



**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 Party:** Acting Specialist Prosecutor

**Date:** 29 November 2022

**Language:** English

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**Public Redacted Version of 'Prosecution consolidated response to F01100 and F01101 with strictly confidential and *ex parte* Annex 1', KSC-BC-2020-06/F01121, dated 24 November 2022**

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**Specialist Prosecutor's Office**  
Alex Whiting

**Counsel for Hashim Thaçi**  
Gregory Kehoe

**Counsel for Victims**  
Simon Laws

**Counsel for Kadri Veseli**  
Ben Emmerson

**Counsel for Rexhep Selimi**  
David Young

**Counsel for Jakup Krasniqi**  
Venkateswari Alagendra

## I. INTRODUCTION

1. The Motions<sup>1</sup> are legally and factually unsubstantiated and should be dismissed. Following a now familiar pattern, counsel for Veseli and Thaçi advance erroneous legal claims based on unsubstantiated factual speculations cloaked in hyperbolic and sensationalist language. As set forth in detail below, many issues raised by counsel in court, and now in this filing, could have easily been resolved through *inter partes* consultation. Counsel for Veseli and Thaçi construct their house of cards argument on information from two individuals who are not witnesses in this case: (i) W04730, who has made various fanciful allegations, has now claimed involvement of the [REDACTED], and whose information has not been relied upon for anything in connection with this case; and (ii) W04326, who has, at times, voluntarily provided information to the Specialist Prosecutor's Office ('SPO'), but who is not, contrary to Defence speculations, an intermediary instructed by the SPO. The Defence's unfounded allegations that W04326 has influenced the testimony of witnesses in this case can be the subject of ordinary disclosure requests and cross-examination, without the need for the extraordinary relief requested in the Motions.

2. The SPO has discharged its disclosure obligations, including in relation to the categories of information sought in the Motions. The Defence fails to rebut the presumption of good faith in this regard,<sup>2</sup> and once again wildly overstates the impact of

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<sup>1</sup> Veseli Defence Supplemental Submissions to Joint Defence Motion for Disclosure Pursuant to Rule 103 (F00877/COR), With Confidential Annexes 1-2, KSC-BC-2020-06/F01100, 14 November 2022, confidential ('Veseli Supplement'); Thaçi Defence Addendum to the Joint Defence Motion for Disclosure Pursuant to Rule 103 (F00877/COR) With Confidential Annexes 1-4, KSC-BC-2020-06/F01101, 14 November 2022, confidential ('Thaçi Addendum'; together with the Veseli Supplement, 'Motions').

<sup>2</sup> *Specialist Prosecutor v. Gucati and Haradinaj*, Public Redacted Version of Decision on the Appeals Against Disclosure Decision, KSC-BC-2020-07/IA005/F00008/RED, 29 July 2021 ('Gucati Appeal Decision'), para.40; Framework Decision on Disclosure of Evidence and Related Matters, KSC-BC-2020-06/F00099, 23 November 2020 ('Framework Decision'), para.66; Decision on Thaçi and Krasniqi Defence Motions Seeking Remedies for Non-Compliance with Disclosure Obligations, KSC-BC-2020-06/F00936, 26 August 2022, Confidential ('Disclosure Decision'), para.35.

recent disclosures on these proceedings. In the interest of fair and expeditious proceedings, the SPO endeavours to disclose the fullest amount of information possible, subject to necessary and proportionate protective measures. In light of the Motions, the SPO reviewed the materials relating to W04730 and W04326 and identified limited, additional materials, which it will disclose consistent with – and in many cases exceeding – a broad and good faith interpretation of its disclosure obligations. There is no further information covered by the Motions which is: (i) in the SPO’s custody, control, or actual knowledge; and/or (ii) potentially exculpatory or even relevant.<sup>3</sup> Having failed to meet this burden, the Motions amount to nothing more than an impermissible attempt to embark on a fishing expedition.<sup>4</sup>

## II. SUBMISSIONS

3. At their core, the Motions seek information they claim is necessary to assess witness credibility.<sup>5</sup> Whether material may reasonably affect witness credibility must be assessed on a case-by-case basis in the specific circumstances of a given witness.<sup>6</sup> Insofar as the Motions seek disclosure of broad categories of information, for example, relating to all ‘intermediaries’ and ‘witnesses’,<sup>7</sup> this lack of specificity does not enable a direct and

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<sup>3</sup> ICTR, *Prosecutor v. Kalimanzira*, ICTR-05-88-A, Judgment, 20 October 2010 (*Kalimanzira Appeal Judgment*), para.18.

<sup>4</sup> *Gucati Appeal Decision*, KSC-BC-2020-07/IA005/F00008/RED, para.56. See also *Specialist Prosecutor v. Gucati and Haradinaj*, Public Redacted Version of Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice, KSC-BC-2020-07/F00413/RED, 3 November 2021 (*Gucati Disclosure Decision*), para.83.

