

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

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi

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**Public Redacted Version of ‘Thaçi Defence Request for a Finding of Disclosure
Failure With Confidential Annex 1’**

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I. INTRODUCTION

1. The SPO's early disclosure of "material 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"¹ is essential for Defence trial preparation.² It is also a core component of an Accused's right to a fair trial.³ The Defence has repeatedly raised this issue throughout the pre-trial proceedings. The SPO's delayed disclosure of such material continues to violate Rule 103 of the Rules, which requires the disclosure of exculpatory material "immediately", "as soon as it is in his or her custody".

2. On 7 March 2022, the Defence filed the 'Thaçi Defence Motion for an Independent and Impartial Review of Exculpatory Material'.⁴ On 25 March 2022, the Defence also filed a reply.⁵ Since that date, being the close of submissions in this initial motion identifying Rule 103 disclosure issues, the SPO has notified 33 additional disclosure packages pursuant to Rule 103, between 28 March and 7 December 2022, containing a total of 2,116 items, with dates ranging from 1998 to 2022.⁶ Among these 33 disclosure packages:

¹ Rule 103 of the Rules of Procedure and Evidence ("Rules").

² KSC-BC-2020-06/F00936, Decision on Thaçi and Krasniqi Defence Motions Seeking Remedies for Non-Compliance with Disclosure Obligations, 26 August 2022 ("Decision on Non-Compliance"), para. 31.

³ Enshrined in Article 31 of the Kosovo Constitution, Articles 1(2), 3(2)(e) and 21(2) of the Law N° 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law"), and Article 6(1) of the European Convention of Human Rights ("ECHR").

⁴ KSC-BC-2020-06/F00724 ("Thaçi Motion").

⁵ KSC-BC-2020-06/F00751, Thaçi Defence Reply to Prosecution response to Thaçi and Krasniqi motions concerning Rule 103 disclosure, 25 March 2022.

⁶ See Annex 1, Index of SPO Rule 103 Disclosure Packages since 25 March 2022.

- (i) only 7⁷ packages were notified pursuant to an order by the Pre-Trial Judge authorising the SPO to apply protective measures to Rule 103 items, which may explain, in part, the lateness of such disclosure;⁸
- (ii) 27 disclosure packages contain items created by the SPO itself, such as transcripts of interviews, notes of contacts, extracts from SPO internal documents, with dates ranging from 2015 to 2022. Among them, 22⁹ disclosure packages contain items created by the SPO before 2022; and
- (iii) the vast majority of the Rule 103 material disclosed since 28 March 2022 was created before 2022. More than 400 documents are contemporaneous items dated 1998-2000, and more than 1200 items are dated 2001-2021.

3. As such, the present request concerns the late disclosure of **thousands** of Rule 103 documents, which must necessarily have been in the SPO's custody for several years. This ongoing late disclosure reinforces previous submissions about the SPO's "inability to implement an organized, efficient, and thorough system for the review of documentary evidence to ensure that all material falling within the disclosure-related Rules is provided to the Accused in a prompt manner."¹⁰

4. Despite having found that the disclosure of individual Rule 103 items could have been completed earlier,¹¹ the Pre-Trial Judge has never found that the SPO has

⁷ See Disclosure Packages 456, 490, 563, 565, 576, 605, 610.

⁸ Decision on Non-Compliance, para. 28.

⁹ See Disclosure Packages 204, 209, 212, 219, 220, 232, 234, 242, 243, 247, 248, 249, 252, 253, 297, 395, 304, 563 (F00984), 565 (F01002), 576 (F01016), 577, 594.

¹⁰ Thaçi Motion, para. 48.

