



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:** **Trial Panel II**  
Judge Charles L. Smith, III, Presiding Judge  
Judge Christoph Barthe  
Judge Guénaël Mettraux  
Judge Fergal Gaynor, Reserve Judge

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Acting Specialist Prosecutor

**Date:** 21 December 2022

**Language:** English

**Classification:** Confidential

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**Prosecution response to Thaçi Defence request for a finding of disclosure failure**

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## I. INTRODUCTION

1. The Trial Panel should reject the THAÇI Request,<sup>1</sup> which misrepresents the disclosure record and impermissibly seeks to relitigate matters decided by the Pre-Trial Judge. The Defence fails to establish that the Specialist Prosecutor's Office ('SPO') has not complied with its disclosure obligations, and seeks unwarranted, disproportionate and inappropriate relief.

2. As discussed in more detail below and in previous filings,<sup>2</sup> the disclosure process in this case has been complex in light of the quantity of documents to be disclosed, necessary and judicially-authorized protective measures requiring redactions across statements and documents, human resource challenges in light of the pandemic, and language/translation issues. The complexity and quantity of reviews being conducted has inevitably led, at times, to errors. To address such errors and accommodate developments in the proceedings, the SPO has adjusted its processes and incorporated safeguards.<sup>3</sup> Overall, the SPO has discharged, and continues to discharge, its disclosure obligations, including under Rule 103 of the Rules,<sup>4</sup> in good faith and in a timely, diligent and transparent manner in compliance with Article 21(6) of the Law,<sup>5</sup> Rule 103, and the Framework Decision.<sup>6</sup> Since the Defence fails to establish non-compliance within the

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<sup>1</sup> Thaçi Defence Request for a Finding of Disclosure Failure, KSC-BC-2020-06/F01145, 8 December 2022, Confidential ('THAÇI Request'). While the THAÇI Request was filed before the Pre-Trial Judge, the case has since been transferred to the Trial Panel (Decision Transmitting the Case File to Trial Panel II, KSC-BC-2020-06/F01166, 15 December 2022), which is now the competent judicial authority to decide on such matters.

<sup>2</sup> See, e.g., Prosecution disclosure report, KSC-BC-2020-06/F01019, 7 October 2022 ('Disclosure Report'), paras 13-15.

<sup>3</sup> Disclosure Report, KSC-BC-2020-06/F01019, paras 6, 10-12, 16; Prosecution reply relating to disclosure reports F01019 and F01036, KSC-BC-2020-06/F01056, 25 October 2022, para.3.

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

<sup>5</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

<sup>6</sup> Framework Decision on Disclosure of Evidence and Related Matters, KSC-BC-2020-06/F00099, 23 November 2020 ('Framework Decision'), paras 66, 68.

meaning of Rule 110, let alone any prejudice, the Trial Panel should not consider the requested relief<sup>7</sup> further.

## II. SUBMISSIONS

### A. THE SPO COMPLIED WITH ITS RULE 103 OBLIGATIONS

3. To date, the SPO has disclosed 6,465 items under Rule 103. As previously set out,<sup>8</sup> the diligent review of many tens of thousands of items demands significant time and resources due, *inter alia*, to the need to protect witnesses and victims, the fact that items were obtained from multiple sources and in various languages, and that numerous items are subject to provider-applied conditions and restrictions.

4. This time-consuming exercise does not take place in a vacuum and cannot be evaluated in the abstract. Indeed, in relation to Rule 103, the Pre-Trial Judge has noted that '[t]he 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.'<sup>9</sup>

5. In the timeframe referred to in the THAÇI Request, 28 March to 7 December 2022,<sup>10</sup> the SPO not only disclosed, as a matter of priority, 2,105<sup>11</sup> items under Rule 103 but also disclosed 66,500 items under Rule 102(3).<sup>12</sup> Contemporaneously, pursuant to orders by the Pre-Trial Judge, the SPO, *inter alia*, supplemented its Rule 102(3) Notice with over

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<sup>7</sup> THAÇI Request, KSC-BC-2020-06/F01145, para.6.

<sup>8</sup> See Prosecution response to THAÇI and KRASNIQI motions concerning Rule 103 disclosure, KSC-BC-2020-06/F00736, 17 March 2022, Confidential, para.7; Disclosure Report, KSC-BC-2020-06/F01019.

