

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: 09 March 2022

Language: English

Classification: Public

Haradinaj Defence Reply to F00568 and F00569

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I. INTRODUCTION

1. On 03 February 2022, the Trial Panel invited submissions in respect of the question of sentence in the event that the Defendant were to be convicted.¹ The Trial Panel further permitted the parties to make submissions on sentencing in its closing oral submissions.²
2. On 03 March 2022, the Defence for Mr. Nasim Haradinaj (“Haradinaj Defence”) filed its Final Trial Brief,³ along with the Defence for Mr Gucati⁴ and the Specialist Prosecutor’s Office (“SPO”).⁵ The Haradinaj Defence did not address sentencing in its Final Trial Brief and the Gucati Defence indicated that in the event of a conviction, it intended to file additional evidence.⁶
3. On 07 March 2022, the Specialist Prosecutor’s Office (“SPO”) requested the Trial Panel to order the Defence to disclose any further evidence to be considered for sentencing by 16:00 on Friday, 11 March 2022.⁷

¹ “Decision on the Closing of the Evidentiary Proceedings and on Submissions Pursuant to Rules 134(b), (d) and 159(6) of the Rules”, KSC-BC-2020-07/F00553, paras. 16-18

² “Decision on the Closing of the Evidentiary Proceedings and on Submissions Pursuant to Rules 134(b), (d) and 159(6) of the Rules”, KSC-BC-2020-07/F00553, para. 22(f)

³ KSC-BC-2020-07/F00566, Final Trial Brief on Behalf of Nasim Haradinaj, 3 March 2022.

⁴ KSC-BC-2020-07/F00567, Final Trial Brief on behalf of Hysni Gucati, 3 March 2022.

⁵ *Ibid.*, para 166-167.

⁶ KSC-BC-2020-07/F00567, Final Trial Brief on behalf of Hysni Gucati, 3 March 2022, para. 170.

⁷ KSC-BC-2020-07/F00568, Prosecution Request for Disclosure of Additional Sentencing Evidence, 7 March 2022.

4. On 08 March 2022, the Trial Panel issued its Order Varying Time Limit to Respond to F00568.⁸ The Trial Panel further indicated that it understood that the Haradinaj Defence is not seeking to adduce additional evidence.⁹
5. The Haradinaj Defence initially intended to address sentencing by oral submissions as it was permitted to do in accordance with the Court's order of 03 February 2022. This is because making detailed submissions on sentencing prior to any determination in respect of guilt, is at odds with the natural progression of the case, especially given:
 - a) no decision has been made by the Trial Panel in respect of the scope of the counts on the indictment, with previous submissions on the elements of crime not being ruled upon as yet;¹⁰
 - b) while general remarks on sentencing can properly be advanced during closing statements, detailed sentencing and mitigation submissions can only be properly advanced on the basis of findings of guilt by a trial panel according to the counts in the indictment.
6. Nonetheless and in view of the SPO's filing of 07 March 2022 and the Trial Panel's Order of 08 March 2022, in this filing, the Haradinaj Defence wishes to:
 - a) make clear that it wishes to adduce evidence on sentencing from six witnesses in the event of a finding of guilt;

⁸ KSC-BC-2020-07/F00569, Order Varying Time Limit to Respond to F00568, 8 March 2022.

⁹ *Ibid.*, para. 5

¹⁰ KSC-BC-2020-07/F00342, Defence Submissions on Elements of Crimes and Modes of Liability, 3 September 2021

- b) provide an overview of the submissions it will make orally on the points that the Trial Panel has requested be addressed, namely:¹¹
- 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 into 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 reason why the Panel should apply the procedure under Rules 162 and 164 of the Rules;
 - 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.

¹¹ KSC-BC-2020-07/F00553, Decision on the Closing of the Evidentiary Proceedings and on Submissions Pursuant to Rules 134(b), (d) and 159(6) of the Rules, para 17.

7. This submission is without prejudice to any further or more detailed points on sentencing that the Haradinaj Defence will make orally or following any conviction.

II. FACTORS RELEVANT TO DETERMINING SENTENCING

8. The Trial Panel is aware of the maximum sentences pursuant to the Criminal Code of the Republic of Kosovo (“KCC 2019”),¹² and the KSC legal framework, which it does not seek to repeat.
9. In terms of those sentences available, the Haradinaj Defence, however, highlights that the Trial Panel is urged to caution against ‘double punishment’, where two distinct offences arise out of the same facts.
10. The Haradinaj Defence further highlights the importance of paying regard to comparable international practice as set out in Section IX of this submission and ensuring that an overall sentence is proportionate.

