

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 Hysni Gucati

Date: 23rd February 2021

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**Written Submissions on behalf of Hysni Gucati for the Second Status Conference
and Related Matters**

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I. INTRODUCTION

1. By order dated 17th February 2021, the Pre-Trial Judge ordered the parties to file written submissions, if they so wish, by Tuesday, 23rd February 2021, 14:00 hours ("Order")¹.
2. The defence on behalf of Mr Gucati hereby sets out its written submissions in relation to the matters set out in paragraphs 7, 8 and 9 of the Order and the additional related matters not covered in the Order as set out below.

II. SUBMISSIONS

Paragraph 7(1)(a)(i) of the Order

3. The SPO has not completed disclosure under Rule 102(1)(b). In addition to any new matters which the SPO may raise at the Second Status Conference:
 - a. At the First Status Conference it was indicated that the SPO were "undertaking steps to conduct witness interviews" and that up to a maximum of 10 witnesses would be called at trial² – at present, no witness statements have been served thus far;

¹ "Order Setting the Date for the Second Status Conference and Related Matters", KSC-BC-2020-07/F00129 at paragraph 10(b) thereof

² First Status Conference, 8th January 2021, Transcript at page 93 line 9-12

- b. Of Batches 1, 2 and 3 only a limited amount of material from Batch 3 has been disclosed (all of which was publicly available). On a proper analysis, Batches 1, 2 and 3 are to be regarded as exhibits and should be made available to the defence under Rule 102(1)(b)(iii)³. The SPO should not be allowed to unfairly subvert the trial process, and the proper operation of Rule 102, by improperly seeking to rely on summaries of Batches 1, 2 and 3 instead of exhibiting the material itself (where redacted or unredacted). This material is subject to an outstanding application by the SPO for wholesale non-disclosure. That wide application, which requests authority to withhold hundreds of pages in their entirety, is contrary to the submission made by the SPO at the First Status Conference that ‘*some of the Rule 102(1)(b) material may require limited redactions*’⁴.

Paragraph 7(1)(a)(ii) of the Order

4. This is a matter for the SPO to assist with.

Paragraph 7(1)(b)(i) and (ii) of the Order

5. This is a matter for the SPO to assist with.

³ See the submission at paragraph 23 of the “*Response to Prosecution Submissions on the Disclosure of Certain Documents Seized from the KLA War Veterans Association*”, KSC-BC-2020-07/F00122

⁴ *Framework Decision*, KSC-BC-2020-07/F00204 at paragraph 43

Paragraph &(1)(c)(i) of the Order

6. Rule 102(3) requires the SPO to provide a detailed notice of any material in his possession. Read together with Article 21(6), Rule 102(3) requires notice to be provided of all material and relevant evidence or facts in the possession of the Specialist Prosecutor's Office (whether for or against the accused).
7. The notice filed on 19th February 2021 is wholly inadequate. For example, the detailed rule 102(3) notice should list *inter alia* and by way of example:
 - a. all material held by the SPO which relates to the origin and provenance of the material contained within Batches 1, 2 and 3, including material as to authorship and chain of custody from creation to its arrival at the KLA WVA HQ;
 - b. all material held by the SPO which relates to any attempts made by the SPO to identify and trace the individual(s) making disclosure of the Three Batches to the KLA WVA HQ;
 - c. [REDACTED];
 - d. Material relating to the alleged diversion of resources to communications with witnesses and related security matters;
 - e. Relevant non-disclosure orders in proceedings before the SC;
 - f. Pending non-disclosure requests in proceedings before the SC;

- g. Relevant prior Kosovo court-ordered protective measures;
- h. Full SPO internal document dated 21 October 2020 (from which 089919-089920 was extracted);
- i. [REDACTED];
- j. Full SPO internal document dated 17 September 2020 (from which 089921-089924 was extracted);
- k. [REDACTED];
- l. Full SPO internal document dated 22 September 2020 (from which 089925-089927 was extracted);
- m. [REDACTED];
- n. [REDACTED];
- o. [REDACTED];

p. [REDACTED];

q. [REDACTED];

r. [REDACTED];

s. [REDACTED];

t. [REDACTED];

u. [REDACTED];

v. [REDACTED];

w. [REDACTED];

x. [REDACTED];

y. [REDACTED];

z. [REDACTED].

aa. The full SPO internal document dated 16 February 2021 (from which 091932-091941 was extracted).

