



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

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 Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Fidelma Donlon

Date: 10 March 2022

Language: English

Classification: Public

Decision on SPO Request for Disclosure of Additional Sentencing Evidence

Specialist Prosecutor

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TRIAL PANEL II (“Panel”), pursuant to Article 40(2) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 104 and 159(6) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 3 February 2022, the Panel closed the evidentiary proceedings and informed the Parties that, if any conviction is entered, it intended to impose a sentence together with the pronouncement of the Trial Judgment rather than apply the procedure set out in Rules 162 and 164 of the Rules.¹ In this same decision, the Panel ordered the Parties to address sentencing matters in their Final Trial Briefs and closing statements and provided instructions in this regard.² Therein, the Panel also scheduled the closing statements including, *inter alia*, the Parties’ submissions on sentencing on 17 and 18 March 2022.³

2. On 3 March 2022, the Parties filed their respective Final Trial Briefs, wherein: (i) the Specialist Prosecutor’s Office (“SPO”) addressed sentencing matters;⁴ (ii) the Defence

¹ F00553, Panel, *Decision on the Closing of the Evidentiary Proceedings and on Submissions Pursuant to Rules 134(b), (d) and 159(6) of the Rules* (“3 February Decision”), 3 February 2022, para. 17.

² 3 February Decision, para. 17.

17. For the time being, the Panel intends to impose a sentence, if any conviction is entered, together with the pronouncement of the Trial Judgment and does not currently intend to apply the procedure set out in Rules 162 and 164 of the Rules. For this reason, the Panel orders the Parties to address the following matters in their Final Trial Briefs and closing statements: (i) the factors relevant to the determination of sentence; (ii) the gravity of the alleged offences, and any mitigating and/or aggravating circumstances to be taken in consideration as set out in Rule 163(1) of the Rules; (iii) any proposed sentence to be imposed pursuant to Rule 163(4) of the Rules, in particular in light of any domestic or international sentencing practice that the Parties consider relevant; (iv) the relevance, if any, of Rule 165 of the Rules; (v) any specific reasons why the Panel should apply the procedure under Rules 162 and 164 of the Rules; and (vi) should the Panel decide, after receiving these submissions, that the procedure under Rules 162 and 164 of the Rules shall apply: (1) the difference between “any relevant information” that may be submitted under Rule 162(1) of the Rules and “additional evidence” that the Panel may hear under Rule 162(5) of the Rules; and (2) what additional evidence, if any, may the Parties wish to call and why such evidence was not called during the trial.

³ 3 February Decision, para. 22 (e) and (f).

⁴ F00565, Specialist Prosecutor, *Prosecution Final Brief*, 3 March 2022, confidential, with Annex 1, paras 323-430.

for Hysni Gucati (“Gucati Defence”) indicated that, “in the event of a finding of guilty in relation to any or all of the counts, it would wish to adduce additional evidence from family members, local politicians, community leaders and teachers in relation to” a number of issues;⁵ and (iii) the Defence for Nasim Haradinaj (“Haradinaj Defence”) did not address sentencing matters.⁶

3. On 7 March 2022, the SPO requested the Panel to order the Gucati Defence and the Haradinaj Defence to disclose any further evidence they seek to be considered for sentencing by 16:00 on Friday, 11 March 2022 (“Request”).⁷

4. On 8 March 2022, the Panel varied the time limit to respond to the Request and ordered the Gucati Defence to respond, if it so wished, by 9 March 2022, noon (“Order”).⁸ In the Order, the Panel noted that, since the Haradinaj Defence did not address sentencing in its Final Trial Brief, it understands that the Haradinaj Defence is not seeking to adduce additional evidence in this regard.⁹ The Panel also informed the Parties that no reply will be entertained.¹⁰

5. On 9 March 2022, both the Gucati Defence and the Haradinaj Defence responded to the Request.¹¹

II. SUBMISSIONS

6. The SPO requests the Panel to order the Gucati Defence and the Haradinaj Defence to disclose any evidence they seek to be considered for sentencing by 11 March 2022,

⁵ F00567, Panel, *Final Trial Brief on behalf of Hysni Gucati Specialist*, 3 March 2022, para. 170.

