

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

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

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi
Specialist Counsel for Kadri Veseli
Specialist Counsel for Rexhep Selimi
Specialist Counsel for Jakup Krasniqi

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Joint Defence Response to Prosecution supplemental Rule 102(3) notice and related request (F02895)

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I. INTRODUCTION

1. On 3 February 2025, the Specialist Prosecutor's Office ("SPO") filed a supplemental Rule 102(3) notice and related request with confidential Annexes 1-2 (the "Request").¹ The SPO requests authorization for the simultaneous disclosure of requested Rule 102(3)² items to all Defence teams.³

2. The Defence for Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi ("Defence") hereby file this response to the SPO's Request.

II. APPLICABLE LAW

3. Rule 102(3) states:

The Specialist Prosecutor shall, pursuant to Article 21(6) of the Law, provide detailed notice to the Defence of any material and evidence in his or her possession. The Specialist Prosecutor shall disclose to the Defence, upon request, any statements, documents, photographs and allow inspection of other tangible objects in the custody or control of the Specialist Prosecutor, which are deemed by the Defence to be material to its preparation, or were obtained from or belonged to the Accused. Such material and evidence shall be disclosed without delay. The Specialist Prosecutor shall immediately seize the Panel where grounds to dispute the materiality of the information exist.⁴

4. Rule 102(3) expressly notes that it arises out of the rights of the Accused as guaranteed in Article 21(6) of the Law on the Kosovo Specialist Chambers (the "Law"), which states:

Article 21

Rights of the Accused

[...]

¹ KSC-BC-2020-06/F02895, SPO, *Prosecution supplemental Rule 102(3) notice and related request with confidential Annexes 1-2*, 3 February 2025, public (the "Request" or "F02895").

² KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, 2 June 2020 ("Rules").

³ F02895, para. 6.

⁴ Emphasis added.

6. All material and relevant evidence or facts in possession of the Specialist Prosecutor's Office which are for or against the accused shall be made available to the accused 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.
5. Rule 110 states that it is for the Trial Panel to decide whether any consequences result from late disclosure of materials:

Rule 110

Non-Compliance with Disclosure Obligations

1. The 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.
6. Rule 118(2) allows the SPO to amend its exhibit list "upon timely notice and a showing of good cause."

III. SUBMISSIONS

7. Rule 102(3) on its face acknowledges that its purpose is to implement the fair trial rights of the Accused guaranteed in Article 21(6) of the Law. Rule 102(3) is thus not intended to, and does not, allow for disclosure by the SPO of materials intended for use by the SPO, or which the SPO discloses in hopes that members of the Trial Panel will use the items in Judges' questioning. This is clear from the plain terms of Rule 102(3), which require disclosure by the SPO, "**upon request**" by the Defence, of materials **which are deemed by the Defence to be material to its preparation, or were obtained from or belonged to the Accused.**" It is for the Defence, and no one else, to decide what is "material to its preparation," and to make a request for disclosure to the SPO. Absent those two requirements, the SPO cannot make disclosures to the Defence except under other applicable provisions of Rules 102 or 103.

8. Contrary to the SPO's claims, there is no ambiguity in Rule 102(3) about the meaning of the term "Defence," even in a multi-Accused trial.⁵ For purposes of Rule 102(3), "Defence" refers to each individual Defence team. Were it otherwise, the SPO would only be required to disclose material under Rule 102(3) where all four Defence teams are unanimous that the materials are material to their preparation, and all four file a request with the SPO. Such an interpretation of the term "Defence" is plainly incorrect and would violate the rights of each Accused protected by Article 21 of the Law. Each Accused is entitled to decide for himself what SPO materials are—and are not—material to his trial preparation, and to request disclosure from the SPO.

9. For two full years, from the initial appearance of the Accused in November 2020 until 4 November 2022, the SPO disclosed Rule 102(3) materials only to the Defence team that specifically requested that material.⁶ This changed at a status conference on 4 November 2022 with the start of trial approaching and when the SPO was faced with a large volume of Rule 102(3) requests from multiple Defence teams seeking to be ready for trial. The SPO then proposed to disclose to all Defence teams any Rule 102(3) material requested by one Defence team.

