



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: **Pre-Trial Judge**
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 11 March 2021

Language: English

Classification: **Public**

Decision on Request for Information on Diplomatic Briefing

Specialist Prosecutor
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THE PRE-TRIAL JUDGE,¹ pursuant to Articles 32(3) and 39(13) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 13 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 22 September 2020, the Specialist Prosecutor's Office ("SPO") requested the arrest of Hysni Gucati ("Mr Gucati") and Nasim Haradinaj ("Mr Haradinaj") (collectively, "Accused") and sought their transfer to the detention facilities of the Specialist Chambers ("SC").²

2. Mr Gucati and Mr Haradinaj were arrested on 25 September 2020³ and transferred to the detention facilities of the SC in The Hague, the Netherlands on 25 and 26 September 2020, respectively.⁴

¹ KSC-BC-2020-07, F00061, President, *Decision Assigning a Pre-Trial Judge*, 29 October 2020, public. Prior to this decision, the President had assigned the same Judge as Single Judge; see KSC-BC-2020-07, F00003, President, *Decision Assigning a Single Judge Pursuant to Article 33(2) of the Law*, 29 May 2018, public.

² KSC-BC-2020-07, F00009/RED, Specialist Prosecutor, *Urgent Request for Arrest Warrants and Related Orders, filing KSC-BC-2020-07/F0009 dated 22 September 2020*, 22 September 2020, public, paras 1, 35(a); with Annexes 1-2, public.

³ KSC-BC-2020-07, F00012/A01/RED, Single Judge, *Public Redacted Version of Arrest Warrant for Hysni Gucati*, 24 September 2020, public; F00015, Registrar, *Notification of Arrest Pursuant to Rule 55(4)*, 25 September 2020, public; F00012/A03/COR/RED, Single Judge, *Public Redacted Version of Corrected Version of Arrest Warrant for Nasim Haradinaj*, 24 September 2020, public; F00016, Registrar, *Notification of Arrest Pursuant to Rule 55(4)*, 25 September 2020, public.

⁴ KSC-BC-2020-07, F00012/A02/RED, Single Judge, *Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers*, 24 September 2020, public; F00018, Registrar, *Notification of the Reception of Hysni Gucati in the Detention Facilities of the Specialist Chambers*, 25 September 2020, public, with Annex 1, confidential; F00012/A04/RED, Single Judge, *Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers*, 24 September 2020, public; F00020, Registrar, *Notification of the Reception of Nasim Haradinaj in the Detention Facilities of the Specialist Chambers*, 26 September 2020, public, with Annex 1, confidential; F00026/COR, Registrar, *Corrected Report on the Arrest and Transfer of Nasim Haradinaj to the Detention Facilities*, 28 September 2020, confidential and *ex parte*, with Annex 1, strictly confidential and *ex parte*. A public redacted version of F00026 was filed 14 October 2020, see F00026/COR/RED.

3. On 11 December 2020, the Pre-Trial Judge confirmed, in part, the Indictment⁵ and ordered the SPO to submit a revised indictment, as confirmed.⁶
4. On 23 February 2021, Mr Haradinaj made submissions requesting, *inter alia*, disclosure of material relating to a diplomatic briefing conducted by the President of the SC (“Request”).⁷
5. On 26 February 2021, the SPO responded to the Request (“Response”).⁸
6. On 3 March 2021, Mr Haradinaj replied to the Response (“Reply”).⁹

II. SUBMISSIONS

7. Following disclosure to the media of a communiqué emanating from the Office of the President of the SC and relating to an 11 February 2021 meeting briefing various members of diplomatic missions (“Diplomatic Briefing”),¹⁰ Mr Haradinaj submits that further disclosures are required (“Requested Disclosure”).¹¹ Mr Haradinaj argues that

⁵ KSC-BC-2020-07, F00063, Specialist Prosecutor, *Submission of Indictment for Confirmation and Related Requests*, 30 October 2020, strictly confidential and *ex parte*, with Annexes 1 and 2, strictly confidential and *ex parte*.

⁶ KSC-BC-2020-07, F00074/RED, Pre-Trial Judge, *Public Redacted Version of the Decision on the Confirmation of the Indictment*, 11 December 2020, public; F00075, Specialist Prosecutor, *Submission of Confirmed Indictment*, 14 December 2020, public, with Annex 1, strictly confidential, and Annex 2, public.

⁷ KSC-BC-2020-07, F00138, Defence for Mr Haradinaj, *Defence Submissions Following Order Setting the Date for the Second Conference and Related Matters (KSC-BC-2020-07/F00129)* (“Request”), 23 February 2021, confidential, paras 43-54.

⁸ KSC-BC-2020-07, F00145, Specialist Prosecutor, *Prosecution Response to the Haradinaj Defence Request for Information Concerning Diplomatic Briefings* (“Response”), 26 February 2021, confidential.

⁹ KSC-BC-2020-07, F00146, Defence for Mr Haradinaj, *Haradinaj Defence Reply to Prosecution Response to the Haradinaj Defence Request for Information Concerning Diplomatic Briefings* (“Reply”), 3 March 2021, confidential.

¹⁰ Request, paras 43-44.

