



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

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

Date: 26 August 2022

Language: English

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Public Redacted Version of

**Decision on Thaçi and Krasniqi Defence Motions Seeking Remedies for
Non-Compliance with Disclosure Obligations**

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THE PRE-TRIAL JUDGE,¹ pursuant to Articles 21(6) and 39(1) of the Law No. 05/L-53 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 95(2)(b), 103 and 110 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 26 October 2020, the Pre-Trial Judge confirmed the indictment against Hashim Thaçi ("Mr Thaçi"), Kadri Veseli ("Mr Veseli"), Rexhep Selimi ("Mr Selimi"), and Jakup Krasniqi ("Mr Krasniqi") (collectively referred to as the "Accused").²

2. On 23 November 2020, the Pre-Trial Judge issued the "Framework Decision on Disclosure of Evidence and Related Matters" ("Framework Decision on Disclosure"), which set out the principles governing the disclosure of evidence between the Parties, established a calendar for disclosure and adopted the redaction regime applicable to the present case.³

¹ KSC-BC-2020-06, F00001, President, *Decision Assigning a Pre-Trial Judge*, 23 April 2020, public.

² KSC-BC-2020-06, F00026, Pre-Trial Judge, *Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi*, 26 October 2020, strictly confidential and *ex parte*. A confidential redacted version was filed on 19 November 2020, F00026/CONF/RED. A public redacted version was filed on 30 November 2020, F00026/RED. The Specialist Prosecutor submitted the confirmed indictment in F00034, Specialist Prosecutor, *Submission of confirmed Indictment and Related Requests*, 30 October 2020, confidential, with Annex 1, strictly confidential and *ex parte*, and Annexes 2-3, confidential; F00045/A03, Specialist Prosecutor, *Further Redacted Indictment*, 4 November 2020, public; F00134, Specialist Prosecutor, *Lesser Redacted Version of Redacted Indictment*, KSC-BC-2020-06/F00045/A02, 4 November 2020, 11 December 2020, confidential. A further corrected confirmed indictment was submitted on 3 September 2021, strictly confidential and *ex parte* (F00455/A01), with confidential redacted (F00455/CONF/RED/A01) and public redacted (F00455/RED/A01) versions. On 17 January 2022, the SPO submitted a confidential, corrected, and lesser redacted version of the Confirmed Indictment, F00647/A01. A confirmed amended indictment was filed on 29 April 2022 ("Confirmed Indictment"), strictly confidential and *ex parte* (F00789/A01), with confidential redacted (F00789/A02) and public redacted (F00789/A05) versions.

³ KSC-BC-2020-06, F00099, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters*, 23 November 2020, public.

3. On 7 March 2022, the Defence for Mr Thaçi (“Thaçi Defence”), filed a motion concerning exculpatory material disclosed by the Specialist Prosecutor’s Office (“SPO”) under Rule 103 of the Rules (“Thaçi Request”).⁴
4. On 11 March 2022, the Defence for Mr Krasniqi (“Krasniqi Defence”) filed a similar motion (“Krasniqi Request”).⁵
5. On 15 March 2022, the Defence for Mr Veseli (“Veseli Defence”) and the Defence for Mr Selimi (“Selimi Defence”) filed joinders to the Thaçi Request and the Krasniqi Request (collectively, “Defence Requests”).⁶
6. On 17 March 2022, the SPO filed a consolidated response to the Defence Requests (“Response”).⁷
7. On 25 March 2022, the Thaçi Defence and Krasniqi Defence (collectively, “Defence”) replied to the Response (“Thaçi Reply” and “Krasniqi Reply”, respectively).⁸

II. SUBMISSIONS

8. The Defence submit that the SPO has failed to disclose several pieces of exculpatory material, “immediately”, and “as soon as they were in its custody” in

⁴ KSC-BC-2020-06, F00724, Defence for Mr Thaçi, *Thaçi Defence Motion for an Independent and Impartial Review of Exculpatory Material*, 7 March 2022, confidential, para. 10. A public redacted version was filed on 29 March 2022, F00724/RED.

⁵ KSC-BC-2020-06, F00730, Defence for Mr Krasniqi, *Krasniqi Defence Request for a Finding of Disclosure Failure, Setting a Disclosure Deadline and Appointment of an Independent and Impartial Magistrate*, 11 March 2022, confidential, para. 2.

⁶ KSC-BC-2020-06, F00732, Defence for Mr Veseli, *Veseli Defence Joinder to F00724 and F00730*, 15 March 2022, confidential; F00735, Defence for Mr Selimi, *Selimi Defence Joinder to F00724 and F00730*, 15 March 2022, confidential.

⁷ KSC-BC-2020-06, F00736, Specialist Prosecutor, *Prosecution Response to Thaçi and Krasniqi Motions Concerning Rule 103 Disclosure*, 17 March 2022, confidential.

