PUBLIC
Date original: 25/03/2022 17:25:00
Date public redacted version: 01/09/2022 12:15:00

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
Date:	1 September 2022
Language:	English
Classification:	Public

Public Redacted Version of Thaçi Defence Reply to Prosecution response to Thaçi and Krasniqi motions concerning Rule 103 disclosure

---

Specialist Prosecutor

Jack Smith

Counsel for Victims

Simon Laws

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

David Young

Counsel for Jakup Krasniqi

Venkateswari Alagendra

PUBLIC
Date original: 25/03/2022 17:25:00
Date public redacted version: 01/09/2022 12:15:00

I. INTRODUCTION

1. The Defence for Mr Hashim Thaçi ("Defence") hereby replies to the Prosecution response to Thaçi and Krasniqi motions concerning Rule 103 disclosure.[1] The SPO has failed to justify the delayed disclosure of exculpatory material in violation of Rule 103 of the Rules.[2] The Defence therefore maintains its request that an independent and impartial magistrate or *amicus curiae* be appointed 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.[3]

II. DISCUSSION

A- THE SPO'S LATE DISCLOSURE OF EXCULPATORY MATERIAL VIOLATES RULE 103

2. The SPO seems to imply that because the Pre-Trial Judge ordered it to disclose Rule 103 material 'as soon as practicable and on a rolling basis', the fact that it discloses regularly packages of exculpatory documents is sufficient to comply with Rule 103.[4] This is wrong. As noted by the Pre-Trial Judge, the SPO has been ordered to disclose exculpatory material on a rolling basis because it is a continuous obligation[5] which will last until the end of the case. This does not mean that the SPO can wait months or years to disclose exculpatory material in its custody. Indeed, the SPO is bound by the terms of Rule 103, which clearly states that it shall disclose exculpatory material 'immediately', 'as soon as it is in his custody, control or actual knowledge', and the

[1] KSC-BC-2020-06/F00736, 17 March 2022, notified on 18 March 2022 ("SPO Response").
[2] Rules of Procedure and Evidence Before the KSC, KSC-BD03/Rev3/2020, 2 June 2020 ("Rules").
[3] KSC-BC-2020-06/F00724, Thaçi Defence Motion for an Independent and Impartial Review of Exculpatory Material, 7 March 2022 ("Thaçi Motion"), para. 10.
[4] SPO Response, paras 3-7.
[5] KSC-BC-2020-06/F00099, Framework Decision on Disclosure of Evidence and Related Matters, 23 November 2020, para. 66.

Pre-Trial has repeatedly recalled the SPO's duty to comply with those criteria during status conferences, including during the last one held on 24 March 2022.[6]

3. The SPO further criticises the case law quoted by the Defence pursuant to which the delayed disclosure of exculpatory material during months or years is a violation, on the ground that it relates to cases where trials had already commenced.[7] However these decisions establish clear principles, not dependant on the stage of the proceedings. Contrary to the SPO's submissions,[8] what is determinant is the date when the material came into the Prosecution's possession and the date of its provision to the Accused.[9] The SPO has failed to justify why it did not disclose old interviews of national or international key players 'immediately'. The SPO had been investigating the events in Kosovo for seven years and must know the core evidence in its possession; several prosecution members appearing in court were present during the interviews of those key players. The SPO applied for an Indictment against Mr Thaçi in April 2020, almost two years ago, and said it was ready for a trial to start in the summer 2021. Therefore, the fact that the current case is still at the pre-trial stage cannot justify the delayed disclosure of exculpatory information in the SPO's custody since several months or years.

