

In: KSC-BC-2020-05
The Prosecutor v. Salih Mustafa

Before: **Trial Panel I**
Judge Mappie Veldt-Foglia, Presiding Judge
Judge Roland Dekkers
Judge Gilbert Bitti, Judge Rapporteur
Judge Vladimir Mikula, Reserve Judge

Registrar: Dr Fidelma Donlon

Filed by: Dr Anni Pues, Victims' Counsel

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**Confidential Redacted Version of Victim's Counsel response to Defence Request
to Access Confidential Material in *Prosecutor v. Salih Mustafa* case, dated 16
November 2021, filed on 25 November 2021**

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I. INTRODUCTION

1. Victims' Counsel hereby responds to the Defence Request to Access Confidential Material in *Prosecutor v. Salih Mustafa* case ("Request"), filed on 16 November 2021 by the Defence of Mr Rexhep Selimi, accused person in the case *Prosecutor v. Thaçi et al.* ("*Thaçi et al.* case")¹ and joined by the Defence of Mr Jakup Krasniqi on 18 November 2021² and the Defence of Mr Hashim Thaçi on 22 November 2021³ ("Defence teams").
2. In their Request, the Defence teams request to have access to confidential material from the *Prosecutor v. Salih Mustafa* case, without prejudice to authorised protective measures in both cases, including (i) all confidential closed and private session testimony transcripts; (ii) all closed session hearing transcripts; (iii) all confidential exhibits; (iv) all confidential filings, submissions and decisions of the Trial Chamber ("materials").⁴
3. Save from materials that have no forensic value for the Defence teams, Victims' Counsel does not *in principle* oppose the Defence teams having access to the materials listed above. However, *at this point*, identities or identifying information of the witnesses in the *Mustafa* case cannot be disclosed to the Defence teams in the *Thaçi et al.* case, in conformity with the protective measures. Victims' Counsel stresses the importance of ensuring the protection, safety, physical and psychological well-being, dignity and privacy of witnesses. Should the Request be granted, the Trial Panel must ensure that the protective measures already in place for the witnesses in the *Mustafa* case continue to effectively apply in the *Thaçi et al.* case.

¹ KSC-BC-2020-05/RAC001/F00001, Defence Request to Access Confidential Material in *Prosecutor v. Salih Mustafa* case, 16 November 2021.

² KSC-BC-2020-05/RAC001/F00002, Krasniqi Defence Joinder to Selimi Defence Request to Access Confidential Material in *Prosecutor v. Salih Mustafa* Case, 18 November 2021.

³ KSC-BC-2020-05/RAC001/F00003, Thaçi Defence Joinder to Selimi 'Defence Request to Access Confidential Material in *Prosecutor v. Salih Mustafa* case', 22 November 2021.

⁴ Request, paras. 1 and 17.

4. This Response is filed as confidential as it refers to confidential decisions issued in the case.

II. SUBMISSIONS

5. A party may obtain confidential material from another case to assist it in the preparation of its case, if (a) the material sought has been identified or described by its general nature; and (b) a legitimate forensic purpose for such access has been shown.⁵ The requesting party must demonstrate a legitimate forensic purpose by establishing that such material is likely to assist its case materially, or at least there is a good chance it would. A legitimate forensic purpose may be established showing the existence of a nexus between the party's case and the case from which such material is sought.⁶

6. Victims' Counsel acknowledges that there is a factual nexus between the *Thaçi et al.* case and the *Mustafa* case, as the accused persons in these two cases are charged for crimes that happened in Zllash location between 1 and 19 April 1999. In light of this nexus, access to confidential material from the *Mustafa* case may materially assist the Defence teams in the *Thaçi et al.* case in the preparation of their defence. For that reason, in general, Victims' Counsel does not oppose the request as far as a legitimate forensic purpose may exist.

7. In its Request, the Defence teams do not seek to vary the protective measures applied to witnesses already called or anticipated to be called in the *Mustafa* or *Thaçi*

⁵ See, e.g., MICT, *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Decision on Defence Motion Seeking Access to Confidential Records from Other Cases, 21 April 2021, p. 2; MICT, *Prosecutor v. Maximilien Turinabo et al.*, Case Nos. MICT-18-116-PT & MICT-12-29-R, Decision on Requests for Access, 26 February 2019, p. 2; *Prosecutor v. Radovan Karadžić*, Case Nos. MICT-13-55-A & MICT-15-96-T, Decision on Simatović's Request for Access to Confidential Material in the *Karadžić* Case, p. 2.

