



SPECIALIST PROSECUTOR'S OFFICE  
ZYRA E PROKURORIT TË SPECIALIZUAR  
SPECIJALIZOVANO TUŽILAŠTVO

**In:** KSC-BC-2020-05  
**The Specialist Prosecutor v. Salih Mustafa**

**Before:** Pre-Trial Judge  
Judge Nicolas Guillou

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Prosecutor

**Date:** 19 October 2020

**Language:** English

**Classification:** Public

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**Request for reconsideration of or, in the alternative, leave to appeal the order to file disclosure charts**

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**Specialist Prosecutor's Office**

Jack Smith

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## I. INTRODUCTION

1. Pursuant to Article 45(2) of the Law<sup>1</sup> and Rules 77 and 79 of the Rules,<sup>2</sup> the Pre-Trial Judge should reconsider or, in the alternative, grant the Specialist Prosecutor's Office ('SPO') leave to appeal the Order<sup>3</sup> requiring the provision of charts<sup>4</sup> with each disclosure batch of material falling under Rule 102(1)(b) and a consolidated version of such charts at the end of the pre-trial proceedings ('Charts').
2. The Pre-Trial Judge failed to adequately consider the legal framework before the Specialist Chambers ('SC') relating to disclosure and case preparation, and failed to give sufficient or any weight to relevant considerations. Accordingly, the Pre-Trial Judge erred in the exercise of his discretion under Article 39 and Rule 95(2)(b) and reconsideration is necessary to avoid injustice, including undue and irreparable impact on the fairness and expeditiousness of the proceedings. In the alternative, for the same reasons, the test for leave to appeal is met.
3. Finally, pursuant to Rule 171, the SPO requests suspensive effect pending final resolution of this request or any appeal because implementation of the Order would defeat the purpose of the relief sought and lead to irreversible consequences.

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<sup>1</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). Unless otherwise indicated, all references to 'Article(s)' are to the Law.

<sup>2</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). Unless otherwise indicated, all references to 'Rule(s)' are to the Rules.

<sup>3</sup> Framework Decision on Disclosure of Evidence and Related Matters, 9 October 2020, KSC-BC-2020-05/F00034 ('Decision'). For the impugned order, *see* Decision, KSC-BC-2020-05/F00034, paras 71-72, 90(m) ('Order').

<sup>4</sup> While para.71 of the Decision indicates that the SPO 'may' use the same format as the Rule 86(3)(b) outline (with necessary layout adjustments), para.90(m) of the Decision subsequently orders the SPO to produce such charts accompanying its disclosure of incriminating material under Rule 102(1)(b).

## II. SUBMISSIONS

### A. THE TEST FOR RECONSIDERATION IS MET

4. Contrary to the purpose of Rule 109<sup>5</sup> and of pre-trial preparations more generally,<sup>6</sup> the Order threatens the expeditiousness and fairness of the proceedings. The Pre-Trial Judge failed to (i) give the parties the opportunity to make submissions on factors necessary to his decision; (ii) adequately consider the relevant legal framework; and (iii) balance any potential benefits of the Order with its substantial impact on the parties' preparations and the fairness and expeditiousness of the proceedings. For these reasons, the test for reconsideration has been met.

#### (i) The Pre-Trial Judge failed to receive necessary submissions

5. Consistent with the Status Conference Order,<sup>7</sup> Rules 95(1)-(2) and 96 highlight the importance of receiving the submissions of the parties, to the extent possible, on issues relevant to the disclosure process.<sup>8</sup> Despite requesting a range of information relating to the scope of disclosure and related timeframes,<sup>9</sup> the Pre-Trial Judge did not invite or receive submissions as to the potential utility of the Charts, resources required, potential delay, or other impact on the expeditiousness or fairness of the proceedings.<sup>10</sup> In turn, the

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<sup>5</sup> Decision, KSC-BC-2020-05/F00034, para.69 (considering that the purpose of Rule 109(b)-(c) is 'to put the receiving Party in the best possible position to familiarise itself with and navigate through the disclosed material, in order to focus its preparation, and, more generally, to enhance the expeditiousness and fairness of the proceedings'), 71 (indicating that the purpose of the Charts is to inform the Defence within the meaning of Rule 109(c)).

