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SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In:	**KSC-BC-2020-06**
	Specialist 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 Prosecutor
Date:	2 September 2022
Language:	English
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Public Redacted Version of 'Prosecution response to THAÇI and KRASNIQI motions concerning Rule 103 disclosure', KSC-BC-2020-06/F00736, dated 17 March 2022

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I. INTRODUCTION

1. The Motions[1] should be summarily rejected. Contrary to the THAÇI Defence's extravagant theories and attempts to distract from the charges in this case,[2] the Specialist Prosecutor's Office ('SPO') has been consistently discharging its obligation to disclose exculpatory material in good faith and in compliance with Article 21(6) of the Law,[3] Rule 103 of the Rules,[4] and the Framework Decision.[5]

2. As demonstrated in detail below, the Motions are fundamentally flawed. The Defence wrongly assert that, because Rule 103 disclosure is ongoing, the SPO has necessarily breached its disclosure obligations. However, even the jurisprudence relied upon by the Defence itself undermines that claim. The Defence fail to demonstrate how the respective timing of the disclosures referred to in the Motions

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[1] Thaçi Defence Motion for an Independent and Impartial Review of Exculpatory Material, KSC-BC-2020-06/F00724, 7 March 2022 ('THAÇI Motion'), Confidential; 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, 11 March 2022 ('KRASNIQI Motion', collectively with the THAÇI Motion, 'Motions'), Confidential. *See also* Veseli Defence Joinder to F00724 and F00730, KSC-BC-2020-06/F00732, 15 March 2022, Confidential; Selimi Defence Joinder to F00724 and F00730, KSC-BC-2020-06/F00735, 15 March 2022, Confidential. The THAÇI, KRASNIQI, VESELI and SELIMI Defence are collectively referred to as the 'Defence'.

[2] *See, e.g.*, Request for Dismissal of KSC-BC-2020-06/IA017/F00008, KSC-BC-2020-06/IA017/F00009, 18 February 2022, Confidential, fn 28, *referring to* Transcript of Status Conference dated 4 February 2022, pp.906-909 (Defence Counsel claiming that the matter 'shakes the foundation of the international justice system', claiming that the prosecution had presented only 'a half story' when submitting the indictment, making allegations regarding 'rogue prosecutions, rogue judicial systems' and 'deception and stating that '[t]he KSC has lost its way' and, if not corrected, the 'legacy of international justice will forever irreparably be harmed'); Klan TV, Opinion, available at https://www.youtube.com/watch?v=fJtrWR13EF0 (quoting Defence Counsel Dastid Pallaska falsely claiming that 'there was a scandal of dimensions probably unheard of for any court, even those that work in the most undemocratic and repressive systems: it was found that the prosecution had deliberately hidden an exculpatory evidence and which it disclosed only when they realised they were caught hiding that evidence'; and claiming the documents not having been part of indictment supporting material to have been 'an unprecedented, unforgivable scandal').

[3] Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.

[4] Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

[5] Framework Decision on Disclosure of Evidence and Related Matters, KSC-BC-2020-06/F00099, 23 November 2020 ('Framework Decision'), paras 66, 68.

violates the applicable legal framework, that certain information is potentially exculpatory, or that other information is even in the SPO's custody, control, or actual knowledge. In any event, even assuming *arguendo* that the Defence was able to show such a breach, which it has not, it has still not demonstrated any prejudice and, in turn, it cannot show that any remedy – let alone those proposed in the Motions – is justified.

II. SUBMISSIONS

A. THE DISCLOSURE OF EXCULPATORY MATERIAL COMPLIES WITH RULE 103

3. The SPO has been discharging its disclosure obligations, including of potentially exculpatory material, in good faith and consistent with its mandate to, *inter alia*, contribute to the establishment of the truth and respect the fundamental rights of the Accused.[6] Rule 103 represents a continuous and ongoing obligation for the SPO to immediately disclose potentially exculpatory material to the Defence, unless justifiable reasons prevent immediate disclosure.[7] Pursuant to Article 39(1) and (13) and Rule 95(2)(b), i.e. in furtherance of his duty to ensure that the case is prepared properly and expeditiously for trial, the Pre-Trial Judge ordered the SPO to disclose 'Rule 103 material as soon as practicable and on a rolling basis.'[8]

4. Those directions reflect the prioritisation which must be afforded to the disclosure of potentially exculpatory information. However, cases which the Defence themselves cite[9] demonstrate that - notwithstanding certain differences in language - Rule 103, as correctly interpreted by the Pre-Trial Judge in the directions given in the Framework Decision, is consistent with jurisprudence which had interpreted

