

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 Christoph Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr. Fidelma Donlon

Filing Participant: Defence Counsel for Jakup Krasniqi

Date: 26 January 2024

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Public Redacted Version of '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'

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INTRODUCTION

1. Defence Counsel for Mr. Jakup Krasniqi respectfully notifies the Trial Panel that Mr. Salih Mustafa wishes to appoint Ms. Alagenda as his Counsel. Both Mr. Krasniqi and Mr. Mustafa have given their informed consent to this appointment.¹ Defence Counsel requests the Trial Panel to determine that no conflict of interests exists which would prevent this appointment.

2. Defence Counsel assesses that there is no conflict of interests between Mr. Mustafa and Mr. Krasniqi. Although the alleged crime site at Zllash has been charged against both, the pleaded lines of defence taken in both cases and the stage of proceedings, disclose no conflict of interest. Indeed, this is clear from a substantive analysis of the facts and considering all relevant matters, including the alleged or adjudicated modes of liability involved in both cases. It is important to recall that Mr. Mustafa did not seek to shift blame to Mr. Krasniqi at any point during his trial or on appeal. It is similarly pertinent to note that Mr. Krasniqi has not sought to shift or apportion blame to Mr. Mustafa either. The Trial Panel is aware that Mr. Mustafa is not on any list of witnesses in Case KSC-BC-2020-06 ("Case 06") and any possibility that he might appear as a witness is purely speculative.

3. In light of impending deadlines in Mr. Mustafa's case, specifically the fixed deadline for requesting protection of legality which falls on 14 March 2024, Defence Counsel respectfully requests an expedited briefing schedule.

¹ KSC-BC-2020-06, F02066, Registry, *Notification of Appointment of Venkateswari Alagenda as Counsel to Salih Mustafa*, 18 January 2024, public, with two Annexes, confidential and *ex parte*.

I. PROCEDURAL HISTORY

4. On 6 November 2020, Ms. Alagenda was appointed as Counsel to Mr. Jakup Krasniqi in Case 06.²
5. On 14 December 2023, the Court of Appeals Panel delivered the Appeal Judgement in Mr. Mustafa's case.³
6. [REDACTED].⁴
7. [REDACTED].⁵
8. On 26 December 2023, Ms. Alagenda emailed the Defence Office to advise that she had been approached to represent Mr. Mustafa.
9. On 29 December 2023, the Defence Office received a signed and dated Power of Attorney and Assignment/Appointment request from Mr. Mustafa confirming that he wished to appoint Ms. Alagenda as his Specialist Counsel.
10. On 2 January 2024, the Defence Office received from Ms. Alagenda both the consent of her current client in Case 06, Mr. Krasniqi, [REDACTED] as well as that of Mr. Mustafa, [REDACTED].

² KSC-BC-2020-06, F00058, Registry, *Notification of the Appointment of Counsel to Jakup Krasniqi*, 6 November 2020, public, with one annex, confidential.

³ KSC-CA-2023-02, F00038, Panel of the Court of Appeals Chamber, *Public Redacted Version of Appeal Judgment*, 14 December 2023, public.

⁴ Annex 1 to this Request.

⁵ *Ibidem*.

11. On 3 January 2024, the Registrar granted Mr. Mustafa's request for the appointment of new Counsel, [REDACTED] and appointed Ms. Alagenda as Mr. Mustafa's Counsel.⁶
12. On 11 January 2024, the Registry informed the President of the appointment of Ms. Alagenda as Counsel to Mr. Mustafa.⁷
13. On 15 January 2024, Ms. Alagenda filed a request for extension of time to file a request for protection of legality in Mr. Mustafa's case.⁸
14. On 18 January 2024, the Registry notified Trial Panel II that Ms. Alagenda had been appointed as Counsel to Mr. Mustafa and attached as confidential Annexes the two informed consents.⁹ On 19 January 2024, the Registry also notified the Supreme Court Panel that Ms. Alagenda was appointed Counsel to Mr. Salih Mustafa and attached as confidential Annexes the waivers which were provided by both Mr. Krasniqi and Mr. Mustafa.¹⁰
15. On 23 January 2024, the Prosecution filed the Prosecution Challenge to Appointment of Counsel before the Supreme Court Panel.¹¹
16. On 25 January 2024, the Supreme Court Panel found that in the absence of a determination from the Trial Panel II that no conflict of interests exists, Ms. Alagenda

⁶ Annex 1 to this Request.

