



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEÇA 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:** 8 February 2024

**Language:** English

**Classification:** Public

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**Decision on Defence Counsel Request for Determination Pursuant to  
Article 28(4)(b)(i) of the Code of Professional Conduct for Counsel and  
Prosecutors (Conflict of Interest)**

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**Specialist Prosecutor**  
Kimberly P. West

**Counsel for Victims**  
Simon Laws

**Counsel for Hashim Thaçi**  
Gregory Kehoe

**Counsel for Kadri Veseli**  
Ben Emmerson

**Counsel for Rexhep Selimi**  
Geoffrey Roberts

**Counsel for Jakup Krasniqi**  
Venkateswari Alagendra

**TRIAL PANEL II** (“Panel” or “Trial Panel II”), pursuant to Articles 21(4)(e) and 40(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”), Rule 26(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), and Article 28(3)(b) and (4)(b)(1) of the Code of Professional Conduct for Counsel and Prosecutors Before the Kosovo Specialist Chambers (“Code of Conduct”),<sup>1</sup> hereby renders this decision.

## I. PROCEDURAL BACKGROUND

1. On 6 November 2020, the Registrar assigned Venkateswari Alagendra (“Ms Alagendra”) as Counsel for Jakup Krasniqi (“Mr Krasniqi”).<sup>2</sup>
2. On 14 December 2023, the Court of Appeals Panel issued its appeal judgment in the case against Salih Mustafa (“Mr Mustafa”), wherein it affirmed Mr Mustafa’s conviction<sup>3</sup> for war crimes committed in Zllash/Zlaš in April 1999.<sup>4</sup>
3. On 3 January 2024, the Registrar granted Mr Mustafa’s request to have his Counsel, Julius von Bóné, replaced and appointed Ms Alagendra as his new Counsel of choice.<sup>5</sup>
4. On 18 January 2024, the Registrar notified Trial Panel II as well as the Parties and participants in these proceedings of Ms Alagendra’s appointment as Counsel for Mr Mustafa.<sup>6</sup>

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<sup>1</sup> KSC-BD-07/Rev1/2021, 28 April 2021.

<sup>2</sup> F00058, Registrar, *Notification of the Appointment of Counsel to Jakup Krasniqi*, 6 November 2020, with Annex 1, confidential.

<sup>3</sup> See KSC-BC-2020-05, F00494/RED3/COR, Trial Panel I, *Further Redacted Version of Corrected Version of Public Redacted Version of Trial Judgment* (“Mustafa Trial Judgment”), 24 January 2023 (date of original judgment: 16 December 2022).

<sup>4</sup> KSC-CA-2023-02, F00038/RED, Court of Appeals Panel, *Public Redacted Version of Appeal Judgment*, 14 December 2023.

<sup>5</sup> See F02084/A01, Specialist Counsel, *Annex 1 to Defence Counsel Request for Determination Pursuant to Article 28(4)(b)(i) of the Code of Conduct*, 26 January 2024, confidential and *ex parte*.

<sup>6</sup> F02066, Registrar, *Notification of Appointment of Venkateswari Alagendra as Counsel to Salih Mustafa* (“18 January 2024 Notification”), 18 January 2024, with Annexes 1-2, confidential and *ex parte*.

5. On 25 January 2024, pursuant to a challenge by the Specialist Prosecutor's Office ("SPO"),<sup>7</sup> the Supreme Court Panel found that: (i) in the absence of a determination by Trial Panel II that no conflict of interest exists, Ms Alagendra should not have been appointed by the Registrar to represent Mr Mustafa; (ii) the Registrar's decision appointing Ms Alagendra has no legal effect; and (iii) Ms Alagendra would have to notify Trial Panel II as set forth in Article 28(4)(b)(1) of the Code of Conduct if she intends to represent Mr Mustafa.<sup>8</sup>

6. On 26 January 2024, Ms Alagendra filed a request before Trial Panel II for determination pursuant to Article 28(4)(b)(i) of the Code of Conduct ("Request").<sup>9</sup>

7. On 29 January 2024, in light of Ms Alagendra's request for expedited consideration of the Request,<sup>10</sup> the Panel varied the briefing schedule, informing the Parties and participants that: (i) should they wish to respond to the Request, they should do so by 4 pm on Monday, 5 February 2024; and (ii) any reply thereto should be filed by Wednesday, 7 February 2024 ("29 January 2024 Correspondence").<sup>11</sup>

8. On 5 February 2024, the SPO and the Defence for Kadri Veseli ("Veseli Defence") filed their responses to the Request ("SPO Response" and "Veseli Response", respectively).<sup>12</sup>

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<sup>7</sup> KSC-SC-2024-02, F00006, Specialist Prosecutor, *Prosecution Challenge to Appointment of Counsel*, 23 January 2024.

