

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: Specialist Counsel for Hashim Thaçi

Date: 10 December 2021

Language: English

Classification: Confidential

**Consolidated Thaçi Defence Reply to SPO and Victims' Counsels Responses to
Defence Request to Access Confidential Material in *Prosecutor v. Salih Mustafa*
case**

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

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I. INTRODUCTION

1. The Defence for Mr Hashim Thaçi (“the Defence”) hereby replies to the SPO¹ and Victims’ Counsels’² Responses to Defence Request to Access Confidential Material in *Prosecutor v. Salih Mustafa* case (“*Mustafa* case”).

II. PROCEDURAL BACKGROUND

2. On 16 November 2021, the Selimi Defence filed a Request to Access Confidential Material in the *Mustafa* case,³ and in particular:

- (i) All confidential closed and private session testimony transcripts;
- (ii) All closed session hearing transcripts;
- (iii) All confidential exhibits; and
- (iv) All confidential filings, submissions and decisions of the Trial Chamber.

3. This request was joined by the Krasniqi⁴ and Thaçi Defence⁵ (thereafter, the “Defence Request”).

4. On 2 December 2021, the SPO filed its response to the Defence Request, pursuant to which it does not oppose it to the extent (i) there is a legitimate forensic

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

² 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 (“Victims’ Counsel Response dated 25 November 2021”); 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 dated 1 December 2021”).

³ KSC-BC-2020-05/RAC001/F00001, Selimi, Defence Request to Access Confidential Material in *Prosecutor v. Salih Mustafa* case, 16 November 2021 (“Selimi Request”), para. 1.

⁴ 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.

⁵ 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 (“Thaçi Joinder”).

purpose, and (ii) applicable protective measures are not compromised.⁶ It argues that 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.⁷ The SPO further contends that 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, in accordance with widely accepted jurisprudence.⁸ The SPO opposes the Defence's request to access confidential filings, submissions and decisions of the Trial Chamber, on the basis that no legitimate forensic basis has been established.⁹

5. On 25 November 2021, the Victims' Counsel in *Mustafa* case filed her response. She submitted that, save from materials that have no forensic value for the Defence teams, she does not *in principle* oppose the Defence Request, in light of the factual nexus between both cases, and stressed that the protective measures already in place for the witnesses in the *Mustafa* case should continue to effectively apply in the *Thaçi et al.* case.¹⁰ In particular, she maintained that testimony transcripts may only be disclosed 30 days prior to the witnesses' respective testimony and that confidential exhibits may be disclosed with appropriate redactions.¹¹ However, in her view, the Defence's requests related to transcripts of all closed session hearings and to confidential filings were too general to demonstrate the forensic value required.¹²

6. On 1 December 2021, the Victims' Counsel in *Thaçi et al* case filed his response to the Defence Request. He submitted that he did not object *in principle* to the Defence Request, provided that the existing protective measures are maintained. He further

⁶ SPO Response, para. 1.

⁷ *Ibid.*, para. 6.

⁸ *Ibid.*, para. 4.

⁹ *Ibid.*, para. 7.

¹⁰ Victims' Counsel Response dated 25 November 2021, paras. 3, 6.

¹¹ *Ibid.*, paras. 12, 14.

¹² *Ibid.*, paras. 13, 15.

asked that, to the extent that the Defence Request is granted by Trial Panel I, he should be granted access to the same material.¹³

7. On 7 December 2021, Selimi Defence filed its reply to the SPO and Victims' Counsels' Responses to the Defence Request.¹⁴

III. SUBMISSIONS

8. The Defence maintains its request to access confidential material in the *Mustafa* case, and in particular:

- (i) All confidential closed and private session testimony transcripts;
- (ii) All closed session hearing transcripts;
- (iii) All confidential exhibits; and
- (iv) All confidential filings, submissions and decisions of the Trial Chamber.

9. The Defence reiterates that its request is justified by the close nexus between the *Mustafa* and *Thaçi et al.* cases, since the latter encompasses the former in its totality.¹⁵ In addition, to deny the Defence Request would contravene the right to a fair trial and to equality of arms, given that the SPO already has access to such material.¹⁶

10. If the panel is not inclined to grant the request in its entirety, in light of the SPO and Victims' Counsels' observations, the Defence submits that it should be granted access, *a minima*, to any transcripts, exhibits and filings related, directly or indirectly, to the SPO witnesses called in both *Mustafa* and *Thaçi et al.* cases.