¹¹ Decision on Non-Compliance, paras. 31, 32, 36; KSC-BC-2020-06/F00984/CONF/RED/COR, Corrected Version of Confidential Redacted Version of Decision on the Prosecution Request for Protective Measures for Items Containing Rule 103 Information, 10 October 2022, para. 23; KSC-BC-2020-06/F01016/CONF/RED, Confidential Redacted Version of Decision on the Fourth Prosecution Request for Protective Measures for Items Containing Rule 103 Information, 11 October 2022 ("Decision on the Fourth SPO Request"), paras. 28-29; KSC-BC-2020-06/F01140/CONF/RED, Confidential Redacted Version of Decision on the Fifth Prosecution Request for Protective Measures for Items Containing Rule 103 Information, 5 December 2022 ("Decision on the Fifth SPO Request"), para. 31.

violated its disclosure obligations. Having repeatedly urged the SPO to comply with its disclosure obligations and exercise greater diligence,¹² only recently was the SPO invited to issue disclosure reports.¹³

5. The SPO's latest disclosure report, notified on 28 November 2022,¹⁴ fails to justify the late disclosure of the 77 Rule 103 items contained in Disclosure Packages 594 and 606. The SPO does not appear to have taken any steps to improve its disclosure system or to remedy the prior failures and lack of diligence identified by the Pre-Trial Judge.

6. In light of the ongoing failure of the SPO to disclose Rule 103 material immediately, and the fact the start of the trial phase is imminent,¹⁵ the Defence respectfully requests that the Pre-Trial Judge:

- (i) **FIND** 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;
- (ii) **APPOINT** an independent and impartial magistrate or *amicus curiae* to review all material in the SPO's custody, control or actual knowledge, identify any exculpatory information and disclose such exculpatory material immediately to the Defence; and

¹² Decision on Non-Compliance, para. 37; KSC-BC-2020-06/F00962/CONF/RED, Confidential Redacted Version of Decision on the Third Prosecution Request for Protective Measures for Items Containing Rule 103 Information, 9 September 2022, para. 17; Decision on the Fourth SPO Request, para. 29; Decision on the Fifth SPO Request, para. 31.

¹³ Decision on Non-Compliance, paras. 37, 40; KSC-BC-2020-06, Transcript of Fourteenth Status Conference, 8 September 2022, p. 1489, lines 14-17; Decision on the Fourth SPO Request, paras. 29, 177(g).

¹⁴ KSC-BC-2020-06/F01123/CONF/RED, Confidential Redacted Version of 'Sixth Prosecution request for protective measures for items containing Rule 103 information and disclosure report, 28 November 2022 ("Sixth Prosecution Request"), paras. 9-13.

¹⁵ KSC-BC-2020-06/F01131, Notification Pursuant to Rule 98(3) of the Rules of Procedure and Evidence, 30 November 2022, pursuant to which the Pre-Trial Judge has notified the President that case file KSC-BC-2020-06 will be ready for transmission to a Trial Panel on Thursday, 15 December 2022.

- (iii) **ORDER** the SPO to disclose any remaining exculpatory items in its database within 15 days.

II. PROCEDURAL BACKGROUND

7. On 24 April 2020, the SPO asked the Pre-Trial Judge to confirm its Indictment against Mr Thaçi,¹⁶ and applied for an arrest warrant.¹⁷ On 26 October 2020, the Pre-Trial Judge confirmed the Indictment¹⁸ and issued an arrest warrant.¹⁹ On 5 November 2020, Mr Thaçi resigned as President of the Republic of Kosovo, surrendered and was transferred to the KSC detention facilities in The Hague.

8. On 23 November 2020, the SPO claimed that it would be able to meet its disclosure obligations to allow the trial to start in the summer of 2021.²⁰

9. The limited amount of exculpatory material disclosed to the Defence pursuant to Rule 103,²¹ and the corresponding failure of the SPO to disclose such material “as soon as it is in its custody,” has been raised by the Defence during pre-trial status conferences. On 29 October 2021, during the Eighth Status Conference, the Defence requested the disclosure of any exculpatory statements from international figures, such as internationals who “have talked about the KLA being in disarray, about the KLA being disorganised, that the command and control was at a zone commander level.”²² On 15 December 2021, the Defence repeated this request.²³

¹⁶ KSC-BC-2020-06/F00002, Public redacted version of ‘Submission of Indictment for confirmation’, filing KSC-BC-2020-06-F00002 dated 24 April 2020.

¹⁷ KSC-BC-2020-06/F00005, Confidential Redacted Version of ‘Request for arrest warrants and related orders’, filing KSC-BC-2020-06-F00005 dated 28 May 2020.