III. GRAVITY AND ANY MITIGATING CIRCUMSTANCES TO BE TAKEN INTO CONSIDERATION AS SET OUT IN RULE 163(1)

11. The SPO have sought to paint a picture that the alleged offending is at the very top of the scale of such offences, and further, that there are no mitigating

¹² Code No. 06/L-074, Criminal Code of the Republic of Kosovo, Official Gazette of the Republic of Kosovo No. 2/14 January 2019.

features. Such a position is at odds with the case put forward at trial and the evidence presented.

12. The Haradinaj Defence, in considering the issue of gravity and mitigation of the alleged offences will draw the Panel's attention to, *inter alia*, the following points:

- a) The Defendant is confirmed to not being involved in the removal of the documents from the SPO offices;
- b) The Defendant is not, at any time, alleged to have procured the documents;
- c) The documents were not 'disseminated' any more widely than professional journalists and the Defendant did not publish any documents;
- d) No violence or specific threats of violence were made or used at any time;
- e) There is no evidence of any threats, intimidation or reprisals;
- f) Not one individual is evidenced to have suffered any physical harm as a result of the alleged actions of the Defendant;
- g) No evidence has been adduced at any time to suggest that any investigation and/or prosecution was compromised at any time as a consequence of the Defendants alleged actions, nor is there any evidence of any witness refusing to cooperate with the SPO.

13. Moreover, the key tenant of the Accused's Defence has been that he was acting in the public interest – that should be taken into account as a point of

important context when understanding the gravity of any alleged offences and / or mitigating factors.

14. In the event of a conviction on one or more counts, the Accused would seek to make additional submissions and adduce additional evidence as to his character and financial circumstances, as is permitted by Rules 162(1) and (5).

IV. ANY PROPOSED SENTENCE TO BE IMPOSED PURSUANT TO RULE 163(4), IN PARTICULAR LIGHT OF ANY DOMESTIC OR INTERNATIONAL SENTENCING PRACTICE THAT THE PARTIES CONSIDER RELEVANT

15. In accordance with Rule 163(4), the Trial Panel is invited to consider the principle of 'totality' in respect of any sentence imposed where guilty verdicts might be returned, to provide a proportionate sentence and to take account of the sentencing practice that is included in Section IX of this submission.

V. THE RELEVANCE OF RULE 165

16. Rule 165 is relevant.
17. Offences are punishable by a fine.
18. Moreover, the practice indicated at Section IX of this submission indicates that a fine is an appropriate penalty for comparable offences.
19. In this instance, Mr Haradinaj has spent considerable time in detention already, at the time of writing close to eighteen (18) months, which must be taken into account and off-set against any fine that is to be imposed.

20. It is submitted that any custodial sentence would be wholly disproportionate. In the event that the Trial Panel considers that a custodial sentence is appropriate, any sentence would need to factor in the considerable time in detention.

VI. THE APPLICATION OF RULE 162 AND 164

21. Rules 162 and 164 should to be adopted in this instance, rather than of Rule 159.
22. The Accused has not been convicted and faces six counts where the precise scope of the offences is still unclear and there has been no ruling on the elements of crimes required to be proven at trial. It is therefore respectfully submitted to be wholly inappropriate to proceed to sentence, without the Accused being given the opportunity to consider detailed and specific submissions in terms of mitigation and sentencing in the light of final decisions on the law and charges against the Accused.
23. Moreover, this is a case that is highlighted as fact sensitive and submissions on sentencing may be impacted by findings of fact that the Trial Panel makes in its judgment.
24. In addition, it is submitted that in the event of a conviction there is no prejudice to the Accused by permitting a further opportunity for submissions on sentencing, especially when the Rules provide scope for submissions on sentencing after judgment on the underlying offences. If anything, when additional time is requested by the Accused to make submissions on sentencing in the event of a conviction, it is more consistent with fair trial rights to provide the Accused with a full opportunity to be heard.

25. The Defendant confirms that he, upon conviction, would seek to call additional evidence relevant to mitigation, that evidence not being permissible at the trial stage, or within the scope of the admissible defence evidence at trial.

VII. SHOULD THE TRIAL 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

26. Relevant information includes:

- a) Information in respect of the relevant statutory framework in terms of maximum penalties;
- b) Information as to sentencing options;
- c) Submissions in respect of gravity;
- d) Submissions in respect of mitigating and aggravating features;
- e) Submissions in respect of previous like matters that may have been determined by International Tribunals

27. Evidence includes additional evidence that may be relevant to sentencing, including evidence as to character and financial means.

28. Evidence, does not, however, include factual evidence relating to the underlying offences that would properly be expected from fact witnesses.

