

**In:** KSC-BC-2020-06

**The 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 Guénaël Mettraux  
Judge Fergal Gaynor, Reserve Judge

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Counsel for Rexhep Selimi

**Date:** 15 March 2024

**Language:** English

**Classification:** Public

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**Selimi Defence Request for Extension of Legal Privilege to Legal Consultant**

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## I. INTRODUCTION

1. The Defence for Mr. Rexhep Selimi (“the Defence”) hereby requests the Trial Panel to exercise its discretion to extend client-counsel privilege currently enjoyed by Dr. Rudina Jasini, Co-Counsel for Mr. Rexhep Selimi, to her as a Legal Consultant.
2. This request is prompted by the Trial Panel’s Oral Order “Regarding Counsel’s Responsibility Arising Out of the Directive on Counsel and the Code of Professional Conduct”, dated 20 February 2024 (“Oral Order”)<sup>1</sup>. In complying with this Order, the Defence seeks to ensure that transformation of Dr. Jasini’s position from Co-Counsel to Legal Consultant, does not have a detrimental impact on the functioning of the Defence team in light of the detention regime instituted following the TP’s Decision, dated 1 December 2023 (“Decision”)<sup>2</sup>, and pursuant to the Registry Update to that Decision, dated 7 December 2023 (“Registry Update”)<sup>3</sup>.
3. Extending client-counsel privilege to Dr. Jasini as a Legal Consultant would fall squarely within the Trial Panel’s discretion. Dr. Jasini would continue to fulfil the criteria of Section 5 of the Directive on Counsel for admission to the List of Counsel even if not appointed as Co-Counsel. It would cause no prejudice to any other participant and would ensure that Dr. Jasini could continue the vital

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<sup>1</sup> KSC-BC-2020-06, In-Court Oral Order Regarding Counsel’s Responsibility Arising Out of the Directive on Counsel and the Code of Professional Conduct, page 12506 Line 15 to page 12508 Line 20, 20 February 2024 (“Trial Panel Oral Order”).

<sup>2</sup> KSC-BC-2020-06/F01977, Further Decision on the Prosecution’s Urgent Request for Modification of Detention Conditions for Hashim Thaci, Kadri Veseli, and Rexhep Selimi, 1 December 2023.

<sup>3</sup> KSC-BC-2020-06/F01989, Registry Update on Implementation Pursuant to Trial Panel II’s Further Decision on the Prosecution’s Urgent Request for Modification of Detention Conditions with confidential Annex 1 and confidential and ex parte Annexes 2, 3 and 4, 7 December.

role she has played within the Selimi Defence team through her privileged communications with Mr. Selimi for the past twenty months.<sup>4</sup>

## II. SUBMISSIONS

4. On 20 February 2024, the Panel issued an oral order directing Counsel for Mr. Thaci and all other accused in the Thaci et al. Case “to inform, without delay, each of the individuals whom he will seek to maintain or seek to be designated as co-counsel to be prepared to step in and represent [the accused] before the Specialist Chambers if and when called upon by [the Counsel] or by the Panel to do so. And, two, inform the Registrar by 4 March 2024 of any person currently listed as co-counsel on the list of [the accused] Defence team members who are not prepared to do so, so that the Registrar can strike any such person from the list of co-counsel.”<sup>5</sup>
5. In response to this Order, on 26 February 2024, Counsel for Mr. Selimi sought confirmation from the Registrar that she would not oppose the extension of legal privilege to Dr. Jasini if she were to revert to her previously held position of Legal Consultant, in the event that such an order was sought by the Selimi Defence from the Trial Panel.
6. On 29 February 2024, the Immediate Office of the Registrar responded to the Counsel for Mr Selimi, concluding that “if Dr. Jasini or any other Co-Counsel, were to take up the position of Legal Consultant, their visits and communications with Mr. Selimi would be privileged only if accompanied by Counsel or Co-Counsel.”<sup>6</sup> In explaining its conclusion, the Office of the Registrar stated that the position of the Registrar on this matter would reflect

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<sup>4</sup> Dr. Jasini held the position of Legal Consultant from November 2020 until 29 June 2022, on which date she assumed the position of Co-Counsel.

