



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: KSC-BC-2020-06
**The 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 Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Fidelma Donlon

Date: 1 February 2023

Language: English

Classification: Public

Decision on Thaçi Defence Request for a Finding of Disclosure Failure

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TRIAL PANEL II (“Trial Panel”, “Panel”), pursuant to Articles 21(6) and 40 of the Law No. 05/L-53 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 103, 110 and 116 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 8 December 2022, the Defence for Hashim Thaçi (“Mr Thaçi”, “Accused”) (“Thaçi Defence”) filed before the Pre-Trial Judge a request for a finding of disclosure failure on the part of the Specialist Prosecutor’s Office (“SPO”) (“Thaçi Request”).¹

2. On 21 December 2022, the SPO filed a response to the Thaçi Request (“Response”) before Trial Panel II.²

II. SUBMISSIONS

3. The Thaçi Defence submits that the SPO has delayed disclosure of thousands of exculpatory documents discloseable pursuant to Rule 103, which must have necessarily been in its custody for several years.³ In light of the alleged failure of the SPO to disclose Rule 103 material immediately, and the fact that the start of the trial phase is imminent, the Thaçi Defence requests that: (i) a finding that the SPO has violated its obligation to disclose exculpatory material “immediately”, “as soon as it is in its custody, control or actual knowledge”, pursuant to Rule 103, be made; (ii) an independent and impartial magistrate or *amicus curiae* be appointed to review all material in the SPO’s custody, control or actual

¹ F01145, Specialist Counsel, *Thaçi Defence Request for a Finding of Disclosure Failure*, 8 December 2022, confidential, with Annex 1, confidential (“Annex 1”).

² F01174, Specialist Prosecutor, *Prosecution Response to Thaçi Defence Request for a Finding of Disclosure Failure*, 21 December 2022, confidential.

³ Thaçi Request, para. 3.

knowledge, identify any exculpatory information and disclose such exculpatory material immediately to the Defence; and (iii) the SPO be ordered to disclose any remaining exculpatory items in its database within 15 days.⁴ The Thaçi Defence identifies several sets of exculpatory documents which were allegedly disclosed late by the SPO.⁵ It submits that the SPO failed to “immediately” disclose documents created by the SPO with dates ranging from 2015 to 2021, which were disclosed (with only standard redactions) between late March and November 2022 in spite of the SPO being necessarily aware of their content and potentially exculpatory nature for several years.⁶ The Thaçi Defence further submits that the SPO failed to disclose immediately documents emanating from other international organisations (such as UNMIK, OSCE, NATO, KFOR, ECMM, ICTY/IRMCT), many of which were created at the time of the events.⁷ According to the Thaçi Defence, the SPO’s justifications for late disclosure of Rule 103 material are inadequate,⁸ and the delayed disclosure of exculpatory material is prejudicial to the Defence.⁹ The Thaçi Defence therefore submits that the SPO’s failure to disclose materials in accordance with Rule 103 warrants a remedy, and requests the appointment of an independent magistrate to review the material in the SPO’s custody, and identify and disclose any exculpatory material.¹⁰

4. The SPO responds that the Trial Panel should reject the Thaçi Request, which in the SPO’s view misrepresents the disclosure record and impermissibly seeks to re-litigate matters decided by the Pre-Trial Judge. The SPO submits that the Thaçi Defence fails to establish that the SPO has not complied with its disclosure obligations, and seeks unwarranted, disproportionate and inappropriate relief.¹¹

⁴ Thaçi Request, paras 6, 37.

⁵ Thaçi Request, para. 20, *referring to* Annex 1.

⁶ Thaçi Request, paras 22-23.

⁷ Thaçi Request, para. 24, *referring to* Annex 1.

⁸ Thaçi Request, paras 26-30.

⁹ Thaçi Request, paras 31-33.

¹⁰ Thaçi Request, paras 34-36.

¹¹ Response, paras 1, 22.

