



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: 30 April 2024

Language: English

Classification: Public

**Decision on Prosecution Request Concerning Access to
Confidential Versions of Judgments from Case KSC-BC-2020-05**

Specialist Prosecutor

Kimberly P. West

Counsel for Hashim Thaçi

Luka Mišetić

Counsel for Victims

Simon Laws

Counsel for Kadri Veseli

Ben Emmerson

Case 05:

Counsel for Victims

Anni Pues

Counsel for Rexhep Selimi

Geoffrey Roberts

Counsel for Salih Mustafa

Julius von Bóné

Counsel for Jakup Krasniqi

Venkateswari Alagendra

TRIAL PANEL II ("Panel"), pursuant to Articles 21(2), 4(c) and (6), 23, and 40(2) and (6) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 81(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 8 February 2024, the Specialist Prosecutor's Office ("SPO") filed a request ("Request")¹ before the President of the Specialist Chambers ("President") concerning access to the confidential versions of the trial judgment² and the appeal judgment³ from case KSC-BC-2020-05 ("Case 05" and "Case 05 Judgments").
2. On 12 February 2024, the President referred the Request to this Panel and ordered the Court Management Unit to file the Request before this Panel ("President's Decision").⁴
3. On 13 February 2024, the Request was cross-filed before this Panel.⁵
4. No responses to the Request were filed.
5. On 18 April 2024, pursuant to a consultation by the Panel,⁶ the Judges of Trial Panel I and the Judges of the Court of Appeals Panel indicated that there are, in their view, no reasons to maintain vis-à-vis the Panel or the Parties and

¹ KSC-CA-2023-02/F00042/COR (in the meantime cross-filed as KSC-BC-2020-06/F02118/COR; see also below, para. 3 and fn. 5), Specialist Prosecutor, *Corrected Version of 'Prosecution Request Concerning Access to the Confidential Trial and Appeal Judgments'*, 9 February 2024 (date of original: 8 February 2024).

² KSC-BC-2020-05/F00494, Trial Panel I, *Trial Judgment* ("Case 05 Trial Judgment"), 16 December 2022, confidential (a public further redacted version was filed on 8 June 2023, F00494/RED3/COR).

³ KSC-CA-2023-02/F00038, Court of Appeals Panel, *Appeal Judgment*, 14 December 2023, confidential, with Annex 1, confidential (a public redacted version was filed on the same day, F00038/RED).

⁴ KSC-CA-2023-02/F00043, President, *Decision Referring a Request to Trial Panel II*, 12 February 2024.

⁵ See F02118/COR (see above, fn. 1).

⁶ KSC/CHA/BC/TP2/012, Trial Panel II, *Memorandum: Consultation Regarding Access to the Confidential Versions of the Trial Judgment and the Appeal Judgment from Case KSC-BC-2020-05/KSC-CA-2023-02*, 5 April 2024, confidential and *ex parte*.

Victims' Counsel in this case ("Case 06") any of the redactions contained in the public redacted versions of the Case 05 Judgments.⁷

II. SUBMISSIONS

6. The SPO requests that this Panel and the Case 06 Parties and Victims' Counsel be authorised to access and use, on a confidential basis, the confidential versions of the Case 05 Judgments.⁸ With respect to the legal basis of the Request, the SPO refers to Rule 82(1) and (5).⁹ It submits that: (i) there is a specific, legitimate forensic purpose for the Request, particularly in relation to a prospective request for judicial notice of adjudicated facts from the Case 05 Judgments; and (ii) granting the Request would not impact applicable protective measures and may ultimately facilitate fair and expeditious proceedings in Case 06.¹⁰ The SPO further submits that evidence cited and discussed in the Case 05 Judgments has already been disclosed in Case 06.¹¹

III. DISCUSSION

7. The Panel observes that the SPO requests authorisation for this Panel and the Case 06 Parties and participants to access and use, on a confidential basis, the confidential versions of the Case 05 Judgments. The Panel will assess the Request particularly in light of the Defence's right to receive all material and relevant evidence or facts, pursuant to Article 21(6), and the need to ensure the protection of victims and witnesses, pursuant to Article 23. The Defence's right to receive all material and relevant evidence or facts is generally implemented through the SPO's disclosure

⁷ KSC/CHA/BC/TP1/MVF/018, Trial Panel I, *Memorandum: Consultation Regarding Access in Case KSC-BC-2020-06 to the Confidential Version of the Trial Judgment from Case KSC-BC-2020-05*, 18 April 2024, confidential and *ex parte*; Court of Appeals Panel, *Memorandum: Consultation Regarding Access in Case KSC-BC-2020-06 to the Confidential Version of the Appeal Judgment from Case KSC-CA-2023-02*, 18 April 2024, confidential and *ex parte*.

⁸ Request, paras 1, 4. *See also* Request, para. 3.

⁹ Request, para. 1.

¹⁰ Request, paras 1-3.

¹¹ Request, para. 3.

obligations under the Law and the Rules. This is, however, without prejudice to the Panel's discretion to grant access to parts of the record of a closed or completed case.¹²

8. In the absence of a specific standard upon which to assess requests for access to confidential information in a different case, the Panel considers it appropriate to turn to jurisdictions outside the Specialist Chambers. In particular, the Panel adopts the test established at the *ad hoc* tribunals for access to confidential material in a different case, namely that: (i) the documents to which access is sought must be identified or described by their general nature; and (ii) a legitimate forensic purpose for such access must be shown.¹³

9. The SPO has identified the documents for which access is sought, namely the Case 05 Judgments, and therefore the first prong of this test is met.

