Specialist Prosecutor v. Mustafa*, Second Further Public Redacted Version of the Corrected Version of Defense Appeal Brief pursuant to Rule 179(1) of Rules of Procedure and Evidence

that MUSTAFA would derive no benefit from attempting to shift blame to KRASNIQI,²⁵ the same cannot be said with respect to KRASNIQI's potential benefit in shifting blame to MUSTAFA.²⁶ Counsel's assurances that – at present – such a strategy is not contemplated²⁷ does not overcome the issue that her representation of MUSTAFA would effectively bar KRASNIQI from pursuing this line of defence. In this complex, multi-Accused trial, Counsel must be in a position to adapt to changing dynamics. No witnesses have testified to date about crimes at the Zllash/Zlaš detention compound,²⁸ and the KRASNIQI Defence thus cannot realistically and definitely claim that its related strategy is final.

8. Furthermore, contrary to the assertion in the Request that KRASNIQI 'is not factually connected in any way' to Zllash/Zlaš,²⁹ KRASNIQI – who is alleged to be individually criminal responsible for the crimes committed at Zllash/Zlaš³⁰ – *inter alia*, visited the Llap Zone and was personally involved in the appointment of senior leadership of the Llap Zone, including the Zone Commander to whom MUSTAFA reported.³¹ Counsel's argument that KRASNIQI was geographically remote from

("Rules") with confidential Annexes 1, 2 and 3, KSC-CA-2023-02/F00021/CORRED3, 22 April 2023, Grounds 2A-C; *Specialist Prosecutor v. Mustafa*, Public Redacted Version of the Defence Brief in Reply to The Prosecutions' Brief in Response to Defence Appeal and Victims' Counsel Response to Defence Appeal Brief F00021 with one Public Annex pursuant to Rule 179 (3) of Rules of Procedure and Evidence ("Rules"), KSC-CA-2023-02/F00028/RED, 16 June 2023, paras 83-85.

²⁵ Request, KSC-BC-2020-06/F02084, para.26.

²⁶ For example, Defence teams have pursued lines of questioning seeking to establish that the General Staff attempted to take measures to prevent crimes by KLA units in the Llap Zone. *See e.g.* Transcript of Hearing, 14 July 2023, public, pp 5740-5744.

²⁷ Request, KSC-BC-2020-06/F02084, para.25.

²⁸ Likewise, the parties may yet request judicial notice of facts from the Mustafa Trial Judgment.

²⁹ Request, KSC-BC-2020-06/F02084, para.33.

³⁰ *See* fn.9 above.

³¹ Pre-Trial Brief, KSC-BC-2020-06/F01415/A01, paras 16(d), 80, 205. *See e.g.* U015-8743-U015-9047, pp.U015-8861-U015-8862; Transcript of Hearing, 11 July 2023, p.5482; Transcript of Hearing, 12 July 2023, pp.5528, 5531-5533; Transcript of Hearing, 13 July 2023, pp.5618-5619; Transcript of Hearing, 14 July 2023, pp.5722-5723. *See also* Pre-Trial Brief, KSC-BC-2020-06/F01415/A01, para.205; Mustafa Trial Judgment, KSC-BC-2020-05/F00494/RED3/COR, para.339. *See also* Transcript of Hearing, 17 July 2023, pp.5844-5846 (Llap Zone Commander W04746 recounting a telephone conversation with Jakup KRASNIQI in which the detention of a person with FARK affiliation was discussed); Transcript of Hearing, 12 July 2023, pp.5563-5564 (Llap Zone Commander W04746 recounting a General Staff meeting where the collaborator issue, including detention of collaborators, was discussed).

