

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 February 2022

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

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I. INTRODUCTION

1. The Defence for Mr Rexhep Selimi (“Defence”) hereby requests, pursuant to Rule 81(1) and Rule 81(2) of the Rules of Evidence and Procedure, access to confidential material from *Prosecutor v. Salih Mustafa*, Case KSC-BC-2006-05 (“*Mustafa*”), for the duration of the proceedings in both *Prosecutor v. Thaci et al.* (“*Thaci et al.*”) and *Mustafa* without prejudice to authorised protective measures in both cases¹, including:
 - (i) All confidential closed and private session testimony transcripts;
 - (ii) All closed session hearing transcripts;
 - (iii) All confidential exhibits;
 - (iv) All confidential filings, submissions and decisions of the Trial Chamber.²
2. Given the overlap between the charges in *Mustafa* and those faced by Mr. Selimi in *Thaci et al.*, access to such materials is vital for the Defence to be able to effectively prepare for trial.

II. APPLICABLE LAW

3. Rules 81(1) and 81(2) of the Rules of Procedure and Evidence³ provide in relevant part:
 - 1) Once protective measures have been ordered by a Panel in respect of a witness, victim participating in the proceedings, or other person at risk on account of testimony given by witnesses, such measures:
 - (a) shall continue to have effect *mutatis mutandis* in any other subsequent proceedings before the Specialist Chambers or another jurisdiction unless and until they are varied in accordance with the procedure set out in this Rule; and
 - (b) shall not prevent the Specialist Prosecutor from discharging any disclosure obligations under the Rules in subsequent proceedings, provided that he or she notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered and of the obligation to abide thereby

¹ In particular, the Defence refers to the following relevant Decisions of the Pre-Trial Judge, KSC-BC-2020-06, F00133, Confidential Redacted Version of Corrected Version of First Decision on Specialist Prosecutor’s Request for Protective Measures, 10 December 2020; KSC-BC-2020-06, F00190, Confidential Redacted Version of Decision on Specialist Prosecutor’s Second Request for Protective Measures and Renewed Request for Protective Measures and Procedural Matters, 5 February 2021; KSC-BC-2020-06, F00373, Confidential Redacted Version of Sixth Decision on Specialist Prosecutor’s Request for Protective Measures, 25 June 2021 (“Relevant Protective Measures Decisions”)

² Further referred as “Requested material”.

³ 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) A Party in the initial or subsequent proceedings within the Specialist Chambers or the Registrar seeking to vary protective measures ordered shall:

- (a) apply to the Panel which ordered the protective measures; or
- (b) if that Panel is no longer seized, apply to the Panel seized of the subsequent proceedings.

4. Other international tribunals have almost identical rules to Rule 81(1) and 81(2) of the Rules in their respective Rules of Evidence and Procedure (“RPE”) and they have been widely used for similar applications by the Parties in those proceedings. Rules 75(F) and (G) of the RPE of the ICTY, which are identical to Rules 75(F) and (G) of ICTR RPE, provide that:

(F) Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the “first proceedings”), such protective measures:

- (i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (“second proceedings”) or another jurisdiction unless and until they are rescinded, varied, or augmented in accordance with the procedure set out in this Rule; but
- (ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings.

(G) A party to the second proceedings seeking to rescind, vary, or augment protective measures ordered in the first proceedings must apply:

- (i) to any Chamber, however constituted, remaining seized of the first proceedings; or
- (ii) if no Chamber remains seized of the first proceedings, to the Chamber seized of the second proceedings.

5. Applying these provisions, it has been repeatedly held that the Defence is always entitled to seek material from any source to assist in the preparation of its case if the document(s) has been identified or described by its general nature, and if a legitimate forensic purpose has been shown.⁴

⁴ ICTY, *Prosecutor v. Limaj*, IT-03-66-T, Decision on Motion of Assigned Counsel in Milosevic for Variance of Protective Measures pursuant to Rule 75, 14 April 2005, p. 2 (“Limaj Decision”); ICTY, *Prosecutor v. 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. 9 (“Lukic and Lukic Decision”); ICTY, *Prosecutor v. Martić*, IT-95-11-A, Decision on motion by Jovica Stanisic for access to confidential testimony and exhibits in the Martić case pursuant to Rule 75(G)(i), 22 February 2008, para. 9; ICTY, *Prosecutor v. Krajisnik*, IT-00-39-A, Decision on “Motion by Mico Stanisic for access to all confidential materials in the Krajisnic Case”, 21 February 2007, p.4.