⁸ KSC-BC-2020-06, F00751, Defence for Mr Thaçi, *Thaçi Defence Reply to Prosecution Response to Thaçi and Krasniqi Motions Concerning Rule 103 Disclosure*, 25 March 2022, confidential; F00753, Defence for Mr Krasniqi, *Krasniqi Defence Reply to Prosecution Response to Thaçi and Krasniqi Motions Concerning Rule 103 Disclosure (F00736)*, 25 March 2022, confidential.

violation of Rule 103 of the Rules.⁹ They allege that the exculpatory nature of the documents is not in dispute,¹⁰ and that such a delayed disclosure is prejudicial to the Defence.¹¹ As such, the Defence request the Pre-Trial Judge to make an express finding of disclosure violation of exculpatory material by the SPO.¹² Moreover, they request the appointment of an independent and impartial entity (magistrate or *amicus curiae*) in charge of reviewing, identifying and disclosing exculpatory material in the SPO's custody, control or actual knowledge.¹³ The Krasniqi Defence further requests the Pre-Trial Judge to set a deadline of 28 working days for the SPO to complete the disclosure of all exculpatory material.¹⁴

9. The SPO responds that the Defence Requests shall be summarily rejected insofar as the SPO has been consistently discharging its obligation to disclose exculpatory material in good faith and in compliance with Article 21(6) of the Law, Rule 103 of the Rules, and the Framework Decision on Disclosure.¹⁵ The SPO further argues that the Defence fail to demonstrate how the timing of the disclosures referred to in the Defence Requests violates the applicable legal framework.¹⁶ The SPO contends that in any case, and even admitting that such a breach existed, the Defence did not demonstrate any prejudice; as a consequence, no remedy is justified.¹⁷ Lastly, the SPO alleges that the Defence Requests are merely a tool to advance an agenda to discredit the SPO and the Specialist Chambers ("SC"), to the detriment of the interests of the Accused.¹⁸

⁹ Thaçi Request, paras 1-9, 37-41; Krasniqi Request, paras 1, 18-36.

¹⁰ Thaçi Request, paras 29-36; Krasniqi Request, paras 19, 21, 23-24, 27.

¹¹ Thaçi Request, paras 42-47; Krasniqi Request, paras 37-40.

¹² Thaçi Request, paras 10, 52; Krasniqi Request, paras 43, 47(i).

¹³ Thaçi Request, paras 10, 48-51, 52; Krasniqi Request, paras 44, 47(ii).

¹⁴ Krasniqi Request, paras 45, 47(iii).

¹⁵ Response, para. 1.

¹⁶ Response, para. 2.

¹⁷ Response, para. 2.

¹⁸ Response, para. 23.

10. The Defence reply to the issues arising from the Response and reiterate the relief sought in the Request.¹⁹

III. APPLICABLE LAW

11. Pursuant to Article 21(6) of the Law, all material and relevant evidence or facts in possession of the SPO which are for or against the accused shall be made available to him or her before the beginning of and during the proceedings, subject only to restrictions which are strictly necessary and when any necessary counter-balance protections are applied.

12. Pursuant to Article 39(1) of the Law and Rule 95(2)(b) of the Rules, the Pre-Trial Judge may make any necessary orders or decisions to ensure the case is prepared properly and expeditiously for trial, such as setting time limits for disclosure, take any measures to ensure timely disclosure and prepare a disclosure report for the Trial Panel.

13. Pursuant to Rule 103 of the Rules, subject to Rules 107 and 108 of the Rules, the SPO 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.

14. Pursuant to Rule 110 of the Rules, the Pre-Trial Judge 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.

¹⁹ Thaçi Reply, paras 1, 15; Krasniqi Reply, paras 1, 17.

IV. DISCUSSION

15. The Defence request the Pre-Trial Judge to adopt three different measures as a consequence of an alleged non-compliance with disclosure obligations on the part of the SPO, pursuant to Rule 110 of the Rules, which vests the Pre-Trial Judge with discretionary powers to decide on appropriate measures, if any. Hence, ordering measures as a consequence of non-compliance with disclosure obligations requires the Pre-Trial Judge to: (i) identify a disclosure violation or failure on the part of the SPO that amounts to non-compliance; and (ii) determine the appropriate measure(s) in the particular circumstances of the case.

16. Whether a disclosure violation or failure meets the threshold of non-compliance within the meaning of Rule 110 of the Rules is to be determined on a case-by-case basis, taking all circumstances into account, including, *inter alia*: (i) the impact on the accused's rights; (ii) the amount of evidence to be reviewed by the SPO; and (iii) the expeditiousness with which the SPO proceeds when reviewing evidentiary material. The measures available to the Pre-Trial Judge are stipulated in a non-exhaustive fashion in Rule 110 of the Rules, including a stay of proceedings or exclusion of evidence, except exculpatory evidence.