4. Contrary to the SPO's submissions, its disclosure system is clearly not 'organised, efficient and thorough'.[10] The SPO has never been transparent[11] since it has never been able to indicate the exact number of documents which remain to be reviewed or at which date it will have completed its review, but rather employed approximate figures and general expression ('largely complete').[12] The ICTY Appeal

[6] KSC-BC-2020-06, Transcript of 11th Status Conference, 24 March 2022 ("11th Status Conference"), p. 22.
[7] SPO Response, para. 6, fn. 14.
[8] SPO Response, para. 9.
[9] ICTY, *Prosecutor v. Radovan Karadžić*, Decision on accused's seventeenth motion for finding of disclosure violation and for remedial measures, 29 September 2020, para. 18.
[10] SPO Response, para. 8.
[11] SPO Response, paras 7, 17.
[12] 11th Status conference, p. 1089.

Chamber has stressed that notwithstanding the practical difficulties encountered by the Prosecution in the assessment of large amounts of evidence in a complex case, evidence of an exculpatory nature must be disclosed to the defence forthwith.[13] The SPO argues that it needs time to review, transcribe, translate, apply redactions,[14] but many items which were not disclosed 'forthwith' did not require any translations or redactions. The SPO stresses that it has 'finite resources'[15] but it is its duty to have the required team to fulfil its disclosure obligations in a case against four individuals, with a large temporal and geographical scope, that it chose to prosecute, while asking that the Accused be kept in jail. The SPO complains that because of COVID, its staff worked remotely and did not have access to 'centralised evidentiary databases' between March 2020 and September 2021, which confirm that its disclosure system is not efficient, since numerous software like Legal Workflow and KSC shared drives are accessible remotely.

5. The SPO further seems to allege that since the Defence has not asked specifically to be disclosed Everts' statement, then it cannot complain about its late disclosure.[16] This is wrong again. The onus to disclose exculpatory material 'immediately' lies on the prosecution. The Defence cannot expect to be disclosed only exculpatory material it has asked for. In addition, the Defence has already asked the SPO to disclose information of an exculpatory nature by several emails, relating to the Marty Report, the Serbian State, etc., but it has not received any such material yet.

6. The SPO has failed to justify the late disclosure of the Everts Documents. Clearance being obtained in June 2021, the SPO could not ignore its significance for the Defence while it was disclosing at the same time the statements of his OSCE colleagues. The fact that the Everts Documents would have been 'allocated for

[13] ICTY, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, (Appeals Chamber) Judgement, 17 December 2004, para. 243.
[14] SPO Response, para. 8.
[15] *Ibid.*
[16] SPO Response, para. 9.

exculpatory review after the review of the 68 000 other items'[17] only illustrate the failure of the SPO disclosure system. The Everts Documents, relating to a senior OSCE officials who clearly contradicts the position of some OSCE prosecution witnesses, should have been flagged immediately.

7. Ironically, the SPO submits that it completed its disclosure obligation relating to Bujar Bukoshi' statement by listing his statement in its Rule 102(3) Notice.[18] However the SPO mentioned only a witness number, [REDACTED], unknown to the Defence, and not his name. Therefore, the Defence had no means to know it related to Bujar Bukoshi and the SPO clearly failed to fulfil its disclosure obligation. This reveals a clear dysfunction of the SPO disclosure system. The Defence does not know whether the SPO omitted to write the full name of the witness by mistake or by choice, to redact his identity. In both cases, this is a real concern, as his full identity should have been disclosed in the SPO Rule 102(3) Notice. The Defence therefore asks the SPO to disclose the names of all the witnesses listed in its Rule 102(3) Notice.

8. With regard to the United States Department Letter dated 4 May 1999, confirming the lack of effective command of the KLA, which has not been located by the SPO in its database,[19] the Defence can only reiterate its observations submitted during the 11th Status Conference.[20]

9. Last but not least, the Defence notes that the SPO has further failed to justify the delayed disclosure, during 16 months, of [REDACTED]'s SPO interview,[21] be it in its Response or during the last status conference.[22] The SPO did not need any Rule 107 clearance, nor any translation since the interview was conducted in English, and the SPO had knowledge of the significance and exculpatory nature of his testimony since

[17] SPO Response, para. 10.
[18] SPO Response, para. 10.
[19] *Ibid*.
[20] 11th Status Conference, pp. 1094, 1109-1110.
[21] Thaçi Motion, para. 36.
[22] 11th Status Conference, p. 1114.

the beginning of this case since Ms Lawson conducted his interview in September 2020.[23]

10. The examples above, as well as those listed in the Thaçi Motion, clearly demonstrate that the SPO has failed to comply with Rule 103. The Pre-Trial Judge should make such a finding.