<sup>5</sup> Trial Panel Oral Order.

<sup>6</sup> Email correspondence between the Immediate Office of the Registrar and Mr. Geoffrey Roberts, Counsel for Mr. Selimi on 29 February and 4 March 2024.

the KSC legal framework. In particular, the Registrar noted that Articles 4(2) and 6(5) of the Registry Practice Direction on Counsel Visits and Communications ('Practice Direction') provide that both Counsel and Co-Counsel are entitled to privileged visits and communications with the Detainee they represent. Articles 6(4) and 9(4) of the Practice Direction further provide that a member of a defence team may accompany Counsel when visiting a Detainee and that these visits shall be treated as privileged to the same extent as other Counsel visits under the Practice Direction.

7. The Immediate Office of the Registrar further noted that Trial Panel II's "Further Decision on the Prosecution's Urgent Request for Modification of Detention Conditions for Hashim Thaçi, Kadri Veseli and Rexhep Selimi," recalled that only named Counsel and Co-Counsel are entitled to privileged visits and that visits by other defence team members, when not accompanied by Counsel or Co-Counsel, are not privileged.
8. The Defence accepts this Response from the Registrar as a correct interpretation of the existing legal framework before the KSC.
9. However, at present, following the Panel's Decision, and pursuant to the Registry Update while there are no formal restrictions imposed in the Decision regarding the privileged communications between Mr. Selimi and his Counsel and Co-Counsel, the newly-instituted regime pursuant to the Registry Update has impacted upon Mr. Selimi's ability to exercise his right to communicate with his Defence team.
10. Notably, in its Decision, the Panel held that, "The Panel recalls that only named counsel and co-counsel are entitled to privileged visits. Visits by other defence team members, when not accompanied by counsel or co-counsel, are not privileged and are subject to the restrictions outlined above, including Registry

approval.”<sup>7</sup> As further set out by the Registry “all non-privileged in-person visits, video visits, and telephone calls require the prior approval of the Registrar so that all relevant considerations (legal, practical, security) can be factored into the decision of whether to authorise a particular visit or communication and/or engage in active monitoring.”<sup>8</sup>

11. As a consequence, the Registrar has interpreted the Decision to prohibit all communications between Mr. Selimi and members of the Defence team who do not benefit from privileged communications, including legal consultants and case managers, unless the communications have been scheduled and authorised in advance and take place in the presence of Counsel or Co-Counsel. That means that every phone call between Mr. Selimi and his Defence team is effectively limited to Counsel, unless such phone calls with other members of the Defence team, have been scheduled and approved by the Registry a month in advance.
12. Since her appointment as Co-Counsel, while Dr. Jasini's attendance in court has been limited, her communications with Mr. Selimi have been of great importance to the Defence team, taking instructions from Mr. Selimi on a range of important issues relating to the ongoing proceedings.
13. In the three months since the Registry Update, given the limitations on communications between Mr. Selimi and his Defence team, Dr. Jasini has played an even greater role in maintaining direct communication with Mr. Selimi through regular phone calls and in-person visits, allowing for effective consultation especially in the current circumstances, and enabling the Defence to receive direct instructions from Mr. Selimi on matters relating to the ongoing

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<sup>7</sup> Decision, para.60.

<sup>8</sup> KSC-BC-2020-06/F02082, Registry Notification in Relation to Court-Ordered Protective Measures and Request for Guidance Pursuant to Decision F01977 with Confidential Annexes 1-10, 26 January 2024, para. 2.

proceedings. It is therefore vital for the work of the Defence team that this communication between Dr. Jasini and Mr. Selimi continue.

