



SPECIALIST PROSECUTOR'S OFFICE  
ZYRA E PROKURORIT TË SPECIALIZUAR  
SPECIJALIZOVANO TUŽILAŠTVO

**In:** KSC-BC-2020-06  
**Before:** Pre-Trial Judge  
Judge Nicolas Guillou  
  
**Registrar:** Dr Fidelma Donlon  
**Filing Participant:** Specialist Prosecutor  
**Date:** 16 August 2021  
**Language:** English  
**Classification:** Public

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**Prosecution Response to Defence request for amended Rule 102(3) notice**

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1. The Defence Request<sup>1</sup> should be rejected as it misapprehends the applicable framework and seeks unwarranted judicial intervention.
2. Judicial intervention on matters of disclosure should be exceptional, and should occur only after all efforts to resolve a dispute in good faith between the parties have been exhausted.<sup>2</sup> In this instance, the Specialist Prosecutor's Office ('SPO') promptly responded to the Veseli Defence's initial request, on the same day on which it was made, and - while declining the request to 'explain[...] the relevance [to the case] of each item of evidence' on the Rule<sup>3</sup> 102(3) Notice<sup>4</sup> - constructively engaged with the Defence, in particular indicating willingness to review certain descriptions.

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<sup>1</sup> Corrected Version of Veseli Defence Request for an Amended Rule 102(3) Notice, 9 August 2021 (originally filed on 5 August 2021), KSC-BC-2020-06/F00424COR ('Veseli Request'); Krasniqi Defence Joinder to Veseli Defence Request for an Amended Rule 102(3) Notice, 6 August 2021, KSC-BC-2020-06/F00425 ('Krasniqi Joinder'), Thaçi Defence Joinder to Veseli Defence Request for an Amended Rule 102(3) Notice, 11 August 2021, KSC-BC-2020-06/F00431 ('Thaçi Joinder') (together 'Defence Request').

<sup>2</sup> For example, STL, Pre-Trial Judge, *The Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, F0913, Decision on Sabra's Seventh Motion for Disclosure-Experts, 24 May 2013, para.10 (describing such *inter partes* efforts as a 'pre-condition' to any request); ICC, Trial Chamber, *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Decision on Defence Request Seeking an Order to the Prosecution to Disclose Additional Information in Relation to Category F Redactions, 29 November 2019, para.11 ('Noting the stage of the proceedings in which the Defence made the Request and that it did not exhaust the *inter partes* process set up by the Chamber, the Chamber considers the Request to be untimely'); ICC, Trial Chamber V, *The Prosecutor v. Alfred Rombhot Yekatom and Patrice-Edouard Ngaïssona*, ICC-01/14-01/18, Transcript of Status Conference, 8 July 2020, ICC-01/14-1/18-T-012-ENG ET, p.6, Ins 12-19 ('First on cooperation, the participants and participants are expected to cooperate with each other wherever possible and to resolve matters *inter partes* before seizing the Chamber with a request. In the same way, the Chamber expects that issues concerning matters within the Registrar's purview be resolved directly with the Registry and not first go to the Chamber. The Chamber considers this approach to be the most efficient. If a resolution has not been tried *inter partes* beforehand, the Chamber may dismiss the relief sought *in limine*'); STL, Trial Chamber, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/T/TC, F1435, Decision and Observations on Inspection of Prosecution's Expert Reports, 28 February 2014, para.5 ('Parties should only bring matters of *inter partes* disclosure to the Trial Chamber's attention where reasonable attempts to resolve any issues have failed.'). See also Transcript of Status Conference dated 24 March 2021, p.344 (directing efforts to resolve certain disclosure related matters *inter partes*).

<sup>3</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

<sup>4</sup> KSC-BC-2020-06/F00421/A01 ('Rule 102(3) Notice').

3. This is the sort of reasonable and good faith engagement which should be expected of the parties,<sup>5</sup> and which the Veseli Defence – faced with a large volume of material and seemingly in a rush to pre-emptively disavow responsibility for any delays which may arise<sup>6</sup> - has chosen to ignore.

