

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: 28 April 2021

Language: English

Classification: Public

Defence Submissions for the Fourth Status Conference

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I. INTRODUCTION

1. As per the Order of the Pre-Trial Judge dated 22 April 2021, setting the date for the Fourth Status Conference,¹ the Defence for Mr. Haradinaj now seek to make submissions in accordance with the directions contained within that order.

II. BACKGROUND

2. The chronology relevant for the purposes of the case status hearing is contained within paragraphs 1-7 of the scheduling order.
3. That same chronology is adopted for the purposes of these submissions and thus is not repeated.

III. THE LAW

4. As per Part II above, the law has been identified and highlighted within the order as noted and therefore again, there is no intention to repeat the same here.

IV. SUBMISSIONS

(1) Disclosure

¹ Order Setting the Date for the Fourth Status Conference, KSC-BC-2020-07/F00187, Public, 22 April 2021.

a. Whether the SPO has completed disclosure of Rule 103 material by the designated deadline of 9 April 2021

5. It is envisaged that the position of the SPO is that it has complied with its obligations under Rule 103.
6. Attention is drawn to the fact that the SPO have confirmed that they do not intend to call any witnesses of fact other than the two SPO investigators noted within the Pre-Trial Brief.
7. Further, the Defence note 'Disclosure 23' in particular the witness identified as 'A.7.B.5.E'.
8. The 'Official Note' would appear to contain potentially exculpatory evidence.
9. This raises a number of issues.
10. Firstly, how many individuals have the SPO spoken to in terms of whether protective measures will be requested, who are these individuals, noting that we are not aware of any pseudonyms of such individuals other than which have already been disclosed.
11. Secondly, have any relevant individuals spoken to provided potentially exculpatory evidence in terms of any counts of the indictments.
12. Thirdly, the Defence cannot assess whether the SPO have complied with their obligations under Rule 103 when there is no notification of who conducted those interviews, the identity of those persons spoken to, when, and the results of those

conversations, taking into account that the number of statements disclosed is limited in the extreme.

b. Whether the Parties are facing or foresee any difficulties related to the remainder of the disclosure process, in particular in relation to Rule 102(3) material

13. While the Defence acknowledges the SPO's attempt at filing a Rule 102(3) notice of all material available, it notes that the purported list was unfortunately both unhelpful and unclear in that it:

- (i) Lists a significant amount of material that had already been disclosed; and
- (ii) Lists items that are difficult or impossible to identify when considering the description provided.

14. In respect of the limited new and unknown material mentioned in the list, the Defence has now received partial clarification to an extent, and will now seek disclosure of the same on an *inter-partes* basis with a view to ascertaining whether those items are relevant or otherwise.

15. The submission of the SPO in the context of the Rule 102(3) notice again demonstrates that the SPO has carried out no meaningful investigation whatsoever at the KLA premises, for example but not limited to, witness and/or CCTV evidence, although it was at the KLA premises that the batches of documents were left, and the (alleged) press conferences held, noting that not a single employee of the KLA was interviewed.

16. The Defence would again repeat previous submissions that it remains startled by the lack of engagement by the SPO in terms of any appropriate investigation that sought to establish the facts of the incidents in question.
- d. Whether and by when the Defence is able to submit its objections, if any, to the evidentiary material disclosed pursuant to Rule 102 of the Rules, as foreseen in Rule 95(2)(e) of the Rules*
17. The Defence does and will seek to file formal objections in respect of the evidentiary material the SPO seeks to adduce at trial.
18. It is of note that the SPO continues to disclose evidence, most recently on 22 April 2021 and 'Disclosure Batch 23'.
19. As a consequence, the Defence is not in a position to file formal submissions in respect of that which the SPO intends to adduce whilst the disclosure process remains ongoing. Further, as will be set out below, there is increasing concern over the translation of material that is preventing the Defence from taking full instructions and advancing this case to trial.
20. If it is that the SPO confirms that it has disclosed any and all evidence that it intends to, and further, that any and all evidence it seeks to rely upon at trial has now been disclosed, the Defence will comply with any reasonable deadline imposed by the Pre-Trial Judge for the purposes of formal written objections.
21. It is however respectfully submitted that the Defence cannot file formal objections until it is known whether any further evidence is to be adduced or otherwise.

