



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

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

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

Registrar: Dr Fidelma Donlon

Date: 11 February 2021

Language: English

Classification: **Public**

Decision on Submissions on Rule 109(c) Categorisation

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THE PRE-TRIAL JUDGE,¹ pursuant to Article 39(13) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 95(2)(b) and 109(c) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 25 and 26 September 2020, Hysni Gucati ("Mr Gucati") and Nasim Haradinaj ("Mr Haradinaj") (collectively, the "Defence" or "Accused") were arrested² in Kosovo and transferred to the Specialist Chambers' detention facilities in The Hague, the Netherlands,³ pursuant to warrants of arrest and orders for their transfer.⁴

2. On 11 December 2020, the Pre-Trial Judge confirmed in part the indictment submitted by the Specialist Prosecutor's Office ("SPO"),⁵ and the SPO thereafter submitted a revised indictment, as confirmed.⁶

¹ KSC-BC-2020-07, F00061, President, *Decision Assigning a Pre-Trial Judge*, 29 October 2020, public. Prior to this decision, the President had assigned the same Judge as Single Judge; see KSC-BC-2020-07, F00003, President, *Decision Assigning a Single Judge Pursuant to Article 33(2) of the Law*, 29 May 2018, public.

² KSC-BC-2020-07, F00015, Registrar, *Notification of Arrest Pursuant to Rule 55(4)*, 25 September 2020, public; F00016, Registrar, *Notification of Arrest Pursuant to Rule 55(4)*, 25 September 2020, public.

³ KSC-BC-2020-07, F00018, Registrar, *Notification of the Reception of Hysni Gucati in the Detention Facilities of the Specialist Chambers*, 25 September 2020, public, with Annex 1, confidential; F00020, Registrar, *Notification of the Reception of Nasim Haradinaj in the Detention Facilities of the Specialist Chambers*, 26 September 2020, public, with Annex 1, confidential.

⁴ KSC-BC-2020-07, F00012/A01/RED, Single Judge, *Public Redacted Version of Arrest Warrant for Hysni Gucati*, 24 September 2020, public; F00012/A03/COR/RED, Single Judge, *Public Redacted Version of the Corrected Version of Arrest Warrant for Nasim Haradinaj*, 24 September 2020, public; F00012/A02/RED, Single Judge, *Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers*, 24 September 2020, public; F00012/A04/RED, Single Judge, *Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers*, 24 September 2020, public.

⁵ KSC-BC-2020-07, F00074/RED, Pre-Trial Judge, *Public Redacted Version of Decision on the Confirmation of the Indictment* ("Confirmation Decision"), 11 December 2020, public.

⁶ KSC-BC-2020-07, F00075/A02, Specialist Prosecutor, *Redacted Indictment*, 14 December 2020, public.

3. On 22 January 2021, the Pre-Trial Judge issued the “Framework Decision on Disclosure of Evidence and Related Matters” (“Framework Decision on Disclosure”), in which he deferred his ruling on the format and timing of disclosures charts that comply with the categorisation requirements of Rule 109(c) of the Rules and ordered the SPO to file a joint proposal on such charts by 1 February 2021.⁷

4. On 1 February 2021, the SPO and the Defence submitted the joint proposal as requested by the Pre-Trial Judge in which they annexed a sample chart pursuant to Rule 109(c) of the Rules (“Proposed Chart”).⁸

II. SUBMISSIONS

5. The Parties have reached partial agreement on an approach to be adopted with respect to a chart to be submitted pursuant to Rule 109(c) of the Rules, but are unable to reach full consensus.⁹ The Parties agree as to the format¹⁰ and level of categorisation of the Proposed Chart¹¹ as well as the categorisation of the metadata fields in Legal Workflow.¹² With respect the timing of the chart¹³ and the type of material with which it relates,¹⁴ no agreement has been reached.

⁷ KSC-BC-2020-07, F00104, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters* (“Framework Decision on Disclosure”), 22 January 2021, public, paras 66, 85(1).

⁸ KSC-BC-2020-07, F00109, Pre-Trial Judge, *Submission of Rule 109(c) Categorisation* (“Submission”), 1 February 2021, public, with Annex 1 (“Proposed Chart”), public.