The SPO responds that it has been discharging its disclosure obligations in good faith and in a timely, diligent and transparent manner, and that the Pre-Trial Judge never found that the SPO violated its disclosure obligations.¹² The SPO argues that, as noted by the Pre-Trial Judge, “[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.”¹³ The SPO therefore submits that the Thaçi Defence 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.¹⁴ The SPO also argues that the relief sought by the Thaçi Defence is unwarranted, disproportionate and inappropriate.¹⁵ According to the SPO, the Trial Panel should reject the Thaçi Request in full.¹⁶

III. APPLICABLE LAW

5. 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 Response, paras 2, 6.

¹³ Response, para. 4, citing F00936, Pre-Trial Judge, *Decision on Thaçi and Krasniqi Defence Motions Seeking Remedies for Non-Compliance with Disclosure Obligations* (“Pre-Trial Judge’s Decision on Non-Compliance with Disclosure Obligations”), 26 August 2022, confidential, para. 15 (a public redacted version was filed on 13 September 2022, F00936/RED).

¹⁴ Response, para. 12.

¹⁵ Response, paras 15-20.

¹⁶ Response, paras 22.

6. Pursuant to Rule 116(4) of the Rules, the Panel may issue orders or decisions on any matter as necessary to ensure a fair and expeditious trial, including disclosure obligations.

7. Pursuant to Article 40(6) of the Law, prior to trial or during the course of a trial, the Trial Panel may exercise any functions or powers of the Pre-Trial Judge referred to in Article 39, and require parties to meet disclosure obligations as set out in the Rules.

8. 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. Compliance with this obligation is an important element of fair proceedings in a normative system such as the one applicable before this court and has been said to be as important as the obligation to prosecute.¹⁷ Material has been considered to affect the credibility of Prosecution evidence if "it undermines the case presented by the Prosecution at trial".¹⁸ Determining what material should be disclosed under Rule 103 is a facts-based assessment which falls primarily within the discretion and responsibility of the Prosecution.¹⁹ While the general approach in this matter should be to "respect the Prosecution's function in the administration of justice, and the Prosecution's execution of that function in good faith",²⁰ that does not excuse a failure to disclose

¹⁷ See e.g. ICTY, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgement ("[Kordić and Čerkez Appeal Judgment](#)"), 17 December 2004, paras 183, 242; *Prosecutor v. Krstić*, IT-98-33-A, Judgement ("[Krstić Appeal Judgment](#)"), 19 April 2004, para. 180; *Prosecutor v. Blaškić*, IT-95-14-A, Judgement ("[Blaškić Appeal Judgment](#)"), 29 July 2004, para. 264; *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused's Seventeenth Motion for Finding of Disclosure Violation and for Remedial Measures ("[Karadžić Decision](#)"), 29 September 2010, para. 15.

¹⁸ See e.g. [Karadžić Decision](#), para. 14; [Krstić Appeal Judgment](#), para. 178.

¹⁹ See e.g. [Kordić and Čerkez Appeal Judgment](#), para. 183; [Blaškić Appeal Judgment](#), para. 264; [Karadžić Decision](#), para. 15.

²⁰ See e.g. [Kordić and Čerkez Appeal Judgment](#), para. 183; [Karadžić Decision](#), para. 15.

exculpatory material “immediately” in accordance with Rule 103.²¹ An assessment of the timeliness of disclosure will depend on the Prosecution having sufficiently accounted for its own conduct and for any delay between the time when it came into possession of the information and the time when it was eventually disclosed to the Defence.²² Among the considerations relevant to such an assessment are the amount of evidence to be reviewed by the SPO and the expeditiousness with which the SPO proceeds when reviewing evidentiary material.²³ In determining whether there has been a violation of the Rule, the Panel will, therefore, assess whether the SPO has indeed made sufficient efforts to ensure the prompt identification of such material and the equally prompt provision to the Accused of that material, taking into account all relevant circumstances.

