

**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:** 5 April 2021

**Language:** English

**Classification:** Confidential

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**Defence Reply to the SPO Response to the request for leave to appeal the  
Decision on Request for Information on Diplomatic Briefing**

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## I. INTRODUCTION

1. On 30 March 2021, the SPO filed its 'Prosecution response to request for leave to appeal the Decision on Request for Information on Diplomatic Briefing.
2. The Defence now seek to reply to that response.
3. The background and/or chronology, and further, the relevant law, is dealt with and/or cited, within the original request for leave to appeal, and accordingly there is no intention to rehearse or advance matters already contained within the leave application, but rather, to confirm that those facts, and the cited law is adopted for the purposes of this reply.

## II. THE PROSECUTION RESPONSE

4. The Prosecution responds, and rejects the premise of the appeal on the following summary basis:
  - a. That the request is in any event 'out of time';
  - b. That the issues cited are not 'appealable' issues;
  - c. That the first issue misrepresents the facts;
  - d. That the second issue is based on a misapprehension of the disclosure framework;

- e. That the third issue is similarly a misunderstanding of the disclosure framework and further, a misrepresentation of the Diplomatic Briefing Decision;
  - f. That the fourth issue misrepresents the Diplomatic Briefing Decision;  
and
  - g. That the fifth issue is an unsubstantiated argument and is a mere disagreement with the Pre-Trial Judge's conclusions.
5. For the purposes of this reply, each objection will be dealt with in the order that it appears within the SPO Response, but as a general point, the SPO seeks to argue ostensibly that it is out of time and thereafter seeks to prematurely advance arguments on the lack of merit of the appeal.

*That the Request for Leave is Out of Time*

6. It is respectfully submitted that the application should be deemed to have been submitted on time. It is accepted that it was received in Legal Workflow one day late, due to an inadvertent administrative oversight where two filings were filed at the same time dealing with different applications for leave to appeal. Rather than filing two separate appeals, a duplicate was filed in error meaning this Application for Leave to Appeal was filed on 19 March 2021, one day late.

7. It is respectfully submitted that the circumstances that gave rise to the late receipt of the filing must be considered in terms of this application.
8. As the SPO refer to at footnote 1 of their submission, and indeed confirm, *“from the Legal Workflow Metadata, it appears that the Haradinaj Defence filed an application with the same title on 18 March 2021. However, filing KSC-BC-2020-07/F00156 was just a duplicate of completely separate leave to appeal application”*.
9. This description of events is not in dispute.
10. On 18 March 2021, two (2) separate applications were filed through ‘Legal Workflow’. Quite evidently, the application for leave to appeal concerning the Diplomatic Briefings request, ought to have been, and was intended as being, one of those applications.
11. As a result of an administrative error, duplicate copies of one application were filed, rather than two different applications on separate issues.
12. The following chronology is relevant:
  - a. KSC-CC-2020-07/F00153 was filed on 16/03/2021 at 09:10;
  - b. On 18/03/2021 at 18.55, Counsel for Haradinaj wrote to Counsel for Gucati enclosing a copy of the filing in order for the latter to prepare an application to join;
  - c. KSC-CC-2020-07/F00156 was filed on 18/03/2021 at 19:53;

- d. KSC-CC-2020-07/F00158, was filed on 18/03/2021 at 21:05 by Counsel for Gucati;
  - e. On 19/03/2021 at 10:19, the CMU informed Counsel, via e-mail, that a duplicate filing had been made and that KSC-CC-2020-07/F00153 and KSC-CC-2020-07/F00156 were identical;
  - f. On 19/03/2021 at 12.44, Counsel responded via e-mail that two filings had been submitted through Legal Workflow. Due to Counsel being in Court on other matters it was not until the end of the working day that Counsel was able to check on Legal Workflow;
  - g. On 19/03/2021 at 19:02 Counsel indicated that the second filing was a duplication in error of the first. Counsel informed CMU that it was intended to file two separate appeals on the same date and therefore KSC-CC-2020-07/F00156 was a duplication of KSC-CC-2020-07/F00153 and that the correct filing would be filed immediately;
  - h. KSC-CC-2020-07/F00159 was subsequently filed on 19/03/2021 at 19:08, some 6 minutes after the administrative error was recognised.
13. It is quite clear that, upon being notified by CMU that duplicate copies had been filed, the mistake was immediately rectified, and thus demonstrating that the issue was one of an administrative error rather than a late filing.

14. It is submitted that the Pre-Trial Judge can, as per Rule 9(5), *proprio motu* exercise discretion to extend the time limit prescribed by the rules,<sup>1</sup> or, “recognise as valid any act carried out after the expiration of the time limit”.<sup>2</sup>
15. The circumstances of the filing of the request would appear to be a case where that discretion ought to be exercised.
16. However, should the Pre-Trial Judge deem it inappropriate to exercise his powers *proprio motu*, then the defence would request that the discretion being exercised on the basis that “good cause” has been shown.
17. In making that application, the following points are raised:
- a. It is a clear administrative error, and further, there is evidence to confirm that the intention was to file the request for leave within the appropriate time-limit;
  - b. Upon being notified of the duplication it was rectified immediately;
  - c. It is in the clear interests of justice that discretion be exercised;
  - d. Good cause has been shown; and

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<sup>1</sup> Rule 9(5)(a)

<sup>2</sup> Rule 9(5)(b)

