

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

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Defence Counsel for Jakup Krasniqi

Date: 23 August 2021

Language: English

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Public Redacted Version of

Krasniqi Defence Reply to Prosecution Response to Defence Request for

Amended Rule 102(3) Notice

Specialist Prosecutor

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Gregory Kehoe

Counsel for Kadri Veseli

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Counsel for Rexhep Selimi

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Counsels for Jakup Krasniqi

Venkateswari Alagendra, Aidan Ellis

I. INTRODUCTION

1. On 16 August 2021, the Specialist Prosecutor's Office ("SPO") responded¹ to the Request for an Amended Rule 102(3)² Notice filed by the Veseli Defence³ and joined by the Krasniqi Defence.⁴ The Krasniqi Defence hereby submit their reply.
2. This filing is confidential [REDACTED].

II. SUBMISSIONS

3. The SPO's first line of defence when challenged on compliance with its disclosure obligations appears to be to side-step judicial scrutiny by wrongly faulting the Defence for alleged failures to attempt to resolve the issue *inter partes*.⁵ On this occasion, judicial intervention is plainly warranted.⁶ The Rule 102(3) Notice spans 2,920 pages and 68,753 documents. The majority of those 2,920 pages contain documents the materiality of which the Defence cannot possibly assess on the basis of the information currently provided. All parties agree that the number of documents listed is voluminous.⁷ The Defence cannot reasonably be expected to litigate the adequacy of the information provided in relation to each document of these thousands of documents, one by one, in *inter partes* discussions within the current time limit.⁸ The

¹ KSC-BC-2020-06, F00433, Specialist Prosecutor, *Prosecution Response to Defence Request for Amended Rule 102(3) Notice* ("SPO Response"), 16 August 2021, public.

² Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules").

³ KSC-BC-2020-06, F00424, Veseli Defence, *Veseli Defence Request for an Amended Rule 102(3) Notice* ("Veseli Defence Request"), 5 August 2021, public.

⁴ KSC-BC-2020-06, F00425, Krasniqi Defence, *Krasniqi Defence Joinder to Veseli Defence Request for an Amended Rule 102(3) Notice* ("Krasniqi Joinder"), 6 August 2021, confidential.

⁵ SPO Response, para. 2. See also KSC-BC-2020-06, F00229, Specialist Prosecutor, *Prosecution Response to 'Thaçi Defence Request for Orders Related to Disclosure'*, 18 March 2021, public, paras 3, 7, 9, 19, 21, 27.

⁶ *Contra* SPO Response, paras 1-2.

⁷ SPO Response, para. 9.

⁸ The Defence must review the list and make its requests to inspect by no later than 24 September. KSC-BC-2020-06, F00370, Pre-Trial Judge, *Decision on Prosecution Request for Extension of Time Limit to Provide its Rule 102(3) Notice*, 24 June 2021, public, para. 16(c).

Rule 102(3) process will only be manageable if the SPO is ordered to review the whole Notice and ensure that the information provided about each document is sufficient to allow the Defence to make an informed decision about materiality. That does require judicial intervention. In any event, it is clear from the correspondence set out in the Veseli Defence Request that the *inter partes* process had reached an impasse.⁹

4. The real issue between the parties is the extent of the information that a Rule 102(3) Notice must provide to the Defence, in order that the Defence can determine whether a document is material for the preparation of the Defence.

5. In raising this issue, the Defence do not seek to substitute SPO assessments of relevance for their own assessment of materiality.¹⁰ The Defence simply want to be put in a position in which they can perform a proper reasoned assessment of materiality – and that is not achieved by the SPO’s current Rule 102(3) Notice for the reasons set out in the Veseli Defence Request¹¹ and the Krasniqi Joinder.¹²

6. The scope of the obligation upon the SPO is defined by the terms of Rule 102(3) itself and the purpose of the provision of the Notice. Rule 102(3) provides that the Notice must be “detailed”. The purpose of the provision of the Notice is – as the SPO themselves cite – “in order to assist the Defence in requesting information they deem material”.¹³ The Rule 102(3) Notice must therefore be sufficiently detailed that it assists the Defence in identifying which information is material.

⁹ Veseli Defence Request, paras 6-7, 12.

¹⁰ *Contra* SPO Response, para. 8.

¹¹ Veseli Defence Request, paras 11-16.

¹² Krasniqi Joinder, paras 9-11.

¹³ SPO Response, para. 7 citing KSC-BC-2020-07, F00172/RED, Pre-Trial Judge, *Public Redacted Version of the Decision on the Materiality of Information Requested under Rule 102(3) and Related Matters*, 15 July 2021, public, para. 23 and IA005/F00008, Court of Appeals Chamber, *Public Redacted Version of Decision on the Appeals Against Disclosure Decision*, 29 July 2021, public, para. 44.

7. The current Rule 102(3) Notice does not provide the requisite level of detail. The obvious deficiency in the Notice's description of [REDACTED], which the SPO has agreed to review,¹⁴ is – as the Krasniqi Joinder made clear¹⁵ – only an example of the deficiency in the Notice rather than the entire problem. Further examples include: [REDCATED];¹⁶ [REDACTED],¹⁷ [REDACTED]¹⁸ [REDACTED].¹⁹ To the SPO, with access to the underlying documents, those descriptions might be meaningful. To the Defence, presented for the first time with only those limited pieces of information, it is impossible to make a reasoned assessment of materiality.

8. The SPO Response observes that the relevance of a document “may derive from its temporal, geographic or other similar connection to the charges”.²⁰ The Defence agree. It follows that the temporal,²¹ geographic or other similar connection to the charges are examples of the minimum information that the SPO must provide to the Defence in relation to each document on the Notice in order to enable the assessment of materiality.²² As the examples in the preceding paragraph demonstrate, the current Rule 102(3) Notice does not provide this information consistently or with enough specificity to allow the Defence to assess materiality.

9. These issues pervade the Rule 102(3) Notice. Given the voluminous nature of the Notice, it is not practicable to identify each and every item which is described with insufficient detail to allow the Defence to assess materiality. The problem can only be resolved by requiring the SPO to review all items on the Notice and ensuring that

¹⁴ SPO Response, para. 10.

¹⁵ Krasniqi Joinder, para. 9 describing this as the “clearest example”.

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ SPO Response, para. 9.

²¹ The Defence note that it is the date of the events addressed in a document which is of assistance, not the date of the document itself.

²² Combining all of these factors is likely to be required; merely indicating the date of a document or the location is unlikely to be useful in the absence of any indication as to the content of the document.

sufficient information is provided to the Defence – and the easiest way to do that is likely to be through the provision of an additional field indicating the relevance of each document as the Defence have requested.

10. Finally, asking for a detailed Notice to be provided is not “fishing”, nor is it an impermissible request for “internal processes and work product”.²³ The Defence simply request, consistent with the SPO’s obligations under Rule 102(3), to be placed in a position in which they have sufficient information to review the materiality of all of the documents listed in the Notice.

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Monday, 23 August 2021

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²³ *Contra* SPO Response, para. 4.