



SPECIALIST PROSECUTOR'S OFFICE  
ZYRA E PROKURORIT TË SPECIALIZUAR  
SPECIJALIZOVANO TUŽILAŠTVO

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

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

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Prosecutor

**Date:** 2 December 2021

**Language:** English

**Classification:** Confidential

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**SPO response to the Defence Request to Access Confidential Material in  
*Prosecutor v. Salih Mustafa* case**

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## A. INTRODUCTION

1. The Specialist Prosecutor's Office ('SPO') does not oppose the Defence requests to access confidential materials in the *Specialist Prosecutor v. Salih Mustafa*<sup>1</sup> case ('*Mustafa* case') to the extent (i) there is a legitimate forensic purpose, and (ii) applicable protective measures are not compromised.
2. As a preliminary matter, it is noted that the SPO has been fulfilling its disclosure obligations in KSC-BC-2020-06 in accordance with applicable rules, including seeking relevant variations of protective measures and/or authorisations as necessary. This includes in relation to evidentiary materials coming into its possession as a consequence of the proceedings in KSC-BC-2020-05.

## B. SUBMISSIONS

3. The categories of material sought in the Defence Request are addressed in turn below. However, in respect of all categories sought, any access granted should not compromise existing protective measures, including in particular where there are orders for delayed disclosure of witness identity. In such cases, the Defence should *not* be given access until the time frames set out in the relevant protective measures decisions.<sup>2</sup> Second, access should not be granted to materials for which there is no legitimate forensic purpose, this includes procedural matters specific to the *Mustafa* case, and material which is otherwise irrelevant to the KSC-BC-2020-06 Defence.

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<sup>1</sup> Defence Request to Access Confidential Material in *Prosecutor v. Salih Mustafa* case, 16 November 2021, KSC-BC-2020-05/RAC001/F00001/CONF; Krasniqi Defence Joinder to Selimi Defence Request to Access Confidential Material in *Prosecutor v. Salih Mustafa* case, KSC-BC-2020-05/RAC001/F00002/CONF; Thaçi Defence Joinder to Selimi 'Defence Request to Access Confidential Material in *Prosecutor v. Salih Mustafa* case', 22 November 2021, KSC-BC-2020-05/RAC001/F00003/CONF, (jointly, 'the Defence' and 'Defence Request').

<sup>2</sup> See e.g. ICTY, *Prosecutor v. Mladić*, IT-09-92-T, Decision on Mladić Motion for Access to Completed Cases, 7 September 2012, para. 23; ICTY, *Prosecutor v. Stanišić & Župljanin*, IT-08-91-T, Decision Partially Granting Radovan Karadžić's Request for Access to Confidential Material, 30 June 2010, '(*Stanišić & Župljanin* Decision)', para.20.

**i. Request for Confidential Exhibits**

4. The Defence's request for 'all confidential exhibits' is understood to be limited to material that is admitted into evidence as part of the case record. This is consistent with widely accepted jurisprudence of relevant tribunals which has clearly established that material which has not been admitted into evidence is not part of the body of evidence and thus remains in the domain of the disclosing party.<sup>3</sup>
5. As with all categories of material sought in the Defence Request, any access granted should not compromise existing protective measures, including in respect of witnesses for whom delayed disclosure of identity has been granted.

**ii. Request for closed and private session testimony transcripts and closed session hearing<sup>4</sup> transcripts**

6. The SPO does not oppose this request subject to applicable protective measures and the existence of a legitimate forensic purpose. In that regard, access should be denied to portions of closed or private session transcripts which relate purely to procedural or similar matters specific to the *Mustafa* case.

**iii. Request for confidential filings, submissions and decisions of the Trial Chamber<sup>5</sup>**

7. The SPO opposes this request on the basis that no legitimate forensic basis has been established. The entirety of the Defence's argumentation concerning forensic purpose relates to evidentiary materials.<sup>6</sup> No justification has been provided for

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<sup>3</sup> See e.g. ICTY, *Prosecutor v. Mladić*, IT-09-92-PT, Decision on Defence Request for Access to Confidential Materials from *Krstić* Case, 21 March 2012 ('*Mladić* Decision'), para. 12; ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-T & IT-95-5/18-T, Decision on Motion for Access to MFI and MNA documents, 18 January 2012 ('*Tolimir* Decision'), p. 2; ICTY, *Prosecutor v. Šešelj*, IT-03-67-T, Decision on Mićo Stanišić Motion for Disclosure of Exhibit List and "MFI" Materials from *Šešelj* Case (IT-03-67), 1 August 2011 ('*Šešelj* Decision'), para. 15. See also ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Order on Defence access to confidential material in the *Lubanga* case, 1 September 2015 ('*Ntaganda* Decision'), para.9 (the Chamber considers that the scope of the Defence request covers all exhibits classified as confidential that were admitted into evidence in the *Lubanga* case).

