



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

In: KSC-BC-2020-06
Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

Date: 27 November 2020

Language: English

Classification: Public

**Submissions on Rule 109(c) categorisation
with public Annex 1**

Specialist Prosecutor
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1. Pursuant to the Order of the Pre-Trial Judge,¹ the Specialist Prosecutor's Office ('SPO') hereby submits the outcome of consultations with the Defence teams for each of Mr Thaçi, Mr Veseli, Mr Selimi, and Mr Krasniqi (collectively, 'Defence') in relation to the categorisation required pursuant to Rule 109(c).²
2. As outlined below, the parties have reached partial agreement on an approach to be adopted, but are unable to reach a full consensus on the matter.
3. The parties have agreed that a chart in the format attached³ be provided within 15 days from filing of any Pre-Trial Brief. Consistent with Rule 109(c), the Proposed Chart categorises disclosed information in accordance with the charges in the indictment, with specific reference to the underlying crimes, contextual elements and alleged conduct of the accused. It also contains a further sub-categorisation into individual counts and modes of liability.⁴ The Proposed Chart is substantively in a similar format to that adopted by the Pre-Trial Judge in the context of the *Mustafa* case.⁵ However, at the request of one of the Defence teams, due to a concern about the resources required to meet this requirement, the 'Specific Referencing' column has been made optional for the disclosing party.
4. Consistent with the approach adopted in the *Mustafa* case, the SPO agrees to provide the Proposed Chart within the timeframe specified above on the basis that it comprises

¹ Framework Decision on Disclosure of Evidence and Related Matters, KSC-BC-2020-06/F00099, 23 November 2020, ('Framework Decision') para.99(m).

² 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.

³ Annex 1 ('Proposed Chart'). The specific document entries in the Proposed Chart are by way of example only and do not necessarily reflect actual evidentiary items.

⁴ With respect to the individual counts, the Proposed Chart will, as far as practicable, be further broken down by location/date, as relevant.

⁵ See Annex 1 to Joint Submission of Rule 109(c) categorisation chart, KSC-BC-2020-05/F00045/A01, *adopted in* Decision on Specialist Prosecutor's Request for Reconsideration or Certification for Appeal, KSC-BC-2020-05/F00046, 5 November 2020.

only, in respect of the SPO, material disclosed pursuant to Rule 102(1)(b), and, in respect of the Defence, material disclosed pursuant to Rule 104(1), (5) and (6). By contrast, Mr Selimi's defence requests that the Proposed Chart encompass all material disclosed by the SPO, whether disclosed under Rules 102 or 103.

5. That proposed significant expansion of the detailed chart content to include all disclosed material would not be practicable, as it would be excessively burdensome and time consuming.⁶ The only practicable means of generating the sub-categorisations and specific referencing contained in the Proposed Chart, without significantly delaying the overall proceedings, is to draw from analysis to be contained in the Pre-Trial Brief. This approach would not be possible in the event that the content of the Proposed Chart were to be expanded as proposed by the Selimi defence. The Selimi defence approach would result in very significant additional analysis and processing by the SPO of potentially voluminous material, resulting in substantial delays, with little, if any, benefit to Defence preparations or the proceedings more generally.

6. Rule 109(c) categorisations are intended simply as a supplementary tool to assist the parties, Pre-Trial Judge, and Trial Panel in understanding and navigating disclosed material.⁷ They are additional to an already fulsome set of requirements, including, for example, on the part of the SPO, the requirement to identify the rule pursuant to which a disclosure is being made, to provide witness and exhibit lists which comply with the requirements of Rule 95(4)(b) and (c), and to provide a Pre-Trial Brief which, for each charge, summarises the evidence to be presented regarding the commission of the alleged

⁶ Further, to the extent that material disclosed pursuant to individual Defence requests under Rule 102(3) would fall within the Selimi defence proposal, it raises the possibility that individualised charts could also be sought by Defence teams.