¹¹ In particular, Mr Haradinaj seeks the disclosure of the following information: (i) details of the membership of the Diplomatic Briefing; (ii) list of attendees at the meeting; (iii) to whom the communiqué was distributed, even if in error; (iv) whether Kosovo government representatives attended or were invited to attend the Diplomatic Briefing; (v) full minutes of the Diplomatic Briefing and minutes of all previous meetings; (vi) confirmation that information disclosed during the Diplomatic Briefing was information only in the public domain; (vii) the frequency of such meetings;

meetings with diplomatic missions should be transparent and capable of scrutiny.¹² He further argues that it is not the role of a judicial official to brief the diplomatic community over pending proceedings and it is wholly inappropriate that discussions in respect of ongoing cases are being held behind closed doors without the parties of the case being present or with only one party present.¹³ Mr Haradinaj maintains that briefing the diplomatic community is beyond the scope of the President of the SC's powers¹⁴ and contends that the President prejudged any potential challenge on the legality or jurisdiction of the SC.¹⁵ Finally, Mr Haradinaj submits that, as the SC is embedded in the constitutional framework of Kosovo, it must comply with the norms associated therewith.¹⁶

8. The SPO responds that it was not represented at the Diplomatic Briefing and is not in possession of any records relevant thereto.¹⁷ The SPO argues that the Requested Disclosure concerns activities that fall within the President's administrative functions, which are necessarily protected by confidentiality and do not in and of themselves give rise to an appearance of impartiality.¹⁸ The SPO further argues that the information requested is irrelevant to the charges against the Accused and the integrity of these proceedings and therefore should be rejected in their entirety.¹⁹

9. Mr Haradinaj replies that the matters discussed by the President were not matters within the public domain, in particular the fact that his trial would be conducted by a Single Judge.²⁰ Mr Haradinaj contends that the President engages in her judicial role

and (viii) copies of all meetings, briefing notes, or any other documents prepared before, during, and after for the purposes of such meetings or in correspondence with those missions. Request, para. 45.

¹² Request, paras 46-47.

¹³ Request, paras 48, 50-52.

¹⁴ Request, paras 49, 51.

¹⁵ Request, para. 53.

¹⁶ Request, para. 54.

¹⁷ Response, para. 2.

¹⁸ Response, para. 3.

¹⁹ Response, para. 3.

²⁰ Reply, paras 9-11.

when assigning judges pursuant to Rule 115 of the Rules.²¹ Mr Haradinaj further contends that the test to be considered is the “objective observer” and not the “actual impropriety” test.²² With regard to SPO representation at the Diplomatic Briefing, Mr Haradinaj notes that no representations have been made as to whether the SPO has been in contact with the President and provided information for her meetings with diplomatic missions.²³ Mr Haradinaj argues that fundamental issues of fairness have been engaged and therefore the Requested Disclosure is warranted under the circumstances.²⁴

III. APPLICABLE LAW

10. Article 32(3) of the Law provides that the President of the SC shall be responsible for the judicial administration of the SC and other functions conferred upon him or her by this Law.

11. Rule 13 of the Rules provides that the President shall, *inter alia*, represent the SC before Kosovo, Third States, international organisations and other entities, where the activities of the SC so require.

12. Article 39(13) of the Law provides that the Pre-Trial Judge may, where necessary, at the request of a party, issue any order as may be necessary for the preparation of a fair and expeditious trial.

²¹ Reply, para. 12.

²² Reply, para. 5.

²³ Reply, paras 13-14.

²⁴ Reply, paras 15-16.

IV. DISCUSSION

13. At the outset, the Pre-Trial Judge finds that the Requested Disclosure is not relevant to the charges against the Accused. Accordingly, it does not fall under any of the applicable rules of disclosure.

14. Moreover, the Requested Disclosure pertains to material relating to the judicial administration of the SC, as it refers to an update given by the President about the activities of the SC. As such, it is not generally subject to disclosure to the parties to a specific case.

15. The Pre-Trial Judge may nevertheless issue any order for the preparation of a fair and expeditious trial. However, a party requesting information usually not subject to disclosure shall demonstrate why access to this information is necessary to ensure the fairness and the expeditiousness of the proceedings. In the present case, Mr Haradinaj points to media coverage that the appointment of a trial panel in his case was raised during the Diplomatic Briefing. The Pre-Trial Judge recalls that a trial panel can only be assigned by the President when preliminary motions have been decided and when the case is ready for trial. At the time of the Diplomatic Briefing, the preliminary motions were still pending and the Pre-Trial Judge had not provided notice to the President, according to Rule 98(3) of the Rules. Moreover, the decision by the President regarding the assignment of judge(s) in this case would be made immediately available to the Parties. To date, no such decision has been rendered by the President and therefore no issue of fairness in the assigning of judge(s) can be implicated.

16. Finally, with respect to any norms violated with respect to the constitutional framework of Kosovo, Mr Haradinaj does not develop or substantiate any arguments therewith. The Pre-Trial Judge therefore dismisses this argument.

17. The Pre-Trial Judge accordingly finds that the Request must be rejected.

V. DISPOSITION

18. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- a. **REJECTS** the Request; and
- b. **ORDERS** the Registry to reclassify the Request, Response, and Reply as public.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Thursday, 11 March 2021
At The Hague, the Netherlands