



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: 17 November 2020

Language: English

Classification: Confidential

**Prosecution submissions on the conduct of proceedings concerning the review of
the Indictment**

Specialist Prosecutor's Office

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I. INTRODUCTION

1. The Pre-Trial Judge should not make the Indictment¹ available to the Defence or permit the Defence to make Indictment-related submissions at the current stage of the proceedings.² This would be inconsistent with the Law³ and the Rules.⁴ There are no factors warranting a departure from the applicable framework. In particular, the detention of Mr GUCATI and Mr HARADINAJ (collectively, the 'Suspects') is based on the Arrest Decision⁵ and Arrest Warrants,⁶ copies of which have been provided to them. As such, the specific content of the Indictment is not necessary or even relevant to an effective review of their detention. Furthermore, disclosure of the Indictment to the Defence may adversely impact the integrity of evidence and may prejudice the SPO's ongoing investigations.

2. Should the Pre-Trial Judge nevertheless decide to make the Indictment available to the Defence at this stage of the proceedings: (i) the Statement of Facts should be redacted; and (ii) the Defence should not be permitted to make any submissions on the Indictment while it is being reviewed by the Pre-Trial Judge. Such an approach would inform the Defence of the specific crimes and modes of liability alleged in the Indictment, while ensuring that the proceedings remain expeditious rather than being waylaid by unnecessary, premature litigation.

¹ Annex 1 to Submission of Indictment for confirmation and related requests, KSC-BC-2020-07/F00063/A01, Strictly Confidential and *Ex Parte*, 30 October 2020 ('Indictment').

² See Order for Submissions on the Conduct of Proceedings Concerning the Review of the Indictment, KSC-BC-2020-07/F00065, 11 November 2020 ('Order'), para.13(a).

³ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.

⁴ 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.

⁵ Decision on Request for Arrest Warrants and Transfer Orders, KSC-BC-2020-07/F00012, Public, 24 September 2020 ('Arrest Decision').

⁶ Arrest Warrant for Hysni Gucati, KSC-BC-2020-07/F00012/A01, Confidential and *Ex Parte*, 24 September 2020; Corrected Version of Arrest Warrant for Nasim Haradinaj, KSC-BC-2020-07/F00012/A03/COR, Confidential and *Ex Parte*, 24 September 2020 (collectively 'Arrest Warrants').

II. BACKGROUND AND PROCEDURAL HISTORY

3. On 24 September 2020, pursuant to an SPO request,⁷ the Single Judge found that there is a grounded suspicion that the Suspects: (i) attempted to commit the offence of intimidation under Article 387 of the 2019 Kosovo Criminal Code, No.06/L-074 (“KCC”); (ii) committed the offence of retaliation under Article 388 of the KCC; and (iii) committed the offence of violating the secrecy of proceedings under Article 392 of the KCC.⁸ The Single Judge also found that there are articulable grounds to believe that there is a risk that the Suspects may flee, obstruct the progress of proceedings, or commit further crimes thereby necessitating their arrest and detention, in accordance with Article 41(6)(b) of the Law, and granted the request for their arrest and transfer.⁹

4. On 25 September 2020, the Suspects were arrested.¹⁰

5. On 29 September and 1 October 2020, Mr HARADINAJ¹¹ and Mr GUCATI¹² made their respective first appearances during which they were informed, *inter alia*, of: (i) the Single Judge’s finding of a grounded suspicion that they committed, or attempted to commit, the crimes of intimidation, retaliation and violation of the secrecy of proceedings; and (ii) the reasons why the Single Judge found articulable grounds to believe that their arrest is necessary. Both Suspects confirmed that they had previously been informed of the reasons for their arrest.¹³

6. On 27 October 2020, the Single Judge dismissed Mr HARADINAJ’s request for immediate release, finding, *inter alia*, that Mr HARADINAJ remained a flight risk and

⁷ Urgent Request for arrest warrants and related orders, KSC-BC-2020-07/F00009, Strictly Confidential and *Ex Parte*, with Strictly Confidential and *Ex Parte* Annexes 1-2, 22 September 2020. A confidential redacted version of this request, KSC-BC-2020-07/F00009/CONF/RED, was filed on 1 October 2020 (‘SPO Request’). No substantive information was redacted in this version.