6. Access to confidential material from another case may be granted where the requesting party establishes that the material sought may be of material assistance to its case⁵ and that there is a good chance that such access would materially assist the case of the applicant.⁶
7. Subsequently, the relevance of the requested material can be determined by the nexus between the two cases.⁷ Such nexus in the present instance is clear from the fact that the case from which the material is requested took place within the same geographical area and within the same time period as the alleged crimes charged against Mr. Selimi.⁸

III. SUBMISSIONS

8. The Defence has reviewed the Public Redacted Version of the Indictment in *Mustafa* (“*Mustafa* Indictment”)⁹, opening statements presented by the Specialist Prosecutor Office (“SPO”) and the available public transcripts of testimonies of five witnesses who have already testified in that case.¹⁰ As outlined below, the overlap between *Mustafa* and *Thaci et al.* is beyond question. The requested material, with the necessary redactions applied, is therefore directly relevant to the Selimi Defence preparations.
9. Comparing the *Mustafa* and *Thaci et al.* Indictments, Mr. Selimi is charged, *inter alia*, with crimes allegedly committed in Zilash location between 1 and 19 April 1999¹¹ which is identical to the temporal and geographical scope as those with which Mr. Mustafa is

⁵ ICTY, *Prosecutor v Milosevic*, IT-01-54-T, Decision on Motion of Defence of Jovica Stanisic for Variance of Protective Measures Pursuant to Rule 75(G)(i), 11 March 2005, p. 3 (“Milosevic Decision”).

⁶ ICTY, *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-A, Order on Pasko Ljubicic’s Motion for Access to Confidential supporting Material, Transcripts and Exhibits in the Kordic Andcerkez Case, 19 July 2002, p.3 (“Kordic Order”); ICTY, *Limaj Decision*, p. 2; ICTY, *Prosecutor v. Blagojevic and Jokic*, Decision on Motion by Radivoje Miletic for Access to Confidential Information, IT-02-60-A, 9 September 2005, p. 4. ICTY, *Prosecutor v. Prlic et al*, IT-04-74-PT, Decision on Defence’s Motion for Access to Confidential Material, 9 March 2005, p. 3. ICTY, *Lukic and Lukic Decision*, para. 10.

⁷ ICTR, *Nahimana v. The Prosecutor*, ICTR-99-52-A, Decision on “Joseph Nzirorera’s Motion for Access to Appeal Briefs”, 9 September 2005, p.3; ICTY, *Lukic and Lukic Decision*, para. 10.

⁸ ICTY, *Kordic Order*, p. 3; ICTY, *Limaj Decision*, p.2, ICTY, *Milosevic Decision*, p. 3; See also ICTY, *Prosecutor v. Simic*, IT-95-9-A, Judgement, 28 November 2006, para. 214.

⁹ KSC-BC-2020-05, F00019, Annex 1 to Submission of further redacted version of confirmed indictment, 28 September 2020 (“*Mustafa* Indictment”).

¹⁰ KSC-BC-2020-05, Public Redacted Version of Opening Statements hearings, 15 September 2021 (“Opening Statements”); KSC-BC-2020-05, Public Redacted Version of the Transcript, 20 September 2021; KSC-BC-2020-05, Public Redacted Versions of the Transcripts, from 20 to 27 September 2021, from 4 to 5 October 2021, from 12 October to 14 October 2021, from 2 to 3 November 2021.

¹¹ KSC-BC-2020-06, F00455, Annex 1 to Public Redacted Version of ‘Submission of corrected Indictment and request to amend pursuant to Rule 90(1)(b)’, KSC-BC-2020-06/F00455, dated 3 September 2021 (“*Thaci et al.* Indictment”), paras 72, 106 and 157. Zilash is as well listed as a Detention Site in Schedule A, as a Murder or Killing related location in Schedule B and as an Enforced Disappearance related location in Schedule C attached to the *Thaci et al.* Indictment.

charged.¹² In addition, the substance of the alleged crimes charged in both indictments correlates to a great extent.