A. ALLEGED NON-COMPLIANCE WITH DISCLOSURE OBLIGATIONS

17. The Defence identify several sets of documents which were allegedly disclosed late or not disclosed at all. The first set of documents are the witness statement and related documents from Ambassador Daan Everts ("Mr Everts"), former Head of the Organisation for Security and Co-Operation in Europe ("OSCE") Mission in Kosovo ("Everts Documents").²⁰ The Defence allege that, while the SPO obtained clearance for such documents on 30 June 2021, it only

²⁰ Thaçi Request, para. 2; Krasniqi Request, paras 22-25.

disclosed them on 1 February 2022, in Disclosure Batch 160, following repeated requests from Mr Everts to the SPO asking for a copy of his statement, and in contrast to other incriminating OSCE witness statements disclosed in August 2021.²¹ The Defence allege that the Everts Documents are clearly exculpatory in the sense that they suggest the innocence or mitigate the guilt of the Accused, showing that they lacked control over the Kosovo Liberation Army (“KLA”) and lacked the *mens rea* for the alleged crimes.²² The Thaçi Defence submits that the fact that the Everts Documents may also contain some incriminating information does not justify any delayed disclosure.²³ Moreover, it expresses concerns over the SPO interview process, which was allegedly conducted in violation of the SPO’s obligations under Rule 62 of the Rules.²⁴

18. The second set of documents identified by the Defence as exculpatory²⁵ is a series of statements and notes of interviews of other international figures contained in Disclosure Batches 160, 174, and 175 which were disclosed as exculpatory to the Defence on 1 February 2022, 3 and 4 March 2022, respectively, which contain several witness statements and notes of meetings with international figures obtained by the Special Investigative Task Force (“SITF”), the SPO, or the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) in a time frame ranging from 2000 to 2019.²⁶

19. The third set of documents identified by the Defence as exculpatory²⁷ relates to various SPO transcripts of interviews of Albanian witnesses, such as former KLA members and journalists, dated 2019 or 2020, contained in Disclosure

²¹ Thaçi Request, paras 2, 37; Krasniqi Request, paras 22, 25 and footnote 35.

²² Thaçi Request, paras 30-31; Krasniqi Request, para. 24.

²³ Thaçi Request, para. 32.

²⁴ Thaçi Request, para. 33.

²⁵ Thaçi Request, para. 34; Krasniqi Request, para. 21.

²⁶ Thaçi Request, para. 3, Krasniqi Request, paras 20, 30-31.

²⁷ Thaçi Request, para. 36; Krasniqi Request, para. 27.

Batch 160, which did not require any prior clearance, as they emanated directly from the SPO, and should have, according to the Defence, been disclosed earlier.²⁸

20. The fourth set of documents identified by the Defence as exculpatory²⁹ relates to material contained in Disclosure Batches 170 and 175, which contain several OSCE reports, and various documents from the North Atlantic Treaty Organization (“NATO”), the Kosovo Force (“KFOR”), or the European Community Monitoring Mission (“ECMM”), dated 1999 and 2000.³⁰ According to the Defence, these documents must have been in the SPO’s custody for several years prior to the confirmation of the indictment, especially since the SPO has decided to call several witnesses from the OSCE and NATO/KFOR, and no justification or explanation for the delay has been given by the SPO.³¹ The Krasniqi Defence further identifies an interview from the [REDACTED] dated 28 and 29 January 2002 and a [REDACTED] dated 17 July 1998, both disclosed in Disclosure Batch 176.³²

21. Lastly, the Thaçi Defence identifies other allegedly exculpatory material which the SPO is allegedly withholding and/or failed to disclose in time. In particular, the Thaçi Defence refers to: (i) a letter from the United States (“US”) State Department dated 4 May 1999 from Barbara Larkin to Senator Mitch McConnell claiming that there was no political structure in Kosovo or effective command and control of the KLA;³³ (ii) statement or notes of interview of Bujar Bukoshi (“Mr Bukoshi”), whom the Thaçi Defence avers to know having been

²⁸ Thaçi Request, para. 4; Krasniqi Request, paras 27-28.

²⁹ Thaçi Request, para. 35.

³⁰ Thaçi Request, para. 5; Krasniqi Request, para. 20.

³¹ Thaçi Request, para. 5; Krasniqi Request, para. 21.

³² Krasniqi Request, paras 32-33.

