



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

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

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

Registrar: Dr Fidelma Donlon

Date: 5 November 2020

Language: English

Classification: **Public**

**Decision on Specialist Prosecutor's Request for Reconsideration or Certification
for Appeal**

Specialist Prosecutor
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THE PRE-TRIAL JUDGE,¹ pursuant to Articles 39(3) and 45 of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 77 and 79 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 9 October 2020, the Pre-Trial Judge issued the "Framework Decision on Disclosure of Evidence and Related Matters" ("Impugned Decision"), in which he, *inter alia*, ordered the Specialist Prosecutor's Office ("SPO") to submit disclosure charts together with any future disclosure package of incriminating evidence falling under Rule 102(1)(b) of the Rules, as well as a consolidated disclosure chart at the end of the pre-trial stage.² The same applies to the Defence, should it choose to disclose any evidence.³

2. On 19 October 2020, the SPO submitted the "Request for Reconsideration of or, in the Alternative, Leave to Appeal the Order to File Disclosure Charts" ("Request"),⁴ in which the SPO requests the Pre-Trial Judge to: (i) reconsider the order to file disclosure charts ("Request for Reconsideration"); or (ii) authorise certification to appeal said order ("Request for Certification"); (iii) grant suspensive effect of said order pending final resolution of the Request or any appeal ("Request for Suspensive Effect"); and (iv) grant the SPO the opportunity to make submissions, upon final resolution of the Request or any appeal, concerning deadlines and requirements in the Impugned Decision that could be impacted ("Request for Submissions").⁵

¹ KSC-BC-2020-05, F00001, President, Decision Assigning a Pre-Trial Judge, 14 February 2020, public.

² KSC-BC-2020-05, F00034, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters*, 9 October 2020, public, paras 71, 90(m).

³ Impugned Decision, para. 90(n).

⁴ KSC-BC-2020-05, F00037, Specialist Prosecutor, *Request for Reconsideration of or, in the Alternative, Leave to Appeal the Order to File Disclosure Charts*, 19 October 2020, public.

⁵ Request, para. 20.

3. On the same day, the Pre-Trial Judge issued an order convening a status conference on disclosure matters for Wednesday, 28 October 2020, at 15:00 hours.⁶
4. On 23 October 2020, the Pre-Trial Judge shortened the time limits for the Defence response to the Request and for the SPO reply, if any.⁷
5. On 28 October 2020, the status conference took place (“Status Conference”),⁸ wherein the Defence provided its response⁹ and the SPO its reply.¹⁰ Following the Parties’ submissions on the Request, the Pre-Trial Judge issued an oral order according to which the SPO shall submit, by Wednesday, 4 November 2020, a joint proposal for a disclosure chart after consultation with the Defence (“Oral Order”).¹¹
6. On 4 November 2020, pursuant to the Oral Order, the SPO filed the “Joint Submission of Rule 109(c) Categorisation Chart” (“Joint Submission”),¹²

II. SUBMISSIONS OF THE PARTIES

7. Regarding the Request for Reconsideration, the SPO submits that the Pre-Trial Judge failed to: (i) give the Parties the opportunity to make submissions on the necessity of disclosure charts;¹³ (ii) adequately consider the legal framework of the Specialist Chambers (“SC”);¹⁴ and (iii) balance any potential benefit of the order to file disclosure charts with its impact on the Parties’ preparation and the fairness and

⁶ KSC-BC-2020-05, F00039, Pre-Trial Judge, *Order Setting the Date for the Plea Hearing and a Second Status Conference*, 19 October 2020, public, paras 19, 22(a).

⁷ KSC-BC-2020-05, F00044, Pre-Trial Judge, *Order Shortening the Time Limits*, 23 October 2020, public, para. 9.

⁸ KSC-BC-2020-05, Transcript, 28 October 2020 (“28 October 2020 Transcript”), public.

⁹ 28 October 2020 Transcript, p. 62, line 10 to p. 65, line 2.

¹⁰ 28 October 2020 Transcript, p. 65, line 16 to p. 69, line 18.

¹¹ 28 October 2020 Transcript, p. 74, line 21 to p. 75, line 2.

¹² KSC-BC-2020-05, F00045, Specialist Prosecutor, *Joint Submission of Rule 109(c) Categorisation Chart*, 4 November 2020, public with one annex (“Proposed Chart”), public.

¹³ Request, paras 4-6.

