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In: **KSC-BC-2020-06**

Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: **Court of Appeals Panel**

Judge Michèle Picard
Judge Emilio Gatti
Judge Nina Jørgensen

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Rexhep Selimi

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Selimi Defence Appeal against "Decision on Defence Motions Alleging Defects in the Form of the Indictment"

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I. INTRODUCTION

1. Pursuant to Article 45(1) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 170(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), the Defence for Mr. Selimi ("Defence") hereby submits its appeal against the "Decision on Defence Motions Alleging Defects in the Form of the Indictment" ("Impugned Decision"),[1] issued by the Pre-Trial Judge on 22 July 2021, pursuant to Article 39(1) of the Law and Rules 9(5)(a) and 97(1)(b), which denied the Selimi Defence Challenge to the Form of the Indictment ("Indictment Motion").[2]

2. On 27 August 2021, the Defence filed its request for leave to appeal the Impugned Decision.[3] On 18 October 2021, the Pre-Trial Judge issued his decision on the request for certification to appeal[4] in which he granted leave for the Selimi Defence to appeal the Impugned Decision in relation to the following issues:[5]

   (i) Whether allegations of non-criminal contribution to the JCE in the Confirmed Indictment, renders it defective or is a question of law to be litigated at trial;

   (ii) Whether the SPO is not required to set out specifically which crimes definitively fall within the common criminal purpose and which not when pleading JCE III liability in the alternative to JCE I;

   (iii) Whether the SPO is permitted to plead that any individual named in the Indictment could either be a JCE Member or a JCE Tool, if it pleads so in the alternative;

   (iv) Whether the mode of liability by which a subordinate allegedly committed crimes is a material fact which needs to be pleaded in the Indictment in a case based on superior responsibility;

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[1] KSC-BC-2020-06/F00413/RED, Decision on Defence Motions Alleging Defects in the Form of the Indictment, 22 July, 2021.

[2] KSC-BC-2020-06/F00222, Selimi Defence Challenge to the Form of the Indictment, 15 March 2021, confidential. A public redacted version was filed on 11 May 2021, F00222/RED.

[3] KSC-BC-2020-06/F00445, Defence Request for Certification to Appeal the Decision on Defence Motions Alleging Defects in the Form of the Indictment ("Request for Certification"), 27 August 2021.

[4] KSC-BC-2020-06/F00534, Decision on Defence Applications for Leave to Appeal the Decision on Defence Motions Alleging Defects in the Form of the Indictment ("Certification Decision"), 18 October 2021.

[5] Certification Decision, paras. 15, 17-21, 22-39, 79.a.i.

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(v) Whether the Rule 86(3)(b) Outline may be used, in this specific instance, to provide the Accused with additional underlying particulars when the factual allegations are provided in the Confirmed Indictment.[6]

3. These issues accordingly form the basis of the grounds submitted in the present appeal.

II. STANDARD OF APPELLATE REVIEW

4. It is established in KSC jurisprudence that the Court of Appeals Panel will apply *mutatis mutandis* to appeals the standard of review provided for appeals against judgments under Article 46(1) of the Law,[7] which specifies, in relevant part, the following grounds of appeal:

(vi) An error on a question of law invalidating the judgment;

(vii) An error of fact which has occasioned a miscarriage of justice; or

(viii) […]

5. In relation to errors of law, the Law states that:

> "When the Court of Appeals Panel determines that a Trial Panel has made an error of law in a judgement arising from the application of an incorrect legal standard, the Court of Appeals Chamber shall articulate the correct legal standard and apply that standard to the evidence contained in the trial record to determine whether to sustain, enter or overturn a finding of guilty on appeal. Alternatively, if the Trial Panel is available and could more efficiently address the matter, the Court of Appeals Panel may return the case to the Trial Panel to review its findings and the evidence based on the correct legal standard."[8]

6. In relation to errors of fact the Law states that:

> In reviewing the factual findings of the Trial Panel, the Court of Appeals Panel shall only substitute its own findings for that of the Trial Panel where the evidence relied on by the Trial Panel could not have been accepted by any reasonable trier of fact or where the evaluation of the evidence is wholly erroneous.[9]

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[6] The wording of this issue was reformulated by the Pre-Trial Judge from the original as submitted in the Request for Certification, see Certification Decision, para. 15, 34-39, 79.a.i.

[7] KSC-BC-2020-07/F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020 ("Gucati Appeal Decision"), paras 4-13; KSC-BC-2020-07/F00005, Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention, 9 February 2021 ("Haradinaj Appeal Decision"), paras 11-13.

[8] Article 46(4) of the Law.

[9] Article 46(5) of the Law.