8. Some material assessed by the SPO to be subject to notification under Rule 102(3) is subject to an outstanding application by the SPO for authorisation to withhold⁵.
9. In the absence of provision of the detailed rule 102(3) notice, the defence are unable to comply with the directions in the Framework Decision at paragraph 48 and a new timetable is required.

Paragraph 7(1)(c)(ii) of the Order

10. This is a matter for the SPO to assist with.

⁵ "Prosecution Request for non-disclosure of certain information pertaining to contacts with witnesses", KSC-BC-2020-07/F00107

Paragraph 7(1)(d)(i) of the Order

11. The SPO has not completed Rule 103 disclosure. In addition to any new matters which the SPO may raise at the Second Status Conference:

- a. [REDACTED] and
- b. Batches 1 and 2 contain undisclosed portions which have been assessed as subject to disclosure under Rule 103⁶.

12. No further submissions can be made by the defence as to the extent to which Rule 103 disclosure is outstanding in the absence of a detailed and complete Rule 102(3) notice listing all the material in the possession of the Specialist Prosecutor.

Paragraph 7(1)(d)(ii) of the Order

13. This is a matter for the SPO to assist with. No explanation has been provided to the defence for the two-week delay in disclosure of Disclosure 6.

Paragraph 7(1)(d)(iii) of the Order

14. This is a matter for the SPO to assist with.

⁶ [REDACTED]

Paragraph 7(1)(e) of the Order

15. This is a matter for the SPO to assist with. At the First Status Conference the SPO informed the Pre-Trial Judge and the parties that: a limited amount of Rule 107 information was potentially subject to disclosure under Rule 102(3) of the Rules; it was taking active steps to receive the requisite response from external parties to meet its disclosure obligations; but would bring to the attention any issue regarding outstanding clearances sought⁷. The defence are unaware as to the progress made by the SPO in relation thereto, or whether they have complied with the Pre-Trial Judge's directions in this regard.

Paragraph 7(1)(f) of the Order

16. In relation to the timetable set at the First Status Conference, the SPO has:

- a. Failed to comply with the deadline to disclose all Rule 102(1)(b) material by 19 February 2021;
- b. Failed to comply with the deadline to provide a detailed and complete Rule 102(3) notice of all material held by the Prosecutor by 19 February 2021; and
- c. Failed to comply with the deadline to disclose all Rule 103 material by 29 January 2021.

⁷ *Framework Decision*, ante at paragraphs 54 and 55

17. In the absence of a detailed and complete Rule 102(3) notice, listing all the material held by the Prosecutor, the defence are unable to commence its disclosure exercise (requesting material in the possession of the Prosecutor deemed by the Defence to be material to its preparation).
18. The foundation stone of the disclosure exercise is a detailed and complete Rule 102(3) notice listing all material held by the Prosecutor (whether or not the material listed thereon is to be subsequently disclosed pursuant to Rules 102(3) or 103).
19. The present failures of the SPO to meet the timetable within the Framework Decision with regards to disclosure, together with their overall dismissive approach⁸ to issues properly and timeously raised by the defence, do not inspire confidence and are suggestive of a prosecution that does not take its disclosure obligations seriously. Indeed, the immature approach of the SPO to disclosure thus far is a recipe for repeated delays, not least during the trial itself when disclosure will inevitably have to be made, albeit in piecemeal fashion.
20. Regrettably, in the obvious absence of a constructive attitude from the SPO towards disclosure, further difficulties with the remainder of the disclosure process are all too predictable.

Paragraph 7(2)(a) of the Order

21. This is a matter for the SPO to assist with.

⁸ See for example paragraph 9 of the *"Prosecution Consolidated reply to Defence Responses to Prosecution submissions on the disclosure of certain documents seized from the KLA War Veterans Association"*, KSC-BC-2020-07/F00130

Paragraph 7(2)(b) of the Order

22. This is a matter for the SPO to assist with (although when, as a matter of fact, the SPO completes disclosure under Rule 102 of the Rules will depend on events and not the SPO's estimate at this stage (as demonstrated by events since the First Status Conference)).

