

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: Specialist Counsel for Hashim Thaçi

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**Public Redacted Version of Thaçi Defence Motion for an Independent and
Impartial Review of Exculpatory Material**

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I. INTRODUCTION

1. The Defence for Mr Hashim Thaçi (“Defence”) has repeatedly raised concerns over the SPO’s lack of disclosure and delayed disclosure of exculpatory material. To date, the SPO has failed to disclose the following documents “*immediately*”, “*as soon as they were in its custody*”, in violation of the clear requirements of Rule 103 of the Rules,¹ which 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.

(i) Delayed disclosure of Everts Documents

2. Ambassador Daan Everts, former Head of the Organisation for Security and Co-Operation in Europe (“OSCE”) Mission in Kosovo, was interviewed by the SPO in January and March 2018 and signed a statement on 10 March 2018.² A request for clearance of the Everts Documents was initiated by the SPO in 2019 and clearance was obtained on 30 June 2021.³ However, the Everts Documents were not disclosed until six months later, on 1 February 2022, in Disclosure Package 160, pursuant to Rule 103. This disclosure followed repeated requests from Ambassador Everts to the SPO starting in mid-January 2022, asking for a copy of his statement, refused by the SPO.⁴

(ii) Delayed disclosure of statements and notes of interview of other international figures

¹ Rules of Procedure and Evidence Before the KSC, KSC-BD03/Rev3/2020, 2 June 2020 (“Rules”).

² [REDACTED] (collectively, “Everts Documents”).

³ KSC-BC-2020-06/IA017/F00009, Request for Dismissal of KSC-BC-2020-06/IA017/F00008 (“SPO Dismissal Request”), footnote 25, para. 13.

⁴ KSC-BC-2020-06, Transcript of the Tenth Status Conference (“Tenth Status Conference”), 4 February 2022, p. 901.

3. When the SPO finally disclosed the Everts Documents, they were buried in a batch of 119 unrelated documents.⁵ A significant number of them were statements or notes of meetings with international figures, from the SITF, the SPO or the ICTY, dated 2014,⁶ 2016,⁷ 2017,⁸ or even 2002,⁹ and contained exculpatory information, as per the disclosure classification of the SPO. These documents must have been in the SPO's custody for several years, and should have been disclosed earlier – the Defence explicitly asked the SPO to disclose such material in previous status conferences, stressing its interest in statements from international figures.¹⁰ The Defence understands that, for some of them, clearance may have been obtained in 2021,¹¹ which does not explain why they were disclosed only in February 2022. Similarly, Disclosure Packages 174 and 175, notified on 3 and 4 March 2022 pursuant to Rule 103, contained ICTY and SPO statements or transcripts of testimony of international figures, dated of 2000, 2002, 2006, 2007 or 2019,¹² exculpatory as per the SPO's classification, which should have been disclosed earlier.

(iii) Delayed disclosure of SPO transcripts of interview of Albanian witnesses

4. Disclosure Package 160 further contained various SPO transcripts of interview of Albanian witnesses, such as former KLA members¹³ and journalists,¹⁴ dated 2019 or 2020, containing exculpatory information, as per the disclosure classification applied by the SPO. This material, which did not require any prior 'clearance', and emanating from the SPO itself, was not disclosed '*immediately*', in violation of Rule 103. Similarly,

⁵ Disclosure Package 160.

⁶ [REDACTED].

⁷ [REDACTED].

⁸ [REDACTED].

⁹ [REDACTED].

¹⁰ KSC-BC-2020-06, Transcript of the Eight Status Conference, 29 October 2021 ("Eight Status Conference"), pp. 702-703; KSC-BC-2020-06, Transcript of the Ninth Status Conference, 15 December 2021 ("Ninth Status Conference"), pp. 812-814, 816.

¹¹ KSC-BC-2020-06/F00673, Prosecution submissions for tenth status conference, para. 9.

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

Disclosure Package 174 included UNMIK, SITF, and SPO interviews of Albanian witnesses, notably former KLA members,¹⁵ dated from 2003 to 2020, which were not disclosed '*immediately*', in breach of Rule 103.