4. Instead of fishing for internal processes and work product,<sup>7</sup> engaging with the SPO's offer to review and, where necessary,<sup>8</sup> supplement descriptions would be more conducive to advancing the disclosure process. Moreover, as outlined below, and in contrast to the relief sought in the Defence Request,<sup>9</sup> such an approach is consistent with the applicable framework.

5. As found by the Pre-Trial Judge,<sup>10</sup> and recently affirmed by the Court of Appeals,<sup>11</sup> the concept of 'relevance to the case' is to be interpreted broadly. It is wider than the, already very broadly defined, test for what is material to the preparation of the defence.<sup>12</sup> The Rule 102(3) notice is required to list 'evidence in the SPO's possession, which has not been disclosed under Rule 102(1)(a)-(b) and 103 and which

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<sup>5</sup> *Contra.* Veseli Request, KSC-BC-2020-06/F00424COR, para.15 (characterising it as a seeming acknowledgement of 'deficiency').

<sup>6</sup> Veseli Request, KSC-BC-2020-06/F00424COR, paras 6, 18.

<sup>7</sup> Veseli Request, KSC-BC-2020-06/F00424COR, paras 6, 14, 16 (focusing on the personnel involved, the timing and manner in which material collected was analysed in the course of the SPO's investigations).

<sup>8</sup> It is noted that the Veseli Defence repeatedly misrepresents the degree of information provided for certain items in the Rule 102(3) Notice (Veseli Request, KSC-BC-2020-06/F00424COR, para.15 - giving, in multiple instances, only the first few introductory words of descriptions which in fact proceed to identify case files, locations, entities and/or SPO witnesses to which the materials relate).

<sup>9</sup> To the extent the Defence Request seeks the SPO to provide explanations of relevance for each evidentiary item (in contrast to further objective information or detail in the description of certain items), no legal basis is provided. Indeed, no such requirement exists in the applicable legal framework. Fairness and equality of arms do not require one party to share its internal evidentiary analysis, or analytical work product, with other parties (*contra.* Veseli Request, KSC-BC-2020-06/F00424COR, para.16).

<sup>10</sup> For example, Framework Decision on Disclosure of Evidence and Related Matters, 23 November 2020, KSC-BC-2020-06/F00099, paras 62-63; Public Redacted Version of the Decision on the Materiality of Information Requested under Rule 102(3) and Related Matters, 15 July 2021, KSC-BC-2020-07/F00172/RED, ('Rule 102(3) Decision'), para.23.

<sup>11</sup> Public Redacted Version of Decision on the Appeals Against Disclosure Decision, 29 July 2021, KSC-BC-2020-07/IA005/F00008, ('Appeals Decision'), para.42.

<sup>12</sup> Appeals Decision, KSC-BC-2020-07/IA005/F00008, paras 41-42.

is relevant *to the case*'.<sup>13</sup> It is not confined to, and in that sense does not require assessment of, how material would be relevant, useful or material to Defence preparations.<sup>14</sup>

6. Indeed, when the Court of Appeals referred to an 'initial assessment' of relevance it did so primarily in order to *de-emphasise* the concept and curtail the scope of any such assessment,<sup>15</sup> expressly stating that this is an exercise which 'should leave little discretion to the SPO'.<sup>16</sup> That limited degree of SPO discretion in generating the Rule 102(3) notice is amongst the distinguishing features of the governing disclosure framework.<sup>17</sup>

7. In this context it would be both futile and inappropriate for the SPO to approach the Rule 102(3) Notice from the perspective of 'explaining' the perceived relevance of the materials in question. Instead, the SPO's obligation is to provide a list objectively informing the Defence of evidence in the possession of the SPO, which has not already been disclosed, 'in order to assist the Defence in requesting information *they* deem material for their preparation'.<sup>18</sup>

8. Faced with a large index of material, the Veseli Defence now effectively seeks to reverse the applicable disclosure framework and substitute SPO assessments of relevance as the basis for its own assessment of materiality. This is directly contrary to the applicable regime. Providing the detailed notice envisioned by Rule 102(3) does

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<sup>13</sup> Rule 102(3) Decision, KSC-BC-2020-07/F00172/RED, para.23 (emphasis in the original); Appeals Decision, KSC-BC-2020-07/IA005/F00008, para.44.