¹³ Victims' Counsel Response dated 1 December 2021, paras. 2, 15-16.

¹⁴ KSC-BC-2020-05/RAC001/F00007, Consolidated Selimi Defence Reply to Victims' Counsel and SPO Response to Defence Request to Access Confidential Material in *Prosecutor v. Salih Mustafa* case ("Selimi Reply").

¹⁵ *Thaçi Joinder*, paras. 8-9.

¹⁶ Selimi Reply, para. 8.

11. The Defence is entitled to the disclosure of such material in accordance with Rules 102(3) and 103 of the Rules, given that it is necessary for the preparation of each witness' cross-examination and may affect the credibility or reliability of the SPO's evidence and suggest the innocence or mitigate the guilt of the Accused.¹⁷ This material includes any exhibits discussed by an SPO witness in court, as well as the testimony of any victim witnesses or defence witnesses which would, for instance, contradict the SPO witnesses' testimony.

12. The Defence should also be disclosed any hearing transcripts and filings relating to procedural or evidential issues linked to the SPO witnesses, such as protective measures sought, the order and modalities of appearance, the admissibility and/or weight of a SPO witness' evidence, *etc.* Disclosure of these transcripts and filings will help anticipate and potentially resolve similar issues which may arise in the *Thaçi et al.* case for these witnesses, thereby contributing to the good administration of justice.

13. The Defence agrees that the protective measures already in place for the witnesses in the *Mustafa* case should in principle continue to apply in the *Thaçi et al.* case, pursuant to Rule 81(1) of the Rules. Nevertheless, the Defence respectfully invites the Panel to reconsider, on an ongoing basis, the necessity of such measures, given their significant impact on defence preparation and investigations. In addition, the Defence submits that any redactions to testimony transcripts, hearing transcripts, exhibits, and filings should be as limited as possible, pending the disclosure of the identity of the relevant witness, in order to limit their impact on the Defence preparation.

¹⁷ *Thaçi Joinder*, para. 10.

14. In this regard, the Defence disputes the Victims' Counsel's submissions pursuant to which testimony transcripts may only be disclosed 30 days prior to the witnesses' respective testimony.¹⁸ When an SPO witness benefits from the delayed disclosure of his/her identity until 30 days before his/her testimony, the Defence must be disclosed without delay a redacted version of his/her testimony transcripts, where only identifying information would be redacted. Indeed, pursuant to Rule 103 of the Rules, the SPO "shall *immediately* disclose to the Defence any information *as soon as it is in his or her custody, control or actual knowledge*, which may reasonably suggest the innocence or mitigate the guilt of the Accused or affect the credibility or reliability of the Specialist Prosecutor's evidence." In addition, pursuant to Article 21(6) of the Law, all material and relevant evidence or facts in possession of the SPO which are for or against the accused "shall be made available to the accused before the beginning of and during the proceedings, *subject only to restrictions which are strictly necessary* and when any necessary counter-balance protections are applied." In light of these provisions, the Defence is entitled to the prompt disclosure of redacted versions of the confidential testimony transcripts of such SPO witnesses. The complete withholding of their testimony would be disproportionate, especially since the Defence has already been disclosed redacted statements or transcripts of interview for these witnesses.

IV. CONCLUSION

15. For the above reasons, the Defence maintains its request to be provided access to the following material from the *Mustafa* case:

- (i) All confidential closed and private session testimony transcripts;
- (ii) All closed session hearing transcripts;
- (iii) All confidential exhibits; and
- (iv) All confidential filings, submissions and decisions of the Trial Chamber.

¹⁸ Victims' Counsel Response dated 25 November 2021, paras. 11-12.

16. In the alternative, the Defence requests to be granted access, *a minima*, to any transcripts, exhibits and filings related, directly or indirectly, to the SPO witnesses called in both *Mustafa* and *Thaçi et al.* cases.

Word Count: 1,463 words

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'G. W. Kehoe', is written over a white rectangular redaction box.

Gregory W. Kehoe

Counsel for Hashim Thaçi

Friday, 10 December 2021

At Tampa, United States of America