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7. In challenging a discretionary decision, the appellant must demonstrate that the lower-level panel has committed a discernible error in that the decision is: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the lower-level panel's discretion. The Court of Appeals Panel will also consider whether the lower-level panel has given weight or sufficient weight to relevant considerations in reaching its decision.[10]

8. All of the grounds of appeal identified below fall into one or more of the aforementioned categories.

III. GROUNDS OF APPEAL

A. Ground One: The Pre-Trial Judge erred in finding that the Selimi submissions regarding non-criminal contribution was a question of law

9. The Pre-Trial Judge dismissed the Defence challenge regarding the non-criminal contribution of Mr. Selimi as alleged in the Confirmed Indictment[11] as "a question of law, which the Defence may litigate at trial", that "the resulting question – whether conduct that appears to be non-criminal can be taken into account when establishing the responsibility of the Accused – is premature" and that "including certain forms of alleged non-criminal conduct in the Confirmed Indictment which is meant to notify the Accused of the [Specialist Prosecutor's Office's ("SPO")] case, does not render it defective".[12] The Pre-Trial Judge erred in concluding that the challenges were questions of law to be resolved at trial and that the relevant paragraph in the Confirmed Indictment[13] provides sufficient notice to the Accused in relation to this issue.

10. The Pre-Trial Judge erroneously interpreted the Indictment Motion[14] as challenging "the [legal principle] that the contribution to a JCE need not be criminal *per se*".[15] This is incorrect. The Defence challenge was that in the specific context of a common plan without an inherently criminal objective, though one which is alleged to have included the contemplation of criminal means and the carrying out of crimes in its achievement,[16]

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[10] *Gucati* Appeal Decision, para. 14; *Haradinaj* Appeal Decision, para. 14.
[11] KSC-BC-2020-06/ F00134, Submission of Confirmed Indictment and Related Requests, 11 December 2021, (lesser redacted version of confidential *ex parte* F00031, corrected by F00045/A01 ("Confirmed Indictment").
[12] Impugned Decision, para. 108
[13] Confirmed Indictment, para. 50.
[14] Indictment Motion, paras. 47-52.
[15] Impugned Decision, para. 108.
[16] KSC-BC-2020-06/F00258, Consolidated Prosecution response to Thaçi, Selimi and Krasniqi preliminary motions on the form of the indictment ("Consolidated Prosecution Response"), 23 April 2021, para. 9.

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the SPO must set forth with sufficient specificity and clarity the facts underpinning the charged crimes for Mr. Selimi to be informed of the nature and cause of the accusation against him.[17]

11. The ICTY jurisprudence which sets out this principle is exclusively based on cases where the pleaded JCE had at their core a criminal objective. Therefore, any contribution to that objective must have contributed to a crime, even if the contribution is not to the actus reus of the crime.[18] Thus, it is logical in the factual context of those cases not to distinguish between criminal and non-criminal contributions to an objective which is itself inherently criminal.

12. Conversely, in the present case, Mr. Selimi is alleged to have taken part in a "common purpose to gain and exercise control over all of Kosovo",[19] a common purpose which, as correctly described by the Defence, is in and of itself legitimate.[20] As noted by the Pre-Trial Judge, this common purpose "would not, indeed, without more, constitute a criminal purpose giving rise to JCE liability.[21] However, as further noted by the Pre-Trial Judge, this legitimate, non-criminal common purpose, as pleaded, "[*was*] *not limited to* gaining and exercising control over Kosovo"[22] and contemplated the commission of crimes, by virtue of the phrase "by means including".[23]

13. The construction of the phrase "by means including", carries an implicit recognition that not every act in furtherance of the common purpose was unlawful. The SPO itself notes that "by means including" indicates that there were other, potentially lawful, means employed to achieve the objective besides those criminal means charged.[24] Accordingly, in the present case, there is a clear delineation between those non-criminal acts carried out in furtherance of the non-criminal, legitimate purpose of gaining and exercising control over Kosovo, and those non-criminal acts that allegedly contributed to the crimes charged. Stated plainly, that there was a non-criminal core objective with an alleged criminal component.

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[17] KSC-BC-2020-07/IA004/F00007, Decision on the Defence Appeals Against Decision on Preliminary Motions ("Gucati and Haradinaj Preliminary Motions Decision"), 23 June 2021, para. 35.
[18] *See* Indictment Motion, paras 49, 50.
[19] *See* Impugned Decision, para. 61.
[20] Indictment Motion, para. 49.
[21] Impugned Decision, para. 61.
[22] *Id.*, para. 61 [emphasis added]. The Defence notes to that the inclusion of the phrase "was not limited to" implies a view that the means to achieve this objective includes both criminal and non-criminal acts.
[23] Confirmed Indictment, para. 32.
[24] Consolidated Prosecution Response, para. 10.

14. Thus, the Defence did not challenge the legal principle that contribution to a JCE need not be criminal *per se*,[25] rather, that in the factual context of this case; an alleged non-criminal contribution to the criminal component must be adequately specified in order to distinguish it from non-criminal contribution to the non-criminal objective. The Defence submits that paragraph 50 is insufficient for Mr. Selimi to prepare a meaningful defence without specific information as to how these alleged acts contribute to that criminal component.[26]

15. The SPO erroneously interpreted the principle on non-criminal contribution to a JCE to permit the inclusion of general, not inherently criminal, contributions set out in paragraph 50, which are not pleaded with sufficient precision in relation to the alleged criminal component of the common plan so as to provide notice to Mr. Selimi and enable him to prepare a meaningful defence.[27]

16. As such, in contrast to those cases considered by the ICTY, where non-criminal contribution to an inherently criminal purpose could stand alone as specifying JCE liability in the relevant indictments, the SPO must sufficiently specify in the present case with a non-criminal core objective at the heart of the common plan, as to how contributions, criminal or otherwise, furthered the alleged criminal component of that common plan.[28]

17. Accordingly, in applying the ICTY jurisprudence to allow such a vague pleading of the alleged non-criminal contribution in the present case and subsequently dismissing the defence challenge, the Pre-Trial Judge erred in law.