¹⁸ KSC-BC-2020-06/F00026, Confidential Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi.

¹⁹ KSC-BC-2020-06/F00027, Decision on Request for Arrest Warrants and Transfer Orders.

²⁰ KSC-BC-2020-06/F00097, Prosecution submissions further to the status conference of 18 November 2020, 23 November 2020, para. 14.

²¹ As at the date of filing, around 6,426 documents have been disclosed pursuant to Rule 103, compared with the 18,080 documents disclosed pursuant to Rule 102(1).

²² KSC-BC-2020-06, Transcript of the Eighth Status Conference, 29 October 2021, pp. 702-703.

²³ KSC-BC-2020-06, Transcript of the Ninth Status Conference, 15 December 2021, pp. 812-814, 816.

10. 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 items obtained before 31 January 2022.²⁴ On 18 May 2022, the SPO confirmed that it had “finalised the initial review of exculpatory evidence in its collection up to the end of January 2022.”²⁵

11. On 20 May 2022, the Pre-Trial Judge set a deadline of 30 June 2022 for the SPO to complete its review of material obtained after January 2022, and to file protective measure requests or disclose material falling under Rule 103.²⁶ On 30 June 2022, the SPO indicated that it had completed its review of material registered between 31 January 2022 and 16 June 2022, and that it had disclosed those items containing Rule 103 information, with the exception of [REDACTED].²⁷

12. On 26 August 2022, the Pre-Trial Judge issued his Decision on Non-Compliance. While noting the SPO’s lack of diligence, and the significant delays in disclosing some of the Rule 103 material concerned, the Pre-Trial Judge considered that this did not amount to non-compliance with disclosure obligations and ordered the SPO to file a comprehensive report to confirm its full compliance with its Rule 103 obligations.²⁸ The SPO filed its Report on 7 October 2022,²⁹ and the Defence responded on 19 October 2022.³⁰

²⁴ KSC-BC-2020-06, Transcript of the Eleventh Status Conference, 24 March 2022, pp. 1161-1162.

²⁵ KSC-BC-2020-06/F00805, Prosecution submissions for twelfth status conference, para. 2. See also KSC-BC-2020-06, Transcript of the Twelfth Status Conference, 20 May 2022, pp. 1222-1225.

²⁶ *Ibid.*, p. 1323.

²⁷ KSC-BC-2020-06/F00861/CONF/RED, Confidential Redacted Version of ‘Third Prosecution request for protective measures for items containing Rule 103 information’, KSC-BC-2020-06/F00861, dated 30 June 2022, para. 1.

²⁸ Decision on Non-Compliance, paras. 32, 37, 40.

²⁹ KSC-BC-2020-06/F01019, Prosecution disclosure report, 7 October 2022.

³⁰ KSC-BC-2020-06/F01043, Joint Consolidated Defence Response to Prosecution Disclosure Reports (F01019 and F01036), 19 October 2022.

13. The SPO has subsequently filed further disclosure reports attempting to explain its ongoing late disclosures and late applications for protective measures of Rule 103 material.³¹

14. On 4 November 2022, the Pre-Trial Judge ordered the SPO to review its Supplemental Rule 102(3) Notice³² for exculpatory material and to disclose this material under Rule 102(3) by 16 December 2022.³³

15. On 28 November 2022, the SPO filed its Sixth Prosecution Request, which also contained a disclosure report on Disclosure Packages 594 and 606.³⁴

III. APPLICABLE LAW

16. The Defence incorporates by reference the legal submissions contained in the Thaçi Motion.³⁵

17. Rule 110 of the Rules provides that “[t]he Panel may decide, upon request by a Party or proprio motu, on measures to be taken as a result of the non-compliance with disclosure obligations pursuant to the Rules, including a stay of proceedings and the exclusion of evidence, except for exculpatory evidence.” In his Decision on Non-Compliance, the Pre-Trial Judge ruled that:

Whether a disclosure violation or failure meets the threshold of noncompliance within the meaning of Rule 110 of the Rules is to be determined on a case-by-case basis, taking all circumstances into account, including, *inter alia*: **(i) the impact on the accused’s rights; (ii) the amount of evidence to be reviewed by the SPO; and (iii) the**

³¹ KSC-BC-2020-06/F01036-CONF, Confidential Redacted Version of ‘Prosecution submissions pursuant to Decision F01016’, KSC-BC-2020-06/F01036, dated 14 October 2022, paras. 3-10; KSC-BC-2020-06/F01055/CONF/RED, “Confidential Redacted Version of ‘Fifth Prosecution request for protective measures for items containing Rule 103 information with strictly confidential and *ex parte* Annexes 1-11’, KSC-BC-2020-06/F01055, dated 25 October 2022”, 26 October 2022, paras. 18-22.

