

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 Guenael Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Nasim Haradinaj

Date: 2 December 2021

Language: English

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Defence Submissions for Defence Case Preparation Conference

Specialist Prosecutor

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Huw Bowden

I. INTRODUCTION

1. On 30 November 2021, the Trial Panel issued its 'Scheduling Order for the Defence Preparation Conference'.¹
2. Within that Order, the Defence are requested to make submissions on various points *per* paragraph 10 of that Order.
3. The Defence notes that submissions are invited 'at the hearing' and therefore no order is made that such submissions need be filed in writing.
4. The Defence do in any event seek to file the following submissions.

II. SUBMISSIONS

5. As per the Order of the Trial Panel the Defence makes the following submissions on those relevant areas in the order as they appear.

Whether the Defence seek to make an Opening Statement and its estimated length

6. The Defence is mindful of the need to use the Court's resources efficiently, and further, notes the timetable for the Defence case has become somewhat 'compressed'.
7. With that in mind, the Defence for Mr. Haradinaj would intend on making a short opening statement, no longer than 1 hour, and likely less.

¹ KSC-BC-2020-07/F00463.

8. The Defence reserves the right to supplement the oral opening statement with written submissions which would be filed prior to the first day of the Defence evidence currently scheduled to be 6 December 2021.

Whether the Accused can be present in the courtroom during the presentation of the Defence evidence

9. As a general principle, the Accused has the right to be present at this trial and face his Accuser.
10. Mr. Haradinaj has however recently tested positive for COVID-19 and on the basis of a message received from the Detention Unit on 1 December 2021, is still displaying symptoms.
11. Accordingly, he cannot be present for the Defence Preparation Conference.
12. As to whether he is able to be present at court in person for the presentation of the Defence evidence, the Defence for Mr. Haradinaj is not, at this time, able to assist the Court. This is subject to Mr. Haradinaj's recovery from COVID-19.
13. In terms of proposed alternatives to actual presence, the Defence makes no submissions on this point, noting it is for the Registry and the Court to make any alternative arrangements that may be necessary, having regard to the fact that the Accused has a right to be present and hear the evidence against him.
14. Further, in the current circumstances, and on the information presented, if the Accused is unable to be present in person, this is not due to any act and/or omission

of the Accused noting that he has contracted COVID-19 whilst in the custody of the KSC.

In what order the Defence intend to call their witnesses

15. The Defence acknowledges that the two defendants are co-defendants for the purposes of the Indictment, however, the defences to be raised are to an extent 'different'.
16. The Defence for Mr. Haradinaj has already confirmed to the Trial Panel, that in terms of those witnesses being called by the Gucati Defence, there is no intention to examine each of those witnesses afresh, but rather, ask only those supplemental questions that are deemed to be strictly necessary having heard that Evidence-in-Chief.
17. It is therefore the position of the Haradinaj Defence, at this stage, that the Accused will be called to give evidence at the conclusion of the Gucati Defence.
18. In terms of whether there is any merit in Mr. Haradinaj testifying immediately after the evidence of Mr. Gucati is heard, the Defence notes the following. This would not shorten the timeframe of the trial; nor would it make proceedings any more efficient. Therefore, it is questionable whether there is any merit in adopting this position.

Whether the Haradinaj Defence intends on tendering any exhibits other than the proposed witness statements

19. The Defence for Mr. Haradinaj intends to submit an additional exhibit list by 16:00 CET on 2 December 2021.

Any further submissions in respect of the Elements of Crime and Modes of Liability

20. The Defence for Mr. Haradinaj intends on making oral submissions in respect of sub-paragraphs (a) and (b) and the questions posed therein if it is that further submissions are deemed to be appropriate.

Any furthersubmissions on the Defence of Entrapment, Public Interest, Whistleblowing, and Chain of Custody challenges, to be advanced

21. The Defence for Mr. Haradinaj intends on making oral submissions in respect of this point, if it is that further submissions are deemed to be appropriate.

III. CONCLUSION

22. By way of concluding remarks, the Defence seeks to highlight that there is a clear disparity between the time that has been allowed for the SPO, between its Preparation Conference, and the calling of evidence, and that which is being afforded to the Defence. The Defence is being given a single weekend, and possibly one extra day, in between the Preparation Conference, and the Defence evidence being called.
23. The Defence has, at each stage, acted with efficiency, and further, has acceded to any and all requests of the Trial Panel to ensure that the trial remains 'on-track' having regard to the previously set, although ambitious, timetable.

24. It ought also to be highlighted that as much as the Defence are willing to act as efficiently and as swiftly as possible, it will not do so to the detriment of either Accused, there being a fine line between efficiency and prejudice.
25. A trial must be fair, it must give the Accused the opportunity to advance his case, and challenge that which has been presented against him. As much as Court resources are not, as noted, limitless, the Court is obliged to provide those resources that are necessary to conduct a fair trial, not merely a quick trial.

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