[6] *See, inter alia*, Rule 62.
[7] Framework Decision, KSC-BC-2020-06/F00099, para.66; Framework Decision on Disclosure of Evidence and Related Matters, KSC-BC-2020-05/F00034, 9 October 2019 ('*Mustafa* Framework Decision'), para.54; Framework Decision on Disclosure of Evidence and Related Matters, KSC-BC-2020-04/F00033, 30 April 2021 ('*Shala* Framework Decision'), para.54.
[8] Framework Decision, KSC-BC-2020-06/F00099, para.68. *See also Mustafa* Framework Decision, KSC-BC-2020-05/F00034, para.56; *Shala* Framework Decision, KSC-BC-2020-04/F00033, para.56.
[9] *For example,* KRASNIQI Motion, KSC-BC-2020-06/F00730, para.12; THAÇI Motion, KSC-BC-2020-06/F00724, para.25.

provisions relating to exculpatory disclosure at courts and tribunals with equivalent disclosure frameworks.[10]

5. Moreover, although the SPO in fact initiated all reasonable advance steps, reviews and preparations to facilitate exculpatory disclosure at a much earlier point in time - prior even to submission of an indictment for confirmation - review and disclosure of potentially exculpatory material is an obligation which arises as part of a subsequent *inter partes* pre-trial process.[11] This is necessarily the case, given that (i) the identification of potentially exculpatory materials must be done in the context of, and relative to, concrete, confirmed charges, against specific accused - that is in light of a confirmed indictment, and (ii) review and disclosure thereof can only take place with knowledge of the protective measures regime which will apply in the particular case. Within that context, any assessment of the efforts made should consider what is a 'reasonable timeframe, taking into account all relevant circumstances'.[12]

6. As such, the fact that potentially exculpatory material has been, and is being, disclosed on a 'rolling basis' during the pre-trial phase in this case, does not mean that the SPO has withheld or delayed disclosure of items in its possession. Rather, it reflects the basic reality of the time and resource demands involved in reviewing many tens of thousands of documents in a thorough, organised and systematic manner. The SPO

[10] The *ad hoc* tribunals, ICC and STL have all interpreted the 'as soon as practical' language in their respective statutes to equate to a requirement of immediacy, subject to justifiable reasons. *For example* ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-203, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 27 February 2015, para.18; ICTY, *Prosecutor v. Kordić et al*, IT-95-14/2-A, Judgement, 17 December 2004, para.243; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on Accused's third, fourth, fifth and sixth motions for finding of disclosure violations and for remedial measures, 20 July 2010, para.25; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ/F0496, Order on a Working Plan and on the Joint Defence Motion Regarding Trial Preparation, 25 October 2012, para.27.

[11] ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution's Request for Reconsideration of Trial Chamber's 11 November 2010 Decision, 10 December 2010, para.12 (indicating that the identification and disclosure of exculpatory material 'should have *started* in earnest' once an accused had been transferred to the tribunal and made an initial appearance (emphasis added)). *See* THAÇI Motion, KSC-BC-2020-06/F00724, para.39 and KRASNIQI Motion, KSC-BC-2020-06/F00730, para.14.

[12] ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution's Request for Reconsideration of Trial Chamber's 11 November 2010 Decision, 10 December 2010, para.11 - as cited to by the Defence themselves, THAÇI Motion, KSC-BC-2020-06/F00724, para.27; the paragraph in the KRASNIQI Motion omits this portion of the paragraph cited (KRASNIQI Motion, KSC-BC-2020-06/F00730, para.13).

simply cannot be expected to disclose material that – despite its best efforts – it has not been able to review and assess relative to the confirmed charges.[13] Notably, the cases which the Defence attempt to rely upon to assert delay are manifestly inapposite, and in no way comparable to the procedural posture of the present case, relating, for example, to rulings made, and issues arising, after the relevant trials had already commenced.[14]

7. In this case, within 30 days of the initial appearance, on 10 December 2020, the SPO disclosed 1309 potentially exculpatory items under Rule 103.[15] Since, the Rule 103 review and disclosure process has been conducted transparently in the ordinary course of an *inter partes* pre-trial process, which is ongoing[16] and has thus far resulted

[13] ICTR, *Prosecutor v. Kalimanzira*, ICTR-05-88-A, Appeals Chamber, Judgement, 20 October 2010 ('*Kalimanzira* Appeal Judgement'), para.21 citing ICTY, *Prosecutor v, Krstić*, IT-98-33-A, Judgement, 19 April 2004, para.197.

