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
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Language:	English
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Defence Reply to Prosecution Response to Preliminary Motion

Specialist Prosecutor

Jack Smith

Counsel for Nasim Haradinaj

Toby Cadman

Carl Buckley

Counsel for Hysni Gucati

Jonathan Elystan Rees QC

Huw Bowden

I. INTRODUCTION

1. On 10 February 2021, the SPO filed its 'Consolidated Prosecution Response to Preliminary Motions'.[1]

2. The Defence for Mr. Haradinaj seek to reply to that consolidated response, noting that any such reply ought to be limited to issues raised within the response.

3. On that basis, the Defence, without prejudice to that which has been previously submitted and argued concerning the submitted defects within the indictment, seek to limit its submissions to the specifics of the aforementioned reply.

II. BACKGROUND

4. The relevant background has, it is submitted, already been adequately highlighted in the substantive submissions concerning the challenge to the indictment and therefore, there is no intention rehearse the same within this reply.

[1] KSC-BC-2020-07/F00120

5. Rather, where any elements of the background to this submission or chronology are deemed relevant, they will be highlighted and addressed specifically within the body of the text.

III. THE LAW

6. Similar to the position adopted in terms of section II above, the relevant 'law' has already been highlighted in the previous and substantive submission, and therefore, there is no intention to rehearse the same here, but again, where it is relevant, it will be dealt with specifically within the submissions below.

IV. SUBMISSIONS

7. These submissions in reply will endeavour to follow, where possible, the same format as the SPO's Consolidated Response for ease of reference.

(a) Batches 1-3 Constitute Supporting Material

8. The SPO submits at paragraph 2 that the material seized from KLA WVA was not itself relied upon as 'supporting material' to the indictment, and therefore is not disclosable per Rule 102(1)(a).

9. The Defence would submit however that the material seized from the KLA WVA is the very foundation of the indictment, as it is abundantly clear that it is upon this evidence that the indictment is based, namely alleging that the contents contained within that material is the basis for the charges.

10. It is respectfully submitted that it is simply not enough to say that because the evidence wasn't categorised as 'supporting material' it therefore isn't, when the reality of the matter is that the material is the supporting evidence as without this there could be no indictment.

11. Further, the statement of the SPO investigator who is said to have assessed the material seized, refers specifically to that material, and therefore again, the material must be read as being part of the 'supporting evidence' to the indictment.

12. The SPO argues, at Section B of its response, that "*the Indictment pleads the material facts necessary to fulfil the elements of the alleged crimes and modes of liability*"[2] and further argues that the material is unnecessary for Defence preparations. It is respectfully submitted here that it is not for the SPO to make such a determination. In *Lubanga*,[3] albeit addressing a different category

[2] Case 6 Order, KSC-BC-2020-06/F00010, para.15

[3] International Criminal Court, ICC-01/04-01/06 OA 13, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the

of evidence, both the Trial and Appeals Chamber ruled that it was for a judge and not the prosecution to resolve the conflict between confidential material and disclosure obligations. In *Lubanga*, the Prosecution sought to withhold material it considered non-material. However, it is clear that (a) it is not for the prosecution to determine materiality; and (b) a potentially exculpatory document may be material, even if it contributes only slightly to a proper defence, it may be more significant in combination with other evidence.[4]

13. The Defence argued that a stay of proceedings was necessary, following the principle applied in *Lubanga*, on the materiality point that it was not for the SPO to determine, unilaterally, what is material to a defence.

(b) Rule 75(4)

14. The Defence would also raise a concern that the SPO suggests that the submission previously made is bordering on the 'frivolous' and refers to Rule 75(4) in footnote 9 of those submissions.

15. The Defence would raise its concern at the tacit threat being made by the SPO.

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accused, together with certain other issues raised at the Status Conference on 10 June 2008," at para. 45 ('Lubanga First Stay of Proceedings Appeal Judgment').

[4] Whiting, A., *Lead Evidence and Discovery before the International Criminal Court: The Lubanga Case*, UCLA Journal of International Law and Foreign Affairs, 14(1), 202-234, at p. 231.

16. The submissions made by the Defence are appropriate and address a very real disclosure concern; a concern that is the subject of separate submissions as per the order of the Pre-Trial Judge in the 'Framework Decision', and therefore cannot be seen to be frivolous.

17. Mr. Haradinaj has a right to challenge the indictment as per Rule 97(1)(a), and further, given the issues raised within the substantive submissions, namely the unresolved disclosure issue, has a further right to raise Rule 110 whilst that issue is still being considered.

18. The SPO can oppose or object to those submissions by way of responding to the legal and factual issues.

19. It is respectfully submitted that there will be opposition to Defence argument at times by the SPO, and *vice versa*, as one would expect in an adversarial process. That adversarial process must allow each party to present its case under the same conditions and without unnecessary procedural obstacles. The equality of arms is an essential mechanism for ensuring fairness.

20. The submissions advanced by the Defence are entirely proper, and foreseen by the applicable legal and constitutional framework, and to raise the prospect of imposing a financial penalty for upholding a fundamental duty as Specialist Counsel in safeguarding the rights of an accused is, in the first

instance, wholly improper, and secondly, an effort to silence the Defendant and prevent him from defending himself against the indictment brought.