<sup>8</sup> KSC-SC-2024-02, F00008, Supreme Court Panel, *Decision on Prosecution Motion Regarding Conflict of Interest of Defence Counsel* ("Supreme Court Panel Decision"), 25 January 2024, paras 9, 11.

<sup>9</sup> F02084, Specialist Counsel, *Defence Counsel Request for Determination Pursuant to Article 28(4)(b)(i) of the Code of Conduct*, 26 January 2024, confidential, with Annexes 1-4, confidential and *ex parte*.

<sup>10</sup> Request, paras 3, 41.

<sup>11</sup> CRSPD423, *Email from Trial Panel II to CMU re Expedited Briefing Schedule for F02084*, 29 January 2024, confidential.

<sup>12</sup> F02102, Specialist Prosecutor, *Prosecution Response to 'Defence Counsel Request for Determination Pursuant to Article 28(4)(b)(i) of the Code of Conduct'*, 5 February 2024, confidential; F02103, Specialist Counsel, *Veseli Defence Response to Defence Counsel Request for Determination Pursuant to Article 28(4)(b)(i) of the Code of Conduct (F02084)*, 5 February 2024, confidential.

9. On 7 February 2024, Ms Alagendra replied to the SPO Response (“Reply”).<sup>13</sup>

## II. SUBMISSIONS

10. Ms Alagendra requests the Panel to determine that no conflict of interest exists which would preclude her appointment as Mr Mustafa’s Counsel.<sup>14</sup> She submits, in particular, that: (i) on the facts of the two cases, they are not substantially related; and (ii) at this stage, there is no indication that the respective lines of defence of Messrs Mustafa and Krasniqi would conflict or that a conflict of interest would arise from evidence (to be) given by Mr Mustafa.<sup>15</sup> Ms Alagendra also submits that Mr Mustafa wishes to appoint her as his Counsel, and both Mr Krasniqi and Mr Mustafa have given their informed consent to her representing them simultaneously.<sup>16</sup> She further argues that the current stage of proceedings of Mr Mustafa’s case is relevant to the assessment of a conflict of interest.<sup>17</sup> In addition, she avers that, in the present circumstances, restricting Mr Mustafa’s right to choose Counsel would be unjustified, lead to the erosion of that right and represent a serious impairment of his right to seek recourse to protection of legality.<sup>18</sup>

11. The SPO responds that the Panel should find that a conflict of interest exists, which prevents Ms Alagendra’s representation of Mr Mustafa.<sup>19</sup> It submits that the Request seeks to impose an inappropriately high standard of proof, which would make it impossible to proactively resolve conflicts of interest.<sup>20</sup> It also submits that, in light of the substantial overlap between the two cases and the resulting conflict of interest, Ms Alagendra’s simultaneous representation of Messrs Krasniqi and Mustafa

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<sup>13</sup> F02110, Specialist Counsel, *Defence Counsel Reply to Prosecution Response to ‘Defence Counsel Request for Determination Pursuant to Article 28(4)(b)(i) of the Code of Conduct’*, 7 February 2024, confidential.

<sup>14</sup> Request, paras 1, 17, 40. *See also* Request, paras 2, 22, 25.

<sup>15</sup> Request, paras 22, 25-37.

<sup>16</sup> Request, paras 1, 24, *referring to* (Annexes 1-2 to) the 18 January 2024 Notification.

<sup>17</sup> Request, paras 25, 28-29.

<sup>18</sup> Request, paras 38-40.

<sup>19</sup> SPO Response, paras 1, 15.