<sup>14</sup> Rule 102(3) Decision, KSC-BC-2020-07/F00172/RED, para.23.

<sup>15</sup> *Contra*. Veseli Request, KSC-BC-2020-06/F00424COR, para.17; Thaçi Request, KSC-BC-2020-06/F00431, para.9 (the Thaçi Defence misinterprets the Appeals Decision – the reference to an 'initial assessment' at para.40 of the Appeals Decision is not referring to SPO obligations in connection with Rule 102(3). Rather, it is doing the exact opposite and *contrasting* the framework applicable before the KSC with that at other courts and tribunals where the prosecution does in fact conduct the initial assessment of what is material to the preparation of the Defence (Appeals Decision, KSC-BC-2020-07/IA005/F00008, para.40).

<sup>16</sup> Appeals Decision, KSC-BC-2020-07/IA005/F00008, para.46. See similarly, Appeals Decision, KSC-BC-2020-07/IA005/F00008, para.40.

<sup>17</sup> Appeals Decision, KSC-BC-2020-07/IA005/F00008, paras 39-40.

<sup>18</sup> Rule 102(3) Decision, KSC-BC-2020-07/F00172/RED, para.23 (emphasis in the original); Appeals Decision, KSC-BC-2020-07/IA005/F00008, para.44.

not entail providing accompanying ‘explanations’ of perceived relevance. In fact, as outlined above, the SPO’s discretion to conduct any such assessment in connection with the Rule 102(3) notice is minimal.

9. Moreover, in keeping with the broadness of the Rule 102(3) notice obligation, in many instances, the *prima facie* relevance of an item may derive from its temporal,<sup>19</sup> geographic or other similar connection to the charges. The SPO endeavoured to provide such information in the descriptions. In the context of a case of this nature and scope, the volume of such material is indeed voluminous.

10. However, in contrast to the relief being sought,<sup>20</sup> the concrete issues identified by the Defence relate to the degree of descriptive detail provided for certain of the items in the Rule 102(3) Notice.<sup>21</sup> As indicated above, consistent with the principle of constructive *inter partes* engagement, the SPO undertook to further review the descriptions, with particular regard to the items highlighted by the Defence. This review is already underway, and includes the use of pseudonyms. As such, to the extent the issues identified in the Defence Request relate to detail provided in the descriptions, no intervention is necessary. The Defence Request chooses to ignore this fact in favour of pursuing a remedy of dubious utility, which runs counter to the applicable framework. It should be rejected accordingly.

11. The request for an oral hearing should also be rejected, as no basis warranting such a hearing has been provided.<sup>22</sup> The parties have the opportunity to present their submissions in writing, and requesting an oral hearing should not be a substitute for doing so.

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<sup>19</sup> See similarly, Appeals Decision, KSC-BC-2020-07/IA005/F00008, para.43 (identifying the relevance of an item to arise from its temporal relation to the charges in that it preceded the events charged).

<sup>20</sup> Veseli Request, KSC-BC-2020-06/F00424COR, para.19(1).

<sup>21</sup> Veseli Request, KSC-BC-2020-06/F00424COR, paras 12, 15, 18 (but see fn.8 above); Krasniqi Joinder, KSC-BC-2020-06/F00425, paras 9-10; Thaçi Joinder, KSC-BC-2020-06/F00431, paras 10-12, 15.

<sup>22</sup> Veseli Request, KSC-BC-2020-06/F00424COR, para.18 (referring generically to the ‘fundamental nature’ of the issues and their potential importance to other future cases before the KSC).

**Word count: 1,619**



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**Jack Smith**

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Monday, 16 August 2021  
At The Hague, the Netherlands.