

In: KSC-BC-2020-06
**The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi
and Jakup Krasniqi**

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Defence Counsel for Jakup Krasniqi

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Public Redacted Version of

Krasniqi Defence Request for a Finding of Disclosure Failure, Setting a

Disclosure Deadline and Appointment of an Independent and Impartial

Magistrate, KSC-BC-2020-06/F00730, dated 11 March 2022

Specialist Prosecutor

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I. INTRODUCTION

1. The Defence for Jakup Krasniqi ("Defence") submits that the Specialist Prosecutor's Office ("SPO") has failed to disclose more than 400 items of exculpatory material "immediately" and "as soon as it is in its custody", in violation of the clear requirements of Rule 103 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules") and despite the Defence repeatedly stating its concerns over the SPO's delayed disclosure or non-disclosure of exculpatory material.

2. The substantial delays involved in these blatant violations of Rule 103 have delayed and prejudiced the Defence investigation. The situation should not be allowed to continue. The Defence requests the Pre-Trial Judge to: (i) enter a finding that the SPO has failed to comply with its disclosure obligations; (ii) appoint an independent and impartial magistrate or *amicus curiae* to review the material in the SPO's custody, control or actual knowledge, identify any exculpatory information and disclose such exculpatory material immediately to the Defence; and (iii) set a deadline of 28 working days for the SPO to complete the disclosure of all exculpatory material.

II. PROCEDURAL HISTORY

3. The Defence Teams made several requests to the SPO to promptly disclose exculpatory material and raised the SPO's failure to comply with its Rule 103 disclosure obligation before the Pre-Trial Judge. For instance, at the Eighth Status Conference, the Thaçi Defence expressly requested the disclosure of any exculpatory

statements from international figures.¹ The Thaçi Defence reiterated this request at the Ninth Status Conference.²

4. Several Defence Teams emphasised that they were aware of individuals who had provided exculpatory information to the SPO, but whose statements had not been disclosed.³ At the Tenth Status Conference, the Thaçi Defence again highlighted the withholding and/or delayed disclosure of exculpatory material by the SPO and submitted that, in light of these failures, the search through the SPO material to identify exculpatory information should be done by an impartial magistrate.⁴ The Pre-Trial Judge invited the Defence to submit a written filing on this issue.⁵

5. At the Fourth and Ninth Status Conferences, the Pre-Trial Judge expressly reiterated that any potentially exculpatory information must be disclosed immediately, as soon as it is in the custody, control, or actual knowledge of the SPO, and reminded the SPO that the review and disclosure of exculpatory material had to be done as a matter of priority and that immediate disclosure may only be prevented by justifiable reasons, such as the need for redactions.⁶ During the Tenth Status Conference, the Pre-Trial Judge emphasised that “[i]t is essential for the Defence and it is also essential for the Court that these documents, items are disclosed as soon as possible” and urged the SPO to continue its review of material as fast as possible.⁷

¹ KSC-BC-2020-06, Transcript of Hearing, 29 October 2021 (“Eighth Status Conference”), confidential, p. 702, line 23 to p. 703, line 9; p. 704, line 12 to p. 705, line 5.

² KSC-BC-2020-06, Transcript of Hearing, 15 December 2021 (“Ninth Status Conference”), public, p. 812, line 4 to p. 814, line 2; p. 816, lines 2-19. *See also* Ninth Status Conference, p. 814, line 24 to p. 815, line 11; KSC-BC-2020-06, F00082, Krasniqi Defence, *Defence Submissions for First Status Conference on Behalf of Jakup Krasniqi*, 17 November 2020, public, para. 11; [REDACTED]; [REDACTED].

³ Eighth Status Conference, p. 703, lines 13-17; p. 704, lines 12-18.

⁴ KSC-BC-2020-06, Transcript of Hearing, 4 February 2022 (“Tenth Status Conference”), public, p. 897, line 19 to p. 901, line 3; p. 901, line 7 to p. 906, line 3; p. 906, line 9 to p. 909, line 8.

⁵ *Ibid.*, p. 923, lines 16-19.

⁶ KSC-BC-2020-06, Revised Transcript of Hearing, 24 March 2021 (“Fourth Status Conference”), public, p. 343, line 24 to p. 344, line 2; Ninth Status Conference, p. 816, line 23 to p. 817, line 15.