⁸ Arrest Decision, KSC-BC-2020-07/F00012, paras 22, 24, 26.

⁹ Arrest Decision, KSC-BC-2020-07/F00012, paras 28-31, 36.

¹⁰ Notification of Arrest Pursuant to Rule 55(4), KSC-BC-2020-07/F00015, Public, 25 September 2020; Notification of Arrest Pursuant to Rule 55(4), KSC-BC-2020-07/F00016, Public, 25 September 2020.

¹¹ KSC-BC-2020-07, Transcript, Public, 29 September 2020, pp.4, 6-9.

¹² KSC-BC-2020-07, Transcript, Public, 1 October 2020, pp.6-11.

¹³ KSC-BC-2020-07, Transcript, Public, 29 September 2020, p.6; KSC-BC-2020-07, Transcript, Public, 1 October 2020, p.11.

that the risks that he may obstruct the progress of proceedings and may commit further crimes also remained.¹⁴

7. On the same day the Single Judge dismissed Mr GUCATI's request for bail, finding, *inter alia*, that: (i) in addition to the factors set out in the Arrest Decision, the notification of the arrest warrant and the SPO's commitment to file an indictment increases Mr GUCATI's incentive to flee; and (ii) the fact an indictment had not been filed did not undermine the Single Judge's assessment that arrest and detention are necessary in view of the risk that Mr GUCATI will obstruct proceedings and commit further crimes, and did not make continued detention unreasonable or disproportionate in the circumstances.¹⁵

8. On 30 October 2020, the SPO filed the Indictment. The Indictment was classified as strictly confidential and *ex parte* in accordance with Rules 85(4) and 86(2). The filing accompanying the Indictment set out a reasoned request for the temporary non-disclosure of the Indictment and related documents to the Suspects.¹⁶

9. On 11 November 2020, the Pre-Trial Judge filed the Order in which he informed the Suspects about the filing of the Indictment and requested submissions on the possibility of making it available to the Defence, if necessary with redactions, and on the possibility of allowing the Defence to make submissions on the Indictment while it is being reviewed by the Pre-Trial Judge.¹⁷

¹⁴ Decision on Request for Immediate Release of Nasim Haradinaj, KSC-BC-2020-07/F00058, Public, 27 October 2020, paras 21, 24, 26 ('Decision on Haradinaj request for release').

¹⁵ Decision on Application for Bail, KSC-BC-2020-07/F00059, Public, 27 October 2020, paras 14, 24 ('Decision on bail for Gucati').

¹⁶ Submission of Indictment for confirmation and related requests, KSC-BC-2020-07/F00063, Strictly Confidential and *Ex Parte*, 30 October 2020, paras 5-6 ('Filing Accompanying the Indictment').

¹⁷ Order, KSC-BC-2020-07/F00065, paras 5, 13.

III. SUBMISSIONS

A. THE INDICTMENT SHOULD NOT BE MADE AVAILABLE TO THE DEFENCE

(i) *Making the Indictment available to the Defence would be inconsistent with the Law and the Rules*

10. Under the Law and the Rules, the Defence is not entitled to receive an indictment or make related submissions unless the indictment has already been confirmed.¹⁸ The Rules expressly provide that, prior to the confirmation of an indictment, all documents and information submitted by the SPO to the Pre-Trial Judge during an investigation shall remain at the least confidential and *ex parte*,¹⁹ and that the SPO shall file an indictment confidentially and *ex parte* with the Pre-Trial Judge.²⁰

11. While the Law and the Rules foresee the possibility that arrest and detention may be ordered prior to the confirmation of an indictment,²¹ no alternative regime governing confirmation proceedings was adopted. Provisions governing the *ex parte* filing, distribution, and confirmation of an indictment, and of related litigation, apply regardless of whether Suspects are already in custody.