14. All international criminal tribunals protect legal professional privilege, and ensure that counsel are able to communicate with their clients in a confidential manner.<sup>9</sup> Legal professional privilege recognizes that “these relationships are founded in trust and that a court of law should not be empowered to impinge upon that trust.”<sup>10</sup> The rights of the accused, of which the client-counsel privilege right is an indispensable component, are one of the foundations of the concept of a fair trial.
15. While each tribunal has defined the ambit of the right of the client-counsel privilege according to its respective statute, when faced with specific circumstances, a broader interpretation of these provisions has been followed, affording an extension of legal privilege to other members of the Defence team.
16. In *Prosecutor v. Turinabo et al*, the International Residual Mechanism for Criminal Tribunals (“MICT”) ruled that:

“CONSIDERING the right to attorney-client privilege set forth under Rule 119 of the Rules and that the right to communicate freely and confidentially with Counsel is a fundamental right with respect to the preparation of an accused's defence and to the fairness of the proceedings, pursuant to Article 18 and 19 of the Statute; [...]

FINDING that it is in the interests of justice to extend the attorney-client privilege once trial proceedings commence to Defence Consultants, Legal Assistants, and other legally qualified members of Defence team(s) who satisfy the requirements identified by the Registrar and

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<sup>9</sup> Sluiter et al., *International Criminal Procedure*, (OUP 2013), p. 873.

<sup>10</sup> *Ibid*, p.876.

where: (i) Lead Defence Counsel and Accused are located in separate countries; and (ii) Defence Consultants, Legal Assistants, and/or other legally qualified members of Defence team(s) are in situ in the same location as the Accused;”<sup>11</sup>

17. In *Prosecutor v Yekatom and Ngaïssona*, the Trial Chamber V at the International Criminal Court (“ICC”) found that, “Lastly, as regards the request of the Ngaïssona Defence to include the case manager in the list of persons entitled to privileged visits with Ngaïssona, the Chamber notes that Ngaïssona does not have a co-counsel. In addition, the Chamber considers that the case manager forms part of the Defence team and is, as such, entitled to the same privileges and subject to the same obligations as counsel. Accordingly, this request is granted.”<sup>12</sup>

18. The principle emanating from these decisions indicates that where circumstances reduce the capacity of named Counsel to communicate, and thus receive instruction from, their clients, the interests of justice allow for privilege to be extended to members of the Defence team on an exceptional basis. Though these two decisions considered issues of geographical distance and lack of co-counsel, respectively, as factors in reaching their conclusion; the issues outlined above regarding restrictions on communication with the accused under the current detention regime, and the negative effect that Ms. Jasini’s loss of privileged communication would have on Mr. Selimi’s ability to prepare his defence, make these findings apt in support of the present motion.

19. Further, the ICC affords legal privilege not only to counsel, whether lead counsel or co-counsel, but also assistants to counsel, as referred to in Regulation

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<sup>11</sup> *Prosecutor v. Maximilien Turinabo et al*, Case Nos. MICT-I8-1I6-PT, Order on the Extension of Attorney-Client Privilege, 25 September 2020, pp. 1-2.

<sup>12</sup> ICC-01/14-01/18-176-Red2, Situation in The Central African Republic II in the Case of the *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, 8 February 2021, para. 34.

178 and 179 (1) of the Regulations of the Registry, who satisfy the respective requirements set out in the ICC legal framework. The ICC does so in recognition of the prime importance of attorney-client communications, and the practical need to facilitate such vital communication through individuals other than Counsel, and indeed does not require that exceptional circumstances be shown to justify the extension of legal privilege.

20. Against this backdrop, a wider application of legal privilege than that which is explicitly set out in the KSC legal framework is warranted. The specific circumstances arising out of the newly-instituted detention regime, which have significantly impacted upon the communication of Mr. Selimi and his Defence, require the continued privileged communication between Mr. Selimi and Dr. Jasini, notwithstanding her reversion to her previous position of Legal Consultant.

21. This request is limited in scope as it applies to only one member of the Defence team, does not confer any existing rights to Dr. Jasini that she does not currently enjoy and thereby causes no prejudice. It would also allow for the appointed Co-Counsel for Mr. Selimi to properly reflect the interpretation of that role as set out by the Trial Panel in the Oral Order.

### **III. CONCLUSION AND RELIEF REQUESTED**

22. For the reasons set out herein, the Defence hereby requests the Trial Panel to extend client-counsel privilege to Dr. Rudina Jasini, as an appointed Legal Consultant for Mr. Selimi.

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Respectfully submitted on 15 March 2024,





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