

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 Guénaél Mettraux

Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Nasim Haradinaj

Date: 29 November 2021

Language: English

Classification: Confidential

Defence Rule 119 Filing on Behalf of Nasim Haradinaj

Specialist Prosecutor

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I. INTRODUCTION

1. In accordance with the Order of the Trial Panel¹ and in accordance with Rule 119 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”),² the Defence for Nasim Haradinaj (“Haradinaj Defence”) hereby files its submissions in respect of the Defence it intends to call.

II. LAW

2. Rule 119 of the Rules provides as follows:
 - (1) At the latest at the closing of the Specialist Prosecutor’s case or following a decision pursuant to Rule 130, if any, the Defence shall decide whether a Defence case will be presented and notify the Panel accordingly.
 - (2) Should the Defence decide to present a case, the Panel shall order the filing of:
 - (a) the list of witnesses the Defence intends to call, including:
 - (i) the total time estimated for presentation of the Defence’s case;

¹ KSC-BC-2020-07/F00428 Scheduling Order for Work Plan and Time Limits for the Next Steps in the Proceedings, 9 November 2021, Public.

² KSC-BD-03/Rev3/2020.

- (ii) the total number of witnesses, including the number of witnesses who are expected to testify for each Accused and on each charge;
 - (iii) the name or pseudonym of each witness;
 - (iv) a summary of the facts on which each witness is expected to testify;
 - (v) the allegations in the indictment on which each witness is expected to testify, including specific references to charges and relevant paragraphs of the indictment;
 - (vi) an indication whether the witness will testify in person or give evidence through other means as provided for by the Rules; and
 - (vii) the estimated length of time required for the direct examination of each witness; and
- (b) the list of proposed exhibits the Defence intends to present stating, where possible, any objection of the Specialist Prosecutor regarding authenticity.
- (3) Within seven (7) days of the Defence's filings under paragraph (2), the Panel shall hold a Defence Preparation Conference, during which, after having heard the Parties, the Panel may:

- (a) determine the number of witnesses the Defence may call and instruct the Defence to remove repetitive witnesses;
 - (b) determine the time available for the Defence for presenting evidence;
 - (c) request the Defence to shorten the estimated length of the direct examination of any witness identified on the Defence Witness List filed under paragraph (2)(a);
 - (d) verify that disclosure obligations of the Parties have been met; and
 - (e) give any further directions as necessary to ensure a fair and expeditious trial.
- (4) At the Defence Preparation Conference, the Panel shall determine the date for the opening of the Defence case, which shall be within thirty (30) days of the Defence Preparation Conference and, in any event, after the closing of the Specialist Prosecutor's case pursuant to Rule 129. ²The Panel shall set target dates for the closing of the Defence case pursuant to Rule 131 and, if possible, for the closing of the case pursuant to Rule 136.
- (5) The Panel may permit, upon timely notice and a showing of good cause, the amendment of the lists of witnesses and exhibits filed pursuant to paragraph (2).

III. SUBMISSIONS

3. At paragraph 2 of the Order Scheduling Order for Work Plan and Time Limits for the Next Steps in the Proceedings, the Trial Panel ordered that the Defence to submit by 29 November 2021, their filings pursuant to Rule 119(2) of the Rules.³
4. In accordance with Rule 119(1) of the Rules, the Haradinaj Defence notified the Trial Panel and the parties, at the conclusion of the prosecution case, that it intended to file a Rule 130 Application to dismiss the charges and further that it intended, in the event that the Application was unsuccessful, to call a Defence case.
5. Pursuant to Rule 119(2)(a) the Haradinaj Defence confirms that, at the conclusion of the Defence that will be called by the first defendant, Mr. Hysni Gucati, the witnesses it intends to call are as follows:
 - a. Mr. Nasim Haradinaj;
 - b. Mr. Tome Gashi;
 - c. Mr. Rashit Qalaj;

³ KSC-BC-2020-07/F00428, Scheduling Order for Work Plan and Time Limits for the Next Steps in the Proceedings, 9 November 2021, Public, at paras. 13, 14, 17(a).