[14] *For example*, ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution's Request for Reconsideration of Trial Chamber's 11 November 2010 Decision, 10 December 2010 (referred to in the Motions as the Karadžić Reconsideration Decision and relied upon, *inter alia*, to assert, without any relevant context, that material which has been in the prosecution's possession for many months would likely constitute a violation, that material cannot be disclosed on a 'rolling basis', and that complexity or volume cannot be an excuse for a failure of proper organisation (THAÇI Motion, KSC-BC-2020-06/F00724, paras 39-40). This is a decision which was issued on 10 December 2010, more than a year after the trial in *Karadžić* had opened in October 2009); ICTY, *Prosecutor v Lukić*, Decision on Milan Lukić's Motion for Remedies Arising out of Disclosure Violations by the Prosecution, 12 May 2011 (relied upon, *inter alia*, to assert, again without any relevant context, that a violation may be even more egregious where an item has been in the prosecution's possession for several years. This decision was issued at the Appeals stage, following a trial judgment in the case, and in relation to materials which had not been disclosed until a very advanced stage of proceedings).

[15] Disclosure Package 8.

[16] Transcript of Status Conference dated 18 November 2020, p. 131 ('The SPO will be disclosing over 1.000 potentially exculpatory items not later than disclosure of the indictment supporting material. And consistent with our obligations, we'll continue to immediately disclose any potentially exculpatory information on a rolling basis.'); Transcript of Status Conference dated 17 December 2020, p.185 ('With regard to the disclosure process, the SPO has now already disclosed 1.309 potentially exculpatory items pursuant to Rule 103.'), p.186 ('Looking to the immediate future, and in line with our commitment to rolling disclosure, we anticipate disclosing a second package of potentially exculpatory items shortly after the judicial recess.'); Transcript of Status Conference dated 16 February 2021, p.234 ('The SPO is also continuing to fulfil its disclosure obligations under Rule 103 with respect to potentially exculpatory items, most recently in disclosure package 20 released on 11 February. We're continuing to review and prepare disclosure of further items pursuant to Rule 103.'); Transcript of Status Conference dated 24 March 2021, p.324 ('Review of potentially exculpatory material is also ongoing to meet our continuing obligation.'); Transcript of Status Conference dated 19 May 2021, p.400 ('We are also continuing the review of potentially exculpatory material. We have recently made a protective measures request in