B. Ground Two: The Pre-Trial Judge erred in finding that the SPO was not required to specify which crimes definitively fall within the common criminal purpose when pleading JCE III liability in the alternative to JCE I

18. The Pre-Trial Judge found that the SPO is not required to specify which crimes definitely fell within the common purpose and which not when pleading JCE III liability in the alternative to JCE I, reasoning that "the Confirmed Indictment makes clear, through the

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[25] The existence of this principle is in fact specifically referred to without criticism in KSC-BC-2020-06/IA009/F00029, Selimi Defence reply to Prosecution response on JCE to Selimi Defence appeal against the 'Decision on Motions challenging the jurisdiction of the Specialist Chambers ("JCE Reply"), 18 October 2021, para. 43.
[26] To this end, the Defence reiterates and resubmits for consideration of the Appeals Panel the arguments not considered by the Pre-Trial Judge in relation to paragraph 50; *see* Indictment Motion, paras. 54-60.
[27] Gucati and Haradinaj Preliminary Motions Decision, para. 36
[28] *See* Indictment Motion, para. 51.

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use of the word "some" in paragraph 34, that at least one of the charged crimes is alleged to have been part of the common purpose". In doing so, the Pre-Trial Judge committed an error of law and abused his discretion in allowing such a vague pleading of JCE I and III to remain in the Confirmed Indictment.

19. As a preliminary matter, as noted by the Appeals Chamber, "an indictment must set forth with sufficient specificity and clarity the facts underpinning the charged crimes, including the modes of liability"[29] and that charges against an accused and the material facts supporting those charges "must be pleaded with sufficient precision in an indictment so as to provide notice to the accused and enable him or her to prepare a meaningful defence".[30] The Confirmed Indictment as presently formulated does not satisfy this legal standard. In relation to Grounds Two and Three, it is not the Defence submission that any charges pleaded in the alternative inherently give rise to ambiguity, rather that the alternative formulations as currently pleaded, with no discernible delineation, creates that ambiguity.

20. In relation to the alternative pleading of JCE I and III, the Confirmed Indictment states the following:

> "*Alternatively, to the extent that some of these crimes did not fall within the joint criminal enterprise*, it was foreseeable that they might be perpetrated by one or more members of the joint criminal enterprise, or by persons used by any member of the joint criminal enterprise to carry out the crimes within the common purpose."[31]

21. The inclusion of the word "some" in paragraph 34, without further identification of the single alleged crime, or crimes, that definitively formed the origin of the JCE violates the fundamental standards of pleading set out above.[32] It is manifestly absurd to find that an indictment containing ten counts of individual criminal responsibility, spread out over more than forty alleged crime bases, each involving multiple different alleged crimes, is pleaded with sufficient precision "through the use of the word 'some' [which notifies] that *at least one* of the charged crimes is alleged to have been part of the common purpose".[33] In this context, there is no interpretation of the phrase "at least one" which

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[29] Gucati and Haradinaj Preliminary Motions Decision, para. 35

[30] *Id.*, para. 36. *Also*, whether a fact is "material" cannot be decided in the abstract, but on a case-by-case basis, and depends on the nature of the Prosecution's case, *Id.* para. 38.

[31] Confirmed Indictment, para. 34 [emphasis added].

[32] *See above*, para. 19.

[33] Impugned Decision, para. 66 [emphasis added].

could allow the conclusion that the Confirmed Indictment was pleaded with sufficient precision.

22. As stated in the Indictment Motion, the "additional crimes" under JCE III have been described as "the outgrowth" of previously agreed or planned criminal conduct for which each participant in the common plan is already responsible" which is "rendered possible by the prior joint plan to commit the agreed crime(s) other than the one 'incidentally' or 'additionally' perpetrated".[34] This is to say that the alleged additional and foreseeable crimes must generally be in line with the agreed upon criminal offence.[35]

23. In essence, this formulation of JCE III logically requires that there is a point of origin in from whence it generates. The Defence submissions in this regard are simple; to know with sufficient specificity the foundational crimes from which this "outgrowth" allegedly sprung and thus, which of the charged crimes will be plead with the additional elements of JCE III. Requiring the SPO to specify with clarity as to which of the crimes are alleged to be JCE square(s) one for this JCE III "outgrowth" is a reasonable request which would allow the Defence to adequately prepare for the coming trial.

