

In: KSC-BC-2020-06

Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: Trial Panel II

Judge Charles L. Smith III

Judge Christoph Barthe

Judge Guénaél Mettraux

Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Rexhep Selimi

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Public Redacted Version of “Corrected Version of Response to SPO Challenge to Disclosure of Items in Rule 102(3) Notice, KSC-BC-2020-06-F01004”

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I. INTRODUCTION

1. The Defence for Mr. Selimi hereby responds to the “Confidential redacted version of ‘Prosecution challenge to disclosure of items in Rule 102(3) Notice with strictly confidential and *ex parte* annexes 1-13’, KSC-BC-2020-06/F01004, dated 30 September 2022” submitted by the SPO on 6 October 2022 (“SPO Challenge”).¹
2. Prior to the SPO Challenge, the Defence engaged with the SPO in *inter partes* discussions on the materiality of certain items which were brought to the Defence’s attention by the SPO and withdrew its requests for certain Rule 102(3) Notice items while reserving the right to request them again in the future should circumstances change.
3. Unfortunately, the SPO did not correspond with the Defence *inter partes* in relation to the majority of the items in the SPO Challenge. Therefore, the Defence will provide its position with regards to those items in the present Response.² Further where requests for items are withdrawn in this response, the Defence reserves the right to request these documents again in the future should circumstances change.

II. APPLICABLE LAW

4. Rule 102(3) provides the following:

“The Specialist Prosecution shall disclose to the Defence, upon request, any statements, documents, photographs and allow inspection of other tangible objects in the custody or control of

¹ KSC-BC-2020-06, F01004, Confidential redacted version of ‘Prosecution challenge to disclosure of items in Rule 102(3) Notice with strictly confidential and *ex parte* annexes 1-13’, KSC-BC-2020-06/F01004, dated 30 September 2022, 6 October 2022.

² Out of 111 items requested by the Selimi Defence and challenged by the SPO in the SPO Challenge the Selimi Defence was only contacted *inter parte* regarding 12 of them.

the Specialist Prosecutor, which are deemed by the Defence to be material to its preparation, or were obtained from or belonged to the Accused. Such material and evidence shall be disclosed without delay.”

5. The phrasing of this Rule indicates that it is in fact for the Defence to deem whether materials are relevant to its preparation or not. Moreover, the application of Rule 102(3) is pursuant to Article 21(6) of the Law which states that the disclosure of such materials is only subject to *strictly necessary* restrictions.
6. The Defence indeed bears the burden of demonstrating that the documents requested are (a) identified with sufficient specificity; (b) *prima facie* material to the preparation of the defence; and (c) *prima facie* in the Prosecutor’s custody or control.³ Considering that all of the items requested by the Defence were listed in the SPO’s Rule 102(3) Notice, such documents are by default identified with sufficient specificity and are *prima facie* in the SPO’s custody or control.
7. In the Framework Decision the Pre-Trial Judge specified that “the formulation *material to the Defence preparation* shall be construed broadly and refers to all documents and objects of relevance to the preparation of the Defence case”.⁴ Further, the relevance of items for the purpose of disclosure under Rule 102(3)

³ Special Tribunal for Lebanon, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, Decision on Sabra’s Ninth Motion for Disclosure - Requests for Assistance, 6 June 2013, para. 10. See SCSL, SCSL-2004-15-T, *Prosecutor v. Sesay*, Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004, para. 27.

⁴ KSC -BC-2020-06, F00099, Framework Decision on Disclosure of Evidence and Related Matters, 23 November 2020, para. 62, fn. 77 and references therein (“Framework Decision”). See also ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Decision on Mr. Thomas Lubanga’s Request for Disclosure, 11 April 2013, para. 10; ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08, Trial Chamber, Decision on the Defence Application for Additional Disclosure Relating to a Challenge on Admissibility, 2 December 2009, para. 30; ICC, *Prosecutor v. Gaddafi*, ICC-01/11-01/11, Pre-Trial Chamber, Decision on the Defence Request for an Order of Disclosure, 1 August 2013, para. 39.