(iv) Delayed disclosure of OSCE, KFOR, NATO and ECMM reports

5. On 28 February 2022, the SPO notified Disclosure Package 170 pursuant to Rule 103, containing 26 OSCE reports (including three from/to [REDACTED]),¹⁶ and several documents from NATO, KFOR, or ECMM, dated 1999 or 2000. Disclosure Package 175 further included OSCE and KFOR documents dated 1999. Such documents must have been in the SPO's custody for several years and should have been disclosed earlier, especially since the SPO has decided to call several OSCE witnesses and NATO/KFOR soldiers. They are directly relevant for the case and contain exculpatory information, as per the disclosure classification applied by the SPO.

(v) Withholding of other exculpatory material

6. As noted during the Tenth Status Conference,¹⁷ the SPO has failed to disclose other exculpatory material in its custody, control or knowledge, such as a letter from the United States State Department dated 4 May 1999, from Barbara Larkin, the Assistant Secretary of Legislative Affairs, to Senator Mitch McConnell, Chairman of the Foreign Operations Committee, saying that "*There is no political structure in Kosovo or effective command and control of the KLA.*" The SPO must have been aware of this document, having been in contact with the United States authorities [REDACTED].

7. Furthermore, the SPO has not disclosed any statement or notes of interview of Mr Bujar Bukoshi, former LDK Prime Minister of Kosovo, quoted by the SPO in its Indictment. The Defence is aware that he was interviewed by the SPO and that his

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ Tenth Status Conference, pp. 902-903.

interview ended with the following question from the SPO investigator: "*Oh, you must be friends with Hashim Thaci, aren't you?*" – the SPO having likely considered that his testimony was exculpatory.

8. The Defence is also aware that several hundred former KLA soldiers have been summoned by the SPO to give statements,¹⁸ but it has only disclosed some of them to date.

9. During the Tenth Status Conference, the Defence advocated that, in light of the SPO's repeated failure to comply with its disclosure obligations, an impartial magistrate should be appointed to review all material in the SPO's possession to identify and disclose that which is exculpatory, because the SPO couldn't be trusted to do so in a timely manner.¹⁹ The Pre-Trial Judge ("PTJ") invited the Defence to file written submissions on this issue,²⁰ which are the subject of the present filing.

10. The Defence hereby requests the PTJ to:

- Find that the SPO has violated its obligation to disclose exculpatory material "*immediately*", "*as soon as it is in its custody, control or actual knowledge*" pursuant to Rule 103, and
- To 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.

¹⁸ See, e.g., <https://zeri.info/aktuale/316779/gjykata-speciale-coi-vendin-ne-zgjedhje-ne-2020-en-aktakuzat-e-para/>.

¹⁹ Tenth Status Conference, pp. 897-908.

²⁰ *Ibid.*, p. 923.

II. PROCEDURAL BACKGROUND

11. On 24 April 2020, the SPO asked the PTJ to confirm its Indictment against Mr Thaçi²¹ and thereafter applied for an arrest warrant.²² On 26 October 2020, the PTJ confirmed the Indictment²³ and issued an arrest warrant.²⁴ On 5 November 2020, Mr Thaçi resigned as President of the Republic of Kosovo, surrendered and was transferred to the KSC detention facilities in The Hague.

12. On 23 November 2020, the SPO claimed that it would be able to meet its disclosure obligations to allow the trial to start in the summer of 2021.²⁵

13. Since then, the limited amount of exculpatory material disclosed to the Defence pursuant to Rule 103,²⁶ and the corresponding failure of the SPO to disclose such material *“as soon as it is in its custody,”* has been a serious concern of the Defence, raised at several status conferences.

14. On 29 October 2021, during the Eighth Status Conference, the Defence expressly requested the disclosure of any exculpatory statements from international figures, such as internationals who *“have talked about the KLA being in disarray, about the KLA being disorganised, that the command and control was at a zone commander level.”*²⁷ Two defence teams stressed that they were aware of individuals who had provided

²¹ KSC-BC-2020-06/F00002, Public redacted version of 'Submission of Indictment for confirmation', filing KSC-BC-2020-06-F00002 dated 24 April 2020.

