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In: **KSC-BC-2020-06**

Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: **Pre-Trial Judge**

Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Kadri Veseli

Date: **9 August 2021**

Language: English

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Corrected Version of
Veseli Defence Request for an Amended Rule 102(3) Notice
(F00424 dated 5 August 2021)

Specialist Prosecutor's Office

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I. INTRODUCTION

1. The Defence for Kadri Veseli ("Defence") hereby requests the Pre-Trial Judge to order the Specialist Prosecutor's Office ("SPO") to amend its notice pursuant to Rule 102(3) [1] and to populate an extra field which will detail the relevance to the case of each item of evidence listed therein.

2. Pursuant to Rule 9(5) of the Rules of Procedure and Evidence ("Rules"), the Pre-Trial Judge is also requested to reduce the time limit for an SPO response to this request and/or to fix an urgent hearing to decide the issues central to this request.

II. PROCEDURAL BACKGROUND

3. On 24 June 2021, pursuant to an SPO request, the Pre-Trial Judge extended the deadline for filing its Rule 102(3) notice to 30 July 2021. In the same decision, the Pre-Trial Judge ordered the Defence to finalise any requests for access to materials listed on the Rule 102(3) notice by 24 September 2021. Finally, the Pre-Trial Judge ordered that, subject to any challenges to the materiality of evidence sought, the SPO should, "*by 15 October 2021, or within three weeks of the Defence indication(s), whichever is earlier, (i) disclose or provide the Defence with access to the selected materials that do not require redactions; and (ii) submit its request for protective measures, if any, in respect of those materials sought by the Defence*".[2]

4. On Saturday 31 July 2021, at 01:00 (am), the SPO filed its Rule 102(3) Notice.[3] The Defence overlooks this late filing in the spirit of collegiality and updates its procedural credit bank accordingly; when wood is chopped, chips can fly.

[1] KSC-BC-2020-06/F00421, Annex 1.
[2] KSC-BC-2020-06/F00370.
[3] KSC-BC-2020-06/F00421.

5. On 2 August 2021, the Defence commenced the daunting task of digesting the Rule 102(3) notice which comprises a rudimentary 2921-page index of thousands of items collected over a period of at least 10 years.

6. On 4 August 2021, the Defence wrote to the SPO as follows:

> *Dear SPO,*
>
> *With respect to filing F00421 which comprises the Rule 102(3) notice:*
>
> *As you are aware the notice must be "detailed". Furthermore, "upon request", the Defence is entitled to be supplied "without delay" with items out of that list which "are deemed to be material to its preparation".*
>
> *All of the aforementioned must be completed at the latest by 15 October 2021 per Decision KSC-BC-2020-06/F00370.*
>
> *The Rule 102(3) notice annexed to F00421 is, in our opinion, insufficiently detailed and does not enable us to approach the task of sensibly requesting discrete access to information.*
>
> *We fail to understand, for example, how the Defence is meant to assess the relevance, let alone, the materiality of an item which is defined as a "Sitrep", "witness statement" or "Summary of Events".*
>
> *As you can appreciate, any responsible Defence team would be expected to leave no stone unturned and assimilate every item of evidence made available to it. For this reason, we do not believe that any delay which could be occasioned by the need to digest and act on this huge and extremely rudimentary 2921 page index of materials (collected over the period of at least 10 years) can be assigned to the Defence.*
>
> *Since we do not wish to be unreasonable with our inspection demands (which could elicit a challenge to materiality and the overburdening of the SPO with requests for protective measures), we would ask you rework the Rule 102(3) notice adding a column explaining the relevance of each item of evidence to the case. **As you will recall, and pursuant to Decision KSC-BC-2020-07/IA005/F00008 in the Gucati/Haradinaj case – the initial assessment of relevance falls to the SPO**. We would like to believe that in determining relevance – lawyers in your office examined each and every item in the Rule 102(3) notice, recording the reasons for relevance such that it will now be easy for the SPO to populate the column presently requested by the Defence. We would not like to think that the Rule 102(3) Notice is essentially an SPO insurance policy - namely the repository for the unbridled dumping of all materials left over after the SPO has cherry-picked its Rule 102(1)(b) incriminating materials and singled out the blatantly obvious Rule 103 exculpatory materials. If that latter scenario is indeed the case – please do inform us.*