21. The SPO appears to take issue with the Defence application to stay proceedings until such time as the question of disclosure has been properly addressed by the Court by way of a further order. The Defence was invited to put forward argument as to the disclosure regime. The SPO has taken the position that it will **not** disclose material within its possession and has advanced argument for adopting such a position. The Defence does not accept that position and has set out its arguments. That is an entirely appropriate approach to take and one that is envisaged by the Rules. It is a foreseeable consequence of failing to disclose material that one party seeks to scrutinise and that has been designated as central to the other party's case. To use the threat of taking proceedings aimed at imposing a financial penalty as a result of taking legitimate points foreseen under the applicable legal framework, that the Defence is entitled to make, is highly improper.

22. It is important that Counsel, for either party, are able to take legitimate points of law in an atmosphere absent hostility and coerciveness of threatened censorship.

(c) The SC has jurisdiction over the offences and modes of liability referenced in the Indictment

23. The final sentence of paragraph 3 of the SPO's response submits that on account of the Defence[5] not seeking leave to appeal a previous decision,[6] and that on account of the Defence failing "*to demonstrate any error of reasoning or that reconsideration is otherwise necessary to avoid justice*", pursuant to Rule 79(1), any submission on the indictment is impermissible as the matter has already been litigated.

24. Rule 97(1) is clear in that it permits preliminary motions pursuant to Rule 97(1)(a)-(c) inclusive, to be filed "*within (30) days from the disclosure of all material and statements referred to in Rule 102(1)(a)*".

25. Notwithstanding and without prejudice to the issues already raised in terms of whether the SPO has complied with Rule 102, the Defence submissions filed,[7] have been filed in compliance with Rule 97(1).

26. At the stage the SPO refers to, disclosure had not been effected.

27. Further, nowhere in Rule 97 does it refer to only one preliminary motion being allowed, Rule 97 itself referring to "*motions*" and therefore in the plural, anticipating that there may be more than one filed.

[5] It ought to be noted that Mr. Haradinaj was represented by a different legal team at that stage.

[6] *Decision on Defence Challenges*, KSC-BC-2020-07/F00057, 27 October 2020

[7] Haradinaj Preliminary Motion, KSC-BC-2020-07/F00116

28. Further, the submissions filed,[8] are not a 're-litigation' as submitted by the SPO, but rather, the first opportunity that issues have been raised post when the SPO maintain that they have complied with their disclosure obligations.

29. Accordingly, the SPO submission on this point is without merit.

(d) References to intimidated 'witnesses and/or their family members' and 'serious consequences for the witnesses' in paragraphs 22, 32, and 35 of the Indictment

30. At paragraph 16 of the SPO's response, it maintains that "*The persons intimidated as a result of the Accused's conduct are identified by group*" and therefore "*further detail is unnecessary*".

31. Respectfully, this cannot be correct.

32. If it is to be maintained that an individual has been intimidated and/or threatened and/or put at risk, evidence must be adduced that demonstrates precisely who and how a witness has been affected in such manner.

33. Otherwise, the allegation is wholly ambiguous and displays a lack of specificity.

[8] *Ibid*

34. The Defendant cannot challenge the allegation that he has intimidated and/or threatened a witness if he is unaware of who that witness is and how it is that they have been threatened or intimidated.[9] The offence of 'threat' can only be made out if there is 'communicated intent' to inflict 'harm or loss' in a way that could 'deter or influence' the witness from testifying, providing written evidence or documentation or complying with a court order. The offence of 'intimidation' constitutes a direct, indirect or potential threat to a witness which may influence a witness's testimony.[10] It is submitted that it is a crime of specific intent and requires not only acting knowingly and wilfully, but with specific intent to interfere with the administration of justice. Therefore, it must follow that the allegation cannot be broadly stated as against such a wide class or group of individuals.

35. The position maintained by the SPO at paragraph 17 of its response that "*all material facts have been pleaded with sufficient detail in the Indictment*", is therefore patently incorrect.

36. Finally, and again with reference to paragraph 17 of the SPO's response, the suggestion that "*any amendment of the Indictment at this stage to include details*

[9] *Prosecutor v. Haraqija and Morina*, Judgment on Allegations of Contempt, 17 December 2008, para. 18; *Prosecutor v. Beqaj*, Judgment on Contempt Allegations, 27 May 2005, para. 16; Archbold International Criminal Courts, 5th Edition, 16–77 – 16–80, pp. 1608-1610.

[10] Ibid.

beyond the material facts already pleaded would be unnecessarily formalistic and threaten the fairness and expeditiousness of the proceedings", is demonstrably wrong.

37. Any amendment proposed is not a 'pointless technicality',[11] nor does it threaten the expeditiousness of the proceedings.

38. It is a fundamental requirement that the Defendant is aware of the charge, and the nature of that charge, in the instant case, it is submitted that the nature of that charge includes those individuals who are said to have been intimidated and how it is that the Defendant has intimidated those specifically.

39. Otherwise, how can the Defendant possibly be expected to challenge the account of an individual absent knowledge of what that account is.

40. At the risk of rehearsing the point further, the Defendant, without the indictment being amended and further disclosure obligations being placed on the SPO, is precluded from bringing a proper challenge to the allegation on this point, as entitled, and thus his rights pursuant to Article 6 of the Convention have been, and will continue to be, breached.

[11] *Prosecutor v. Krnojelac*, IT-97-25, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999.

VII. CONCLUSION

41. The Defence for Mr. Haradinaj maintain those submissions made within the substantive preliminary motion.

42. Further, and for the avoidance of doubt, the response of the SPO is rejected in its entirety and the failure to address a point ought not to be taken as accession.

43. Accordingly, for the reasons already outline in the substantive submission, and built upon where appropriate above, the relief requested within that substantive filing is adopted and reaffirmed here.

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Toby Cadman **Carl Buckley**

Specialist Counsel **Specialist Co-Counsel**