



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

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

Judge Christoph Barthe

Judge Guénaél Mettraux

Judge Fergal Gaynor, Reserve Judge

Registrar: Fidelma Donlon

Date: 24 February 2025

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Decision on Prosecution Supplemental Rule 102(3) Notice and Related Request

Specialist Prosecutor

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TRIAL PANEL II ("Panel"), pursuant to Article 21(4)(c) and (6), 40(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 110 and 102(3) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 3 December 2024, the Defence for Hashim Thaçi ("Thaçi Defence") objected to the use of a document because it had been previously disclosed pursuant to Rule 102(3) without an accompanying Defence request.¹
2. On 4 December 2024, the Panel issued an oral order allowing a calling Party, in light of the reactive nature of redirect examination, to use documents, including Rule 102(3) documents, which are not on its exhibit list, provided they have been disclosed to the Defence sufficiently in advance ("Oral Order").²
3. On 24 January 2025, the Panel denied the request from Defence for Hashim Thaçi, Kadri Veseli, and Jakup Krasniqi for leave to appeal the Oral Order.³
4. On 3 February 2025, the Specialist Prosecutor's Office ("SPO") filed a supplemental Rule 102(3) notice and related request ("Request").⁴
5. On 14 February 2025, the Defence for Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi (collectively, "Defence" and "Accused") filed a joint response to the Request ("Response").⁵

¹ Transcript, 3 December 2024, pp. 23265-23267.

² Transcript, 4 December 2024, p. 23295, lines 11-15, confidential.

³ F02861, Panel, *Decision on Thaçi, Veseli and Krasniqi Defence Request for Certification to Appeal the First Oral Order of 4 December 2024*, 24 January 2025.

⁴ F02895, Specialist Prosecutor, *Prosecution Supplemental Rule 102(3) Notice and Related Request*, 3 February 2025, with Annexes 1-2, confidential.

⁵ F02934, Specialist Counsel, *Joint Defence Response to Prosecution Supplemental Rule 102(3) Notice and Related Request (F02895)*, 14 February 2025.

6. On 21 February 2025, the SPO replied to the Response (“Reply”).⁶

II. SUBMISSIONS

7. The SPO requests the Panel’s authorisation to continue disclosing Rule 102(3) items to all Defence teams once such items have been requested by at least one Defence team.⁷ The SPO asserts that Rule 102(3) provides that requested items should be disclosed to the Defence, but the Rule does not explicitly address what this term means in the context of a multi-accused trial.⁸ The SPO submits that it has been the longstanding, previously unopposed practice of the SPO⁹ to disclose an item to all four Defence teams and such a practice: (i) enhances the efficiency and fairness of the proceedings; (ii) promotes clarity, visibility, and greater ease of oversight regarding disclosure status; (iii) reduces the consumption of time and resources for both the SPO and Defence; and (iv) avoids practical difficulties in the courtroom, including potential delay.¹⁰ The SPO further submits that selective and partial disclosure in a multi-accused case potentially infringes upon the rights of all Accused.¹¹

8. The Defence responds that Rule 102(3) includes two requirements, namely a Defence request and a judgement by a Defence team that the documents are “material to its preparations or were obtained from or belonged to the Accused”. The Defence argues that absent those two requirements, the SPO cannot make disclosures to the Defence except under other applicable provisions of Rules 102 or 103.¹² The Defence further argues that: (i) there is no ambiguity in Rule 102(3) about the meaning of the term “Defence,” and it refers to each individual Defence

⁶ F02956, Specialist Prosecutor, *Prosecution Reply Relating to Request F02895*, 21 February 2025.

⁷ Request, para. 1.

⁸ Request, para. 2.

⁹ Transcript, 4 November 2022, p. 1632; *See also* Transcript, 15 February 2023, p. 1949.

¹⁰ Request, para. 3.

¹¹ Request, para. 6.