<sup>6</sup> Article 39; Rule 95(2).

<sup>7</sup> Order Setting the Date for a Status Conference, 30 September 2020, KSC-BC-2020-05/F00023 ('Status Conference Order'), paras 17-21.

<sup>8</sup> See, similarly, ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", 17 June 2015 ('*Ongwen* Appeal Decision'), para.41.

<sup>9</sup> Annex 1 to Order Setting the Date for a Status Conference, 30 September 2020, KSC-BC-2020-05/F00023.

<sup>10</sup> *Ongwen* Appeal Decision, para.43.

Pre-Trial Judge issued the Order on the basis of SPO submissions that did not contemplate the possibility that production of the Charts would be required.<sup>11</sup>

6. In very similar factual circumstances, the ICC Appeals Chamber found that failure to hear the parties constituted an abuse of discretion.<sup>12</sup> It stressed that ‘the duty to ensure that the disclosure process takes place under satisfactory conditions requires that the full circumstances of each individual case must be considered in making orders and decisions regarding disclosure’.<sup>13</sup> In this case, the failure to invite and receive submissions resulted in the failure of the Pre-Trial Judge to take into account relevant factors, necessary to his decision, as set out below.

(ii) The Charts are not required in the SC’s legal framework

7. The Charts are not envisaged in the Law or Rules. They are also not required in the legal framework of Kosovo or of any international tribunal.<sup>14</sup> If the drafters had considered that the Charts were necessary, they would have been expressly included, just as the Rule 86(3)(b) outline was included at the confirmation stage. Indeed, the SPO will provide the defence with substantially the same – and more – information through a

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<sup>11</sup> Prosecution Submissions for first Status Conference, 5 October 2020, KSC-BC-2020-05/F00030 (‘Status Conference Submissions’); Transcript of Status Conference, 5 October 2020.

<sup>12</sup> *Ongwen* Appeal Decision, paras 36, 38-39 (the Single Judge transmitted questions to the Prosecutor relating to the amount of material in the Prosecutor’s possession, required time to review it, redactions, and other disclosure related matters. However, no submissions were requested from the Prosecutor regarding the production of the in-depth analysis charts. The need for the Prosecutor to provide an additional tool to facilitate the Defence’s understanding of the disclosed information or to prepare in-depth analysis charts was not discussed or foreshadowed at the related status conference), 42 (finding that the Single Judge did not properly exercise her discretion when she ordered the production and submission of in-depth analysis charts without first receiving submissions from the parties, as imposition of such obligations ‘may place a disproportionate burden on the parties and may ultimately lead to delays in the proceedings’), 43.

<sup>13</sup> *Ongwen* Appeal Decision, para.41. See also STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Decision on Merhi Defence Request for a ‘Table of Incriminating Evidence’, 9 May 2014 (‘STL Decision’), para.17 (in deciding how to exercise its discretion, the chamber took into account the history of the case, the arguments of the Parties and the applicable law).

<sup>14</sup> STL Decision, para.15 (noting that there is no such requirement at the STL or other international courts).

combination of documents and information expressly required in the SC's legal framework, including the indictment, existing Rule 86(3)(b) outline, Rule 109(c) categorisation, pre-trial brief, and witness and exhibits lists. Accordingly, the Charts are unnecessarily and unfairly duplicative, and threaten to complicate and hinder, rather than facilitate, proceedings.

8. The Order is based on the erroneous consideration that the 'content and linkage' requirement stipulated in Rule 109(c) is the same as in Rule 86(3)(b).<sup>15</sup> However, on their face, these provisions have different content and format requirements and serve different purposes at different stages of the proceedings.

9. Rule 86(3)(b) requires production of a 'detailed outline demonstrating the relevance of each item of evidentiary material to each allegation, with particular reference to the conduct of the suspect with respect to the alleged crime(s)'. This provision is designed to assist the Pre-Trial Judge when determining whether the standard for indictment confirmation has been met. The SPO has already produced a Rule 86(3)(b) outline in this case and the indictment has been confirmed. A redacted version of this outline will be provided to the Defence.<sup>16</sup> In turn, this provision has no bearing on the SPO's obligations at this stage.