⁷ Tenth Status Conference, p. 922, line 23 to p. 923, line 3.

6. Having received 118 items of exculpatory disclosure in Disclosure Batch 174 on 3 March 2022, the Defence asked the SPO to confirm when those documents came into the SPO's custody or control and, if not disclosed immediately, to provide a full explanation for the late disclosure of the items in Disclosure Batch 174. The SPO responded on 9 March 2022 in the following terms:

[REDACTED].

7. The Defence notes that the SPO's response makes no attempt to suggest that the items in Disclosure Batch 174 were disclosed "immediately". The number of documents requiring review, the protective measures assessment and the COVID pandemic are a woeful justification for this violation of Rule 103.

III. APPLICABLE LAW

8. The SPO is under the strict obligation to disclose potentially exculpatory material "immediately", "as soon as it is in its custody", under Rule 103 of the Rules, which provides:

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.

9. The SPO's obligation to disclose exculpatory material is a fundamental component of its obligation to contribute to the establishment of the truth by the Specialist Chambers under Rule 62 of the Rules.⁸ Prompt disclosure of exculpatory material is also an indispensable element of the right to a fair trial and, specifically,

⁸ See, among other authorities, ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Chamber, *Decision on Prosecution's Request for Reconsideration of Trial Chamber's 11 November 2010 Decision* ("Karadžić Reconsideration Decision"), 10 December 2010, para. 10; *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-A, Appeals Chamber, *Judgment*, 17 December 2004, paras 242-243.

equality of arms.⁹ Failure to disclose such material in full or withholding it from disclosure may result in miscarriage of justice.¹⁰

10. In the Framework Decision, the Court stressed that “[t]he requirement that the SPO shall disclose exculpatory evidence *immediately, as soon as* it is in its custody, control or actual knowledge, identifies a continuous obligation for the SPO to disclose such material to the Defence, unless justifiable reasons prevent immediate disclosure. The initial determination as to whether or not certain information is exculpatory in nature falls upon the SPO and must be done in good faith”.¹¹ Further, in *Gucati and Haradinaj*, the Court held that the SPO’s disclosure obligations “are not duties to be circumvented through sophistries, but legal obligations to be fulfilled with the greatest of care, urgency and diligence”.¹²

11. It is important to stress that the statutory regime governing the disclosure of exculpatory material at the Kosovo Specialist Chambers (“KSC”) is much stricter and accords more protection to the accused than the similar provisions at the *ad hoc* tribunals and the International Criminal Court (“ICC”). The SPO must disclose the

⁹ See, e.g., ICTY, *Prosecutor v. Stakić*, IT-97-24-A, Appeals Chamber, *Judgement*, 22 March 2006, para. 188; *Prosecutor v. Lukić & Lukić*, IT-98-32/1-A, Appeals Chamber, *Decision on Milan Lukić’s Motion for Remedies Arising out of Disclosure Violations by the Prosecution (“Lukić Decision”)*, 12 May 2011, para. 13; ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1401, Trial Chamber I, *Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008 (“Lubanga Decision”)*, 13 June 2008, paras 77-81; *Prosecutor v. Banda & Jerbo*, ICC-02/05-03/09-259, Trial Chamber IV, *Decision on Article 54(3)(e) Documents*, 23 November 2011, para. 14; *Prosecutor v. Yekatom & Ngaïssona*, ICC-01/14-01/18-296, Pre-Trial Chamber II, *Decision on the Yekatom Defence Motion for Disclosure of Exculpatory Material*, 28 August 2019, para. 12; ECtHR, *Dowsett v. The United Kingdom*, no. 39482/98, *Judgement (Merits and Just Satisfaction)*, 24 September 2003, para. 41.

¹⁰ KSC-CC-PR-2017-01, F00004, Constitutional Court, *Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office*, 26 April 2017, public, para. 172.

¹¹ KSC-BC-2020-06, F00099, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters (“Framework Decision”)*, 23 November 2020, public, para. 66.

¹² KSC-BC-2020-07, F00413/RED, Trial Panel II, *Public Redacted Version of Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice*, 3 November 2021, public, para. 48.

exculpatory material *immediately*, not *as soon as practicable* as required, for example, under Article 67(2) of the ICC Statute, Rule 68 of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) Rules of Procedure and Evidence or Rule 113 of the Special Tribunal for Lebanon (“STL”) Rules of Procedure and Evidence. The requirement of immediacy in Rule 103 is not tempered by any reference to practicability and therefore the SPO cannot rely upon its resources or the number of documents to be reviewed as a justification for the delayed disclosure of exculpatory material.