<sup>20</sup> SPO Response, paras 2, 5.

could seriously and irreversibly prejudice the interests of her clients and the wider interests of justice.<sup>21</sup> The SPO argues, in particular, that: (i) Ms Alagendra's duty of confidentiality towards one client may conflict with her duty of loyalty towards the other in situations where she receives privileged information;<sup>22</sup> and (ii) she may be precluded from adapting a certain strategy or making a particular submission on behalf of one client so as not to prejudice the interests of the other.<sup>23</sup> According to the SPO, a finding preventing Ms Alagendra from representing Mr Mustafa would not cause undue prejudice and may ultimately facilitate fair and expeditious proceedings.<sup>24</sup> Therefore, the Panel should, in the SPO's view, proactively prevent any conflict from arising and thus guarantee the fairness and integrity of the proceedings.<sup>25</sup>

12. The Veseli Defence responds that, on the facts as presently known, it does not foresee any conflict arising and that it is not aware of any reason to prevent Ms Alagendra from representing Mr Mustafa.<sup>26</sup> It considers that Ms Alagendra's representation of Mr Mustafa would not cause any delay to the Case 06 proceedings or prejudice the ongoing representation of Mr Krasniqi in Case 06 or the wider interests of justice.<sup>27</sup>

13. The Veseli Defence also indicated that it currently does not intend to call Mr Mustafa as a witness.<sup>28</sup>

14. In her Reply, Ms Alagendra maintains that the Panel should grant the Request.<sup>29</sup> She submits that the SPO Response: (i) is speculative; (ii) fails to establish the existence of a conflict of interest or a sufficient risk of such conflict occurring in the future; and (iii) sets far too low a threshold for finding a conflict of interest and hence depriving

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<sup>21</sup> SPO Response, para. 2. *See also e.g.* SPO Response, paras 3, 8-9.

<sup>22</sup> SPO Response, paras 6, 10.

<sup>23</sup> SPO Response, paras 7, 9, 10-11.

<sup>24</sup> SPO Response, para. 12.

<sup>25</sup> SPO Response, para. 13.

<sup>26</sup> Veseli Response, paras 1-2, 5.

<sup>27</sup> Veseli Response, paras 2, 4.

<sup>28</sup> Veseli Response, para. 3.

<sup>29</sup> Reply, para. 12.

an accused of their choice of counsel.<sup>30</sup> She also submits that the SPO Response: (i) misinterprets the Request when claiming that Ms Alagenda ‘conceded’ that the two cases are substantially related within the meaning of Article 28(3)(b) of the Code of Conduct; and (ii) attaches too little weight to the informed consent given by Messrs Mustafa and Krasniqi.<sup>31</sup> Ms Alagenda further takes issue with the SPO’s argument of a risk of a delay in proceedings<sup>32</sup> and contends that irreparable prejudice would be caused if Mr Mustafa’s fundamental right to choose Counsel were to be overridden.<sup>33</sup>

### III. APPLICABLE LAW

15. Pursuant to Article 21(4)(e) of the Law, in the determination of any charge against the accused pursuant to the Law, the accused shall be entitled to defend himself or herself through Specialist Counsel of his or her own choosing.<sup>34</sup>

16. Pursuant to Article 40(2) of the Law, the Trial Panel shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules, with full respect for the rights of the accused.

17. Pursuant to Article 28(3)(b) of the Code of Conduct, except as provided in Article 28(4), Counsel shall not advise, represent or act on behalf of a Client in a matter before the Specialist Chambers if Counsel is advising, representing or acting or has advised, represented or acted on behalf of a Client in a substantially related matter before the Specialist Chambers.

18. Pursuant to Article 28(4)(b)(1) of the Code of Conduct, where an actual or potential conflict of interest arises pursuant to Article 28(3), at any stage of

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<sup>30</sup> Reply, paras 1, 3-4, 8-9. *See also* Reply, paras 6, 10.

<sup>31</sup> Reply, paras 5-7.

<sup>32</sup> Reply, para. 10.

<sup>33</sup> Reply, para. 11.

<sup>34</sup> *See also* Article 30(5) of the Constitution of the Republic Kosovo; Article 6(3)(c) of the European Convention on Human Rights; Article 14(3)(d) of the International Covenant on Civil and Political Rights.

proceedings, Counsel shall notify the Registrar in writing and obtain the informed consent of each potentially affected Client and notify the relevant Panel(s), which shall determine whether a conflict of interest exists.