relation to a small number of documents identified during this exculpatory review. At this time, no further protective measures requests in relation to such material is foreseen. However, we will continue to disclose or seek protective measures as required in relation to potentially exculpatory material identified.'); Transcript of Status Conference dated 21 July 2021, pp.461-462 ('Turning to Rule 103 material. Since the last Status Conference, four packages of potentially exculpatory items falling under Rule 103 have been disclosed. […] Further review of material remains ongoing, and the SPO will continue to promptly disclose any such material. No protective measures request is currently imminent. […]'); Transcript of Status Conference dated 14 September 2021, p.582 ('Since the last Status Conference, five packages of potentially exculpatory items have been disclosed, including, most recently, disclosure package 83. Remaining materials are being worked through. The review is ongoing, and we will continue to disclose the materials on a rolling basis as soon as it is identified. And there are no protective measures requests imminent in respect of such material.'), pp.589-590 ('Now, we're not in any way suggesting that that makes it less of an obligation for us to disclose that material. We are reviewing and will disclose it. But just to note that it may well not be significantly new exculpatory issues that are arising. And in addition, as the Thaci Defence team themselves mentioned, certain items are, of course, only exculpatory relative to the witnesses and evidence that's being relied upon. So that is a review that we will need to continue and we're aware that we need to continue it as we finalise our witness and exhibit lists.'), p.593 ('To be clear, I did not say that 68.000 items have not been reviewed. There is a subset of that data which has not been reviewed fully for exculpatory material yet, and that review is ongoing.'); Transcript of Status Conference dated 29 October 2021, p.702 ('We are continuing to disclose potentially exculpatory items on a rolling basis as they are identified. That review does remain ongoing, and outstanding items are being worked through systematically. In addition to the three packages you mentioned which have already been disclosed, two further packages are being processed and are expected to be disclosed within the coming week. No protective measures request is currently imminent.'), p.704 ('As I indicated in my prior submissions, the exculpatory review is not complete and, therefore, it is not a confirmation that I can give.'); Transcript 15 December 2021, p.811 ('Since the last Status Conference, the SPO disclosed three further packages of potentially exculpatory items. The SPO has also indicated that a protective measures request in respect of a small number of items will be forthcoming. […] Indeed, we are continuing to conduct exculpatory reviews and run relevant searches for potentially exculpatory material as the witness and exhibit lists are being finalised. And we are, of course, also aware that exculpatory disclosure will remain an ongoing obligation of the office throughout the proceedings and after the current review exercises are completed.'), p.815 ('We have, indeed, indicated that a review of the materials is ongoing. If Defence teams, for whatever reason, wish to identify items that they are apparently wishing to be reviewed with priority, they are welcome to inform us of those and we will expedite their review accordingly. And we would believe that that would be more effective than a repeatedly abstract discussion about such items in these Status Conferences. We are well aware of our obligations for the exculpatory review and disclosure, and we are working hard on those as well as we are working on the other disclosure obligations.); Transcript of Status Conference dated 4 February 2022, pp.896-897 ('As you noted, since the last Status Conference we have disclosed two further packages of potentially exculpatory material. That's Packages 152 and 160. And as outlined in our written submissions, we're working to complete exculpatory reviews of material held. Review is currently focused, in particular, on materials that were either received by the office or otherwise cleared for disclosure purposes within approximately the past six or seven months. And, in addition, in light of the finalisation of the witness list in December 2021, we are organising certain additional focused exculpatory reviews and searches related to that. In respect of the progress, the current status. We are now over 50 per cent through review of the more recently received or cleared items. So it would be hard to give an estimate, but the review is continuing at a rapid pace for those items. And the results of the reviews that have been conducted have either been disclosed. We've disclosed 21 packages to date of Rule 103 materials, or they're being processed for disclosure, including

in the disclosure of 4035 items under Rule 103.[17] This process has entailed the review of voluminous records, amounting to many tens of thousands of documents from many different sources, in many different languages, subject to various provider-applied conditions and restrictions, and concerning hundreds, if not thousands, of (sensitive) witnesses and victims, in proceedings before the Specialist Chambers and other criminal investigations and proceedings conducted over the last twenty plus years. While the SPO discharges its Rule 103 obligations, it has also been identifying, reviewing, preparing, and disclosing tens of thousands of items falling under Rule 102(1) and 102(3), while some of those items contain many hundreds of pages each.

8. In such circumstances, the SPO employed an organised, efficient, and thorough disclosure system[18] – with due respect for the interests of justice, safety and security of witnesses and victims, and the rights of the Accused – that was and is necessarily tailored to and must be considered in light of, *inter alia*:[19] (i) the voluminous nature of the records under review;[20] (ii) the accompanying need to transcribe, translate, obtain clearance, review and apply redactions, and/or assess and request necessary protective measures;[21] and (iii) other factors, such as finite resources, competing

conducting redaction reviews, or they're being collated for a protective measures request, and we're aiming to collate those materials as much as possible in the interests of judicial efficiency overall.').

[17] So far, a total of 26 packages were disclosed under Rule 103 (namely, Disclosure Packages 8 (1309 items), 20 (462 items), 26 (27 items), 35 (97 items), 36 (165 items), 39 (260 items), 45 (209 items), 56 (23 items), 73 (160 items), 71 (23 items), 76 (22 items), 83 (18 items), 90 (146 items), 92 (54 items), 98 (82 items), 110 (97 items), 111 (110 items), 119 (118 items), 152 (45 items), 160 (119 items), 170 (55 items), 174 (118 items), 175 (47 items), 176 (89 items), 181 (138 items) and 186 (42 items) amounting to 4035 items.

[18] *See* KRASNIQI Motion, KSC-BC-2020-06/F00730, para.14 and the source cited therein; THAÇI Motion, KSC-BC-2020-06/F00724, para.39 and the source cited therein at fn 61-62.

[19] Notably, the THAÇI Defence cited and underlined the due diligence standard applicable in this context which requires '[i]n determining whether there has been a violation of the Rule' to 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'. *See* THAÇI Motion, KSC-BC-2020-06/F00724, para.27 *citing* ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution's Request for Reconsideration of Trial Chamber's 11 November 2010 Decision, 10 December 2010, para.11.

[20] *Kalimanzira* Appeal Judgement, para.21.