⁹ Submission, para. 2.

¹⁰ Submission, para. 3.

¹¹ Submission, para. 4.

¹² Submission, para. 9.

¹³ Submission, paras 3, 6-7.

¹⁴ Submission, paras 5-6.

III. APPLICABLE LAW

6. Pursuant to Rule 95(2)(b) of the Rules, after the initial appearance of the Accused in accordance with Rule 92 of the Rules, the Pre-Trial Judge shall set time limits for disclosure of evidence and take any measure to ensure timely disclosure.

7. Pursuant to Rule 109(b) and (c) of the Rules, both the SPO and the Defence, should it choose to disclose any evidence, shall submit, when disclosing: (i) a clear and concise description of the items, or categories thereof, disclosed to the other Party; and (ii) a categorisation of the information disclosed, in accordance with the charges in the Confirmed Indictment, with specific reference to the underlying crimes, contextual elements of the crimes charged, the alleged conduct of the Accused or, where applicable, evidence to be presented by the SPO.

IV. DISCUSSION

A. FORMAT AND CATEGORISATION

8. The Parties agree as to the format of, and categorisation within, the Proposed Chart.¹⁵

9. 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, conduct of the Accused, the evidence relied upon by the SPO, and a further sub-categorisation into modes of liability.¹⁶ Moreover, the Parties

¹⁵ Submission, paras 3-4. Mr Haradinaj reserves his right to make further submissions after seeing the completed Proposed Chart. Submission, fn. 4.

¹⁶ Submission, paras 4, 8. It is noted that offences under Article 15 of the Law do not include contextual elements.

agree to provide a “specific reference” in relation to each piece of evidence, so as to inform the receiving Party as to the precise relevant excerpt of the evidence.¹⁷

10. The Pre-Trial Judge finds that the Proposed Chart will assist the defence in its preparations and is consistent with the standard of categorisation required by Rule 109(c) of the Rules.

B. METADATA

11. The SPO agrees to, as far as practicable, at time of disclosure, categorise each disclosed item according to underlying crimes, contextual elements, conduct of the Accused, and/or evidence relied upon by the SPO (“Rule 109(c) Categories”) in the metadata fields in Legal Workflow.¹⁸

12. The Pre-Trial Judge considers that using the Rule 109(c) Categories in the metadata fields at the time of disclosure, with respect to all disclosed material, would provide a significant portion of the information in the Proposed Chart at the time of disclosure and therefore greatly assist the Defence in its preparations.

13. The Pre-Trial Judge accordingly finds that the Parties’ shall include the Rule 109(c) Categories in the metadata of all disclosed material.

C. RELEVANT MATERIAL

14. The SPO submits that the Proposed Chart should only relate to Rule 102(1)(b) material, and with respect to the Defence, material disclosed pursuant to Rule 104(1),

¹⁷ Proposed Chart.

¹⁸ Submission, para. 9.

(5), and (6) of the Rules.¹⁹ The SPO argues that, if the Proposed Chart were to relate to all disclosed material, the disclosure process would suffer unavoidable delays.²⁰ In addition, the SPO argues that the Rule 86(3)(b) outline already provides extensive analysis in relation to Rule 102(1)(a) material and to now resubmit such material, in the format of the Proposed Chart, serves no practical purpose.²¹ The Defence submits that the Proposed Chart shall, in addition to Rule 102(1)(b) material, also include Rule 102(1)(a) and Rule 103 material.²²

15. The Pre-Trial Judge recalls that, at the time of submitting its indictment for confirmation, the SPO provided a detailed outline of the supporting material, as mandated by Rule 86(3)(b) of the Rules (“Detailed Outline”).²³ As stipulated by this provision, the Detailed Outline demonstrates 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). The Pre-Trial Judge is of the view that the format of the Detailed Outline satisfies the requirements of Rule 109(c) of the Rules, as the content and linkage requirement stipulated under the Rules is the same.²⁴ The SPO therefore need not include Rule 102(1)(a) material within the Proposed Chart.

