

**In:** KSC-BC-2020-07

**The Prosecutor v. Hysni Gucati and Nasim Haradinaj**

**Before:** Court of Appeals Panel

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Counsel for Hysni Gucati

**Date:** 7<sup>th</sup> January 2021

**Language:** English

**Classification:** Public

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**Defence Submissions for the First Status Conference**

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## INTRODUCTION

1. Pursuant to the Order Setting the Date for the Plea Hearing and the First Status Conference and on Related Matters dated 18 December 2020 ('the Order'), the defence on behalf of Mr Gucati hereby provides written submissions on the agenda items identified by the Pre-Trial Judge as directed towards the defence, the redaction regime and related matters<sup>1</sup>.
2. The information provided is necessarily provisional at this time, given that limited disclosure has been provided by the SPO. The SPO has indicated that their investigation is ongoing<sup>2</sup> and further evidence will be served<sup>3</sup>. Disclosure of (i) evidence material to defence preparation, (ii) material obtained from or belonging to the accused, and (iii) exculpatory material remains outstanding<sup>4</sup>. Accordingly, the defence are not in a position to assist, at this stage, in terms of a proposed trial date, or likely length of trial.
3. In the circumstances, further Status Conferences should be held post disclosure of the above outstanding matters.
4. Subject to the above caveats, and without prejudice, the defence presently envisage undertaking extensive investigative work in preparation for trial. Preparation will include (but not be restricted to) work relating to the following matters.

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<sup>1</sup> *Order Setting the Date for the Plea Hearing and the First Status Conference and on Related Matters*, KSC-BC-2020-07/F00089 and *Annex 1 thereto*, KSC-BC-2020-07/F00089/A01

<sup>2</sup> *Prosecution Submissions for First Status Conference*, KSC-BC-2020-07/F00096 at paragraphs 3, 5, and 10

<sup>3</sup> *Prosecution Submissions for First Status Conference*, KSC-BC-2020-07/F00096 at paragraphs 3, 5, 9, 10, and 11

<sup>4</sup> *Prosecution Submissions for First Status Conference*, KSC-BC-2020-07/F00096 at paragraphs 13 to 15

5. The defence anticipate that the further material to be disclosed will include copies of the documentation seized by the SPO on 8, 17 and 22 September 2020 and referred to in the Decision on Confirmation of the Indictment as Batch 1, Batch 2 and Batch 3<sup>5</sup>, and as the First Disclosure, the Second Disclosure and the Third Disclosure, or the “Confidential Information” in the Indictment itself<sup>6</sup>. Unhelpfully, the amount of material contained therein is not indicated by the SPO in the ‘Prosecution Submissions for first Status Conference’ (although the material has been in their possession since before the arrests of the defendants).
6. The defence put the SPO to strict proof that the documentation seized and referred to as Batch 1, Batch 2 and Batch 3, or the First Disclosure, the Second Disclosure and the Third Disclosure, or the “Confidential Information”, is genuine and contains protected information. The SPO will be required to demonstrate the origin and provenance of the same, by way of an audit trail from the creation of each document to its arrival at the KLA WVA HQ. The defence will seek to scrutinise the same in detail.
7. To the extent that the person(s) making disclosure of the above documentation to the KLA WVA HQ was an agent of/working with/associated with the SPO, the defence put the SPO to strict proof of the absence of incitement and a breach of the right to a fair trial under Article 6 of the European Convention on Human Rights<sup>7</sup>.
8. The defence anticipate that the SPO will disclose the seized CCTV footage of the person(s) making the disclosure of the above documentation to the KLA WVA HQ, and details of the attempts made by the SPO, if any, to identify and trace the same.

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<sup>5</sup> *Decision on the Confirmation of the Indictment*, KSC-BC-2020-07/F00074 at paragraph 100

<sup>6</sup> *Redacted Indictment*, KSC-BC-2020-07/F00075/A02 at paragraphs 8 to 19

<sup>7</sup> *Teixeira de Castro v Portugal*, 28 EHRR 1010, ECtHR

9. Whereas the Indictment is notably silent as to the person(s) who made the disclosure of the above documentation to the KLA WVA HQ, the Indictment nevertheless contains criminal allegations against unnamed 'Associates' and 'certain others' and 'others' who are said to have participated in offences subsequent to disclosure of that material to the KLA WVA HQ<sup>8</sup>.
10. As noted by the Pre-Trial Judge in the Decision on the Confirmation of the Indictment, the Indictment must provide the Accused with sufficient information to understand clearly and fully the nature and cause of the charges against him or her, with a view to preparation of the defence<sup>9</sup>. The SPO should identify to the defence those persons, so that the defendant can understand clearly and fully the nature and cause of the charges against him and prepare his defence accordingly.
11. The Decision on the Confirmation of the Indictment sheds *some* light as to the unnamed targets of those SPO allegations. It is clear from the Decision on the Confirmation of the Indictment that those the SPO accuses of participating with the defendant in offences include 'certain members of the press', broadcasters, and news organisations<sup>10</sup>. The SPO should identify to the defence those persons alleged to have participated with the defendant in the offences charged, so that the defendant can understand clearly and fully the nature of the charges against him and prepare his defence accordingly.
12. The defence refutes this wide attack made by the SPO upon the media, and others, in Kosovo, and the work presently envisaged to be undertaken by the

