



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

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: Fidelma Donlon

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Language: English

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Decision on the request of the Defence in KSC-BC-2020-06 to access confidential material in the *Prosecutor v. Salih Mustafa* case

To be notified to:

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TRIAL PANEL I (Panel), hereby renders this decision on the request of the Defence in KSC-BC-2020-06 to access confidential material in *Prosecutor v. Salih Mustafa* case.

I. PROCEDURAL BACKGROUND

1. On 16 November 2021, the Defence for Rexhep Selimi (Selimi Defence) filed the “Defence Request to Access Confidential Material in *Prosecutor v. Salih Mustafa* Case” (Selimi Defence Request).¹

2. On 18 November 2021, the Defence for Jakup Krasniqi (Krasniqi Defence) filed the “Krasniqi Defence Joinder to Selimi Defence Request to Access Confidential Material in *Prosecutor v. Salih Mustafa* Case” (Krasniqi Defence Joinder).²

3. On 22 November 2021, the Defence for Hashim Thaçi (Thaçi Defence) filed the “Thaçi Defence Joinder to Selimi ‘Defence Request to Access Confidential Material in *Prosecutor v. Salih Mustafa* Case’” (Thaçi Defence Joinder).³

4. On 23 November 2021, the Panel varied the time limit for responses and ordered the Specialist Prosecutor’s Office (SPO), the Defence for Salih Mustafa (Mr Mustafa or Accused), and Victims’ Counsel in the present case (Case 05 Victims’ Counsel) to file consolidated responses, if any, to the Selimi Request, the Krasniqi Defence Joinder and the Thaçi Defence Joinder, within 10 days from the last joinder.⁴

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

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

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

⁴ Transcript of Hearing, 23 November 2021, public, p. 1793, lines 9-23.

5. On 25 November 2021, Case 05 Victims' Counsel filed the "Victims' Counsel response to Defence Request to Access Confidential Material in *Prosecutor v. Salih Mustafa Case*" (Case 05 Victims' Counsel Response).⁵
6. On 1 December 2021, Victims' Counsel in KSC-BC-2020-06 (Case 06 Victims' Counsel) filed the "Victims' Counsel Response to the Defence Request to Access Confidential Material in *Prosecutor v. Salih Mustafa case*" (Case 06 Victims' Counsel Response).⁶
7. On 2 December 2021, the SPO filed the "SPO response to the Defence Request to Access Confidential Material in *Prosecutor v. Salih Mustafa case*" (SPO Response).⁷
8. The Defence for Mr Mustafa did not file any response.
9. On 7 December 2021, the Selimi Defence filed the "Consolidated Selimi Defence Reply to Victims' Counsel and SPO Response to Defence Request to Access Confidential Material in *Prosecutor v. Salih Mustafa case*".⁸
10. On 10 December 2021, the Thaçi Defence filed the "Consolidated Thaçi Defence Reply to SPO and Victims' Counsels Responses to Defence Request to Access Confidential Material in *Prosecutor v. Salih Mustafa Case*" (Thaçi Defence Reply).⁹

⁵ KSC-BC-2020-05, RAC001/F00004, Case 05 Victims' Counsel, *Victims' Counsel response to Defence Request to Access Confidential Material in Prosecutor v. Salih Mustafa Case*, 25 November 2021, confidential and *ex parte*. A confidential redacted version was filed on the same day (RAC001/F00004/RED2).

⁶ KSC-BC-2020-05, RAC001/F00005, Case 06 Victims' Counsel, *Victims' Counsel Response to Defence Request to Access Confidential Material in Prosecutor v. Salih Mustafa Case*, 1 December 2021, confidential.

⁷ KSC-BC-2020-05, RAC001/F00006, Specialist Prosecutor, *SPO response to the Defence Request to Access Confidential Material in Prosecutor v. Salih Mustafa case*, 2 December 2021, confidential.

⁸ KSC-BC-2020-05, RAC001/F00007, Selimi Defence, *Consolidated Selimi Defence Reply to Victims' Counsel and SPO Response to Defence Request to Access Confidential Material in Prosecutor v. Salih Mustafa case*, 7 December 2021, confidential.

⁹ KSC-BC-2020-05, RAC001/F00008, Thaçi Defence, *Consolidated Thaçi Defence Reply to SPO and Victims' Counsels Responses to Defence Request to Access Confidential Material in Prosecutor v. Salih Mustafa Case*, 10 December 2021, confidential.