12. Accordingly, making the Indictment²² available to the Defence and permitting related submissions at the current stage of the proceedings would be inconsistent with the Law and the Rules. There are no unique, unforeseen, or other cogent reasons to depart from the clear wording in, and intention of, the applicable framework, which the Constitutional Court has found to comply with the fundamental rights set out in

¹⁸ Article 39(4) and (5); Rule 87(1). *See also* Section III(B)(ii) below.

¹⁹ *See* Rule 85, entitled 'Functions of the Pre-Trial Judge Prior to Confirmation of the Indictment', paragraph (4).

²⁰ Rule 86(2).

²¹ *See* Decision on Defence Challenges, KSC-BC-2020-07/F00057, 27 October 2020, paras 29-31.

²² The SPO understands the Order to refer solely to the possibility of making the Indictment, as contained in KSC-BC-2020-07/F00063/A01, available to the Defence, and not the Filing Accompanying the Indictment (KSC-BC-2020-07/F00063) or Annex 2 (KSC-BC-2020-07/F00063/A02) to this filing. Should the Pre-Trial Judge be minded to make these separate documents available to the Defence, the SPO reserves the right to make further submissions on such issues.

Chapter II of the Constitution.²³ In such circumstances, departure from the clear framework creates uncertainty, and a potentially dangerous precedent. As outlined below, doing so would also be unnecessary²⁴ and likely create duplicative litigation which would delay, rather than expedite, proceedings.²⁵

(ii) *The Indictment is not necessary to an effective review of the Suspects' detention*

13. Consistent with European Court of Human Rights ('ECtHR') jurisprudence, the specific content of the Indictment is not necessary or even relevant to an effective review of the Suspects' detention or for any other reason at this stage.²⁶

14. In particular, it is the Arrest Decision and Arrest Warrants, not the unconfirmed Indictment, which currently form the lawful basis for the Suspects' detention. The Suspects have access to the decision and warrants and, during their respective first appearances, were informed of the Single Judge's finding of: (i) a grounded suspicion that they committed, or attempted to commit, the crimes of intimidation, retaliation, and violation of the secrecy of proceedings; and (ii) articulable grounds to believe that their arrest is necessary.²⁷ Accordingly, the Suspects are already fully aware of the

²³ See Judgment on the Referral of the Rules of Procedure and Evidence Adopted by the Plenary on 17 March 2017 [...], KSC-CC-PR-2017-01/F00004, 26 April 2017, paras 141-167.

²⁴ See Sections III(A)(ii) and III(B)(ii) below.

²⁵ See Section III(B)(ii) below.

²⁶ In addressing alleged violations of article 5(2) of the European Convention on Human Rights (establishing that '[e]veryone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him'), the ECtHR has stated that while any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness, when a person is arrested on suspicion of having committed a crime, there is no requirement that the necessary information be given in a particular form or that it consists of a complete list of the charges held against the arrested person, see European Commission of Human Rights (Plenary), *X v. Federal Republic of Germany*, No.8098/77, Decision of 13 December 1978 on the admissibility of the application, para.3 (finding no violation of the applicant's fundamental procedural guarantees in remand proceedings where the applicant was only informed through an arrest warrant of certain, but not all, facts against him because there were sufficient reasons to detain the applicant, these reasons were known to him, and 'additional results of the investigations against him were thus superfluous in connection with his arrest and detention'); ECtHR, *Nowak v Ukraine*, No.60846/10, Judgment, 31 March 2011, para.63.