<sup>5</sup> See, for example, Veseli Supplement, KSC-BC-2020-06/F01100, para.41; Taçi Addendum, KSC-BC-2020-06/F01101, paras 22, 24, 28.

<sup>6</sup> See, similarly, ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Chamber, Decision on Accused’s Sixtieth, Sixty-First, Sixty-Third and Sixty-Fourth Disclosure Violation Motions, 22 November 2011 (*Karadžić Decision*), para.23; ICTR, *Karemera et al. v. Prosecutor*, ICTR-98-44-AR73.18, Appeals Chamber, Decision on Joseph Nzirorera’s Appeal from Decision on Alleged Rule 66 Violation, 17 May 2010 (*Karemera Decision*), para.32.

<sup>7</sup> Veseli Supplement, KSC-BC-2020-06/F01100, KSC-BC-2020-06/F01100, para.47(d); Taçi Addendum, KSC-BC-2020-06/F01101, para.30.

unambiguous identification or assessment – by either the Pre-Trial Judge or SPO – of the requested material.<sup>8</sup> Accordingly, such broad requests should be summarily dismissed.

4. The Motions are also procedurally defective insofar as they seek judicial intervention in relation to disclosure matters that were never raised *inter partes*. While the Defence did seek disclosure in relation to W04730,<sup>9</sup> issues relating to the alleged use of intermediaries<sup>10</sup> and witness benefits<sup>11</sup> were raised for the first time in open court to publicly advance unsupported and exaggerated claims of disclosure violations.<sup>12</sup> In doing so, the Defence ignored the Pre-Trial Judge's prior instruction for the parties 'to engage in more fruitful and constructive discussions on disclosure matters, rather than using judicial avenues to confront each other.'<sup>13</sup> Accordingly, insofar as the Defence did not raise these issues *inter partes* before seeking judicial intervention, their submissions should be rejected outright. In any event, the failure to do so undercuts any Defence argument that it requires such information for its preparations. If it did, it would have taken measures to obtain such information directly from the SPO, which has a policy of disclosing the fullest information possible when requested by the Defence. Such *inter partes* consultations would have obviated the need for or at least limited the scope of this litigation and related expenditure of court and party time and resources.<sup>14</sup>

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<sup>8</sup> *Gucati* Disclosure Decision, KSC-BC-2020-07/F00413/RED, para.83. See also *Karemera* Decision, para.25.

<sup>9</sup> Veseli Supplement, KSC-BC-2020-06/F01100, paras 16-30, 35-38, 47(b); Thaçi Addendum, KSC-BC-2020-06/F01101, paras 12-23, 30.

<sup>10</sup> Veseli Supplement, KSC-BC-2020-06/F01100, paras 11-15, 44, 47(d); Thaçi Addendum, KSC-BC-2020-06/F01101, paras 28, 30.

<sup>11</sup> Veseli Supplement, KSC-BC-2020-06/F01100, paras, 47(a)(v); Thaçi Addendum, KSC-BC-2020-06/F01101, paras 29, 30.

<sup>12</sup> See Transcript, 4 November 2022, pp.5-33.

<sup>13</sup> Disclosure Decision, KSC-BC-2020-06/F00936, para.29.

<sup>14</sup> On 22 November 2022, the Thaçi Defence requested by email certain materials from the Rule 102(3) notice relating to W04236. Such *inter partes* disclosure requests should have preceded the Thaçi Addendum, not followed it.

5. In addition to being procedurally defective, on the merits, the Motions fail to demonstrate that any additional information is: (i) in the SPO's custody, control, or actual knowledge; or (ii) potentially exculpatory or even relevant.

A. CERTAIN REQUESTED INFORMATION IS NOT IN THE SPO'S CUSTODY, CONTROL, OR ACTUAL KNOWLEDGE

6. When requesting disclosure under Rule 103, the Defence is under an obligation to, first, demonstrate that information is in the SPO's custody, control, or actual knowledge.<sup>15</sup>

As the Appeals Panel in *Gucati and Haradinaj* made clear:

[...] the Prosecution cannot disclose that which it does not have and is not obliged to undertake investigations, perform analyses, or create work products which are not in its custody or control, possession or actually known to it.<sup>16</sup>

Therefore, the Defence's requests for material or information that is neither in the SPO's possession or actual knowledge have no legal basis.<sup>17</sup>

7. In this regard, the SPO notes that it does not have in its possession the following records (and in many cases, doubts they even exist):<sup>18</sup>

- any recording of a conversation between W04730 and [REDACTED]<sup>19</sup> [REDACTED];
- any records of contact between W04326 and [REDACTED], because no such direct contact has occurred;

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<sup>15</sup> *Kalimanzira* Appeal Judgment, para.18.

