

In: KSC-BC-2020-07
The Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: **Trial Panel II**
Judge Charles L. Smith III, Presiding Judge
Judge Christoph Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hysni Gucati

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Defence Submissions on Reclassification of Private Sessions

Specialist Prosecutor

Jack Smith
Valeria Bolici
Matthew Halling
James Pace

Counsel for Hysni Gucati

Jonathan Elystan Rees QC
Huw Bowden
Eleanor Stephenson

Counsel for Nasim Haradinaj

Toby Cadman
Carl Buckley
Jonathan Peter Worboys

I. INTRODUCTION

1. On 28 March 2022, the Trial Panel issued an Order for the Gucati Defence to make submissions on the reclassification of the private sessions, if they so wished, by 8 April 2022 (the 'Order')¹. The procedural background is set out in paragraphs 1-8 of the Order.
2. The Defence on behalf of Mr Gucati hereby makes its submissions.

II. SUBMISSIONS

3. The Defence maintains the same position that it has throughout the proceedings namely that there is nothing that necessitates confidentiality.
4. The SC regulatory framework provides that that proceedings shall in principle be public, unless the pursuit of a competing legitimate interest warrants an exception to that principle.² The principle of publicity not only safeguards the fundamental rights of the Accused to a public and fair trial, but also ensures trust in the judicial process through transparency, thereby constituting an important safeguard against arbitrariness.³ As a result, exceptions to this principle must be commensurate to the importance of the interests and rights

¹ KSC-BC-2020-07/F00584, "Order for Submissions on Reclassification of Transcripts and Filings", 28 March 2022, Public at paragraph 9(a)

² KSC-BC-2020-07/F00303, "Decision on the Prosecution Request for Protective Measures" ("Decision on Protective Measures"), 7 September 2021, Public at paragraph 9

³ Decision on Protective Measures at paragraph 9, citing the European Court of Human Rights ("ECtHR"), Riepan v. Austria, no. 35115/97, Judgment, 14 November 2000, para. 27; Krestovskiy v. Russia, no. 140440/03, Judgment, 28 October 2010, para. 24; Sutter v. Switzerland, no. 8209/78, Judgment, 22 February 1984, para. 26.

that it seeks to protect and must preserve the fundamental right of the Accused to a fair trial and the essence of other fundamental rights.⁴

5. The Defence's position on the publication of "names" is set out in the Defence Pre-Trial Brief and therefore is not repeated here. In summary, however, the non-disclosure of the "names" is deeply concerning given the nature of this case and the nature of the individuals in question. Non-disclosure of the identities of these individuals achieves the exact opposite of "preserving the fundamental right of the Accused to a fair trial."
6. The discussions relating to SPO investigations do not warrant confidentiality. No prejudice would be suffered by the SPO if any of the information discussed relating to its investigations were made public. The SPO is a public investigative body carrying out work that would be expected of a public investigative body. The Trial Panel must consider whether withholding information is proportionate to any of the risks identified by the SPO. The Defence submits that none of the risks identified by SPO justify withholding the information. Exceptions to public proceedings must be strictly necessary.⁵
7. The content of the batches is already in the public domain. Therefore any discussions about the content of the batches should be public. The SPO has never sought to remove the information from the public domain.
8. In addition, and for the same reasons as set out above, the Gucati Defence requests that the parts of the closing statements that are currently classified as confidential are reclassified as public.

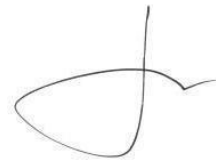
⁴ Decision on Protective Measures at paragraph 9

⁵ Decision on Protective Measures at paragraph 9

III. CLASSIFICATION

9. This filing is classified as public.

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JONATHAN ELYSTAN REES QC

Specialist Counsel for Mr Gucati

HUW BOWDEN

Specialist Co-Counsel for Mr Gucati

ELEANOR STEPHENSON

Specialist Co-Counsel for Mr Gucati

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The Hague, Netherlands