24. It is the logical implication of including "some" as a quantifier in paragraph 34 that the SPO knows, or at the very least suspects, that among the alleged crimes, there may also be "at least one" which does not fall within the common purpose. Regardless of the Trial Panel's role following the presentation of evidence, the indictment remains the primary accusatory instrument[36] and Mr. Selimi "cannot be expected to engage in guesswork in order to ascertain what the case against him is, nor can he be expected to prepare alternative or entirely new lines of defence because the Prosecution has failed to make its case clear".[37]

25. The Appeals Chamber has found that;

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[34] Indictment Motion, para. 62, citing STL-11-01/I, Interlocutory decision on the applicable law: terrorism, conspiracy, homicide, perpetration, cumulative charging, 16 February 2011, para. 243.

[35] STL-11-01/I, Interlocutory decision on the applicable law: terrorism, conspiracy, homicide, perpetration, cumulative charging, 16 February 2011, para. 241. The Defence notes that the SPO strongly emphasised this point of jurisprudence in its response to the Defence submissions on JCE, *see* KSC-BC-2020-06/F00263, Consolidated Prosecution response to preliminary motions challenging Joint Criminal Enterprise (JCE), 23 April 2021, paras 3 and 86.

[36] Gucati and Haradinaj Preliminary Motions Decision, para. 49, *see Id.* fn. 131 citing e.g. ICTR, *Uwinkindi v. Prosecutor*, ICTR-01-75-AR72(C), Decision on Defence Appeal Against the Decision Denying Motion Alleging Defects in the Indictment ("*Uwinkindi* Appeal Decision"), 16 November 2011, para. 4. *See also* ICTR, *Prosecutor v. Bikindi*, ICTR-2001-72-PT, Decision on the Amended Indictment and the Taking of a Plea Based on the Said Indictment, 11 May 2005, para. 7

[37] ICTY, *Prosecutor v Simić*, No. IT-95-9-A, Judgement (28 Nov 2006), para. 71.

> "the Prosecution is expected to know its case before it goes to trial. Even where it is impracticable or impossible to provide full details of a material fact, the Prosecution must indicate its best understanding of the case against the accused, and the trial should only proceed where the right of the accused to know the case against him or her and to prepare his or her defence has been assured."[38]

If the SPO does indeed know its case, then now is the time for it to be stated. If the Prosecution's "best understanding of [this] case against the accused" at this stage is that "at least one" (perhaps more, or even all) of the alleged crimes were collectively agreed upon, then these crimes must be so specified and the trial must not proceed until Mr. Selimi has sufficient notice of the case against him and is thus assured of his right to prepare his defence.

C. Ground Three: The Pre-Trial Judge erred in finding that any individual named in the Confirmed Indictment could either be a JCE Member or a JCE Tool, if pleaded in the alternative

26. The Pre-Trial Judge found that "the Confirmed Indictment defines the Tools with reference to the same individuals, categories and groups as the JCE Members [which] are pleaded with sufficient specificity" and that "for the purpose of informing the Accused of the charges, the Defence is hereby put on notice that, if some of the alleged JCE Members are found not to have been so, they are nevertheless alleged to have been Tools".[39] In doing so, the Pre-Trial Judge committed the same error of law and abuse of discretion as in Ground Two regarding the specificity and clarity required in the indictment for Mr. Selimi to prepare his defence.

27. As noted above, the SPO is expected to "know its case" before it goes to trial and the SPO must indicate its best understanding of the case against the accused.[40] As was further noted by the ICTY Appeals Chamber in relation to both of these points, "the Prosecution […] may not rely on the weaknesses of its own investigation in order to mould the case against the accused as the trial progresses",[41] or "to omit the material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds".[42] It is clear from the opaque case as presently pleaded, that the SPO ardently anticipates a trial in which it is permitted

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[38] Gucati and Haradinaj Preliminary Motions Decision, para. 37.
[39] Impugned Decision, paras. 81, 82.
[40] *See above*, para. 25.
[41] ICTY *Prosecutor v Dordević*, No. IT-05-87/1-A, Judgement (27 January 2014), para. 575.
[42] ICTY, *Prosecutor v. Kupreškić et. al*, IT-95-16-A, Appeal Judgement, 23 October 2001, para. 92.

to present evidence with no realistic limit placed on the scope of the charges. In short, the SPO seeks, and has erroneously been granted, a trough into which it may pour evidence and await to see what settles at the bottom.

28. While this is the common theme in every ground submitted for appeal, it is most apparent in the alternative pleading relating to the alleged JCE Members and Tools in paragraph 35 of the Confirmed Indictment, which states that:

> "some or all of [the named and unnamed] individuals were not members of the joint criminal enterprise but were used by members of the joint criminal enterprise to carry out crimes committed in furtherance of the common purpose (together with the JCE Members, collectively 'JCE Members and Tools')"[43]

29. This alternative pleading suffers the same flaws as those set out in Ground Two of the present appeal, in that the SPO does not, with sufficient clarity, identify its case as it relates to those alleged to have carried out the crimes allegedly collectively agreed upon, as distinct from those who carried out the alleged crimes constituting their "outgrowth". In short, it is an extension of the deliberately vague manner in which the SPO has pleaded JCE I and JCE III in the alternative.

30. It is absurd at this stage in proceedings that the SPO, having had many years in which to carry out and complete its investigations, is unable to provide a fundamental distinction between the JCE Members and Tools, and set out how they relate both to each other and to the commission of the alleged crimes. The SPO must identify with sufficient precision the roles alleged to have been performed by each group in direct furtherance of, or incidental to, the alleged criminal component of the common plan.

