



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: **KSC-BC-2020-06**

**The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi,
and Jakup Krasniqi**

Before: **Pre-Trial Judge**

Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 12 March 2021

Language: English

Classification: **Public**

Decision on Categorisation of Evidence Under Rule 109(c) and Related Matters

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THE PRE-TRIAL JUDGE,¹ pursuant to Article 39(1) and (13) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 95(2)(b) and 109(a) and (c) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 23 November 2020, the Pre-Trial Judge issued the "Framework Decision on Disclosure of Evidence and Related Matters" ("Framework Decision on Disclosure"), in which he set out the principles governing disclosure of evidence between the Parties, established a calendar for disclosure by the SPO, and adopted the redaction regime applicable to the present case.²

2. On 27 November 2020, the Defence for Rexhep Selimi ("Mr Selimi" or "Selimi Defence") submitted the "Defence Notification in Relation to Rule 109(c)" ("Selimi Rule 109(c) Notification").³

3. On 27 November 2020, the SPO filed the "Submissions on Rule 109(c) Categorisation" ("Submissions on Proposed Chart") together with a consolidated disclosure chart in a format agreed upon with the Defence of all Accused ("Proposed Chart").⁴

4. On 10 February 2021, the SPO and the Defence for Hashim Thaçi ("Mr Thaçi" or "Thaçi Defence"), the Selimi Defence, and the Defence for Jakup Krasniqi

¹ KSC-BC-2020-06, F00001, President, *Decision Assigning a Pre-Trial Judge*, 23 April 2020, public.

² KSC-BC-2020-06, F00099, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters*, 23 November 2020, public.

³ KSC-BC-2020-06, F00106, Selimi Defence, *Defence Notification in Relation to Rule 109(c)*, 27 November 2020, public.

⁴ KSC-BC-2020-06, F00108, Specialist Prosecutor, *Submissions on Rule 109(c) Categorisation*, 27 November 2020, public, with Annex 1, public.

(Mr Krasniqi” or “Krasniqi Defence”), respectively, filed their submissions ahead of the third status conference in this case (“Third Status Conference”).⁵

5. On 16 February 2021, the Third Status Conference took place, in which the Parties reiterated their diverging positions on the matter, and requested the Pre-Trial Judge to take a decision, given the impasse reached.⁶

II. APPLICABLE LAW

6. Pursuant to Article 39(13) of the Law and Rule 95(2) of the Rules, the Pre-Trial Judge shall ensure that pre-trial proceedings are not unduly delayed and shall take all necessary measures for the expeditious preparation of the case for trial, including setting time limits for disclosure of evidence and taking any measure to ensure timely disclosure.

7. Pursuant to Rule 109(a) of the Rules, each Party shall fulfil all its disclosure obligations in electronic form, together with the appropriate computer software provided by the Registrar to allow for searching of the material.

8. Pursuant to Rule 109(c) of the Rules, as far as practicable, when disclosing material a Party shall categorise such information in accordance with the charges in the 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.

⁵ KSC-BC-2020-06, F00191/COR, Specialist Prosecutor, *Corrected Version of Prosecution Submissions for Third Status Conference* (“SPO Submissions”), 10 February 2021, public; F00194, *Thaçi Defence, Thaçi Defence Submissions for Third Status Conference* (“Thaçi Defence Submissions”), 10 February 2021, public; F00195, *Selimi Defence, Defence Submissions for Third Status Conference* (“Selimi Defence Submissions”), 10 February 2021, public; F00196, *Krasniqi Defence, Krasniqi Defence Submissions for Third Status Conference* (“Krasniqi Defence Submissions”) 10 February 2021, public.

⁶ KSC-BC-2020-06, Transcript, 16 February 2021 (“16 February 2021 Transcript”), public, p. 260, line 22 to p. 274, line 9.

III. SUBMISSIONS

9. The SPO's position on Rule 109(c) categorisation revolves around what is, in its view, practicable and feasible, considering the resources of the SPO and the requirements of Rule 109(c) of the Rules.⁷ The SPO submits that the Defence have received, and continue to receive, sufficient guidance through the disclosed evidence by way of: (i) the Detailed Outline pursuant to Rule 86(4) of the Rules, which categorises the material relied upon by the SPO in support of the indictment; and (ii) the categories in Legal Workflow, which are drawn from the language of Rule 109(c) of the Rules⁸ and are applied to each item of evidence disclosed under Rules 102 and 103 of the Rules.⁹ In addition, the SPO is willing to submit the Proposed Chart, namely a consolidated disclosure chart, as agreed with all Defence teams, with a sub-categorisation of Rule 102(1)(b) material, within 15 days from its Pre-Trial Brief.¹⁰ The SPO submits that any sub-categorisation exercise can only be undertaken on the basis of the analysis in the Pre-Trial Brief and, should a similar exercise be required before that time, this will effectively mean that disclosure of Rule 102(1)(b) material would cease until the Pre-Trial Brief is at an advanced stage, in "several months" from now.¹¹ In sum, the SPO contends that any categorisation exercise in addition to what it has proposed is not feasible and, accordingly, outside the terms of Rule 109(c) of the Rules.¹²

⁷ 16 February 2021 Transcript, p. 262, lines 17-18; p. 270, lines 9-16; SPO Submissions, paras 10-11.