“should not be limited by the temporal scope of the Confirmed Indictment nor should it be confined to material relevant to countering the SPO’s case”.⁵

8. In addition, the Pre-Trial Judge established that “Defence preparation is also a broad concept and need not be limited to what is directly linked to exonerating or incriminating evidence or related to the SPO’s case”.⁶
9. An assessment of whether information is material to the defence should be made on a *prima facie* basis with a low burden placed on the defence.⁷ Moreover, when assessing the materiality of the items for the Defence preparation “it may be that information is material to the defence even if it is not ultimately used at trial or turns out not to be relevant to it”.⁸

III. SUBMISSIONS

10. The SPO Challenge was framed in such a manner as to make it entirely unhelpful. If any future challenges of this type are made, it is expected that a more efficient and effective manner of doing so will be adopted.
11. For example, the annexes to the SPO Challenge were originally *ex parte*, thereby preventing the Defence from being able to identify which documents were even being challenged. While the annexes were eventually provided by the SPO to the Defence, upon the Defence *inter partes* request, they did not specify, in relation to each item, which Defence team had actually requested them.
12. Further, the unhelpful categorisation of items in the SPO Challenge, and the SPO’s failure on a lot of occasions to even provide in the body of the Challenge

⁵ Framework Decision, para. 62, fn. 78 and references therein.

⁶ Ibid, para. 62, fn. 79-80 and references therein.

⁷ ICC, *Prosecutor v. Banda & Jerbo*, ICC-02/05-03/09, Appeals Chamber, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled “Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor”, 28 August 2013, para. 42.

⁸ Ibid.

examples of the items which the SPO is challenging by reference to their title or ERN, has negatively affected the Defence's ability to respond to each challenge, as it required the Defence to identify all the above information by means of its own efforts. Any further information provided in the SPO Reply may therefore lead to a sur-reply.

13. However, the Defence has sought to respond to the arguments raised in the SPO Challenge where possible. In this regard, the position of the Defence, as previously expressed, is that all of the items on the initial Rule 102(3) are *prima facie* material. As confirmed by the SPO, the initial 102(3) Notice was supposed to contain 100,000 items with the final list reduced to 68,753 items, which the SPO considered to be relevant to the case⁹. Therefore, the SPO already undertook an initial assessment of relevance by including documents in the 102(3) list. By challenging materiality at this stage, the burden therefore rests squarely on the SPO to justify that the requested documents are not able to meet the low *prima facie* standard.

A. Category A – Documents which concern relations with external entities

14. The SPO argues that the requests for assistance and requests for international legal assistance ("RFAs") selected by the Defence for disclosure from the Rule 102(3) Notice do not meet the requirements of the test for materiality and that the Defence have not articulated the rationale for requesting them.¹⁰ These documents are set out in Annexes 1 and 2.
15. The Defence maintains its request of the items identified by the SPO as RFAs and provided within Annex 1 to the SPO Challenge¹¹ as "it is imperative that the Defence be able to test the reliability of the procedure employed in collecting the

⁹ KSC-BC-2020-06, Transcript, 14 September 2021, p. 589 lines 14-16.

¹⁰ SPO Challenge, paras 15-17.

¹¹ [REDACTED].

evidence against them”.¹² The issue of who provides evidence to the SPO, when and how, are all central issues for Defence preparations¹³ and should be disclosed to allow the Defence to properly investigate this issue. This is of particular relevance for documents such as the “[REDACTED] outlining the framework for assistance [REDACTED] to the SPO”¹⁴ when various SPO witnesses presumably gave evidence pursuant to this [REDACTED].

16. Even the SPO concedes that “an expectation of confidentiality is not absolute” with regards to the RFAs,¹⁵ and the SPO has identified no jurisprudential support from the KSC preventing the RFAs from disclosure to the Defence.
17. Instead, the SPO seeks to artificially minimise the interpretation of materiality in this regard, by claiming that requested documents have “no bearing on the charges against the accused or the events giving rise to the Indictment”¹⁶ or is “remote from the charges facing the accused.”¹⁷ Yet, materiality is far broader than simply the specific allegations in the Amended Indictment, encompassing every aspect that allows the Defence to prepare for trial.
18. Finally, the SPO’s choice to include reference to privileges and immunities in its correspondence, or to otherwise “explain the SITE/SPO’s investigative objectives”,¹⁸ is the SPO’s strategic choice. It does not render those documents less material to Defence preparations and does not prevent the SPO from applying for redactions when such documents are disclosed, if there is a

¹² ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15, Trial Chamber, Decision on Disclosure Issues arising out of the First Status Conference, 7 June 2016, para. 13.

