

BEFORE THE PRE-TRIAL JUDGE
KOSOVO SPECIALIST CHAMBERS

Case No.: KSC-BC-2020-04

Before: Judge Nicolas Guillou, Pre-Trial Judge

Registrar: Dr Fidelma Donlon, Registrar

Date: 10 November 2021

Filing Party: Defence Counsel

Original Language: English

Classification: Public

THE SPECIALIST PROSECUTOR
v.
PJETËR SHALA

Submissions Pursuant to the Pre-Trial Judge's Order
Dated 5 November 2021 Concerning the Fourth Status Conference

Specialist Prosecutor
Jack Smith

Counsel for the Accused
Jean-Louis Gillissen
Hedi Aouini

I. INTRODUCTION

1. The Defence for Mr Pjetër Shala (“Defence” and “Accused”, respectively) presents its submissions on the matters identified by the Pre-Trial Judge in his order dated 5 November 2021.¹

II. SUBMISSIONS

2. On 5 November 2021, the Pre-Trial Judge convened the Fourth Status Conference in this case on Monday, 15 November 2021.²
3. On the same date, the parties were instructed to submit written submissions on the issues identified for consideration by the Pre-Trial Judge in advance of the next status conference.³
4. On 9 November 2021, the Specialist Prosecutor’s Office (“SPO”) filed their submissions for the fourth status conference.⁴

A. Disclosure

5. On 22 September 2021, the SPO filed a supplemental Rule 102(3) notice and indicated that its notice will be further supplemented once additional clearances are obtained with respect to a number of items subject to Rule 107 restrictions.⁵

¹ KSC-BC-2020-04, F000101, Order Varying Time Limits for Certification Requests and Setting the Date for the Fourth Status Conference and for Submissions, 5 November 2021 (“Order of 5 November 2021”). All further references to filings in this Motion concern Case No. KSC-BC-2020-04 unless otherwise indicated.

² Order of 5 November 2021, para. 19(c).

³ Order of 5 November 2021, paras. 16, 19(d).

⁴ F00102, Prosecution Submissions for Fourth Status Conference, 9 November 2021.

⁵ F00082, Prosecution supplemental Rule 102(3) notice with confidential Annex 1, 22 September 2021, para. 1.

6. On 29 September 2021, the Defence requested additional information about a number of items listed in the SPO Rule 102(3) notice for the purpose of assessing their materiality to the case of the Defence.⁶
7. On 1 October 2021, the SPO released to the Defence Disclosure Package 16 under Rule 102(1)(b) of the Rules that contained five items. In addition, the SPO provided the Defence with a chart that included all items listed in its supplementary Rule 102(3) notice.⁷
8. On the same date, the Defence submitted a further request for information as to several items listed in the SPO Rule 102(3) notice and gave the SPO a preliminary indication of the items it would seek access to in due course.⁸
9. On 7 October 2021, the Defence formally requested access to a number of items included in the SPO notice and requested better particulars as to a number of other items listed in that notice.⁹ The Defence noted with concern that the vast majority of the items identified for the first time in the supplemental Rule 102(3) notice appeared material for the Defence case.¹⁰
10. On 8 October 2021, the SPO released to the Defence Disclosure Package 17 under Rule 102(1)(b) of the Rules that contains six items. The SPO also released Disclosure Package 18 under Rule 103 of the Rules, which consists of two items.
11. On 12 October 2021, the SPO provided the Defence with an updated version of its Rule 102(3) chart, which included 424 revised descriptions as requested by

⁶ E-mail to the SPO by Defence Co-Counsel, 29 September 2021, at 11:23 a.m.

⁷ E-mail from the SPO to Defence Team, 1 October 2021, at 4:00 p.m.

⁸ E-mail to the SPO by Defence Co-Counsel, 1 October 2021, at 12:50 p.m.

⁹ E-mail to the SPO by Specialist Counsel, 7 October 2021, at 12:16 p.m.

¹⁰ E-mail to the SPO by Specialist Counsel, 7 October 2021, at 12:16 p.m. Specifically, the Defence identified as material to its case 406 out of 470 items listed for the first time in the supplemental notice.

the Defence.¹¹ The SPO confirmed that its review of additional items for which the Defence has requested additional information is ongoing.

12. On 13 October 2021, the Defence requested variation of the time limit for its Rule 102(3) request so that this can be made two weeks from the date on which the SPO provides sufficient particulars as to all items listed in its Rule 102(3) notice.¹²
13. On 15 October 2021, the SPO indicated that it did not oppose the Defence request and that further information for certain items in the Rule 102(3) notice would be provided by 22 October 2021.¹³
14. On 15 October 2021, the Defence requested additional items from the SPO Rule 102(3) notice.¹⁴
15. On 19 October 2021, the Pre-Trial Judge ordered the Defence to provide its Rule 102(3) indications by 5 November 2021 and varied various other deadlines related to the SPO's disclosure obligations.¹⁵
16. On the same date, in *inter partes* communications, the SPO identified 12 items for which it expected to challenge materiality, either in full or in part, and sought clarifications as to certain Defence Rule 102(3) chart indications.¹⁶ On 20 October 2021, the Defence provided further clarifications to its indications.¹⁷

¹¹ E-mail from the SPO to Defence Team, 12 October 2021, at 9:48 p.m.