IV. DISCUSSION

9. At the outset, the Panel notes that the Taçi Request was filed before the Pre-Trial Judge one week before the transfer of the case to the Trial Panel. The Panel will therefore address the Taçi Request pursuant to Article 40(6) of the Law and Rule 116(4) of the Rules.

10. The Panel notes that the Taçi Defence requests the adoption of two different measures pursuant to Rule 110 as a consequence of what it says is a failure on the part of the SPO to comply with its disclosure obligations under Rule 103.

²¹ See e.g. [Karadžić Decision](#), para. 15 (in respect of the less demanding standard of disclosure “as soon as practicable”).

²² See e.g. [Karadžić Decision](#), para. 16. See also [Kordić and Čerkez Appeal Judgment](#), paras 209, 243; [Krstić Appeal Judgment](#), paras 180, 197; [Blaškić Appeal Judgment](#), para. 265.

²³ Pre-Trial Judge’s Decision on Non-Compliance with Disclosure Obligations, para. 16. See also ICTR, *Karemera and Ngirumpatse v. Prosecutor*, ICTR-98-44-A, [Judgement](#), 29 September 2014, para. 52; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, [Decision on Accused’s Second Motion for Finding Disclosure Violations and for Remedial Measures](#), 17 June 2010, paras 16-17; *Prosecutor v. Karadžić*, IT-95-5/18-T, [Decision on Accused’s Eighteenth to Twenty-First Disclosure Violation Motions](#), 2 November 2010, para. 43; *Prosecutor v. Karadžić*, IT-95-5/18-T, [Decision on Accused’s Twenty-Ninth Disclosure Violation Motion](#), 11 January 2011, paras 13, 16.

11. In order to establish a violation of this obligation by the Prosecution, the Defence must “present a prima facie case making out the probable exculpatory or mitigating nature” of the materials in question and the failure of the SPO to disclose “immediately”, i.e., promptly and without undue delay.²⁴ Where this has been established, the Panel will decide what measure(s) is or are appropriate to address such a violation.²⁵ The existence of a demonstrable prejudice to the Accused is a primary consideration in deciding what response or sanction is appropriate in a given case.²⁶

A. ALLEGED NON-COMPLIANCE WITH DISCLOSURE OBLIGATIONS

12. The Panel will assess the Taçi Defence’s allegations of disclosure violation on the part of the SPO distinguishing between: (i) documents created by the SPO; (ii) other documents emanating from international organisations.

1. Documents created by the SPO

13. The Panel notes and accepts the SPO’s submission that “the mere date of a document relative to the date of its disclosure cannot demonstrate tardiness”.²⁷ The Panel is also aware of and has accounted for the fact that the process of reviewing material newly obtained or created by the SPO will take a reasonable amount of time. Considered in that light, the Panel is satisfied of the timeliness of: (i) the disclosures, having occurred between 28 March 2022 and 20 May 2022, of documents created by the SPO;²⁸ (ii) the disclosure, between 20 May 2022 and

²⁴ See e.g. [Kordić and Čerkez Appeal Judgment](#), para. 179; [Karadžić Decision](#), paras. 14.

²⁵ Pre-Trial Judge’s Decision on Non-Compliance with Disclosure Obligations, para. 15.

²⁶ See e.g. [Karadžić Decision](#), para. 17; [Kordić and Čerkez Appeal Judgment](#), para. 179; [Blaškić Appeal Judgment](#), para. 268.

²⁷ Response, para. 9.

²⁸ Disclosure Packages 204, 209, 212, 219, 220, 232, 234, 242, 243, 247, 248, 249, 252, 253.