<sup>16</sup> *Gucati* Appeal Decision, KSC-BC-2020-07/IA005/F00008/RED, para.54. *See also* *Gucati* Disclosure Decision, KSC-BC-2020-07/F00413/RED, para.83.

<sup>17</sup> Although the Defence does not request disclosure under Rule 102(3), the SPO's disclosure obligation under this provision is equally confined to material in its possession.

<sup>18</sup> *See* Veseli Supplement, KSC-BC-2020-06/F01100, para.47; Thaçi Addendum, KSC-BC-2020-06/F01101, para.30. When this list indicates that the SPO does not have 'further' material in its possession, this qualification takes into account materials previously disclosed and, as explained below, to be disclosed. In relation to W04236, certain categories of information sought are addressed in Section C.

<sup>19</sup> [REDACTED].

- any further material that W04730 claims to possess, including any notes of communications with W04326 or Serbian intelligence;
- the [REDACTED] that W04730 claims to have;
- any further material suggesting that W04730 has a relationship with any intelligence agency;
- any further material relating to W04730's claimed interactions with W04326 or Serbian authorities; or
- any further document discussed during W04730's SPO interviews.

8. Moreover, Veseli seeks the following materials, which the SPO does not possess and is under no obligation to create: (i) a detailed account of all steps taken to obtain certain materials relating to W04730 and W04326; and (ii) an order from the Pre-Trial Judge for such materials to be produced.<sup>20</sup> These additional requests fall squarely outside the SPO's disclosure obligations.<sup>21</sup>

9. Further, to the extent Veseli requests an order from the Pre-Trial Judge, he does not indicate to whom such order should be addressed or demonstrate that it is necessary for 'preparation of a fair and expeditious trial'.<sup>22</sup>

10. In relation to those items identified with sufficient specificity and within the SPO's custody, control, or actual knowledge, the Motions fail to justify additional disclosure, as set out below.

#### B. THE MOTIONS FAIL TO JUSTIFY ADDITIONAL DISCLOSURE IN RELATION TO W04730

11. The Defence fails to justify any disclosure of further materials relating to W04730, relying on baseless allegations of impropriety and failing to demonstrate that the requested materials are potentially exculpatory or material.

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<sup>20</sup> Veseli Supplement, KSC-BC-2020-06/F01100, para.47(a)(ii)&(b)(iii).

<sup>21</sup> *Gucati* Appeal Decision, KSC-BC-2020-07/IA005/F00008/RED, para.54. *See also* para.6 above.

<sup>22</sup> Article 39(3). *See also* Article 39(10)-(11).

## 1. The Defence's allegations of impropriety are baseless

12. The Defence's unfounded allegations of impropriety by the SPO rest on the false assumption that W04730's fantastical [REDACTED] account is credible. Even assuming undisclosed evidence concerning W04730 is relevant to this case – which it is not – the sweeping and abstract submissions and conclusions of the Defence are wholly inadequate to rebut the presumption of good faith afforded the SPO in the discharge of its disclosure obligations.

13. According to W04730, [REDACTED]<sup>23</sup> [REDACTED]<sup>24</sup> [REDACTED]. [REDACTED]<sup>25</sup> [REDACTED].<sup>26</sup>

14. W04730 also claimed the following:

- [REDACTED];<sup>27</sup>
- [REDACTED];<sup>28</sup>
- [REDACTED];<sup>29</sup>
- [REDACTED],<sup>30</sup> [REDACTED];<sup>31</sup>
- [REDACTED].<sup>32</sup>

15. The confusing nature of this rambling, incoherent narrative is illustrated by W04730's claim that [REDACTED]. Even Thaçi appears confused as he submits that this allegation is at the same time incriminating and exculpatory.<sup>33</sup>

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<sup>23</sup> [REDACTED].

<sup>24</sup> [REDACTED].

<sup>25</sup> [REDACTED].

<sup>26</sup> [REDACTED].

<sup>27</sup> [REDACTED].

<sup>28</sup> [REDACTED].

<sup>29</sup> [REDACTED].

<sup>30</sup> [REDACTED].

<sup>31</sup> [REDACTED].

<sup>32</sup> [REDACTED].

<sup>33</sup> Thaçi Addendum, KSC-BC-2020-06/F01101, paras 21, 24 .

16. The Defence now criticise the SPO for not pursuing this obviously incredible story.<sup>34</sup> For instance, Veseli submits that Prosecution counsel, after hearing of screenshots [REDACTED], ‘shut down the interview immediately after this revelation, without asking any follow-up questions’.<sup>35</sup> This not only misrepresents the transcript of the phone call – [REDACTED]<sup>36</sup> – but ignores the futility of this line of questioning.<sup>37</sup> Veseli even baselessly insinuates that the SPO has acted unethically and criticises the SPO for failing to use its coercive powers.<sup>38</sup>

17. Contrary to the Defence’s baseless aspersions, the SPO appropriately focussed on [REDACTED], having established that W04730’s account is not credible. W04730 stated at the beginning of the phone call that, [REDACTED].<sup>39</sup> [REDACTED].