³³ Thaçi Request, para. 6.

interviewed by the SPO;³⁴ and (iii) hundreds of statements of former KLA soldiers, whom the Thaçi Defence avers to know having been summoned by the SPO.³⁵

22. Relying on the SC legal framework, the Defence aver that the statutory regime governing the disclosure of exculpatory material at the SC is much stricter and accords more protection to the accused than similar provisions before other international tribunals, seeing as the SPO must disclose the exculpatory material *immediately* and not *as soon as practicable*.³⁶ More generally, relying on international jurisprudence, the Defence aver that disclosure of exculpatory material is fundamental to the fairness of the proceedings and it is a fundamental component of the SPO's obligation to contribute to the establishment of the truth by the SC.³⁷ Accordingly, they request the Pre-Trial Judge to adopt the proposed measures pursuant to Rule 110 of the Rules.³⁸

23. The SPO responds that it has been discharging its disclosure obligations 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.³⁹ Recalling that Rule 103 of the Rules represents a continuous and ongoing obligation for the SPO to immediately disclose potentially exculpatory material to the Defence, the SPO submits that review and disclosure of potentially exculpatory material is an obligation which arises during the pre-trial phase, in light of the: (i) charges against specific accused in the confirmed indictment; and (ii) knowledge of the applicable protective measures regime.⁴⁰ Therefore, according to the SPO, any assessment of the efforts made should consider what is

³⁴ Thaçi Request, para. 7.

³⁵ Thaçi Request, para. 8.

³⁶ Thaçi Request, paras 25-27; Krasniqi Request, para. 11.

³⁷ Thaçi Request, para. 28; Krasniqi Request, para. 9.

³⁸ Thaçi Request, paras 10, 28; Krasniqi Request, paras 17, 47.

³⁹ Response, para. 3.

⁴⁰ Response, paras 3-5.

“a reasonable timeframe, taking into account all relevant circumstances”.⁴¹ According to the SPO, this means that the fact that potentially exculpatory material is being disclosed on a “rolling basis” does not mean that the SPO has withheld or delayed disclosure of items in its possession, but rather reflects the reality of the time and resource demands involved in reviewing many tens of thousands of documents in many different languages in a thorough, organised and systematic manner.⁴² The SPO further argues that its disclosure system needs to be considered in light of, *inter alia*: (i) the voluminous nature of the records under review; (ii) the need to transcribe, translate, obtain clearance, review and apply redactions, and/or assess and request necessary protective measures; and (iii) other factors such as finite resources, competing deadlines and the Covid-19 pandemic.⁴³

24. The SPO avers that the Defence submissions concerning allegedly withheld documents are speculative, generalised and incapable of demonstrating that the material is potentially exculpatory.⁴⁴ Insofar as arguments revolve around the date of disclosure and the date of certain documents, the SPO submits that such arguments are plainly inadequate, without more, to demonstrate either a violation or prejudice.⁴⁵ In particular, the SPO argues that: (i) at the time clearance had been received for the Everts Documents, the SPO was reviewing and processing tens of thousands of items on its Rule 102(3) Notice and, therefore, the Everts Documents were allocated for exculpatory review after the review of the Rule 102(3) items;⁴⁶ (ii) with regard to Mr Bukoshi’s statement, it had already been listed on the Rule 102(3) Notice and therefore it had been available for the Defence to request for a considerable period of time;⁴⁷ and (iii) with regard to the US State Department

⁴¹ Response, para. 5.

⁴² Response, paras 6-7.

⁴³ Response, para. 8.

⁴⁴ Response, para. 9.

⁴⁵ Response, para. 9.

⁴⁶ Response, para. 10(a).

⁴⁷ Response, para. 10(b).

letter of 4 May 1999, the SPO submits that it is not in possession of this letter and that the Thaçi Defence's submission that this letter is in the SPO's custody, control or actual knowledge is groundless and speculative.⁴⁸ Accordingly, the SPO submits that the Defence have not demonstrated any violation under Rule 103 of the Rules and, on this basis alone, the Defence Requests shall be dismissed.⁴⁹

25. The SPO submits that, in any case, the Defence has failed to show that the timing of disclosure has actually prejudiced them, insofar as the fact that material has not been disclosed in a timely manner does not *per se* create a prejudice to the Accused, since such prejudice needs to qualify as "material".⁵⁰ In particular, the SPO avers that the stage of proceedings shows the lack of any prejudice as 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, *inter alia*, the start of the trial.⁵¹

26. With particular regard to the Everts Documents, the SPO argues that the Defence appear to have been in contact with Mr Everts from at least October 2021, they have known the information and were in a position to use Mr Everts' views in the planning of their investigation and evidence.⁵² With regard to remaining Defence submissions, the SPO labels them as defective, speculative, unsubstantiated, and incapable of showing prejudice.⁵³ The SPO submits that, accordingly, no remedy is justified.⁵⁴

27. The Defence reply that the fact that the SPO regularly discloses packages of exculpatory material is not sufficient to comply with Rule 103 of the Rules.⁵⁵ What

⁴⁸ Response, para. 10(c).