³² KSC-BC-2020-06/F01021, Prosecution supplemental Rule 102(3) notice, 7 October 2022 (“Supplemental Rule 102(3) Notice”).

³³ KSC-BC-2020-06, Transcript of the Fifteenth Status Conference, 4 November 2022 (“Transcript of Fifteenth Status Conference”), p. 1691, lines 2-7.

³⁴ Sixth Prosecution Request, paras. 9-12.

³⁵ Thaçi Motion, paras. 17-28.

expeditiousness with which the SPO proceeds when reviewing evidentiary material. The measures available to the PRE-TRIAL JUDGE are stipulated in a non-exhaustive fashion in Rule 110 of the Rules, including a stay of proceedings or exclusion of evidence, except exculpatory evidence.³⁶

18. The Pre-Trial Judge was explicit that “exculpatory material is fundamental for the preparation of the Defence and its disclosure shall take place immediately”,³⁷ and that “the wording ‘immediately, as soon as it is in its custody, control, or actual knowledge’ needs to be interpreted **in the context of the proceedings, notably depending on the stage of the proceedings, and on the amount of evidence to review.**”³⁸

19. During the Thirteenth Status Conference on 13 July 2022, the Pre-Trial Judge reminded the SPO that it did not have a *carte blanche* in its review of Rule 103 material, stressing that the mere punctual reassessment of evidence was not sufficient, in itself, to justify late disclosure of Rule 103 material. The Pre-Trial Judge was explicit in stating:

[W]hat I wouldn't want to see is disclosure of documents that you consider suddenly at a later stage of the proceedings exculpatory that was already exculpatory six months before. You see what I mean? I mean, if there is a new line of reasoning from the Defence or if there has been new things that have been said at some point during the proceedings that changes how you read, again, a witness testimony, I perfectly understand. But if this thing was already obvious before, there is no justification for you. You see? It cannot be a *carte blanche* where you reassess and then you find something new and then -- if you could have considered that this was exculpatory before the deadline of the disclosure of the Rule 103 material, I don't see why you would be entitled to disclose it at a later stage.³⁹

IV. DISCUSSION

A. THE DOCUMENTS IN QUESTION ARE EXCULPATORY

³⁶ Decision on Non-Compliance, para. 16 (Emphasis added).

³⁷ *Ibid.*, para. 31.

³⁸ *Ibid.*, para. 28 (Emphasis added).

³⁹ KSC-BC-2020-06, Transcript of the Thirteenth Status Conference, 13 July 2022, p. 1343, lines 3-17. *See also* p. 1341, lines 14-21.

20. The documents disclosed by the SPO in the Disclosure Packages in question⁴⁰ are exculpatory, as per the SPO's own classification.

21. The statements and interviews of international figures who at the relevant time were working with or for UNMIK, OSCE, KFOR, and who were present in Kosovo during the events charged in the Indictment, are undoubtedly relevant for the Defence and its ongoing investigations. The interviews of former KLA members, who may have insider knowledge of the KLA, as well as local inhabitants who may know about the alleged crimes, are obviously relevant for the Defence and may also provide additional leads for Defence investigations. The reports issued by the OSCE, NATO, KFOR, ECMM or other international organisations present in Kosovo are also material to Defence investigations and preparations, having been written at the time of the events. The exculpatory nature of this material is beyond dispute.