#### IV. DISCUSSION

##### A. VESELI RESPONSE

19. It is questionable whether the Veseli Defence has standing in the present litigation. The Panel notes, however, that the 29 January 2024 Correspondence could be read to suggest that this Correspondence granted all Parties a right to respond. In those circumstances, the Panel will not determine whether the Veseli Defence has standing to respond.

20. This said, the Panel recalls that it set the deadline for responses from all Parties and participants to 4 pm on 5 February 2024.<sup>35</sup> The Veseli Response was filed at 7:40 pm on 5 February 2024. The Veseli Defence did not seek an extension of time and thus filed its submissions late. Nevertheless, considering that the late filing did not cause prejudice to any Party or participant, the Panel finds, on an exceptional basis, that the Veseli Response is validly before the Panel.

##### B. SCOPE OF THE PRESENT DECISION

21. The Supreme Court Panel has already determined that “Ms Alagendra’s representation of Mr Mustafa falls within the scenario set forth in Article 28(3)(b) of the Code of Conduct, namely where Counsel is representing a client in a substantially related matter before the Specialist Chambers by virtue of her representation of Mr Krasniqi”.<sup>36</sup> Trial Panel II is now being asked to determine, pursuant to Article 28(4)(b)(i) of the Code of Conduct, whether an actual or potential conflict of interest exists between Ms Alagendra’s appointment as Counsel for

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<sup>35</sup> See above, para. 7.

<sup>36</sup> Supreme Court Panel Decision, para. 8.

Mr Krasniqi in these proceedings (“Case 06”), and her prospective appointment as Counsel for Mr Mustafa. In this regard, the Panel understands, based on the Request and other filings on the Case 06 record, that the question of the existence of a conflict of interest has arisen primarily in relation to a future protection of legality request which Mr Mustafa intends to submit.<sup>37</sup> This scenario will form the basis of the Panel’s determination of whether a conflict of interest exists.

### C. DETERMINATION OF AN ACTUAL OR POTENTIAL CONFLICT OF INTEREST

22. According to international case law, a conflict of interest arises where, by reason of certain circumstances, representation by Counsel prejudices, or could prejudice, the interests of the client and the wider interests of justice.<sup>38</sup> Conflicts of interest have, for instance, been found to exist where, due to Counsel’s duty of loyalty, simultaneous representation of two clients would limit the choice of defence strategies of one or both clients.<sup>39</sup> The International Criminal Tribunal for the former Yugoslavia has further determined that a conflict of interest might be more readily identified where Counsel represents two accused who are, at least partly,

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<sup>37</sup> See e.g. Request, paras 13-15, 28, 39, 41; Annexes 1-2 to 18 January 2024 Notification (“[...] to appeal the Judgment of the Court of Appeals before the Supreme Court of the KSC [...]).

<sup>38</sup> See e.g. ICTY, *Simić et al.*, IT-95-9, Trial Chamber, [Decision on the Prosecution Motion to Resolve Conflict of Interest Regarding Attorney Borislav Pisarević](#) (“*Simić et al.* 25 March 1999 Decision”), 25 March 1999, p. 4; *Prlić et al.*, IT-04-74-AR73.1, Appeals Chamber, [Decision on Appeal by Bruno Stojić against Trial Chamber’s Decision on Request for Appointment of Counsel](#) (“*Prlić et al.* 24 November 2004 Decision”), 24 November 2004, para. 22; *Prlić et al.*, IT-04-74-AR73.6, Appeals Chamber, [Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić’s Questioning Into Evidence](#), 23 November 2007, para. 19; *Gotovina et al.*, IT-06-90-AR73.1, Appeals Chamber, [Decision on Mirsolav Šeparović’s Interlocutory Appeal against Trial Chamber’s Decision on Conflict of Interest and Finding of Misconduct](#), 4 May 2007, para. 23; *Gotovina et al.*, IT-06-90-AR73.2, Appeals Chamber, [Decision on Ivan Čermak’s Interlocutory Appeal against Trial Chamber’s Decision on Conflict of Interest of Attorney’s Čedo Prodanović and Jadranka Sloković](#) (“*Gotovina et al.* 29 June 2007 Decision”), 29 June 2007, para. 16; ICTR, *Nahimana et al.*, ICTR-99-52-A, Appeals Chamber, [Judgment](#), 28 November 2007, para. 158.