¹² F00086, Defence Request for Variation of Time Limit for its Rule 102(2) Request, 13 October 2021, paras. 1, 13, 15.

¹³ F00086, Response to Defence extension request, 15 October 2021, para 1.

¹⁴ E-mail to the SPO by Defence Co-Counsel, 15 October 2021, at 10:12 a.m.

¹⁵ F00090, Decision on Request to Vary the Time Limit for the Defence's Rule 102(3) Request, 19 October 2021, para. 18.

¹⁶ E-mail from the SPO to Defence Team, 19 October 2021, at 6:43 p.m.

¹⁷ E-mail to the SPO by Defence Co-Counsel, 20 October 2021, at 1:31 p.m.

17. On 20 October 2021, the SPO requested from the Pre-Trial Judge authorisation to disclose additional Rule 102(1)(b) material.¹⁸ The Defence did not oppose the request but reserved its right *“to seek an appropriate remedy for the prejudices suffered as a result of the delayed disclosure once it has had an opportunity to review and assess the relevance of such material to its case”*.¹⁹
18. On 20 October 2021, the SPO disclosed 48 items under Rule 102(1)(b) in Disclosure Packages 19 and 20.
19. On 21 October 2021, the Defence indicated to the SPO that, following its review of the additional particulars provided by the SPO related to one item, it no longer requires access to it.²⁰
20. On 22 October 2021, the SPO provided the Defence with an updated Rule 102(3) chart, which included the remaining revised descriptions requested by the Defence.²¹
21. On 26 October 2021, the SPO disclosed under Rule 103 of the Rules Disclosure Packages 18 and 21, which consist of 7 items.
22. On 2 November 2021, the Defence provided the SPO with the last batch of its Rule 102(3) indications.²²
23. On 4 November 2021, the Pre-Trial Judge granted the SPO request to disclose additional Rule 102(1)(b) material.²³

¹⁸ F00091, Request for Authorisation to Disclose Additional Rule 102(1)(b) Material, 20 October 2021.

¹⁹ F00097, Defence Response to ‘Request for authorisation to disclose additional Rule 102(1)(b) material, 28 October 2021’, 28 October 2021, para. 3.

²⁰ E-mail to the SPO by Defence Co-Counsel, 21 October 2021, at 5:25 p.m.

²¹ E-mail from the SPO to Defence Team, 22 October 2021, at 7:21 p.m.

²² E-mail to the SPO by Defence Co-Counsel, 2 November 2021, at 12:45 p.m.

²³ F00100, Decision on Request for Authorisation to Disclose Additional Material under Rule 102(1)(b) of the Rules, 5 November 2021, para. 15(a).

24. On 5 November 2021, the SPO released to the Defence Disclosure Package 22 containing 412 documents which were disclosed under Rule 102(3). The SPO indicated that 405 of these items formed part of the Defence request for items listed in the SPO Rule 102(3) Notice, which was submitted to the SPO on 7 and 15 October 2021.²⁴
25. Lastly, the Defence notes that it has requested the SPO to disclose audio or video recordings of interviews with witnesses it purports to rely on at trial and the parties are discussing this matter *inter partes*.

B. Translations

26. The Defence has obtained a number of translations from the SPO and the parties continue their discussions related to translations *inter partes*.

C. Defence Investigations and Next Steps

27. The Defence confirms its intention to carry out investigations for the purposes of the presentation of its case. The Defence has entered into agreements with persons that will be assisting its investigative efforts on the ground and is in the process of determining the principal subject and timeline for its first investigative mission. The Defence remains, however, unable to provide any information on the anticipated duration or status of its investigative activities. The Defence will be in a position to advise on such matters once the disclosure process set out in the Disclosure Decision is complete and the Defence has had a realistic opportunity to review and analyse the disclosed material.
28. Similarly, the Defence is not in a position to indicate whether it will be making any request concerning unique investigative opportunities pursuant to Rule 99(1). The Defence will only be able to properly commence its investigations

²⁴ E-mail from the SPO to Defence Team, 5 November 2021, at 6:25 p.m.

once disclosure of the SPO's case is complete and the appeals challenging the decisions on its preliminary motions,²⁵ have been definitively determined.

29. The Defence is unable to indicate at present whether it will provide notice of an alibi and/or any other grounds excluding criminal responsibility. The Defence repeats that it needs to review the entirety of the evidentiary material disclosed by the Prosecution as well as the Prosecution's Pre-Trial Brief before taking a position on these matters.

D. Points of Agreement on Matters of Law and Fact

30. The Defence confirms that the parties are discussing the possibility of submitting points of agreement on law and/or facts. The Defence awaits the SPO's first formal proposal on possible points of agreement and the Pre-Trial Judge will be informed of any progress made in this respect in due course.

E. Next Status Conference

31. The Defence confirms its availability to attend a status conference on 14 January 2022.

Word count: 1646



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²⁵ F00088, Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers, 18 October 2021; F00089, Decision on Motion Challenging the Form of the Indictment, 18 October 2021 (confidential).