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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 Guénaël Mettraux
	Judge Fergal Gaynor, Reserve Judge
Registrar:	Dr. Fidelma Donlon
Filing Participant:	Defence Counsel for Jakup Krasniqi
Date:	7 February 2024
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Public Redacted Version of 'Defence Counsel Reply to Prosecution Response To 'Defence Counsel Request for Determination Pursuant to Article 28 (4) (b) (i) of the Code of Conduct''

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1. Defence Counsel hereby replies to the Prosecution Response to Defence Counsel Request for Determination Pursuant to Article 28 (4) (b) (i) of the Code of Conduct.[1] The Response is speculative. It fails to establish that a conflict of interest ("CoI") exists or that there is sufficient risk that a CoI might occur in the future, so as to justify overturning Mr. Mustafa's choice of counsel.

2. In assessing the Response, it should not be forgotten that the Prosecution is not a neutral party in relation to this issue. The Prosecution, placed in opposition to the Defence in these adversarial proceedings, is not privy to Defence strategy or instructions. Any disruption to the Defence, especially anything that could prejudice Mr. Mustafa's ability to request protection of legality by the current deadline, is to the benefit of the Prosecution.

3. The Response fails to substantiate its submissions about the existence of a CoI. Anticipating whether a CoI is likely to arise in the future does **not** mean that "all possible evidence, submissions, strategies, and potential implications and limitations at future stages of the trial" can result in a CoI.[2] This would set far too low a threshold for finding a CoI and hence depriving the accused of their choice of counsel. Persuasive authority from the International Criminal Court is clear that more than mere speculation is required. Pre-Trial Chamber II held that "[a] suspect's right to counsel of choice should prevail over the desire to address out of mere precaution scenarios which might never materialise. The inconveniences which replacement of counsel by its nature inevitably entails should not be brought about if not warranted,

[1] KSC-BC-2020-06, F02102, Specialist Prosecutor, *Prosecution Response to Defence Counsel Request for Determination Pursuant to Article 28(4)(b)(i) of the Code of Conduct* ("Response"), 5 February 2024, confidential.
[2] *Contra* Response para. 5 (emphasis added).

on the basis of pure speculation and in the absence of compelling circumstances."[3] Trial Chamber VII rejected a claim of CoI founded on "mere speculation".[4] Trial Chamber V similarly rejected prosecution submissions as to potential CoI that might arise mid-trial and the possibility of one client blaming another client as "speculative and unsubstantiated".[5] These persuasive authorities reflect the fundamental principle that any restriction on the right to counsel of choice must have an objective and sufficiently serious purpose and not go beyond what is necessary to uphold the interests of justice.[6] Contrary to the Response, the mere possibility that a CoI could occur in a hypothetical situation which might never materialise is not sufficient.

4. The submissions in the Response about defence strategy in relation to Zllash, the possibility that Mr. Mustafa could be called as a witness in Case-06, the discovery of new facts or evidence, and the possibility of Mr. Mustafa or Mr. Krasniqi blaming each other in the future are all purely speculative.[7] For instance, the Response speculates that a CoI could arise if Counsel discovers new facts which were not known in Mr. Mustafa's trial or appeal, but fails to substantiate what new facts could possibly be discovered that would give rise to a CoI. As set out in the Request,[8] Mr. Mustafa was convicted of direct perpetration and a local level joint criminal enterprise. New facts relevant to those convictions would not conflict with Mr. Krasniqi. A further example of inappropriate speculation is the Response's insistence that Mr. Mustafa is a

[3] 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.
[4] 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.
[5] ICC, Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona, 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.
[6] United Nations Human Rights Committee, Esergepov v. Kazakhstan, Communication No. 2129/2012, Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, 4 May 2016, Para. 11.6.
[7] Response, paras 6-10.
[8] Request, para. 26.

"potential witness" in Case-06.[9] This overlooks the concrete parameters of Case-06, in which the Prosecution has not [REDACTED] and no Defence team has indicated any intention to call Mr. Mustafa.[10] By the Response's logic Case-06 Counsel would have a CoI with almost every KLA member, on the basis that they are all potential witnesses in Case-06 – which would extend the scope of CoI beyond any reasonable bounds.

5. The Response misinterprets the Request. Defence Counsel does not concede that the two cases are 'substantially related' within the meaning of Article 28 (3) (b).[11] To the contrary, Defence Counsel stated her good faith assessment that no CoI existed because "on the facts of the two cases (as developed below), the cases are not substantially related".[12] Defence Counsel then continued, in the paragraph cited by the Response, to explain why the Request was made in the light of the Supreme Court Panel's Decision.[13] No concession was made.

6. The Response attaches too little weight to informed consent, which both Mr. Mustafa and Mr. Krasniqi have given.[14] Article 28 (4) (b) (i) of the Code of Conduct specifically provides for informed consent to be obtained. No purpose whatsoever would be served by this provision, if informed consent is incapable of being relevant to the assessment of a CoI. The Response would render meaningless the Article 28 (4) (b) (i) procedure for informed consent. The true position is that the fact that both Mr. Mustafa and Mr. Krasniqi have given informed consent is a clear indicator that there is no CoI; the Response submission that clients may not be "fully

[9] Response, para. 9.
[10] *See*, KSC-BC-2020-06, F02103, Veseli Defence, *Veseli Defence Response to Defence Counsel Request for Determination Pursuant to Article 21(4)(b)(i) of the Code of Conduct*, 5 February 2024, confidential, para. 3. No Defence team opposed the Request.
[11] *Contra* Response para. 3.
[12] KSC-BC-2020-06, F02084, Defence Counsel for Mr. Krasniqi, *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* ("Request"), 26 January 2024, confidential, para. 22.
[13] 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.
[14] Response, para. 4.

