

**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:** 26 May 2021

**Language:** English

**Classification:** Confidential

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**Defence Submissions for the Fifth Status Conference**

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## I. CLASSIFICATION

1. NOTE: in an abundance of caution, these submissions have been noted as 'Confidential' so as to accord with the Order and Annex of the Pre-Trial Judge.<sup>1</sup>
2. The Defence would however submit that nothing prevents these submissions from being re-classified as public and leaves the final determination to the Pre-Trial Judge.

## II. INTRODUCTION

3. On the 20 May 2021, the Pre-Trial Judge issued his order in preparation for the forthcoming 5<sup>th</sup> Case Status Conference.<sup>2</sup>
4. Contained within that Order are several issues upon which comment is requested; the remainder of these submission will therefore address those issues as they arise within the order and relevant Annex.
5. Further, the Defence would reserve the right to raise any further relevant issues should the same arise following any submissions on the part of the SPO.

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<sup>1</sup> KSC-BC-2020-07/F00204

<sup>2</sup> *Ibid*

6. Finally, the Defence do not seek to address the background, the chronology of events, and/or the law at this stage, save where they may be directly relevant to the particular submissions, the general position having been adequately dealt with within the order of the Pre-Trial Judge.
7. The submissions of the Defence in response to those issues raised within the Confidential Annex to the aforementioned order, are dealt with within a confidential annex appended hereto, as per paragraph 16(b) of the aforementioned order.

### III. SUBMISSIONS

#### *Disclosure*

8. The Defence notes the Order at paragraph 14(2)(a), where an inquiry is made as to whether the Defence is able to submit its objections to the admissibility of evidence disclosed pursuant to Rule 102, by Monday 14 June 2021.
9. The Defence would at this stage request that the timetable in respect of this issue is extended.
10. The Defence highlights that as much as the SPO have on a number of occasions sought to suggest and maintained that they have complied with

their disclosure obligations, and did so within the appropriate timetable, they have not.

11. On 25 May 2021, the SPO served Disclosure Batch 30, which consists of several thousand pages of additional material. It is of concern that this was served just days before the Status Conference, a matter that was raised at the last Status Conference as an ongoing concern.
12. With disclosure clearly still undergoing, consequently, the previous timetable has become extended.
13. Further, it is of note that given the issues raised by in the Order of the Pre-Trial Judge and the confidential Annex, there are further issues pertaining to the admissibility of evidence that need to be resolved.
14. It is submitted that until those issues have been resolved, it is not appropriate to file submissions on the admissibility of evidence, as it is entirely foreseeable that further disclosure and/or submissions may be required.
15. The Defence adopts the position that the disclosure process has not been completed at this time, as it may be that further disclosure is given, is requested and/or ordered. Accordingly, the Defence is not in a position to finalise its submissions where it might seek to challenge the admissibility of evidence, when it is not clear this juncture, as to whether all appropriate evidence has been disclosed.

16. In terms of part (b), the Defence do not foresee any issues as such in terms of the remainder of the disclosure process, however, this is subject to whether any further evidence is marked as capable of being disclosed, and whether any further applications are made by the SPO to withhold that evidence, and therefore prolong the process even further.
17. The Defence is hopeful that the previous reluctance on the part of the SPO, to adequately disclose their case, and therefore seek to ensure that the Defendant is afforded a fair trial does not arise further.
18. The Defence however makes no apology for taking points and pursuing avenues that seek to ensure that Mr. Haradinaj is afforded a fair trial and will continue to challenge the position of the SPO as when there is a requirement to do so.

*Agreement on Points of Law and Fact*

19. To answer paragraph 14(3)(a), the Defence have not communicated their position in terms of 'agreed facts' at this stage, however, we can confirm that those points, if any, are intended to form part of an Annex to the Defence pre-trial brief.
20. To answer the point raised at paragraph 14(3)(b), as per the above, it is intended to deal with such issues by way of annex to the pre-trial brief.

21. As much as the Defence have adopted the above position(s), if it is that the Pre-Trial Judge would prefer the relevant points to be communicated prior to the filing of the pre-trial brief, the Defence will endeavour to do so.

*Defence Submissions and Investigations*

22. To answer the point raised at paragraph 14(3)(a), the Defence confirms that it has already communicated to the SPO on an inter-parties basis that there is no intention to adduce alibi evidence at this stage.
23. In terms of those other relevant “*grounds excluding responsibility*”, the Defence has not finalised its position at this stage, and therefore cannot commit in the positive or the negative in terms of the defence(s) to be advanced at this stage.
24. The issues will however be addressed where relevant, within the pre-trial brief.
25. To answer the point raised at 14(3)(b), the Defence would highlight that it can foresee an issue with filing the pre-trial brief within the timeframe envisaged in the ‘Consolidated Calendar’, that being 14 June 2021.
26. The contents of the confidential annex to the order setting this 5<sup>th</sup> Case Status Conference are noted. It is entirely foreseeable that this may raise issues that fall to be addressed by the SPO, by the Defence, or both.

