



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

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

Date: 8 September 2021

Language: English

Classification: **Public**

Decision on the Defence Request for an Amended Rule 102(3) Notice

Specialist Prosecutor
Jack Smith

Counsel for Victims
Simon Laws

Counsel for Hashim Thaçi
Gregory Kehoe

Counsel for Kadri Veseli
Ben Emmerson

Counsel for Rexhep Selimi
David Young

Counsel for Jakup Krasniqi
Venkateswari Alagenda

THE PRE-TRIAL JUDGE,¹ pursuant to Article 39(13) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 9(5)(a), 82(5), 95(2)(b) 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 23 November 2020, the Pre-Trial Judge ordered, *inter alia*, that the Specialist Prosecutor's Office ("SPO") provide a detailed notice of the evidence falling under Rule 102(3) of the Rules ("Notice") by Friday, 30 April 2021.²
2. On 24 March 2021, the Pre-Trial Judge extended the deadline for the SPO to provide the Defence with the Notice to Friday, 25 June 2021.³
3. On 24 June 2021, the Pre-Trial Judge extended the SPO's deadline for filing the Notice to Friday, 30 July 2021, and accordingly extended the Defence's deadline for requesting Rule 102(3) material to Friday, 24 September 2021 ("Extension of Time Decision").⁴
4. On 31 July 2021, the SPO filed the Notice.⁵
5. On 5 August 2021, Kadri Veseli ("Mr Veseli") filed a request for an amendment of the Notice ("Veseli Request"),⁶ following an unsuccessful *inter partes* exchange with the SPO.⁷ Both Jakup Krasniqi ("Mr Krasniqi") and Hashim Thaçi ("Mr Thaçi") joined

¹ KSC-BC-2020-06, F00001, President, *Decision Assigning a Pre-Trial Judge*, 23 April 2020, public.

² KSC-BC-2020-06, F00099, Pre-Trial Judge, *Framework Decision on Disclosure and Related Matters* ("Framework Decision on Disclosure"), 23 November 2020, public, para. 99(f).

³ KSC-BC-2020-06, Transcript of Hearing, 24 March 2021, public, p. 390, line 17 to p. 391, line 10.

⁴ 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.

⁵ KSC-BC-2020-06, F00421, Specialist Prosecutor, *Prosecution Rule 102(3) Notice*, with confidential Annex 1 ("F00421/A01") and strictly confidential and *ex parte* Annex 2, 31 July 2021, public. The Pre-Trial Judge notes that the filing was submitted on 31 July 2021 at 1 AM, i.e. only one hour after the deadline. The Pre-Trial Judge accepts the SPO's filing, in light of the negligible delay.

⁶ KSC-BC-2020-06, F00424, Defence for Mr Veseli, *Veseli Defence Request for an Amended Rule 102(3) Notice*, 5 August 2021, public. A corrected version was filed on 9 August 2021, F00424/COR.

⁷ Veseli Request, paras 6-7.

the Veseli Request (respectively, “Krasniqi Joinder”⁸ and “Thaçi Joinder”⁹). The Veseli Request, the Krasniqi Joinder and the Thaçi Joinder will be collectively referred to as the “Defence Request”.

6. On 16 August 2021, the SPO responded to the Defence Request (“Response”).¹⁰ Mr Veseli and Mr Krasniqi replied, respectively, on 17 August 2021 (“Veseli Reply”)¹¹ and on 23 August 2021 (“Krasniqi Reply”).¹²

II. SUBMISSIONS

7. Mr Veseli, Mr Krasniqi and Mr Thaçi (collectively, the “Defence”) submit that the SPO has not satisfied the requirement of providing a detailed notice under Rule 102(3) of the Rules. In particular, they challenge that many items contained in the Notice are inadequately described and give no indication to the Defence of their relevance to the case for the purposes of assessing their materiality to Defence’s preparation.¹³ By way of example, Mr Krasniqi refers to the mention of transcripts of various witnesses identified by pseudonym and without information as to the contents of the evidence, which does not allow the Defence to assess whether said evidence may be material to the preparation of the Defence.¹⁴ While recalling that the SPO bears the burden of determining the relevance of materials to the case, they argue that the assessment of the materiality of the items contained in the Notice, for which the Defence bears the

⁸ KSC-BC-2020-06, F00425, Defence for Mr Krasniqi, *Krasniqi Defence Joinder to Veseli Defence Request for an Amended Rule 102(3) Notice*, 6 August 2021, confidential. A public redacted version was filed on the same day and notified on 9 August 2021, F00425/RED.

