

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

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

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hysni Gucati

Date: 28 January 2022

Language: English

Classification: **Public**

Provisional Written Submissions re Agenda for Parties' Submissions on the Next Steps in the Proceedings F00527

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I. INTRODUCTION

1. On 20 January 2022, the Defence received of the Agenda for Parties' Submissions on the Next Steps in the Proceedings ("Agenda")¹.
2. Further directions from the Trial Panel were indicated by email dated 25th January 2021 entitled "Schedule for 28 and 31 January" ("Schedule"), ordering a Status Conference to be held on the morning of 31st January 2022 to hear submissions as outlined in the Agenda and inviting any written submissions ahead of the Status Conference to be submitted by 4pm on today's date.
3. Both the Agenda and the Schedule anticipated that the Defence cases would close at 4pm on today's date.
4. Following the notification on 26th January 2022 of an additional item to the Rule 102(3) Notice, namely item 205, and the Prosecution challenge to disclosure thereof ("Challenge")², it is not possible to close the Defence case until resolution of that outstanding Challenge.
5. Accordingly, and in order to assist, the Defence will make the following submissions at the Status Conference on a provisional basis.

II. SUBMISSIONS

Paragraph 6(a) of the Agenda

¹ KSC-BC-2020-07/F00534, *Agenda for Parties' Submissions on the Next Steps in the Proceedings*, Trial Panel II, Public, 20 January 2022

² KSC-BC-2020-07/F00534, *Prosecution notice of additional item 205 and challenge to disclosure with one strictly confidential and ex parte annex*, 25 January 2022, confidential at paragraph 8

6. The Defence does not seek the submission of DHG0075-DHG0081 into evidence (DHG0075-DHG0081 was not used or tendered with any witness).
7. Paragraph 6 of the *Haradinaj* judgment of 3 April 2008 was admitted by the oral order of the Trial Panel on 28 January 2021³.
8. The Defence does not seek the submission into evidence of portions of SPOE00248303-00248304 used by the SPO in the cross-examination of Mr Gucati, Transcript, 8 December 2021, pp.2343-2349. The first two sentences of the passage at page 16 & 17 of SPOE00248303-00248304, which was put to Mr Gucati at Transcript p.2347, related specifically those individuals giving evidence in case P.No.85/2005 before the Prizren District Court in proceedings occurring between 2005-2006 (15 years before the current events) and not of any wider application. The remaining part of the passage simply recites a quotation from an earlier judgment from the ICTY in the *Fatmir Limaj* case, IT-03-66-T. The Defence, in these proceedings, have had no opportunity to challenge either statement as to its accuracy in 2005-2006. Neither statement, in any event, can fairly be said to be probative of an environment of witness intimidation in Kosovo in 2020.

Paragraph 6(b) and 6(c) of the Agenda

9. The SPO indicated in open court on 28 January 2022 that it did not intend to seek leave to present evidence in rebuttal.

Paragraph 6(d) of the Agenda

³ Transcript, 28 January 2022 at page 3371

10. The shortened period of 21 days from the closing of evidentiary proceedings for the filing of Final Trial Briefs was tentatively proposed on 2 December 2021 before the commencement of the defence cases and before the extension of the target date for the closing of defence cases from 17 December 2021 to 17 January 2022⁴.
11. The target date for the closing of defence cases has subsequently been extended further, to 28 January 2022; a current target date which will necessarily be extended further due to the outstanding disclosure challenge.
12. The scope and extent of the defence cases as of 2 December 2021 was uncertain, with the Trial Panel restricting the scope of the defence case of the co-Accused significantly on that date, before the Court of Appeals Panel subsequently overturning in part that decision. As a result, significant additional expert and technical evidence has been heard by the Trial Panel, consideration of which must be incorporated into the final position of the Defence.
13. The evidentiary proceedings commenced on 18 October 2021 and, as of 2 December 2021, were due to conclude on 17 December 2021 – a period of some 9 weeks. As of the time of drafting, the evidentiary proceedings have already run for some 15 weeks.
14. In the circumstances, the Defence submit that a longer period than 21 days for the filing of the Final Trial Brief, up to the 30 days provided for in Rule 134 of the Rules, is appropriate.