## **2. The requested material is not potentially exculpatory**

18. The Defence’s requests under Rule 103 are misguided because none of the requested material related to W04730 is exculpatory.<sup>40</sup>

19. The [REDACTED] phone call was assessed as potentially exculpatory material because of W04730’s fictitious assertion that [REDACTED]. The SPO has already disclosed the [REDACTED] phone call and has thus fully discharged its obligations under Rule 103.<sup>41</sup> Further, the SPO has also disclosed the [REDACTED]<sup>42</sup> as a matter of courtesy and in light of the Thaçi Defence request.<sup>43</sup>

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<sup>34</sup> Thaçi Addendum, KSC-BC-2020-06/F01101, para.22; Veseli Supplement, KSC-BC-2020-06/F01100, paras 30, 35-38.

<sup>35</sup> Veseli Supplement, KSC-BC-2020-06/F01100, paras 30, 37.

<sup>36</sup> [REDACTED].

<sup>37</sup> [REDACTED].

<sup>38</sup> Veseli Supplement, KSC-BC-2020-06/F01100, paras 35, 38.

<sup>39</sup> [REDACTED].

<sup>40</sup> Thaçi Addendum, KSC-BC-2020-06/F01101, para.12.

<sup>41</sup> Disclosure 490: Rule 103, 23 September 2022.

<sup>42</sup> [REDACTED].

<sup>43</sup> Thaçi Addendum, KSC-BC-2020-06/F01101, para.6.



20. Thaçi now claims that 'any information in the SPO's custody, control or actual knowledge which relates to W04730' is 'manifestly exculpatory', but does not substantiate this.<sup>44</sup> Thaçi partly bases this submission on the false assumption that W04730 provided 'incriminating information' to the SPO [REDACTED].<sup>45</sup> In addition, W04730's allegation implicating Thaçi's family in 'such unlawful behaviour' as [REDACTED] is apparently 'extremely worrying for the Defence'.<sup>46</sup> Contrary to these submissions, none of the information W04730 gave to the SPO – even if accepted – bears any relevance this case. Indeed, Thaçi's only submission substantiating the relevance of at least some of the requested documents is that [REDACTED].<sup>47</sup> Whatever concern Thaçi may have about W04730's allegations in a general sense, he has failed to substantiate any link between W04730 and the charges in this case. Further, the unverified allegations of impropriety [REDACTED] against, among others, the Serbian authorities and W04326 are not directly or credibly connected to the SPO's cooperation with the Serbian authorities, thereby undermining the purpose of these 'supplements' to the Defence's prior unsubstantiated request.<sup>48</sup>

21. Finally, Thaçi baselessly claims that he is concerned by the weight given to W04730 by the SPO and the Pre-Trial Judge.<sup>49</sup> Similarly, Veseli asserts that the SPO has relied upon W04730's [REDACTED] evidence and repeated it publicly to the detriment of the Accused.<sup>50</sup> These insincere submissions should be rejected, since W04730's [REDACTED] interview has not been used against Thaçi, Veseli, or any other accused. Consequently, whether or not that evidence was fabricated is immaterial to any issue to be litigated in

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<sup>44</sup> Thaçi Addendum, KSC-BC-2020-06/F01101, para.22.

<sup>45</sup> Thaçi Addendum, KSC-BC-2020-06/F01101, para.12.

<sup>46</sup> Thaçi Addendum, KSC-BC-2020-06/F01101, para.12.

<sup>47</sup> Thaçi Addendum, KSC-BC-2020-06/F01101, para.22.

<sup>48</sup> Thaçi Addendum, KSC-BC-2020-06/F01101, para.1; Veseli Supplement, KSC-BC-2020-06/F01100, para.2.

<sup>49</sup> Thaçi Addendum, KSC-BC-2020-06/F01101, para.23.

<sup>50</sup> Veseli Supplement, KSC-BC-2020-06/F01100, para.35.

this case. Knowing this, Thaçi and Veseli once again attempt to disingenuously employ the smoke screen of the Specialist Prosecutor's and President's meeting with diplomats on 7 December 2020, without even attempting to explain its relevance to this case.<sup>51</sup> Previous Defence requests in this and other SC cases pertaining to this diplomatic briefing have been rejected, with the Pre-Trial Judge and President (i) clarifying that material relating to such briefings concern the administration of the SC and are not *per se* relevant to or subject to disclosure in a given case; and (ii) considering that the unknown source's summary notes of the meeting were unreliable and inaccurate.<sup>52</sup> Defence submissions do not engage with such issues and should not be entertained. They are incapable, on their face, of demonstrating that any requested information has any direct relevance to this case.