²² KSC-BC-2020-06/F00005, Confidential Redacted Version of 'Request for arrest warrants and related orders', filing KSC-BC-2020-06-F00005 dated 28 May 2020.

²³ KSC-BC-2020-06/F00026, Confidential Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi.

²⁴ KSC-BC-2020-06/F00027, Decision on Request for Arrest Warrants and Transfer Orders.

²⁵ KSC-BC-2020-06/F00097, Prosecution submissions further to the status conference of 18 November 2020, 23 November 2020, para. 14.

²⁶ Around 3,760 documents have been disclosed pursuant to Rule 103, compared with the 18,000 documents disclosed pursuant to Rule 102(1).

²⁷ Eight Status Conference, pp. 702-703.

exculpatory information to the SPO but whose statements had not been disclosed.²⁸ On 15 December 2021, the Defence reiterated this request.²⁹

15. It was not until 1 February 2022 that the SPO released Disclosure Package 160 pursuant to Rule 103, containing 119 items of exculpatory evidence relating, to a significant extent, to international witnesses, and containing the Everts Documents.

16. During the Tenth Status Conference, the Defence complained about the withholding and/or delayed disclosure of exculpatory material by the SPO and submitted that the search through the SPO material to identify exculpatory information should be done by an impartial magistrate.³⁰ The PTJ invited the Defence to file a written filing on this issue.³¹

III. APPLICABLE LAW

17. The right to a fair trial is an essential component of any democratic society, enshrined in Article 31 of the Kosovo Constitution, Articles 1(2), 3(2)(e) and 21(2) of the Law N° 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Article 6(1) of the European Convention of Human Rights ("ECHR").

18. Pursuant to Rule 62 of the Rules, in performing his or her functions, the Specialist Prosecutor, who shall contribute to the establishment of the truth by the Specialist Chambers, shall take measures "*for the fundamental rights of suspects and Accused.*" In particular, to ensure the fairness of the trial, the SPO must disclose not only incriminating material in support of its case, but also material relevant for the

²⁸ *Ibid.*, pp. 703, 704.

²⁹ Ninth Status Conference, pp. 812-814, 816.

³⁰ Tenth Status Conference, pp. 897-908.

³¹ *Ibid.*, p. 923.

preparation of the Defence and, more importantly, exculpatory material, as per Rule 103 Rules.

19. The SPO's obligation to disclose exculpatory material is as important as the obligation to prosecute³² and is an essential and fundamental element of the guarantee of a fair trial and of equality of arms.³³ Miscarriages of justice may occur where such material is withheld from disclosure; the golden rule is that full disclosure should be made.³⁴

20. The SPO must fulfill its obligation to disclose exculpatory material without delay, to ensure that the accused has adequate time to examine it and prepare his defence. Such evidence is absolutely crucial for Defence investigations.³⁵ In his Framework Decision on Disclosure of Evidence and Related Matters, the PTJ noted *"[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.*

³² ICTR, *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Judgment, 30 September 2011, para. 134; ICTY, *Prosecutor v. Karadzic*, No. IT-95-5/18-T, Decision on Prosecution's Request for Reconsideration of Trial Chamber's 11 November 2010 Decision, 10 December 2010 (*"Karadzic Reconsideration decision"*), para. 10; ICTY, *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-A, Judgment, 17 December 2004, paras. 242-243.

³³ KSC, *Prosecutor v. Gucati & Haradinaj*, KSC-BC-2020-07/F00413/RED, Public Redacted Version of Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice, 3 November 2021 (*"Gucati Decision"*), para. 43; ICTY, *Prosecutor v. Stakic*, No. IT-97-24-A, Judgment, 22 March 2006, para. 188; ICTY, *Prosecutor v. Lukic & Lukic*, No. IT-98-32/1-A, Decision on Milan Lukic's Motion for Remedies Arising out of Disclosure Violations by the Prosecution, 12 May 2011 (*"Lukic Decision"*), para. 13; ICC, *Prosecutor v. Lubanga*, 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, 13 June 2008 (*"Lubanga Decision"*), paras 77-81; ICC, *Prosecutor v. Banda & Jerbo*, ICC-02/05-03/09-259, Decision on Article 54(3)(e) Documents, 23 November 2011, para. 14; ICC, *Prosecutor v. Yekatom & Ngaissona*, ICC-01/14-01/18-296, Decision on the Yekatom Defence Motion for Disclosure of Exculpatory Material, 28 August 2019, para. 12; ICC, *Prosecutor v. Yekatom & Ngaissona*, ICC-01/14-01/18, Decision on the Yekatom Defence Motion for Disclosure of Prior Statement of Witness P-[Redacted], 15 June 2020, para. 25; ECtHR, *Dowsett v. The United Kingdom*, Application no. 39482/98, Judgment, 24 June 2003.