B. THE SPO FAILED TO DISCLOSE EXCULPATORY DOCUMENTS AS SOON AS THEY WERE IN ITS CUSTODY, CONTROL OR KNOWLEDGE, TO THE PREJUDICE OF THE DEFENCE

1. Documents created by the SPO

22. The Defence submits that the SPO failed to "immediately" disclose the following documents created by the SPO, with dates ranging from 2015 to 2021:

- (i) Disclosure 204: SPO [REDACTED];
- (ii) Disclosure 209: SPO [REDACTED];
- (iii) Disclosure 212: SPO [REDACTED];⁴¹
- (iv) Disclosure 219: SPO [REDACTED];
- (v) Disclosure 220: SPO [REDACTED];
- (vi) Disclosure 232: SPO [REDACTED] including with:
 - o [REDACTED];⁴²

⁴⁰ Annex 1.

⁴¹ SPOE00291903-00291915.

⁴² 073287-073294, para. 11.

- [REDACTED];⁴³ and
- [REDACTED];⁴⁴
- (vii) Disclosure 234: SPO [REDACTED];⁴⁵
- (viii) Disclosure 242: SPO [REDACTED] including with:
 - [REDACTED];⁴⁶
 - [REDACTED];⁴⁷
 - [REDACTED];⁴⁸
 - [REDACTED];⁴⁹
- (ix) Disclosure 243: [REDACTED]SPO [REDACTED];⁵⁰
- (x) Disclosure 247: SPO [REDACTED] in particular with:
 - [REDACTED];⁵¹
 - [REDACTED];⁵²
 - [REDACTED];⁵³
 - [REDACTED];⁵⁴
 - [REDACTED];⁵⁵
 - [REDACTED];⁵⁶
- (xi) Disclosure 248: SPO [REDACTED];
- (xii) Disclosure 249: SPO [REDACTED];
- (xiii) Disclosure 252: SPO [REDACTED];
- (xiv) Disclosure 253: SPO [REDACTED];
- (xv) Disclosure 297: SPO [REDACTED], notably with:

⁴³ SPOE00325903-00325916.

⁴⁴ SPOE00325917-00325925.

⁴⁵ 077847-077854.

⁴⁶ SPOE00292023-00292042 RED.

⁴⁷ 041903-041904 RED, para. 5.

⁴⁸ SPOE00301495-00301503, para. 29.

⁴⁹ 053209-053219 RED.

⁵⁰ 066843-066855-ET Revised RED.

⁵¹ SPOE00292043-00292049 RED.

⁵² 087845-087855.

⁵³ SPOE00292774-00292780 RED.

⁵⁴ SPOE00300814-SPOE00300823.

⁵⁵ 050281-050285 RED, para. 7.

⁵⁶ 071642-071648 RED, paras. 30-31.

- [REDACTED];⁵⁷
- [REDACTED];⁵⁸
- [REDACTED];⁵⁹

(xvi) Disclosure 395: SPO [REDACTED];

(xvii) Disclosure 418: [REDACTED] SPO [REDACTED]. This package includes [REDACTED]:

- [REDACTED];⁶⁰
- [REDACTED];⁶¹

(xviii) Disclosure 577: SPO [REDACTED], in particular with:

- [REDACTED];⁶²
- [REDACTED];

(xix) Disclosure 594:

- [REDACTED] SPO [REDACTED] including with:
 - [REDACTED];⁶³
 - [REDACTED];⁶⁴
 - [REDACTED];⁶⁵
 - [REDACTED];⁶⁶
 - [REDACTED];⁶⁷
 - [REDACTED];⁶⁸
 - [REDACTED];
 - [REDACTED];⁶⁹
 - [REDACTED];⁷⁰

⁵⁷ SPOE00325889-00325902.

⁵⁸ SPOE00325965-00325971.

⁵⁹ 069756-TR-ET Part 1.

⁶⁰ SPOE00308800-00308804 RED.

⁶¹ 074952-TR-ET Part 1 RED.

⁶² SPOE00301973-00301986.

⁶³ 063254-TR-ET Parts 1 - 4.

⁶⁴ 067966-TR-ET Part 1.

⁶⁵ 081927-TR-ET Part 1.

⁶⁶ 078007-TR-ET Parts 1 RED – 4.

⁶⁷ 078010-TR-ET Parts 1 RED - 5.

⁶⁸ 078013-TR-ET Parts 1 RED – 4.