<sup>4</sup> The request for access to closed session hearing transcripts is understood to be confined to *inter partes* hearings only.

<sup>5</sup> This request is similarly understood to relate only to *inter partes* filings.

<sup>6</sup> Defence Request, KSC-BC-2020-05/RAC001/F00001/CONF, paras 8-15.

how confidential filings, submissions and decisions are relevant for their purposes. Nor is there any such legitimate forensic purpose. The limited portions of such filings that contain any discussion or analysis of confidential evidentiary materials would be of little benefit to the Defence since the Defence would already have access to the underlying evidence itself. In addition, for the filings, there exist public redacted versions of submissions and decisions that discuss and analyse the substance of confidential evidentiary materials that the Defence can already review. If, upon such review, the Defence were to determine that access to a particular confidential version would be material to its preparation for trial, they could make a specific, targeted access request.

8. If the Panel is nonetheless minded to grant access, it is requested that filings which relate to procedural or similar matters specific to the *Mustafa* case should still be excluded. Any access should be limited to the filings (or portions thereof) directly related to the substance of the relevant confidential evidence to which access has been granted. It is established jurisprudence of other tribunals applying equivalent access regimes that materials related to, for example, modalities of trial, protective measures, video conference links, subpoenas, order to redact transcripts and broadcasts hearing, witness scheduling, and health of the accused, have little or no forensic value.<sup>7</sup>

#### **iv. Confidentiality of accessed materials**

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<sup>7</sup> IRMCT, *Prosecutor v. Stanišić & Simatović*, MICT-15-96-PT & MICT-16-101, Decision on Stanišić's Request for Access to Confidential Material in the *Haždić* Case, 29 September 2016 ('*Stanišić & Simatović* Decision'), p.2; IRMCT, *Prosecutor v. Karadžić*, MICT-13-15-A & MICT-15-96-PT, Decision on Stanišić's Request for Access to Confidential Material in the *Karadžić* Appeal Proceedings, 28 September, p.3; ICTY, *Prosecutor v. Mladić*, IT-09-92-T, Decision on Mladić Motion for Access to Completed Cases, 7 September 2012, para.18.

9. The Prosecution further requests that, should the Defence Request be granted, the Trial Panel include a confidentiality order, similar to those which have been made in analogous contexts.<sup>8</sup>

**v. Access Procedure**

10. Finally, in terms of procedure, should the request be granted in whole or in part, it is requested that the SPO, the Victim's Counsel in the *Mustafa* case, and the Defence for Mr Mustafa have the opportunity to make submissions regarding the relevance of certain materials and/or any additional protective measures or redactions which may be required.<sup>9</sup> In order to facilitate that exercise, it is recommended that the Registry - as the custodian of the case record in KSC-BC-2020-05 with access to all necessary materials - generate a list of the case record falling within the parameters of any order which may be issued, from which the SPO, the Victim's Counsel in the *Mustafa* case, and the Defence for Mr Mustafa can conduct any necessary subsequent review prior to access being granted.

**C. CONFIDENTIALITY**

11. Pursuant to Rule 82(4), this filing is confidential in line with the classification of the Defence Request. The SPO would not oppose the reclassification of the filing to public should the Trial Panel deem it appropriate to do so.

**D. CONCLUSION AND RELIEF REQUESTED**

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<sup>8</sup> See e.g. IRMCT, *Prosecutor v. Kabuga*, MICT-13-38-PT, Decision on Defence Motion Seeking Access to Confidential Records from Other Cases, 21 April 2021, p.6; IRMCT, *Prosecutor v. Nzabonimpa et al.*, MICT-18-116-T & MICT-12-29-R, Decision on Request for Access, 26 February 2019, p.4; *Stanišić & Župljanin* Decision, pp.10-11.

<sup>9</sup> *Stanišić & Simatović* Decision, p.4; ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Order on Defence access to confidential material in the *Lubanga* case, 1 September 2015, para.12.

12. Based on the foregoing, the SPO requests that the Panel:

- i. grant the request only insofar as there is a legitimate forensic purpose for the materials in question, and in a manner which ensures that protective measures are not compromised, as outlined above; and
- ii. relatedly, establish a procedure which – based on a list of materials in the case record as generated by the Registry – facilitates the SPO, Victim’s Counsel in the *Mustafa* case, and the Defence for Mr Mustafa in first reviewing the material, including so as to make requests for any necessary additional protective measures.

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**Jack Smith**

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Thursday, 2 December 2021

At The Hague, the Netherlands.