

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: Counsel for Rexhep Selimi

Date: 7 December 2021

Language: English

Classification: Confidential

**Consolidated Selimi Defence Reply to Victims' Counsel
and SPO Response to Defence Request to
Access Confidential Material in *Prosecutor v. Salih Mustafa* case**

Specialist Prosecutor

Jack Smith

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Victims

(Case No. KSC-BC-2020-06)

Simon Laws

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Accused

(Case No. KSC-BC-2020-05)

Julius von Bóné

Counsel for Rexhep Selimi

David Young

Counsel for Victims

(Case No. KSC-BC-2020-05)

Anni Pues

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. Pursuant to Rules 76, 81(1) and 81(2) of the Rules,¹ the Defence for Mr. Selimi (“Defence”) files this Consolidated Reply to address new issues arising from the Specialist Prosecutor’s and Victims’ Counsel in *Thaci et al.* case (“*Thaci et al.*”) Responses² to the Selimi Defence Request to Access Confidential Material in the *Prosecutor v. Salih Mustafa* case (“*Mustafa*”),³ namely: (1) whether the Defence provided legitimate forensic basis to request confidential filings, submissions and decisions of the Trial Chamber in *Mustafa*; (2) whether the Defence can be disclosed confidential closed and private session witness testimony transcripts prior to 30 days before the respective witnesses’ testimony.
2. While the Defence does not address in this Reply the other points set out in the Request,⁴ nothing in the SPO’s and Victims’ Counsel Response undermines or contradicts the arguments set out by the Defence therein.

II. SUBMISSIONS

A. Legitimate forensic basis to request confidential filings, submissions and decisions of the Trial Chamber in *Mustafa*

3. The SPO opposed the Defence request for confidential filings, submissions, and decisions of the Trial Chamber on the basis that no legitimate forensic basis was established by the Defence and that no justification was provided for how the above materials are relevant for the Defence’s purposes.⁵
4. However, the Defence has provided a clear nexus and proof of a direct overlap between the two cases and thus provided sufficient forensic basis to demonstrate that there is a good chance that access to confidential filings, submissions and decisions will materially assist the Defence in preparing its case.⁶

¹ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (‘Rules’). All references to ‘Rule’ or ‘Rules’ herein refer to the Rules, unless otherwise specified.

² KSC-BC-2020-05, RAC001-F00005, Victims’ Counsel Response to the Defence Request to Access Confidential Material in *Prosecutor v. Salih Mustafa* case, 1 December 2021, (“Victims’ Counsel Response”); RAC001-F00006, SPO response to the Defence Request to Access Confidential Material in *Prosecutor v. Salih Mustafa* case, 2 December 2021, (“SPO Response”).

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

⁴ Ibid.

⁵ SPO Response, para. 7.

⁶ Defence Request, paras 8-14.

5. Further, when access to confidential materials in another case has been granted by Trial or Appeal Chambers before other international tribunals, this has included confidential submissions, given that the nexus between the two cases was established.
6. In particular, in 2005 the Appeals Chamber in *Blagojevic* held that where such a nexus had been demonstrated, decisions of the Trial Chamber should be provided as “the Trial Chamber’s decisions may help the Applicant to prepare his case by shedding light on the Trial Chamber’s treatment of legal and factual issues that may be common to the two cases and due to the fact that the Prosecution has access to those filings.”⁷
7. Similarly, the Trial Chamber in *Lukic* held that access to the confidential filings, submissions and decisions will provide the Applicant with an ability to better understand and make use of confidential exhibits, testimony transcripts and proceedings in the case the confidential materials are requested from and, as such, “there is a legitimate forensic purpose in granting him [the Applicant] access to this materials [filings, submissions, decisions and hearing transcripts]”.⁸
8. Moreover, in addressing this precise issue, the Appeals Chamber in *Blagojevic* held that such access should be provided, based on the equality of arms principle, to not put the Defence in a disadvantageous position in comparison to the Prosecution., In particular, the Appeals Chamber provided that:

“[...] Mr. Nikolic [the Applicant] will be better able to understand and make use of both the decisions and the evidence in the *Blagojevic and Jokic* case if he can read the filings that related to them. The Prosecution has access to those filings, and given Mr. Nikolic’s demonstration of the nexus between the two cases, the principle of equality of arms supports giving Mr. Nikolic a similar chance to understand the proceedings and evidence in the *Blagojevic and Jokic* case and evaluate their relevance to his own case.

12. The Prosecution is a party to both cases. If, for example, the Prosecution made factual representations in the *Blagojevic* and *Jokic* case that are advantageous to Mr. Nikolic, Mr. Nikolic might be able to argue that it cannot contradict itself in his own case, at least without some justification for its change in position.[...]”⁹

⁷ ICTY, *Prosecutor v. Blagojevic and Jokic*, IT-02-60-A, Decision on Motion by Radivoje Miletic for Access to Confidential Information, 9 September 2005 (“Blagojevic Decision on Motion by Miletic”).

