



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: 16 March 2022

Language: English

Classification: Public

Decision on 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 138 and 153 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* (“F00553”), 3 February 2022, para. 17.

² F00553, 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 F00553, 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 (“F00569”).⁸ In F00569, 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 Defence teams responded to the Request, indicating that they were in a position to adduce additional evidence on sentencing.¹¹

6. On 10 March 2022, the Panel, partly granting the Request, ordered the Defence to disclose any additional sentencing evidence (or a detailed summary thereof) it wished to adduce by 14 March 2022. The Panel also directed the Parties to engage in *inter partes* discussions with a view to reaching agreement on facts relevant to sentencing

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 (“F00569”)*, 8 March 2022, paras 8, 10(a).

⁹ F00569, para. 5.

¹⁰ F00569, paras 9, 10(b).

¹¹ F00570, Haradinaj Defence, *Haradinaj Defence Reply to F00568 and F00569*, 9 March 2022, para. 29; F00571, Gucati Defence, *Response to F00568*, 9 March 2022, para. 11.

and/or to stipulate and notify the Panel of any agreed fact at the start of the submissions on sentencing (“Order”).¹²

7. On 14 March 2022, the Gucati Defence and the Haradinaj Defence respectively disclosed eleven (11) and five (5) witness statements for the purposes of sentencing. On 15 March 2022, the Haradinaj Defence disclosed an additional statement (collectively “Statements”).¹³

8. On 15 March 2022, the Panel, varying its Order, ordered the SPO to indicate, by the end of the day, whether it agreed or objected to the admissibility of the Statements. The Panel specified that, should the SPO object only in part to the admission of some of the Statements, the Parties should endeavour to find a solution through *inter partes* discussions before their submissions on sentencing on 17 March 2022.¹⁴

9. On the same day, 15 March 2022, the SPO filed their submissions on the Statements (“SPO Submissions”).¹⁵ The Panel ordered the Haradinaj Defence to respond to the SPO Submissions by 16 March 2022, 16:00.¹⁶

10. On 16 March 2022, the Haradinaj Defence responded to the SPO Submissions.¹⁷

II. SUBMISSIONS

11. The SPO avers that the Statements do not comply with the requirements of Rule 153(2) of the Rules as admissible written statements.¹⁸ With the exception of one

¹² F00572, Panel, *Decision on SPO Request for Disclosure of Additional Sentencing Evidence* (“Order”), 10 March 2022, para. 19.

¹³ Disclosure 82; Disclosure 83; Disclosure 84. *See also* F00573, Haradinaj Defence, *Response to Decision on Disclosure on Additional Sentencing Evidence*, 14 March 2022.

¹⁴ Draft Transcript, 15 March 2022, pp 3533-3534.

¹⁵ F00574, Specialist Prosecutor, *Prosecution Submissions on “Good Character” Evidence* (“SPO Submissions”, “F00574”), 15 March 2022, confidential.

¹⁶ Draft Transcript, 15 March 2022, p. 3627.

¹⁷ F00577, Haradinaj Defence, *Response to Prosecution Submissions on “Good Character” Evidence* (“Haradinaj Response”, “F00577”), 16 March 2022, confidential.

¹⁸ SPO Submissions, para. 2.

of the Statements (“Impugned Statement”),¹⁹ the SPO submits that it does not oppose that the Panel consider the Statements for the purpose of sentencing.²⁰ The SPO objects to the admission of the Impugned Statement on the basis that, *inter alia*, its author had very limited interaction with Nasim Haradinaj (“Mr Haradinaj”) and is therefore not in a position to provide meaningful character evidence and that the content of the statement is irrelevant for the purpose of sentencing.²¹

12. The Haradinaj Defence responds that the Panel should allow the Impugned Statement and overrule the SPO’s objection.²² The Haradinaj Defence submits that the author of the Impugned Statement is particularly suited to comment on Mr Haradinaj’s character because of his “outstanding professional career” and “high moral calibre”.²³ The Haradinaj Defence avers that the context of the two meetings the author of the Impugned Statement had with Mr Haradinaj is highly relevant to establishing Mr Haradinaj’s “unique approach” while exercising his role within the Kosovo Liberation Army War Veterans’ Association.²⁴

III. APPLICABLE LAW

13. 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.

14. Pursuant to Rule 153(1)(a)(vi) and (vii) of the Rules, the Panel may admit in lieu of oral testimony the written statement of a witness which goes to proof of a matter

¹⁹ DNH2617-DNH2619 (“Impugned Statement”).

²⁰ SPO Submissions, para. 3.

²¹ SPO Submissions, para. 4.

²² Haradinaj Response, para. 11.

²³ Haradinaj Response, para. 8.

²⁴ Haradinaj Response, para. 9.

other than the acts and conduct of the Accused as charged in the indictment. Factors militating for the admission of a written statement in lieu of oral testimony include circumstances in which the evidence in question relates to the character of the Accused or to factors to be taken into account in determining sentence.

15. Pursuant to Rule 153(2) of the Rules, a statement shall be signed by the person who records and conducts the questioning and by the person who is questioned and his or her counsel, if present. The record shall note the date, time and place of, and all persons present during the questioning.

IV. DISCUSSION

16. At the outset, the Panel recalls that, in light of Rule 159(6) of the Rules, Parties should have assumed that the Panel would determine the appropriate sentence at the same time as the pronouncement of the Trial Judgment and Parties must have therefore planned for and presented at trial all evidence they considered relevant to sentencing.²⁵

17. That being said, the Panel observes that, except for the Impugned Statement, the SPO does not object to the Panel considering the remainder of the Statements for the purpose of sentencing.²⁶ In that light, and to ensure that the sentencing submissions are fully informed and based only on admitted evidence, the Panel will consider the admissibility of the Statements for the exclusive purpose of sentencing should the Panel enter a conviction on any of the counts of the Indictment.