10. With respect to the legitimate forensic purpose, the Panel observes that Case 05 and Case 06 overlap significantly.¹⁴ Furthermore, the Panel takes note of the SPO's submissions that: (i) the SPO may file a request for judicial notice of adjudicated facts arising from the Case 05 Judgments; and (ii) relevant judicial

¹² See also KSC-BC-2020-05, RAC001/F00009, Trial Panel I, *Decision on the Request of the Defence in KSC-BC-2020-06 to Access Confidential Material in the Prosecutor v. Salih Mustafa Case*, 1 February 2022, para. 23.

¹³ See e.g. ICTY, *Prosecutor v. Hadžić*, IT-04-75-PT / IT-95-13/1-A, [Decision on Motion on Behalf of Goran Hadžić Seeking Access to Confidential Material in Prosecutor v. Mrkšić et al.](#), 22 March 2012, para. 5; *Prosecutor v. Hadžić*, IT-04-75-PT / IT-95-13a-T, [Decision on Motion on Behalf of Goran Hadžić Seeking Access to Confidential Material in Prosecutor v. Slavko Dokmanović](#), 22 March 2012, para. 5; *Prosecutor v. Hadžić*, IT-04-75-PT / IT-02-54-T, [Decision on Motion on Behalf of Goran Hadžić Seeking Access to Confidential Material in Prosecutor v. Slobodan Milošević related to Croatia](#), 22 March 2012, para. 5; *Prosecutor v. Hadžihasanović et al.*, IT-01-47-PT, [Decision on Motion by Mario Čerkez for Access to Confidential Supporting Material](#), 10 October 2001, para. 10; *Prosecutor v. Blaškić*, IT-95-14-A, [Decision on Appellants Dario Kordić and Mario Čerkez's Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post-Appeal Pleadings and Hearing Transcript Filed in the Prosecutor v. Blaškić](#), 16 May 2002, para. 14; *Prosecutor v. Brđanin*, IT-99-36-A, [Decision on Mićo Stanišić's Motion for Access to All Confidential Materials in the Brđanin Case](#), 24 January 2007, para. 10; *Prosecutor v. Martić*, IT-95-11-A, [Decision on Motion by Jovica Stanišić for Access to Confidential Testimony and Exhibits in the Martić Case Pursuant to Rule 75\(G\)\(i\)](#), 22 February 2008, para. 9; ICTR, *Prosecutor v. Rutaganda*, ICTR-96-3-R, [Decision on Georges A.N. Rutaganda's Appeal Against Decision on Request for Closed Session Testimony and Sealed Exhibits](#), 22 April 2009, para. 10.

¹⁴ See F02112, Panel, *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)*, 8 February 2024, paras 23-25.

findings are redacted in the public redacted versions of the Case 05 Judgments.¹⁵ To be able to make submissions on, and assess, such prospective request for judicial notice of adjudicated facts, this Panel and the Case 06 Parties and participants would need to have access to the confidential versions of the Case 05 Judgments. As such, there is a specific, legitimate forensic purpose for the access sought by the SPO.

11. Regarding the protection of witnesses and victims, the Panel understands that while, to date, none of the Case 05 witnesses have testified in Case 06,¹⁶ the identities of Case 05 witnesses who are also witnesses in Case 06, are known to the Case 06 Defence.¹⁷ Furthermore, the SPO asserts that it has already disclosed in Case 06 evidence cited and discussed in the Case 05 Judgments, pursuant to, as appropriate, Rules 81(1)(b), 102 and 103. Based on the Request, the Panel also understands that the SPO does not consider that granting the Request would pose a risk to witnesses or victims, and no responses to the Request raising such concerns have been filed. The Panel further notes that pursuant to Rule 81(1)(a), protective measures in Case 05 shall continue to have effect *mutatis mutandis* in Case 06 unless otherwise varied in accordance with Rule 81. Moreover, the Judges of Trial Panel I and the Judges of the Court of Appeals Panel consider that there are no reasons to maintain vis-à-vis the Panel or the Case 06 Parties and Victims' Counsel any of the redactions contained in the public redacted versions of the Case 05 Judgments.¹⁸

¹⁵ Request, para. 2.

¹⁶ For SPO witnesses in Case 05, *see* Trial Judgment, paras 58-137. For Defence witnesses in Case 05, *see* Trial Judgment, paras 139-223.

¹⁷ To the extent that witnesses had delayed disclosure towards the Defence, their identities have been disclosed on or about 3 April 2023, *see e.g.* Disclosure Packages 739-741. *See also* F01394, Specialist Prosecutor, *Delayed Disclosure Notification for Witnesses*, 24 March 2023, confidential.

¹⁸ *See above*, para. 5.

12. In light of the above, the Panel is satisfied that granting the Request would be consistent with the need to ensure the protection of witnesses and victims, provided that the Case 05 Judgments remain confidential in Case 06.

13. Accordingly, the Panel grants the Request. The Registry is directed to ensure that this Panel and the Case 06 Defence and Victims' Counsel are granted access to the confidential versions of the Case 05 Judgments in Legal Workflow.

14. The Panel reminds the Parties and participants of the confidential classification of these versions of the Case 05 Judgements and that, pursuant to Rule 82(1)(b), the confidential portions of the Case 05 Judgements shall not be disclosed to the public.

IV. DISPOSITION

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

- a) **GRANTS** the Request;
- b) **DIRECTS** the Registry to ensure that this Panel and the Case 06 Defence and Victims' Counsel are granted access to the confidential versions of the Case 05 Judgments in Legal Workflow; and
- c) **REMINDS** the Parties and participants of the confidential classification of these versions of the Case 05 Judgements and that, pursuant to Rule 82(1)(b), the confidential portions of the Case 05 Judgements shall not be disclosed to the public.



Judge Charles L. Smith, III
Presiding Judge

Dated this Tuesday, 30 April 2024
At The Hague, the Netherlands.