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:	**17 August 2021**
Language:	English
Classification:	Public

Veseli Defence Reply to SPO Response KSC-BC-2020-06/F00433

(Request for an amended Rule 102(3) Notice)

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I. SUBMISSION

1. To what degree does the SPO have a duty to provide sufficient indicia of the relevance of items listed on a Rule 102(3) Notice to allow the Defence, thereafter, to properly assess the materiality of those items? That is the question currently before the honourable Pre-Trial Judge.

2. The SPO faults the Defence for failing to provide a statutory basis for its request that the relevance of each item on the Rule 102(3) Notice be specified.[1] The statutory basis is contained in Rule 102(3) itself which requires the SPO to produce a **"detailed"** notice of evidence in its possession. In determining the degree of such detail, the SPO must be guided by Article 21(6) of the Law on the Specialist Chambers and Specialist Prosecutor's Office. In other words, the items listed on the Rule 102(3) Notice must give some indication of how they are relevant to or are "for or against" Kadri Veseli thereby allowing the Defence to perform the second-stage materiality analysis in an effective manner.

3. The second stage materiality test, by its very nature, restricts the Defence's access to relevant material and is designed, ultimately, to prevent the SPO from being overburdened with the need to disclose untold reams of information and to seek an unwarranted number of protective measures. Since this would have a negative impact on the pace of the judicial proceedings, it is in the interest of both the Chamber and the SPO to ensure that the Rule 102(3) Notice is sufficiently detailed to prevent unmanageable requests for access to materials which will not be of assistance in establishing the truth of the allegations contained in the indictment.

[1] KSC-BC-2020-06/F00433 ("SPO Response") at footnote 9.

4. The Rule 102(3) Notice, at present, gives no indication as to why the materials listed therein are relevant, i.e. "for or against" Kadri Veseli. Even if it can be argued that there is a presumption of SPO administrative regularity, such a presumption is rebuttable - especially if knowledge of the methodology employed for assessing whether materials are "for or against" Kadri Veseli is intentionally denied and the demand for its clarification is categorized as a "fishing" expedition.[2] In the absence of sufficient detail, the SPO cannot divest the Defence of its overarching ethical duty to examine **all** materials that, by their very inclusion on the list, are *ipso facto* deemed "for or against" Kadri Veseli. The only way that such a quandary may be resolved is by ordering the SPO to populate an extra field in its Rule 102(3) Notice which will set out the fruits of its presumed relevance analysis. The Defence uses the word "presumed" purposefully because it has genuine reason to doubt that the relevance analysis in question was performed, as it ought to have been, by qualified lawyers who recorded their informed assessment of the evidence.

5. The SPO piously lectures[3] the Defence on "constructive" and "good faith" engagement yet does so while steadfastly "**declining** the request to 'explain […] the relevance to the case of each item of evidence on the Rule 102(3) Notice"[4] [emphasis added]. In other words, the SPO acknowledges the deficiency of the Rule 102(3) Notice by virtue of its offer to make sporadic cosmetic modifications of a 2921-page document. Notwithstanding, the SPO ignores the fundamental issue identified in paragraph 1 above and seeks to saddle the Defence with a non-existent duty to require clarification of a Rule 102(3) Notice as a precursor to its materiality analysis. If the SPO is so

[2] SPO Response at para 4.
[3] SPO Response at para 3; "this is the sort of reasonable and good faith engagement which should be expected of the parties…".
[4] SPO Response at para 2.

"constructive" (as it clearly believes it is), it would welcome, not shirk, an oral hearing and, furthermore, it would have provided its response to the Veseli Defence request in expedited fashion (as invited)[5] and not left it to the afternoon of the last statutory day.

6. "Constructive" is not the appropriate adjective for describing the nature of the SPO's engagement with the Defence on issues pertaining to the lack of clarity in the Rule 102(3) Notice. The Defence would characterise such engagement as grudgingly remedial. The seemingly generous proffer "to further review … the use of pseudonyms"[6] only arose after the SPO mistakenly divulged the name and pseudonym of a highly sensitive individual who "it no longer intends to call as a witness"[7]. Were it not for this freak and fortuitous occurrence, the Defence would have had no way of knowing, from the Rule 102(3) Notice, the identity of the material witness concerned; The SPO would have successfully "buried" the fact of its contact with him in an unsurmountable morass of information. This is exactly the reason why the SPO's flawed understanding of the requirements of a Rule 102(3) Notice is liable severely to impact on the "equality of arms".

7. The SPO states that it has no duty to provide the relief sought by the Defence which comprises an attempt "to reverse the applicable disclosure framework and substitute SPO assessments of relevance".[8] According to the SPO, a field detailing the relevance of each item of evidence on the Rule 102(3) Notice would be "futile and inappropriate".[9] The SPO has had many years to prepare the Rule 102(3) Notice and ought to have been well positioned to provide the

[5] Email from the Veseli Defence to the Pre-Trial Chamber copying the SPO dated 6 August 2021.
[6] SPO Response at para. 10.
[7] Email from the SPO representative to the Defence dated 6 August 2021.
[8] SPO Response at para 8.
[9] SPO Response at para. 7.

same "assessments" which it is now quite clearly unable to provide. The SPO conceals such inability by arguing that there is no duty to provide. For this reason, the Defence seeks "judicial intervention"[10] and openly declares that the SPO should carry the concurrent blame for any resulting delay to the start of trial especially when it involves the protraction of Kadri Veseli's incarceration.

II. CONCLUSION

8. The Defence repeats its respectful request that the SPO be ordered to amend the Rule 102(3) Notice so as to include an extra field which will be populated by the "initial assessment" of the relevance of every item of evidence contained therein with particular reference as to how that item is "for or against" Kadri Veseli.[11]

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[10] SPO Response at para. 2.
[11] KSC-BC-2020-06/F00424 at para. 19(1).