⁶ F00566, Haradinaj Defence, *Final Trial Brief on Behalf of Nasim Haradinaj*, 3 March 2022.

⁷ F00568, Specialist Prosecutor, *Prosecution Request for Disclosure of Additional Sentencing Evidence (“Request”)*, 7 March 2022.

⁸ F00569, Panel, *Order Varying Time Limit to Respond to F00568 (“Order”)*, 8 March 2022, paras 8, 10(a).

⁹ Order, para. 5.

¹⁰ Order, paras 9, 10(b).

¹¹ F00570, Haradinaj Defence, *Haradinaj Defence Reply to F00568 and F00569 (“Haradinaj Response”)*, 9 March 2022; F00571, Gucati Defence, *Response to F00568 (“Gucati Response”)*, 9 March 2022.

16:00.¹² In support of its Request, the SPO submits that: (i) it should have notice of any additional evidence proposed for sentencing in order to set out its full position in closing statements; (ii) the Defence should not be permitted to force the Panel into a bifurcated procedure by delaying disclosure of evidence it wishes to submit for sentencing; and (iii) there is no reason why the Defence should not be able to submit such proposed evidence by the requested date.¹³

7. In response, the Haradinaj Defence submits that it initially intended to address sentencing by oral submissions.¹⁴ However, in light of the Request and the Order, the Haradinaj Defence confirms that, in the event of a finding of guilt, it wishes to adduce evidence from six witnesses regarding Mr Haradinaj's character which, it submits, would be relevant for mitigation.¹⁵ The Haradinaj Defence provides an overview of its oral submissions on sentencing.¹⁶ The Haradinaj Defence concludes that, pending any convictions, the Panel should adopt the bifurcated procedure of Rules 162 and 164 of the Rules and dismiss the Request.¹⁷

8. The Gucati Defence responds that the Panel should refuse the Request.¹⁸ The Gucati Defence submits that it complied with the Panel's directions which did not require the Parties to disclose any additional evidence that they may wish to call for the purpose of sentencing.¹⁹ The Gucati Defence opines that the Rules do not require disclosure of such material pre-Trial Judgment.²⁰ The Gucati Defence argues that, if it were to find the Accused guilty of one or more crime(s), the Panel should proceed in accordance with Rules 162 and 164 of the Rules.²¹ Should the Panel be nonetheless

¹² Request, para. 4.

¹³ Request, para. 3.

¹⁴ Haradinaj Response, para. 5.

¹⁵ Haradinaj Response, paras 6(a), 14, 25, 29.

¹⁶ Haradinaj Response, paras 6(b)-61.

¹⁷ Haradinaj Response, para. 62.

¹⁸ Gucati Response, para. 4.

¹⁹ Gucati Response, paras 5-6 *referring to* Order, para. 4. *See also* 3 February Decision, para. 17

²⁰ Gucati Response, para. 9.

²¹ Gucati Response, paras 7, 10.

mind to order disclosure of additional evidence on sentencing prior to hearing the Parties' submissions on sentencing on 17 and 18 March, the Gucati Defence avers that it anticipates that it would be in a position to disclose its additional sentencing evidence by 14 March 2022, 16:00.²²

III. APPLICABLE LAW

9. Pursuant to Article 40(2) of the Law, the Panel shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules; having heard the parties, the Panel may adopt such procedures as are necessary to facilitate the fair and expeditious conduct of proceedings. It may give directions for the conduct of fair and impartial proceedings and in accordance with the Rules.

10. Pursuant to Rule 159(6) of the Rules, if the Panel finds the Accused guilty of one or more crime(s), it shall determine the appropriate sentence to be imposed on the Accused with the pronouncement of the Trial Judgment, unless, having heard the Parties, the Panel decides to proceed in accordance with Rule 162 and Rule 164 of the Rules.

IV. DISCUSSION

11. The Panel recalls that Rule 159(6) of the Rules provides for a separate sentencing procedure *only* as a secondary option. The Panel reiterates that Parties should have assumed that the Panel shall determine the appropriate sentence *at the same time* as the pronouncement of the Trial Judgment. Counsel for the Parties must, therefore, have planned for and presented at trial all evidence they considered relevant to sentencing.²³

²² Gucati Response, para. 11.