⁶⁹ 088703-TR-ET Part 1.

⁷⁰ 088708-TR-ET Part 1.

- [REDACTED];⁷¹
- [REDACTED];⁷²
- [REDACTED] related to:
 - [REDACTED];⁷³
 - [REDACTED];⁷⁴
 - [REDACTED];⁷⁵
 - [REDACTED];⁷⁶
 - [REDACTED];⁷⁷ and
 - [REDACTED].⁷⁸

23. These items were disclosed between late March and November 2022. Their source, the SPO, has necessarily had knowledge of their content and potentially exculpatory nature for several years. These documents, which do not seem to have been the object of any requests for protective measures from the SPO, contain only standard redactions, which do not require prior judicial authorisation, and do not justify any disclosure delays.⁷⁹

2. Other documents

24. The SPO failed to disclose immediately documents from international organisations, such as UNMIK, OSCE, NATO, KFOR or ECMM, many created at the time of the events, as notified in the Disclosure Packages listed in Annex 1. The SPO also failed to disclose ICTY statements and other exhibits provided to the SPO by the ICTY/MICT, presumably several years before Mr Thaçi's surrender.

⁷¹ 088717-TR-ET Parts 1 – 4.

⁷² 094537-TR-ET Parts 1 RED – 3.

⁷³ 108450-108450 RED.

⁷⁴ 108449-108449 RED.

⁷⁵ 108612-108612 RED.

⁷⁶ 108610-108610 RED.

⁷⁷ 108624-108624 RED.

⁷⁸ 108446-108446 RED.

⁷⁹ KSC-BC-2020-06/F00099, Pre-Trial Judge, Framework Decision on Disclosure of Evidence and Related Matters, 23 November 2020, para. 95.

25. For example, the following documents, in light of the identity and profession of the witnesses and the content discussed, were evidently exculpatory, undermining any SPO justification for their untimely disclosure.

- (i) Disclosure 209:
 - [REDACTED];⁸⁰
 - ICTY Case [REDACTED];⁸¹
- (ii) Disclosure 220:
 - OSCE report [REDACTED] ;⁸²
- (iii) Disclosure 243:
 - ICTY [REDACTED];⁸³
 - ICTY [REDACTED];⁸⁴
 - ICTY [REDACTED];⁸⁵
- (iv) Disclosure 247:
 - [REDACTED];⁸⁶
 - ICTY [REDACTED];⁸⁷
- (v) Disclosure 253:
 - [REDACTED];⁸⁸
- (vi) Disclosure 306:
 - [REDACTED];⁸⁹
- (vii) Disclosure 562:
 - [REDACTED];⁹⁰
- (viii) Disclosure 577:

⁸⁰ 069758-06.

⁸¹ SITF00105433-00105623.

⁸² SITF40008634-40008635.

⁸³ IT-05-87 P02772.

⁸⁴ IT-04-84 P00376.

⁸⁵ IT-05-87.1 P00803.

⁸⁶ Disclosure Package 70.

⁸⁷ K022-4449-K022-4489.

⁸⁸ 009810-009811.

⁸⁹ SITF00013504-00013506 RED and SITF00373887-00373890 RED.

⁹⁰ SITF00032994-SITF00033020.

- Several items relating to the Accused, including [REDACTED] documents related to Mr Thaçi, such as [REDACTED], etc;
 - [REDACTED];⁹¹
 - ICTY [REDACTED];⁹²
- (ix) Disclosure 606
- OSCE [REDACTED].⁹³

3. The SPO's justifications for late disclosure of Rule 103 material are inadequate

26. The SPO's latest disclosure report,⁹⁴ related to Disclosure Package 594, fails to justify the late disclosure of the material listed above. The SPO acknowledges that [REDACTED]⁹⁵ and that [REDACTED].⁹⁶ The fact that the "the Pre-Trial Judge has set a 16 December 2022 deadline for disclosure of potentially exculpatory materials from the supplemental Rule 102(3) notice" does not render the SPO disclosure timely. The SPO failed to disclose those items, dated between December 2018 and March 2021, as soon as they were in its custody, in violation of Rule 103.