- e. No prejudice has been caused to the SPO in responding to the application.
18. Finally, the SPO draw reference to the fact that “*the Request was not actually notified to the SPO until 22 March 2021*”.<sup>3</sup> This is with respect, not relevant.
19. The communication of an application to the SPO is not within the power of the Defence, and therefore the date to be considered is the date of filing, not the date of communication to the SPO.
- That the Issues are not Appealable Issues*
20. It is unclear as to the premise of the submission that none of the issues are ‘appealable’ issues.
21. In principle, any decision and/or order made by the Pre-Trial Judge is ‘appealable’, and therefore the suggestion that the issues are not appealable is misconceived.
22. As the Pre-Trial Judge ruled in granting leave to appeal on the **Defence Applications for Leave to Appeal the Decision of Defence Preliminary Motions**, an appealable issue requires only that the applicant to articulate clearly discrete issues for resolution by the Court of Appeals Panel that emanate from the ruling concerned and do not amount to abstract questions

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<sup>3</sup> KSC-BC-2020-07/F00167 at footnote 1.

or hypothetical concerns and that the “issue” must have significant repercussions on either the “the fair and expeditious conduct of the proceedings” or on “the outcome of the trial”.<sup>4</sup> The issues raised concern the most fundamental aspect of the proceedings, namely the independence and impartiality of the tribunal and whether the Defendant may now receive a fair trial.

23. Whether there is merit in the appeal is a wholly different matter, and that is the issue to be considered within the framework of the Rules of Evidence and Procedure, having regard to the facts of the issue before the Chamber when considering the application.

*That the First Issue Misrepresents the Facts*

24. The Defence submissions do not misrepresent the facts, rather, the SPO appear to be unwilling to accept that which the diplomatic briefing clearly contains.
25. The President of the Specialist Chambers quite clearly states within that briefing that the trial of Gucati and Haradinaj would be presided over by a Single-Judge, rather than a panel and has requested the presence of that judge,

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<sup>4</sup> Decision on the Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, KSC-BC-2020-07/F00169, paras. 12-13.



clearly denoting steps over and above mere consideration, at the court from 1 February 2021.

26. This is not a mischaracterisation or a difference of interpretation of what was stated, but merely recounting that which is clearly noted.
27. The briefing note states quite unequivocally "*The same purpose informed me of my decision to request the presence of the Single Judge in the Gucati and Haradinaj case at the court as of 1 February.*" One can read that the President of the Court decided to request the Single Judge's presence at the court as of 1 February. In order to make such a decision, the President must have communicated her decision to a particular judge. It is difficult to see how that can be viewed in any other way.
28. The Defence accepts that decisions on assignment ought only to occur after all preliminary motions and/or appeals have been dealt with; however, it is abundantly clear that the President of the Chamber has sought to take decisions *ultra vires* and communicate those decisions to individuals who are not subject to the proceedings, namely members of the diplomatic community, and therefore, has taken a '*de facto*' decision; to suggest otherwise is a very clear example of the mischaracterisation for which the SPO now accuses the Defence.

*That the Second Issue is based upon a misapprehension of the disclosure framework*

29. The material sought will have a material effect on the Defendant's trial, and therefore must fall within the applicable rules of disclosure.
30. If decisions are being taken, as it would appear they are, that materially affect the conduct of the Defendant's trial, and those decisions are being taken behind closed doors, which they are, then this absolutely affects the Defendant's fair trial rights and therefore absolutely falls within the disclosure framework.
31. The briefing and those subsequent to, or those made previously, may not be evidence concerning the conduct alleged to have given rise to the charges themselves, however, given their material effect to the trial, or, the potential for there to be a material effect, they must fall to be disclosed as a failure to do so would in itself constitute a violation of an individual's fair trial rights.

*That the 3<sup>rd</sup> issue is similarly a misunderstanding of the disclosure framework and further, a misrepresentation of the Diplomatic Briefing Decision*

32. The submissions as per the application for leave to appeal are maintained.

*That the 4<sup>th</sup> issue misrepresents the Diplomatic Briefing Decision*

33. The SPO makes this assertion but fails to address why there has been a misrepresentation of the Briefing decision.

*That the 5<sup>th</sup> issue is an unsubstantiated argument and is a mere disagreement with the Pre-Trial Judge's conclusions.*

34. The submissions made by the Defence are not merely disagreement with the decision. The issue raised is that the Pre-Trial Judge erred in the exercise of his discretion, this is not an example of disagreement, but an argument that the decision was incorrect on the basis of an accepted legal principle.
35. The SPO's argument that "*none of the Issues have any impact on the fair and expeditious conduct of the proceedings or the outcome of the trial*", is with respect, misconceived for the reasons set out in the original submissions, and that which has been raised above.

## **V. Conclusion**

36. The SPO adopts a seemingly default position that any issue raised on appeal is not an appeal point at all, but rather a disagreement with the Pre-Trial Judge and the decision made.
37. It is a fundamental element of any appeal that a ground raised will be a disagreement with the decision, as if the decision was accepted and agreed, it would negate the need for an appeal to be brought.

38. Further, the SPO makes an entirely unsubstantiated suggestion that issues raised do not have any impact on the fair and expeditious conduct of the proceedings or outcome of the trial.
39. In circumstances where decisions are being made, or purported to be made by those who are not party to proceedings, or those who do not have any involvement in proceedings, or where those decisions are being made in the absence of any party to the proceedings, then such decisions cannot be said to have anything other than an effect on the fair and/or expeditious conduct of proceedings.

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