10. In its Opening statement for *Mustafa* case, the SPO stated the following:

“During this time, and throughout the whole indictment period, a 3 non-international armed conflict existed between the Kosovo 4 Liberation Army and the forces of the Federal Republic of Yugoslavia 5 and the Republic of Serbia [...] The level of organisation of the warring parties was sufficient to qualify it as an armed conflict under international law. [...] And the Kosovo Liberation Army, already in 1999, was an organised armed force under a responsible command, had control over parts of the territory of Kosovo, and had the ability to carry out sustained and concerted military operations. It was issuing internal regulations, orders, and public communiques, had a proper reporting and communication system between its General Staff and the subordinate combat units - brigades, battalions, companies, and squads. It was divided into operational zones, with each having its commander. It had weapons supplies, a recruitment system, training centres, and a system of ensuring military discipline. Its soldiers had uniforms and unified army markings. All these elements are indicia of a sufficiently organised party to the armed conflict, which the Kosovo Liberation Army undeniably was at the time relevant for this case.”¹³

11. Noting the above, and that Mr Selimi has been charged under the Joint Criminal Enterprise (“JCE”) mode of liability within the temporal period of March 1998 through September 1999, as well as being within the context of the same alleged armed conflict between the KLA and FRY forces, evidence heard and submitted during closed and private session hearings in *Mustafa* are highly relevant to Mr Selimi’s case.

12. In addition, based on the SPO’s requests for protective measures for the witnesses in *Thaci et al.*,¹⁴ and based on the available to public *Mustafa* documents,¹⁵ the Defence has identified at least 12 witnesses, out of the 16 witnesses that the SPO intends to rely on at trial in *Mustafa*, who are anticipated to be subsequently relied upon by the SPO in *Thaci et al.*¹⁶

13. The Defence has examined the redacted summaries of the facts upon which each of the identified 12 witnesses is expected to testify in *Thaci et al.* based on the provisional list of

¹² *Mustafa* Indictment, paras 7, 18, 21, 31-32, 35. In addition, see also Opening Statements, p.327.

¹³ Opening Statements, p. 326 lines 2-25 to p. 327 lines 1-8.

¹⁴ Relevant Protective Measures Decision.

¹⁵ [REDACTED].

¹⁶ KSC-BC-2020-05, F00170, Decision on the conduct of the proceedings, 26 August 2021, para. 15. The Defence notes that considering the direct overlap between the cases the Defence expects the number of witnesses called during *Mustafa* case trial and who are expected to be called in *Thaci et al.* case to be bigger.

witnesses provided to the Defence on 22 October 2021,¹⁷ as well as the statements of the overlapping witnesses. These witnesses are expected to provide evidence regarding the alleged crimes pertaining to Zllash location within the temporal scope of the *Thaci et al.* Indictment. In particular, [REDACTED].¹⁸

14. Due to the summaries of the facts upon which the majority out of the 12 witnesses are expected to testify being heavily redacted, the Defence is prevented from carrying out a similar analysis with respect to all relevant witnesses at this stage. However, based on the available information including the overlapping locations and time-period as set out above, it is necessary for the present request to include all witnesses' statements and exhibits tendered in *Mustafa*, with the necessary redactions applied, as they are crucial for the Selimi Defence in its preparations, including but not limited to carrying out its own investigations.
15. Finally, 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.* The unredacted versions of transcripts and exhibits of these witnesses will thus be disclosed to the Defence in due course. However, the Defence should not be placed at a disadvantage by having to wait for such a future date to be able to access material relevant to its preparation which falls outside the protective measures that have been ordered.

IV. CLASSIFICATION

16. The present Request is filed confidentially before the Trial Panel in *Mustafa* considering the reference to protected witnesses expected to testify in both *Mustafa* and *Thaci et al.* case. The Defence intends to file a public redacted version of the Request in due course.

V. RELIEF SOUGHT

17. Therefore, the Defence respectfully requests to provide the access to the following material in *Mustafa* case:
 - (i) All confidential closed and private session testimony transcripts;
 - (ii) All closed session hearing transcripts;

¹⁷ KSC-BC-2020-06, F00542, Annex 2 to Prosecution submission of preliminary witness list with strictly confidential and *ex parte* Annex 1 and confidential redacted Annex 2, 22 October 2021 ("Preliminary Witness List").

¹⁸ *Ibid*, p. 378.

- (iii) All confidential exhibits; and,
- (iv) All confidential filings, submissions and decisions of the Trial Chamber.

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Respectfully submitted on 7 February 2022,



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