

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 Vladimir Mikula, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Victims' Counsel (Case No. KSC-BC-2020-06)

Date: 01 December 2021

Language: English

Classification: Confidential

**Victims' Counsel Response to the Defence Request to Access Confidential
Material in *Prosecutor v. Salih Mustafa* case**

Specialist Prosecutor
Jack Smith

Counsel for Victims
Simon Laws

Counsel for Accused
(Case No. KSC-BC-2020-05)
Julius von Bóné

Counsel for Victims
(Case No. KSC-BC-2020-05)
Anni Pues

Counsel for Hashim Thaçi
Gregory Kehoe

Counsel for Kadri Veseli
Ben Emmerson

Counsel for Rexhep Selimi
David Young

Counsel for Jakup Krasniqi
Venkateswari Alagendra

I. INTRODUCTION

1. Pursuant to Articles 22(3) and 22(6) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law"), Rule 114(4)(a) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), the Pre-Trial Judge's *First Decision on Victims' Participation*¹ and the Oral Order of Trial Panel I in the *Mustafa* case², the Victims' Counsel submits these observations on Rexhem Selimi's *Defence Request to Access Confidential Material in Prosecutor v. Salih Mustafa case*,³ subsequently joined by the Defence of Hashim Thaçi and the Defence of Jakup Krasniqi ("Defence Request").⁴
2. The Victims' Counsel does not object in principle to the Defence Request but submits that the access granted to the defence must be in accordance with the existing protective measures in the *Thaçi et al.* case. Moreover, to the extent that the Defence Request is granted by Trial Panel I, the Victims' Counsel requests access to the same material, pursuant to Article 22(6) of the Law and the Pre-Trial Judge's decision of 21 April 2021.

II. CLASSIFICATION OF FILING

3. This filing is classified as confidential as it refers to previous filings that are confidential.

¹ *Prosecutor v. Thaçi et al.*, KSC-BC-2020-06/F00257, Public Redacted Version of the First Decision on Victims' Participation, 21 April 2021, paras 84 and 85(d)(vi).

² *Prosecutor v. Mustafa*, KSC-BC-2020-05, Oral Order, Transcript of Hearing 23 November 2021, p. 1793:9-23.

³ *Prosecutor v. Mustafa*, KSC-BC-2020-05/RAC001/F00001, Defence Request to Access Confidential Material in *Prosecutor v. Salih Mustafa* case, 16 November 2021.

⁴ *Prosecutor v. Mustafa*, 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; *Prosecutor v. Mustafa*, 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.

III. PROCEDURAL HISTORY

4. On 21 April 2021, the Pre-Trial Judge determined the modalities of participation of victims in pre-trial proceedings in the *Thaçi et al.* case, admitted nine applicants as victims participating in the proceedings (“VPPs”) and granted protective measures to them.⁵
5. On 16 November 2021, the Selimi Defence filed its *Request to Access Confidential Material in Prosecutor v. Salih Mustafa case*.⁶
6. On 18 and 22 November 2021, the Krasniqi Defence⁷ and Thaçi Defence⁸ filed their joinders to the Selimi Defence Request, respectively.
7. On 23 November 2021, the Trial Panel in the *Mustafa* case ordered that consolidated responses from “the parties and the Victims’ Counsel in the present case” should be filed within ten days from the last joinder.⁹
8. On 25 November 2021, the Victims’ Counsel in the *Mustafa* case responded to the Defence Request.¹⁰

⁵ *Prosecutor v. Thaçi et al.*, KSC-BC-2020-06/F00257, Public Redacted Version of the First Decision on Victims’ Participation, 21 April 2021, para. 85.

⁶ *Prosecutor v. Mustafa*, KSC-BC-2020-05/RAC001/F00001, Request to Access Confidential Material in *Prosecutor v. Salih Mustafa case*, 16 November 2021.

⁷ *Prosecutor v. Mustafa*, 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.

⁸ *Prosecutor v. Mustafa*, 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.

⁹ *Prosecutor v. Mustafa*, KSC-BC-2020-05, Oral Order, Transcript of Hearing 23 November 2021, p. 1793:9-23.

¹⁰ *Prosecutor v. Mustafa*, KSC-BC-2020-05/RAC001/F00004/CONF/RED2, 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, 25 November 2021 (“VC05 Response”).