²⁷ KSC-BC-2020-07, Transcript, 29 September 2020, pp.4, 6-9; KSC-BC-2020-07, Transcript, 1 October 2020, pp. 6-11.

reasons for their detention. Indeed, on the basis of all the information currently available to them, the Suspects have challenged their detention and the Single Judge has dismissed these challenges.²⁸

(iii) *Making the Indictment available to the Defence may prejudice the SPO's ongoing investigations*

15. Making the Indictment available to the Defence at this stage of the proceedings may adversely impact the integrity of evidence, and may prejudice the SPO's ongoing investigations.²⁹

16. By making the Indictment available to the Defence, the Suspects would receive a clear, premature, indication of the nature and sources of evidence being relied upon, providing ample opportunity for them to seek to tamper with, distort, or destroy it. In this regard, as recently found by the Single Judge, there are concrete risks that the Suspects may obstruct the progress of proceedings and commit further crimes.³⁰

17. The SPO's power to conduct investigations against persons criminally liable for offences within the jurisdiction of the Specialist Chambers³¹ does not cease once an indictment has been submitted. The SPO has the authority to continue its investigation into the conduct of suspects pending confirmation of an indictment, including with a view to amending such indictment.³² Further, at this stage of the proceedings, the Pre-Trial Judge may request or permit the Specialist Prosecutor, *inter alia*, to present additional material in support of any or all charges³³ and, ultimately, the Pre-Trial Judge may decide to dismiss the Indictment in whole or in part.³⁴ Pursuant to Rule

²⁸ Decision on Haradinaj request for release, KSC-BC-2020-07/F00058, paras 21, 24, 26; Decision on bail for Gucati, KSC-BC-2020-07/F00059, paras 14, 24.

²⁹ Cogent reasons for the temporary non-disclosure of the Indictment and related documents were also set out in the SPO's filing accompanying the Indictment, *see* Filing Accompanying the Indictment, KSC-BC-2020-07/F00063, paras 5-6.

³⁰ Decision on Haradinaj request for release, KSC-BC-2020-07/F00058, paras 21, 24, 26; Decision on bail for Gucati, KSC-BC-2020-07/F00059, paras 14, 24.

³¹ *See* Article 38(1).

³² *See* Rule 90(1)(a).

³³ Rule 86(4).

³⁴ Article 39(2), Rule 86(5).

86(9), the non-confirmation of any charge in an indictment would not preclude the Specialist Prosecutor from subsequently filing an amended indictment or from including the same charge in an indictment supported by new evidentiary material.

18. Consequently, providing the Indictment to the Defence prior to any confirmation thereof may prejudice the SPO's ongoing investigation, *inter alia*, by revealing areas of investigative focus, and the nature of the evidence relied on in relation to the Suspects.

B. SHOULD THE INDICTMENT NEVERTHELESS BE MADE AVAILABLE TO THE DEFENCE, IT SHOULD BE REDACTED AND NO SUBMISSIONS THEREON SHOULD BE PERMITTED

(i) *Information other than that listing the crimes and modes of liability should be redacted*

19. While the SPO opposes the provision of the Indictment to the Defence at the current stage of the proceedings, should the Pre-Trial Judge nevertheless decide to make the Indictment available to the Defence, the Statement of Facts (paragraphs 4-46) should be redacted; only sections concerning the Accused and the Statement of Crimes should be provided.

20. Such redaction would mean that the Defence would be informed of the specific crimes and modes of liability included in the Indictment while the *ex parte* nature of the specific actions giving rise to these crimes and modes of liability as alleged by the SPO would be maintained. While not addressing all concerns,³⁵ this approach could mitigate certain of the risks to the integrity of the evidence and ongoing investigations as identified above.

(ii) *No submissions on the Indictment should be permitted*

21. Should the Pre-Trial Judge decide to make the Indictment available to the Defence in any form, the Defence should not be allowed to make submissions thereon while it is being reviewed by the Pre-Trial Judge. Allowing the Defence to make

³⁵ See Sections III(A)(i) and (iii) above.

submissions on the Indictment prior to confirmation would conflate the confirmation and pre-trial stages of proceedings and, as such, be inconsistent with the applicable framework, and contrary to the interests of justice.