³⁴ KSC-CC-PR-2017-01/F00004, 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, para. 135, referring to *R v H* [2004] UKHL 3; [2004] 2 Cr. App. R. 10, House of Lords.

³⁵ Tenth Status Conference, p. 896.

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."³⁶

21. During status conferences, the PTJ has repeatedly stressed that the review and disclosure of exculpatory material has to be done as a "*matter of priority*", "*immediately*", and "*as soon as possible*", also reminding the SPO "*that only justifiable reasons, such as the need for redactions, may prevent immediate disclosure*".³⁷

22. In the *Gucati and Haradinaj* case, Trial Panel II, being "*concerned about the SPO's full compliance with its disclosure obligations*", further cautioned the SPO that disclosure obligations stemming from the guarantee of fair trial "*are not duties to be circumvented through sophistries, but legal obligations to be fulfilled with the greatest care, urgency and diligence*."³⁸

23. In case of non-compliance with its disclosure obligations by a Party, a Panel may adopt remedial measures, in accordance with Rule 110 of the Rules:

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.

24. Article 39(13) of the Law further provides that the PTJ "*may, where necessary, at the request of a party or Victims Counsel or on his or her own motion, issue any other order as may be necessary for the preparation of a fair and expeditious trial*." In addition, Rule 48(2) provides that "[u]pon 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." Rule 67 of the Rules explicitly foresees the possibility of appointing an *amicus curiae*. With regard to 'information not subject to

³⁶ KSC-BC-2020-06/F00099, 23 November 2020 ("Framework Decision"), para. 66.

³⁷ Ninth Status Conference, p. 817; KSC-BC-2020-06, Transcript of the Fourth Status Conference, 24 March 2021, pp. 344-345; Tenth Status Conference, pp. 922-923.

³⁸ *Gucati* Decision, para. 43.

disclosure', Rules 108(5) and (6) also provide that the SPO and the Defence may apply to the President to appoint an *amicus curiae* to assist and advise the Panel on counterbalancing measures.

25. It is worth noting that the disclosure regime established by the KSC is more protective of the accused than the ones adopted by other international criminal tribunals ("ICTs"). The exculpatory material is to be disclosed '*immediately*', not '*as soon as practicable*', as the Rules of Procedure and Evidence of ICTs usually require.³⁹ Since the ICC identified '*immediately*' as one of the elements that concretise '*as soon as practicable*',⁴⁰ the disclosure deadline of exculpatory material before the KSC is much stricter compared to other ICTs.⁴¹ In addition, the KSC Rules dropped any formulation that turned the classification of the material as incriminating or exculpatory into a discretionary Prosecution decision.⁴² Rule 110 explicitly foresees the possibility to adopt remedies in case of non-compliance with disclosure obligation, whose list is not exhaustive.⁴³ The KSC being bound by the ECHR,⁴⁴ the disclosure regime must comply with the very strict standards of this Convention as interpreted by the European Court of Human Rights.

26. Nevertheless, the KSC case law on the SPO's disclosure obligations being still at an early stage, the ICTs case law may give some guidance. In the *Karadžić* case, the

³⁹ See, e.g., ICC Statute, Article 67(2); ICTY RPE, Rule 68.

⁴⁰ See, e.g., ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-203, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, para. 18: "shall disclose such evidence immediately after having identified any such evidence".

⁴¹ Alexander Heinze, The Kosovo Specialist Chambers' Rules of Procedure and Evidence, <https://www.ejiltalk.org/the-kosovo-specialist-chambers-rules-of-procedure-and-evidence/#:~:text=The%20defence%20has%20the%20right,generally%20ask%20for%20helpful%20evidence>.