⁷ KSC-CA-2023-02, F00041, Registry, *Notification of Approval of Counsel for Salih Mustafa with one confidential Annex*, 11 January 2024, public.

⁸ KSC-SC-2024-02, F00001, Mustafa Defence, *Mustafa Urgent Motion for an Extension of Time to File a Request for Protection of Legality*, 15 January 2024, public.

⁹ KSC-BC-2020-06, F02066, Registry, *Notification of Appointment of Venkateswari Alagenda as Counsel to Salih Mustafa*, 18 January 2024, public, with two Annexes, confidential and *ex parte*.

¹⁰ KSC-SC-2024-02, F00004, Registry, *Information Additional to Notification of Approval of Counsel for Salih Mustafa*, 18 January 2024, public, with two Annexes, confidential and *ex parte*.

¹¹ KSC-SC-2024-02, F00006, Specialist Prosecutor, *Prosecution challenge to appointment of Counsel ("Prosecution Challenge")*, 23 January 2024, public.

should not have been appointed by the Registrar to represent Mr. Mustafa. The Supreme Court Panel held that “Ms. Alagendra will 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.”¹²

17. In accordance with the Supreme Court Panel’s decision, Defence Counsel hereby notifies the Trial Panel II of the situation and respectfully requests the Trial Panel II to determine that no conflict of interest exists which would preclude or otherwise prevent Defence Counsel’s appointment.

II. SUBMISSIONS

18. Mr. Mustafa’s right to freely choose Counsel is protected by the Law No. 05/L 053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”), the Constitution and International Human Rights Law. Article 21(4)(e) of the Law provides that an accused has the right and minimum guarantee “to defend himself or herself through Specialist Counsel of his own choosing”. The Specialist Chambers must also adjudicate and function in accordance with the Constitution.¹³ Article 30(5) of the Constitution similarly provides that an accused has the right to assistance of legal counsel of his/her choosing. The same fundamental right is protected by Article 14(3)(b) of the International Covenant on Civil and Political Rights and regional international human rights conventions.¹⁴ Mr. Mustafa has exercised this right to choose Ms. Alagendra.

¹² KSC-SC-2024-02, F00008, Supreme Court Panel, *Decision on Prosecution Motion Regarding Conflict of Interest of Defence Counsel*, 25 January 2024, public, para. 9.

¹³ Article 3(2)(a) of the Law.

¹⁴ See, for instance, Article 6(3)(c) of the European Convention on Human Rights, Article 8(2)(d) of the Inter-American Charter on Human Rights, and Article 7(1)(c) of the African Charter on Human and Peoples’ Rights.

19. International jurisprudence has recognised that, whilst the right to choose counsel is not absolute, the choice of counsel should not be interfered with in the absence of **compelling** circumstances.¹⁵ Moreover, there is a duty to justify why the interests of justice require an individual's choice of counsel to be overridden.¹⁶ This should not be lightly done. Rather, any justification must be grounded in the detailed assessment of the specific circumstances of the relevant cases.¹⁷

20. Not every involvement in similar or even the same case necessarily gives rise to a conflict of interest. The Defence notes, for instance, that both Mr. Abdallah Banda and Mr. Saleh Jerbo – co-accused in the same case before the International Criminal Court (“ICC”) – were represented by the same Counsel.¹⁸ No party or participant argued that there was a conflict; although charged with the same crimes in the same case, their interests aligned.

