



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 Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Fidelma Donlon

Date: 30 November 2021

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Scheduling Order for the Defence Preparation Conference

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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 72(2), 116 and 119 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this order.

I. PROCEDURAL BACKGROUND

1. On 9 November 2021, the Panel issued an order setting out the timeline for the prospective motions to dismiss charges pursuant to Rule 130 of the Rules as well as for the Defence Preparation Conference and the opening and presentation of the Defence case, in the event that not all charges were dismissed ("Scheduling Order").¹
2. On 10 November 2021, the Specialist Prosecutor formally closed his case.²
3. On 26 November 2021, the Panel issued its decision denying the Defence motions to dismiss charges.³
4. On 29 November 2021, in line with the Scheduling Order, the Defence filed their respective lists of witnesses and exhibits pursuant to Rule 119(2) of the Rules ("Rule 119(2) Filings").⁴

¹ F00428, Panel, *Scheduling Order for Work Plan and Time Limits for the Next Steps in the Proceedings* ("Scheduling Order"), 9 November 2021, para. 16. The Panel also noted in para. 11 of the Scheduling Order the indication from the Defence that, should there be a case to answer, the Defence intends to call a case, which could start in early December 2021.

² F00431, Specialist Prosecutor, *Prosecution Notice of the Closing of its Case*, 10 November 2021.

³ F00450, Panel, *Decision on Motions to Dismiss Charges*, 26 November 2021.

⁴ F00460, Gucati Defence, *Defence Submission of List of Anticipated Witnesses* with Annex 1 ("Gucati Proposed Witness List") and Annex 2 ("Gucati Proposed Exhibit List"), 29 November 2021; F00461, Haradinaj Defence, *Defence Rule 119 Filing on Behalf of Nasim Haradinaj* with Annex 1 ("Haradinaj Proposed Witness List") and Annex 2 ("Haradinaj Proposed Witness Statements"), 29 November 2021, confidential.

II. APPLICABLE LAW

5. Pursuant to Article 40(2) of the Law and Rule 116(1) of the Rules, the Panel shall ensure fair and expeditious proceedings in accordance with the Rules and full respect for the rights of the Accused. After having heard the Parties, the Panel may adopt procedures and modalities as are necessary to facilitate the fair and expeditious conduct of proceedings.

6. Pursuant to Rule 119(3) of the Rules, within seven (7) days of the filing by the Defence of the list of witnesses it intends to call and the list of proposed exhibits it intends to present, the Panel shall hold the Defence Preparation Conference. During that conference the Panel may, after having heard the Parties, *inter alia*: (i) determine the number of Defence witnesses; (ii) determine the time available to the Defence for presenting evidence; (iii) request the Defence to shorten the estimated length of the direct examination of any of its witnesses; and (iv) give any further directions as necessary to ensure a fair and expeditious trial. Pursuant to Rule 119(5) of the Rules, the Panel may also permit, upon timely notice and a showing of good cause, the amendment of the Defence lists of witnesses and exhibits.

7. Pursuant to Rule 119(4) of the Rules, 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 set the target dates for the closing of the Defence case and, if possible, for the closing of the case pursuant to Rules 131 and 136 of the Rules respectively.

III. DISCUSSION

8. The Panel recalls that the pending requests in relation to the proposed Defence Witnesses⁵ will be addressed at the Defence Preparation Conference, with any

⁵ F00312, Specialist Prosecutor, *Prosecution Requests in Relation to Defence Witnesses*, 15 September 2021, confidential; F00329, Gucati Defence, *Response to Prosecution Requests in Relation to Defence Witnesses*,

decision thereon to be issued either orally or in writing by 3 December 2021. In this regard, the Panel observes that, further to the Gucati Proposed Witness List and the Haradinaj Proposed Witness List, the SPO challenges raised in relation to Witnesses 1, 9, 11, 14 and 18 are moot, as these witnesses are no longer proposed to be called by the Defence.⁶

9. In light of the current general COVID-19 situation, the Panel instructs the Defence to indicate, by 1 December 2021 16:00 hours, whether the Accused wish and can attend the Defence Preparation Conference. Such an indication can be made via email to the Court Management Unit. If the Accused do not wish to attend the Defence Preparation Conference, the Defence should submit the pertinent waivers, in the same manner and by the same time.

