

**In:** KSC-BC-2020-07  
**The Prosecutor v. Hysni Gucati and Nasim Haradinaj**

**Before:** Pre-Trial Judge

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Counsel for Nasim Haradinaj

**Date:** 3 March 2021

**Language:** English

**Classification:** Confidential

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**Haradinaj Defence Reply to Prosecution response to the Haradinaj Defence  
request for information concerning diplomatic briefings**

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## I. REPLY

1. The Defence for Mr. Haradinaj seeks to briefly reply to the Special Prosecutor's Office ('SPO') one-page-long Response<sup>1</sup> to the matters the Defence raised in respect of a disclosure request that relates to a confidential Diplomatic Briefing held by the President of the Specialist Chambers on 11 February 2021.<sup>2</sup>
2. In making this reply, it had been anticipated that a decision of the Pre-Trial Judge would have already been made and circulated, and therefore, given the timing of the response of the SPO, it was felt prudent to wait for that decision rather than seeking to reply and risk having the submissions and order 'cross'.
3. However, as there has been no decision as issued by the Pre-Trial Judge to date, the Defence now files this reply for the Pre-Trial Judge to consider prior to making a ruling on disclosure.
4. If it is that the reply is deemed to be 'out of time' than an application is made for that time period to be extended due to the exceptional circumstances of the request for disclosure that risk having a direct impact on the case at hand

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<sup>1</sup> Prosecution Response to the Haradinaj Defence request for information concerning diplomatic briefings (KSC- BC-2020-07/F00141), Confidential, 26 February 2021.

<sup>2</sup> Defence Submissions Following Order Setting the Date for the Second Conference and Related Matters (KSC-BC-2020-07/F00129), KSC-BC-2020-07/F00138, Confidential, 23 February 2021, paras. 43-54.

and in order to remove any appearance of impropriety however innocent it may appear.

5. The Defence respectfully seeks to remind the Court, that it is a test of the objective observer that is relevant and not a subjective test of actual impropriety.
6. In making the application, the Defence seeks to highlight the following:
  - a. The fact that a judgment/order had been expected;
  - b. The fact that issues raised within the application and this reply are fundamental to the fairness of the proceedings and the principle of 'open justice'; and
  - c. For the above reasons, it is submitted to be quite clearly in the interests of justice for any time limit to be extended.
7. First of all, the Defence categorically reject's the SPO's assertion that its request for information and disclosure concerning the said meeting is based "entirely on speculative grounds".<sup>3</sup> To the contrary, the Defence has provided uncontested information regarding the said Meeting which raise

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<sup>3</sup> Prosecution Response to the Haradinaj Defence request for information concerning diplomatic briefings (KSC- BC-2020-07/F00141), Confidential, 26 February 2021, para. 2.

several serious concerns to which the SPO has not responded in its “Response”.

8. Second, the existence of the meeting is not a matter that has disputed or challenged.
9. The Defence for Mr. Haradinaj requested details as to whether the Defence Coordination Office, as part of the Registry, was present at the briefing, to ensure that if the meeting had in fact taken place that all independent organs of the joint judicial institutions, namely the Court, Prosecution and Defence, were represented. The Defence Coordination Office responded that the briefing, conducted by the President of the Specialist Chambers, summarised matters addressed in public filings, and that such matters are not unprecedented.
10. It is respectfully submitted that both matters are not entirely accurate. First, it is not accepted that the summarised matters concerned public filings and a determination will need to be made as to whether matters discussed concerned details not yet determined by the Specialist Chambers or matters contained in confidential filings and that it is not standard practice for domestic courts in the Republic of Kosovo, or indeed in any country, to brief diplomatic missions on matters that are *sub judice*.

11. Crucially, the President of the Court stated during the said Meeting that Mr. Haradinaj's trial is being heard by a Single Judge, despite no decision having actually being made on this point yet. Therefore, the President was commenting on an issue concerning a live case. The Defence for Mr. Haradinaj is concerned that it was not a party to this briefing, nor were the interests of the defence represented in this, or as it would appear, earlier briefings to diplomatic missions.
12. The only point the SPO makes in its Response is that what the President said was within her administrative role at the KSC.<sup>4</sup> However, the President will be acting in her *judicial* role under Rule 115 when making a decision as to the number of judges that will hear the trial. Therefore, the said statement by the President raises serious concerns, as outlined in the Defence Submissions.<sup>5</sup> The Defence therefore maintains its requests for disclosure as previously requested.
13. Secondly, as much as the Defence are prepared to accept that a representative of the SPO was not present at the meeting in question, no comment is made as to whether the SPO have been present at any previous meetings, or any

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<sup>4</sup> *Ibid.*, at para. 3.

<sup>5</sup> Defence Submissions Following Order Setting the Date for the Second Conference and Related Matters (KSC-BC-2020-07/F00129), KSC-BC-2020-07/F00138, Confidential, 23 February 2021, paras. 43-54.

subsequent meetings. The SPO is silent on this point as it relates solely to the Coordinating Meeting of 11 February 2021.

14. Further, no comment is made as to the extent to which, if at all, the SPO has been in contact with the President and provided information to be presented at any such meeting. The SPO states that it was not represented at the Coordination Meeting of 11 February 2021 and makes no further representations.
15. Again therefore, very serious concerns of transparency, open justice, and fundamental issues of fairness are raised.
16. It is therefore maintained that full disclosure as per the substantive request is warranted.
17. Pursuant to Rule 82(4), this Reply is confidential. The Defence for Mr. Haradinaj does not object to its reclassification as public.

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