27. Concerning Disclosure Package 606, the SPO's disclosure report fails to adequately justify the delay in producing these materials. The SPO submits that [REDACTED] and that [REDACTED].⁹⁷ Such submissions are manifestly insufficient. This material should have been immediately disclosed.

28. As noted by the ICTY, the review and disclosure of exculpatory material must start "in earnest as soon as the Accused [is] transferred to the custody of the Tribunal

⁹¹ 107348-107354-ET.

⁹² K044-8781-K044-8799.

⁹³ SITF40009151-40009155.

⁹⁴ Sixth Prosecution Request.

⁹⁵ *Ibid.*, para. 10.

⁹⁶ *Ibid.*, para. 11.

⁹⁷ Sixth Prosecution Request, para. 12.

and ma[kes] his initial appearance”⁹⁸ and the prosecution must maintain “an organized, efficient, and thorough system for the review of documentary evidence to ensure that all material falling within the disclosure-related Rules are provided to the Accused in a prompt manner.”⁹⁹ Any disclosure of exculpatory material which has been in the prosecution’s possession for many months would likely amount to a violation of the Rules.¹⁰⁰ The situation is even more egregious when, as in the present case, the exculpatory material has been in the possession of the prosecution for years, including some documents for many years prior to the Accused’s arrest.¹⁰¹

29. As previously submitted,¹⁰² the complexity of the case and the amount of material in the SPO’s possession does not justify a failure on the part of the SPO to properly organise itself, and ensure that disclosure is carried out in accordance with the Rules.¹⁰³ The SPO cannot delay the disclosure of exculpatory material already in its possession, or identify and disclose potentially exculpatory material on a “rolling basis”.¹⁰⁴ The SPO has failed to make sufficient efforts to ensure the identification of exculpatory material and its disclosure to the Defence “immediately”, “as soon as it is in its custody, control or actual knowledge”, in violation of Rule 103.

30. The case is now at an advanced stage of the proceedings, more than two years after the arrest of the Accused. The SPO Witness List and Exhibit List were filed over a year ago, in December 2021, and the case will be transferred to a Trial Panel within a week. At this point in the proceedings, the SPO can be reasonably expected to have

⁹⁸ ICTY, *Prosecutor v Karadzic*, No. IT-95-5/18-T, Decision on Prosecution’s Request for Reconsideration of Trial Chamber’s 11 November 2010 Decision, 10 December 2010 (“*Karadzic* Reconsideration Decision”), paras. 12, 13.

⁹⁹ *Ibid.*, para. 12.

¹⁰⁰ *Karadzic* Reconsideration Decision, para. 15.

¹⁰¹ ICTY, *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, Decision on Milan Lukic’s Motion for Remedies Arising out of Disclosure Violations by the Prosecution, 12 May 2011, para. 23.

¹⁰² *Thaçi* Motion, para. 40.

¹⁰³ ICTY, *Prosecutor v Karadzic*, No. IT-95-5/18-T, Oral Decision on Accused’s Twenty-Sixth Disclosure Violation Motion, 3 November 2010, T8908; *Karadzic* Reconsideration Decision, para. 12.

¹⁰⁴ *Karadzic* Reconsideration Decision, para. 11.

a deep knowledge of its own database, and be in a position to comply spontaneously with its disclosure obligations. Yet, it was only following an order by the Pre-Trial Judge requiring the SPO to review its own database that it managed to identify even *further* exculpatory material. This gives rise to a reasonable expectation on the part of the Defence that the SPO has missed numerous other Rule 103 items which will again be revealed following SPO compliance with additional orders from the Pre-Trial Judge, such as the ongoing review of its Supplemental Rule 102(3) notice to identify any exculpatory information therein.

C. THE DELAYED DISCLOSURE OF EXCULPATORY MATERIAL IS PREJUDICIAL TO THE DEFENCE

31. Exculpatory material is crucial for Defence investigations. As such, its prompt disclosure is crucial for the expeditious conduct of a case.¹⁰⁵ Exculpatory material such as that referred to in this motion, opens further investigative avenues for the Defence, which the Defence needs to follow in a timely manner. This is one of the reasons the exculpatory material must be disclosed “immediately”. When the SPO sits on exculpatory material, investigative opportunities will undoubtedly be delayed or lost.