31. Not identifying whether an individual was a JCE Member or Tool causes substantial prejudice. It requires the Defence to speculate as to whether anyone of the named or unnamed individuals set out in paragraph 35 could either have fully formed the agreement underpinning the JCE together with Mr. Selimi, and therefore fully shared the intent and agreed with the alleged objective of the JCE. Or, on the other hand, any of these individuals could alternatively have been wholly unaware of the objective of the JCE and did not have the intention to carry it out. Without knowing which of these scenarios is actually charged by the SPO, each one, for each individual referred to by the SPO in paragraph 35 must be comprehensively investigated by the Defence. This forces Mr.

[43] Confirmed Indictment, para. 35.

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Selimi to waste time and resources on multiple different possible allegations, in similar fashion to Ground Two.[44]

32. Finally, with regard the sole piece of jurisprudence cited to by the Pre-Trial Judge in support of the alternative pleading of JCE Members and Tools, [45] the Defence notes that this is a single decision of a lower-level ICTY panel on an issue which was not referred to the Appeals Chamber; in a case which did not reach Trial Judgment, let alone Appeal Judgment. Furthermore, the specific cited paragraphs of this decision do not contain a single footnote which might offer support to the findings of the Trial Chamber on that issue. As such, while jurisprudence of international tribunals may be relevant in certain cases for guiding the decision of the Appeals Panel, this single ICTY Trial Chamber decision should be treated as having little to no persuasive weight in the present case.[46]

D. Ground Four: The Pre-Trial Judge erred in finding that the mode of liability by which a subordinate allegedly committed crimes is not a material fact which needs to be pleaded in the Indictment on a case based on superior responsibility

33. The Pre-Trial Judge found that the Confirmed Indictment is not defective for failing to specify the forms of liability applicable to the crimes allegedly committed by subordinates in relation to superior responsibility and that "while the crimes committed by the subordinates are material facts to be pleaded, the corresponding modes of liability are not".[47] In making this finding, the Pre-Trial Judge erred in law.

34. The challenge raised in the Indictment Motion[48] concerned paragraph 53 of the Confirmed Indictment, specifically the sentence stating that "the term 'committed', as used in the

[44] Furthermore, in submissions relating to specificity of charges which were unaddressed and not considered by the Pre-Trial Judge, the Indictment Motion set out several examples of the specific prejudices that would be presented to Mr. Selimi, with the alternative charging in the Confirmed Indictment as is presently formulated, *see* Indictment Motion, paras. 58-60.
[45] Impugned Decision, para. 82, *see* fn. 140 citing ICTY, *Prosecutor v. Hadžič*, IT-04-75-PT, Trial Chamber, Decision on Defence Motion Alleging Defects in Form of First Amended Indictment, 10 November 2011, para. 17.
[46] The Defence also notes that the Second Indictment in *Hadzić*, while being permitted to plead both JCE Members and Tools in the alternative, as well as JCE I and III, nevertheless set out more specificity in relation to the separation between JCE I and III than the SPO has done in the present case, *see* ICTY, *Prosecutor v. Hadžič*, IT-04-75-PT Notice of Filing of Second Amended Indictment, 22 March 2012, para. 9.
[47] Impugned Decision, para. 119.
[48] Indictment Motion, para. 67.

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context of superior responsibility, includes all modes of liability covered by Article 16(1) of the Law".[49]

35. First, the Pre-Trial Judge set out no reasons for making his finding in the Impugned Decision. While reasons for a particular finding may be brief, depending on the circumstances of the submissions, they nevertheless must "demonstrate to the parties that they have been heard".[50] Furthermore, the purpose of a reasoned decision is that it affords a party the possibility to appeal against it, as well as the possibility of having the decision reviewed by an appellate body. It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice". [51]

36. Second, the only jurisprudence cited to in support of the relevant finding does not resolve the challenge posed by the Defence, and as such, is inapposite to the issue as decided by the Pre-Trial Judge.[52] The Defence challenge to paragraph 53 argued for specificity as to whether Mr. Selimi is charged for crimes either physically committed (directly, or through a JCE), aided and abetted, or even instigated by subordinates.[53]

37. The Trial Chamber in *Perišić* considered a legal question posed by the defence in that case as to whether or not the "participation by subordinates in crimes as planners, instigators, orderers or aiders and abettors is legally sufficient to state a claim, because [under superior responsibility in the ICTY Statute], "command responsibility cannot extend to the acts of subordinates who did not actually *commit* the criminal act". The *Perišić* Trial Chamber was asked to either strike the relevant sections of the indictment or to order the Prosecution to specify "whether and how a particular subordinate is criminally responsible for the [relevant criminal acts].[54] However, although the relief seems superficially similar to the present case, the issue was not directly addressed in the decision.