Paragraph 6(e) of the Agenda

⁴ Transcript, 2 December 2021 at page 2110

15. The shortened period of a *minimum* of 7 days between the filing of Final Trial Briefs and the hearing for closing statements was tentatively proposed on 2 December 2021 before the commencement of the defence cases and before the extension of the target date for the closing of defence cases from 17 December 2021 to 17 January 2022⁵.
16. The target date for the closing of defence cases has subsequently been extended further, to 28 January 2022; a current target date which will necessarily be extended further due to the outstanding disclosure challenge.
17. The scope and extent of the defence cases as of 2 December 2021 was uncertain, with the Trial Panel restricting the scope of the defence case of the co-Accused significantly on that date, before the Court of Appeals Panel subsequently overturning in part that decision. As a result, significant additional expert and technical evidence has been heard by the Trial Panel, consideration of which must be incorporated into the final position of the Defence.
18. The evidentiary proceedings commenced on 18 October 2021 and, as of 2 December 2021, were due to conclude on 17 December 2021 – a period of some 9 weeks. As of the time of drafting, the evidentiary proceedings have already run for some 15 weeks.
19. In the circumstances, the Defence submit that a longer period than 7 days between the filing of the Final Trial Brief and the hearing for closing statements, up to the 21 days provided for in Rule 134 of the Rules, is appropriate.

Paragraph 6(f) of the Agenda

⁵ Transcript, 2 December 2021 at page 2110

20. At this stage, the Defence for Mr Gucati estimates that it will require 9 hours (two days) for its closing statement. The Defence also anticipate requiring additional time to comment on any response from the Specialist Prosecutor in accordance with Rule 135(4) of the Rules.

Paragraph 6(g), (h), (i) and (j) of the Agenda

21. The list of facts set out in F00262/A01, Specialist Prosecutor, *Annex 1 to Prosecution submissions on points of agreement on matters of fact*, 14 July 2021 at pages 2-3 can be agreed.

22. They can be made public.

23. No further points of fact have been agreed to.

Paragraph 7 of the Agenda

24. The Defence submits that, if the Trial Panel finds the Accused guilty of one or more crime(s) it should proceed in accordance with Rules 162 and Rule 164, save in the following circumstance: where the Trial Panel finds the Accused guilty of one or more crime(s) and is of the view that, taking into account the time during which the Accused has already been detained on remand in accordance with Rule 163(6), the Accused has, or will have, already served the appropriate term of imprisonment by the date of pronouncement of Trial Judgment ('Time Served').

25. Otherwise, the Accused faces an indictment with six counts, and multiple bases of liability alleged in the alternative for each count. The precise scope of those

offences is still unclear, with submissions as to the essential legal ingredients to be determined in the Trial Judgment. It is neither practicable nor fair for the Accused, in the present case, to be required to prepare abstract submissions in mitigation in advance of any Trial Judgment identifying which count or counts, and upon which basis, or bases, the Accused falls to be sentenced (if any).

Date for Closing Statements

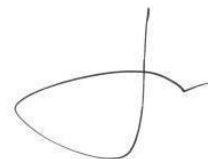
26. The Trial Panel, when previously setting the target date of 1 March 2022 for the Closing of the Case, stressed that that date was a 'mere indication of its estimates'⁶.
27. Although the Agenda did not seek submissions from the parties as to the target date of the hearing for Closing Statements, the Defence invite the Trial Panel to consider the week commencing 14 March 2022 as a new tentative date, with the Closing of the Case to occur at the end of that hearing.

III. CLASSIFICATION

28. This filing is classified as public.

Word count: 1445 words

⁶ Transcript, 2 December 2020 at page 2111



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28 January 2022

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