¹² Response, paras 7, 13.

team;¹³ (ii) the circumstances of the initially unopposed practise changed when the SPO unilaterally disclosed a document pursuant to Rule 102(3) for the sole purpose of using that document in re-direct examination;¹⁴ (iii) Rule 102(3) now threatens to be used as a vehicle by the SPO to introduce more inculpatory evidence against the Accused;¹⁵ (iv) the SPO has no right to make an assumption that all Defence teams have identical interests and strategies;¹⁶ (v) the Defence acts in good faith and in compliance with Rule 102(3) when declining to accept disclosure from the SPO that was not requested by that Defence team;¹⁷ (vi) adherence to Rule 102(3) requirements does not affect the ability of another Defence team or Victims' Counsel to use that material in cross-examination;¹⁸ (vii) the SPO will not be prejudiced by adherence to the terms of Rule 102(3) and similarly the Panel will not feel restricted from using Rule 102(3) materials if they have not been disclosed to all Defence teams;¹⁹ and (viii) the SPO's claim that adherence to the terms of Rule 102(3) "risks undue delay and waste of time and resources" is unsubstantiated as Rule 102(3) requests from the Defence have been sporadic and infrequent for many months, if not longer.²⁰

9. The SPO replies that the Response misrepresents the Request and the Defence's refusal to accept Rule 102(3) disclosures requested by and made to other Parties and participants is ill-fitted to the reasons given in the Response and contradicts the underlying purposes of the Rule.²¹

¹³ Response, para. 8.

¹⁴ Response, paras 9-11.

¹⁵ Response, para. 12.

¹⁶ Response, para. 14.

¹⁷ Response, para. 15.

¹⁸ Response, para. 16.

¹⁹ Response, paras 17-18.

²⁰ Response, para. 19.

²¹ Reply, para. 1. *See also* paras 2-4.

III. APPLICABLE LAW

10. Rule 102, paragraph 3, reads:

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.

11. Rule 102(3) provides for a three-step process.²² The first of these – the provision of a “detailed notice” of the material in the possession of the SPO – precedes the process of disclosure. This step constitutes a practical and procedural step by which the SPO informs the Defence of what material is in the SPO’s possession so as to place the Defence in a position to: (i) determine in a meaningful way which of the items listed in the notice are material to its case; and (ii) make a disclosure request to the SPO for any such items, which is the second step.²³ The third step is that, once such a request is made, the requested material shall be

²² F01226/A01, Panel, *Annex 1 to Order on the Conduct of Proceedings* (“Order on the Conduct of Proceedings”), 25 January 2023, para 21 and footnote 5, referring to: KSC-BC-2020-07, F00304, Trial Panel II, *Order on the Updated Rule 102(3) Detailed Notice* (“Order from 7 September 2021”), 7 September 2021, with confidential and ex parte annex, paras 16, 20; F00413, Trial Panel II, *Public Redacted Version of Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice* (“Decision from 3 November 2021”), 3 November 2021, , para. 36; F00435, Trial Panel II, *Public Redacted Version of Decision on the Prosecution Request Related to Rule 102(3) Notice Item 201* (“Decision from 15 November 2021”), 15 November 2021, , para. 11; F00479, Trial Panel II, *Decision on Item 202 Disclosure* (“Decision from 7 December 2021”), 7 December 2021, confidential, para. 11; F00533, Trial Panel II, *Decision on the SPO Request Regarding Items 203 and 204* (“Decision from 25 January 2022”), 25 January 2022, confidential, para. 14; F00541, Trial Panel II, *Decision on the SPO Request Regarding Item 205* (“Decision from 28 January 2022”), 28 January 2022, confidential, para. 12. See also KSC-BC2020-07, IA005-F00008, Court of Appeals Panel, *Public Redacted Version of Decision on the Appeals Against Disclosure Decision* (“Appeals Decision”), 29 July 2021, para. 39; F00172, Pre-Trial Judge, *Public Redacted Version of Decision on the Materiality of Information Requested under Rule 102(3) and Related Matters* (“Decision on the Materiality”), 1 April 2021, para. 22.

²³ *Ibid.* See, in particular, *Order from 7 September 2021*, para. 16. See also, *ibid*, para. 20.

disclosed without delay. Where grounds to dispute the materiality of the information exist, the Specialist Prosecutor shall immediately seize the Panel.

IV. DISCUSSION

General considerations regarding the disclosure regime applicable before the KSC

12. The purpose of disclosure is to contribute to the overall fairness of proceedings.²⁴ An effective system of disclosure thus seeks to ensure that the Defence receives from the prosecuting authorities all material that is or might be relevant to its preparation so as to enable the Defence to make use of it for the purpose of its investigation, trial preparation, and/or questioning of witnesses.