30 June 2022, of documents created by the SPO, dating after 31 January 2022;²⁹ (iii) the disclosure, after 30 June 2022, of documents created by the SPO, dating after 16 June 2022;³⁰ (iv) the disclosures of documents created by the SPO, having occurred between 16 August 2022 and 7 December 2022, pursuant to or addressed in the Pre-Trial Judge's decisions on protective measures;³¹ (v) the disclosure of a document created by the SPO on 12 October 2022 following the SPO's notification of its intention to lift protective measures for a witness;³² and (vi) the disclosure of documents created by the SPO on 11 October 2022 pursuant to a Pre-Trial Judge's decision on a Rule 107(2) request.³³ The Panel notes, however, that disclosure of material coming within the scope of Rule 103 does not depend on an order having been made for the disclosure of such material. The primary responsibility for the review and disclosure of such information is with the SPO. Only where a dispute arises between the Parties or where the SPO seeks a relief from the Panel, should such an order be necessary.

14. In respect of other material created by the SPO, the Panel notes that on 24 March 2022, the Pre-Trial Judge set a deadline of 20 May 2022 for the SPO to complete its Rule 103 review of evidentiary items obtained before 31 January 2022.³⁴ On 18 May 2022, pursuant to the Pre-Trial Judge's order, the SPO confirmed that it had "finalised the initial review of exculpatory evidence in its collection up to the end of January 2022".³⁵ Furthermore, on 30 June 2022, pursuant to another order of the Pre-Trial Judge,³⁶ the SPO confirmed that it had completed its review of material registered between 31 January 2022 and

²⁹ Such disclosure involves some documents contained in Disclosure Packages 297, 306, 323.

³⁰ Disclosure Packages 418, 577, 594, 606.

³¹ Disclosure Packages 395, 418, 490, 563, 576, 577, 594, 605, 606.

³² Disclosure Package 569.

³³ Disclosure Packages 565.

³⁴ Transcript of Hearing, 24 March 2022, pp. 1161-1162.

³⁵ F00805, Specialist Prosecutor, *Prosecution Submissions for Twelfth Status Conference*, 18 May 2022, para. 2 *See also* Transcript of Hearing, 20 May 2022, pp. 1222-1225.

³⁶ Transcript of Hearing, 20 May 2022, p. 1323.

16 June 2022 for exculpatory evidence.³⁷ The Panel therefore finds that the SPO had or should have had knowledge of the content and potentially exculpatory nature of the documents at issue at an earlier stage of the proceedings and at least as of May/June 2022.

15. For these reasons, the Panel is satisfied of the untimeliness of the disclosure, after 20 May 2022, of documents created by the SPO, dating prior or up to 31 January 2022, and in relation to which the SPO had not requested protective measures.³⁸

16. The Panel notes the SPO's reference to the Pre-Trial Judge's finding that "[t]he wording 'immediately, as soon as it is in [the SPO's] 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".³⁹ The Panel acknowledges the sheer volume of the evidentiary material disclosed by the SPO pursuant to Rules 103 as well as Rule 102(3) of the Rules. The Panel is also aware of the SPO's efforts to supplement its Rule 102(3) Notice and to streamline and prepare its case for trial. This being said, the Panel is of the view that, more than two years after the Accused were arrested and with the trial set to start in less than 40 days, the context of the proceedings no longer justifies the delayed disclosure of exculpatory evidence to the Defence. The Panel also reiterates that the SPO's obligation to disclose this sort of information to the Defence is as important as the obligation to prosecute.⁴⁰

³⁷ F00861, Specialist Prosecutor, *Third Prosecution Request for Protective Measures for Items Containing Rule 103 Information*, 30 June 2022, strictly confidential and *ex parte*, with Annexes 1-9, strictly confidential and *ex parte*, para. 1 (a confidential redacted version was filed on 1 July 2022, F00861/CONF/RED).

³⁸ Such late disclosure involves some, but not all, documents contained in Disclosure Packages 297, 306, 323.

³⁹ Pre-Trial Judge's Decision on Non-Compliance with Disclosure Obligations, para. 28

⁴⁰ See e.g. [Kordić and Čerkez Appeal Judgment](#), paras 183, 242; [Krstić Appeal Judgment](#), para. 180; [Blaškić Appeal Judgment](#), para. 264; [Karadžić Decision](#), para. 15.