⁹ KSC-BC-2020-06, F00431, Defence for Mr Thaçi, *Thaçi Defence Joinder to Veseli Defence Request for an Amended Rule 102(3) Notice*, 11 August 2021, confidential.

¹⁰ KSC-BC-2020-06, F00433, Specialist Prosecutor, *Prosecution Response to Defence Request for Amended Rule 102(3) Notice*, 16 August 2021, public.

¹¹ KSC-BC-2020-06, F00435, Defence for Mr Veseli, *Veseli Defence Reply to SPO Response KSC-BC-2020-06/F00433 (Request for an Amended Rule 102(3) Notice)*, 17 August 2021, public.

¹² KSC-BC-2020-06, F00437, Defence for Mr Krasniqi, *Krasniqi Defence Reply to Prosecution Response to Defence Request for Amended Rule 102(3) Notice*, 23 August 2021, confidential. A public redacted version was filed on the same day and notified on 24 August 2021, F00437/RED.

¹³ Veseli Request, paras 6, 14-15; Krasniqi Joinder, para. 9-10; Thaçi Joinder, paras 10-12, 15.

¹⁴ Krasniqi Joinder, para. 9. *Similarly*, Thaçi Joinder, para. 12.

onus, could not be efficiently performed if the Notice lacks specificity.¹⁵ Lastly, they assert that failure of the SPO to detail the relevance to the case of an item violates the principles of fairness and of equality of arms.¹⁶ They accordingly request the Pre-Trial Judge to direct the SPO to amend its Notice by adding a field which will detail the SPO's "initial assessment" as to the relevance to the case of each item listed therein.¹⁷

8. The SPO responds that, having regard to its limited degree of discretion in generating the Notice, it would be futile and inappropriate to explain the perceived relevance to the case of the items contained therein.¹⁸ The SPO further argues that the relevance of certain items can be implicitly derived from its temporal, geographic or similar connection to the charges and that it provided such information in the descriptions of the items.¹⁹ In any case, the SPO avers that it already undertook to review the Notice, in particular the use of the pseudonyms, in order to address the Defence's concerns with regard to certain items.²⁰

9. In his Reply, Mr Veseli reiterates that the Notice shall give detailed indication of the reason why the items contained therein are relevant to the case, i.e. with particular reference as to how the item is "for or against" Mr Veseli.²¹ He further avers that the SPO had time to prepare a detailed list and that the SPO shall be held responsible for any delay arising from this process.²² Mr Krasniqi reiterates that the Notice is not detailed enough and that the Defence cannot be expected to litigate the adequacy of the voluminous information *inter partes* within the current time limit.²³ He clarifies that the issue revolves around the level of detail provided in the Notice and recalls that the

¹⁵ Veseli Request, paras 10-11.

¹⁶ Veseli Request, para. 16.

¹⁷ Veseli Request, paras 1, 15, 17; Krasniqi Joinder, paras 2, 9, 12; Thaçi Joinder, paras 4, 16.

¹⁸ Response, paras 5-7.

¹⁹ Response, para. 9.

²⁰ Response, para. 10.

²¹ Veseli Reply, paras 2-4, 8.

²² Veseli Reply, para. 7.

²³ Krasniqi Reply, paras 3-4.

Defence shall be put in a position where it has sufficient information to assess the materiality of all items.²⁴

III. APPLICABLE LAW

10. Pursuant to Article 39(13) of the Law, the Pre-Trial Judge may, where necessary, at the request of a Party or Victims Counsel or on his or her own motion, issue any other order as may be necessary for the preparation of a fair and expeditious trial.