13. Different jurisdictions have adopted different regimes of disclosure. The regime adopted by the KSC is essentially based on the system that was in place before certain international(ised) jurisdictions. Important adaptations have been made, however, in order to address difficulties encountered in other jurisdictions and with a view to render the system fairer to the Defence. Among the most significant adjustments is Rule 103's requirement of 'immediate' disclosure of exculpatory material in the custody, control or actual knowledge of the SPO.²⁵ Most importantly, Rule 102(3) improves upon existing regimes in that (i) it requires the SPO to provide detailed notice to the Defence of any material and evidence in its possession and (ii) places the onus of deciding what is material to Defence preparation not on the Prosecutor, as is the case in other such regimes, but on the Defence. This was intended to address situations where the Prosecution would adopt too narrow a definition of materiality to the prejudice of the Defence or would use the question of materiality to tease out the Defence case.

²⁴ See also Law, Article 21(4)(c) and (6).

²⁵ See also Order on the Conduct of Proceedings, para. 24.

14. Under the KSC regime, the responsibility of determining what is material to the Defence is therefore firmly with the Defence. And so, in principle, are the consequences for failing to request disclosure of a document of which notice was fairly given by the SPO.²⁶ A Defence that has adopted the strategy of *not* requesting certain material that was clearly and fairly notified pursuant to Rule 102(3) cannot later complain of not being made aware of the existence of that material.

Meaning of the words “the Defence” in Rule 102(3)

15. The Parties disagree about the meaning of the expression ‘the Defence’ in Rule 102(3) and whether it refers to all Defence teams (i.e., the Defence as a whole) or to each Defence team individually. The Panel will consider each step of the disclosure system put in place by Rule 102(3) and consider in that context what the meaning of that phrase is.

16. As a preliminary matter, the Panel notes that the expression “the Defence” is used in the Rules *both* to refer to individual Defence teams²⁷ and to the Defence in general.²⁸

17. Regarding Rule 102(3), the first sentence of that provision states that 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. It is apparent that this refers to each and all Defence teams.

18. Regarding the second step in the process, Rule 102(3) provides that the Defence is expected to make a materiality determination in respect of items of

²⁶ See also *Order from 7 September 2021*, paras 16, 20; *Decision from 3 November 2021*, para. 36; *Decision from 15 November 2021*, para. 11; *Decision from 7 December 2021* para. 11; *Decision from 25 January 2022*, para. 14; *Decision from 28 January 2022*, para. 12. See also *Appeals Decision* para. 39; *Decision on the Materiality*, para. 22. *Order on the Conduct of Proceedings*, para. 21.

²⁷ See, e.g., Rule 2 (“Defence” being defined as “The suspect/Accused and/or Specialist Counsel”); Rule 104

²⁸ See, e.g., Rule 46(2); Rule 90(4).

which notice has been given (*“which are deemed by the Defence to be material to its preparation”*). The Panel is of the view that this particular reference to “the Defence” must be referring to each Defence team individually. First, the sentence uses the word ‘its’ rather than ‘their’, although one could argue that this reflects the fact that the provision also regulates single accused cases. More importantly, a teleological interpretation of Rule 102(3) also supports the suggestion that the notion of “Defence” in relation to the determination of materiality must be understood to refer to each, individual, Defence team. As noted above, the system put in place by the Rules was intended to ensure that the Defence, not the SPO, determines what is or might be material to its preparation. Considering that, in a multi-accused case, strategies and cases might vary and even conflict between Defence teams, this must perforce mean that each Defence team should be able to make that determination of materiality for itself.

19. Regarding the third stage of that process, that of actual disclosure of the requested items, Rule 102(3) provides that, upon request, the Specialist Prosecutor shall disclose the requested item(s) *to the Defence*. It is apparent from the above already that the expression “the Defence” is used in at least two different ways in this provision so that it cannot be inferred that a unique interpretation of the notion would apply across that provision. The Panel will consider below whether the SPO’s interpretation of this phrase and its practice of disclosing requested items to all Defence teams once requested by at least one of them involves a breach of the Rules or any unfairness to the Accused.