⁴² As Article 67(2) of ICC Statute does: "*which [the Prosecutor] believes shows or tends to show*".

⁴³ The ICC Statute does not contain any similar provisions; Article 68 *bis* of the ICTY RPE refers only to "*sanctions to be imposed on a party which fails to perform its disclosure obligations.*"

⁴⁴ Article 3(2)(e) of the Law.

Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) found:

16. 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”.

17. Rule 68 bis provides that a Trial Chamber may, *proprio motu* or at the request of either party, decide on sanctions to be imposed on a party which fails to comply with its disclosure obligations under the Rules. In determining the appropriate remedy (if any), the Chamber has to examine whether or not the accused has been prejudiced by a breach of Rule 68.⁴⁵

27. The same Trial Chamber further clarified that:

11. Regardless of the Office of the Prosecutor’s internal practices, Rule 68 clearly requires the Prosecution to disclose potentially exculpatory material as “soon as practicable”.²⁴ 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 the Prosecution can delay the disclosure of such material already in its possession, or identify and disclose potentially exculpatory material on a “rolling basis”. In determining whether there has been a violation of the Rule, a Chamber will assess whether the Prosecution has indeed made sufficient efforts to ensure the identification of such material and its provision to the Accused within a reasonable time-frame, taking into account all relevant circumstances.⁴⁶

28. The disclosure of exculpatory material is fundamental to the fairness of proceedings, and considerations of fairness are the overriding factor in any determination of whether the governing Rule has been breached.⁴⁷ The ICC and *ad hoc*

⁴⁵ ICTY, *Prosecutor v. Radovan Karadžić*, Decision on accused’s seventeenth motion for finding of disclosure violation and for remedial measures, 29 September 2020 (footnotes omitted).

⁴⁶ *Karadzic* Reconsideration decision, para. 11 (footnotes omitted, emphasis added).

⁴⁷ ICTY, *Prosecutor v. Stakic*, No. IT-97-24-A, Judgement, 22 March 2006, para. 188.

Tribunals have adopted a variety of measures to remedy violations of its disclosure obligations by the prosecution, on a case-by-case basis, such as ordering a stay of proceedings,⁴⁸ recalling Prosecution witnesses, allowing the Defence to call additional witnesses, drawing an inference in favour of the Accused from exculpatory material,⁴⁹ admitting additional evidence on appeal,⁵⁰ etc.

IV. DISCUSSION

A. THE DOCUMENTS IN QUESTION ARE EXCULPATORY

29. The exculpatory nature of the documents disclosed by the SPO in the Disclosure Package 160, 170, 174 and 175, pursuant to Rule 103,⁵¹ is not in dispute, as per the SPO's own classification. Nevertheless, it is useful to highlight their significance for the Defence.

30. As previously submitted,⁵² Ambassador Everts is a senior Dutch diplomat, who was appointed Head of the OSCE Mission in Albania in December 1997 and then in Kosovo in July 1999. The Everts Documents are exculpatory as regards the SPO's case against Mr Taçi, given that they reasonably suggest the innocence or mitigate the guilt of Mr Taçi, and affect the credibility or reliability of the SPO's evidence, as demonstrated by the excerpts quoted by the Defence during the Tenth Status

⁴⁸ *Lubanga* Decision, paras 90-94.

⁴⁹ ICTR, *Prosecutor v. Augustin Ndindiliyimana et al.*, ICTR-00-56-T, Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68, 22 September 2008, paras. 61-62; ICTY, *Prosecutor v. Naser Orić*, IT-03-68-T, Decision on Ongoing Complaints about Prosecutorial Non-Compliance with Rule 68 of the Rules, 13 December 2005, para. 35.

⁵⁰ *Lukic* Decision, para. 17.

⁵¹ Listed in paragraphs 2-5 above.

⁵² KSC-BC-2020-06/IA017/F00008, Taçi Defence Additional Submissions on Appeal against the Decision on Review of Detention of Hashim Taçi, 15 February 2022 ("Taçi Additional Submissions"), paras. 14-18.

