

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: 7 February 2022

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Public Redacted Version of Thaçi Defence Joinder to Selimi 'Defence Request to Access Confidential Material in *Prosecutor v. Salih Mustafa* case'

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I. INTRODUCTION

1. The Defence for Mr Hashim Thaçi (“the Defence”) hereby joins the Selimi Defence Request to Access Confidential Material in *Prosecutor v. Salih Mustafa* case,¹ 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.

2. This response is filed as confidential in light of the classification of the Selimi Request and because it refers to confidential witness information.

II. APPLICABLE LAW

3. Rule 81 of the Rules of Procedure and Evidence² defines the modalities of variation of protective measures; it provides, *inter alia*, that:

- (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,³ 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.
- (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. [...]

¹ 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.

² Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (“Rules”).

³ Emphasis added.

4. Pursuant to Rule 102(3) of the Rules, the Specialist Prosecutor shall disclose to the Defence, upon request, any statements, documents, photographs and allow inspection of other tangible objects in the custody or control of the Specialist Prosecutor, which are deemed by the Defence to be material to its preparation. Such material and evidence shall be disclosed without delay.

5. Rule 103 of the Rules provides that subject to Rule 107 and Rule 108, the Specialist Prosecutor 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.

6. It is a widely accepted practice before international criminal courts that the Defence may access confidential material, including filings, transcripts and exhibits, from other cases, provided that such documents are "material to the preparation of the defence in that trial (e.g. they may have a direct impact on the defence strategy)".⁴ The protective measures applied in the initial case are usually maintained in the subsequent case.⁵ It is often the prosecution itself which requests leave to disclose such material to the defence, in accordance with its disclosure obligation.⁶

⁴ ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-2471, Trial Chamber I, Decision on the request from the defence in the Katanga and Ngudjolo case for disclosure of transcripts in the Luhanga case, 11 June 2010, paras. 27, 34, 39.

⁵ ICC-01/04-01/06-2471, para. 31.

⁶ See, for instance, ICC, *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-1516-tENG, Trial Chamber II, Order concerning protection measures applied to transcripts of testimonies of prosecution Witnesses 2, 12, 30 and 157 in the Thomas Lubanga Dyilo case, 7 October 2009; ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-3074, Decision on 'Prosecution's Urgent Further Request for Disclosure of Evidence in a Related Article 70 Proceeding', 27 May 2014; ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-3098-Red, Redacted Version of "Decision on 'Prosecution's Second Further Request for Disclosure of Evidence in a Related Article 70 Proceeding'", 26 June 2014.

III. SUBMISSIONS

7. The Defence adopts the Selimi⁷ and Krasniqi⁸ Defence submissions which point to the geographical, temporal and material overlap between the *Mustafa* case and the proceedings in *Prosecutor v. Thaçi et al.* ("*Thaçi et al.*"), and therefore accessing the materials from the *Mustafa* case is vital for the Defence to be able to prepare effectively for trial.

8. In particular, Mr Mustafa is charged with the war crimes of arbitrary detention, cruel treatment, torture and murder at the Zllash Detention Compound, between approximately 1 April 1999 and 19 April 1999,⁹ while Mr Thaçi is charged, *inter alia*, with the crimes of imprisonment, illegal or arbitrary arrest and detention, other inhumane acts and cruel treatment, torture, murder and enforced disappearance of persons at Zllash, between 1998 and 1999.¹⁰

9. In addition, as stressed by the Selimi Defence, there are at least 12 witnesses that the SPO intends to rely on in the *Mustafa* proceedings, who are also anticipated to be relied on by the SPO at trial in *Thaçi et al.*¹¹ These witnesses have been identified on the basis of publicly available filings and transcripts in the *Mustafa* case, and in light of the fact that protective measures applied in the *Mustafa* case for these witnesses have been subsequently applied in the *Thaçi et al* case. The 12 witnesses are as follows:

- (i) [REDACTED];¹²

⁷ Selimi Request, para. 8.

⁸ KSC-BC-2020-05/RAC001/F00002, Krasniqi, Krasniqi Defence Joinder to Selimi Defence Request to Access Confidential Material in *Prosecutor v. Salih Mustafa* Case, 18 November 2021, para. 2.

⁹ KSC-BC-2020-05/F00019/A01, Indictment, para. 35.

¹⁰ KSC-BC-2020-06/F00455/RED/A01, Indictment, paras 72, 106, 135, 157, 171, p. 54 (Schedule A, detention site), p. 62 (Schedule C, enforces disappearance of persons).

¹¹ KSC-BC-2020-06/F00542, SPO, Prosecution submission of preliminary witness list, 22 October 2021.

¹² [REDACTED].

- (ii) [REDACTED];¹³
- (iii) [REDACTED];¹⁴
- (iv) [REDACTED];¹⁵
- (v) [REDACTED];¹⁶
- (vi) [REDACTED];¹⁷
- (vii) [REDACTED];¹⁸
- (viii) [REDACTED];¹⁹
- (ix) [REDACTED];²⁰
- (x) [REDACTED];²¹
- (xi) [REDACTED];²² and
- (xii) [REDACTED].²³

10. The material sought is necessary for Defence preparation, since it may suggest the innocence of Mr Thaçi, who has been mentioned by some of the witnesses; it may further affect the credibility or reliability of the Specialist Prosecutor's evidence and in particular of its witnesses.

IV. CONCLUSION

11. For the above reasons, the Defence respectfully joins the Selimi Request²⁴ and asks to be provided access to the following material from the *Mustafa* case:

- (i) All confidential closed and private session testimony transcripts;

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

²³ [REDACTED].

²⁴ Selimi Request, para. 17.

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

Word Count: 1,095 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

Monday, 7 February 2022

At Tampa, United States of America