‘Collective’ disclosure pursuant to Rule 102(3)

20. Until December 2024, the Defence had not objected to material being disclosed collectively to all Defence teams pursuant to Rule 102(3) when requested by one of the Defence teams. The Panel notes in that regard that the proposed

approach was put forth by the SPO at the latest on 4 November 2022, without drawing any objection from the Defence.²⁹

21. The Defence submits that “[c]ircumstances 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”.³⁰ The Defence points out that none of the Defence teams had requested disclosure of this item or claimed materiality in respect of it. Nevertheless, the SPO was allowed to use the document in re-direct examination.³¹

22. The Panel will deal with both aspects of these submissions in turn: first, does the practice of ‘collective’ disclosure of Rule 102(3) violate that provision; secondly, is the SPO permitted to disclose an item pursuant to Rule 102(3) where it has not been expressly requested by any of the Defence teams.

23. Regarding the first issue, as already noted, the Defence did not object to such practice and allowed the SPO to proceed in such manner for at least two years. This, at the very least, stands as confirmation that (a) up until December 2024, the Defence did not regard ‘collective’ disclosure under Rule 102(3) as being contrary to that provision and that (b) unfairness does not necessarily arise from such practice. Secondly, as the SPO notes, such an approach ensures effectiveness of disclosure by avoiding multiple disclosure requests for the same document by different Defence teams and is conducive to the goal of fairness insofar as it ensures that all Defence teams have in their possession potentially relevant items which were identified as material by one team and which other teams might have failed to identify as such. Such a system also avoids staggered disclosure (potentially involving four separate requests and disclosures) and unnecessary delays in securing access to such documents for all Defence teams. Thirdly, none

²⁹ Transcript of Status Conference, 4 November 2022, at p. 1632.

³⁰ Joint Defence Response, para. 11.

³¹ Joint Defence Response, para. 11.

of the Defence teams has suggested that this practice resulted in overwhelming the Defence with material that individual teams were unable to review and analyse effectively. Lastly, the Panel notes that if a Defence team does not consider it necessary to acquaint itself with items the disclosure of which it has not sought, it may opt not to review this material. That material has, however, been disclosed to that team, whether or not it decides to acquaint itself with its content.

24. Based on the above, the Panel is satisfied that the practice of disclosing Rule 102(3) material to all Defence teams once a request has been made for the disclosure of such material by one Defence team is not prohibited by Rule 102(3), is not per se unfair, and has not been shown to have caused any prejudice to any Defence team.

Disclosure of items which a Party intends to use in re-examination

25. The Panel next turn to the question of whether the SPO is permitted to disclose pursuant to Rule 102(3) an item which no defence team has requested and which the SPO intends to use in re-examination of a witness.

26. As noted above, the Defence objected to such practice, suggesting that Rule 102(3) would thus become a ‘Trojan horse’ enabling the SPO to bring in new inculpatory evidence relevant to its case through that process. The Panel has already ruled that, in light of the reactive nature of re-examination, a calling Party is authorised to use material in re-examination that addresses a new issue raised in cross-examination irrespective of whether that material is on its proposed exhibit list.³²

³² Transcript, 4 December 2024, p.23295. See also F02861, Panel, *Decision on Thaçi, Veseli and Krasniqi Defence Request for Certification to Appeal the First Oral Order of 4 December 2024* (“Certification Decision”), 24 January 2025

27. The Panel notes that the Rules do not specifically address the process of disclosure of material which a Party wishes to use in re-examination. The fact that the Rules do not expressly regulate this matter does not mean that it is not subject to regulation. First, Rule 127(3) makes clear that the Panel “may allow redirect examination as deemed necessary”. The Panel’s Order on the Conduct of Proceedings further regulates the scope of permissible re-examination by making it clear that re-examination is permitted “only on matters arising in cross-examination”.³³ This sets the general normative framework within which the use of documents might be permitted in re-examination.³⁴ Furthermore, in order to be effective, the possibility of re-examination perforce implies the ability of the questioning party to use documents and material relevant to its questioning. The Law also provides for the fundamental rights of the Accused to a fair trial and to adequate time and facilities to prepare.³⁵ An effective system of disclosure must therefore ensure that the Defence is put on timely notice of and provided with copies of items that might assist the fair and effective preparation of its case.