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[49] The challenge raised in the Indictment Motion concerned paragraph 53 of the Confirmed Indictment, specifically the sentence stating that "the term 'committed', as used in the context of superior responsibility, includes all modes of liability covered by Article 16(1) of the Law, *see* Indictment Motion, para. 67.
[50] ECtHR, *Fomin v. Moldova*, no. 36755/06, Judgment (Merits and Just Satisfaction), 11 January 2012, para. 31, citing ECtHR, *Suominen v. Finland*, no. 37801/97, 1 July 2003, para. 37
[51] *Id. See also,* ECtHR, Lobzhanidze and Peradze v. Georgia, nos. 21447/11 and 35839/11, Judgment (Merits and Just Satisfaction), 27 February 2020, para. 66: "parties to judicial proceedings can expect to receive a specific and explicit reply to those arguments that are decisive for the outcome of those proceedings"; Moreira Ferreira v. Portugal, no. 19867/12, Judgment (Merits and Just Satisfaction), 11 July 2017, para. 84; Boldea v. Romania, no. 19997/02, Judgment (Merits), 15 May 2007, para. 30; ECtHR.
[52] Impugned Decision, para. 119, citing fn. 191, ICTY, *Prosecutor v. Perišić*, IT-04-81-PT, Decision on Preliminary Motions, ("*Perišić* Decision"), 29 August 2005, para. 31
[53] Indictment Motion, para. 67.
[54] *Perišić* Decision, para. 27 [emphasis in original].

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38. The *Perišić* Trial Chamber narrowly focused its findings as to whether or not the legal liability of a commander under the relevant article of the ICTY Statute was limited to those crimes physically perpetrated by his or her subordinates. In doing so, it stated merely that "the question of whether the Accused's subordinates "committed" crimes, by physical perpetration or otherwise, can only be determined at trial" and further, "that although the acts or omissions of the alleged subordinates are themselves material facts that must be pleaded, whether responsibility pursuant to Article7(3) may in effect arise from these acts or omissions is a matter to be resolved at trial and does not concern the form of the Indictment".[55]

39. In the present case, in contrast to the finding above, the Indictment Motion did not challenge whether or not Mr. Selimi can be found legally liable for failing to punish or prevent crimes not physically carried out by subordinates. In this respect, it may indeed be a matter for evidence to be determined at trial, and the Defence reserves its right to challenge such an issue at the appropriate stage. Instead, the Indictment Motion was limited to requesting sufficient clarity in the Confirmed Indictment as to the modes of liability under which the SPO is alleging these (non-specified) subordinates carried out the crimes for which Mr. Selimi is now allegedly responsible as a superior.

40. In the context of the allegations as they presently stand in the Confirmed Indictment, the lack of this information results in manifest prejudice and unjustly impairs the Defence's ability to effectively prepare and defend against the SPO's allegations as to Mr. Selimi's knowledge of the alleged criminal acts of subordinates.

41. If crimes are alleged to have been physically committed by subordinates, then the level and likelihood of knowledge of these crimes on the part of a commander may well be significantly higher than would be expected for crimes that are alleged to have been aided and abetted, or instigated by those subordinates. The Defence must also investigate all forms by which subordinates of Mr. Selimi allegedly perpetrated the crimes to see whether they did in fact occur. In the same vein, a determination as to whether measures taken by that commander were necessary and reasonable for the prevention or punishment of those crimes may also differ significantly depending on those same modes of liability.

42. The Defence must investigate and present its case in relation to all reasonable interpretations of the allegations in the Indictment including the liability of Mr. Selimi's

[55] *Id.*, para. 31.

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alleged subordinates. As such, all three factors affect both investigations undertaken by the Defence as well as the presentation of the Defence case in court. The current vagueness in relation to this allegation therefore results in substantial potential lost time and resources to the Defence's detriment.

43. The Defence notes that in its Response, the SPO cited other jurisprudence in support of its contention that "the Article 16(1) modes of liability need not be pleaded in the Indictment and are evidentiary matters for trial".[56] Similarly to the *Perišić* Decision, this jurisprudence does not address the specific challenge of the Defence and is irrelevant to the issue. The decision in question states, in part, that "specific details of the acts or omissions that support the allegation and of the individualised role of the Accused beyond what are alleged in the Indictment are not matters required to be pleaded in the indictment but rather are matters for evidence".[57] It is in keeping with the lack of detail set out in the indictment that the SPO would interpret this to mean that absolutely nothing beyond stating that alleged crimes occurred should be notified to the accused, but this approach violates the legal requirement that Mr. Selimi be provided with sufficient detail to prepare his case.

44. Moreover, the "specific details" sought by the accused in *Milutinović* in relation to superior responsibility were, *inter alia*, "the persons and institutions that committed the alleged acts of crime",[58] the "persons and institutions […] responsible for the commission of the alleged crimes",[59] "the subordinates in question"[60] and the "act[s] or omission[s] [in which] the alleged criminal liability lie[s]".[61]

45. In the present case, the Defence does not seek any of the same detail to be added to the indictment, and requesting more information as to the modes of liability does not equate to a request for specific alleged acts or omissions in the perpetration of those crimes. The addition of the modes of liability of the alleged crimes is a reasonable request which does not demand that the SPO provide *specifics* of the alleged crimes, but merely seeks *enough* detail for Mr. Selimi to exercise his right to prepare a defence. A denial of this small amount of sufficient detail directly violates this right and ensures that the Defence is at as

[56] Prosecution Response, para. 28.
[57] ICTY, *Prosecutor v. Milutinović et al.*, IT-99-37-PT, Decision on Defence Preliminary Motion Filed by the Defence for Nikola Šainović, 27 March 2003 ("*Milutinović* Decision"), p.4.
[58] ICTY, *Prosecutor v. Šainović and Ojdanić*, IT-99-37-PT, Defence Preliminary Motion ("*Šainović* Preliminary Motion"), 2 August 2002, para. 23.
[59] *Id.*
[60] *Id.*, para. 29.
[61] *Id.*

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much disadvantage as possible in readying itself to meet the criminal charges under superior responsibility as pursued by the Prosecution.