VIII. WHAT ADDITIONAL EVIDENCE, IF ANY, MAY THE PARTIES WISH TO CALL AND WHY THAT EVIDENCE WAS NOT CALLED DURING TRIAL

29. In the event of a finding of guilt on any or all charges, Mr Haradinaj would call additional evidence regarding his character from six witnesses. This evidence would be relevant for mitigation.
30. This evidence was not called at trial because it was not relevant to underlying fact evidence to respond to the indictment as envisaged by Rules 119(2)(v) and 138(1).

IX. SENTENCING PRACTICES

31. The following paragraphs set out the sentencing practice of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the Special Tribunal for Lebanon (“STL”). The Haradinaj Defence reserves the right to refer to additional cases in oral closing submissions and to make additional submissions if the Trial Panel adopts the Rule 162 and 164 procedure.

*The Ivica Marijačić and Markica Rebić Contempt Case*¹³

32. Marijačić was a journalist and editor-in-chief of a weekly publication ‘Hrvatski List’. While Rebić was the former head of the Security Information Service for the Republic of Croatia.
33. In 1997, a protected witness testified in a closed session during the Blaškić case.

¹³ *Prosecutor v Ivica Marijačić and Markica Rebić* (Judgment) IT-95-14-R77.2 10 Mar 2006

34. Some years later, on 18 November 2004, Hrvatski List published an article titled 'World Exclusive – The First in the World to Publish THE SECRET DOCUMENT which Shows Carla Del Ponte's Plot against Croatia'. The article was written by Marijačić and included an interview with Rebić. The article detailed that it was Rebić who provided the identity of the protected witness, alongside copies of the statements made and a transcript of testimony.
35. Both parties were aware that disclosure and publication of this information was prohibited and that they were in violation of three existing applicable orders made to protect witnesses.
36. The court found both the Accused guilty of deliberately disclosing: the identity of the protected witness, statement and transcript of the witness and the fact that the witness had testified in non-public proceedings before the tribunal, despite knowing that the above was subject to protection orders issued by the tribunal.
37. In dealing with sentence, the Trial Chamber outlined that the most important factors to be taken into account when determining the appropriate penalty are 'the gravity of the contempt and the need to deter repetition and similar conduct by others.'¹⁴
38. When considering the gravity, the Panel held that there was "plainly a knowing interference with the administration of justice" and noted the defiant way that the Accused breached the orders, in particular, that they had done so knowingly and wilfully. The relevant behaviour is described as 'deliberate'

¹⁴ Ivica Marijačić and Markica Rebić (Judgment) IT-95-14-R77.2 10 Mar 2006, para 46

and calculated'.¹⁵ The Panel further that the acts diminished the authority of the Trial Chamber.¹⁶

39. Both of the Accused were fined 15,000 Euros to be paid within one month of the judgment.¹⁷

*The Jović Contempt Case*¹⁸

40. The *Jović* case followed the *Marijačić & Rebić* case.
41. Jović was the Editor-in-Chief of 'Slobodna Dalmacija', a Croatian daily newspaper.
42. On 27 November 2000, the newspaper published information concerning a protected witness in the *Blaškić* case - Mr Stjepan Mesić. They ran this article on their front page titled 'Transcripts from the Hague'.
43. An order to cease the publication of this information was issued. However, Jović refused to comply.
44. In its judgment, the Trial Chamber referred to *Marijačić & Rebić*, agreeing that the most important facts to determine an appropriate penalty are gravity and the need to deter.
45. In passing its judgment, the Trial Chamber took account of the fact that after being ordered to cease publication of the protected witness' evidence, Jović compounded the original contempt by further publishing transcripts of the

¹⁵ *Ibid* para 48

¹⁶ *Ibid*

¹⁷ *Ibid* para 52.

¹⁸ *Prosecutor v Josip Jović* (Judgment) IT-95-14 and 14/2-R77 30 Aug 2006

witness's closed session testimony in 22 further consecutive newspaper editions.¹⁹

46. The judgment further described the publication of this information as boastful, as the editions acknowledged that the transcripts were secret.²⁰

47. A fine of 20,000 Euros to be paid within 30 days of the judgment was ordered.²¹

*The Khayat Contempt Case*²²

48. There have been two contempt cases at the Special Tribunal for Lebanon. In each case, an individual and a media company were charged with contempt and obstruction of justice concerning media publications that contained information about alleged confidential witnesses in the *Ayyash et al.* case.

49. The first case was against Karma Khayat, the Deputy Head of News and Political Programs, as well as a shareholder of 'Al Jadeed' TV.