10. During the Defence Preparation Conference, the Panel will invite submissions from the Parties and/or the Registry, as the case may be, on:

- (i) Whether the Defence can confirm that they intend to make opening statements and if so, the estimated length of such statements;
- (ii) Whether, in light of the current general COVID-19 situation, the Accused can be present in the courtroom during the presentation of the Defence evidence, and if not, what the proposed alternatives are;

27 September 2021, confidential; F00330, Haradinaj Defence, *Defence Response to Prosecution Requests in Relation to Defence Witnesses*, 27 September 2021, confidential; F00376, Haradinaj Defence, *Submissions of Expert Report from the Defence for Mr Haradinaj* and its annex, 15 October 2021; F00386, Haradinaj Defence, *Defence Submission of Instructions to Expert Witness 17 with Confidential Annex 1*, 20 October 2021; F00388, Specialist Prosecutor, *Prosecution Challenge to Proposed Defence Expert and Report*, 22 October 2021; F00394, Haradinaj Defence, *Defence Request for Addition of an Expert to its List of Potential Witnesses*, 23 October 2021, confidential; F00410, Haradinaj Defence, *Defence Response to Prosecution Challenge to Proposed Defence Expert and Report*, 1 November 2021, confidential; *see also* F00410RED; F00426, Haradinaj Defence, *Submission of Expert Report from the Defence for Mr. Haradinaj* and its two annexes, 9 November 2021; F00444, Haradinaj Defence, *Haradinaj Defence Response to F00438*, 22 November 2021, confidential.

⁶ Gucati Proposed Witness List; Haradinaj Proposed Witness List.

- (iii) Any SPO challenges to new witnesses or exhibits proposed by the Defence or any further SPO submissions on the pending challenges, in light of the Rule 119(2) Filings;
- (iv) Whether the Defence intends to call the witnesses in the order submitted (Gucati Defence first; Haradinaj Defence second) or whether it sees merit in having the two Accused testify first, *i.e.* Mr Haradinaj testifying immediately after Mr Gucati;
- (v) Which, if any, proposed witness statements does the Defence wish to tender from those submitted with or disclosed pursuant to their Rule 119(2) Filings;
- (vi) Noting the submission of the Haradinaj Defence regarding the Panel's pending decision, whether the Haradinaj Defence can confirm that it does not plan to tender any exhibit other than, as the case may be, the submitted proposed witness statements;
- (vii) Estimates of cross-examination by the SPO for each proposed witness and, if applicable, the co-Accused;
- (viii) Any further submissions, not repeating those previously made, on the elements of offences and modes of liability in light of the Panel's decision under Rule 130 of the Rules and, in particular:
 - a. the requirement of specific intent under Count 4 in light of the evidence adduced by the SPO (see F00450, para. 65);
 - b. the requirement of proof under Counts 5-6 that the confidential classification and/or protective measures were still valid and in force at the time of the alleged commission of the offences, *i.e.* in September 2020 (see F00450, para. 81);

- (ix) Any further submissions, not repeating those previously made, on the Defence entrapment allegations, Defence arguments on public interest and whistleblowing as well as the challenges to the chain of custody;
- (x) Any further SPO submissions on the outstanding Defence application for video-link (in the event that such witness is allowed to be called by the Panel); and
- (xi) Any other questions that the Panel may wish to ask.

11. The Panel also notes that the submission or disclosure of two witness statements proposed by the Haradinaj Defence is still pending. The Panel orders the Haradinaj Defence to produce the statements of DW1249 and DW1250 by 1 December 2021, 16:00 hours.

12. Finally, the Panel instructs the Parties to notify via email the Panel and the opposing Party, by 1 December 2021, 16:00 hours, of any other issue that they would wish to raise during the Defence Preparation Conference.

IV. DISPOSITION

13. In light of the foregoing, and in order to ensure the fair and expeditious conduct of the trial proceedings, the Panel:

- a. **CONFIRMS** that the Defence Preparation Conference will be held on **2 December 2021**, with **3 December 2021** as a reserve day if needed;
- b. **INSTRUCTS** the Defence to indicate, by **1 December 2021, 16:00 hours** and in the manner set out in paragraph 9, whether the Accused wish and can attend the Defence Preparation Conference;
- c. **INSTRUCTS** the Parties to notify via email the Panel and the opposing Party, by **1 December 2021, 16:00 hours**, of any other issue that they would wish to raise during the Defence Preparation Conference;

- d. **ORDERS** the Haradinaj Defence to produce, by **1 December 2021, 16:00 hours**, the statements of DW1249 and DW1250; and
- e. **SETS** the agenda of the Defence Preparation Conference to include:
- i. determining the number of Defence witnesses and hearing submissions from the Parties on it if any;
 - ii. determining the time available to the Defence for presenting its evidence;
 - iii. determining the date for the opening of the Defence case;
 - iv. seeking confirmation from the Defence as to whether it elects to make an opening statement and if so, its length;
 - v. setting a provisional schedule for the Defence presentation of evidence, after having heard the Parties on the proposed timetable for 6-9 and 16-17 December 2021 and, if deemed necessary, in January 2022;
 - vi. setting target dates for the closing of the Defence case, and if possible for the closing of the case pursuant to Rules 131 and 136 of the Rules;
 - vii. hearing the Parties' and/or the Registry's submissions in relation to the matters described in paragraph 10; and
 - viii. any other matter raised by the Parties and any other intervening issue that the Panel may wish to address.



Judge Charles L. Smith, III
Presiding Judge

Dated this Tuesday, 30 November 2021
At The Hague, the Netherlands