Conference, related, *inter alia*, to Mr Thaçi's lack of control over the KLA and lack of *mens rea* for the alleged crimes.⁵³

31. Mr Thaçi is being accused by the SPO of being part of a joint criminal enterprise to gain and exercise control over Kosovo by committing violence and removing those deemed to be opponents. He is also being charged on the basis that he exercised effective control over the direct perpetrators of the crimes charged. The Everts Documents undoubtedly call the SPO's case into question, particularly as regards Mr Thaçi's ability to prevent and punish crimes, and his *mens rea* for the crimes as charged. The Everts Documents are relevant, highly probative, and *prima facie* exculpatory of serious allegations upon which the Prosecution seeks a conviction, from a credible and well-placed source.

32. Their exculpatory nature was acknowledged by the SPO, as per their disclosure classification.⁵⁴ The failure to disclose the Everts Documents therefore puts the SPO in violation of its statutory obligations. The fact that, as alleged by the SPO,⁵⁵ the Everts Documents may also contain some incriminating information does not justify any delayed disclosure. In any event, his testimony wasn't sufficiently incriminating for the SPO to have added him to its list of witnesses.

33. Ambassador Everts' account of the SPO interview process itself is also alarming. When reviewing his SPO statement, he said that: "[w]hile every single paragraph is accurate as written and can stand as it is, the totality of the statement seems to reflect a lesser interest in exculpatory than incriminating information."⁵⁶ In placing an artificial and blinkered focus on incriminating evidence, the SPO breached its obligations under Rule 62 to "*contribute to the establishment of the truth by the Specialist*

⁵³ Tenth Status Conference, pp. 899-900, referring to, *inter alia*, [REDACTED]; also quoted in Thaçi Additional Submissions, para. 16.

⁵⁴ SPO Dismissal Request, para. 15.

⁵⁵ *Ibid.*

⁵⁶ [REDACTED].

Chambers". This conduct then continued when the Everts Documents were buried for four years, emerging only after the Ambassador told the Thaçi Defence team of their existence.⁵⁷

34. Similarly, the statements of other international figures, present in Kosovo during the period charged in the Indictment, are relevant for the Defence since their opinion on the KLA and Mr Thaçi may be given a significant weight, as they may appear more neutral than some local players. They may also provide leads for investigations.

35. The reports issued by the OSCE, NATO, KFOR or other international organisations present in Kosovo are also material for the Defence, since they were written at the time of the events and may contradict the opinions expressed by some witnesses called by the SPO.

36. The SPO interviews of former KLA members, who may have insider knowledge of the KLA, and of local journalists, [REDACTED],⁵⁸ are obviously relevant for the Defence and may also provide additional leads for Defence investigations.

B. THE SPO FAILED TO DISCLOSE EXCULPATORY DOCUMENTS AS SOON AS THEY WERE IN ITS CUSTODY, CONTROL OR KNOWLEDGE

37. The SPO failed to disclose the Everts Documents "immediately". While they are dated from 2018 and the SPO obtained clearance for them on 30 June 2021, they were not disclosed until 1 February 2022. [REDACTED] OSCE colleagues were interviewed by the SPO [REDACTED];⁵⁹ their SPO statements were disclosed to the Defence in mid-August 2021, while the Everts documents were disclosed five and a

⁵⁷ Tenth Status Conference, pp. 901-902.

⁵⁸ [REDACTED].

⁵⁹ [REDACTED].

half months later, after Everts had asked the SPO for a copy of his statement. The SPO has thus withheld the Everts documents for an inordinate amount of time before disclosing them and failed to provide any satisfactory explanation for the delay. The Everts Documents contain only standard redactions, which do not require prior judicial authorisation,⁶⁰ therefore such redactions do not justify any delayed disclosure. The Everts Documents should have been disclosed, at the latest, at the same time as the statements of his OSCE colleagues, *i.e.* by mid-August 2021.

38. Similarly, the SPO has failed to disclose “*immediately*” the statements, notes of interviews and transcripts of interview of other international figures and Albanian witnesses notified in Disclosure Packages 160, 174 and 175, ranging from 2000 to 2020, which were obtained prior to Mr Thaçi’s Indictment. The same applies to the various OSCE, NATO, KFOR or ECMM reports notified in Disclosure Packages 170 and 175, dated 1999 and 2000.