12. In any event, other Courts and Tribunals applying the test “as soon as practicable”, have emphasized the importance of prompt disclosure of exculpatory material. The Single Judge in the *Ongwen* case found:

[T]he reference to the phrase “as soon as practicable” [in Article 67(2) of the Statute] must be understood as being the earliest opportunity after the evidence comes into the Prosecutor’s possession. Therefore, the Prosecutor shall disclose such evidence immediately after having identified any such evidence, unless some justifiable reasons prevent her from doing so.¹³

13. The ICTY Trial Chamber, in *Karadžić*, held:

An assessment of whether material has been disclosed “as soon as practicable” will depend on whether the Prosecution “has sufficiently accounted for its own conduct”, or whether there was an “inordinate amount of time before disclosing material in this case, and [whether the Prosecution] has failed to provide a satisfactory explanation for the delay”. While the Appeals Chamber has recognised the practical difficulties for the Prosecution in discharging its Rule 68 obligations when dealing with large volumes of evidence, it has concluded that “notwithstanding the practical difficulties encountered by the Prosecution, [...] evidence of an exculpatory nature must also be disclosed to the defence forthwith”.¹⁴

The ongoing nature of the obligation relates only to the fact that as new material comes into the possession of the Prosecution it should be assessed as to its potentially exculpatory nature and disclosed accordingly. This duty is a continuous obligation, as it remains even after a trial judgement has been rendered, and throughout the appeals proceedings. It does not suggest that

¹³ See, e.g., ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-203, Pre-Trial Chamber II, *Decision Setting the Regime for Evidence Disclosure and Other Related Matters*, 27 February 2015, para. 18: “shall disclose such evidence immediately after having identified any such evidence”.

¹⁴ ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Chamber, *Decision on Accused’s Seventeenth Motion for Finding of Disclosure Violation and for Remedial Measures*, 29 September 2010, para. 16.

the Prosecution can delay the disclosure of such material already in its possession, or identify and disclose potentially exculpatory material on a “rolling basis”.¹⁵

14. The same Trial Chamber underlined that the review and disclosure of exculpatory material must start “in earnest as soon as the Accused [is] transferred to the custody of the Tribunal and ma[kes] his initial appearance”¹⁶ and the Prosecution must maintain “an organized, efficient, and thorough system for the review of documentary evidence to ensure that all material falling within the disclosure-related Rules are provided to the Accused in a prompt manner”.¹⁷

15. Article 39(13) of Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) empowers the Pre-Trial Judge, where necessary, at the request of a party or Victims Counsel or on his or her own motion, to issue any order as may be necessary for the preparation of a fair and expeditious trial. Further, under Rule 48(2) of the Rules, upon request by a Party or *proprio motu*, a Panel may issue such decisions or orders as may be necessary for the purposes of the investigation or for the preparation and conduct of the proceedings.

16. In case of non-compliance by a Party with its disclosure obligations, Rule 110 of the Rules provides:

The Panel may decide, upon request by a Party or *proprio motu*, on measures to be taken as a result of the non-compliance with disclosure obligations pursuant to the Rules, including a stay of proceedings and the exclusion of evidence, except for exculpatory evidence.

17. The list of remedies which may be adopted under Rule 110 in case of non-compliance with disclosure obligations is not exhaustive.¹⁸ The measures to be taken as a result of non-compliance with disclosure obligations must be assessed on a case-

¹⁵ *Karadžić* Reconsideration Decision, para. 11.

¹⁶ *Ibid.*, paras 12-13.

¹⁷ *Ibid.*, para. 12.

¹⁸ The ICC Statute does not contain any similar provisions, and Article 68 *bis* of the ICTY RPE refers in abstract only to sanctions to be imposed on a party which fails to perform its disclosure obligations.

by-case basis.¹⁹ Measures considered or adopted by the ICC and *ad hoc* tribunals in the case of Prosecution failures to disclose exculpatory material include ordering a stay of proceedings,²⁰ recalling Prosecution witnesses, allowing the Defence to call additional witnesses, admitting additional evidence on appeal,²¹ and drawing an inference in favour of the Accused from exculpatory material.²²

IV. DISCUSSION

A. THE SPO HAS FAILED TO “IMMEDIATELY” DISCLOSE EXCULPATORY MATERIAL

18. Despite repeated complaints by several Defence Teams about the SPO withholding and/or delaying disclosure of exculpatory material,²³ the SPO continues its slow and inefficient disclosure of Rule 103 material.