<sup>39</sup> ICTY, *Mejakić et al.*, IT-02-65-AR73.1, Appeals Chamber, [Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simić](#) (“*Mejakić et al.* 6 October 2004 Decision”), 6 October 2004, para. 15; *Gotovina et al.* [29 June 2007 Decision](#), paras 22-28; *Gotovina et al.*, IT-06-90-PT, Trial Chamber I, [Decision on Conflict of Interest of Attorneys Čedo Prodanović and Jadranka Sloković](#) (“*Gotovina et al.* 5 April 2007 Decision”), 5 April 2007, paras 11-19.



charged with the same criminal acts, committed during the same period of time and in the same area.<sup>40</sup>

23. Messrs Krasniqi and Mustafa are charged, in part, with the same crimes, namely those alleged to have been committed in Zllash/Zlaš in April 1999.<sup>41</sup> As noted above,<sup>42</sup> Mr Mustafa had already been convicted for these crimes on trial and his conviction was upheld on appeal.

24. Based on the Case 06 Indictment and the Case 06 SPO Pre-Trial Brief,<sup>43</sup> the Panel observes the following: (i) Mr Krasniqi is alleged to have been part of a Joint Criminal Enterprise (“JCE”) together with other individuals, and the crimes alleged in the Indictment, including in Zllash/Zlaš, are alleged to be both evidence of and implementation of that JCE;<sup>44</sup> (ii) in Case 06, it is further alleged that Mr Mustafa was subordinated to the alleged Case 06 JCE member Rrustem Mustafa who, in turn, is alleged to have been a subordinate of the Accused;<sup>45</sup> (iii) in other words, Mr Krasniqi is being charged, *inter alia*, in respect of crimes attributed to Mr Mustafa (and his associates), both under the JCE theory and command/superior responsibility;<sup>46</sup> and (iv) the potential relationship of

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<sup>40</sup> ICTY, *Prlić et al.*, IT-04-74-PT, Trial Chamber I, [Decision on Requests for Appointment of Counsel](#), 30 July 2004, para. 16 (see also *Prlić et al.* [24 November 2004 Decision](#), para. 24); *Gotovina et al.* [29 June 2007 Decision](#), para. 24.

<sup>41</sup> See F00999/A01, Specialist Prosecutor, *Annex 1 to Submission of Confirmed Amended Indictment* (“Case 06 Indictment”), 30 September 2022, confidential, paras 75, 109, 160 (a public lesser redacted version was filed on 27 February 2023, F01323/A01); KSC-BC-2020-05/F00011/RED/A01, Specialist Prosecutor, *Annex 1 to Public Redacted Version of “Submission of Confirmed Indictment”*, Filing KSC-BC-2020-05/F00011 dated 19 June 2020, 2 October 2020, paras 5 ff. See also F00709/A01, Specialist Prosecutor, *Annex 1 to Prosecution Submission of Corrected Pre-Trial Brief and Related Request* (“Case 06 SPO Pre-Trial Brief”), 24 February 2022, strictly confidential and *ex parte*, paras 203, 438-457 (a public redacted version, F01415/A01, and a confidential lesser redacted version, F01594/A03, were filed on 3 April and 9 June 2023, respectively).

<sup>42</sup> See above, para. 2.

<sup>43</sup> See above, fn. 41.

<sup>44</sup> Case 06 Indictment, paras 32-54, 75, 109, 160, 176.

<sup>45</sup> Case 06 Indictment, paras 35, 55-57, 176; Case 06 SPO Pre-Trial Brief, e.g. paras 203, 439. See also Mustafa Trial Judgment, para. 339.

<sup>46</sup> Case 06 Indictment, paras 32-57, 75, 109, 160, 176. See also Case 06 SPO Pre-Trial Brief, paras 267-268, 438-457.

subordination between the KLA General Staff and the zones (including the Llap zone in which Mr Mustafa operated) are live issues in Case 06.<sup>47</sup>

25. Based on the considerations noted in paragraphs 23-24 above, the Panel is of the view that there is a significant factual overlap between the two cases and associated allegations.