*In light of all the aforementioned, we would be grateful if you could indicate to us **within the next day** how long you anticipate that it will take the SPO to produce an amended table as requested.*

Kind regards,

7. On the same day, 4 August 2021, the SPO replied to the Defence as follows:

Dear Counsel,

The SPO has selected material for inclusion in the Rule 102(3) notice in a manner consistent with the applicable framework. As recently affirmed by the Court of Appeals, that framework requires the concept of relevance to the case to be interpreted broadly and, in fact, permits only a limited degree of discretion on the part of the SPO in making that assessment. As such, it is neither an 'unbridled dumping' nor an 'insurance policy' - indeed we consider such terminology to be unnecessary, and unhelpful to communications.

There is no requirement for the SPO to identify the specific basis upon which an item is assessed to be relevant, and we do not intend to revise the notice in the manner requested. We are, however, happy to review certain of the descriptions provided, and will pay particular attention to the terms identified in your e-mail.

Kind regards,

III. RELEVANT STATUTORY PROVISIONS

8. Rule 102(3) provides as follows:

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.

9. Article 21(6) of the Law on Specialist Chambers and Specialist Prosecutor's Office stipulates as follows:

> *"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".*

IV. SUBMISSION

10. The Appeals Chamber has already had the opportunity to rule on the requirements of a Rule 102(3) notice in the *Gucati/Haradinaj* case:

> *"The Panel agrees with the Pre-Trial Judge's assessment that disclosure under Rule 102(3) of the Rules is a three-step process. The first step involves the SPO providing a detailed notice of "any material and evidence in [its] possession". According to Rule 102(3) of the Rules, the scope of this requirement is determined by Article 21(6) of the Law, which refers to "all material and relevant evidence or facts […] for or against the accused". According to the Pre-Trial Judge, this entails that the detailed notice must include any material and evidence in the SPO's possession that is "relevant to the case". Under the second step, the SPO must disclose, inter alia, any material in its custody or control which the Defence deems to be material to its preparation and has requested. Finally, under the last step, the SPO can seize a Panel if it disputes the materiality of the material requested by the Defence. However, neither the Rules nor the Law offer guidance as to the interpretation of the concepts of 'relevance to the case' and 'material to the Defence preparation'."*[4]

11. It is clear that the SPO bears the burden of determining the relevance of materials to the case as the "first step", whereas the Defence bears the subsequent onus of determining the materiality of the same materials to the preparation of the Defence. The Defence can only perform the "second step" identified by the Appeals Chamber

[4] KSC-BC-2020-07/IA005/F00008/RED at para. 38.

in an effective manner if the SPO Rule 102(3) notice is sufficiently "detailed" *and reliable* so as to permit a discrete and appropriate selection of those materials for review in keeping with judicially ordained deadlines.

12. As mentioned in the *inter partes* correspondence, however, no responsible Defence Counsel acting in the best interests of his client would neglect to examine any item of evidence deemed relevant to the case by the SPO – i.e. "for or against" Kadri Veseli. The SPO has identified 68,753 such items of evidence which comprise, inter alia, video interviews. The Defence is now obliged to review the index of these 68,753 items and to restrict its requests for access to those items which it deems material to the preparation of the Defence by 24 September 2021. Putting aside questions as to whether the KSC statutory framework is even compatible with Counsel's ethical duties to familiarise himself with all items of evidence deemed relevant to his/her client's case, the task ahead of the Defence is unjustifiably complicated by the lack of specificity in the Rule 102(3) notice. In this respect, the Pre-Trial Judge is referred once again to the ruling of the Appeals Chamber in the *Gucati/Haradinaj* case:

> *"The Panel finds that the dispute mechanism foreseen under the last limb of Rule 102(3) of the Rules concerns challenges to the materiality of the requested materials, not their relevance (i.e. the basis for inclusion in the Rule 102(3) Notice). The Panel finds that, in the present case, the Defence was deprived of the first step of Rule 102(3) of the Rules, namely the opportunity to be informed of the relevant materials in the possession of the SPO, in order to assist its identification of items which could be material to its preparation and facilitate its request of such items.*
>
> *The Panel furthermore finds that the "degree of initial assessment" by the SPO in terms of which materials are "relevant to the case" and must therefore be included on the Rule 102(3) Notice should leave little discretion to the SPO".*[5]

