

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

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Defence Counsel for Jakup Krasniqi

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Public Redacted Version of

Krasniqi Defence Reply to Prosecution Response to Thaçi and

Krasniqi Motions Concerning Rule 103 Disclosure (F00736),

KSC-BC-2020-06/F00753, dated 25 March 2022

Specialist Prosecutor

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I. INTRODUCTION

1. The Defence for Jakup Krasniqi (“Defence”) hereby replies to the Prosecution Response to Thaçi and Krasniqi motions concerning Rule 103 disclosure.¹ The excuses offered by the Specialist Prosecutor’s Office (“SPO”) should not divert the Court from the obvious conclusion that the SPO has failed in its obligation to disclose exculpatory material “immediately” or “as soon as” the material was in its custody. Contrary to the Response, the Defence is prejudiced by this delay and the relief sought in the Request² is a reasonable, necessary and proportionate response to the SPO’s failings.

II. THE SPO DID FAIL TO DISCLOSE EXCULPATORY MATERIAL IMMEDIATELY

2. At the core of the Response is the assertion that the profound discrepancy between the dates of the exculpatory documents and the dates of their disclosure to the Defence is “plainly inadequate, without more, to demonstrate either a violation or prejudice”.³ In fact, the reverse is true; the enormity of the gap between the date when the SPO obtained these documents and the date of their disclosure, and the number of documents affected, clearly demonstrates that the SPO did not disclose them immediately or as soon as they were in the SPO’s custody. Even if the test is “as soon as practicable”,⁴ which is not the wording of Rule 103,⁵ the delays are such that the SPO has failed to meet this threshold also.

¹ KSC-BC-2020-06, F00736, Specialist Prosecutor, *Prosecution Response to Thaçi and Krasniqi Motions Concerning Rule 103 Disclosure* (“Response”), 17 March 2022, confidential.

² KSC-BC-2020-06, F00730, Krasniqi Defence, *Krasniqi Defence Request for a Finding of Disclosure Failure, Setting a Disclosure Deadline and Appointment of an Independent and Impartial Magistrate* (“Request”), 11 March 2022, confidential.

³ Response, para. 9.

⁴ *Ibid.*, para. 3.

⁵ Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”).

3. In order to illustrate the scale of the delays, the Defence summarises below the dates of the documents newly disclosed in Disclosure Batch (“DB”) 174 on 3 March 2022 (which was one of the five recent batches of exculpatory disclosure relied upon in the Request).

[REDACTED]	
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
Other Documents	
[REDACTED]	[REDACTED] ⁶
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

4. The above documents would all have been in the SPO’s possession when the Indictment was confirmed in October 2020.⁷ They were disclosed more than 16 months later – far beyond any sensible definition of ‘immediately’. This alone establishes a breach.

⁶ [REDACTED].

⁷ KSC-BC-2020-06, F00026/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi*, 19 November 2020, confidential.

5. Contrary to the SPO's habitual allegations of "bad faith" and "unwillingness to constructively engage *inter partes*",⁸ the Defence did raise the delayed disclosure of the contents of DB 174 in *inter partes* correspondence but received only a bland and non-specific response.⁹

6. The excuses offered by the SPO for these delays are plainly inadequate. The voluminous nature of the records and the need to transcribe certain records¹⁰ do not come close to justifying a delay of more than 16 months. Moreover, the SPO can muster no authority for its submission that its "finite resources, competing disclosure and other deadlines" excuse such a prolonged delay in disclosing exculpatory material.¹¹

7. Amongst these diverse excuses, particularly woeful is the submission that "the majority of staff worked predominantly remotely, without access to centralised evidentiary databases, for approximately 18 months".¹² Whilst the Defence is unfortunately well acquainted with the difficulties posed by the COVID pandemic, it is extraordinary that the disclosure of exculpatory material has been delayed because SPO staff did not have access to the necessary databases, and that no satisfactory solution was found for 18 months – during most of which time Mr. Krasniqi was remanded in detention.

8. The Defence notes that the SPO has not bothered to provide a specific explanation for the delay in disclosing the specific documents cited by the Defence at

⁸ Response, para. 9.

⁹ Request, para. 6.

¹⁰ Response, para. 8.

¹¹ *Ibid.*

¹² *Ibid.*

paragraphs 27 and 30 – 33 of its Request.¹³ The Defence infers that there is no good explanation for these delays.