17. The Panel further finds that the SPO has not adequately accounted for the delays in disclosing the impugned material. In particular, the fact that the disclosure obligation attaching to Rule 103 is a continuing or “rolling” one cannot excuse those delays.⁴¹ Rule 103 requires that such material be disclosed “immediately”, meaning upon the SPO coming in possession of it and without undue delay. The fact that the SPO’s disclosure obligation under that Rule is a continuing or rolling one, therefore, does not authorize the SPO to delay the disclosure of such material outside of circumstances foreseen under the Rules. In that regard, the Panel shares and adopts the views expressed by the ICTY Trial Chamber in the *Karadžić* case:

Regardless of the Office of the Prosecutor’s internal practices, Rule 68 clearly requires the Prosecution to disclose potentially exculpatory material as “soon as practicable”. The ongoing nature of the obligation relates only to the fact that as new material comes into the possession of the Prosecution it should be assessed as to its potentially exculpatory nature and disclosed accordingly. This duty is a continuous obligation, as it remains even after a trial judgement has been rendered, and throughout the appeals proceedings. It does not suggest that the Prosecution can delay the disclosure of such material already in its possession, or identify and disclose potentially exculpatory material on a “rolling basis”. In determining whether there has been a violation of the Rule, a Chamber will assess whether the Prosecution has indeed made sufficient efforts to ensure the identification of such material and its provision to the Accused within a reasonable time-frame, taking into account all relevant circumstances.⁴²

18. On that basis, the Panel finds that the SPO failed to comply with Rule 103 and to disclose the material outlined in paragraph 15 above in accordance with that Rule.

⁴¹ See also, to the same effect, in respect of Rule 68 ICTY RPE: [Blaškić Appeal Judgment](#), para. 267; [Karadžić Decision](#), paras 14-17.

⁴² ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, [Decision on Prosecution’s Request for Reconsideration of Trial Chamber’s 11 November 2010 Decision](#), 10 December 2010, para. 11 (footnotes omitted). See also *Prosecutor v. Karadžić*, IT-95-5/18-T, [Decision on Accused’s Seventeenth bis and Twenty-Eighth Disclosure Violation Motions](#), 16 December 2010, para. 23; *Prosecutor v. Karadžić*, IT-95-5/18-T, [Decision on Accused’s Forty-Seventh Motion for Finding of Disclosure Violation and for Further Suspension of Proceedings](#), 10 May 2011, para. 11.

19. Turning to the Thaçi Defence's submission that the delayed disclosure of exculpatory material is prejudicial to the Defence, the Panel is not persuaded by such argument. The Thaçi Defence has not demonstrated that the SPO's late disclosure of the material mentioned in paragraph 15 above resulted in investigative opportunities being delayed or lost, nor that the review of the relatively limited belatedly disclosed material will affect the Defence right to adequately prepare for trial. The Panel notes, however, that the belated disclosure of this material at a time when the Defence should be focusing on other priorities, in particular the preparation of cross-examination of SPO witnesses, must have caused the Defence to divert some of its resources to perform tasks that should have been carried out months earlier. To that extent, a limited prejudice has accrued to the Defence.

20. For the reasons set out above, the Panel finds that the SPO should have disclosed the documents referred to in paragraph 15 at an earlier stage of the proceedings. The Panel holds that, by not doing so, the SPO failed to fully comply with its disclosure obligations pursuant to Rule 103 of the Rules.

2. Other documents

21. The Panel is satisfied of the timeliness of: (i) the disclosures, having occurred between 28 March 2022 and 20 May 2022, of documents emanating from other international organisations;⁴³ (ii) the disclosure, between 20 May 2022 and 30 June 2022, of documents emanating from other international organisations, dating after 31 January 2022;⁴⁴ (iii) the disclosure, after 30 June 2022, of documents emanating from other international organisations, dating after 16 June 2022;⁴⁵ (iv) the disclosures of documents emanating from other international

⁴³ Disclosure Packages 204, 209, 212, 219, 220, 232, 234, 242, 243, 247, 248, 249, 252, 253.