⁸ These categories are: (i) contextual elements of the crimes; (ii) underlying crimes; (iii) alleged conduct of the accused; and (iv) evidence to be presented by the SPO.

⁹ 16 February 2021 Transcript, p. 262, line 23 to p. 263, line 1; p. 270, lines 17-21; SPO Submissions, para. 8.

¹⁰ 16 February 2021 Transcript, p. 262, line 23 to p. 263, line 1; SPO Submissions, para. 9.

¹¹ 16 February 2021 Transcript, p. 270, line 22 to p. 271, line 3; SPO Submissions, para. 10.

¹² 16 February 2021 Transcript, p. 262, lines 18-20; p. 270, lines 12-16; p. 271, lines 10-14; SPO Submissions, para. 9.

10. The position of the Defence for Mr Thaçi, Mr Selimi and Mr Krasniqi is consistent in requesting: (i) a further and more specific categorisation of Rule 102(1)(b) material at the time of each disclosure package,¹³ either in Legal Workflow or by way of the Proposed Chart, and in addition to the Rule 109(c) categories;¹⁴ and (ii) a consolidated Proposed Chart comprising all Rule 102(1)(b) material, to be submitted within 15 days from the Pre-Trial Brief.¹⁵ By analogy, the Defence would undertake the exact same categorisation exercise (as applicable) when disclosing evidence under Rule 104(1), (5) and (6) of the Rules, and would submit the Proposed Chart, within 15 days from their respective Pre-Trial Briefs, comprising the evidence under Rule 104(1), (5) and (6) of the Rules.¹⁶ The Selimi Defence additionally requests that sub-categorisation be done in relation to each package of material falling under Rules 102(3) and 103 of the Rules.¹⁷ In light of the SPO's submission that any sub-categorisation may only be drawn from the Pre-Trial Brief, the Defence for Kadri Veseli ("Mr Veseli", or "Veseli Defence") requests that the SPO Pre-Trial Brief be filed as early as April 2021, so that the Defence can receive the Proposed Chart reasonably soon.¹⁸ In this regard, the SPO maintains its position that it intends to file its Pre-Trial Brief as close as possible to the trial date, notably three months before the start of the trial.¹⁹

¹³ The sub-categories proposed by the Defence are essentially: (i) contextual elements of the crimes: war crimes or crimes against humanity; (ii) underlying crimes: specific crime or count number; (iii) location of the crime; (iv) alleged conduct of the accused: specific mode of liability; and (v) name of the Accused.

¹⁴ 16 February 2021 Transcript, p. 264, lines 3-10, p. 268, lines 12-17, p. 269, lines 11-15; Thaçi Defence Submissions, para. 12; Selimi Defence Submissions, paras 4-8; Krasniqi Defence Submissions, paras 14-17.

¹⁵ Submissions on Proposed Chart, paras 3-4; Thaçi Defence Submissions, para. 12.

¹⁶ Submissions on Proposed Chart, para. 4.

¹⁷ Selimi Rule 109(c) Notification, para. 2.

¹⁸ 16 February 2021 Transcript, p. 267, lines 12 to p. 268, line 9.

¹⁹ 16 February 2021 Transcript, p. 281, lines 1-8; KSC-BC-2020-06, Transcript, 17 December 2020, public, p. 199, lines 15-21; p. 200, lines 1-5.

IV. DISCUSSION

A. MATERIAL SUBJECT TO CASE-SPECIFIC CATEGORISATION

11. The Pre-Trial Judge recalls that Rule 109(c) of the Rules describes in general terms the generic categories (“Standard Categories”) that can be assigned to evidentiary material when it is uploaded on Legal Workflow and disclosed to the receiving Party: contextual elements of the crimes, underlying crimes, alleged conduct of the accused, and, where applicable, evidence to be presented by the SPO.