(2) Accused's Access to Documents

a. *Whether issues concerning the sharing documents with the Accused at the detention unit have been resolved*

22. The Defence for Nasim Haradinaj refers to its previous submissions in this regard, and further, notes that the issues have not been resolved, and if anything, the problems in sharing documents with the Defendant, and therefore the problems in ensuring that his defence can be prepared have been entrenched further.
23. Firstly, The Defence notes that the only attempt at accommodating Mr. Haradinaj's and Specialist Counsels' concerns about the Accused's access to documents since the Third Status Conference has been for the detention facilities to accept CDs in addition to hard copies. However, it is noted that CDs, too, are a completely impractical means to share documentation with Mr. Haradinaj. This is demonstrated by the fact that the Defence prepared a USB-stick containing approximately 40gb of material which, if put onto CDs, would a substantial number of CDs. At the same time, a single USB-stick would be sufficient. Accordingly, such a proposal for facilitation of access of documents is yet again completely impracticable.
24. No reason has been given as to why a USB drive cannot be provided and thus again, efforts to prepare the defence are further frustrated. It is noted that a secure USB that is passcode protected provides a more secure transfer.
25. The Defence would further highlight the 'space' allocated for the Defendant in terms of the Secure Electronic Data Sharing (SEDS) for the sharing of documents and

material with the Defendant, does not appear to be large enough to enable all of the evidence to be uploaded, in particular the video evidence.

26. The Defendant has an absolute right to be able to have sight of, and consider the evidence being adduced, and therefore alternative arrangements, such as a USB stick ought to be made.
27. Secondly, the SPO has now disclosed its pre-trial brief in English, however, we are advised that the brief will not be translated into Albanian until July. This is wholly unacceptable, and prevents the Defendant from taking an active part in the preparation of his Defence.
28. No reason, much less a justification, has been provided as to why it will take some three months to translate an essential document.
29. It is further noted that the full translation of all disclosure material, filings and decisions by the Specialist Chambers is running at significant delay with the majority not having been translated. It is noted that the official language of these proceedings is English, which may need to be reviewed, in light of the fact that the Specialist Chambers is an organ of the criminal justice system of the Republic of Kosovo and therefore a domestic institution *not* an international tribunal, Furthermore, as will be set out in a separate filing, the right of the Defendant to follow the proceedings and have full access to all material in a language which he understands is a fundamental right under Article 6(3)(a) and (e) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR').

30. Thirdly, an appropriate regime for in-person visits is yet to be facilitated.
31. The KSC detention facilities have taken the position that there will be no in-person visits in the absence of a full glass partition between Defendant and Counsel, until all Defendants and staff have been fully vaccinated. Again, this is not envisaged until the end of July 2021.
32. No reason has been provided for why this policy has been adopted, and no written medical opinion has been provided by the Registry other than oral advice given to the Registrar, and it is of note that no such policy exists for the purposes of court hearings. Again, there is no explanation for this disparity.
33. In the absence of an appropriate visiting regime from being adopted, again, the Defendant is being prevented from taking an active part in his defence.
34. Each of the three issues cited above, both singularly, and taken cumulatively, result in the Defendant not being provided with adequate facilities to prepare his defence in the context of Article 6(3)(b), and further, in terms of the translation delays, there is an arguable violation of Article 6(3)(a) and (e) of the ECHR.

(3) **Agreement on Points of Law and Fact**

- a. Whether the Parties have been able to reach any agreement on points of law and fact, particularly in light of the 9 April 2021 deadline for doing so in the Consolidated Calendar*

35. The Defence is aware of the deadline, however, it unfortunately has not been able to take detailed instructions from the Defendant in terms of the suggested 'agreed facts' due to the reasons previously set out.

36. The Defence intends to confirm that which is capable of agreement, once those instructions have been taken.

b. Whether and when the Parties expect to be able to identify a list of issues subject to dispute and one with issues not subject to dispute

37. The Defence are aware of its obligation and are happy to identify a list of relevant issues, however, it would respectfully submit that it cannot begin this process until the SPO have completed the disclosure process and all material has been translated into a language which the Defendant understands.