E. Ground Five: The Pre-Trial Judge erred in finding that the Rule 86(3)(b) Outline may be used, in this specific instance, to provide the Accused with additional underlying particulars when the factual allegations are provided in the Confirmed Indictment

46. The Pre-Trial Judge noted, generally, that "the SC legal framework ensures that, in addition to the disclosure process, further evidentiary details are provided early on to the accused in the Rule 86(3)(b) Outline, the Confirmation Decision, and the submissions under Rule 95(4) of the Rules"[62] and specifically in relation to the identification of JCE Members, that:

> "The nature of the charges in the present case, the large scope and extended duration of the alleged crimes, and the alleged involvement of other individuals in the commission of the alleged crimes make it impracticable for the Confirmed Indictment to list all specific particulars concerning the Accused's alleged contributions, as requested by the Defence [and that] [s]uch details may be provided in the Rule 86(3)(b) Outline and the evidence submitted"[63]

In finding that the Rule 86(3)(b) Outline may be used, in this specific instance, to provide the accused with specific underlying particulars when the factual allegations are provided in the Confirmed Indictment, the Pre-Trial Judge committed an error of law.[64] Furthermore, the Pre-Trial Judge committed an error of fact in his assumption that there would be no conflict between the Rule 86(3)(b) Outline and the Confirmed Indictment.

47. As set out previously, the Indictment is the primary accusatory instrument[65] and an accused should not have to decipher the alleged basis of his criminal responsibility from scattered factors read together.[66] Furthermore, an accused should not be required to

[62] Impugned Decision, para. 29.
[63] *Id.*, para. 104.
[64] The relevant paragraphs which are the subject of the Pre-Trial Judge's finding on this issue relate to preliminary motions filed by the Defence for Mr. Thaçi and Mr. Krasniqi *see Id.*, para. 104 fn. 171. as it relates to paras. 39, 42-48 and paras. 39 and 51 of the Confirmed Indictment respectively. While this specific issue was not raised in the Indictment Motion, the Impugned Decision and its findings affect equally the interests of Mr. Selimi, who is the subject of the same and identical paragraphs which formed the basis of the Thaçi and Krasniqi submissions, and accordingly are addressed in this appeal. For the purposes of this Ground, the relevant paragraphs of the Confirmed Indictment to which it relates are paras 39, 42-47 and 50.
[65] *See above*, para. 24.
[66] Gucati and Haradinaj Preliminary Motions Decision, para. 49. citing ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-A, Judgement, 14 December 2015, para. 2538.

consult documents other than the indictment in order to understand and piece together the factual allegations underpinning the charges.[67] These principles are to be read in light of the fact that the degree of specificity to be provided in an indictment depends on the nature and circumstances of the case.[68]

48. The Pre-Trial Judge's reasoning in making his findings is based on the supposed impracticability for the Confirmed Indictment to list all specific particulars concerning the Accused's alleged contributions to the alleged crimes. However, concerns over the relative practicability of providing certain specifics in an indictment must not be used to allow the Prosecution to shirk its responsibility to particularise the material facts to such a degree that provides Mr. Selimi with the ability to prepare a meaningful defence.[69] Furthermore, irrespective of practicability, the SPO must still indicate its best understanding of its case against the accused[70] in the primary accusatory instrument.

49. The wide-ranging and vaguely pleaded, or as the Impugned Decision characterises it, the "large-scope and extended duration [of the]", case pursued by the SPO against Mr. Selimi has resulted in the vaguest of particulars in the indictment as a whole, and in the relevant paragraphs related to this ground specifically. That the case has been set out in such an obscure manner, which lies squarely at the door of the Prosecutor as the charging party, must not be allowed to result in the erosion of Mr. Selimi's right to understand from the Confirmed Indictment alone, without recourse to various other documents, the precise nature of those allegations which he faces.

50. On the specific issue at the heart of this ground, it is not the case that the Confirmed Indictment as it is presently formulated can be cured merely by recourse to the Rule 86(3)(b) Outline, which is replete with further ambiguity and insinuation as demonstrated by the following examples:

51. First, each accused is alleged in paragraph 50 to have contributed to the purported common plan by "providing, arranging and/or facilitating political, logistical, military, and/or financial support", whereas the Rule 86(3)(b) Outline specifies that Mr. Selimi was

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[67] Gucati and Haradinaj Preliminary Motions Decision, para. 49,

[68] *Id.*, para. 42.