¹⁴ Request, paras 4, 7-12.

expeditiousness of the proceedings.¹⁵ Accordingly, the SPO submits that the Pre-Trial Judge erred in the exercise of his discretion under Article 39 of the Law and Rule 95(2)(b) of the Rules and reconsideration is necessary to avoid injustice.¹⁶

8. Alternatively, for the same reasons, the SPO submits that the requirements for certification to appeal under Rule 77(2) of the Rules are also met.¹⁷ Accordingly, the SPO requests certification to appeal the Impugned Decision with regard to the issue of whether the Pre-Trial Judge exceeded his discretionary authority under Article 39 of the Law and Rule 95(2)(b) of the Rules when imposing on the SPO a duty to file charts.¹⁸

9. At the Status Conference, the Defence submitted that the Parties should be allowed to make submissions regarding any order that places particular burdens on one or both Parties.¹⁹ With a view to being practicable and avoiding duplication of work, the Defence proposed to devise, in consultation with the SPO, a disclosure chart that would satisfy the requirements of Rule 109(c) of the Rules and the Pre-Trial Judge's expectations.²⁰ Upon proposal of such chart, the Defence suggested that the Pre-Trial Judge adjust or specify its previous order in the Impugned Decision, without necessarily reconsidering it under Rule 79 of the Rules.²¹

10. At the Status Conference, the SPO did not oppose the idea of a disclosure chart as the one envisaged in the Impugned Decision nor its usefulness, but it opined that its preparation requires time and resources that would affect the expeditiousness of the proceedings in the present case.²² Specifically, the SPO submitted that Rule 109(c) of the Rules requires a categorisation of the evidence "as far as practicable", which may

¹⁵ Request, paras 4, 13-14.

¹⁶ Request, para. 2.

¹⁷ Request, paras 2, 15-17.

¹⁸ Request, para. 15.

¹⁹ 28 October 2020 Transcript, p. 63, line 23 to p. 64, line 1.

²⁰ 28 October 2020 Transcript, p. 64, lines 14-19.

²¹ 28 October 2020 Transcript, p. 64, lines 22-25.

²² 28 October 2020 Transcript, p. 73, line 22 to p. 74, line 1.

vary from case to case.²³ The SPO submitted that “practicable” within the meaning of Rule 109(c) of the Rules means “fair and proportionate and what can reasonably be done with available resources, consistent with the overall disclosure framework and without compromising the expeditiousness of proceedings”.²⁴ Considering the resources available at the moment and the time required to produce the requested charts, if the order to produce disclosure charts stands, the SPO anticipates requesting a delay in excess of a month, with a consequent knock-on effect for the other disclosure deadlines in this case.²⁵ For these reasons, the SPO concurs with the Defence to devise a chart that could satisfy the requirements of the Rules and to submit it to the Pre-Trial Judge for approval.²⁶

11. In the Joint Submission, after consultation with the Defence, the SPO submits that the Proposed Chart complies with the categorisation requirements of Rule 109(c) of the Rules and would be submitted within one week from the filing of the SPO Pre-Trial Brief, considering that such categorisation will be drawn from the analysis in the Pre-Trial Brief.²⁷

III. APPLICABLE LAW

12. Pursuant to Rule 79 of the Rules, in exceptional circumstances and where a clear error of reasoning has been demonstrated or where reconsideration is necessary to avoid an injustice, a Panel may reconsider its own decisions. A request for reconsideration does not stay the time limits of any legal remedy.

13. Pursuant to Article 45 of the Law and Rule 77 of the Rules, certification to appeal shall be granted if the impugned decision involves an issue that would significantly

²³ 28 October 2020 Transcript, p. 66, lines 8-17.

²⁴ 28 October 2020 Transcript, p. 67, lines 2-5.

²⁵ 28 October 2020 Transcript, p. 68, lines 10-23.

²⁶ 28 October 2020 Transcript, p. 69, lines 12-15.

²⁷ Joint Submission, paras 2, 4.

affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial Judge, an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.

IV. DISCUSSION

A. REQUEST FOR RECONSIDERATION

14. Reconsideration is an exceptional measure and should only be undertaken if a clear error of reasoning has been demonstrated or if necessary to avoid injustice. New facts and arguments arising since the Impugned Decision was rendered may be relevant to this assessment.²⁸

15. In the present case, the Pre-Trial Judge takes into consideration the new relevant facts and arguments submitted after the Impugned Decision, namely the Parties' submissions during the Status Conference, the Joint Submission, and the Proposed Chart, as agreed by the SPO and the Defence.