38. As per previous submissions above, if it is that the SPO have now completed the disclosure process, subject to those items to be requested by the Defence from the most recent schedule provided, the Defence can now seek to identify those issues

(4) Translations

a. Whether and to what extent there are outstanding requests for translation, of documents or evidence, into a language the Accused understand, that are required by law to be translated

39. It is particularly concerning that the Defence has been informed that the SPO Pre-Trial Brief will only be translated into Albanian by the end of July 2021. Meanwhile, the deadline for the Defence Pre-Trial Brief is 14 June 2021, which is well before the actual translation of the SPO Pre-Trial Brief will be available.
40. It is simply impossible to get proper instructions from Mr. Haradinaj for a Defence Pre-Trial Brief before the translation of the SPO Pre-Trial Brief is complete and Mr. Haradinaj has had sufficient time to review the translation, in order to give instructions.
41. The Defence further notes the requirement that all other material the SPO is relying on must be translated. No information has been provided as to whether the process of translation of evidentiary material is even underway, and if so, when it will be completed.
42. In short, without the translations of the SPO Pre-Trial Brief and supporting materials, Specialist Counsel for Mr. Haradinaj will be unable to take instructions for the next steps, notably the Defence Pre-Trial Brief. Accordingly, if deadlines were to be maintained as they currently stand, this will wholly undermine and prejudice Mr. Haradinaj's right to adequately prepare his defence.

b. Whether a timeline can be provided for any outstanding requests for translation

43. In light of the outstanding translations of the SPO Pre-Trial Brief and supporting materials, the Defence looks forward to a timeline and to reviewing the deadlines and calendar for the case in the light of these delays.
44. The Defence would seek to be given the opportunity to make submissions in respect of revisions to the current timetable in terms of the Defence pre-trial brief, agreed facts, etc, upon the SPO's confirmation of a revised timeline for the translation of their disclosed pre-trial brief.

(5) **Defence Investigations**

b. Whether the Defence is in a position to provide updates on the status of its investigations, taking in consideration the Registrar's Ex Parte Submissions, including the estimated overall amount and type of evidence it intends to disclose to the SPO, and whether requests for protective measures are envisaged

45. Given extreme difficulty of international travel in times of COVID-19 lockdowns and restrictions, Specialist Counsel have not been able to carry out the investigations that would have been carried out in normal circumstances, accordingly the process continues to be significantly restricted and delayed.
46. Specialist Counsel for the Defence have conducted further brief trips to Kosovo and intend to embark on a week-long investigative mission at the end of May, with countries' travel and health restrictions permitting.

47. Accordingly, Defence investigations are ongoing.

c. Whether the Defence intends to:

(i) give notice of an alibi or grounds for excluding responsibility, pursuant to Rule 95(5) of the Rules, and

48. At this stage, the Defence has no submissions on this point.

(ii) any associated disclosure, pursuant to Rule 104(1) and (2) of the Rules; make any related requests for protective measures

49. At this stage of the Defence investigations, the Defence has no submissions on this point.

(iii) make requests concerning unique investigative opportunities, pursuant to Rule 99(1) of the Rules

50. At this stage of the Defence investigations, the Defence has no submissions on this point.

d. Whether the Defence is on target to meet remaining deadlines set out in the Consolidated Calendar and the Decision on Rule 102(3) Material

51. The Defence for Mr. Haradinaj repeats its submissions above, in particular on outstanding translations of the SPO Pre-Trial Brief and supporting material, as well as problems posed by the current pandemic and related restrictions and lockdowns. Taking into account these aspects, neither of which are the fault of the Defence,

Specialist Counsel notes that the Defence deadlines in the Consolidated Calendar should be revised to allow for more time for an adequate preparation of the defence.

52. Specifically, the Defence notes that the Prosecution pre-trial brief will not be translated until the end of July, one month after the deadline for submission of the Defence pre-trial brief, and therefore it is likely that the timetable set previously will need to be revised.
53. It is not envisaged at this stage that there will be a need to make any request for protective measures, however, as noted, investigations are still ongoing.
54. Further, the Defence have not identified any issue that would require a request concerning a 'unique investigative opportunity' at this stage, however, the position will be confirmed by 11 May 2021 as noted within the consolidated calendar.
55. Finally, reference has already been made to the pre-trial brief being due on 14 June 2021, despite the translation of the prosecution being delayed until July. It would therefore appear to be appropriate for the Defence deadline to be extended to take into account this delay, delay that is not down to any act or omission of the Defendant.
56. In terms of the Rule 102(3) issue, a request has been made to the SPO on an interparty basis, and the disclosures of those requested items is now awaited.

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