21. Article 28(3)(b) of the Code of Professional Conduct for Counsel and Prosecutors Before the Kosovo Specialist Chambers (“Code of Conduct”) provides that Counsel may not act 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

¹⁵ ICC, Prosecutor v. Jean-Pierre Bemba Gombo 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*, 1 April 2014, para. 5. See also ICC, Prosecutor v. Jean-Pierre Bemba Gombo et al, ICC-01/05-01/13-909, Trial Chamber VII, *Decision on Prosecution Submission on the Appointment of Defence Counsel*, 15 April 2015, para. 24; Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngäïssona, ICC-01/14-01/18-837-Red, Trial Chamber V, *Decision on the Prosecution Submission on the Appointment of Defence Counsel*, 19 January 2021, para. 13.

¹⁶ ICC, Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka, ICC-01/14-01/22 OA, Appeals Chamber, *Judgment on the Appeal of Maxime Jeoffroy Eli Mokom Gawaka against the Decision of Pre-Trial Chamber II of 25 March 2022 Entitled “Order to the Registry concerning the appointment of Mr Nicholas Kaufman as counsel for Mr Maxime Jeoffroy Eli Mokom Gawaka”*, 19 July 2022, para. 60.

¹⁷ See, e.g., ICC, Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka, ICC-01/14-01/22 OA3, Appeals Chamber, *Judgment on the appeal of Maxime Jeoffroy 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” (“Mokom Decision”)*, 19 December 2022, para. 59.

¹⁸ See as noted on: ICC, Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, ICC-02/05-03/09, Pre-Trial Chamber I, *Decision on issues relating to disclosure*, 29 June 2010, p.2.

Chambers". Article 28(4)(b)(1), however, provides that in such cases, Counsel may obtain the informed consent of both potentially affected clients and notify the relevant Panel, which will determine whether a conflict exists.

22. Defence Counsel assessed in good faith that no conflict existed, because on the facts of the two cases (as developed below), the cases are not substantially related. Hence, Defence Counsel assessed that notification to the Trial Panel was not required. In reaching that view, Defence Counsel was also aware that pursuant to Article 12(5) of the Directive on Counsel, the Registry is empowered to refer the appointment of Counsel to the appropriate Panel in circumstances where a potential conflict of interest is identified. Indeed, in other cases the Registry did refer the matter to the appropriate Panel and did not proceed to appoint Counsel.¹⁹ Following that referral, the relevant Panel ordered further submissions and submissions were made, though no decision has been rendered. No referral was made by the Registry in the present case. Instead, the Registry appointed Counsel without demur or query. The Defence Office proceeded to formalise the appointment of new team members, indeed Defence Counsel asked the Defence Office for advice on formalities by email, but at no time was advised or instructed to notify the Trial Panel.²⁰ The approach of the Registry and Defence Office thus appeared consistent with Counsel's assessment that there was no conflict and no filing to the Trial Panel was required.

23. The Registry, properly, notified both the Supreme Court as well as Trial Panel II of the relevant appointments and furnished both with the informed consents provided by Counsel. Prior to the Supreme Court Decision, Defence Counsel is aware of no prior authority from the Specialist Chamber on the interpretation of Article 28(4)(b)(1) of the Code of Conduct and the correct procedure to be followed. In the light of the Supreme Court Decision, it is now clear that it is for the Trial Panel II to assess whether

¹⁹ Annex 2 to this Request.

²⁰ Annex 3 and Annex 4 to this Request.

a conflict of interests exists which, despite the informed consents provided, would prevent Counsel representing Mr. Mustafa.

24. In making that assessment, the importance of the signed waivers should not be underestimated. Mr. Mustafa and Mr. Krasniqi are fully aware of the position and both have clearly indicated their consent.