26. This said, the Panel notes the current stage of proceedings in relation to Mr Mustafa, namely that: (i) he had already been convicted at trial and his conviction was affirmed on appeal; and (ii) available legal remedies are thus limited.<sup>48</sup> As such, Mr Mustafa's lines of defence have generally already been explored on trial and appeal. The Panel has, at this stage, no reason to doubt the veracity of Ms Alagenda's assertion<sup>49</sup> that the respective lines of defence of Messrs Mustafa and Krasniqi do not and will not consist in shifting blame to one another. The Panel also notes in this regard that Ms Alagenda's submissions suggest that Mr Mustafa's arguments in a future protection of legality request could relate, for instance, to sentencing matters or the legal standard applied for murder.<sup>50</sup> Such arguments are unlikely to negatively affect Mr Krasniqi's position. Moreover, there is currently no concrete indication that any party intends to call Mr Mustafa as a witness in Case 06, nor to call Mr Krasniqi as a witness in proceedings related to Mr Mustafa.<sup>51</sup>

27. Furthermore, the Panel observes that Messrs Mustafa and Krasniqi have both given their consent to Ms Alagenda representing them simultaneously.<sup>52</sup> The

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<sup>47</sup> See e.g. Case 06 Indictment, paras 32-57; Case 06 SPO Pre-Trial Brief, e.g. paras 12, 203, 267-268, 709-713.

<sup>48</sup> See Article 48 of the Law.

<sup>49</sup> See Request, paras 25, 27. See also Request, paras 32-34; Reply, para. 4.

<sup>50</sup> Request, para. 28.

<sup>51</sup> For instance, Mr Mustafa is not on the SPO's list of witnesses (see F01594, Specialist Prosecutor, *Prosecution Submission of Updated Witness List and Confidential Lesser Redacted Version of Pre-Trial Brief*, 9 June 2023, with Annex 1, strictly confidential and *ex parte*, and Annexes 2-3, confidential), and the Veseli Defence indicated that it currently does not intend to call Mr Mustafa as a witness (see Veseli Response, para. 3).

<sup>52</sup> See Annexes 1-2 to 18 January 2024 Notification.

duty to inform promptly and fully each potentially affected client and to take all steps to remove a (potential) conflict of interest and/or to obtain the full and informed consent of the concerned individuals lies squarely upon Counsel.<sup>53</sup> Consent provided should generally be regarded as being fully informed in the absence of an indication to the contrary.<sup>54</sup> There is no indication that Messrs Mustafa and Krasniqi have given anything but informed consent. The Panel also notes that none of Mr Krasniqi's Co-Accused have raised an objection to Ms Alagendra representing both Mr Krasniqi and Mr Mustafa.<sup>55</sup>

28. However, despite the considerations noted in paragraphs 26-27 above, the significant factual overlap between the two cases and associated allegations<sup>56</sup> raises a matter of concern with respect to Ms Alagendra's duty of loyalty and from the broader point of view of the interests of justice, as her duty of loyalty could impact the nature of arguments that could be put forward on behalf of either client.<sup>57</sup> In particular, the lines of defence of Messrs Krasniqi and Mustafa could be affected in respect of, *inter alia*: (i) the role and responsibilities of the General Staff; (ii) the relationship between the General Staff and the zones (including the Llap zone in which Mr Mustafa operated); (iii) the question of subordination of alleged

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<sup>53</sup> *Gotovina et al.* [29 June 2007 Decision](#), para. 34; ICC, *Bemba et al.*, ICC-01/05-01/13-306, Pre-Trial Chamber II, [Decision on the "Prosecution Submission on the Appointment of Defence Counsel" for Mr Fidèle Babala Wandu](#) ("*Bemba et al.* 1 April 2014 Decision"), 1 April 2014, para. 3; *Mokom*, ICC-01/14-01/22-70-Anx-Red, [Partially Dissenting Opinion of Judge Luz Del Carmen Ibáñez Carranza and Judge Solomy Balungi Bossa to Public Redacted Judgment on the Appeal of Maxime Jeoffroy Eli Mokom Gawaka against the Decision of Pre-Trial Chamber II of 25 March 2022 \[...\]](#), 19 July 2022, para. 6, referring to *Bemba*, ICC-01/05-01/08-769, Trial Chamber III, [Decision on the "Prosecution's Request to Invalidate the Appointment of Legal Consultant to the Defence Team"](#), 7 May 2010, para. 39.