II. SUBMISSIONS

A. THE SELIMI DEFENCE REQUEST

11. Pursuant to Rule 81(1) and (2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (Rules), the Selimi Defence requests access to confidential material from proceedings in KSC-BC-2020-05 (Case 05), without prejudice to authorised protective measures in Case 05 as well as in KSC-BC-2020-06 (Case 06), for the duration of both proceedings, including: (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 Panel (Requested Material).¹⁰ The Selimi Defence contends that, as the overlap between Case 05 and Case 06 is “beyond question”, the Requested Material, with necessary redactions, is directly relevant to the preparation of the Selimi Defence.¹¹ In particular, the Selimi Defence submits that it has identified at least 12 witnesses, out of the 16 relied upon by the SPO in Case 05, who are anticipated to be relied upon by the SPO in Case 06.¹² Based on the geographical and temporal overlap of the facts between Case 05 and Case 06, the Selimi Defence submits that it is necessary to access all witnesses’ statements and exhibits tendered in Case 05, with necessary redactions, as they are crucial to the Selimi Defence preparations, including carrying out its own investigations.¹³ The Selimi Defence further submits that it does not seek to vary protective measures applied to witnesses in Case 05 and that accordingly unredacted version of transcripts and exhibits of these witnesses will be disclosed in accordance with such protective measures.¹⁴ Nevertheless, the Selimi Defence contends that it should not be placed at a disadvantage by having to wait for such a future date to be

¹⁰ Selimi Defence Request, paras 1, 17.

¹¹ Selimi Defence Request, para. 8.

¹² Selimi Defence Request, para. 12.

¹³ Selimi Defence Request, para. 14.

¹⁴ Selimi Defence Request, para. 15.

able to access material relevant to its preparation, which falls outside the protective measures ordered.¹⁵

B. CASE 06 DEFENCE JOINDERS

12. The Krasniqi Defence joins the Selimi Defence Request on the basis that access to the Requested Material is necessary for the Defence preparations in Case 06.¹⁶

13. Similarly, the Thaçi Defence joins the Selimi Defence Request and submits that the Requested Material is also necessary for its Defence preparation in Case 06, since it may suggest the innocence of Mr Thaçi, who has been mentioned by some of the Case 05 witnesses. Further, the Requested Material may also affect the credibility or reliability of the SPO evidence, in particular of its witnesses.¹⁷

C. VICTIMS' COUNSEL RESPONSES

14. Case 05 Victims' Counsel does not oppose the Selimi Defence Request as far as a legitimate forensic purpose may exist, but underlines that the identities and identifying information of the Case 05 witnesses cannot be disclosed to the Defence in Case 06 at the current stage without undermining existing protective measures and the measures imposed on Mr Mustafa in detention.¹⁸ Specifically, Case 05 Victims' Counsel does not oppose the disclosure of: (i) transcripts of private and closed session witness testimony, which may be disclosed to Case 06 Defence teams 30 days prior to the witnesses' respective testimony; and (ii) confidential exhibits, which may be disclosed with appropriate redactions, where this is feasible to ensure the non-disclosure of the witnesses' identities, in conformity with the protective measures

¹⁵ Selimi Defence Request, para. 15.

¹⁶ Krasniqi Defence Joinder, paras 1-3.

¹⁷ Thaçi Defence Joinder, paras 1, 7, 10-11.

¹⁸ Case 05 Victims' Counsel Response, para. 6.

in place for the witnesses concerned.¹⁹ In relation to all other closed session transcripts and filings, submissions and decisions in the present case record, Case 05 Victims' Counsel is of the view that these requests are too general and should be rejected, unless the Defence demonstrates the forensic value required.²⁰

15. Case 06 Victims' Counsel does not oppose the Selimi Defence Request, provided that access to parts of the Requested Material, as identified by Case 05 Victims' Counsel, if granted, is in compliance with existing protective measures adopted in Case 06.²¹ In addition, Case 06 Victims' Counsel requests that the same access granted to Case 06 Defence be granted to him.²²

D. SPO RESPONSE

16. The SPO submits that any access granted should not compromise existing protective measures and should not be granted in relation to material for which there is no legitimate forensic purpose, including material dealing with procedural matters or that is irrelevant to Case 06.²³ On this basis, the SPO does not oppose, in principle, access by the Case 06 Defence to confidential exhibits, to the extent that they are admitted into evidence in Case 05, and to closed and private session testimony transcripts and closed session hearing transcripts.²⁴

17. The SPO opposes the part of the Selimi Defence Request concerning access to confidential filings, submissions and decisions by the Panel, on the basis that no legitimate forensic purpose has been established and/or that it deals with procedural matters.²⁵

¹⁹ Case 05 Victims' Counsel Response, paras 12, 14, 16.

²⁰ Case 05 Victims' Counsel Response, paras 13, 15, 16.