[21] The SPO cannot be expected to disclose material which, acting in good faith, it has not been able to adequately review and assess, including in light of the potential impact on witnesses and victims. *See Kalimanzira* Appeal Judgement, para.21 and the sources cited in fn.51. *See also* [REDACTED].

disclosure and other deadlines and obligations, and the realities of the COVID pandemic, which has coincided with the pre-trial proceedings in this case. The pandemic has not only resulted in regular staff absences (up to and including the present day) due to illness of staff or their close family members, but also necessitated that the majority of staff worked predominantly remotely, without access to centralised evidentiary databases, for approximately 18 months (between March 2020-September 2021).[22] Considered in this light, the Motions – which do not address, let alone acknowledge, the circumstances or procedural stage of this case and the SPO's transparency throughout these proceedings as to the status of disclosure review[23] – fail to displace the presumption of good faith afforded the SPO in discharging its obligations.[24] Accordingly, the Defence allegation that the SPO has violated its Rule 103 obligation because it has not yet completed its exculpatory review and related disclosure has no reasonable basis.[25]

9. Contrary to the Defence's submissions,[26] the SPO has not withheld and is not withholding any exculpatory material in bad faith. The Defence submissions are, for the most part, speculative, generalised and incapable of demonstrating that material is potentially exculpatory[27] and/or any disclosure violation. Insofar as Defence

[22] While the SPO promptly implemented alternative, work-around systems in order to maintain continuity of work throughout, this involved very significant, complex, and time-consuming additional logistical and administrative challenges.
[23] *See* fn 16 above.
[24] The onus is on the Defence to displace the presumption that the SPO is discharging its disclosure obligation under Rule 103 in good faith. *See* ICTR, *Prosecutor v. Nahimana*, ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion Requesting that the Prosecution Disclosure of the Interview of Michel Bagaragaza be Expunged from the Record, 30 October 2006, para.6; MICT, *Prosecutor v. Niyitegeka*, MICT-12-16-R, Decision on Appeals of Decisions Rendered by a Single Judge, 9 August 2017, para.18; MICT, *Prosecutor v. Stanišić et al*, MICT-15-96-T, Decision on Stanišić Defence Motion Alleging Violation of the Prosecution's Disclosure Obligations, 18 December 2019, p.2; STL, *Prosecutor v. Ayyash*, STL-11-01/PT/PTJ, Defence's First, Second, Third, Fourth, Fifth and Sixth Motions for Disclosure, 8 November 2012, para.28.
[25] THAÇI Motion, KSC-BC-2020-06/F00724, paras 1, 39-40; KRASNIQI Motion, KSC-BC-2020-06/F00730, paras 34-35, 41.
[26] THAÇI Motion, KSC-BC-2020-06/F00724, paras 2-9; KRASNIQI Motion, KSC-BC-2020-06/F00730, paras 21-22, 26, 28-36, 39.
[27] *See*, *e.g.*, THAÇI Motion, KSC-BC-2020-06/F00724, paras 7-8.

arguments revolve around the date of disclosure and the date of certain documents,[28] such arguments are plainly inadequate, without more, to demonstrate either a violation or prejudice.[29] Moreover, while the Defence claims that it has repeatedly requested disclosure from the SPO,[30] the context of such requests belie their nature and purpose. Rather than genuine engagement in relation to disclosure, such requests were merely rhetorical questions asked in open court[31] to publicly advance unsupported and exaggerated theories impugning the conduct of the SPO and SC in this case and attempting to distract from the charges against the Accused.[32] While the SPO has indicated multiple times that it is open to good faith *inter partes* engagement on the disclosure process, including Rule 103 disclosure, the Defence has not responded in kind.[33] In doing so, the Defence has acted in bad faith and demonstrated

[28] *See, e.g.*, THAÇI Motion, KSC-BC-2020-06/F00724, paras 2-5, 37-38; KRASNIQI Motion, KSC-BC-2020-06/F00730, paras 20, 22, 25, 27.

[29] *See* paras 5, 7 and 8 above. The fact that a document might be dated 1998, 2000, 2014, 2016, or 2017 (KRASNIQI Motion, KSC-BC-2020-06/F00730, paras 20, 22, 30-31; THAÇI Motion, KSC-BC-2020-06/F00724, paras 4-5) has no bearing on the assessment for exculpatory content necessary in light of an indictment confirmed on 26 October 2020; nor does it take into account the further essential steps outlined in paragraphs 7 and 8 above. Equally, submissions regarding the date of disclosure of materials relating to other international witnesses or documents (KRASNIQI Motion, KSC-BC-2020-06/F00730, para.25) are irrelevant, both because clearances are obtained on a witness-by-witness, item-by-item basis and not *en bloc*, and because material must necessarily be worked through in a systematic manner.

