

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

Before: Pre-Trial Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Nasim Haradinaj

Date: 7 January 2021

Language: English

Classification: Public

Defence Submissions for First Status Conference on Behalf of Nasim Haradinaj

Specialist Prosecutor

Jack Smith

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INTRODUCTION

1. Pursuant to the Order for the First Status Conference (“Order”),¹ Specialist Counsel for Nasim Haradinaj (“Haradinaj”) hereby provides written submissions, where appropriate, on the agenda items identified by the Pre-Trial Judge² and related matters.
2. Further, having had sight of the Submissions of the Specialist Prosecutor’s Office (“SPO”) in response to the Order,³ and have received Disclosure Package 2 and 3 and a draft Rule 109(c) Disclosure Chart, Counsel for Haradinaj is able to address certain relevant issues contained therein, but raises a number of issues that cannot be responded to at this stage.
3. As a preliminary point, the Defence is not in a position to advise, at this stage, in terms of a proposed trial date, or likely length of trial, as there remain a number of matters that require resolution, some of have been addressed by the SPO in its written submissions. It would be quite premature to set out a rigid timetable at this stage until the issue of further disclosure and the adopted reduction regime has been finalised. In response to the proposed start date raised by the SPO of ‘Spring’ of 2021, it is respectfully submitted

¹ Order Setting the Date for the Plea Hearing and the First Status Conference and on Related Matters KSC-BC-2020-07/F00089, 18 December 2020.

² Annex 1 to the First Status Conference Order KSC-BC-2020-07/F00089/A01, 18 December 2020.

³ KSC0BC-2020-07/F00096

that such a start date is wholly unrealistic taking into account a number of factors and it is therefore anticipated that early to mid 'Summer' 2021 is a more realistic estimation, having regard to the following:

- a. The extent of Disclosure is as yet unknown;
- b. The result of those further investigations being undertaken by the SPO is unknown; and
- c. The length of any investigation to be undertaken by the Defence is unknown having regard to points (a) and (b) above.

Submissions

General Questions

4. In terms of points (d) and (e) of the order, the Defence can confirm that at this stage it does anticipate undertaking investigations into relevant issues; however, the extent of which will depend on the issues disclosed.
5. It is anticipated that any such investigation will last for one to two months; however, and again, we cannot provide a more finite estimation at this stage until the SPO complies with its disclosure obligations and we can assess the extent of the investigation that will be required. It is to expected that any defence investigations, and for that matter further prosecution investigations, will be impacted by the uncertainty of the COVID-19 pandemic and the

restrictions imposed on travel. The Court is invited to take this into account in any future scheduling order.

6. In terms of point (e) of the order, the Defence is not in a position to indicate whether notice of alibi and/or any other grounds excluding criminal responsibility will be adduced at this stage, other than to say it is the intention of the Defendant to enter Not Guilty pleas to all counts on the indictment.
7. As far as those points raised by the SPO under this head, the Defence would comment as follows.
8. In terms of the SPO submission that there are further investigative steps ongoing, the Defence would ask:
 - a. When it anticipates those steps being completed; and
 - b. When the SPO will be in a position to disclose any evidence arising out of those further investigative steps.
9. The Defence notes the position of the SPO in that these steps are unlikely to affect the speedy conduct of proceedings, and it is hoped that this is accurate and realistic; however, without answers to the two questions at point 8 above, it is unclear how this can be submitted with any certainty.
10. In regard to the above, the SPO will remain mindful of its obligation and the Court of its overriding duty to ensure that the defendant receives a fair trial

and that any investigative measures are concluded and further evidence disclosed well in advance of the start of the prosecution case to allow for defence case preparations.

Rule 102(1)(a) Material (Supporting Material to the Indictment)

11. The Defence are not asked to comment upon any specific issues under this head of the order, however, having had sight of the submissions of the SPO, the Defence would at this stage, comment as follows.
12. The Defence confirms receipt of the documents as per paragraph 6 and Table A of those documents and does not seek to make any further submissions at this stage.

Rule 102(1)(b) Material (Additional Material Intended for Use at Trial)

13. The Defence anticipates further material being disclosed by the SPO; however, it is requested that any such material is disclosed further in advance than the 30-days before trial, which, it is respectfully submitted, is wholly inadequate.
14. It is respectfully submitted that the 30-day time period on disclosure of material that the SPO seeks to rely on at trial is not consonant with the fundamental requirement of ensuring the time and facilities to prepare as guaranteed under the applicable legal framework that regulates these proceedings. Subject to the volume of evidence that might be disclosed, a

more realistic timeframe will need to be considered as this is considered to be grossly insufficient to prepare this matter adequately for trial, having regard to the fact:

- a. Detailed instructions will need to be taken from the Defendant;
 - b. Further Defence enquiries may need to be undertaken; and
 - c. We are still dealing with a global pandemic which hampers international travel and movement, it is entirely feasible that the current situation will remain at least for the immediate months, which will impact any investigations to be carried out, and the ability for the Defence case to be prepared.
15. The Defence would therefore request that the situation in terms of further SPO investigations and disclosure is kept under constant review with further Status Conferences being scheduled prior to any trial date being fixed, with clear directions for disclosure that take into account the volume of that disclosure so as to ensure that adequate time is allowed to prepare the case for trial.

Rule 102(2) Material (Evidence Material to Defence Preparation, and Material Obtained from or Belonging to the Accused)

16. The Defence do not seek to make any submissions at this stage under this section.

Rule 103 Material (Exculpatory Evidence)

17. The Defence notes the position of the SPO in terms of the disclosure of exculpatory evidence, however, as much as the rolling and ongoing obligation to disclose, the Defence would also seek a direction that the exculpatory evidence known of at this stage, is disclosed by 19 February 2021 latest.

Rule 107 Material (Protected Material)

18. The Defence doesn't seek to make any submissions at this stage.

Procedure for Disclosure of Evidence

19. The Defence tentatively agrees with the proposal of the SPO at this stage.

Redaction Regime

20. The Defence takes no issue with the redaction regime as per the ruling in *Mustapha*.
21. It is wholly unclear as to why the SPO prefers the position as per the regime adopted in *Hashim Thaçi & Others*, and further, the SPO has not justified why the regime in *Thaçi* is more appropriate in the instant case, noting that the

Single-Judge has already identified *Salih Mustapha* and invited submissions on that basis.

22. The Defence would therefore seek to adopt the position in *Mustapha* rather than *Thaçi*.

Procedure for Disclosure of Evidence

23. The Defence tentatively agrees with the proposal of the SPO at this stage.

Rule 109(c) Disclosure Chart

24. The Defence tentatively agrees with the proposal of the SPO at this stage.

Other Matters

25. No further submissions are made at this time.

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