Zllash/Zlaš at the relevant time is beside the point, since he is not charged as a physical perpetrator.³² Likewise, the Trial Panel should reject Counsel's unpersuasive attempt to distinguish the *Gotovina* decision of the ICTY Appeals Chamber on the basis that, compared to that case, MUSTAFA is one step further removed from KRASNIQI in the chain of command.³³ MUSTAFA reported to named JCE member Rustem MUSTAFA,³⁴ who in turn reported to the General Staff, including KRASNIQI.³⁵ As detailed above,³⁶ this scenario leaves plenty of scope for conflicting defence strategies and potential (mis)use of confidential information.³⁷

9. MUSTAFA could also be called as a witness in *Thaçi et al.* Contrary to Counsel's submissions,³⁸ MUSTAFA is a potential witness regardless of whether he currently features on any Party's witness list, considering the substantial likelihood that he has information about charged crimes, alleged perpetrators, and circumstances relevant to the *Thaçi et al.* proceedings.³⁹ For this reason, Counsel's assurance that there is presently 'no indication that any Defence team or other participant wishes to call Mr. Mustafa' rings hollow, particularly well before the start of any defence case. Should MUSTAFA be called as a witness, Counsel, *inter alia*: (i) would be incapable of independently advising MUSTAFA about his options; and/or (ii) may not be able to pursue certain lines of examination on behalf of KRASNIQI, without prejudicing MUSTAFA's interests.⁴⁰

³² *Contra* Request, KSC-BC-2020-06/F02084, paras 25, 32-35.

³³ *Contra* Request, KSC-BC-2020-06/F02084, para.35.

³⁴ Pre-Trial Brief, KSC-BC-2020-06/F01415/A01, paras 112, 203; Mustafa Trial Judgment, KSC-BC-2020-05/F00494/RED3/COR, para.339.

³⁵ Pre-Trial Brief, KSC-BC-2020-06/F01415/A01, para.108; *see above* fn.31.

³⁶ *See* paras 6-7 above.

³⁷ *See, similarly*, Prlić Decision, paras 23-24.

³⁸ Request, KSC-BC-2020-06/F02084, para.36.

³⁹ *See, inter alia*, Article 42. Indeed, notwithstanding the fact that MUSTAFA is not on the SPO's witness list, the Defence teams have not filed their witness lists and the Panel may order the submission of or call any evidence it considers necessary for the determination of the truth. *See* Rule 137.

⁴⁰ *See, similarly*, Mejakić Decision, paras 13-15. *Compare, for example*: 069404-TR-ET Part 1, pp.18-23 (MUSTAFA's statement to the SPO claiming, *inter alia*, that from 1997 or 1998, the KLA General Staff issued orders to the subzone staff, which passed these orders down the chain of command) *with* Transcript of Hearing, 5 April 2023, pp.2408, 2413 (Jakup KRASNIQI's Opening Statement claiming,

10. In addition, although the issuance of the second instance judgement has finalised the criminal proceedings in the *Mustafa* case,⁴¹ leaving only limited scope for review,⁴² procedural avenues remain open to MUSTAFA that may place Counsel in a position of conflict.⁴³ For example, through her representation of or confidential communications with KRASNIQI or MUSTAFA, Counsel may discover new facts or new evidence which were not known during the trial or appeals proceedings in the *Mustafa* case. In such circumstances and for many of the same reasons enumerated above, (i) Counsel's ability to adopt related strategies or make related submissions may be impaired, and (ii) her duty of confidentiality may bar any use of such information either in this case or as a basis for an application to re-open criminal proceedings pursuant to Article 48(2)(c).

11. Counsel's assertion that evidence disproving 'the occurrence or commission of crimes at Zllash' would equally benefit MUSTAFA and KRASNIQI is reductively misleading.⁴⁴ While, on proof of the occurrence or commission of crimes, their interests may generally be expected to align, the present conflict of interest between MUSTAFA and KRASNIQI is likely to arise in relation to evidence and strategy relevant to responsibility through a mode of liability other than direct commission, with which KRASNIQI is not charged. As Counsel confirms,⁴⁵ the latter issue is at the heart of KRASNIQI's pleaded defence.

12. Finally, a finding preventing Counsel's representation of MUSTAFA would not cause undue prejudice and, in fact, may ultimately facilitate fair and expeditious

inter alia, that in June 1998 there was no General Staff 'in any meaningful sense of that word' and that the KLA did not have a hierarchical structure with a chain of command).