25. Defence Counsel denies that any conflict of interest, still less an irreconcilable conflict, arises on the facts of these cases and at the relevant stage of proceedings. Simply, through his trial and appeal, Mr. Mustafa did not seek to defend himself by placing the blame on Mr. Krasniqi or on the General Staff more broadly. Mr. Mustafa cannot do so in the future, since (1) Mr. Mustafa cannot advance entirely new lines of defence on a request for protection of legality, and (2) the Trial Panel found that Mr. Mustafa was criminally responsible as a direct perpetrator and pursuant to local level joint criminal enterprise in Zllash, which would be unaffected by any attempt to shift the blame upwards. Similarly, Mr. Krasniqi has not sought to blame Mr. Mustafa for the crimes alleged to have been committed at Zllash. [REDACTED]. In these specific circumstances, no conflict of interest has arisen, nor is one foreseeable in the future. Any assertions to the contrary are merely speculative.

26. Mr. Mustafa was convicted of crimes committed at a single detention centre in Zllash. The Trial Panel held that he was responsible as a direct perpetrator²¹ and pursuant to a joint criminal enterprise.²² Importantly, all the members of the plurality of persons who the Trial Panel found comprised the joint criminal enterprise were part of the KLA in the local Zllash area.²³ They were “all linked to each other by the fact

²¹ KSC-BC-2020-05, F00494/RED, Trial Panel I, *Public redacted version of Trial Judgment* (“Trial Judgment”), 19 January 2023, public, paras 729-733.

²² *Idem*, paras 742-757.

²³ *Idem*, para. 742.

that their activities revolved around the ZDC".²⁴ Mr. Mustafa was thus convicted based on his own alleged conduct and the conduct of a local group in the Zllash area. Command responsibility played no part in the Trial Judgment or Appeal Judgment. There is no conflict between Mr. Mustafa's position on these adjudicated modes of liability and Mr. Krasniqi; since Mr. Mustafa is faced with direct perpetration and a local level joint criminal enterprise, he would derive no benefit from any attempt to shift blame to Mr. Krasniqi.

27. None of the lines of defence previously advanced by Mr. Mustafa conflict with Mr. Krasniqi. In his Final Trial Brief, [REDACTED].²⁵ It is apparent from the Trial Judgment that Mr. Mustafa challenged the evidence of Prosecution witnesses about the commission of crimes and his alleged connection to the crimes.²⁶ There is nothing in these lines of defence which is inconsistent with the position of Mr. Krasniqi.

28. The stage of proceedings is also relevant to the assessment of a conflict of interest because it sets the scope of Counsel's representation of Mr. Mustafa. The Appeal Judgment has been handed down. Counsel would now be instructed to consider extraordinary remedies pursuant to Article 48 of the Law. Mr. Mustafa may seek protection of legality pursuant to Article 48(7). It is important to emphasise that this is a limited remedy, which is restricted to correcting errors of criminal law or procedure (Article 48(7)) or violations of rights protected under the Constitution (Article 48(8)). The Prosecution has previously submitted that issues cannot be raised *de novo* before the Supreme Court.²⁷ By way of illustration, protection of legality in Mr. Mustafa's case might challenge the legal standard applied in determining the murder conviction,

²⁴ Trial Judgment, para. 743.

²⁵ KSC-BC-2020-05, F00457, Mustafa Defence, *Defence Final Trial Brief*, 21 July 2022, public, with Annex 1, confidential.

²⁶ See, e.g., Trial Judgement, paras. 395, 412, 420, 469-473, 479.

²⁷ KSC-SC-2024-02, F00002, Specialist Prosecutor, *Prosecution response to 'Mustafa Urgent Motion for an Extension of Time to File a Request for Protection of Legality'*, 17 January 2024, public, para. 3.

or the legal approach taken by the Courts in relation to sentencing – neither of which is remotely in conflict with Mr. Krasniqi. Accordingly, the risk that a conflict might arise from new lines of defence advanced by Mr. Mustafa is purely speculative and without any foundation or basis.

29. Whilst Mr. Mustafa retains the possibility of seeking re-opening, such application is, at this stage, also speculative. It would require the Defence to demonstrate that the existing evidence is false or to find new evidence satisfying the requirements of Article 48 of the Law.²⁸ Importantly, no such new evidence would conflict with Mr. Krasniqi. Evidence disproving the occurrence or commission of crimes at Zllash would equally benefit Mr. Mustafa and Mr. Krasniqi.