22. Nevertheless, despite the premature, defective and overblown nature of the Motions, in the interest of minimising litigation during the final stages of the pre-trial phase, the SPO nevertheless re-reviewed items related to W04730 and, subject to any necessary protective measures, will disclose additional records,<sup>53</sup> including:

- contact notes;
- [REDACTED]; and
- screenshots of the alleged contact between W04730 and [REDACTED].<sup>54</sup>

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<sup>51</sup> Veseli Supplement, KSC-BC-2020-06/F01100, para35; Thaçi Addendum, KSC-BC-2020-06/F01101, paras 9, 23, 26, 29; Transcript, 4 November 2022, pp.10-11, 14.

<sup>52</sup> Decision on Application for the Recusal of the President, KSC-BC-2020-06/F00440, 24 August 2021, paras 17, 19 24; *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on Request for Information on Diplomatic Briefing, KSC-BC-2020-07/F00150, 11 March 2021, para.14; *Specialist Prosecutor v. Gucati and Haradinaj*, KSC-BC-2020-07/F00272, Decision on the Application for Recusal or Disqualification, 6 August 2021, para.20.

<sup>53</sup> These records are being prepared, together with the W04236 records referenced below, and will be disclosed as soon as practicable. Likewise, a related protective measures request will be filed shortly.

<sup>54</sup> As mentioned by the SPO during the Fifteenth Status Conference (*see* Transcript, 4 November 2022, p.1600), the screenshots mentioned at the end of the contact with W04730 are not in the SPO's possession. *See* 105694 TR ET Part 1, p.21. W04730 never provided them.

23. Thaçi also requests information about ‘any payment received by [REDACTED] from the SPO or any other entity acting under the SPO’s instructions’.<sup>55</sup> Beyond reasonable expenses relating to his SPO interview,<sup>56</sup> W04730 has not received any direct or indirect payment from the SPO.

### 3. Disclosure of W04730’s [REDACTED] phone call was timely

24. Contrary to Veseli’s assertions,<sup>57</sup> the [REDACTED] phone call was timely disclosed. The SPO requested protective measures for W04730 and the records relating to the [REDACTED] phone call by the relevant disclosure deadline.<sup>58</sup> This request was supplemented on 5 July 2022 with the English transcript, which due to the poor quality of the recording, was only available on 4 July 2022.<sup>59</sup> Consistent with the Framework Decision,<sup>60</sup> the [REDACTED] phone call records were not disclosed until after the Pre-Trial Judge ruled on the Protective Measures Request. Such disclosures were therefore timely.

#### C. THE MOTIONS FAIL TO JUSTIFY ADDITIONAL DISCLOSURE IN RELATION TO W04326

25. Defence submissions concerning information relating to W04326 derive from W04730’s unreliable evidence and suffer from the same defects. As noted below, the SPO has conducted a further review in light of the Motions, the [REDACTED] phone call, and

<sup>55</sup> Thaçi Addendum, KSC-BC-2020-06/F01101, para.30.

<sup>56</sup> As consistently held at similarly situated courts, such reasonable expenses are not disclosable. *See, for example*, STL, *Prosecutor v. Ayyash et al.*, Decision on Prosecution Witness Expenses, 9 May 2014, paras 8 (‘The policy reason is the expectation, and especially in circumstances where witnesses must travel to attend interviews or to testify, that they should not be out of pocket for doing so; in other words, paying witnesses their reasonable expenses is considered a normal part of a functioning system of justice’), 12; ICC *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Public Redacted Version of ‘Decision on Defence requests seeking disclosure orders in relation to witness P-0901 and seeking the postponement of the witness’s cross-examination’ [...], 5 October 2015, para.57.

<sup>57</sup> Veseli Supplement, KSC-BC-2020-06/F01100, paras 45, 47(e).

<sup>58</sup> [REDACTED].

<sup>59</sup> Prosecution supplement to filing F00861, KSC-BC-2020-06/F00865, Confidential, 5 July 2022.

<sup>60</sup> Framework Decision, KSC-BC-2020-06/F00099, para.97.

a recent Thaçi Defence *inter partes* request. During this process, it identified certain additional materials for disclosure based on and indeed exceeding a broad and good faith interpretation of its disclosure obligations. The Defence submissions fail to demonstrate that any additional relief is justified.

### **1. The Defence's allegations concerning impact and impropriety are baseless**

26. The Defence's submissions about the impact of W04326 on this case are exaggerated and inaccurate. Veseli, in particular, submits sensationally that at the 'heart of the Prosecution's case is an apparently trusted intermediary', and calls W04730's allegations against W04326 'potentially disastrous for the integrity of the Prosecution's case'.<sup>61</sup> These submissions vastly overstate the nature and extent of the SPO's involvement with W04326, as well as the credibility of W04730's evidence, including in relation to W04326.