11. Pursuant to Rule 102(3) of the Rules, the Specialist Prosecutor shall, pursuant to Article 21(6) of the Law, provide a detailed notice to the Defence of any material and evidence in his or her possession.

12. Pursuant to Rule 9(5)(a) of the Rules, the Panel may, *proprio motu* or upon a showing of good cause, extend or reduce any time limit prescribed by the Rules or set by the Panel.

13. Pursuant to Rule 95(2)(b) of the Rules, the Pre-Trial Judge shall, *inter alia*, set time limits for disclosure and take any measures to ensure timely disclosure.

14. Pursuant to Rule 82(5) of the Rules, the Panel may reclassify a filing *proprio motu*, where the basis for the reclassification no longer exists.

IV. PRELIMINARY MATTER

15. The Defence requests that an urgent hearing be held given the fundamental nature of the issues raised in the Veseli Request.²⁵ The SPO responds that the request for an oral hearing shall be rejected as the Parties had the opportunity to

²⁴ Krasniqi Reply, paras 6-7, 9-10.

²⁵ Veseli Request, paras 2, 18; Krasniqi Joinder, paras 2, 12; Thaçi Joinder, paras 4, 16.

present their submissions and no basis other than the alleged fundamental nature of the issues has been provided.²⁶

16. In light of the exhaustive written submissions provided by the Parties, the Pre-Trial Judge does not find it necessary to hold an oral hearing on this matter.

V. DISCUSSION

17. At the outset, the Pre-Trial Judge points out that he is well aware of the difficulties that may underlie the *inter partes* disclosure process²⁷ and the efforts that need to be put by the Parties involved in the latter. The Parties are called upon to continue to constructively cooperate in order to try to resolve disputes *inter partes*, whenever possible. In case of disagreement, the Pre-Trial Judge will step in.

18. Disclosure under Rule 102(3) of the Rules consists of a three-step process.²⁸ As a first step, the SPO shall provide a detailed notice of “any material and evidence in [its] possession”. The detailed notice must include any material and evidence in the SPO’s possession that is “relevant to the case”.²⁹ This first step of the Rule 102(3) disclosure process is necessary so that the Defence can assess what is material to their preparation.³⁰

19. The Pre-Trial Judge notes that the Rules do not establish to what extent the SPO Notice shall be “detailed”. While it is true, as the SPO avers, that the Court of Appeals has affirmed that the SPO has little discretion in generating the

²⁶ Response, para. 11.

²⁷ Framework Decision on Disclosure, paras 46, 47.

²⁸ KSC-BC-2020-07, IA005/F00008/RED, Court of Appeals Panel, *Public Redacted Version of Decision on the Appeals against Disclosure Decision* (Disclosure Appeals Decision), 29 July 2021, public, para. 38, confirming the Pre-Trial Judge’s interpretation in the same case, F00172/RED, Pre-Trial Judge, *Public Redacted Version of the Decision on Materiality of Information Requested under Rule 102(3) and Related Matters* (“Case 07 Materiality Decision”), 1 April 2021, public, para. 22.

²⁹ Disclosure Appeals Decision, paras 38, 44. *See also* Case 07 Materiality Decision, para. 23.

³⁰ Disclosure Appeals Decision, paras 39, 45.

Rule 102(3) Notice,³¹ the SPO retains the obligation to provide the Defence with a “detailed” notice. The Pre-Trial Judge considers that such a requirement implies that the Defence need to be put in a position where they can, at a minimum and at least in general terms, either be able to link an item to the Accused or to the context of the commission of the crimes, or understand its content. The Pre-Trial Judge finds that although, as the SPO avers, temporal, geographic or other similar connections to the charges might suffice in some cases, a date of a document in the absence of any other description as to its content, for example, might not always allow the Defence to assess the materiality of said item to their preparation. Lastly, according to the wording of Rule 102(3) of the Rules, the Pre-Trial Judge finds that the SPO is not obliged to explain the relevance of each evidentiary item, but to provide sufficiently detailed descriptions in the Notice that will allow the Defence to undertake the assessment as to the materiality for their preparation.