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<sup>8</sup> *Redacted Indictment*, KSC-BC-2020-07/F00075/A02 at paragraphs 25, 26, 28, 29, 30, 31, 34, 39, 41, 42, 43, 44, 45 and 46

<sup>9</sup> *Decision on the Confirmation of the Indictment*, KSC-BC-2020-07/F00074 at paragraph 26

<sup>10</sup> *Decision on the Confirmation of the Indictment*, KSC-BC-2020-07/F00074 at, for example, paragraphs 135 and 139

defence includes, and is not limited to, extensive investigations with a view to obtaining evidence from those other participants in the chronology.

13. In the circumstances, the suggestion from the SPO that there is 'no reason why trial in this matter could not be scheduled to commence in the spring' of this year is wholly unrealistic. The work provisionally envisaged, including but not restricted to work in relation to the matters identified above, will take significant time (not helped by COVID-19 related travelling restrictions extending well into 2021), as will the taking of meaningful instructions from the defendant. The defence are conscious that the outstanding investigative work being undertaken by the SPO includes 'ongoing analysis of seized electronic items'. Although the outcome of that analysis is not presently known, such material, if relied upon, has the potential to add further significant burden to the defence preparation, involving complex forensic issues as to seizure procedures and expert evidence.

SUBMISSIONS ON PARAGRAPHS 1 TO 7 OF ANNEX 1 TO THE ORDER AND  
PARAGRAPH 22 OF THE ORDER

14. In addressing paragraphs 1 (d) and 1 (e) of Annex 1 to the Order, specifically the defence envisage undertaking extensive investigative work in preparation for trial, including but not limited to work relating to the issues identified above. The defence are not able to confirm at this stage whether it will provide notice of alibi and/or any other grounds excluding criminal responsibility.
15. In relation to further disclosure, as indicated above the defence expect such to include the documents identified as Batch 1, Batch 2 and Batch 3 (or the First

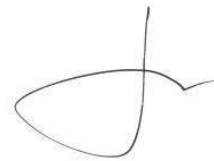
Disclosure, the Second Disclosure and the Third Disclosure, or the Confidential Information). This evidence will inevitably lead to extensive investigative work, involving travel. It is not possible to indicate an exact amount of time to conclude investigative activities, particularly with current travelling restrictions in place.

16. In relation to rule 102(1)(a) the defence confirm receipt of documentation identified as Disclosure 2 and 3 (not to be confused with the documentation identified as Batch 1, Batch 2 and Batch 3, or the First Disclosure, the Second Disclosure and the Third Disclosure, or the Confidential Information, which have not been served upon the defence). The defence make no submissions about Disclosure 2 and 3 at this stage, but reserve the right to raise such concerns as may arise as matters progress.
17. The defence submit that the disclosure to be served under rule 102(1)(b) should be served as soon as possible, and in any event well in advance of trial (30 days pre-trial is wholly inadequate). As indicated above there are many investigative steps that are likely to be undertaken and instructions to be obtained. The defence specifically draw attention to the SPO's ongoing "analysis of seized electronic items" - a date for disclosure of the results thereof should be identified.
18. The defence also request that a date is set down for the disclosure of material under rule 102(2) and rule 103.
19. The defence do not make any submissions at this stage regarding rule 107 material.

20. In relation to paragraph 7 of Annex 1 to the Order setting the Date for a Status Conference and for Submissions<sup>11</sup> and the proposal of the SPO in response thereto<sup>12</sup>, the defence do not object to the proposal of the SPO at this stage, but reserve the right to raise such concerns as may arise as matters progress.

21. In relation to paragraph 22 of the Order itself, the defence do not object to the proposed redaction regime set out in paragraphs 73-89 of the Framework Decision on Disclosure of Evidence and Related Matters, 9 October 2020 in *Prosecutor v Salih Mustafa*<sup>13</sup>, but reserve the right to raise such concerns as may arise as matters progress.

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<sup>11</sup> *Annex 1 to Order Setting the Date for a Status Conference and for Submissions*, KSC-BC-2020-07/F00089/A01 at paragraph 7

<sup>12</sup> *Prosecution Submissions for first Status Conference*, KSC-BC-2020-07/F00096 at paragraph 18

<sup>13</sup> *Framework Decision on Disclosure of Evidence and Related Matters*, KSC-2020-05/F00034, at paragraphs 73-89

7<sup>th</sup> January 2021

Cardiff, UK