22. The legal framework was clearly and deliberately designed to exclude the Defence from proceedings leading to the confirmation or dismissal of an indictment.³⁶ It is only after an indictment is confirmed and a suspect becomes an accused³⁷ that the Defence may, *inter alia*, challenge the jurisdiction of the Specialist Chambers, allege defects in the form of the indictment, and seek the severance of an indictment.³⁸

23. Allowing submissions on the Indictment by the Defence prior to its confirmation would not only be premature, given that, at this stage, the indictment may change or be dismissed,³⁹ but contrary to the fairness and expeditiousness of the proceedings.

24. For example, first, it is in the interest of fair and expeditious proceedings for the confirmation process to be as brief as possible, this is especially so where the Suspects are in detention. Relatedly, a number of pre-trial deadlines, including in particular related to disclosure, begin to run only once an indictment is confirmed,⁴⁰ reinforcing the interest of all concerned in a speedy confirmation process. Defence

³⁶ The legal framework differs to that, for example, governing the confirmation procedure at the ICC where the person charged has an explicit right, *inter alia*, to be provided with the document containing the charges on which the Prosecution intends to bring the person to trial, to be informed of the evidence on which the Prosecution intends to rely at the confirmation hearing, and to object to the charges, challenge the evidence presented by the Prosecution and present evidence at the confirmation stage, *see* Article 61 of the ICC Statute, and Rule 121 of the ICC Rules of Procedure and Evidence.

³⁷ *See* Rule 2(1) defining 'Accused' as '[a] natural person against whom one or more charges have been confirmed pursuant to Article 39(2) of the Law and Rule 86'.

³⁸ *See* Rule 97(1).

³⁹ *See* Article 39(2), Rule 86(4) and Rule 90(1)(a).

⁴⁰ *See, e.g.*, Article 39(5), Rule 87(1) and (6), Rule 92(1) and (2), and Rule 95. *See also* Rules 102-103.

submissions and litigation at this stage - which there would be no meaningful way to circumscribe - could only slow the confirmation process.

25. Second, it is not apparent that Defence submissions at this time would in any way expedite a subsequent pre-trial phase.⁴¹ Indeed, they could only be duplicative of the motions which the Defence would be entitled to bring following confirmation, thereby simply creating a double round of litigation, and generating uncertainty regarding procedure, including rights of appeal.

26. In summary, fairness and expeditiousness are threatened if the Parties are permitted to engage in unnecessary, duplicative litigation unforeseen by the applicable framework.

27. There is no prejudice to the Suspects' rights since: (i) they are able to challenge the lawfulness and basis for their detention and request release on the information already available to them; and (ii) should the Indictment be confirmed, the Defence will have rights to, *inter alia*, disclosure and to make preliminary motions as envisioned by the Law and the Rules.

IV. CLASSIFICATION

28. Pursuant to Rule 82(4), these submissions are classified as 'Confidential'. Considering previous, public submissions made concerning the filing of the Indictment,⁴² the SPO does not object to the reclassification of the Order or these submissions as public.⁴³

V. RELIEF REQUESTED

29. For the foregoing reasons, the Pre-Trial Judge should not make the Indictment available to the Defence. Should the Pre-Trial Judge nevertheless be minded to do so,

⁴¹ Indeed the Pre-Trial Judge has expressly indicated that Defence submissions would be 'without prejudice' to the Suspects' exercise of rights under the Law and the Rules, Order, para.11.

⁴² First Appearance of Hysni GUCATI, Transcript, 29 September 2020, p.15; First Appearance of Nasim HARADINAJ, Transcript, 1 October 2020, pp.12-13.

⁴³ The SPO notes, however, that filing KSC-BC-2020-07/F00067, filed by the Defence for Mr Haradinaj, was inappropriately and prematurely classified as public, contrary to the requirements of Rule 82(4).

the Indictment should be redacted as set out above, and the Defence should not be allowed to make any submissions thereon while it is being reviewed by the Pre-Trial Judge.

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Tuesday, 17 November 2020

At The Hague, the Netherlands.