12. The Pre-Trial Judge considers that these Standard Categories must be open to adjustments, depending on the specificities of each case, including the number, nature and scope (temporal and/or geographical) of the charges, the number of Accused, and the amount of evidence to be disclosed. Thus, pursuant to Article 39(1) and (13) of the Law and Rule 95(2) of the Rules, it falls within the powers of the Pre-Trial Judge to specify the categorisation level, including the timing when such categorisation is released to the receiving Party, taking into account the aforementioned factors and practicability requirement in Rule 109(c) of the Rules.

13. The Pre-Trial Judge observes that the present case is characterised by the following features: (i) four Accused; (ii) six counts of crimes against humanity and four counts of war crimes, allegedly committed over the course of one and a half years; (iii) more than 40 charged locations; and (iv) three modes of liability.²⁰ Moreover, an extensive amount of evidence is being and will continue to be disclosed by the SPO in accordance with the Framework Decision on Disclosure. This comprises, in addition to the evidence already disclosed pursuant to Rule 102(1)(a) of the Rules, around 1,500 exhibits and material related to 50 witnesses falling under Rule 102(1)(b) of the Rules,

²⁰ KSC-BC-2020-06, F00045/A03, *Annex 3 to Submission of Corrected and Public Redacted Versions of Confirmed Indictment and Related Request* (“Confirmed Indictment”), 4 November 2020, public.

Rule 103 material as well as material to be included in the detailed notice under Rule 102(3) of the Rules, which may top 100,000 items.²¹

14. In this regard, the Pre-Trial Judge considers that, regarding the Rule 102(1)(a) material, the Defence already benefitted from the meticulous guidance provided in the Detailed Outline, prepared by the SPO, pursuant to Rule 86(4) of the Rules,²² in addition to the Standard Categories in Legal Workflow. The categorisation of Rule 102(1)(a) material in the Detailed Outline received by the Pre-Trial Judge at the confirmation stage is exactly the same as the one received by the Defence, subject to the necessary protective measures, as authorised.²³ Accordingly, the Pre-Trial Judge finds that no further categorisation is needed with respect to Rule 102(1)(a) material and that the Defence is in a position to investigate on the basis of such categorised material.

15. Regarding the material falling under Rules 102(3) and 103 of the Rules, the Pre-Trial Judge considers that the SPO is duty-bound to prepare a detailed notice of Rule 102(3) material, and to identify and immediately disclose potentially exculpatory material under Rule 103 of the Rules. These obligations are designed to put the Defence in the best possible position to follow-up on such evidence, which is supposed to assist the latter in the preparation of their case. It is also underscored that the purpose for which this evidence may be used by the Defence at trial depends mainly on the Defence strategy. The Pre-Trial Judge recalls that the SPO, when disclosing such material, currently applies the Standard Categories in Legal Workflow.²⁴ Therefore, as the SPO does not intend to rely on the Rule 102(3) and 103 material at trial, any further categorisation of such material is not necessary to

²¹ Framework Decision on Disclosure, paras 24-26.

²² KSC-BC-2020-06, F00136, Specialist Prosecutor, *Submission of Confidential Redacted Version of Rule 86(3)(b) Outline*, public, with confidential annexes 1-2, confidential.

²³ Framework Decision on Disclosure, para. 81.

²⁴ *Similarly*, KSC-BC-2020-07, F00121, Pre-Trial Judge, *Decision on Submissions on Rule 109(c) Categorisation*, 11 February 2021, public, para. 16.

understand the SPO's case. Accordingly, no further specification of the Standard Categories is required for material falling under Rules 102(3) and 103 of the Rules.

16. Regarding the Rule 102(1)(b) material, the Pre-Trial Judge considers that this category of evidence fulfils a crucial function for the preparation of the Defence. The Rule 102(1)(b) material shapes the SPO case to be presented at trial, together with the material previously disclosed under Rule 102(1)(a) of the Rules. By analogy, material falling under Rule 104(1), (5) and (6) of the Rules, should the Defence choose to disclose any, fulfils an equally important function in informing the SPO of the Defence case(s). While the Rule 102(1)(b) material already benefits from the Standard Categories assigned in Legal Workflow, the Pre-Trial Judge considers that a specification of the generic categorisation of information is required to ensure the fair and expeditious conduct of the proceedings. That being said, in light of the overall amount of Rule 102(1)(b) material, taken together with Rule 102(1)(a) material, it is necessary, in the present case, to adopt a case-specific categorisation of the Rule 102(1)(b) material. By analogy, the same case-specific categorisation shall apply to material falling under Rule 104(1), (5) and (6) of the Rules, should the Defence choose to disclose any.

