

15 December 2020

Pieter Omtzigt

Rapporteur on ‘the assassination of Daphne Caruana Galizia and the rule of law in Malta and beyond: ensuring that the whole truth emerges’

Dear Mr. Omtzigt,

Thank you for your 12 December 2020 (public) letter in which you purport to explain how, when seeking your assistance to ensure a fair trial for Mr. Fenech, I have been “labouring under a fundamental misunderstanding” of your function as Rapporteur.

I had hoped that my letter of 9 December 2020 to you (responding to your public exposure of private correspondence and your failure to respond to my several requests for assistance) would be the end of the public discourse on these issues. Unfortunately, your 12 December 2020 letter fails to address the most vital fair trial and rule of law issues implicated and misrepresents my requests for assistance. Accordingly, and in order to set the record straight, I am compelled to respond.

First, I note that your latest explanation for your failure to respond to my letters of the 13 May and 8 September 2020 – that my requests fall outside of the exercise of your mandate - is an explanation that could have been provided, privately or otherwise, six months ago. Moreover, it is a different explanation that you provided in your 24 November 2020 letter to me (privately) and in your latest (public) Report.<sup>1</sup> Your 12 December 2020 letter fails to explain your shifting narrative, namely why you first claimed you were unable to respond due to the issues being sub judice and why, when I pointed out that such a claim was inconsistent with the facts and had no basis in law, you now offer another ‘explanation’ for your apparent refusal to engage with Mr. Fenech’s fair trial issues.

Putting aside this apparent volte face, your latest claim - that your mandate does not allow you to assist (or even discuss any fair trial and rule of law issue with Mr. Fenech’s legal representatives) – appears, to say the least, to be a curious interpretation of your mandate. Indeed, in light of Resolution 2293 and the need to ensure a *fair* and effective investigation and trial into the murder of Ms. Caruana Galizia, I can only surmise that you do not consider the fairness of the trial, at least for Mr. Fenech, to be within your mandate. It seems *any* investigation and *any* trial will do.

Unfortunately, this impression is strengthened by both your 12 December 2020 letter

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<sup>1</sup> Follow-up to Parliamentary Assembly Resolution 2293 (2019).

and your latest Report. Neither display the type of even handedness or respect for the Accused's fundamental rights that are the essence of a fair trial and the rule of law.

In my 9 December letter I suggested that you had acted in a manner akin to "pouring oil on the flames" of "an already inflamed situation". However, contrary to the impression you seek to convey in your 12 December letter, my focus was not your publication of my private correspondence. This was a concern, but the least of my concerns. The real interest of justice concerns were those you have chosen, once again, to ignore, namely your previous attack on the integrity of Mr. Merceica, a member of Mr. Fenech's Defence team (<https://timesofmalta.com/articles/view/lawyers-switch-to-yorgen-fenech-slammed-by-council-of-europe.791381>), your subsequent failure to record in your Report the fact that Mr. Merceica's conduct was investigated by the Attorney General of Malta and an official Inquiry and he was cleared of all wrongdoing; and your failure to record in your Report Mr. Caruana Curran's version of events – that Mr. Martin posed as an investigator. Rather than focus on me, I would have expected that your 12 December 2020 would have acknowledged the unfairness of your previous attack on Mr. Merceica, expressed regret for these important omissions, and showed some awareness of how they may adversely impact the work of the Defence and the rule of law more generally.

Sadly, as serious as these matters are, they are not the only insufficient or misleading characterizations of Mr. Fenech's trial process and the Defence team contained in your latest Report. Although you purport to be summarizing "the main developments since adoption of Resolution 2293", your Report is replete with damaging omissions and inaccuracies. It is a curious fact of your Report that, whilst scrupulously outlining the detail of the Prosecution case against Mr. Fenech, you fail to even record for the public, that you purportedly serve, that Mr. Fenech has categorically denied any involvement in the crime. For the avoidance of doubt, Mr. Fenech's defence is not that he has "accused Mr Schembri of.... [ ]...being involved in the murder plot". It is that Mr. Fenech was not involved in said plot.

Additionally, in your Report, you accuse Mr. Merceica of resigning his position as a junior lawyer in the office of the Attorney General and the following morning appearing in court as a member of Mr Fenech's defence team and accuse Mr. Fenech of claiming "that his escape from impending arrest had been planned with Keith Schembri, the prime minister's chief of staff". Neither of these claims are accurate. Mr. Merceica joined the criminal proceedings more than a month after he resigned from the Attorney General's office. Mr. Fenech is on record on numerous occasions denying ever planning to escape Malta, with Mr. Schembri or anyone else. Mr. Fenech has no reason to hide.

So, I hope you will please forgive me if I am a little confused about your mandate. You claim in your 12 December 2020 that you are neither an advocate or a judge in the criminal process. However, I would have considered that a Rapporteur of the Council of Europe would restrain from attacking members of a Defence team without cogent reason and would present the accused's defence and Defence team in a manner that was accurate, impartial and measured. I would expect that any Rapporteur that violated these obligations, advertently or otherwise, would issue forthright and timely corrections and/or apologies. Instead, I note that both your 24 November 2020 and

your 12 December 2020 letters studiously skirt around these issues as if your public misrepresentations were justified or of no import. In these circumstances, you cannot be surprised that observers of the criminal process, whether paid, or with a personal, or professional, interest or otherwise, arrive at the conclusion that you have, for reasons best known to yourself, reinterpreted the essence of your function and donned the mantle of a prosecutor or a judge.

Warmest,

A handwritten signature in blue ink, appearing to be 'WJ', written in a cursive style.

Kind regards,

Wayne Jordash QC