⁸ ICTY, *Prosecutor v. Lukic and Lukic*, IT-98-32/1-T, Decision on Motion by Radovan Karadzic for Access to Confidential Materials in the Lukic and Lukic Case, 10 July 2009, para 14. See as well ICTY, *Prosecutor v. Blagojevic and Jokic*, IT-02-60-A Decision on Motions for Access to Confidential Materials, 16 November 2005, para. 11.

⁹ *Ibid*, paras 11-12.

9. The SPO also attempted to unfairly shift the burden on the Defence by requiring that, if the Defence upon its review, were to determine that access to a particular confidential filing would be material to its preparation for trial, then the Defence could make a specific, targeted access request.¹⁰
10. Pursuant to existing practice in international tribunals, the Defence should not be required to go through each individual public filing to identify a specific reason to request each confidential filing on a case-by-case basis. There is no justification for this overly bureaucratic and unnecessarily complicated approach to providing the requested information. Rather the Defence should be able to access all items falling under the same category collectively. For instance, the Appeals Chamber in *Blagojevic* provided that “although it is true that, as the Prosecution argues, not all the confidential decisions are likely to be relevant to the Applicant’s case [...] the Appeals Chamber has not required accused seeking access to *inter partes* confidential materials in other cases to establish a specific reason that each individual item is likely to be useful”.¹¹
11. Finally, the SPO requested that, in the event access is granted, filings which relate to procedural or similar matters which are specific to the *Mustafa* case should be excluded, and that 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.¹² and closed or private session transcripts which relate purely to procedural or similar matters in *Mustafa*.¹³
12. However, the nexus between the *Thaci* and *Mustafa* cases is so substantial, that it is unlikely that there would be any filings, submissions and decisions in the latter case which could not conceivably be relevant to the former, except, potentially, procedural issues in relation to Mr. Mustafa’s health or detention conditions. Therefore, any restrictions on such disclosure must be interpreted strictly, justified by the SPO, notified to the Defence in the form of a list of such non-disclosable filings and subject to review by the Trial Chamber.

¹⁰ SPO Response, para. 7.

¹¹ Blagojevic Decision on Motion by Miletic.

¹² SPO Response, para. 8.

¹³ SPO Response, para. 6.

B. Disclosure of confidential closed and private session witness testimony transcripts prior to 30 days before the respective witnesses' testimony

13. The Victims' Counsel submitted that the material in *Mustafa* requested by the Defence includes information that could potentially reveal the status and identities of the victims participating in the proceedings ("VPPs") in *Thaci et al.* and therefore, requested that confidential closed and private session witness testimony transcripts (ordered according to Rule 120(3)(d) of the Rules) shall only be disclosed to the Defence 30 days prior to the respective witnesses' testimony.¹⁴
14. The Defence reiterates that it does not seek to vary protective measures applied to witnesses already called or anticipated to be called either in *Mustafa* or in *Thaci et al.*¹⁵ and hereby extends this position in relation to the VPPs in both *Mustafa* and *Thaci et al.* proceedings and protective measures applied to the VPPs. However, it is vital for the Defence to be provided with the requested material, in particular with confidential closed and private session witness testimony transcripts with redactions applied where necessary.
15. The Defence should not be placed at a disadvantage by having to wait for 30 days before the respective witness testimony, unless such a protective measure has been ordered with regards to a particular witness, to be able to access material relevant to its preparation which falls outside the ordered protective measures.

III. CLASSIFICATION

16. The present Reply is filed confidentially before the Trial Panel in *Mustafa* pursuant to Rule 82(4). The Defence would not oppose the reclassification of the filing to public should the Trial Panel find it appropriate to do so.

IV. RELIEF SOUGHT

17. In light of the foregoing, the Defence therefore reiterates its request to the Appeals Chamber to grant access to the following material in *Mustafa* case:

¹⁴ Victims' Counsel Response, paras 11-12.

¹⁵ Defence Request, para. 15.

- i) All confidential closed and private session testimony transcripts, excluding the portions related to procedural or similar matters specific to *Mustafa*;
- ii) All closed session hearing transcripts, excluding the portions related to procedural or similar matters specific to *Mustafa*;
- iii) All confidential exhibits; and,
- iv) All confidential filings, submissions and decisions of the Trial Chamber, excluding the portions related to certain procedural or similar matters specific to *Mustafa* as referred to in paragraph 12 of the Reply.

Word count: 1567

Respectfully submitted on 7 December 2021,



DAVID YOUNG
Lead Counsel for Rexhep Selimi



GEOFFREY ROBERTS
Co-counsel for Rexhep Selimi