27. The SPO has had a number of contacts with W04326, primarily in 2017 and 2018. During this period, W04326 informed the SPO of potential leads and facilitated contact, mostly introductions, between the SPO and a limited number of witnesses. W04326 did so on his own initiative, not under instruction from the SPO. Five of these witnesses are on the SPO's witness list.<sup>62</sup>

28. One of the witnesses whom W04326 introduced to the SPO is [REDACTED].<sup>63</sup> The SPO has questioned [REDACTED] about his interactions with W04326 to ascertain the nature of the contact between them and any impact this may have had on [REDACTED] evidence.<sup>64</sup> The following exchange is instructive:

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<sup>61</sup> Veseli Supplement, KSC-BC-2020-06/F01100, para.35.

<sup>62</sup> These include [REDACTED]. The remaining three witnesses have protective measures and are listed in Annex 1. When their identities are disclosed, information concerning their relationship with W04326 will likewise be disclosed.

<sup>63</sup> [REDACTED]. A lesser redacted version of the relevant part of this transcript will be promptly disclosed.

<sup>64</sup> [REDACTED]. *See also* [REDACTED].

[REDACTED].<sup>65</sup>

29. Similar questions were put to another witness, whose identity has not yet been disclosed to the Defence. This witness confirmed to the SPO that he only had brief, superficial discussions with W04326 about his interview with the SPO and did not discuss the substance thereof.<sup>66</sup>

30. In 2019, [REDACTED] told the SPO that he has fallen out with W04326 and thinks he is 'crazy'.<sup>67</sup>

## **2. The Defence requests have no legal or factual basis**

31. The Defence's request for material falling outside the established categories of disclosure (Rules 102-103) is excessive, unjustified, and unsubstantiated. Under the SC disclosure regime, it is the SPO's responsibility to determine, in good faith, whether information within the SPO's possession falls within Rules 102 or 103.<sup>68</sup> To show an error in such assessment, the Defence must demonstrate an item's potentially exculpatory nature.<sup>69</sup>

32. The Defence now seek to bypass this statutory framework without offering any legal basis for their extraordinary requests. As also noted above, while Rule 102(3) provides a mechanism for the Defence to request documents that are material to its preparation, the present requests fail entirely to engage with this provision and instead embark on an ill-founded fishing expedition.<sup>70</sup>

33. The SPO's responses to the items specifically requested are set out below.

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<sup>65</sup> [REDACTED].

<sup>66</sup> See Annex 1.

<sup>67</sup> [REDACTED]. See also [REDACTED].

<sup>68</sup> *Gucati* Appeal Decision, KSC-BC-2020-07/IA005/F00008/RED, para.40; Framework Decision, KSC-BC-2020-06/F00099, para.66; Disclosure Decision, KSC-BC-2020-06/F00936, para.35.

<sup>69</sup> *Kalimanzira* Appeal Judgment, para.18.

<sup>70</sup> *Gucati* Appeal Decision, KSC-BC-2020-07/IA005/F00008/RED, para.56.

(a) Records of contacts between W04326 and the SPO

34. The Defence requests all records of contacts between W04326 and the SPO. Many of these records have already been disclosed under Rule 103, if deemed exculpatory, or noticed under Rule 102(3), if deemed relevant. In light of the Motions, an *inter partes* Thaçi Defence disclosure request pertaining to W04236 made on 22 November 2022,<sup>71</sup> and the allegations in W04730's [REDACTED] phone call, the SPO has reviewed materials relating to W04326 and will disclose information falling within a broad interpretation of Rule 102(3) or Rule 103, as applicable, subject to any necessary requests for protective measures.<sup>72</sup> The Rule 103 documents to be disclosed contain further details relating to previously disclosed, potentially exculpatory information. The remaining materials to be disclosed contain no Rule 103 information and are being disclosed under Rule 102(3) in light of the Defence's submissions that such information is material and based on a broad and good faith interpretation the SPO's disclosure obligations.<sup>73</sup>

(b) Disclosure of each witness connected with W04326 and records of W04326's witness contacts

35. As indicated above, this information has already been disclosed or will be disclosed after expiry of the relevant delayed disclosure period for the limited number of witnesses on the SPO's witness list. To the extent this request also concerns other individuals not on the witness list, it is overbroad and unsubstantiated. In any event,

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<sup>71</sup> See fn.14 above.

<sup>72</sup> Related disclosures and protective measures requests are being prepared and will be submitted promptly. See also fn.53 above.