39. As noted by the ICTY, 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*”⁶¹ 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 gmanner.*”⁶² Any disclosure of exculpatory material which has been in the prosecution’s possession for many months would likely amount to a violation of the Rules.⁶³ This is even more egregious when the material has been in the possession of the prosecution for several years, some of it even prior to the Accused’s Indictment.⁶⁴

⁶⁰ Framework Decision, para. 95.

⁶¹ *Karadzic* Reconsideration decision, paras 12, 13.

⁶² *Ibid.*, para. 12.

⁶³ *Karadzic* Reconsideration decision, para. 15.

⁶⁴ *Lukic* Decision, para. 23.

40. The complexity of the case and/or the amount of material in possession of the SPO cannot be an excuse for prosecution's failure to properly organise itself to ensure that disclosure is carried out in accordance with the Rules.⁶⁵ The SPO cannot delay the disclosure of exculpatory material already in its possession, or identify and disclose potentially exculpatory material on a "rolling basis".⁶⁶ The SPO has not made sufficient efforts to ensure the identification of exculpatory material and its disclosure to the Defence⁶⁷ "immediately", "as soon as it is in its custody, control or actual knowledge", in violation of Rule 103.

41. Rule 110 sets out a non-exhaustive list of measures which the PTJ can take in response to the SPO's failure to comply with its disclosure obligations, such as a stay of proceedings or an exclusion of evidence. A further obvious example of a measure the PTJ may take is to formally recognise the disclosure violation by making a judicial finding on it.⁶⁸ During the Tenth status conference, the PTJ rightly appeared to acknowledge that the disclosure of the Everts Documents was 'late'.⁶⁹ In the absence of the SPO having received the PTJ's permission to delay or withhold the Rule 103 disclosure of the Everts Documents and other material listed above, by way of confidential and *ex parte* applications to the PTJ under either Rule 107 or Rule 108, then the SPO is in breach of Rule 103. The PTJ should issue such a finding.

C. THE DELAYED DISCLOSURE OF THE EVERTS DOCUMENTS AND OF ANY OTHER EXCULPATORY MATERIAL IS PREJUDICIAL TO THE DEFENCE

⁶⁵ ICTY, *Prosecutor v Karadzic*, No. IT-95-5/18-T, Oral Decision on Accused's Twenty-Sixth Disclosure Violation Motion, 3 November 2010, T8908; *Karadzic* Reconsideration decision, para. 12.

⁶⁶ *Karadzic* Reconsideration decision, para. 11.

⁶⁷ *Ibid.*

⁶⁸ ICC-01/14-01/18-1202-Red, Decision on the Yekatom Defence Motion for Finding of Disclosure Violation and Additional Remedies, 7 December 2021, P. 10.

⁶⁹ Tenth Status Conference, p. 914, line 16.

42. As noted by the PTJ, exculpatory material is crucial for the Defence investigation and, thus, for the expeditiousness of the case.⁷⁰ The SPO itself acknowledges that such material assists the Defence to develop its case and identify leads.⁷¹

43. The Everts Documents are particularly significant since they bring into question not only the SPO's JCE theory and charges against Mr Thaçi, but also the testimony of [REDACTED] his OSCE colleagues, [REDACTED].⁷² Because of this delayed disclosure, the Defence has lost time and efficiency in the conduct of its investigations, as it has expended time and investigative resources capturing the same information that was already in the SPO's possession.⁷³ It also wasted time speaking to Ambassador Everts without having his SPO statement, and in reviewing and analyzing the statements of Everts' colleagues, which will now need to be re-assessed in light of the Everts Documents.

44. Exculpatory material such as that referred to in this motion, opens further investigative avenues for the Defence, which the Defence need to follow up in a timely manner. This is one of the reasons it must be disclosed "immediately"; when the SPO sits on exculpatory material, investigative opportunities will undoubtedly be delayed or lost. The SPO's failure to disclose exculpatory material also then obliges the Defence to spend time and resources raising disclosure violations and engaging in litigation such as the present.