IV. SUBMISSIONS

9. Having been notified of the Oral Order of Trial Panel I in the *Mustafa* case,¹¹ the Victims' Counsel submits this response pursuant to Article 22(6) of the Law, Rule 114(4) of the Rules and the Pre-Trial Judge's decision in the *Thaçi et al.* case.¹² The Victims' Counsel's response to the Defence Request is necessary as the outcome of that request concerns the interests of VPPs in the *Thaçi et al.* case:
- i. The Defence Request relates to the receipt of material from the record of the *Mustafa* case that are of relevance for the proceedings in the *Thaçi et al.* case; and
 - ii. If granted, the Defence Request may lead to disclosure of the identities of VPPs who are currently protected by anonymity in the *Thaçi et al.* case.¹³
10. The factual nexus between the *Thaçi et al.* and *Mustafa* cases necessarily leads to a partial overlap of witnesses and VPPs in both cases. Therefore, the Victims' Counsel in general does not object to the Defence Request and agrees with the submission of the Victims' Counsel in the *Mustafa* case (hereafter "VC05") that "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."¹⁴
11. However, the material in the *Mustafa* case requested by the Defence includes information that could potentially reveal the status and identities of the VPPs in the *Thaçi et al.* case. Disclosure of such information would breach Rule 80(4)(e)(i) of the Rules and jeopardise the protection of witnesses and VPPs, as provided for in Article 23(1) of the Law. Therefore, material disclosed to the Defence

¹¹ *Prosecutor v. Mustafa*, KSC-BC-2020-05, Oral Order, Transcript of Hearing 23 November 2021, p. 1793:9-23.

¹² *Prosecutor v. Thaçi et al.*, KSC-BC-2020-06/F00257, Public Redacted Version of the First Decision on Victims' Participation, 21 April 2021, paras 82 and 85(d)(i).

¹³ *Prosecutor v. Thaçi et al.*, KSC-BC-2020-06/F00257, Public Redacted Version of the First Decision on Victims' Participation, 21 April 2021, paras 68, 69, 85(g).

¹⁴ VC05 Response, para. 6.

should not have the potential to reveal the identities and status of VPPs in the *Thaçi et al.* case.

12. Therefore, the Victims' Counsel agrees with the VC05 as to the conditions of granting the Defence Request set out in paragraph 16 of the VC05 Response, namely that the request should only be granted if the following conditions are met:
 - i. Confidential closed and private session witness testimony transcripts (ordered according to Rule 120 (3)(d) of the Rules) may only be disclosed to the Defence 30 days prior to the respective witnesses' testimony; and
 - ii. All confidential exhibits may at this point be disclosed only 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.¹⁵
13. Should Trial Panel I grant the Defence Request, the Victims' Counsel requests access to the same material from the record of the *Mustafa* case as those disclosed to the Defence teams. Due to the factual overlap between the *Mustafa* and *Thaçi et al.* cases, access to this material would assist the Victims' Counsel in preparation of the case strategy and allow for due performance of his obligations towards the VPPs in the *Thaçi et al.* case.
14. This request is consistent with Article 22(6) of the Law and the Pre-Trial Judge's decision that the Victims' Counsel shall have access to "the entire case file, including all public and confidential filings, transcripts and evidentiary material and excluding any *ex parte* items of the case file".¹⁶ Finally, realisation of this

¹⁵ *Prosecutor v. Mustafa*, KSC-BC-2020-05/RAC001/F00004, 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, 25 November 2021, para. 16.

¹⁶ *Prosecutor v. Thaçi et al.*, KSC-BC-2020-06/F00257, Public Redacted Version of the First Decision on Victims' Participation, 21 April 2021, para. 85(d)(i). In the *Mustafa* case, the VC05 was granted similar access (*Prosecutor v. Mustafa*, KSC-BC-2020-05/F00105, Public Redacted Version of Second Decision on Victims' Participation, 30 April 2021, para. 54(d)(i)).

request would in no way prejudice the Accused in the *Thaçi et al.* and *Mustafa* cases.

V. CONCLUSION AND RELIEF REQUESTED

15. The Victims' Counsel does not oppose the Defence Request provided that it is granted only to the extent set out by the VC05 in the VC05 Response, and that the material disclosed to the Defence does not reveal identifying information of VPPs and witnesses in the *Thaçi et al.* case.
16. Should Trial Panel I grant the Defence Request, the Victims' Counsel requests access to the same material from the record of the *Mustafa* case as those disclosed to the Defence teams.

Word count: 1364



Simon Laws QC

Counsel for Victims

01 December 2021

Exeter, United Kingdom



Maria Radziejowska

Co-Counsel for Victims

01 December 2021

The Hague, the Netherlands