<sup>73</sup> Considering Defence submissions about 'summaries' from internal documents (see Veseli Supplement, KSC-BC-2020-06/F01100, para.31) and in the interests of transparency, the SPO – clarifying that it has not disclosed 'summaries', but has, in some cases, disclosed extracts from internal documents – has exceptionally decided to disclose certain, complete internal documents with appropriate standard redactions.

subject to applicable protective measures, the SPO has disclosed or will disclose all information in its possession, which falls under this category.

(c) W04326's status within the SPO (including benefits)

36. The history of the SPO's relationship with W04326 is set out above and in the materials disclosed or to be disclosed. The SPO has never had any contractual relationship with W04326 and has not provided W04326 with any benefits that exceed reasonable expenses connected with his SPO interviews.<sup>74</sup>

(d) W04326's alleged relationships or contacts with intelligence agencies and Serbian authorities

37. While requests for such information are overbroad and unsubstantiated, the SPO has disclosed or will disclose all requested records in its possession, subject to necessary protective measures.

(e) Alleged payment of money by Thaçi and Veseli in exchange for documents and/or influence of witnesses

38. As set out above and contrary to the Defence's ill-founded assertions that this overly broad category of information is exculpatory, it fails to hurdle even the relatively low bars of relevance and materiality. The SPO has disclosed or will disclose, subject to necessary protective measures, the information that falls within its disclosure obligations.

### **3. The Defence fails to substantiate its request for reconsideration of protective measures orders**

39. Veseli makes an entirely unsubstantiated and generalised request for reconsideration of decisions on protective measures. Given Veseli's failure to address either the reconsideration standard under Rule 79(1) or the requirements for varying protective measures under Rule 81, Veseli's requests for reconsideration should be

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<sup>74</sup> See fn.56 above (concerning the definition of 'reasonable expenses' and related jurisprudence).

summarily dismissed. Insofar as they are based on unreliable and unverified information, they are also wholly unfounded.

D. THE MOTIONS FAIL TO JUSTIFY ANY RELIEF IN RELATION TO INTERMEDIARIES

40. The Defence's submissions on intermediaries are equally overblown.

41. Veseli cites the broad definition of what constitutes an intermediary in the ICC Guidelines,<sup>75</sup> which were developed as a response to specific challenges at the ICC and self-evidently do not apply to SC proceedings. More importantly, Veseli fails to acknowledge that, even at the ICC, these guidelines only apply 'to intermediaries working under a contractual relationship with an organ or unit of the Court or Counsel'.<sup>76</sup> Whether the guidelines apply to an intermediary in the absence of a contractual relationship is decided on a case by case basis. Even for those intermediaries for whom the guidelines apply, there is no general obligation to disclose the existence or identity of an intermediary to other parties. The Defence's broad and unsubstantiated submissions are insufficient to demonstrate that – in light of W04730's unreliable evidence upon which the Motions are based – the existence or identities of any and all intermediaries should be disclosed. As demonstrated by disclosure in relation to W04326, the SPO does disclose the existence of – and in certain cases identities of – persons involved in witness contacts or investigations where such information falls under its disclosure obligations. Any further order is therefore wholly unjustified.

42. The Defence relies on a decision of the *Lubanga* Trial Chamber to support the submission that the existence of intermediaries is disclosable.<sup>77</sup> That case is *sui generis*. The prosecution had used intermediaries for approximately half of the witnesses it had

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<sup>75</sup> Veseli Supplement, KSC-BC-2020-06/F01100, para.11.

<sup>76</sup> ICC, Guidelines Governing the Relationship between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with intermediaries, March 2014 ('ICC Guidelines'), p.6.

<sup>77</sup> Veseli Supplement, KSC-BC-2020-06/F01100, paras 12-15, 44.



called at trial.<sup>78</sup> The Trial Chamber initially did not consider the identities of intermediaries disclosable,<sup>79</sup> and even emphasised that ‘a desire to pursue a speculative line of questioning is insufficient’.<sup>80</sup>

43. The Trial Chamber’s approach only changed after it had heard detailed testimony that a certain intermediary had told witnesses to lie.<sup>81</sup> At that point, the Trial Chamber ordered the prosecution to disclose the identity of the intermediary.<sup>82</sup> After the close of the prosecution case, a defence witness testified that a certain intermediary had conducted an extensive campaign to fabricate evidence:

Intermediary 321 arrived in their area about 5 years before to recruit children. He took children from the streets, saying that they were going to load sand into lorries.<sup>83</sup>

[...]

When he arrived at the family, he explained to everyone. He talked about money. He told them that they would be given money. He said that the child had to claim to have served as a child soldier in order to get money. He went all over the town recruiting children, and he would tell you what you had to say.<sup>84</sup>

Similar allegations were raised in relation to other intermediaries.<sup>85</sup>

44. Faced with evidence of such egregious corruption of witness testimony, the Trial Chamber requested ‘comprehensive information on all the intermediaries’ from the prosecution.<sup>86</sup> As the Trial Chamber commented, the ‘precise role of the intermediaries (together with the manner in which they discharged their functions) has become an issue of major importance in this trial’.<sup>87</sup> Even so, the Trial Chamber refused to order blanket

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<sup>78</sup> ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06, Redacted Decision on Intermediaries (‘*Lubanga Decision*’), 31 May 2010, para.2.