19. The Defence emphasises that the exculpatory nature of the 428 items included in Disclosure Batches 160, 170, 174, 175 and 176 is not in dispute. The SPO itself has classified the material as exculpatory. Even a cursory assessment of these documents demonstrates that they are indeed exculpatory in nature. The Defence highlights certain disclosed documents below as particularly stark examples which clearly illustrate the SPO’s inability to comply with its statutory disclosure obligations, without detracting from the general submission that all the 428 items in Batches 160, 170, 174, 175 and 176 are exculpatory, all had been in the SPO’s

¹⁹ ICTR, *Prosecutor v. Ndindiliyimana et al.*, ICTR-00-56-T, Trial Chamber II, *Decision on Defence Motions Alleging Violation of the Prosecutor’s Disclosure Obligations Pursuant to Rule 68* (“Ndindiliyimana et al. Decision”), 22 September 2008, para. 14.

²⁰ *Lubanga* Decision, paras 90-94.

²¹ *Lukić* Decision, para. 17.

²² *Ndindiliyimana et al.* Decision, paras 61-62; ICTY, *Prosecutor v. Orić*, IT-03-68-T, Trial Chamber II, *Decision on Ongoing Complaints About Prosecutorial Non-Compliance with Rule 68 of the Rules*, 13 December 2005, para. 35.

²³ *See*, for example, paras 3-4 above.

custody for a substantiated period of time and all should have been disclosed earlier.

i. International witnesses and related documents

20. Disclosure Batch 160, which was disclosed to the Defence on 1 February 2022, contains 119 items of exculpatory material, including [REDACTED],²⁴ [REDACTED],²⁵ [REDACTED],²⁶ and [REDACTED].²⁷ Disclosure Batch 170, notified to the Defence on 28 February 2022, similarly contains [REDACTED],²⁸ [REDACTED].

21. The SPO's own classification of these documents as potentially exculpatory establishes that they may contain material that affects the credibility and reliability of the SPO's evidence or is otherwise exculpatory. As to the delay in disclosing these documents, [REDACTED], they were in the SPO's custody for a period of years prior to the confirmation of this Indictment. The SPO's decision to call several witnesses from [REDACTED] also clearly suggests that these documents have been in the SPO's custody, control or knowledge for many years. Nevertheless, in disregard of its statutory obligations, the SPO has not provided any justification or explanation for delaying their disclosure until February 2022.

22. More specifically, Disclosure Batch 160 contains the witness statement and related documents from Ambassador Daan Everts. The SPO interviewed Mr. Everts in [REDACTED] and he signed a statement on [REDACTED].²⁹ Even though the

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

SPO obtained clearance to disclose Mr. Everts' statement and related documents on 30 June 2021³⁰ and even though Mr. Everts requested the SPO to obtain a copy of his statement,³¹ these documents were not disclosed until 1 February 2022.

23. The contents of Mr. Everts' meeting notes and statement are obviously exculpatory as the following passages demonstrate:

[T]he criminal activities post-June 1999 were committed by individuals who sought a chance to gain personal benefit and was not part of an organized campaign from the Albanian leadership.³²

[REDACTED].³³

[REDACTED].³⁴

24. This statement and the accompanying meeting notes are exculpatory as regards the SPO's case against Mr. Krasniqi since they reasonably suggest the innocence of Mr. Krasniqi and clearly affect the credibility and reliability of the SPO's evidence, in particular in relation to the absence of *mens rea* for the alleged crimes and Mr. Krasniqi's lack of control over the KLA at the material time. In addition, the disclosed material that the SPO obtained from Mr. Everts undeniably brings into question the SPO's case regarding Mr. Krasniqi's ability to prevent and punish crimes, and his *mens rea* for the crimes with which he is charged.