<sup>9</sup> Decision on Thaçi and Krasniqi Defence Motions Seeking Remedies for Non-Compliance with Disclosure Obligations, KSC-BC-2020-06/F00936, 26 August 2022, Confidential ('26 August 2022 Decision'), para.28.

<sup>10</sup> THAÇI Request, KSC-BC-2020-06/F01145, para.2.

<sup>11</sup> While the THAÇI Request refers to 2,116 items, eleven of such items were redisclosures of items previously disclosed under Rule 103 due to reworks in Legal Workflow.

<sup>12</sup> The SPO also disclosed items under Rules 102(1) and 102(2) in connection with certain requests to amend the witness and exhibit lists and related decisions.

eight thousand items,<sup>13</sup> streamlined its case for trial<sup>14</sup> and tentatively selected the first forty witnesses it intends to call.<sup>15</sup> Further, as acknowledged by the Defence and in light of the circumstances of the case and necessary and proportionate protective measures, the litigation in this case has been particularly burdensome.<sup>16</sup> The SPO has filed numerous written submissions, including requests for protective measures in relation to Rule 103 items, as evidenced by the fact that 102<sup>17</sup> items from the 2,105 items disclosed in the relevant timeframe were disclosed pursuant to decisions on such requests.

6. As acknowledged by the Defence, the Pre-Trial Judge, who diligently and carefully monitored all aspects of the disclosure process, never found that the SPO violated its disclosure obligations.<sup>18</sup> Indeed, in the relevant timeframe,<sup>19</sup> and thereafter,<sup>20</sup> the Pre-Trial Judge consistently dismissed Defence allegations of SPO non-compliance with disclosure

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<sup>13</sup> Prosecution supplemental Rule 102(3) notice, KSC-BC-2020-06/F01021, 7 October 2022; Annex 1 to Prosecution supplemental Rule 102(3) notice, KSC-BC-2020-06/F01021/A01, 7 October 2022, Confidential.

<sup>14</sup> Prosecution submission of revised witness list, KSC-BC-2020-06/F00948, 2 September 2022.

<sup>15</sup> Prosecution submission of provisional list of first 40 witnesses to be called at trial, KSC-BC-2020-06/F01117, 18 November 2022.

<sup>16</sup> Joint Defence Request for Suspension of Time Limit During the Winter Recess, KSC-BC-2020-06/F01155, 13 December 2022, para.3.

<sup>17</sup> While the Defence asserts seven packages during the relevant timeframe were notified pursuant to an order on protective measures (THAÇI Request, KSC-BC-2020-06/F01145, para.2(i); fn.7, Annex 1 to THAÇI Request, KSC-BC-2020-06/F01145, pp.2-4), it fails to refer to disclosure packages 395 and 418 which were also so disclosed, or contained items disclosed, pursuant to such decisions.

<sup>18</sup> THAÇI Request, KSC-BC-2020-06/F01145, para.4.

<sup>19</sup> 26 August 2022 Decision, KSC-BC-2020-06/F00936, paras 31-32, 35-36; Decision on the Fourth Prosecution Request for Protective Measures for Items Containing Rule 103 Information, KSC-BC-2020-06/F01016/CONF/RED, 7 October 2022, Confidential ('Decision on the Fourth Prosecution Request'), para.29; Decision on the Fifth Prosecution Request for Protective Measures for Items Containing Rule 103 Information, KSC-BC-2020-06/F01140/CONF/RED, 5 December 2022, Confidential ('Decision on the Fifth Prosecution Request'), para.31.

<sup>20</sup> Decision on Joint Defence Motion for Disclosure Pursuant to Rule 103 (F00877/COR), KSC-BC-2020-06/F01149, 9 December 2022, Confidential ('Decision on Joint Defence Motion'), paras 63, 82; Decision on the Sixth Prosecution Request for Protective Measures for Items Containing Rule 103 Information, KSC-BC-2020-06/F01157, Strictly Confidential and *Ex Parte* ('Decision on the Sixth Prosecution Request'), 14 December 2022, paras 38-39; *See also* Decision on Deferred Material from F00984 and F01016 and Related Matters, KSC-BC-2020-06/F01144/CONF/RED, Confidential, 8 December 2022 ('Decision on Deferred Material'), paras 45-46.