10. On the other hand, Rule 109(c), which is applicable at this stage, requires, as far as practicable, *categorisation* of disclosed information with reference to the underlying crimes, contextual elements, alleged conduct of the Accused, or evidence to be presented by the SPO. Otherwise, no particular format or contents are required. In the SC's legal framework, considering the disclosure timeframes in the Rules and in the interest of fair and expeditious proceedings, the SPO's preparations to meet its disclosure obligations necessarily commence long before the current stage of proceedings. It must therefore be afforded some degree of discretion in fulfilling the requirements of, *inter alia*, Rule 109(c).

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<sup>15</sup> Decision, KSC-BC-2020-05/F00034, para.71.

<sup>16</sup> Decision, KSC-BC-2020-05/F00034, paras 72, 90(b).

Consistent with the plain language of this Rule, the SPO already ensured that Legal WorkFlow was designed in a manner to accommodate categorisation of disclosed material and engaged in a resource-intensive project to, as far as practicable, tag a substantial amount of all the disclosable information in this case<sup>17</sup> – not just incriminating evidence – in light of the identified categories. This process continues and the SPO intends to so tag all information disclosed, insofar as practicable. Such information enables the Defence to directly navigate the disclosed material in each disclosure package in Legal WorkFlow, without the need for cross-referencing it with other documents, and to focus its preparation.<sup>18</sup>

11. Further, Rule 109(c) must be considered in light of other documents, which are expressly required in the Rules at this stage of proceedings, and are intended to, *inter alia*, inform the Defence and assist in its preparations. In this regard, the Pre-Trial Judge failed to consider that the Charts duplicate, in a different format, the information to be provided through the pre-trial brief<sup>19</sup> and the witness and exhibit lists.<sup>20</sup> The Pre-Trial Brief must, *inter alia*, include, for each charge, a summary of the evidence which the Specialist Prosecutor intends to present regarding the commission of the alleged crime and the alleged mode of liability of the Accused. Meanwhile, the witness list must contain, *inter alia*, a summary of the facts and the allegations in the indictment on which each witness is expected to testify, including specific references to charges and relevant paragraphs of the indictment.<sup>21</sup>

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<sup>17</sup> Significant resources have also been expended in commencing to categorise material which would be subject to disclosure in other anticipated proceedings.

<sup>18</sup> Decision, KSC-BC-2020-05/F00034, paras 69, 71. A metadata column indicating tagged categories is visible when viewing the list of documents in a disclosure package. It is not necessary to open each document to identify the relevant, tagged category. The Legal WorkFlow design also enables users to quickly and simply generate lists or charts of documents based on the Rule 109(c) categories.

<sup>19</sup> Rule 95(4)(a).

<sup>20</sup> Rule 95(4)(b)-(c).

<sup>21</sup> Rule 95(4)(b)(iv)-(v).

12. Accordingly, the Charts are plainly unnecessary. This conclusion is consistent with the practice at other courts. In cases of varying size and scope, ICC<sup>22</sup> and STL Chambers have found that (i) documents similar to the Charts are unnecessary and unduly burdensome; and (ii) a combination of the charging document or indictment, pre-trial brief, witness and exhibit lists, and/or disclosed evidence provides sufficient information for adequate Defence preparations.<sup>23</sup> The ICC Chambers Practice Manual has gone so far as to state that '[n]o submission of any "in-depth analysis chart", or *similia*, of the evidence disclosed can be imposed on either Party'.<sup>24</sup>

(iii) The Order threatens the expeditiousness and fairness of the proceedings

13. The Order fails to balance its significant, potential impact on SPO resources and on the expeditiousness and fairness of the proceedings, with the limited, if any, benefits of the Charts in the SC legal framework. Considering past experience at the SC<sup>25</sup> and at the

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<sup>22</sup> While several ICC Chambers required production of documents similar to the Charts (*see, for example*, Decision, KSC-BC-2020-05/F00034, fn.62), in the most recent cases over the last several years, ICC Chambers have not imposed such a requirement (*see, inter alia*, the sources cited in fn.23 below).

