

**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:**                         23 February 2021

**Language:**                 English

**Classification:**            **Confidential**

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**Defence Submissions Following Order Setting the Date for the Second  
Conference and Related Matters (KSC-BC-2020-07/F00129)**

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## I CLASSIFICATION

1. Out of an abundance of caution, this submission has been classified as 'CONFIDENTIAL', given the issues raised at **Part VI** below.
2. However, the Defence for Mr. Nasim Haradinaj are content for this submission to be public, and submit that it should be made public.

## II. INTRODUCTION

3. On 17 February 2021, the Pre-Trial Judge issued its Order 'Setting the Date for the Second Status Conference and Related Matters'.<sup>1</sup>
4. Within that Order, the Defence (and the Specialist Prosecutor's Office ('SPO')) were invited to make submissions on various issues as cited.
5. The Defence now seeks to make the following observations on those points in the Order raised by the Pre-Trial Judge.
6. Further, the Defence takes this opportunity to request disclosure of further evidence following recent revelations within the press, as per **Part VI** below, as such matters have a direct impact on these proceedings and concern matters that are subject to ongoing legal argument. It is of serious concern

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<sup>1</sup> KSC-BC-2020-07/F00129

that it appears decisions have been made, outside of legal argument in open and adversarial proceedings, that have a fundamental impact on the Defendant's ability to receive a fair trial.

### III. PROCEDURAL BACKGROUND

7. The procedural background as highlighted within the **Order** of the Pre-Trial Judge is noted, and adopted for the purposes of these submissions without being further rehearsed.
8. Where there is a need to address a specific element of that procedural background and/or chronology, that specific element will be addressed within the body of the submissions below.

### IV. THE LAW

9. As per the position set out at **Part II** above in respect of the procedural history, the applicable law in respect of these submissions is addressed within the **Order** of the Pre-Trial Judge and therefore, there is no need to rehearse the same here.
10. Again, where reference to the law is necessitated, it will be dealt with in the context of the specific issue being addressed.

## V. ISSUES OF DISCUSSION

*Whether Rule 102(1)(b) has been undertaken*

11. It is fully anticipated that the SPO will maintain the position that Rule 102(1)(b) disclosure has been completed, following the service of 'Disclosure 7' of 19 February 2021.
12. It is noted that no schedule has been provided, but rather, 379 items have been disclosed with no note of what they are nor what they relate to and as noted by the Defence for Mr. Gucati at paragraph 3(a) of its **Written Submissions on behalf of Hysni Gucati for the Second Status Conference and Related Matters** the SPO has failed to provide the statements of the 10 witnesses to be called at trial.
13. It is in any event submitted that the question cannot be answer until the Chamber has ruled upon the issue of disclosure pursuant to the submissions filed regarding that which has been referred to as 'the seized material', namely Batches 1, 2, and 3 of the information that purports to have been leaked from the SPO. The Defence for Mr. Haradinaj endorses and adopts the position set out by the Defence for Mr. Gucati at paragraph 3(b) of its written submissions on the improper reliance on summaries and the wholesale withholding of several hundred pages of documents. The Defence for Mr. Haradinaj agrees

with the position advocated that Batches 1, 2 and 3 are to be regarded as exhibits and should be available to the Defence under Rule 102(1)(b)(iii).

14. It is submitted that the SPO has now served six sets of disclosure that constitute, as has been expressed in other proceedings before this court as an “unorganised and chaotic way of disclosing evidence”. The Defence has received no index, no schedule of evidence, no indication of relevance. It is recognised that the SPO has been directed by the Pre-Trial Judge to serve an ‘evidence chart’, however, the Pre-Trial Judge declined to direct the SPO to do this on an ongoing basis and therefore this piecemeal disclosure that amounts to little more than an ‘evidence dump’ is hampering the Defence’s ability to understand the prosecution case, scrutinise whether it can meet its burden and prepare a defence.
15. The SPO has informally notified the Defence that there is an automated function within Legal Workflow, the system for disclosure, that allows for a table to be generated as a Microsoft Excel file. Regrettably, it does not appear to be quite so straightforward, but if it were to be, as the SPO submits, it begs the question as to what prevents the SPO from doing precisely this when they make a disclosure and serving a schedule with each disclosure.
16. It is respectfully submitted that the SPO’s approach to its obligation to secure and safeguard a fair trial and comply with the principle of equality of arms,

through full and proper disclosure, is having a direct impact on these proceedings.

*Whether Rule 102(2) has been undertaken*

17. The Defence makes no comment at this stage on the basis that the position of the SPO is not known at the time of making these submissions.