28. Under the Defence’s interpretation of the Rules, the SPO would not be permitted to disclose items pursuant to Rule 102(3) absent an express disclosure request by the Defence. The Defence submits that the SPO should, instead, apply Rules 102(1)(b) and 118(2) to that process and demonstrate that it has acted in a timely manner and has good cause for adding the proposed document to its exhibit list.³⁶ The Panel notes that such an interpretation of the Rules would have little or no beneficial effect for the Defence. The safeguards foreseen in Rule 118(2)

³³ Order on the Conduct of Proceedings, paras 111-112. *See also*, *ibid*, para. 132.

³⁴ *See also*, regarding the discretion that the Panel enjoys in regulating re-examination: ICTY, Prosecutor v. Popovic et al., IT-05-88-T, *Decision on Borovcanin Motion for Reconsideration of Oral Decisions*, 23 June 2009, para. 8; ICTY, Prosecutor v. Popovic et al., IT-05-88-A, *Judgement*, 30 Jan 2015, para. 205; ICTR, Prosecutor v. Nahimana et al., ICTR-99-52-A, *Judgment*, 28 November 2007, para. 182; and ICTY, Prosecutor v. Kupreskic et al., IT-95-16-T, *Decision on Order of Presentation of Evidence*, 21 January 1999 (no paras).

³⁵ Law, Article 21, in particular, para. 2 and 4(c).

³⁶ Joint Defence Response, para. 17.

are, in effect, comparable to those regulating re-examination: re-examination and the use of documents in that context is permitted only if and where an issue has arisen from cross-examination (good cause); disclosure must perforce occur during or after cross-examination when that issue arises and before the new material is used in re-examination (timeliness). The Defence's suggestion that disclosure should go through the process of Rules 102(1) and 118(2), therefore, appears to be unnecessarily formalistic without any material gain for the Defence. The Panel notes, furthermore, that Article 21, paragraphs 4(c) and 6, of the Law already require that, subject to the restrictions provided by the Rules, 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 so that the Defence can fairly and effectively prepare and defend itself.

29. Where material is disclosed to the Defence in advance of re-examination, fairness is guaranteed in a variety of ways. *First*, the use of new material is only permitted to the limited extent that it is linked to an issue on which re-examination is authorised under the Order on the Conduct of Proceedings, i.e., one directly arising from cross-examination. *Secondly*, as has been the SPO's practice in such a case, it will immediately disclose the material in question to the Defence. *Thirdly*, the SPO will also release a 'queue' in accordance with the Order on Conduct of proceedings, which will put the Defence on further notice of the SPO's intention to use that material as part of its re-examination of a witness. *Fourthly*, the Order on the Conduct of Proceedings at paragraph 112 permits "re-cross-examination if new material is introduced during re-direct examination or cross-examination by any Party or participant. In such circumstances, a Party is entitled to further cross-

examine the witness on that new material” *including in respect of any newly disclosed document*.³⁷

30. The fact that such material is notified to the Defence by the opposing party pursuant to Rule 102(3) is therefore not material here. What is material is to ensure that the Defence is on fair notice of the Prosecution’s intention to use such material and has it in its possession in timely manner in order to prepare for this possibility.

31. Based on the above, the Panel is satisfied that the timely disclosure of material which the SPO intends to use in re-examination whether pursuant to Rules 102(1)/118(2), Rule 102(3) or directly pursuant to Articles 21(4)(c) and (6) of the Law, does not breach the terms of the Rules and serves the more general purpose of ensuring that the Defence has adequate notice of material which the SPO might use for that purpose. In all such cases, fairness is maintained and guaranteed by the safeguards outlined above and no prejudice arises from the fact that such material is being disclosed pursuant to one of these Rules or another (or pursuant to a combination of these provisions).

³⁷ ICTY, Prosecutor v. Mucić et al., IT-96-21 (“Čelebici case”), *Decision on the Motion on Presentation of Evidence by the Accused, Esad Landzo*, 1 May 1997, para. 30

V. DISPOSITION

32. Based on the above, consistent with the practice followed thus far in these proceedings, the Panel authorizes the SPO to continue disclosing Rule 102(3) items to all Defence teams if disclosure of those items has been requested by at least one Defence team.

A handwritten signature in black ink, reading "Charles L. Smith, III". The signature is written in a cursive style with a horizontal line underneath.

Judge Charles L. Smith, III
Presiding Judge

Dated this Monday, 24 February 2025

At The Hague, the Netherlands.