17. The Pre-Trial Judge considers, in this respect, that if no case-specific categorisation was adopted for the material falling under Rule 102(1)(b) and Rule 104(1), (5) and (6) of the Rules, the pre-trial proceedings may be significantly delayed due to the time spent by both Parties in understanding and linking the evidence disclosed to the alleged crimes (context and/or underlying crimes) or modes of liability in this case. The delays caused by the analysis of the receiving Parties are likely to be more substantial than the time required for each Party to undertake the case-specific categorisation adopted by the present decision. In this respect, the Pre-Trial Judge must assume that the disclosing Party has analysed the evidence before its disclosure

under any of the applicable rules, and, therefore, should not further delay the disclosure process.

18. The Pre-Trial Judge clarifies that the case-specific categorisation of the material falling under Rules 102(1)(b) and 104(1), (5) and (6) of the Rules shall only be applied in Legal Workflow and, accordingly, no disclosure chart, whether in the form of the Proposed Chart or otherwise, shall be submitted separately with each disclosure package. As Legal Workflow is the designated electronic system for disclosure of evidence at the SC,²⁵ it is imperative that the Parties and the Panels rely on it as much as possible, in order to increase productivity and efficiency of the proceedings while ensuring their fairness and expeditiousness. This is further supported by Rule 109(a) of the Rules, which stipulates that each party shall fulfil all its disclosure obligations in electronic form.

B. CASE-SPECIFIC CATEGORISATION IN LEGAL WORKFLOW

19. Taking into account the case-specific features highlighted above, the Pre-Trial Judge considers it appropriate to strike a balance between (i) the right of the Defence to meaningfully investigate and prepare their case as disclosure of evidence progresses, (ii) the expeditiousness of the pre-trial proceedings, and (iii) the practicability requirement mentioned in Rule 109(c) of the Rules. In this respect, the Pre-Trial Judge finds that when selecting material to be disclosed under Rules 102(1)(b) and 104(1), (5) and (6) of the Rules, respectively, the SPO and Defence must naturally be in a position to identify which elements of the charges each piece of disclosed evidence intends to prove or disprove. As far as the SPO is concerned, such exercise is already reflected in the fact that the SPO has been in a position to assign (when applicable) the Standard Categories to each evidentiary item disclosed so far,

²⁵ Rule 98(1)(b) of the Rules.

distinguishing between evidence supporting contextual elements, underlying crimes and/or alleged conduct of the Accused.

20. In light of the above considerations, and in addition to the Standard Categories, it is appropriate to adopt the following case-specific categorisation in Legal Workflow, which shall be applied by the SPO and the Defence when disclosing each batch of Rules 102(1)(b) and 104(1), (5) and (6) material, respectively: (i) contextual elements: “war crimes”, “crimes against humanity”, “all”; (ii) underlying crimes: “count 1”, “count 2”, “count 3”, “count 4”, “count 5”, “count 6” “count 7”, “count 8”, “count 9”, “count 10, “all”; (iii) location: “[name of location]”, “redacted”, “all”;²⁶ (iv) alleged conduct of the Accused: “direct commission”, “JCEI”, “JCEII”, “JCEIII”, “planning”, “instigating”, “ordering”, “aiding and abetting”, “responsibility of the superior”, “all”;²⁷ and (v) Accused: “Thaçi”, “Veseli”, “Selimi”, “Krasniqi”, “all”.²⁸

C. FREQUENCY OF THE CASE-SPECIFIC CATEGORISATION IN LEGAL WORKFLOW

21. According to the current calendar for disclosure of Rule 102(1)(b) material, as established in Framework Decision on Disclosure, the SPO shall submit its requests for protective measures for this category of evidence, by Friday, 2 April²⁹ and Friday 7 May 2021, and shall disclose such material with redactions, if granted, within two weeks from the Pre-Trial Judge’s ruling in that respect.³⁰ The amount of material

²⁶ This menu should encompass all locations in the Confirmed Indictment and should also include the option “redacted”, in case the location to which the specific item of evidence refers cannot be revealed to the Defence, for the time being, due to ongoing protective measures.

²⁷ While only some of the modes of liability under Article 16(1) of the Law are charged in the present case, the menu should contain all of them for any future proceedings where such case-specific categories may be relied upon.

²⁸ The Court Management Unit has informed the Pre-Trial Judge that the case-specific categorisation of the evidence can be implemented in Legal Workflow. The release of Legal Workflow incorporating the changes envisaged in this decision is foreseen for 6 April 2021.

²⁹ As Friday 2 April 2021 is a public holiday, according to Rule 9(4) of the Rules the deadline falls on the next working day, namely Tuesday 6 April 2021.