[30] *See, e.g.*, THAÇI Motion, KSC-BC-2020-06/F00724, paras 14, 46; KRASNIQI Motion, KSC-BC-2020-06/F00730, paras 3-4, 40.

[31] *See, e.g.*, Transcript of Status Conference dated 29 October 2021, pp.702-703 (THAÇI's Defence Counsel asking, after the SPO already explicitly stated that Rule 103 reviews were ongoing: 'Is it the Prosecution's position that they have disclosed all witness statements that have exculpatory material? That's the question.'); Transcript of Status Conference dated 15 December 2021, p.813 (THAÇI's Defence Counsel asking: 'and a rhetorical question is: if that statement is not turned over by a very competent witness in the international arena, what else is not being turned over? What else has not been given to the Defence? What else falls in the category of Rule 103 material that we wait in vain for? It's very disturbing, Your Honour. It's very disturbing. […]').

[32] *See* fn.2 above.

[33] *See e.g.* Transcript of Status Conference dated 15 December 2021, p.776, 826-827 (the SPO expressly stating being open to *inter partes* discussions regarding all disclosure matters); Transcript of Status Conference dated 4 February 2022, p.897 (the SPO explaining having contacted the THAÇI Defence to ask whether they would like the SPO to prioritise review of any particular item to which they responded they would be raising the matter at the status conference).

an unwillingness to constructively engage *inter partes* in relation to Rule 103 disclosure.

10. The few, specific examples mustered in the Motions demonstrate the overall inadequacy thereof.

a. Everts Documents.[34] The record shows due diligence on the part of the SPO in disclosing the Everts Documents in Disclosure Package 160 on 1 February 2022. As recognised by the Defence, the SPO applied for Rule 107 clearance of these documents in 2019 and clearance was received on 30 June 2021. At the time, the SPO was reviewing and processing more than 68,000 items on its Rule 102(3) notice. Accordingly, for purposes of conducting the review in a comprehensive and organised fashion, the Everts Documents, along with other more recently obtained/cleared materials, were allocated for exculpatory review after the review of the 68,000 other items was nearing completion. In this context, the Everts Documents were timely disclosed to the Defence on 1 February 2022.

b. Bujar BUKOSHI's statement. In accordance with applicable requirements, this statement was listed on the Rule 102(3) notice,[35] and as such, has already been available for the Defence to request for a considerable period of time.[36]

c. United States State Department Letter dated 4 May 1999. The Defence, without first attempting to verify on an *inter partes* basis, submits that this letter is in the SPO's custody, control, or actual knowledge solely on the basis that the SPO has contact with American authorities;[37] such an

[34] 049196-049198 RED, 049808-049835 RED, and 049984-049988 RED ('Everts Documents').
[35] *See* Prosecution Amended Rule 102(3) Notice Pursuant to F00421 with confidential Annexes 1 and 2, KSC-BC-2020-06/F00543, 22 October 2021, items 4285-4287. The descriptions provided make the potential relevance of the items clearly apparent (Item 4285: '[REDACTED].'; Item 4286: '[REDACTED].'; Item 4287: '[REDACTED].').
[36] Moreover, the basis which the THAÇI Defence puts forward for asserting that this item is exculpatory is not only entirely speculative, but also inaccurate. [REDACTED]. [REDACTED].
[37] THAÇI Motion, KSC-BC-2020-06/F00724, para.6.

argument, without more, fails to present a *prima facie* case that this letter is in the custody, control, or actual knowledge of the SPO. In fact, the SPO has searched its evidence collection and has not been able to locate this letter.

11. The Defence has not demonstrated any violation under Rule 103 and on this basis alone, the Motions should be dismissed.