<sup>23</sup> *See, for example*, ICC, *Prosecutor v. Yekatom and Ngaiissona*, ICC-01/14-01/18, Second Decision on Disclosure and Related Matters, 4 April 2019 ('*Yekatom* Decision'), para.24 (considering that any benefits of an in-depth analysis chart would be substantially outweighed by the potential, significant delay in proceedings); ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01/18, Decision on the In-Depth Analysis Chart of Disclosed Evidence, 29 June 2018 ('*Al Hassan* Decision'), paras 22-23 (considering the burden and potential delay was disproportionate with any potential benefits of an in-depth analysis chart); STL Decision, paras 18-19, 34 (finding that the combination of the indictment, pre-trial brief, witness list, and evidence intended to be used at trial provided the defence the necessary information to properly prepare for trial, and that a document similar to the Charts was unnecessary); ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-134, Decision on the 'Defence Request for an in-depth analysis chart' submitted by the Defence for Mr Jean-Pierre Bemba Gombo, 28 January 2014, paras 6-7 (finding that submission of an appropriately drafted charging document and list of evidence was sufficient and refusing to order an in-depth analysis chart); ICC, *Prosecutor v. Kenyatta*, ICC-01/09-02/11, Decision on the schedule leading up to trial, 9 July 2012, paras 11, 16 (finding that an updated document containing the charges and pre-trial brief was sufficient for defence preparations and that an in-depth analysis chart was unnecessary).

<sup>24</sup> ICC, Chambers Practice Manual, 2019, para.24.

<sup>25</sup> Substantial time and resources were devoted to drafting of the Rule 86(3)(b) outlines in this and other cases. Indeed, preparation for and production of such outlines – which involves only part of the incriminating evidence falling under Rule 102(2)(b) – required the full-time work of multiple staff over several months, depending on the scope of the relevant case.

ICC,<sup>26</sup> production of the Charts would require substantial, additional resources and time not factored into the SPO's submissions concerning disclosure deadlines and modalities.<sup>27</sup> At this stage, as production of the Charts is not required in the legal framework and has never before been contemplated in the SPO's trial preparation planning, precise estimations are impossible. However, production of the Charts would necessarily require redistribution of limited staff and resources, and, in the circumstances of this particular case, could take several weeks, if not more.<sup>28</sup> Diversion of resources to produce the Charts would also necessarily impact on the SPO's ability to prepare for trial and produce in a timely manner disclosure packages and other documents expressly required in the Rules, including the pre-trial brief and witness and exhibit lists. The overall impact could result in delays of at least several months not only in this case, but also potentially in other cases before the SC. The Order therefore threatens to unjustifiably and unfairly delay the proceedings.

14. Finally, the SPO notes that Legal WorkFlow already permits users to automatically generate charts or lists based on, *inter alia*, the existing Rule 109(c) categorisation. As an alternative to the Charts, as necessary, the SPO is willing to produce or provide such automatically generated charts.

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<sup>26</sup> See, for example, *Yekatom* Decision, para.23; *Al Hassan* Decision, para.21; ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15, Prosecution's appeal against the "Decision Setting the Regime for Evidence Disclosure and Other Related Material", 28 April 2015, para.32, fn.58.

<sup>27</sup> Status Conference Submissions, KSC-BC-2020-05/F00030; Transcript of Status Conference, 5 October 2020. Indeed, despite the Defence raising no objection, the Decision also reduces certain disclosure deadlines beyond what the SPO was in a position to represent that it could meet (*see* Decision, KSC-BC-2020-05/F00034, para.90(b) and (d)) and opened the possibility of additional translation burdens, beyond those required in the Law and Rules, being placed on SPO translation resources (*see* Decision, KSC-BC-2020-05/F00034, para.68). The SPO emphasises that its ability to meet any such additional translation requests is almost non-existent at this time, and any future requests will have to be considered on a case-by-case basis.

<sup>28</sup> The SPO emphasises that, in other cases, preparation of the Charts could take up to a year, if not more. *See also* fn.25 above.