45. Mr Thaçi was further prejudiced by the late disclosure of the Everts Documents as he missed the opportunity to rely on it when applying for interim release in his

⁷⁰ Tenth Status Conference, p. 896.

⁷¹ *Ibid.*, p. 915.

⁷² [REDACTED].

⁷³ Thaçi Additional Submissions, para. 22.

second detention review. Indeed, the PTJ denied interim release without being aware of the true nature and strength of the SPO case, to the detriment of Mr Thaçi.⁷⁴

46. By raising the issue of the lack of disclosure of SPO statements of international figures at prior status conferences, the Defence was simply giving the SPO the opportunity to fulfil its disclosure obligations, and the SPO failed to comply with such obligation in a timely manner. The KSC cannot rely on a regime where the Defence would be disclosed only what it has explicitly asked for.

47. What is even more worrying and prejudicial to the Defence, is the slow pace at which the SPO is reviewing and disclosing exculpatory material, as illustrated by the content of Disclosure Packages 160, 170, 174 and 175, and its inability to identify how much material remains to be reviewed. Pursuant to its own submissions at the Tenth Status Conference, the SPO has just reviewed over 50 per cent of the more recently received or cleared material and remains unable to give any precise figure of the remaining documents to be reviewed, despite repeated requests.⁷⁵ At the end of the Tenth Status Conference, the PTJ asked the SPO to inform the Defence, *inter partes*, of the state of review of the material that the SPO has under its control or possession.⁷⁶ The Defence has not received any update yet.

D. THE SPO'S FAILURE TO DISCLOSE EXCULPATORY MATERIAL IMMEDIATELY WARRANTS THE APPOINTMENT OF AN INDEPENDENT AND IMPARTIAL ENTITY IN CHARGE OF REVIEWING, IDENTIFYING AND DISCLOSING SUCH MATERIAL

48. The SPO's failure to disclose exculpatory material as soon as it is in its custody, as illustrated by the example of the Everts Documents and other material listed in paragraphs 3 to 8 *supra*, as well as its inability to implement an organized, efficient,

⁷⁴ *Ibid.*, para. 23. See also Ninth Status Conference, p. 813.

⁷⁵ Tenth Status Conference, pp. 895-897.

⁷⁶ *Ibid.*, pp. 923.

and thorough system for the review of documentary evidence to ensure that all material falling within the disclosure-related Rules is provided to the Accused in a prompt manner,⁷⁷ justifies the appointment of an independent and impartial magistrate to review the material in the SPO's custody, identify and disclose exculpatory information. The fact that some documents may contain both incriminating and exculpatory information further justifies an impartial review of the material in the SPO's custody.

49. 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 guarantee the accused's rights and the expeditiousness of the proceedings.

50. The PTJ has the power to issue such order pursuant to Rule 110 of the Rules, Article 39(13) of the Law, Rule 48(2), and Rule 67. The order sought 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, in accordance with Article 31 of the Kosovo Constitution and Articles 1(2), 3(2)(e) and 21(2) of the Law.

51. Regarding the technical modalities, the Defence suggests that the PTJ appoints an independent magistrate who could be selected from the KSC roster of international judges, established pursuant to Article 26 of the Law. The magistrate should have access to the entire database of the SPO, as well as to the SPO Indictment and Pre-Trial Brief in the *Thaçi* case. He/she should be able to search through the SPO database and give instructions regarding the organisation of the review of such database, identification of exculpatory material and disclosure of such material. Thus, he/she should be tasked not only with the review of the SPO material but also with the definition and implementation of an organized, efficient, and thorough system for the review of documentary evidence to ensure that all exculpatory material falling within

⁷⁷ *Karadzic* Reconsideration decision, para. 12.

the disclosure-related Rules are provided to the Accused forthwith.⁷⁸ This would help to mitigate some of the prejudice caused to the Accused to date and to prevent any future prejudice.

V. CONCLUSION

52. For the foregoing reasons, the Defence respectfully requests the PTJ to grant the relief sought in paragraph 10.

[Word count: 5,712 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

Tuesday, 29 March 2022

At Tampa, United States

⁷⁸ *Ibid.*, para. 12.