B. FAILURE TO SHOW ANY PREJUDICE SUFFERED BY THE TIMING OF THE DISCLOSURES

12. Even if the Defence was able to show a breach of the SPO's obligation under Rule 103 – which it has not[38] – the Pre-Trial Judge must determine 'whether the Defence has actually been prejudiced by such failure before considering whether a remedy is appropriate'.[39] It is a well settled principle that 'the fact that material has not been disclosed in a timely manner does not *per se* create a prejudice to the accused.'[40] In addition, the prejudice shown has to qualify as 'material'.[41]

13. Contrary to the Defence's cursory submissions,[42] the timing of the disclosures in question have not led to any prejudice to the Defence. The stage of the proceedings itself shows the lack of any prejudice - the Accused have not procedurally taken any substantive position at this stage regarding their Defence case theory and there is no date set yet for the filing of the Defence's Rule 95(5) materials, for the transfer of the case file to Trial Panel, or for the start of trial.

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[38] *See* paras 3-11 above.

[39] ICTR, *Prosecutor v Nahimana*, ICTR-99-52-A, Decisions on Motions relating to the Appellant Hassan Ngeze's and the Prosecution's Requests for leave to present Additional Evidence of Witnesses ABC1 AND EB, 27 November 2006, para.11. *See also* ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused's Eighty-second Disclosure Violation notion, 7 November 2013, para.14.

[40] ICTR, *Prosecutor v. Karemera et al*, ICTR-98-44-T, Decision on Joseph Nzirorera's 13th, 14th, and 15th Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures: ZF, Michel Bakuzakundi, and Tharcisse Renzaho, 18 February 2009 ('*Karemera* Decision'), para.18; ICTR, *Prosecutor v. Kajelijeli*, ICTR-98-44A-A, Judgement, 23 May 2005, para.262.

[41] *Karemera* Decision, para.18.

[42] THAÇI Motion, KSC-BC-2020-06/F00724, paras 42-45; KRASNIQI Motion, KSC-BC-2020-06/F00730, paras. 37-38.

14. In relation to the Everts Documents, the THAÇI Defence argues that the alleged 'delayed' disclosure resulted in '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'.[43] Concretely, it appears that the alleged 'expended time and investigative resources' refer to *minimal* steps taken by one defence team member 'who worked in the international community' to contact Mr EVERTS and discuss the matter.[44] Importantly, the THAÇI Defence appears to have been in contact with Mr EVERTS from at least October 2021.[45] It has therefore known the information and has been in a position to use Mr EVERTS' views in the planning of its investigation and evidence analysis since at least this time. Equally, the time necessary to review and analyse the statements of Mr EVERTS' three colleagues in light of the Everts Documents[46] appear extremely marginal *at best* given that at least by October 2021, the THAÇI Defence was aware of the tenor of this exculpatory material whose value, in any case, is greatly overstated by the Defence.[47] The KRASNIQI Defence invokes the exact same prejudice, which is equally insignificant.[48] Given that the prejudice alleged by the Defence is infinitesimal, even taken at face value, a remedy is obviously unwarranted.

15. The remaining Defence submissions merely formulate broad and abstract allegations of prejudice relating to unsupported claims of missed opportunities for the Defence to pursue investigative avenues.[49] As such, they are defective, speculative, unsubstantiated, and incapable of showing prejudice.

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[43] THAÇI Motion, KSC-BC-2020-06/F00724, para.43.
[44] Transcript of Status Conference dated 04 February 2021, p.920 ('We went through who the ambassadors and the internationals were, and, guess what, Judge, we have a member of our team who worked in the international community, Ambassador Prosper, and Ambassador Prosper was the gentleman who contacted Ambassador Everts and we started this conversation.').
[45] Transcript of Status Conference dated 29 October 2021, pp.702-703.
[46] THAÇI Motion, KSC-BC-2020-06/F00724, para.43.
[47] *See*, *e.g.*, Request for Dismissal of KSC-BC-2020-06/IA017/F00008, KSC-BC-2020-06/IA017/F00009, 18 February 2022, paras 15-18, Confidential.
[48] KRASNIQI Motion, KSC-BC-2020-06/F00730, para.38.
[49] THAÇI Motion, KSC-BC-2020-06/F00724, para.44; KRASNIQI Motion, KSC-BC-2020-06/F00730, para.37.

16. In sum, the prejudice alleged by the Defence is nonexistent. Based on the lack of any prejudice as such suffered by the Defence, no remedy is justified and the Motions should be dismissed. For the sake of completeness, the remedies sought by the Defence are briefly addressed below.

C. THE REMEDIES SOUGHT ARE EXCESSIVE AND INAPPROPRIATE

17. Since the Defence fail to show any violation or prejudice, no remedy is warranted.[50] In addition to being unwarranted, the remedies sought are manifestly disproportionate and inappropriate to the prejudice claimed.