<sup>79</sup> *Lubanga Decision*, para.6.

<sup>80</sup> *Lubanga Decision*, para.16.

<sup>81</sup> *Lubanga Decision*, paras 17-23.

<sup>82</sup> *Lubanga Decision*, para.23.

<sup>83</sup> *Lubanga Decision*, para.26.

<sup>84</sup> *Lubanga Decision*, para.28.

<sup>85</sup> *Lubanga Decision*, paras 38-39.

<sup>86</sup> *Lubanga Decision*, para.30.

<sup>87</sup> *Lubanga Decision*, para.135.

disclosure of the identities of all the intermediaries, and instead invited the defence to file applications, supported by evidence, on an individual basis.<sup>88</sup>

45. The situation here is patently different. W04730 is not a prosecution witness and W04326 is not an intermediary. While he was involved in certain witness introductions – a fact the SPO has disclosed more than a year ago<sup>89</sup> – there has not been a contractual relationship between W04326 and the SPO. Moreover, there is no widespread use of intermediaries in this case, let alone information that intermediaries were involved in improper conduct. The Defence already knows W04326's identity and has been provided information concerning W04326's involvement with the SPO.

46. The very decisions cited by the Defence unambiguously establish that information about intermediaries is subject to the same rules of disclosure as any other information,<sup>90</sup> meaning that the threshold for disclosure of such information is materiality.<sup>91</sup> Moreover, this jurisprudence requires the Defence to support requests with detailed submissions and evidence.<sup>92</sup>

47. The Defence has not substantiated in any detail why it is material to defence preparations to have access to: 'any information related to the use of intermediaries between the SPO and witnesses on the SPO's witness list' (Thaçi);<sup>93</sup> and 'all SPO intermediaries that have been used in this case' (Veseli).<sup>94</sup> The requests for these broad categories of immaterial information should therefore be rejected.

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<sup>88</sup> *Lubanga* Decision, para.139.

<sup>89</sup> See, for example, [REDACTED].

<sup>90</sup> ICC, *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11, Decision on Disclosure of Information related to Prosecution Intermediaries, 4 September 2013 ('*Ruto* Decision'), para. 43.

<sup>91</sup> *Ruto* Decision, para.43; *Lubanga* Decision, para.143; Framework Decision KSC-BC-2020-06/F00099, para.62.

<sup>92</sup> *Lubanga* Decision, para.139; ICC, *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07, Order in relation to the disclosure of the identity of P-143, 1 February 2010, paras 22-23.

<sup>93</sup> Thaçi Addendum, KSC-BC-2020-06/F01100, para.30.

<sup>94</sup> Veseli Supplement, KSC-BC-2020-06/F01100, para.47.

E. THE MOTIONS FAIL TO JUSTIFY ANY ADDITIONAL RELIEF IN RELATION TO WITNESS BENEFITS

48. The Defence request for information concerning witness benefits, including expenses and relocation, is overbroad and unsubstantiated. The Request pertains to witness credibility matters and must be assessed on a case-by-case basis.<sup>95</sup> [REDACTED]. [REDACTED].<sup>96</sup> In relation to the remaining benefits information requested by the Defence, the SPO is discharging its disclosure obligations under Rule 103, including in relation to any witness benefits which may reasonably impact on witness credibility.<sup>97</sup> The Defence presents no arguments that could displace the presumption of good faith afforded the SPO.

Overall, the Defence once again abuses these proceedings as a tool to advance an agenda – to discredit the SPO and SC by any means and without any foundation – to the detriment of the interests of justice.

III. CLASSIFICATION

49. This response is confidential and Annex 1 is strictly confidential and *ex parte* pursuant to Rule 82(4) and to give effect to existing protective measures. A public redacted version of this response will be filed.

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<sup>95</sup> See para.3 above.

<sup>96</sup> See Annex 1.

<sup>97</sup> The SPO's disclosure practice in relation to benefits is consistent with established standards at similarly situated courts. See, for example, *Karadžić* Decision, para.23. To the extent any benefits potentially impact witness credibility, including any expenses that exceed the 'reasonable' standard in the relevant jurisprudence (see fn.56), they are subject to disclosure.

IV. RELIEF REQUESTED

50. For the foregoing reasons, the Motions should be denied.

**Word count: 5132**



**Alex Whiting**

**Acting Specialist Prosecutor**

Tuesday, 29 November 2022

At The Hague, the Netherlands.