conscious of all possible implications and possible limitation" is once again highly speculative.[15]

7. Similarly, properly construed, Article 28 (3) (a) of the Code of Conduct does not support the Response. Article 28 (3) (a) prevents Counsel from acting for another client in "the same matter before the Specialist Chambers". This is an absolute bar, which makes no allowance for informed consent or determination by the Panel. By contrast, Article 28 (3) (b) does not impose an absolute bar; through Article 28 (4) (b) (i), it provides for informed consent and determination by the Panel. Even if *arguendo* this is a 'substantially related matter' within the meaning of Article 28 (3) (b), then to give effect to the distinction between Article 28 (3) (a) and (b) this application must not be treated as analogous to the situation in which both clients are in the same matter before the Specialist Chambers ("KSC").

8. It is quite clear from the Response that the Prosecution is unable to substantiate a factual connection between Mr. Krasniqi and the crimes alleged at Zllash – otherwise such connection would have been plainly identified in the Response. Desperately, the Response asserts that Mr. Krasniqi visited Llap zone (not Zllash) in August and October 1998.[16] That is at least six months before the crimes in Zllash are alleged to have occurred – and months after the Prosecution's pleaded case that Mr. Mustafa was appointed by the zone commander around May 1998.[17] Equally unimpressively, the Response submits that "Llap zone commander W04746 recount[ed] a telephone conversation with Jakup Krasniqi in which the detention of a person with FARK affiliation was discussed".[18] W04746 recounted nothing. He said [REDACTED].[19]

[15] Response, fn. 15.
[16] 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 205, 212.
[17] *Idem*, para. 203.
[18] Response, fn.31.
[19] KSC-BC-2020-06, Transcript of Hearing, 17 July 2023, confidential, p.5846 lines 2-3.

Moreover, the alleged intercept cited by the Prosecution, the authenticity and reliability of which remains firmly disputed, says [REDACTED].[20] The evidence cited by the Response supports the Defence contention that, properly analysed, there is no CoI.

9. Further, the Response errs in asserting that Mr. Krasniqi's geographic remoteness from Zllash is "beside the point" since he is not charged as a physical perpetrator.[21] The relevance of geographic remoteness goes far beyond physical perpetration. The distance between the alleged crimes at Zllash and Mr. Krasniqi, and the absence of any evidence of communication between the KLA in Zllash and Mr. Krasniqi, also undermines *inter alia* the allegations of command responsibility, knowledge and common plan. Geographic distance thus re-affirms that there is no CoI between Mr. Krasniqi and Mr. Mustafa regarding facts relevant to Zllash.

10. There is no risk of delay in both cases.[22] The Response inappropriately seeks to undermine Defence Counsel's professionalism and ability to manage teams and deadlines. There can be no delay in Mr. Mustafa's case since the Supreme Court Panel has found that the deadline for requesting protection of legality cannot be extended.[23] There will be no delay in Mr. Krasniqi's case either. The Trial Panel will recall that the Krasniqi Defence did not seek to delay proceedings even when affected by most pressing personal circumstances.[24] The Trial Panel is already actively managing Case-06 to ensure that no delays occur.[25] There will be no clash of court commitments. Supreme Court proceedings will be commenced in writing. Given court-room availability, there have been no occasions when two hearings at the KSC have been

[20] 111491-111682, p. 111666.
[21] Response, para. 8.
[22] *Contra* Response para. 12.
[23] KSC-SC-2024-02, F00009, Supreme Court Panel, *Decision on the Request for an Extension of Time,* 25 January 2024, public.
[24] KSC-BC-2020-06, Transcript of Hearing, 4 September 2023, confidential, p.7039 lines 18-23.
[25] KSC-BC-2020-06, Transcript of Hearing, 1 February 2024, confidential, p.12366 lines 1–2.

listed at the same time. It is unrealistic to speculate that any oral hearing before the Supreme Court Panel would clash with any hearing in Case-06. Defence Counsel also notes that Prosecution Counsel have played important roles in both Case-05 and Case-06 without occasioning delay (or any CoI).

11. Finally, the prejudice to Mr. Mustafa in overriding his choice of counsel is not "limited" but irreparable. Choosing Counsel is a fundamental right. Mr. Mustafa has been convicted and faces a substantial sentence. It is vitally important to him that he has confidence in Counsel in pursuing the final avenues of appeal. The appointment of Duty Counsel on 29 January 2024 inevitably prejudices his interests since Duty Counsel would only have around six weeks to meet with Mr. Mustafa, read the case material and prepare and submit the request for protection of legality.[26] Defence Counsel has knowledge of the background and culture of Kosovo and the history of the war (none of which is remotely conflicting). During the period of her appointment, Defence Counsel commenced preparatory work for the request for preparation of legality. The Response provides no evidence that Duty Counsel is familiar with the historical background or KSC proceedings. The difficulty which would face Duty Counsel in requesting protection of legality within the fixed deadline does represent prejudice to Mr. Mustafa.

12. For the above reasons, Defence Counsel respectfully requests the Panel to grant the Request.

[26] KSC-SC-2024-02, F00010, Registry, *Notification of Assignment of Duty Counsel to Salih Mustafa with one Confidential Annex*, 29 January 2024, public.

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