16. The Pre-Trial Judge notes that the Proposed Chart is based on an individual categorisation of each piece of evidence disclosed, according to the contextual elements, underlying crimes and modes of criminal responsibility charged.²⁹ Moreover, the Parties propose to indicate a specific reference in each piece of evidence disclosed, so as to lead the receiving Party to the precise relevant excerpt of the evidence.³⁰ Importantly, the Pre-Trial Judge further notes that the Parties will endeavour, as far as practicable, to categorise the disclosed evidence according to the legal elements of each crime and mode of criminal responsibility charged, and

²⁸ Similarly, for example, ICC, *Prosecutor v Dominic Ongwen*, ICC-02/04-01/15-468, Trial Chamber IX, Decision on Request for Reconsideration of the Order to Disclosure Requests for Assistance, 15 June 2016, para. 4; *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-1085, Trial Chamber VII, Decision on Kilolo Defence Request for Reconsideration, 15 July 2015, para. 4.

²⁹ Joint Submission, para. 2.

³⁰ Joint Submission, para. 2.

according to the specific date or location, as relevant.³¹ In light of the foregoing, the Pre-Trial Judge finds that the Proposed Chart is consistent with the Pre-Trial Judge's finding in the Impugned Decision regarding the format of the disclosure chart and the standard of categorisation required by Rule 109(c) of the Rules. Accordingly, the Pre-Trial Judge does not reconsider this aspect of the Impugned Decision.

17. With regard to the timing of the Proposed Chart, the Parties suggest that only one consolidated chart will be prepared, within one week of the SPO Pre-Trial Brief and, by analogy, within one week of the Defence Pre-Trial Brief, should the latter choose to disclose any evidence. This element differs from the Impugned Decision, which instead foresees a disclosure chart with each disclosure package of incriminating evidence under Rule 102(1)(b) of the Rules, together with a consolidated chart at the end of the pre-trial stage.³² In this regard, the Pre-Trial Judge considers, on the one hand, that the Defence's preparation may be impacted by the lack of disclosure charts filed together with each disclosure package, as this deprives the Defence of a useful guiding tool accompanying each evidentiary batch during the preparation phase. On the other hand, the Pre-Trial Judge notes the flexible language in Rule 109 of the Rules and that the Defence agrees with the submission of one single Proposed Chart at the time of the SPO Pre-Trial Brief. Attention is also paid to the fact that in this particular case only a relatively limited amount of evidence will be disclosed under Rule 102(1)(b) of the Rules, and that the Proposed Chart will still provide a minimum degree of analysis for the benefit of the Defence sufficiently in advance of the trial proceedings.³³

18. In light of the foregoing, the Pre-Trial Judge is of the view that maintaining the original order to file charts throughout the disclosure process would constitute an injustice within the meaning of Rule 79(1) and finds it appropriate to reconsider the

³¹ Joint Submission, footnote 4.

³² Impugned Decision, paras 71, 90(m).

³³ Joint Submission, para. 1 and footnote 4.

Impugned Decision concerning the timing of the submission of the Rule 109(c) chart. Therefore, the Pre-Trial Judge adopts the Proposed Chart for the purpose of the disclosure proceedings in this case and orders the SPO and the Defence, should the latter choose to disclose any evidence, to submit the Proposed Chart within one week of filing of their respective Pre-Trial Briefs.

B. REQUEST FOR CERTIFICATION

19. The Pre-Trial Judge notes that the Joint Submission constitutes the last submission for the purpose of the seven-day time limit for the Pre-Trial Judge's decision on the Request for Certification, in accordance with Rule 77(3) of the Rules.

20. In view of the reconsideration of the Impugned Decision to the extent specified in paragraph 18 above, the Request for Certification becomes moot, as the SPO requested it in the alternative to reconsideration.

C. RELATED REQUESTS

21. In view of the reconsideration of the Impugned Decision to the extent specified in paragraph 18 above, the Request for Suspensive Effect becomes moot.

22. Regarding the Request for Submissions, the Pre-Trial Judge notes that the SPO has already made submissions during the Status Conference on deadlines of the disclosure process.³⁴ Accordingly, the Request for Submissions is moot.

³⁴ 28 October 2020 Transcript, p. 68, lines 4-23.

V. DISPOSITION

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

- a. **GRANTS** the Request for Reconsideration to the extent specified in paragraph 18 of the present decision;
- b. **ADOPTS** the Proposed Chart for the purpose of disclosure proceedings in the present case;
- c. **ORDERS** the SPO and the Defence, should the latter choose to disclose any evidence, to submit the Proposed Chart within one week of filing of their respective Pre-Trial Briefs;
- d. **DISMISSES** the Request for Certification;
- e. **DISMISSES** the Request for Suspensive Effect; and
- f. **DISMISSES** the Request for Submissions.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Thursday, 5 November 2020

At The Hague, the Netherlands.