Paragraph 7(2)(c) of the Order

23. This is a matter for the SPO to assist with (although when, as a matter of fact, the SPO completes disclosure under Rule 102 of the Rules will depend on events and not the SPO's estimate at this stage (as demonstrated by events since the First Status Conference)).

Paragraph 7(3)(a) of the Order

24. No such discussions have commenced.

Paragraph 7(3)(b) of the Order

25. The defence would not expect to be able to identify a list of issues subject to dispute, and one with issues not subject to dispute, until after the exchange of Pre-Trial Briefs.

Paragraph 7(4)(a) of the Order

26. Since the first disclosure on 4th January 2021, the defence have had disclosed to it approximately 3000 pages of material, which, all but for a minimal amount, has been categorised as evidence to be presented by the SPO. An estimated 100 hours of footage has been disclosed and categorised as evidence to be presented to the SPO. The material disclosed pursuant to Rule 102(1)(b) at present contains 379 items (well in excess of the 150 estimated at the First Status Conference⁹).

27. The material disclosed in Disclosures 2 to 7 contains the identities of scores of other persons who played a significant part in the events of the indictment, all of which, as far as possible, the defence will seek to interview with a view to obtaining evidence therefrom. The task of identifying such persons who played a significant part in the events is made much harder due to the refusal of the SPO to properly particularise the indictment. An application for further and better particulars is presently outstanding¹⁰.

28. Across the same period, the UK and the Netherlands has struggled with a huge surge in coronavirus cases, with Kosovo continuing to see a higher rate of positive COVID tests during that period than during the first half of 2020. The UK has been in the grip of strong coronavirus restrictions during that period which has made international travel practically impossible. Those restrictions

⁹ *"Framework Decision"*, ante at paragraph 43

¹⁰ *"Preliminary Motion Alleging Defects in the Form of the Indictment Pursuant to Rule 97(1)(b)"*, KSC-BC-2020-07/F00113

upon travel will continue for some time, with no change foreseeable until at least the early part of the summer.

29. Additionally, it is understood that there is a curfew in place in Kosovo between 8pm and 6am, which compounds the difficulty in witness interviews, particularly those who are in full-time employment.

30. Whereas work upon the analysis of the 3000 pages and extensive video footage disclosed has progressed, the defence has been unable to make significant progress with the next stage of its investigations, namely the interviewing of potential defence witnesses.

31. Without the resources of the SPO, it is anticipated that the defence will continue to encounter such difficulties for some time to come, adding necessarily to the time required for the defence to properly prepare its case.

Paragraph 7(4)(b)(i)

32. 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.

Paragraph 7(4)(b)(ii)

33. The defence are not able to confirm at this stage whether it will make any request concerning unique investigative opportunities pursuant to Rule 99(1).

Paragraph 7(4)(c) of the Order

34. The defence envisages filing a Pre-Trial Brief and related material under Rule 95(5) of the Rules but does not expect to be in a position to submit such a filing until 2 July 2021.

35. Rule 95(c) anticipates that the Pre-Trial Brief will indicate a list of potential witnesses the Defence intends to call, specifying to which particular relevant issue the evidence relates. Compliance therewith involves the difficulties set out above.

36. Any Defence Pre-Trial Brief must by necessity follow the Prosecution Pre-Trial Brief and respond to it (see Rule 95(5)). The present proposal is for the Prosecution Pre-Trial Brief to be submitted not before 9 April 2021, some 6 weeks forward of the Second Status Conference (permitting the SPO 4 months from confirmation of the indictment to prepare its Pre-Trial Brief).

37. An equivalent period of 6 weeks thereafter to respond would take the timetable to 21 May 2021. It is not anticipated, however, that coronavirus restrictions on travel will have eased significantly or at all during that same period¹¹. A further six weeks from 21 May 2021 would take the timetable to 2nd July 2021 for submission of any defence Pre-Trial Brief, which it is to be hoped is realistic and would allow the defence just shy of 3 months to respond to the Prosecution Pre-Trial Brief (assuming that the Prosecution Pre-Trial Brief is indeed filed by 9th April 2021).

¹¹ Indeed, the most recent announcement suggests travel restrictions will remain in place in the UK until 21 June 2021 at the earliest

Paragraph 7(5) of the Order

38. The defence on behalf of Mr Gucati would object to any proposal that this matter be tried by a Trial Panel consisting of a single judge.