*Whether Rule 102(3) has been undertaken*

18. At the time of submitting this filing, no notice as per that referred to at paragraph 7(c)(i) of the **Order** of the Pre-Trial Judge has been provided. The Defence for Haradinaj adopts and endorses the position set out at paragraph 7 of the written submissions of the Defence for Gucati regarding points (a) to (aa) on what is required to be set out in the detailed notice under Rule 102(3) and that it cannot comply with the directions under paragraph 48 of the Framework Decision.
19. The Defence makes no comment on the issue raised at paragraph 7(c)(ii) of the **Order** as at the time of filing these submissions, the Defence has not had sight of the Prosecution position and further endorses and adopts the position set out at paragraphs 17-20 of the written submissions of the Defence for Mr. Gucati in particular that the Defence cannot commence its disclosure exercise unless and until the SPO has filed a detailed and complete Rule 102(3) notice.

*Rule 103*

20. The Defence makes no comment in respect of parts (i) and (ii) for the aforementioned reasons in terms of Rule 102(2) and(3).
21. In terms of part (iii), the only observation the Defence would seek to make at this stage, with the already aforementioned caveats, is that any and all disclosure, be it Rule 103, or Rule 102, ought to be disclosed in good time prior to the SPO filing any Pre-Trial Brief so as not to prejudice the Defence should the Defence choose to file a Pre-Trial Brief.

*Rules 107 and 108*

22. The Defence do not seek to make any comment in respect of whether there is any intention on the part of the SPO to file any further requests under Rules 107 and 108, but does seek to reserve the right to respond to any and all applications under the aforesaid provisions should any such application be made.
23. With regard to paragraph 7(1)(f), the Defence seek to highlight the ongoing impasse in respect of whether the 'seized material' ought to be disclosed or otherwise, that issue being subject to a forthcoming decision of the Pre-Trial Judge.

*SPO Investigations*

24. The Defence does not seek to make any written submissions at this stage, on account of it not being aware of the position of the SPO; as a consequence, the Defence would seek to address any points where relevant, by way of Oral submissions or in response to any written application/submissions of the SPO at the appropriate time.

*Points of Agreement on Matters of Law and Fact*

25. No such discussions have been entered into at this time, and with respect, cannot be entered into until disclosure has been completed in its entirety, and further, there has been opportunity to take the Defendant's full instructions upon that evidence.
26. Further, there are still issues subject to litigation in terms of the disclosure obligations of the SPO and therefore the issue remains unclear at this juncture.
27. With regard to when the Parties will be able to identify a list of issues subject to dispute and agreement, the position of the Defence is that we will be able to advise on this issue within a reasonable time after disclosure has been completed. At this juncture, and subject to the SPO complying in full with its disclosure obligations, the SPO is put to strict proof on all of the matters that have been raised, including the purported assertion that the documents originated from the SPO.



28. The SPO has stated that it is aware of its burden, but in making such a statement does not appear to recognise its disclosure obligations in securing and safeguarding a fair trial. It is not merely the burden of establishing the constituent elements of each count in the indictment, there are additional obligations to ensure that the process is fair, transparent and the parties are on an equal footing.
29. The Defence for Mr. Haradinaj supports the contention advanced by the Defence for Mr. Gucati that a list of issues subject to dispute and a list of agreed issues are best identified following the exchange of pre-trial briefs.

*Defence investigations and related procedural steps*

30. Defence investigations are at this stage, in their infancy and are so as a result of two predominant reasons:
- a. In the first instance, it is submitted that any relevant investigations cannot be undertaken to their conclusion, until disclosure has been completed so as to ascertain exactly what evidence the SPO seeks to rely upon in attempting to prove those allegations within the indictment –

It is of note that further disclosure of some 379 'items' (not pages but items and noting that no schedule is attached and

therefore little if any assistance is provided in terms of organisation) took place,<sup>2</sup> on 19 February 2021;

- b. Further, the impact of the COVID-19 is still being felt –

The Chamber will be aware of the extent to which the Republic of Kosovo, the Netherlands and the United Kingdom have been affected, with the latter still in a state of ‘lockdown’, and a formal ‘stay at home’ order still being in force;

To travel to another country therefore places the physical safety of individuals at very real and demonstrable risk and therefore the situation is less than conducive to investigations or witnesses being interviewed etc;

Counsel had intended to travel to The Hague to take custody of all evidence in a form that is manageable. It is submitted in this regard, that remote access to the material is not user friendly through the Legal Workflow system as it does not allow for printing documents nor does it easily allow for the downloading of files to view outside of remote access. The

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<sup>2</sup> Disclosure 7

system is intended to maintain security of confidential material, but not to the extent that it becomes unmanageable. This has in itself hampered defence investigations. Added to this, flights from the United Kingdom to the Netherlands have been temporarily suspended.