²¹ Case 06 Victims' Counsel Response, paras 2, 10, 11-12, 15.

²² Case 06 Victims' Counsel Response, paras 2, 13-14, 16.

²³ SPO Response, para. 3.

²⁴ SPO Response, paras 5-6.

²⁵ SPO Response, paras 7-8.

18. Should any access be granted, the SPO requests the Panel to issue a confidentiality order to the Case 06 Defence teams and further requests that the SPO, the Defence of Mr Mustafa and Case 05 Victims' Counsel be given the possibility to make submissions on the relevance of material for which access is granted or on the necessity for further protective measures.²⁶

E. DEFENCE REPLIES

19. In its reply, the Thaçi Defence maintains its position that due to the close nexus between Case 05 and Case 06, the Requested Material is relevant to its preparation and that denying access to it would contravene the right to a fair trial and to equality of arms, considering that the SPO has already access to such material.²⁷ It further maintains that, contrary to the Victims' Counsel submissions, the Defence is entitled to the prompt disclosure of redacted confidential testimony transcripts, and not only 30 days prior to the witness's testimonies.²⁸ Should access to the Requested Material be denied, the Thaçi Defence submits that, in the alternative, it should be granted access, as a minimum, to any transcripts, exhibits and filings related, directly or indirectly, to the SPO witnesses called in both Case 05 and Case 06.²⁹

20. The Selimi Defence reiterates its arguments that the overlap between Case 05 and Case 06 is such that access to the Requested Material should be granted, based on the existing legitimate forensic purpose and subject to protective measures adopted for the witnesses.³⁰ In relation to access to all filings in the Case 05 record, the Selimi Defence argues that this is justified by the clear and substantial nexus between Case 05 and Case 06 and that any restrictions thereto should be strictly interpreted.³¹ In

²⁶ SPO Response, paras 9-10.

²⁷ Thaçi Defence Reply, paras 9, 15.

²⁸ Thaçi Defence Reply, para. 14.

²⁹ Thaçi Defence Reply, paras 10, 16.

³⁰ Selimi Defence Reply, paras 3-15, 17.

³¹ Selimi Defence Reply, paras 4-12.

relation to confidential transcripts of (already received or anticipated) testimony, the Selimi Defence reiterates that it is entitled to the redacted material, in line with existing protective measures.³²

III. APPLICABLE LAW

21. The Panel notes Articles 21 and 23(1) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (Law), and Rules 80, 81 and 82(3) and (5) of the Rules.

IV. ANALYSIS

22. At the outset, the Panel takes note that the facts for which Mr Mustafa is on trial in Case 05 are also part of the confirmed indictment in Case 06.³³ The Panel therefore considers that the Requested Material, in whole or in part, may have relevance for the Case 06 Defence.

23. As regards the legal basis for the Selimi Defence Request, as joined, the Panel considers that reliance on Rule 81 of the Rules is inappropriate, as the Case 06 Defence does not seek a variation of protective measures. In fact, the Case 06 Defence stresses that protective measures remain in effect, as clearly stipulated in Rule 81(1)(a) of the Rules. Rather, the Case 06 Defence seeks disclosure, by the SPO, of the evidentiary material used in Case 05, and access to all other material in the Case 05 record (transcripts, submissions and judicial decisions). Therefore, requests for access, such as the one before the Panel, must be assessed in light of the Defence's right to receive all material and relevant evidence or facts in accordance with Article 21(6) of the Law. Such right is implemented, first and foremost, through the disclosure obligations of

³² Selimi Defence Reply, paras 14-15.

³³ KSC-BC-2020-06, F00455/RED, Specialist Prosecutor, *Annex 1 to Public Redacted Version of 'Submission of corrected Indictment and request to amend pursuant to Rule 90(1)(b)*, 8 September 2021, public, para. 72.

the SPO in Case 06, under Rules 102 and 103 of the Rules. This is, however, without prejudice to the Panel's discretion to grant access to parts of the record of this case.

24. The Panel stresses that it is for the SPO to abide by its disclosure obligations, within the disclosure framework of Case 06, and for the Pre-Trial Judge to exercise control over such process up until the case file is transmitted to a Trial Panel, pursuant to Rule 98 of the Rules.

25. In this respect, the Panel notes the SPO's assertion that it has fulfilled its disclosure obligations in Case 06 in accordance with the applicable rules, including seeking relevant variations of protective measures and/or authorisations as necessary,³⁴ in order to effectuate disclosure to the Case 06 Defence.