⁴⁹ Response, para. 11.

⁵⁰ Response, para. 12.

⁵¹ Response, para. 13.

⁵² Response, para. 14.

⁵³ Response, para. 15.

⁵⁴ Response, para. 17.

⁵⁵ Thaçi Reply, para. 2; Krasniqi Reply, para. 10.

is determinant, the Thaçi Defence avers, is the date when the material came into the SPO's possession and the date of its provision to the Accused.⁵⁶ The Defence further rebut the SPO's contention that it has an organised, efficient and thorough disclosure system and challenges the obstacles put forward by the SPO.⁵⁷ Turning to the specific sets of documents, insofar as the Everts Documents are concerned, the Defence submit that the SPO failed to justify their late disclosure.⁵⁸ With regard to Mr Bukoshi's statement, the Thaçi Defence submits that their inclusion on the Rule 102(3) Notice is of no significance since the relevant document on the Notice was specified by the witness's pseudonym, unknown to the Defence.⁵⁹ With regard to the US State Department letter, the Thaçi Defence refers to its submissions in the 11th Status Conference.⁶⁰ Lastly, the Defence argue that the SPO failed to justify the late disclosure of the remaining other items, from which it shall be inferred that there is no good explanation for such delays.⁶¹ The Thaçi Defence submits that late disclosure is prejudicial to the Defence insofar it is precisely at the pre-trial stage that the Defence needs exculpatory information in order to conduct efficient investigations.⁶² Lastly, the Defence reiterate that the massive, delayed disclosure of exculpatory material has a detrimental effect on its investigations, as investigations which arise from the review of the late disclosed items delay the start of the trial and preparation for trial, thereby causing prejudice to the Defence.⁶³

28. The Pre-Trial Judge notes, at the outset, that the Parties still disagree as to the extent of the SPO's obligations under Rule 103 of the Rules. In this regard, the

⁵⁶ Thaçi Reply, para. 3.

⁵⁷ Thaçi Reply, para. 4; Krasniqi Reply, paras 6-7.

⁵⁸ Thaçi Reply, para. 6; Krasniqi Reply, para. 9.

⁵⁹ Thaçi Reply, para. 7.

⁶⁰ Thaçi Reply, para. 8.

⁶¹ Thaçi Reply, para. 9; Krasniqi Reply, para. 8.

⁶² Thaçi Reply, para. 11.

⁶³ Thaçi Reply, para. 12; Krasniqi Reply, paras 11-13.

Pre-Trial Judge wishes to recall that he repeatedly stated that exculpatory material pursuant to Rule 103 of the Rules must be disclosed *immediately, as soon as* it is in the custody, control or actual knowledge of the SPO.⁶⁴ The wording "*immediately, as soon as* it is in its custody, control, or actual knowledge" needs to be interpreted in the context of the proceedings, notably depending on the stage of the proceedings, and on the amount of evidence to review. At the beginning of the pre-trial phase, the requirement is that the SPO immediately starts the review and immediately discloses the evidentiary items when it assesses that they potentially contain exculpatory information. Insofar as the SPO argues that in the Framework Decision on Disclosure it was ordered to disclose Rule 103 material only "as soon as practicable and on a rolling basis",⁶⁵ the Pre-Trial Judge notes that the language of the Framework Decision on Disclosure aimed at finding practical solutions at the beginning of the pre-trial phase, given the voluminous amount of evidence in the case. It did and it does not allow the SPO to consider that it can proceed with the review of exculpatory material throughout the proceedings according to its own calendar. The Pre-Trial Judge also reminded the SPO that only justifiable reasons, such as the need for redactions, may prevent immediate disclosure.⁶⁶ Insofar as the duty to disclose exculpatory material is a continuing obligation, the Pre-Trial Judge recalled and clarified that this applies to the any new evidentiary material which the SPO obtains in the course of the proceedings.⁶⁷ Lastly, guided

⁶⁴ Framework Decision on Disclosure, para. 66; *see also, for example*, KSC-BC-2020-06, Transcript of Hearing, 24 March 2022 ("24 March 2022 Hearing"), confidential, p. 1086, lines 16 to 18. A public redacted version was also issued; Transcript of Hearing, 4 February 2022, public, p. 896, lines 3 to 8; Transcript of Hearing, 15 December 2021 ("15 December 2021 Hearing"), public, p. 816, line 21 to p. 817, line 15.

⁶⁵ Response, para. 3.