9. The SPO's explanation of the delay in disclosing the Everts documents highlights the poverty of its argument. The SPO received clearance to disclose these documents on 30 June 2021 and disclosed them on 1 February 2022 – a delay of seven months. The pleaded excuse is that the SPO was “reviewing and processing” the Rule 102(3) Notice and decided to delay the exculpatory review of the documents until “after the review of the 68,000 other items was nearing completion”.¹⁴ The Rule 102(3) Notice was filed on 31 July 2021;¹⁵ at most, its preparation can only account for one of the seven months' delay in disclosing the Everts documents. By the time the Rule 102(3) Notice was served, proceedings had been ongoing for more than 8 months and the SPO should therefore have already reviewed those items for exculpatory disclosure. Moreover, the Everts documents did not require prolonged exculpatory review; they were obviously exculpatory and that must have been apparent to the SPO at the time the interview was conducted.

10. The simple fact is that neither the continuing nature of the obligation to disclose exculpatory material, nor directions to disclose exculpatory material on a rolling basis, operate as a cloak to shield the SPO from the Rule 103 obligation to disclose exculpatory material which is in its custody immediately. The portrait painted by the SPO of an “organised, efficient, and thorough disclosure system”¹⁶ is flatly refuted by the recent disclosure of hundreds of items of exculpatory material, most of which have been in the SPO's custody all along.

¹³ Paragraph 10 of the Response appears to be directed only at the documents highlighted by the Taçi Defence.

¹⁴ Response, para. 10(a).

¹⁵ KSC-BC-2020-06, F00421, Specialist Prosecutor, *Prosecution Rule 102(3) Notice*, 31 July 2021, public, with Annex 1, confidential, and Annex 2, confidential and *ex parte*.

¹⁶ Response, para. 8.

III. THERE IS PREJUDICE

11. The SPO's second line of defence is to assert that the Defence is not entitled to any remedy for its breach of Rule 103 because the Defence has not been prejudiced.¹⁷ The breach in question concerns the significantly delayed disclosure of hundreds of items to the Defence. It is difficult to imagine any scenario in which delays of this magnitude would not prejudice the Defence.

12. First, delay in receiving these items has delayed the investigations which arise from the review of these items, and hence has delayed the start of trial. In itself this is a substantial prejudice to the Defence, especially where Mr. Krasniqi remains remanded in custody.

13. Second, the prejudice at this stage of proceedings arises not from any substantive procedural step,¹⁸ but from the delay in the Defence investigation. The Request concerns more than 400 items of disclosure and a delay of around 15 months from the detention of the Accused to the provision of exculpatory disclosure. Delay on this scale is always prejudicial; the more time that passes and the more items of disclosure affected, the more likely it is that memories will fade or witnesses will be harder to contact.

IV. THE REMEDIES ARE JUSTIFIED

14. The three remedies sought by the Defence are necessary, proportionate and appropriate. First, if the Pre-Trial Judge accepts the Defence submission that the SPO has breached its disclosure obligations, it follows that such a finding should be clearly

¹⁷ *Ibid.*, para. 12.

¹⁸ *Ibid.*, para. 13.

and expressly made. It is in the interests of all parties and participants and the interests of justice that a breach of the applicable disclosure rules is clearly recognised, not least to provide a clear record should any further disclosure problems occur in the future. Indeed, a finding that the SPO has breached Rule 103 should flow automatically from the breach and should be entered regardless of the Pre-Trial Judge's conclusions on the issue of prejudice.

15. Second, the Defence request that a deadline be set for the conclusion of the SPO's Rule 103 review is not unexplained or unsubstantiated.¹⁹ The SPO should now have been reviewing its evidential holdings for exculpatory material for at least 16 months. That process cannot continue indefinitely. The Defence needs to be able to plan and complete its investigation. Imposing a deadline is a proportionate response to the delays in producing exculpatory material that have occurred thus far. If the SPO is confident that its review is "at an advanced stage" and "being pursued diligently"²⁰ it is difficult to understand its objection to the imposition of a sensible deadline - which would be a desirable case management decision, even in the absence of the breaches itemised above.

16. Third, the appointment of an impartial magistrate is justified by the seriousness of the breaches identified in the Request. The Defence underscores that, at the time the Request was filed, as many as 428 exculpatory items had not been disclosed immediately, in breach of Rule 103. Breaches are ongoing; four further batches of exculpatory material have been disclosed since the Request was submitted. Moreover, the stage of proceedings also supports this remedy; since no date has been set for the transfer of the case file to the Trial Panel, it is unlikely that such an appointment would threaten the fair and expeditious conduct of proceedings.²¹

¹⁹ *Contra* Response, para. 18.

²⁰ Response, para. 18.

²¹ *Contra* Response, para. 21.

V. CONCLUSION

17. The Defence requests the Pre-Trial Judge to grant the Request.

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Friday, 2 September 2022

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