B. THE TEST FOR LEAVE TO APPEAL IS MET

15. In the event the Pre-Trial Judge declines to reconsider the Order, he should grant the SPO leave to appeal the following discrete, appealable issue that arises from the Order:<sup>29</sup> whether the Pre-Trial Judge exceeded his discretionary authority under Article 39 and Rule 95(2)(b) when imposing on the Prosecution a duty to file the Charts ('Issue').<sup>30</sup>

16. As set out above,<sup>31</sup> the Order imposes a substantial, additional burden on the SPO (and potentially the Defence), which is not part of the SC's legal framework or based on the circumstances of the case. It threatens to significantly delay the proceedings in this case and others. The Issue also concerns the following fundamental matters relevant to proceedings in this case and other cases before the SC: (i) the rights of the parties to be heard on matters potentially impacting their trial preparations and the fair and expeditious conduct of proceedings; and (ii) the scope of the Pre-Trial Judge's discretionary powers under Article 39 and Rule 95(2)(b). Accordingly, the Issue has significant repercussions for the fair and expeditious conduct of the proceedings and, particularly insofar as it relates to disclosure and the parties' ability to prepare, could impact on the outcome of the proceedings.

17. If the Issue is not resolved at this stage, the parties' ability to prepare and the fairness and expeditiousness of the proceedings could be irreparably damaged. After the close of the trial, appropriate remedies could not effectively be granted.<sup>32</sup> There would be no way

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<sup>29</sup> ICC, Situation in the Democratic Republic of Congo, ICC-01/04, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006 ('DRC Decision'), para.9.

<sup>30</sup> See, similarly, ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15, Decision on the Prosecutor's application for leave to appeal decision ICC-02/04-01/15-203 with respect to the imposition of a duty to file "in-depth analysis charts" of the disclosed evidence, 14 April 2015 ('Ongwen Leave Decision'), paras 7-11 (finding the criteria for leave to appeal were met, emphasising that the issue 'goes to the core of the procedural architecture of the Court' and the 'significant adverse consequences on the fair conduct of the confirmation proceedings, of which this system is a fundamental part').

<sup>31</sup> The submissions made in Section II(A) are incorporated herein *mutatis mutandis*.

<sup>32</sup> Rule 77(2).

for the parties to redeem the time and resources lost as a result of the Order. Thus, immediate resolution will materially advance proceedings and rid the judicial process of a potential error that 'might taint the fairness of the proceedings'.<sup>33</sup>

### C. SUSPENSIVE EFFECT PENDING RESOLUTION OF THIS MATTER IS JUSTIFIED

18. Pursuant to Rule 171, the SPO requests suspensive effect in relation to the Order pending a final decision on this matter, whether by the Pre-Trial Judge or Court of Appeals. This exceptional measure is necessary in this case because implementation of the Order, including related preparations, would necessarily commence while this request and/or any appeal are pending,<sup>34</sup> thereby (i) defeating the purpose of the appeal; and (ii) due to the imminent impact of the Order on resources and the fairness and expeditiousness of the proceedings, leading to irreversible consequences.<sup>35</sup> The SPO will continue to abide by all other requirements of the Decision.

19. Upon final resolution of this request or any appeal, the SPO requests the opportunity to, if necessary, make additional submissions concerning deadlines and requirements set out in the Decision that are potentially impacted.

### III. RELIEF REQUESTED

20. For the foregoing reasons, the Pre-Trial Judge should:

- a. reconsider the Order or, in the alternative, grant the SPO leave to appeal the Issue;

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<sup>33</sup> DRC Decision, para.14.

<sup>34</sup> In order to meet the first potentially applicable deadline on 9 November 2020, when the second protective measures request is to be filed, or the deadline on 16 November 2020 when Rule 102(1)(b) material not requiring redaction is to be disclosed, SPO preparations of the Charts would need to commence imminently. *See* Decision, KSC-BC-2020-05/F00034, paras 90(c)-(d), (m).

<sup>35</sup> *See, similarly, Ongwen* Leave Decision, para.12 (granting a stay in similar circumstances, considering 'that the matter concerning presentation of such charts is of particular importance for the general architecture of the Court's system and the independent role of the Prosecutor in pursuing her case, and that the imposition of these charts bears the potential to taint the present confirmation proceedings').

- b. grant suspensive effect in relation to the Order pending final resolution of this request or any appeal; and
- c. upon final resolution of this request or any appeal, grant the SPO the opportunity to make additional submissions, as requested in paragraph 19 above.

**Word count: 3351**



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**Jack Smith**

**Specialist Prosecutor**

Monday, 19 October 2020

At The Hague, the Netherlands.