10. No Defence team objected because of the volume of material that the SPO still needed to disclose prior to the commencement of trial, and because no Defence team was told that the SPO would later use Rule 102(3) as vehicle for disclosing materials that it intended to use in its own case and to circumvent the requirements of Rule 102(1)(b) and Rule 118(2).

11. Circumstances materially changed for the Defence on 3 December 2024, when the SPO unilaterally disclosed a document pursuant to Rule 102(3) for the sole purpose of using that document in re-direct examination.⁷ *No Defence team had requested the*

⁵ F02895, para. 2.

⁶ KSC-BC-2020-06, Transcript of Status Conference, 4 November 2022, p. 1632.

⁷ F02895, para. 5.

document under Rule 102(3), and no Defence team stated that the document was material to its preparation. Nevertheless, the SPO was allowed to use the document in re-direct examination.

12. Rule 102(3), unambiguously and *prima facie* created as a rule for implementation of the fundamental rights of the Accused under Article 21 of the Law, now threatens to be used as a vehicle by the SPO to introduce more inculpatory evidence against the Accused. Rule 102(3) is being turned on its head: instead of being a shield which the Accused can use to ensure his fundamental rights are protected under Article 21 of the Law, the SPO wishes to use it as a sword against the Accused, *even in situations where no Defence team has requested the disclosure of material.*

13. To prevent the events of 3 December 2024 from recurring, and to ensure that Rule 102(3) remains a Defence shield and not an SPO sword, the Defence has chosen to exercise its right to require the SPO to adhere strictly to the plain terms of Rule 102(3): documents should only be disclosed to each individual Defence team that (1) requested the materials, and (2) deemed them to be material to the preparation of that Defence team. Contrary to the SPO's submissions, Article 40(2) of the Law does not give the Trial Panel the authority to disregard the Rules or alter their plain terms. On the contrary, Article 40(2) expressly obligates the Trial Panel to "ensure that a trial is fair and expeditious and that proceedings **are conducted in accordance with the Rules of Procedure and Evidence**". The terms of Rule 102(3) are unambiguous: the provision is there to protect the Article 21 rights of the Accused and requires (1) a request from a Defence team, and (2) a judgment by that Defence team that the requested items are material to that team's preparation.

14. The SPO claims, without basis, that the Thaçi Defence, in exercising its discretion in determining that an item "deemed material by other Defence teams" is not necessary to its preparation and therefore need not be disclosed by the SPO to the Thaçi Defence, "cannot in good faith claim lack of notice or inability to prepare should

one or more of the Parties, Victims' Counsel, or Panel ultimately seek to use the item in questioning.”⁸ First, the argument that material must be relevant to the Thaçi Defence because it has been deemed relevant by other Defence teams assumes that all Defence teams have identical interests and strategies. The SPO has no right to make this assumption. Moreover, Rule 102(3) does not give “other Defence teams”—or the SPO and Trial Panel—the ability to usurp the Thaçi Defence’s right to determine on its own what is and is not relevant to its preparation.

15. Moreover, the Defence acts entirely in good faith—and consistently with the terms of Rule 102(3)—when it insists that only documents necessary for its preparation are disclosed under Rule 102(3), while declining to accept disclosure from the SPO that was not requested by that Defence team and is only being disclosed so that the SPO can use the material against the Accused in violation of Rules 102(1)(b) and 118(2). If the material in question is exculpatory, it should be disclosed under Rule 103. If it is not, then the SPO does not believe the material exculpates the Accused and it is solely for the Defence to decide whether such non-exculpatory materials need to be in its possession. The SPO offers no justification to challenge the good faith of the Defence simply because the Defence objects to the SPO’s use of documents that have not been disclosed in accordance with the Rules.