¹³ See, KSC-BC-2020-06, F00877, Joint Defence Motion for Disclosure Pursuant to Rule 103, with Public Annexes 1-3 and Confidential Annex 4, 12 July 2022.

¹⁴ SPO Challenge, para. 18, referring to [REDACTED].

¹⁵ Ibid, para. 14.

¹⁶ Ibid, para. 18.

¹⁷ Ibid, para. 19.

¹⁸ Ibid.

sufficient legal basis for doing so, although, as the SPO concedes, they are not subject to Rule 107 privilege.¹⁹

19. However, the Defence withdraws its request at this stage for the documents listed in Annex 2 based on the explanation provided by the SPO.²⁰

B. Category B – Documents of a purely procedural character concerning contacts with witnesses and similar matters do not meet the standard for Rule 102(3) disclosure

20. As previously notified to the SPO, the Defence maintains its request for all items, however procedural the SPO deems them, that pertain to the case file of local proceedings²¹ (in this instance, the [REDACTED] cases) when the facts and allegations in these local proceedings overlap with allegations against Mr. Selimi before the KSC. The SPO has not provided any detailed reasoning as to why it challenges the materiality of such documents besides their procedural character. The position of the Defence has therefore not shifted with regards to these items.
21. As regards the SPO's challenge to disclosure of certain Official Notes prepared by the SITF/SPO, on the basis that they are internal SPO records of a purely factual and administrative purpose and that the Defence has received disclosure of the verbatim transcripts of the recorded interview, is undermined by the prior disclosure of hundreds of Official Notes of interviews with witnesses under Rule 102(1)(b) and 103.
22. While an Official Note may have been prepared internally by the SPO/SITF, it does not inform the Defence of information related to the investigation and preparation of the case to warrant non-disclosure as set out in Rule 106.

¹⁹ Ibid.

²⁰ In particular, ERNs [REDACTED].

²¹ [REDACTED].

23. Moreover, considering that these Official Notes²² concern a Prosecution witness and [REDACTED], such notes are clearly material to its investigation and preparation of this witness' testimony, and therefore the Defence maintains its request.
24. The SPO's assertion that some of these Official Notes are duplicative of the associated exhibits and transcripts of the witness interview disclosed under Rule 102(1)(b)²³ does not diminish their materiality. It rather demonstrates the direct link between the documents requested and SPO witnesses. Given the SPO's confused and confusing approach to its disclosure obligations thus far, disclosing the requested documents would also allow the Defence to compare and verify that all the relevant documents shown to a witness have actually been properly disclosed.
25. Lastly, the Defence hereby withdraws its request for one item from this category titled [REDACTED]²⁴.

C. Category C – Items of a personal nature

26. The SPO provides that certain "personal" items out of the list of those requested by the Defence from the Rule 102(3) Notice are of the personal nature, too remote from the charges to be material to the Defence's preparation.²⁵ It also highlights the inherent data privacy concerns.²⁶
27. Following the description provided in the SPO Challenge, the Defence hereby withdraws its request with regards to 4 items provided in Annex 6 to the SPO

²² [REDACTED].

²³ SPO Challenge, para. 22.

²⁴ [REDACTED].

²⁵ SPO Challenge, para. 23.

²⁶ Ibid.

Challenge, in particular with regards to the previously requested [REDACTED].²⁷

28. However, the Defence maintains its requests and its position previously provided to the SPO in *inter partes* correspondence with regards to the remaining 3 items requested by the Defence from the Annex 6 to the SPO Challenge.²⁸ These items either relate to domestic Kosovo cases or to the alleged crime sites which overlap with allegations against Mr. Selimi.²⁹ In these circumstances, they are materially relevant; the personal nature of the documents and the associated privacy concerns should not prevent their disclosure.

D. Category D – Witness security notes

29. The SPO argues that, due to the personal information, personal and security-related concerns, the items from Annex 7 to the SPO Challenge shall be found not material to the Defence preparation and shall not be disclosed.³⁰
30. The Defence hereby maintains its request with regards to 3 items requested from the Rule 102(3) Notice and listed in the Annex 7 to the SPO Challenge.³¹ These items either relate to the persons interviewed by the SPO with regards to the events directly related to the charges ([REDACTED])³² or to the witnesses in the present case (e.g. item related to [REDACTED])³³. They are therefore self-evidently relevant to Mr. Selimi's preparation.