⁶⁶ Framework Decision on Disclosure, para. 68 ("Should any future batch(es) of potentially exculpatory material require redactions, the SPO shall first seize the Panel at the earliest opportunity for a ruling on the matter, *in order to facilitate immediate disclosure* of such material to the Defence", emphasis added); 15 December 2021 Hearing, p. 817, lines 10 to 12.

⁶⁷ KSC-BC-2020-06, Transcript of Hearing, 13 July 2022 ("13 July 2022 Hearing"), confidential, p. 1329, line 25 to p. 1330, line 2. A public redacted version was also issued.

by the spirit of the Rules which favour an early and full disclosure of evidence at the pre-trial stage, the Pre-Trial Judge finds that the absence of a strict deadline for exculpatory evidence in the Rules should not be used as a pretext to delay the disclosure of such material.

29. As a further preliminary matter, the Pre-Trial Judge reminds the Parties that they must fulfil their disclosure obligations in good faith.⁶⁸ In this regard, the Pre-Trial Judge invites the Parties to engage in more fruitful and constructive discussions on disclosure matters, rather than using judicial avenues to confront each other. Resorting to confrontational and polemic language does not help advancing proceedings and hinders the ultimate goal of bringing this case to trial expeditiously. The Pre-Trial Judge, therefore, invites the Parties to try to solve doubts and queries regarding disclosure of exculpatory material *inter partes* before seeking judicial intervention.

30. Before turning to the merits of the Defence Requests, the Pre-Trial Judge notes that the Parties agree the material in Disclosure Batches 160, 170, 174, 175 and 176 is exculpatory in nature. Further, there is also agreement amongst the Parties that the material in Disclosure Batches 160, 170, 174, 175, and 176 has been disclosed and is in possession of the Defence.

31. In respect of the Everts Documents, the Pre-Trial Judge notes that, as the SPO itself concedes, clearance for disclosure of these documents was obtained by the SPO on 30 June 2021 and that they were disclosed to the Defence on 1 February 2022.⁶⁹ The Pre-Trial Judge notes that, at the time clearance for disclosure was obtained, the SPO was reviewing and processing several tens of thousands of items on its Rule 102(3) Notice, a factor that had, according to the SPO, a substantive impact on the SPO's workload. The Pre-Trial Judge also takes

⁶⁸ Similarly, for example, Framework Decision on Disclosure, paras 66, 91.

⁶⁹ Response, para. 10(a).

into consideration, as part of his case-by-case assessment of the disclosure process, the Covid-19 pandemic-related and logistic difficulties. On the other hand, the Pre-Trial Judge wishes to recall that exculpatory material is fundamental for the preparation of the Defence and its disclosure shall take place immediately. In this regard the Pre-Trial Judge considers that the SPO was or should have been aware, at least from 2019, when clearance for disclosure was sought, of the potentially exculpatory content of these documents. Therefore, the Pre-Trial Judge finds that, once the clearance was obtained on 30 June 2021, the Everts Documents could have been immediately disclosed to the Defence. However, the Pre-Trial Judge observes that the Defence is able, having received the documents concerned in February 2022, to conduct its investigation prior to trial, for the commencement of which no date has been set yet. Moreover, the Pre-Trial Judge notes that the Defence can always apply for an amendment of the procedural calendar, should they deem it necessary for the preparation of the trial. As a result, in light of the specific circumstances of the case, the Pre-Trial Judge does not find the delay excessive as to qualify as non-compliance with disclosure obligations. Lastly, in respect of the Thaçi Defence's allegation that the interview of Mr Everts has been conducted in violation of Rule 62 of the Rules, the Pre-Trial Judge dismisses it as unsubstantiated, and, in any case, ill-founded; any shortcomings in the relevant statement can be discussed at trial, also in the presence of Mr Everts.

32. In respect of all other documents identified by the Defence, the Pre-Trial Judge notes that these documents include: (i) statements of, transcripts of testimony of, and notes of meetings with international figures originating from the SITF, the SPO or the ICTY;⁷⁰ (ii) transcripts of interviews of witnesses interviewed by the SPO;⁷¹ (iii) OSCE, KFOR, NATO and ECMM reports;⁷² and

⁷⁰ Disclosure Batches 160, 174, 175, and 176.

⁷¹ Disclosure Batches 160, 174.

⁷² Disclosure Batches 170, 176.