16. As for the SPO’s alleged concern about the ability of other Defence teams, Victims’ Counsel and the Trial Panel to use Rule 102(3) materials, Rule 102(3)’s requirement that the SPO disclose materials only to the Defence team that requested them does not in any way inhibit the ability of that Defence team to use that material in cross-examination. As is now clear after almost two years of trial, no Defence team has ever objected to the use by another Defence team of new materials that had never been previously disclosed to the other Defence teams. This is because the Rules make clear that no Defence team has a disclosure obligation prior to the commencement of

⁸ F02895, para. 5.

the Defence case. Similarly, Victims' Counsel has not been required to disclose any of his cross-examination materials to the Defence prior to releasing his queue. Accordingly, no Defence team has objected to use of documents by Victims' Counsel on the grounds of an alleged disclosure violation. Enforcing the terms of Rule 102(3) thus has no impact on other Defence teams or Victims' Counsel.

17. The SPO will also not be prejudiced by adherence to the terms of Rule 102(3). The Rules allow the SPO the possibility of adding new materials for use in trial, although not through Rule 102(3). If the SPO complies with the terms of Rule 102(1)(b) and Rule 118(2) and demonstrates that it has acted in a timely manner and has good cause for adding the exhibit to its exhibit list, the SPO does not need Rule 102(3). If it intends to comply with the Rules, the SPO has no basis to be concerned about its own ability to use evidence in these proceedings if Rule 102(3) is enforced as written.

18. As for the Trial Panel, the Panel has not expressed any concern about its own ability to use whatever documents it wishes to use, regardless of whether they have previously been disclosed to individual Defence teams,⁹ or even whether they have been disclosed to any Defence team.¹⁰ Accordingly, the Trial Panel will not feel restricted from using Rule 102(3) materials if they have not been disclosed to all Defence teams. However, the Defence jointly wishes to express its concern about the SPO's submissions that its use of Rule 102(3) is at least in part motivated by its desire to facilitate the transmission of documents to the Trial Panel for use by the Trial Panel in judicial questioning.¹¹ The Defence has jointly expressed its objections to the lack of appearance of impartiality in the manner in which judicial questioning has been

⁹ See for example, objections raised by the Thaçi Defence to three documents proposed for use by the Panel with W03873, which had not previously been disclosed to the Thaçi Defence: KSC-BC-2020-06, Transcript of Hearing (Procedural Issues), 27 November 2024, pp. 22785-22786. Similarly, a document proposed for use by the Panel with W01511 pursuant to a notification dated 4 September 2024 had not previously been disclosed to the Thaçi Defence.

¹⁰ KSC-BC-2020-06, Transcript of Hearing (W03881 Testimony), 22 May 2024, p. 15715.

¹¹ F02895, paras. 3, 5.

conducted in this trial,¹² and the Trial Panel should avoid creating an appearance that the Trial Panel is allowing the SPO to facilitate the Panel's questioning through the abuse of Rule 102(3).

19. Finally, the SPO's claim that adherence to the terms of Rule 102(3) "risks undue delay and waste of time and resources"¹³ is entirely unsubstantiated in the Request. Although the simultaneous disclosure of Rule 102(3) material may have promoted efficiency in the months leading to the commencement of trial, when the SPO was substantially behind in its Rule 102(3) disclosure obligations and the Defence was attempting to obtain all information necessary for trial, this has not been the case now for a long time. The reality is that Rule 102(3) requests from the Defence have been sporadic and infrequent for many, many months now, if not longer. Further, any requests that are made are limited in scope and size, usually comprising targeted requests focused on discrete issues. Considering this, the SPO has identified no basis to claim that adherence to the terms of Rule 102(3) will impose any "undue delay and waste of time and resources." The SPO's claim is conclusory, entirely without elaboration or justification in the Request, and should be rejected.

IV. CONCLUSION

20. For the reasons outlined above, the Defence requests the SPO's Request should be denied in its totality.

[Word count: 2,308 words]

¹² See KSC-BC-2020-06/F02718, *Joint Defence Request for the Trial Panel to take Measures to Ensure the Appearance of Impartiality of the Proceedings and Avoid Prejudice to the Defence*, 13 November 2024, public.

¹³ F02895, para. 6.

Respectfully submitted on 14 February 2025,



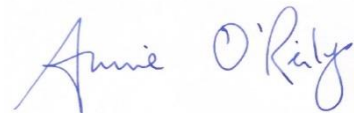
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