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ Defence has previously expressed its position with regards to the items in question in its email to the SPO on 12 September 2022.

³⁰ SPO Challenge, paras 25-27.

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

31. However, based on explanation provided by the SPO both in its Challenge and in *inter partes* correspondence, the Defence withdraws its requests for the remaining items in this category.³⁴

E. Category E - Investigative records of unrelated crimes bearing no connection to the charged events and which are not material

32. This category concerns a single investigative file and related case record of a crime committed in Kosovo after the indictment period and investigated and prosecuted by UNMIK.³⁵ The SPO argues that any connection to Case 06 would be too remote, distant, or tangentially relevant to qualify as material.³⁶
33. However, from initial investigations, the perpetrators of the murders are alleged to have been KLA commanders and that the victims were KLA members. The relationship between the two, and indicia of control over the latter by the former are central elements in the Indictment. Thus, while the events are temporally remote from the Indictment Period, the investigative records pertaining to this case may unveil information which is material to the investigations and preparation of the Defence. The Defence therefore maintains its request for this item.

F. Category F - Certain materials related to non-witnesses which do not bear even an abstract logical relationship to issues relevant for defence preparation should not be disclosed

34. The SPO argues that materials relating to non-witnesses bear little relevance to the case. More specifically, in relation to materials associated with [REDACTED], it states that “these materials are substantively, temporally and geographically

³⁴ [REDACTED].

³⁵ [REDACTED]

³⁶ SPO Challenge, para. 28.

remote from the charges and are unrelated to the Accused". It then oddly proceeds to argue that "His passing reference to a person who was shot by the KLA does not render these items material".³⁷

35. First, any reference to crimes allegedly committed by the KLA is at face value substantively, temporally and geographically linked to the case against Mr. Selimi. In addition, the title of one of the documents disputed by the SPO³⁸, aside from referring to a person shot by the KLA, also mentions "crimes against Opponents", a pillar of the SPO case.
36. In line with the Pre-Trial Judge's findings, relevance in accordance with Rule 102(3) is not artificially limited to the temporal scope of the Confirmed Indictment or limited to what is directly linked to exonerating or incriminating evidence or related to the case presented by the SPO.³⁹ Individuals who the SPO has interviewed but decided not to rely upon as SPO witnesses are often, by definition, individuals that the Defence is interested in speaking to. As such, any documents which relate to such individuals and which can therefore assist the Defence in making such determination in an efficient manner and prioritising its investigations accordingly are to be considered highly relevant and material to the preparation of the Defence.
37. The Defence for Mr. Selimi therefore maintains its request for all items challenged by the SPO under this category.

³⁷ SPO Challenge, para. 30.

³⁸ [REDACTED].

³⁹ See above, para. 8.

G. Category G - Additional Items (“Residual items”)

38. In light of the explanations set out in the SPO Challenge,⁴⁰ the Defence withdraws its request of items listed in Annex 10 which have not been the subject of *inter partes* correspondence.
39. However, the Defence maintains its request for the documents which derive from the *Mustafa* or *Shala* cases.⁴¹ Regardless of whether they were included in the 102(3) list in error, as the SPO asserts, this does not affect their materiality. Much like other local cases where the facts and allegations overlap with those against Mr. Selimi, these two cases before the KSC also overlap. As such, any documents which derive from those cases, and which are not covered by any privilege, should be disclosed on the same basis.

H. Categories H & I – Various attorney notes concerning witness evidence & Rule 106 internal work product

40. The Defence notes the explanation provided by the SPO that the notes taken by investigators of interviews of SPO witnesses and non-witnesses were replicated and subsumed by the official records of those interviews.⁴² Where a full transcript is provided of these interviews, and the entirety of the evidence is subsumed within and official record, the Defence would normally withdraw its request for these documents.
41. However, the SPO confirms that some of these notes contain information about the “impressions, analysis, and credibility”⁴³ of these individuals. While the SPO considers that such information is privileged and non-disclosable, no explanation is provided for why this is the case. Evidently information that

⁴⁰ SPO Challenge, paras 32-35 relating to [REDACTED].