25. The witness statements the SPO obtained between 2018 and 2020 from several witnesses [REDACTED]³⁵ were disclosed in August 2021, while the SPO withheld Mr. Everts' statement and meeting notes for five and a half months and disclosed them only after Mr. Everts informed the Krasniqi and Thaçi Defence

³⁰ [REDACTED].

³¹ Tenth Status Conference, p. 901, lines 7-25.

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

teams of their existence and after Mr. Everts had asked the SPO for a copy of his statement.

26. The Defence acknowledges the SPO's duty to apply for redactions and receive clearance before disclosing some of these documents.³⁶ Nevertheless, it is clear that most of these documents were in the SPO's custody, control or knowledge for years. Since these documents contain only standard redactions, which do not require judicial authorisation,³⁷ such redactions do not justify any delayed disclosure. Despite the Defence repeatedly requesting the SPO to disclose these documents,³⁸ the SPO has disclosed them only on 1 February 2022, without providing any justification or explanation as to why these documents were not disclosed, at the latest in August 2021, when the statements of the other [REDACTED] witnesses were disclosed.

ii. [REDACTED] witnesses

27. The documents containing exculpatory information disclosed on 1 February 2022 (Disclosure Batch 160) also contain transcripts of SPO interviews, dated 2019 and 2020, obtained from [REDACTED], [REDACTED].³⁹ For instance, [REDACTED], one witness stated: "[REDACTED]".⁴⁰ [REDACTED], is plainly exculpatory because it refutes the SPO's erroneous case that Mr. Krasniqi was part of a common criminal plan which treated these parties as 'opponents' and intended to commit crimes against them.

³⁶ KSC-BC-2020-06, F00673, Specialist Prosecutor, *Prosecution Submissions for Tenth Status Conference*, 1 February 2022, public, para. 9.

³⁷ Framework Decision, para. 95.

³⁸ Eighth Status Conference, p. 702, line 23 to p. 703, line 9; p. 704, line 12 to p. 705, line 5; Ninth Status Conference, p. 812, line 4 to p. 814, line 2; p. 814, line 24 to p. 815, line 11; p. 816, lines 2-19.

³⁹ [REDACTED].

⁴⁰ [REDACTED].

28. These documents did not require any clearance to be granted before disclosure. The SPO has offered no justification or explanation for their delayed disclosure.

iii. Further examples of exculpatory material

29. The Defence identifies below a number of additional examples of exculpatory material withheld by the SPO.

30. The relevant parts of a witness statement [REDACTED], reads as follows:

[REDACTED].⁴¹

[REDACTED].⁴²

31. The relevant part of a report of the [REDACTED], reads as follows:

[REDACTED].⁴³

32. In the interview from the [REDACTED] “[REDACTED]”.⁴⁴

33. The relevant part of the [REDACTED], reads as follows:

[REDACTED].⁴⁵

⁴¹ [REDACTED]. This document was notified to the Defence in Disclosure Batch 174 (Rule 103). The same document previously disclosed in Disclosure Batch 160 (Rule 103) with a different ERN: [REDACTED].

⁴² [REDACTED].

⁴³ [REDACTED]. This document was disclosed in Disclosure Batches 164 (Rule 102(3)) and 175 (Rule 103; notified on 4 March 2022).

⁴⁴ [REDACTED]. This document was disclosed to the Defence in Batch 176 (Rule 103; notified on 9 March 2022).

⁴⁵ [REDACTED]. This document was disclosed to the Defence in Batch 176 (Rule 103; notified on 9 March 2022).

34. The SPO cannot consistently delay the disclosure of exculpatory material already in its possession for months and years, by repeatedly stating at every status conference that the Office is “identifying” and “disclosing” potentially exculpatory material on a “rolling basis”,⁴⁶ without any indication of when the material was obtained, thereby circumventing the disclosure regime and the clear language and intent of Rule 103 which requires the SPO to ensure the identification of exculpatory material and its disclosure to the Defence “immediately”, “as soon as it is in its custody, control or actual knowledge”, not on a “rolling basis”.