³⁰ Framework Decision on Disclosure, para. 60.

subject to monthly requests for protective measures and the amount of material that does not require redactions, as well as the timeline of the latter's disclosure, are left to the SPO's discretion.³¹ As it stands, disclosure of Rule 102(1)(b) material shall be finalised by Monday, 31 May 2021.³²

22. Mindful that the case-specific categorisation adopted in the present decision may require additional time to be completed before a disclosure package is uploaded and released to the receiving Party, the Pre-Trial Judge considers it fair to amend the disclosure calendar for the Rule 102(1)(b) material. Therefore, the SPO shall submit its requests for protective measures, if any, for Rule 102(1)(b) material, by Tuesday, 6 April, Friday, 7 May, and Friday, 4 June 2021 and shall disclose such material with redactions, if granted, within four weeks from the Pre-Trial Judge's ruling in that respect. The amount of material subject to monthly requests for protective measures and the amount of material that does not require redactions, as well as the timeline of the latter's disclosure, remains at the SPO's discretion. In light of the amendment to the calendar, disclosure of Rule 102(1)(b) material shall now be finalised by Friday, 23 July 2021. With regard to any batch of Rule 102(1)(b) material that: (i) is already disclosed to the Defence;³³ (ii) is subject to an SPO pending request for protective measures (see F00212/CONF/RED);³⁴ and (iii) may be disclosed without protective measures, the SPO is at liberty to apply the case-specific categorisation at its earliest convenience, and no later than Friday, 23 July 2021.

23. Noting the request by the Veseli Defence that the SPO Pre-Trial Brief be filed in April 2021, the Pre-Trial Judge considers that the case-specific categorisation, in addition to the Standard Categories, will provide adequate guidance to the Defence

³¹ Framework Decision on Disclosure, para. 60.

³² Framework Decision on Disclosure, para. 60.

³³ Batches 16 and 22 have already been disclosed to the Defence and contain a limited amount of items (45 items in total).

³⁴ See KSC-BC-2020-06, F00212/CONF/RED, *Confidential Redacted Version of Fourth Request for Protective Measures*, 8 March 2021, confidential.

when reading the Rule 102(1)(b) material. Accordingly, the Pre-Trial Judge sees no reason to order the SPO to file its Pre-Trial Brief as early as April 2021.

24. Lastly, with regard to the material falling under Rule 104(1), (5) and (6) of the Rules, the Defence shall apply the case-specific categorisation, in addition to the Standard Categories, to each batch of any such material they choose to disclose, in accordance with a calendar to be issued by the Pre-Trial Judge at a later stage of the proceedings.

D. PROPOSED CHART AND ITS TIMING

25. With regard to the Proposed Chart, the Pre-Trial Judge considers it appropriate to retain it, particularly in light of the agreement between the Parties as to its format and timing, namely within 15 days from their respective Pre-Trial Briefs. In addition, the Proposed Charts, in conjunction with Pre-Trial Briefs and related material under Rule 95(4) and (5) of the Rules, will constitute useful guiding tools for the Trial Panel, in order to familiarise itself with the case and the evidence to be presented at trial by each Party.

26. The Pre-Trial Judge further considers that the case-specific categorisation to be undertaken by both Parties for their respective disclosed evidence will assist them in the preparation of their Proposed Charts and Pre-Trial Briefs, the timing of which shall be decided by the Pre-Trial Judge at a later stage.

V. DISPOSITION

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

- a. **DECIDES** to adopt the case-specific categorisation set out in paragraph 20 above;

- b. **ORDERS** the SPO to provide the Court Management Unit with the necessary details regarding the case-specific categorisation, including the list of locations that can be privy to the SPO and the Defence, respectively;
- c. **DIRECTS** the Court Management Unit to amend, as soon as possible, Legal Workflow in order to reflect the case-specific categorisation, as adopted;
- d. **ORDERS** the SPO to apply the case-specific categorisation set out in paragraph 20 above, in addition to the Standard Categories, for each batch of material disclosed under Rule 102(1)(b) of the Rules;
- e. **ORDERS** the SPO to follow the amended disclosure calendar for Rule 102(1)(b) material set out in paragraph 22 above;
- f. **ORDERS** the Defence, should it choose to disclose evidence, to apply the case-specific categorisation set out in paragraph 20 above, in addition to the Standard Categories, for each batch of material disclosed under Rule 104(1), (5) and (6) of the Rules; and
- g. **ORDERS** the SPO and Defence to submit their Proposed Charts within 15 days from their respective Pre-Trial Briefs and related material under Rule 95(4) and (5) of the Rules.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Friday, 12 March 2021
At The Hague, the Netherlands.