50. Khayat was charged on two counts:

- a) Count 1: the Accused was charged with knowingly and wilfully interfering with the administration of justice by broadcasting and /or publishing information on purported confidential witnesses

¹⁹ *Ibid* para 26

²⁰ *Ibid*

²¹ *Ibid*

²² Special Tribunal for Lebanon, *Prosecutor v. Al Jadeed S.A.L. & Ms Khayat*, (Judgment) STL-14-05/T/CJFO 176/PRV/20150918/R005223-R005280/EN/dm, (18 September 2015); Special Tribunal for Lebanon, *Prosecutor v Al Khayat* (Reasons for Sentencing Judgment) STL-14-05/S/CJ F0186/20 151 006/R005339-R005346/EN/dm (6 October 2015)

b) Count 2: the Accused was charged with knowingly and wilfully interfering with the administration of justice by failing to remove from Al Jadeed TV.

51. Khayat was originally acquitted of the first count and found guilty of the second. She later appealed and was acquitted of the second count; however, the reasoning here is still relevant.

52. In reaching its decision on sentencing, the Panel said that it should be guided by well-established sentencing practice from the ICTY in contempt matters.²³

53. In terms of gravity, the Judge noted that Khayat had knowingly violated an Order by failing to remove the 'Episodes' from the website and YouTube channel and that this defied the authority of the Tribunal.²⁴

54. In mitigation, the Judge did accept that there was no evidence to show that the publication of the 'Episodes' would likely undermine the public's confidence in the Tribunal's ability to protect confidential information. Further, the Judge noted that Khayat had cooperated with the investigation and had appeared at trial and been duly represented by counsel during judgment and sentencing.²⁵

55. The Accused was sentenced to pay a fine of 10,000 Euros.²⁶

²³ Special Tribunal for Lebanon, *Prosecutor v Al Khayat* (Reasons for Sentencing Judgment) STL-14-05/S/CJ F0186/20 151 006/R005339-R005346/EN/dm (6 October 2015), para. 15

²⁴ *Ibid.*, para 17

²⁵ *Ibid.*, para 18

²⁶ *Ibid.*, para 23.

*The Al Amin Contempt Case*²⁷

56. Al Admin was the Editor-in-Chief and Chairman of the Board of Directors of 'Al Akhbar'.
57. On 15 January 2013, Al Admin co-authored an article titled, 'STL Leaks: The Prosecution's Surprise Witnesses'. Information on seventeen (17) purported confidential witnesses in the *Ayyash et al.* case was published in the newspaper as well as online website in Arabic and English.
58. A second article was published on 19 January 2013, titled 'The STL List: Why We Published'. This article contained information on a further fifteen (15) purported confidential witnesses. Again, this was published in the newspaper and on the website. First in Arabic, then a day later in English.
59. In line with previous cases, gravity and deterrence were considered the most important factors. In respect of gravity, the publication of a second article revealing further confidential information, despite public outcry and public claims that he had infringed on the law, was particularly aggravating (as it was in Jović), as was the "contemptuous behaviour".²⁸
60. Additionally, it was found that several witnesses experienced fear. Two witnesses lost confidence in the Tribunal's ability to maintain the confidentiality of its witness information. Further, at least one witness suffered direct harm – loss of business.²⁹

²⁷ Special Tribunal for Lebanon, *Prosecutor v. Akhbar Beirut S.A.L and Mr Ibrahim al Amin*, (Judgment) STL-14-06/T/CJ F0262/PRV/20160715/R007725-R007795/EN/af (15 July 2016).

²⁸ Special Tribunal for Lebanon, *Prosecutor v. Akhbar Beirut S.A.L and Mr Ibrahim al Amin* (Reasons for Sentencing), F0265/20 160905/R008239-R00824 7/EN/dm (5 Sept 2016) para 17

²⁹ Special Tribunal for Lebanon, *Prosecutor v. Akhbar Beirut S.A.L and Mr Ibrahim al Amin*, (Judgment) STL-14-06/T/CJ F0262/PRV/20160715/R007725-R007795/EN/af (15 July 2016), para 118; Special

61. The Accused was found guilty and fined 20,000 Euros.³⁰

X. CONCLUSION

62. The Haradinaj Defence invites the Trial Panel to adopt the procedure in Rules 162 and 164 and to dismiss the SPO request for disclosure of additional sentencing evidence, pending any convictions.

Word Count: 3,312 words



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Tribunal for Lebanon, *Prosecutor v. Akhbar Beirut S.A.L and Mr Ibrahim al Amin* (Reasons for Sentencing), F0265/20 160905/R008239-R00824 7/EN/dm (5 Sept 2016) para 19

³⁰ *Ibid.*, para 20