(iv) other exculpatory material.⁷³ The Pre-Trial Judge notes that the SPO gives no explanation at all for the disclosure timing of these batches and items contained therein. In particular, the SPO does not explain which of these documents needed clearance, when, if any, such clearance was obtained and what is the reason for the alleged disclosure delay, other than the generic factors invoked above. While the Pre-Trial Judge is mindful that: (i) the Covid-19 pandemic had an unprecedented and unexpected impact on the working methods of the SPO; (ii) human errors, if any, may occur; and (iii) competing deadlines might hamper the smooth operation of the disclosure exercise, the Pre-Trial Judge nevertheless considers that the delay in disclosing the material concerned is in some instances significant, especially as it concerns exculpatory evidence that can be critical for the trial preparation of the Defence. However, the Pre-Trial Judge finds that having received the documents, the Defence is able to conduct its investigation prior to trial, for the commencement of which no date has been set yet. Moreover, the Pre-Trial Judge notes that the Defence can always apply for an amendment of the procedural calendar, should they deem it necessary for the preparation of the trial. As a result, in light of the specific circumstances of the case, despite the fact that the SPO has not been fully diligent in the disclosure of these items, the Pre-Trial Judge does not find that this amounts to non-compliance with disclosure obligations.

33. Insofar as the statement of Mr Bukoshi is concerned, the Pre-Trial Judge notes that the document, as indicated by the SPO, was listed on the Rule 102(3) Notice.⁷⁴ The Pre-Trial Judge further notes that the Thaçi Defence requested and obtained this document on 1 August 2022.⁷⁵ As to the alleged exculpatory nature of such

⁷³ Disclosure Batches 160, 170, 174, 175, 176.

⁷⁴ KSC-BC-2020-06, F00543/A01, Specialist Prosecutor, *Annex 1 to Prosecution Amended Rule 102(3) Notice Pursuant to F00421*, confidential, items 4285-4287.

⁷⁵ Disclosure Batch 376, [REDACTED].

statement, the Pre-Trial Judge, having reviewed the statement, finds that the determination done by the SPO was not unreasonable and that the Thaçi Defence's allegations as to the fact that the item is exculpatory are ill-founded. Accordingly, the Pre-Trial Judge does not consider this item exculpatory and will not deal any longer with it in the context of this decision.

34. As regards the Thaçi Defence request to disclose all names on the Rule 102(3) Notice,⁷⁶ the Pre-Trial Judge recalls that he previously found that the requirement of a "detailed" notice requirement implies that the Defence need to be put in a position where they can, at a minimum and at least in general terms, either be able to link an item to the Accused or to the context of the commission of the crimes, or understand its content. What is crucial, is that the Defence is allowed to undertake the assessment as to the materiality for their preparation.⁷⁷ Turning to the present case, the Pre-Trial Judge finds that the Thaçi Defence was able to understand, from the description contained in the Rule 102(3) Notice, the nature of the document and undertake an assessment of its relevance as to the materiality for its preparation. The Pre-Trial Judge further notes that the Thaçi Defence requested and obtained the document on 1 August 2022. Therefore, no prejudice can be identified in the instant case. The Thaçi Defence request is accordingly rejected.

35. Lastly, insofar as the Thaçi Defence alleges that the SPO is withholding or not disclosing other documents, such as the US State Department letter dated 4 May 1999, or other statements of several hundreds of former KLA soldiers, the Pre-Trial Judge considers that, at this stage, he has no information at hand to conclude that the SPO is withholding any document. In particular, the SPO confirmed that it concluded the review of all exculpatory material until

⁷⁶ Thaçi Reply, para. 7.

⁷⁷ KSC-BC-2020-06, F00460, Pre-Trial Judge, *Decision on the Defence Request for an Amended Rule 102(3) Notice*, 8 September 2021, public, para. 19.

16 June 2022 and will only perform targeted searches for material that was not legitimately considered exculpatory when the initial review was performed.⁷⁸ The Pre-Trial Judge finds that, insofar as 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, the Thaçi Defence has failed to demonstrate that the SPO did not comply with its disclosure obligations.⁷⁹ Accordingly, the Pre-Trial Judge finds that the Thaçi Defence's allegations are speculative.

36. In light of the foregoing, the Pre-Trial Judge finds that, while disclosure for some exculpatory items could have taken place earlier, the disclosure effectuated in Disclosure Batches 160, 170, 174, 175 and 176 does not amount to a non-compliance of the SPO disclosure obligations under Rule 103 of the Rules warranting the adoption of measures. As the threshold of non-compliance, within the meaning of Rule 110 of the Rules, has not been met, taking all circumstances into account, the Pre-Trial Judge will not further discuss the appropriateness of the measures proposed by the Defence.

37. That being said, the Pre-Trial Judge strongly urges the SPO to abide by its obligation to disclose exculpatory material *immediately*, as soon as it is in its custody, control, or actual knowledge and to prioritise disclosure of exculpatory material over other competing deadlines and disclosure materials. Moving forward, the Pre-Trial Judge finds that, given that the end of the pre-trial phase is approaching, there is a need to ensure that the disclosure of exculpatory material is timely and fully effective. Therefore, in accordance with Article 39(1) of the Law and Rule 95(2)(b) of the Rules, the Pre-Trial Judge instructs the SPO to provide a comprehensive disclosure report, to be filed confidentially and to be notified to

⁷⁸ 13 July 2022 Hearing, p. 1329, line 10 to p. 1345, line 11.