obligations. The Defence makes no effort to satisfy the standard to reconsider prior rulings of the Pre-Trial Judge which directly conflict with its relief sought, and the leave to appeal deadlines for all but the most recent disclosure rulings have passed.<sup>21</sup>

7. The Defence presents no reason to revisit those findings, which rely on factors that continue to apply before this Panel. In particular: (i) a Rule 103 disclosure deadline, that of 16 December 2022,<sup>22</sup> has passed recently; (ii) the Defence will have time to assess the items disclosed under Rule 103 and conduct investigations prior to trial, tentatively scheduled to commence in March 2023<sup>23</sup> (indeed, over 85% of the items referenced in the THAÇI Request were disclosed, at the latest, some three and a half months ago); and (iii) the number of Rule 103 items disclosed in recent months is limited considering the amount of material to be disclosed by the SPO.<sup>24</sup>

8. Moreover, the THAÇI Request ignores judicially set deadlines concerning Rule 103. Specifically, it ignores the 20 May 2022 deadline for Rule 103 review of items obtained up to 31 January 2022,<sup>25</sup> the 30 June 2022 deadline for Rule 103 review of items obtained after January 2022,<sup>26</sup> and the 16 December 2022 deadline for disclosure of potentially exculpatory materials from the supplemental Rule 102(3) notice.<sup>27</sup> Over 70% of the items referred to in the THAÇI Request were disclosed by the 30 June 2022 deadline.

9. Further, one the main premises of the THAÇI Request is faulty. The mere date of a document relative to the date of its disclosure cannot demonstrate tardiness or

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<sup>21</sup> Rules 77 and 79.

<sup>22</sup> Transcript, 4 November 2022, p.1691.

<sup>23</sup> Transcript, 16 December 2023, p.1773.

<sup>24</sup> See, e.g. 26 August 2022 Decision, KSC-BC-2020-06/F00936, para.32; Decision on the Fourth Prosecution Request, KSC-BC-2020-06/F01016/CONF/RED, para.29; Decision on the Fifth Prosecution Request, KSC-BC-2020-06/F01140/CONF/RED, para.31.

<sup>25</sup> Transcript, 24 March 2022, p.1161-1162.

<sup>26</sup> Transcript, 20 May 2022, p.1323.

<sup>27</sup> Transcript, 4 November 2022, p.1691.

prejudice. Such submissions ignore the necessary components of the review process, which naturally could only run from 26 October 2020 when the indictment in this case was confirmed, and countless other factors, including, significantly, the date when the item was actually received by the SPO and when any clearances were obtained.

10. Defence submissions that the SPO failed by disclosing, in the relevant timeframe, documents created by the SPO with dates ranging from 2015 to 2021<sup>28</sup> impermissibly seek to relitigate alleged violations already dismissed by the Pre-Trial Judge or are otherwise misleading. The Pre-Trial Judge has already specifically found that there has been no violation in relation to the items in Disclosures 577<sup>29</sup> and 594,<sup>30</sup> which the Defence takes issue with within this category of items.<sup>31</sup> Almost every remaining item within this category was disclosed under Rule 103 following re-assessments of such items, a process outlined in previous submissions,<sup>32</sup> and one which serves as a safeguard and is clearly in the interests of justice. Finally, contrary to Defence submissions,<sup>33</sup> 17 parts of transcripts within this category, corresponding to two witness interviews, were disclosed following protective measure requests.<sup>34</sup>

11. Defence submissions that the SPO failed by disclosing, in the relevant timeframe, documents from international organisations created at the time of the events<sup>35</sup> are similarly flawed. The Pre-Trial Judge has already specifically found that there has been

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<sup>28</sup> THAÇI Request, KSC-BC-2020-06/F01145, para.22.

<sup>29</sup> Decision on the Fifth Prosecution Request, KSC-BC-2020-06/F01140/CONF/RED, paras 27-31.

<sup>30</sup> Decision on the Sixth Prosecution Request, KSC-BC-2020-06/F01157, paras 38-39.

<sup>31</sup> THAÇI Request, KSC-BC-2020-06/F01145, para.22(xviii), (xix).

<sup>32</sup> Disclosure report, KSC-BC-2020-06/F01019, 7 October 2022, para.11, fn.9.

<sup>33</sup> THAÇI Request, KSC-BC-2020-06/F01145, para.23.

