



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

**In:** KSC-BC-2020-07  
**Specialist Prosecutor v. Hysni Gucati and Nasim Haradinaj**

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

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Prosecutor

**Date:** 1 February 2021

**Language:** English

**Classification:** Public

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**Submissions on Rule 109(c) categorisation**

**with public Annex 1**

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**Specialist Prosecutor's Office**

Jack Smith

**Counsel for Hysni Gucati**

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**Counsel for Nasim Haradinaj**

Toby Cadman

1. Pursuant to the Order<sup>1</sup> of the Pre-Trial Judge, the Specialist Prosecutor's Office ('SPO') hereby submits the outcome of consultations with the Defence teams for each of Mr Gucati and Mr Haradinaj (collectively, 'Defence') in relation to the categorisation required pursuant to Rule 109(c).<sup>2</sup>
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 SPO has proposed that a chart in the format attached<sup>3</sup> be provided within 15 days from filing of any Pre-Trial Brief. The Defence<sup>4</sup> has confirmed its agreement with the format of the Proposed Chart.
4. Consistent with Rule 109(c), the Proposed Chart categorises disclosed information in accordance with charges in the indictment, with specific reference to underlying crimes, contextual elements and alleged conduct of the accused. It also contains further sub-categorisation into modes of liability. The Proposed Chart is substantively in a similar format to that adopted by the Pre-Trial Judge in the context of the *Mustafa* case,<sup>5</sup> to the extent it is applicable to the criminal offences relevant to the present proceedings. At the request of Mr Gucati's Defence team, four columns have been added, allowing to easily visualise the categorisation of each evidentiary item according to the four criteria listed in Rule 109(c).<sup>6</sup>

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<sup>1</sup> Framework Decision on Disclosure of Evidence and Related Matters, KSC-BC-2020-07/F00104, 22 January 2021 ('Framework Decision'), para. 85(1).

<sup>2</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

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

<sup>4</sup> Counsel for Mr Haradinaj reserves the right to make further submissions on the content of the Proposed Chart after having received it in a completed form.

<sup>5</sup> See Annex 1 to Joint Submission of Rule 109(c) categorization 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.

<sup>6</sup> The "Comments/Miscellaneous" column has been removed to maintain the Proposed Chart within a manageable size, with the understanding that parties may always offer any additional comments in any convenient format.

5. 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 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).

6. By contrast, the Defence requests that the SPO produces by 19 February 2021 the Proposed Chart, including Rule 102(1)(a), Rule 102(1)(b) and Rule 103 material. The Defence further Requests that the SPO re-submits an updated consolidated version of the Proposed Chart at every new disclosure of material. The Defence advances no proposals on the timeline for the submission of the Proposed Chart by the Defence, in relation to any evidence that the Defence may disclose.

7. That significant expansion of the detailed chart content, as proposed by the Defence, as well as the request that such detailed charts be provided first by 19 February and then in a consolidated form with any new disclosure of materials, would not be practicable, as it would be excessively burdensome and time consuming. 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. If the degree of detailed categorisation contained in the Proposed Chart were to be provided for all disclosed material and at the time of each disclosure package, the disclosure process would suffer unavoidable delays.<sup>7</sup>

8. 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 the disclosed material.<sup>8</sup> They are additional to an already fulsome set of requirements,

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<sup>7</sup> For example, in proposing to disclose all 102(1)(b) materials by 19 February, the SPO identified the earliest possible date to complete the disclosure process. If the disclosure of the 102(1)(b) materials were to be accompanied by additional analysis, to the degree of detailed categorisation contained in the Proposed Chart, the disclosure process would not be realistically completed within the same time-frame.

<sup>8</sup> 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.

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 crimes and alleged mode(s) of liability.

9. In addition to the tools outlined above, and to the 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 emblems, 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. Consistent with this approach, a categorisation of the disclosed items in accordance with each of the four categories identified in Rule 109(c) has been already provided to the Defence for all evidence disclosed so far.

10. In addition, the detailed outline prescribed under Rule 86(3)(b) has already been made available to the Defence,<sup>9</sup> containing not only a detailed categorisation but also extensive analysis in relation to all Rule 102(1)(a) materials. The Defence's request that the same information be now resubmitted, in the format of the Proposed Chart, by 19 February would be not only not practicable, but also clearly of no additional utility for Defence preparation.

11. In summary, any Rule 109(c) categorisation requirement adopted must not jeopardise the overall expeditiousness of proceeding, including of the disclosure process. The additional requests made by the Defence exceed the limits of what is

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<sup>9</sup> Framework Decision, KSC-BC-2020-07/F00104, para. 67.

practicable in the circumstances, as well as what is necessary to facilitate Defence preparations and the understanding and oversight of the Pre-Trial Judge and ultimately Trial Panel.

12. 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:

- 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: 1,277**



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**Jack Smith**

**Specialist Prosecutor**

Monday, 1 February 2021

At The Hague, the Netherlands.