⁷ Categorisations provided, whether in the Proposed Chart or through Legal WorkFlow, are not binding on the disclosing party, or any Trial Panel, in terms of how such material is ultimately used or relied upon. *See also* Rules 137(2), 139.

crimes and the alleged mode(s) of liability. Moreover, no such tools can replace the need for disclosed materials to be read in full by the receiving party.⁸

7. In addition to the tools outlined above, and to provision of the Proposed Chart, the SPO also agrees, so far as practicable, and by way of the metadata fields in Legal Workflow, to provide at the time of each disclosure - and in respect of all disclosed material - a categorisation of the disclosed items in accordance with each of the four categories identified in Rule 109(c) (i.e. underlying crimes, contextual elements, conduct of the Accused and/or, as applicable, evidence to be relied upon by the SPO). Should more than one category apply, each will be indicated. Recipients would, at the time of receipt of each disclosure package, thereby be able to see the categories applicable for each document, to filter documents by category and to generate exportable excel files containing that categorisation.

8. Mr Selimi's defence requests that at the time of each disclosure package, and for all disclosed material, the SPO additionally sub-categorise each item according to, *inter alia*, individual counts, locations and modes of liability.⁹

9. The Selimi defence proposal again effectively requires the degree of detailed categorisation contained in the Proposed Chart to be provided for all disclosed material and at the time of each disclosure package. For the reasons outlined above,¹⁰ that

⁸ See *similarly* Transcript of Status Conference, 18 November 2020, pp.144 and 146.

⁹ The specific example provided by the Selimi Defence consisted of:

- (a) underlying crimes
 - (i) Type of crime eg. Illegal arbitrary arrests and detentions
 - (1) Sedlare etc;
- (b) Contextual elements
 - (i) Crimes against humanity,
 - (ii) war crimes;
- (c) conduct of the accused
 - (i) joint criminal enterprise,
 - (ii) Superior responsibility etc;
- (d) Evidence to be presented
 - (i) linked to the relevant item of evidence.

¹⁰ See paras 5-7.

approach is not within the realm of what is practicable and is of very limited overall utility. It would, for example, result in immediate and very lengthy delays in the disclosure process, with the result that the Defence teams would not even begin to receive the underlying material itself for many months.

10. In summary, any Rule 109(c) categorisation requirement adopted must not jeopardise the overall expeditiousness of proceeding, including of the disclosure process. Given the onerous disclosure obligations placed on the prosecution pursuant to the Rules, preparations for disclosure necessarily commenced many months in advance, thereby facilitating an expeditious disclosure timeline being promptly decided upon by the Pre-Trial Judge.¹¹ Were the proposals put forward by the Selimi Defence to be adopted that disclosure timeline would be very significantly delayed. The additional requests made by the Selimi defence far exceed the limits of what is practicable in the circumstances,¹² as well as what is necessary to facilitate Defence preparations and the understanding and oversight of the Pre-Trial Judge and ultimately Trial Panel.

11. It is noted that the position advanced by Mr Selimi's defence, in relation to both the expanded content of the Proposed Chart and the further sub-categorisation sought at the time of each disclosure, is now supported by the defence for both Mr Thaci and Mr Krasniqi.

12. Consistent with prior submissions, Mr Veseli's defence reserves its position and makes no submissions on the proposed regime.

13. The SPO respectfully requests the Pre-Trial Judge to adopt an approach consistent with that approved in the context of the *Mustafa* proceedings, by approving that the parties, so far as practicable:

¹¹ Framework Decision, KSC-BC-2020-06/F00099.

¹² See also Transcript of Status Conference, 18 November 2020, pp.143-144 and 146-147 (emphasising the need for any categorisation regime adopted to remain within what is practicable and not to delay the disclosure process itself).

- a. provide a chart in the form annexed within 15 days from provision of any Pre-Trial Brief, in relation to, in respect of the SPO, material disclosed pursuant to Rule 102(1)(b), and, in respect of the Defence, material disclosed pursuant to Rule 104(1), (5) and (6); and
- b. at the time of each disclosure, categorise, by way of the metadata fields in Legal WorkFlow, the disclosed items in accordance with each of the four categories identified in Rule 109(c) (i.e. underlying crimes, contextual elements, conduct of the Accused and/or, as applicable, evidence to be relied upon by the SPO).

Word count: 1,414



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Friday, 27 November 2020

At The Hague, the Netherlands.