<sup>34</sup> The following items were disclosed pursuant to Decision on the Second Prosecution Request for Protective Measures for Items Containing Rule 103 Information, KSC-BC-2020-06/F00918, 8 August 2022, Strictly Confidential and *Ex Parte*: 082736-TR-ET Part 1 RED - 082736-TR-ET Part 9 RED; 057758-TR-ET Part 1 RED to 057758-TR-ET Part 8 RED.

<sup>35</sup> THAÇI Request, KSC-BC-2020-06/F01145, paras 24-25.

no violation in relation to the items in Disclosures 562,<sup>36</sup> 577,<sup>37</sup> and 606,<sup>38</sup> which the Defence challenges within this category.<sup>39</sup> Almost every other item in this category – which considered holistically and in context represents a limited number of materials – was disclosed under Rule 103 following re-assessments, as explained above.

12. Accordingly, the THAÇI Request fails to establish any disclosure violation or failure meeting the threshold of non-compliance within the meaning of Rule 110, which 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.<sup>40</sup>

13. The amount of Rule 103 information disclosed in this case, and the consistency with which it has been disclosed, including in the relevant timeframe, is a testament to the SPO’s good faith in discharging its obligations. The disclosure reports filed pursuant to the Pre-Trial Judge’s orders are fully compliant therewith and demonstrate that the SPO continues to act transparently while also showing why any delays in disclosure are reasonable and not prejudicial.<sup>41</sup> In this respect, on 14 December 2022, the Pre-Trial Judge rejected a Defence request to find the SPO violated its disclosure obligations in relation to Disclosures 594 and 606,<sup>42</sup> the disclosure reports for which the Defence takes particular issue with.<sup>43</sup>

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<sup>36</sup> Decision on the Fifth Prosecution Request, KSC-BC-2020-06/F01140/CONF/RED, paras 27-31.

<sup>37</sup> Decision on the Fifth Prosecution Request, KSC-BC-2020-06/F01140/CONF/RED, paras 27-31.

<sup>38</sup> Decision on the Sixth Prosecution Request, KSC-BC-2020-06/F01157, paras 38-39.

<sup>39</sup> THAÇI Request, KSC-BC-2020-06/F01145, para.25(vii)(viii)(ix).

<sup>40</sup> 26 August 2022 Decision, KSC-BC-2020-06/F00936, para.16.

<sup>41</sup> *Contra* THAÇI Request, KSC-BC-2020-06/F01145, paras 5, 26-27.

<sup>42</sup> Decision on the Sixth Prosecution Request, KSC-BC-2020-06/F01157, paras 38-39.

<sup>43</sup> THAÇI Request, KSC-BC-2020-06/F01145, paras 5, 26-27.

14. The THAÇI Request fails to rebut the presumption of good faith afforded to the SPO in relation to its disclosure obligations.<sup>44</sup>

B. THE RELIEF SOUGHT IS UNWARRANTED, DISPROPORTIONATE AND INAPPROPRIATE

15. Since non-compliance has not been established, the Trial Panel need not consider the requested relief further.<sup>45</sup>

16. Even if the Defence was able to show a breach of the SPO's obligation under Rule 103, which it has not, the Trial Panel must determine 'whether the Defence has actually been prejudiced by such failure before considering whether a remedy is appropriate'.<sup>46</sup> It is a well-settled principle that 'the fact that material has not been disclosed in a timely manner does not *per se* create a prejudice to the accused.'<sup>47</sup> In addition, the prejudice shown has to be 'material'.<sup>48</sup>

17. Defence submissions as to prejudice are exaggerated, abstract, and speculative, referring to unspecified investigative opportunities that will allegedly 'undoubtedly' be delayed or lost.<sup>49</sup> Just as the Pre-Trial Judge found to be the case in relation to previous

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<sup>44</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, para.53; 26 August 2022 Decision, KSC-BC-2020-06/F00936, para.39; Decision on Joint Defence Motion, KSC-BC-2020-06/F01149, para.33.

<sup>45</sup> 26 August 2022 Decision, KSC-BC-2020-06/F00936, para.36.