20. In applying these principles to the present case, the Pre-Trial Judge notes that the Notice contains 68,753 items, which is a voluminous number. While the majority of the items are extensively described, others lack such details and are described in rather general terms. By way of illustration, the Pre-Trial Judge notes that descriptions of some items in the Notice contain explicit reference to a certain Accused,³² make full reference to a particular person or event,³³ or briefly explain the content of an item,³⁴ thus allowing the Defence to understand the relevance and to conduct a preliminary assessment of the materiality to their preparation. On the other hand, the Pre-Trial Judge considers that descriptions of items which only succinctly refer to a dated witness statement,³⁵ a telephone conversation,³⁶ a

³¹ Disclosure Appeals Decision, para. 46.

³² See, for example, F00421/A01, items 64622-65047, pp. 2758-2777. The Pre-Trial Judge notes that this and the following lists are not exhaustive and are only provided as examples.

³³ See, for example, F00421/A01, items 1503-1520, p. 54.

³⁴ See, for example, F00421/A01, item 1559, p. 55.

³⁵ See, for example, F00421/A01, items 2-172, pp. 2-5; items 174-212, pp. 5-6; items 358-363, p.13; items 555 to 559, p. 22.

³⁶ See, for example, F00421/A01, items 18141-18173, pp. 755-756; items 18175-18384, pp. 756-765.

photograph,³⁷ a note,³⁸ without referring to its content, not even in a generic way, are of a too vague nature. The Pre-Trial Judge agrees with the Defence and understands that in such instances they are effectively prevented from understanding the relevance of said items to the case, and, accordingly, to assess the materiality to their preparation.

21. The Pre-Trial Judge further notes that the SPO undertook to further review the Notice, in particular with regard to the items pointed out by the Defence, and that such review is already underway. Recalling that there is a presumption of good faith on the SPO's part when discharging its disclosure obligations,³⁹ the Pre-Trial Judge considers that such a review should address the Defence's concerns with regard to the Notice.

22. Having regard to the fact that (i) several items of the Notice are sufficiently described and allow the Defence to assess their materiality; (ii) a further review by the SPO is currently underway to address the concerns pointed out by the Defence, and; (iii) the fact that the SPO does not need to explain in detail the relevance of each item but ought to provide a detailed description of them, the Pre-Trial Judge does not find it necessary to order the SPO to add an extra field to its Notice, as requested by the Defence. The Pre-Trial Judge accordingly rejects the Defence Request, insofar as the addition of an extra field to the Notice is concerned.

23. However, having agreed with the Defence's claim that some of the items contained in the Notice need further specification, the Pre-Trial Judge finds it necessary to direct the Parties to solve the issue first *inter partes* and to keep him abreast of the developments. In this regard, he recalls that the Defence shall indicate to the SPO by Friday, 24 September 2021,⁴⁰ or at any time earlier, the items

³⁷ See, for example, F00421/A01, item 22423, p. 931.

³⁸ See, for example, F00421/A01, item 4350, p. 150.

³⁹ Disclosure Appeals Decision, para. 53, with further references.

⁴⁰ Extension of Time Decision, para. 16(c).

(that are sufficiently detailed in the Notice) in relation to which they seek to have access by way of disclosure or inspection.⁴¹ By the same deadline, or at any time earlier, the Defence shall indicate to the SPO the items for which further details are needed, other than those already indicated in their submissions, against the benchmarks set in paragraphs 19-20 above. The SPO shall provide the requested information to the Defence on an *inter partes* basis, and within two weeks of each of the Defence's enquiries, or at any time earlier. Furthermore, upon receipt of all Defence enquiries, the SPO shall prepare an amended Notice containing the more specific description, as requested by the Defence or as provided *proprio motu* by the SPO, by Friday, 22 October 2021 and file it in the record of the case. In order to facilitate the work of the Defence in identifying the items whose description have been updated, the Pre-Trial Judge orders the SPO to highlight in the amended Notice, either with a colour code or a coloured font, the updated items.