⁷⁹ The Pre-Trial Judge recalls that there is a presumption of good faith which is afforded to the SPO when discharging its disclosure obligations. *See, similarly, and among many others, STL, Prosecutor v. Ayyash et al., STL-11-01/PT/PTJ, Pre-Trial Judge, [Decision on the Sabra Defence's First, Second, Third, Fourth, Fifth and Sixth Motions for Disclosure](#), 8 November 2012, para. 28, with further references.*

the Defence as well, explaining the difficulties it is still facing in fulfilling its Rule 103 disclosure obligations and satisfying the Pre-Trial Judge that everything is being done to comply with the legal requirements set in the Rules. In particular, the SPO shall: (i) indicate whether it still encounters substantive difficulties in carrying out the disclosure of exculpatory material; and (ii) provide a detailed explanation of how it conducts the review of documents in its possession for identifying Rule 103 material, how it determines which documents should be disclosed pursuant to Rule 103 of the Rules, and how does it plan and execute the release of disclosure packages, having particular regard to the formation of the batches and the timing of their disclosure. Such a report shall be filed by no later than 7 October 2022.

B. DEADLINE FOR RULE 103 DISCLOSURE

38. The Krasniqi Defence, joined by the Selimi Defence and Veseli Defence, requests that, having regard to the serious deficiencies in the SPO's disclosure system and the impact this ineffective system has on the Mr Krasniqi's fair trial rights, the Pre-Trial Judge set a deadline of 28 days for the SPO to complete the disclosure of all exculpatory material in its possession or control.⁸⁰

39. At the outset, the Pre-Trial Judge clarifies that this aspect of the Defence Requests is dealt with separately in the context of his responsibility to take all necessary measures for the expeditious preparation of the case for trial. The Pre-Trial Judge notes that, after the filing of the Defence Requests, and pursuant to an order by the Pre-Trial Judge,⁸¹ the SPO completed the review and disclosure of Rule 103 material

⁸⁰ Krasniqi Request, para. 45.

⁸¹ 24 March 2022 Hearing, p. 1161, line 24 to p. 1162, line 2.

up to 31 January 2022.⁸² Furthermore, pursuant to an order of the Pre-Trial Judge,⁸³ the SPO completed its review and disclosure of Rule 103 material registered between 31 January 2022 and 16 June 2022.⁸⁴ The SPO further submitted that it will continue to review and disclose items registered after 16 June 2022 on an ongoing basis and consistent with its obligations under Rule 103 of the Rules.⁸⁵ Having regard to the above, and recalling that there is a presumption of good faith which is afforded to the SPO when discharging its disclosure obligations, the Pre-Trial Judge does not deem it necessary to set a new deadline for disclosure of exculpatory evidence. Therefore, the Krasniqi Defence request to set a disclosure deadline for the SPO to disclose exculpatory material is moot.

V. DISPOSITION

40. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- a. **REJECTS** the Defence's request for a finding of non-compliance with the SPO's disclosure obligations;
- b. **ORDERS** the SPO to file a disclosure report, as indicated in paragraph 37 above, by no later than **Friday, 7 October 2022**;
- c. **DECLARES** the Krasniqi Defence request for setting a deadline for disclosure of Rule 103 material moot; and

⁸² KSC-BC-2020-06, Transcript of Hearing ("20 May 2022 Hearing"), 20 May 2022, public, p. 1224, line 23 to p. 1226, line 16.

⁸³ 20 May 2022 Hearing, p. 1323, lines 10-14.

⁸⁴ KSC-BC-2020-06, F00861, Specialist Prosecutor, *Third Prosecution Request for Protective Measures for Items Containing Rule 103 Information* ("SPO Rule 103 Notice"), 30 June 2022, strictly confidential and *ex parte*, para. 1, with Annexes 1-9, strictly confidential and *ex parte*. A confidential redacted version was filed on 1 July 2022 (F00861/CONF/RED). The SPO confirmed that all exculpatory evidence registered between 31 January 2022 and 16 June 2022 had been disclosed to the Defence, with the exception of nine items subject to a protective measures request. *See also*, 13 July 2022 Hearing, p. 1329, lines 17-24 and p. 1333, lines 20-22.

⁸⁵ SPO Rule 103 Notice, footnote 2.

- d. **ORDERS** the SPO, the Taçi Defence, the Krasniqi Defence, and the Veseli Defence, to submit public redacted versions of their respective filings, by no later than **Friday, 2 September 2022**, or to indicate that the relevant filings can be reclassified as public by the same date.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Friday, 26 August 2022
At The Hague, the Netherlands.