18. As regards the non-objected Statements, the Panel is satisfied that their contents: (i) go to proof of a matter other than the acts and conduct of the Accused as charged in the indictment; (ii) relate to the character of the Accused and/or to factors to be

²⁵ Order, para. 11. *See also* 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 2022, para. 16.

²⁶ SPO Submissions, para. 3.

taken into account in determining sentence; and (iii) satisfy the general requirements of admissibility outlined in Rule 138(1) of the Rules. The Panel is therefore satisfied that these Statements are admissible under Rule 153 (a)(vi) and (vii) of the Rules.

19. As regards the Impugned Statement, the Panel observes that most of its content expresses the opinion of its author and relates neither to the character of Mr Haradinaj, nor to any relevant factor to be taken into account in determining the sentence. The Panel therefore is not persuaded by the argument of the Haradinaj Defence and finds these paragraphs irrelevant and inadmissible under Rules 138(1) and 153 of the Rules. However, the Panel considers that the part pertaining to the author's background and to his encounters with Mr Haradinaj could be regarded, for the former as providing context, and for the latter as relating to the character of Mr Haradinaj and to factors that could be taken into account in determining sentence. As a result, the Panel finds that only paragraphs 1, 2, 3 (first sentence), 6 (two first sentences), 8 (second and third sentences), 9 and 10 of the Impugned Statement are admissible under Rule 153 (a)(vi) and (vii) of the Rules.

20. The Panel observes, however, that the Statements do not meet all requirements of form provided in Rule 153(2) of the Rules. Indeed, the Statements are neither signed by the person who recorded and conducted the questioning; nor do they note the time and place of recording (and sometimes the date); nor do they record all persons present during the questioning. Nonetheless, in light of the absence of objection to admission from the SPO and in light of the fact that the unfulfilled requirements of form do not raise question of reliability of the evidence in question, the Panel hereby waives the requirements under Rule 153(2) of the Rules.²⁷

21. In light of the foregoing, the Panel hereby reopens the evidentiary proceedings in this case for the sole purpose of admitting the above-mentioned part of the Impugned

²⁷ See STL, *Prosecutor v. Ayyash et al*, STL-11-01/PT/TC, *Decision on Compliance with the Practice Direction for the Admissibility of Witness Statements Under Rule 155*, 30 May 2013, para. 28.

Statement and the non-objected Statements in full.²⁸ The classification of the admitted Statements shall be public.²⁹ The Panel notes that such admission is without prejudice to the weight, if any, that the Panel may give to these Statement, should a conviction be entered.

V. CLASSIFICATION

22. The Panel observes that the SPO Submissions (“F00574”) were filed confidentially given that the Impugned Statement was disclosed *inter partes* and the Panel’s decision on its admission was pending.³⁰ The Panel further observes that the Haradinaj Defence likewise filed its response (“F00577”) confidentially. Considering the present decision, the Panel directs the Registry SPO to reclassify both F00574 and F00577 as public.

VI. DISPOSITION

23. For these reasons, the Panel:

- a. **RE-OPENS** the evidentiary proceedings in the case of the *Prosecutor v. Hysni Gucati and Nasim Haradinaj* (KSC-BC-2020-07) for the sole purpose of the present decision;
- b. **ADMITS**, in part, the Impugned Statement as specified in paragraph 19;³¹

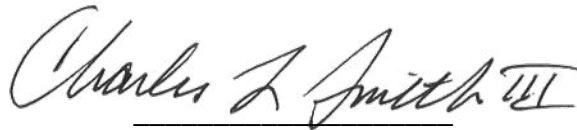
²⁸ F00553, para. 26(a).

²⁹ See Email correspondence dated 16 March 2022.

³⁰ SPO Submission, para. 6.

³¹ Updated version of DNH2617-DNH2619 to be filed by the Haradinaj Defence.

- c. **ADMITS** the remainder of the Statements in full,³² along with their English translations;³³
- d. **DIRECTS** the Haradinaj Defence to disclose an updated version of the Impugned Statement redacting the excluded paragraphs in accordance with paragraph 19 by Friday, 18 March 2022, 16:00 hours;
- e. **DIRECTS** the Registry to assign exhibit numbers to the updated, redacted version of the Impugned Statement and the other Statements;
- f. **DIRECTS** the Registry to classify the updated, redacted version of the Impugned Statement and the other Statements as public; and
- g. **DIRECTS** the Registry to reclassify F00574 and F00577 as public by Friday, 18 March 2022, 16:00 hours.



Judge Charles L. Smith, III
Presiding Judge

Dated this Wednesday, 16 March 2022

At The Hague, the Netherlands

³² DHG0000567-DHG0000569; DHG0000570-DHG0000571; DHG0000572-DHG0000574; DHG0000575-DHG0000576; DHG0000577-DHG0000578; DHG0000579-DHG0000580; DHG0000581-DHG0000583; DHG0000584-DHG0000586; DHG0000588-DHG0000587; DHG0000590-DHG0000597; DHG0000598-DHG0000600; DNH2623-DNH2625; DNH2590-DNH2592; DNH2593-DNH2594; DNH2601-DNH2606; DNH2607-DNH2611.

³³ DHG0000564-DHG0000566; DHG0000562-DHG0000563; DHG0000559-DHG0000561; DHG0000557-DHG0000558; DHG0000555-DHG0000556; DHG0000553-DHG0000554; DHG0000550-DHG0000552; DHG0000536-DHG0000537; DHG0000544-DHG0000546; DHG0000538-DHG0000543; DHG0000547-DHG0000549; DNH2620-DNH2622; DNH2587-DNH2589; DNH2595; DNH2596-DNH2600; DNH2612-DNH2616.