Further, and despite these risks, flights were booked for 20 February 2021 to enable Counsel to travel to Kosovo to commence investigations, however, those flights were cancelled by the carrier at the last minute and therefore the scheduled trip has not been possible and will not be possible until some time after the Second Status Conference.

The Detention Unit does not have in place a suitable system for the secure electronic transfer of case material during COVID-19 to enable Counsel to take instructions from the Defendant which has further caused delay.

31. Accordingly, the Pre-Trial Chamber is asked to take into account these extraordinary circumstances that will quite clearly affect any timeline in terms of defence preparations.
32. The Defence would therefore consider a period of three months to be reasonable, with the obvious caveat of COVID-19 being noted as potentially

affecting any timeline imposed. In this regard it is noted that this provisional period relates to defence investigations not being trial ready.

33. The Defence are not in a position to advise at this stage whether it intends to provide notice of 'Alibi' or other grounds for excluding criminal responsibility pursuant to Rule 95(5).
34. The Defendant denies all charges, and it is for the SPO to prove each element of each count in the indictment.
35. The Defendant is not in a position to advise of any witnesses that may called in Defence, on account of relevant investigations as yet not being completed as set out above, and further, having regard to the most recent disclosure of documents and evidence (Disclosure 7), Defence preparations are still ongoing.
36. The Defence do envisage and fully intends to submit a Pre-Trial Brief; however, it is not in a position to advise as to when, on account of the issues still subject to litigation, and further, no direction having been given as to when the SPO is to file any Pre-Trial Brief.
37. The Defence for Haradinaj endorses and adopts the timescale put forward by the Defence for Mr. Gucati at paragraphs 34 to 37 of its written submissions.

*Anticipated Transmission of the Case Pursuant to Rule 72(1)*

38. The Defence Mr. Haradinaj endorses and adopts the position advanced by the Defence for Mr. Gucati at paragraphs 38 to 43 of its written submissions and objects to this case being heard by a Single Judge Panel. In any event, it is not appropriate for any decision to be taken on the composition of the trial panel without hearing argument from the parties. As noted by the Defence for Mr. Gucati, the SPO has been at pains to stress serious nature of these proceedings, as has the Pre-Trial Judge and Court of Appeal.
39. Given the ongoing motions before the Chamber, and the fact that the Defence have been hampered in respect of its preparations by the COVID-19 pandemic and the restrictions upon movement resulting, transmission of the case per Rule 72(1) in mid-April 2021 is clearly not appropriate.
40. The Defence cannot state at this stage, when they will be trial ready, however, it is wholly unlikely that any trial can commence prior to late August 2021 at the earliest, taking into account the work that needs to be undertaken, and further, the Defendant's fair trial rights. Taking into account the current state of play, the uncertainty of COVID-19 and the Court's summer recess, that a trial date towards the end of August 2021 is realistic. Much will depend upon the anticipated length of trial, namely how many days/weeks the Court is expected to sit and whether it will sit every day for the duration of the trial.

41. Accordingly, the Defence at this stage would suggest a date post-August as being an appropriate anticipated trial date.

*Next Status Conference*

42. The Defence are amenable to any reasonable date for the next case-status conference; however, it is proposed that this take place during the first week of April 2021, with a view to the Defence being in a better position to advise upon issues that are currently yet to be determined.

**VI. REQUEEST FOR FURTHER DISCLOSURE**

43. The Defence seeks disclosure of material, some of which is now in the public domain, and would appear to have an impact on the present case.
44. On or around 15 February 2021, attention was drawn through the media,<sup>3</sup> to a communiqué emanating from the Office of the President of the Specialist Chambers, Judge Ekaterina Trendafilova. Having, on 11 February 2021, briefed members of 'Diplomatic Missions', referred to as the 'Heads of Mission Coordination Meeting', in respect of the work of the Specialist Chamber, and those ongoing cases, which importantly, is likely to have

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<sup>3</sup> <https://www.euronews.com/2021/02/15/kosovo-could-try-to-move-war-crimes-court-to-pristina-judge-warns>;  
<https://www.rferl.org/a/kosovo-specialist-court-hague-trendafilova-thaci/31106876.html>;

included Mr. Haradinaj's case, a document was inadvertently communicated to an unintended audience, contents of that document has been subject to widespread media reporting.