⁴⁴ Such disclosure involves some documents contained in Disclosure Packages 297, 306, 323.

⁴⁵ Disclosure Packages 418, 577, 594.

organisations, having occurred between 16 August 2022 and 7 December 2022 pursuant to or addressed in the Pre-Trial Judge's decisions on protective measures;⁴⁶ and (v) the disclosure of documents emanating from other international organisations, having occurred on 7 December 2022 pursuant to a Pre-Trial Judge's decision on a Rule 107(2) request.⁴⁷

22. Regarding other categories of disclosed information emanating from international organisations, the Panel has taken into consideration that, on 18 May 2022, the SPO confirmed that it had finalised the review of exculpatory evidence it obtained up to the end of January 2022. Furthermore, on 30 June 2022, the SPO confirmed that it had completed its review of material registered between 31 January 2022 and 16 June 2022 for exculpatory evidence. The Panel therefore finds that, in light of the identity and profession of relevant witnesses and the content of their statements as well as the nature and content of other documents received from other international organisations,⁴⁸ the SPO had or should have had knowledge of the potentially exculpatory nature of the documents at issue at an earlier stage of the proceedings and at least as of May/June 2022. The SPO has not specified which of these documents were affected by requests for consent to the information provider. As noted above, the onus is upon the SPO to account for any delay in the disclosure of exculpatory material. The Panel is of the view that the SPO has failed to do so in relation to the documents falling in the present category.⁴⁹

23. For these reasons, the Panel is satisfied of the untimeliness of the disclosure, after 20 May 2022, of documents emanating from other international

⁴⁶ Disclosure Packages 418, 490, 562, 563, 576, 577, 594, 605, 606.

⁴⁷ Disclosure Packages 610.

⁴⁸ See e.g. 069758-06; SITF00105433-00105623; SITF40008634-40008635; IT-05-87 P02772; K022-4449-K022-4489; 009810-009811; SITF00013504-00013506 RED; SITF00373887-00373890 RED; SITF40009151-40009155.

⁴⁹ Response, para. 3.

organisations, dating prior or up to 31 January 2022, and in relation to which the SPO had not requested protective measures.⁵⁰

24. The Panel has considered that more than two years have passed since the Accused were arrested and the trial is set to start in a month, so that the stage of the proceedings and the amount of evidence to review can no longer justify the delayed disclosure of exculpatory evidence to the Defence. Nor, for reasons explained above, can the rolling or ongoing nature of the SPO's disclosure obligation in relation to items listed in paragraph 23 above.⁵¹

25. For these reasons, the Panel holds that the SPO should have disclosed the documents referred to in paragraph 23 at an earlier stage of the proceedings. The Panel finds that, by not doing so, the SPO failed to fully comply with its disclosure obligations pursuant to Rule 103 of the Rules. The Panel further finds that, for reasons given above, the SPO's failure resulted in a limited prejudice to the Defence.⁵²

3. Conclusion

26. For the foregoing reasons, the Panel is satisfied that the SPO failed to fully comply with its disclosure obligations pursuant to Rule 103 with respect to certain categories of the documents. Considering the pivotal role of timely disclosure in particular in respect of exculpatory material, the Panel is of the view that the disclosure failure on the part of the SPO meets the threshold of non-compliance, within the meaning of Rule 110 of the Rules, and thus warrants the adoption of "appropriate measures". The Panel will therefore turn to assess the appropriate measures to adopt in the particular circumstances of the case.

⁵⁰ Such late disclosure involves the documents contained in Disclosure Package 284 and some, but not all, documents contained in Disclosure Packages 297, 306, 323.

⁵¹ See above para. 17.

⁵² See above para. 19.

