

**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:** 16<sup>th</sup> February 2021

**Language:** English

**Classification:** Public

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**Public Redacted Version of Reply to Prosecution Response to Preliminary Motion**

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**Specialist Prosecutor**

Jack Smith

**Counsel for Hysni Gucati**

Jonathan Elystan Rees QC

Huw Bowden

**Counsel for Nasim Haradinaj**

Toby Cadman

Carl Buckley

## I. INTRODUCTION

1. On Thursday 11<sup>th</sup> February 2021, the Accused received notification that the Specialist Prosecutor's Office ('SPO') had filed a submission ("the Response")<sup>1</sup> requesting that the Accused's Preliminary Motion Alleging Defects in the Form of the Indictment Pursuant to Rule 97(1)(b) ("the Preliminary Motion")<sup>2</sup> be dismissed.
2. The Accused hereby replies to the Response, pursuant to rules 9 and 76 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"), without prejudice to the submissions made in the Preliminary Motion and acknowledging that the Panel shall only consider a reply or parts thereof addressing new issues arising from the response.

## II. SUBMISSIONS

3. The Accused specifically adopts herein paragraphs 8 to 12, 28 to 40 and 42 of the Defence Reply to Prosecution Response to Preliminary Motion filed on behalf the co-accused<sup>3</sup>.
4. Additionally, the Accused submits the following.
5. In relation to paragraph 3 of the Response the Accused does not dispute that the Specialist Chambers have jurisdiction over the offences and modes of liability incorporated in Articles 6(2) and 15(2) of the Law on Specialist Chambers and Specialist Prosecutor's Office No.05/L-053 ("Law"). The

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<sup>1</sup> "Consolidated Prosecution Response to Preliminary Motions", KSC-BC-2020-07/F00120

<sup>2</sup> "Preliminary Motion Alleging Defects in the Form of the Indictment Pursuant to Rule 97(1)(b)", KSC-BC-2020-07/F00113

<sup>3</sup> "Defence Reply to Prosecution Response to Preliminary Motion", KSC-BC-2020-07/F00126

Accused submits that the indictment is defective in that it wrongly refers to provisions of the 2019 Kosovo Criminal Code which are not applied by Articles 6(2) and 15(2) of the Law and invites amendment accordingly<sup>4</sup>.

6. In relation to paragraph 6 of the Response (and footnote 25 thereto), it is accepted that details need only be pleaded 'as far as possible', 'as much as possible' and 'if known'.
7. That is what the Prosecution has been requested to do in the Preliminary Motion.
8. The Prosecution is requested to plead the identities of affected witnesses as far as possible and if known. It is clear that the Prosecution has in fact simply refused to do so. Such refusal is improper.
9. The Prosecution is requested to plead the identities of assisted and incited persons, co-perpetrators and accomplices as far as possible and if known. It is clear that the Prosecution has in fact simply refused to do so. Such refusal is improper.
10. Specifically, in relation to paragraphs 10 and 11 of the Response, the Prosecution should plead as far as possible and if known the identities of the alleged co-perpetrators and accomplices referred to at present simply as 'others', 'at least one other representative of the KLA WVA', 'certain others', 'Associate(s)' and 'group' in paragraphs 6, 16, 25-26, 28-30,33-34, 39 and 41-46 of the Indictment (even if the Prosecution cannot on the existing evidence identify *all* the persons involved). At present, not a single such person is properly identified in the Indictment.

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<sup>4</sup> *"Preliminary Motion Alleging Defects in the Form of the Indictment Pursuant to Rule 97(1)(b)"*, KSC-BC-2020-07/F00113 at paragraphs 17, 18 and 20(a)

11. In relation to paragraphs 12 and 13 of the Response, the Prosecution should plead as far as possible and if known the identities of the alleged assisted and incited persons referred to at present simply as 'others', 'certain members of the public', 'certain members of the press' and 'certain others' in paragraphs 6, 26, 30(v)-(vi), 33 and 41-46 of the Indictment (even if the Prosecution cannot on the existing evidence identify *all* the persons involved). At present, not a single such person is properly identified in the Indictment.
12. In relation to paragraphs 12 and 13 of the Response, the Prosecution should plead as far as possible and if known the identities of the alleged assisted and incited persons referred to at present simply as 'others', 'certain members of the public', 'certain members of the press' and 'certain others' in paragraphs 6, 26, 30(v)-(vi), 33 and 41-46 of the Indictment (even if the Prosecution cannot on the existing evidence identify *all* the persons involved). At present, not a single such person is properly identified in the Indictment.
13. In relation to paragraph 14, if the Prosecutor is unable to specify means of dissemination other than 'in the press and online' then the Prosecution case should be restricted to dissemination by the press and online only and the word 'including' should be deleted. It is unfair and improper for an unspecified and undefined allegation of dissemination by unknown means, which is - by the Prosecution's own admission in paragraph 14 - unsupported by evidence, to remain on the indictment.
14. In relation to paragraph 15, if the Prosecutor is unable to specify such contents of the First and Third Disclosures which are said to have been confidential and disseminated other than [REDACTED] then the Prosecution case should be restricted to dissemination of [REDACTED] only and the word 'including' should be replaced with the word 'namely'. It is unfair and improper for an

unspecified and undefined allegation of dissemination of ‘certain contents’, which is - by the Prosecution’s own admission in paragraph 15 – obscure and unsupported by evidence, to remain on the indictment.

15. In relation to paragraph 16 of the Response, the Prosecution should plead as far as possible and if known the identities of the alleged ‘intimidated witnesses and/or their family members’ and the averred ‘serious consequences for the witnesses’ in paragraphs 22, 32 and 35 of the Indictment (even if the Prosecution cannot on the existing evidence identify *all* the persons involved). At present, not a single such person is properly identified in the Indictment.

16. If there are grounds to redact/anonymise any such identities within the indictment, such concerns are properly dealt with in accordance with the redaction regime as set out in the Framework Decision<sup>5</sup> rather than by the SPO unilaterally refusing to properly plead the indictment in the first instance.

### III. CONCLUSION

17. The Accused maintains the submissions within the Preliminary Motion.

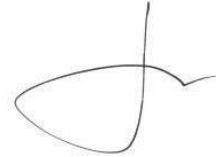
18. For the reasons set out therein, and as supplemented by the matters contained within paragraphs 8 to 12, 28 to 40 and 42 of the Defence Reply to Prosecution Response to Preliminary Motion filed on behalf the co-accused<sup>6</sup> and above, the relief requested at paragraph 20 of the Preliminary Motion is requested.

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<sup>5</sup> *“Framework Decision on Disclosure of Evidence and Related Matters”*, KSC-BC-2020-07/F00104 at paragraphs 81 to 84

<sup>6</sup> *“Defence Reply to Prosecution Response to Preliminary Motion”*, KSC-BC-2020-07/F00126

Word count: 1068 words



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16<sup>th</sup> February 2021

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