18. First, the KRASNIQI Defence does not explain or substantiate its request for a deadline to be set.[51] Further, this request does not take into account the ongoing and continuous obligations of the SPO under Rule 103 or the realities of the disclosure process, as set out above.[52] The SPO reiterates that it is, on an ongoing basis and in a transparent manner, keeping the Pre-Trial Judge and Defence apprised of Rule 103 disclosure status.[53] Indeed, as is apparent from the status updates which the SPO has provided,[54] the review is already at an advanced stage, is being pursued diligently, and consequently no deadline is necessary to ensure that the SPO continues to meet its obligations in this regard.

19. In relation to the request for appointment of a third-party reviewer, the frivolous nature of this request is demonstrated by the precedents omitted from the Motions. Neither the THAÇI Defence nor KRASNIQI Defence mention that other courts have consistently and repeatedly denied requests for third party reviewers

[50] *See* para.12 above.
[51] KRASNIQI Motion, KSC-BC-2020-06/F00730, para.45.
[52] *See* paras 3 -8 above.
[53] *See* para.7 above.
[54] *See* fn.16.

even in cases which were at a significantly more advanced stage and in the context of which several findings of non-compliance had previously been made.[55]

20. Considering the minimal alleged prejudice argued by the Defence,[56] the request to appoint an independent and impartial magistrate or *amicus curiae* to discharge the SPO's Rule 103 obligation is manifestly excessive.

21. Moreover, it is entirely unclear how such measure would mitigate the prejudice alleged.[57] In fact there is no link between this remedy and the violation and prejudice argued by the Defence, which relates to the timing of disclosure. The remedy proposed by THAÇI Defence, and supported by the other Defence teams, is utterly inappropriate and puzzling, insofar as it would clearly threaten, not advance, the fair and expeditious conduct of these proceedings. For example, the time that would be needed to identify, select, and process such appointment would, in and of itself, delay Rule 103 review and the pre-trial proceedings overall. Similarly, the time required for this hypothetical individual to familiarise themselves with the case and the SPO's evidentiary collections, recruit a team, and conduct such exculpatory review of tens of thousands of documents would undeniably lead to delays.

22. Further, such review would not, even *in arguendo*, accelerate the process when it comes to steps that need to be taken after identifying an exculpatory item, such as addressing the ongoing need to, as appropriate, transcribe, translate, obtain clearance,

[55] *See, e.g.*, ICTR, *Prosecutor v. Karemera et al*, ICTR-98-44-T, Decision on Joseph Nzirorera's 13th, 14th, and 15th Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures: ZF, Michel Bakuzakundi, and Tharcisse Renzaho, 18 February 2009, paras. 31-32; ICTR, *Prosecutor v. Karemera et al*, ICTR-98-44-T, Decision on Prosecutor's Rule 68(D) Application and Joseph Nzirorera's 12th Notice of Rule 68 Violation, 26 March 2009, para.27; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused's Forty-Ninth and Fiftieth Disclosure Violation Motions, 30 June 2011, para.52; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused's Fifty-First and Fifty-Second Disclosure Violation Motions, 7 July 2011, para.18; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision On Accused's Fifty-Third and Fifty-Fourth Disclosure Violation Motions, 22 July 2011, para.16.
[56] *See* paras 13-16 above.
[57] THAÇI Motion, KSC-BC-2020-06/F00724, para.51.

review and apply redactions, and/or assess and request necessary protective measures.[58]

23. The THAÇI Defence asserts that the purpose of this measure would be 'to prevent any future prejudice'.[59] As outlined above, there has been no violation of Rule 103 and no prejudice suffered to date. Given the unfounded nature of the claims, coupled with inflammatory public amplifications by members of the THAÇI Defence, it is apparent that the Motions are merely a tool to advance an agenda – to discredit the SPO and Specialist Chambers by any means and without any foundation – to the detriment of the interests of the Accused, and ultimately justice.

III. CLASSIFICATION

24. This filing is confidential pursuant to Rule 82(4). Once public versions of the Motions are ordered or filed, the SPO will file a public redacted version of this response.

IV. RELIEF REQUESTED

25. For the foregoing reasons, the Pre-Trial Judge should reject the Motions in their entirety.

Word count: 5782

Jack Smith

Specialist Prosecutor

[58] *See* para.8 above.
[59] THAÇI Motion, KSC-BC-2020-06/F00724, para.51.

Friday, 2 September 2022

At The Hague, the Netherlands.