B. APPROPRIATE MEASURE(S) IN THE PARTICULAR CIRCUMSTANCES OF THE CASE

27. The measures available to the Panel 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.

28. As noted above, the prejudice to the Defence is limited. It comes, however, at a critical juncture in the case when final preparations for trial are taking place. It also takes place late in the preparation of the case and long after the point of “immediacy” foreseen by Rule 103. The failure is therefore not a minor one. Considering, however, that the prejudice to the Defence is limited and does not prejudice the Accused’s right to a fair trial, the measure appropriate in this case would not justify a stay of proceedings or a prohibition on the part of the SPO to produce certain evidence.

29. At this stage, the Panel will adopt three measures intended to both acknowledge the violation of the SPO’s disclosure obligations and to try to prevent the reoccurrence of such incidents. First, the Panel directs the SPO to treat its disclosure obligations as a priority requiring time and resources commensurate to its importance. Second, in this context, the Panel directs the SPO to adopt a broad understanding of its obligations under Rule 103 whereby, in case of doubt as to the exculpatory nature of the material in question, the SPO should err on the side of disclosure. Such an approach will reduce the possibility that subsequent re-assessments of material, if any, lead to different conclusions as to the exculpatory nature of evidentiary material, and hence to further disclosures. Third, the Panel will give careful consideration to any Defence application for postponement of testimony of a SPO witness where the preparation to cross-examine him/her was negatively affected by belated disclosure of material relevant to this witness.

30. Turning to the remedies requested by the Thaçi Defence, the Panel is of the view that the appointment of an independent and impartial magistrate or *amicus curiae* to review all material in the SPO's possession, for the purpose of identifying and disclosing any exculpatory material, is not warranted, proportionate and appropriate at the current stage.

31. Regarding the Thaçi Defence's request that the Trial Panel order the SPO to disclose any remaining exculpatory items in its database within 15 days, the Panel recalls that the SPO has recently confirmed that it has disclosed all exculpatory items in its possession up to mid-January 2023, subject to a request for protective measures that will be filed soon.⁵³ The Thaçi Defence's request is therefore dismissed as moot.

V. CLASSIFICATION

32. Noting that the SPO has indicated that it does not object to its Response being reclassified as public,⁵⁴ the Panel: (i) pursuant to Rule 82(5) of the Rules, instructs the Registrar to reclassify the Response accordingly; and (ii) orders the Thaçi Defence to submit a public redacted version of its Request by no later than Friday, 10 February 2023.

VI. DISPOSITION

33. For the above-mentioned reasons, the Panel hereby:

- a. **FINDS** that the SPO has failed to fully comply with its disclosure obligations under Rule 103 of the Rules with respect to the categories of evidentiary material referred to in paragraphs 15 and 23 and **GRANTS** the Thaçi Defence's request in part;

⁵³ Transcript of Hearing, 18 January 2023, pp. 1782-1783.

⁵⁴ Response, para. 21.

- b. **FINDS** that, as appropriate measures pursuant to Rule 110 of the Rules and consistent with the importance of strict and timely compliance with disclosure obligations in the overall context of a fair and expeditious trial:
- i. the SPO is directed to treat its disclosure obligations as a priority requiring time and resources commensurate to its importance;
 - ii. the SPO is directed to adopt a broad understanding of its disclosure obligations under Rule 103, as outlined above in para. 29; and
 - iii. any Defence's requests to postpone the testimony of SPO witnesses whose associated evidentiary material was or will be disclosed in an untimely manner will be given due consideration by the Panel where the belated disclosure of relevant material demonstrably impacted the Defence's ability to prepare effectively;
- c. **REJECTS** the Thaçi Defence's request for the appointment of an external reviewer of the SPO's disclosure process as unnecessary in the circumstances;
- d. **DISMISSES** the Thaçi Defence's request that the Trial Panel order the SPO to disclose any remaining exculpatory items in its database within 15 days as moot;
- e. **ORDERS** the Registry to reclassify the Response as public; and
- f. **ORDERS** the Thaçi Defence to submit a public redacted version of its Request by no later than Friday, 10 February 2023.



Judge Charles L. Smith, III
Presiding Judge

Dated this Wednesday, 1 February 2023
At The Hague, the Netherlands.