<sup>54</sup> *Martić*, IT-95-11-PT, Trial Chamber, [Decision on the Appeal against Decision of Registry](#), 2 August 2002, p. 7; *Prlić et al.* [24 November 2004 Decision](#), para. 27; *Gotovina et al.* [5 April 2007 Decision](#), paras 20-22; *Gotovina et al.* [29 June 2007 Decision](#), para. 33; MICT, *Turinabo et al.*, MICT-18-116-PT, President, [Decision on Request for Review of Registrar's Decision](#), 25 January 2019, para. 39. See also *Bemba et al.* [1 April 2014 Decision](#), paras 3, 9-10.

<sup>55</sup> With respect to the Veseli Defence, see above, para. 12 (summarising the Veseli Response).

<sup>56</sup> See above, paras 23-25.

<sup>57</sup> See on this e.g. *Prlić et al.* [24 November 2004 Decision](#), para. 24; *Tolimir et al.*, IT-05-88-PT, Trial Chamber II, [Decision on Appointment of Co-Counsel for Radivoje Miletic](#) ("*Tolimir et al.* 28 September 2005 Decision"), 28 September 2005, paras 29-30; *Gotovina et al.* [29 June 2007 Decision](#), paras 22-28.

(direct) perpetrators to (some of the) Accused in Case 06; (iv) whether or not the alleged crimes of Mr Mustafa and associates are evidence of implementation of the JCE alleged against Mr Krasniqi and his Co-Accused; (v) relatedly, whether the crimes committed by Mr Mustafa and his associates are those of 'rogue' agents or the implementation of an alleged KLA policy; and (vi) provided that there was a superior-subordinate relationship, whether Mr Krasniqi and/or his Co-Accused violated their obligation to prevent or punish in relation to crimes committed by Mr Mustafa and his associates.

29. While, as noted above,<sup>58</sup> the Panel has, at this stage, no reason to doubt the veracity of Ms Alagendra's assertion that the lines of defence for Messrs Mustafa and Krasniqi do not and will not include shifting blame to one another, it considers, based on the above-noted elements,<sup>59</sup> that there remains a sufficiently real possibility that a situation arises that would conflict with, or at least influence, the Defence strategy of either client. Simultaneous representation by Ms Alagendra of Messrs Krasniqi and Mustafa could, for instance, create a disincentive for Ms Alagendra in her capacity as Counsel for Mr Krasniqi to lead evidence that Mr Mustafa (or his associates) committed crimes for their own personal interests. Furthermore, Ms Alagendra could, for instance, be precluded from calling or examining certain witnesses and/or challenging witness evidence in Case 06 in order not to prejudice Mr Mustafa's interests.<sup>60</sup>

30. This, in turn, could pose a risk to an integral element of the fairness of proceedings, namely the assumption that Mr Krasniqi will be represented effectively and forcefully at all stages of the proceedings. The fact that Mr Krasniqi

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<sup>58</sup> See above, para. 26.

<sup>59</sup> See above, paras 23-25, 28.

<sup>60</sup> In this regard, see also e.g. *Mejakić et al.* [6 October 2004 Decision](#), para. 15; *Gotovina et al.* [5 April 2007 Decision](#), paras 11-19; *Gotovina et al.* [29 June 2007 Decision](#), paras 22-28; ICC, *Mokom*, ICC-01/14-01/22-70-Red, [Public Redacted Judgment on the Appeal of Maxime Jeoffroy Eli Mokom Gawaka against the Decision of Pre-Trial Chamber II of 25 March 2022 \[...\] \("Mokom 19 July 2022 Judgment"\)](#), 19 July 2022, paras 62-63, 65.

consented to Ms Alagendra representing Mr Mustafa<sup>61</sup> does not allow for the presumption that those interests will not be endangered by such representation.<sup>62</sup>

31. These concerns are further heightened by the fact that proceedings are ongoing in both cases. While, admittedly, they are at an advanced stage with respect to Mr Mustafa,<sup>63</sup> it remains difficult to assess what will or could occur in either case and whether and how this would impact the other case. In this respect, the Panel is mindful of the principle established in international case law that 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 such conflicts *before* they arise.<sup>64</sup>

32. Based on the above assessment, the Panel finds that while there is, at this stage, no indication of an *actual* conflict of interest, a *potential* conflict of interest exists if Ms Alagendra, in addition to her appointment as Counsel for Mr Krasniqi, were to also represent Mr Mustafa.