39. Article 25(2) is a provision which *permits* a Trial Panel to consist of a single judge for proceedings in relation to Article 15(2) crimes which are not classified as serious crimes under Article 22 of the Kosovo Criminal Procedure Code, Law No.04/L-123. It does not provide that a Trial Panel *shall* consist of a single judge for such proceedings.

40. The defendants do not face an indictment containing a single offence (otherwise than as envisaged in Rule 72). The defendants face a multi-count indictment alleging a course of conduct spanning a period of some six months¹². The offences alleged include:

- a. violating the secrecy of proceedings in its aggravated form (resulting in (i) serious consequences for the Protected Person; or (ii) criminal proceedings being severely hindered or made impossible);
- b. retaliation through harmful action (which may include violence, serious threats, interference with individual safety, security, well-being, privacy, dignity or any other interference harmful to the person or his or her immediate family);
- c. Intimidation through the use of serious threat;

¹² "Annex 1 to Submission of Confirmed Indictment", KSC-BC-2020-07/F00075/A01 at paragraphs 5 and 6

- d. Obstruction of official persons by force or serious threat in its aggravated form (where it is directed against, *inter alia*, a judge, a prosecutor, an official of a court, prosecution officer or a person authorised by the court and prosecution office); and
- e. Obstruction of official persons by participation in a group in its aggravated form (where the perpetrator is the leader or organiser of the group).

41. The seriousness of the charges has been repeatedly stressed by the SPO in its various submissions on detention¹³, and by the Pre-Trial Judge in refusing provisional release¹⁴. The defendants are charged, as the Court of Appeals Panel has noted, with serious offences¹⁵.

42. Whereas it may be appropriate to try a single defendant charged with a single Article 15(2) offence within the scope of Article 25(2) of the Law by Trial Panel consisting of a single judge, it is submitted that these proceedings, jointly charging both defendants with a series of aggravated offences conducted as part of an alleged deliberate and concerted campaign to interfere with the administration of justice, should be tried by a full Trial Panel composed of three judges and one reserve judge in accordance with Article 25(1) of the Law.

¹³ "Prosecution Consolidated Submissions on Review of Detention", KSC-BC-2020-07/F00088 at paragraph 3: "... the Pre-Trial Judge has confirmed a six-count Indictment, charging both Accused with serious offences against the administration of justice and public order"; "Prosecution Consolidated Response for Review of Detention", KSC-BC-2020-07/F00124 at paragraph 3

¹⁴ "Decision on Review of Detention of Nasim Haradinaj", KSC-BC-2020-07/F00094 at paragraph 32

¹⁵ "Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention", KSC-BC-2020-07/IA001-F00005 at paragraph 71

43. The defence reiterate that the process for the assignment of a Panel should be transparent¹⁶.

44. In any event, it is submitted that mid-April 2021 is too early for transmission of the case file to the Trial Panel. Rule 98 requires transmission of a complete case file including a Handover Document summarising *inter alia*:

- a. The arguments of the Parties;
- b. The points of agreement;
- c. The evidentiary material produced by each Party;
- d. Suggestions as to the number and relevance of the witnesses to be called;
and
- e. The questions of fact and law that are in dispute.

45. The above matters will not be clear in this matter until after the exchange of Pre-Trial Briefs by the Specialist Prosecutor and by each defendant. Submissions as to a realistic timetable for the same are set out above.

Paragraph 8 of the Order

46. The defence do not expect to be ready for trial before the week commencing 30th August 2021 (six weeks after submission of the Defence Pre-Trial Brief). That timetable would allow 4 weeks after submission of Defence Pre-Trial Briefs on 2nd July 2021 for the parties to prepare points of agreement on matters of law and fact (by 30th July 2021), and a further 4 weeks thereafter for final trial preparation.

¹⁶ Rules on the Assignment of Specialist Judges, KSC-BD-02 at paragraph 4(1)

Paragraph 8 of the Order

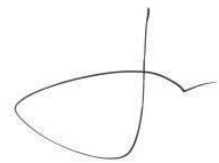
47. The defence suggest that the next status conference should take place in the week commencing 5th April 2021 (not including Easter Monday).

Paragraph 9 of the Order (other related matters not referred to in the Order)

48. [REDACTED]

49. [REDACTED]

Word count: 3631 words



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