B- THE SPO'S LATE DISCLOSURE OF EXCULPATORY MATERIAL IS PREJUDICIAL TO THE DEFENCE

11. The SPO maintains that the Defence has not been prejudiced by the timing of the disclosures in question, in particular in light of the stage of the proceedings.[24] However it is precisely at the pre-trial stage that the Defence needs exculpatory information, in order to conduct efficient investigations before the start of the trial. Once the trial starts, less efforts and resources can be allocated to investigations in light of the time required by court hearings and preparation of cross-examination.

12. The SPO focusses on the Everts Documents and alleges that the Defence would not be prejudiced by their late disclosure because the Defence would have accomplish only a '*minimal* steps' through a contact by a single defence team member.[25] The Defence does not have to reveal to the SPO nor to the Court the methods or extent of its investigations; it suffices to say that several team members met Mr Everts and discussed his potential testimony prior to the disclosure of his SPO statement. It follows that the Defence will need to reorganise another meeting to confront Mr Everts to his prior statement, which will require further time and resources, while, at the same time, the Defence needs to investigate 326 witnesses and more than 40 alleged

[23] 11th Status Conference, pp. 1090-1092, 1109, 1113-1114.
[24] SPO Response, para. 13 (SPO's itallic).
[25] SPO Response, para. 14.

crimes sites. The Defence does not have the time to go through this exercise each time the SPO manages to disclose exculpatory material while it was in its custody since serval months or years. Disclosure of exculpatory material must be done 'immediately'. The Defence has applied for a ruling with regard to the SPO Rule 103 disclosure obligations not only in relation to the Everts Documents but because of the late disclosure of hundreds of documents,[26] one year and a half after Mr Thaçi surrendered to the KSC. The prejudice of the Defence lies in the massive, delayed disclosure of exculpatory material, which has a detrimental impact on its investigations and preparation for trial.

C- THE APPOINTMENT OF AN INDEPENDENT AND IMPARTIAL ENTITY IN CHARGE OF REVIEWING, IDENTIFYING AND DISCLOSING EXCULPATORY MATERIAL IS NECESSARY

13. The SPO argues that the appointment of such an entity is not justified because other courts have denied such a remedy.[27] This argument is without merit since these courts have not said it was not possible but, eventually, that it was not required in the particular cases under consideration. Ultimately, the necessity to appoint an independent magistrate or *amicus curiae* to review, identify and disclose exculpatory material can only be assessed on a case-by-case basis, and is warranted in the particular circumstances of the current case, where the SPO has failed to disclose 'immediately' hundreds of exculpatory documents in its custody since several years, without justification, to the prejudice of the Defence.

14. Given the number of witnesses and exhibits relied upon by the SPO, this case is going to last for years. Therefore, it is in the interest of the Defence that a solution be adopted at this stage of the proceedings to ensure the timely disclosure of

[26] See, *inter alia*, Thaçi Motion, paras 2-5.
[27] SPO Response, para. 19.

exculpatory material until the end of the case. The remedy proposed by the Defence will not delay the proceedings[28] but contribute to the 'immediate' disclosure of exculpatory by the SPO and to efficient investigations/preparation by the Defence. The Pre-Trial Judge must thus intervene to protect the Accused's rights to be disclosed exculpatory material 'immediately' and to have enough time for the preparation of its Defence.

III. CONCLUSION

15. For the foregoing reasons, the Defence maintains the relief sought in its Motion.[29]

[Word count: 1,990 words]

Respectfully submitted,

Gregory W. Kehoe

Counsel for Hashim Thaçi

Thursday, 1 September 2022

At Tampa, United States

[28] SPO Response, paras 21-22.
[29] Thaçi Motion, para. 20.