33. Furthermore, the Panel wishes to emphasise that its determination of a *potential* conflict of interest should not be regarded as an expression of the Panel's view that Ms Alagendra could not or should not be appointed as Counsel for Mr Mustafa. It is the Panel's view that it is not being asked to determine what measures ought to or could be taken in these circumstances to reduce the risk of an actual conflict arising. Nor has the Panel sought to consider the effect of this risk in light of Mr Mustafa's statutory and fundamental right to choose his Counsel. Therefore, the Panel will not address the Parties' submissions in this respect. The appointment or assignment of Counsel are matters to be primarily

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<sup>61</sup> See Annex 1 to 18 January 2024 Notification.

<sup>62</sup> See also *Prlić et al.* [24 November 2004 Decision](#), para. 27; *Tolimir et al.* [28 September 2005 Decision](#), para. 32; *Gotovina et al.* [29 June 2007 Decision](#), paras 32-35. See also ICTY, *Gotovina et al.*, IT-06-90-PT, Trial Chamber I, [Decision on Finding of Misconduct of Attorney Miroslav Šeparović](#), 6 March 2007, p. 4.

<sup>63</sup> See above, paras 2, 23. See also, in this regard, *Tolimir et al.* [28 September 2005 Decision](#), para. 31.

<sup>64</sup> *Prlić et al.* [24 November 2004 Decision](#), para. 25; *Gotovina et al.* [29 June 2007 Decision](#), paras 16, 28.

decided by the Registrar.<sup>65</sup> Accordingly, the Panel has not and will not engage in a balancing exercise of the competing interests, particularly Mr Mustafa's right to Counsel of his own choosing,<sup>66</sup> other interests of Mr Mustafa and Mr Krasniqi, and the interests of justice. Likewise, the Panel will not address whether measures other than non-appointment of Ms Alagenda as Counsel for Mr Mustafa could be put in place that would sufficiently reduce the risk of this *potential* conflict of interest affecting the rights and interests of Mr Krasniqi, Mr Mustafa and/or the interests of justice.

## V. CLASSIFICATION

34. Noting that the Request, the Veseli Response and the Reply were filed confidentially, the Panel orders the Parties to submit public redacted versions of their respective filings, or request their reclassification, by Thursday, 15 February 2024.

35. With respect to the confidential SPO Response, the Panel notes that the SPO does not object to it being reclassified as public.<sup>67</sup> Considering that the SPO Response does not contain any confidential information, the Panel directs the Registry to reclassify the SPO Response as public.

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<sup>65</sup> See Rule 26(1) of the Rules; KSC-BD-04/Rev1/2021, *Registry Practice Direction: Directive on Counsel*, 28 April 2021, in particular, Chapter III.

<sup>66</sup> See e.g. *Mejakić et al.* [6 October 2004 Decision](#), para. 8; *Prlić et al.* [24 November 2004 Decision](#), para. 19; *Bemba et al.* [1 April 2014 Decision](#), para. 5; *Mokom* [19 July 2022 Judgment](#), paras 57 ff. See also e.g. ICC, *Yekatom and Ngaïssona*, ICC-01/14-01/18-837-Red, Trial Chamber V, [Public Redacted Version of Decision on the Prosecution Submission on the Appointment of Defence Counsel](#), 19 January 2021, para. 6; ECtHR, *Croissant v. Germany* [GC], no. 13611/88, [Judgment](#), 25 September 1992, para. 29; *Meftah and Others v. France* [GC], nos. 32911/96, 35237/97 and 34595/97, [Judgment](#), 26 July 2002, para. 45; *Dvorski v. Croatia* [GC], no. 25703/11, [Judgment](#), 20 October 2015, paras 78-82.

<sup>67</sup> SPO Response, para. 14.

## VI. DISPOSITION

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

- a) **FINDS** that a *potential* conflict of interest exists if Ms Alagendra, in addition to her appointment as Counsel for Mr Krasniqi, were to also represent Mr Mustafa;
- b) **ORDERS** the Parties to submit public redacted versions of the Request, the Veseli Response and the Reply, or request their reclassification, by **Thursday, 15 February 2024**; and
- c) **DIRECTS** the Registry to reclassify the SPO Response (F02102) as public.



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**Judge Charles L. Smith, III**  
**Presiding Judge**

Dated this Thursday, 8 February 2024

At The Hague, the Netherlands.