[69] MICT, *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-T, Decision on Stanisic's Motion for Further Particularisation of the Prosecution's Case,2 May 2018, at para. 12.

[70] MICT, *Prosecutor v Turinabo et al*, No. MICT-18-116-PT, Decision on Dick Prudence Munyeshuli's Motion Alleging Defects in the Indictment,12 March 2019, at para. 6; MICT, *Prosecutor v Kabuga*, No. MICT-13-38-PT, Decision on Defence Preliminary Motion,14 May 2021, at para. 5.

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not a member of the Political Directorate,[71] and as such, where his political support for this common plan is alleged to have originated is unclear.

52. Second, the Outline specifies that both Jakup Krasniqi and the other members of the General Staff responsible for information and communications with the public were, at a minimum, aware of the text of communiques being issued. Further, the Outline specifies that Mr. Krasniqi and the Political and Information Directorates were allegedly responsible for communiques and public statements[72] and that Messrs Thaçi, Krasniqi, and Veseli were allegedly involved in creating the KLA political policy and that the dissemination of KLA plans and policies to the public was exclusive to the Political and Information Directorates.[73] Yet paragraph 50(a) and (d), alleges that Mr. Selimi is involved in the formulation and dissemination of plans, policies, strategies, or information (including communiques, public statements and media) in furtherance of the common purpose.

53. This list is not intended to be exhaustive. It simply illustrates the inherent problem with relying upon the Outline to supplement the Indictment in providing notice to Mr. Selimi. Indeed, there are even examples where certain allegations in the indictment are wholly absent in the Outline. For example, paragraph 50(f) of the Indictment alleges that Mr. Selimi contributed to the common purpose by "providing, arranging, and/or facilitating financial support".[74] This specific allegation does not actually feature in the Outline with respect to any of the Accused and as a result no evidentiary materials referred therein clarify the matter.

54. The findings of the Pre-Trial Judge on this issue must also be read in light of the actual size and breadth of the Rule 86(3)(b) Outline, a 603-page document with 4,133 footnotes and one which remains heavily redacted. While the document itself may indeed provide additional detail concerning the SPO's case, it cannot reasonably be regarded as akin to a case information sheet, or an index to the Confirmed Indictment. Deciphering its contents in order to divine the particulars of each charge as it relates to the relevant paragraphs of the indictment is not a task which any accused should reasonably be expected to undertake. Furthermore, it is not one which could possibly satisfy a reasonable decision-

[71] KSC-BC-2020-06/F00139/A01, Annex 1 to Submission of public redacted Rule 86(3)(b) Outline Public Redacted Version of Annex 2 to Request to present additional supporting materials, KSC-DC-2020-06/F00006/A02, 14 December 2020, p.28 ("Outline").
[72] Outline, p. 30.
[73] *Id.*, p. 29.
[74] Indictment, para 50(f).

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maker that the Accused is able to know the case against him without being required to trawl through a library's worth of documentation.

55. In addition, in anticipation of any argument in response which points to the provision of a Pre-Trial Brief as curing these defects and therefore resolving any prejudice, this would be a wholly unjust and inadequate solution to the present issues.

56. First, the latest date, after many more that preceded it, provided by the SPO, and ordered by the Pre-Trial Judge, for the provision of the Pre-Trial Brief is 17 December 2021.[75] This may well change before the Appeals Panel has heard the parties and resolved the present issue. As all parties to these proceedings have become acutely aware, any suggested date for the provision of any kind of document or disclosure by the SPO must be regarded as a moveable feast.

57. Second, the Appeals Chamber has previously considered that while defects in an indictment may, in certain circumstances, be cured through the Pre-Trial Brief; when deficiencies surface at the pre-trial stage, they should be resolved before the start of the trial by amending the Indictment.[76]

58. Accordingly, the Rule 86(3)(b) Outline by its very nature, far from clarifying the charges contained in the Confirmed Indictment, in fact exacerbates the difficulties faced by the Defence in deciphering the case against Mr. Selimi. In a case as broad and ambiguous as the present one, the indictment should be the document which provides an appropriate index to the Rule 86(3)(b) Outline and not the other way around.

IV. RELIEF REQUESTED

59. The Defence for Mr. Selimi respectfully requests the Appeals Panel to grant this appeal and reverse the findings of the Pre-Trial Judge as they relate to the grounds set out above.

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[75] KSC-BC-2020-06, Order on SPO's pre-trial brief and related material according to Rule 95(4)(a), Transcript of 29 October 2021, page 752 line 20 to page 753 to line 5.

[76] Gucati and Haradinaj Preliminary Motions Decision, para. 51, citing e.g., *Uwinkindi* Appeal Decision, para. 13; ICTR, *Prosecutor v. Nizeyimana,* ICTR-00-55C-PT, Decision on Ildephonse Nizeyimana's Motion for Certification, 12 August 2010, para. 8; ICTR, *Prosecutor v. Ntawukulilyayo,* ICTR-05-82-PT, Decision on Defence Preliminary Motion Alleging Defects in the Indictment, 28 April 2009 *("Ntawukulilyayo Decision"),* para. 13.

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Respectfully submitted on 12 November 2021,

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