32. The late disclosure of the Rule 103 material in question is prejudicial for the Defence. This late disclosure contained a significant number of items to review, including [REDACTED] disclosed in Disclosure Package 594. The prejudice is exacerbated by the advanced stage of the proceedings, with the transfer of the case to the Trial Panel imminent. The Defence should be able to focus on preparing for the first 40 witnesses, rather than having to re-dedicate significant resources to processing and reviewing another batch of Rule 103 material which could and should have been disclosed at least one year ago. The sporadic and incoherent disclosure of Rule 103

¹⁰⁵ KSC-BC-2020-06, Transcript of the Tenth Status Conference, 4 February 2022, p. 896.

material, some of which relates to witnesses on the SPO Witness List, delays Defence investigations and hinders the review of the material disclosed thus far.

33. In reality, the SPO's delayed disclosure is a direct consequence of the slow and irregular pace at which it is reviewing its own material. While the SPO notified its Supplemental Rule 102(3) Notice on 7 October 2022, the Pre-Trial Judge was then required to *order* the SPO to review this Notice for exculpatory material and to disclose this material under Rule 103 or request protective measures by 16 December 2022, in order to prompt the SPO to comply with its disclosure obligations.¹⁰⁶ Such an order should be unnecessary. In the context of the present case, it is crucial.

D. THE SPO'S FAILURE TO DISCLOSE MATERIALS IN ACCORDANCE WITH RULE 103 WARRANTS A REMEDY

34. Rule 110 of the Rules sets out a non-exhaustive list of measures which the Pre-Trial Judge can take in response to the SPO's failure to comply with its disclosure obligations. In this framework, the Pre-Trial Judge may recognise the disclosure violation through a formal judicial finding.¹⁰⁷ In the absence of any confidential and *ex parte* applications and orders under either Rule 107 or Rule 108, authorising the SPO to delay or withhold the Rule 103 disclosure listed above, the SPO is in breach of Rule 103. The Pre-Trial Judge should now issue such a finding.

35. Moreover, in March 2022, having identified significant issues in the disclosure of Rule 103 material by the SPO, the Defence requested 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.¹⁰⁸ In particular, the Defence identified that this appointment was necessary

¹⁰⁶ Transcript of the Fifteenth Status Conference, p. 1691, lines 3-5.

¹⁰⁷ ICC, *Prosecutor v. Yekatom & Ngaissona*, ICC-01/14-01/18-1202-Red, Decision on the Yekatom Defence Motion for Finding of Disclosure Violation and Additional Remedies, 7 December 2021, p. 10.

¹⁰⁸ Thaçi Motion, paras. 10, 48-51.

to ensure there was no further prejudice to the accused caused by ongoing late disclosures of Rule 103 material, as well as to protect the fair trial rights of the accused and the expeditiousness of proceedings.¹⁰⁹ In deciding the Thaçi Motion, the Pre-Trial Judge did not deem it necessary to address the remedial measures proposed, so this request was never adjudicated.¹¹⁰

36. In light of the fact that manifest violations by the SPO of their Rule 103 disclosure obligations are continuing, nine months later, the Defence submits the need for such an appointment is even more pressing. The reasoning in support of the original request remains persuasive, and is only heightened by the length of time that the Defence has now been forced to deal with these issues, and the consequent significant prejudice that has resulted. The Defence therefore reiterates its request for the appointment of an independent magistrate to review the material in the SPO's custody, and identify and disclose any exculpatory material.¹¹¹

V. CONCLUSION

37. For the foregoing reasons, the Defence respectfully requests that the Pre-Trial Judge to grant the relief sought in paragraph 6.

[Word count: 4,515 words]

¹⁰⁹ Thaçi Motion, paras. 48-50.

¹¹⁰ Decision on Non-Compliance, para. 36.

¹¹¹ See Thaçi Motion, para. 51, for the technical modalities proposed for such an appointment.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "G. W. Kehoe". The signature is written over a white rectangular redaction box.

Gregory W. Kehoe

Counsel for Hashim Thaçi

Thursday, 8 December 2022

At London, United Kingdom