45. A number of issues arise as a result of that inadvertent disclosure, and thus the Defence now seeks disclosure of the following:

- a. Details of the membership of the Heads of Mission Coordination Meeting;
- b. Which representatives of the Specialist Chambers, Office of the Registry, Specialist Prosecutor's Office attended the meeting and whether a representative of the Defence Coordination Office attended this meeting or any meeting in the past;
- c. Confirmation as to whom the Briefing Note was communicated to, even if communicated in error;
- d. Whether representatives of the Government of the Republic of Kosovo attended, or were invited to attend, the Heads of Mission Coordination Meeting;
- e. Full minutes of the Heads of Mission Coordination Meeting held on 11 February 2021 and minutes of all previous meetings;

- f. Confirmation that the information disclosed during the Heads of Mission Coordination Meeting did not consist of confidential information and was information only in the public domain;
  - g. Confirmation of the frequency of such meetings as the media reported 'regular meetings' at one point and 'bi-annual' elsewhere;
  - h. Copies of any and all meetings that may have taken place with diplomatic Missions, and further, copies of any and all briefing notes, and/or minutes and/or any other documents that have been prepared for the purposes of such meetings, during those meetings, or after those meetings in correspondence with those missions.
46. The fact that these meetings are being held 'behind-closed doors' and therefore with a complete lack of transparency, is of significant concern.
47. The response to the media enquiry by a court spokesperson stated "...that the briefing was confidential and the transcript had been circulated accidentally and was intended for the internal use of diplomatic missions."<sup>4</sup> Such a statement causes some concern as the spokesperson indicated that the briefing summarised matters already addressed in public filings, then it is unclear why it needs to be done behind closed doors and confidentially. Moreover, such a position

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<sup>4</sup> <https://www.euronews.com/2021/02/15/kosovo-could-try-to-move-war-crimes-court-to-pristina-judge-warns>



would appear to be inaccurate taking into account that comment was made on the composition of the trial panel for this case and a potential trial start date.

48. The Defence does not take issue with the existence of meetings by members of the institution with diplomatic missions *per se*, but it is essential that any such meetings are transparent and capable of scrutiny. It is further noted, that it does not appear to be the role of a judicial official to brief the diplomatic community over pending proceedings, as any meetings will almost certainly call into question the legitimacy of the institution and its ability to operate independently and impartially. The Heads of the joint-institutions must be mindful of the appearance impropriety, particularly where it does not appear that the interests of the defence are properly represented.

49. According to Article 34(3) of the Law, the Registrar shall be responsible for the administration and servicing of the KSC. Article 32(3) of the Law and Rule 13 of the Rules of Procedure and Evidence sets out the functions of the President of the Court. Article 32(3) clearly sets out that the President shall be responsible for the 'judicial administration' of the Specialist Chambers and other functions conferred by the Law. Rule 13 further sets out the administration and management function of the President. Rule 13(1)(e) mandates the President to represent the institution where so required.

However, at no stage in the legal, regulatory and constitutional framework of

the institution does it state that the Specialist Chambers and Specialist Prosecutor's Office are anything but domestic judicial and prosecutorial institutions of the Republic of Kosovo and as a consequence, it would appear that the briefing of the diplomatic community, in such a confidential manner, far exceeds that which is permissible and calls into question the very notion of natural justice.

50. It is most disconcerting that it would appear information has been, and is being, given to diplomatic missions and/or discussed between the parties to which the Defence are not party. Any objective observer would naturally draw the conclusion that it will have an impact on the way in which the proceedings are perceived. One must be reminded of the maxim, that justice must not only be done, but it must also be manifestly seen to be done.<sup>5</sup>

51. As highlighted, the Defence takes no issue with the fact that such meetings may occur, nor does it take issue with certain discussions remaining confidential, such as the financing of the Specialist Chambers. However, it is respectfully submitted to be wholly inappropriate that discussions in respect of ongoing cases are being held behind closed doors with individuals not party to those cases, and further, without participants being present.

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<sup>5</sup> *R v. Sussex Justices, Ex party McCarthy* (1923) 1 KB 256 at p. 259

Moreover, it is the position of the Defence that it is not the role of a judge or prosecutor to lead such briefings.

52. We would further request confirmation of whether any member of the SPO has been present at any of these meetings, if so whom, in what capacity, and for what purpose. If it is the case that briefings are being jointly held by judges and prosecutors, then full details of those meetings will need to be disclosed and a determination made as to whether it affects the integrity of the ongoing proceedings.
53. Finally, it would appear that the President of the Specialist Chambers has discussed, with members of the diplomatic community, matters that pertain to the legal framework and the jurisdiction of the court. To suggest that any amendment to the legal framework would be unlawful is to prejudge any potential challenge on the legality or jurisdiction of the Specialist Chambers and directly impinges on the independence and impartiality of the process.
54. The Specialist Chambers and the Specialist Prosecutor's Office are unique institutions created under a national act of parliament, an amendment to the Constitution and a Host State Agreement that only goes to its geographical placement, not its legal status as an international court or tribunal. It remains to be governed by the legal, regulatory and constitutional framework of the

Republic of Kosovo and therefore it must comply with norms associated with  
that State.

Word Count: 3690 words



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