27. Accordingly, it is entirely foreseeable that these issues may affect the manner in which either the case of the SPO or the Defence, or both, are presented, and therefore the issues to be addressed within the pre-trial brief may fall to be amended.
28. It is respectfully submitted on the part of the Defence that it be unreasonable for the Defence pre-trial brief to be filed prior to all preliminary issues being resolved to a conclusion.
29. To answer the point raised at 14(4)(c), the Defence team have undertaken a further 'in-country' visit, and therefore investigations have progressed, however, they are by no means concluded.
30. In a similar vein to previous points raised above, considering the submissions per the confidential annex, it is unclear at this stage as to whether any further avenues of investigation will be identified.
31. In terms of evidence to be disclosed to the SPO, the proposed Defence witness list has not yet been finalised, and further, cannot be finalised until it is confirmed that there will be no further disclosure.
32. Further, we would again reiterate previous arguments raised, in that, given the SPO's opacity in terms of its investigations, or lack thereof, and its abject failure to engage in any meaningful way with reasonable requests made by

the Defence, what ought to be a relatively simple process from the Defence, is becoming protracted and complex.

33. The SPO continues to maintain that the Defence requests in terms of details of the SPO investigation into the 'leaks' themselves is irrelevant to the proceedings, and further, the Defence are not entitled to receive any element of disclosure on this point.
34. Contrary to the position advanced, the circumstances behind the 'leaks' are central to this case as a whole, and further, it is of the utmost concern that the SPO is so reluctant to disclose any details of its findings.
35. It has already been established that no investigation has been done by the SPO in terms of the documents being left at the KLA WVA, noting that no-one has been spoken to by the SPO, and no CCTV evidence was seized from anywhere in the surrounding area, despite there being at least 5 separate CCTV cameras that potentially recorded the individual entering and leaving the building.
36. Further, the SPO have thus far failed to justify why no such investigatory steps were taken.
37. By refusing to disclose any investigatory steps, or indeed any evidence from this portion of the incident subject to indictment, the SPO are actively prejudicing the ability of the Defence to prepare their case and take an active part in proceedings.



38. Without such disclosure, the Defence are precluded from considering whether the defence of *agent provocateur* and/or 'Entrapment' is available.
39. The Defence must be clear at this juncture, in that no accusation levied in terms of the above principle, however, without relevant disclosure, the prospect cannot be ruled out, and thus again, as has been a consistent theme from the point of arrest, the Defendant is being prejudiced in terms of his ability to prepare his defence.
40. A separate inter-parties request is currently being drafted and is likely to be made of the SPO prior to the Case Status Hearing; subject to the position adopted by the SPO on the points raised therein, it may be that issues fall to be discussed at the case-status hearing.

*Detention Facilities*

41. The situation has not been resolved and it remains a matter of serious concern that proper preparations cannot be made with the current facilities. Further, the issue of translation remains an ongoing concern that will affect the ability to be trial ready as planned.

*Further Status Conference*

42. The Defence would submit that a further Status Conference is essential.

43. There are clear unresolved issues in terms of disclosure, and further, given the issues dealt with within the confidential access, it is entirely foreseeable that further issues will arise that will be the subject of applications, from either the SPO, the Defence, or both.
44. The simple fact of the matter is that the case is not ready to be transferred to the trial panel, and will not until such time as all preliminary issues are resolved to their conclusion.
45. We note that the President of the Court has yet again made comments in the press in terms of when this case is to be ready for trial, and again, the Defence must express its concern that such a view is being expressed publicly when no such decisions have been taken.
46. We appreciate that the Chamber may be subject to pressure to progress matters, however, this is no justification for the hearing of a case for trial before it is ready to be so heard.
47. The Defence would remind all parties, including the SPO, that the Defendant(s) must be guaranteed a fair trial; further, it is not for the SPO to deem what is fair and appropriate, nor is it appropriate for the President of the Chamber, or any other individual to express an opinion on when a matter is to be heard at trial or otherwise.

48. These issues have been subject to separate applications, and further, were the subject of submissions by Defence counsel for *Kadri Veseli* at a recent case status hearing.
49. The Defence for Mr. Haradinaj would adopt the submissions of Mr. Ben Emmerson QC, in that it is wholly inappropriate for such comments to be made, be it publicly, or in secret as appears to have been done already.
50. Where discussions take place regarding a defendant's case, the Defendant has an absolute right to be party to those discussions so as to enable submissions to be made on appropriate issues.
51. Again therefore we must remind the Chamber and all parties to proceedings that the Defendant(s), and all subsequent individuals that may be indicted by the Chamber, have an absolute non-derogable right to a fair trial. At this juncture, whether that principle is being upheld, is subject to debate.
52. In any event, a further case status hearing is essential prior to any determination that the case is ready to be sent to the trial panel, as now, it is not ready.
53. In terms of a date for the same, it is submitted that this is wholly dependent on the position taken in respect of the issues raised within the Confidential Annex to this filing, and thus, we would seek to deal with this point within that same annex.

Word Count: 2123 words



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