16. With respect to Rule 103 material, the Pre-Trial Judge considers that the limited factual and legal complexity of the case, involving alleged crimes under Article 15 of the Law, makes inclusion of this material in the Proposed Chart unnecessary. However, as discussed above, this material will benefit from categorisation according

¹⁹ Submission, para. 6.

²⁰ Submission, para. 7.

²¹ Submission, para. 10.

²² Submission, para. 6.

²³ KSC-BC-2020-07, F00063/A02, Specialist Prosecutor, *Annex 2 to Submission of Indictment for Confirmation and Related Requests*, 30 October 2020, strictly confidential.

²⁴ Similarly, KSC-BC-2020-05, F00034, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters*, 9 October 2020, public, para. 71.

to Rule 109(c) of the Rules as such categories will be included in the metadata fields of each document upon disclosure. As a consequence, the Pre-Trial Judge finds it sufficient that the categorisation is contained in the metadata fields and does not find it necessary that the same information be reflected again in the Proposed Chart.

17. With respect to the Defence, in the event Mr Gucati and/or Mr Haradinaj choose to disclose evidence pursuant Rule 104(1) and (5) of the Rules, they should provide a Proposed Chart to categorise this material.

18. The Pre-Trial Judge notes that the Parties have the possibility of calling additional witnesses. In such instances, material relating to these witnesses and falling under Rules 102(2) and 104(6) of the Rules should also be included in the Proposed Chart or in an addendum made thereto, at the time of the respective disclosure.

19. The Pre-Trial Judge accordingly finds that the Proposed Chart shall include Rule 102(1)(b) and 102(2) material, with respect to the SPO, and Rule 104(1), (5), and (6) material with respect to the Defence.

D. TIMING

20. The SPO submits that the Proposed Chart be provided within 15 days from the filing of any pre-trial brief.²⁵ The Defence requests that the SPO's Proposed Chart be provided by 19 February 2021 and that the SPO produce and update, consolidated version of the Proposed Chart at every new disclosure of material.²⁶

21. The Pre-Trial Judge considers the flexible language of Rule 109 of the Rules and the specificities of the case at hand, including the complexity of the case and the

²⁵ Submission, paras 3, 12(a).

²⁶ Submission, para. 6.

timeline for disclosure.²⁷ In this regard, the Pre-Trial Judge considers that the present case is of comparatively limited factual and legal complexity, involving alleged crimes under Article 15(2) of the Law of limited temporal and geographical scope.²⁸ In addition, pursuant to the Framework Decision on Disclosure, the SPO must disclose all Rule 102(1)(b) material by 19 February 2021.²⁹ In order not to disrupt the progress of disclosure, and in light of the efficiency in generating the Proposed Chart around the time of the pre-trial brief, the Pre-Trial Judge considers that the most expeditious way of proceeding in the present case is to have the Proposed Chart provided to the opposing Party at the time of filing any pre-trial brief.

22. The Pre-Trial Judge accordingly orders the Parties to disclose of the Proposed Chart at the time of filing their respective pre-trial briefs.

V. DISPOSITION

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

- a. **ADOPTS** the Proposed Chart for the purposes of disclosure in the present case;
- b. **APPROVES** use of the Rule 109(c) Categories in the metadata field of each item of disclosure;
- c. **DECIDES** that the Proposed Chart shall include, with respect to the SPO, Rule 102(1)(b) and 102(2) material, and with respect to the Defence, material disclosed pursuant to Rules 104(1), (5), and (6) of the Rules; and

²⁷ Similarly, KSC-BC-2020-05, F00046, Pre-Trial Judge, *Decision on Specialist Prosecutor's Request for Reconsideration or Certification for Appeal*, 5 November 2020, public, para. 17.

²⁸ Confirmation Decision, paras 103, 109, 113, 117, 121, 125.

²⁹ Framework Decision on Disclosure, para. 85(b).

- d. **ORDERS** the SPO and the Defence, should the latter choose to disclose any evidence, to submit the Proposed Chart at the time of filing of their respective pre-trial briefs.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Thursday, 11 February 2021

At The Hague, the Netherlands.