24. With regard to the items for which amendments to the description will be sought or made, the Defence shall indicate to the SPO by Friday, 5 November 2021, or at any time earlier, which items they seek to have access to by way of disclosure or inspection. On the basis of such indication, the SPO shall, no later than Friday, 26 November 2021, or within three weeks of the Defence indication(s), whichever is earlier: (i) disclose or provide access to the selected material that does not require redactions; and (ii) submit a request for protective measures, if any, in respect of the material sought by the Defence. The SPO shall disclose to the Defence the material for which redactions are granted as soon as possible after the Pre-Trial Judge has ruled on the requested protective measures. Should the SPO

⁴¹ The Pre-Trial Judge recalls that, accordingly, the deadlines set in the Extension of Time Decision, para. 16(c)-(e) shall continue to apply in relation to such items. The Pre-Trial Judge further notes, in this regard, that the Defence is already submitting some material requests to the SPO: *see, for example* KSC-BC-2020-06, F00444, Defence for Mr Veseli, *Veseli Defence Notification of Request for Access to Rule 102(3) Materials*, 26 August 2021, public, with confidential Annex 1; F00459, Defence for Mr Krasniqi, *Krasniqi Defence First Notification of Request for Access to Rule 102(3) Material*, 7 September 2021, public, with confidential Annex 1.

wish to dispute the materiality of the evidence sought by the Defence, it shall seize the Panel within 10 days of the Defence indication.

25. In view of the need to maintain a consistent filing schedule, the Pre-Trial Judge *proprio motu* grants the same extension of time to Rexhep Selimi ("Mr Selimi"), should he wish to indicate to the SPO any item for which further details are needed, against the benchmarks set in paragraphs 19-20 above.

VI. RECLASSIFICATION

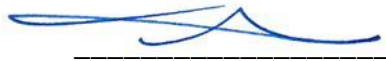
26. The Pre-Trial Judge notes that the Thaçi Joinder has been filed confidentially. Finding no basis for maintaining the confidential classification, and in the absence of any confidential information contained therein, the Pre-Trial Judge accordingly directs the Registry to reclassify F00431 as public.

VII. DISPOSITION

27. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- a) **REJECTS** the Defence Request insofar as the addition of an extra field to the Notice is concerned;
- b) **RECALLS** that, pursuant to the Extension of Time Decision, the Defence shall indicate to the SPO by **Friday, 24 September 2021**, or at any time earlier, the items (that are sufficiently detailed in the Notice) in relation to which they seek to have access by way of disclosure or inspection and that the deadlines set in paragraphs 16(c)-(e) of the Extension of Time Decision shall continue to apply in relation to such items;
- c) **ORDERS** the Defence to indicate to the SPO the items for which further details are needed, against the benchmarks set in paragraphs 19-20 above, by **Friday, 24 September 2021**, or at any time earlier;
- d) **ORDERS** the SPO to provide the requested information to the Defence on an *inter partes* basis, **within two weeks of each of the Defence's enquiries**, or at any time earlier;
- e) **ORDERS** the SPO to prepare an amended Notice containing the more specific description, as requested by the Defence or as provided *proprio motu* by the SPO, by **Friday, 22 October 2021** and file it in the record of the case and to highlight in the amended Notice, either with a colour code or a coloured font, the updated items;
- f) **ORDERS** the Defence to indicate to the SPO by **Friday, 5 November 2021**, or at any time earlier, which items, among those requested at paragraph c) above, they seek to have access to by way of disclosure or inspection;
- g) **ORDERS** the SPO, by no later than **Friday, 26 November 2021**, or within three weeks of the Defence indication(s), whichever is earlier, to:

- (i) disclose or provide access to the selected material that does not require redactions; and (ii) submit a request for protective measures, if any, in respect of the material sought by the Defence;
- h) **ORDERS** the SPO to seize the Pre-Trial Judge **within ten days of the Defence indication(s)** should a dispute as to the materiality of the evidence arise; and
- i) **ORDERS** the Registry to reclassify F00431 as public.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Wednesday, 8 September 2021
At The Hague, the Netherlands.