⁴¹ Article 46(7).

⁴² Article 48.

⁴³ For example, the Supreme Court recently considered an alleged disclosure violation in the context of a request for protection of legality. See *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on Requests for Protection of Legality, KSC-SC-2023-01/F000021, 18 September 2023, Section IV(G). In substantially related cases, which concern the same crimes and overlapping evidentiary records, such procedural matters could reasonably be expected to affect Counsel's ability to full represent both KRASNIQI and MUSTAFA.

⁴⁴ Request, KSC-BC-2020-06/F02084, paras 29, 33-34.

⁴⁵ Request, KSC-BC-2020-06/F02084, para.31.

proceedings. Counsel's dual role poses the risk of delay in both cases due to conflicting time and resource constraints. Further, while some delay may result from a further change of MUSTAFA's counsel, it need not be substantial, considering that Counsel was only briefly appointed and duty counsel has since been assigned.⁴⁶ Moreover, it would mitigate the real risk that Counsel might (seek to) withdraw in the course of these proceedings or those in the *Mustafa* case due to circumstances arising from the apparent conflict of interest. Thus, any limited prejudice caused by overriding MUSTAFA's choice of counsel at this stage is far outweighed by the interests of justice.⁴⁷

13. In the circumstances, the Trial Panel should proactively step in to prevent any conflict from arising and thus guarantee the fairness and integrity of the proceedings.⁴⁸ Such a course would be consistent with the Kosovo Ethics Code,⁴⁹ as well as practice and jurisprudence in both international and domestic systems.⁵⁰

III. CLASSIFICATION

14. Consistent with the Request, this response is confidential pursuant to Rule 82(4). However, as it does not contain confidential information and related filings in the

⁴⁶ Mustafa Decision on Conflict of Interest, KSC-SC-2024-02/F00008; *Specialist Prosecutor v. Mustafa*, Notification of Assignment of Duty Counsel to Salih Mustafa with one confidential Annex, KSC-SC-2024-02/F00010, 29 January 2024.

⁴⁷ See, similarly, Gotovina Decision, paras 54-55.

⁴⁸ Article 40(2), (6). See also Mokom Appeal Decision, paras 41, 43, 45, 54, 59, 61-62, 64, 93-95; Ruto Decision, paras 33 (finding that a lawyer is seldom justified in asserting that 'it is up to him or her alone to decide to act, as a participant in the judicial process, when the interests of a particular client collide with the interests of other persons or clients or indeed the broader interests of justice'), 47 (the primary obligation on the counsel to address potential conflicts does not negate the role of a court to take appropriate steps to avoid the potential for such conflict where timeous information has come to the attention of the court), 48 (steps should be taken to avoid conflicts when such potential becomes apparent, as damage may not always be easily remedied when a potential conflict materialises later); Gotovina Decision, paras 23, 28 (safeguarding the interests of justice requires not only the existence of a mechanism for removing conflicts of interests after they have arisen, but also the prevention of conflicts before they arise).

⁴⁹ Kosovo Bar Association, Lawyers Code of Professional Ethics, 2012 ('Kosovo Ethics Code'), Article 25 (providing that a lawyer should refuse offering legal assistance, *inter alia*, if s/he has represented clients in the same case or a case related to it).

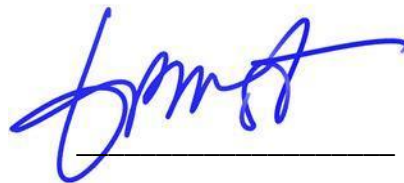
⁵⁰ See e.g. Gotovina Decision, paras 44-47 (reviewing the practice in various jurisdictions); Mokom Decision, paras 43-45.

Mustafa case were public, the SPO does not object to reclassification of this response as public.

IV. RELIEF SOUGHT

15. For the foregoing reasons, the Trial Panel should find that a conflict of interest exists, which prevents Counsel's representation of MUSTAFA.

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Kimberly P. West

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Monday, 5 February 2024

At The Hague, the Netherlands.