⁴¹ ERNs [REDACTED], 082259-082262, 091252-091253, 091254-091254, 094538-094539, 094626-094627, 094681-094726, [REDACTED].

⁴² SPO Challenge, para. 38 referring to [REDACTED].

⁴³ SPO Request, fn. 56.

affects the credibility of witness, and which may be based on information that does not appear in the written official records of these interviews, such as relating to the demeanour or non-verbal communication of the witnesses, would be material for Defence preparation.

42. Nor does the SPO even specify which documents actually contain such information, merely suggesting that “some” do. If the SPO wishes to rely upon Rule 106 to prevent disclosure of information, the burden rests on it, as explained above, to specifically identify the specific sections of documents to which this applies and why. The SPO’s failure to fulfil its burden in this regard is telling.
43. Finally, the summary of a meeting [REDACTED],⁴⁴ a directly important individual to this case, whether draft or not, is material for Defence preparation. As the SPO admits, there is no recording of the meeting and so, no independent method of verifying what was said at that meeting. The summary is not therefore subsumed into a transcript as one does not exist. Nor does disclosure of an Official Note which “memorialises the occurrence of the meeting and details the status of cooperation between the SPO and the person at the conclusion of the meeting”⁴⁵ compensate for the non-disclosure of this document. It merely reinforces the necessity of disclosing all documents relating to what occurred during that meeting.

I. Category I – Rule 106 internal work product

44. The Defence recognises the importance and application of Rule 106 to internal party information which is not subject to disclosure. However, the SPO undermines its own argument that information covered by Rule 106 is not even subject to notification as it included such documents on the Rule 102(3) list, thereby notifying the Defence of their existence. These documents must be

⁴⁴ [REDACTED].

⁴⁵ SPO Challenge, para. 39.

objectively assessed by the Pre-Trial Judge to determine whether they fall within Rule 106.

45. Rule 106 is explicitly subject to Rule 103. While the Defence notes the SPO assertion that none of these items have any Rule 103 content “which has not been disclosed”,⁴⁶ this is the wrong test. Even if similar material to that which is in these documents has been previously disclosed under Rule 103, this does not allow the SPO to withhold disclosure. It is only if there is no Rule 103 information in such documents that disclosure can be refused on this point. This must be strictly applied and verified by the Pre-Trial Judge.
46. In its Challenge, the SPO seeks to extend the application of this provision to documents prepared by UNMIK and EULEX, and thereby withholding disclosure under this rule of various documents they produced.⁴⁷ However, Rule 106 refers only to documents prepared by the SPO and other “internal documents prepared by the SITF or its assistants or representatives in connection with its investigative work.” No specific mention is made of EULEX or UNMIK. Rule 106 does not therefore prevent disclosure to the Defence under this rule.
47. Finally, the SPO’s assertion that [REDACTED] contains “internal administrative procedures and protocols adopted in connection with the SPO’s investigative work”⁴⁸ is not supported. This Official Note appears to relate directly to the search that was conducted at Mr. Selimi’s house in November 2020 and the information recovered from it, much of which the SPO seeks to rely upon at trial. The processes and protocols in relation to this search are therefore very much at issue in this case.

⁴⁶ SPO Challenge, para. 41.

⁴⁷ ERNs [REDACTED].

⁴⁸ SPO Challenge, para. 42.

J. Category J – Rule 107 items

48. Due to the extensively redacted nature of this section of the SPO Challenge, the Defence cannot make any meaningful submissions with regards to the items falling under this category. Thus, a lesser redacted version should be submitted to enable the Defence to provide an informed response in this regard.

IV. CLASSIFICATION

49. The Response is filed confidentially in accordance with the Rule 82(4). A public redacted version will be filed in due course.

V. CONCLUSION AND RELIEF REQUESTED

50. For the reasons set out herein, the Defence requests the Pre-Trial Judge to:
- (i) Order the SPO to disclose the items for which the Defence maintained its requests for disclosure; and,
 - (ii) Order the SPO to refile the Request with the additional information provided in relation to Category J as sought in paragraph 48 or otherwise deny the SPO request with regards to items within this Category.

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Respectfully submitted on 4 May 2023,



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