13. All parties to the judicial process have an obligation to assist the Court to establish the truth of the allegations contained in the indictment. The SPO also has the

[5] KSC-BC-2020-07/IA005/F00008/RED at paras. 45-46.

obligation of investigating exonerating evidence. Without even considering time constraints, these obligations cannot be discharged effectively when the Defence is not a party to determining the relevance of the materials listed in the Rule 102(3) notice and is, furthermore, denied the basic rationale for such materials being deemed relevant.

14. If the SPO has conducted its investigations in a responsible manner (as one should *prima facie* assume it did), it would have recorded the "initial assessment" of relevance immediately upon collecting any item of evidence. That initial assessment should now be present somewhere in the SPO's archives or work product. If it is not, then it is entirely reasonable for the Defence to surmise that the Rule 102(3) notice is nothing more than a default/catch-all repository for all residual materials collected without proper analysis and remaining after the extraction of Rule 102(1)(b) incriminating materials and clearly exculpatory Rule 103 materials. The Defence questions how the "initial assessment" of these materials was performed. Was it, for example, performed by an experienced lawyer or by non-qualified clerks who briefly looked at the items in question and decided issues of relevance without recording the reasons for such a decision? The Pre-Trial Judge is respectfully requested to enquire as to the SPO's methodology.

15. The lack of specificity in the Rule 102(3) notice is quite extraordinary. The use of terminology such as "*SITF Transcript of W-xxxx*"[6], "*xx second video file*"[7], "*audio files from USB memory stick of xx*"[8],"*File from DVD labelled Kosovo*"[9] or "*Document with information about a phone call between monitored number ***** and ******* on 28 Aug 2005*"[10] is totally inadequate. Such descriptions give the Defence absolutely no indication of relevance to the case so that materiality to the defence can be assessed. For all the

[6] For example, items 2-212 and items 583-820.
[7] For example, items 477 to 544.
[8] For example, items 2779-2823,
[9] For example, items 2833-2837.
[10] For example, items 18222-18568.

Defence is aware, such items could contain potentially exonerating evidence. The SPO seems to acknowledge this deficiency by virtue of its offer "*to review certain of the descriptions provided*".

16. The Defence strenuously disputes the Prosecution assertion that *"there is no requirement for the SPO to identify the specific basis upon which an item is assessed to be relevant*". If the SPO is aware of the relevance of an item in the Rule 102(3) notice then it should detail it to the Defence. Failure to do so is not accordance with basic principles of fairness or the equality of arms. If the Prosecution, however, is not aware of the relevance of an item of evidence, then the Pre-Trial Judge should question why it was included on the Rule 102(3) notice in the first place.

17. To conclude, the Pre-Trial Judge is requested to rule that the SPO has not satisfied the requirement of providing a ***"detailed"*** notice under Rule 102(3) and to order the SPO to amend the said notice by populating an additional field which sets out the "*intial assessment*" deemed essential by the Appeals Chamber.

V. VARIATION OF TIME LIMITS

18. The Defence is not prepared for the lack of specificity in the Rule 102(3) notice and the need to obtain clarification thereof to be used as the means for attributing it blame for any delay occasioned. To this end, it has acted expeditiously in bringing the present request to the attention of the Pre-Trial Judge. Given that the Defence is required to submit its requests for selected materials by 24 September 2021, good cause is presently shown for reducing the deadline for resolving the issues raised in this filing. Furthermore, given the fundamental nature of the issues raised and the potential for them to impact on any future case at the KSC, the Defence believes that good cause is shown for convening a hearing, as soon as possible, so that oral submissions may be presented.

VI. CONCLUSION

19. The Pre-Trial Judge is respectfully requested to order:

1) the SPO to amend the Rule 102(3) notice so as to include an extra field which will be populated with its "initial assessment" of the relevance of every item contained therein with particular reference as to how that item is "*for or against*" Kadri Veseli;

2) to reduce the deadline for an SPO response, and;

3) to convene a hearing for the presentation of oral submissions if necessary.

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