30. [REDACTED].²⁹ [REDACTED].³⁰ [REDACTED].

31. [REDACTED].³¹ [REDACTED].³²

32. In relation to Zllash itself, the crimes are alleged to have occurred between 1 and 19 April 1999. In general, Mr. Krasniqi's pleaded defence is to put the Prosecution to proof that the alleged crimes were committed and to deny knowledge of the crimes.³³ Those lines of defence are entirely consistent with the position adopted by Mr. Mustafa at trial and on appeal and, at the very least, do not conflict with them.

²⁸ Article 48(2)(a) and (c).

²⁹ KSC-BC-2020-06, F00999/A01, Specialist Prosecutor, *Annex 1 to Submission of confirmed amended Indictment* ("Amended Indictment"), 30 September 2022, confidential, para. 32.

³⁰ Amended Indictment, paras 55-57.

³¹ KSC-BC-2020-06, F01051, Krasniqi Defence, *Pre-Trial Brief of Jakup Krasniqi* ("Defence Pre-Trial Brief"), 21 October 2023, confidential, paras 8 and 36.

³² *Idem*, paras 136-138.

³³ *Idem*, para. 36.

33. [REDACTED].³⁴ [REDACTED].³⁵ Further, on 2 April 1999, he was appointed as spokesperson of the Provisional Government of Kosovo (not the KLA).³⁶ The Defence have consistently put this position to Prosecution witnesses in Case 06.³⁷ Neither of these assertions is inconsistent with the position adopted by Mr. Mustafa. Indeed, it is important to note that Mr. Krasniqi [REDACTED]. [REDACTED].³⁸ [REDACTED]. Defence Counsel is not aware that any of the Zllash victim witnesses mentions Mr. Krasniqi in any substantive way. There is no conflict between Mr. Krasniqi and Mr. Mustafa since Mr. Krasniqi has no knowledge and is not factually connected in any way to Zllash.

34. In short, Mr. Mustafa denies that the alleged crimes at Zllash occurred. Mr. Krasniqi requires the Prosecution to prove that the alleged crimes at Zllash occurred. There is no conflict of interest between these positions.

35. [REDACTED],³⁹ [REDACTED].

36. In asserting the existence of a conflict of interest, the Prosecution has previously fallen into baseless speculation. The assessment of the risk of a conflict arising must consider the likelihood of an event occurring. In particular, [REDACTED].⁴⁰ The

³⁴ *Idem*, para. 89.

³⁵ U015-8743-U015-9047, p.217-226.

³⁶ Defence Pre-Trial Brief, para. 91.

³⁷ *See for instance*: KSC-BC-2020-06, Transcript of Hearing, 17 July 2023, confidential, p. 5821; Transcript of Hearing, 16 October 2023, confidential, p. 8945; Transcript of Hearing, 16 November 2023, public, p. 10333.

³⁸ KSC-BC-2020-06, F01594/A03, Specialist Prosecutor, *Annex 3 to Prosecution submission of updated witness list and confidential lesser redacted version of pre-trial brief ("SPO PTB")*, 9 June 2023, confidential, paras 438-443.

³⁹ 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.

⁴⁰ Prosecution Challenge, para. 4.

Prosecution submitted its List of Witnesses as long ago as 17 December 2021.⁴¹ [REDACTED]. Whilst the Prosecution may seek permission to amend its List of Witnesses, it is difficult to see how the requirements of good cause and timely notice⁴² could possibly be satisfied more than two years after the List was first submitted, nine months after the start of trial and in circumstances where the Prosecution has been aware of Mr. Mustafa's evidence since [REDACTED].⁴³ [REDACTED].⁴⁴ His interview originally featured on [REDACTED].⁴⁵ [REDACTED]. As a result, any potential conflict that could arise from [REDACTED] is based on speculation and most unlikely ever to arise.