⁶ See, e.g., MICT, *Prosecutor v. Félicien Kabuga*, MICT-13-38-PT, Decision on Defence Motion Seeking Access to Confidential Records from Other Cases, 21 April 2021, p. 2; MICT, *Prosecutor v. Maximilien Turinabo et al.*, Case Nos. MICT-18-116-PT & MICT-12-29-R, Decision on Requests for Access, 26 February 2019, p. 2 and 3; *Prosecutor v. Radovan Karadžić*, Case Nos. MICT-13-55-A & MICT-15-96-T, Decision on Simatović's Request for Access to Confidential Material in the *Karadžić* Case, p. 2.

et al. case.⁷ Victims' Counsel is of the view that the Defence teams' position in that regard is consistent with Rule 81(1)(a) of the Rules of Procedure and Evidence ("Rules"), which provides that once protective measures have been ordered by a Panel in respect of a witness, victim participating in the proceedings or other person at risk on account of testimony given by witnesses, such measures "shall continue to have effect *mutatis mutandis* in any other subsequent proceedings before the Specialist Chambers or another jurisdiction unless and until they are varied".⁸

8. In the *Mustafa* case, the witnesses were granted "[REDACTED]"⁹. Namely, the Pre-Trial Judge authorized;

[REDACTED].¹⁰

9. These conditions continue to apply to the Defence teams in the *Thaçi et al.* case. The current request has to be assessed in light of these measures. At the *current* stage, only very limited access to the requested materials may be granted, as they contain names of protected witnesses, identifying information, or bear a witness' signature. Disclosure, at the *current* stage, of any such materials would undermine the protective measures in place in this case.

10. It would also undermine the [REDACTED]. On 2 August 2021, the Trial Panel ordered [REDACTED].¹¹ It noted that [REDACTED].¹² Consequently, it concluded that [REDACTED].¹³

11. In view of the above, Victims' Counsel submits that it is necessary to differentiate *between* the different materials requested. Having said that, in any case the identity of the witnesses or materials containing identifying information may only be disclosed to the Defence 30 days prior to the witnesses' respective testimony.

⁷ Request, paras. 1 and 15.

⁸ Rule 81(1)(2).

⁹ [REDACTED].

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² [REDACTED].

¹³ [REDACTED].

12. For the requested materials listed in the request under (i), transcripts of private and *closed* session witness testimony, Victims Counsel notes that any transcript of a session that was ordered according to Rule 120 (3)(d) of the Rules, may only be disclosed 30 days prior to the witnesses' respective testimony. These materials contain identifying information and names of witnesses.

13. As for the requested materials listed in the request under (ii), transcripts of all closed session hearings, the Defence request is too general to allow the determination of the specific forensic value the requested transcripts may have. Based on the current submission, the Request does not seem to meet the requirements for disclosure. If, however, any forensic value may be determined, any transcript containing identifying information may only be disclosed 30 days prior to the relevant witness testimony.

14. As for the requested materials listed in the request under (iii), confidential exhibits, these may at this point only be disclosed with appropriate redactions in place, where this is feasible to ensure the non-disclosure of the witnesses' identities, in conformity with the protective measures granted to the witnesses in the *Mustafa* case. This would, for example, require the redaction of any signatures or other identifying information contained on the exhibit.

15. As for the requested materials listed in the request under (iv), namely all confidential filings, submissions and decisions of the Trial Chamber, Victims' Counsel submits the Request is too general. The Defence has not sufficiently demonstrated the forensic value required. Victims' Counsel is in particular of the view that no access should be granted to confidential filings, submissions and decisions of the Trial Chamber concerning, notably, the appointment of experts, modalities of trial, reparations, review of detention, and orders to redact transcripts and broadcasts of hearings.¹⁴ None of these materials have a specific forensic purpose for the Defence teams and therefore do not require disclosure.

¹⁴ Similarly, see MICT, *Prosecutor v. Ratko Mladić*, Decision on Franko Simatović's Request for Access to Confidential Material in the *Mladić* case, 27 July 2018, p. 4; MICT, *Prosecutor v. Radovan Karadžić*, MICT-

III. RELIEF REQUESTED

16. Victims' Counsel requests the Trial Panel to:

- ALLOW the disclosure of the requested materials to the Defence teams under the following conditions:
 - confidential closed and private session, ordered according to Rule 120 (3)(d) of the Rules, witness testimony transcripts (request item (i)) may be disclosed 30 days prior to the witnesses' respective testimony;
 - all confidential exhibits (request item (iii)) may at this point only be disclosed with appropriate redactions in place ensuring the non-disclosure of the witnesses' identities, in conformity with the protective measures granted to the witnesses in the *Mustafa* case;
- REJECT the Request to access:
 - all closed session hearing transcripts (request item (ii));
 - any other materials (request item (iv)) as not having any forensic value to the Defence teams.

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Anni Pues

Victims' Counsel

25 November 2021

At The Hague, the Netherlands

13-55-A & MICT-15-96-T, Decision on Simatović's Request for Access to Confidential Material in the *Karadžić* Case, 4 July 2018, p. 3.