35. The continuing nature of this obligation does not permit the SPO to delay the disclosure of potentially exculpatory material which was already in its possession or to adopt a practice of identifying and disclosing such material on a “rolling basis”.⁴⁷ Instead, the approach adopted by the Prosecution demonstrates a failure to comply with the Court’s repeated instructions to immediately disclose all exculpatory materials in its possession.⁴⁸ Moreover, the scale and scope of the case, insufficient resources and the amount of material in the possession of the SPO cannot be an excuse for the SPO’s failure to properly organise itself to ensure that disclosure is carried out in accordance with the Rules.⁴⁹

36. The SPO has thus withheld the above documents, which are only examples of exculpatory material contained in the 428 items in Disclosure Batches 160, 170, 174, 175 and 176, for an inordinate amount of time before disclosing them. The SPO has failed to provide any satisfactory explanation for such delay. The only possible conclusion is that the SPO has clearly not made proper efforts to ensure the

⁴⁶ KSC-BC-2020-06, Transcript of Hearing, 14 September 2021, public, p. 582, lines 18-24; Eighth Status Conference, p. 702, lines 13-16.

⁴⁷ *Karadžić* Reconsideration Decision, para. 11.

⁴⁸ See para. 5 above.

⁴⁹ ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, *Oral Decision on Accused’s Twenty-Sixth Disclosure Violation Motion*, 3 November 2010, T8908; *Karadžić* Reconsideration Decision, para. 12.

identification of exculpatory material and its disclosure to the Defence “immediately”, “as soon as it is in its custody, control or actual knowledge”, as required under Rule 103. The Defence submits that the delayed disclosure of this exculpatory material, which has been in the SPO’s possession for many years and months (including documents which were in the SPO’s possession before the Accused’s Indictment), amounts to a disclosure failure in violation of the Rules and the Law.

B. THE DELAYED DISCLOSURE OF THE EXCULPATORY MATERIAL IS PREJUDICIAL TO THE DEFENCE

37. The delayed disclosure of this material negatively affects the efficiency and expeditiousness of the Defence investigations and the expeditiousness of the proceedings in many respects. Exculpatory material assists the Defence to develop its case and identify leads, whereas when the SPO withholds such material, investigative opportunities are delayed or lost. The delayed disclosure precludes the Defence from efficiently conducting its investigations, as it has wasted time and investigative resources to obtain the same information that was already in the SPO’s possession.

38. To return to the example of Mr. Everts’ statement and meeting notes, the Krasniqi Defence, as the Thaçi Defence, wasted time and investigative resources speaking to Mr. Everts without having his SPO statement, and will now need to re-assess the SPO statements of [REDACTED] and other witness statements considering the relevant documents from Disclosure Batch 160.

39. The Defence should not be placed in a position where it has to reconsider its investigation plans or revert to and follow up with the witnesses it has already interviewed each time the SPO discloses new Rule 103 material, especially when the SPO had such material in its possession for years and deliberately withheld it. A fair trial requires the SPO not to take unfair advantage of the accused by withholding

exculpatory material and sitting on the fence whilst the Pre-Trial Judge and the Defence time and again ask the SPO to comply with its disclosure obligations.

40. The Court cannot and should not rely on a regime where the Defence is disclosed only what it has explicitly and repeatedly asked for, or where exculpatory statements are only disclosed to the Defence after it learns from potential witnesses that the SPO is in the possession of their statements. That is not the intention of Rule 103. Exculpatory material is so crucial for the Defence investigation and, thus, for the expeditiousness of the case, that deviation from the disclosure regime - absent justifiable reasons, such as the need for redactions - cannot be tolerated by the Court. The SPO's compliance with its disclosure obligations must be strictly insisted upon by the Court, and the requirements of Rule 103 are to be regarded as fundamental and permitting of no deviation.

41. Judicial intervention is required at this stage. Without intervention, it is the Defence's concern that the SPO will continue to fail in the proper discharge of its disclosure obligations, despite previous judicial admonishment, and that this failure is prejudicing the Defence's ability to properly investigate and challenge prosecution evidence. This Defence's concern is justified not only by the systemic delays in the disclosure of the 428 items of exculpatory material contained in Disclosure Batches 160, 170, 174, 175 and 176, but also by the SPO's inability to assess how much material remains to be reviewed and disclosed. At the Tenth Status Conference, the SPO submitted that it has reviewed over 50 per cent of the more recently received or cleared material, but was unable to give any precise figure of the remaining documents to be reviewed.⁵⁰ At the same Status Conference, the Pre-Trial Judge asked the SPO to inform the Defence, *inter partes*, and then the Bench before the next status conference

⁵⁰ Tenth Status Conference, p. 896, line 21 to p. 897, line 5.

of the state of review of the material that the SPO has under its control or possession.⁵¹
The Defence has not received so far any update or information from the SPO.