- d. Mr. Malcolm Simmons;
 - e. Ms. Maria Bamieh;
 - f. Ms. Anna Myers, expert witness;
 - g. Mr. Robert Reid, expert witness.
6. It is noted that the Gucati Defence will call eight Defence witnesses which appear on the Provisional Defence witness List for both the Gucati and Haradinaj Defence.⁴ It is not the intention of the Haradinaj Defence to separately question those witnesses unless it appears necessary following the completion of the evidence-in-chief by the Gucati Defence. Any additional questions to be put to those witnesses will be kept to only those matters that are necessary in order for the Haradinaj Defence to put its case.
7. Pursuant to the formal requirements of Rule 119(2), the Haradinaj Defence can provide the following information:⁵
- a. A total of six days for the presentation of the Haradinaj Defence Case
[Rule 119(2)(a)(i)];

⁴ KSC-BC-2020-07/F00260, Haradinaj Defence Pre-Trial Brief, 12 July 2021, Annex 1; KSC-BC-2020-07/F00258, Gucati Defence Pre-Trial Brief, Annex 1.

⁵ Please note that estimates have been given where appropriate which may change subject to the evidence that is heard as part of the Gucati Defence, any cross-examination by the prosecution and any further disclosure that may be made before and during the presentation of the Defence case.

- b. A total of seven witnesses for the Haradinaj Defence Case [Rule 119(2)(a)(ii)];
- c. The Haradinaj Defence do not intend to make any application for pseudonyms or other forms of protective measures [Rule 119(2)(a)(iii)];
- d. Annexed to this submission are the full witness statements of Tome Gashi, Rahit Qalaj and Maria Bamieh. The expert reports have been submitted already.⁶ The statements of Malcolm Simmonds and Nasim Haradinaj will follow. A full statement is provided for each witness rather than summaries of their evidence [Rule 119(2)(a)(iv)];
- e. Each witness will give evidence in relation to each charge. The expert witnesses will give evidence in respect of (a) the public interest defence; and (b) matters that relate to the effectiveness of the SPO's investigations, steps taken to investigate the leaks and to mitigate against the security breach and the continuity of chain of custody of evidence seized [Rule 119(2)(a)(v)];
- f. It is anticipated, subject to any additional health measures put in place as a result of the uncertainty of the COVID19 pandemic, that

⁶ KSC-BC-2020-07/F00376 and KSC-BC-2020-07/F00426.

the witnesses listed under (a) – (f) above will testify in person and witnesses (g) will be required to testify via secure video link [Rule 119(2)(a)(vi)];

g. It is anticipated that Mr. Haradinaj will require two days for his evidence-in-chief; witnesses (b) – (e) will require approximately two full days; and the two experts are unlikely to exceed another two days [Rule 119(2)(a)(vii)];

8. Pursuant to Rule 119(2)(b), the Haradinaj Defence notes the requirement to provide a list of exhibits upon which it seeks to rely. It is not possible to provide that list at this stage, given a decision remains outstanding on which Defence witnesses the Trial Panel is going to allow to be called, including whether the two expert witnesses will be allowed to give evidence.

9. In any event, there is no intention at this stage to seek admission of any exhibits that have not already been admitted into evidence following the SPO case.

10. The Defence for Mr. Haradinaj will therefore confirm the position at the Defence Case Preparation Hearing currently listed for 2 December 2021 where all outstanding issues are likely to be resolved.

IV. CONCLUSION

11. It is respectfully submitted that there remain unresolved matters that will almost certainly impact the ability of these matters being taken forward expeditiously. The Haradinaj Defence has acted in a way so as to ensure these matters proceed in a way that ensures the proceedings are expeditiously advanced, but not at the expense of maintaining a fair trial for the accused. There remain concerns in this regard.
12. It is noted that matters relating to disclosure have not been resolved. There is dispute as to the elements of the offences and modes of liability. The prosecution has not discharged its burden in respect of the evidence presented at trial. Notwithstanding these significant shortcomings in the trial proceedings, the Haradinaj Defence will continue to assist the Trial Panel in ensuring that the trial schedule is maintained.

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