<sup>46</sup> ICTY, *Prosecutor v. Bralo*, IT-95-17-A, Decision on Motions for Access to *Ex Parte* Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006, para. 31; ICTR, *Kalimanzira v. Prosecutor*, ICTR-05-88-A, Judgement, 20 October 2010, para. 18; ICTR, *Prosecutor v Nahimana*, ICTR-99-52-A, Decisions on Motions relating to the Appellant Hassan Ngeze's and the Prosecution's Requests for leave to present Additional Evidence of Witnesses ABC1 AND EB, 27 November 2006, para.11. *See also* ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused's Eighty-second Disclosure Violation notion, 7 November 2013, para.14.

<sup>47</sup> ICTR, *Prosecutor v. Karemera et al*, ICTR-98-44-T, Decision on Joseph Nzirorera's 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures: ZF, Michel Bakuzakundi, and Tharcisse Renzaho, 18 February 2009 ('*Karemera Decision*'), para.18; ICTR, *Prosecutor v. Kajelijeli*, ICTR-98-44A-A, Judgement, 23 May 2005, para.262.

<sup>48</sup> *Karemera Decision*, para.18.

<sup>49</sup> *See* THAÇI Request, KSC-BC-2020-06/F01145, paras 31-32.



Defence allegations,<sup>50</sup> no material prejudice has been shown or caused. Accordingly, the relief requested is unwarranted.

18. Further, the requested relief would also be disproportionate and inappropriate. That the Defence dedicates only two paragraphs to its proposal of an external reviewer, which merely hark back to previous submissions,<sup>51</sup> and entirely fails to elaborate on its throwaway request for a deadline,<sup>52</sup> indicates that the Defence itself does not take these requests seriously.

19. In particular, the Defence fails to explain how the appointment of an external entity to review and disclose SPO material would speed up the disclosure process, which is clearly the main concern of the THAÇI Request. The outcome of such an appointment would unquestionably be extensive delays to the proceedings, which are not in the interests of justice. Indeed, other courts have consistently and repeatedly denied requests for third party reviewers even in cases which were at a significantly more advanced stage and in the context of which several findings of non-compliance had previously been made.<sup>53</sup>

20. Finally, the unreasoned proposal for an arbitrary deadline<sup>54</sup> is blind, *inter alia*, to the necessary processes involved in the identification of Rule 103 items and to the

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<sup>50</sup> 26 August 2022 Decision, KSC-BC-2020-06/F00936, paras 31-32, 35-36; Decision on the Fourth Prosecution Request, KSC-BC-2020-06/F01016/CONF/RED, para.29; Decision on the Fifth Prosecution Request, KSC-BC-2020-06/F01140/CONF/RED, para.31. On 9 December 2022, the Pre-Trial Judge again dismissed a Defence request to find a disclosure violation, *see* Decision on Joint Defence Motion, KSC-BC-2020-06/F01149, paras 63, 82; Decision on the Sixth Prosecution Request, KSC-BC-2020-06/F01157, paras 38-39; *See also* Decision on Deferred Material, KSC-BC-2020-06/F01144/CONF/RED, paras 45-46.

<sup>51</sup> *See* THAÇI Request, KSC-BC-2020-06/F01145, paras 35-36.

<sup>52</sup> This request is solely referred to at para.6(iii) of the THAÇI Request.

<sup>53</sup> *See, e.g., Karemera* Decision, paras. 31-32; ICTR, *Prosecutor v. Karemera et al*, ICTR-98-44-T, Decision on Prosecutor's Rule 68(D) Application and Joseph Nzirorera's 12<sup>th</sup> Notice of Rule 68 Violation, 26 March 2009, para.27; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused's Forty-Ninth and Fiftieth Disclosure Violation Motions, 30 June 2011, para.52; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused's Fifty-First and Fifty-Second Disclosure Violation Motions, 7 July 2011, para.18; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision On Accused's Fifty-Third and Fifty-Fourth Disclosure Violation Motions, 22 July 2011, para.16.

<sup>54</sup> THAÇI Request, KSC-BC-2020-06/F01145, para.6(iii).

extensive reviews the SPO has clearly undertaken in view of the material disclosed thus far.

### III. CLASSIFICATION

21. This request is confidential in accordance with Rule 82(4). The SPO does not object to reclassification as public.

### IV. CONCLUSION

22. For the foregoing reasons, the Trial Panel should reject the THAÇI Request in full.

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Wednesday, 21 December 2022

At The Hague, the Netherlands.