37. In any event, the Defence does not accept – and respectfully refutes – the assertion that a conflict of interest would arise from Mr. Mustafa's evidence. Whilst the Prosecution has previously selectively highlighted comments that Mr. Mustafa made in the interview [REDACTED],⁴⁶ in assessing whether any real conflict exists the Trial Panel should take into account that: (1) [REDACTED];⁴⁷ (2) [REDACTED];⁴⁸ (3) [REDACTED];⁴⁹ (4) [REDACTED]. Not every difference of emphasis or factual inconsistency creates a conflict of interest sufficient to prevent Counsel from acting. Seen in their full context, Mr. Mustafa's evidence does not create a conflict with Mr. Krasniqi's position.

⁴¹ KSC-BC-2020-06, F00631, Specialist Prosecutor, *Submission of Pre-Trial Brief, with witness and exhibit lists*, 17 December 2021, confidential, with Annexes 1-3, strictly confidential and *ex parte*.

⁴² Rule 118(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules").

⁴³ 069404-TR-ET, Part 1, p.1 line 6.

⁴⁴ SPO PTB; KSC-BC-2020-06, F00647/A02, Specialist Prosecutor, *Annex 2 to Prosecution submission of lesser redacted versions of Indictment and Rule 86(3)(b) outline*, 17 January 2022, confidential.

⁴⁵ KSC-BC-2020-06, F00421/A01, Specialist Prosecutor, *ANNEX 1 to Prosecution Rule 102(3) notice*, 31 July 2021, confidential, items 4024-4031.

⁴⁶ Prosecution Challenge, fn. 19.

⁴⁷ 069404 -TR-ET Part 1, p. 18.

⁴⁸ *Ibidem*.

⁴⁹ 069404 -TR-ET Part 1, pp. 23, 24.

38. A broad construction of conflict of interest, such as that previously contended for by the Prosecution, would prevent any Counsel in Case-06 representing any other client before the Specialist Chambers. The Prosecution's attempt to restrict the fundamental right to choose Counsel on such flimsy grounds should, it is respectfully submitted, be summarily rejected by the Trial Panel. It is further submitted that any such restriction would be thoroughly unjustified and lead to the erosion of an important right that should be preserved, not undermined in a Court of law.

39. Recognising that the Trial Panel II requires to assess the wider interests of justice,⁵⁰ Defence Counsel assures the Trial Panel II that no delay will be caused to Case-06 should it be determined that no conflict of interest exists. The Defence will continue to comply with all deadlines in Case-06. An appropriate team has already been identified and previously approved by the Registrar to ensure Mr. Mustafa's representation was rendered effective. Given the Supreme Court Panel's finding that the 90-day limit for filing a request for protection of legality is immutable, it is further submitted that the denial of Mr. Mustafa's right to counsel of choice would represent a serious impairment of his right to seek recourse to the protection of legality.

III. CONCLUSION

40. As recognised by the ICC Appeals Chamber, "[a]ny limitation of a person's right to choose counsel must be proportional to the need to protect the fairness of the proceedings and the interests of justice."⁵¹ As detailed above, Mr. Mustafa's right to choose counsel is not outweighed by any other interests. Accordingly, Defence Counsel respectfully requests the Trial Panel to determine that there is no conflict of interest preventing Ms. Alagendra from representing Mr. Mustafa.

⁵⁰ Mokom Decision, para. 43.

⁵¹ Mokom Decision, para. 45.

41. Defence Counsel notes that the Supreme Court Panel has determined that it is unable to extend the three-month time period for Mr. Mustafa to submit the request for protection of legality. Mr. Mustafa will therefore have to submit his request for protection of legality by 14 March 2024. It is therefore a matter of urgency that his appointment of Counsel is resolved. The Prosecution previously made submissions on conflict of interest to the Supreme Court Panel. Defence Counsel therefore respectfully requests the Trial Panel II to adopt an expedited briefing schedule in order to achieve prompt resolution of this matter.

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Venkateswari Alagenda

Friday, 26 January 2024

The Hague, the Netherlands.