26. The Panel further finds that the vast majority of the Requested Material, notably all confidential, closed and private session testimony transcripts, and all confidential (witness-related) exhibits could only be released to Case 06 Defence teams in accordance with existing protective measures for Case 05 witnesses, i.e. by withholding identities and identifying information of protected persons. This would render such material available only 30 days before the testimony of each respective witness in Case 06 trial,³⁵ assuming that some or all of those witnesses will ultimately testify in those proceedings. Even conceding that such material could be accessed by the Case 06 Defence at this stage, given that the totality of Case 05 protected witnesses gave evidence almost entirely in private session, due to protective measures, the transcripts concerned would have to be redacted to such an extent that they would become essentially incomprehensible to the Case 06 Defence or be of a very limited value to them. In relation to the Defence request for transcripts containing anticipated

³⁴ SPO Response, para. 2.

³⁵ KSC-BC-2020-05, F00162/CONF/RED, Trial Panel, *Decision on Specialist Prosecutor's Request for Segregation and Other Measures, confidential*, 18 August 2021, confidential, para. 22.

testimony of witnesses to be called (including by Case 05 Victims' Counsel and Defence), the Panel finds it impossible to rule on material that is yet to be produced.

27. As regards all confidential (witness-related) exhibits, and considering the above mentioned SPO's assertion to have fulfilled its disclosure obligations in Case 06 in accordance with the applicable rules, the Panel is not in a position to assess whether the exhibits used in Case 05 have not already been disclosed in Case 06. In any event, even assuming that said material has not been disclosed and would fall under either Rule 102(3) or Rule 103 of the Rules, it is the SPO's obligation to disclose such material (as it is already in its possession), mindful of existing protective measures, as stipulated in Rule 81(1)(b) of the Rules. Therefore, invoking fair trial rights and equality of arms to argue that the Case 06 Defence is in a disadvantageous situation *vis-à-vis* the SPO is without merit.

28. With regard to the remainder of the Requested Material, namely all other closed session hearing transcripts and all confidential filings, submissions and decisions of the Panel, the Panel considers such request to be an attempt to gain blanket and unregulated access to the present case record, in search of anything that might be useful to Case 06 Defence teams in their preparation. The argument that Case 05 and Case 06 factually overlap is insufficient to justify full access to all other confidential material in the case record, especially in light of the SPO's submission that its disclosure obligations have been fulfilled in Case 06. The Panel reiterates that it is rather incumbent upon the SPO to remain alerted as to its disclosure obligations and to make targeted requests for material that it considers to fall under any of the disclosure categories set out in the Rules, if necessary.

29. Viewed as a whole, the Panel finds that, if granted, the Selimi Defence Request, as joined by other Case 06 Defence teams, would constitute a circumvention of the proceedings in Case 06, including its disclosure process, which is under the control of the Pre-Trial Judge assigned to that case. In fact, the Panel is not in a position, nor

should it be put in such position, to determine which items of evidence disclosed in Case 05 may have already been disclosed (or will be disclosed) in Case 06, or are included in the list of exhibits submitted by the SPO in that case pursuant to Rule 95(4) of the Rules.³⁶ By the same token, the Panel is of the view that, should the SPO ultimately wish to rely on some or all of its Case 05 witnesses and related material in the context of Case 06, it will have to disclose such material, including transcripts of their testimony before the Panel, at the appropriate time and within the framework of the disclosure process of Case 06, as informed by the Rules and ordered by the Pre-Trial Judge or the future Trial Panel assigned to that case.

V. DISPOSITION

30. For the above-mentioned reasons, the Panel hereby:

- a. **REJECTS** the Selimi Defence Request and its joinders, including any alternative requests formulated therein;
- b. **ORDERS** the Selimi Defence, the Krasniqi Defence, the Thaçi Defence, Case 05 Victims' Counsel and Case 06 Victims' Counsel to file public redacted versions of their submissions or to indicate whether they can be reclassified as public, by **Monday, 7 February 2022**; and
- c. **ORDERS** the Registry to reclassify the SPO Response (RAC001-F00006) as public.

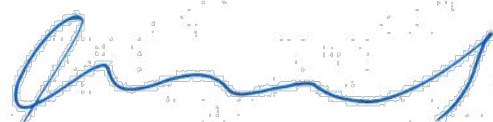
³⁶ KSC-BC-2020-06, F00631, Specialist Prosecutor, *Submission of Pre-Trial Brief, with witness and exhibit lists*, 17 December 2021, public, with Annexes1-3, strictly confidential and *ex parte*.



Judge Mappie Veldt-Foglia
Presiding Judge



Judge Gilbert Bitti



Judge Roland Dekkers

Dated this Tuesday, 1 February 2022
At The Hague, the Netherlands.