²³ 3 February Decision, para. 16.

12. The Panel also emphasises that, even under a separate sentencing procedure, Rule 162 of the Rules provides that the Panel, in determining the sentence, shall rely on the evidence presented during trial and may hear additional evidence only upon request and “if necessary”. This means that evidence on sentencing should, as a matter of course, be tendered during trial. Furthermore, the Panel notes that, under the Rule 162(1) procedure, the Parties may submit “any relevant information that may assist the Panel in determining an appropriate sentence”. This suggests that the Panel may rely on information that is not in evidence in determining an appropriate sentence.

13. The Panel also recalls that it scheduled the oral submissions on sentencing on 17 March 2022 for the SPO and on 18 March 2022 for both Defence teams.²⁴

14. The Panel received so far the written submissions of the SPO and the Gucati Defence on sentencing.²⁵ The Panel is yet to hear the aforementioned oral submissions. At this stage, the Panel still intends to determine the appropriate sentence at the same time as the pronouncement of the Trial Judgment. This means that the Panel expects that all facts relevant to sentencing are presented during the closing statements.

15. In this light, notwithstanding that evidentiary proceedings have been closed, the Panel considers that both Defence teams should disclose any additional evidence they wish to adduce in relation to sentencing sufficiently in advance of 17 March 2022 in order for the SPO to be in a position to make fully informed submissions on sentencing matters.

16. As regards the Gucati Defence, the Panel notes the Defence’s submission that it should be able to disclose its proposed additional evidence by 14 March 2022 at

²⁴ 3 February Decision, para. 22(e) and (f).

²⁵ F00565, Specialist Prosecutor, *Prosecution Final Brief*, 3 March 2022, confidential, with Annex 1, paras 323-430; F00567, Panel, *Final Trial Brief on behalf of Hysni Gucati Specialist*, 3 March 2022, paras 152-172.

16:00.²⁶ The Panel finds that such a timeline would leave sufficient time for the SPO to review the proposed additional evidence before their scheduled submissions on 17 March 2022. The Panel therefore orders the Gucati Defence to disclose, to the Panel and the Parties, any additional evidence it seeks to adduce for the purpose of sentencing by 14 March 2022 at 16:00.

17. As regards the Haradinaj Defence, the Panel notes its intent, in the event of a finding of guilt, to call six witnesses to provide evidence on the good character and financial circumstances of Mr Haradinaj.²⁷ In this light, the Panel orders the Haradinaj Defence to provide a clear and detailed summary of the content and relevance of the evidence it seeks to submit from each of the six intended witnesses, by 14 March 2022 at 16:00.

18. The Panel encourages the Parties to reach agreement on facts that might be relevant to sentencing, should the Panel decide to enter a conviction on any charge. Accordingly, upon disclosure of the aforementioned evidence and information, the Panel directs the Parties to engage in *inter partes* communications with a view to reaching agreement in relation to the facts that the Gucati Defence and the Haradinaj Defence wish to establish in relation to sentencing. Any such agreed facts should be stipulated and notified to the Panel at the start of the submissions on sentencing.

V. DISPOSITION


19. For these reasons, the Panel:

- a. **GRANTS** in part the Request;

²⁶ Gucati Response, para. 11.

²⁷ Haradinaj Response, paras 14, 27, 29.

- b. **ORDERS** that, by **14 March 2022 at 16:00**:
- i. the Gucati Defence disclose any additional evidence it wishes to adduce in relation to sentencing;
 - ii. the Haradinaj Defence disclose a detailed summary of any additional evidence it wishes to adduce in relation to sentencing;
- c. **DIRECTS** the Parties to engage in *inter partes* discussions with a view to reaching an agreement on facts relevant to sentencing and/or to stipulate and notify the Panel of any agreed fact at the start of the submissions on sentencing; and
- d. in case the Parties cannot reach an agreement, **ORDERS** the Parties to make submissions during the allotted time for sentencing on:
(i) whether a Party is authorised to submit relevant information or call additional evidence not presented during trial for the purpose of sentencing; and (ii) if so, under what conditions.



Judge Charles L. Smith, III
Presiding Judge

Dated this Thursday, 10 March 2022

At The Hague, the Netherlands