C. APPROPRIATE REMEDIES

42. The Defence submits that the SPO has repeatedly failed to comply with its statutory obligation to disclose exculpatory material “immediately”, “as soon as it is in its custody, control or actual knowledge”. The individual documents from Disclosure Batches 160, 170, 174, 175 and 176 discussed above are only a few examples the Defence uses to illustrate the inability of the SPO to put in place and implement an efficient, functional and thorough system for the review of documentary evidence to ensure that all exculpatory material is identified and disclosed to the Defence in a timely manner. None of the 428 items in these four disclosure batches was disclosed to the Defence “immediately”. They therefore amount to 428 separate violations of Rule 103. The Defence also recalls the Pre-Trial Judge’s previous requests for diligence in respect of the SPO’s disclosure obligations, as well as the Defence’s repeated requests for specific documents and information which should have been disclosed much earlier.

43. The Defence requests the Pre-Trial Judge to make an express finding that the SPO has failed to comply with its obligation to disclose exculpatory material immediately. It is necessary for the Court to make a clear finding on this issue at this stage in order to safeguard the rights of the accused and deter future violations.

44. Moreover, considering the pattern of the SPO’s conduct and observing that the disclosure problems plaguing the SPO persist, the Defence fully supports the Thaçi Defence proposal, namely that the Pre-Trial Judge, acting pursuant to his

⁵¹ *Ibid.*, p. 923, lines 4-6.

Article 39(13) authority, should appoint an independent and impartial magistrate to review the material in the SPO's custody, identify and disclose exculpatory information.⁵² The appointment of an independent magistrate or *amicus curiae* to ensure the timely disclosure of exculpatory material to the Defence, at the pre-trial stage, would indeed guarantee the accused's rights and the expeditiousness of the proceedings.⁵³ The Defence agrees that the remedy sought by the Thaçi Defence is necessary to ensure the fairness of the proceedings, the equality of arms, and the accused's rights to be tried within a reasonable time and to have adequate time and facilities for the preparation of his defence.⁵⁴

45. Furthermore, considering the serious deficiencies in the SPO's disclosure system and the undeniable impact of this ineffective system on the accused's rights to be tried within a reasonable time and to have adequate time to prepare his case, the Defence requests that the Pre-Trial Judge set a deadline of 28 days for the SPO to complete the disclosure of all exculpatory material in its possession or control and to certify to the Pre-Trial Judge that it has done so. The Accused have been remanded in custody for 16 months. The SPO cannot be permitted to continue reviewing on a rolling basis exculpatory material which ought to have been disclosed "immediately". Whilst there would remain an ongoing obligation on the SPO to disclose any newly received exculpatory material immediately, that does not provide an excuse for the SPO not to complete its review of its current evidential holdings.

46. The Defence considers that combining the appointment of an independent magistrate, or such other officer as the Pre-Trial Judge deems appropriate, who will identify and disclose exculpatory information in the SPO's custody with the

⁵² KSC-BC-2020-06, F00724, Thaçi Defence, *Thaçi Defence Motion for an Independent and Impartial Review of Exculpatory Material*, 7 March 2022, confidential, paras 10, 52.

⁵³ *Ibid.*, para. 49.

⁵⁴ *Ibid.*, para. 50.

imposition of a strict deadline for disclosure would solve any difficulties faced by the SPO and would therefore facilitate and expedite the finalisation of the disclosure process. The Defence submits that both remedies are required to ensure accountability and the effectiveness of the disclosure system going forward.

V. REQUESTED RELIEF

47. For the reasons set out above, the Defence requests the Pre-Trial Judge to:

- (i) enter a finding that the SPO has failed to comply with its disclosure obligations;
- (ii) appoint an independent and impartial magistrate or *amicus curiae* to review the material in the SPO's custody, control or actual knowledge, identify any exculpatory information and disclose such exculpatory material immediately to the Defence; and
- (iii) set a deadline of 28 working days for the SPO to complete the disclosure of all exculpatory material.

Word count: 5,048



Venkateswari Alagendra

Friday, 2 September 2022

Kuala Lumpur, Malaysia.



Aidan Ellis

Friday, 2 September 2022

London, United Kingdom.